SUPPLEMENTAL (3rd) REPORT OF THE INSIDER DEALING TRIBUNAL OF HONG KONG

on whether insider dealing took place
in relation to the listed securities of

HKCB BANK HOLDING COMPANY LTD & HONG KONG CHINA LTD (NOW RENAMED LIPPO CHINA RESOURCES LTD)

between 1 & 23 May 1997 (inclusive)
and on other related questions

Supplemental (3rd) Report

Introduction

In compliance with an order of the Court of Appeal in Civil Appeal number 176 of 2006 that we reconsider the award of costs to Edmund Kung under the provisions of section 26A of the Securities (Insider Dealing) Ordinance Cap. 395 (the Ordinance), we have pleasure in submitting the supplemental (3rd) report of our findings in the Insider Dealing Tribunal Inquiry into certain dealings by Carlton Poon Kam Tao (Carlton Poon), Edmund Kung Chiu Nam (Edmund Kung) and Jenny Kong Yuen Kwan (Jenny Kong) in the listed securities of HKCB Bank Holding Co Ltd and Hong Kong China Ltd (now renamed as Lippo China Resources Ltd) between 1 and 23 May 1997.

The Inquiry was held in compliance with the Financial Secretary's notice pursuant to section 16 of the Ordinance dated 2 November 2000 requesting the Insider Dealing Tribunal to conduct an inquiry into those dealings (the section 16 notice).

The first part of the report, comprising of chapters 1-10 inclusive, of our findings in relation to questions (a) & (b) of the section 16 notice was submitted to the Financial Secretary on 10 March 2005.

The second part of the report, comprising of chapters 11-14 inclusive, of our findings in relation to question (c) of the section 16 notice was submitted to the Financial Secretary on 10 August 2005.

The first and second parts of the report were also sent to the Department of Justice and the solicitors representing the implicated persons, and made available to the public.

We held our hearing in compliance with the Court of Appeal's order on Tuesday, 12 February 2008. The sole matter for our consideration was the question of Edmund Kung's costs application.

The Tribunal consisted, as before, of Mr. Gareth John Lugar-Mawson (formerly The Hon Mr. Justice Lugar-Mawson) as Chairman, Mr Dickson Lee and Mr. Ian Grant Robinson as members.

Mr. Peter Duncan SC and Mrs. Winnie Ho Ng Wing Yee were counsel to the Tribunal.

The implicated persons (with the exception of Mr. Stephen Riady who chose not to be represented before us) were represented as follows:

Implicated Person	**Counsel**	**Instructing Solicitors**
Carlton Poon	Tim Mak	Herbert Smith
Jenny Kong	Michael Delaney	Weir & Associates
Edmund Kung	Barrie Barlow SC	Tanner De Witt

This supplemental (3rd) report is to be read as Chapter 15 of the whole report.

Save where the context otherwise requires it, the same terms and abbreviations used in the first part of the report are used in this supplemental (3rd) report.

Chapter 15

In the second part of our report, dated 9 August 2005, we refused Edmund Kung's application that he be awarded costs incurred after 1 May 2001. Our reasons are set out in Chapter 13 of that report.

Subsequently Edmund Kung challenged our decision in the Court of First Instance of the High Court by way of judicial review, arguing that we were wrong in law and had exercised our discretion wrongly. The case reference is HCAL No. 120 of 2005.

The Full Bench of the Court of First Instance ruled in Edmund Kung's favour and ordered that he should have his costs as applied for and made an award in his favour.

The Financial Secretary, being an interested party, appealed against that decision to the Court of Appeal. That court held the High Court did not have the jurisdiction to award costs. The order for costs was set aside and the matter remitted to the Tribunal for consideration in accordance with the correct principles. The case reference is CA No. 176 of 2006.

As we acknowledged at the hearing of Edmund Kung's original application, the award of costs is governed by section 26A of the Securities (Insider Dealing) Ordinance Cap. 395 (the Ordinance).

Section 26A(4) of the Ordinance provides that subject to any rules made by the Chief Justice (none have been made), Order 62 of the Rules of the High Court applies to the award and taxation of any costs awarded by the Tribunal.

In the second part of our report we said that, notwithstanding these provisions, we were not precluded from applying the principles in criminal cases in the exercise of our discretion. Order 1 rule 2(3) of the Rules of the High Court provides that Order 62 applies to criminal proceedings.

The Full Bench held we were wrong to do so. The Court of Appeal agreed with them, saying:

> *"...the only basis for the exercise of the discretion should be under the provisions of Order* 62" (see paragraph 18 of the judgment).

According to the Court of Appeal, the correct principles are:

> *"...first, under Order 62, rule 2(4) the award of costs is in the discretion of the Court; second, under Order* 62, *rule* 3(2) *the Court in the exercise of the discretion should order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other orders should be made as to the whole or any part of the costs. In the context of this case the reference to the Court will be substituted with that of the Tribunal.*
>
> *In Ritter* v. *Godfrey [1920]* 2 *KB* 47 *it was held by Atkin LJ that in the case of a wholly successful defendant the judge must award him costs unless there is evidence*
>
> *(1) that the defendant brought about the litigation; or*
>
> (2) *has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense; or*
>
> (3) *has done some wrongful act in the course of the transaction of which the plaintiff complains."* (see paragraphs 20 & 21 of the judgment).

There is no dispute that Edmund Kung lied to the SFC in the course of its investigation, representing to the Commission's investigators in 1998 that he had purchased certain warrants on Carlton Poon's instructions. What he did is set out at pages 41 to 43 of the first part of our report.

There is also no dispute that some three years later in 2001, having learned that he was an implicated person in the inquiry and after having taken legal advice, Edmund Kung made a further statement, dated 26 March 2001, saying that he had received no such instructions from Carlton Poon and that he had made his original untrue statement at Poon's request. We ultimately found this second statement to contain the truth.

The date of 1 May 2001 for payment of Edmund Kung's costs was chosen on legal

advice as it is six weeks after the date of this statement. It is submitted on his behalf that this period was sufficient for the SFC investigators to absorb and act on the content of the statement.

