Court of Appeal dismisses SFC's appeal against MMT decision

28 Apr 2017

The Court of Appeal has dismissed an appeal by the Securities and Futures Commission (SFC) against the Market Misconduct Tribunal's (MMT) findings that two former executives of Asia Telemedia Limited (ATML) (now known as Reorient Group Limited), Mr Yiu Hoi Ying and Ms Marian Wong Nam, had not engaged in insider dealing (Notes 1 & 2).

The SFC is reviewing the decision.

The SFC has also instituted parallel proceedings in the Court of First Instance under section 213 of the Securities and Futures Ordinance against ATML's former chairman, Mr Lu Ruifeng, for his alleged insider dealing in ATML shares (Note 3).

End

Notes:

1. The MMT was chaired by The Honourable Mr Justice Michael Hartmann with two lay members, Mr Stephen Chan Sai Hung and Dr Ricky Chu Keung Wah. The MMT's decision is available on its website (www.mmt.gov.hk).
2. A copy of the Court of Appeal judgment (Case No: CACV 154/2016) is available on the Judiciary's website (www.judiciary.gov.hk).
3. Please see the SFC's press releases dated 2 May 2008, 5 November 2008 and 6 December 2010, 29 January 2014 and 26 Nov 2015.

Page last updated : 28 Apr 2017

上訴法庭駁回證監會就市場失當行為審裁處的裁決而提出的上訴

2017年4月28日

上訴法庭駁回證券及期貨事務監察委員會（證監會）就市場失當行為審裁處（審裁處）的裁決而提出的上訴。審裁處早前裁定亞洲電信媒體有限公司（亞洲電信媒體）（現稱瑞東集團有限公司）兩名前行政人員姚海鷹（男）及王嵐（女）並無進行內幕交易（註1及2）。

證監會正審視上訴法庭的裁決。

與此同時，證監會亦根據《證券及期貨條例》第213條，在原訟法庭就亞洲電信媒體前主席呂瑞峰（男）涉嫌進行亞洲電信媒體股份的內幕交易而對其提起法律程序（註3）。

完

備註：

1. 市場失當行為審裁處由夏正民法官（The Honourable Mr Justice Michael Hartmann）出任主席，另有兩名外界成員陳世雄先生及朱強華博士。審裁處的裁決已載於其網站（www.mmt.gov.hk）。
2. 上訴法庭判案書（案件號碼：CACV 154/2016）載於司法機構網站（www.judiciary.gov.hk）。
3. 請參閱證監會2008年5月2日、2008年11月5日、2010年12月6日、2014年1月29日及2015年11月26日的新聞稿。

最後更新日期：2017年4月28日

CACV 154/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 154 OF 2016

(ON APPEAL FROM DETERMINATIONS OF THE MARKET MISCONDUCT TRIBUNAL PURSUANT TO SECTION 266 OF THE SECURITIES AND FUTURES ORDINANCE, CAP 571)

IN THE MATTER OF section 266 of the Securities and Futures Ordinance, Cap 571

and

IN THE MATTER OF proceedings conducted by and determinations of the Market Misconduct Tribunal into whether any market misconduct had taken place in relation to the dealings in the listed securities of Asia Telemedia Limited (now known as Reorient Group Limited) (stock code 376) and on other related questions

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BETWEEN

SECURITIES AND FUTURES COMMISSION	Appellant
and	
YIU HOI YING CHARLES	1st Respondent
WONG NAM MARIAN	2nd Respondent
MARKET MISCONDUCT TRIBUNAL	3rd Respondent

Before: Hon Lam VP, Cheung JA and Kwan JA in Court

Date of Hearing: 28 March 2017

Date of Judgment: 26 April 2017

J U D G M E N T

Hon Lam VP:

1. I agree with the judgement of Kwan JA.

Hon Cheung JA:

2. I agree with the judgement of Kwan JA.

Hon Kwan JA:

3. This is an appeal brought by the Securities and Futures Commission ("SFC") against the determination of the Market Misconduct Tribunal (chaired by Mr Justice Hartmann NPJ, sitting with two lay members, Dr Chu Keung Wah and Mr Chan Sai Hung) in its report dated 26 November 2015 ("the Report"). The hearing took place over 14 days in December 2014, January and March 2015. The Tribunal determined that no market misconduct was identified in respect of Yiu Hoi Ying Charles ("Charles") and Wong Nam Marian ("Marian") because the defence under section 271(3) of the Securities and Futures Ordinance, Cap 571 ("SFO") was applicable. Leave to appeal was granted by the Court of Appeal (Barma JA and Poon JA) on 14 July 2016.

