REPORT OF THE INSIDER DEALING TRIBUNAL OF HONG KONG

on whether insider dealing took place

in relation to the listed securities of

SUCCESS HOLDINGS LIMITED

between

15th MAY 1992 and 12th JUNE 1992

and on other related questions

Presented and published
pursuant to section 22 of the
Securities (Insider Dealing) Ordinance

Abridged Version

財 政 司 辦 公 廳

FINANCIAL SECRETARY'S OFFICE
THE SECRETARIAT,
HONG KONG.

The Honourable Mr Justice Stock
The Chairman of the
Insider Dealing Tribunal
established under
Section 15 of the
Securities (Insider Dealing) Ordinance, Cap 395
of the Laws of Hong Kong

Notice under Section 16(2) of the
Securities (Insider Dealing) Ordinance

Whereas it appears to me that insider dealing (as that term is defined in the Securities (Insider Dealing) Ordinance) in relation to the listed securities of a corporation, namely Success Holdings Limited, has taken place or may have taken place, the Insider Dealing Tribunal is hereby required to inquire into and determine -

(a) whether insider dealing has taken place in relation to the listed securities of Success Holdings Limited in the period between 15th May 1992 and 12th June 1992;

(b) the identity of every insider dealer, if any, in the above-mentioned securities; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing.

Dated 31 December 1993

H. Macleod

(N W H Macleod)
Financial Secretary

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(Cap. 395)

INSIDER DEALING TRIBUNAL

To the Honourable Sir Hamish Macleod, K.B.E.
Financial Secretary
Hong Kong

On 31st December 1993, in the exercise of your powers under Section 16(2) of the Securities (Insider Dealing) Ordinance, you required this Tribunal "to inquire into and determine -

(a) whether insider dealing has taken place in relation to the listed securities of Success Holdings Limited in the period between 15th May 1992 and 12th June 1992;

(b) the identity of every insider dealer, if any, in the above-mentioned securities; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing."

We, the undersigned members of the Tribunal have duly conducted such inquiry in accordance with the provisions of that Ordinance, and hereby furnish to you this Report pursuant to the provisions of section 22 thereof.

CHAPTER 1
BACKGROUND

COMPANIES AND PERSONALITIES

1.1 Success Holdings Limited ("SHL") was incorporated on 28th July 1972 as a private limited company. It became a listed company in November 1992. The company was originally involved in property development, but later diversified its activities. As at 30th April 1992, the issued capital of SHL was 159,300,000 shares, each with a par value of $1.

1.2 In 1989, Hong Kong Pacific Investments Ltd. ("HKP") acquired about 35.9% of the issued share capital of SHL, and in the same year Main Road Limited ("Main Road"), a wholly-owned subsidiary of HKP made a general offer for shares, resulting in an aggregate holding of approximately 54.8%. By 1992, HKP and Main Road together held approximately 58.1% of SHL.

1.3 HKP is and was at all material times a private limited company controlled by Mr. Tony Lau Hon-chung ("Mr. Lau"). He held 759 out of 760 issued shares. The remaining share was held by Mr. Lau's wife. Subsidiaries of HKP included Golden States Properties Limited ("Golden States"), and Golden Harvest Dyeing and Weaving Factory Limited ("Golden Harvest").

1.4 Mr. Lau was also a director of SHL. Its Chairman, before 10th August 1992, was Mr. Brian Leung who held 15,000,000 SHL shares. The other directors were Madam Sophie Lau Yau-fun, Mr. Chiu Siu-po and Mr. Chu Hok-ling.

1.5 In 1987 Mr. Lau met a lady named Ms. Chan Dan-nar ("Ms. Chan") and there developed between them an intimate relationship. Ms. Chan was born in 1969, left school in 1987, since when she worked occasionally as a model and in films.

1.6 In 1990, on a date which has not been specified, Ms. Chan purchased 100,000 SHL shares. They were the first shares Ms. Chan had ever purchased, and it was Mr. Lau who purchased them for her through a stockbroker. Later in 1990, it was decided by one or both of them that she should open an account with Richardson Greenshields of Canada (Pacific) Ltd. ("Richardson Greenshields"), with whom Mr. Lau maintained a trading account, as did HKP. Mr. Lau contacted Mr. Francis Ka, the President and a director of Richardson Greenshields, and, upon Mr. Lau's introduction, a securities trading account for Ms. Chan was opened with them in August 1990. Thereafter, all her acquisitions and sales of SHL shares were effected through Richardson Greenshields.

1.7 On 14th August 1990 Ms. Chan purchased 100,000 shares in SHL, and from that date until 12th June 1992, she acquired a further 2,290,000 SHL shares, though she sold 442,000 during that period, all of which, save for 4,000, were sold on two consecutive days in May 1992.

THE ALLEGATIONS

1.8 The allegations which have been the subject of this inquiry relate to purchases and sales of SHL shares in May and June 1992. Those allegations were the result of an investigation carried out during the course of 1993 by the Securities and Futures Commission ("the SFC") pursuant to powers of investigation conferred by section 33 of the Securities and Futures Commission

Ordinance ("the SFC Ordinance"). The result of that investigation was presented to the Financial Secretary in a report prepared by the SFC. It was on the basis of that report that the Financial Secretary ordered this inquiry.

1.9 There were three key events around which the SFC investigation had concentrated, and the allegations in the report to the Financial Secretary were directed at certain dealings in SHL shares executed upon Ms. Chan's instructions shortly before the public announcements related to these events :

(1) The Proposed Privatisation

1.10 The first event was a proposal that SHL be privatised by a Scheme of Arrangement which would result in the cancellation of all the shares in the capital of SHL, other than those held by HKP and Main Road; withdrawal of the listing of SHL shares; and SHL becoming a wholly-owned subsidiary of HKP.

1.11 On the evening of 22nd May 1992, SHL and HKP jointly announced the privatisation proposal. The announcement appeared in the press the following day, 23rd May 1992. Ms. Chan had not purchased any SHL shares since November 1991, but between 15th and 19th May 1992, inclusive, she bought 444,000 SHL shares. On 21st and 22nd May 1992 however, she sold 438,000 SHL shares.

1.12 The allegation was that Mr. Lau had passed to her the inside information that a privatisation proposal was afoot, and the price at which, under that proposal, it was intended to acquire the shares; and that he did so before that information was made known to the public, knowing and intending that she would use that privileged position to deal ahead of any public

announcement. Ms. Chan, it was said, knew full well that the information was inside information when she dealt in the shares.

1.13 There are two limbs to the allegations about the May transactions - that which relates to the purchase of shares whilst the information was still unpublished; and that which relates to the sales. As for the latter, the suggestion was that these sales were deliberately effected in an attempt to suppress the market price to ensure, if possible, that the proposed privatisation price would be accepted.

(2) The Proposed Special Dividend

1.14 The day of the announcement of the privatisation proposal, 22nd May, was a Friday. The following trading week, Monday 25th to Friday 29th May saw a turnover in SHL shares of 3,626,000. None was bought or sold by Ms. Chan. At the beginning of the week after that, the price of the share crept up towards the privatisation offer of $1.60, and on Wednesday 3rd June traded between $1.58 and $1.70. That day, Ms. Chan purchased 260,000 SHL shares at $1.60 each. The following evening, 4th June 1992, SHL and HKP announced a revision of the proposal to privatise. The privatisation proposal was revised in that it was now proposed to pay to all shareholders a special dividend of HK$0.12 per share, on condition that the scheme of arrangement came into effect. Announcement of the special dividend proposal was carried by newspapers on 5th June 1992.

1.15 The allegation was that Mr. Lau imparted to Ms. Chan the fact that there was to be proposed a special dividend, and the size of that dividend, and that he did so before that proposal was revealed to the public, in consequence of which Ms. Chan purchased 260,000 SHL shares. Mr. Lau, it

was contended, knew and intended that Ms. Chan would trade with the benefit of that information.

(3) The Third Party Take-over

1.16 After the announcement of the special dividend proposal, Mr. Charles Chan Kwok-keung, a director of International Tak Cheung Holdings Limited ("ITC") approached Mr. Lau and canvassed with him the idea that Chevy Investments Limited ("Chevy"), a wholly owned subsidiary of ITC, should acquire a controlling stake in SHL. On 10th June 1992, Mr. Chan asked Mr. Francis Leung Pak-to, a director of Peregrine Capital Limited ("Peregrine"), for advice about the proposed acquisition, and on 11th June there took place, at Peregrine's offices, formal discussions between SHL representatives, including Mr. Lau and ITC personnel, with solicitors in attendance. That evening, the directors of SHL issued a press release announcing that SHL had been approached by an independent third party "in respect of a proposal which may or may not lead to a conditional cash offer for the entire issued share capital of [SHL]."

1.17 Ms. Chan had not purchased SHL shares on 4th, 8th, 9th or 10th June 1992. But on 11th June 1992 she sought to buy 200,000 to 300,000 such shares, though she managed to acquire only 148,000 at prices ranging between $1.78 and $1.86 per share.

1.18 On 12th June 1992 a further meeting of the negotiating parties was held at Peregrine's offices, and an agreement was reached on the structure of the proposed cash offer, as well as in relation to the disposal of certain SHL assets to companies controlled by Mr. Lau. The take-over price, namely, $2.88 per share, was fixed. On the same day, 12th June, Ms. Chan purchased

176,000 SHL shares at prices ranging between $2.40 and $2.475 per share. There was no public announcement that day about the agreement. The next three days were public holidays. The announcement came on 16th June 1992, and was published in the press on 17th June. It was a detailed announcement, which set out the terms of the conditional agreement. The effect of the agreement, and of steps consequential to it, was that Chevy would acquire 60.5% of the issued share capital of SHL at a price of $2.88 per share; the privatisation proposal would be cancelled; a general offer at the same price would be made to all shareholders; and SHL would dispose of certain assets to two subsidiaries wholly owned by HKP.

1.19 The allegation against Mr. Lau and Ms. Chan was that the fact of the third party approach, the likely acquisition price, the fact of the conditional agreement, and the agreed acquisition price each constituted price sensitive information which Mr. Lau revealed to Ms. Chan before those pieces of information were known to the public; that he knew and intended that she would deal in SHL shares with the advantage of the inside information; and that she in fact did so on 11th and 12th June 1992.

1.20 By letter dated 7th July 1992, Mr. Chu Hok-ling, appointed to be the independent director to advise the minority shareholders regarding the conditional offer, advised those shareholders that he considered the terms of the conditional offer to be fair and reasonable, and recommended them either to accept the offer, or sell their shares in the market during the offer period.

1.21 The offer, in due course, became unconditional, and those shareholders who intended to accept it were required to surrender their shares on or before 10th August 1992.

1.22 By 10th August, Ms. Chan held 2,048,000 SHL shares. 1,024,000 were held by Richardson Greenshields on her behalf, and were surrendered by that firm on her behalf to ITC. The proceeds of that sale, namely, $2,943,220 were credited to Ms. Chan's account with Richardson Greenshields. The balance of the shares held by her, another 1,024,000 shares, had (she alleged) for some time been kept by her at home. These were surrendered to ITC through Mr. Lau, and a cheque in the sum of $2,943,220 was drawn by ITC in favour of Ms. Chan. That amount was credited to one of Ms. Chan's bank accounts, but on 12th August 1992, Ms. Chan drew a cheque in the same sum in favour of HKP. From there, that sum was credited to an account with HKP held by Golden Time Company. The Golden Time account was Mr. Lau's only personal account with HKP.

1.23 Against that background, it was also originally alleged that as a result of the various instances of insider dealing, Ms. Chan profited to the tune of about $570,000. That calculation rested on a comparison between the prices at which, during May and June 1992, Ms. Chan traded in SHL shares, and the price for which she sold them in August 1992.

1.24 It was also alleged in the account proffered by the SFC to the Financial Secretary that Mr. Lau was a 'connected person' for the purpose of section 9 of the Ordinance, in that he was a director of SHL and HKP, and was also a substantial shareholder in HKP, a corporation related to SHL. The relevance of that status, namely, "a connected person", is made apparent in paragraphs 2.6 and 2.9 of this report.

1.25 It was further suggested that Ms. Chan was a "connected person" as defined by the Ordinance, in so far as there was evidence put before us that, in a variety of ways, Ms. Chan had represented herself to be, or had been represented as, an assistant manageress of HKP; the property manager of Golden States; and an assistant sales manageress employed by Golden Harvest. For reasons touched upon later, we have found it unnecessary to decide whether Ms. Chan was or was not employed by HKP or a related company.

THE TERMS OF REFERENCE

1.26 Against the background of these allegations, the Financial Secretary, in the exercise of his powers under section 16(2) of the Ordinance, issued a notice to the Tribunal "to inquire into and determine -

(a) whether insider dealing has taken place in relation to the listed securities of Success Holdings Limited in the period between 15th May 1992 and 12th June 1992;

(b) the identity of every insider dealer, if any, in the above-mentioned securities; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing."

CHAPTER 2

THE LAW

A. THE NEW ORDINANCE

(1) Statutory Background

2.1 The Securities (Insider Dealing) Ordinance ('the Ordinance') creates a new legislative regime by which insider dealing in Hong Kong is tackled. It was enacted in 1990, and came into operation in September 1991. Its predecessor was Part XII A of the Securities Ordinance.

2.2 Part XII A, now repealed, established the Insider Dealing Tribunal, and provided the mechanism by which the Financial Secretary might refer to that Tribunal cases of suspected insider dealing, labelled by that ordinance "culpable insider dealing". A Tribunal charged with the investigation of a particular case was required to report its findings to the Financial Secretary, and to make its report available to the public. The only sanction which lay against anyone identified as an insider dealer was the public obloquy which it was thought would flow from publicity of the Tribunal's findings. Insider dealing was not, in Hong Kong, a criminal offence, and Part XII A gave to the Tribunal no power to penalise the insider dealer.

2.3 In November 1989, the Financial Secretary of the day required the Tribunal to inquire into and determine whether culpable insider dealing had taken place in relation to the ordinary shares of Lafe Holdings Limited earlier that year. In its report, dated 22nd February 1990, the Tribunal, chaired by the Hon. Mr. Justice Nazareth, expressed some scepticism at the notion that mere public censure would provide a sufficient deterrent against insider dealing, and recommended a change to the law which would empower the Tribunal to

disqualify insider dealers from being directors of public companies, and to require those who had profited from such conduct "to surrender their ill-gotten gains," and to penalise them further by ordering payment of an amount determined by "a multiple of the gain made or loss avoided".

2.4 Those recommendations are reflected in the new Ordinance. That Ordinance effected a number of changes to the law, including a widening of the circumstances classified as insider dealing, and the creation of new powers in the hands of the Tribunal by which those shown to have engaged in insider dealing may be penalised. In particular, under section 23 of the Ordinance, the Tribunal may order a person identified as an insider dealer not to be a director of a listed company, and, further, may order that person to disgorge profits made by him as a result of insider dealing, and to pay a penalty of up to three times the profit gained or loss avoided.

(2) Insider Dealing Defined

2.5 Section 9(1) of the Ordinance specifies the six circumstances which by law constitute insider dealing in this jurisdiction. Each category in turn envisages a number of circumstances of insider dealing. Some amendments to the Ordinance, including amendments to section 9, have come into effect in May 1994. None is of any consequence to the issues we have to decide and, in any event, we are concerned with the law as at May and June 1992. Section 9 is recited below in its unamended form, as are all other sections.

2.6 Section 9(1) provided that :

"(1) Insider dealing in relation to the listed securities of a corporation takes place -

(a) when a person connected with a corporation who is in possession of information which he knows is relevant information in relation to that corporation deals in any listed securities of that corporation (or in the listed securities of a related corporation) or counsels or procures another person to deal in such listed securities knowing or having reasonable cause to believe that such person would deal in them;

(b) when a person who is contemplating or has contemplated making (whether with or without another person) a take-over offer for a corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to that corporation, deals in the listed securities of that corporation (or in the listed securities of a related corporation) or counsels or procures another person to deal in those listed securities, otherwise than for the purpose of such take-over;

(c) when relevant information in relation to a corporation is disclosed directly or indirectly, by a person connected with that corporation, to another person and the first-mentioned person knows that the information is relevant information in relation to the corporation and knows or has reasonable cause for believing that the other person will make use of the information for the purpose of dealing, or counselling or procuring another to deal, in the listed securities of that corporation (or in the listed securities of a related corporation);

(d) when a person who is contemplating or has contemplated making (whether with or without another person) a take-over offer for a corporation and who knows that the information that the offer is contemplated or is no longer contemplated is relevant information in relation to that corporation, discloses that information, directly or indirectly, to another person and the first-mentioned person knows or has reasonable cause for believing that the other person will make use of the information for the purpose in dealing, or in counselling or procuring another to deal, in the listed securities of that corporation (or in the listed securities of a related corporation);

(e) when a person who has information which he knows is relevant information in relation to a corporation which he received (directly or indirectly) from a person -

(i) whom he knows is connected with that corporation; and

(ii) whom he knows or has reasonable cause to believe held that information by virtue of being so connected,

deals in the listed securities of that corporation (or in the listed securities of a related corporation) or counsels or procures another person to deal in those listed securities;

(f) when a person who has received (directly or indirectly) from a person whom he knows or has reasonable cause to believe is contemplating or is no longer contemplating a take-over offer for a corporation, information to that effect and knows that such information is relevant information in relation to that corporation, deals in the listed securities of that corporation (or in the listed securities of a related corporation) or counsels or procures another person to deal in those listed securities."

2.7 The section does not, of course, stand on its own. We need to look further to ascertain what is "relevant information"; who is "a person connected with a corporation"; and what, according to the Ordinance, is "a take-over offer."

2.8 "Relevant information" is defined by section 8 of the Ordinance. In relation to a corporation, relevant information

"..... means specific information about that corporation which is not generally known to those persons who are accustomed or would be likely to deal in the listed securities of that corporation but which would if it were generally known to them be likely materially to affect the price of those securities."