Although not referred to either by the Full Court or the Court of Appeal in their respective judgments, Atkin LJ in *Ritter v. Godfrey* went on to explain the three exceptions to the principle that a wholly successful defendant must be awarded costs; saying at pages 60 & 61.

> *"By (1.) is meant - has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action....*
>
> *...(2), I think, would include improper conduct in or connected with the litigation calculated to defeat or delay justice. Such conduct would also be included in (3), which, I think, further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public: King v. Gizzard [1905] 2Ch. 11, by which I understand some criminal or quasi criminal misconduct, e.g., a fraud or crime or preparation for a fraud or crime, or possibly some act of serious oppression. Such conduct must, however, be in the course of the transaction complained of. If there is evidence of facts falling within the three classes above mentioned, then an appellate court will not interfere with the discretion of the trial judge, even though they might not have come to the same finding of fact or exercised their discretion in the same way."*

Exception (1) in *Ritter v. Godfrey* has no application. We were satisfied that Edmund Kung's acts did not wholly or in part cause the institution of the Inquiry, or more particularly that part of it relating to him (see report page 90).

We are, however, satisfied that Edmund Kung's deliberate lies to the SFC investigators constitute evidence of the conduct described in exception (2). Not only were they clearly calculated to defeat and delay justice, they had a considerable impact on the hearing before us, being calculated to occasion unnecessary litigation and expense. It was self-interest and not a concern for the truth that led Edmund Kung

to make his corrective statement after taking legal advice in March 2001.

Indeed, there are strong arguments for saying that Edmund Kung's lies go so far as providing evidence of conduct falling within the type described in exception (3) in *Ritter v. Godfrey*, for the giving of false or misleading answers to questions from investigators appointed under section 33(1) of the now repealed Securities and Futures Commission Ordinance, Cap 24 was a criminal offence under section 33(12)(d) of that ordinance.

Applying the principles in *Ritter* v. *Godfrey*, we exercise our discretion against an award of costs to Edmund Kung.

Before closing, there are two matters which Mr. Barlow raised to deal with.

The first is that, as we concluded that even had we believed and accepted Carlton Poon's evidence of what happened between Edmund Kung and himself; that would not provide evidence that Edmund Kung had the necessary knowledge of relevant information for him to have acted in contravention of section 9(1)(e) of the Ordinance, we are precluded from denying him his costs (or at least those incurred since 1 May 2001) because a finding that he was not engaged in insider dealing was inevitable on either version of events.

We do not agree. We were faced with situation where on one version of events - a version Edmund Kung himself advanced to the SFC investigators - he, a close friend of Carlon Poon's, had traded in listed securities of the Corporations during the material period. In those circumstances, did he trade with the benefit of relevant information and in the belief that the price of those securities was likely to increase because of it? As it turned out, there was no evidence to sustain that possibility, but that was something which we, the Tribunal, were called upon to inquire into and to determine. It was incumbent on us to consider all of the evidence before we could determine where the truth lay. It is putting the cart before the horse, to say that at the outset of the inquiry there was no evidence. The whole concept of an Insider Dealing Tribunal inquiry is to find out why it was that the implicated parties traded. As it turned out, we found that Edmund Kung hadn't traded in the securities in question at all.

The second is that, as their only substantive finding was that the Full Court had no jurisdiction to make the costs order, we are bound by the Court of Appeal's decision to

follow the Full Court's reasoning and make the order in Edmund Kung's favour. Mr Barlow argued that the only matter reserved to our discretion is consideration of whether or not we should should make a *Bullock Order* (see: *Bullock v. London General Omnibus Co.* [1907] 1KB 264 CA) ordering Carlton Poon to reimburse the Government for Edmund Kung's costs.

This argument places an extremely strained interpretation on the Court of Appeal's judgment. Cheung JA, who presided, said this:

> *"...I will allow the appeal to the extent that the order of costs made by the Full Bench is set aside and in its place there should be an order remitting Mr. Kung's application for costs to the Tribunal for consideration."* (see paragraph 50 of the judgment).

Yuen JA, in a short additional judgment said this:

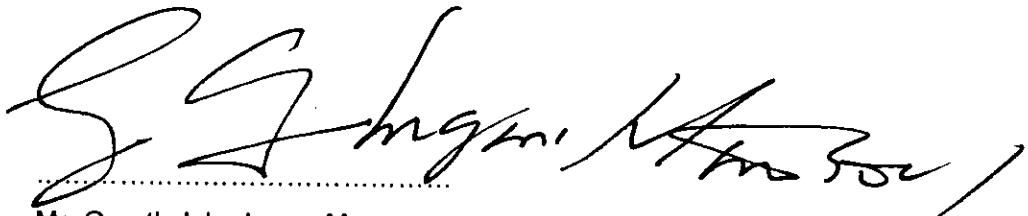
> *"...the Tribunal should be asked to consider the issue of costs afresh, applying principles under Order 62 and in the light of all the evidence it had heard, only part of which had been placed before the Full Bench..."* (see paragraph 52 of the judgment - emphasis supplied).

Waung J said that he agreed with Chung JA's judgment (see paragraph 53 of the judgment).

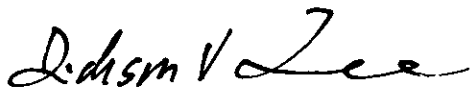
There can be no doubt that the Court of Appeal remitted Edmund Kung's costs application back to us for our unfettered reconsideration, subject only to our applying the principles under Order 62 as explained in *Ritter v. Godfrey* to that reconsideration. Indeed it is clear from paragraphs 42 to 44 of the judgment that the Court of Appeal was unimpressed with the Full Bench's reasons for awarding Edmund Kung his costs. The judgment cannot fairly be read as being an approval of the Full Bench's reasons.

For the sake of completeness copies of the Full Bench and Court of Appeal judgments are annexed to this supplemental report.

