IN THE INSIDER DEALING TRIBUNAL (3rd DIVISION)
OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

Asia Orient Holdings Inquiry

In the Matter of an Inquiry into Certain Dealings in the Listed Securities of Asia Orient Holdings Limited

And

In the Matter of an Application to the Tribunal by LAU Luen Hung, Thomas for Certain Orders

Tribunal: Deputy High Court Judge Saunders
Mr Nigel Keith Bacon, Member,
Mr Pang Hon Chung, Member

Date of Hearing: 25-27 July 2005

Date of Delivery of Ruling: 11 August 2005

Chairman's Ruling on Questions of Law

Preliminary matters:

1. This is a ruling on certain questions of law by the Chairman of the Insider Dealing Tribunal, (3rd Division), made pursuant to paragraph 13 of the Schedule to the Securities (Insider Dealing) Ordinance, Cap 395, (the Ordinance). The questions have arisen in the course of the Inquiry into certain dealings in the listed securities of Asia Orient Holdings Limited, (AOL). In the course of this ruling it was necessary that the Tribunal should make one particular factual finding. That finding was a unanimous finding of the whole Tribunal.

2. By a notice pursuant to s 16(2) of the Ordinance, dated 15 May 2003, (the Notice), addressed to a Chairman of the Insider Dealing Tribunal, the Financial Secretary requested the Insider Dealing Tribunal to conduct an inquiry into certain dealings in the listed securities of AOL. The relevant portion of the Notice reads as follows:

> "Whereas it appears to me that insider dealing (as that term is defined in the Ordinance) in relation to the listed securities of a corporation namely Asia Orient Holdings Limited, ("the company"), has taken place or may have taken place, the Insider Dealing Tribunal is hereby required to inquire into and determine:-
>
> (a) whether there has been insider dealing in relation to the company connected with or arising out of the dealings in the listed securities of the company by or on behalf of Lau Luen Hung Thomas during the period from 14 to 20 September 1999 (both dates inclusive);
>
> (b) in the event of there having been insider dealing as described in paragraph (a) above, the identity of each and every insider dealer;".

It is relevant to observe that the Notice identifies "dealings in listed securities" into which inquiry must be made. Whilst asserting the name of

the person upon or on whose behalf those dealings are believed to have been undertaken, the Notice does not define or determine who the persons are, who are "implicated or concerned in the subject matter of the inquiry". That expression is used in paragraph 16 of the Schedule to the Ordinance. The identification of these persons is important, because only persons falling within that expression are entitled to be present and to take part in the Inquiry and to be represented at the Inquiry by a barrister or solicitor: (Schedule, para 16). Further, it is only such persons, and witnesses, who are entitled to seek costs at an inquiry: (s 26A).

The formation of the Tribunal:

3. Lugar-Mawson J. was Chairman of the Tribunal at the time the Notice was received. While Lugar-Mawson J. was Chairman, the Financial Secretary, acting pursuant to s 15(2) of the Ordinance, appointed Mr Nigel Keith Bacon and Mr Eric Ng Kwok Wai to be members of the Tribunal. On 17 August 2004, the Tribunal, in that composition, appointed Mr Herbert Li, Senior Government Counsel, to be junior counsel to the Tribunal

4. Lugar-Mawson J. subsequently resigned, (for reasons quite unrelated to this Inquiry). On 30 October 2004, I was appointed by the Chief Executive, pursuant to paragraph 8 of the Schedule to the Ordinance, to be a temporary member and Chairman of the Tribunal. On 11 January 2005, the Tribunal, in a private meeting at which no one else was present, determined that Mr Lau Luen Hung Thomas, (Mr Lau), was the only person implicated or concerned in the subject matter of the inquiry. On 18 January 2005, the Tribunal, then comprising myself, Mr Bacon and Mr Ng, appointed Mr Andrew A Bruce SC, to be senior counsel to the Tribunal.

On 28 January 2005, junior counsel for the Tribunal sent to Mr Lau a "Salmon Letter" notifying him that:

> "..the Tribunal has determined that you are a person who is implicated or concerned in the subject matter of the Inquiry and that your conduct in relation to the dealings in the listed securities of the company as described in the notice will be one of the subjects of the Inquiry."

The Salmon Letter informed Mr Lau that a preliminary hearing would be held on 28 February 2005.

The resignation and replacement of Mr Ng:

5. The Tribunal duly convened its first public sitting on 28 February 2005. At that hearing a question was raised by Mr McCoy SC, counsel for Mr Lau, as to the suitability of Mr Ng as a member of the Tribunal, by virtue of a matter of apparent bias. Mr McCoy carefully explained to the Tribunal that no actual matter of bias was raised. The circumstances raised were that Mr Ng had been a member of another Insider Dealing Tribunal in which Mr Lau's brother was the subject of the Inquiry and Mr Lau was a witness. Having heard counsel, and the Tribunal having considered the matter in private, Mr Ng resolved that, in order to avoid any appearance of bias, it was undesirable that he should continue to exercise his functions in the matter.

6. Subsequently, acting pursuant to paragraph 8 of the Schedule to the Ordinance, Mr Ng notified the Chief Executive of the circumstances and tendered his resignation as a member of the Tribunal. Consequently, acting pursuant to the same paragraph, the Chief Executive, by his delegate, the Financial Secretary, appointed Mr Pang Hon Chung to be a Temporary

Member of the Tribunal to act in place of Mr Ng.