2.9 In so far as is relevant to this inquiry, a person is connected with a corporation if he (or she) is a director or an employee of that corporation (or of a related corporation); or is a substantial shareholder of such a corporation or a related corporation; or occupies a position which might reasonably be expected to give him access to relevant information concerning the corporation (see section 4).

2.10 A substantial shareholder, for the purpose of the Ordinance, is

"a person who has an interest in the relevant share capital of that corporation which has a nominal value equal to or more than 10% of the nominal value of the relevant share capital of that corporation." (Section 4(3))

2.11 A related corporation is defined as :

"(a) any corporation that is that corporation's subsidiary or holding company or a subsidiary of that corporation's holding company;

(b) any corporation a controller of which is also a controller of that corporation". (Section 2)

2.12 A controller, in relation to a corporation, is any person who is entitled to exercise, or control the exercise of, more than 33% of the voting power at general meetings; or any person in accordance with whose directions the directors of the corporation or of another corporation of which it is a subsidiary are accustomed to act. (section 2)

2.13 A take-over offer is defined by section 7 as :

"an offer made to all the holders (or all the holders other than the person making the offer and his nominees) of the shares in the corporation to acquire those shares or a specified proportion of them, or to all the holders (or all the holders other than the person making the offer and his nominees) of a particular class of those shares to acquire the shares of that class or a specified proportion of them."

Accordingly, the proposed privatisation, as well as the ITC proposal, constituted take-over proposals.

2.14 There are some circumstances in which a person who enters into an insider dealing transaction is nevertheless to be held not to be an insider dealer, but the burden of establishing such a defence is on that person. So, for

example, a person who shows that he entered into a transaction which is an insider dealing transaction "otherwise than with a view to the making of a profit or the avoiding of a loss ...." is not to be held to be an insider dealer (see section 10(3)).

2.15 We shall see in due course how some of these situations apply to the facts of this case.

B. THE STANDARD OF PROOF

2.16 We have had the advantage of the reports in two insider dealing inquiries preceding this inquiry, namely, the 1986 report of the Tribunal of Inquiry, chaired by the Hon. Mr. Justice Clough, into certain dealings in the shares of International City Holdings Ltd. ("ICH"), and the 1990 report of the Tribunal of Inquiry chaired by the Hon. Mr. Justice Nazareth into certain dealings in the shares of Lafe Holdings Limited ("Lafe"). Both Tribunals addressed in some detail the question of the standard of proof required before the Tribunal could properly arrive at a decision that an individual or a corporation had taken part in what was then called culpable insider dealing. In the ICH case, the Tribunal "considered the safest and fairest approach ..... to adopt was that we should find no dealing to be a culpable insider dealing for the purposes of the Ordinance unless we were satisfied that it was established beyond doubt by the most cogent evidence resulting from our inquiry in which no persuasive or evidential burden was placed on any affected party" (Volume I, para 2.48).

2.17 In the Lafe inquiry, the Tribunal, though mindful of the decision in the ICH case, nevertheless concluded that "the civil standard of the balance

of probabilities is the standard of proof required in law in this inquiry." That said, the Tribunal "[n]evertheless, having regard to the seriousness of the allegations against Mr. Pang and the circumstances revealed by the evidence, [chose] to apply the higher criminal standard of proof beyond reasonable doubt" (see para 14 of that Report).

2.18 We recognised that the question of the standard of proof was a question of importance which had to be determined in light of the new statutory provisions, and that it was likely that the penal provisions of section 23 of the Ordinance, referred to at paragraph 2.4 above and absent from Part XII A of the Securities Ordinance, would give rise to the suggestion that a standard of proof higher than that applicable under the previous legislation should prevail. It was, we thought, desirable that those most affected in this case, Mr. Lau and Ms. Chan, should know before any evidence was led what standard was to be applied. So, at the preliminary hearing, we notified those present that we wished to receive submissions about the standard of proof required before the Tribunal could lawfully make a finding that insider dealing had taken place, identify an insider dealer, and determine the amount of profit gained or loss avoided; and we decided that that issue of law was to be determined at the outset.

2.19 Accordingly, we heard submissions on the first day of the substantive hearings, by Mr. Wong Q.C. on behalf of Mr. Lau and Ms. Chan; by Mr. Pethes, counsel for the Tribunal; and by Mr. Cooney, counsel instructed to appear for the Financial Secretary for the purpose of this issue only.

2.20 The Tribunal had the advantage of able and well-researched submissions. Mr. Wong contended that the standard of proof required was the

standard applied in criminal proceedings, namely, proof beyond reasonable doubt, and in support of that submission he prayed in aid speeches in the Legislative Council which demonstrated, he said, that insider dealing was now openly viewed as essentially fraudulent. He pointed also to powers in the Ordinance, labelled by him as draconian, including the absence of protection against self-incrimination, and to the penalties which were now available, but were not before.

2.21 Mr. Cooney submitted that these proceedings were not criminal proceedings, and that the civil standard of proof applied, though in the application of that standard we ought to take into account the gravity of the allegations. That, in essence, was also the stand taken by Mr. Pethes.

2.22 A ruling was delivered the following day. It is set out in full at Appendix I. It is a ruling which purports to answer "the central question whether in inquiries before the Insider Dealing Tribunal established under the new legislation the standard to be applied is the standard applied to criminal proceedings, namely, proof beyond reasonable doubt, or that applied to civil proceedings, namely, a balance of probabilities and, if the latter, where in the range that that standard allows, the issue should generally be drawn." (see Appendix I, page 5)

2.23 In the result, the Chairman concluded that the proceedings were not criminal proceedings, that the allegation of insider dealing is not in Hong Kong an allegation of a crime, nor is it tantamount to such an allegation, and that, accordingly, the standard of proof to be applied was the standard applicable to civil proceedings, namely, proof on a balance of probabilities. It is recognised that the degree of probability is one which has to be proportionate

to the subject matter. In the context of the issues at stake and the opprobrium and penalties which accompany a finding of insider dealing, this Tribunal should not be satisfied upon a mere balance of probabilities and, although not required to analyse and express the precise degree of proof which we apply, we apply a degree significantly higher than a mere balance of probabilities, though not as high as the criminal standard. We abide by the ruling that the proof required is a high degree of probability.

2.24 At the end of the ruling, the Chairman noted that "there is, however, one area of investigation where allegations may emerge which would require a standard approximate to the criminal standard. Were it to arise for our determination, I will identify it and state what standard we intend to adopt." We had there in mind the employment issue; in other words, the fact that the Tribunal might have to determine whether false representations had been made about Ms. Chan's status as an employee of HKP or related companies. In the event, for reasons referred to in paragraph 5.4 of this report, it was not necessary to determine that issue.

2.25 However, an issue did arise which has required us to determine whether, in relation to that issue, we should adopt another standard. It occurred to us that the May sales (see paragraphs 1.11 and 1.13 above) may have been transacted not only with the benefit of price-sensitive inside information, but, more particularly, with a view to suppressing the price of SHL shares in order to maintain that price sufficiently below the proposed acquisition figure, $1.60, to give the privatisation exercise a greater chance of success. There was discussion during our hearings whether an allegation of such a design in selling shares was an allegation of criminal conduct and it seemed to be contended that, if so, such a design had to be proved beyond reasonable doubt.

Alternatively, it was said, the allegation was particularly grave so that a standard approximate to the standard in criminal proceedings should apply.

2.26 Our attention was drawn to sections 135 and 137 of the Securities Ordinance. The first, section 135, when read with section 139, makes it an offence intentionally to create a false appearance of active trading, or a false market in securities on the Stock Exchange. We have noted the provisions of section 135(2) which delineate the boundaries of the offence, and are satisfied that in this case there were no collaborative sales and purchases to secure an unjustified market price, no act to prevent or inhibit the free negotiation of market prices for the sale or purchase of the securities, and no fictitious transaction or device (or other deception) to affect the market price. In short, if there was something suspicious about the May sales, no offence under section 135 was involved.

2.27 It was then suggested that section 137 was somewhat more germane to the allegation. Section 137 provides that :

> "A person shall not, either alone or with one or more other persons, effect any series of transactions for the purchase or sale of securities, or the purchase and sale, of any securities for the purpose of pegging or stabilizing the price of securities of that class in contravention of any regulations made for the purposes of this section".

By virtue of section 139, contravention of that prohibition is intended to be a criminal offence. It is noteworthy that section 137 concentrates on measures to peg or stabilize the price, whereas section 135 is concerned with raising and depressing, as well as pegging and stabilizing, the market price. Our analysis of the May sales, at paragraph 5.8 below, demonstrates the nature of the allegation which we examined, and what it amounts to is an allegation that such design as there may have been on Mr. Lau's part in relation to the May sales

was a design to depress the market price in SHL securities. It follows that no criminal conduct is alleged. Even were we to proceed on the footing that the suspected conduct would constitute an intent to stabilize the price of SHL securities ahead of the privatisation, no offence could then (or now) have been committed by such conduct, for no regulations have been made for the purposes of section 137.

2.28 We are directed by the Chairman that we should not make a finding adverse to Mr. Lau or Ms. Chan that there was in May an attempt to depress the price of shares unless we are satisfied about that to a high degree of probability. However, in assessing the gravity of this allegation, we are conscious of the manipulative and serious nature of the suspected act, and we bear in mind that there are statutory provisions which categorise certain acts of market manipulation as criminal conduct, or which treat them as awaiting criminalisation.

2.29 Whether the conduct alleged is of the "great gravity" to which Kempster J.A. referred in TSUI Kwok-leung (see Appendix I, pages 13 and 14) when he said that "..... in cases of great gravity ..... the civil standard may well approximate to the criminal" we doubt, but in coming to our findings on this particular issue (see paragraph 5.8.22 below) we have, in the alternative, considered the allegation as if it were one of great gravity, requiring as a standard of proof one approximate to the criminal standard.

2.30 What, it may be asked, has all this to do with insider dealing? The point was made during argument, and rightly so, that there was to be drawn a very clear distinction between insider trading and market manipulation. We answered by accepting that it was not within our function to scour the evidence

for any and every wrongdoing that might emerge. So there could not properly be an investigation by us into price suppression as an end in itself. But that was not our purpose. Our purpose was twofold :

(1) to determine respective culpabilities. If Ms. Chan was merely doing as she was directed by Mr. Lau for a manipulative venture of his own, then if and in so far as their conduct amounted to insider dealing, such a finding would impact upon the penalties to be imposed on each, quite apart from the fact that, if insider dealing is established, characterisation of the roles played by the insider dealers is, we believe, part of our fact finding function; and

(2) if Mr. Lau procured Ms. Chan to sell SHL securities in May in order to maintain the price at a suitably attractive level for the minority shareholders, a question has been begged, namely, whether that constituted insider dealing at all. The point is more conveniently tackled in that part of this report which deals with the issue of suggested manipulative tactics, namely, paragraph 8.4 below.

C. PROFIT

2.31 We were required to determine the correct approach to the calculation of profit gained as a result of insider dealing. It was decided that it was inappropriate to direct the calculation at the difference between the price of shares when they were acquired and the price at which they were sold in August 1992. To do so would be to assume that all profit after publication of price sensitive information was attributable to the advantage gained by the insider dealing. In situations shorn of other influences on market price, the correct approach is to calculate the difference between the purchase price, and

the value of the security at a stage when the market's settled reaction to the information crystallises. The point is more conveniently explained in the chapter of this report which addresses the profit made in this particular case, namely, Chapter 9.

D. OTHER DIRECTIONS

2.32 We record the following further directions as to law which have guided our approach in this inquiry :

(1) Save for those issues covered by the provisions of sections 10(3) and 10(4) of the Ordinance, there lies upon neither Mr. Lau or Ms. Chan any onus of proof. Where an onus of proof does lie upon either of them, such an onus is discharged on a mere balance of probabilities.

(2) To the extent that we may decide that lies have been told to the SFC or to this Tribunal, we are conscious of the fact there may be reasons for lies consistent with absence of any wrongdoing, or of the particular wrongdoing alleged, and that it is only if we exclude such reasons that lies may support the particular allegation.

(3) Counselling and procuring. To counsel is to advise or solicit; whereas to procure is to see that something is done, or to take appropriate steps to ensure that it happens.

(4) Our attention is also directed to the principles articulated in Mahon v. Air New Zealand [1984] 1 AC 808, that :

> "... the person making a finding in the exercise of [an investigative] jurisdiction must base his decision upon evidence that has same probative value.
>
> "What is required ..... is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts

consistent with the finding and that the reasoning supportive of the finding ..... is not logically self-contradictory" (pages 820 and 821).

CHAPTER 3
PROCEDURE

3.1 In 1966 there was appointed in the United Kingdom a Royal Commission on Tribunals of Inquiry under the Chairmanship of Lord Justice Salmon. Its report was submitted in November 1966, and has since been known as "The Salmon Report." Certain sections of the Report were commended by the Chairman for study by the Tribunal, for the Report most aptly describes the nature of the inquisitorial process, how that process is to be distinguished from the adversarial procedure practised in our civil and criminal courts, the role of a tribunal of inquiry and of counsel to such a tribunal, and the safeguards to be adopted for the protection of those against whom allegations have been or are likely to be made.

3.2 "There are", according to the Salmon Report, at paragraph 30, "important distinctions between inquisitorial procedure and the procedure in an ordinary civil or criminal case. It is inherent in the inquisitorial procedure that there is no *lis* [i.e. an issue between two parties]. The Tribunal directs the inquiry and the witnesses are necessarily the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be tried, no charges, indictments, or depositions. The inquiry may take a fresh turn at any moment."

3.3 Whilst the Report is not a statutory instrument, so that what is appropriate procedure in any inquiry may vary according to the nature of the inquiry and such statutory provisions as may apply to the inquiry at hand, the Report provides fundamental recommendations designed to ensure fairness and

efficiency. In particular, the Report recommended that before a person was called as a witness he should be notified "of any allegations which are made against him, and the substance of the evidence in support of them" (see paragraph 32). That recommendation, engraved in the Report as a cardinal principle, serves as a reminder of that fundamental rule of natural justice that no man should be condemned unheard.

3.4 There has, since publication of the Report, developed a practice in inquiries for letters to be sent to those against whom allegations are levelled, summarising the nature of those allegations and the evidence in support of them. These letters have come to be known as "Salmon letters".

3.5 On 28th March 1994, the Governor appointed as members of the Tribunal for this particular inquiry, Mr. Patrick Yeung Kai-cheung and Mr. Derek Murphy. The Tribunal then held a number of preparatory meetings; and public hearings took place on 25th April, 2nd to 5th May, 13th May, and 16th to 18th May 1994.

3.6 Well before the public hearings, each member of the Tribunal had in his possession the statements made to the SFC by witnesses who had been interviewed by the SFC, as well as a covering report sent by the SFC to the Financial Secretary. With the aid of those statements and that report, counsel for the Tribunal fashioned Salmon letters which were sent to Mr. Lau and Ms. Chan. Those letters are at Appendix II. Also sent to those two individuals were copies of witness statements and records of interviews with the SFC which were before the Tribunal, as well as a copy of the covering report. We made clear at an early stage, and now state again, that that covering report,

though helpful as an introductory aide, was not treated by us as evidence in the inquiry.

3.7 Although Mr. Lau and Ms. Chan were the only persons against whom allegations of insider dealing were made, Salmon letters were also sent to a small number of individuals whom it was thought might have relevant information concerning the employment issue to which reference has been made in paragraph 1.25 above, in respect of which issue adverse findings against those individuals were possible. In the event, no such findings have been made, but the point to be noted is that we proceeded on the footing that it was incumbent on the Tribunal to notify any individual or corporation of allegations which may prejudice that individual or corporation and which, from the material in the Tribunal's possession, would be or appeared likely to be made, even if the allegation was not one of insider dealing.

3.8 It is always possible that as an inquiry proceeds, fresh allegations, or a new aspect of an existing allegation, may arise. Or it may happen that it becomes apparent that an individual does not, or may not, appreciate from a Salmon letter the full extent of the Tribunal's concern or of the allegation, or that the Tribunal intends to pursue a particular line of inquiry with potentially adverse ramifications for that individual. In such a case, the same principle of natural justice must be observed. In the instant inquiry, for example, the Salmon letter addressed to Mr. Lau informed him that it was alleged that he "counselled or procured Ms. Chan to deal in these securities, knowing or having reasonable cause to believe that she would do so either for her account or on your behalf." Though the last phrase of that sentence gave, we thought, notice that we would, in the event of a finding against Mr. Lau of insider dealing, wish to ascertain for whose benefit such unlawful dealings were

transacted, there were in the event two matters in particular that required further and more specific articulation. Both encompassed the question whether there was design in the dealings beyond a motive of profit for Ms. Chan. The first was whether the May sales of SHL shares on 21st and 22nd May, were effected to keep down the price of SHL shares in an attempt to maintain the attraction of the privatisation offer. The second was whether there was any plan behind Ms. Chan's purchases in June to influence the take-over price. Neither issue had been spelt out in the Salmon letters, so the Tribunal ensured that in the course of the hearing they were drawn to the attention of leading counsel for Mr. Lau and Ms. Chan.

3.9 To those whom the Tribunal wished to call as witnesses but against whom no allegations were made, each was notified of the hearing and sent a copy of his or her statement to, or record of interview with, the SFC. Each was told that anyone who was concerned in the subject matter of the inquiry was entitled to be present in person at any sitting of the Tribunal, and to be represented by a barrister or solicitor. At a preliminary hearing, we stated that any individual or corporation wishing to have access to material not sent to that individual or corporation, could apply to inspect, and make copies of, such material.

3.10 We took the Salmon letter principle one stage further and, at the preliminary hearing, directed that :

> ".... if any party who is concerned in the subject matter of this inquiry intends in the course of the inquiry to make allegations or counter allegations against any individual or corporation, notice of those allegations [are to] be served on that individual or corporation as soon as

is reasonably practicable, a copy of that notice to be served on the Tribunal."

