INSIDER DEALING TRIBUNAL

IN THE MATTER of the Securities (Insider Dealing) Ordinance, Cap 395

and

IN THE MATTER of an Inquiry into certain dealings in the listed securities of Vanda Systems and Communications Holdings Limited

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Tribunal: Chairman: The Hon Mr. Justice McMahon

Members: Professor LAM Kin

Mr. NG Tze Kin, David

Dates of Hearing: 28th July - 2nd August 2005

Date of Delivery of Ruling: 9th August 2005

RULING

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1. Mr. Kevin Patterson represents CHONG Wai Lee, Charles (Charles CHONG) and Madam CHONG Bun Bun, Becky (Becky CHONG) for the purposes of the present applications. They are implicated persons in the present inquiry and are brother and sister. Mr. Patterson makes a series of applications on their behalf all of which seek the cessation of this inquiry so far as his clients are concerned.

2. Firstly, he argues that the present Tribunal lacks independence and impartiality because its lay members were selected by the Chairman who in doing so was acting as an arm of the executive, i.e. of the Financial Secretary. He says in this regard also that counsel assisting (at that time Mr. Duncan, SC and Mr. Dick HO of the Department of Justice) prior to their appointment as counsel assisting had advised the Financial Secretary in respect of the present inquiry, and so were in a position of conflict vis-à-vis their duties towards the Financial Secretary and the Tribunal. He says also, so far as the Tribunal's impartiality is concerned, that the present Tribunal became seized with another inquiry the subject of a section 16(2) notice (called "Harbour Ring" for convenience) which may involve implicated parties who are also implicated parties in the present inquiry, and in so doing may be perceived as being biased against the present implicated parties.

3. The second argument of Mr. Patterson is that the Tribunal failed to comply with the provisions of paragraph 17 of the Securities (Insider Dealing) Ordinance as it has been amended by sections 78 and 80(b) of Schedule 10 of the new Securities and Futures Ordinance. He says in this regard that the Tribunal should only arrive at a decision as to whom the implicated parties are at the first sitting of the Tribunal, that is either at the preliminary hearing (which it is accepted was a sitting of the Tribunal) or at a meeting held between the Tribunal and counsel assisting on the 31st March 2005 (if that was a sitting). In either case he says his clients were entitled to make representations as to whether or not they should have been regarded as implicated parties by the Tribunal.

4. Finally, Mr. Patterson says these proceedings should be stopped because of the five year three month delay between the share trading the subject of the inquiry in February 2000 and the commencement of proceedings at the preliminary hearing held in May 2005, which period includes a 17 month delay between the Tribunal's receipt of the section 16(2) notice from the Financial Secretary and the issuance of Salmon letters to the implicated parties.

5. Those applications require the resolution of a mixture of issues of facts and law. Accordingly, in this ruling by the Tribunal matters of fact were decided by all members,

matters of law by the Chairman alone, although for convenience sake a finding of either fact or law is referred to as that of the Tribunal.

6. As a preliminary matter Mr. Patterson originally sought to argue that the matters he complains of are breaches of the rights of his clients at common law and of their rights under Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance (the Bill of Rights) and of Article 14(1) and (3) of the International Covenant on Civil and Political Rights (the ICCPR). In this Tribunal's view Article 11 of the Bill of Rights and Article 14(3) of the ICCPR (which for present purposes are in the same terms) can have no application to these proceedings and Mr. Patterson was right to inform us during the course of his argument that he no longer relied on those two Articles. They are restricted in their terms to criminal matters. The present proceedings are civil in nature: see *R - v - Securities and Futures Commission* (1993) 3 HKPLR 1. They are governed only by Article 14(1) of the ICCPR and Article 10 of the Bill of Rights. Both Articles are in the same terms and we set out the relevant part of Article 10 only:-

" **Article 10**
Equality before courts and right to fair and public hearing

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,

> everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."
>
> [*cf. ICCPR Art. 14.1*]

In the present case we will proceed on the basis that the principles of fairness, independence and impartiality referred to in Article 10 (and Article 14(1) of the ICCPR) are indistinguishable with those principles as they exist in the common law: see *R - v - William HUNG* (1992) 2 HKCLR 90, *R - v - CHEUNG Wai Bun* (1993) 1 HKCLR 189.

THE TRIBUNAL'S LACK OF INDEPENDENCE AND IMPARTIALITY

7. We turn now to the first application by Mr. Patterson, to the effect this Tribunal lacks independence and impartiality.

8. There have been a number of tests of impartiality proposed by the courts here and overseas in recent years. In our view the appropriate test is that of the reasonable apprehension of bias favoured by the Court of Final Appeal in *Deacons - v - White & Case Ltd.* [2003] 3 HKC 374 which was based on the test proposed in the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 as refined in *Porter - v - Magill* [2002] 2 AC 357. That test was subsequently adopted by the Court of Appeal in *Sun Honest Development Ltd. - v - Appeal Tribunal (Buildings)*

CACV 254/2004. The test itself was definitively stated in *Porter - v - Magill* [2002] 2 AC 357 in this way:

> "The question is whether the fair minded and informed observer having considered the facts would conclude there was a real possibility that the Tribunal was biased."

That formulation of the test is the one we adopt for the purpose of these applications.

9. In support of his argument that this Tribunal lacks independence or impartiality Mr. Patterson relies primarily on two circumstances. He complains that it was wrong for the Chairman to select two individuals (who subsequently became the lay members in this inquiry) and have them nominated to the Financial Secretary for appointment.