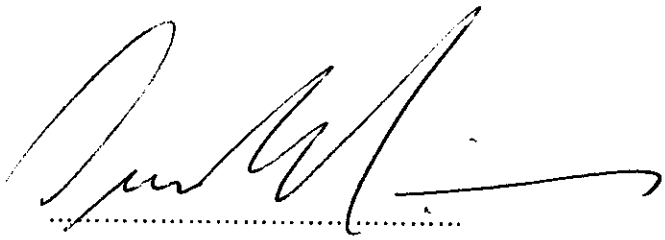
Signed:



Mr. Gareth John Lugar-Mawson
Chairman



Mr. Dickson Lee
Member



Mr. Ian Grant Robinson
Member

Dated: 20 March 2008

Annexure 1

Judgment of the Court of First Instance of the High Court

HCAL 120/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 120 OF 2005

IN THE MATTER of section 26A of the Securities (Insider Dealing) Ordinance (Cap. 395) and

IN THE MATTER of an Inquiry by the Insider Dealing Tribunal into certain dealings in May 1997 in listed securities of HKCB Holding Co Ltd and Hong Kong China Ltd and

IN THE MATTER of an application for judicial review by EDMUND KUNG CHIU NAM

BETWEEN

EDMUND KUNG CHIU NAM	Applicant
and	
THE INSIDER DEALING TRIBUNAL	Respondent
and	
THE FINANCIAL SECRETARY	Interested Party

Before: Hon Chu J and Hon Reyes J in Court

Dates of Hearing: 29 March 2006

Date of Judgment: 29 March 2006

JUDGMENT

Hon Reyes J:-

I. Introduction

1. In March 2005 an Insider Dealing Tribunal held that Mr. Kung was not guilty of insider dealing. Mr. Kung thereupon applied for some of his costs of defending himself before the Tribunal. The Tribunal refused his application. Mr. Kung now seeks judicial review of that refusal. In essence, he says that, in rejecting his application, the Tribunal was wrong in law and wrongly exercised its discretion.

II. Background

2. In May 1997 Mr. Carlton Poon engaged in insider dealing using Mr. Kung' s discretionary account with Worldsec International Ltd. Mr. Kung knew nothing of this trading. Out of friendship, Mr. Kung had simply allowed Mr. Poon to conduct personal trading through the Worldsec account.

3. When the SFC investigated Mr. Poon' s trades in May 1998, Mr. Kung lied to the SFC. At Mr. Poon' s prompting, Mr. Kung claimed that the relevant trades had been executed on his behalf.

4. In November 2000 Mr. Kung received a letter from the Financial

Secretary naming him as a person implicated in insider dealing. Mr. Kung then consulted a lawyer for the first time.

5. In March 2001, acting on legal advice which he had received, Mr. Kung volunteered a statement admitting that he lied and providing the correct information. He stated that, contrary to what he had told the SFC in 1998, he had not authorised and had no knowledge of the securities which Mr. Poon had bought and sold using his account.

6. Between 8 December 2003 and 11 October 2004 the Tribunal conducted an inquiry into the case against Mr. Poon, Mr. Kung and others. In its 1st Report, the Tribunal accepted Mr. Kung's March 2001 statement. The Tribunal believed that, although Mr. Poon was guilty of insider dealing, Mr. Kung was not.

7. The Tribunal said of Mr. Kung (at 1st Report, p.41):-

> "We have taken particular care in assessing Edmund Kung's evidence given that, notwithstanding the fact that at end of his two SFC interviews his obligation to tell the truth and to maintain secrecy were clearly spelled out to him, Edmund Kung deliberately chose to defy these obligations.
>
> In favour of his credibility is the fact that on 26 March 2001 at a relatively early stage, albeit after the announcement that there would be an inquiry and that his securities dealings in May 1997 were to [be] part of the subject of the inquiry, he volunteered a statement admitting that he had lied to the SFC in his earlier interviews and claiming that he was now giving a true and full account of his actions. Mr. Fred Kinmonth, Edmund Kung's solicitor, informed us that a draft of this statement had been read out to Carlton Poon on 20 March. According to Mr. Kinmonth, Poon had not challenged the accuracy of the contents of the statement, but had replied to the effect that its contents were 'substantially correct'.
>
> We were satisfied that Edmund Kung told the truth in his 26 March 2001 statement to the SFC and in evidence before us and that his claim that he had nothing to do with the trades in HKCBH and HKC securities in his Worldsec account over the material time is true."

8. The Tribunal then concluded (at 1st Report, pp.70):-

> "As we accept Edmund Kung's evidence in substance, the trades carried out in his account were not his and were carried out without any of the information needed to constitute insider dealing on his part."

9. Securities (Insider Dealing) Ordinance (Cap.395) (SIDO) s.26A regulates the award of costs in an insider dealing inquiry. The section provides:-

"(1) Subject to subsection (5), at the conclusion of an inquiry or as soon as reasonably practicable thereafter, the Tribunal may award to:-

(a) ...

(b) any person whose conduct is, in whole or in part, the subject of the inquiry,

such sum as it thinks fit in respect of the costs reasonably incurred by him in relation to the inquiry.

(2) Any costs awarded by the Tribunal under subsection (1) shall be charged on the general revenue.

(3) The Tribunal may order that nay costs awarded under subsection (1) may be taxed on the basis of any one of the scales of costs set out in the Schedules to Order 62 of the Rules of the High Court (Cap.4 sub. leg.).

(4) Subject to any rules made by the Chief Justice under section 36. Order 62 of the Rules of the Supreme Court (Cap.4 sub. leg.) shall apply to the award and taxation of any costs awarded by the Tribunal under this section.

(5) This section shall not apply to any person referred to in subsection (1) who is:-

(a) a person who has been identified as an insider dealer in a determination under section 16(3);

(b) an officer of a corporation who has been identified as such officer in a determination under section 16(4);

(c) a person who and in respect of whom it appears to the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the Tribunal to inquire into his conduct subsequent to the institution of the inquiry under section 16 or during the course of that inquiry; or

(d) any other person who and in respect of whom it appears to the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the institution of the inquiry under section 16."

10. Mr. Kung applied for his costs from 1 May 2001 (that is, a date 6 weeks after service of his voluntary statement). By its 2nd Report dated 9 August 2005 the Tribunal rejected Mr. Kung's application for costs.

11. In so doing, the Tribunal accepted the argument of Mr. Barlow (Mr. Kung's counsel) that Mr. Kung was not a person who was barred from recovering his costs by SIDO s.26A(5).

