REPORT OF THE
INSIDER DEALING TRIBUNAL
OF HONG KONG

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

CHINA APOLLO HOLDINGS LIMITED

between

March 1ST and March 21ST ,1996 (inclusive)

and on other related questions

Introduction

By a notice pursuant to section 16 of Securities (Insider Dealing) Ordinance Cap. 395 (the Ordinance) dated 30 June 2000, The Hon. Donald Tsang, the then Financial Secretary of the Hong Kong Special Administrative Region, requested the Insider Dealing Tribunal to conduct an inquiry. The notice reads as follows:

> *'**Notice under section 16(2) of the***
> ***Securities (Insider Dealing) Ordinance, Cap 395***
>
> *Whereas it appears to me that insider dealing (as that term is defined in the Ordinance) in relation to the listed securities of a corporation, namely, China Apollo Holdings Limited ('the Company') has taken place or may have taken place, the Insider Dealing Tribunal is hereby required to inquire into and to determine:*
>
> *(a) Whether there has been insider dealing in relation to the company arising out of the dealings in the listed securities of the company by Messrs Lau Chan Wing, Raymond and Zhang Tie Cheng during the period from 1st to 21st March 1996 (inclusive);*
>
> *(b) in the event of there having been insider dealing as described in paragraph (a) above, the identity of each and every insider dealer; and*
>
> *(c) the amount of any profit gained or loss avoided as a result of such insider dealing.'*

In compliance with the notice, the Insider Dealing Tribunal, comprising of The Hon Mr Justice Lugar-Mawson as Chairman and Mr Simon Lam Siu Lun, and Mr Malcolm Barnett as members, heard evidence and submissions from counsel for 35 days, between 2 April 2001 to 10 August 2001.

We now have pleasure in submitting the report on our findings in relation to questions (a) and (b) of that notice. Our report in relation to question (c) will be submitted at a later date.

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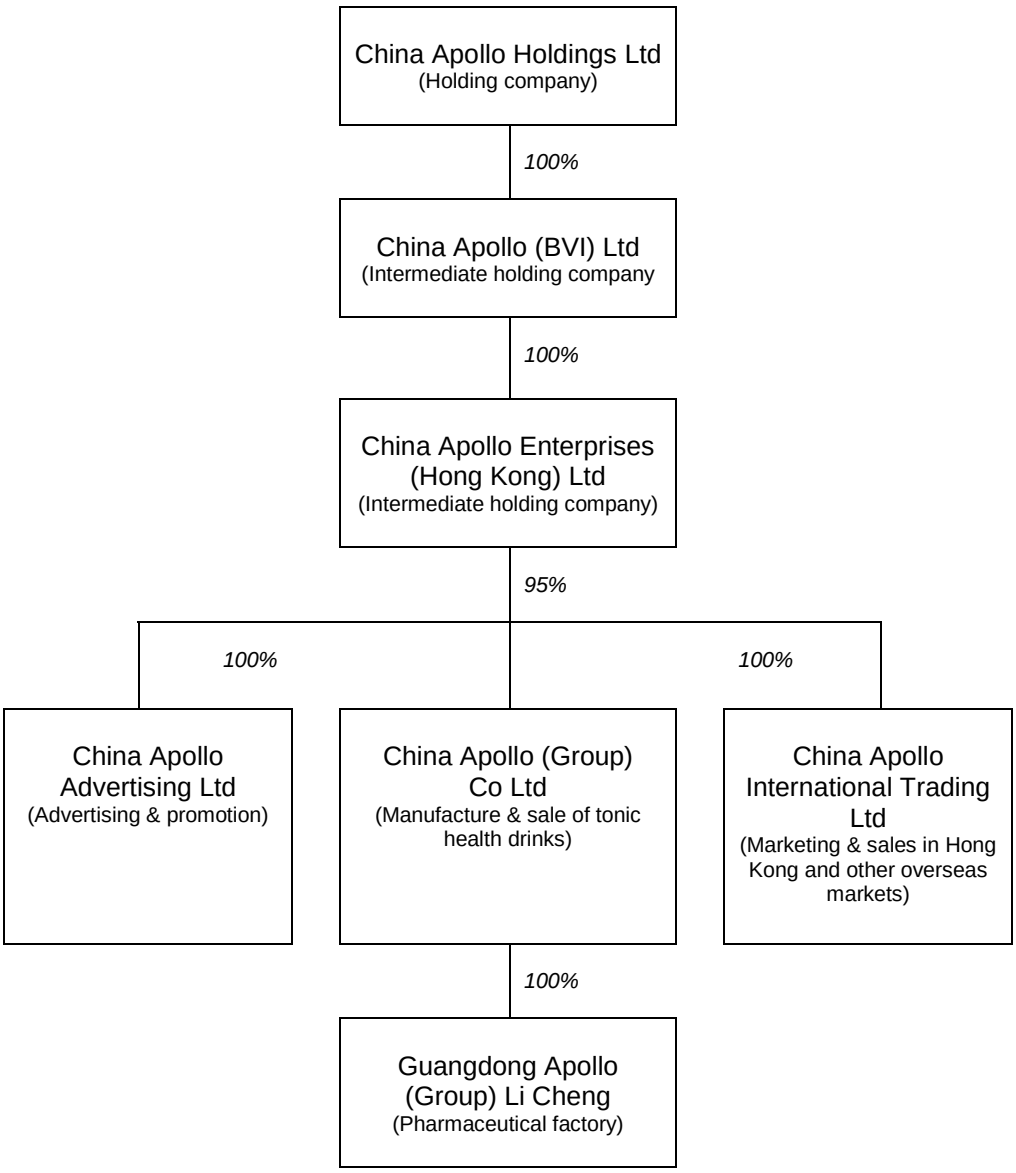
Chapter 1

In this chapter we set out the background to the Inquiry and deal with non-contentious facts, figures and events. Throughout this report, references to dollars ($) are to Hong Kong dollars, words and expressions employing the masculine gender include the feminine and neuter genders and words and expressions in the singular include the plural and vice-versa. Where we have provided the definition of any word or expression given in any ordinance, the definition extends to all grammatical variations and cognate expressions of that word or expression.

The company

The following chart shows the principal companies in the China Apollo Group of companies (the Group).



China Apollo Holdings Ltd (China Apollo) was incorporated in Bermuda on 18 October 1995 as an exempted company under the Companies Act 1981 of Bermuda (as amended). It carried out no business from the date of its incorporation to 17 November 1995 when it acquired the entire share capital of China Apollo (BVI) Ltd (an International Business Company incorporated in the British Virgin Islands) through a share exchange and became the ultimate holding company of China Apollo Group Co Ltd (China Apollo Group). China Apollo (BVI) Ltd acts as an intermediate holding company holding the equity interests in Guangdong Apollo (Group) Co Ltd (Guangdong Apollo), which is the principal operating entity of the Group, through China Apollo Enterprises (Hong Kong) Limited (China Apollo Enterprises), a Hong Kong registered company. Guangdong Apollo is a Sino-Hong Kong joint venture enterprise established in the People's Republic of China on 25 August 1988 for a joint venture period term of 10 years, which was subsequently extended to 30 years in 1994. China Apollo's main business is the manufacture and sale of tonic health drinks and soft drinks in the Mainland.

In 1995 and 1996 the Chairman and Executive Director of China Apollo was Mr. Lok Fai ('Mr Lok'). Its other four Executive Directors were, Mr. Zhang Tie Cheng ('Mr Zhang'), Mr. Tsueng Wai Lok ('Mr Tseung'), Ms. Wang Hui Hui Huang ('Ms. Wang') Mr. Raymond Lau Chan Wing ('Mr Lau').

In their biographies given in the prospectus we were told that:

Mr Lok is the Chairman and Managing Director of the China Apollo Group. He is responsible for the overall strategy and development of the Group. He has been one of the directors and the general manager of Guangdong Apollo since its establishment in 1988 and is responsible for product development, production management and marketing. Prior to founding the China Apollo Group, Mr. Lok had over 17 years of experience in corporate development in a state-owned manufacturing enterprise.

Mr. Zhang is the Deputy General Manager of the China Apollo Group, mainly responsible for sales and marketing, production management and corporate management. Mr. Zhang is a senior economist and a graduate of Zhongshan University in the Peoples' Republic of China. Prior to joining the Group in September 1990, he had over 13 years' experience in corporate management.

Mr. Tseung is the Deputy General Manager of the China Apollo Group mainly responsible for product development and business development. He has been a member of the senior management of Guangdong Apollo since its establishment. Prior to that, Mr Tseung had 19 years' experience in administration and business development in the manufacturing industry.

Ms. Wang is the Deputy General Manager of the China Apollo Group mainly responsible for strategic planning and business development. Ms. Wang is a graduate of Boston University in the United States holding a MBA degree. Before joining the Group in February 1995, she was a vice-president of Springfield Financial Advisory Ltd. in Hong Kong. Prior to that, she was an assistant treasurer of the Bank of New York from 1989 to 1993 in New York.

Mr. Lau is the Finance Director and Company Secretary of China Apollo and is responsible for finance, accounting and corporate secretarial matters. Mr. Lau is a graduate of Hong Kong Polytechnic holding a diploma in accountancy and is an associate member of the Canadian Association of Certified Executive Accountants. Before joining the China Apollo in June 1995, Mr. Lau had over 15 years' experience in accounting and financial management and held senior financial management position in several multinational and listed companies in Hong Kong and overseas. Prior to that, he also had three years' auditing experience with an international accounting firm in Hong Kong.

The listing on the Stock Exchange of Hong Kong

On 19 December 1995, China Apollo was listed on the Stock Exchange of Hong Kong.

On 7 December 1995, before the listing, China Apollo published a prospectus. This announced a private placement of 100 million new shares at $1.50 per share to professional investors and invited the public to subscribe for 100 million new shares also at $1.50 payable in full on application.

Page 49 of the prospectus, under the section entitled 'Information Relating to the Group', stated that:

> *'The Directors forecast that, on the basis and assumptions set out in Appendix II and in the absence of unforeseen circumstances, the*

combined profit after taxation and minority interests but before extraordinary items of the Group for the year ending 31 December 1995 will amount to not less than $190 million. The Directors are not aware of any exceptional items having arisen, nor do they expect any that are likely to arise during the year ending 31 December 1995.'

It was accepted at the Inquiry that the wrong adjective had been employed in the first sentence of that statement, the word should have been *'exceptional'* not *'extraordinary'*, mirroring in the use of that word in the second paragraph.

Appendix II of the prospectus (pages 68 to 70) listed the basis and assumptions for the forecast. It included two letters, one issued by Arthur Anderson, the auditors and reporting accountants of China Apollo, the other by HSBC Corporate Finance Limited the sponsor and manager of the new issue. Arthur Anderson's opinion was that the profit forecast in the prospectus had been properly compiled. HSBC Corporate Finance Limited's opinion was that, relying on the calculations reviewed by Arthur Anderson, they believed that the profit forecast had been made after due and careful consideration.

The share allocations

The share application list for the 100 million China Apollo shares offered to the public opened at 11.45 a.m. and closed at 12 noon on 12 December 1995. The first day of trading was a week later, on 19 December 1995. All 100 million shares available for allocation were taken up. At Annexure 1 is a table (compiled by the Securities & Futures Commission from information supplied by brokers pursuant to notices issued under section 31 of the Securities & Futures Ordinance, Cap 24) of those who successfully subscribed for shares in China Apollo.

Major allocations were made to 4 companies:

1. Bowring Assets Ltd, which was allocated 10 million shares through the placing underwriters Yiu Xie Finance (Securities) Ltd.

2. High Margin Investments Ltd, which was allocated 12 million shares through the placing underwriters J & A securities (Hong Kong) Ltd.

3. Queen's Choice Investments Ltd, which was allocated 21.5 million shares through the placing underwriters J & A Securities (Hong Kong) Ltd; and

4. Savoy Assets Ltd, which was allocated 7.7 million shares through the placing underwriters Wheelock NatWest Securities Ltd.

Between them these 4 companies were allocated 51.2 million (51.2%) of the 100 million shares available to the public in the flotation. Each one of them is a British Virgin Islands International Business Company. We have more to say about them and their control and ownership in Chapter 6.

China Apollo's share price following the listing

At Annexure 2 is a table listing, for the period 19 December 1995 (the first day of trading) to 30 June 1996, the:

- daily high/low price of China Apollo's shares
- daily closing price of China Apollo's shares
- daily turnover of China Apollo's shares; and
- All Ordinaries Index.

The All Ordinaries Index, and not the Hang Seng Index, has been chosen for the market comparison as China Apollo has a relatively low capitalisation and the All Ordinaries Index represents the movement of all stocks listed on the Stock Exchange of Hong Kong, whereas the Hang Seng Index more closely tracks the movements of blue chips.

The graph at Annexure 3 compares the daily closing price of China Apollo and the All Ordinaries Index during the period 19 December 1995 to 30 June 1996.

The graph at Annexure 4 shows the daily closing price and turnover of China Apollo's shares during the period 19 December 1995 to 30 June 1996.

In summary:

The trading debut was disappointing; the price closed at $1.17 on 19 December 1995 as compared to the offer price of $1.50. Sentiment remained bearish in December

1995 with the price ending the month at only $1.06, while the All Ordinaries Index ended at 4,770.57.

After the start of the New Year - 1996, the stock price gathered strength and out performed the All Ordinaries Index. On 18 January 1996, for the first time the stock closed above the offer price and by end of the month, it ended at $1.81. This represents an increase of 70.7% in January 1996. The All Ordinaries Index increased only by 13% to 5,394.93.

In February 1996, the stock price hovered within a 10 cents range of $1.70 to $1.80 with the average daily turnover reduced to about 2.8 million shares. It closed the month at $1.84, an increase of 2.8%. The All Ordinaries Index eased 0.8% to 5,349.02.

The closing price on Friday, 1 March 1996 was $1.87. On Monday, 4 March 1996, the day when Mr. Tseung, Mr. Zhang, Ms. Wang and Mr. Lau, the four executive directors, were granted their options to subscribe for shares at $1.44, the price jumped 13.6% to close at $2.125.

From 5 to 8 March 1996, the price stayed above the $2 level and ended the week at $2.05. On Monday, 11 March 1996, the price fell sharply to close at $1.75 (a drop of 14.6% from $2.05). The All Ordinaries Index also dropped 7% to 5,015.40 because of bearish market sentiment over tension in the Taiwan Straits.

On 12 March 1996, the market rebounded with 1.9% increase in the All Ordinaries Index to 5,115.63. The price of China Apollo's shares also bounced back to close at $1.87 (an increase of 6.8%). On the same day each of the four executive directors exercised part of their options at $1.44 per share.

On 13 March 1996, the price eased 2.1% to close at $1.83 against a 3% drop in the All Ordinaries Index to 4,958.36. Over the next two days, the price moved up to the $2 level, and ended at $2.05 on Friday, 15 March 1996. The All Ordinaries Index also increased by 3% to 5,107.97.

Between 18 and 21 March 1996, when the four executive directors and Ms. Tsang and Mr Peter Wong sold all their shares at prices ranging between $1.99 and $2.15,

the closing prices of the shares moved within a narrow range of $2.05 to $2.125. The All Ordinaries Index increased by 3.6% ending at 5,293.32 on 21 March 1996.

Between 22 March to 21 May 1996 the share price fluctuated narrowly around the $2 level. The All Ordinaries Index fluctuated between 5,100 and 5,300.

China Apollo released its 1995 annual results on the evening of 21 May 1996. Reacting to the results, on 22 May 1996, the price of its shares dropped from previous close of $2.10 to close at $1.53 (a drop of 27.14%) with 26.8 million shares traded. The All Ordinaries Index only eased 0.07% to 5,287.27 on that day.

The decline in the share price continued on 23 May 1996, dropping another 4.58% to close at $1.46 with a market volume of 11.1 million shares. The All Ordinaries Index only dropped 0.25% to 5,273.66.

The share price rebounded slightly on 24 May 1996 by 2.05%, closing at $1.49 while turnover increased to 17.6 million shares. The All Ordinaries Index remained stable at 5,269.29.

In the last 5 trading days of May 1996 the share price continued to drop and closed at $1.36 on 31 May 1996. The All Ordinaries Index gained ground over this period.

China Apollo's results for the year ended 31 December 1995

In the evening on 21 May 1996, China Apollo announced its final results for the year ended 31 December 1995. Arthur Anderson issued the audit report to the accounts on the same day. The profit & loss account showed a profit attributable to shareholders of $192 million. The figure included an exceptional gain of $15.8 million made on the disposal of a long-term investment held by Guangdong Apollo pursuant to a sale and purchase agreement dated 26 December 1995.

China Apollo treated the $15.8 million gain as an exceptional item and it was therefore included as part of the 'profit after tax and minority interests' but before 'extraordinary items'. This gain had effectively brought the net operating profit figure up by $15.8 million from $176.2 million to $192 million, or 8.9%. This resulted in it being more or less in line with the profit forecast in the prospectus. The prospectus, however, had stated that the year-end profits would not include any exceptional items.

A further public announcement, made by China Apollo in the evening of 23 May 1996, said that the $15.8 million gain came from the sale, on 26 December 1995, of shares in Guangdong Wah Nan Communication Investment Co Ltd ('Wah Nan'), which Guangdong Apollo held as an investment, to a Mainland entity, the Dongguan Huangjiang Town Industry & Communication Office ('Dongguan/Huangjiang').

We shall refer to this transaction as 'the Wah Nan sale' from now on.

The announcement of 21 May 1996, under the section headed 'Business Review', stated that:

> *'The Group's turnover for the 1995 financial year was approximately HK$685,510,000 representing a decrease of 17.9% from the 1994 financial year.'*

The same section attributed two reasons to the decrease in the 1995 sales figures. Firstly, it was said that, due to the tightening of the credit lines extended to its distributors in the second half of 1995, the amount of products sold to them had decreased. Secondly, it was said that the relocation of the production line during the period December 1994 to February 1995 had interrupted production and reduced production capacity.

The 2 announcements are annexures 5 & 6, respectively.

The Wah Nan sale agreement

The Wah Nan sale agreement of 26 December 1995 provided for a consideration of RMB¥27 million for 10 million shares. Sixty percent of the consideration was to be paid within six months after the agreement came into effect, with the remaining 40% to be paid within one year after that date.

Written 'Supplementary Notes' to the agreement, dated for the next day, 27 December 1996, provided:

> *'2. Upon the effective date of the shares assignment contract, all the economic income such as dividend income derived from the aforementioned 10 million shares of Wah Nan Communications shall belong to Industry & Communication Office, and Apollo shall not be*

entitled to any of the economic rights arising from the aforementioned shares.'

and

'3. These supplementary notes shall become effective upon the signature of the authorized representatives of the two parties. It shall be deemed as a document supplementary to the aforesaid shares assignment contract and carry the same legal effect as the shares assignment contract.'

On 20 May 1996, that is one day before the release of the 1995 results, four cheques, for $1,058,736, $3,252,788, $2,416,356 & $800,000 respectively, were issued by a company called Crownton Investments Ltd (Crownton) to China Apollo Enterprises (Hong Kong) Ltd, the intermediate holding company which is the wholly owned subsidiary of China Apollo. These four cheques totalled $7,527,880 (RMB¥8,100,000) and represented 30% of the consideration for Guangdong Apollo's sale of its shares in Wah Nan.

China Apollo's staffs share subscriptions

Among the staff members of China Apollo who subscribed for and were allotted the company's shares at $1.50 per share on 15 December 1995 were:

1. Mr. Wang Feng Yi (Mr. F. Y. Wang) who subscribed for 1,300,000 shares

2. Mr. Jin Dong (Mr. Jin) who subscribed for 300,000 shares

3. Ms. Florence Tsang Ho Ling ('Ms. Tsang') who subscribed for 150,000 shares.

4. Mr Peter Wong Hoi Kin ('Mr. Peter Wong') who subscribed for 148,000 shares.

Mr. Lok provided them with the money to pay for their shares.

The Option Scheme

The Prospectus, at page 156, disclosed the existence of an employee share option scheme under which employees of China Apollo could be granted options to subscribe for shares in the Company at an exercise price of not less than 80% of the average of the closing prices of the shares on the Stock Exchange on the five trading

days immediately preceding the date on which an option would be granted or the nominal value of the shares (10 cents), whichever would be higher.

On 4 March 1996, the four executive directors, Mr. Tseung, Mr. Zhang, Ms. Wang and Mr. Lau, were granted options to purchase 2.5 million shares, exercisable at the price of $1.44 for each share.

A number of the senior management of China Apollo were also granted options. They included Mr. Jin, Mr. F. Y. Wang and Mr. Huang Mu Yan (Mr. Huang) who were granted options to purchase 1.5 million, 1.8 million and 1.8 million shares respectively, also exercisable at the price of HK$1.44 for each share.

On 12 March 1996 all 7 of them exercised part of their options to subscribe for shares.

Mr. Tseung subscribed for 1.5 million shares, paying a total price of $2,160,000.

Mr. Zhang subscribed for 1.2 million shares, paying a total price of $1,728,000.

Ms. Wang subscribed for 1.1 million shares, paying a total price of $1,584,000.

Mr. Lau subscribed for 1.3 million shares, paying a total price of $1,872,000.

Mr. Jin Dong subscribed for 600,000 shares, paying a total price of $864,000.

Mr. F. Y. Wang subscribed for 1 million shares, paying a total price of $1,440,000.

Mr. Huang Mu Yan subscribed for 900,000 shares paying a total price of $1,296,000.

Mr Lok provided them with the money to pay for the shares.

The sale of the subscription & option shares

Between 18 to 21 March 1996:

Mr. Tseung sold his 1.5 million shares at prices ranging from $2.025 to $2.1. He received $3,082,465, resulting in a net profit of $922,465.

Mr. Zhang sold his 1.2 million shares at prices ranging from $2.025 to $2.15. He received $2,483,997, resulting in a net profit of $755,997.

Ms. Wang sold her 1.1 million shares at prices ranging from $2.0 to $2.15. She received $2,276,904, resulting in a net profit of $692,904.

Mr. Lau sold his 1.3 million shares at prices ranging from $1.99 to $2.10. He received $2,618,986, resulting in a net profit of $746,986.

Mr. Jin sold 282,000 of his shares acquired at the initial public offering at prices ranging from $2.1 to $2.125. He received $591,794, resulting in a net profit of $168,794.

Mr. F. Y. Wang sold 50,000 of his shares acquired at the initial public offering at $2.025. He received $100,830, resulting in a net profit of $25,830.

Ms. Tsang sold all her 150,00 shares acquired at the initial public offering at $2.125 per share. She realised $317,433.16, resulting in a net profit of $90,153.91.

Mr. Peter Wong sold all his 148,000 shares acquired at the initial public offering at $2.125 per share. He received $313,200.13, resulting in a net profit of $88,951.45.

Only Mr. Huang Mu Yan did not sell any of his shares in March 1996.

Proceeds of Sale

All the above sales were effected through Crownton. Crownton is a company controlled by Ms. Arthine Chung Ming Chee ('Ms. Chung'). The proceeds of sale were deposited into one of Crownton's bank accounts.

Undisputed facts

With the exception of the circumstances under which Ms. Tsang came to acquire and sell her shares (a matter we deal with in Chapter 4), none of the above matters were in dispute at the Inquiry.

Chapter 2

In this chapter we deal with the constitution of the Tribunal; identify the implicated persons and the witnesses before the Tribunal; and outline the procedures we followed and the juridical basis of our findings.

The Tribunal's constitution{ XE "constitution of the Tribunal" \b }

As a result of the trading in China Apollo's shares in March 1996, described in Chapter 1, the Securities & Futures Commission conducted an investigation. This led to The Hon Donald Tsang, the then Financial Secretary, on 30 June 2000 requesting the Insider Dealing Tribunal to conduct this inquiry. We have quoted the terms of his notice of that date in the introduction.

Pursuant to Section 15(2) of the Ordinance, Cap 395, The Hon Mr. Justice Hartmann was appointed the Chairman of the Tribunal and Mr. Joseph Hui Sik Wing, and Mr James Wardell were appointed as members.

The Tribunal chaired by Mr. Justice Hartmann heard evidence between 6 to 14 November 2000. After having regard to certain parts of the evidence, the Tribunal decided that the conduct of other persons besides Mr. Lau and Mr. Zhang should be the subject of the Inquiry and that they be brought into the Inquiry as implicated persons.

That Tribunal was also concerned with 2 issues that arose in the course of the November 2000 hearings, namely:

1. Was the Wah Nan sale a device to enable China Apollo to meet the 1995 profit forecast contained in the prospectus?

   and -

2. Were the subscriptions for China Apollo shares at the initial public offering and/or the exercise of share options and subsequent sales by the directors and staff of China Apollo in the period 7 December 1995 to 21 May 1996, carried out to raise funds to pay the consideration for the Wah Nan sale and in order to ensure that Arthur Anderson would agree to the sale being reflected in China Apollo's audited 1995 accounts?

That Tribunal's decision and concerns necessitated an adjournment of the Inquiry while arrangements were made for the necessary notifications to be given to those persons and for them to arrange legal representation. A further complication was that Mr Justice Hartmann's judicial commitments in the Court of First Instance in 2001 meant that he was unable to continue as Chairman of the Inquiry.

After consultation with Counsel to the Tribunal and counsel for certain of the implicated parties, conducted in open court, it was decided that Mr. Justice Hartmann, and Mr. Hui and Mr. Wardell should step down as Chairman and members, respectively, of the Tribunal and that the Inquiry should proceed with The Hon Mr. Justice Lugar-Mawson, who had recently been appointed a Chairman of the Insider Dealing Tribunal, as Chairman and Mr. Simon Lam Siu Lun and Mr. Malcolm Barnett as members. Accordingly, they were appointed as such under the provisions of section 15(2) of the Ordinance.

Mr. Lam is a Certified Public Accountant and the principal of his own accountancy practice. He has served as a committee member on other public boards in Hong Kong. Mr. Lam has previously sat as a member of the Insider Dealing Tribunal.

Mr Barnett is a solicitor and a company director; formerly he was a legal adviser to the HSBC Group. He has also served as a committee member on many public boards in Hong Kong. This is the first time that Mr. Barnett has sat as a member of the Insider Dealing Tribunal.

References in this report to 'The Chairman' are to Mr. Justice Lugar-Mawson.

The sending out of the 'Salmon letters'{ XE "Salmon' letters" \b }

Paragraph 17 of the Schedule to the Ordinance provides that it is for the Tribunal to determine 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. These persons are referred to by the descriptive term 'Implicated Persons'. There is no statutory definition of the term given in the Ordinance; indeed it is not a term used anywhere in the Ordinance.

As there are no pleadings or charges in an Insider Dealing Tribunal inquiry the way of notifying the implicated persons of the fact that the Tribunal has identified them as

such is to send them a letter informing them of that fact and giving them advance notice that their conduct will be one of the subject matters of the inquiry. These letters are commonly described as 'Salmon letters'**{** XE "Salmon' letters" \b **}** after Lord Justice Salmon**{** XE "Lord Justice Salmon" \b **}** who in 1966 sat as Chairman of the United Kingdom's 'Royal Commission on Tribunals of Inquiry'**{** XE "Royal Commission on Tribunals of Inquiry" \b **}**. Again, there is no statutory definition of the term 'Salmon letter' and no statutory prescription of the form one should take, or what information it should contain. And, likewise, the term 'Salmon letter' appears nowhere in the Ordinance.