7. The Tribunal resumed its hearing, in its newly constituted form, on 14 April 2005. On that day counsel for Mr Lau indicated that it was intended to make certain preliminary challenges to the constitutionality of the Tribunal and to raise certain other preliminary matters. Those matters were heard by the Tribunal on 25-27 July 2005.

The Legislative background:

8. On 1 April 2003, the Ordinance was repealed by s 406(1)(f) Securities and Futures Ordinance Cap. 571. However, by virtue of paragraph 78 of Schedule 10 to Cap 571, the Ordinance, in an amended form, remained in force in relation to any dealings in securities which had taken place prior to 1 April 2003, but in which a Notice had not yet been issued. As the dealings at issue were prior to that date, and the Notice was issued following that date, the Inquiry falls to be considered under the provisions of the Ordinance, in a form amended by Cap 571. Insofar as this Inquiry is concerned the relevant amendment was to add to paragraph 17 of the Schedule six words: "at the first sitting of the Tribunal", so that paragraph 17 shall read:

> "For the purposes of paragraph 16 the Tribunal shall determine ***at the first sitting of the Tribunal*** whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry." (The emphasis is mine.)

It is paragraph 16 of the Schedule that gives the right to a person whose conduct is the subject of an inquiry or who is implicated, or concerned in the subject matter of the inquiry to be present at any sitting of the Tribunal

relating to that inquiry and to be represented by a barrister or solicitor.

The application made by Mr Lau:

9. The application seeks either; (i) the recusal or resignation of the Chairman and members of the Tribunal, or (ii) alternatively a permanent stay of the Tribunal's proceedings or (iii) alternatively an adjournment of the proceedings sine die, pending withdrawal of the terms of reference before the Tribunal. A further order was sought for the removal of junior counsel to the Tribunal on the basis that he was disqualified from acting for the Tribunal by reason of a conflict of interest. The grounds argued comprise the following points:

(i) It was contended that the method of appointment of Tribunal lay members, including the temporary member, which involved actual steps by the Chairman for the time being, was unlawful. (The appointment point).

(ii) It was argued that the Tribunal failed to comply with paragraphs 16 and 17 of the Schedule to the Ordinance by holding its first sitting in secret, (as opposed to a sitting in private or public), at which sitting the Tribunal determined that Mr Lau was an 'implicated person', thereby denying Mr Lau the opportunity to be present and heard at that sitting and to be represented thereat by a barrister or solicitor. (The first sitting point).

(iii) It was argued that the Financial Secretary acted

unlawfully when acting as the delegate of the Chief Executive in making the appointment of Mr Pang as a temporary member of the Tribunal. (The delegation point).

(iv) It was contended that there has been inordinate and unreasonable delay by the Financial Secretary and/or the Tribunal in the conduct of the proceedings. (The delay point).

(v) It was argued that junior counsel to the Tribunal was in a situation of conflict of interest and ought to be directed by the Tribunal to resign his position. (Counsel's conflict point).

10. The first three points were argued. Mr McCoy was of the view, correctly, that if any of the first three points were successful, the Tribunal need not consider the delay point. Accordingly while seeking a ruling on the counsel's conflict point he was content to reserve the delay point for subsequent argument if required. That was a sensible course. The counsel's conflict point stands alone and was argued.

The appointment point:

11. In order to properly consider this point it is necessary to set out the circumstances in which lay members have, apparently for some time, been appointed to membership of an Insider Dealing Tribunal.

12. It had been my preliminary view that it was appropriate that

formal findings of fact were required to be made in this respect. Such findings of fact would have been matters for the Tribunal as a whole. It has not been necessary for the Tribunal to make findings of fact as Mr McCoy was content to accept my own statement from the bench as to my understanding of the method adopted in the appointment of members.

The method of appointment of members:

13. There exists at the office of the Financial Secretary a list of persons who are willing to act as members of an Insider Dealing Tribunal. Each Secretary of a Division of the Insider Dealing Tribunal holds a copy of the list. It is updated from time to time. Upon the receipt by a Chairman of the Insider Dealing Tribunal of a Notice by the Financial Secretary pursuant to s 16 of the Ordinance, the chairman requests the appropriate section of the Civil Division of the Department of Justice which deals with insider dealing matters to supply to the Tribunal a synopsis of the circumstances that are alleged in the Notice.

14. I interpolate here, that following the issue of the s 16 Notice, the Financial Secretary forwards to that section in the Civil Division the bundles of evidence collected by the SFC upon which he has reached the conclusion that he ought to issue a section 16 Notice. It is necessary to note that at this point in time no formal appointment of counsel to the Tribunal has yet been made, nor indeed could it have been made, for it is apparently considered necessary that such an appointment must be made by the whole Tribunal, and not the chairman alone.

15. It is further convenient to note here, (although not in relation to this point, but the counsel's conflict point), that it is that same section of

the Civil Division of the Department of Justice which gives advice to the SFC and the Financial Secretary in relation to the investigation of insider dealing and whether or not there is sufficient evidence to justify the issue of a s 16 Notice. I am informed that appropriate "walls" have been established within that section of the Civil Division with the intention of avoiding cross contamination between those counsel advising the Securities and Futures Commission, those advising the Financial Secretary, and those acting in a particular matter as counsel to the Tribunal.