10. He complains additionally that as counsel assisting the Tribunal at one time also advised the Financial Secretary about this case they themselves may be perceived as lacking impartiality and that perception may "taint" the Tribunal itself.

11. We will deal with those two complaints in turn.

The Chairman's Role in the Appointment of the Lay Members

12. The two lay members were appointed by the Financial Secretary on the 18th March 2005 pursuant to letters of appointment of that date.

13. Mr. Patterson argues that the "appointment" was such in name only and that in reality both members were in fact selected and nominated by the Chairman from a panel of prospective lay members and that the Financial Secretary merely rubber stamped a selection already made. Mr. Patterson says that is not a proper appointment.

14. It is true that the present members were selected from a list of prospective members by the Chairman and interviewed by him. It is accepted that interview was for the purpose of determining whether either lay member had any conflict of interest in this inquiry and whether the lay member's professional and personal commitments would allow him to sit during the anticipated timetable of the inquiry.

15. We might add that the panel of prospective members from which the present members were selected is compiled by the Financial Services and Treasury Bureau (FSB) and comprises persons who have volunteered their services from the academic, accountancy, legal and various commercial fields in Hong Kong, and includes many retired individuals and others

whose working hours allow them better opportunities to sit as members of the Tribunal. All have some form of working or professional experience which qualifies them as a matter of practicality to sit as lay members.

16. The lay members' personal particulars were then forwarded to the ICAC for "vetting". The results of that were then provided to the Tribunal in brief form to the effect that there was no objection to the two members being appointed to the Tribunal.

17. The members' names were then forwarded to the FSB, which is under the supervision of the Financial Secretary, under a covering memorandum which requested the formal appointment of the two members and included also the results of the ICAC "vetting" which had earlier taken place.

18. That memorandum was in these terms:

> "2. Mr Ng and Professor Lam have seen the Dramatis Personae and the synopsis of the evidence of the inquiry during an interview by the Chairman and they have indicated that there is no conflict of interest if they were appointed as members for the inquiry. ICAC vetting on Mr Ng and Professor Lam have been completed and the vetting result is set out in ICAC's memos ... dated 20 January and 10 March 2005 respectively, a copy each of which together with our requesting memos is attached for

> your reference. The curriculum vitae of Mr Ng and Professor Lam are also enclosed."

Then, following a brief description of the personal particulars of the two lay members, the memorandum concluded:-

> "4. I should be grateful if you would arrange for their formal appointment as IDT members under section 15(2) of the Securities (Insider Dealing) Ordinance, Cap. 395 by the Financial Secretary."

All correspondence relating to the nomination and appointment process was disclosed to the implicated parties.

19. In the Tribunal's view, there is a plain difference in functions concerning "nominating" or "recommending" someone for appointment and the act of appointment itself.

20. Section 15(2) of the Securities (Insider Dealing) Ordinance Cap. 395 makes this distinction as does paragraph 18 of the Schedule to it. If, as seems clear to this Tribunal, the two functions are different then the exercise of one by the Chairman does not preclude the proper exercise of the other by the Financial Secretary.

21. Further, if the legislation is silent as to who shall recommend or nominate members then there can be no prohibition express or implied on the Chairman making such a

recommendation. Any such recommendation or nomination does not operate to prevent the Financial Secretary's discretion in appointing the proposed lay members being exercised. Any absence of legislation as to who may recommend the appointment of a lay member does not mean it is intended the Financial Secretary must take it upon himself to search for and find suitable persons to be then appointed as lay members to the Tribunal.

22. A person vested with a power, such as the Financial Secretary has in the present case, can accept advice, recommendations or urgings from any source he reasonably regards as proper and fit to offer such advice or recommendation. In this Tribunal's view the Financial Secretary was acting properly in considering and deciding to appoint the members on the recommendation of the Chairman.

23. Subsequently each of the present members received a letter of appointment signed by the Financial Secretary in these terms:-

> "I hereby appoint you in accordance with section 15(2) of the Ordinance to be a member of the Insider Dealing Tribunal for the inquiry specified in this letter."

24. Whatever the terminology of the covering letter which provided the names of the present members to the FSB

the reality was that it remained a matter for the Financial Secretary's discretion as to whether to appoint the present members or not. Obviously he had to have some information before him which he could take into account before he exercised his discretion. That information comprised the nomination of them through the FSB by the Chairman of this Tribunal to the effect that they had no apparent conflict of interest in the subject matter of the inquiry or with the witnesses who were to be called, as well as the favourable report upon them by the ICAC. In our judgment that is sufficient information for the Financial Secretary to properly determine whether the members should or should not be appointed.

25. It most certainly was not a "rubber stamp" exercise as suggested by Mr. Patterson. The decision to appoint the two lay members was the Financial Secretary's based on the information before him. It may be that the two lay members were selected from the panel of prospective members, and were interviewed by the Chairman prior to being nominated or recommended by the Secretary of the Tribunal for appointment, but the function of appointment was not removed from the hands of the Financial Secretary, and the lay members in this Tribunal were properly appointed.

26. As a corollary to his argument in this regard Mr. Patterson also suggests by selecting the members in the way he

did the Chairman became the unofficial delegate of the Financial Secretary and performed a role which the Financial Secretary should have performed, and thereby lost his independence and impartiality in these proceedings.