3.11 We decided to hold a preliminary hearing, and did so on 25th April 1994. Its prime purpose was to announce the terms of reference, to receive applications for legal representation (that is, to appear at the hearing with the advantage of such representation), to give notice of the procedures to be adopted, and to set a date for the substantive hearings.

3.12 The powers at the disposal of the Tribunal in its inquisitorial function are prescribed by sections 17 and 18 of the Ordinance. Amongst those powers is the power to receive and consider any material whether by oral evidence, written statement, documents or otherwise; to require any person to attend at any sitting and to give evidence and produce relevant documents; to determine the procedure to be followed; and to exercise such other powers as may be necessary or ancillary to the carrying out of our functions under the Ordinance. There is also power to authorise the SFC to inspect books or documents where the Tribunal has reasonable grounds to believe or suspect that they may contain information relevant to our task.

3.13 The Tribunal issued a number of orders pursuant to the powers conferred by sections 17 and 18. In some cases, those orders were directed at witnesses who had not hitherto been interviewed. Each was required to file with the Tribunal by a given date a statutory declaration containing the information sought by the order. Some of these orders were issued in tandem with section 18 authorisations to the SFC to inspect books and documents in the possession of that individual. It is to be noted that section 18 does not enable the Tribunal to call upon the investigative resources of the SFC to conduct

interviews at the Tribunal's behest, save in very limited circumstances. Section 18 is a section aimed at facilitating the process of discovery of relevant documents, and the power to interview is there limited to obtaining an explanation or particulars concerning a book or document, rather than concerning an event referred to in that book or document. We pause to remark that that limitation is unhelpful, because a response to the Tribunal's section 17 orders for information will often be a response which complies with the order, but which is as broad as the order permits, calling, therefore, for further questions which might have been asked by the SFC had the Tribunal the power to request the SFC to interview, whether or not documents were also sought.

3.14 The Ordinance provides, by section 29, that "an order of the Tribunal may be registered by the Tribunal, in such manner as may be prescribed, in the High Court and shall, on such registration become for all purposes an order of the High Court made within the jurisdiction of the High Court." No doubt the prime intention behind section 29 is to ensure that orders to disgorge profits, and orders imposing financial penalties, may be enforced as orders of the High Court. The effect of the section would also permit breach of an order to be treated as a contempt of the High Court. Be that as it may, the section was of scant practical use to us, because no rules have been prescribed for the registration of the Tribunal's orders, and in the absence of such rules there is, apparently, no mechanism for registration. We understand that the matter is now receiving attention.

3.15 The Ordinance provides that : "Every sitting of the Tribunal shall be held in public unless the Tribunal considers that in the interests of justice a sitting or any part thereof should not be held in public in which case it may hold the sitting or part thereof in private" (see paragraph 14 of the Schedule to the

Ordinance). All sittings of the Tribunal were held in public, save that at the preliminary hearing a brief application was made in private, and, at the next sitting, the ruling in relation to that application was delivered in private. We report the details of the matter to the Financial Secretary in a short appendix to this report.

3.16 All witnesses called to give evidence are, strictly speaking, the Tribunal's witnesses, though it has long been the practice with inquiries that those against whom allegations are made are taken through their evidence by those representing them, permitting counsel for the Tribunal to examine them further or cross-examine them. That is the procedure which was offered in this inquiry, although, as matters turned out, there were few questions by counsel for Mr. Lau and Ms. Chan.

3.17 There were, in the event, and for reasons that will become apparent, only a handful who gave oral evidence. Most of the evidence was, with the agreement of counsel for Mr. Lau and Ms. Chan, placed before the Tribunal in its original form, namely, as records of interviews conducted by the SFC.

3.18 We have abided by the requirement of paragraph 13 of the Schedule to the Ordinance that "every question before the Tribunal shall be determined by the opinion of the majority of the members, except a question of law which shall be determined by the Chairman."

CHAPTER 4
THE ADMISSIONS

4.1 It will have been evident to those who followed the inquiry as it progressed, that, at an early stage, Mr. Lau and Ms. Chan admitted that they had engaged in insider dealing on each occasion in respect of which allegations had been made.

4.2 Despite those admissions, the Tribunal decided to require oral evidence, including evidence from Mr. Lau and Ms. Chan. The thought will no doubt have crossed some minds that in taking that course we were insensitive to the strong desire by Mr. Lau and Ms. Chan to keep publicity to a minimum, particularly since publicity would be driven not so much by a story about insider dealing as by a thirst for insight into a personal relationship; and insensitive, too, to the need not to discourage admissions in future cases by those who have engaged in insider dealing.

4.3 There is no doubt but that the case attracted an intense degree of publicity which must have been harassing and harrowing to Mr. Lau and Ms. Chan, and to their respective families. There can also be little doubt that they would not have been pursued to such a degree, nor the story so prominently and widely reported, had there been no intimate relationship in that story. In the circumstances, requiring their presence before the Tribunal clearly caused both of them significant upset. Why, then, did we take the course we did?

4.4 On the second day of the hearing, Mr. Wong sought an adjournment. In doing so, he told the Tribunal that there had already taken

place detailed discussions with counsel for the Tribunal which, if further pursued, might result in such a degree of agreement as to the facts, that it might not be necessary to call any evidence, and that much time and costs might be saved. The adjournment was granted, and upon resumption of the hearing the following morning, a Statement of Facts, which we understand was drawn by counsel for the Tribunal, was presented to the Tribunal. That Statement is at Appendix III. It constitutes a statement of purported facts which Mr. Lau and Ms. Chan presented as accurate.

4.5 By that Statement, Mr. Lau admitted that before the information was available to the public, he had disclosed to Ms. Chan, knowing the information to be relevant information which she would use for the purpose of dealing, the fact that a privatisation proposal would be made; and, later, that a special dividend was to be offered to shareholders; and, that he had also disclosed the fact of a third party approach and/or the likely acquisition price and/or the fact of the conditional agreement (see para. 27 of the Statement of Facts).

4.6 Ms. Chan admitted that, on receipt of that information, she knew on each occasion that it was relevant information which Mr. Lau possessed by reason of his position with HKP and SHL and that, armed with that information, she dealt in SHL shares to the extent which had been alleged.

4.7 Other contentions put forward by the Statement included the suggestions that payment for 142,000 shares purchased on 15th May was funded from part of the proceeds of sale of a flat in Ms. Chan's name (para. 17); that "concerning the shares purchased between 15th May 1992 and 12th June 1992, Ms. Chan made a profit of $555,000" (para. 34); and,

importantly, that "on each occasion when Ms. Chan dealt in the listed securities of SHL, she did so on her own account." (para. 35)

4.8 Upon receipt of this Statement, we adjourned to consider its impact upon the course of the inquiry. There were at that stage two orders issued by the Tribunal which were outstanding. The first was designed to ascertain the identity of the beneficiary of the proceeds of a cheque dated 18th May 1992 in the sum of over $2 million drawn on Ms. Chan's account with the Hong Kong Bank in favour of the Swiss Bank Corporation; to trace the proceeds of a cheque dated 10th August 1992 in the sum of $2.943 million payable to Ms. Chan; and to secure the production of Ms. Chan's banking documents. The second order was directed at Mr. Lau, requiring him to divulge information and produce documents, including his bank statements for the period 1st April 1992 to 31st August 1992. An extension of time was granted for compliance with these orders.

4.9 The following day, 5th May, we heard the evidence of Mr. Francis Ka of Richardson Greenshields. We were interested to ascertain from him an assessment of Ms. Chan's grasp of market matters. He described the orders placed by Ms. Chan in June 1992 - by whom placed, when, and in what quantity, her apparent attitude to orders once placed, his view of her relative expertise as a trader in securities, and the limited number of companies in which she invested.

4.10 We also decided that we wished to hear the evidence of Mr. Charles Chan of ITC. We wanted to know when initial meetings took place, what prices were discussed and when, and, in particular, whether the market price of SHL shares had any bearing on the take-over price.

4.11 After production of the Statement of Facts, Mr. Lau and Ms. Chan served on the Tribunal statutory declarations which were designed to cover aspects of the case which it was felt were not adequately covered by that Statement. These declarations confirmed the admissions already made, suggested a reason for the sale of shares in May, revealed the ultimate destination of the proceeds of sales of SHL shares in August 1992, and asserted that all transactions were for Ms. Chan's own account.

4.12 Despite this, we heard further evidence for the following reasons :

(1) These are inquisitorial proceedings. They are not adversarial proceedings in which there are two or more parties with issues to be decided as between those parties alone, and on such evidence - whether in the form of admitted facts or oral evidence or otherwise - as the protagonists choose to put before a court. We are enjoined by statute, and by the terms of reference, to inquire into and determine a series of issues, and we are not bound, either as a matter of law or practice, to accept statements put before us, especially when those statements are incomplete, or put forward contentions which appear to be inherently improbable, or which require probing.

(2) It was incumbent upon us to determine degrees of blameworthiness as between Ms. Chan and Mr. Lau. It would be an odd report that did not; but, that aside, the penalties to be imposed in consequence of a finding of insider dealing would have to have regard to relative culpability, and section 22 requires us to provide reasons for our determinations and for the orders we make.

(3) Section 23(1)(b) of the Ordinance requires us to ascertain the amount of any profit gained or loss avoided by each person who is identified in this report as an insider dealer. We had therefore to determine on whose account Ms. Chan traded in SHL shares. The evidence was that precisely half of the proceeds of the August sale of SHL shares found their way to Mr. Lau. We could not properly, in the circumstances, proceed on the mere say so of Mr. Lau and Ms. Chan that all was for her benefit.

(4) We are required by the Ordinance, and by the terms of reference, to ascertain the amount of profit gained or loss avoided by reason of the insider dealing. The amount put to us in the Statement of Facts was calculated by reference to the difference between the purchase price and the ultimate selling price, $2.88, and was restricted to those transactions executed by Ms. Chan. There was, however, the possibility of a connection between determination of the take-over price, on the one hand, and market price, on the other; and if there was such a connection, we would then have to embark on the difficult exercise of determining the extent to which, if at all, the SHL transactions executed by Ms. Chan increased the market price and therefore the take-over price, so creating a profit beyond that reflected by her actual purchases and sales, but accruing also to Mr. Lau in the sale by him in August 1992 of HKP's entire interest in SHL.

(5) There were statements in the statutory declarations which, we felt, invited requests for more detail, or for verification. For example, in her first statutory declaration, Ms. Chan said in relation to the May purchases that Mr. Lau "counselled or procured me to purchase shares of SHL before the public

announcement ..... However, [he] did not tell me the number of SHL shares that I should buy or the price at which such shares be bought." The reference to counselling or procuring was repeated throughout their statutory declarations, and for reasons explained at paragraph 2.30 of this report, we had to determine which it was. The suggestion that Mr. Lau did not mention the price at which shares should be purchased left open the question whether Mr. Lau disclosed to Ms. Chan the privatisation price, the amount of the special dividend, and the take-over price. As for the reason for the sale of shares in May, this was explained by the suggestion that "Mr. Lau told me that he had some reservations whether his privatisaton when announced would be warmly received by the other shareholders. He cautioned me against holding too many SHL shares before public announcement of his privatisation proposal. Accordingly ..... I placed orders .... to sell .....". There was no reference, either by Mr. Lau or Ms. Chan, to the nature or cause of the reservation, an omission of some significance given that it was known - indeed it must in any event have been obvious - that there was suspicion that the May sales were engineered to enhance the chances of success of the privatisation proposal.

(6) It was contended in the statutory declarations that at all times Ms. Chan dealt on her own account, and that profits were for her own benefit. The record of trading by Ms. Chan was one that disclosed dealings in and after 1990 almost exclusively in SHL shares - a pattern of trading in short bursts with substantial gaps between the bursts. By August 1992, Ms. Chan had purchased 2,490,000 SHL shares. She had sold 442,000 SHL shares. That

left 2,048,000. Of that number 1,024,000 shares were kept at Richardson Greenshields, and, according to Ms. Chan, 1,024,000 were kept by her at home or in a safe deposit. The SHL shares were sold in these two batches. The proceeds of sale of one batch went to Ms. Chan's account with Richardson Greenshields. The proceeds of the other batch went to Mr. Lau's account with HKP. Against this background, failure by us to question the bald assertion that she traded on her own account would have been a glaring omission.

(7) We were alive to the possibility that, if it were shown that Mr. Lau directed Ms. Chan to sell shares in May to suppress the market price of SHL shares, we would or might have to consider whether there was in that direction motive other than that of profit. Section 10(3) of the Ordinance would then be relevant (see paragraph 8.4.5 below).

4.13 These were the prime reasons for our decision to continue the inquiry by the taking of oral evidence, in particular from Mr. Lau and Ms. Chan. That is not to say that their admissions were of scant use or that they are not to be taken into account in the determination of penalty. Their admissions were of substantial use in shortening the proceedings, and the penalties we impose should reflect the credit given by us in recognition of their concessions.

4.14 In so far as it might be said that our course of conduct will serve to discourage others in future from making admissions, we comment that admissions will always be reflected in the penalty imposed but, further, that admissions which beg questions will inevitably require probing.

CHAPTER 5
EVIDENCE AND FINDINGS

5.1 Most of the evidence before us was not in dispute. Some was. Save where it is expressed or implicit that our narrative refers to contentions rather than findings, what follows constitutes our findings.

5.2 Ms. Chan was born on 13th April 1969. She was therefore 18 when she met Mr. Lau. The point is made, not as a comment on the relationship which thereafter developed, but as part of the picture, which has presented itself, of a young lady not at all versed in commercial matters, and a successful and wealthy businessman to whom the intricacies of company and stock market matters were second nature. Her birthday is relevant also because it coincided with significant events in the story which has unfolded.

5.3 FINANCIAL SUPPORT

As the relationship progressed, Mr. Lau provided substantial financial support to Ms. Chan.

(1) The Properties

(a) Julimount Garden

By an assignment dated 27th April 1988, Mr. Lau acquired the beneficial ownership of Flat B, 15th Floor, Block 1, Julimount Garden, Shatin, for the sum of $1,630,000. By a declaration of trust, also dated 27th April 1988, Mr. Lau declared that he held one half share of that property on trust for Ms. Chan. The declaration stated that a half share of the purchase price "[belonged] to and [was] provided by Chan Dan-nar." By an assignment dated 9th May 1990,

Mr. Lau's share of the property was assigned to Ms. Chan. In his interview, with the SFC investigators, Mr. Lau said that all the purchase moneys for this property were provided by him and that when Ms. Chan had a birthday he assigned to her his own half share. We accept that as so.

(b) Beverly Hill

By an agreement dated 19th April 1991, Ms. Chan agreed to purchase a flat on the 32nd floor of Block A, Beverly Hill, Broadwood Road, Hong Kong, for the sum of HK$4,800,000. The assignment, however, which was dated 10th May 1991, was in favour of Mr. Lau and Ms. Chan as joint tenants. In his SFC interview in 1993, Mr. Lau asserted - and we believe the assertion - that the purchase price was provided by him. "It was", he said "..... most likely that I [will] give the other half of ..... this property ..... to Chan Dan-nar as well in the future."

By an assignment dated 11th May 1992, Ms. Chan sold the Julimount Garden flat for $4,550,000. She then lived, and still lives, at the flat in Broadwood Road. Mr. Lau has not lived at either of those premises.

(2) Periodic Financial Support

We have not ascertained the amount of financial support that Mr. Lau provided periodically to Ms. Chan. In his SFC interview, he put the figure at $50,000 to $60,000 per month. It would seem that apart, perhaps, from part-time work as a model, Ms. Chan has had no independent means of support. She also had the advantage of a Standard Chartered corporate Visa card,

obtained for her by HKP. She used the card for personal expenditure. These purchases were funded by Mr. Lau. Ms. Chan said in an interview that at one stage the monthly limit for expenditure with the use of the card was $30,000 but "among the bills which I signed recently, the most enormous one amounted to $100,000 something. Most of my bills were signed for buying daily necessities. When I went on trips, I would sign to pay the bills for hotel accommodation." We do not doubt that she used the card liberally for living and travelling expenses.

(3) Purchase of Shares

The effect of Ms. Chan's evidence was that all share transactions were financed by gifts from Mr. Lau or by her savings. But by her savings, we took her to mean moneys saved by her from those gifts. Mr. Lau's evidence was that moneys provided to Ms. Chan were intended to be, and were treated by both of them, as outright gifts. The only sum which ever found its way back to Mr. Lau, according to their evidence, was the sum of $2.943 million, the proceeds of the sale of scrip not held by Richardson Greenshields; and that sum, they said, was held by him on trust for her pending the purchase of some property. To these assertions we return in Chapters 6 and 7.

5.4 EMPLOYMENT

In paragraph 1.25 we referred to the existence of evidence which suggested that Ms. Chan had been represented to be an employee of HKP and some related companies. In the event, we have not found it necessary to determine whether Ms. Chan was employed by HKP or a related company, or whether she received a salary. We recognised at an early stage of the hearing

that, in the light of the admissions of insider dealing, we would not have to determine whether or not Ms. Chan was a "connected person" for the purposes of section 9(1)(a) of the Ordinance, since insider dealing by her was established under another head or heads. Accordingly, it would have been a waste of time and funds to seek to unravel the fairly obscure employment picture which had been placed before us.

5.5 1990 - 1992

5.5.1 From a time in 1990, which cannot be better particularised than that it was before August 1990, until mid-June 1992, Ms. Chan acquired 2,490,000 SHL shares. During the same period, she sold 442,000 SHL shares of which all but 4000 were sold on 21st and 22nd May 1992.

5.5.2 There appears at Appendix IV a table (referred to throughout the hearing by its exhibit number AP9) which illustrates the dates of her SHL transactions from the time she opened an account with Richardson Greenshields in August 1990, the prices at which she bought and sold SHL securities, and the dates and quantities of her withdrawals of SHL shares from the custody of Richardson Greenshields. There has now been inserted onto that exhibit a number of features so that the document at once provides an overview of key events. It omits only the initial purchase of 100,000 SHL shares from a stock-broker who has not been identified.