The 'Salmon letters' have annexed to them a case synopsis outlining the allegations made against the recipient. They stress that the synopsis is no more than a guide and that the Tribunal is free to investigate whatever matters it considers relevant in the light of the evidence led at the inquiry. They also **{** XE "Salmon' letters" \b **}** inform the recipient**{** XE "implicated persons" \b **}** that copies of the witness statements and documentary evidence from which the case synopsis has been compiled are available to them.

Based on information available before the start of the hearings, the Tribunal chaired by Mr. Justice Hartmann identified only Mr. Lau and Mr. Zhang, the two persons named in the Financial Secretary's notice of 30 June 2000 as implicated persons and served 'Salmon letters' on them. Once that inquiry commenced the Tribunal identified 7 other persons as implicated persons. They were:

1. Mr. Lok Fai (Mr. Lok)

2. Mr. Tseung Wai Lok (Mr. Tseung)

3. Ms. Wang Hui Hui Huang (Ms. Wang)

4. Ms. Arthine Chung Ming Chee (Ms. Chung)

5. Mr. Jin Dong (Mr. Jin)

6. Mr. Huang Mu Yan (Mr. Huang); and

7. Mr. Wang Feng Yi (Mr. F. Y. Wang)

In Chapter 1 we dealt with Mr. Lok, Mr. Zhang, Mr. Tseung, Ms. Wang and Mr. Lau's positions in China Apollo. The prospectus told us that, Mr. Huang is the administration manager of China Apollo. He is an economist and a graduate of Jimei Nautical College in the PRC. Mr. Huang is primarily responsible for the administration of the general manager's office and its external communications. Prior to joining China Apollo in September 1991, he worked for Guangzhou Ocean Transport Bureau, with responsibility for general management and administration. Mr. F. Y. Wang is a Deputy General Manager of the China Apollo and also the personnel manager of Guangdong Apollo. He is an economist and is primarily responsible for the China Apollo's personnel management. Prior to joining China Apollo in September 1990, he worked at the Guangdong Post & Telecommunication Bureau and has more than 10 years' experience in personnel management. The prospectus made no mention of Mr. Jin; in his statement to the Tribunal he told us that he is the Deputy Personnel Manager of Guangdong Apollo. We deal in Chapter 6 with who Ms. Chung is.

The 'Salmon' letters**{** XE "Salmon' letters" \b **}** were served on Mr. Lok, Mr. Tseung, Ms. Chung, Mr. Jin, and Mr. F. Y. Wang on 24 November 2000 and were, in substance, the same. The whereabouts of Ms. Wang and Mr. Huang could not be ascertained and in consequence it was impossible for 'Salmon Letters' to be served on them.

By way of illustration of their terms and content, a copy of the 'Salmon letter' sent to Mr. Lau (which does not include the case synopsis) is at Annexure 7 and a copy of the 'Salmon letter' sent to Mr. Lok is at Annexure 8.

Legal representation{ XE "Legal representation" \b }

The Tribunal chaired by Mr. Justice Hartmann appointed Mr. Peter Duncan, barrister **{** XE "Peter Davies" \b **}**and Mrs. Winnie Ho Ng Wing Yee, Government Counsel in the **{** XE "Winnie HO NG Wing-yee" \b **}**Department of Justice as Counsel to the Tribunal. Their appointment was made under the provisions of paragraph 18 of the schedule to the Ordinance. They remained Counsel to the Tribunal throughout all the hearings.

Paragraph 16 of the schedule to the Ordinance provides that any person whose conduct is the subject of an inquiry or who is implicated or concerned in the subject

matter of an inquiry is entitled to legal representation. At the inquiry, Mr Alan Hoo SC assisted by Ms. Catrina Lam, barrister, instructed by Messrs. Tsang, Chan & Woo, represented Mr. Lok. Mr. Graham Harris, barrister, instructed by Messrs. Kwok & Yih, represented both Mr. Lau and Mr. Zhang. Mr Bernard Mak, barrister, instructed by Messrs. Peter K S Chan & Co, represented Mr. Tseung. And Mr. Ronny F H Wong SC assisted by Mr Richard Wong, barrister, instructed by Messrs. Lo, Chan & Leung, represented Ms. Chung.

Mr. Jin and Mr. F. Y. Wang, both of whom are resident in the Mainland, chose not to appear at any sitting of the Inquiry, or be represented by counsel. They did, however, submit written statements to the Tribunal. We were satisfied that each of them had been given adequate notice of the hearings and the opportunity of being heard by the Tribunal. Accordingly, we proceeded in their absence and have made findings in respect of both of them.

Mr. Zhang, although represented by counsel, was because of ill health unable to attend any of the hearings; he submitted a written statement. Again, we were satisfied that he had been given adequate notice of the hearings and the opportunity of being heard by the Tribunal, and we proceeded in his absence and have made findings in respect of him.

We also proceeded in the absence of Ms. Wang and Mr. Huang who could not be served with 'Salmon letters'. However, as we cannot be satisfied that they had been given adequate notice of the hearings and the opportunity of being heard by the Tribunal, we are mindful of the provisions of section 16(5) of the Ordinance and have made no findings in respect of either of them.

The Preliminary meeting

A preliminary meeting of the Tribunal chaired by Mr. Justice Lugar-Mawson was held on 6 February 2001 in the Tribunal's courtroom at Tower 2 of the Lippo Centre, Queensway, Hong Kong. At that meeting the date of the commencement of the reconvened Inquiry was fixed for Monday, 2 April 2001.

We made it clear at the preliminary meeting, and we make it clear now, that this is the same Inquiry as the one that started in November 2000 and not a new one. The terms of reference set out in the Financial Secretary's notice of 30 June 2000 have not been amended, as it is for the Tribunal to decide who is an implicated party.

However, as the Tribunal now had a different Chairman and members, we directed that the evidence given at the earlier hearings should not stand and be treated as evidence in the Inquiry, unless there was agreement between all parties that all, or some, of it may be so accepted and that failing such agreement we would hear evidence de novo. We were not asked to have regard to the evidence led in the earlier hearings and have heard all evidence *de novo*.

As the cost of the Inquiry for all parties could be substantial, we encouraged the agreement of facts wherever possible. We are pleased to say that there was considerable goodwill between the parties and a number of facts were agreed. We deal with these in their proper place in this report.

We pointed out that Counsel to the Tribunal would, of necessity, be involved in a large amount of administrative work, such as arranging for the attendance of witnesses and, when appropriate, ensuring that steps were taken to secure new evidence. To this end it was said that Counsel to the Tribunal might from time to time have to meet with the Chairman and the Tribunal members in chambers. However, it was anticipated that once the Inquiry commenced, such meetings would be kept to the minimum necessary to ensure the orderly progress of the Inquiry. We place on record that once the Inquiry commenced there was no need for any meetings, and none were held, between Counsel to the Tribunal and the Chairman and the Tribunal members to discuss matters of law or substantive evidence, as opposed to purely administrative matters.

The length of the Inquiry{ XE "length of the inquiry" \b **}**

The Inquiry commenced, as scheduled, on Monday, 2 April. The evidence was completed and all submissions made by Friday, 10 August. During this time we sat on 35 days. We mainly sat in the mornings from 9.30 a.m. to 1 p.m. to enable the Tribunal members to attend to their professional commitments in the afternoons. When it was necessary to accommodate witnesses or speed up the progress of the Inquiry the Tribunal sat in the early evening from 5 to 7 p.m., and on one Saturday morning.

The Tribunal's proceedings were recorded and transcribed by Smith Bernal International (Asia) Ltd. A transcript of each day's proceedings was ready in the late afternoon of that day. The transcripts were made available to all the implicated

persons and their legal representatives, as soon as they were ready, on payment of a prescribed fee.

Witnesses called{ XE "Witnesses called" \b } during the Inquiry

Twelve witnesses were called to give oral evidence in the course of the Inquiry, 2 were expert witnesses and 4 were implicated persons. The non-expert witnesses were:

1. Mr.Nigel Chan Kwong Yeung, a dealing director with ING Baring Securities (Hong Kong) Ltd,

2. Mr. Timothy Love Greaton, an investment representative with Nicholas-Applegate Capital Management (Hong Kong) LLC;

3. Ms. Tommei Tong Mei Kuen, a former partner of Arthur Anderson,

4. Ms Tsang (the Ms. Florence Tsang Ho Ling referred to in Chapter 1), Mr. Lok's former secretary),

5. Mr. Peter Wong (the Mr. Peter Wong Hoi Kin referred to in Chapter 1), the former Project Investment Manager of China Apollo); and

6. Mr. Yeung Wai Shing, an accounts clerk with China Apollo.

The 4 implicated persons called as witnesses were:

7. Mr.Lok,

8. Ms. Chung,

9. Mr. Lau; and

10. Mr. Tseung.

The two expert witnesses were:

11. Mr. Alex Pang Cheung Hing; and

12. Mr. Clive Derek Conway Louis Rigby.

Mr. Pang is **{** XE "Alex PANG" \b **}**a director of the Securities and Futures Commission**{** XE "SFC" \b **}**. He first joined Government working in the field of securities and commodities in 1983. He has been with the Securities and Futures Commission since its establishment in 1989 and is head of the Commission's Surveillance Department of the Enforcement Division. He holds a diploma in advanced securities markets analysis.

Mr. Rigby**{** XE "Clive Rigby" \b **}** is the managing director of Lippo Securities Ltd. He has over 30 years experience as a broker in the commodities futures trading industry and over 20 years experience as a broker in the securities industry. He has been actively engaged in the Hong Kong financial market since the late 1970s.

In addition, and with the consent of the implicated persons present at the Inquiry and their counsel, we considered the statements given to the investigating officers of the Securities & Futures Commission of various witnesses who were not called to give oral evidence before us.

The inquisitorial process

The Financial Secretary's power under section 16(1) of the Ordinance to require the Tribunal to conduct an inquiry does not presuppose that there has necessarily been a representation made to him by the Securities & Futures Commission that there be an inquiry, though that will almost invariably be the case. Even when the Financial Secretary acts pursuant to the Commission's investigation, he acts upon a representation, and requires the Tribunal, not the Commission, *'…to inquire into the matter'*.

The provisions of Part III of the Ordinance (including the schedule) envisage an inquisitorial process not an adversarial one. Although the inquisitorial process appears unusual - even sinister - to those brought up in the common law tradition, it is not. The process observes the basic principle embodied in all developed systems

of justice in the Latin maxim *'audiatur et altera partes'*[1]. No decision can be reached until a fair opportunity has been given to all concerned in the inquiry to be heard, and to discuss and test the claims, arguments, considerations and evidence of the others.

There is nothing in section 16 that limits the Tribunal to evidence presented, either to the Financial Secretary or the Tribunal, by the Commission. There are no opposing parties and Section 18 of the Ordinance envisages that the Tribunal may conduct inquiries and, if necessary, inquiries beyond the material forwarded to the Tribunal by the Financial Secretary.

In the inquisitorial process the judges are given a greater role, as it is believed that, thereby, it will be easier for them to arrive at the truth. The Tribunal, therefore, directs the inquiry; the witnesses called are the Tribunal's witnesses; and as the Inquiry progresses, new matters may be raised which require a line of investigation not previously thought necessary. The Tribunal has a broad discretion to receive and consider relevant material, whether by way of oral evidence, written statements, documents or otherwise. Neither is the Tribunal bound by the conventional rules of evidence that apply in adversarial proceedings.

Counsel to the Tribunal is not a prosecutor, neither is he counsel for the Securities & Futures Commission. His function is to present relevant evidence to the Tribunal objectively, regardless of which way that evidence falls. It may be in support of, or against, an allegation of insider dealing. Counsel to the Tribunal, however, is not constrained to remain neutral throughout the inquiry. Where appropriate, he is entitled to employ his advocacy skills to test and probe evidence.

We emphasise the inquisitorial nature of our function because we sought and obtained evidence beyond that obtained by the Commission. This was the consequence of the task entrusted to us by the Ordinance and the terms of reference, in doing so we uncovered significant relevant evidence.

Decisions

Paragraph 13 of the Schedule to the Ordinance provides that the three members of the Tribunal decide all questions of fact, but that the Chairman alone decides all questions of law. All our findings of fact in this report were made unanimously. Any

[1] Latin: literally 'hear both or all parties'.

reference in this report to the Tribunal making a decision on a question of law is to be read as being a decision made at the Chairman's direction.

The Chairman gave four rulings on points of law that arose in the course of the Inquiry. These are at Annexure 9.

Chapter 3

In this chapter we deal with the law. It is divided into two parts. In Part 1 a number of general legal principles are considered. These are principles that we found to be of importance in the course of our deliberations. Part 2 deals with the relevant provisions of the Ordinance.

Part 1: General legal principles

The standard of proof{ XE "standard of proof" \b }

The Ordinance was enacted in 1990. The first inquiry conducted under it concerning Success Holdings{ XE "Success Holdings" \b } Limited took place in 1994. At the commencement of the substantive hearing in that inquiry, the Chairman, The Hon Mr. Justice Stock{ XE "Stock J" \b } heard detailed argument on the standard of proof and gave a considered ruling in which he held that the burden of proof placed upon counsel to the Tribunal in that inquiry was the civil standard, but was higher than a mere balance of probabilities. He held that proof must be to 'a high degree or probability'. To our understanding, all subsequent Tribunals have adopted the same standard of proof.

In the Hong Kong Parkview{ XE "Hong Kong Parkview" \b } Group inquiry, conducted in 1996 & 1997, the Chairman, The Hon Mr. Justice Burrell, held{ XE "Burrell J" \b } that the standard of proof to a high degree of probability should remain the same throughout an inquiry even though allegations against one implicated person may be more serious than against another, or the consequences more draconian in respect of one person than another.

We are aware that we are not bound by decisions on the appropriate standard of proof made by earlier Tribunals. However, consistency of approach in matters of such a fundamental nature is desirable and we have applied the same standard in this Inquiry.

Whenever in this report we say that we are 'satisfied' of a fact or matter, it should be taken that we were satisfied of that fact or matter to that high standard.

Securities & Futures Commission statements

With the consent of all the implicated persons choosing to appear at the hearings, the statement or statements to the investigating officers of the Securities & Futures Commission of each live witness called by Counsel to the Tribunal were adopted by

them as part of their evidence. With a few minor exceptions, each witness stated that the contents of his or her statement were true and accurate and each witness was given the opportunity to clarify or amend his or her statement.

Likewise, extracts from the statement or statements of each implicated person to the investigating officers of the Securities & Futures Commission was, on Mr. Duncan's application and without objection by counsel representing the implicated person, put into evidence. By this procedure they became evidence of what they had said to the Commission's investigating officers, subject to any live evidence they gave by way of clarification or amendment.

Whenever they wished to do so, we permitted each witness before us, including the implicated persons, to give their evidence-in-chief by way of a written statement and to make such amendments and clarifications to it as they wished by way of oral evidence.

In determining issues of fact we have attached such weight to the contents of each witnesses' statement as we consider fair and proper. In accordance with well-established legal principle we have made no findings of fact in relation to one implicated person based on the contents of another implicated person's statement.

Consideration of factual evidence

The benefit of an Insider Dealing Tribunal consisting of three members, two of whom are drawn from Hong Kong's business and professional community is that the two members bring to the Tribunal a wealth of relevant experience and expertise that a High Court Judge does not necessarily possess.

Mr. Lam and Mr. Barnett are an accountant and a solicitor, respectively. Both have first hand experience of Hong Kong's financial markets. They may use their own experience in assessing the evidence given by the witnesses. This principle however can only go so far, and we have been careful not to use Mr. Lam's and Mr. Barnett's professional knowledge and experience in place of the evidence called.[2]

Drawing of inferences

[2] See: **Wetherall v. Harrison** [1976] QB 733.

More often than not, proof of insider dealing will depend to some extent on circumstantial evidence. We inevitably had to make decisions as to whether or not an inference of wrongdoing could properly be drawn from proven facts. We frequently had to decide if a person knew something, although they claimed that they did not. Proof of such knowledge regularly depended on us relying on circumstantial evidence.

We are aware that circumstantial evidence can be as powerful, or even more powerful than direct evidence and that, in appropriate cases, it is conclusive against an implicated person. It derives its strength from a combination and accumulation of facts and circumstances.[3]

On the other hand, the inference of a fact from evidence must be done with caution and in accordance with the established directions on the subject. Whenever we inferred from any of the facts that were agreed or proved before us the existence of some further fact, we reminded ourselves that such an inference must be a compelling one - the sort of inference that no reasonable man would fail to draw - and must be the only reasonable inference, which is not the same thing as the only possible inference, which could be drawn from the facts agreed or proved before us.

We were especially careful not to draw inferences based on mere speculation, or conjecture.

Good character

All the implicated persons are of good character. In past inquiries, where applicable, the Tribunal has taken into account the implicated persons' good character in the course of its deliberations

In this Inquiry we directed ourselves that the implicated persons' good character is relevant in two ways. First, it bolstered their credit in deciding what weight we should attach to their evidence and, secondly, it established that, because they had been of good character throughout their careers, they were, as a result, less likely to have committed the civil wrong of insider dealing.

Demeanour

[3] See: **R v. Exhall** (1866) 4F&F 922.

While the ability to watch and listen to a witness giving his or her evidence is of considerable assistance in deciding what weight to give to that witness's evidence, we have borne in mind that demeanour is an imprecise concept and invariably subjective. These difficulties were increased when in respect of many of the witnesses two of us heard their evidence only through an interpreter. We are aware that demeanour can only be a point of last resort and have cautioned ourselves accordingly when assessing the credibility of all the witnesses, including the implicated persons.

Lies

It has been impossible for us to carry out our task without assessing and forming our opinion on the credibility of the witnesses who gave evidence before us, including the implicated persons. In order to find a fact proved, we had to be satisfied that the evidence we relied on was reliable, which means that it was both accurate and honest evidence. Conversely, in respect of other pieces of evidence, we concluded that they were unbelievable, unreliable, inaccurate, or dishonest. This was a necessary part of our function as a tribunal of fact.

Lies by the implicated persons

We regret to say that we have concluded that certain of the implicated persons lied both in their statements to the Securities and Futures Commission and in their evidence before us. Mr. Lau, in fact, admitted that he had lied in certain of his answers given to the investigators from the Securities & Futures Commission in the course of an interview conducted on 26 February 1998 under section 33(4) of the Securities and Futures Commission Ordinance, Cap 24. As a result the question of the proper weight to be attached to the evidence we found to be dishonest is important. We are conscious of the fact that lies by themselves prove nothing, save that they have been told. We are also conscious of the fact that there may be reasons for lies that are consistent with the absence of any wrongdoing, or of the particular wrongdoing alleged. It is only if we exclude such reasons that an implicated person's lies, in conjunction with other evidence, can go to support an inference of insider dealing. This is in the sense that they can confirm, or tend to support, other evidence, which of itself is indicative of such conduct.

Where we have concluded that one of the implicated persons lied, we have borne in mind that the reason for the lie may not have been a realization that they had committed insider dealing, but a realization, or fear, that they had committed some

other wrongdoing, or a fear (whether justified or not) that others would view certain conduct as improper, or no more than a feeling that the truth was unlikely to be believed.

We have also borne in mind that before a lie may be used to support a particular allegation, we have first to be satisfied that the lie was both deliberate and material to the issue we had to decide.

Part 2: The relevant provisions of the Ordinance

Taking into account the provisions in each of the sub-section's 6 paragraphs for the commission of the act by counselling or procuring, section 9(1) of the Ordinance**{** XE "Ordinance:section 9" \b **}** provides 12 instances of when the civil wrong of insider dealing takes place. Three are relevant to this Inquiry. They are as follows:

1. Section 9(1)(a) provides that insider dealing in relation to a listed corporation takes place when a person connected with that corporation, who is in possession of information in relation to that corporation, which he knows is relevant information, deals in any listed securities of that corporation. For ease of reference, we call this 'section 9(1)(a) dealing' from now on.

2. Section 9(1)(a) also provides that insider dealing in relation to a listed corporation takes place when a person connected with that corporation, who is in possession of information in relation to that corporation, which he knows is relevant information, counsels or procures another person to deal in such listed securities, knowing or having reasonable cause to believe that such person would deal in them. For ease of reference, we call this 'section 9(1)(a) counseling or procuring' from now on.

The ordinary meaning of the word 'counsel' is 'advise' or 'solicit. There is no implication in the word itself that there should be any causal connection between the counselling and the offence. However, one who counsels is liable only for an offence that is committed in consequence of such counseling. However, it is not necessary to prove that the counselling was a substantial cause of the commission of the offence:

To 'procure' means to produce by endeavour; you procure a thing by setting out to see that it happens and by taking the appropriate steps to produce that happening. There are plenty of instances in which a person has been said to procure the

commission of an offence by another, even though there was no sort of conspiracy between the two, and even where there was no attempt at agreement or discussion as to the form the offence should take. An offence cannot, however, be said to have been procured unless there is a causal link between what the alleged procurer did and the commission of the offence.

in Chapter 8, we consider whether or not Mr. Lok counselled or procured others to deal in China Apollo's shares.

3. Section 9(1)(e) provides that insider dealing in relation to a listed corporation takes place when a person, who has information in relation to that corporation, which he knows is relevant information and which he received (directly or indirectly) from a person whom he knows is connected with that corporation, and knows or has reasonable cause to believe held that information by virtue of being so connected, deals in the listed securities of that corporation. For ease of reference, we call this 'section 9(1)(e) dealing' from now on.

The word 'corporation' used in those 3 instances is defined in section 2(1) of the Ordinance (the General Definitions section) as *'any company or other body corporate or an unincorporated body, incorporated or formed either in Hong Kong or elsewhere.'* Section 2(1) also defines the phrase *'securities'* as meaning (among other things) *'shares'* and *'listed securities'* as meaning *'securities that are listed on the Unified Exchange'* which is now called 'The Stock Exchange of Hong Kong'.

For insider dealing to be proved in respect of each one of these 3 instances the Tribunal must be satisfied, to the requisite standard, of 4 different matters. They are as follows:

A. The securities must be those of a 'listed corporation' and must be 'listed securities'.

There is no dispute that China Apollo was at the material time (1 to 21 March 1996) a listed corporation as defined in section 2(1) of the Ordinance; that is, a corporation whose shares and other issued securities are listed on the Stock Exchange of Hong Kong and that all the dealings we were concerned with were of its listed securities. We use the words *'corporation'* and *'company'* interchangeably from now on.

B. For section 9(1)(a) dealing to take place the person dealing in the securities must

be ‘connected’ to the corporation. For there to be section 9(1)(a) counselling or procuring the person who counsels or procures the other person to deal in the listed securities must be ‘connected’ to the corporation. And for section 9(1)(e) dealing to take place the person dealing in the securities must have received ‘relevant information’ relating to them from a person whom he knows is ‘connected’ to the corporation.

For the purposes of this Inquiry there are 2 instances of how a person may be connected to the corporation. They are as follows:

(1). By virtue of section 4(1)(a) of the Ordinance a person is connected with a corporation if, being an individual, he is a director or employee of that corporation or a related corporation. A ‘related corporation’ In relation to a corporation (for ease of comprehension in following this definition we term it ‘corporation A’), is defined in section 2(1) of the Ordinance as being any corporation that is corporation A's subsidiary or holding company, or a subsidiary of corporation A's holding company, or any corporation a controller of which is also a controller of corporation A.

We refer to such a connected person as a ‘section 4(1)(a) connected person’ from now on.

(2) By virtue of section 4(1)(c) of the Ordinance a person is connected with a corporation if, being an individual, he occupies a position which may reasonably be expected to give him access to relevant information concerning the corporation by virtue of any professional or business relationship existing between himself (or his employer or a corporation of which he is a director or a firm of which he is a partner) and that corporation, a related corporation or an officer or substantial shareholder in either of such corporations.

We refer to such a connected person as a ‘section 4(1)(c) connected person’ from now on.

C. The connected person (or for the purposes of section 9(1)(e) dealing the person who received information from a person whom he knew to be a connected person) must ‘deal in’ the securities, or else counsel or procure another person to deal in them.

Section 6 of the Ordinance**{** XE "Ordinance:section 6" \b **}** defines dealing in securities as follows:

> *'For the purposes of this Ordinance, a person deals in securities or their derivatives if (whether as principal or agent) he buys, sells, exchanges or subscribes for, or agrees to buy, sell, exchange or subscribe for, any securities…acquires or disposes of, or agrees to acquire or dispose of, the right to buy, sell, exchange or subscribe for, any securities….'*

D. At the time of dealing (whether it be dealing by a connected person, or by a person who is counselled or procured to deal in them by a connected person) the connected person must be in possession of information in relation to the corporation, which he knows to be 'relevant information'.

Section 8 of the Ordinance**{** XE "Ordinance:section 8" \b **}** defines the phrase 'relevant information' as:

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

For information to be 'relevant information' it must possess 3 elements, each of which must be proved to the Tribunal's satisfaction. Those elements are:

(i) The information is known only to a few and is not generally known to the market; that is, to those individuals and institutions accustomed or likely to deal in the securities of the corporation.

(ii) It must be 'specific information'. Specific information is information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed[4].

(iii) It must be information of the kind, which, if it were generally known to the market, would *'be likely materially to affect'* the price of that corporation's listed securities.

[4] See: *dicta* of the Singapore High Court in **Public Prosecutor v. GCK Choudrie** (1981) 2 Co. Law 141).

The test of price sensitivity has to be applied at the time the alleged insider dealer's transaction took place and the exercise of determining how general investors would have behaved on that day, had they been in possession of that information, is, necessarily, an assessment. It is not a simple matter of deciding whether the information, when it became general knowledge, in fact had a material impact on the market. The test is instead hypothetical, the Tribunal must ask itself: had this information been generally known on the day the insider traded would it, at that time, have been **likely** to have had a material impact on the company's share price? Evidence of how investors reacted once the information was stripped of its confidentiality and became public knowledge will often provide the answer. However, care must be taken to ascertain whether the investors' response was attributable to the information released, or whether it was, wholly or in part, attributable to other events or considerations.

Further, the test is not simply whether the information, along with other matters already known, would have been likely to affect the price of the company's securities; the test is whether it would have been likely to have affected their price **materially**. Thus information that would be likely to cause a mere fluctuation, or a slight change in price, is not sufficient; there must be the likelihood of change of sufficient degree to amount to a material change.

It must also be recognized that not all important or interesting information will necessarily be materially price sensitive. Important information, or information of great interest, concerning a company may excite comment, but it may nevertheless be information of the kind that would not be likely to have a material impact on the price of that company's securities.

Similarly, past tribunals have recognized that information concerning a company's affairs which, although important, is of a neutral or mixed nature may influence some investors to buy and some investors to sell, but will not thereby be likely to affect the price either up or down to a material degree; that is to say to a degree that causes more than a mere fluctuation or slight change.

Section 10 of the Ordinance provides for statutory defences to an allegation of insider dealing. In particular sub-section 10(3) provides:

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

And sub-section 10(4) provides:

'A person who, as agent for another, enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction as agent for another person ***and*** *he did not select or advise on the selection of the securities to which the transaction relates.'* (emphais added)

The defences only arise if the Tribunal is satisfied to the required standard that a transaction was an instance of insider dealing. If that is so, once either of the defences are raised (and it is on the person relying on it to raise them) the burden of proof is on the person who seeks to rely on them and is discharged on a balance of probabilities. If that burden is discharged the person will not be identified as an insider dealer.

The words *'…if he establishes'*, do not mean that the burden can only be discharged by the evidence of the person who seeks to rely on either of the defences. The Tribunal must consider the whole of the evidence, including his evidence (if any), and decide if it, taken as a whole, discharges the burden on a balance of probabilities.