12. In particular, Mr. Barlow submitted (as recorded at 2nd Report p.11) that:-

> "[I]t cannot be said that Edmund Kung did anything to cause the institution of this Inquiry because it cannot reasonably be suggested that it was Edmund Kung's false statements to the SFC investigators when they interviewed him on 13 May 1998 that he had instructed Carlton Poon to purchase HKCBH and HKC warrants on his behalf in May 1997, [that] did anything to bring it into being. Even if Edmund Kung had told the truth in that interview, rather than harbour it in his breast until 26 March 2001 once he learnt that he was an implicated person, the Inquiry would still have been instituted because one of the objects of the Inquiry would have been the circumstances under which his Worldsec account was used to trade in those warrants in May 1997."

13. The Tribunal accepted the logic of this submission at 2nd Report p.265. But, in the exercise of its discretion, the Tribunal felt that it was inappropriate to award Mr. Kung any costs.

14. As a matter of general principle, the Tribunal held that it could follow the practice in criminal cases. Thus, costs might be:-

> "denied to an acquitted defendant [such as Mr. Kung] where his conduct has brought suspicion on himself and/or misled the investigating authorities into thinking that the case against himself is stronger than it is."

15. The Tribunal gave 2 specific reasons for its decision.

16. First, Mr. Kung had lied to the SFC. The Tribunal thought that was "completely unacceptable". This was especially so where Mr. Kung:-

> "did nothing to rescind [his lies] until they drew him into the Inquiry and that he only did that after legal advice, when his own conscience as market professional should have told him where his duty lay..."

17. The Tribunal felt that "to grant Edmund Kung his costs ... would only be rewarding deceit and mendacity".

18. Second, Mr. Kung had allowed Mr. Poon to use his Worldsec account without exercising any control over such use. That (the Tribunal believed) was "grossly negligent".

19. Worse, such conduct might be characterised (the Tribunal said) as "condoning or hiding possible inappropriate or illegal transactions on Carlton Poon's part".

III. Discussion

20. In my view, the Tribunal was wrong to apply a principle of criminal law in determining whether to award Mr. Kung costs.

21. The Chief Justice has not made any rules in respect of the award of costs in insider dealing cases. Consequently, by SIDO s.26A(4), the civil law principles in RHC Order 62 must govern any exercise of the Tribunal' s discretion to award costs to a defendant. Criminal law cost considerations do not enter the picture.

22. The basic principle in the award of costs under s.26A(1) must be Order 62, Rule 3(2). That provides that costs should:-

> "follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs" .

23. Indeed, I do not understand Mr. Cooney (who appears for the Financial Secretary as an interested party) to be vigorously contending that criminal law principles apply to the award of costs.

24. Instead, Mr. Cooney himself strongly relies on guidelines provided by the civil case of *Ritter v. Godfrey* [1920] 2 KB 47 (CA). There Atkin LJ suggested (at 60):-

> "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

25. To the extent then that the Tribunal applied criminal law cost considerations, the Tribunal must have erred in law.

26. However, Mr. Cooney argues that, in any event, the 2 specific reasons which the Tribunal gave for refusing costs were wholly in keeping with *Ritter*.

27. First, Mr. Kung' s lies (Mr. Cooney submits) fall within the 2nd consideration stated by Atkin LJ. Mr. Kung' s earlier lies to the SFC (Mr. Cooney argues) were connected with the institution of the inquiry and occasioned unnecessary litigation and expense.

28. My difficulty with this submission is that the Tribunal held that SIDO s.26A(5)(d) was not applicable. Thus, the Tribunal expressly accepted

that Mr. Kung's lies did not cause or bring about (whether wholly or in part) the institution of the inquiry. In those premises, I do not see how the Tribunal could also conclude that Mr. Kung's lies were connected with the institution of the inquiry for the purposes of the test in *Ritter*. That would be contradictory.

29. The Tribunal in fact merely said that to award costs would be to "reward mendacity and deceit".

30. In so stating, the Tribunal does not seem to have taken into account that Mr. Kung was only asking for costs incurred from a date following his voluntary statement. The Tribunal does not appear to have addressed the desirability of encouraging a defendant to make a clean breast of his wrong and to tell the truth at the earliest opportunity. It therefore seems to me that the first limb of the Tribunal's reasoning was too broad a basis on which to refuse costs. I do not see how the award of costs from a date 6 weeks following Mr. Kung's honest confession can be characterised as rewarding mendacity.

31. It is true that Atkin LJ's 2nd consideration includes "improper conduct in or connected with the litigation calculated to defeat or delay justice" (*Ritter* at 61). But here once the inquiry or "litigation" was commenced, Mr. Kung admitted his lies by a voluntary statement. Given the making of such statement, I do not think that Mr. Kung can be said to have acted to defeat or delay the progress of the inquiry.

32. Accordingly, even if the Tribunal was purporting to apply *Ritter* by its first reason, the Tribunal's decision would still be untenable.

33. Second, Mr. Cooney argues that the Tribunal's other basis for refusing costs falls within the 3rd category of situations described in *Ritter*. Mr. Kung's conduct in allowing Mr. Poon to use the Worldsec account (Mr. Cooney suggests) constituted a wrongful act in the course of the insider dealing transactions of which complaint is made.

34. The Tribunal in fact merely said that Mr. Kung had been "grossly negligent" in allowing Mr. Poon to use his account without exercising any control. It is far from clear to me on what basis the Tribunal found Mr. Kung

to be negligent, much less grossly negligent.

35. The Tribunal found that Mr. Poon engaged in insider dealing out of Mr Kung's account on 16 and 23 May 1997.

36. The Worldsec account had been dormant for some time before Mr. Kung noticed that Mr. Poon was using it to execute trades. Mr. Kung only made the discovery around 15 to 17 May 1997 by his recollection. He made a note to speak to Mr. Poon about it.

37. In the event, Mr. Poon called Mr. Kung first and asked whether he could use the account for his own trades. Mr. Kung said it was "OK" provided any profits or losses would be Mr. Poon's. Mr. Kung explained in his voluntary statement that he agreed because Mr. Poon was a long-time friend whom Mr. Kung trusted and whose business relationship he valued.