16. The practice has developed that upon the receipt of the synopsis the chairman consults the list of potential members from which he selects potential members for the particular Tribunal, and then interviews them. The interview is an interview in which the chairman seeks first to ascertain the availability of the potential member over the period in which it is anticipated the Tribunal will sit. Next, the chairman invites the potential member to read the synopsis, on a confidential basis, in order to determine whether or not that person might have any conflict of interest or involvement with any person who may appear from the synopsis to be either an implicated person or a witness in the Inquiry. When the chairman has determined the availability of two suitable persons, that is suitable in the sense of availability and lack of conflict of interest, the Secretary to the Tribunal refers those names to the Independent Commission Against Corruption, (ICAC), for vetting as to personal probity. Upon receipt of a report indicating no adverse matters, (the reports I have received go no further than to say "no adverse matters"), the Secretary to the Tribunal passes those names to the Financial Secretary who may then, if he finds the names acceptable to him, make appropriate appointments.

17. The chairman is quite unaware of any further enquiries or consideration the Financial Secretary may make or give, as to those names. There was no evidence from the Financial Secretary as to any steps he may take upon receipt of names from a chairman of the Tribunal. As I understand the position however, there has been no occasion in which a name passed to the Financial Secretary by a chairman of the Inside Dealing Tribunal has not subsequently been duly appointed to the Tribunal. Consequently it may reasonably be inferred that the practice of the Financial Secretary is to treat the names forwarded to him by the chairman as a recommendation, which he accepts without further inquiry.

18. Mr Bacon has confirmed to me that, in accordance with the procedure I have described above, he was interviewed by Lugar-Mawson J. Upon the resignation of Mr Ng, I consulted the list, as it then stood, and following an interview with Mr Pang, ascertained that he was available during the relevant timeframe, and that he had no knowledge of or involvement with any of the persons likely to be involved in the inquiry. I interviewed one other person, but that person indicated to me that he would not be in the Hong Kong and available to sit during the anticipated timeframe of the inquiry. The Secretary then followed the usual practice, and referred Mr Pang's name to ICAC, following which his appointment was made by the Financial Secretary.

The complaints as to the process:

19. The primary point raised by Mr McCoy was that the involvement of both Chairmen of this Tribunal in the appointment process was not authorised by the Ordinance, was accordingly unlawful, and consequently the appointments of the members was unlawful. That was,

he said, a circumstance which went to the root of the appointments. From that it was argued the Chairman and members ought to recuse themselves or resign their positions.

20. As a further corollary to this point Mr McCoy contended that the list of names held by the Financial Secretary was a secret list. He said that it was not publicly known, nor was it known by what criteria a person might become a member of the list, or even by what criteria a person might be removed from the list. All of these matters, he said, offended a sense of fairness and would lead a fair-minded observer to conclude that the Tribunal appointed to inquire into the affairs of Mr Lau may not be appropriately independent and free from apparent bias to be able to properly discharge the affairs of the Tribunal. The same submission that the Chairman and members ought to resign or recuse themselves was made. It must be recorded that this submission was raised in the face of repeated assurances by Mr McCoy that no objection was taken to the Chairman or members as individuals, all of whom he accepted were persons of the highest probity and integrity.

21. Mr Tong SC, for the Financial Secretary, submitted that there was a distinction to be made as to the Tribunal's powers. On the one hand there existed implied powers and jurisdiction necessary for the exercise of the Tribunal's expressly conferred jurisdiction for the proper discharge of its defined duties. On the other, was the jurisdiction to challenge an administrative act of another body, (in this case Chief Executive and the Financial Secretary in appointing the chairmen and members respectively), carried out prior to the formation of the Tribunal itself. The distinction is amply demonstrated in *PCCW-HKT Telephone Ltd v The Telecommunications Authority* FACV 14/2004 per Bokhary PJ at § 36. Mr

Bruce adopted that submission.

22. In response Mr McCoy argued that if the Tribunal were not permitted to look at matters which had gone on prior to their appointment, but which went to the root of their appointment, the Tribunal would potentially be left powerless and defenceless in the face of plain circumstances which demonstrated that their appointments were flawed. He did not cite any authority in which a subordinate tribunal had examined its own appointments in this way, although he did refer to matters of bias.

23. Mr Tong's proposition is twofold. First he says that the Tribunal is a statutory tribunal whose jurisdiction is necessarily limited to that specified under the enabling legislation: see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 HL at 194E-195C per Lord Pearce. Second he says that there is nothing within the provisions of the Ordinance which can be construed as conferring upon the Tribunal powers to make determinations in respect of the constitutional propriety of its institutional position or as to any other matter occurring prior to the commencement of the Inquiry. The jurisdiction of the Tribunal is limited to the exercise of the powers set out in ss 16, 17, 18, 23, 24, 26, 26a and 27 of the Ordinance. I accept those two propositions as correct statements of the law.

24. The jurisdiction of the Tribunal is confined to that which is necessary to carry out an inquiry of the kind stipulated in the Ordnance. That jurisdiction necessarily includes a power to receive evidence or submissions as to issues of actual or apparent bias which might result in a member or the chairman resigning or recusing himself. But it does not include jurisdiction to intervene as to the administrative phase of the

inquiry. That is for another forum.

25. The Tribunal has power under s 17(i), to:

> "exercise such other powers as may be necessary or ancillary to the carrying out of its functions under this Ordinance."

26. The function of the Tribunal under the Ordinance is to inquire into alleged insider dealing. All its other functions are related to that purpose. I reject Mr McCoy's submission the power under s 17(i) includes a power to inquire into the propriety of the appointment of members of the Tribunal. That is plainly beyond the function of the Tribunal as prescribed under the Ordinance. An inquiry into the propriety of the appointment of members is plainly a matter for the High Court.