The background

4. The background facts are mainly set out in Chapter 3 of the Report. The key events relevant to this appeal have been helpfully summarized in the skeleton arguments of Mr Horace Wong, SC, who appeared with Mr Norman Nip for SFC in this appeal but not before the Tribunal. The narrative I give below is taken largely from the summary in their submissions.

5. The listed company being the subject matter of the insider dealing inquiry was Asia Telemedia Limited ("ATML")[1].

6. At all material times,

(1) Lu Ruifeng ("Lu") held a controlling interest in ATML and was its Chairman, CEO and Executive Director;

(2) Charles was ATML's Executive Director and Financial Director. He joined ATML in July 2004 and was given the responsibility of reporting directly to Lu;

(3) Marian was ATML's Company Secretary. She joined ATML in September 2002.

7. On 23 March 2005, Lu, Charles and Marian were granted share options in ATML's shares in the respective quantities of 1 million, 8 million and 8 million, at an exercise price of $0.20 per share, exercisable until 22 March 2010.

8. ATML was an insolvent company due to a long standing debt owed to Madam Liu Lien Lien ("Madam Liu"). As at 1 February 2007, the debt owing to Madam Liu stood at $58,083,992 with interest. Between 11 October 2002 and 10 April 2006, Madam Liu had issued and served five statutory demands on ATML in respect of this indebtedness. However, she had not presented any petition to wind up ATML and had been generally responsive and open to negotiation on repayment of the debt.

9. On 1 February 2007, Madam Liu assigned the debt to a BVI company, Goodpine Limited ("Goodpine"), for $25 million ("the Assignment"). On 5 February 2007, Woo, Kwan, Lee & Lo issued a letter on behalf of Goodpine to inform ATML of the Assignment and demanded payment of the full amount of the debt. Marian passed the letter to ATML's solicitors, Chiu & Partners, for advice and received the advice, which was copied to Lu and Charles, that ATML did not have a real defence to the demand for payment.

10. Goodpine was in fact controlled by Madam Liu. However, whether the Assignment was part of a scheme involving third parties is not known[2]. During the hearing before the Tribunal, evidence was given by Marian and Charles that they believed Goodpine was simply Madam Liu under a new guise and their surmise was apparently founded on the mere fact that Goodpine was represented by Woo, Kwan, Lee & Lo, the same solicitors who had advised Madam Liu for a number of years[3]. This was no more than a surmise and not a compelling one[4]. At the relevant time, nobody in ATML knew who was the beneficial owner of Goodpine[5].

11. On 2 March 2007, Woo, Kwan, Lee & Lo sent a copy of the Assignment to Chiu & Partners and demanded payment of the debt within seven days, failing which legal

proceedings would be commenced without further notice.

12. Between 28 February 2007 and 26 April 2007, Marian sold 6.2 million of her shares in ATML at the price of $0.37 to $0.494 per share.

13. On 26 April 2007, Marian instructed Chiu & Partners by email, copied to Lu and Charles, that the directors of ATML proposed to offer $10 million to Goodpine to settle the debt. Following a conversation between Marian and Chiu & Partners, it was agreed as a negotiating tactic to make an offer to Goodpine of $8 million payable in five instalments. On the same day, ATML received a statutory demand from Woo, Kwan, Lee & Lo, demanding payment of $70,270,491, inclusive of interest and other costs.

14. At that moment in time, what was known to Lu, Charles and Marian, but not to the market, was the following[6]:

> (1) ATML owed a debt in excess of $70 million and Madam Liu had now assigned the debt to a corporate third party;
>
> (2) on the face of the Assignment, the third party had already paid $25 million to acquire all rights in the debt;
>
> (3) while it might have been surmised that Goodpine was controlled by Madam Liu, the true identity of those behind this company was not known, nor was the purpose of the Assignment. After some five years of default and delay, the probabilities suggested something more than an exercise in passive internal administration and on any informed reckoning the Assignment signalled some new and more aggressive set of moves to recover the debt; and
>
> (4) Goodpine had now served the statutory demand seeking full payment within 21 days, failing which proceedings to wind up ATML would be brought.