5.5.3 In 1990 Ms. Chan first purchased shares in SHL. She had not previously purchased any shares at all. There is before us no record of this first transaction. We have been told that they were acquired for her by Mr. Lau through a stockbroker firm from whom Ms. Chan collected the scrip. Ms. Chan says that she cannot recall the name of the broker. We have no reason to doubt

the suggestion that these shares were acquired, and the suggestion fits in with the total number of SHL shares sold in August 1992. We accept also that Mr. Lau funded this initial purchase.

5.5.4 In mid-1990 Mr. Lau contacted Mr. Francis Ka. He introduced Mr. Ka to Ms. Chan for her to open an account. She opened an account in August 1990, and we have the advantage of full records kept by Richardson Greenshields, and of detailed and helpful evidence by a number of the company's officers, including oral evidence by Mr. Ka.

5.5.5 Mr. Ka told us, and we accept, that when Ms. Chan traded, she herself placed the orders. Mr. Lau did not place orders on her behalf. Mr. Ka evidently thought, as was the case, that Ms. Chan was not experienced in share dealing. It had even occurred to him that she did not know the time at which trading on the floor of the Stock Exchange ceased each afternoon. On a four-runged ladder of investment knowledge - poor, fair, good, and excellent - he graded her knowledge as fair. From 1990 to May 1994 she had traded in four stocks only, namely, Hong Kong Land, SHL, China Entertainment and Hutchison Whampoa. She never sought his advice. Furthermore, she seldom telephoned him to make detailed inquiries about orders which she had placed. "She is," he suggested, "not too concerned about the orders which she does not care too much about once they have been placed".

5.5.6 After 1990, such trading in SHL shares as took place by Ms. Chan occurred in short concentrated bursts. Within a one week period in April 1991 she purchased 742,000 SHL shares for $1,039,000, an acquisition, we note, that coincided with her birthday. She immediately thereafter withdrew from Richardson Greenshields all SHL shares purchased in April.

5.5.7 Over a two day period in September 1991, she purchased 182,000 SHL shares at a cost of $217,680. One day later, she withdrew scrip for 182,000. With this withdrawal, there remained in Richardson Greenshields' custody 100,000 of Ms. Chan's SHL shares. In the course of interview with the SFC in June 1993, she said that she took home the shares she withdrew, and placed them in a safe. Either she or her younger brother had collected them from Richardson Greenshields. She said to the interviewer that she treated these shares, the ones she took home, as a long term investment, and planned to put them in a safe deposit. The withdrawals are facts which we find. The motive is an issue to which we later return.

5.5.8 The withdrawal of SHL shares on 6th September 1991 was the last withdrawal of all. It struck us that that withdrawal brought the total SHL shares withdrawn by Ms. Chan from Richardson Greenshields to 924,000. It struck us because, added to the original 100,000 shares, she had then in her custody 1,024,000, the precise number with Richardson Greenshields in August 1992, when all the shares were sold to ITC. That contributed to the degree of suspicion we nursed that not all SHL transactions executed by Ms. Chan were for her benefit, or sole benefit.

5.5.9 There followed in October and November 1991 the acquisition by Ms. Chan of 338,000 SHL shares at a cost of $397,160. Aside from the sale of 4,000 shares the following March, nothing of any moment happened until April 1992.

5.5.10 In April 1992, Ms. Chan celebrated her 23rd birthday. On 14th April 1992, one day after her birthday, she purchased 100,000 Hong Kong

Land shares at $9.90 per share. We are satisfied that the funds to meet that purchase, a figure of $995,187.53, came indirectly from Mr. Lau through HKP, and went into Ms. Chan's AssetVantage current account with the Hong Kong Bank. The receipt of that sum into that account is shown in a fund flow analysis, prepared for the assistance of the Tribunal, which shows deposits and withdrawals into and from a number of bank accounts in Ms. Chan's name at the Hong Kong Bank. That analysis was extracted from bank statements, copies of which we have, and covered the period 23rd March 1992 to 14th July 1992. It is a document which has proved to be a handy aid to our task, and we exhibit it to this report, together with copies of Ms. Chan's AssetVantage Statements for the relevant period, as Appendix V.

5.6 THE PRIVATISATION IDEA

5.6.1 We are unable to pinpoint the date at which Mr. Lau decided to privatise SHL. In the course of his oral evidence, he was asked when the idea first occurred to him. The answer was a safe one : ".... between three weeks and six months prior to the announcement ....," though he was prepared to adopt the answer which he had given to that question when he was interviewed by the SFC, namely, "about one month prior to the announcement because before the privatisation proposal was put forward, Success was still buying properties on the market". We have evidence from Mr. Francis Leung, a director of Peregrine, that "sometime in May 1992 [Mr.] Lau informed me that he intended to privatise SHL and sought my advice on the privatisation price". Mr. Leung told Mr. Lau that "in order to be successful the privatisation price could be around 20% discount on the net asset value" and that according to his experience if the discount was higher than 25% the chance of success was very small. On or about 21st May Mr. Lau asked Mr. Leung to prepare documentation for the privatisation of SHL.

5.6.2 What was it that motivated Mr. Lau to privatise? When questioned before us by Mr. Pethes, Mr. Lau gave as his reason that doing business as a listed company did not suit him; he preferred to do as he liked. In his interview with the SFC, the reason he gave was that liquidity of SHL shares was "almost zero" and, further, that SHL "had to pay a large sum every year to maintain its listing status." The joint announcement of 22nd May 1992 gave as a reason that the shares had been "thinly traded for the last six months .... at a substantial discount to their underlying net asset value of HK$2.13 per share on the last audited consolidated balance sheet ... as at 30th April 1991 and it is not anticipated, in the absence of the [privatisation scheme] that the market price is likely to improve significantly. Accordingly the [privatisation scheme] will give the shareholders .... an opportunity to realise their shares for cash at a price higher than the current market price of the shares." We are inclined to accept all these as reasons for the privatisation proposal, and we find accordingly. That is not to say that the proposal to privatise at the prices put forward carried with it no profit motive. To this we return in Chapter 8 of this report.

5.7 THE MAY PURCHASES

5.7.1 It will be remembered that on 11th May 1992, the Julimount Garden flat was sold for $4,550,000. The fund flow analysis, Appendix V, shows that on that day, the sum of $3,671,325 was deposited into Ms. Chan's savings account. That sum, we find, was part of the proceeds of the sale of the flat.

5.7.2 If we now glance at Appendix IV, we see the purchase by Ms. Chan of 444,000 SHL shares on 15th to 19th May, inclusive, at prices ranging between $1.39 and $1.45 per share. We find that before 15th May,

Mr. Lau had decided that the privatisation price that would be offered was $1.60 per share.

5.7.3 Mr. Lau and Ms. Chan have admitted that Mr. Lau passed to Ms. Chan the information that a proposal was to be announced for the privatisation of SHL; that that information was disclosed before that announcement; and that when in possession of this information Ms. Chan purchased 444,000 SHL shares.

5.7.4 We accept as accurate the following paragraphs from the Statement of Facts :

> "17. On Friday, 15th May 1992, Ms. Chan bought 142,000 shares of SHL at prices ranging between $1.39 and $1.42 per share. These purchases represented 82.6% of the total trading in SHL shares on the [Stock Exchange]. On 18th May 1992, Ms. CHAN issued a cheque for $202,691.87 to RGC in payment of the 142,000 SHL shares. This cheque was funded from the proceeds of sale of the Julimount Garden flat."
>
> "18. On Monday, 18th May 1992, Ms. Chan bought 150,000 shares of SHL at prices ranging between $1.40 and $1.43 per share. These purchases represented 68.18% of the total trading in SHL shares on the [Stock Exchange]."
>
> "19. On Tuesday, 19th May 1992, Ms. Chan bought 152,000 shares of SHL at prices ranging between $1.40 and $1.45 per share. These purchases represented 55.47% of the total trading in SHL shares on the [Stock Exchange]."

5.7.5 There are, as we have already indicated, a number of issues yet to determine, some significant, but we are satisfied to the requisite degree that, so far as they go, the admissions concerning these purchases and set down at paragraphs 14 to 19 inclusive of the statement at Appendix III, are true. We have considered whether they, and the admissions of other acts of insider dealing, might have been proffered merely to curtail an inquiry which was traumatic to Mr. Lau and Ms. Chan and to their families, but we are satisfied that that is not so, not least because the circumstantial evidence pointed overwhelmingly to insider dealing by both of them.

5.7.6 The motive for the May purchases was, we find, simple enough, and as Ms. Chan described it in her oral evidence :

> "Because Lau Hon-chung told me he planned to have his company privatised, and the price of the shares might go up".

5.7.7 In his statutory declaration dated 11th May 1994, Mr. Lau said that he did not tell Ms. Chan how many shares to buy, and at what price, but, he said, "I indicated to [her] that it [was] likely that she would make a profit by buying SHL shares in the stock market at that stage." In his oral evidence, he told us that whilst he was not sure whether he had told her the privatisation price, he believed that he did. We have no hesitation in concluding that he did tell her the privatisation price before she executed any of her May transactions. It would have been extraordinary had he not done so.

5.8 <u>THE MAY SALES</u>

5.8.1 We made known at an early stage of the hearings the suspicion we harboured that Mr. Lau had procured Ms. Chan to dispose of a substantial quantity of SHL shares to counteract a feared momentum by which the market

price might, uncomfortably for Mr. Lau's plans, approach the privatisation offer. That suggestion was denied by Mr. Lau, and it is an issue of fact to which we now turn.

5.8.2 The Statement of Facts at Appendix III correctly records, at paragraphs 20 and 21, what happened on 21st and 22nd May. On 21st May, Ms. Chan sold 244,000 shares. That represented no less than 93.1% of the turnover in SHL shares that day. The disposal by her of 194,000 shares on 22nd May accounted for 77.6% of the total SHL turnover that day.

5.8.3 In his statutory declaration dated 11th May 1994 Mr. Lau only touched upon the reason for the May disposals, by saying :

"On or shortly prior to 21st May, I told Ms. Chan that I had some reservations whether any privatisation when announced would be warmly received by the other shareholders. I cautioned her against holding too many SHL shares before public announcement of my privatisation proposal."

Quite what the reservation was is not there explained. Ms. Chan, in her statutory declaration of the same date, makes the same assertion in the same terms. She, too, does not volunteer the nature or cause of the reservation. It should not, therefore, have come as a surprise that we asked a number of questions about the circumstances of, and motive for, these sales.

5.8.4 In the event, it was Mr. Lau who purported to take the bull by the horns and tell us the true story about the sales. He asked for permission "to tell the Tribunal the whole story from [15th May] up to 22nd May." The effect of the story which he recounted was this. Ms. Chan had very recently sold the Julimount Gardens flat but she did not, as he had naturally expected, use those funds to pay for the May purchases. She had instead used the funds to

purchase Japanese bonds, and European Currency Units ("ECU"). (Indeed, the flow chart shows a sum of $2,089,844.59 going from her current account on 18th May to an account with the Swiss Bank Corporation, depleting her reserves with the Hong Kong Bank by that amount). Accordingly, she asked Mr. Lau to "foot the bill" for the shares acquired by her in May. She caught him on a bad day, however, for he was not in a good mood. He refused her request. He told her to sell the shares that she had bought so that the debt could be met. "Then," he continued in his oral testimony, "she asked me this question : 'Is it not that your company is going to be privatised?' All of a sudden I was taken by surprise and I said 'It may not succeed.' Then I said to her; 'You better sell the shares you have.' That's it. Very simple." The reference to sudden surprise and the response "It may not succeed" was, it became clear, his attempt to explain the referral in the statutory declaration to reservations about the privatisation. In other words, as Mr. Lau subsequently emphasised, it was (he said) not true that he had reservations about the sale; he had merely told her that.

5.8.5 To reinforce his contention that there was on his part no design to keep the price in harness, and no direction or procurement to that end, Mr. Lau asserted that, at the time, he did not follow the market price of SHL shares very closely; that it never occurred to him that when he suggested she sell, the effect of sales would depress the price of SHL shares on the market : "The then price of the share was meaningless," he said. "It would be meaningful only after the privatisations succeeded and the so-called street shareholders apply ....."

"What if," he was asked by Mr. Pethes," the price had closed at $1.65, for example; what price would you have offered?"

"I would have announced $1.60 also," he replied. "... I would just wait until the Sun Hung Kai report [the report by the advisers to the minority

shareholders] came out. Then I would decide whether to add or to take off something."

5.8.6 The "low on funds" theme had been mentioned by Ms. Chan in the course of her evidence before us. She gave evidence prior to Mr. Lau, and said that he had told her to sell the shares, although he had given no reason other than that there was no need to purchase so much. When asked why in May she sold the "440,000 shares" purchased only a few days previously, she said that on 15th and 18th May she had used $2 million to purchase debentures through Swiss Bank, and the balance in her account was then very low. She sold both because the balance was low and because Mr. Lau told her to sell, she asserted.

5.8.7 On the penultimate day of our hearings, we told Mr. Wong that Ms. Chan's bank statements did not seem to us to support the suggestion of inadequate funds, and we wanted to give her an opportunity of answering that assessment. So the following day there was presented to us a draft statutory declaration in which Ms. Chan developed further the suggestion that the reason, or a reason, for the sales in May, was that she was low on funds.

5.8.8 Her bank accounts showed that on 18th May 1992, she drew two cheques on her current account - one slightly over $2 million, which we accept went in payment of bonds she acquired; the other in the sum of $202,691.87 which we find was used by her to pay for the SHL shares purchased on 15th May. On 19th May, though, she still had about $520,000 in her current account, and $1,641,240 in her savings account; sums which were more than sufficient to fund the purchases effected on 18th May and 19th May, the cost of which were in the region of $430,000.

5.8.9 In the draft statutory declaration, Ms. Chan said that the funds in her savings account ($1.64 million) were earmarked for long term investments, and we see from her savings account that on 29th May she invested $1.5 million in time deposits, which she says, and we accept, were Deutschmark and ECU deposits. Therefore, she says, she was left with only $520,000 in her current account with which to settle her indebtedness to Richardson Greenshields in the sum of $434,903, thus depleting her current account "to a dangerously low level."

5.8.10 So Mr. Lau and Ms. Chan have pointed to these accounts in support of the 'low fund' story, and have added the argument that given their strong desire to avoid having to give evidence, it would have been easy enough to admit an allegation that they set out to depress the price, not least because assurances had been received from the SFC that there would be no action taken if it emerged that there had been manipulation of that kind. It was a point worth making and we have given it full consideration.

5.8.11 We have, however, no hesitation in rejecting the account given that shares were sold because, or partly because, of lack of funds.

5.8.12 It is an account which, before their oral evidence, had never been put forward either by Mr. Lau, or by Ms. Chan. It was not put forward by Ms. Chan in her interview with the SFC, even though in the context of the admittedly untrue account she was then advancing, it would not have been incongruous, or damaging. In his first statutory declaration, dated 11th May 1994, Mr. Lau offered an account for the May sales which we have recited at paragraph 5.8.3 above, that he had told Ms. Chan of his reservations

about the privatisation plan's likely reception. Mr. Lau told us in his oral testimony that in fact he had had no reservations about the privatisation; that what he told Ms. Chan about that was untrue. Yet in a solemn declaration - the statutory declaration - he did not qualify his reference to reservations, as one might expect, by saying that it was not in fact the real reason for his advice to her to sell; nor in that declaration is there a whisper of the allegedly true reason for the sale.

5.8.13 Much the same can be said for Ms. Chan's first statutory declaration. Paragraph 5 of that document, which bears the same date as Mr. Lau's, reflects exactly the account in Mr. Lau's declaration, that he had said that he had reservations, and cautioned her against holding too many shares. "Accordingly," she concludes, "on ..... 21st and 22nd May ..... I placed orders ....." (Emphasis added). That is the sole reason she then provided for the May sales. It is, moreover, most unlikely that Ms. Chan had it in mind that Mr. Lau would foot the bill for all the May purchases, for on 18th May she paid, from her own funds, about $202,000 for the purchases on 15th May.

5.8.14 The truth of the matter is that Ms. Chan was not looking to Mr. Lau for funds on the occasion of the May purchases. She was flush with the proceeds of the Julimount Gardens sale, and she was aware that she could afford to pay for the shares she intended to, and did, purchase. She said as much in her evidence before us. When asked by Mr. Pethes how, before she bought them, she expected to pay for the shares purchased on 15th May, she answered that she could make the purchase first and pay later from the proceeds of the Julimount sale; that fund determined how many shares she acquired. Referring to the purchase by her of 150,000 SHL shares on 18th May, counsel for the Tribunal asked her whether she had discussed with Mr. Lau from where

the money for that acquisition was to come : "No," she replied, "because that time I had sufficient funds in hand to make the purchase" (emphasis added). She went on to say that Mr. Lau told her to sell the shares, that he said that there was no need to buy so many, and she then said that there was another reason for the sales - namely, that her bank balance was low.

5.8.15 Nor does the story fit the history of their relationship. He was lavish with gifts and the provision of funds, whether real property or cash for investments in the stock market. We need look back only to April 1992 to see the gift of almost $1 million for shares; and we need look forward only to June 1992 to see Mr. Lau providing $600,000 to pay for SHL shares. And we need look only to Mr. Lau's own description of his unquestioning largesse, when asked whether there had been a discussion about payment for some shares :

> "I don't think there was any discussion, because whenever she asked for money, I would surely give money to her"

5.8.16 What is more, if Ms. Chan needed to sell shares to raise money, she had shares other than SHL shares which she could have used. It might have made much more sense to do so, particularly when she was in possession of inside information in relation to SHL securities, which information had not yet been disseminated when she chose to sell them.