27. Unlike provisions for the appointment of the Chairman and counsel assisting, there is no provision in the Securities (Insider Dealing) Ordinance ("SIDO") for the formal recommendation to the Financial Secretary of persons as lay members. Perhaps there should be.

28. But that does not mean that there can be no recommendation. As we have said the Financial Secretary is entitled to accept nominations as to the appointment of lay members to Tribunals from whatever source he reasonably regards as appropriate. Equally in selecting the candidates for appointment the Chairman was acting reasonably. He is in the best position to know the timetable of his inquiry and to explain to lay members how the inquiry will be conducted and what issues may arise. He is in the best position to determine whether a potential member may have a conflict of interest.

29. The Chairman was acting for proper reasons in selecting and recommending the lay members for appointment. In doing so the Chairman did not compromise the independence or impartiality of the Tribunal. Indeed, if one were to be

pedantic the Chairman was, by so doing, going some way to limit the influence of the Financial Secretary on the composition of the Tribunal. That is a step towards the independence and impartiality of the Tribunal.

30. No fair minded persons in those circumstances in this Tribunal's view would regard the selection by the Chairman and appointment of the lay members by the Financial Secretary as generating any possibility of this Tribunal being biased. That is particularly so given the fact that all Tribunals since the commencement of SIDO have had lay members appointed in like manner. As was said by Laws LJ in *R - v - Spear* (2001) QB 804 at 819 in dealing with the reasonable man's apprehension of bias, the test was (under article 6(1) of the Convention for Protection of Human Rights and Fundamental Freedoms as incorporated into English Law):-

> "Would the reasonable man apprised of all the relevant facts about the particular case and the general practice conclude that there existed any real doubt as to the court's impartiality or independence."
>
> (*emphasis in judgment*)

31. In this Tribunal's view the fact that this Tribunal in the present inquiry has adopted a practice general to all earlier inquiries is a factor operating against any apprehension of bias in the mind of a fair minded observer of this particular inquiry.

The Role of Counsel Assisting

32. The second challenge to the independence and impartiality of this Tribunal is mounted by Mr. Patterson in this way.

33. He says because counsel assisting the inquiry (who were originally Mr. Duncan SC and Mr. Dick HO of the Department of Justice, Mr. Duncan being replaced at the conclusion of the preliminary hearings by Mr. Marash SC) had previously acted as advisors to the Financial Secretary (via the FSB) so far as the subject matter of this inquiry is concerned, then they lacked independence and impartiality when they were appointed as counsel assisting the Tribunal and that in turn tainted this Tribunal.

34. Mr. HO disclosed his involvement with the provision of advice to the FSB. A statement summarising his role in that regard was provided to the Tribunal in open court.

35. It was as follows:-

> "**Chronology of issue of section 16(2) notice**
>
> (1) When the SFC completed its investigation in to the Vanda matter, it submitted a report to Financial Services & Treasury Bureau.

(2) FSTB then asked DoJ for legal advice, which in the case of Vanda, was provided by senior council from outside the DoJ [not Mr. D.Y. Marash S.C.]. Dick HO (Government Counsel in Civil Litigation Unit) acted as instructing solicitor.

(3) After considering that legal advice, FS issued a section 16(2) Notice to the Tribunal."

The outside counsel referred to was Mr. Duncan, SC. The advice presumably was as to the issuance of the section 16(2) notice and its terms.

36. We have given careful consideration to Mr. Patterson's complaint in this regard. As a general rule we think it proper to say that it is desirable that so far as is possible the role of counsel advising the Financial Secretary (whether directly or through the FSB) or any other governmental body involved in the investigation, or initiation or assessment of such investigation, should be kept separate from the role of counsel assisting any subsequent inquiry into those same matters.

37. But the question before us is whether in the circumstances of the present inquiry the roles of Mr. Duncan SC and Mr. HO in advising the FSB prior to their appointment as counsel assisting the present Tribunal could give rise in the mind of our notional objective observer to the conclusion that there was a real possibility this Tribunal was biased.

38. We have decided that any such observer would dismiss that possibility.

39. Firstly, Mr. Patterson does not suggest any actual bias on the part of either the Tribunal or of counsel assisting. He suggests in this regard only that the Tribunal has incurred the appearance of possible bias through its association with counsel who themselves have incurred the appearance of possible bias by advising the FSB prior to the issue of the section 16(2) notice.

40. That, to us, seems something less than an immediate connection between this Tribunal and the circumstances giving rise to the alleged apprehension of bias.

41. Secondly, Mr. Marash SC now (for unrelated reasons) replaces Mr. Duncan SC. That occurred at an early stage in this inquiry and before the calling of any evidence. The only involvement the Tribunal had with Mr. Duncan was to meet with him and Mr. HO twice prior to the preliminary hearing in this inquiry.

42. At those meetings (which we will shortly categorise as such, though Mr. Patterson argues they were "sittings") the Tribunal discussed primarily one topic; that is, which persons were to be served with Salmon "A" letters (which is the

generally accepted method of informing someone that they are considered to be an implicated party).

43. Of the present eleven implicated persons no material advice was sought from or given by either Mr. Duncan or Mr. HO as to whether those persons should be regarded as implicated persons. The Tribunal required no assistance from counsel in that regard. The real issue was whether there were other persons who had dealt in the shares of the subject company and if so whether they should be considered as implicated persons.