Earlier decisions of the Tribunal establish that sub-section 10(3) is construed narrowly. The defence is available to an implicated person only if the evidence establishes, on a balance of probabilities, that the true reason or reasons for his dealing were wholly unconnected with any desire or intention on his part to make a profit or avoid a loss. It is not intended to provide an implicated person with a defence that a genuine non-profit motive contributed to that person's reason or reasons for dealing. In the light of that test, in the case of a disposal of securities, the evidence must show, on a balance of probabilities, that circumstances compelled the implicated person to sell and that, without alternative resources, he had no choice but

to sell at that time, regardless of whether or not he had come into possession of the relevant information.[5]

The defence provided for in sub-section 10(4) is only available to an agent who deals on an execution only basis. The law recognises that the acquisition or disposal of securities may be made by an individual acting either as principal acting for himself or as an agent acting for another. Accordingly, if the agent has relevant information at the time of his dealing, he will engage in insider dealing, even though he may not gain personally from the transaction. The logic of this is plain in circumstances where the agent engages in the transaction to benefit his principal. This is simple insider dealing and the fact that the individual deals as agent and not principal is irrelevant. However, where the agent deals on an execution only basis, neither selecting or advising on the selection of the securities to which the transaction relates, such an approach hardly seems justified, hence this particular defence

So far, in dealing with the law under this Part, we have used the word and phrase employed in the Ordinance: *'securities'* and *'listed securities'.* As we have said, section 2(1) of the Ordinance defines the word *'securities'* as meaning (among other things) *'shares'* and the phrase *'listed securities'* as meaning *'securities that are listed on the Unified Exchange'* which is now called 'The Stock Exchange of Hong Kong'. In this inquiry we have only been concerned with China Apollo's shares traded on Hong Kong Stock Exchange and from now on, whenever the context requires it, we use the word *'shares'* interchangeably with the word *'securities'* and the phrase *'listed securities'.*

[5] In particular, see the decision of the Insider Dealing Tribunal in the inquiry into Hanny Holdings Ltd, at pages 76-79.

Chapter 4

In this chapter we deal with the ambit of the inquiry and identify the issues in the Inquiry.

The question of the ambit of the Inquiry was a subject of much debate, both in the hearings before the Tribunal chaired by Mr. Justice Hartmann and the one chaired by Mr. Justice Lugar-Mawson. On 23 January 2001, despite a request from Counsel for the Tribunal for him to do so, which was supported by Mr. Justice Hartmann, the Financial Secretary declined to extend the Tribunal's terms of reference. And in the course of the hearings the Chairman gave the four rulings on the issue at Annexure 9, all of which should be read as part of this report.

Part III of the Ordinance establishes the Insider Dealing Tribunal and deals with its constitution, jurisdiction and powers. Section 16 of the Ordinance sets out the Tribunal's jurisdiction. The relevant subsections provide:

> *'(1) If it appears to the Financial Secretary, whether following representations by the Commission or otherwise, that insider dealing in relation to a listed corporation has taken place or may have taken place, he may in accordance with this section require the Tribunal to inquire into the matter.*
>
> *(2) An inquiry shall be instituted by the Financial Secretary by notice in writing to the chairman of the Tribunal containing such particulars as are sufficient to define the terms of reference of the inquiry.*
>
> *(3) The object of an inquiry shall be to determine at the conclusion of the inquiry or as soon as it is reasonably practicable thereafter, within the terms of reference of the inquiry as defined under subsection (2) –*
> *(a) whether insider dealing in relation to a listed corporation has taken place;*
> *(b) the identity of every insider dealer; and*
> *(c) the amount of any profit gained or loss avoided as a result of the insider dealing.'*

The remaining three subparagraphs are not relevant.

The jurisdiction is a wide one. It is for the Financial Secretary to define the terms of reference, but it is for the Tribunal to determine whether insider dealing has taken place [subsection 3(a)]; and, if it has, the identity of the insider dealers [subsection 3(b)] and the amount of profit gained or loss avoided as a result [subsection 3(c)]. This is reinforced by paragraphs 16 and 17 of the schedule to the Ordinance, which provide:

> *'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 whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry.'*

The schedule itself is provided for in section 15(5) of the Ordinance, which reads:

> *'The Schedule shall have effect in relation to the appointment of members and temporary members of the Tribunal, procedural and other matters concerning an inquiry and the Tribunal and its sittings.'*
> *(emphasis supplied)*

The Financial Secretary's notice to the Tribunal of 30 June 2000 (reproduced in the introduction) does not confer jurisdiction on the Tribunal; jurisdiction is conferred by the Ordinance itself; rather the notice defines the Inquiry's terms of reference, pursuant to section 16(2). By it we are required to:

> *'…inquire into and to determine:*
>
> *(a) Whether there has been insider dealing in relation to the company arising out of the dealings in the listed securities of the company by Messrs Lau Chan Wing, Raymond and Zhang Tie Cheng during the period from 1st to 21st March 1996 (inclusive);*

(b) in the event of there having been insider dealing as described in paragraph (a) above, the identity of each and every insider dealer; and

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

In his ruling of 9 May 2001, the Chairman ruled that, although the terms of reference are sufficiently wide for us to examine and inquire into the conduct of persons other than Mr. Lau and Mr. Zhang, we are required to limit the ambit of the inquiry to allegations of insider dealing over the period given in paragraph (a) of the notice, namely from 1 to 21 March 1996. This is because the Financial Secretary did not ask us to look into dealings in China Apollo's shares at any other time, or give us a general mandate to extend our inquiries into dealings over an unspecified time period, leaving it to us to identify time periods that we choose to look into.

It was argued by counsel for the implicated persons that the terms of reference, by employing the *phrase '… arising out of the dealings in the listed securities of the company by Messrs Lau Chan Wing, Raymond and Zhang Tie Cheng'* in paragraph (a), limited us to looking into the conduct of Mr. Lau and Mr. Zhang and no one else. It was also argued that if we sought to inquire into the activities of other persons and companies then we should ask the Financial Secretary to extend, or clarify, his terms of reference.

> Although there is no doubt that we could have asked Financial Secretary to extend or clarify the terms of reference, that was not necessary, as we were satisfied that the existing terms were wide enough to cover our inquiring into other persons' and companies' activities and that no unfairness arose as a result of our doing so.

We say that for these reasons. Firstly, as we have said, it is for us, not the Financial Secretary, to determine who the insider dealers are.

The ambit of the first paragraph of the terms of reference is wide and is not just limited to the conduct of Mr. Lau and Mr. Zhang, the two people named in the notice. The key is the phrase *'**arising out of** the dealings in the listed securities or the corporations by …'* (emphasis added).

'Arising out of' is a phrase with a wide meaning. It has been given a wide construction in previously decided cases, though admittedly in different contexts.

In **The Antonis P. Lemos** [1985] AC 711 (HL), the House of Lords held that the phrase *'arising out of any agreement relating to… the use or hire of a ship'* in subsection 20(1)(h) of the Supreme Court Act 1981 (a provision dealing with the Admiralty jurisdiction of the English High Court) was wide enough to cover claims (whether in contract or tort) arising out of any agreement relating to the carriage of goods in a vessel. And that for such an agreement to come within subsection 20(1)(h) it was not necessary that the claim in question be directly connected with some agreement of the kinds referred to in it, or that the agreement be one made between the parties to the action themselves.

In **Ethiopian Oilseeds v Rio Del Mar** [1990] 1 Lloyds Rep 87, the phrase *'arising out of or under this contract',* contained in an arbitration clause, was given a wide interpretation; covering all disputes before the arbitrator, other than one as to the very existence of the contract itself.

And in **Dunthorne v Bentley** [1996] 1 RTR 428, the English Court of Appeal held that the phrase '*…arising out of'* in section 145 of the English Road Traffic Act 1988 contemplated a more remote consequence than that embraced by the phrase *'…caused by'* (per Rose LJ at pp.431 H-433A, & Pill LJ at pp.433L-434A).

On the direction of the Chairman, we are satisfied that the phrase'*…arising out of'* in the context we are looking at it, means that the Tribunal is directed to the issue of whether or not a finding of fact can be supported by underlying facts. In other words, the Tribunal looks at what happened in the triangle formed by China Apollo (the named company), Mr. Lau and Mr. Zhang (the persons named in the notice) and the period of time given in the notice (1 to 21 March 1996), and then establishes facts from the evidence led in relation to those matters, and then makes a finding of whether or not insider dealing arose out of that and, if it did, who engaged in that insider dealing. In short, it is by the transactions - the named persons' dealings in the relevant listed securities - that the factual confines of the Inquiry are marked out. By the notice we are authorized and required to look at all the facts pertaining to these dealings. Any finding of insider dealing which is supported by these facts is within the ambit of the Inquiry. If other persons are shown to be involved in dealings in the company's securities during the relevant period, then we are authorised and required

to *'…inquire into and determine'* whether such other persons themselves engaged in insider dealing.

This view is reinforced by paragraph (b) of the Financial Secretary's notice, which requires us to identify '... ***each and every*** *insider dealer'* (emphasis added). As a matter of language this phrase contemplates persons in addition to the named persons. If it were intended that paragraph (b) of the notice be confined just to them then, no doubt, the Financial Secretary would have used a more appropriate and restrictive phrase.

Secondly, the scheme and purpose of the Ordinance is consonant with this interpretation; in **Hong Kong Hansard** Session 1989 - 1990, p.142, Sir Piers Jacobs, the then Financial Secretary, in the context of procedural protection in the Tribunal, is reported as saying that the Tribunal has the duty to observe the principle of *audi alteram partem.* However, flexibility is essential:

> *'The Tribunal's proceedings are investigative or inquisitorial by nature. The flexibility which this approach affords is the main attraction of the tribunal system. Any attempt to lay down formal procedural requirements would inhibit the Tribunal and would undermine the very flexibility which is crucial to the effectiveness of the system.'*

He had earlier said (at p.2141):

> *'The whole purpose of retaining the tribunal system is to ensure that as far as possible the Tribunal is able to get at the truth.'*

The emphasis on flexibility is echoed in the **Salmon Report** at paragraph 30:

> *'It is inherent in the inquisitorial procedure that there is no lis[6]. The Tribunal directs the inquiry and the witnesses are necessarily the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be*

[6] 'a lawsuit; a process or action at law' OED

> *tried, no charges, indictments or depositions.* ***The inquiry may take a fresh turn at any moment****.'* (emphasis added)

Further, in paragraph 79 of the **Salmon Report**, in relation to an Inquiry's terms of reference, it is said that, although there is a need for the terms to be drafted with certainty, *'…[o]n the other hand it is essential that Tribunals should not be fettered by terms of reference which are too narrowly drawn'*.

The Tribunal in **Yanion International Holdings** also expressed this sentiment. At page 71 of the Report, it was said:

> *'It was open to us, as the inquiry progressed, to reduce that list [of implicated persons] if we felt any one of the four had been wrongly implicated or* ***extend the list if we decided that more individuals were at risk of a finding being made against them****.'* (emphasis added)

Thirdly, section 16(3)(b) of the Ordinance makes it clear that the statutory 'object' of an inquiry includes the determination of 'the identity of every insider dealer'.

Fourthly, relating to the issue of fairness, all implicated persons, not just Mr. Lau and Mr. Zhang, were given ample notice of this Inquiry and provided with copies of all relevant statements and other documents in the possession of the Securities & Futures Commission. They had the opportunity to appear at all hearings of the Inquiry, either in person or represented by lawyers of their own choosing - which ever they wished. And they had the opportunity of challenging all the evidence led before us.

It has to be remembered that 'fairness' is not a one-way street; not only have we to be scrupulously fair to all the implicated parties, we also have to be scrupulously fair to the interests of the public at large. The public have a legitimate interest in seeing that insider dealing does not take place, and a legitimate expectation that, if it takes place, the perpetrators are identified and dealt with in accordance with the law. We are satisfied that the issue of fairness has been addressed adequately.

In his ruling of 9 May 2001, the Chairman ruled that within the ambit of our inquiry are all share dealings conducted by the implicated persons and by the British Virgin

Islands International Business Companies, Savoy Assets Ltd, and Queen's Choice Investments Ltd, in the period between 1 to 21 March 1996.

Subsequent to the date of that ruling, evidence emerged that Bowring Assets Ltd had also traded in China Apollo's shares in the period between 1 to 21 March 1995 and we are of the view, on the Chairman's direction, that these dealings also fall within the ambit of the Inquiry.

In view of the Chairman's ruling as to what the ambit of the Inquiry was, we decided that the issues we should inquire and determine were these:

1. Whether any of the implicated persons, with the exception of Ms. Wang and Mr. Huang, and/or Queen's Choice, and/or Savoy Assets, and/or Bowring Assets 'dealt' in China Apollo's shares at any time within the period of 1 to 21 March 1996 (from now on, we shall refer to that period as 'the relevant time').

2. Whether Mr. Lok counselled or procured any of the other implicated persons, with the exception of Ms. Wang and Mr. Huang, and/or Queen's Choice Investments, and/or Savoy Assets, and/or Bowring Assets to deal in China Apollo's shares at any time within the relevant time.

3. If there were any dealings by any of the implicated persons and/or Queen's Choice, Savoy Assets, and Bowring Assets, within the relevant time, whether, at the time of any such dealing, there existed 'relevant information' as defined in section 8 of the Ordinance.

4. If such 'relevant information' existed, whether any of the implicated persons, so dealing, was, at the time of his or her dealing:

    (a) 'connected' with China Apollo, as that term is defined in section 4 of the Ordinance;

    (b) if so 'connected', in possession of the relevant information; and

    (c) if so, knew that it was relevant information.

5. Whether Mr Tseung has established a defence under section 10(3) of the

Ordinance; and

6. Whether Ms. Chung has established a defence under section 10(4) of the Ordinance.

We deal with these issues in the following chapters:

Chapter 5.	The identification of relevant information.
Chapter 6.	The identification of the connected persons.
Chapter 7.	The dealings in China Apollo shares.
Chapter 8.	Mr. Lok's role as a counsellor or procurer.
Chapter 9.	The knowing possession of relevant information.
Chapter 10.	Mr. Tseung's section 10(3) defence.
Chapter 11.	Ms. Chung's section 10(4) defence.

We summarise our conclusions in Chapter 12.

We agreed that the issue of the amount of profit gained or loss avoided as a result of such dealing fell to be determined once we had dealt with the above issues.

As to the matters that concerned the Tribunal chaired by Mr. Justice Hartmann, namely:

3. Was the Wah Nan sale a device to enable China Apollo to meet the 1995 profit forecast contained in the prospectus?

and -

4. Were the subscriptions for China Apollo shares at the initial public offering and/or the exercise of share options and subsequent sales by the directors and staff of China Apollo in the period 7 December 1995 to 21 May 1996, carried out to raise funds to pay the consideration for the Wah Nan sale and in order to ensure that Arthur Anderson would agree to the sale being reflected in China Apollo's audited 1995 accounts?

On the direction of the Chairman, and although we harbour considerable scepticism over the *bona fides* of the Wah Nan sale, we are of the view that these matters fall outside the jurisdiction given to us by the Ordinance. In so far as it is necessary for us to express any view on them, we are satisfied that the answer to the first question is that there is insufficient evidence on which a Tribunal could come to a concluded view and on the second question that the answer is 'No'. Neither question is discussed further in this report.

We also state now that we saw no need to resolve the issue as to the date on which and circumstances under which Ms. Tsang signed the receipt for the net proceeds of the sale of the shares subscribed for in her name. This issue, which was entirely peripheral, took up an inordinate amount of time at the Inquiry and tended to obfuscate matters unnecessarily.

Chapter 5

In this chapter we deal with the question of whether or not 'relevant information' existed.

We dealt with the definition of the term 'relevant information' in Chapter 3, where we said that for information to be 'relevant information' it must posses 3 elements, each of which must be proved to our satisfaction. They are:

1. The information is known only to a few and is not generally known to the market; that is, to those individuals and institutions accustomed or likely to deal in the securities of the company

2. It must be 'specific information'.

3. It must be information of the kind which, if it were known to the market, would be likely to materially affect the price of that company's listed securities.

The information that might constitute 'relevant information' is China Apollo's poor trading results during the 2nd half of 1995.

The Prospectus contained China Apollo's business results to 30 June 1995 and a forecast for the profit for the full year 1995. The investing public was not made aware of the actual business results after 30 June 1995 until the release of the announcement on 21 May 1996. At the time of the issue of the prospectus (7 December 1995) only the directors of China Apollo were in possession of information relating to its business results up to and including October 1995. It is apparent from the results announced on 21 May 1996, that sales deteriorated in the second half of 1995, resulting in a performance well below that achieved in 1994 and rendering the attainment of the profit forecast of *'not less than $190 million'* contained in the prospectus impossible.

The figures are these[7]: Page 43 of the prospectus shows the profit made by China Apollo, for the year 1994 as RMB¥205 million ($188 million[8]) and for the 6 months ending 30 June 1995 as RMB¥113 million ($106 million). The same page also shows sales (turnover) for the year 1994 as RMB¥ 912 million ($836 million) and

[7] For ease of comprehension, all figures are rounded up or down to the nearest million
[8] At the exchange rate of $1.075 to RMB¥1as given on page 8 of the prospectus.

sales for the 6 months ending 30 June 1995 as RMB¥ 434 million ($404 million).

The prospectus's consolidated profit forecast analysis, on which the profit forecast was based, shows the same sales (turnover) and profit for the year 1994 and the same sales and profit for the 6 months ended 30 June 1995; the forecast profit for the year 1995 as RMB¥205 million ($190 million) and the turnover needed to generate a profit of $190 million for the year as RMB¥ 820 million ($762 million). By subtracting from that figure the actual turnover for the first 6 months of RMB¥434 million ($403 million) it can be seen that sales of RMB¥386 ($359 million) were required in the second 6 months of 1995 in order to meet the profit forecast.

What was actually achieved during this period is seen in the 21 May 1995 announcement of the 1995 year-end results.

The turnover for the year 1995 was only $685 million (RMB¥737) million; subtracting from that the sales figure for the first 6 months of 1995 of RMB¥ 434 million, it can he seen that the sales actually achieved during the 2nd six months were RMB¥303 million, a shortfall of RMB¥83 million from forecast amount of RMB¥386 million.

The operating profit was $207 million. The profit attributable to shareholders was $192 million, but included the exceptional gain of $15.8 million made on the Wah Nam sale. This had effectively brought the net operating profit figure up by $15.8 million from $176.2 million to $192 million.

In a letter sent to the Stock Exchange of Hong Kong on 21 June 1996, China Apollo said that the total sales achieved in the last 3 months of 1995 were only RMB¥117 ($108 million). The figure for that period given in the profit forecast was RMB¥200 million ($186 million).

In particular, the November and December 1995 actual sales figures fell far short of the forecast figures. Arthur Anderson, the reporting accountants, in a letter to the Stock Exchange of Hong Kong, dated 8 July 1996 said that the directors had forecast a turnover of RMB¥64 million in November and RMB¥74 million in December. All that was achieved, according to a letter Mr Lok sent the Stock Exchange on 21 June 1996, was RMB¥25 million in November and RMB¥31 million in December.

It does not require a financial genius to realise that the actual figures, especially for

November and December 1995, were well below those forecasted in the prospectus and were responsible for China Apollo being unable to meet that forecast and that it was only by including the exceptional gain of $15.8 million made on the Wah Nan sale that China Apollo was able to achieve the prospectus's profit forecast. The inclusion of this gain in late May 1996 went completely contrary to the statement given not less than 6 months earlier, at page 49 of the prospectus, that not only had the profit forecast been arrived at without including extraordinary items in the calculation, but that, ***'The Directors are not aware of any exceptional items having arisen, nor do they expect any that are likely to arise during the year ending 31 December 1995.*** (emphasis supplied)'

We have no doubt that the fact that China Apollo would not meet the prospectus's profit forecast without the inclusion of the exceptional gain on the Wah Nan sale was information that was known only to a few and not generally known to the market.

Neither have we any doubt that it is 'specific information': it possesses sufficient particularity and is capable of being identified, defined, and unequivocally expressed.

We now turn to the question of whether or not, had the market known about it, it would have been likely to affect the price of China Apollo's shares materially.

As we said in Chapter 1, once the 1995 results were announced, there was a dramatic fall in the price of China Apollo's shares. On 22 May 1996 day after the release of the results, their price dropped from a previous close of $2.10 to $1.53 (a drop of 27.14%) with 26.8 million shares traded. The All Ordinaries Index only eased 0.07% to 5,287.27 on that day. The decline continued on 23 May 1996, with the price dropping another 4.58% to close at $1.46, with 11.1 million shares traded. The All Ordinaries Index only dropped 0.25% to 5,273.66. The share price rebounded slightly on 24 May 1996 by 2.05%, closing at $1.49, while turnover increased to 17.6 million shares. The All Ordinaries Index remained stable at 5,269.29. The price continued to drop in the last 5 trading days of May 1996, closing at $1.36 on 31 May 1996. The All Ordinaries Index gained ground over this period.

To what extent was this drop in price attributable to the fact that China Apollo could only meet the prospectus's profit forecast by including the profit made on the Wah Nan sale as an exceptional item?

In his evidence before us Mr Nigel Chan of ING Barings, the first of the two witnesses from the securities market who had subscribed for China Apollo's shares on the listing, said that the profit forecast had been his primary yardstick in considering whether or not to buy China Apollo's shares. In his experience, only recurrent profits are included in a prospectus's profit forecast. The fact that China Apollo could only meet its profit forecast, made within only one month before the end of the financial year to which it related, by including an exceptional gain shocked him and led him to immediately sell the China Apollo shares ING Barings held.

His exact words, given in evidence, were:

> *'Q. What was your reaction after seeing that information available to you on the evening of 21st May?*
>
> *A. Shock, I would say. First of all, the actual earnings were higher than the prospectus forecast. However, that included an exceptional profit and that exceptional profit was arrived at after the listing date. It seems to me that my personal feeling, just a personal feeling, is that there was an earnings shortfall and they wanted to make it up with a disposal of investment after the listing date.*
>
> *…….*
>
> *Q. The shortfall seems to be only about 6 to 7 per cent, and you were shocked?*
>
> *A. Yes. First of all, this company was listed in December. They should have had a good idea about what the business would be. So there should not be a shortfall. Secondly, it is quite a common market practice to give a little bit of a buffer when making an earnings forecast. So if you look at the record of a lot of listed companies, the chance of missing an earnings forecast is actually not that common.*
>
> *Q. Did you contact anyone upon seeing these results?*
>
> *A. I tried to get hold of a couple of clients and, subsequently, the next morning, I contacted virtually all of our clients.*
>
> *Q. Why did you contact your clients?*

A. Because we thought that this company -- I remained sceptical on the company and there is an earnings shortfall and if the company cannot keep its earnings forecast for only one month, then that means the company may not be honest. In that case, why bother to take a risk? In this case, this is a brand-new company and, if it is not going to meet our expectation, we would recommend our clients to sell.

Q. Did your clients accept your recommendation?

A. Some of them, I cannot say all, but I would say quite a lot of them.'

Mr. Timothy Greaton of Credit Lyonnais, the other of the two witnesses from the securities markets, said that he had only subscribed for shares in China Apollo because it was a small growth company. He sold Credit Lyonnais' holding immediately on release of the year-end results because the main reason for the profit forecast being achieved was due to an exceptional gain. He had been looking for a number significantly above the one achieved in terms of operating profit. He had also acted in deciding to sell on a downgrading by a securities analyst advising a change from 'buy' to 'hold', which he took to be a 'sell' recommendation.

He said in evidence about this issue:

'Q. Why did you sell the shares?

A. The main reason was because the main reason they made their forecast was due to an exceptional gain, whereas we were looking for a number significantly above this in terms of operating profit. We were not investing in the company to -- basically, we were investing in the company for their operating business, not for what they could do in terms of any exceptional profits they can make from businesses that were outside of the tonic drinks business, which is what we wanted to invest in. It just did not look right. Plus, remember, you are talking about a whole portfolio of 40 to 50 stocks; this would have been a very small position in an aggressive growth portfolio. Probably, if I recall correctly, it was a rather small position in those portfolios which were aggressively managed for growth. If you have a company that you are expecting to

grow and all of a sudden you find out it is no longer a growth investment, that investment is discarded and you look for one that is growing.'

In his evidence, Mr Alex Pang of the Securities and Futures Commission, the first of the two expert witnesses, said that the drop in China Apollo's share price was due to a negative market reaction to the results, in particular the significant decrease in turnover in the second half of 1995 and the inclusion of exceptional gain to meet the profit forecast. Mr. Pang also said that there were no other factors, or announcements by China Apollo, that caused its share price to drop.

Mr. Clive Rigby of Lippo Securities, the second of the two expert witnesses, said that if the sales results had generally been known to investors in March 1996 they would have been likely to affect China Apollo's share price materially. As the prospectus had been issued less than one month before the end of the financial year in question, market participants would, accordingly, have expected the forecast trading results to be reasonably accurate.

We accept the evidence of these four witnesses, which was not substantially challenged in cross-examination. On the evidence the investors' response was wholly attributable to the information released on 21 May 1996. We have no doubt that had the market known of China Apollo's poor trading results for the 2nd half of 1995 before that date, this information would have been likely to have had a material impact on the price of its shares, both on the flotation and in subsequent trading up to 21 May 1996, and in particular during the relevant time of 1 to 21 March 1996. It was certainly information, which had it been known during the relevant time would have been likely to cause more than a mere fluctuation, or a slight change in China Apollo's share price.

We are satisfied on each of the three necessary elements and find that China Apollo's poor trading results for the 2nd half of 1995 constitutes 'relevant information'.

Chapter 6

In this chapter we deal with whether or not the implicated persons, with the exception of Ms. Wang and Mr Huang, are connected with China Apollo.

We dealt with the meaning of the term 'connected with' in Part 2 of Chapter 3.

Mr Lau

There was no dispute that Mr. Lau was the Finance Director of China Apollo at the relevant time. There was no dispute that he is a section 4(1)(a)[9] connected person.

Mr Zhang

There was no dispute that Mr. Zhang was the Commercial Director of China Apollo at the relevant time. There was no dispute that he is a section 4(1)(a) connected person.

Mr. Lok

There was no dispute that Mr. Lok was the Chairman and Managing Director of China Apollo at the relevant time. There was no dispute that he is a section 4(1)(a) connected person.

Mr. Tseung

There was no dispute that Mr. Tseung was the Deputy General Manager of the China Apollo Group, responsible for product and business development, at the relevant time. There was no dispute that he is a section 4(1)(a) connected person.

Mr. Jin

There was no dispute that Mr. Jin was the Deputy Personnel manager of Guangdong Apollo at the relevant time. There was no dispute that he is a section 4(1)(a) connected person.

Mr. F. Y. Wang

There was no dispute that Mr. F. Y. Wang was the Deputy General Manager of the China Apollo Group and Personnel Manager of Guangdong Apollo at the relevant time. There was no dispute that he is a section 4(1)(a) connected person.

Ms. Chung

There was no evidence, or admission, that Ms. Chung was a director, or an employee of China Apollo, or of a corporation related to it, at the relevant time.

[9] See: definitions in Chapter 3, at page 27.

We have considered whether the evidence establishes that she is a section 4(1)(c) connected person[10]. In deciding this issue, we have looked at 3 areas of the evidence namely;

- her role as agent for Ming Wah;
- her role in advising Mr Lok on China Apollo's listing in 1995; and
- her role in assisting China Apollo's directors and staff in disposing of their China Apollo shares in March 1996.

Ms. Chung's background

Ms Chung told us that she is now 39. She completed Form 5 when she was 18. She then worked for her aunt's company for a number of years. In 1984, she joined a company called Maxan Computronic, where, as part of her duties, she had to make frequent visits to China. She joined Cotterell, a Swiss Company, in 1988 or 1989. She worked for Cotterell until she started working as an agent for China Ming Wah Co Ltd (Ming Wah) in 1993. She said she received no salary from Ming Wah. She has no professional qualifications.