38. On that evidence (which the Tribunal accepted), I do not think that Mr. Kung can reasonably be said to have been negligent. There are simply no findings of fact to back the Tribunal's second reason. The Tribunal's assertion of negligence instead raises many unanswered questions: To whom did Mr. Kung owe a duty of care? When precisely was any such duty breached? How was any such breach causative of Mr. Poon's insider dealing?

39. The Tribunal went so far as to say that Mr. Kung's conduct amounted to "condoning" or "hiding possible inappropriate or illegal transactions" on the part of Mr. Poon. But this conclusion is unjustified. As the Tribunal itself found (at 1st Report pp.70-1), there was just no evidence that Mr. Kung had knowledge of relevant information to have enabled him to conclude that there was insider dealing by Mr. Poon.

40. Mr. Cooney submits that the Tribunal might have had in mind evidence of Mr. Kung's knowledge as to possible insider dealing by Mr. Poon in connection with Agrol Investment Company Limited. That evidence is said to have emerged from Mr. Kung's cross-examination. However, there is no indication in the 1st or 2nd Reports that this material is what the Tribunal had in mind when giving its second reason. On the contrary, the Tribunal does not appear to have made findings in relation to

Agrol. In the absence of cogent findings, Mr. Cooney's suggestion amounts to pure speculation.

41. Consequently, it seems to me that the Tribunal's second reason for denying costs was likewise a flawed exercise of discretion.

42. In my judgment, the Tribunal's refusal to refuse costs was arrived at in error. I come to this conclusion on 3 grounds. First, in referring to the criminal law, the Tribunal applied the wrong approach. Second, on analysis, the Tribunal's decision on costs cannot be characterised as an exercise of discretion consonant with the principles of civil law in *Ritter*. Third, the Tribunal's express reasons were inconsistent with its acceptance of Mr. Kung's statement.

IV. Conclusion

43. The Tribunal's decision refusing costs to Mr. Kung is quashed. I think that no reasonable tribunal could arrive at any conclusion other than that, Mr. Kung having effectively prevailed on the allegation of involvement in insider dealing, he should have his costs as from 1 May 2001. I propose to substitute an Order granting Mr. Kung such costs.

Hon Chu J:-

44. I agree. I agree too that in the circumstances of this case it is appropriate for this Court to make the Order proposed by Reyes J instead of remitting the matter to the Tribunal for re-consideration.

(C Chu)
Judge of the Court of First Instance
High Court

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr. Barrie Barlow, instructed by Messrs. Minter Ellison, for the Applicant

Respondent in person - absent

Mr. Nicholas Cooney, instructed by the Department of Justice, for the Interested Party

Insider Dealing Tribunal Inquiry into HKCB Bank Holding Company Ltd & Hong Kong China Ltd

Annexure 2

Judgment of the Court of Appeal

Annexure 2

CACV 176/2006

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL

CIVIL APPEAL NO. 176 OF 2006

(ON APPEAL FROM HCAL 120 OF 2005)

BETWEEN

Edmund Kung Chiu Nam	Applicant
and	
The Insider Dealing Tribunal	Respondent
and	
The Financial Secretary	Interested Party

Before : Hon Cheung JA, Yuen JA and Waung J in Court

Date of Hearing : 11 January 2007

Date of Judgment : 23 January 2007

J U D G M E N T

Hon Cheung JA :

The background

1. On 2 November 2000 the Financial Secretary issued a notice pursuant to section 16 of the *Securities (Insider Dealing) Ordinance*, Cap. 395 ('*S(ID)O*') requesting the Insider Dealing Tribunal ('the Tribunal') to conduct an inquiry on whether there had been insider dealing in relation to the listed securities of two companies, namely, the HKCB Bank Holding Company Limited ('HKCB') and Hong Kong China Limited (renamed as Lippo China Resources Limited) ('HKC') by Mr. Carlton Poon Kam Tao ('Mr. Poon'), Mr. Edmund Kung Chiu Nam ('Mr. Kung') and two other persons.

2. The request for inquiry arose out of trading in these two companies' securities in May 1997 through an account in Mr. Kung's name at Worldsec International Limited ('Worldsec'). Worldsec was a brokerage firm of which Mr. Poon was a director and a market analyst.

3. Mr. Kung's account in Worldsec was set up and operated as a discretionary account by Mr. Poon. Starting at the beginning of 1993 Mr. Poon had used this account to conduct certain of his own personal trades. Mr. Kung had agreed to him doing this provided Mr. Poon kept track of those trades and kept the dealings separate.

4. Before the section 16 notice was issued, the Securities and Futures Commission ('SFC') had investigated the trade of the securities of these two companies on suspicion of insider dealing. When the SFC officers interviewed Mr Kung on 13 May 1998 he told them that he had given instructions for the purchase of the securities. Mr Poon himself had been interviewed by the SFC and in anticipation of the SFC interviewing Mr. Kung, persuaded Mr. Kung to mislead the SFC about the transactions in HKCB and HKC by falsely telling the investigators that Mr. Kung himself had given specific instructions for these purchases.

5. Mr. Kung maintained his story in correspondence with the SFC and during a second interview on 8 August 1998.

6. On learning that he was to be an implicated person in the insider dealing inquiry and after he had taken legal advice Mr. Kung told the SFC investigators on 26 March 2001 that he had permitted Mr. Poon to use his account and that Mr. Poon had purchased the securities without his knowledge.

7. Pursuant to the section 16 notice the Tribunal comprising of Mr. Justice Lugar Mawson (now retired) as chairman and two members conducted the inquiry. It took place between 16 July 2001 and 11 October 2004.

8. The conclusion by the Tribunal was that Mr. Poon and his wife had engaged in insider dealing of the securities. As to Mr. Kung the Tribunal found that

> 'As we accept Edmund Kung's evidence in substance, the trades carried out in his account were not his and were carried out without any of the information needed to constitute insider dealing on his part.
>
> Even had we believed and accepted Carlton Poon's evidence of what happened between Edmund Kung and himself; that would not provide evidence that Edmund Kung had the necessary knowledge of relevant information for him to have acted in contravention of section 9(1)(e) of the Ordinance (i.e. the *S(ID)O*).'