44. In other words there was no material input by counsel assisting at those two meetings as to whether the present implicated persons (including Mr. Patterson's clients) should be regarded as such. That is plain from the transcript prepared of those two meetings. The decision as to the present implicated persons being so regarded was plainly that of the Tribunal members. The discussions between counsel assisting and the Tribunal members (principally the Chairman) revolved around those other persons who were eventually decided by the Tribunal, after the provision of further material to it at a subsequent date, not to be under sufficient suspicion to warrant amendment to the section 16(2) notice and the issue to them of Salmon letters. No realistic possibility exists, from the contents of those meetings, of the Tribunal being influenced by

counsel assisting adversely to the interests of the implicated parties.

45. Thirdly, the advice that counsel gave to the FSB was not advice to a party to these proceedings. The Financial Secretary (who is the person to whom that Bureau reports) is, in inquiries such as this, a somewhat neutral entity. He simply orders that an inquiry be conducted and does so by way of a notice to the Chairman pursuant to section 16(2) of SIDO. That notice does not specify who the implicated parties are (that is a matter to be subsequently determined by the Tribunal), nor does it suggest suspicion falls on any individual. It simply requires that the Tribunal inquire into certain share trading events and report whether there has been insider dealing, if so by whom and in what degree.

46. In other words counsel's role in advising the FSB, though undesirable, was of lesser importance in considering questions of bias than if, for example, they had advised the Securities and Futures Commission, who are the investigators of the subject matter of this inquiry, and who effectively report their conclusions to the FSB.

47. So far as the role of counsel assisting to date is concerned we wish to specifically refer to Mr. HO. He was junior counsel initially to Mr. Duncan SC and now to Mr.

Marash SC. His role in providing advice to the FSB was, in those circumstances relatively minor. Mr. Duncan no doubt provided the advice after Mr. HO briefed him. In those circumstances his real involvement as a matter of fact with the FSB was that of a "go between", Mr. Duncan having the conduct of the advice. Nevertheless, though we do not think Mr. HO's continuing presence in this inquiry as junior counsel assisting could give rise to any sensible apprehension in the mind of an informed observer that either he, or more importantly, that through him this Tribunal, was biased or lacked impartiality we think it right to say in accordance with what we have said earlier that if reasonably possible it is best Mr. HO should be replaced as junior counsel so as to preserve the separation between the roles of counsel we think is desirable. That is in no way to cast any aspersion upon Mr. HO. He has in this inquiry conducted himself entirely properly and with a high degree of professionalism.

Harbour Ring

48. Mr. Patterson mounted one last argument concerning the lack of independence or impartiality of this Tribunal. It relates to the Chairman's involvement in deciding that this inquiry should proceed separately and prior to another inquiry (to be held in Division 3 of the Tribunal) which may involve at least some of the implicated parties in the present inquiry.

49. Mr. Patterson says by the Chairman so deciding this Tribunal has seized jurisdiction of the other inquiry and dealt with his clients in a way which lacked impartiality because that decision was made without input from the CHONG's and abrogated their rights in that regard.

50. We must confess we found it somewhat difficult to follow this argument. But in any event are satisfied that the Chairman's decision to proceed with this inquiry in advance of and separately from the Harbour Ring inquiry in no way impinged upon the rights of any party implicated in the present inquiry. It certainly does not suggest any lack of impartiality in the present Tribunal.

51. For one thing all dealings with Harbour Ring by the Chairman arose from considerations of the best interests of the implicated parties. If, as seems possible, the present implicated parties are also involved in some way with the forthcoming Harbour Ring inquiry it is obviously desirable to avoid contemporaneous hearings in the two Divisions of the Tribunal dealing with the two inquiries. There is no legal jurisdiction for the two inquiries to be amalgamated as they relate to separate suspected instances of trading in different companies shares and on different information.

52. In any event the Chairman decided that the present inquiry should proceed first. The other Division has been alerted to that and the Harbour Ring inquiry, we assume, will not start until an appropriate time after the conclusion of the present inquiry.

53. These decisions were administrative. They were made to lessen any burden on the implicated parties, and they were made prior to the appointment of the lay members in the present inquiry, that is before the present Tribunal was constituted.

54. It is true the Harbour Ring inquiry was mentioned in the first meeting with counsel, when the lay members were present, but again only in the context of timetable considerations. That was the first time the lay members were aware of the existence of the Harbour Ring inquiry.

55. In our view it stretches reality to suggest this present Division of the Tribunal seized jurisdiction of the Harbour Ring inquiry. A Chairman of a Tribunal must act as his own listing officer. He must and is entitled to consider the existence of other matters the subject of section 16(2) notices in performing that role. In doing so he does not seize jurisdiction of all future inquiries he considers in that regard. He most certainly does not do so on behalf of the future Tribunal on which he will sit in

circumstances where the lay members of that Tribunal have not yet been appointed.

56. In our judgment none of the matters complained of either individually or together could bring about any apprehension of bias in the mind of our notional observer.

57. There is no merit to the first application made by Mr. Patterson.

THE DETERMINATION OF THE IMPLICATED PARTIES

58. In his second application, Mr. Patterson argues that the Tribunal's determination of who was to be considered an implicated person and thereby served with a Salmon letter was wrongly conducted in the absence of those persons.