15. On 7 May 2007, Marian was granted a further 5 million share options at an exercise price of $0.40 per share, exercisable immediately. Between 27 April 2007 and 5 June 2007, she exercised further options and sold 3.8 million shares at between $0.395 and $0.98 per share. She made a net profit of some $5.1 million from the sale of all her shares obtained by way of her options.

16. Also on 7 May 2007, Chiu & Partners sent a without prejudice letter to Woo, Kwan, Lee & Lo offering to pay $8 million to Goodpine in five instalments. Chiu & Partners further advised Marian by email, copied to Lu and Charles, that if the statutory demand was not complied with within 21 days from 26 April 2007, Goodpine might present a

petition to wind up ATML.

17. With no response coming from Goodpine, Marian instructed Chiu & Partners to improve the offer. On 22 May 2007, an offer to pay $8 million in a lump sum was made. There was no response to this either.

18. The 21-day period of the statutory demand of Goodpine expired on 17 May 2007.

19. Between 28 May and 31 May 2007, Charles exercised 6 million of his share options and sold them at between $0.85 and $0.91 per share. He made a net profit of some $5.3 million.

20. On 6 June 2007, Goodpine served its petition to wind up ATML.

21. Between 5 February 2007 and 6 June 2007, there was not one communication from Goodpine, direct or through its solicitors, touching upon the issue of negotiating new terms of repayment. Nor was there any public announcement by ATML of the Assignment or the statutory demand served by Goodpine.

22. In the meantime, the share price of ATML had surged from $0.20 on 1 February 2007 to a peak of $0.97 on 29 May 2007. It would appear that the increasing integration of Mainland and Hong Kong securities markets buoyed stocks in companies such as ATML which were in the securities business, and market attention was drawn to short term profits to be gained from 'small cap' stocks such as ATML. ATML was an insolvent company and had only one asset of real value, being its listing status. It was riding a speculative wave of 'small cap' stocks, not supported by any realistic fundamentals. Its share price on relevant event dates showed the rise:

(1) 1 February 2007 (date of the Assignment): $0.20

(2) 5 February 2007: (notice of the Assignment served by Woo, Kwan, Lee & Lo): $0.18

(3) 16 February 2007 (first deadline for repayment by the letter of Woo, Kwan, Lee & Lo dated 5 February 2007): $0.31

(4) 9 March 2007 (second deadline for repayment by the letter of Woo, Kwan, Lee & Lo dated 2 March 2007): $0.43

(5) 26 April 2007 (service of the statutory demand): $0.40

(6) 7 May 2007 (ATML offered $8 million to settle the debt by instalments): $0.40

(7) 17 May 2007: (expiry of 21-day period of the statutory demand): $0.61

(8) 22 May 2007: (ATML offered $8 million to settle the debt in one lump sum): $0.69.

23. As the Tribunal remarked, ATML was "a speculators' stock, certainly in May and June 2007. The price of such stocks are not resilient."[7] It closed at $0.83 on 6 June 2007. Trading in ATML shares was suspended on the following day. When trading resumed on 18 October 2007, the share price fell by 62% to close at $0.315.

Findings of the Tribunal

24. There were four specified persons in the inquiry. Apart from Charles and Marian, there were Lu and Ho King Lin Cecilia, the Assistant Company Secretary of ATML. The Tribunal found it has not been possible to come to a conclusion whether Lu was or was not culpable of market misconduct by reason of the fact that, due to evidence of acute illness, he was not given a reasonable opportunity of being heard. As for Cecilia Ho, it was found that she was not identified as an insider dealer and therefore culpable of market misconduct on the basis that although in possession of information which constituted relevant information at the time of certain of her later dealings, she did not know that such information constituted relevant information. There is no appeal by the SFC against the findings relating to Lu and Cecilia Ho.

25. The Tribunal defined the scope of its inquiry by reference to these three questions[8]:

(1) whether the Assignment and Goodpine's statutory demand, taken separately or together, constituted relevant information which was non-public, price-sensitive information ("PSI") in that if the information were disclosed to the public at the time, it could have affected ATML's stock price[9];

(2) whether the specified persons [Charles and Marian, for the purpose of this appeal] knew that the Assignment and statutory demand, taken separately or together, was relevant information; and

(3) whether, if the information was found to be relevant information, that fact was in any way a motivating factor when each of them dealt in the shares of ATML.

