

HONG KONG / JUDGMENT

KOON WING YEE v. INSIDER DEALING TRIBUNAL AND ANOTHER

COURT

Court of Appeal

DECIDED

30 May 2007

CASE / FILE NUMBER

CACV358/2005

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bjbj cacv 358/2005 AND CACV 360/2005 cacv 358/2005 in the high court of the hong kong special administrative region court of appeal civil appeal no. 358 of 2005 (ON APPEAL PURSUANT TO SECTION 31 OF THE SECURITIES (INSIDER DEALING) ORDINANCE, CAP. 395 FROM DETERMINATIONS OF AN INSIDER DEALING TRIBUNAL IN RELATION TO EASY CONCEPTS INTERNATIONAL HOLDINGS LTD. AND EASYKNIT INTERNATIONAL HOLDINGS LTD.) BETWEEN KOON WING YEE Appellant INSIDER DEALING TRIBUNAL 1st Respondent THE FINANCIAL SECRETARY 2nd Respondent cacv 360/2005 in the high court of the hong kong special administrative region court of appeal civil appeal no. 360 of 2005 (ON APPEAL PURSUANT TO SECTION 31 OF THE SECURITIES (INSIDER DEALING) ORDINANCE, CAP. 395 FROM DETERMINATIONS OF AN INSIDER DEALING TRIBUNAL IN RELATION TO EASY CONCEPTS INTERNATIONAL HOLDINGS LTD. AND EASYKNIT INTERNATIONAL HOLDINGS LTD.) BETWEEN CHAN KIN SHING SONNY Appellant INSIDER DEALING TRIBUNAL 1st Respondent THE FINANCIAL SECRETARY 2nd Respondent Before: Hon Ma CJHC, Tang VP AUTOTEXTLIST * MERGEFORMAT and Stone J in macrobutton nomacro Court Date macrobutton nomacro s of Hearing: 7 and 8 May 2007 Date of macrobutton nomacro Judgment : 30 May 2007

macrobutton nomacro J U D G M E N T

Hon Tang VP (giving the judgment of the court):

Introduction

These appeals arose out of an inquiry by the Insider Dealing Tribunal under the Securities (Insider Dealing) Ordinance Cap. 395 (the SIDO), which now has been repealed and replaced by the Securities and Futures Ordinance, Cap. 571 (the SFO). On 28 January 2000, the shares in Easy Concepts International Holdings Ltd. (Easy Concepts) closed at \$0.34 with a turnover of 50,000 shares. On 31 January 2000, by the time trading was suspended at 10:47 am, it closed at \$2.10. The

turnover was 4,228,000 shares. On 18 February 2000, an announcement was made that the Pollon Group had taken a 75% interest in Easy Concepts. When trading resumed on 18 February 2000, the shares traded between \$12.40 and \$8 and closed at \$10.05. The turnover was 14,378,000 shares. The shares in Easyknit International Holdings Ltd. (Easyknit), which owned 75% of Easy Concepts prior to the Pollon Group transaction, rose by 30.91% on 31 January 2000 before its suspension at 10:48 am. On resumption of trading on 18 February 2000, it rose a further 239%. Perhaps unsurprisingly, in these circumstances, the Securities and Futures Commission () launched an investigation under section 33 of the Securities and Futures Commission Ordinance, Cap. 24 (the SFCO) (now repealed) into possible insider dealing in the shares of Easy Concepts and Easyknit. Koon Wing-yee (Koon), the appellant in CACV 358 of 2005, was the chairman of Easy Concepts as well as the chairman of Easyknit. Sonny Chan Kin-shing (Sonny Chan), the appellant in CACV 360 of 2005 was a business acquaintance of Koon of long standing. In 2001, both Koon and Sonny Chan were required by the SFC to testify pursuant to section 33(4)(c) of the SFCO. During their evidence, they had claimed that answers to certain questions might tend to incriminate them; however, they were required to answer those questions under sections 33(4) and (6) of the SFCO which provided that:

- (4) The person under investigation or any person who is reasonably believed or suspected by the investigator to have in his possession or under his control any record or other document which contains, or which is likely to contain, information relevant to an investigation under this section, or who is so believed or suspected of otherwise having such information in his possession or under his control, shall-
- (c) attend before the investigator at such time and place as he may require in writing, and answer truthfully and to the best of his ability such questions relating to the matters under investigation as the investigator may put to him; and (6) A person shall be obliged to answer questions put to him under this section by the investigator, but if the answers might tend to incriminate him, and he so claims before answering the question, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings for an offence under subsection (12) or section 36 of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the answer but shall be admissible for all the purposes of the Securities (Insider Dealing) Ordinance (Cap. 395); the investigator shall, before asking any question under this section, inform the person concerned of the limitation imposed by this subsection in respect of the admissibility in evidence of the question and any answer given. Following the section 33 investigation, the Financial Secretary, on 26 May 2003, required the Insider Dealing Tribunal (the Tribunal), to inquire into and determine:
- (a) whether there has been insider dealing in relation to the companies connected with or arising out of the dealings in the listed securities of the companies by or on behalf of: Chung Ki To, Sonny Chan Kin Shing and Lam Ping Wan on 31 January 2000;