9. Mr. Kung then applied for his costs of the inquiry from 1 May 2001 which was about six weeks after he told the SFC investigators that he had permitted Mr. Poon to use his account and that Mr. Poon had purchased the securities without his knowledge. The Tribunal refused to award him costs.

The judicial review

10. Mr. Kung applied by way of judicial review to challenge that decision. The judicial review was heard by Chu J and Reyes J of the Court of First Instance of the High Court ('the Full Bench'). The Full Bench quashed the order of the Tribunal and awarded costs of the inquiry in favour of Mr. Kung.

The appeal

11. The Financial Secretary who is an interested party in these proceedings now appeals against that decision.

Section 26A

12. The award of costs in relation to the inquiry at the time when the application for costs was made was governed by section 26A of the *S(ID)O*. It provided that

> (1) Subject to subsection (5), at the conclusion of an inquiry or as soon as reasonably practicable thereafter, the Tribunal may award to—
>
> *(a)* any witness;
>
> *(b)* any person whose conduct is, in whole or in part, the subject of the inquiry,
>
> such sum as it thinks fit in respect of the costs reasonably incurred by him in relation to the inquiry.
>
> (2) Any costs awarded by the Tribunal under subsection (1) shall be charged on the general revenue.
>
> (3) The Tribunal may order that any costs awarded under subsection (1) may be taxed on the basis of any one of the scales of costs set out in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.).
>
> (4) Subject to any rules made by the Chief Justice under section 36, Order 62 of the Rules of the High Court (Cap. 4 sub. leg.) shall apply to the award and taxation of any costs awarded by the Tribunal under this section.
>
> (5) This section shall not apply to any person referred to in subsection (1) who is—
>
> *(a)* a person who has been identified as an insider dealer in a determination under section 16(3);
>
> *(b)* an officer of a corporation who has been identified as such officer in a determination under section 16(4);
>
> *(c)* a person who and in respect of whom it

appears to the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the Tribunal to inquire into his conduct subsequent to the institution of the inquiry under section 16 or during the course of that inquiry; or

(d) any other person who and in respect of whom it appears to the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the institution of the inquiry under section 16.'

13. Section 26A(5) precluded four categories of persons from applying for costs, one of which was someone who by his own acts or omissions caused or brought about (whether wholly or in part) the institution of the inquiry under section 16. An issue that arose before the Tribunal was whether Mr. Kung was such a person. The Tribunal ruled that Mr. Kung was not such a person and hence it had jurisdiction to consider his application for costs.

14. Section 26A(4) expressly provided that subject to any rules made by the Chief Justice, Order 62 of the *Rules of the High Court* shall apply to the award and taxation of any costs awarded by the Tribunal under this section.

15. No rules had been made by the Chief Justice under section 36. Notwithstanding the reference to the provisions of Order 62 the Tribunal held that it was not precluded from applying the principles in criminal cases in the exercise of the discretion on costs. It relied on the principle in criminal cases that costs should be denied to an acquitted defendant where his conduct has

brought suspicion on himself or misled the investigating authorities into thinking that the case against him is stronger than it is.

Reasons given by the Tribunal

16. The reasons given by the Tribunal that Mr. Kung should be deprived of costs were first that Mr. Kung had lied. It held that

> 'Were we to grant Edmund Kung his costs we would only be rewarding deceit and mendacity'.

17. The second reason was that

> 'Mr. Kung allowed Mr. Poon to use his account without excising any form of control over how Mr. Poon used it. At the very least he was grossly negligent in that regard. At the worst it could be said that he was condoning or hiding possible inappropriate or illegal transactions on Carlton Poon's part'.

Civil or criminal principles?

18. The Full Bench held that it was wrong to apply the principle in criminal cases in considering costs. The only basis for the exercise of discretion should be under the provisions of Order 62.

19. I agree with this view. The wording in sections 26A(3) and (4) provided the clearest indication as to how the award of costs should be made and they were to be made on the basis of Order 62 of the *Rules of the High Court*. There was no room for

the application of the principle in criminal cases. Mr. Cooney, counsel for the Financial Secretary, did not argue otherwise.

The correct principles

20. The correct principles are : first, under Order 62, rule 2(4) the award of costs is in the discretion of the Court; second, under Order 62, rule 3(2) the Court in the exercise of the discretion should order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other orders should be made as to the whole or any part of the costs. In the context of this case the reference to the Court will be substituted with that of the Tribunal.

21. In *Ritter v. Godfrey* [1920] 2 KB 47 it was held by Atkin LJ that in the case of a wholly successful defendant the judge must award him costs unless there is evidence

1) that the defendant brought about the litigation; or

2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense; or

3) has done some wrongful act in the course of the transaction of which the plaintiff complains.

The Full Bench's approach

22. As the Tribunal had applied the wrong test in awarding costs it had not properly exercised the discretion and the decision was vitiated. I would have thought that the appropriate order then would be for the Full Bench to quash the decision and remit the matter to the Tribunal for reconsideration based on the correct principles.

23. I am aware that Mr. Justice Lugar-Mawson had since retired and no longer lives in Hong Kong and if the matter was to be remitted to the Tribunal, there might be practical difficulties involved in reconstituting the Tribunal. But these were matters for the Administration to resolve.

24. Instead of doing so, the Full Bench then considered and rejected the two reasons given by the Tribunal. It considered how the discretion should be exercised, exercised the discretion itself and awarded the costs of the inquiry to Mr. Kung. Reyes J who delivered the main judgment of the Full Bench held that,

> '43. The Tribunal's decision refusing costs to Mr. Kung is quashed. I think that no reasonable tribunal could arrive at any conclusion other than that, Mr. Kung having effectively prevailed on the allegation of involvement in insider dealing, he should have his costs as from 1 May 2001. I propose to substitute an Order granting Mr. Kung such costs.'.

25. Chu J held that,

> '44. I agree. I agree too that in the circumstances of this case it is appropriate for this Court to make the Order proposed by Reyes J instead of remitting the matter to the Tribunal for re-consideration.'