Question (1): relevant information

26. On question (1), the Tribunal found that the Assignment and the statutory demand taken together constituted relevant information[10]. In this regard, the Tribunal held:

(1) The assignment of the debt from a "known quantity" in Madam Liu to a "totally unknown quantity" in Goodpine for a recorded consideration of $25 million promised a "dramatic change in environment"[11].

(2) ATML shares were swept up in a speculative wave of buying at the material time, one which the market recognised was not based on any real form of solid fundamentals. Under the Listing Rules, ATML was under an obligation to make an announcement to the public regarding the Assignment and the statutory demand, and the failure to do so was a "palpable failing". If such an announcement had been made, it would certainly have acted to put pressure on any further price rise, and, in all likelihood, would have resulted in a material decrease in the share price. Put simply, the relevant information would have "puncture[d] the exuberance" once announced[12].

Question (2): knowledge of relevant information

27. On question (2), the Tribunal found Charles and Marian knew that the Assignment and the statutory demand were relevant information. Both knew that if a public announcement was made of such information, it would in all likelihood have a material effect on the share price of ATML, not only in terms of cancelling out the continuing rise in value, but, having regard to ATML's known frailty, would have brought about a material reduction in the share price[13].

28. In respect of Charles' knowledge, the Tribunal found "it is clear that [he] was at the very centre of this new debt issue"[14] and rejected his protestations that "he was essentially a simpleton in respect of commercial matters with no real understanding of the threat" facing ATML[15]. The Tribunal further found that Marian's experience and professional knowledge "does not take away from Charles Yiu's own professional knowledge and corporate experience."[16] He understood full well the nature of the threat posed by the Assignment and the statutory demand and contrived to put on a façade of ignorance before the Tribunal[17].

29. As for Marian, the Tribunal found that "as the Company Secretary, it was [her] responsibility to advise Lu Ruifeng and the Board whether this new threat to the Company, one that clearly she must have understood carried with it a threat of winding up proceedings, should be announced to the market."[18] However, she "turned a blind eye to the issue of whether the market should be informed although in truth she knew the answer."[19]

Question (3): the defence under section 271(3) of the SFO

30. At the relevant time in 2007, section 271(3) of the SFO provided as follows:

> "A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives or his disclosure of information if he establishes that the purpose for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) was not, or, where there was more than one purpose, the purposes for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information."

31. Pursuant to this provision, it is open to a person to establish on a balance of probabilities that, although at the time of dealing he was knowingly in possession of PSI, that was not a factor inducing him to deal. If he is able to establish that fact, then he is not to be identified as being an insider dealer. It is not sufficient to establish that the PSI was only a subsidiary motivating factor, it must be established it was not in any way a causative factor[20]. As stated by Rogers VP in *Henry Tai Hon Leung v Insider Dealing Tribunal*, CACV 333/2004, 3 November 2005 at §28: "What has to be determined is whether there was any desire or intention to make a profit or avoid a loss by use of the relevant information."[21]

32. Both Charles and Marian asserted they exercised their share options for only one reason, and that was to seize the chance of a lifetime when there was a sudden and unexpected speculative surge in the price of ATML shares that put the price beyond anything that they could have expected and, like other ATML employees who had received share options and exercised them at the time, to profit from the windfall. The Tribunal accepted on balance their sole motivating factor was to profit from an unexpected speculative boom in the share price and the motivation for their exercise of the share options was not in any way coloured by the PSI in their possession and there was no indication of a conscious intent to misuse the PSI in their possession[22].

33. As to how it could be that their possession of the PSI played no role in their exercise of the share options, the Tribunal is satisfied that while they were in possession of information which they knew should properly form the basis for a public announcement by ATML, both nevertheless believed that somehow, in some way, any threat presented by Goodpine would be sorted out behind closed doors (as it had been in the past with Madam Liu) and would not therefore become a matter to influence the market[23]. That explained why Charles paid no heed to the 21-day deadline imposed by the statutory demand and only began to sell his shares, over four days, between 28 and 30 May 2007, because the price had gone so high that it was time to take his profit[24]. Marian sold her shares regularly on some 27 occasions between 28 February 2007 and 5 June 2007, and

after receipt of the statutory demand on 26 April 2007, she sold her shares on nine occasions[25].