27. I am satisfied that matters of actual or apparent bias fall to be dealt with in a separate category to the administrative circumstances leading to an appointment by either the Chief Executive or the Financial Secretary, of a chairman or a member of an Insider Dealing Tribunal.

28. A matter of actual or apparent bias is a matter which will be personal to a member of the Tribunal. That was amply demonstrated by Mr McCoy when he, quite properly, raised concerns as to the background of Mr Ng at the first sitting of the Tribunal. Mr McCoy properly made it clear at that time that he took no exception to Mr Ng's personal integrity or probity, but submitted that because of circumstances in Mr Ng's past a fair-minded observer might not be sure that Mr Ng, having had a previous involvement with Mr Lau, would be able to bring a fair and open mind to the issues to be raised by the inquiry. That was a circumstance which arose from matters which occurred prior to the appointment of Mr Ng as a

member, and were quite distinct from the administrative process by which he was appointed. The Tribunal was neither powerless nor defenceless. That was demonstrated when Mr Ng recognised that in the circumstances it was appropriate that he should resign.

29. It must clearly be said that notwithstanding the conclusion that we are unable to intervene on this issue, the Tribunal is neither defenceless nor powerless. It may be that a tribunal will be presented with submissions which demonstrate a good arguable case that by reason of flawed administrative matters prior to its establishment in good grounds existed to question the validity of the tribunal's proceedings. I have not the slightest doubt such a tribunal would immediately adjourn its proceedings to enable the complainant to make an appropriate application in the High Court for a review of the administrative decision constituting the tribunal. By that procedure the complainant would be appropriately protected and could seek his remedy in a forum which does have jurisdiction to inquire into the administrative phase of an inquiry by a statutory tribunal. Should a tribunal refuse to adjourn, and insist on proceeding, it would always be open to a complainant to seek an injunction to restrain further hearings pending resolution of the issue. There is no doubt that subordinate statutory tribunals such as the Insider Dealing Tribunal are subject to the supervision and control of the High Court.

30. Being satisfied that the Tribunal has no jurisdiction to entertain the appointment point, the first application by Mr Lau that the Tribunal should resign or recuse itself is declined.

31. I am satisfied that this is not a case where the circumstances that have been put before the Tribunal are such that it can be said that there

are good grounds to question the validity of the appointment of the Tribunal.

32. The first point made was that the list of potential members was a secret list, that there were no published criteria as to how a person came to be on the list, nor were there published criteria as to how a person might be removed from the list. The simple answer is that the Legislature has, in the case of the Insider Dealing Tribunal, not considered it appropriate to make such provisions. Part of the information put before the Tribunal in support of the application by Mr Lau was the Report of the Bills Committee on the Securities and Futures Bill and Banking (Amendment) Bill 2000 (LC Paper No. CB(1) 1217/01-02), a Legislative Council report considered by the Legislative Council in the course of the passage of Cap 571. It is instructive to note that in paragraph 114 of the Report, dealing with the Market Misconduct Tribunal, (which will in due course replace the Insider Dealing Tribunal), the question as to whether there should be a panel of members for appointment as ordinary members was considered. The establishment of a formal panel implies that members of the panel may be Gazetted. The view of the Administration was expressed in the following terms:

> ".....that the present proposal for Chief Executive to appoint ordinary members to a tribunal hearing on a case-by-case basis will allow greater flexibility and better ensure persons with the expertise required for a specific market misconduct will be appointed to hear a particular case."

33. It may be right that in the case of other statutory tribunals such as the Inland Revenue Board of Review, the Solicitors Disciplinary Tribunal and other similar bodies, the legislation establishing such bodies does make provision for the Gazetting of the persons who may be

members of those bodies. But there are other statutory tribunals where there is no requirement that the identity of the members should be Gazetted: see s17A Town Planning Ordinance, s 53F Immigration Ordinance, and s 3C Registration of Persons Ordinance. In each case it will be a matter for the Legislature. It may well be that in the case of the Insider Dealing Tribunal the Legislature has considered that it is not necessary to Gazette the list of members because it is a tribunal chaired by a Judge of the High Court.

34. The point was made that in the present case an approach had been made to a person to ask them to act as an expert witness in these proceedings. That person's response was that he considered that he could not act, as he was a person who was available for appointment as a member of the Tribunal. For myself I would not see that as a factor which would disbar a person from acting as an expert witness, because of course he is not a member of the present tribunal. Where is the mischief? It surely cannot be the intention of Gazetting the names of potential members of statutory tribunals to save interested parties the trouble of inquiring of potential witnesses their availability, only to be told they are unavailable to act in an inquiry in which they are not members.

35. There plainly cannot be any right in a person implicated or involved in an insider dealing inquiry to have any say in who is to try them, save as to the right to raise, as Mr Lau has, relevant matters of actual or apparent bias. Any act of the Legislature in deciding to require the Gazetting of the names of potential members could only be in the course of an adherence to modern concepts of open and transparent government. It must be a matter solely for the Legislature as to the circumstances in which it wishes to follow that course.