59. Mr. Patterson's complaint arises in this way.

60. The Ordinance governing this Tribunal, that is SIDO, was repealed by section 406(1)(f) of the Securities and Futures Ordinance Cap. 571 ("SFO") which came into effect on the 1st April 2003.

61. Transitionary provisions were enacted however which allowed suspected insider dealings which occurred at

least in part before the 1st April 2003 to continue to be dealt with under SIDO.

62. Pursuant to those provisions, where the section 16(2) notice was issued after the coming into effect of the SFO as occurred in the present inquiry then certain amendments were to be read into SIDO.

63. Those provisions and amendments are contained in sections 78 and 80 of Schedule 10 to the SFO:-

Section 78

"78. Where —

(a) the repealed Securities (Insider Dealing) Ordinance would but for the enactment of this Ordinance have effect with respect to an insider dealing within the meaning of the repealed Securities (Insider Dealing) Ordinance; and

(b) the insider dealing has in whole or in part taken place before the commencement of Part XIII of this Ordinance,

but the Financial Secretary has not before the commencement of Part XIII of this Ordinance instituted an inquiry with reference to the insider dealing under section 16(2) of the repealed Securities (Insider Dealing) Ordinance, then the repealed Securities (Insider Dealing) Ordinance shall continue to have application in connection with the insider dealing and with any inquiry, appeal, and other matters relating thereto (including, without limiting the generality of the foregoing, the exercise of any power to appoint any person as a member (whether as the chairman or other member) or as a temporary member of the Insider Dealing Tribunal referred to in section 15 of that Ordinance for the purposes of any inquiry relating thereto) as if –

(i) this Ordinance had not been enacted; and

(ii) the repealed Securities (Insider Dealing) Ordinance had been amended in the manner described in section 80."

Section 80

"80. Where section 78 applies, the repealed Securities (Insider Dealing) Ordinance shall apply as if it had been amended –

(a) by adding –

"27A. Recommendations to Financial Secretary to institute inquiry

At the conclusion of any inquiry or as soon as is reasonably practicable thereafter, where it appears to the Tribunal that insider dealing has taken place or may have taken place by reference to the conduct of any person, it may, where it considers appropriate, recommend the Financial Secretary to institute an inquiry under section 16 to inquire into the matter.";

(b) in the Schedule, in paragraph 17, by adding ", at the first sitting of the Tribunal relating to the inquiry," after "shall determine"."

(emphasis added)

64. The relevant and amended parts of the Schedule to SIDO therefore now read as follows:-

"16. A person whose conduct is the subject of an inquiry or who is implicated, or concerned in the subject matter of an inquiry shall be entitled to be present in person at any sitting of the Tribunal relating to that inquiry and to be represented by a barrister or solicitor.

> 17. For the purposes of paragraph 16 the Tribunal shall determine, ***at the first sitting of the Tribunal relating to the inquiry,*** 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."
>
> *(emphasis added)*

65. As a preliminary matter we are of the view that although paragraphs 16 and 17 of the Schedule to SIDO refer to three categories of persons, that is persons whose conduct is the subject of the inquiry, persons who are implicated in the subject matter of the inquiry and persons who are concerned in the subject matter of the inquiry, the principles of this judgment apply equally to all of them and in most instances we will refer to them as a group with the term "implicated persons".

66. Mr. Patterson argues that the result of the amendment to paragraph 17, taken in conjunction with the terms of paragraph 16 is that any decision made by the Tribunal as to whom the implicated parties are to be in an inquiry must be made at the first sitting of the Tribunal and in the presence of those parties and they must be allowed to be heard on that decision.

67. One fundamental difficulty with the interpretation placed upon paragraph 17 (as amended) by Mr. Patterson's

argument is that before the Tribunal determines who the implicated parties are, they are not entitled to the rights claimed by Mr. Patterson, i.e. they are not, pursuant to paragraph 16, entitled to be present or to be represented by a barrister or solicitor.

68. It is at the point of the determination by the Tribunal pursuant to paragraph 17 that an individual becomes a person "implicated or concerned in the subject matter of the inquiry" or that a person's "conduct ... is the subject of the inquiry", that the person then has the right pursuant to paragraph 16 to be present personally or to be represented by counsel or a solicitor, and not before.

69. Accordingly, it is difficult to see how at any stage prior to the Tribunal's determination that an individual is an implicated person that he or she has any rights of appearance and accordingly has any rights to make submissions or representations as to whether he or she should be found to be an implicated person. In our view, paragraph 16 only comes into operation after the Tribunal has made a determination as to which persons (if any) are to be regarded as implicated persons. The words "shall be entitled to be present in person at any sitting of the Tribunal" can only have prospective effect.

70. There are other matters which support this conclusion. In our judgment the intent of the legislature in amending the terms of paragraph 17 by way of the transitionary provisions in section 80(b) was not to create a unique and previously unknown procedure but to cure a specific evil (if that is not too harsh a word). That "evil" was that under the previous provisions of SIDO there was nothing to prevent a person being brought into the proceedings after they had commenced and were underway.

71. The new SFO prohibits that course of action and requires that a notice under section 252(2) (which is the equivalent of the section 16(2) notice under SIDO) specify the identity of any person who appears to have perpetrated any market misconduct (including insider dealing): Schedule 9, section 13; and that there shall be no amendment of the identities of such persons specified: Schedule 9, section 15. It restricts the Tribunal's finding of market misconduct (including insider dealing) to those persons identified in the original section 252(2) notice: Schedule 9, section 17.