This appeal

34. The nub of the SFC's complaint in this appeal is that it cannot be right that senior executives who had withheld information which they knew would significantly impact on the market price of the shares, should be able to deal with the shares and make profit without liability, on the purported basis that they were merely taking advantage of a speculative boom, when they knew well that the boom would have been punctured had they done what they should have done, namely, disclosing the relevant information.

35. Two broad grounds of appeal were advanced.

36. The first is a complaint that the Tribunal had made an error of law. This turned on the words "by using relevant information" at the end of section 271(3). The SFC contended that the meaning of "using" is broad enough to cover "withholding" or "non-disclosure" of relevant information. Hence, the Tribunal should have found that the failure of ATML (of which Charles was an Executive Director and Marian the Company Secretary) to disclose the relevant information had directly contributed to the maintenance of a falsely inflated share price of ATML, from which Charles and Marian profited directly by selling their shares at the falsely inflated price. Hence, at least part of their purpose when selling their shares included the purpose of securing or increasing their profits "by using relevant information", rendering the defence in section 271(3) inapplicable.

37. The other broad ground sought to attack the factual findings of the Tribunal and would not be pursued if the SFC should succeed on the legal ground. It was contended that the Tribunal was wrong to find that (1) Charles and Marian believed that the settlement of the relevant debt would be resolved behind closed doors and would not become a matter to influence the market; and (2) the sole motivating factor of Charles and Marian in exercising the share options was to profit from an unexpected speculative boom in the share price.

If the Tribunal had made an error of law

38. The word "using" or "use" was not defined in the SFO. Mr Wong referred the court to these dictionary meanings of "use":

> "take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result; employ"
>
> "exploit (a person or situation) for one's own advantage"

(The New Oxford Dictionary of English)

"to employ for some purpose"

"to avail oneself of; apply to one's own purposes"

(Webster's Encyclopedic Unabridged Dictionary of the English Language)

39. He submitted that conceptually, the "use" of relevant information must be broad enough to encompass the "withholding" or "non-disclosure" of the information as a means of accomplishing or achieving some purpose, for instance, the making of profits or avoidance of a loss, as well as the exploitation of the information in any way to one's own advantage, including withholding the same when it should have been disclosed. He argued that withholding information while knowing the consequences of non-disclosure is plainly a "use" of that information, as the information is employed by withholding it in breach of an obligation to disclose, when one knows full well the consequences of withholding information is to facilitate the accomplishment of one's purpose.

40. He prayed in aid the general principle that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit. The Tribunal has found that under the Listing Rules, ATML was under an obligation to disclose the Assignment and the statutory demand to the public, which in all likelihood would have resulted in a material decrease in the share price. The non-disclosure of the relevant information to the public falsely sustained an inflated share price of ATML and avoided puncturing the exuberance of the speculation bubble. By withholding or causing ATML to withhold disclosure, Charles and Marian had knowingly and directly contributed to the maintenance of the falsely inflated share price. In selling their shares, they knowingly and directly profited from the falsely inflated share price which they had contributed to maintaining through non-disclosure. Mr Wong submitted this plainly was "use" of the relevant information for the purpose of making profit.

41. Furthermore, he submitted that this interpretation of "use" in section 271(3) is consistent with the object of the legislation, which is "to eliminate insider dealing and to reinforce the transparency of the markets, thereby enhancing and preserving Hong Kong's position as an international financial centre." (*Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at §45, per Sir Anthony Mason NPJ)

42. Regardless of their prime motivation in selling their shares, or their belief that the news of the Assignment and the statutory demand would not get out to the market, Mr Wong submitted that the fact that they sold their shares for profit in a false market which they knew well was maintained by the non-disclosure of the relevant information

procured or knowingly contributed to by them necessarily means that they were using the PSI for the purpose they aimed to achieve, namely to make profits for themselves.