36. Mr McCoy objected to the involvement of the chairman in the selection of members. It was an act he said which was not authorised by the Ordinance. But the Ordinance places no limitations on the inquiry that may be made by the Financial Secretary as to the appropriateness of persons to be appointed as members. Plainly some inquiry must be made. Both Mr Tong and Mr Bruce asked, rhetorically, who better to ask than a Judge of the High Court, who is familiar with the requirements of an insider dealing inquiry. As it was put by Mr Tong: the involvement of the Chairman, an experienced judge who was not appointed by the Financial Secretary must if any thing enhance the fairness of the process of selection. I agree. Again, as it was put by Mr Tong, this is particularly so, given the advantageous position the judge is in when it comes to assessing the suitability of candidates in the light of the specific technical demands given rise to by the inquiry that will likely be undertaken. In my view there can be no suggestion that the judge, as chairman, has any particular agenda in relation to an inquiry, other than to discharge his appointed task. The course in fact further insulates the Tribunal from any perceived lack of independence or impartiality.

37. Mr McCoy was unable to say just how it was objectionable that the Chairman should be involved in the recommendation process, other than to say that a fair-minded observer would be concerned about the circumstance. He did not clarify just what the concern was that would be held. I have had careful regard to the qualities of the fair-minded observer, (or fictitious bystander), as they are described by Philips MR in *Taylor & Anor v Lawrence & Anor* [2003] QB 528, and Kirby J in *Johnson v Johnson* [2000] CLR 488 at 508, HCA. I am satisfied that such an observer would be content from his knowledge of the manner in which this Tribunal was created, that the persons adjudicating the issues involving Mr

Lau were both disinterested and unbiased.

38. I accordingly hold that the challenge made by Mr Lau to the constitutionality of the Tribunal fails in all respects.

39. In the course of arguing this point Mr McCoy sought from me an order that the Financial Secretary should make available to Mr Lau's advisors a copy of the list as it existed at the time of the original appointment of members, and as it existed at the time of the appointment of Mr Pang. Mr Tong informed the Tribunal that the Financial Secretary's position was that he did not oppose the release of the list and left the matter to the Tribunal. I am satisfied that the disclosure of the list is simply not relevant to the challenge made by Mr McCoy and that there is no need to make any order. I note with interest that in the Vanda Inquiry, (see para 44 below), a similar request was made but subsequently abandoned.

The first sitting point:

40. This point centres on the amendment to paragraph 17 of the Schedule to the Ordinance set out in paragraph 8 above. As is well-known, prior to the commencement of any quasi-judicial inquiry such as an Insider Dealing Tribunal Inquiry, the proper course is to send to concerned persons a letter known as a "Salmon Letter" informing them that they are considered to be in some way implicated or concerned in the subject matter of the inquiry. The usual practice of the Insider Dealing Tribunal, prior to the amendment of the legislation, was that following its formal constitution, the members of the Tribunal, having read the synopsis and bundles of evidence supplied to them by their counsel, would meet in private, perhaps

with the assistance of their counsel, and decide to whom Salmon Letters should be sent. That procedure is entirely in accordance with Recommendation 3 of the Report by Lord Justice Salmon on the Royal Commission on Tribunals of Inquiry, 1966, (the Salmon Report).

41. That is the procedure followed by this Tribunal. The Tribunal met in private, without the assistance of counsel, on 11 January 2005, when the members and Chairman, having considered the material, reached the decision that Mr Lau was the only implicated person to be served with a Salmon Letter. On 13 January 2005, on the instruction of the Tribunal, the Secretary of the Tribunal, wrote to counsel to the Tribunal requesting a draft of the Salmon Letter together with a summary of the evidence for approval. The Salmon Letter and summary of evidence was subsequently sent to Mr Lau on 28 January 2005, and a preliminary hearing of the inquiry was held on 28 February 2005 in the course of which the Tribunal stated that it had determined, pursuant to paragraph 17 of the Schedule to the Ordinance that Mr Lau's conduct alone would be the subject matter of the Inquiry.

42. Mr McCoy's submission was that the consequence of the amendment was that, before the Salmon Letter was issued, and at the first sitting of the Tribunal the Tribunal must make a public determination as to whom Salmon Letters, if any were to be sent. That was a sitting which, it was submitted, must be in public at which Mr Lau would have a right to attend, and to be represented by counsel. Mr McCoy said that in the present case, had such a sitting been held, it would have given Mr Lau the opportunity to lead evidence as to the long period over which, and the substantial extent prior to the date specified in the Notice in which, he had been acquiring shares in AOL. This, it was submitted, would potentially

have led the Tribunal to conclude that there was no possibility that there might be an adverse finding of insider dealing against Mr Lau.

43. By not holding such a sitting, and by denying Mr Lau that opportunity, it was argued that he had been unfairly deprived of a fair trial. It was submitted that Mr Lau was thus forced into a potentially long hearing, which he might otherwise have been able to avoid, together with the attendant expense thereof, expense which may not be recoverable.

44. The submission was at first sight a compelling one. However upon close analysis I am satisfied that it is without any basis at all. It is appropriate to record here that the Insider Dealing Tribunal, 2nd Division, in its current inquiry, known as the Vanda Inquiry, (the transcript of which was put before me by Mr Lau's advisors), and which commenced on 17 May 2005, under identical legislative provisions, did not find it necessary to hold a preliminary public sitting, prior to the issue of the Salmon Letters. In the same manner as this Tribunal did, the Vanda Inquiry Tribunal announced at its first sitting that it had determined to whom Salmon Letters should be sent.