In his statement to the Tribunal of 9 April 2001, Mr Lok said that he had met Ms. Chung many years ago in Beijing through the introduction of Mr. Ma Yu Fang (Mr. Ma) of Ming Wah. He came to know that she represented the interests of various Chinese enterprises, and was knowledgeable about Hong Kong's business environment. Since she was based in Hong Kong, he came to rely on her assistance in various aspects of his Hong Kong business operations, including the listing of China Apollo.

Ms. Chung's role as agent for Ming Wah

Ms. Chung said in evidence that Ming Wah was incorporated in Shenzhen on 14 January 1993. Mr. Ma Yu Fang was one of its 3 directors and its authorised legal representative. It is a trading company. She produced an opinion from a Mr. Cheung Chun, a Law Society accredited Mainland Lawyer in Hong Kong, stating that the inclusion of 'China' as part of its name is suggestive of the fact that Ming Wah is

[10] See: definitions in Chapter 3, at page 27.

established by the State Council of the Central Peoples' Government and is a state-owned enterprise.

She first met Mr. Ma in Beijing in about 1991. They socialised with each other on an occasional basis. Mr. Ma impressed her as *'…a very influential person in the Capital, offering advice and other services to businessmen from Hong Kong who wished to operate in the Mainland'.* There were occasions when she sought his assistance.

As more and more business came to be conducted between Mr. Ma and herself, she became *'…in many ways, an active agent looking after a growing number of Mr. Ma's interests, and also that of his friends and business acquaintances, in Hong Kong'*. At the same time, Mr. Ma reciprocated by helping a number of her clients *'…gain the right kind of business information in the Mainland'*. She had set up Crownton *'…to further my business interests'.*

Ms. Chung produced a power of attorney in her favour executed in the Mainland by Mr. Ma on 5 October 1995. In it she is authorised to collect RMB¥100 million from Mr. Lok on Ming Wah's behalf. The sum is said to be a *'…debt owed by Mr. Lok to our company'*. She is required to *'…report to the company immediately (she) has received the said sum'.* In paragraph 2; *'The company authorises (her) to manage the whole said sum which can be applied in investment or other usage on behalf of the company'.* By paragraph 4(ii) *'…(she) can apply the said sum in any manner without informing our company before hand, but (she) should inform the company afterwards.'* The only fetter imposed on her by the power of attorney is that she has to *'…report to the company about the main application of the said sum timely'* and if the company has *'…arranged other usage in regard of the said sum, (she) will be informed to assist the arrangement'.* As the power itself laconically ends *'…this is it'*. The power of attorney is reproduced at Annexure 10.

As the Inquiry progressed the evidence revealed that Ming Wah had a very close relationship with China Apollo and Mr. Lok.

Starting in October 1993 and ending in May 1994 Ming Wah had extended 3 loans to Mr. Lok totalling RMB¥100 million. It was not disputed that these are the 'debt' referred to in the power of attorney in Ms. Chung's favour.

Regrettably, we never got a direct answer from Mr. Lok about what these loans were for. The best explanation he could give was in answer to Mr. Duncan's questions, as follows:

'Q. What was the purpose of the loan, Mr Lok?

A. It is for my cashflow arrangement.

Q. Why would you need RMB100 million for your own personal cashflow requirements, Mr Lok?

A. I do not just need 100 million.

Q. For what particular cashflow requirements was this money needed, Mr Lok?

A. I myself, my own personal assets at the time, were 1 billion, and then my financial situation with the State was involving 10 billion, so if you ask me to separate it, how can I do that, because it would almost involve all of my financial activities. I do not even know how many resources I can do the explanation.

Q. Mr Lok, I will ask the question again once, and once only: for what particular personal cashflow purposes was this sum of RMB100 million needed?

A. Some were involved in real estate; some were involved in other areas. I cannot produce any detailed explanation at this time, but it is definite that I must have a need for it, so then I borrow it. I can give you an example that I have a private company called Daily Chance Industrial Company. This company was disclosed to the public. It has made several items of investment in mainland China. I do not know whether I have to have all Daily Chance Industrial Company's financial activities investigated.'

In his statement to the Tribunal of 27 July 2001, Mr Lok said that Mr. Ma had telephoned him in early December 1995, asking whether it was 'convenient' for him to repay Ming Wah a sum in the region of HK$20 million. He agreed to do so. So far as we could gather, this related to a part repayment of the RMB¥100 'debt' referred to in the power of attorney.

'Convenient' is a strange term for a creditor to use when requiring a debtor to repay a debt, but Mr. Lok had an explanation for this. In answer to Mr. Duncan's question he said this:

> *'Q. Mr Lok, is that* (the claim in the 27 July 2001 statement) *a true statement of yours?*
>
> *A. Correct.*
>
> *Q. Have you, Mr Lok, ever borrowed money from a bank?*
>
> *A. Of course, yes.*
>
> *Q. Have you ever experienced a lender ringing you up and asking you whether it is convenient for you to make a repayment?*
>
> *A. This is different because I had a personal acquaintance with him; because a bank is a financial organisation, and China Ming Hua, because I have a personal enterprise relationship with them, that is a loan between enterprise to enterprise.*
>
> *Q. I take it, then, that the answer to my question is no?*
>
> *A. No.'*

Mr. Lok continued, saying that several days later, Mr. Ma telephoned him again and informed him that the amount required was around $15 million and that he (Mr. Lok) would soon receive a fax from Ms. Chung setting out the exact amount and the method of payment.

On the same day, he received a fax from Ms. Chung giving him that information. He therefore asked Mr. Lau to issue a cheque for $15,151,950 out of what he described as *'an interim dividend'* that he was entitled to from China Apollo Enterprises and to deposit it into a bank account, whose number Ms. Chung had given him.

Mr. Duncan questioned him about other repayments of the same debt that he had made in late 1995 and early 1996, and he gave these answers:

'Q. How much did you repay, Mr Lok, to Ming Hua between 11th December and 8th January 1996?

A. It was around HK$91 million-odd. I have already said that. That is equivalent to RMB100 million. As I remember, this is the third time I answered to this question.

Q. Mr Lok, that was all between 11th December and 8th January, was it; in a period of 28 days, you paid $91 million?

A. No, it is not like that.

Q. My question, Mr Lok, was very simple: between 11th December and 8th January, how much did you repay?

A. I cannot remember, but I did certainly make the repayment.

Q. You make the point, in paragraph 5 of your further supplemental statement, that you could forward to repay the polite request for 20 million because you had funds coming from the interim dividends?

A. That is one of the reasons.

Q. So that is $30 million available to you. Where did the other $61 million come from, Mr Lok?

A. I stated already that prior to 11th December 1995, I had already made some repayment, and after this date I also made some repayment, but exactly how much, I cannot remember.

Q. Again, I have to repeat my question, Mr Lok: where did the money come from?

A. My own money.

Q. Did you make these payments to Ms Chung by cheque?

A. No matter, through whatever method, I have made the repayment, and also you can check from the records, and the money was my own money.

Q. I will repeat the question, Mr Lok, in case you did not understand me: did you make all these payments by cheque?

A. I do not know the cheques or the transfer, these relationships, but all these repayments, that was handled by Mr Lau. So however Mr Lau made repayments or issued cheques, you can ask Mr Lau.

Q. Were any payments made by cash?

A. I have no recollection of that. I am not sure what you mean by this cash, because in Hong Kong, the banking organisations, they have this cash cheque or some transfer cheques, so when you talk about cash, are you talking about these cheques? If you are talking about cash cheques, it could be possible to have that. If you are talking about counting the bank notes, that sort of cash, then I do not think so.

Q. Mr Lok, approximately how many individual payments were made in repayment of this loan of RMB100 million? We are told of one which amounts to $15 million-odd. Approximately how many were there in total?

A. If I remember exactly how many times that I have made a repayment or the sum involved or the date involved, then I do not need to sit here and say so many things. Also, I am not a financial person, and also, it is seven years ago. I hope that you can understand this objectionable condition involved, because I did not know that something serious like this would have happened. If I knew, then I would have kept the records.

Q. Mr Lok, I will repeat the question once more, and only once: approximately how many instalments were there of this repayment?

A. I guess it would be within ten times, but I cannot be sure.'

Beneath the prevarication, it appears that by July 1996 the RMB¥100 debt had been repaid. The odd thing about these repayments, however, is that according to Mr. Lok, Ming Wah took back from him, through Ms. Chung, the receipts he had received from them evidencing payment of each instalment. All that he could produce to evidence repayment was a document from Ming Wah, dated 8 January 1996, which reads in translation:

> *'Mr. Lok Fai, our company (has) received from Ms. Madam Chung, the power of attorney, her notification that this company would confirm the following. Our company has received totally RMB100 million, the repayment in total'*

The loss of the original receipts did not appear to concern Mr. Lok. He was prepared to accept the 8 January 1996 as a *'…a protection to me'* and *'…I have no need to keep all these separate repayment receipts.'*

The evidence shows - and it was not disputed by Ms. Chung - that when she received Mr. Lok's cheque for $15,151,950 (paid out of what he described as *'an interim dividend'*) she used the funds to subscribe for 10 million China Apollo shares available in the flotation in the name of a company called Bowring Assets Ltd.

That is not the end of the matter: we spoke of Bowring Assets Ltd in Chapter 1, where we said that of the 100 million China Apollo shares available for allocation in the flotation, 51.2 million of those allocated went to four companies:

5. Bowring Assets Ltd, which was allocated 10 million shares through the placing underwriters Yiu Xie Finance (Securities) Ltd.

6. High Margin Investments Ltd, which was allocated 12 million shares through the placing underwriters J & A Securities (Hong Kong) Ltd.

7. Queen's Choice Ltd, which was allocated 21.5 million shares through the placing underwriters J & A Securities (Hong Kong) Ltd; and

8. Savoy Assets Ltd, which was allocated 7.7 million shares through the placing underwriters Wheelock NatWest Securities Ltd.

Bowring Assets, High Margin, Queen's Choice and Savoy Assets are all British Virgin Islands International Business Companies. It was not disputed that they were purchased from company formation agents in Hong Kong in early December 1995, just before China Apollo's flotation; by whom we will deal with shortly. It was not disputed that all four were companies under Ms. Chung's control.

Ms. Chung accepted in her evidence that she had subscribed for the China Apollo shares allocated to these four companies on the flotation. She said this was done at Mr. Ma's direction and on Ming Wah's behalf. She accepted, however, that he had given her a free hand as to how many shares to subscribe for and how to allocate the shareholding between the British Virgin Islands companies. She also accepted that she controlled the accounts out of which payment for the shares was made.

As we probed deeper into the matter, the evidence showed that, not only did Ms. Chung use the proceeds of Mr. Lok's cheque for $15,151,950 to subscribe for the 10 million China Apollo shares acquired by Bowring Assets, but also she used his other repayments of the Ming Wah 'debt' to subscribe for the shares she purchased in the names of Queens' Choice, Savoy Assets and High Margin.

In answer to Mr. Barnett's questions, she had this to say about this matter:

> *'MR BARNETT: We have heard at some length about the mechanics for the purchase of the 10 million shares by Bowring, and that this was, according to you, a purchase or rather a subscription by way of repayment by Mr Lok Fai of part of the indebtedness to Ming Hua?*
>
> *A. Yes.*
>
> *MR BARNETT: Bearing in mind all the time you have spent on this case, and looking at your records, would you please tell us now how the 21.5 million shares subscribed by Queens Choice were funded?*
>
> *A. From my own point of view, of course it is Ming Hua's money.*
>
> *MR BARNETT: Did this involve another repayment by Mr Lok?*
>
> *A. Correct.*

MR BARNETT: Were there any other shares you are aware of having been subscribed for in China Apollo which were funded for Ming Hua by repayment of indebtedness by Mr Lok?

A. As you see, just this much.

MR BARNETT: What do I see?

A. Just Queens Choice.

MR BARNETT: Just these three?

A. Yes, approximately, I think.

MR BARNETT: These three were all funded by repayments by Mr Lok?

A. Because this money was the repayment made by Mr Lok to Ming Hua, and that is Ming Hua's money, so Ming Hua has the right to decide how to use his money, and that is not Mr Lok's money.

MR BARNETT: So only those three subscriptions were funded by repayment by Mr Lok to Ming Hua?

A. Yes, from the list, as I can see, yes.

MR BARNETT: Are you sure there are only three? Look carefully at page 2, please.

A. And also Savoy.

MR BARNETT: I see, so those four; no more?

A. If Ming Hua through other people made the subscription, then I do not know about that.'

For his part, Mr. Lok, claimed to know nothing about this. In answer to the Chairman's questions he said this:

'MR JUSTICE LUGAR-MAWSON: I see. It is your case, as I understand it, that you then were not aware that Bowring Assets Limited, High Margin Investments Limited, Queens Choice Investments Limited and another company called Savoy Assets Management Limited had been used by your contact, Ms Chung, to buy 51.2 million shares in China Apollo Holdings Limited on its flotation?

A. During the time when she was doing that, I did not know anything about that. Only now, when I come to this tribunal, do I come to have some vague idea.

MR JUSTICE LUGAR-MAWSON: It is also your case, as I understand it, that you were not aware that she was doing that on the instructions of your friend Mr Ma of Ming Hua?

A. No.

MR JUSTICE LUGAR-MAWSON: As I understand it, it is your case that you were not aware that she was doing that not only on the instructions of your friend Mr Ma of Ming Hua, but also she was using money that you had paid to her in order to repay debts that you owed to Ming Hua?

A. Correct.

MR JUSTICE LUGAR-MAWSON: Is it also your case, if I understand it correctly, that you were not aware that the money you repaid Ming Hua never went into a bank account of Ming Hua but only went as far as bank accounts that Ms Chung operated?

A. Correct.'

What is even more curious, is the fact that the company formation agent's invoice for the sale of Bowring Assets, High Margin and Queen's Choice was made out to Mr.

Lau and Daily Chance Industrial Ltd, which Mr. Lok told us is one of his private companies (see his answer at page 49).

Ms. Chung's explanation for that was, in answer to a question from Mr. Hoo:

> *'Q. …the purchase of these BVI companies. You just confirmed through your counsel that the invoice for all three companies, namely High Margin Investments Limited, Bowring Assets Limited and Queens Choice Investments Limited -- and you can see that all three are set out in invoices that were shown to you just now -- were made out to Mr Raymond Lau? You have just been shown this -- I have not asked a question yet. My question is this: you have told your counsel that the reason why Raymond Lau's name appears is for the same reason as you told us on the previous occasion. Could you remind us what the question is?*
>
> *THE INTERPRETER: Sorry - Do you want me to repeat it?*
>
> *MR JUSTICE LUGAR-MAWSON: I suppose the question is, "Why did you buy them through Raymond Lau?", is it not, Mr Hoo?*
>
> *MR HOO: Yes.*
>
> *A. If I remember correctly, it was that my secretary did not know how to make purchase to this company, so she asked Mr Raymond Lau, so that I remember, but why the invoice got to Mr Lau, I do not know.'*

Mr. Lok, the owner of Daily Chance, claimed to know nothing about this. In answer to questions from Mr. Barnett, he said this:

> *'MR BARNETT: We know that these four BVI companies were purchased by your own private company, Daily Chance, through the medium of Mr Raymond Lau?*
>
> *A. I now know that Raymond Lau did that, but prior to this, I did not know. Even after the purchase was made, I did not know that either; only in this court did I come to know that.*

MR BARNETT: I see. Your private company, Daily Chance, which had major investments in China, was run by you,was it?

A. Yes.

MR BARNETT: Were there any parts of the company that were run by anybody except you?

A. The financial department was not run by me, because I do not understand financial matters. I am mainly in charge of the administration.

MR BARNETT: But you are the 100 per cent owner of that company?

A. Correct.

MR BARNETT: So the finance department was able to buy BVI companies without your knowledge?

A. This is not an enterprise or business favour. I think this is a personal behaviour, but exactly why or how it was done, I do not know.

MR BARNETT: Have you discovered any other unauthorized transactions entered into by the finance department of Daily Chance?

A. Temporarily, no.

MR BARNETT: Have you asked Mr Lau to explain to you how it was that he purchased the four BVI companies without your knowledge?

A. I wanted to ask but I have not had time yet.

MR BARNETT: You have never asked?

A. Not yet. I did not know that.

MR BARNETT: Until when?

A. Until now that I am sitting in this tribunal that I know.'

And in answer to questions from the Chairman he said:

'MR JUSTICE LUGAR-MAWSON: …You were telling us that you were not aware that on 1st December 1995 Mr Raymond Lau, who was only the person in charge of your financial department, used the name of your own private company, Daily Chance Industrial Limited, to buy three British Virgin Islands companies?

A. If he indeed used the Daily Chance name to buy the companies, he made an offence.

MR JUSTICE LUGAR-MAWSON: My question was, you were not aware? Were you aware or were you not aware?

A. I absolutely did not know about that.'

It was left to Mr. Lau to attempt to explain the mystery, which he attempted to do in this way, in answer to questions from Mr. Duncan:

'Q. Did you yourself contact Offshore Incorporations Limited in connection with the purchase of these three BVI companies?

A. Maybe let me explain why my name was on this invoice. I do not remember exactly that accurate but it was around November 1995. The secretary of Ms Chung, Monica Kwan, she rang me asking me how to make purchase of BVI companies. Because before I had some contact with this company OIL. It was around September and October of 95, around the period of the floatation, that was because of the reconstruction of the company during the floatation that we needed to buy some BVI companies. So therefore I made some of the inquiries to those companies OIL concerning some of the procedures. Therefore, the company had my records. So I was just doing Monica a favour, ringing this company for her and telling the company that wanting to buy three

companies. So after a short while the company sent some documents to us with this invoice issued. Therefore, my name was on this invoice. That day when the documents arrived I did not even have a look at the documents, I rang Monica and told her to collect them. So that the invoice, whether my name was on it, I did not pay attention to that because Monica would pay for that so I did not pay attention. That is her procedure of making purchase of those companies.

……

MR DUNCAN: What I am keen to find out and ascertain Mr Lau is why would Offshore Incorporations Limited have had your address at any stage as being the address of Daily Chance? Remembering the earlier information you have given us that you really had no connection with Daily Chance at this time.

A. Correct.

Q. So why would Offshore Incorporations Limited have in their computer or elsewhere you associated with this company?

A. I explained before that the inquiries were made before China Apollo's floatation so when I made the inquiries I did not want to use the company about to float, I did not want to use that company's name to make inquiries. Normally, making inquiries of this sort you would use a private company's name.

…….

MR DUNCAN: I am sorry, I do not understand. What would be wrong with using the company's name? Raymond Lau, you are employed by China Apollo Enterprises, what would be wrong with your giving that name to Offshore Incorporations Limited?

A. It is not that you cannot do that, it is not so good to use the name of a company about to float because if your company is about to be floated then that information supposed to be confidential, so it is not so good. If you use the name of it then it will let other people know that you are about to be floated.

Q. Why use a company name at all, why not just say Mr Lau of 10th floor, Cammer Commercial Building, why put in the name of a company at all?

A. At the time maybe they ask me from what company.

Q. If you are asked the question in November/December 1995 "From which company are you?" What is the correct answer?

A. You mean work for which company?

Q. Yes?

A. China Apollo.

Q. So why would you give the name of Daily Chance?

A. I cannot remember why.'

The evidence before us showed that ever since the flotation these four companies had regularly dealt in China Apollo shares, as had Ms. Chung. In Chapter 7, we deal with her own dealings and those she conducted in the name of Queen's Choice, Savoy Assets and Bowring Assets in the relevant period of 1 to 21 March 1996[11].

There were other loans extended to Mr. Lok by Ming Wah in 1996.

Ms. Chung said in her evidence that in late January 1996, Mr. Ma informed her that Ming Wah had agreed to extend a loan of RMB¥152 million to Mr. Lok. Mr. Ma instructed her to make the advance out of Ming Wah's funds in Hong Kong. About the same time, Mr. Lok told her that he wished to draw down this loan. On, or about, 2 February 1996, Mr. Lok instructed her to pay Dubois $16,089,076. And on, or about, 6 February 1996, he instructed her to pay Dubois $28.5 million - a total of $44,589,076.

[11] See: Chapter 7, Pages 81 to 83.

She went on to say that on or about 7th May 1996, Mr. Ma phoned, enquiring if she held funds on Ming Wah' behalf, and she confirmed that she did. Mr. Ma told her that, on 5th May 1996, Ming Wah had granted Mr. Lok an additional loan of RMB¥120 million and instructed her to place the funds at Mr. Lok's disposal. Mr. Ma subsequently sent her a copy of a loan agreement, dated 5 May 1996.

On, or about, 16 May 1996, Mr. Lok gave her notice that he proposed to draw down the balance of the 25 January 1996 loan and the 5 May 1996 loan. He instructed her to pay that sum to China Apollo in 3 instalments, as follows:

(a) $3,252,790 before the end of May 1996

(b) $1,850,000 before the middle of June 1996, and

(c) $15,055,760 before the end of June 1996.

Mr. Lok later varied those instructions, for on, or about, 20 May 1996, he instructed her to pay him $7,527,880. She complied with his instruction.

In her evidence before us, Ms. Chung claimed not to know why Mr. Lok had asked her for this $7,527,880. She claimed to have no knowledge of the Wah Nan sale prior to the start of the Inquiry. No one had ever suggested to her that the payments were needed in order to facilitate the publication of China Apollo's year-end results on 21 May 1996.

Mr. Lok when questioned by Mr. Duncan about the loan repayments said:

> *'Q. …in fact, these loans could have been drawn down, could they not, quite easily without the necessity of involving Ms Chung, without the necessity of all those exchanges between the Mainland and Hong Kong.*
>
> *A. As I remember, but let me explain simply, there was a company in Guangzhou called Reton Industrial Company Limited, and this Guangzhou CBA company, wanted me to pay them in Hong Kong dollars. It may be that the companies in every district, they must have some window companies in Hong Kong, and the Hong Kong dollar to them in developing business in Hong Kong, that would be quite important. Of course, that is just an assumption on my part, but I cannot deny the possibility of that.'*

In his statement to the Tribunal of 18 April 2001, Mr Lok said, in relation to transactions that took place in May 1996, that just prior to the announcement of China Apollo's year-end results for 1995, Arthur Anderson informed Mr. Lau that they needed 'additional evidence' to support the Wah Nan sale, otherwise they would be unwilling to reflect the profit on the disposal of the holding in the 1995 results.

Ms. Tommei Tong, the senior manager of Arthur Anderson who then handled the China Apollo audit confirmed this. After referring to file notes and correspondence, she said that another senior manager of Arthur Anderson's had told Mr. Lau that '*…there should be some evidence showing that the buyer is able and willing to pay the transaction.*' This was, she said, a normal audit procedure.

Mr. Lok went on to say that the finance manager of Guangdong Apollo contacted Dongguan/Huangjiang the purchaser and asked whether they would be willing to accelerate part of the first instalment of 60% of the total consideration, which was due by 26 June 1996. In reply, they pointed out that Mr. Lok still owed a company called Dongguan Huangjiang Health Products $55 million in respect of an earlier transaction; if he was prepared to repay part of this, they would be willing to off-set it as part of the consideration due from Dongguan/Huangjiang. He approached Ms. Chung and asked her to draw down some of the loans he had with Ming Wah. He later learnt that she had used funds from Crownton to enable the payment to be received by China Apollo Enterprises. The amount was $7,527,880 (equivalent to RMB¥8.1 million) and it was paid on 20 May 1996.

Ms. Chung claimed that she had been no more than Ming Wah's agent in recovering the loans they had extended to Mr. Lok. She had ceased to be their agent in 1998 and had returned all documentation to them. She had not kept any copies - except it would appear the 10 October 1995 power of attorney and the January and May 1996 loan agreements. She claimed that the reason she had not kept copies was that she had not done anything wrong and there was no need to protect herself.

Ms. Chung's role in advising Mr Lok on China Apollo's listing in 1996

A hand-written letter, dated 26 October 1996 sent by Mr. Lau to Mr. Lok, was produced at the hearing. It related to the work then being done within China Apollo in preparation for the listing. In it Mr. Lau expressed concerns he had about the

adequacy of the draft profit forecast. At the Inquiry this letter became known as 'the worry letter'. It contains the following two phrases:

> *'Following the meeting with Miss Chung and you last Sunday, we have reached a consensus over the fact that if the profit forecast is revised to 1994 level, we must increase the sales as well cut down the expenditures.'*

And

> *'As a result of further discussions with Arthur Andersen and Miss Chung, the following revisions are based on preliminary estimates…'.*

In their evidence, neither Mr. Lau, nor Mr. Lok, nor Ms. Chung denied that the profit forecast had been discussed at that meeting. However, all said it was only one of the topics discussed and that they had discussed many other matters.

In his statement of 18 April 2001, Mr. Lok said this about Ms. Chung's involvement in those discussions:

> *'Lau was the person who had day-to-day responsibility for handling CAHL's Prospectus and for dealing with AA. I have had no previous experience in listing a company and therefore my business friend in Hong Kong Madam Chung agreed to help because she had been involved in a previous listing in Hong Kong.*
>
> *There were a number of regular meetings between AA, Lau and Tan Dong Yun (being the Finance Manager in GA) during which the progress of AA's work was discussed. This involved an audit of the historical figures of CAHL for the past three and a half years up to 30 June 1995 and assistance with the preparation of the profit forecast.*
>
> *As I was not in Hong Kong most of the time, Lau and Madam Chung would keep me informed of the progress of the IPO.*

…..

Some time towards the end of October 1995, Lau and I had a meeting during which concerns about the Forecast were discussed. I remember Madam Chung was also present rendering some assistance. Following this meeting, Lau wrote a letter to me in which he identified his concerns that the forecast sales for the last quarter might not be met.

I remember discussing our worries about the sales figures, but when I received Lau's letter I did not pay particular attention to it because I felt we had addressed these issues at the meeting with him a few days earlier. Furthermore, Lau had only been with the company for a short while and I was confident that the forecast sales figures for the last quarter could be achieved because of my knowledge of the market and my experience with year end sales.'

Towards the end of the inquiry, Mr. Lok, in answer to the Chairman's questions, said this in relation to Ms. Chung's role in the listing:

'MR JUSTICE LUGAR-MAWSON: Did you discuss the flotation with Mr Ma of Ming Wah?

A. To the company's flotation, Mr Ma knew that. Mr Ma and I had a little bit of a discussion over the matter, and also we discussed, then I asked for Ms Chung's help, because I was not familiar with Hong Kong terminology and procedure and so on. Because the company is going to be floated and it is going to change from a private company to becoming a public company, so the financing matter would be altogether different from before.

MR JUSTICE LUGAR-MAWSON: Whose idea was it that you sought Ms Chung's help, yours or Mr Ma's?

A. That was my idea, because I was introduced to Ms Chung in Beijing

and I thought that Ms Chung understands the Hong Kong business operation environment, and she would have more understanding of English terminology and Hong Kong colloquial terms, so I sought her help, because at the time, during the time in Hong Kong, I could not find any friends who were familiar with the Hong Kong business operation environment. Ms Chung herself was also the shareholder of some listed companies.'

Ms. Chung claimed that her role at this time was no more than that of interpreting, or explaining, terms to Mr. Lok, when circumstances required it. She took no active part in the preparation of the prospectus. She said that she had helped Mr. Lok in this way because Mr. Ma had asked her to do so, as Mr. Lok wished to have his company listed in Hong Kong. Mr. Lok was unfamiliar with Hong Kong's business environment and did not know English, so she had to interpret for him; neither was his Cantonese very good, because sometimes he did not understand what people were saying to him in that dialect.