72. Accordingly the addition of implicated persons during the course of an inquiry is prohibited by the new legislation. If suspicion does fall on a previously unidentified person then the provisions of the SFO are to the effect that a recommendation may be made by the Tribunal at the conclusion

of the inquiry to the Financial Secretary that a further inquiry be instituted into that person's conduct: Schedule 9 section 19.

73. In this Tribunal's view, sections 78 and 80 of Schedule 10 to the New Ordinance attempt to achieve the same result in the transitionary operation of SIDO.

74. Section 80 of the SFO imports two amendments into SIDO. Firstly, it allows the Tribunal to recommend to the Financial Secretary that a further inquiry be instituted into the conduct of any person to determine whether insider dealing has taken place: section 80(a). And secondly it, in our view, requires the determination of precisely which persons are involved as implicated persons at the time of the first sitting of the Tribunal: section 80(b).

75. The "evil" therefore section 80(a) and (b) together address is the uncertainty as to who may eventually become an implicated party in an inquiry and more specifically it prevents people being bought into an inquiry as implicated persons after that inquiry has commenced, which, reasonably, may be thought to be potentially unfair, but with an additional provision allowing the institution of subsequent and separate proceedings against those persons.

76. If that is the purpose of section 80(a) and (b), and it seems to this Tribunal that it is, then the intent of section 80(b) is to require the Tribunal to make certain at the first sitting the identities of the persons to be regarded by it as implicated persons.

77. This Tribunal cannot accept that it was the intention of the legislature to go further than that and turn the first sitting of the Tribunal (i.e. the preliminary hearing) into a series of preliminary submissions on the part of individuals or their counsel as to whether or not they should be considered implicated parties. For one thing as we say it goes against the plain language of paragraphs 16 and 17 of the Schedule to SIDO to suggest a person has a right to be heard before he is determined to be an implicated party. For another it would be most undesirable for the Tribunal to deal with the pros and cons of a particular individual's case in a public session before that person was determined to be an implicated party and before evidence was called. A practical question is how the parties would know at that stage, in any event, that they should appear. Should they be served with some form of preliminary Salmon letter? Mr. Patterson suggests they should be served with "a letter of mindedness" which informs them that the Tribunal considers they are at risk of being considered implicated persons. Are all the documents to be served on them? That would appear to be necessary if they had the right to make submissions

at that stage. Where would the prospective implicated parties' right to be heard end? Would the prospective implicated parties have the right to call evidence at that stage? And if limits were to be placed upon those individuals right to make submissions and call evidence where would those limits stem from? There would be no guidance in the legislation as to where any such supposed right in a person, not yet an implicated person, to be heard would end.

78. All this would be a wholly new procedure and seems highly unlikely to have been intended by the amendment to paragraph 17 of the Schedule to SIDO.

79. If there is any analogous procedure to the issuance of Salmon letters, it is the signing of a charge sheet before a criminal trial. There is no right for a defendant to be heard before he is charged. His rights commence once he is charged and has the legal status of a party to the criminal proceedings.

80. Further, under the provisions of the new SFO the section 252(2) notice must specify those persons who appear to have been insider dealers: see sections 13 and 14 of Schedule 9 to the Ordinance. In other words the Financial Secretary under the new legislation decides who the "implicated persons" are. No right is given to such persons to make submissions as to their status in that regard prior to the issue of the section 252(2)

notice. It would be extremely odd if the transitionary provisions in the new Ordinance (i.e. the SFO) intended to import into SIDO a procedure and set of rights which are non-existent in the new Ordinance.

81. We do not think the amendment to paragraph 17 of the Schedule to SIDO requires the Tribunal to hear from any person prior to determining whether they are an implicated party to the inquiry.

82. But regardless of whether anyone has a right to be heard as to whether or not they should be regarded as implicated parties, does paragraph 17 as amended now require the Tribunal to actually decide at its first sitting who the implicated persons are? That is the meaning Mr. Patterson attaches to the word "determine" in the amended paragraph 17.

83. Again that seems an extremely unlikely intention of the legislature in amending paragraph 17, even allowing for the provisions of paragraph 14 which allow a Tribunal to have a "chambers" or a private sitting. In our view the latter provision is intended to apply only in exceptional circumstances and not to operate routinely in the course of the Tribunal deciding who is an implicated party. We might say here that a sitting is not a meeting. A sitting occurs, other than in exceptional circumstances in open court. A meeting is not intended to be a

court proceeding. It is informal and is organised as a meeting, not as a sitting. Paragraph 19 of the Schedule to SIDO recognises their different natures. More fundamentally such meetings (which have been held in most of these inquiries since the commencement of the legislation) occur prior to the issuance of Salmon letters. They are administrative in nature and their purpose was recognised in *Dato Tan Leong Min and the Insider Dealing Tribunal* (1998) 1 HKLRD 630 at 637 per Sears J:

> "It is obviously desirable and indeed necessary for the Tribunal and counsel to meet before the inquiry opens and to discuss the procedure, relevant lines of inquiry and potential problems and for the counsel to interview witnesses or investigate various avenues for importance."

That position changes once the substantive inquiry begins. Only rarely thenceforth would a meeting occur in the absence of the implicated parties. For the purposes of this application we regard the first preliminary hearing held on the 17th May 2005 as being the first sitting of the Tribunal.