The Court lacks jurisdiction

26. In my view the Full Bench was wrong to exercise the discretion itself because section 26A does not confer jurisdiction on the Court to exercise the discretion itself. This has been authoritatively decided by the Court of Final Appeal in *Financial Secretary v. Wong* (2003) 6 HKCFAR. At paragraph 71 of the judgment Ribeiro PJ held that 'the Court lacks jurisdiction to make such an order'. He further held (at page 505),

> 71. ....the particular order proposed to be made as a consequential order is an order for costs which is a matter expressly regulated and, indeed, constrained, by statute, namely, by s.52A of the High Court Ordinance (Cap.4) and s.26A of the Ordinance. One must obviously give effect to those statutory provisions and the general power to make consequential orders cannot displace or be exercised inconsistently with any constraints imposed by such provisions.
>
> 72. Section 52A confers on the Court a statutory power to award costs, subject to rules of court, in respect of "the costs of and incidental to all proceedings in the Court of Appeal in its civil jurisdiction and in the Court of First Instance," with full power to determine by whom and to what extent the costs are to be paid. This Court enjoys the same power by virtue of s.17 of its statute. This is, however, a power to award costs of and incidental to proceedings before the Court itself and does not empower the Court to make such orders in respect of non-court proceedings.
>
> 73. It is s.26A which specifically addresses the entitlement to costs of persons implicated in an insider dealing inquiry. It plainly seeks to provide a complete code concerning such entitlement. Thus, it expressly

> allocates liability for such costs as a charge on the general revenue. It provides for such costs to be taxed on one of the bases of taxation provided for by the High Court Rules and makes O.62 of those Rules generally applicable to such costs. Most importantly, it restricts eligibility to such costs to those implicated persons who have neither been identified as insider dealers nor been found to have brought the inquiry on themselves.
>
> 74. In my view, that legislative framework does not allow room for the Court to make a costs order at large, which is not subject to any such constraints, purely on the jurisdictional basis that it is consequential to an order quashing the Tribunal's findings. This is particularly so where the payment of those costs is to be met out of the general revenue. It is for the legislature and not the Courts to determine what is and what is not to be a charge on the general revenue. The legislature has expressly made such provision in respect of the costs of implicated persons in insider dealing proceedings, subjecting such entitlement to the conditions specified in s.26A.'

27. Similar views were expressed by Chan PJ and Litton NPJ. Although Bokhary PJ was of the view that the Court might have jurisdiction, he was prepared to abide by the majority view. Millett NPJ agreed with Bokhary PJ.

28. In *Wong* the application for costs was premature because the inquiry had not been concluded. This was contrary to section 26A. I do not regard the view expressed by the Court in *Wong* on jurisdiction to be confined to the fact that the application was pre maturely made. In my view the decision the Court made on jurisdiction was of general application.

Amendment of notice of appeal

29. The lack of jurisdiction of the High Court to deal with the costs of the inquiry was not one of the grounds of appeal in the Notice of Appeal. The Court at the beginning of the appeal invited counsel to address us on this point. Mr. Cooney said he intended to rely on this point and he had notified Mr. Kung's lawyers before the hearing of his intention to amend the Notice of Appeal. Mr. Barlow, counsel for Mr. Kung, opposed the application. We allowed the amendment because the question of jurisdiction was clearly a highly relevant matter in this case.

The 'mix and match' approach

30. In my view, in light of the decision in *Wong* the High Court in judicial review proceedings when considering the lawfulness of the exercise of discretion by the Tribunal should adopt the following approach : if it finds that the decision was unlawful in the sense that it was erroneously exercised or based on wrong principles, it may, of course, quash the decision and remit the decision to the Tribunal for further consideration. However it does not have jurisdiction to exercise the discretion itself.

31. The Full Bench's approach might well be due to the submission of Mr. Cooney who had invited it to dismiss the judicial review. He submitted to the Full Bench, as he did before us, that the Tribunal had considered the conduct of Mr. Kung in

refusing him costs and that the Tribunal had in effect adopted the second and third principles laid down by Atkin LJ in *Ritter*.

32. In my view it is wrong to adopt this approach. This is tantamount to fitting the reasons provided by the Tribunal into another set of well established principles which in fact had not been relied upon by the Tribunal in the first place.

33. The two sets of principles although similar are not identical. As Litton PJ (as he then was) observed at page 535 in *Tong Cun Lin v. HKSAR* (1999) 2 HKCFAR 531, which was a criminal case dealing with the costs application by an acquitted person :

> 'Since, however, the discretion is being exercised in the context of an *acquittal* — the averments constituting the charges having been found by the jury as *not* amounting to the crimes alleged — it follows that, generally speaking, the conduct most relevant to the matters under consideration must be the defendant's conduct during the investigation and at the trial: How he first responded to the investigators, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, etc. Wrapped up with this is the strength of the case against the defendant and the circumstances under which he came to be acquitted: These too are relevant to the exercise of the discretion to deprive him of his costs, so long as the judge is not, indirectly, thereby punishing him by taking a view of the facts palpably different from that taken by the jury and reflected in the not-guilty verdict. The person in the best position to weigh those matters is clearly the judge himself.'

34. The emphasis in criminal cases is on events *in the investigation and at the trial* whereas in civil cases as the third situation in *Ritter* shows the Court is also entitled to look at

events connected with the underlying transaction as well. In my view it is wrong to suggest that somehow one can 'mix and match' the two sets of principles. The fact that the Tribunal might have relied on reasons which might fit into another set of principles does not mean that the Tribunal had properly focused on the correct principles.

Exercise of discretion

35. Mr. Barlow opposed the matter to be remitted to the Tribunal. He submitted that first, the Full Bench did not exercise the discretion itself and he had not asked the Full Bench to exercise the discretion which he accepted could only be exercised by the Tribunal. He referred to the Form 86A in which the relief he sought was first for a *certiorai* to quash the decision of the Tribunal and then

> 'An order of mandamus requiring the Tribunal to award to the Applicant the costs reasonably incurred by him in relation to the inquiry.'

36. The same relief was sought in the Notice of Motion for Judicial Review. Mr. Barlow submitted that the wording of the Full Bench's order did not accurately reflect the relief that Mr. Kung had sought from the Full Bench.