45. When the submission was first made I suggested to Mr McCoy that what he sought was, in effect, a hearing in the nature of a committal hearing, such as the hearing that takes place in the case of a criminal offence to be tried by a jury in the High Court. Mr McCoy accepted the analogy. The analogy was entirely appropriate. Such a hearing entitles the person charged to hear the evidence from the witness box, on which he is to be tried in due course, to cross-examine those witnesses, and if he wishes to call or give evidence himself. In his submissions that was precisely what Mr McCoy sought, and what he said

had been denied to Mr Lau. Mr McCoy went further. He relied upon the decision in *Wong Sun v Insider Dealing Tribunal* [2000] 4 HKC 557, at 571, where Rogers JA said:

> "I have no doubt that the standards of fairness to the accused which are applicable in criminal proceedings should be applied to proceedings in the Insider Dealing Tribunal in respect of persons liable to be found to be insider dealers."

Mr McCoy argued that from that proposition Mr Lau was entitled to rely upon the protections in Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance 1991, (BORO), which set out the right to equality before the courts and to a fair and public hearing, (Art 10), and particular protections in relation to persons charged with criminal offences, (Art 11).

46. An examination of the concept of a committal hearing such as was initially envisaged by Mr McCoy's submission made it plain that the duration of the hearing of insider dealing inquiry might be very greatly extended. It is true that a person might accept the paper evidence and argue on that or on further evidence that he should not be committed for trial. But if Mr McCoy was right, it would be open to a person, not yet implicated in the inquiry, to demand that every witness be called and that he himself give evidence and call evidence and make submissions. Apparently Mr McCoy recognised the inappropriateness of such a circumstance. He modified his submission. He suggested that the Tribunal might, under s 17(h) of the Ordinance, regulate its own procedure and, for example, require a putative implicated person to accept the evidence contained in the bundles and, perhaps, have two hours in which submissions could be made as to why he ought not be the recipient of a Salmon Letter.

47. I asked Mr McCoy how the chairman of a tribunal, who sought to limit the preliminary hearing in that way, would resist a demand, citing Article 11, that full evidence be heard. Mr McCoy then abandoned his reliance upon Article 11. That left him relying on Article 10. In my view that did not advance his position. It is not difficult to argue, as Mr Bruce submitted, that Articles 10 and 11 are merely declaratory of existing rights and do not create new rights. If under Article 10, at such a hearing, Mr Lau can demand a "fair" hearing, it is difficult to see how he could be restricted to merely making submissions. A fair hearing must necessarily include the right to examine witnesses and to call witnesses. It was upon consideration of Article 11(xxv)(e), the right to examine and cross-examine witnesses, that Mr McCoy abandoned his reliance upon Article 11. If the same rights are imported by Article 10, then for the same reason, reliance upon Article 10 must go. Such a restriction on the nature of the hearing could only be made, in terms, in legislation or regulations.

48. What Mr McCoy sought, in reliance upon the insertion of six words into the Schedule to the Ordinance, was as an entirely new regime by which insider dealing inquiries were to be conducted. That new regime was one which included a formal preliminary hearing at which a prima facie case must be established before Salmon Letters were issued to persons implicated or concerned in the subject matter of the inquiry. At the end of the day Mr McCoy was unable to assert quite how that preliminary hearing might be conducted, other than by way of a hearing in the nature of a committal hearing, the duration of which was essentially at the whim of a putative implicated person.

49. I sought from Mr McCoy advice as to whether any other subordinate statutory tribunal was subject to such a regime. He referred

me to, but with no detail, the Dentists Registration Ordinance, Cap 156; the Legal Practitioners Ordinance, Cap 159, and the Medical Registration Ordinance, Cap 161. It is instructive to examine these particular ordinances.

50. Both the Dentists Registration Ordinance and the Medical Registration Ordinance make provision for extensive and comprehensive formal procedures, contained in regulations made under the relevant ordinances, for preliminary inquiries leading to the establishment of a prima facie case before a complaint proceeds further. Under both ordinances a Preliminary Investigation Committee is established. In the case of dentists the matter is dealt with in rr 12-18 of the Dentists (Registration and Disciplinary Procedure) Regulations. In the case of doctors, an even a more extensive regulatory system is set out in rr 6-16 of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations.

51. The precise and detailed nature of these statutory regimes, whereby the subject of an investigation into conduct is not given a preliminary right to be heard or to examine witnesses, but only a limited right to make representations in writing, stand in stark contrast to the six words inserted in the Schedule to the Ordinance upon which Mr McCoy relies.

52. The Solicitors Disciplinary Tribunal is established under s 9 of the Legal Practitioners Ordinance. The relevant rules are the Solicitors Disciplinary Tribunal Proceedings Rules. They are extensive and comprehensive, setting up a particularly convoluted procedural regime through which a complaint must pass before it gets to the Disciplinary

Tribunal. There is no provision in the Rules providing for a preliminary hearing in the nature of a committal hearing.

53. I am left with no doubt at all that had it been the intention of the Legislature that a formal preliminary hearing procedure, to be undertaken prior to a substantive inquiry into insider dealing, aimed at determining whose conduct should be the subject of inquiry, should be established, it would have been done so by appropriate legislation. Such legislation would need to precisely delineate, as does the Dentists Registration Ordinance and the Medical Registration Ordinance, the scope and extent of such a preliminary inquiry and the rights of those involved.

54. It cannot be without significance that Cap 571 which establishes the Market Misconduct Tribunal makes no provision whatsoever for any form of preliminary hearing prior to the issue of Salmon letters. It is inconceivable that the Legislature would by amendment to the Ordinance make provision for preliminary hearings in relation to a tribunal procedure that is being phased out, but not include such a provision in the replacement tribunal procedure.