43. The Tribunal recognised there is a moral dimension in finding that the defence under section 271(3) succeeded in this instance, which some may find "unappealing"[26]. It sought to answer the concern in this way:

> "The answer perhaps, in so far as one may be required, is twofold. First, the mischief to be avoided is the use of confidential information to 'steal a march' on ordinary investors. If, however, the confidential information has not been used in any way in that manner then there has been no mischief. Second, there is no risk of the floodgates being opened because the circumstances will be rare when a person who deals in the shares of a listed company while in possession of price sensitive information will be able to demonstrate that his dealing was totally unconnected with any desire to avoid a loss or make a profit by reason of the price sensitive information."[27]

44. Mr Wong submitted that the answers given by the Tribunal are not really answers at all. This is because Charles and Marian did "use" the confidential information (in the way as he has submitted) to steal a march on ordinary investors. And the Tribunal's comment on the risk of floodgates is premised on its failure to recognise that a person who occupies a senior position in a listed company while in possession of PSI could "use" that information for the purposes of profiting from his share dealings by withholding its disclosure to the public.

45. I reject the submission that the Tribunal had erred in law for the following reasons.

46. Firstly, I do not agree that "use" in this context should be construed as covering withholding or non-disclosure of relevant information. I agree with Mr Russell Coleman, SC (appearing with Mr Samuel Wong for Charles) and Mr Laurence Li (for Marian) that to extend the meaning of "use" in this way is a strained interpretation and if upheld would render the statutory defence in section 271(3) largely (if not wholly, as submitted by counsel) inoperative and otiose.

47. I agree with their submission that the effect of the suggested interpretation of the SFC would seem to equate "use" of the PSI with the "possession" of it. This is demonstrated by Mr Li in his analysis of SFC's case, which in essence is as follows:

> *If* – (1) a person is connected to a listed company; (2) he is in possession of PSI; (3) he knows the information is PSI; and (4) he trades in the shares of the company while the information has not been disclosed to the public;
>
> *Then* – (5) he necessarily is making a profit "by use of" the information in that he is withholding the PSI from disclosure to the public knowing the market price is higher or lower (as the case may be) than it would have been had the

information been disclosed. In other words, his purpose in trading necessarily includes a purpose to profit "by use of" the non-public information.

48. Mr Coleman reasoned that given this interpretation, any senior executive who has such information would be deemed to have withheld information which he knew would significantly impact on the share price, regardless of the reason and whether it was the executive that caused the information not to be released to the public, so that there would always be a mischievous purpose in any dealing. This would make the statutory defence illusory.

49. I see much force in these submissions.

50. In his oral submission, Mr Wong sought to counter the above submissions by contending that on the interpretation he advanced, "use" of the PSI would include withholding it only where that person plays a part in withholding the information. However, as I understand his position, this would cover the situation where a company is under an obligation to disclose the PSI under rule 13.09 of the Listing Rules, but has failed to do so and the senior executive would be regarded as having withheld or caused the company to withhold information by virtue of his corporate position and duties. This is precisely the situation postulated by Mr Coleman that a senior executive would be deemed to have withheld information, thereby making the statutory defence illusory.

51. I have reservations whether it is necessary to strain the meaning of "use" in the statutory defence to import the obligation of disclosure. The obligation of disclosure or to ensure disclosure was regulated by rule 13.09 and related provisions of the Listing Rules in 2007. The provisions are now codified into Part XIVA of the SFO. The prohibition against dealing while the relevant information has not been disclosed was and is contained in Part XIV of the SFO. As submitted by Mr Li, the regulatory objective of ensuring disclosure is fully reflected in and is to be achieved under a specific set of rules – previously rule 13.09 and now Part XIVA of the SFO, it is not necessary or appropriate to employ another set of provisions (on insider dealing) to further the same objective, not to mention by a strained interpretation of "use".

52. Secondly, the suggestion made on appeal that Charles and Marian had knowingly and directly contributed to the maintenance of a falsely inflated share price of ATML by withholding or causing ATML to withhold PSI and that they had knowingly and directly profited from the falsely inflated share price in selling their shares necessarily meant they were "using the relevant information" when they dealt in the shares was not advanced by the SFC before the Tribunal. I do not agree with Mr Wong this is purely a question of law turning entirely on statutory interpretation. I agree with Mr Coleman and Mr Li this

is an issue of mixed law and fact and it is a fact sensitive matter whether there was withholding of the PSI.