Ms. Chung said this about the worry letter in her statement to the Tribunal of 4 May 2001:

'I recall being present at a Sunday meeting. The discussion and the consensus was however between Mr. Lau and Mr. Lok. I had no knowledge of the performance of the Company or Guangdong Apollo. That letter also referred to further discussions with Arthur Andersen and Miss Chung. I do not recall attending any meeting held merely between Arthur Andersen, Mr. Lau and I. I certainly had no suggestion to make on the manner whereby a targeted profit level could be achieved. What was likely to have happened was a discussion between Mr. Lau and Arthur Andersen and I was asked to relay the outcome of their discussion to Mr. Lok. The numbers which they were discussing meant little to me and did not register in my mind. The final paragraph of this letter suggested a further meeting in Hong Kong between Mr. Lok and Mr. Lau. I have no recollection attending such meeting. What I can state for sure is that I did not take part in drafting the profit forecast memorandum nor did I

participate in resolving the final sales projection for the 3 months from October to December 1995. Prior to the IPO, Mr. Lok was generally optimistic about the market conditions'.

In his statement to the Tribunal of 27 April 2001, Mr. Lau said this about Ms. Chung's role in relation to the listing:

'In July or August 1995, Mr. Lok Fai ("Mr. Lok") introduced to me a lady called Miss Chung Ming Chee (" Ms. Chung"). I understand that Ms. Chung was a friend of Mr. Lok and had some knowledge about listing in Hong Kong. Mr. Lok was not conversant in English at all and relied on her assistance in understanding the listing process in Hong Kong. Therefore, sometimes Mr. Lok would invite Ms. Chung to attend some meetings with AA and HSBC Corporate Finance Limited ("HSBC") (the sponsor) so that she could interpret and explain to Mr. Lok what had been discussed. However, after I became familiar with the listing process by the end of October 1995, Mr. Lok did not ask Ms. Chung to join our meetings anymore.'

In answer to Mr. Duncan's questions, he said this about Ms. Chung's role in the listing:

'Q. When you had the discussions with Arthur Andersen, was Ms Chung present?

A. I cannot remember whether Ms Chung was present, or after I discussed with Arthur Andersen, then I talked to Ms Chung.

Q. So you did have discussions with Ms Chung, did you not, between the lunch and the drafting of the letter of 26th October?

A. Actually, let me think about that. I just asked her to do me a favour, to relay some of the message to Mr Lok, and then he seemed to be -- well, not quite understanding all the accounting terms, something like that, so she said, "You had better write to him by yourself", so that is why I did this letter.

…..

Q. In your letter, you have used the wording…a further discussion with not only Arthur Andersen but also Ms Chung?

A. Yes.

Q. Why did you use that language?

A. Well, just to let him know that I have discussed with Arthur Andersen, and also I have discussed with Ms Chung, because at that time, Ms Chung is helping him in some way, some listing procedure, something like that.

Q. Were you discussing with Ms Chung the revision of the profit forecast to the 1994 level and the difficulties associated with that?

A. I cannot remember exactly.

Q. What were you discussing with Ms Chung?

A. Not in great detail, I think just some ballpark figures, saying that, "Well, we are now in the midst of doing the profit forecast, and Arthur Andersen and the sponsor are urging, are pressing us for figures", so something like that and then she said, "You had better write to Mr Lok by yourself."

Q. It is true, is it not, that Ms Chung at the date you wrote that letter was well aware of the fact that there were significant issues in the way of revising the profit forecast to the 1994 level.

A. Actually, there is no significant issue, because the original forecast is 186, and then, after discussion with Arthur Andersen, I propose to revise to 206, and then after their calculation, they only accept the revision of the Double Dragon Ginseng tonic drink, which is around 40 million, up to say from 186 up to 200 million. So there is no big issue until I got the estimation from Mr Liang, so I did not tell this issue to Ms Chung at that point in time, because, as before, I write this letter.

Q. Did Ms Chung know of the fact that there was a proposal to increase

the profit forecast to the 1994 level when you wrote this letter on 26th October?

A. Well, I cannot remember the exact details I told her, but only some conceptual question, I guess. Actually I think there is no concrete figure that I was proposing.

…..

Q. But the topic that came up… in your discussions with Ms Chung was the revision of the profit forecast?

A. Yes.

Q. And the difficulties that were faced, if that was to become reality?

A. There is no difficulty at that moment, until I call Mr Liang.'

Ms. Tommei Tong, the senior manager of Arthur Anderson, who worked on the preparation of the prospectus and the initial public offering, said that she had met *'a Ms. Anda Chung'* on about 2 or 3 occasions at *'…business meetings'*. She was unaware of Ms. Chung's exact role:

'…sometimes, or mainly, she did some interpretation for Mr. Lok, if he was there. But in terms of the business, she did not, to my memory, she did not say a lot about the business.'

There was no dispute that Ms. Chung is also known as 'Anda Chung'.

Ms. Tommei Tong did not say that Ms. Chung had been involved in any of the discussions that she had with Mr. Lau when she was questioned about the contents of the worry letter.

Ms. Chung's role in assisting China Apollo's directors and staff in disposing of their China Apollo shares in March 1996.

In chapter 1 we gave details of the share subscriptions by China Apollo's directors and Mr. Wong and Ms. Tsang, both at the initial public offering and by way of exercise of share options, and said that all sales were effected through Crownton, a

company which is controlled by Ms. Chung, and that the proceeds of sale were deposited into one of Crownton's bank accounts.

In his statement of 9 April 2001, Mr. Lok said this about Ms. Chung's involvement in this matter:

> *'…Madam Chung Ming Chee would be entrusted with disposing of the option shares on behalf of the staff as she is a business friend of mine experienced in dealing in securities in Hong Kong. In this way, she would be able to ensure that my loans were repaid satisfactorily.*
>
> *…I had every confidence that Chung would carry out my request to handle this matter by facilitating the loans on my behalf and to protect my interests in relation to repayment of the proposed loans to the staff of CAHL.*
>
> *……*
>
> *I understood that between 18 and 21 March 1996, Chung sold a number of the Option shares for the directors and staff, and used a private vehicle of hers called Crownton Investments Limited for the purposes of handling this matter.*
>
> *I instructed Chung to repay to me my said loans of HK$14.4 million out of the sale proceeds and that was paid by 2 cheques dated 20 March 1996 and 28 March 1996. These cheques were drawn by Crownton in the respective sums of HK$2.3 million and HK$12.1 million payable to Reton Industry Limited (in discharge of a prior debt owed by me) and to Dubois (my … private vehicle).'*

Mr. Lau, in his evidence before the Tribunal, said this about Ms. Chung's involvement in this matter:

In answer to Mr. Harris, his counsel's, questions:

> *'Q. Now, what about the arrangements for repayment of Mr Lok's loan?*
>
> *A. At the time, it was through Ms Chung; she sold the shares and then she would make repayment to Mr Lok for us.*

Q. Whose idea was that?

A. I think it should be Mr Lok notified Ms Chung, because a lot of the Chinese employees were involved. They did not have share-trading accounts in Hong Kong, nor did they understand the trading procedures of the shares, so Mr Lok asked Ms Chung to handle that.

Q. Did you have any problem with that?

A. No problem, we just all did that.

……..

Q. We know exactly when they (the shares) were sold…but what I do want to understand is the circumstances in which you came to open a trading account with J&A Securities, a firm of brokers.

A. Correct.

Q. When was it that you opened that account?

A. Around March 19th or 20th, just around that time.

Q. Was this a firm that had been recommended to you?

A. It was suggested by Ms Chung.

Q. Was it your understanding that others also opened a trading account with the same broker?

A. Yes, all other colleagues had a trading account in this firm.

Q. Given that your purchase was funded entirely by Mr Lok, did you see anything unreasonable about all of you operating through the same broker?

A. No problem, because everybody asked Mr Lok to borrow money and Mr Lok asked Ms Chung to handle the matter and then we would sell the

shares through her and there was no problem.

Q. Again, given that it was Mr Lok's money which funded this exercise, did you see anything unreasonable about Ms Chung being there to protect Mr Lok Fai's interests?

A. I think that it was an agreement or relationship between Mr Lok and Ms Chung and then through this way to protect Mr Lok's interest. I think it should be reasonable.'

In answer to Mr. Duncan's questions:

'Q. When you sold the China Apollo shares in March 1996, you made just under $750,000 profit, did you not?

A. Yes.

……

Q. According to the procedures which had been agreed, your profit was paid, was it not, by J&A Securities to Crownton?

A. Deposit, yes.

……

Q. So it would have been sitting with Crownton by the end of March 1996?

A. It was sitting in there, yes.

……

Q. Why was it left sitting with Ms Chung for April, May, June, July, August, September, October -- what is it, eight months?

A. Well, that is the fact.'

He went on to say that RMB¥400,000 of the profit due to him was paid to him in early 1997 in his office in Guangzhou. The payment was in cash, made by a messenger sent by Ms. Chung. He had no copy of the receipt; he was not given a copy. The later payments were by cheques given to him by Ms. Chung.

He was asked by Mr. Duncan:

'Q. Well, there is $350,000 owing, Mr Lau. Why it did take between 21st April and 30th May for Ms Chung to come up with the remainder, given this money had been due to you since March of the previous year?'

And answered:

'A. I cannot remember the conversation exactly, but it is just like that.'

Ms. Chung's evidence on this matter was that neither Mr. Lok, nor Mr. Lau had discussed the granting of the options with her. She played no part in determining the option price. She learnt about their existence when Mr. Lok requested her to *'…take charge of them, as he had extended loans to members of his staff to support their subscriptions'*. He told her that his staff members wanted to dispose of their option shares and he wished to ensure that he was repaid his loans from the proceeds of sale. Mr. Lok *'…may have mentioned'* to her that he expected prompt repayment, because the shares had to be sold at least one month before the announcement of the 1995 results *'…as such announcement may have a negative impact on the share price'.*

She went on to say that in order to carry out the disposals, the various shareholders had to open an account in their own names with a local broker. She selected J & A Securities (Hong Kong) Ltd to be that broker. She sent Mr. Lau a bundle of J & A Securities' account opening forms for the members of staff who wished her to dispose of their shareholdings to fill in. Between 13 and 20 March 1996, various accounts were opened in their names with J & A Securities and she started disposing of China Apollo's shares on their behalf. *'Some of them would call me to check out the price and then ask me to make the sales. Others would tell me to effect sales at a specific price such as around $2'.* Others adopted a wait and see attitude. Each one was different. She could not recall the precise circumstances of each.

On or about 19 March 1996, Mr. Lok instructed her to give him two cheques out of the sale proceeds. One for $2.3 million in favour of Reton Industries Ltd and one for $12.1 million in favour of Dubois. On 28 March she drew two cheques on Crownton's Hongkong Bank account effecting those instructions.

She said that there was no fixed manner in which she paid the staff their profit. It was given to them in whatever form they wanted it. Some were paid in Renminbi in the Mainland. Mr. Peter Wong was paid in cash, about $50,000. It was not unusual for her to carry this amount of cash and there was no reason for her not to help him out by expediting a partial payment in his favour. He was paid the balance several days later and wrote out a receipt for her.

She said that Ms. Florence Tsang's 150,000 shares were sold on 21 March 1996 and that she was paid her profit in cash in April 1996, via a messenger. The messenger returned with a receipt signed by Ms. Tsang acknowledging receipt of the cash. This is not what Ms. Tsang said had happened.

Mr. Ronny Wong SC's arguments

Mr. Ronny Wong SC, her counsel, described Ms. Chung as a 'conduit pipe'. He argued that her role at the listing stage was no more than that of an interpreter, explaining terms to Mr. Lok when circumstances required it, and that she took no active role in the preparation of the prospectus.

In respect of the Ming Wah loans, Mr. Ronny Wong argued that Ms. Chung's role was no more than that of Ming Wah's agent in recovering them.

In respect of her role in selling the directors' and staff's shares, Mr. Ronny Wong submitted that the share options granted to the staff of the Company were genuine, bona fide transactions. The share option scheme is mentioned in the prospectus. It is understandable that Mr. Lok, as lender of the funds for the purchase of the shares, would want someone other than the borrowers to handle their sale. As Ms. Chung had been handling the loans between Mr. Lok and Ming Wah, it is logical that Miss Chung was also asked to handle the sale of the shares. Her role in doing this was not concealed from the directors and the staff.

As to why the directors and staff did not demand payment of their sale profits immediately and why some of the profits were not paid by cheque; Mr. Ronny Wong submitted that as most of the directors and staff were working in China it is probable that they did not have a checking account either in China or in Hong Kong. Further each had different needs; buying a house in China (Mr. Tseung), or a house in Hong Kong (Mr. Peter Wong), or waiting for an investment opportunity (Mr. Lau).

He submitted that Ms. Florence Tsang had lied when she said that she had not been paid her profit, in cash, in April 1996.

He submitted that there was nothing odd in Ms. Chung carrying substantial amounts of cash with her. Ming Wah is a Mainland State enterprise. As its agent, she would need ready cash to meet the needs of visitors coming from China. It is *'…a well-known fact'* that those visitors require cash for their stays in Hong Kong.

Our conclusion

Although Ms Chung may have taken no **'active'** role in the listing process, the evidence satisfies us that her role went further than merely interpreting or explaining terms to Mr. Lok and that he sought her advice on matters that concerned him in relation to that exercise, and that she gave him advice. The reference to her taking part in discussions concerning the draft profit forecast, adverted to in Mr. Lau's worry letter of 26 October 1996, and Mr. Lok's statement that '…s*ince Chung was based in Hong Kong, I have come to rely on her assistance in various aspects of my Hong Kong business operations including the listing of CAHL on the HKSE…'* reinforces our view in this respect.

Ms Chung may well have been Ming Wah's agent, and no more than that, in advancing and collecting that entity's loans to Mr. Lok. But, she was a very active agent.

In January 1996 Ming Wah (which we are told in the Chinese lawyer's opinion is a trading company and not a bank, or finance house) extended a facility of RMB¥152 million to Mr. Lok and in May 1996 it extended a further facility of RMB¥120 million. From the 10 October 1995 power of attorney, we know that Ming Wah had extended to him a series of loans that totalled RMB¥100 by October 1995. Thus, we had evidence that, in total, he had borrowed RMB¥372 million from Ming Wah. This in anybody's terms is a considerable sum of money.

The 10 October 1995 power of attorney gave Ms. Chung almost a completely free hand to invest the monies under her control.

She admitted purchasing, in December 1995, the 51.2 million subscription shares in China Apollo on behalf of Ming Wah through the four British Virgin Islands companies, Bowring Assets, High Margin, Queen's Choice and Savoy Assets.

She admitted that she had received from Mr. Lau, Mr. Lok's cheque for $15,151,950 and used the proceeds to subscribe for 10 million China Apollo shares on behalf of Bowring Assets.

She also admitted that she had used other monies paid to her in December 1995, allegedly in repayment of Mr. Lok's RMB¥100 million debt to Ming Wah, to purchase the three other British Virgin Islands companies' shareholdings in China Apollo at the flotation.

The Crownton bank account was used to receive the repayment of the Ming Wah loans. It was also used to receive the proceeds of sale of the directors' and staff's shares and to repay Mr. Lok for the loans he had advanced to them to buy those shares. As he himself said, *…These cheques were drawn by Crownton in the respective sums of HK$2.3 million and HK$12.1 million payable to Reton Industry Limited (in discharge of a prior debt owed by me) and to Dubois (my…private vehicle).'* Ms. Chung alone appears to have made the decision when and in what form payment of the profit due to the directors and staff arising from their share disposals was to be made.

All the Ming Wah loan funds were under Ms. Chung's control and were disbursed through Crownton's bank account. Indeed, it would appear that Mr. Ma was not even aware of the amount of Ming Wah funds she had under her control, for she said that on 7 May 1996 he had to ask her if she held funds on Ming Wah's behalf (see page 62).

There is a very high degree of probability that Mr. Lau, using Daily Chance's name, purchased the four British Virgin Islands companies on Ms. Chung's behalf - or at least assisted her to do so.

By no stretch of the imagination can Ms. Chung's role be described as that of a mere 'conduit pipe' and, frankly, it was futile to argue that it could. The evidence indicates that she had a very considerable degree of discretion and freedom of action in relation to Ming Wah's and Mr. Ma's dealings with Mr. Lok, and the companies under his control.

We are aware that Ms. Chung claims to have no professional qualifications, but subsection 4(1)(c) does not require that the connected person be a member of a professional body.

We found her claim that she had had returned all documentation relating to Ming Wah to them and not kept copies, to be highly suspicious. Good business practice, as well as a need to defend oneself against possible claims of malfeasance, would demand that any agent would want to keep copies of his or her dealings with and on behalf of his principal. Particularly so when the agent had handled over $300 million of her principal's money.

We had little evidence as to what Ming Wah really is; save that it is a Mainland 'State Enterprise' incorporated in Shenzhen. The definition of 'corporation' given in section 2(1) of the Ordinance is a wide one. It means any company, or other body, either corporate or unincorporated, incorporated or formed either in Hong Kong, or elsewhere. Whatever else Ming Wah may be, we are satisfied that it is a corporation for the purposes of the Ordinance.

To be frank, we are in no doubt that we were told many half-truths and some downright lies, by Mr. Lok, Ms. Chung and Mr. Lau about the nature of the relationship between Ming Wah (and its Mr. Ma) and Mr. Lok and China Apollo and about Ms. Chung's role in facilitating that relationship. In his closing submissions to us, Mr. Duncan went so far as to say this about Ming Wah and that relationship:

> *'Members have heard a lot in the inquiry about the involvement of Ming Wah. A lot of documents have been produced, and I think continue to be produced today, with regard to Ming Wah. I think perhaps it is fair to say that the tribunal will be at pains to consider, and probably have been at pains already to consider, where exactly the truth lies with respect to Ming Wah. Has the tribunal been told the whole truth, and nothing but the truth, or perhaps has the existence of Ming Wah been used as something, as a smokescreen for the truth?*
>
> *……*
>
> *For example, in the case of Mr. Lok, although we have these documents, which start with a $100 million loan, if the three advances are put together, and they finish with the receipt dated 8th January 1996, the*

documents do not really tell what happened in between. In that respect, you may well feel, notwithstanding the bank account entries and so forth, that your conclusions with respect to what happened in between, and what the reasons for those payments were, rests on the credibility or otherwise of witnesses that you have heard, rather than any particular piece of paper that you have seen.

The sort of thing, for example, that would have to be considered is what could be regarded as a fairly extraordinary situation, whereby more than 50 per cent of the placement or the money generated by the placement exercise were, apparently unknown to Mr. Lok, if Mr. Lok is to be believed, generated by funds which came from his accounts. They started off in Daily Chance or China Apollo Enterprises, went out to Ms. Chung, went off to the securities companies, and then ended back up in the beneficial ownership of Mr. Lok.

Another sort of thing: Ming Wah, according to what we have been told, was an enterprise which had access to enormous amounts of money. If they had wanted to invest in the placement and keep it from Mr. Lok, as I think Mr. Lok has suggested, would you think that they would nevertheless use Mr. Lok's money to do it -- and when I say "Mr. Lok's money", I mean the money in Mr. Lok's accounts -- or, with that enormous access to money, would they simply say, "We are going to put money in the placement; we will provide Ms. Chung with the money that she needs"?

I am not pretending that I have addressed all the questions. I am highlighting the fact, Mr. Chairman, that in many areas -- and there will be many others that have occurred to members already, and I know they have occurred to members because members have raised issues themselves, and I am not going to trouble the members with matters that are known to them -- but the point is that members will have to consider, as I have said before, at the risk of repetition, has the whole truth about Ming Wah been told, or is it something which has proved to be a very, very convenient way of keeping some fairly material things from you?'

Mr. Duncan identified our concerns very accurately.

Without evidence from Mr. Ma, or any responsible officer of Ming Wah, there remain many unanswered questions about that entity and its true relationship with China Apollo and Mr. Lok. Unfortunately, both Ming Wah and Mr. Ma are outside our jurisdiction and we considered that any attempt to call them before us to account for these matters would be a futile exercise. Suffice it to say that the evidence (and only a very small portion has been reproduced and commented on in this chapter) shows, very clearly, that there was a very close business relationship existing between Ms. Chung and Mr. Lok (an officer of China Apollo) as well as with China Apollo itself.

We are satisfied that the evidence shows that Ms. Chung occupied a position which may reasonably be expected to have given her access to relevant information concerning China Apollo by virtue of that business relationship. In short, we are satisfied that she was a section 4(1)(c) connected person.

Chapter 7

In this chapter we deal with the question of whether or not the implicated persons, with the exception of Ms. Wang and Mr. Huang, dealt in China Apollo's shares (shares being listed securities[12]) during the relevant time.

Messrs. Tseung, Zhang, Lau, Jin & F. Y. Wang

We said in Chapter 1 that on 15 December 1995, at the initial public offering:

- Mr. F. Y. Wang subscribed for 1,300,000 shares; and
- Mr. Jin subscribed for 300,000 shares.

On 12 March 1996, exercising part of their share options, granted to them on 4 March 1996:

- Mr. Tseung subscribed for 1.5 million shares;
- Mr. Zhang subscribed for 1.2 million shares;
- Mr. Lau subscribed for 1.3 million shares;
- Mr. Jin subscribed for 600,000 shares; and
- Mr. F. Y. Wang subscribed for 1 million shares.

We also said in Chapter 1 that, between 18 to 21 March 1996:

- Mr. Tseung sold his 1.5 million shares, making a profit of $922,465;
- Mr. Zhang sold his 1.2 million shares, making a profit of $755,997;
- Mr. Lau sold his 1.3 million shares, making a profit of $746,986;
- Mr. Jin sold 282,000 of his shares, making a profit of $168,794; and

[12] See: Chapter 3, page 28.

- Mr. F. Y. Wang sold 50,000 of his shares, making a profit of $25,830.

None of these acquisitions or disposals were in dispute before us. We are therefore satisfied that Mr. Tseung, Mr. Zhang, Mr. Lau, Mr. Jin and Mr. F. Y. Wang dealt in China Apollo's securities at the relevant time.

Mr. Lok

There was no evidence before us that Mr. Lok dealt in China Apollo's listed securities at the relevant time either in his own name or through a limited company, or agent. In Chapter 8 we refer to the fact that funds, which he repaid on loans extended by Ming Wah, were used to subscribe for 51.2% of the China Apollo shares issued to the public. In chapter 8 we also deal with the issue of whether or not Mr. Lok counselled or procured anyone else to deal in China Apollo's listed securities.

Ms. Chung

Although it was not mentioned in her statement to the Tribunal of 9 April 2001, or in any of her interviews with the investigators from the Securities & Futures Commission, the evidence showed that Ms. Chung traded in China Apollo shares over the relevant period. This was done in her own name and through Queens Choice, Savoy Assets and Bowring Assets.

Those of the transactions that occurred during the relevant time are as follows:

In her own name:

Date	Buy	Sell	Buy Price ($)	Sell Price ($)
04/03/1996	300,000		2.050	
06/03/1996		200,000		2.200
15/03/1996	100,000		2.125	
17/05/1996		100,000		2.050
		100,000		2.075
Total	**400,00**	**400,000**		

In the name of Queen's Choice:

Date	Buy	Sell	Buy Price ($)	Sell Price ($)
04/03/1996		100,000		2.025
		1,100,000		2.000
		300,000		2.075
		300,000		2.100

Date	Buy	Sell	Buy Price ($)	Sell Price ($)
04/03/1996		300,000		2.150
		800,000		2.125
		700,000		2.150
		300,000		2.175
05/03/1996	10,000		2.150	
		100,000		2.075
		600,000		2.100
		110,000		2.125
06/03/1996		210,000		2.100
		650,000		2.125
		424,000		2.050
		76,000		2.175
07/03/1996		10,000		2.000
		170,000		2.050
		206,000		2.075
		670,000		2.100
07/03/1996		230,000		2.125
		10,000		2.150
08/03/1996	148,000		2.125	
		144,000		2.050
11/03/1996	50,000		1.870	
12/03/1996	16,000		1.900	
	50,000		1.940	
	100,000		1.950	
15/03/1996		300,000		2.050
19/03/1996	750,000		2.025	
	250,000		2.000	
	100,000		2.050	
		1,100,000		2.125
Total	**1,474,000**	**8,910,000**		

In the name of Savoy Assets:

Date	Buy	Sell	Buy Price ($)	Sell Price ($)
06/03/1996		200,000		2.225
07/03/1996		142,000		2.125
		300,000		2.100
		100,000		2.075
Total	**NIL**	**742,000**		

As far as Bowring Assets was concerned, Mr. Duncan informed us that the Securities & Futures Commission's investigations revealed that Bowring Assets dealt in China Apollo shares on 7 March 1996. He took the view that, given the state of the evidence already before the Tribunal, it would not add a tremendous amount of value to our deliberations to spend a lot of time on that particular transaction. We, however, pressed the point. The evidence showed that Bowring Assets had disposed of the

bulk of its 10 million China Apollo shares before 1 March 1996 and had sold the remaining 950,000 on 7 March 1996. When Mr. Ronny Wong questioned Ms. Chung about this, she said:

> *'Q. …According to my learned friend Mr Duncan, Bowring sold the bulk of its shares prior to 7th March 1996. Then, on 7th March 1996, Bowring sold 950,000 shares. As far as you can recall, was the sale by Bowring on 7th March 1996 effected through you?*
>
> *A. I do not have any recollection that it was through me.*
>
> *Q. As far as you can recall, did you have any discussion with Ming Hua prior to 7th March 1996 for disposal of 950,000 shares?*
>
> *A. No.*
>
> *Q. As far as you can recall, did you yourself have any interest in the proceeds arising from the disposal of the 950,000 shares?*
>
> *A. No.'*

Accordingly there should be added to those transactions set out on pages 79 and 80 the following:

In the name of Bowring Assets:

Date	Buy	Sell	Buy Price ($)	Sell Price ($)
07/03/1996		950,000		2.125
Total	**NIL**	**950,000**		

Mr. Duncan told us that the Securities & Futures Commission had found no dealing in China Apollo's shares by High Margin over the relevant time.

In her evidence before us, Ms. Chung accepted that Queen's Choice, Savoy Assets and Bowring Assets were under her control and that she effected the transactions described above.

In a letter her solicitors sent to the Securities & Futures Commission of 2 November 1998 it was claimed that *'…all shareholdings of Queen's Choice belong to Ms. Chung.*' However, before the Tribunal, she claimed that the transactions had been carried out on Ming Wah's behalf.

Whatever the truth is about the various claims that Ms. Chung has made in attempting to explain the reason and the authority for these trades, as we said in Chapter 3[13], transactions in shares by an agent on behalf of a principal fall within the section 6 definition of 'dealing'. We are therefore satisfied that Ms. Chung, either personally or through Queen's Choice, or Savoy Assets, or Bowring Assets, dealt in China Apollo's securities at the relevant time. However, of the transactions set out above, it is only in respect of those occurring on or after 11 March 1996 that we have concluded that Ms. Chung is culpable under the Ordinance. Our reasons for saying this are given in Chapter 9 at page 110.

[13] See: Chapter 3, page 31.

Chapter 8

In this chapter we deal with whether or not, at any time within the relevant time, Mr. Lok counselled or procured:

1. Any of the other implicated persons, with the exception of Ms. Wang and Mr. Huang, and Ms. Chung to deal in China Apollo's shares;

and

2. Ms. Chung, both in respect of her own dealings and the dealings she effected through her Queen's Choice, Savoy Assets and Bowring Assets, to deal in China Apollo's shares.