5.8.17 The fact is, as we find, that Ms. Chan was not out of pocket, nor nearly so. Once she had purchased the bonds, she still had substantial sums in her savings and current accounts, and even if she had committed herself to time deposits - and she does not say she committed herself - there was enough to cover her acquisition of SHL shares in May. We note, too, that on 11th June

she was not slow to fund from her accounts a payment of $300,000 for SHL shares, when the sums to her credit in those accounts were less than they had been in mid-May.

5.8.18 The fact of the fabrication of this reason for the May sales does not of itself prove that Mr. Lau directed Ms. Chan to sell the shares, nor does it of itself prove that his intention was to depress the price so as to keep the privatisation plan alive. We remind ourselves that there may be reasons, consistent with innocence, for the telling of tales. We have to say that we can think of no reason for this particular untruth save that Mr. Lau and, to a lesser extent Ms. Chan, were intent upon distancing Mr. Lau from any suggestion or suspicion that, for a selfish motive, he directed Ms. Chan what to do. That was particularly evident in his suggestion that he did not follow the market very closely at a stage when he was about to announce a privatisation proposal. That suggestion was only slightly less fanciful than the contention that it had never occurred to him that the sale by her of SHL shares might depress the price on the market. He had made more realistic statements during his interview by the SFC in June 1993 when he said :

> "Although I had not done anything to interfere with Success' share price after the privatisation proposal had been made, I still hoped that Success' market price would be lower than $1.60, but not higher than $1.60. It was only in this way would privatisation be successful"; and later :
> "I certainly did not want the price to be too high, and yet I still wanted to privatise Success. Frankly speaking, if less could be paid, I do not want to pay a higher price. After all, it is my money."

5.8.19 That summary of his attitude accords with reality, with the way in which one would expect his mind (or, for that matter, the mind of anyone else

contemplating a privatisation) to have been working in middle and late May 1992.

5.8.20 We have examined movement in the market generally, as well as in SHL shares for the period in question, and we conclude that there was indeed reason for Mr. Lau to fear that privatisation might become more expensive than he wished. Exhibit AP8, which is at Appendix VI, is a ready reference to the daily turnover and the daily highs and lows, in SHL shares between 1st May 1992 and 30th June 1992. We have added to it Ms. Chan's transactions in SHL shares during that period. An examination of Appendices IV and VI shows how thinly traded were SHL shares for the ten days preceding 15th May; that during the consecutive trading days 15th, 18th and 19th May the turnover in SHL shares was markedly higher than before, with Ms. Chan's transactions taking up 82.6% of the turnover on 15th May, 68.18% on 18th May, and 55.47% on 19th May, which suggests that other buyers had noticed increased activity in SHL shares and had decided to join in. It may be suggested that despite this activity there was but a small increase in the price of SHL shares between 14th May ($1.41) and the closing price on 18th May ($1.42). That is so, but that increase was against the trend of the market as a whole, for in that same period the Hang Seng Index had dropped 109 points or 1.9%.

5.8.21 On 19th May, however, two things happened : the price of SHL shares increased on the previous day by 2.11%, and the Hang Seng Index showed a slight rise. On 20th and 21st May the Index moved up a total of 224 points or nearly 4%, evidence of strong overall market sentiment, a reaction, perhaps, to an expectation of a reduction in bank interest rates - a reduction which was announced on Friday 22nd May.

5.8.22 We are entirely satisfied, and find, that Ms. Chan's sales of SHL shares on 21st and 22nd May 1992 were executed by her at Mr. Lau's direction, and that his motive for directing her to sell was to counteract the rise in the price of SHL shares which had taken place and which he feared might continue. He feared - as he told Ms. Chan - that as matters stood the privatisation plan was in jeopardy. At paragraphs 2.25 to 2.29 above, there is discussed the character of the conduct which is the subject of this particular aspect of the case and the requisite standard of proof. If the standard of proof required in respect of this conduct were more appropriately classified as one approximating to the criminal standard, our finding would be the same.

5.9 THE SPECIAL DIVIDEND

5.9.1 We know that on the evening of Friday 22nd May 1992, the privatisation proposal was announced. It appeared in the press the following day. One notes from Appendix VI that in the week following the privatisation announcement there was a substantial increase in turnover, and a corresponding rise in the price of SHL shares. During that week Ms. Chan acquired no shares.

5.9.2 Paper work necessary to give effect to the privatisation continued, after the public announcement, under the direction of Peregrine. On 26th May 1992, a Mr. Toby Lee of SHL spoke over the telephone to Mr. Wong Lai-fong, executive director of Raine, Horne and Lau, Francis Lau and Company ("Raine Horne"), surveyors, and appointed Raine Horne to conduct valuations on four properties owned by SHL or its subsidiaries. The valuation was said to be for SHL's annual report and for the privatisation. The report was prepared, dated 1st June 1992, and estimated the value of the properties as at 30th April 1992.

5.9.3 At close of trading on 29th May 1992, SHL shares stood at $1.59 per share; only one cent below the privatisation offer. By that stage it had been widely reported that the net asset value of SHL shares as at 30th April 1991 was $2.13 per share.

5.9.4 We do not know when Mr. Lau decided upon the special dividend and its amount, save that it was before Ms. Chan purchased 260,000 SHL shares at $1.60 per share on 3rd June 1992. In the course of his interview with the SFC, he said that the market price was at about $1.70 when he spoke to Mr. Leung of Peregrine, and that he, Mr. Leung, advised him that if a special dividend was not distributed the privatisation proposal would fail. That does not quite match with Mr. Leung's written statement that instructions to prepare documentation for a special dividend were received from Mr. Lau on 4th June 1992, and that that afternoon he was informed by Mr. Lau that the special dividend was to be $0.12 per share.

5.9.5 According to Mr. Ka, whose evidence we accept, Ms. Chan telephoned him on the morning of 3rd June 1992. Although 260,000 SHL shares were acquired for her, she had ordered more, probably 300,000. He believes, but cannot be sure, that she placed a limit of about $1.60 as her ceiling. The batch of 260,000 was acquired for her in five parcels. He also recalled that all her orders in June were placed by telephone early in the morning.

5.9.6 We find that whilst the information about the planned dividend was not yet in the public realm, Mr. Lau divulged the plan and, we feel sure, the price too, to Ms. Chan. A study of the history of the case and the pattern of

trading immediately before each public announcement went a far way to establish insider dealing on each occasion. The admissions seal the issue. As for the special dividend, the admissions are to be found at paragraphs 23 to 26 inclusive of Appendix III, and in the statutory declarations filed by Mr. Lau and Ms. Chan.

5.9.7 The day after Ms. Chan purchased 260,000 shares, trading in SHL shares forced up the price at one stage to $1.98, but closed at $1.90 just before the announcement of the special dividend. This movement was not in line with the Hang Seng Index which had fallen on the first three days of June. On 4th June the Hang Seng Index was steady. On 3rd June, Ms. Chan's transactions constituted 43.33% of SHL's turnover, and on 4th June she did not trade at all. The suggestion has been made by a senior securities officer of the SFC whose function it has for some time been to monitor activity on the Stock Exchange, that the fact that on 4th June SHL prices were well beyond the privatisation price was "probably due to follow through buying by speculators as the $1.60 technical resistance was broken the previous day which tended to lead to the belief of possible revision terms of the privatisation."

5.9.8 Friday 5th June was not a trading day. On Monday 8th June 1992, there was no trading in SHL shares. Trading was sparse on the two following days, and by close of play on 10th June, the price had dropped quite considerably to $1.76 per share. Again, there were no transactions by Ms. Chan that day.

5.10 <u>THE THIRD PARTY TAKE-OVER</u>

5.10.1 Early in the morning of 11th June, Ms. Chan placed an order with Richardson Greenshields for the purchase of about 200,000 SHL shares.

Mr. Ka spoke to her and received the order. He asked her at what price she wished to execute the order and "she answered that it would be fine even if the price was 10 to 20 cents higher than the current market price." It is not surprising that, despite the fact that the price the previous day had ranged at and above the new privatisation price of $1.72, Ms. Chan was prepared to buy at 10 to 20 cents above the market price, for before she placed that order, she had been told by Mr. Lau that there was a proposal afoot for a take-over by a third party, and - so we find - she had also been told by him the likely level of the offer, or (and it is not necessary for us to decide which) that the offer would be in the region of $2.60.

5.10.2 The public announcement of the approach by a third party was made on the evening of 11th June. Once again, we observe that in the days leading up to the announcement there was no trading by Ms. Chan, but that immediately preceding it, she bought a substantial tranche of SHL shares.

5.10.3 We have no hesitation in accepting the admissions of Mr. Lau and Ms. Chan contained in the Statement of Facts at paragraphs 27 to 32 in so far as they reveal that Mr. Lau passed inside information about the take-over to Ms. Chan which she then relied upon to trade on 11th and 12th June. Paragraph 27 is not specific about the extent of the information disclosed ("....disclosed one or more pieces of this relevant information ..."). That admission is further particularised in Ms. Chan's first statutory declaration, the one dated 11th May 1994. She there says that Mr. Lau told her that he had been approached by a third party concerning a possible conditional cash offer for the entire share capital of SHL. "He suggested that I should consider acquiring additional SHL shares as the prospect of making profit if such conditional cash

offer be forthcoming would be good. .....Once again, Mr. Lau did not tell me at what price and for what quantity ..... my purchase should be made."

5.10.4 Whether or not Mr. Lau told her at what price to buy, we are satisfied that he told her the price that the third party was prepared to pay for SHL shares, or that the third party was prepared to pay $2.60 per share or more. It would have been odd for him not to do so, and, in any event, we were told by Ms. Chan when she gave evidence that he gave her a rough figure, and by Mr. Lau that he told her someone was willing to buy at $2.60.

5.10.5 The take-over phase had commenced with an approach to Mr. Lau by Mr. Charles Chan of ITC. Mr. Lau told the SFC investigators that after the announcement of the special dividend, Mr. Chan telephoned him and suggested that he, Mr. Lau, might sell his stake in SHL to ITC. They had lunch and, according to Mr. Lau at the interview: "We discussed about the offer price on several occasions afterwards ..... Later, after both of us agreed on the prices of the shell and the properties, we made an appointment to meet at the office of Francis Leung." He said that the price he sought at the beginning of their bargaining was around $2.90, a price arrived at by dividing the total asset value by the number of shares, and then adding a consideration for the shell. He said that he had in mind a figure for the shell in the region of $40 million.

5.10.6 Mr. Charles Chan gave evidence. He could not recall when he first contacted Mr. Lau about a possible take-over, save that it was in early June. Following discussions with Mr. Lau, he contacted Mr. Francis Leung of Peregrine on 10th June 1992. Mr. Leung confirms this. Mr. Leung was told that no price had been agreed because both parties intended that some of SHL's properties were to be sold to Mr. Lau before the take-over. Mr. Chan asked

Mr. Leung whether a privatisation proposal could be replaced by a take-over proposal, and was told that it could, but that ITC should be prepared to pay an offer price higher than the privatisation price. That night, instructions were given by Mr. Leung to solicitors to abandon work on the privatisation proposal, and to start work on drafting documentation for a take-over.

11TH JUNE

5.10.7 On 11th June there were a number of meetings centred upon the take-over proposal. There was a board meeting of ITC in the morning; and a meeting at Peregrine's offices in the afternoon attended by representatives of SHL (including Mr. Lau) and ITC (including Mr. Chan), and their respective solicitors.

5.10.8 The morning of 11th June witnessed a surge in the price of SHL shares. Ms. Chan's purchase of 148,000 SHL shares was but 16.93% of the day's turnover in those shares of 874,000. The Hang Seng Index suffered a drop of 90.96 points that day, so the SHL rise of 22.09% was decidedly against the trend.

5.10.9 At around lunch time on 11th June, Mr. Leung was informed that prices had risen sharply that morning and "as the prices of SHL share would have a bearing on the Code of Takeovers and Mergers, [he] spoke to Lau on the telephone shortly after lunch and asked him to request the board of SHL to consider suspending the shares of SHL from trading". At 3.18 p.m. and at the request of SHL trading in SHL shares was suspended, and the price then stood at $2.10.

5.10.10 Though it is clear that Ms. Chan entered upon her transactions on 11th June because of inside information received from Mr. Lau, there is some evidence that there was a rumour on 11th June about a third party approach. The Hong Kong Economic Times for 12th June said that "..... it was rumoured in the market that a third party had approached Success for a cash offer for its shares. As a result, buying orders in the market for Success' shares were pushing the share prices upwards tremendously".

5.10.11 It was also on 11th June that Ms. Chan presented a cheque to Richardson Greenshields in the sum of $300,000 drawn on her current account at the Hong Kong Bank. This was in payment for the shares purchased on 3rd June 1994.

5.10.12 During the afternoon of 11th June, the structure of the transaction was discussed by the parties at Peregrine's office; there was also discussion about which properties would stay with SHL. The price for the shares was not finalised. That evening, the announcement was made that SHL had been approached by an independent third party "in respect of a proposal which may or may not lead to a conditional cash offer for the entire issued share capital of the Company".

12TH JUNE

5.10.13 On the morning of 12th June 1992, Ms. Chan telephoned Mr. Ka and placed an order for the purchase of SHL shares. Between 11.36 a.m. and 3.23 p.m. 176,000 SHL shares were acquired for her at prices ranging between $2.40 and $2.475 per share. Her order, however, had been for more than 176,000 shares. According to Mr. Ka's recollection, the quantity she sought was a round figure - 300,000. That day, 1,757,000 SHL shares were traded at

prices ranging between $2.20 and $2.525 per share. Ms. Chan's purchases therefore formed about 10% of trading in SHL shares that day.

5.10.14 During the afternoon of 12th June 1992, there was another meeting at Peregrine's office at which agreement was reached between Mr. Lau and Mr. Chan on the structure of the proposed take-over, the disposal of SHL assets, and detailed terms of the agreements. Draft announcements were sent to the SFC and the Stock Exchange, and ,after a response by the Stock Exchange, the structure and terms of the transactions were revised. The price of the take-over was then fixed.

AFTER 12TH JUNE

5.10.15 The press announcement, which published the fact of the conditional agreements for the acquisition of SHL shares by Chevy, and for the disposal of certain SHL assets to HKP, Main Road and Golden Triumph Investment Ltd., another wholly owned subsidiary of HKP, was issued on 16th June, and published in the press the following day. There had been no trading on Monday 15th June because that was a public holiday, and on 16th June trading in SHL shares was suspended. The effect of the share agreement was that Chevy was to acquire from HKP, Main Road, and a Mr. Chiu Siu-po, their 60.5% stake in SHL at the price of $2.88 per share. Trading in SHL shares resumed on 17th June, and the price closed that day at $2.80.

5.10.16 The transactions effected on Ms. Chan's behalf on 12th June were the last of the transactions by her in SHL shares, save in so far as she disposed of all her SHL shares to ITC on 10th August 1992.

5.10.17 On 17th June 1992, there was credited to Ms. Chan's current account $600,000 in respect of a cheque in that amount drawn by HKP but debited to Mr. Lau's Golden Time account with HKP. Three days later, Ms. Chan issued a cheque in favour of Richardson Greenshields for the same amount. That sum was intended to meet the balance of her liability in respect of her purchases on 11th and 12th June 1994.

5.10.18 A letter was issued by the independent director, Mr. Chu Hok-ling, to the minority shareholders. It is dated 7th July 1992. On that day SHL announced its results for the year ended 30th April 1992. It reported that the net asset value of the group as at 30th April 1992 was approximately $2.62 per share. The independent director concluded that the terms of the offer were fair and reasonable. Those who decided to accept the offer were required to deliver relevant completed forms together with share certificates or other documents of title to SHL's registrar no later than 10th August 1992.

5.11 WERE THE PURCHASES DESIGNED TO AFFECT THE TAKE-OVER PRICE?

5.11.1 In order to determine "the amount of any profit gained or loss avoided as a result of the insider dealing," we wished to ascertain whether there was a connection between the take-over price ultimately agreed and the market price. Given that SHL was such a thinly traded stock, we wanted to know whether Mr. Lau procured the purchase by Ms. Chan of SHL shares in order to raise the market price of those shares and, assuming a connection between the market and the take-over price, thereby to influence the latter. If such a connection were established, it might be said that, by reason of the insider dealing, a profit would accrue to Mr. Lau in respect of his entire interest in SHL - a sum enormously in excess of any profit in the transactions themselves.

5.11.2 We are satisfied, and find, that there was no such plan. It was a point thoroughly explored with Mr. Charles Chan. He told us that before he first approached Mr. Lau about a possible take-over of SHL, ITC had not carried out a market analysis. "The price," he said, "was set by reference to the net asset value of Success, plus a premium which was determined at the meeting at Peregrine on 11th June 1992". At some stage he saw a valuation report, and ,in any event, an estimate of the net asset value of a company whose prime assets were four properties was but a relatively simple matter. He had in mind, he said, a premium for goodwill - as he put it - in the region of HK$50 million. He asserted that the price at which the stock was being traded on the Stock Exchange had no influence on him in relation to his determination of the acquisition price. We accept that the formula used was net asset value plus premium, divided by the number of shares.

5.12 OTHER SHARES

5.12.1 In July 1992, HKP, Mr. Lau, and Ms. Chan acquired substantial quantities of shares of China Entertainment Holdings. On 13th July, HKP bought 3 million such shares for almost $6 million; on 14th July 1992, Mr. Lau acquired 5 million China Entertainment shares at a cost of slightly more than $10m, next to which, Ms. Chan's acquisition of 300,000 China Entertainment shares for $600,000 might seem tame. On 11th August 1992 Mr. Lau bought, again through Richardson Greenshields, Hutchison Whampoa shares at $15.50 a share. Ms. Chan acquired, on the same day, 150,000 Hutchison Whampoa shares at the same price, a cost therefore in respect of her purchase, of $2,325,000.