53. Mr Wong pointed out that the hearings before the Tribunal are inquisitorial in nature not adversarial litigation, and the SFC is not bound by the ordinary rules of evidence or by the way in which it had presented its case. Further, the rule in *Browne v Dunn* (1893) 6 R 67 (HL) – that a material point which might be used against a witness should be put to him – is not inflexible and is not broken if the witness can fairly be said to be on notice of the point or where it is apparent. Mr Wong contended that even if it was not put to Charles and Marian they had withheld relevant information for the purpose of inflating the share price, and the term "false market" was not expressly mentioned, the meaning of the questions put to them was clear. They knew full well SFC's case that if the market had known of the Assignment and the statutory demand, the share price of ATML would go down, as this had been put specifically to each of them as a reason for selling their shares.[28] And both have had full opportunity of explaining their case in evidence. The fact is that the Tribunal had found that ATML was under an obligation to disclose the relevant information to the public; by virtue of their corporate positions Charles and Marian contributed to the non-disclosure as a matter of law, no assistance could be derived from the evidence.

54. I do not accept his submissions.

55. The fair hearing requirement in article 10 of the Hong Kong Bill of Rights is engaged notwithstanding that the proceedings in the Tribunal are inquisitorial in nature (*Koon Wing Yee v Insider Dealing Tribunal* (2010) 13 HKCFAR 133, §§8 and 9). Procedural fairness would require that a person who is the subject of an inquiry should know the factual and legal bases which formed part of SFC's case, so that he would have full opportunity to address the pertinent issues in evidence and make meaningful submission.

56. Although there was some questioning of Charles and Marian that they knew the share price would probably go down if the market had heard of the Assignment and the statutory demand, and it was suggested to them that was why they had sold their shares, the focus of the inquiry in the Tribunal was not whether Charles or Marian had withheld relevant information for the purpose of inflating the price of the shares. It was not explored whether they had the authority to withhold or release the relevant information. Nor were they asked specifically about the obligation of disclosure under rule 13.09 of the Listing Rules. There was no evidence they had withheld relevant information for the purpose of inflating the share price. There was no suggestion of linking non-disclosure of relevant information to maintenance of an inflated share price and the possibility of

benefiting from the inflated price. I do not agree with Mr Wong no assistance could possibly be derived from the evidence if the inquiry had focussed on the matters now sought to be raised.

57. There was no finding of fact by the Tribunal that Charles or Marian had knowingly and directly contributed to the maintenance of a falsely inflated share price of ATML. To the contrary, the Tribunal found that the sole motivating factor for the exercise of the share options by Charles and Marian was to take advantage of the unexpected boom in the share price. Hence, there was no question of their exploiting the non-disclosure of relevant information.

58. Mr Coleman further submitted that had this argument of the SFC been run before the Tribunal, more information could have been presented to demonstrate the general market condition and its trend. He referred to the expert evidence of Charles Li (given on behalf of Lu) that during the relevant period, there was an influx of funds from the PRC which pushed up the prices of listing shell companies for backdoor listing, and that the Hang Seng Index went from 18,454 on 1 November 2006 to 31,638 on 30 October 2007. This is also a valid point.

59. The new argument in law advanced by the SFC to counter the statutory defence would contravene the requirements of procedural fairness. Moreover, it does not have the factual basis required for its support.

60. For all the above reasons, I reject the first broad ground of appeal.

If the Tribunal had erred in its factual findings

61. The SFC sought to challenge two findings of fact made by the Tribunal, that Charles and Marian believed the settlement of the debt would be settled behind closed doors and that their sole motivating factor in exercising their share options was to profit from the unexpected speculative boom. It was contended that these two findings were plainly wrong.

62. Mr Wong made a bold submission there was no basis and no evidence for finding that Charles and Marian held the belief the settlement of the debt would be settled behind closed doors so that the relevant information would remain confidential and would never have any impact on the share price. He pointed to a host of matters which he argued would show otherwise: the circumstances had changed after the debt was assigned to Goodpine; the surmise that Goodpine was controlled or owned by Madam Liu was not based on any rational justification; the belief that ATML could deal with Goodpine in the same way as Madam Liu was misconceived and the threat of winding up was real; there

was no evidence of any actual capital injection by Lu to reduce the debt; there was no basis for thinking that any funding would arrive before a winding-up petition was presented. Mr Wong argued that if Charles and Marian were aware that the Assignment and the statutory demand were a real threat to ATML and ATML was particularly vulnerable, they could not possibly have believed that the information would never come to light and that ATML's vulnerability would never be realised.