We said in Chapter 3 that section 9(1)(a) of the Ordinance provides that insider dealing in relation to a listed corporation can take place when a person connected with that corporation, who is in possession of information in relation to that corporation, which he knows is relevant information, counsels or procures another person to deal in such listed securities, knowing or having reasonable cause to believe that such person would deal in them. We also said in Chapter 3 that for us to be satisfied that Mr. Lok counselled the other implicated persons to deal in China Apollo's shares at the relevant time, the evidence must lead us to the conclusion that he ordered or advised, or encouraged, or persuaded the others to deal and that they did so as a result. And, in the alternative, for us to satisfied that he procured them to deal, the evidence must lead us to the conclusion that he deliberately set out to cause the others to deal in China Apollo's shares and that they did so as a result.

The other implicated persons

Firstly, we deal with the question of the position of the other implicated persons.

In his statement to the Tribunal of 9 April 2001, Mr. Lok Fai said that it was always intended that the directors and senior employees' 1995 bonuses would be awarded by the grant of option shares to them. By about mid-February 1996, both Mr. Lau and he were were aware of the disappointing November 1995 and December 1995 sales figures and they met and discussed them. At the meeting Mr. Lau informed him that if the staff were to obtain their 1995 bonuses the option shares would have to be granted, exercised and disposed of within a short period of time and in any event at least one month before the announcement of China Apollo's 1995 year-end

results. This was because under Rule A3 of the Stock Exchange's 'Model Code of Securities Transactions by Directors of Listed Companies', the option shares could not be disposed of by the directors within a period of one month before the announcement of China Apollo's year-end results. Mr. Lau informed him that certain of the directors and senior staff members had suggested that this was the right time to consider the implementation of the option scheme as the market price of the shares was above the flotation price of $1.50 per share.

A directors' meeting of China Apollo was held on 4 March 1996 to consider this matter. It was resolved at that meeting to grant the following share options at the exercise price of $1.44 per share, representing approximately 80% of the average of the closing prices of China Apollo's shares on the preceding 5 trading days.

	Grantee	**No. of Options**
1.	Zhang Tie Cheng	2,500,000
2.	Lau Chan Wing Raymond	2,500,000
3.	Tseung Wai Lok	2,500,000
4.	Wang Hui Hui Huang	2,500,000
5.	Wang Feng Yi	1,800,000
6.	Huang Mu Yan	1,800,000
7.	Kwok Shun	1,700,000
8.	Yim Kwok Wah	1,700,000
9.	Tan Dong Yun	1,500,000
10.	Jin Dong	1,500,000

Soon after the 4 March board meeting, Mr. Lau asked Mr. Lok to lend him money so that he could exercise his options and, soon after, Mr. Lau and Mr. Tseung, on behalf of the other directors and employees, asked Mr. Lok to loan money to them so that they all could exercise their options. Mr. Lok agreed to do so, at no interest, on the understanding that the loans would be repaid immediately on sale of the option shares and that Ms. Chung would handle the disposal of the shares on their behalf.

Mr. Lau assured him that the loans would be repaid very quickly, as the staff intended to dispose of their shares as soon as possible in order to lock in their bonuses. Mr. Lok claimed that is why no documentation was drawn up in respect of the loans. He claimed that Ms. Chung was required to be involved as she would be

able to ensure the repayment of his loans.

Mr. Lok Fai repeated these assertions in his supplemental statement of 18 April 2001.

Mr. Lau in his statement to the Tribunal of 27 April 2001 confirmed Mr. Lok's evidence about this matter. He also said that on 11 March 1996 Mr. Lok had instructed him to prepare cheques drawn on Dubois Development Corporation's (Mr. Lok's personal private company) bank account and instructed him to fill in the amount and payee details on each cheque before passing it to Mr. Lok for signature. Mr. Lau did so preparing three cheques made payable to China Apollo Enterprises in the amounts of $1,872,000, $1,440,000 and $1,728,000 respectively and one for $9,360,000 payable to Mr. Tseung, as he was accepting the loan payments on behalf of six other employees and himself. Out of those funds Mr. Tseung then issued seven cheques payable to China Apollo Enterprises in payment of the exercise of the share options on behalf of himself and the six other persons.

Mr. Tseung in his evidence before us also confirmed that he had borrowed the money to buy the shares from Mr. Lok. He claimed that he had done so because he had cash flow problems.

Mr. Zhang in his statement to the Tribunal of 1 June 2001 also confirmed that he had borrowed the money to buy the shares from Mr. Lok, as did Mr. Jin in his statement to the Tribunal of 2 July 2001. Mr. Wang in his statement to the Tribunal, also of 2 July 2001, said that he had borrowed only part of the money required to purchase his option shares from Mr. Lok, the balance had come from his own savings in renminbi.

We dealt with what Ms. Chung had to say about this matter in Chapter 6, at pages 73 to 74.

The minutes of the board meeting on 4 March 1996, which Mr. Lok referred to, show that he presided at that meeting and signed the minutes as Chairman. He also presided at a subsequent board meeting held on 12 March 1996 at which the allotment of the option shares was authorised. Mr. Lau and Mr. Tseung are also recorded as being present at both board meetings and both signed the minutes of the meetings.

On behalf of Mr. Lok, Mr. Alan Hoo argued that the evidence did not support a finding that Mr. Lok had either counselled or procured all, or any, of the other implicated

persons to deal in China Apollo's shares. Stress was laid on the fact that it was Mr. Lau who first raised the issue of implementation of the option scheme when he approached Mr. Lok about this matter in late-February 1996; and that the staff themselves suggested the timing for the implementation of the scheme; and that Mr. Lok's provision of the loans was done at the request of the staff themselves.

We do not agree; while it is true that Mr. Lok did not order, or advise, or persuade the directors and staff to deal in China Apollo's shares, he certainly encouraged them to do so and went to the trouble of providing them with interest free loans to enable them to do so. Not only was he aware that they intended to sell their shares once they had obtained them, he made it a condition of his loans that the shares would be sold almost immediately they had obtained them and that Ms. Chung would handle the disposal of the shares on their behalf. That is sufficient for us to be satisfied that he counselled them. And, as it is the case that they could not have exercised their options without his loans, it can be said that he deliberately set out to cause the others to deal in China Apollo's shares and that they did so as a result. That is sufficient for us to be satisfied that he procured them to deal in those shares. In short, we are satisfied that Mr. Lok counselled or procured all of the other implicated persons, with the exception of Ms. Wang and Mr. Huang and Ms. Chung, to deal in China Apollo's shares within the relevant time.

Ms. Chung, Queen's Choice Investments, Savoy Assets and Bowring Assets

Secondly, we deal with the question of the position of Ms. Chung's own dealings and her dealings through Queen's Choice Investments, Savoy Assets, and Bowring Assets.

In Chapter 6, we discussed Ms. Chung's role as an Agent for Ming Wah in its relationship with China Apollo.

As we said in that Chapter, the evidence showed that by October 1995, Ming Wah had extended three loans to Mr. Lok, totalling RMB¥100. In January 1996 Ming Wah extended him further facility of RMB¥152 million; and in May 1996 it extended him further facility of RMB¥120 million. We had evidence that, in total, he had borrowed RMB¥372 million from Ming Wah. All these loans were, for the want of a better word, 'administered' by Ms. Chung on Ming Wah's behalf.

Mr. Lok told us that in early December 1995, at Mr. Ma of Ming Wah's request, he made a partial repayment of $15,151,950 of the RMB¥100 loan. This was out of

what he described as *'an interim dividend'* he was entitled to from China Apollo Enterprises and he made the payment into a bank account, whose number Ms. Chung had given him.

He also told us that between 11 December 1995 and 8 January 1996 he had, in total, repaid around $91 million to Ming Wah.

When Ms. Chung received Mr. Lok's cheque for $15,151,950 she used the funds to subscribe for 10 million China Apollo shares available in the flotation in the name of Bowring Assets. And not only did she do that, but she used his other repayments of the Ming Wah 'debt' to subscribe for the shares she purchased at the flotation in the names of Queens' Choice, Savoy Assets and High Margin. Ms. Chung accepted that she did all that.

We also said in Chapter 6 that the company formation agent's invoice for the sale of Bowring Assets, High Margin and Queen's Choice was made out to Mr. Lau and Daily Chance Industrial Ltd, which Mr. Lok told us is one of his private companies. We dealt with Mr. Lok's, Ms. Chung's and Mr. Lau's various explanations for this in Chapter 6 and concluded that there is a very high degree of probability that Mr. Lau, using Daily Chance's name, purchased those four British Virgin Islands companies on Ms. Chung's behalf - or at least assisted her to do so.

The evidence before us showed that ever since the flotation those four companies had regularly dealt in China Apollo shares, as had Ms. Chung. In Chapter 7[14], we dealt with the dealings on behalf of Queen's Choice, Savoy Assets, Bowring assets, and Ms. Chung that took place within the relevant time of 1 to 21 March 1996.

For his part, Mr. Lok claimed to be totally unaware that Ms Chung, through Bowring Assets, High Margin, Queens Choice and Savoy Assets, had used his Ming Wah loan repayments to buy 51.2 million shares in China Apollo on its flotation. We quoted his answers to the Chairman's questions on this issue in Chapter 6, at page 56. We do not believe him. It is inconceivable that Mr. Lok, the Chairman and Managing Director of the China Apollo Group of companies, would be unaware that his own money had been used to purchase over half of the shares in China Apollo available to the public on its flotation. This is a matter that may need to be taken up elsewhere.

Mr. Lok may also have been aware of the trading in China Apollo's shares by Ms. Chung and the three British Virgin Islands companies after the flotation, including that which occurred within the relevant time, but there was no evidence before us either to confirm or refute this.

We, however, are concerned with the narrow issue of whether or not Mr. Lok counselled or procured Ms. Chung, and through her Queen's Choice, Savoy Assets and Bowring Assets, to deal in China Apollo's shares at any time within the relevant time. Although a considerable cloud of suspicion must hang over Mr. Lok in relation to those dealings, there is not a shred of evidence, direct or circumstantial, that he ever ordered, or advised, or persuaded, or encouraged her to effect those dealings; or that he deliberately set out to cause her to effect them and that she did so as a result. In short, we cannot be satisfied that Mr. Lok counselled or procured Ms. Chung and through her Queen's Choice, Savoy Assets and Bowring Assets to deal in China Apollo's shares within the relevant time.

[14] See: Chapter 7, pages 81 to 83.

Chapter 9

In this chapter we deal with whether or not the implicated persons, with the exception of Ms. Wang and Mr. Huang, were in possession of the relevant information at the time they dealt in China Apollo's shares between 1 to 21 March 1996 and whether or not they knew that it was relevant information at the time of their dealing. We also deal with the date on which the relevant information came to their knowledge.

In chapter 5 we identified the relevant information as China Apollo's poor trading results during the 2nd half of 1995 and the fact that China Apollo would not meet the prospectus's profit forecast without the inclusion of the exceptional gain on the Wah Nan sale.

Mr. Lau

Mr. Lau said this in his statement to the Tribunal of 27 April 2001:

> *'13. In mid-Feb 1996, I received the internal management accounts for December 1995 and noted that the sales figures for November 1995 and December 1995 of the China Apollo Group (the "Group") were substantially below the forecast sales. At that moment, I was concerned that the profit forecast might not be achieved. However, I was aware that this drop in sales was compensated by the other income, namely, the gain of RMB 17 million in respect of the disposal of GA's investment in Wah Nam.*
>
> *14. In mid-February 1996, I discussed with Mr. Lok the annual results of the Group and I told him that the total profits (including the gain on disposal of Wah Nam) had just met with the profit forecast. However, I pointed out that this gain on disposal of Wah Nam was not projected in the profit forecast.*
>
> *15. However, because of the non-recurring nature of the gain from the disposal of the Wah Nam investment, I was concerned that there might be an adverse impact on the share price of CAHL when its results were later published in May 1996. (As it turned out, on 22 May 1996, the share price dropped after China Apollo's 1995 annual results were announced for the reason that the public considered that*

China Apollo had only been able to meet its profit forecast because of an unexpected profit from the sale of an investment in Wah Nam.)

……

35. Upon reflection, I now realise that my dealing with the listed securities of CAHL in the way that I may have constituted insider dealing.'

This is an admission by Mr. Lau that he was in possession of the relevant information and knew it to be relevant information. We accept that admission as true.

Further in his evidence before us, Mr. Lau was asked the following questions by Mr. Harris, his own counsel:

'MR. HARRIS: Mr Lau, I would appreciate total frankness from you in relation to the next question. I think your position is this: having received advice, having reflected upon the matter, you now appreciate that at the time, certainly when you sold your shares, you did so with the benefit of relevant information.

(Question repeated for the interpreter)

A. If it was the business result of the year 1995 that led to the share price decline, if that is characterised as "sensitive information", yes, I have the information.

Q. Let us keep it simple. You knew of the sales figures, and the investing public did not?

A. Correct.

Q. You knew that the sales figures were likely to have a negative impact on the value of the shares?

A. Correct.

Q. Checkmate, I am afraid, Mr Lau, that is relevant information…'

We find that Mr. Lau was knowingly in possession of the relevant information before 1 March 1996; it follows that he must have been in possession of it when he was granted his share option on 4 March 1996, when he exercised his share option on 12 March 1996 and when he sold his 1.3 million China Apollo shares between 18 to 21 March 1996.

Mr. Zhang

Mr. Zhang said this in his statement to the Tribunal of 1 June 2001:

> *7. 'After I had exercised my share options, during one of my conversations with Mr. Lau, he told me that he was going to sell his option shares as soon as possible because of the following reasons:*
>
> *(a) No directors' dealing in the Company's shares is allowed within one month prior to the announcement of results;*
>
> *(b) The inclusion of a profit from the sale of the Investment which migt have a negative impact on the share price of the Company when its results were later announced in May 1996.*
>
> *8. Based on what Mr. Lau told me and since I had promised Mr. Lok that I would repay him within a short period of time, I therefore decided to sell all my option shares immediately in order to lock in an immediate profit and "cash in" my bonus.*
>
> *……*
>
> *12. In retrospect, as I was aware of relevant information and had traded in the share of the Company at that particular time, I now realise my actions constituted insider dealing.'*

This too is an admission by Mr. Zhang that he was in possession of the relevant information and knew it to be relevant information. We accept that admission as true. Mr. Zhang was granted his option on 4 March 1996, he exercised his option on 12 March 1996 and had sold all of his China Apollo shares all by 21 March 1996. We find that Mr. Zhang was knowingly in possession of the relevant information at the time he sold his 1.3 million China Apollo shares.

Mr. Lok

Mr. Lok said this in his statement to the Tribunal of 9 April 2001:

> *'17. By about mid-February 1996, Raymond Lau ("Lau"), being CAHL Finance Director, and I were aware of the disappointing November 1995 and December 1995 sales figures. As far as I can recall, the said figures were the subject of a meeting I had with Lau and it is fair to say that:*
>
> *(a) At that time, Lau had seen the unaudited management accounts of GA but had not done a comparison between the actual and forecast figures.*
>
> *(b) Although CAHL had not been audited at that time, Lau believed and advised me that the Wah Nam sale might be included as part of the profits of the year 1995 under extraordinary income;*
>
> *18. I was informed by Lau of the following:*
>
> *(i) The profits for the Wah Nam sale might be included as part of CAHL's 1995 profits under extraordinary Income;*
>
> *(ii) The disposal had not been anticipated in the profit forecast;*
>
> *(iii) As a result, the announcement of the 1995 results in May 1996 may still have a negative impact on CAHL's share price.'*

And In his supplemental statement to the Tribunal of 18 April 2001, when speaking of the loans he made to the directors and staff to purchase the option shares, Mr. Lok said this:

> *'19. Lau assured me that the loans would be repaid as soon as possible because:*

(a) the announcement of the 1995 results in May 1996 may have a negative impact on CAHL's share price;

(b) the shares would have to be sold at least one month before the announcement of 1995 results.

There would therefore only be a short period of time when the loans would be outstanding.'

In evidence before us, in answer to Mr. Duncan's questions, Mr. Lok said this:

'Q. When you agreed to make those loans on those conditions, you were aware, were you not, that the sales results for November and December were well below expectations?

A. Correct.

Q. When I say "expectations" I mean, Mr Lok, the figures on which the prospectus had been based?

A. Correct.

Q. You also knew, did you not, at the time that you agreed to make those loans that the profit forecast in the manner that it had been calculated for the purposes of the prospectus would not be met?

A. Correct.

Q. You also knew, did you not, at the time that you agreed to the making of those loans that the announcement of the results in May would probably have a negative impact on the share price?

A. It is possible to have a negative impact.

Q. It was a bit more likely than "possible", was it not, Mr Lok?

A. A negative impact, that is definite, but I did not know what sort of a

situation would occur.

Q. You did not know exactly what the negative impact would be, but you knew, did you not, that it was likely that there would be a negative impact?

A. Correct.

Q. This information that you were aware of about the poor results of November/December, the failure to make the profit forecast, you were aware when you agreed to make the loans that that information was not known outside those working for the company?

A. I should say the chief financial officer should know, because I would have confronted him for explanations.

Q. Well, I may not have made my question clear, Mr Lok: in March 1996, the results for 1995 had not been made public?

A. In March 1996, the management financial report should have come out.

Q. But that is not disputed (sic) outside the company, is it?

A. No.

Q. So you were aware, were you not, when you agreed to make the loans, that this information about the sales and the profit forecast was not known beyond people who worked for the company?

A. You cannot say that either, because the financial report was made by the financial manager and also it would be audited by the Dongguan Dongcheng certified public accountants.

Q. So beyond the company and the company's professional advisers, you were aware that no other people were aware of this information?

A. Correct.

Q. When the results in May came out, the share price did actually fall, did it not?

A. Correct.

Q. So as events proved, some information at least seemed to be what could be described as price sensitive.

A. Correct.

Q. Again, at the time that you made or agreed to make the loans, Mr. Lok, you were aware, were you not, that, had that information about the sales results and the profit forecast been known to the general public then, that is in March, it would have been likely to have had a significant adverse effect on the company share price?

A. Correct.

Q. Can I take it then that when the results came out in May and when the share price fell, that was not a complete surprise to you?

A. But I did not think it would be in that sort of magnitude.

Q. I beg your pardon?

A. But I did not know that would be in that sort of magnitude.

Q. In fact, it was no surprise to you at all, was it, that the share price fell?

A. No.

Q. What you did not know was the magnitude?

A. Correct.

Q. But you were not surprised by the reaction of the market, Mr. Lok,

were you?

A. Correct.'

These are all admissions by Mr. Lok, which we accept, that he was in possession of the relevant information and knew it to be relevant information. Given his position as The Chairman and Managing Director of China Apollo this is hardly surprising. In fairness, we acknowledge that in his final address to us Mr. Hoo accepted this to be the case. We find that Mr. Lok was knowingly in possession of the relevant information before 1 March 1996, he must therefore have been in possession of it at the time he extended his loans to the directors and staff and counseled and procured them to deal in China Apollo's shares in the period 1 to 21 March 1996.

Mr. Tseung

Mr. Tseung said this in his statement of to the Tribunal of 4 May 2001:

'14. In or about late February, 1996, in a chit-chat with Lau in Hong Kong, Lau told me that the profit made by the Group in 1995 was not good and the profit forecast made at the IPO was barely met by inclusion of the profit made by GA on disposal of Wah Nam. Lau told me that these might have a negative impact on CAHL's share price when the result were to be announced.'

In his evidence when questioned by Mr. Mak, his counsel, he claimed that at the time he was granted his option on 4 March 1996, when he exercised his option on 12 March 1996 and when he sold his shares between 18 to 21 March 1996, he had forgotten this conversation with Mr. Lau. His exact words were:

'Q. Now, Mr Tseung, this is the million dollar question: you decided to sell the shares, but at the same time you admitted in your statement that in February you were told by Mr. Raymond Lau that the profit forecast of China Apollo could only be met by inclusion of the profit made by disposal of Wah Nam, so was your decision to sell affected by this particular information you have?

A. It should not be.

Q. Why do you say so?

A. It is because the conversation arose from a chit chat, and he only told about the worries about the negative effect, but then, because I did not participate in the listing preparation and I did not know about the stock market, so when he said that, I only listened, and that is it.

Q. Well, at the time when you decided to sell the shares, did you indeed remember what Mr. Raymond Lau told you in late February?

A. No.

Q. So you decided to exercise the option, using moneys borrowed from Mr. Lok, and you decided to sell that as soon as possible?

A. Yes.

Q. And all you were looking at was the 20 per cent discount?

A. Yes.'

It was argued by Mr. Mak that Mr. Tseung failed to appreciate the significance of Mr. Lau's comments about the year-end results and their likely effect on China Apollo's share price. He only believed that Mr. Lau was doing no more than expressing worries about the impact the results may have on the share price. He did not regard that information as special or alarming and appreciate that he was aware that he had been told something that was price sensitive. Mr. Mak stressed that there was no evidence that Mr. Tseung communicated or discussed what Mr. Lau had told him with anybody else. And that, in answer to Ms. Ho's questions, he stated that, because he was never involved in the business of departments other than his own - his work all along being the development of new products for China Apollo - he did not know the percentage of income that Guangdong Apollo derived from sales.

Mr. Mak also drew our attention to the fact that Mr. Tseung was allocated 2.5 million shares and only exercised his option over 1.5 million, arguing that had he realised that Mr. Lau had communicated price sensitive information to him, he would have maximised his profit by taking-up and immediately selling his entire allocation.

We have considered these matters carefully and are not persuaded by them, or by Mr. Tseung's assertion that he only looked for the 20% share price discount. The minutes show him as being present at the directors' meetings on 4 & 12 March 1996 at which the share options were granted and exercised. Mr. Tseung's exercise of his share option must have been done only days after the 'chit-chat' with Mr. Lau; it is inconceivable that he would have forgotten such a significant matter within the space of a few days.

Further Mr. Tseung had been with Guangdong Apollo since its inception and was the Deputy General Manager of China Apollo, in charge of product and business development. It is stated in the prospectus that he had 19 years experience in administration and business development in the manufacturing industry. He cannot hide behind a mere assertion that, as he was not directly involved with the financial administration of the China Apollo Group of companies, he had no interest in, or knowledge of, the Group's on-going business performance. Given his experience and his position in China Apollo he must have been interested in its performance and its share price. Mr. Tseung was also one of the directors of China Apollo who had signed the individual and collective responsibility statement in the prospectus, which, among other things, contained the erroneous profit forecast.

We are satisfied, and find as fact, that Mr. Tseung was knowingly in possession of the relevant information and knew it to be relevant information. As he admitted that his conversation with Mr. Lau was in late February 1996, he must have been in possession of it both at the time he exercised his share option and when he sold his 1.5 million China Apollo shares between 18 to 21 March 1996.

We deal with Mr. Tseung's section 10(3) defence in Chapter 10.

Ms. Chung

Ms. Chung, in her statement to the Tribunal of 4 May 2001, in relation to the question of whether or not she was knowingly in possession of the relevant information over the relevant time and whether or not she knew it to be such, said only this

> *'19. I crave reference to the minutes of the Board of Directors of the Company dated 4th and 12th March, 1996 … wherein the Company resolved to ratify issuance of 10 million option shares to various*

members of its staff. Neither Mr. Lok nor Mr. Lau discussed with me the possibility of the grant of such options. I played no part whatsoever in determining the option price. I came to learn about these option shares when Mr. Lok requested me to take charge of them as he had extended loans to members of his staff to support their subscriptions. His staff members wished to dispose of their option shares and he wished to ensure due repayments from their proceeds of sale. Mr. Lok may well have mentioned to me that he expected prompt repayment as the shares had to be sold at least 1 month before the announcement of the 1995 results as such announcement may have a negative impact on the share price.'

Mr. Lok however, in his supplemental statement of 19 April 2001, had said:

'20. After I agreed to grant the loans to the directors and employees, I spoke to Madam Chung on or about 11 March 1996. I told her that the loans were to be repaid as soon as possible. I also mentioned to her the reasons Lau gave me when he reassured me of the prompt repayment.'

Mr. Lau's reasons were those we referred to when discussing Mr. Lok's state of knowledge and included Mr. Lau's fear that the announcement of China Apollo's 1995 results in May 1996 may have a negative impact on China Apollo's share price.

In his evidence Mr. Lok accepted that he had told Ms. Chung about this. In answer to Mr. Duncan's questions, he said:

'Q. Perhaps I could just take you back to your supplementary statement again, at paragraphs 19 and 20. In paragraph 19, you have given there, have you not, the two reasons that Mr. Lau had given you as to why the loans would be repaid as soon as possible?

A. That is correct, and also he said that if any directors sell on the share options one month prior to the public announcement of the company report, that is illegal.

Q. That is the item in 19B, is it not?

A. Correct.

Q. Then, if you could go to paragraph 20, and the last sentence of that paragraph, you have said in your supplementary statement that you also mentioned to Ms Chung the reasons that Mr. Lau had given you when he reassured you of the prompt repayment?

A. Mr. Lau relieved me, the fact that the money would be repaid promptly.

Q. But you said in that particular sentence that her told you the reasons that Mr. Lau had given you, you actually told her the reasons?

A. Correct.

Q. Is that true?

A. Yes.

Q. Can we take it that the reasons that you mentioned to Ms Chung are the two which appear in paragraphs 19A and 19B.

(Question repeated for the interpreter)

A. Correct.

Q. We know from your earlier evidence that the negative impact on the share price was something, was it not, which arose from the drop of the sales and the inability to make the profit forecast as it had been calculated?

A. Correct.

Ever the gentleman, Mr. Lok then attempted to mitigate the effect of those answers, as the questioning continued in this way:

'Q. Now, Ms Chung was a lady, was she not, in whom, as we have

already discussed, you had quite a bit of confidence, trust?

A. Correct.

Q. Presumably you explained to her when you discussed this matter with her why it was that the announcement of the results would adversely affect the share price?

A. At that point in time, I did not make much of the explanation. My main purpose was to ask her to help to handle the matter of the share options matters, so I did not see why I should explain so much.

Q. When you said to Ms Chung, a lady with whom you had spent quite a bit of time during the preparation of the prospectus, "Look, when the results come out in May, there is going to be a negative impact on the share price", did she show some interest in that topic?

A. She did not concern with that. She mainly handled the employees, the matters involving the share options.

Q. When you spoke to Ms Chung about this, was this a telephone conversation or a meeting in person?

A. Over the telephone.

Q. When you said to her, "Look, the results are coming out in May, it is going to be a negative impact on the share price, did she say to you, "Well, why would that be?"

A. She did not.

Q. She showed no interest in that subject at all?

A. The message that she received from me was mainly that I entrusted her to handle the capital from the share options sold by the employees, and that also at that point in time I was very busy, so after I was talking to her, I would just go on to handle other matters.

Q. Given the involvement of Ms Chung at the time of the preparation of prospectus, do you not think that would have been a topic of interest to her, the fact that the share price would go down on the announcement of the company's results?

A. It is because she herself has her own business, so I really do not know what she is interested in.

Q. Did you in fact tell her during that telephone conversation that there had been a drop in the sales at the end of the year?

A. What do mean, that the share price will drop at the end of the year?

MR JUSTICE LUGAR-MAWSON: Sales.

MR DUNCAN: Thank you. Did you tell her during that conversation that the sales had been disappointing at the end of the year 1995?