5.12.2 We see nothing sinister or remarkable about these acquisitions in the context of the issues we have to address. They are relevant, though, to complete the picture and to demonstrate, if demonstration is still needed, the degree to which Ms. Chan depended upon Mr. Lau for her investment behaviour and decisions.

CHAPTER 6
THE SALE OF SHL SHARES AND ITS AFTERMATH

6.1 We can see from Appendix IV that with the acquisition by Ms. Chan on 12th June of 176,000 SHL shares, Richardson Greenshields held on her behalf scrip for 1,024,000 SHL shares. The balance of the scrip for SHL shares that she had purchased was, wherever they may have been kept, a balance in the same quantity, namely, 1,024,000 shares.

6.2 Before the closing date of the general offer, Ms. Rosa SIN Chi-fong, an employee of Richardson Greenshields, spoke to Mr. Paul Lee, Financial Controller of SHL, about the surrender of SHL shares. She said that Mr. Lee suggested that she pass SHL shares in their custody directly to ITC who would arrange the issue of cheques in favour of Richardson Greenshields' clients. In due course, someone from ITC collected from Richardson Greenshields the shares of those accepting the offer, and presented corresponding cheques made payable to Richardson Greenshields, who in turn credited the trading accounts of their clients. That is what happened with Ms. Chan. Her account with Richardson Greenshields was credited with the sum of $2,943,220. A sizeable proportion of that credit was used in the purchase on 11th August of 150,000 Hutchison Whampoa shares.

6.3 What of the shares not kept at Richardson Greenshields? When Mr. Lau was interviewed about this matter in June 1993, he said that he thought that Ms. Chan asked him to submit SHL shares on her behalf to ITC, and that he had entrusted the matter to Mr. Paul Lee. Mr. Lee's account was that in August 1992, a Mr. Tse of ITC telephoned him and asked if there was anyone who held SHL shares and, if so, whether they intended to accept the offer.

Mr. Lee then spoke to Mr. Lau who handed to him on the following day shares belonging, he says, to Ms. Chan. Of these, 100,000 were in Ms. Chan's name, and 924,000 were in 'street' names. ITC collected the shares and handed to Mr. Lee a cheque in the sum of HK$2,943,220 made payable to Ms. Chan. The proceeds of that cheque were credited to Ms. Chan's AssetVantage current account on 11th August, and, soon after that, were credited to Mr. Lau's Golden Time account in the books of HKP. Thereafter, that sum merged with other monies, although it is suggested that it at all times remained earmarked as a sum owing to, or held on behalf of, Ms. Chan.

6.4 This was the only sum that ever found its way to Mr. Lau from Ms. Chan. Given, furthermore, the close interest that Mr. Lau had paid to Ms. Chan's SHL transactions in 1992; the fact that she had conducted transactions at least in one instance at his direction, as we have found; the fact that his funds were the source of her purchases; and the two-fold split of the proceeds of sale; we were, without more, minded to think that all Ms. Chan's transactions in SHL shares were executed for their joint benefit, and that the disposition of this second sum was cogent evidence in support of that suspicion.

6.5 That suspicion or suggestion was contested. In her statutory declaration of 11th May, Ms. Chan said that she had decided to segregate the proceeds of sale of her SHL shares into two - the first for continued investment in securities through Richardson Greenshields, the second for investment in real property. She had, she said, by 12th August already identified a property at Ronsdale Garden in Tai Hang Drive. The average price of a unit then was $3,500,000. Mr. Lau, she said, was in the business of real estate, and he offered to procure a unit on one of the high floors of that development. "Furthermore," the declaration continues, "he also promised me that in so far as

the price of a high floor unit stood at $3,500,000 or thereabout, he would contribute the balance in my favour. Upon that promise, I drew a cheque for $2,943,220 in favour of HKP by way of payment to Mr. Lau."

6.6 It was, however, not until mid-June 1993, according to this account, that a suitable unit in Ronsdale Garden was found - in fact two were found, and negotiations came to fruition for one in June 1993, and another in November 1993. So Mr. Lau had the benefit of her $2.943 million for 10 months, or 14 months, depending on how one chooses to follow it through. The purchase price for one flat was $5.35 million, and for the other $4.79 million, a total of $10.14 million. Towards this Mr. Lau is said to have contributed $3.5 million, consisting of Ms. Chan's $2.943 million, and Mr. Lau's promised 'top-up'. The contribution was split as to $1 million in June 1993, and $2.5 million in November. The first flat is said to be registered in the joint names of Ms. Chan and her mother, the second in Ms. Chan's name alone.

6.7 From where did Ms. Chan find something in the order of $7 million with which to pay the balance of the purchase price of the flats? In respect of the property purchased in June 1993, Ms. Chan says that she sold a significant quantity of shares in May and June. She has produced documents in support of that suggestion. According to her account, her mother contributed $1 million which is why that property is in the joint names of Ms. Chan and her mother. To pay for the second flat, Ms. Chan apparently sold bonds, and has produced documents to show that, and utilised the remainder of the proceeds of sale of shares, as well as Mr. Lau's (or her) $2.5m.

6.8 In her oral testimony, Ms. Chan said that she regarded the sum of $2.943 million which went to Mr. Lau to be hers (as indeed she regarded all the profits from her dealings in SHL shares as hers). When asked why she went to the trouble of drawing a cheque for $2.943 million in favour of HKP rather than leaving the money in her account until she secured a flat she said this :

> "I told Mr. Lau that I was minded to purchase a flat. The price of that flat was $3 million odd, yet I only received a cheque for $2.9 million something. That will be insufficient to pay out for that flat and I told Mr. Lau that, and he said, "well, if you are minded to buy the flat then I will pay off the balance for you.""

In the ten months before a flat was secured, she said, nothing happened with the earmarked $2.943 million. "All along [Mr. Lau] had it in his possession."

6.9 In the course of Mr. Lau's evidence, the same question was asked - why should she give the cheque to him? His answer was that in her account she could earn only 1%. "She promised to give me a cheque and I promised her, by using that cheque, I would give her a flat." He also made the point in a second statutory declaration that, given his admission to the Tribunal that he had engaged in insider dealing, and his anxiety to avoid prolonging the proceedings and the embarrassing publicity that came with it, and given also the fact that he would meet any penalty imposed on Ms. Chan, there was scant advantage in denying that he was the real or joint beneficiary of the cheque for $2,943,220, unless that denial were true. He made the further point in evidence that he regarded the sum as "pretty small" in the context of his personal wealth.

6.10 In so far as it was canvassed at the hearing whether the SHL shares as a whole were so accumulated and acquired to ensure that Ms. Chan

should keep half the total shares at home for herself, and half for Mr. Lau at Richardson Greenshields, we accept, and find, that there was no such plan or arrangement. We note in particular that when Ms. Chan placed orders in June 1992, she placed orders for quantities larger than Richardson Greenshields were in fact able to secure for her. That does not sit well with any plan to accumulate with Richardson Greenshields the same quantity of SHL shares as were held by Ms. Chan at home or in some safe-deposit. We are satisfied that the fact of the two equal blocks of 1,024,000 shares was a coincidence.

6.11 We do not, however, believe the story that the money that found its way to Mr. Lau, that is, the sum of $2.943 million, was intended to be used in the way Mr. Lau and Ms. Chan suggested. Their account has all the hallmarks of an *ex post facto* rationalisation; a search for a sum subsequently paid by Mr. Lau to Ms. Chan which approximates to the figure of $2.943 million. A number of matters rested uneasily with their account :

(1) On no other occasion had Ms. Chan paid money to HKP or to Mr. Lau.

(2) There was a very significant delay between payment to HKP of $2.943 million and the acquisition of a flat at Ronsdale Garden.

(3) There appears to have been no sound reason for Ms. Chan not to invest the second sum of $2.943 million until such time as a flat was found.

(4) In his second statutory declaration, which was intended to address only this issue as a result of the Tribunal's pursuit of the point, Mr. Lau referred to the fact that on 12th August 1992 a total sum of $28,983,834 was entered in the Bank ledger of HKP with a corresponding entry in Golden Time's current account with HKP. The figure, as the books show, comprised three sums -

(i) $18,245,440;

(ii) $2,943,220 (the sum in question); and

(iii) $8,795,174.

The source of the funds referred to at (i) and (iii), a matter not referred to in the statutory declaration, turned out to be proceeds of sales by Mr. Lau of SHL shares. In other words, one may be forgiven for believing, having regard also to the other factors here prayed in aid, that item (ii) was of the same category.

(5) The story offered was that in so far as the purchase price exceeded $2.943 million, Mr. Lau would provide the excess. In other words, when she purchased property, she would receive $3.5 million from Mr. Lau, but the fact is that when she purchased in June 1993, she did not receive $3.5 million from Mr. Lau, even though the purchase price for the June acquisition was $5.35 million. It seems odd to hold back $2.5 million for a subsequent purchase which, in June 1993, was not concluded.

(6) We note that Ms. Chan drew a cheque, intended for Mr. Lau's benefit, in the precise sum of $2,943,220; rather than, $2,900,000, or even $2,940,000 or some other round sum. That was, we think, a strange thing to do if the idea was to pass over a lump sum to be held for a property purchase. It was not, however, a strange thing to do if there was an understanding that one set of proceeds of sale should go to her, another to him.

6.12 The fact that we do not believe the testimony of Mr. Lau and Ms. Chan that her cheque to HKP in August 1992 in the sum of $2.943 million was earmarked for property investment does not, of course, mean that the moneys were treated as belonging to Mr. Lau, or to Mr. Lau and Ms. Chan

jointly. That said, we can conceive of no other explanation, in the context of all the facts of this case, for the treatment of the proceeds of sale of the shares in the "home" batch than that they were treated as Mr. Lau's. The fact that these proceeds were blended with two other sums, which two sums were undoubtedly due to him alone as the proceeds of sale of his SHL shares, is a compelling fact. Taken in conjunction with the other matters we have itemised, we are satisfied to a high degree of probability that he received as his the cheque in August 1992 for $2.943 million.

6.13 It is no doubt the case that in many instances what was given to Ms. Chan by Mr. Lau was intended to be hers. That does not preclude them from coming to an occasional understanding that half the proceeds of a particular investment were to go back to him. Such an understanding may not have been in any particular instance a matter of great moment, and it may have formed sometime after the investment but before or at the time of its realisation. That is what we believe and find happened on this occasion, namely, that by 10th August 1992, it was understood that Ms. Chan would retain half the proceeds of sale of the SHL shares, the remaining half to go to Mr. Lau.

6.14 It is said that the sum was, to a man of Mr. Lau's financial worth, a small sum; certainly small when set against the quantity of his admitted SHL holdings. And, what is more, why run the media gauntlet by having to come to the hearings just to make a stand on this issue? There may be a number of reasons for accepting or requiring a half share. It was not invariably the case that Mr. Lau was divorced from Ms. Chan's assets. He retained a joint interest in the Beverly Hill property; he still had that interest in 1993 when interviewed by the SFC. It may to him have been a point of principle, rather than money, at

that particular juncture of their relationship, that she return half the proceeds to him. She may have surrendered that half to him as a gesture of her own.

6.15 As for the suggestion that it would have been easier on them both to admit that the second half of the proceeds was treated as his, that may be so. Yet the admissions and the oral evidence were put forward on a footing which, we believe, sought to distance Mr. Lau as much as possible from any suggestion that the insider dealing went beyond a favour to a close acquaintance, and entailed a degree of self-interest. Self-interest or partial self-interest gives to the matter a different complexion.

6.16 We do not know whether the understanding was reached before the June acquisitions. We shall assume in Mr. Lau's favour that it was not, and that it was reached shortly before 10th August 1992, or at least before the funds were passed over to him on 12th August.

6.17 We are required by the terms of section 23(1)(b) of the Ordinance to ascertain which insider dealer or dealers gained a profit as a result of the insider dealing. The point at which the profit from insider dealing is to be deemed to accrue is stated at paragraph 2.31 of this report, and the approach which leads to that conclusion is explained in Chapter 9 of this report. In the result, the profit gained as a result of the insider dealing was gained well before August 1992, and at the time it was gained, it was gained on Ms. Chan's account with Richardson Greenshields. We therefore find that, whatever agreement there was by Ms. Chan and Mr. Lau as to the ultimate disposition of the gains made on insider dealing, the gains were in fact made by Ms. Chan.

CHAPTER 7
RESPECTIVE ROLES, AND MOTIVE

7.1 In Chapter 4 of this report we stated why we thought it necessary to scrutinise the suggestion that all SHL dealings were effected for Ms. Chan's benefit. We have concluded that in relation to the May sales, Mr. Lau played an active role in securing sales of SHL shares by Ms. Chan. We have also concluded that the proceeds of the August sales were divided between Mr. Lau and Ms. Chan. We now address the wider picture. Was there, in general, an understanding that in relation to all Ms. Chan's SHL transactions, they were effected for Mr. Lau's benefit? What, in general, was the agreement or understanding between them about the shares, and the provision of funds for them? And, in so far as insider dealing took place upon information provided by Mr. Lau, did he merely counsel Ms. Chan to deal, or did he procure her to do so?

7.2 Mr. Lau was, and is, a man of considerable personal wealth who was content to support Ms. Chan financially, not in a regimented way by regular periodic payments, but by meeting such financial expenses as she happened to incur from time to time. We find, too, that with the development of the relationship in and after 1991 Mr. Lau became increasingly generous towards her, and we are satisfied that in many instances funds or property interests which were provided were intended as outright gifts. The Hong Kong Land shares and the interest in Julimount Garden fall into this category. So, too, it may have been the case that, when funds for the acquisition of SHL shares were provided it was intended that all of the shares so purchased should be hers.

7.3 But we find that Mr. Lau was not as distant from Ms. Chan's financial interests and investment decisions as he would have had us believe. In 1991 Ms. Chan was aged 22 years, and wholly untutored in investment matters. That Mr. Lau would guide her investments by suggesting what she should do, and that she would be unquestioning in her acceptance of his advice, we have no doubt.

7.4 We have made reference at an early stage of this report to short bursts of dealings in 1991 by Ms. Chan in SHL shares. That reference was made in connection with our stated desire to ascertain whether dealings by Ms. Chan in SHL shares were indeed on her own behalf. We thought it possible that the 1991 transactions may throw light on the position in 1992. There are in relation to the two material phases in 1991 no particular or extraordinary events in the life of SHL, of which we are aware, which would support a theory that the 1991 acquisitions were transactions carried out for some ulterior motive of Mr. Lau's. We note, too, that the purchase of 742,000 shares in April 1991 straddled Ms. Chan's birthday. We are satisfied that there is no warrant for any inference or finding, in relation to the 1991 transactions, of some ulterior motive on Mr. Lau's part.

7.5 As for the period which is embraced by the terms of reference, we see no sinister or ulterior motive in Ms. Chan's May and June transactions other than profit on insider information, save for the May sales in respect of which we have recorded our finding that this was a deliberate attempt to save the privatisation scheme; and we are satisfied that in relation to those sales Mr. Lau procured Ms. Chan to sell. In relation to all other transactions in May and June there is insufficient evidence of procurement, and we find that those other transactions were counselled, rather than procured, by Mr. Lau.

CHAPTER 8

INSIDER DEALING : CONCLUSIONS

8.1 We now answer questions (a) and (b) of the terms of reference :

"(a) whether insider dealing has taken place in relation to the listed securities of Success Holdings Limited in the period between 15th May and 12th June 1992;

(b) the identity of every insider dealer, if any, in the above-mentioned securities."

8.2 It follows from our findings so far that we have determined that insider dealing has taken place in relation to SHL shares between 15th May and 12th June. There were a number of such instances.

8.3 THE MAY PURCHASES

8.3.1 The privatisation proposal constituted specific information which at the time of the May purchases was not generally known to those accustomed or likely to deal in SHL shares but which would if it were generally known to them likely materially to affect the price of these securities.

8.3.3 The purchase by Ms. Chan of SHL shares on 15th, 18th and 19th May 1992 constituted insider dealing by Ms. Chan and Mr. Lau :

(a) Mr. Lau was an insider dealer in that as a person connected with SHL, and in possession of relevant information (the privatisation proposal and the actual or likely acquisition price of SHL shares), knowing it to be relevant information, he counselled Ms. Chan to deal in those shares, knowing or having reasonable cause to believe she would do so (Section 9(1)(a) of the Ordinance). So,

too, is he an insider dealer by virtue of the provisions of sections 7 and 9(1)(b) and 9(1)(d) since contemplation by him of privatisation is contemplation of a take-over. It follows too from our findings that his conduct in counselling the May purchases falls within the contemplation of section 9(1)(c).

(b) Ms. Chan was an insider dealer by virtue of the provisions of section 9(1)(e), for she possessed relevant information (the privatisation proposal and acquisition price), which she knew was relevant information received from a person she knew to be a connected person who held the information because of that connection, and, when in possession of that information, she dealt in SHL shares. The provisions of sections 7 and 9(1)(f), and the facts we have found render Ms. Chan an insider dealer in relation to the May purchases of shares.

8.4 THE MAY SALES

8.4.1 The sale by Ms. Chan of SHL shares on 21st and 22nd May 1992 also constituted insider dealing, odd though that may seem in so far as one would normally expect the sale of shares which were acquired during the insider phase to take place after the information has been publicised, and to be no more than the realisation of the profit for which the unlawful acquisition was intended. The point, however, is that in this case the sales had a life of their own. When those sales took place, those who effected the sales, whether by dealing or by procuring the deals, were possessed of information which at that stage was still "relevant information" as that term is defined by section 8 of the Ordinance.

8.4.2 Mr. Lau procured Ms. Chan to deal in these securities. He was then in possession of relevant information, namely, the fact of the pending privatisation proposal; information which he knew to be relevant information. The privatisation proposal also constituted a contemplated take-over. Those facts suffice to find insider dealing by Mr. Lau within the meaning of sections 9(1)(a) and 9(1)(b) of the Ordinance.