84. If Mr. Patterson is right in his understanding of the word "determine" it would mean, assuming that as there are as yet no implicated parties there are no rights in any party to be heard, that the Tribunal would at the first preliminary hearing discuss the prima facie evidence concerning each prospective implicated party in the presence of anyone who chose to be present, including those persons. In other words, the Tribunal

would be expected to conduct a public sitting of and discussion amongst its members as to who should become implicated parties in the presence of various persons some of whom may eventually become implicated parties.

85. That seems an undesirable unworkable and unnecessary procedure particularly if those persons, at that stage have no right to be heard. If there is no right vested in any person to be heard, what point would there be in requiring the Tribunal to arrive at its decision as to whom the implicated parties are during the course of the first sitting rather than at some previous time?

86. In this Tribunal's view, the amended paragraph 17 simply means that the Tribunal shall, at the first sitting of the Tribunal (that is the preliminary hearing), state as a matter of finality who precisely the implicated parties are for the purpose of the inquiry. The Shorter Oxford English Dictionary Volume 2 (5th Edition) defines "determine" as follows:-

> "**determine** from Latin determinare bound, limit.
> 1. Put an end to: come to an end. [Now chiefly LAW.] Bring to an end, conclude.
> 2. [Now chiefly LAW.] Come to an end;
> 3. Bound, limit. ... Limit to, restrict to.
> 4. Settle or decide
> 5. Come to a judicial decision; make or give a decision about something."

"Determine" in paragraph 17 is used in the sense of making certain, stating conclusively or limiting the persons who are implicated in the inquiry rather than in the sense of actively arriving at a decision. The persons who are implicated parties were named as such at the first preliminary hearing of this matter. It matters not that the decision that they were to be implicated parties was made before that hearing, so long as that decision was given at that first sitting. That complied with the provisions of the amended paragraph 17 of the Schedule to SIDO.

87. This second complaint of Mr. Patterson's fails for those reasons.

DELAY

88. We turn now to the final of Mr. Patterson's complaints. He says that there has been considerable delay in this matter and that it would be unfair to proceed. He asks the Tribunal to take what steps it can to prevent these proceedings continuing. He is effectively asking that the proceedings be stayed.

89. As we have said the law applicable to this aspect of Mr. Patterson's submissions is the common law. The relevant provision in Article 14(1) of the ICCPR and Article 10 of the

Bill of Rights (see above) is the requirement that these proceedings be "fair". That concept of fairness is the same as that of the common law. There is an impressive body of case law as to when the delay of proceedings may render them unfair.

90. Those cases can be distilled for present purposes into the following proposition:-

> "the imposition of a permanent stay should be the **exception rather than the rule** ... (and)
>
> no stay should be imposed unless the defendant shows on the balance of probabilities that, owing to the delay, he will suffer *serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.*": ***Attorney-General's Reference (No. 1 of 1990)*** [1992] 1 QB 630 at 644 per Lord Lane CJ.
>
> (*emphasis added*)

91. In our view if that is a statement of the law as it applies to criminal offences then the hurdle cannot be sensibly set lower in proceedings such as the present. That statement of the law by Lord Lane CJ will be applied by this Tribunal to the present application.

92. Mr. Patterson is right that there has been delay. The events the section 16(2) notice requires us to inquire into occurred in February 2000. That is now five years six months ago (though the last two months have been taken up with

various arguments and matters of disclosure relating to these applications). That, in the view of this Tribunal, is a most undesirable period of delay between events and any inquiry into them. And unfortunately the present inquiry is not an exception to the rule. For some time past a delay of about five years and sometimes more has elapsed between the events the subject of a section 16(2) notice and the issue of Salmon letters in inquiries conducted by the Divisions of the Insider Dealing Tribunal.

93. Mr. Patterson also complains that as a part of this delay the section 16(2) notice which triggered the constitution of this Tribunal and the inquiry into these events was issued to a Chairman of the Tribunal on, or shortly after, the 28th October 2003. He says that his clients (as with the other implicated parties) were not aware that any inquiry was to take place, or that they were implicated parties until the service of Salmon letters in April 2005. That is some 17 months after the date of issue of the section 16(2) notice.

94. Again, unfortunately the time period between the issue of a section 16(2) notice and the service of Salmon letters has expanded over recent years in respect of most cases to a period of a year or more.

95. It appears these delays, which have slowly increased over time, were caused by an increase in the number of cases which the Tribunal and Department of Justice received at the end of 2003.

96. We will deal firstly with Mr. Patterson's complaints regarding his clients (and the other implicated parties) not being notified of their status. He says it is wholly wrong for an implicated party not to be notified of the issuance of a section 16(2) notice concerning them for a period of 17 months after its issue. He suggests that any person named in a section 16(2) notice should be notified as soon after its issue as is possible.

97. He may be right that in some circumstances that is an appropriate course of action. But we do not think that in this case or in most cases it would be practical to notify implicated parties of the issuance of a section 16(2) notice immediately. For one thing, the notice does not purport to name the implicated parties. They have yet to be decided. A section 16(2) notice names only those individuals whose share trading is to be the subject of an inquiry. They may or may not become implicated parties. Other persons who do become implicated parties are not named and cannot be named until the Tribunal has been constituted and its members have appointed counsel assisting and have been served with the inquiry materials and had an opportunity to read those materials, that is the various

witness statements and interviews, and examine the documents, then meet with counsel assisting and decide which of the various individuals referred to in those materials are to be considered as implicated parties and will accordingly be issued with Salmon letters (which include the terms of the section 16(2) notice).