A. In fact that telephone conversation was a very short time. I do not believe that I have said so many things.

Q. Did you tell her during that conversation that there was a problem with the profit forecast?

A. No.

Mr. Duncan questioned Ms. Chung on paragraph 19 of her 4 May 2001 statement, the evidence went this way:

'Q. …Ms. Chung, could I refer you, please, to paragraph 19 of your statement?

A. Yes.

Q. You will recall that in March 1996 there was a conversation with Mr. Lok relating to the sales of certain China Apollo shares?

A. Yes, I remember.

Q. Mr. Lok has told us that this conversation look place on or about 11th March; would you agree with that?

A. Around that time, I think.

Q. Mr. Lok also told us what he told you during the course of that conversation; he told us that you were informed that loans that had been made to employees of the company had to be repaid?

A. About that, yes.

Q. He told us that in order to effect repayment the shares were to be sold?

A. Approximately in broad terms, yes.

Q. He also told us that the shares would be sold and the loans would be repaid immediately, given that the company results for 1995, which were to be released in May, might have a negative impact on China Apollo's share price. Do you remember his saying that to you?

A. He did mention that there is negative impact, but then he did not mention the direct relationship with the share price.

Q. He told the tribunal very clearly, Ms Chung, that he informed you during this conversation that the announcement of the 1995 results in May might have a negative impact on China Apollo's share price.

A. Correct, he said that.

Q. Given the trading that you were doing in these shares, the news of a negative impact on the share price must have been of considerable interest to you?

A. Because those shares were not mine and I felt it was quite strange, so

that I told Mr. Ma about that.

……

Q. When Mr. Lok told you about negative impact when the announcement of the 1995 results came out, did you wonder what that might have meant?

A. Because that conversation was very short and so after that discussion I did wonder about that, so I made a phone call to Mr. Ma, but Mr. Ma said that China Apollo was so famous in China so that he did not -- and then he said that if he has a chance that he would talk to Mr. Lok and ask him about that, but then he did not make any clear instruction about purchasing China Apollo shares. Then we just left it at that.

Q. When Mr. Lok told you about the negative impact, what did you understand him to mean?

A. I think that, roughly speaking, maybe just meaning that some certain area is not that satisfactory.

Q. You knew, did you not, from his remark to you that there was bad news within the operations of the company?

A. Just not very satisfactory, because Mr. Lok really did not go into any details, just one or two words, that is it.

Q. You knew, did you not, from your knowledge of the Hong Kong business environment that that was information known to Mr. Lok but not known to the investing public?

A. At that time I did not think about the matter from this point of view or at all.

Q. Well, Ms Chung, you knew that the public would not become aware of the bad news, did you not, until the results were announced in May?

A. I did not pay attention to this matter and I was not aware of the seriousness of the matter.

Q. You knew, I suggest, Ms Chung, from that conversation with Mr. Lok that there was bad news looming for the share price and that that was not a matter known to the general public?

A. The first response that I had, after I knew of that news, was to communicate with Mr. Ma and to see his response to that.

Q. So obviously, having heard that news, you were concerned about it?

A. It is because I thought that Mr. Ma would have the need to be concerned about that.

……

Q. After the news was given to you by Mr Lok, you continued to trade, did you not, under the name of Chung Chee Ming Arthine and Queens Choice Investments?

A. Correct. If Ming Wah felt there was a need to buy, then I would buy; if they thought there was a need to sell, then I sell.

Q. You were aware, were you not, of Mr. Lok's conversation with you when you traded in these shares between 11th and 19th March?

A. I thought that the trading of these shares, the pattern of the trading of these shares had nothing to do with the conversation of Mr. Lok.

Q. When did you have the conversation with the gentleman at Ming Wah about the negative impact?

A. Very soon after the conversation with Mr. Lok. I cannot remember whether that is the same day or the next day.

Q. Was there any later discussion about this issue with your contact at Ming Wah?

A. I do not understand what you mean by this matter.

Q. Well, you told us that, having been informed by Mr. Lok about the possible negative impact, you spoke to the gentleman meanwhile?

A. Correct.

Q. You saw fit to communicate that issue to him?

A. At least I did that, yes.

Q. Were there any subsequent discussions with your contact at Ming Wah relating to that issue, the negative impact on the shares?

A. I cannot remember that.

Q. Well, it is the sort of thing you would remember, Ms Chung, is it not?

(Question repeated for the interpreter)

A. Mr. Ma did not concern about that and the fact is that I do not remember.

Q. You, yourself, I take it, being an experienced person, conversant with Hong Kong business affairs, would have known in 1996 that it is unlawful to use inside information to deal in shares?

A. At the time, I did not think that is any particular news, and I did not think that is useful news to me either.

Q. Did you know in March 1996 that in Hong Kong it was unlawful to trade in shares using inside information?

A. I did not pay attention to that, because I did not own any shares.

Q. I suggest to you Ms Chung that if you were the person that Mr. Ma recommended to Mr. Lok, you would have known in March 1996 that in Hong Kong it is unlawful to trade in shares utilising inside information?

A. I did not consider the matter - that view - at all. If you ask me now, of course I know now, but I did not think of the whole thing like that during the time.

We are satisfied that the evidence establishes that by 11 March 1996, at the latest, Ms. Chung was well aware of the relevant information and knew it to be relevant information.

We cannot be satisfied, to the high standard required of us, that she was aware of the relevant information before that date. China Apollo's poor trading results during the 2nd half of 1995 were not known, or at least confirmed, to Mr. Lok and Mr. Lau until February 1996. Mr. Lau's 26 October 1995 'worry letter' referring to the discussion he had with Ms. Chung and Mr. Lok was addressed to the issue of the prospectus's profit forecast. The fact that in October 1995 she was aware that Mr. Lau was concerned that the profit forecast may not be met cannot fix her with knowledge of the actual figures, which were not known until three or four months later. Ms. Chung is not a director of China Apollo and we cannot infer in the absence of evidence that just by reason of her close relationship with Mr. Lok he told her about them prior to 11 March 1996.

Mr. Jin

In his statement of 2 July 2001, Mr Jin said:

'4. As the financial sheets of Guangdong Apollo were confidential and in accordance with rights attached to my job responsibilities, I was not entitled to the circulation of financial sheets, I have therefore never come across the financial sheets of Guangdong Apollo. Further, in accordance with rights attached to my job responsibilities, neither could I access the actual monthly sales of Guangdong Apollo, nor did I obtain such data through any means.

…..

7. When I sold the 282,000 China Apollo shares in March 1996, I did not know the results of Guangdong Apollo and China Apollo. Therefore, I do not admit having violated the Securities (Insider Dealing) Ordinance of Hong Kong.'

This accords with the answers he gave to the investigators from the Securities & Futures Commission when they interviewed him on 3 September 1998.

As we have said, Mr. Jin chose not to appear before the Tribunal, or appoint a lawyer to represent his interests. There was, therefore no opportunity for him to be questioned. He subscribed for 300,000 shares on the initial public offering and for 600,000 shares on the exercise of his share option, but sold only 282,000 in March 1996. We are of the view that there is insufficient evidence for us to conclude that he was, or must have been, in possession of the relevant information both at the time he subscribed for and sold his China Apollo shares.

Mr. F. Y. Wang

In his statement of 2 July 2001, Mr F. Y. Wang said:

> *'2. When China Apollo was preparing for listing, I did not take part in making the 1995 profit forecast, nor did I provide any opinions on that. matter. As I was responsible mainly for the training of Guangdong Apollo staff, financial sheets of Guanagdong Apollo were never circulated to me. I did not know the actual monthly sales of Guangdong Apollo because they were not directly related to my job.*
>
> *Conclusions*
>
> *1. I did not know the results of China Apollo in 1995 when I sold the 50,000 China Apollo shares in March 1996, so I do not admit having violated the Securities (insider Dealing) Ordinance.*
>
> *2. If I had known about the unfavourable results of China Apollo in 1995 and the adverse effect the results announcement might have on the share price, why would I not have sold all my China Apollo shares in order to gain a huge profit but instead end up instead suffering great losses?'*

This accords with the answers he gave, on 29 December 2000, to the investigators from the Securities & Futures Commission in answer to a questionaire they had forwarded to him on 22 November 2000.

As we have said Mr. F. Y. Wang, like Mr. Jin, chose not to appear before the Tribunal, or appoint a lawyer to represent his interests. There was, therefore, no opportunity for him to be questioned. He subscribed for 1,300,00 shares on the initial public offering and for 1,000,000 shares on the exercise of his share option, but sold only 50,000 in March 1996. His claim that he suffered *'great losses'* would undoubtedly appear to be correct. We are of the view that there is insufficient evidence for us to conclude that he was, or must have been, in possession of the relevant information both at the time he subscribed for and sold his China Apollo shares.

Chapter 10

In this chapter we deal with whether or not Mr. Tseung has established a defence under section 10(3) of the Ordinance. We set out the text of the subsection in Chapter 3 and explained how this defence arises and how it is established.

As we said in Chapter 3, earlier decisions of the Tribunal establish that sub-section 10(3) is construed narrowly. The defence is available to an implicated person only if the evidence establishes, on a balance of probabilities, that the true reason or reasons for his dealing were wholly unconnected with any desire or intention on his part to make a profit or avoid a loss. It is not intended to provide an implicated person with a defence that a genuine non-profit motive contributed to his reason or reasons for dealing. In the light of that test, in the case of a disposal of securities, the evidence must show, on a balance of probabilities, that circumstances compelled the implicated person to sell and that, without alternative resources, he had no choice but to sell at that time, regardless of whether or not he had come into possession of the relevant information.

It was Mr. Tseung's case that he had bought and sold his 1.5 million China Apollo shares in order to realize the built in profit he would gain by buying them through the share option scheme at a 20% discount on their open market value - the difference between the option price available to him of $1.44 a share and the market value of $1.80 a share – and that he did so in order to receive his annual bonus. In his evidence before us he frankly admitted that this was the case and Mr. Mak acknowledged it to be the case in his final submissions to us. There was no evidence that he was under any form of pressure to sell, or that external circumstances forced him to sell; in fact there was no suggestion that this was or could have been the case. Mr. Tseung's decision to buy and sell the shares was on his own admission made for sound commercial reasons. He has failed - in fact he has not even attempted - to establish he had no choice but to sell his China Apollo shares at the time he did, regardless of whether or not he had come into possession of the relevant information.

We are satisfied that Mr. Tseung has failed to establish a defence in terms of section 10(3) of the Ordinance.

Chapter 11

In this chapter we deal with whether or not Ms. Chung has established a defence under section 10(4) of the Ordinance. We set out the text of the subsection in Chapter 3 and explained how this defence arises and how it is established. As we said in Chapter 3, this defence is only available to an agent who deals on an execution only basis.

We are concerned only with the transactions that Ms. Chung carried out over the relevant time in her own name, and in the names of Queen's Choice, Savoy Assets and Bowring Assets which we identified in Chapter 7. It was advanced to us by Mr. Ronny Wong on behalf of Ms. Chung that all these transactions (as well as all other transactions in China Apollo's shares that she carried out) were carried out by her merely as an agent and that she did not select or advise on the selection of those shares.

We refer again to the power of attorney in her favour executed in the Mainland by Mr. Ma on 5 October 1995 (reproduced at Annexure 10) under which she claimed to act as Ming Wah's agent in effecting these transactions. As we said in Chapter 6, in paragraph 2; *'The company (China Ming Wah Co Ltd) authorises (her) to manage the whole said sum which can be applied in investment or other usage on behalf of the company'.* By paragraph 4(ii) *'…(she) can apply the said sum in any manner without informing our company before hand, but (she) should inform the company afterwards.'* The only fetter imposed on her by the power of attorney is that she has to *'…report to the company about the main application of the said sum timely'* and if the company has *'…arranged other usage in regard of the said sum, (she) will be informed to assist the arrangement'.* As a matter of simple interpretation, this power of attorney gave her a very broad, if not absolute, discretion. It can by no means be interpreted as being no more than a simple execution only instruction.

Ms. Chung made no mention of any of these dealings in her statement to the Tribunal of 4 May 2001. In her evidence, in answer to questions from her counsel Mr. Ronny Wong, she said:

> *'Q. Since making this statement, the tribunal has been appraised of various share dealings in your name, in the name of Queens Choice and Savoy Assets during the period between 1st to 21st March 2001… Would you please look at this schedule. It seeks to set out the relevant*

transactions in March 1996. Were these transactions effected by you on your own behalf or on account of others?

A. On behalf of somebody else.

Q. On whose behalf did you effect these transactions?

A. China Ming Wah.

Q. Did you select China Apollo shares as the subject matter of your deals, or was it selected by Ming Wah?

A. I helped China Ming Wah to make the decision.

Q. Would you listen to the question again, because I think there might be a bit of misunderstanding in the translation. Did you select China Apollo shares as the subject of the deal, or was it selected by Ming Wah?

A. They made the choice of the shares.

Q. Did you give any advice to China Ming Wah on their selection of China Apollo?
A. No.'

In answer to questions from Mr. Duncan she said:

'Q. When you were trading in these shares, you actually were physically situated, were you not, often in the offices of J & A Securities?

A. Sometimes, but whether that was all the time that I was there, I cannot remember.

Q. You were making spot decisions about whether to sell or whether to buy, were you not?

A. Yes, approximately, yes.

……

Q. If we look at the chart which was produced this morning, it is fair to say, Ms Chung, is it not, that between 4th and 11th March, you were very active in trades of China Apollo shares; is that a fair description?

A. I do not know whether it is fair or not, and I think that is just normal, nothing in particular.

Q. It might be normal to you, Ms Chung, but let us just examine what the transactions were.

(The transactions on 4,5,7 & 8 March 1996 drawn to Ms. Chung's attention.)

Q. You were the person who was giving the instructions to the brokers for these deals?

A. Correct.

Q. You were giving instructions in March, prior to 11th March, virtually on a daily basis?

A. Correct.

……

Q. Now, the buying and the selling of these shares was being done, was it not, to make a profit?

A. Theoretically speaking, yes.

Q. And you have told the tribunal that this was being conducted on behalf of Ming Wah?

A. Correct.

Q. This involved a considerable amount of your time and energy, Ms Chung, did it not, buying and selling these shares?

A. Yes.

……

Q. Did you receive benefits from Ming Wah for doing all this work for them?

A. If over this matter that I did for Ming Wah, did I not receive any benefits but because I was an agent for Ming Wah over some business in China, then over those matters I received some benefits.

Q. What benefits did you receive for this piece of work for Ming Wah?

A. No.

……

Q. You did not tell the Securities & Futures Commission, did you, that you were trading for Ming Wah?

A. Whether they asked me or not.

Q. Well, let us have a look at what they asked you.. that is the interview, Ms. Chung, on 26th September 1998… page 7, entry 21, through to page 8, entry number 29……You were legally represented at the interview?

A. Correct.

Q. And at entry number 9, you had indicated that you were a shareholder and director of Savoy Assets Limited and were in control of that company?

A. Correct.

Q. You had also confirmed that the same situation prevailed with regard to Queens Choice?

A. Correct.

Q. At entry 24, you were asked a very simple question, were you not?

(The relevant questions and answers are as follows:

24. Q. Did you trade the shares of China Apollo between 12 March and 21 March 1996 ("that period")?
A. . I cannot remember.

25. Q. Did the companies under your control trade the shares of China Apollo during that period?
A. I cannot remember.

26. Q. Did you trade the shares of China Apollo during that period for other people?
A. For purchases, probably no. Sales were likely. But even if there were any, the sales should only have made according to the instructions they gave.

27. Q. Who did "they" refer to?
A. The staff of China Apollo.

29. Q. During the period 19 December 1995 and 11 March 1996, did you buy or sell any China Apollo shares in you own name, in the name of the four aforementioned companies under your control or for other people?
A. Not for other people. But my companies did buy and sell the shares of China Apollo. But which one of them did, I cannot remember clearly.)

A. Correct.

Q. You said you could not remember?

A. Correct.

Q. And at entry 25, you were asked a very simple question, were you not?

A. Correct.

Q. And you said you could not remember?

A. Correct.

Q. At entry 26, you were asked a very simple question?

A. Correct.

Q. And you gave an answer which we can all see?

A. Correct.

Q. You mentioned that sales should only have been made according to the instructions they gave?

A. Correct.

Q. And you were asked, were you not, who "they" referred to -- Ms Chung, you were asked that, and you replied, did you not, "the staff of China Apollo"?

A. Correct.

Q. That was your opportunity, was it not, to tell the Securities & Futures Commission that "they" also included Ming Wah?

A. As I remember, when I had an interview with the SFC, I thought that it was specifically referring to the employees' trading of shares and also they are talking about the time of March, that I did not have any records back then.

Q. But, Ms Chung, they had asked you a few questions earlier about Queens Choice and Savoy?

A. Correct.

Q. Is there any particular reason, Ms Chung, why you failed in answer 27 to communicate the Ming Wah connection to the Securities & Futures Commission?

A. I have not -- I mentioned to the SFC the name of Ming Wah. If there was any reason I should not mention it, I would not mention it at all. It

may be that to the time or the question that I had some misunderstanding, that is all.

Q. These are simple questions, Ms Chung.

A. I was not sure about that, because as I understood, they were asking questions in relation to the March time and also to the staff, so these are rather irrelevant.

Q. Could you take a look at another simple question at entry number 29. That simple question is concerned with the period 19th December to 11th March, is it not?

A. Correct.

Q. That does not have anything to do with the staff.

A. I do not understand. It mentions four companies -- which four companies?

Q. It asks the question: " ... did you buy or sell any China Apollo shares in your own name, in the name of the four aforementioned companies under your control or for other people?"

A. Let me have a look at the question first, because I think that what you are talking about and what I understand from this question is different. My understanding about this question was that during the period of 19th December 1995 to 11th March 1996 the trading of the shares is under my own name or the four companies under my control or on behalf of other people. My answer was that not in the name of other people but in the name of myself, and I do not see that any of the details -- I do not remember any other details, and I do not see that what I answer that relates to your questions. Maybe there are some translation problems.

Q. Ms Chung, there is no indication on the record, is there, that you misunderstood the question?

A. Because I was only reading the Chinese statements. I did not read in the English statement, so I do not know.

Q. The translation indicates that you first said "not for other people" and then you go on to distinguish that by saying: "But my companies did buy and sell the shares of China Apollo"?

A. But then what I said was only that in my own name and also for my own companies to trade the shares and I do not use other people's names or other companies' names.

Q. Ms Chung, were all these transactions, that is the transactions in the name of Ms Chung, Queens Choice and Savoy, in fact all for Ming Wah?

A. Correct.

……

Q. Now, given that all these transactions were for Ming Wah, why the two companies?

A. If Ming Wah felt there was a need for that, then there was a need for that.

Q. Whose idea was it to go to the additional expense of acquiring and maintaining a second company?

A. To buy a company involves a very small amount of money and if Mr Ma felt that there was a need to buy a company, then we would buy a company.

Q. Whose idea was it to purchase two companies?

A. When we made a purchase of a company, it was only because Ming Wah felt there was a need, and if they agreed to buy a company, then we would buy a company.

Q. Why were some shares in Queens and some shares in Savoy?

A. To diversify. There was no particular reason involved, just to give custom to different companies.

Q. Who made the decision when you came to sell a share whether it would be Queens Choice that would sell or whether it would be Savoy that would sell?

A. I discussed with Ming Wah and Ming Wah would give broad directions and we would just do it.

Q. So on each individual trade, there would be a discussion, "Look, Mr Ma, do I purchase this in Queens or do I purchase this in Savoy?", is that what happened?

A. Whether it would be as specific as that, I cannot remember, but every day Mr Ma would be kept informed.

Q. How would you know whether to buy or whether to sell in the name of Queens or Savoy?

A. Within a certain scope then Mr Ma would tell us what to do, and then we would tell Mr Ma what we have done. Of course, it is not as specific as to one share or two shares, but within a certain scope.

Q. The SFC was interested, was it not, in how you came to control these two companies?

A. I cannot remember on this.

Q. Perhaps I can prompt your memory by taking you to the bundle again at page 214.

A. Yes.

Q. You see the letter from your solicitors Messrs Lo Chan & Leung there, do you not?

(This is the letter in which it is stated "…all the shareholdings of Queen's Choice Investments Limited "QC" belong to Ms. Chung Ming Chee, Arthine.')

A. Yes.

……

Q. Do I assume correctly that this letter was written on your instructions?

A. Correct.

……

Q. If we go back to the chart of your share dealings, we can see some dealings in the name of Chung Chee Ming, Arthine?

(The transactions on 4,5, & 6 March 1996 drawn to Ms. Chung's attention.)

Q. Now, Ms Chung, who were these trades for?

A. Also for Ming Wah.

Q. Ms Chung, these trades were also done through J & A Brokers Limited, were they not?

A. Yes.

Q. On 4th March, Ming Wah, according to you, already had an account with J & A Securities Limited?

A. Yes.

Q. So it was possible for the owner of that account to trade in China Apollo shares through that account opened in the name of Queens Choice?

A. Yes.

Q. Why was this trade on the --

A. As I said, I was the agent for Ming Wah, so if Ming Wah asked me to open an account with my name, what is so strange about that?

Q. Who made the decision to undertake the trade on 4th March in your name?

A. It is such a long time, I cannot remember. All of the transactions that I have done were approved by Ming Wah and also with the broader instruction.

Q. Whose idea was it originally to use your name to trade in China Apollo shares?

A. All these accounts, no matter it was under my own name or Queens Choice's name, it was Ming Wah's instruction to open those accounts.

Q. So we can take it was somebody from Ming Wah, is that the position?

A. Mr Ma.

Q. When Mr Ma instructed you to use your name, did you ask him why he wanted to do that?

A. Mr Ma only told me to open an account under my own name and nothing particular about that.

Q. Did it occur to you that there was something a little out of the ordinary about that?

A. What is so out of the ordinary?

Q. At the time Ms Chung's name was first used to trade in shares the names of Savoy and Queens Choice were already being used, were they not?

A. There is nothing to strange about that. As I explained before, I was the agent for Ming Wah and those were only the vehicles.

……

Q. Do you know of anybody else who has been trading in shares using your name?

A. I was not their agent.

Q. Do you make a habit of trading in other people's shares using your own name?

A. I have never been any other people's agent.

Q. Also in this chart, we see some dealings of Savoy, Ms Chung?

(The transactions on 6 & 7 March 1996 conducted through Wheelock NatWest Securities were drawn to Ms. Chung's attention.)

Q. Who chose this broker? (Wheelock)

A. I think that I may have discussed with Ming Wah to use this broker.

Q. Well, was that rather inconvenient, Ms Chung, you already had a broking relationship with J & A Brokers Limited?

A. It would not be.

Q. Would it not have been more convenient simply to use the same broker for all of the share trades?

A. It was Ming Wah who felt that they had a need to have more companies.

Q. Was there a particular reason to separate some of the transactions from one broker to another?

A. I do not see there was any particular reason.

Q. There was an account at Wheelock also opened in the name of Chung Ming Chee, was there not?

A. Correct.

Q. Why was that?

A. The same reason as I said, that we may open more accounts to subscribe some new shares, and we open accounts not just to subscribe China Apollo shares.

Q. Do I understand your evidence correctly, Ms Chung, that the decisions to sell the shares under the name of Savoy on 6th and 7th March were not your decisions?

A. I can say that the sales of all these shares were under the approval and instruction or suggestion of Ming Wah.
……

Q. So if I ask you this question; who made the decision for Savoy to purchase the China Apollo shares in December, what would your answer be?

A. I should say that because we bought some companies and they only know that there are A, B, C companies and they did not define which companies I have to make the purchase of the share, but they said to me -- defined to me the amount, how much I have to subscribe.

Q. Was it your decision in December 1995 to purchase the China Apollo shares, or was it somebody else's decision, that is the purchases by Savoy in December 1995?

A. To decide the company name and the amount, it was my decision, but then in general how much shares and how much companies, that was their decision, they do not care which company I would use to subscribe

their shares.

Q. But the decision to purchase the shares, who made that, was it you or was it Ming Wah?

A. The general decision was made by Ming Wah, but then which company and also the amount was decided by me.

Q. This was a matter in which the SFC was interested when they interviewed you, was it not?

A. Really I do not remember.

Q. Well, perhaps I can refresh your memory by asking you to look at the interview that was conducted in 1998 at page 270 of bundle 7. The translation is at page 191, and it is entry number 39. Perhaps you can read to yourself, Ms Chung, entries 38 and 39.

(The relevant questions and answers are as follows:

38. Q. According to investigation, Savoy has a securities trading account in Wheelock Natwest Securities Limited. In December 1995, Savoy bought a total of 10,828,000 shares of China Apollo through that account, involving an amount of $15,349,932.77. Where did this sum of money come from?
A. I'll check it out first before I'll answer you.

39. Q. Who made the decision for Savoy to purchase the block of China Apollo shares?
A. Me.)

Q. Did you tell the SFC that it was Ming Wah's decision for Savoy to purchase the China Apollo shares?

A. Not in here, what I meant in here was that it is Ming Wah's instruction to subscribe the shares, but then they did not define to me using which company and using which format to subscribe the shares.

……

Q. Would you like to go on and read entries 40 and 41, please, in the

same interview.

A. Yes.

Q. At entry 41 you were asked, were you not, why you would be interested in the shares of China Apollo?

(The relevant question and answer is:

41. Q. Why would you be interested in the shares of China Apollo?
A. I knew Lok, so I was interested in this company.)

A. Yes.

Q. That was your opportunity, Ms Chung, if your evidence about Ming Wah is correct, for you to say, "Well, actually, this was not my interest, I was simply acting as a pawn for Ming Wah"?

A. I did not see any problem with that. I could have discussed with Ming Wah saying that maybe the company is not so sound or the shares not so good, but since I knew Mr Lok, I saw there was no problem with China Apollo shares.'

In answer to questions from Mr. Lam she said:

'MR LAM: All these transactions that you undertook on instructions for Mr Ma, were those instructions verbally or in writing?

A. "Transactions", what do you mean?

MR LAM: Buying and selling of shares, receipts and payments of money?

A. If you are talking about stock trading, that is because it is quite impossible to have written instructions, so that he would normally give me the verbal instruction and the account statement that I normally would show him, and then, with his approval as well, if payment or repayment of the money, that would be definitely with his instruction.

MR LAM: As agent for Mr Ma, at the end of each day, if you bought or sold shares on behalf of Ming Wah, did you report back to Mr Ma in writing?

A. It is not necessary because from J&A, it would have a statement issued, so then I would take it to show to him. If I am on my own writing then it might sometimes have some small deviation.

……

MR LAM: Ms Chung, I am a bit confused about your level of authority. During this whole inquiry, I have got the impression that you took very specific instructions from Ming Hua; is that correct?

A. Sometimes, yes.

MR LAM: Then you acted upon those instructions?

A. Basically, yes.

MR LAM: Were there many times that you did things, you made decisions on behalf of Ming Hua and then you reported back to them?

A. Sometimes, yes.'

In answer to questions from the Chairman she said:

'MR JUSTICE LUGAR-MAWSON: When it came to investing in China Apollo in the name of these companies, who decided which stockbrokers would be used?

A. They made the decision.

MR JUSTICE LUGAR-MAWSON: So they would say, for Bowring Assets, Yue Xiu (Finance) Securities Co Limited, would they?

A. Because Yue Xiu is a Chinese funded company, so Ming Hua should know them.

MR JUSTICE LUGAR-MAWSON: It is not a question of what Ming Hua knew; I am asking you what instructions you got from them. Did they say, "The Bowring Assets investment is to be done through that particular firm of brokers"; did they say that in specific terms, or did they leave it to you to make the decision, in the terms of your Power of Attorney?

A. No.

MR JUSTICE LUGAR-MAWSON: What was the position?