63. In light of the above circumstances, Mr Wong submitted that Charles and Marian must have been motivated at least in part by a desire to take profit from the artificially inflated share price before Goodpine resorted to more drastic debt recovery measures such as a winding-up petition. The Tribunal had placed great emphasis that Charles and Marian did not exercise their share options and sell within the 21-day period of the statutory demand. Mr Wong submitted this would at best indicate a belief that the petition would not be presented immediately, not that it would not be presented at a later stage.

64. The principles governing an appeal to challenge factual findings are well established. The appeal court does not assume the task of reviewing the evidence and substituting its finding in place of the trial judge unless the finding of fact of the trial judge is plainly wrong, even if the appeal court may entertain some doubts as to its correctness. And an appeal is not the proper occasion for canvassing new points which might have been relevant but have not been raised below. The appeal court cannot be expected to re-assess the weight to be attached to the evidence of a witness when the point had not been properly canvassed below (*China Gold Finance Ltd v CIL Holdings Ltd*, CACV 11/2015, 27 November 2015, §48).

65. The applicable principles must be firmly borne in mind in this instance of a specialist tribunal, chaired by a judge with two members drawn from the financial industry. Members of the Tribunal have a unique advantage in understanding the market participants and their behaviour.

66. The factual findings under attack are subjective questions, one relates to the belief of Charles and Marian, the other relates to their sole motivation. The Tribunal had given full explanation why it accepted the evidence of Charles and Marian on these two matters. The evidence was not all one way, as Mr Wong would appear to suggest. And it is certainly not the case that there was no evidence in support of the Tribunal's findings. The Tribunal had taken note of the rare and peculiar circumstances of this case – that ATML had long been insolvent, was propped up by its controlling shareholder Lu, and was successful at stalling payment of the debt for several years; that persons accustomed

to dealing in the shares of ATML would have become aware that it was in precarious financial position and was insolvent.

67. I have summarised in the earlier part of this judgment the factual findings. I do not propose to repeat salient aspects of the evidence that would go to support the Tribunal's findings in respect of Charles and Marian. They have been set out in some detail in the submissions of Mr Coleman (at §22) and Mr Li (at §§2.1 to 2.11).

68. The Tribunal found the evidence of both credible. There is no basis to interfere with its findings.

Conclusion

69. I would dismiss the appeal of the SFC. Costs of the appeal should follow the event. I would make an order *nisi* that the SFC should pay the costs of Charles and Marian in this appeal, with a certificate for two counsel in the case of Charles.

(M H Lam)	(Peter Cheung)	(Susan Kwan)
Vice President	Justice of Appeal	Justice of Appeal

Mr Horace Wong SC and Mr Norman Nip, for the Appellant

Mr Russell Coleman SC and Mr Samuel Wong, instructed by Sit, Fung, Kwong & Shum, for the 1st Respondent

Mr Laurence Li, instructed by Raymond Chan, for the 2nd Respondent

Market Misconduct Tribunal, the 3rd Respondent, in person (Absent)

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[1] Formerly called Mansion House Group Limited, it changed its name to ATML in August 2004, and it is now known as Reorient Group Limited.

[2] Report, §102

[3] Report, §103

[4] Report, footnote 23

[5] Report, §203(ii)

[6] Report, §122

[7] Report, §112

[8] Report, §196

[9] See the definition of “relevant information” in section 245 of the SFO in 2007, quoted in the Report at §164

[10] Report, §§218 and 219

[11] Report, §208

[12] Report, §219

[13] Report, §§241 and 255

[14] Report, §225

[15] Report, §235

[16] Report, §234

[17] Report, §242

[18] Report, §249

[19] Report, §255

[20] Report, §§183, 185 and 264

[21] Quoted in the Report at footnote 19

[22] Report, §§266, 276, 292 and 293

[23] Report, §§276 and 294

[24] Report, §§133, 267, 268 and 276

[25] Report, §§289 and 290

[26] Report, §278

[27] Report, §279

[28] Transcript, Day 11, p 36 lines 9 to 11; Day 13, p 22 lines 25 to 30, p 23 lines 5 to 21