37. Consequential upon granting leave to the Financial Secretary to amend the notice of appeal we also allowed Mr. Barlow's application to serve a respondent's notice out of

time whereby he sought the following order in place of the original order made by the Full Bench :

> '2. An order of mandamus hereby issues to require the Insider Dealing Tribunal to perform their public duty under s. 26A of the Securities (Insider Dealing) Ordinance, Cap. 395 by awarding the Applicant the costs reasonably incurred by him in relation to the Inquiry from 1st May 2001 to be taxed if not agreed — which the Insider Dealing Tribunal may do in writing without the necessity of a formal meeting.'

38. The original order made by the Full Bench was :

> '2. The Applicant be awarded the costs reasonably incurred by him in relation to the Inquiry from 1 May 2001 to be taxed if not agreed.'

39. I do not regard the proposed order and the actual order made by the Full Bench to be concerned only with matters of form and not substance.

40. In my view the Full Bench had exercised the discretion itself. The judgments I have quoted earlier speak for themselves.

Error of the Full Bench

41. Secondly, Mr. Barlow submitted that the Financial Secretary had not demonstrated how the Full Bench had erred at all: as a general rule a successful party is entitled to his costs and since the Full Bench had found the two reasons given by the

Tribunal were wrong it means the decision of the Tribunal was vitiated and Mr. Kung should be entitled to his costs.

42. I am also unable to accept this submission because it proceeds on the basis that in the first place the Tribunal had applied the correct principles but only came to an erroneous decision. In my view the fundamental mistake made by the Tribunal was that it had not applied the correct principles in the first place. Once this has been identified it means that the discretion had not been properly exercised at all. The fact that the Full Bench did not agree with the two reasons given by the Tribunal does not mean that Mr. Kung should be entitled to his costs. And as the Full Bench has no jurisdiction in the matter, the discretion could not be exercised afresh.

43. Even if, for the purpose of argument, the Full Bench had only considered the lawfulness of the decision of the Tribunal and that it was entitled to do so by reference to two of the principles in *Ritter*, I am still of the view that its rejection of the first of the two reasons given by the Tribunal was plainly wrong.

44. The giving of a false statement by Mr. Kung did not preclude his case from coming within the second principle in *Ritter*, namely, it was something done which was connected with the institution or conduct of the investigation which eventually led to the inquiry. The purpose was to cause unnecessary delay in the inquiry and expense. The fact that Mr. Kung was found by the Tribunal not to have brought about the inquiry which was covered by the first principle in *Ritter* does not preclude this

reason from being applied. The focus of the first principle in *Ritter* must be on whether Mr. Kung was engaged in insider dealing, while the second principle was in respect of his conduct in the course of the investigation which led to the inquiry.

45. This error vitiates the Full Bench's decision and as such it is not necessary for me to comment further on its rejection of the second reason of the Tribunal. Whether the third principle is also engaged has to be considered by the Tribunal in the light of the evidence it had heard.

The best person to deal with costs

46. Mr. Barlow described the defences of Mr. Kung and Mr. Poon at the inquiry as a 'cut throat' defence. Although in the First Report of the Tribunal at page 149, the Tribunal stated that

> 'Carlton Poon lied in his interviews with the SFC and he compounded this by requesting Edmund Kung to lie to the SFC when they interviewed him on 13 May 1998. Both men admit this.' (emphasis added),

Mr. Barlow also informed the Court that Mr. Poon's counsel challenged the correctness of Mr. Kung's corrective statement.

47. This is not a situation where Mr. Kung had been providing consistent statements which might assist the Tribunal in its task. The consequence of giving two contrary statements would mean that the Tribunal had to resolve the conflict in the evidence.

48. This Court does not know the length of time taken by the Tribunal to resolve the conflict. The Tribunal had conducted the inquiry over a substantial period of time. It must be the best person to decide on this issue and consequently whether Mr. Kung was entitled to costs.

49. Mr. Barlow had very properly referred to the Tribunal the principles in *Ritter* which the Tribunal chose not to adopt. He had also submitted to the Tribunal that it might consider applying a *Bullock* order (i.e. the Government was to pay Mr. Kung his costs which was to be recovered from Mr. Poon) or a *Sanderson* order (i.e. Mr. Poon paying Mr. Kung's costs directly). In my view the possibility of making these two types of order further emphasizes the importance of allowing the Tribunal who heard the evidence to make the decision on costs itself.

Conclusion

50. Accordingly I will allow the appeal to the extent that the order of costs made by the Full Bench is set aside and in its place there should be an order remitting Mr. Kung's application for costs to the Tribunal for consideration.

Costs of the court proceedings

51. The costs order that I propose to make are provisional in nature. Three sets of costs are involved :

1. Costs of the amendment of the Notice of Appeal

This is the amendment applied for on the day of the hearing of the appeal which has a substantial impact on the outcome of the case. The Financial Secretary should bear the costs incurred and thrown away by the amendment. This will include the costs incurred by Mr. Kung in respect of the respondent's notice.

2. Costs of the appeal

The Financial Secretary succeeded partially in the appeal, namely, setting aside the judgment of the Full Bench in awarding costs of the inquiry to Mr. Kung. He failed to affirm the decision on costs made by the Tribunal. He is entitled to half of the costs of the appeal.

3. Costs in the Court of First Instance

The Full Bench should only have quashed the order made by the Tribunal and should have remitted the matter to the Tribunal for consideration. In other words Mr. Kung only succeeded partially in the Court of First Instance. He is entitled to half of the costs there.

Hon Yuen JA :

52. I have had the benefit of reading in draft Cheung JA's judgment. I agree with it. In any event, the Tribunal should be asked to consider the issue of costs afresh, applying principles

under Order 62 and in the light of all the evidence it had heard, only part of which had been placed before the Full Bench. I agree with the order proposed by Cheung JA and with the order *nisi* as to costs.

Hon Waung J :

53. I agree with the judgment of Cheung JA.

(Peter Cheung) Justice of Appeal	(Maria Yuen) Justice of Appeal	(William Waung) Judge of the Court of First Instance

Mr. Barrie Barlow, instructed by Minter Ellison, for the Applicant

Respondent in person, absent

Mr. Nicholas Cooney, instructed by Department of Justice, for the Interested Party