A. Because it is too long ago, I really cannot remember, but Bowring, the name, maybe they just take a pick, but then the directors, they were all their people, so they make the decision.

MR JUSTICE LUGAR-MAWSON: I am asking what instructions they gave you. You are, Ms Chung, their girl in Hong Kong who does all this dealing for them under Power of Attorney. What instructions did they give you?

A. They instructed me to purchase three companies. Then they have their own shareholders in there, and then they instructed me to make a cheque and to issue a cashier order through Bowring, and that is it.

MR JUSTICE LUGAR-MAWSON: What about High Margin; what instructions did you get about that investment?

A. Just like that.

MR JUSTICE LUGAR-MAWSON: What about Queens Choice?

A. They just told me simply how many China Apollo shares to subscribe; that is all.'

Again, we regret to say that we find we were told many half-truths and some downright lies about this matter. Frankly, we found Ms. Chung to be an inveterate, but not accomplished, liar. While we have no doubt that Ms. Chung was Ming Wah's

agent in effecting the share transactions in March 1996 with which we are concerned (as well as all other transactions in China Apollo's shares that she carried out) we are not pursuaded by her claims that she neither selected, nor advised on the selection of, the shares involved in those transactions and acted on that company's behalf on an execution only basis.

Ms. Chung is not a stockbroker. In fairness, we acknowledge that she never claimed to be one.

Ms. Chung concealed the existence of Ming Wah and her relationship with that company from the Securities & Futures Commission's investigators in her two interviews with them in 1998; saying, in answer to very clearly expressed and simple questions, that the transactions were on her own behalf.

We were wholly unconvinced by her professed reasons why two firms of stockbrokers were used to effect the transactions.

In the course of her examination by Mr. Duncan, Ms. Chung conceded that Ming Wah gave *'broad directions'*, that *'all of the transactions were approved by Ming Wah'*; that *'the sales of all these shares were under the approval and instruction or suggestion of Ming Wah'*, that *'the general decision was made by Ming Wah, but…which company and also the amount was decided by me'* and that *'they (Ming Wah) did not define to me using which company and using which format to subscribe the shares'*.

As we have said, as a matter of simple interpretation, Ming Wah's power of attorney gave her a very broad, if not absolute, discretion and can by no means be interpreted as being no more than a simple execution only instruction. As we said in Chapter 6[15], it gave her almost a completely free hand to invest Ming Wah's monies under her control.

We are satisfied that Ms. Chung has failed to establish a defence in terms of section 10(4) of the Ordinance.

[15] See: Chapter 6, page 76.

Chapter 12

In this chapter we summarise our findings in relation to questions (a) and (b) of the Financial Secretary's notice.

Mr. Lau

Mr. Lau engaged in insider dealing when he sold his 1.3 million China Apollo shares between 18 and 21 March 1996.

Mr. Zhang

Mr. Zhang engaged in insider dealing when he sold his 1.2 million China Apollo shares between 18 and 21 March 1996.

Mr. Lok

Mr. Lok engaged in insider dealing when he counselled and procured Mr. Lau, Mr. Zhang and Mr. Tseung to deal in China Apollo shares by providing them with funds in the relevant time of 1 to 21 March 1996 to enable them to purchase their shares, on the condition that they immediately sell them.

Ms. Chung

Ms. Chung engaged in insider dealing when she, either in her own name or the name of Queen's Choice, Savoy Assets and Bowring Assets, engaged in the share dealings in China Apollo shares particularised in Chapter 7, between 11 and 19 March 1996. She has failed to establish a defence under section 10(4) of the Ordinance.

Mr. Tseung

Mr. Tseung engaged in insider dealing when he sold his 1.5 million China Apollo shares between 18 and 21 March 1996. He has failed to establish a defence under section 10(3) of the Ordinance.

Mr. Jin

Mr. Jin did not engage in insider dealing when he sold 282,000 of his China Apollo shares between 18 and 21 March 1996.

Mr. F. Y. Wang

Mr. F. Y. Wang did not engage in insider dealing when he sold 50,000 of his China Apollo shares between 18 and 21 March 1996.
We make no findings in respect of Ms. Wang and Mr. Huang.

For the avoidance of doubt, we again state that our findings are unanimous.

In the light of the above findings Chapters 1 to 12 (inclusive) of the Tribunal's report are now sent to the Financial Secretary, pursuant to the provisions of section 22(3)(a) of the Ordinance.

On a future date, we will hear representations in respect of the requirement, contained in paragraph (c) of the Financial Secretary's notice, that we determine the amount of profit gained or loss avoided as a result of the insider dealing we have found took place and thereafter decide upon the consequent orders and penalties.

Signed

……

The Hon Mr. Justice Lugar-Mawson

Chairman

……..

Mr. Simon Lam Siu Lun

Member

……

Mr. Malcom Barnett

Member

Dated: 31 January 2002

Chapter 13

In this chapter we set out our findings in respect of paragraph (c) of the Financial Secretary's notice of 30 June 2000 and deal with penalties and consequential orders.

On 31 January 2002, we sent Chapters 1-12 inclusive of this report to the Financial Secretary. This contained our findings in respect of paragraphs (a) and (b) of the Financial Secretary's notice. The same chapters were also sent to the Department of Justice and the solicitors representing the implicated parties. As Mr. Lau is a Certified Public Accountant a copy was also sent to the Hong Kong Society of Accountants in accordance with the provisions of subsection 22(3)(iv) of the Ordinance.

By paragraph (c) of the Financial Secretary's notice we are required to inquire into and determine the amount of any profit gained or loss avoided by those persons we identified as insider dealers as a result of their insider dealing between the 1 to 21 March 1996, inclusive.

As subsection 23(2) of the Ordinance provides that the Tribunal shall not make an order in respect of any person under subsection 23(1) without first giving that person the opportunity of being heard, we sat on 13 & 14 March 2002 to hear submissions from all parties relating to:

(A) the method of calculating the amount of any profit gained or loss avoided as a result of the insider dealings which we had found proved;

(B) the appropriate financial penalties and orders under section 23 which should follow our findings;

(C) what witness expenses should be granted under section 26 of the Ordinance; and

(D) what orders, if any, should be made under section 27 of the Ordinance.

We now deal with the sections in the Ordinance dealing with our powers in this regard.

Method of calculation

There are 2 financial orders we can make, they are provided for in section 23 of the Ordinance, subsections 23(1)(a) & (b) of which provide:

> *'(1) At the conclusion of an inquiry or as soon as is reasonably practicable thereafter, where a person has been identified in a determination under section 16(3) or in a written report prepared under section 22(1) as an insider dealer, the Tribunal may in respect of such person make any or all of the following orders -*
>
> *……*
>
> *(b) an order that that person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the insider dealing;*
>
> *(c) an order imposing on that person a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the insider dealing.*

To be within the scope of either or both financial orders there must be a 'profit' that is 'gained' by the person in question, or a 'loss' that is 'avoided' by that person, whether he be the insider dealer or someone else, and it must have been 'gained' or 'avoided' as a result of the insider dealing.

Under subsection 23(1)(b) the Tribunal may order that the insider dealer pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by him as a result of his insider dealing. For ease of reference we shall refer to such orders as 'disgorgement orders' from now on.

Under subsection 23(1)(c) the Tribunal may make an order imposing on the insider dealer a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by **any person** as a result of the insider dealing. The formula of profit gained or loss avoided as a result of the insider dealing is common to both forms of financial orders. The aggregate amount of all the penalties imposed under subsection 23(1)(c) may not exceed three times the profit gained or loss avoided by all persons as a result of the insider dealing. For ease of reference we shall refer to such orders as 'penalty orders' from now on.

A penalty order goes further than a disgorgement order. Although not so described, a penalty order is comparable to a fine. Its purpose is to deter insider dealing, and it seeks to do so by leaving a person who engages in insider dealing substantially out of pocket. The amount of the penalty can be up to treble the amount, not of the benefit gained by the insider dealer himself, but of the benefit gained by the insider dealer **and anyone else** as a result of the insider dealing. Thus, no disgorgement order may be made against an insider dealer who counsels or procures others to deal, but does not do so himself and thereby himself neither makes a gain, nor avoids a loss. However, a penalty order may be made against him, provided that those he counseled or procured dealt as a result and thereby gained a profit, or avoided a loss. This means that the counsellor or procurer can be subjected to a substantial penalty order even though he himself gained no profit, or avoided no loss. This is the position with respect to Mr. Lok.

The context of section 23 is dealings in listed securities; in the context of this Inquiry China Apollo's shares. References to profit gained or loss avoided are to be read, naturally and consistently with the purpose of financial orders, as references to profits or losses arising from buying and selling in the market, without any allowance for the ordinary incidents affecting market prices.

When the insider dealing consists of an improper purchase, the profit gained comprises the difference between the cost of purchase and the net sale price. Both subsections 23(1)(b) and (c) envisage that the profit gained as a result of an insider dealing is to be calculated by the simple exercise of comparing the actual cost of purchase and the actual sale proceeds. However, if the shares are retained after the information has become generally known to the market, the profit is calculated by reference to the unrealised market value at a date that has to be identified as the appropriate date (the appropriate date). That date will usually be the date on which the market learned of and absorbed the information.

Subsections 23(1)(b) and (c) also apply to the amount of any loss avoided as a result of the insider dealing. This could arise if the confidential information were bad news about a company's business. The calculation of the amount of a loss avoided is different from the calculation of the amount of profit gained.The amount of profit gained by an insider dealer is an actual amount and can be calculated accordingly. By way of contrast, the amount of a loss avoided by an

> insider dealer is a notional exercise, because *ex hypothesi* the loss was not actually sustained by the insider dealer - it was avoided. In the case of a dealing in shares, the calculation of the amount of loss avoided will involve comparison of two elements, one actual (the shares were sold), and the other notional (what would have happened if the shares had been retained). The actual element in the calculation will comprise the amount realised by the insider dealer from the shares sold before the market learned of the bad news. The notional element will comprise the market value of the shares at the appropriate date. In the case of an insider dealing which consists of an improper purchase that date will usually be the date on which the market learned of and absorbed the information. This also will usually be the appropriate date in the loss avoided situation because it can normally be expected that, save for the misuse of the confidential information, the insider dealer would still have held his shares at that date and, hence, would have suffered loss accordingly.
>
> As we are of the view that in Ms. Chung's case we are dealing with a loss avoided situation, we had to decide what the appropriate date was. Acting on the advice of Mr. Denis Ho Shu Kin an accountant with the Enforcement Division of the Securities & Futures Commission, who gave evidence before us on 13 March 2002, we decided that the appropriate date is the close of business on Friday, 24 May 1996. That is 3 working days after China Apollo's 1995 year-end results were published in the morning of 22 May 1996.

Our reasons for choosing this date come from Mr. Ho's examination of the trading record in China Apollo shares in late May 1996. Over the five trading days between 15 May 1996 to 21 May 1996, the average daily trading volume in China Apollo shares was only 0.6 million shares. Immediately after the results were published, their trading volume surged to 26.8 million shares on 22 May; 11.2 million shares on 23 May and 17.6 million shares on 24 May respectively. On 23 May 1996, 12 articles relating to China Apollo's results appeared in various local newspapers and on 24 May 1996, China Apollo issued the announcement giving further information about the Wah Nam sale.[16] Twenty-fourth May was a Friday and the Stock Exchange closed until the following Monday. China Apollo's trading volume dropped quickly in the week beginning Monday, 27 May 1996, fluctuating between 3.3 million shares to 1.5 million shares, or an average daily trading volume of 2.45 million shares over the

[16] See: Chapter 1, page 8.

week. This significant decrease in trading volume after 24 May 1996 indicates to us that the market had absorbed the information by close of trading on that day.

As to the market value of the shares at the appropriate date, we have again followed Mr. Ho's advice and adopted a weighted average method in arriving at this. The weighted average method was used in the Emperor (China Concepts) Investments Ltd Inquiry and in the Hannay Holdings Ltd Inquiry. Mr. Ho calculated this for us by reference to the total of China Apollo's monetary turnover in the 3 days 22 to 24 May 1996 divided by the total number of shares traded over these 3 days. The price works out at $1.542764 a share. The information for this exercise came from the Stock Exchange of Hong Kong. This method takes into account the price and volume of all of the transactions in China Apollo shares executed in that 3-day period. We consider this to be a fairer and more representative method than simply taking the average of the closing prices of China Apollo's shares on those 3 days.

We take the view, which is contrary to that held by Mr. Ho, that Mr. Lau, Mr. Zhang and Mr. Tseung exercised their share options and bought and sold their China Apollo shares after they became aware of the relevant information, not to avoid a loss but to gain a profit. We are of the view that they, while in possession of the relevant information, took advantage of a rising market in China Apollo's shares in order to enrich themselves. We, however, agree with Mr. Ho, that in Ms. Chung's case she traded in China Apollo's shares while in possession of the relevant information in order to avoid losses. The pattern of her trading indicates that she, and the British Virgin Island companies she controlled, were systematically disposing of the 52% shareholding acquired on flotation in December 1995. It is true that there were purchases within the relevant period, but these were far fewer and for far smaller amounts than the disposals.

Disgorgement orders

As Mr. Lok did not deal in China Apollo's shares within the period in question, for the reasons given above[17], we can make no disgorgement order against him.

A disgorgement order made need not necessarily be for the same amount as the amount of profit gained, or loss avoided; it could be less for the subsection says an amount *'…not exceeding the amount of any profit gained or loss avoided.'* We take

[17] See: this Chapter, page 137.

the view that, as the purpose of a disgorgement order is to strip the insider dealer of the amount of the profit gained or loss avoided by him as a result of his insider dealing; in short, he is not to be allowed to retain his ill-gotten gains. It is only in very exceptional circumstances, such as his patent lack of means, that it will be appropriate to award a lesser sum than the profit gained or loss avoided. We find that Messrs. Lau, Zhang and Tseung and Ms. Chung have no exceptional circumstances, which would justify our making no, or a lower, disgorgement order against them.

We considered and discarded the argument that there should be a deduction from the profit gained by Messrs. Lau, Zhang and Tseung to take account of the 20% discount they were entitled to in purchasing China Apollo shares under the option scheme. We have done this because we take the view that the exercise of their options, the purchase of the shares and the almost immediate disposal of those shares was part and parcel of one continuing act directed at exploiting the advantage they had from being in possession of the relevant information.

Our findings in respect of the disgorgement orders are:

Mr. Lau

Mr. Lau gained a profit of $746,986, when he sold his 1.3 million China Apollo shares between 18 and 21 March 1996.

Mr. Zhang

Mr. Zhang gained a profit of $755,997 when he sold his 1.2 million China Apollo shares between 18 and 21 March 1996.

Mr. Tseung

Mr. Tseung gained a profit of $922,465 when he sold his 1.5 million China Apollo shares between 18 and 21 March 1996.

Ms. Chung

Ms. Chung avoided a loss of $793,360 when she in the name of Queen's Choice engaged in the share dealings in China Apollo shares on 15 and 19 March 1996.

Details of the calculations used in arriving at the above figures are given in Annexure 11.

Penalty orders

Because penalty orders are more in the nature of a fine, it is open to us to look at the overall picture and attach such weight, as we consider appropriate to the wider mitigating, or, indeed, aggravating features in each insider's case. What does and does not constitute a mitigating factor in insider dealing cases has been dealt with in previous inquiries. We have followed those principles and also taken into account such of the mitigation advanced to us, as we considered it appropriate to do so. We do not propose to set out in this report all matters advanced by way of mitigation. Counsel made helpful submissions in this respect and these can be found in the transcript of proceedings.

We believe that it is no part of our function to make findings as to why an insider sold or did not sell the shares they acquired by insider dealing. The decision to sell or buy is entirely in the hands of the insider, no one forced him to deal. We do not consider claims of ignorance of the law relating to insider dealing at the time of dealing to be of any mitigating value. Such claims are merely illustrative of the widespread lack of understanding concerning the stringency of Hong Kong's laws and regulations governing share trading.

Our findings are as follows:

Mr. Lau

In Mr. Lau's case we take account of the fact the fact that he is a qualified accountant and that his insider dealing was a calculated attempt to make a quick profit for himself, fully realizing that he was acting in breach of the law relating to insider dealing. We take account of the fact that he admitted insider dealing. The amount we consider appropriate in his case is an amount equal to the disgorgement order that is $746,986.

Mr Zhang

There was nothing sophisticated about Mr. Zhang's insider dealing, it was prompted by a mixture of greed and naivety. He made an admission of wrongdoing. In his case we make a penalty order for a lesser sum than the disgorgement order. It must

however bear some relation to the disgorgement order figure, because the size of the potential profit must be regarded as one of the factors in assessing the gravity of the wrongdoing. The amount we consider appropriate in his case is an amount equal to half the disgorgement order, that is $377,998.

Mr. Lok

We take account of the very important role Mr. Lok played in counselling Messrs Lau, Zheg and Tseung's insider dealing. He is the Chairman of China Apollo and the man who by hard work and determination, no doubt aided by his own share of good fortune, has built it up into a prosperous modern enterprise. Given that China Apollo's trading activities are mainly centred in the Mainland, it was his choice to float it in Hong Kong and thus subject it, and himself, to Hong Kong's laws relating to corporate governance and market control. It is disturbing that within 3 months of the floation he chose to ignore those laws. Although he apologized for his wrong dong, that was conditional on our finding that he had committed a wrongdoing. He said in his statement to the Tribunal of 18 April 2001:

> *'I have no knowledge of the rules and regulations relating to insider dealing, but I have been advised by my legal representations that my actions may have breached the Ordinance. In any event, I recognize that I am responsible for my actions, and if I have breached the Ordinance then I am willing to accept responsibility and also to apologise for what I did.'*

The combined profits gained by Messrs Lau, Zhang and Tseung were $2,425,448. The maximum order we could make would be approximately $7,276,344, which is three times their combined gain. The amount we consider appropriate in his case is for a sum equivalent to their combined gain that is $2,425,448.

Ms. Chung

Ms. Chung we find to be an arch-typical speculator. She was intimately bound up in China Apollo's affairs through her connection with Ming Wah, she was involved in the financing of China Apollo, she advised on its flotation in 1995 and she arranged for the disposal of the directors' option shares in March 1996. Her section 10(4) defence failed because we disbelieved her and her attitude towards the Tribunal was mendacious in the extreme. While that does not aggravate her penalty, it does nothing to mitigate it. The loss she avoided within the relevant period was a modest

$793,360, which bears little relation to the other losses she may have avoided outside that period. We think that in her case the penalty order should be for one and a half times the loss avoided that is $1,190,040.

Mr. Tseung

There was nothing sophisticated about Mr. Tseung's insider dealing, like Mr. Zhang he was prompted by a mixture of greed and naivety. He admitted his acts and the fact that he was knowingly in possession of the relevant information. His section 10(3) defence failed, not because we disbelieved it, but because it was unsustainable as a matter of law and we do not seek to penalize him for that. In his case we make a penalty order for a lesser sum than the disgorgement order. As in the case of the order we make against Mr. Zhang, his too must bear some relation to the disgorgement order figure. The amount we consider to be appropriate in his case is an amount equal to half the disgorgement order that is $461,232.

Disqualification

Section 23(1)(a) of the Ordinance provides for disqualification orders, and that is what we shall call them. The relevant part of the subsection provides:

> *'At the conclusion of an inquiry…where a person has been identified…as an insider dealer, the Tribunal may in respect of such person make…-*
>
> *(a) an order that that person shall not, without the leave of the High Court, be a director or a liquidator or a receiver or manager of the property of a listed company or any other specified company or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company or any other specified company for such period (not exceeding 5 years) as may be specified in the order;…'*

A disqualification order can take many forms. For example, it can relate to a listed company or a private company or both; it can prohibit a person from being a director, a liquidator, a receiver and a manager or any combination of these. It can also prohibit indirect management of companies. The maximum period of disqualification we can order is 5 years.

Given the serious nature of insider dealing, it would be exceptional for us to make no disqualification order and we are of the view that there are no exceptional circumstances in this Inquiry arising from either the nature of the insider dealing committed, or the personal circumstances of the insider dealers identified that would justify us not making one.

This case is not one of the most serious that the Tribunal as a body has had to deal with, but neither can it be said that the insiders only committed minor breaches of the Ordinance.

In arriving at our decision we have taken into account the need to: ensure the integrity of the securities market; protect the public from further abuse by the insider of the privileged position of trust which that office carries; deter others from breaching that trust; and mark the disapproval of the investment community with the conduct of the insider dealer. We have taken into account the impact upon the insider of a disqualification order[18].

We gave individual consideration to the circumstances of each insider dealer. We considered the wrongdoing of Mr. Lau and Ms. Chung to be more serious than the remaining three. Mr. Lau was the Financial Director of China Apollo, he should not have sanctioned and promoted the insider dealing. Ms. Chung, as we have said was the arch-speculator, intimately bound up in China Apollo's affairs. Our orders are in every case confined to listed companies. We do not consider it necessary to extend the disqualification orders to private limited companies.

The periods of disqualification that we consider proper are that Mr. Zhang, Mr. Lok, and Mr. Tseung should be disqualified for the period of one year and that Mr. Lau and Ms. Chung should be disqualified for the period of 18 months from being a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly being concerned or taking part in the management of a listed company without leave of the Court of First Instance of the High Court.

Witness expenses

Section 26 of the Ordinance empowers the Tribunal, in its discretion, to pay to a

[18] See: The report in the Success Holdings Inquiry, at page 97.

witness appearing before it, out of funds proved for that purpose by the Legislative Council, such sum for his expenses and loss of time as the Tribunal may determine. Only Mr. Clive Rigby, one of the 2 the expert witnesses, claimed fees of $38,250, we make an order that he be paid those fees as expenses under this section.

Expenses of Investigation & Inquiry

Section 27 empowers the Tribunal to make an award of costs against persons identified as insider dealers. The section provides:

> *'At the conclusion of an inquiry or as soon as is reasonably practicable thereafter, the Tribunal may order any person who has been identified as an insider dealer in a determination under section 16(3) or as an officer of a corporation in a determination under section 16(4), as the case may be, to pay to the Government such sums as it thinks fit in respect of the expenses of and incidental to the inquiry and any investigation of his conduct or affairs made for the purposes of the inquiry.'*

The complication in this Inquiry is that it had, effectively, a false start and we do not believe that those we have identified as insider dealers should bear all the expense of that. The assessment and apportionment of costs is always a 'judgment of Solomon', the best we can do is to say that the five identified insider dealers should bear between them 75% of the total costs of the Inquiry. The costs of the Inquiry have been calculated at $5,686,958 thus the amount of costs that they will bear between them is $4,265,218.

These costs include:

- The Tribunal's costs, that is the fees and salaries of the Tribunal members and staff, Mr. Rigby's fees, and expenses such as interpretation services, court reporting services and photocopying directly attributable to the inquiry itself. In keeping with the practice in previous inquires, establishment expenses are not included.

- The costs of the Department of Justice; and

- The costs of the Securities & Futures Commission.

Annexure12 gives details of these costs.

We consider it just that Mr. Lok and Ms. Chung should bear the highest proportion of the costs as their cases took up more of the Tribunal's time. We also consider it just that Mr. Lau should bear a higher proportion of the costs than Mr. Zhang and Mr. Tseung as his case took up more of the Tribunal's than theirs did. Those costs will therefore be borne by the identified insider dealers in the following proportions:

Mr. Lau - 16%
Mr. Zhang - 9%
Mr. Lok - 33%
Ms. Chung - 33%
Mr. Tseung - 9%.

Chapter 14

In this chapter we set out our penalties and orders in respect of paragraph (c) of the Financial Secretary's notice of 30 June 2000.

We order that:

Mr. Raymond Lau Chan Wing shall:

1. not without leave of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region be a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly be concerned or take part in the management of a listed company for a period of 18 months;

2. pay to the Government of the Hong Kong Special Administrative Region the sum of $746,986 under s.23(1)(b) of the Ordinance;

3. pay to the Government of the Hong Kong Special Administrative Region a penalty of $746,986 under s.23(1)(c) of the Ordinance and

4. pay to the Government of the Hong Kong Special Administrative Region $682,434, being16% of 75% of the costs of the Inquiry.

Mr. Zhang Tie Cheng shall:

1. not without leave of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region be a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly be concerned or take part in the management of a listed company for a period of 1 year;

2. pay to the Government of the Hong Kong Special Administrative Region the sum of $755,997 under s.23(1)(b) of the Ordinance;

3. pay to the Government of the Hong Kong Special Administrative Region a penalty of $377,998 under s.23(1)(c) of the Ordinance and

4. pay to the Government of the Hong Kong Special Administrative Region $383,870, being 9% of 75% of the costs of the Inquiry.

Mr. Lok Fai shall:

1. not without leave of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region be a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly be concerned or take part in the management of a listed company for a period of 1 year;

2. pay to the Government of the Hong Kong Special Administrative Region a penalty of $2,425,448 under s.23(1)(c) of the Ordinance and

3. pay to the Government of the Hong Kong Special Administrative Region $1,407,522, being 33% of 75% of the costs of the Inquiry.

Ms. Arthine Chung Ming Chee shall:

1. not without leave of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region be a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly be concerned or take part in the management of a listed company for a period of 18 months;

2. pay to the Government of the Hong Kong Special Administrative Region the sum of $793,360 under s.23(1)(b) of the Ordinance;

3. pay to the Government of the Hong Kong Special Administrative Region a penalty of $1,190,040 under s.23(1)(c) of the Ordinance and

4. pay to the Government of the Hong Kong Special Administrative Region $1,407,522, being 33% of 75% of the costs of the Inquiry.

Mr. Tseung Wai Lok shall:

1. not without leave of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region be a director or a liquidator or a receiver or a manager of the property of a listed company or in any way whether directly or indirectly be concerned or take part in the management of a listed company for a period of 1 year;

2. pay to the Government of the Hong Kong Special Administrative Region the sum of $922,465 under s.23(1)(b) of the Ordinance;

3. pay to the Government of the Hong Kong Special Administrative Region a penalty of $461,232 under s.23(1)(c) of the Ordinance and

4. pay to the Government of the Hong Kong Special Administrative Region $383,870, being 9% of 75 % of the costs of the Inquiry.

All the orders for financial penalties and costs shall be paid on or before 30 September 2002.

Pursuant to s.29 of the Ordinance, this Order will be registered with the Court of First Instance of the High Court of the Hong Kong Special Administrative Region and become for all purposes an order of the Court of First Instance made within the jurisdiction of that court.

Acknowledgements

The Chairman places on record his appreciation of the assistance given to him by the 2 members of the Tribunal**{** XE "Tribunal:acknowledgements" \b **}**, Mr. Simon Lam Siu Lun**{** XE "Simon LAM Siu-lun" \b **}**, and Mr. Malcom Barnett**{** XE "Eric NG Kwok-wai" \b **}**, both for their contribution during the hearings and their methodical, patient and highly professional approach to their consideration of the evidence. Tribunal members play a vital role in insider dealing inquires and Hong Kong is fortunate to have the services of people of such high calibre.

We are grateful for the assistance given to us by all the counsel and solicitors involved in the inquiry. Without exception, they carried out their respective duties with professionalism, vigour and courtesy. Their level of assistance, especially in the submission of detailed, written arguments, made our work a good deal easier.

We are grateful also for the reliable and efficient support rendered by the Tribunal's staff, Smith Bernal International (Asia) Ltd (the court reporters) and Abraham, Wong, Hoffman & Associates (the interpreters).

Signed

……

The Hon Mr. Justice Lugar-Mawson

Chairman

……..

Mr. Simon Lam Siu Lun

Member

……

Mr. Malcom Barnett

Member

Dated: Thursday, 6 June 2002