8.4.3 When Ms. Chan sold those shares in May, she had information which she knew to be relevant information, which information she had received from someone she knew was connected with SHL and whom she knew possessed that information by reason of that connection, and, further, whom she knew was contemplating a take-over offer for SHL. Accordingly, those sales constituted insider dealing as contemplated by sections 9(1)(e) and 9(1)(f) of the Ordinance.

SECTION 10(3)

8.4.4 Insider dealing transactions though these were, it is argued that neither Mr. Lau nor Ms. Chan are to be held to be insider dealers in relation to them, because on any view there was no intention by either that, by the sales themselves, a profit should be made or a loss avoided.

8.4.5 Section 10(3) of the Ordinance reads as follows :

> "A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction otherwise than with a view to the making of a profit or the avoiding of a loss (whether for himself or another) by the use of relevant information."

8.4.6 It is noted that the burden of establishing that lack of motive rests upon the person who entered into the transaction. The contention that the motive in the May sales was or may have been price suppression is not a contention advanced by either Mr. Lau or Ms. Chan. It is a finding by us which is contrary to the accounts they gave. Nevertheless, Mr. Wong puts the matter in this way, that if we were to find that the motive was manipulative, then the transaction was not executed with a view to profit or avoidance of loss in that transaction. Mr. Wong is entitled to put the argument in the alternative, and we do not construe the phrase "if he establishes" so narrowly as to preclude us from making a finding that section 10(3) avails Mr. Lau and Ms. Chan, even though the facts upon which it might avail them are the facts we find rather than those they would have us find.

8.4.7 For the purpose of the first question posed by the terms of reference (whether there has been insider dealing), section 10(3) matters not, for section 10(3) presupposes that an act of insider dealing has been proved, but it goes on to ensure that a dealer is not, in certain prescribed circumstances, to be branded an insider dealer. That has practical ramifications, most notably the fact that such a person is not to be penalised pursuant to the provisions of section 23 in respect of that act of insider dealing. So Mr. Wong argues that if Mr. Lau directed Ms. Chan to sell the shares in May, and did so to depress the price, the reason for that action on their part is otherwise than for profit in that transaction, or that that profit is not the predominant reason, and that, therefore, neither Mr. Lau nor Ms. Chan are to be regarded in law as insider dealers in that instance, and, consequently, that that act should be ignored for the purpose of determining the appropriate penalty or penalties under section 23.

8.4.8 A detailed analysis of the category of person or transaction for whom or for which the protection of section 10(3) is intended is unnecessary. The aim of a like provision in the U.K.'s (now repealed) Companies Securities (Insider Dealing) Act 1985 has been the subject of discussion by commentators, and the examples they suggest provide a helpful guide. It is, says one, "..... apparently intended to permit trustees or legal personal representatives to sell securities pursuant to their legal duties without incurring criminal penalties for doing so....." (see L.H. Leigh *"The Control of Commercial Fraud"*, page 115). Most writers agree that the provision would protect the person who sells to raise funds "to meet a sudden and pressing need" (Loose, Yelland, and Impey, *"The Company Director,"* 7th Edition, page 284); as well as the insider who "[takes up] qualification shares required under the terms of a company's articles of association" (*"Insider Trading"* by Rider, page 34). (The last example is separately provided for by the Ordinance : See section 10(1)(a)).

8.4.9 Interestingly for the purpose of the present exercise, it has been suggested that it would follow from the terms of section 3(1)(a) of the 1985 Act (the broad equivalent of section 10(3) of the Ordinance) "that in the context of a take-over, a shareholder who deals or communicates information with a clear motive of preserving control in the hands of the existing controllers of a company, or of ensuring that a controlling interest passes, would not thereby commit an offence unless, of course, his reason for wishing this result is so that either he or any other person may thereby profit. It is not clear whether there must be absolutely no profit motive at all or whether the existence of a profit motive will not be fatal so long as there is an overriding non-profit motive." (Emphasis added) (See Weinberg and Blank on *"Take-Overs and Mergers,"* 5th Edition, para 3 - 733). We have held that Mr. Lau's motive in his direction to Ms. Chan to sell was to preserve the viability of the privatisation proposal at

the price - $1.60 - at which Mr. Lau, through his alter ego, HKP, hoped to acquire those shares in SHL which were not already his. The profit to which Mr. Lau could look was that which arises on a successful privatisation of a company through unlocking the underlying value of the property assets. We note, too, that it was known in May 1992 that the net asset value of the company per share was substantially in excess of $1.60. The danger of an increase in the market price of SHL shares was either that the whole scheme would fail, or that Mr. Lau's profit would be reduced if and in so far as he might have to increase his privatisation offer. We note, too, that the survival of the scheme presented Ms. Chan with the chance of a handsome profit on the other SHL shares acquired by her before May 1992.

8.4.10 Not easy of resolution is the question whether the profit to be gained in these ways was to be gained "by the use of [the] relevant information." In the normal insider dealing situation, the availability of inside information is the sine qua non of the dealing that follows. Whilst the scenarios we pose are not the traditional scenarios, we are satisfied that the May sales would not have been transacted but for possession of the information that it was proposed to privatise at $1.60.

8.4.11 We recognise that section 10(3) exempts only the person "who enters into [the] transaction". In this case, that was Ms. Chan. We have considered the suggestion that she did not know why she was told to sell, or why the privatisation proposal might fail, and, if that be so, she may have sold simply because she was told to, in which case she sold otherwise than with a view to the making of a profit. If that is the suggestion, the burden of showing that that is what happened has not been discharged.

8.4.12 Finally, it is said that the prime motive for securing privatisation was, in Mr. Lau's mind, "to release himself from the constraints of public companies. This is," said Mr. Wong, "the only public listed company he deals with and, right up to today still the only public company that he was ever involved in. So his objective in privatisation was not with a view of making financial gain but with the view of loosening himself from the shackles of the regulatory control imposed under the various Ordinances." That is to concentrate on Mr. Lau rather than the "person who [entered] into [the] transaction", and if he procured her to enter upon an insider dealing transaction which she fails to establish was not, on her part, entered into without a profit motive for herself or for Mr. Lau, that is the end of the matter. But even if that were not so, it has not been shown that the profit motives which have been identified were not significant considerations for Ms. Chan and Mr. Lau. In such circumstances, it is artificial to weigh one significant motive against another to determine which was the more significant.

8.4.13 The various texts which discuss provisions which are in the same terms of section 10(3) are not agreed about the test to be applied. Indeed, few, if any, go further than remarking how uncertain is the position. That may be why section 3(1) of the Companies Securities (Insider Dealing) Act 1985 has been replaced by section 53(1) of the Criminal Justice Act 1993 which provides a defence to an individual who shows :

> "(a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities; or
>
> (b) .....
>
> (c) that he would have done what he did even if he had not had the information."

8.4.14 The test in sub-section (c) is an echo of an argument in the 4th edition of Gower's Principles of Modern Company Law, in relation to another and earlier statutory provision similar to section 10(3), that :

> ".... this undoubtedly will be the defence invoked by directors and other insiders detected in insider dealing. It will, legitimately, protect them if they can show that circumstances compelled them to realise their holdings, and that they would have done so at the time, whether or not they had the price sensitive information."

8.4.15 That is the practical interpretation of section 10(3), and is an interpretation which offends neither the words of the sub-section nor the scheme of the Ordinance. There is a difference between, on the one hand, selling because one has to - and that primarily, is what this defence is about - where the fact of a profit is an incidental consequence rather than an aim, and, on the other, selling to gain a profit, though there may be other aims too. It has not been shown that profit was merely incidental to some other prime purpose.

8.4.16 Accordingly, we find that section 10(3) of the Ordinance avails neither Ms. Chan nor Mr. Lau.

8.5 THE SPECIAL DIVIDEND

8.5.1 The decision to offer distribution of a special dividend is altogether more straightforward than the May sales. It constituted relevant information. The purchase by Ms. Chan of 260,000 SHL shares on 3rd June was insider dealing.

8.5.2 Mr. Lau was an insider dealer in that, as a person connected with SHL, and in possession of that relevant information, which he knew to be

relevant information, he counselled Ms. Chan to deal in those shares knowing or having reasonable cause to believe that she would do so. That was insider dealing within the contemplation of section 9(1)(a) of the Ordinance. So, too, by the mere disclosure of that information, with that knowledge, insider dealing as defined by section 9(1)(c) has taken place.

8.5.3 By dealing in SHL securities upon receipt of the information about the special dividend Ms. Chan, who well knew the information to be unpublished and undisclosed, was an insider dealer by virtue of the provisions of section 9(1)(e) of the Ordinance.

8.6 THE MID-JUNE TRANSACTIONS

8.6.1 There were two pieces of information each of which was "relevant information", as that term is defined, which Ms. Chan possessed when she purchased SHL shares on 11th June 1992, and on 12th June 1992. The first was the fact of a third party approach. The second was the likely or proposed acquisition price, or the fact that that price was unlikely to be less than $2.60 per share. When Ms. Chan bought on 11th June, neither piece of information had been published. When she bought on 12th June, only the first had been published. So both purchases were acts of insider dealing, as was the counselling of Ms. Chan to deal, and the disclosure to her of those items of information. In each instance, Mr. Lau and Ms. Chan knew the information to be relevant information, and that Ms. Chan would use the information to deal.

8.6.2 In the result Mr. Lau's conduct constituted insider dealing as envisaged by :

(a) Section 9(1)(a) of the Ordinance (a connected person counselling another to deal);

(b) Section 9(1)(c) (disclosing relevant information, knowing or having reasonable cause to believe the recipient would deal);

(c) Section 9(1)(f) (Mr. Lau, as a recipient of information from a person, Mr. Chan, that a take-over is contemplated, counselled Ms. Chan to deal in SHL shares; this applying only to the purchases on 11th June).

Ms. Chan's conduct in relation to both purchases falls within the ambit of section 9(1)(e) of the Ordinance.

8.7 ANY OTHER INSIDER DEALING?

8.7.1 Conscious of the fact that our terms of reference require us to inquire and determine whether insider dealing has taken place in relation to SHL shares during the specified period and, if so, the identity of every insider dealer, we thought it incumbent upon us to ascertain what further investigations into other SHL share dealings had been carried out, and with what result. To this end we had the benefit of the evidence of Mr. Richard Chow Kam-to, a senior manager with the SFC.

8.7.2 Mr. Chow described the nature of the investigations, which included letters sent to stockbrokers, replies analysed, the identification of those who purchased significant quantities of SHL shares in the period 3rd June to 12th June, and the fact that all but one were eliminated from the investigation. That one was Ms. Chan, whose connection with Mr. Lau was revealed by a land search relating to the Julimount Garden flat. This initiative by the SFC was representative of the investigative skill which led to the uncovering of the insider dealing in this case.

8.7.3 The evidence has satisfied us that there is no basis to find that there was insider dealing in SHL shares during the relevant period other than by Mr. Lau and Ms. Chan.

CHAPTER 9
THE AMOUNT OF PROFIT GAINED

9.1 Paragraph (c) of the terms of reference requires this Tribunal to determine "the amount of any profit gained or loss avoided as a result of [the] insider dealing."

9.2 THE APPROACH TO PROFIT CALCULATION

9.2.1 There are in this case several acts of insider dealing, each of which has been identified in Chapter 8 of this report. In the determination of the profit gained or loss avoided as a result of each instance of insider dealing we have addressed first the question of the basis for calculation.

9.2.2 The Statement of Facts (Appendix III) contains an admission that between 15th May and 12th June "Ms. Chan made a profit of $550,000." That calculation is directed at the difference between the price of the shares acquired in June, and $2.88, which is the price at which they were sold in August 1992. No profit is said to arise in relation to the May transactions, and, for the purpose of the present exercise, we put the May transactions aside for a moment, for in the assessment of profit they, again, present unusual features.

9.2.3 The basis adopted in the Statement of Facts for calculation of profit is inappropriate, for it assumes that all profit after the publication of the confidential or inside information is attributable to the advantage gained by the insider dealing. The point is that once inside information is no longer inside information, and has percolated to and been absorbed by those who would normally deal in the securities of the corporation concerned, to a stage where the market's settled reaction to the information can be guaged, the benefit of the

insider dealer's unfair advantage crystallises, and what happens to the value of the securities beyond that stage is attributable to other factors and forces.

9.2.4 We note the provisions of section 21(d)(2)(A) of the Securities Exchange Act 1934, enacted in the United States of America. Subsection (2)(A) was introduced by section 2 of the Insider Trading Sanctions Act 1984, and gives to the United States District Courts jurisdiction to impose a civil penalty "not [exceeding] three times the profit gained or loss avoided as a result of ....." the purchase or sale of a security while in possession of non-public information. There is provided, by section 21(d)(2)(C), the method by which the "profit gained" or "loss avoided" is to be measured :

> "For purposes of this paragraph 'profit gained' or 'loss avoided' is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information."

9.2.5 The fact that the Ordinance houses no such definition, even though it contains a penal provision in the same terms as the section defined by the American statute, does not derogate from the validity of the approach which the American statute prescribes. It was an approach which was heralded by the United States Court of Appeals for the First Circuit in a judgment the reasoning of which does not depend on the statutory definition, not least because the case preceded the statute's enactment. The case is SEC v. MacDonald 699 F.2d 47. The defendant was trustee of an investment trust the stock of which was traded on the American Stock Exchange. Shortly before publication of favourable price-sensitive information the defendant purchased shares in the trust. A day later the trust issued a press release with the good news, and the price of the

stock increased dramatically. The defendant retained the stock for over a year, at which point the stock was selling at almost double the price it had fetched shortly after publication,. The question was whether a corporate officer should in such circumstance be required to disgorge the entire profits realised upon his ultimate sale, or only the profit accrued a reasonable time after dissemination of the price-sensitive information.

9.2.6 It was decided (see 699 F 2d 47 at pp 54 and 55) that the "point of his full gain ...[was] a reasonable time after the undisclosed information has become public..." and that "any consequence of a subsequent decision, be it to sell or to retain stock, is .... not causally related to the fraud." Since there was in the case "no evidence of other material events during the period in question," it was said that the market itself may be the best indicator of how long it took for the investing public to learn of, and react to, the disclosed facts .....

"..... in determining what was a reasonable time after the inside information had been generally disseminated, the court should consider the volume and price at which [the] shares were traded following disclosure, in so far as they suggested the date by which the news had been fully digested and acted upon by investors". So the approach taken was to ascertain the profit "accrued from the rise in price caused by the disclosure". That was an echo of the approach by the District Court, where it was said that "the gain is determined by how much 'paper' profit accrued between the acquisition dates and the conclusion of "the gestation period" (568 F Supp. 111, 112).

9.2.7 This was the approach urged on us by Mr. Pethes, an approach with which Mr. Wong was content.

9.2.8 It is an approach which, in general, commends itself to us, but there must be sounded a note of caution :

(1) As Mr. Pethes rightly pointed out, there will be situations which do not fit the kind of facts envisaged by the MacDonald case.

(2) One must be careful to ascertain whether there is "evidence of other material events during the period in question".

(3) The circumstances which may, and indeed should, impact on the analysis will almost certainly vary case by case. These factors would include, for example, general market movement, the number of shares in "the float", that is, shares held by persons other than one or more controlling shareholders, average daily volume, and market capitalization. The less spectacular the information, the longer will be the "reasonable period" for public dissemination of information. Allowance must be made for the impact of supervening events. If, for instance, the release of price sensitive information coincides with, or precedes by a day or two, a favourably viewed and significant political event which buoys market sentiment and behaviour, it may well be an error to attribute the whole of a stock's rise to the particular corporate news.

9.2.9 We recognise too that in the calculation of profits, it is appropriate to take into account transaction costs i.e. stamp duty, commission, and levies. We have estimated these costs and made the relevant adjustment.

9.2.10 With these caveats in mind, we turn now to the individual transactions.

9.3 THE MAY TRANSACTIONS

9.3.1 The test propounded in SEC v. MacDonald presupposes that the inside information has been disseminated publicly, in consequence of which the market reacts in a way in which it would not have reacted but for the disclosure of that information. What normally happens is that the insider has stolen a march on those who are accustomed, or would be likely, to deal in that corporation's securities, and the gain or loss attributable to the insider dealing is measured by reference to that advantage.

9.3.2 In this particular instance, namely, the May transactions, there were purchases of SHL securities with the benefit of inside information. So far, so good. But what profit or loss avoided was there as a result of that insider dealing? That is not the same as what profit was intended, or what loss it was intended to avoid.

9.3.3 Counsel for the Tribunal, in his submissions on the question of profit arising from the May transactions, treated the 438,000 SHL shares sold in May by Ms. Chan as representing that quantity of shares acquired on 15th, 18th and 19th May. Ms. Chan was, by 21st and 22nd May possessed of a much larger holding of SHL shares than 438,000, and, on one view, one might treat the shares purchased in May as having been held by Ms. Chan beyond the evening of 22nd May (the time of the public announcement), thereby gathering to themselves the benefit of the market's response to that announcement. That approach would treat the shares sold in late May as coming from the earlier and general pool of Ms. Chan's SHL shares. Despite the fact that Ms. Chan said in her evidence that she did not view the shares sold in May as representing those she had purchased a few days before, we find that she took that stance because of the significance which the Tribunal attached to that sale. We think it

unrealistic to approach this particular part of our exercise on any basis other than that the 438,000 SHL shares sold were those bought a few days earlier.

9.3.4 Since that is our determination, we do not view the shares bought on 15th, 18th and 19th May as retained beyond the announcement of the privatisation proposal, save for 6,000 SHL shares. None of the cases or commentaries devoted to insider dealing addresses, so far as we have ascertained, the approach to be adopted to the question of profit when the insider dealer sells before the information has been disseminated, either at a profit or at a loss. That is not surprising, for the sale of shares acquired because of inside information will hardly ever take place before the inside information is publicised, and if it does take place prematurely, the sale may well have no profit motive allied to the use of the inside information. It is not a point which needs to be decided in this case, because there was in the event no profit. That is the commercial reality of the matter. Even if it were appropriate to apply the MacDonald test to a situation in which the insider dealer sells before the news is out, we are satisfied that to do so in this case would be wholly artificial. Sales of SHL shares by Ms. Chan in May took place between two and four trading days after purchase, during which time the Hang Seng Index went down and up, quite steeply, and the price of SHL shares went up by 2.11% between 15th and 19th May. We think that it would be unsatisfactory to attribute a paper profit by such a comparison, when we know that by 21st May (within six days after the first May acquisition) all shares bought in May, bar 6,000, were in fact sold at a loss. It follows that in relation to the SHL shares bought in May, there resulted from those acts of insider dealing no profit gained or loss avoided.