98. No doubt that process could be hastened and be conducted in a timeframe of less than the 17 months it took in the present inquiry. But it should be remembered that this process is usually conducted during the course of another inquiry. No Salmon letters can be issued without the appointment of lay members and the constitution of the Tribunal. Lay members can only be appointed with some specific hearing timetable in mind, they cannot be appointed and then be expected to be available at large ready to sit whenever at some future time the inquiry is to begin. For that reason a compromise has to be arrived at, where members are best appointed to new inquiries only once the end of a currently proceeding inquiry is in view and the dates for the new inquiry can be set with some (though far from complete) certainty.

99. It should be borne in mind that a section 16(2) notice is not a charge sheet. It is a direction to a Chairman institute an inquiry. We do not accept that there is any relationship between a section 16(2) notice and a criminal charge. As MA

JA (as he then was) said in *Riady - v - Insider Dealing Tribunal* (2003) 2 HKC 10:-

> "Terms of reference for Insider Dealing Tribunals are not charge sheets or indictments or even, in civil terms, pleadings. They are, as the phrase suggests, the terms of reference of the inquiry to be conducted by an Insider Dealing Tribunal."

Accordingly, the authorities Mr. Patterson urged upon us relating to delay between the charging and trial of defendants in criminal trials have no bearing on the question of delay in this case. It is, if anything, the Salmon letters which approximate a charge sheet although the analogy is tenuous. In our judgment, no additional or special prejudice attaches to an implicated party because they were not immediately informed of the issuance of a section 16(2) notice.

100. Therefore, the relevant consideration is solely whether the implicated parties can have a fair hearing given the period of delay which has elapsed since the date of the events the subject of the inquiry.

101. It is not suggested in this case that the delay was deliberate or in any way caused other than by institutional matters, that is the time required to investigate and prepare a complex commercial matter for hearing, and by the volume of

inquiries coming before this Tribunal for hearing and the processing time of those inquiries.

102. In our view the real issue, given that there was delay, is whether the delay which did occur was such as to so prejudice the implicated party's position as to require this Tribunal to regard further proceedings as unfair and to take what steps in law it is able to take so as to bring the present proceedings to an end.

103. Mr. Patterson argues that the fact of delay in these proceedings is by itself and without proof of prejudice to any party sufficient to render these proceedings unfair and an abuse of process if they were to continue. We do not think that proposition can be correct under either the provisions of Article 14(1) or Article 11 or the common law, which for our purposes are identical (see above). It may be that the period of delay complained of in some cases (but we do not think the present one) is so long that a presumption of prejudice can arise. The law is clear. The relevance of delay to a fair hearing is the effect it has on that hearing. Has evidence been lost? Has an available defence or explanation been rendered less potent? Have memories faded to an extent that the evidence to be called could not sensibly be regarded as reliable?

104. In the view of this Tribunal the applicants must satisfy us that the present hearing if it proceeds with them as implicated parties would be unfair. In the circumstances of the present inquiry that means they must point to some prejudice suffered by them as a result of the period of delay.

105. We bear in mind that the present proceedings are the equivalent of a reasonably complex commercial trial. It is not unusual in this jurisdiction for such trials to be heard after five years or more have elapsed. Such cases require considerable investigation and preparation.

106. Nevertheless it is true that five and a half years have elapsed since the events the subject of this proceeding took place. While that is a substantial period of time and while there is no doubt that the detail and clarity of those events will to some extent have faded in the recollection of witnesses called in the course of the present inquiry we do not believe that it is so long a period as to undermine witnesses' recollections to a degree as to render the proceedings unfair.

107. Although individuals vary, in our experience events of other than a trivial nature can be remembered reasonably adequately over that period of time. That is particularly so when in most cases the witness, whether an implicated party or otherwise, made a statement to or was interviewed by an SFC

officer shortly after the events and the record of that statement is still available both to the witness and the Tribunal. Many complex criminal commercial cases have gone to trial many more years after their events than the present proceedings and the evidence given was sufficiently reliable to found convictions before juries. Further, the period of delay is a matter which can be taken into account in a commonsense way in assessing a witness's credibility and reliability in determining the facts of the case.

108. Importantly a large part of the evidence which will be placed before the Tribunal is documentary, and those documents are themselves in large part commercial in nature from sources such as banks, securities firms and other commercially orientated institutions which keep their records for a minimum of seven years. Any such document required for these proceedings which has not already been obtained is still available.

109. For the purposes of the present applications we place no weight on the affirmation of Becky CHONG so far as that affirmation says she has little or no recollection of the events we are to inquire into. In our view it is far too early to know or decide how much Becky CHONG (or indeed any other witness) can or cannot remember. We will however regard her evidence afresh in due course.

110. No other specific matter of prejudice is relied upon by Mr. Patterson. Accordingly we do not think any material prejudice has been occasioned to the applicants, or any other implicated party by the period of delay and this last ground of complaint cannot succeed.

111. Accordingly, Mr. Patterson's applications are dismissed and the inquiry will proceed as presently constituted.

(The Hon. Mr. Justice McMahon)
Judge of the Court of First Instance
& Chairman of the Insider Dealing Tribunal

(Professor LAM Kin)
Member

(NG Tze Kin, David)
Member