55. Merely by looking at the very procedure by which persons would come before Mr McCoy's proposed first sitting it may be seen that there was no intention to create such a regime by the use of six words in the Schedule. The question must be asked, by what means are such persons brought to the proposed first sitting? The only answer that could be produced was that a preliminary letter would have to be issued to notify the persons involved of the situation. Mr Bruce artfully coined the expression a "Letter of Mindedness" to describe the letter. The proposition needs only to be stated to demonstrate its absurdity in the context of a

tribunal of inquiry applying Salmon Report criteria in its administration.

56. My conclusion is reinforced by an examination of the circumstances in which the relevant amendment was made. It is common ground that the amendment was made following an issue that arose in relation to an inquiry by the Insider Dealing Tribunal known as the "Lippo Inquiry". In that matter, Salmon Letters were issued prior to the commencement of the hearings to three named individuals. In the course of the Inquiry, the Tribunal determined that it was appropriate that a Mr Riady should be issued a Salmon Letter and brought in to the inquiry. That raised obvious difficulties, not the least of which was that Mr Riady had not been present or represented at the sittings of the Tribunal leading up to the issue to him of a Salmon Letter. A good deal of evidence had been heard, and subjected to cross-examination. Mr Riady was not present at any of that. Mr Riady challenged the decision to issue the Salmon Letter by way of judicial review; (see *Riady v Insider Dealing Tribunal* HCAL 89/2000). The application failed, as did a subsequent appeal; (see *Riady v Insider Dealing Tribunal* CACV 310/2002).

57. There is nothing in the legislative papers that were put before me in relation to the amendment. The clear inference however, is that the Legislature, being concerned about the situation in which a person might be joined into an inquiry mid-stream, made the six word amendment to the Schedule with the intention, as Mr McCoy put it, (Transcript, Day 6, 10-20), to make sure that counsel and solicitors for an implicated person were available and entitled to make submissions at every sitting of the Tribunal.

58. I am satisfied that the purpose of the amendment was simply to ensure that, once an inquiry commenced, if a name emerged of a further

putative implicated person, that person would not be joined into the inquiry at that point, but would have to be the subject of a separate inquiry. The effect of the amendment is to limit those persons whose conduct may be considered by the Tribunal, to those persons who are named at the first sitting of the Tribunal as being implicated or concerned persons. I am satisfied that it was not intended by the Legislature that a regime should be established whereby a prima facie case must be established at a separate hearing, before the issue of Salmon Letters.

59. The first sitting point fails. It does not follow from this conclusion that a person, believing himself to be wrongly brought into a Tribunal is without remedy. The Tribunal has the power to determine its own procedure: see s 17(h), (no rules have been made by the Chief Justice). I have no doubt at all that if a person brought to a Tribunal by a Salmon Letter stated at the outset that he had a complete answer to the allegation, which if heard immediately, would bring his part in the inquiry to an end, a sensible Tribunal would then hear that answer. That is the great advantage of the flexibility of the tribunal procedure.

The delegation point:

60. This matter may be shortly disposed of. The Ordinance provides in s 15(2) that the chairman of a Tribunal is to be appointed by the Chief Executive on the recommendation of the Chief Justice. The two other members are to be appointed by the Financial Secretary. However paragraph 8 of the Schedule requires that a temporary member must be appointed by the Chief Executive. The document by which Mr Pang was appointed was signed by the Financial Secretary.

61. The Interpretation and General Clauses Ordinance, Cap 1, provides in s 63:

> (1) Where any Ordinance, confers powers or imposes duties upon the Chief Executive, he may delegate any person by name or the person holding any office designated by him to exercise such powers or perform such duties on his behalf and thereupon, or from the date specified by the Chief Executive, the persons so delegated shall have and may exercise such powers and perform such duties.
>
> (3) Where any Ordinance, confers powers or imposes duties upon the Chief Executive and such power is exercised or such duty is performed by any public officer, the Chief Executive shall, unless the contrary is proved, be deemed to have delegated such public officer under subsection (1) to exercise the power to perform that duty.

62. I accept the submission of both Mr Tong and Mr Bruce that that provision provides a complete answer to the delegation point so far as this Tribunal is concerned.

63. Mr McCoy relied upon the following provision in s 2(1) of Cap 1:

> "Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply to this Ordinance and to many other Ordinance in force....."

64. The argument was that the terms of paragraph 8 of the Schedule showed that the matter was considered by the Legislature to be so important is to require the act of the Chief Executive Consequently, Mr McCoy argued, it was simply not open to the Chief Executive, notwithstanding the clear terms of s 63 of Cap 1, to delegate the power.

65. I am satisfied that the Tribunal has no jurisdiction in this issue. It is neither jurisdictionally permitted, nor proper nor appropriate that this Tribunal should look beyond the signatures on their documents of appointment. In so saying I do not overlook my previous remark that if an appropriate argument were brought before the Tribunal, the Tribunal may find it necessary to adjourn its proceedings to permit a person to go to the High Court. This is not such an argument.

Counsel's conflict of interest point:

66. Again this matter may be shortly disposed of. The essence of the complaint was that there was a conflict of interest in junior counsel to the Tribunal in that it was not established that he had not had some prior involvement in the matter for a "client" other than the Tribunal, before his formal appointment as counsel to the Tribunal. The implication of the submission was that junior counsel may have advised either the SFC in its inquiries into AOL, or the Financial Secretary in his decision to issue the Notice. I accept that in both of those circumstances there would be an inappropriate conflict of interest.