9.3.5 Although we have classified the May sales as insider dealing transactions, there was, as we know, no profit in the sales themselves, nor was there in fact in the sales themselves a loss avoided. Since the privatisation proposal did not survive, there was also no profit in the wider sense to which we have referred, namely, a profit to Mr. Lau in the acquisition of shares at a price well below net asset value.

9.3.6 6,000 shares were, however, kept beyond the announcement of the privatisation proposal. Those shares came from the 444,000 shares that had been acquired by Ms. Chan on 15th, 18th and 19th May. The average cost, inclusive of transaction costs per share, as computed from her account statement with Richardson Greenshields, was $1.43 (rounded to the nearest cent, as with all calculations which follow). Applying the MacDonald test, we have used the average closing price for the five trading days from 27th May to 2nd June, which is $1.58. Allowing for transaction costs of 0.5%, we determine that the profit gained by Ms. Chan as a result of her insider dealing in May was $862.

9.4 THE SPECIAL DIVIDEND

9.4.1 Ms. Chan's account statement with Richardson Greenshields shows a total cost of $418,101 for the 260,000 SHL shares she purchased on 3rd June, an average of $1.61 per share. There were only three trading days between the announcement of the special dividend and a new factor affecting market price, namely, a rumour on 11th June of a third party take-over. Of these three days, only two recorded trading in SHL shares. It would be inappropriate to say that the profit accrued on 11th June was attributable to the advantage of the inside information on which she traded on 3rd June. In the event, we are satisfied that the price of $1.72, the closing price on 10th June, is

the appropriate price for the purpose of determining the profit gained by Ms. Chan. In this instance also, we allow for transaction costs even though no such costs would have been incurred had the privatisation proceeded. We do so because the approach we have adopted presupposes a sale once the market has reacted. We therefore determine the profit attributable to this act of insider dealing to be $26,863.

9.5 THE THIRD PARTY TAKE-OVER

9.5.1 The two acts of insider dealing that took place on 11th June and 12th June involved different pieces of inside information. One might engage in a separate "MacDonald exercise" for each. However, the transactions were on consecutive days, and the pieces of information were closely connected. Accordingly, it would be artificial to carry out separate assessments for each. The public announcement of the third party approach was on 11th June and appeared in the press on 12th June. The public announcement of the conditional agreement was on 16th June, and appeared in the press on 17th June. We take the five trading days from 18th to 24th June as the appropriate period to determine the average market price which would fairly reflect the effect of dissemination of the previously unpublished news. The price that we adopt is $2.82. Using this to compute the notional sales proceeds and deducting the cost of purchasing 324,000 SHL shares, namely, $699,870, we determine the profit to be $209,242, after allowing for transaction costs of 0.5%.

9.6 THE TOTAL

9.6.1 It follows that the amount of profit gained as a result of the several acts of insider dealing which have been established is $236,967. That profit was gained by Ms. Chan.

CHAPTER 10

SECTION 23 ORDERS

THE SECTION

10.1 Section 23(1) of the Ordinance provides that :

> "(1) At the conclusion of an inquiry, where a person has been identified in a written report prepared under section 22(1) as an insider dealer, the Tribunal may in respect of such person make any or all of the following orders -
>
> (a) an order that that person shall not, without the leave of the High Court, be a director or a liquidator or a receiver or manager of the property of a listed company or any other specified company or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company or any other specified company for such period (not exceeding 5 years) as may be specified in the order;
>
> (b) an order that that person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the insider dealing;
>
> (c) an order imposing on that person a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the insider dealing."

10.2 We note that the sum to which to direct our minds is the profit gained, or loss avoided, by a particular dealer. So in the case of he who counsels or procures but with no gain to himself, no order may be made against him under section 23(1)(b), though an order may be made against him under section 23(1)(c) provided that someone has profited, or has avoided a loss.

10.3 In Chapter 6 of this report, we addressed in some detail the question of the ultimate disposition of the proceeds of sale of the SHL shares. The profit gained as a result of the acts of insider dealing was, for reasons explained in Chapter 9, gained well before that ultimate disposition. The

original gain is not necessarily synonymous with ultimate disposition, and we are satisfied that for the purpose of section 23(1)(b) the gain is to be treated as Ms. Chan's gain.

10.4 THE APPROACH TO SECTION 23

We have kept in mind the following principles, which we believe should apply to the approach we adopt for the purpose of section 23 :

(1) The fact that Mr. Lau and Ms. Chan presented to the SFC investigators a false story does not go in aggravation of the penalties which would otherwise be imposed. It is merely that he who admits fault at the very outset will be credited for that fact.

(2) The fact of an admission before the Insider Dealing Tribunal, especially at an early stage, is a fact which goes in mitigation of the penalty, though in a strong case that will carry less weight than in a case where the evidence is not strong.

(3) Where an admission is put forward on a basis which is not believed, the credit for the admission will be less than it would otherwise be.

(4) Financial penalties are to accord with the gravity of the wrong-doing, and are not to be increased by reason of the substantial wealth of the insider dealer.

(5) The Tribunal should not impose a financial penalty on an assumption that someone else will pay.

(6) In determining whether to disqualify an insider dealing from holding office as a director of a listed company, or of listed companies, there come into play a number of considerations. The determination will take into account the need to ensure the integrity of the securities market; to protect the public from

further abuse by that person of the privileged position of trust which that office carries; to deter others from breaching that trust; and to mark the disapproval of the investment community with the conduct of the insider dealer.

(7) In determining whether to disqualify an insider dealer from holding office as a director of a private company, one should have regard to the connection, if any, of the company with the insider dealing, and any relationship between the insider dealer and the private company; and the impact upon the individual of such a disqualification.

(8) Where an incident in, or in connection with, the inquiry, gives rise to a justified sense of grievance, the Tribunal should recognise and take that fact into account in determining the appropriate penalties.

(9) In making its orders under section 23(1)(b) and (c) and section 27, the Tribunal should have regard to the totality of the financial burden imposed by these orders.

(See *"Current Sentencing Practice"* by Thomas, from which text some of these principles, albeit in relation to criminal matters, are drawn.)

MITIGATING AND AGGRAVATING FEATURES

10.5 To say that the reputation of Hong Kong's securities market is an issue of importance to this territory is not to make a policy statement, but is a statement of the obvious. It is also stating the obvious to remark that insider dealing and the degree to which it may prevail are matters that materially affect that reputation. The legislature has acknowledged these facts by enacting new laws conferring on the Insider Dealing Tribunal significant powers in the form of penalties, absent from the Ordinance's predecessor. Still, the conduct is not

a criminal offence, and the maximum disqualification from commercial office is five years. Those are the parameters within which we must address the question of appropriate orders in this case.

10.6 The setting for the infringements in this case was not of the most sinister kind. The infringements were essentially favours to a girlfriend. There was, in other words, the absence of a grand scheme motivated purely by greed, and the profits were not large.

10.7 Yet the setting and the motivation went beyond a mere leak of information to a friend or family member or girlfriend. What happened was worse than that. The tipper was a director and controller of a public company, and he breached the confidences entrusted to him by those positions. And he breached them more than once. He breached them at every turn of the SHL story between mid-May and mid-June 1992. Beyond that, he advised the tippee what to do, and beyond that he directed her what to do for his own benefit when he told her to sell SHL shares in May. We are satisfied that he treated insider dealing laws with cavalier disregard.

10.8 As for Ms. Chan, we accept Mr. Wong's submission that she is not an insider dealer of the worst kind, and that the profits were not high. We do not treat her as having breached a fiduciary duty, for we have made no finding as to her employment with HKP or related companies, and we are in any event satisfied that even if it had been shown that she had been an employee, the employment would have been cosmetic in the sense that she did no work for any of those companies. We accept too that she was at the salient times a young lady enamoured of a successful and experienced businessman, so that resistance to the financial temptations put in her path would have been

difficult. Led she certainly was, and the lion's share of the blame must attach to Mr. Lau, though we are satisfied that she knew full well what she was doing.

10.9 Both have offered in their statutory declarations their "utmost regret over this entire episode." We accept that each has been acutely embarrassed by the publicity of these proceedings, but we are bound to say that we view with scepticism the suggestion that they are ashamed at having breached Hong Kong's insider dealing laws.

10.10 By far the most substantial mitigating feature is the early acknowledgment by both Mr. Lau and Ms. Chan that the allegations were, in their essential aspects, true. The fact that they were nevertheless required to give evidence was the result partly of the inquisitorial nature of our function (not their fault), and partly the lack of detail, and some inherent improbabilities, in their admissions.

10.11 We recognise also the harassment and embarrassment which accompanied the widespread publicity which this case generated. That will have affected not only Mr. Lau and Ms. Chan, but also their families. That degree of public exposure was largely attributable to interest in the relationship between Mr. Lau and Ms. Chan, rather than to their culpability as insider dealers. The punishment which they thereby suffered is a factor we take into account.

10.12 Both are persons of substantial means. Neither holds office in a public company, and it seems unlikely that either will do so. Mr. Lau holds directorships of a large number of private companies, and is actively involved with the management of many. None of these companies was involved in

insider dealing, and we believe that the penalties we intend to impose are sufficient in the circumstances we have outlined, and that to disqualify him from management of any of these private companies would be to exact an overall penalty beyond that warranted.

10.13 In the context of this case, disqualification from directorships of public companies is likely to be of little practical impact, but that does not preclude us from making an order. The term of such an order is not easy to determine when the legislation prescribes a maximum of five years. Nevertheless in the orders we have made, we have sought to reflect the fact that the breaches by Mr. Lau were serious breaches, and that as between the two Mr. Lau carries a significantly higher degree of blame than does Ms. Chan.

THE ORDERS

10.14 Applying that approach, as well as the principles at paragraph 10.4, and in light of the factors to which reference is made at paragraphs 10.5 to 10.11 above, we have made the following orders pursuant to the provisions of section 23 of the Ordinance :

(1) In respect of Mr. Lau

(i) that he shall not, for a period of two years from the 15th day of July 1994, without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of any listed company, or in any way, whether directly or indirectly, be concerned in, or take part in the management of any listed company; and

(ii) that he shall pay to the Hong Kong Government on or before the 31st day of July 1994 a penalty in the sum of $ 473,934.

The figure in paragraph (ii) represents twice the profit gained as a result of insider dealing in SHL shares between 15th May and 12th June 1992.

(2) In respect of Ms. Chan

(i) that she shall not, for a period of two years from the 15th day of July 1994, without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of any listed company, or in any way, whether directly or indirectly be concerned in, or take part in the management of any listed company; and

(ii) that she shall pay to the Hong Kong Government on or before the 31st day of July 1994, the sum of $236,967.

The figure in paragraph (ii) represents the profit gained by Ms. Chan as a result of insider dealing in SHL shares between 15th May and 12th June 1992.

CHAPTER 11
EXPENSES

11.1 Section 27 of the Ordinance provides that :

> "At the conclusion of an inquiry, the Tribunal may order any person who has been identified as an insider dealer to pay to the Government such sums as it thinks fit in respect of the expenses of and incidental to the inquiry and any investigation of his conduct or affairs made for the purposes of the inquiry."

11.2 Two points arise. The first is that the expenses to which the section refers are restricted to those expenses incurred after the requirement by the Financial Secretary, directed to this Tribunal, that this inquiry be held. Investigations made by the SFC before the date of that requirement were, says Mr. Wong, made for a different purpose, namely, to make a report to the Commission under section 33 of the Securities and Futures Commission Ordinance, so that the Commission might then make representations to the Financial Secretary.

11.3 After conclusion of the hearings we were informed in writing by counsel for the Tribunal that those acting for the Financial Secretary agree that that narrow interpretation is correct.

11.4 Whatever the reason for excluding the cost of investigation by the SFC, it does seem that there is no warrant for an interpretation beyond that for which Mr. Wong contends.

11.5 The second point taken by Mr. Wong is that this Tribunal should adopt the principles which apply in criminal proceedings in the case of a finding of guilt, namely, that costs should only be awarded against a convicted

person in exceptional circumstances. In support of that submission, he says (relying on a Hansard report) that only the difficulties of prosecution and of securing convictions stood in the way of making insider dealing a criminal offence. "There is," he argued "no logical reason why a person implicated in insider dealing should be worse off than a defendant in a criminal trial." He then cited examples of special circumstances in criminal cases which might warrant a costs order. These included contest of a strong case; putting prosecutors to expense in having to investigate a false alibi; and strident allegations against other parties. He urged the Tribunal to make no order as to costs.

11.6 The Chairman does not accept that the approach towards the award of costs against convicted defendants in criminal cases is the same as that intended by the Ordinance in respect of payment of the expenses of the inquiry.

11.7 There is no established practice concerning expenses of inquiries under this Ordinance. There was no provision in Part XII A of the Securities Ordinance akin to section 27 of the new Ordinance. Indeed, Part XII A imported section 14 of the Commissions of Inquiry Ordinance, which provides that : "The cost of an inquiry conducted under this Ordinance ..... shall be a charge on the general revenue ....". So it is clear that the legislature, in enacting the new Ordinance, intended a change from the former position in which, as a matter of course, the general revenue bore the costs. It is noted that section 15(4) of the Ordinance provides that fees paid to members of the Tribunal "shall be charged on the general revenue," but the Chairman is satisfied that it is not thereby intended to exclude those fees from the expenses chargeable under section 27.

11.8 It is true that the costs regime for civil cases, a regime in which costs normally follow the event, is readily understandable as compensatory as between private litigants. That is not the position here, where it is the Government that institutes an inquiry, a factor which in part explains the reason for the rule in criminal cases, in that the extent to which the state should be compensated for prosecuting its citizens is more readily susceptible to debate. But there is another reason for the absence of a standard rule in criminal cases that a person convicted shall pay the costs of the prosecution, and that is the danger of real pressure or the perception of pressure not to contest a criminal charge because of the threat of a substantial order in costs. The fact, however, is that insider dealing is not a criminal offence in this territory, and there appears to be no cogent reason why those well able to contribute towards the expense of a procedure necessitated by their conduct should not do so.

11.9 We have also been referred by Mr. Pethes to the U.K's "Report of the Council on Tribunals on the Award of Costs at Statutory Inquiries." It is dated 1964. It was referred to us because it stated that the practice at the time was for costs to be awarded only in "exceptional circumstances such as the case of unreasonable behaviour by the parties at the inquiry." But the types of inquiries there considered were inquiries relating to compulsory purchase orders, re-development plans, and planning appeals. One can well understand the policy consideration that dictates that the making of objections to a planning proposal should not be discouraged by a practice of awarding costs against unsuccessful objectors. That is quite a different kettle of fish from the policy considerations which apply to section 27 of the Ordinance.

11.10 We see no warrant for holding that it is only in exceptional circumstances that an order under section 27 should be made. The decision whether to award costs of an inquiry, and if so, what that order should be lies within the Tribunal's discretion. Orders should, of course, be compensatory in effect, and not punitive. The ability of the insider dealer to pay is highly relevant, and the combined impact of section 27 orders and a section 23 order, should not be disproportionate to the gravity of the infringement. In deciding whether to make an order and, if so, how much that order should require, the fact of an early admission is a factor to be taken into account.

11.11 In this case, we take all those matters into account. We balance the early admissions against the fact that much of the time subsequent to the admissions was spent in probing the degree to which those admissions were accurate and full. In the event, we have decided that Mr. Lau should pay two-thirds of the expenses assessed, details of which have been provided to the parties. We have assessed expenses which we believe were reasonably necessary, making allowance for the fact that this was the first inquiry under the new Ordinance, and that certain expenses are properly attributable to work which was also relevant to, or necessary for, the Tribunal's future tasks. The figure which Mr. Lau has been ordered to pay is $439,360. No order under section 27 has been made in relation to Ms. Chan.

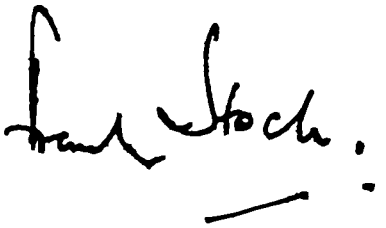
CHAPTER 12
ACKNOWLEDGMENTS

12.1 We are much indebted to Mr. Wong for the crystal clarity of his excellent submissions, and to the industry of his junior Mr. Wilson Chan.

12.2 Counsel to the Tribunal, Mr. Pethes and Ms. Chung, have had a task quite different from that which counsel are normally required to perform in the course of routine litigation. They have not only presented the case in public hearings, but have ensured that the Tribunal's many requirements have been met quickly and efficiently. They have handled their tasks with great skill and commitment, even though they have not had at their disposal the depth of support services which an inquiry of this kind requires.

12.3 We are indebted, too, to Mr. David Cheng who has acted as Secretary to the Tribunal for his highly efficient administration of the Tribunal's office; and to Ms. Shirley Wong, personal secretary to the Chairman, for a difficult task well done.

12.4 The quality of the investigation by SFC investigators was of the highest order, and their excellent presentation of the papers was of much assistance.



The Honourable Mr. Justice Stock
Chairman

Derek Murphy, BA, LLB (Qld), LLM (Lond.), FSIA, Barrister of the Supreme Court of Queensland and the Federal and High Courts of Australia

Member

Patrick Yeung Kai-cheung, MBA, FCMA, FCCA, ASA, FCIS, FHKSA

Member

24th June 1994