67. The one factual matter in which we found it necessary to make a decision was the status of junior counsel to the Tribunal. No evidence was called, but Mr Bruce read from the bar a statement in which he set out the position. Mr McCoy did not challenge that statement but said that it did not go far enough. Mr McCoy said that the role of junior counsel in the period between May 2003, when the Notice was issued, and his formal appointment on 17 August 2004, was not clear.

68. From Mr Bruce's statement we are completely satisfied that

prior to the issue of the Notice under s 16 by the Financial Secretary, junior counsel to the Tribunal had no involvement whatsoever in advising either the SFC in connection with their investigation of the matter, or the Financial Secretary as to his decision on whether or not to issue a Notice.

69. The agreed correspondence before us establish that the Notice was sent to the Tribunal by The Financial Secretary on 22 May 2003. It appears that a copy was sent to the Civil Division of the Department of Justice at the same time. On 24 June 2003, junior counsel informed the Secretary for Financial Services and the Treasury, (SFST), (the civil servant who heads the department for which the Financial Secretary is the "minister") that:

> "In anticipation of a request from the Chairman of the Tribunal, this department will soon begin preparing a case synopsis."

70. On 31 October 2003, Lugar-Mawson J. wrote directly to junior counsel at the Department of Justice, requesting him to supply background information and a synopsis in respect of (inter alia) AOL. The stated purpose of the request was that the Judge was about to interview potential lay members to constitute a Tribunal for the Inquiry. On 26 November 2003, junior counsel sent a synopsis and a dramatis personae to the Judge. On the same day, junior counsel informed the SFST that the case synopsis had been provided to the Chairman. It was only subsequently, on 17 August 2004, that the Tribunal made a formal appointment of junior counsel. There is no evidence whatsoever of any other involvement by junior counsel in this matter prior to his formal appointment as counsel to the Tribunal.

71. Mr McCoy posed the question: for whom was junior counsel

acting when he prepared the synopsis? The answer is abundantly clear. He was acting as counsel to the Tribunal, initially in anticipation of, and later in response to, a specific request from the Chairman of the Tribunal, albeit prior to the Tribunal putting its signature to his formal document of appointment. Sensibly, being aware that the Financial Secretary had forwarded the Notice to the Chairman on 22 May 2003, and undoubtedly having been instructed by his section leader that he would be dealing with the matter for the Tribunal, junior counsel began work before any formal request was received from the Tribunal. He correctly and properly anticipated the request that came from the Chairman on 31 October 2003. In modern parlance his action may be described as proactive.

72. To suggest that the two memoranda addressed to the SFST, merely reporting progress, constituted advice, or an involvement, either of which raised a conflict of interest, was facile. It was entirely appropriate that the Financial Secretary was informed, by way of the SFST, of progress of action on the Notice that he had issued. It was equally appropriate that junior counsel should have commenced work on the matter when he did.

73. In the light of these facts, as found by us all, I am completely satisfied that junior counsel has no conflict of interest whatsoever in this matter and is perfectly entitled to continue to act. The application for the removal of junior counsel is to be declined.

74. Each matter raised by Mr Lau before us has failed. The Tribunal will resume at 9 a.m. on Thursday 18 August 2005, at which time we will hear counsel and give directions as to the further conduct of the Inquiry.

The availability of the relevant legislation:

75. There is one final matter that I wish to mention. I am concerned that the terms of the Ordinance do not appear to be readily publicly available.

76. When I was appointed chairman of the Tribunal my first step was to go to the Laws of Hong Kong to familiarise myself with the Ordinance. I found that the relevant pages in the loose-leaf Laws of Hong Kong, published by the Government Printer, had been removed and replaced by pages indicating that the Ordinance had been repealed. I then went to the Bilingual Laws Information System, (BLIS), on the Internet, only to find that again statements that the Ordinance had been repealed. It is right that it has been repealed, but not for those whose conduct occurred before 1 April 2003, and for which a Notice had not yet been issued.

77. The website for the Tribunal itself contains a link to the relevant part of BLIS purporting to lead to the Ordinance. The link is of course a blind link for it leads a citizen to a mere statement that the Ordinance has been repealed.

78. Fortunately for me, previous Chairmen of the Tribunal had, for convenience, made up their own copies of the Ordinance. Regrettably however the amendment made by Cap 571 to the Schedule had not been endorsed in the copies at the Tribunal Office.

79. The situation is very unsatisfactory. People are still being brought before this Tribunal They cannot, with the ease they ought, gain access to the very legislation that governs their rights before the Tribunal.

I raised this matter in the course of the hearing. I would have thought that the message would have got to the Law Draughtsman, the Law Officer in charge of the Law Drafting Division of the Department of Justice, who is, I understand, responsible for BLIS. It does not appear to have reached that office and I am obliged therefore to include a request in this Ruling that urgent steps be taken to rectify the position.

John Saunders
Chairman
Deputy High Court Judge

Mr. Gerard J X McCoy SC and Mr. Kevin Patterson, instructed by Messrs Sit Fung Kwong & Shum, for the Applicant

Mr. Ronnie Tong SC, and Abraham Chan instructed by The Department of Justice, for the Financial Secretary

Mr Andrew A Bruce SC and Mr Herbert Li, Counsel to the Tribunal