- (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. The Tribunal comprised McMahon J, Chairman, and Professor Lui Yu-hon and Mr Phil Chan Kin-fung, as members. The Tribunal was empowered by section 17 of the SIDO to: (b) require any person to attend and to give evidence and (d) require such person to answer all questions put by or with the consent of the Tribunal; In due course, so-called Type Salmon letters were served on Koon and Sonny Chan, requiring them to attend before the Tribunal and give evidence under section 17 of the SIDO. The letters informed them that: The Tribunal has determined that your conduct will be the subject of the Inquiry and that you are potentially implicated or concerned in the subject matter of the Inquiry. Both Koon and Sonny Chan duly appeared before the Tribunal and gave evidence. The Tribunal had also admitted into evidence the questions and answers given by them under section 33(4) of the SFCO, including those in relation to which they had claimed might incriminate them. In relation to a person who has been identified by the Tribunal as an insider dealer, the Tribunal, under the SIDO, may in respect of such person make any or all of the following orders 23(1) (a) an order that that person shall not, without the leave of the Court of First Instance, 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;
- (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. Under section 27 of the SIDO, the Tribunal could also order the insider dealer to pay the expense of the inquiry. By the Interim Report, Koon Wing-yee and Sonny Chan, were found to be insider dealers: Koon Wing Yee We find Koon Wing Yee to have been an insider dealer in respect of Sonny Chan s purchase of 568,000 Easy Concepts shares on 31st January 2000 in breach of the provisions of section 9(1)(a) and 9(1)(c) of the Ordinance. Koon also counselled or procured Lam Ping Wan s purchase of 3.2 million Easy Concepts shares on 31st January 2000 and is again in breach of the provisions of section 9(1)(a) in this regard. Sonny Chan We find Sonny Chan to have been an insider dealer in respect of his purchase of 568,000 Easy Concepts shares and 100,000 Easyknit shares on 31st January 2000 in breach of the provisions of section 9(1)(e) of the Ordinance. As a result of such findings and following further hearings, the following orders were made under section 23 of the SIDO: Section 23(1) (a) Koon: Disqualified as a director or taking part in the management of a listed or limited company or being involved as a liquidator or receiver or manager of the property of such companies for a period of 5 years. Sonny Chan: Disqualified as a director or taking part in the management of listed companies for 2 years. Section 23(1)(b) Koon: Pay his profits of

\$31,367,553 to the Hong Kong Government. Sonny Chan: Pay his profits of \$5,090,219 to the Hong Kong Government. Section 23(1)(c) Koon: Pay a penalty of \$15,000,000 to the Hong Kong Government. Sonny Chan: Pay a penalty of \$1,500,000 to the Hong Kong Government. Section 27 The shares of the inquiry s expenses of \$6,316,815 to be paid to the Hong Kong Government by the insider dealers are: Koon (30%): \$1,895,044 Sonny Chan (12%): \$758,017 The Appeal These appeals raise an important point of principle. The point briefly stated is: Are the proceedings before the Insider Dealing Tribunal criminal in nature and as such were the appellants entitled to the protection of the International Covenant on Civil and Political Rights (the ICCPR) under Article 39 of the Basic Law? Sir John Swaine SC, who appeared for Koon and Mr John Swaine, who appeared for Sonny Chan, contended that the proceedings were criminal in nature; accordingly, they argued, section 33(6) of SFCO and section 17 of SIDO contravened Article 14 of the ICCPR, and were therefore incompatible with Article 39 of the Basic Law (the constitutional point). This point was not raised before the Insider Dealing Tribunal until the penalty stage. The Tribunal at page 189 of the Final Report rejected the submission though it was of the view that there were good, arguable reasons to regard the penalties imposable under section 23(1)(c) as criminal rather than civil in nature. because the Tribunal, regarded themselves, rightly in our view, as bound by the decision of Jones J in R v Securities and Futures Commission, ex parte Lee Kwok-hung [1993] 3 HKPLR 1. We will say something more about that case below. The ICCPR has been implemented in Hong Kong by the Hong Kong Bills of Rights Ordinance, Cap. 383 (the HKBOR). Although the language of the ICCPR and HKBOR is not identical, we need only refer to the provisions of the HKBOR since there is no material difference between them. At the request of the parties, we agreed to deal with the constitutional point at the outset. Consequent upon our decision on this point, the parties can seek directions on the further conduct of the appeals. Article 10 of HKBOR provides that: In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing and under Article 11:

- (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 11(2)(g) provides:
- (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-
- (g) not to be compelled to testify against himself or to confess guilt. The Court of Final Appeal has declared in Ng Ka-ling v Director of Immigration [1999] 2 HKCFAR 4 at 25: In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is

right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law. When the court examines domestic legislation for consistency with the Basic Law, the court must look at the substance of what is involved and not just the form, since it is the effect of the domestic legislation that has to be examined. Put shortly, the appellant's case is that insider dealing inquiries are criminal proceedings because of the penal consequences, in particular, the power under section 23(1)(c) to impose: a penalty of an amount not exceeding 3 times the amount of any profit gained or loss avoided by any person as a result of the insider dealing. In the case of Koon, the maximum penalty which could have been imposed was about \$90 million, and in the case of Sonny Chan about \$15 million. The European Court of Human Rights has concluded that crime has an autonomous meaning under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). Article 6 of the European Convention is similar in terms to Article 14(1) of the ICCPR and Article 10 of HKBOR, and provides, so far as relevant: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. However, unlike the ICCPR and the HKBOR, there is no express provision in the European Convention that: in the determination of any criminal charge against him, everyone shall be entitled to

- (9) not to be compelled to testify against himself or to confess guilt. Article 14(3)(g) of ICCPR and Article 11(2)(g) of HKBOR. Ribeiro PJ (with whose judgment their other Lordships concurred) has explained in *HKSAR v Lee Ming-tee & Anor* [2001] 4 HKCFAR 133 that the protection of Article 11(2)(g) of HKBOR: 101. is only a testimonial immunity, namely, the right not to be compelled to testify against himself or to confess guilt. It is therefore of a much narrower scope than the common law privilege against self-incrimination and had no application at the time of the company inspection since neither respondent had been charged at that time. Per Ribeiro PJ at 171H. Ribeiro PJ (at 173J) went on to say that in addition to the common law right against self-incrimination, one could deduce from the right to a fair trial in criminal proceedings enshrined within Article 10 of HKBOR the existence of the privilege against self-incrimination as an integral part of such right. As we will explain later, we believe it was Ribeiro PJ's view that such a privilege would cover the direct use of evidence obtained under compulsion even though at the time when such evidence was compulsorily obtained no charge had yet been made. However, as Ribeiro PJ further observed (at 175G, citing *Brown v Stott* [2003] 1 AC 681): 115. even direct use of compulsorily obtained self-incriminating materials was not absolutely prohibited by Article 6(1) but could be justified if it was not a disproportionate response to a serious social problem and did not undermine the accused's right to a fair trial viewed in the round. (Emphasis supplied.) That such privilege, although not absolute, could be deduced from the equivalent of Article 10 of HKBOR is important, because any law passed by the legislature

must be consistent with the maintenance of such privilege. On the other hand, a privilege founded solely upon the common law might be more vulnerable to statutory limitation since the court would normally have to give effect to the clear intention of the legislature. In Hong Kong, the power of the legislature is controlled by the Basic Law. Any law passed by the legislature must accordingly be consistent with the Basic Law. In the United Kingdom, although Parliament remains supreme, there is power under the Human Rights Act 1998 designed to ensure that British laws should be construed compatibly with the European Convention, and the court has been given the power to declare, if such be the case, that any British law is incompatible with a Convention right: see sections 2, 3 and 4 of the Human Rights Act 1998. Hence, as Potter LJ explained in *Han v Customs & Excise Commissioners* [2001] 1 WLR 2253: 25 Since section 2(1) of the HRA requires the court or tribunal to take into account the case law of the European Court of Human Rights at Strasbourg (the Strasbourg court) when determining a question which has arisen in connection with a Convention right, that case law provides the starting point for the domestic court or tribunal's deliberations and the court or tribunal has a duty to consider such case law for the purposes of making its adjudication. It is not bound to follow such case law (which itself has no doctrine of precedent) but, if study reveals some clear principle, test or autonomous meaning consistently applied by Strasbourg court and applicable to a Convention question arising before the English courts, then the court should not depart from it without strong reason. The European Court of Human Rights has decided that the concept of a criminal charge under Article 6 has an autonomous convention meaning, and that the criteria to determine whether proceedings are criminal within the meaning of the European Convention are:

- 1) the categorisation of the allegation in domestic law; the nature of the offence; the nature and degree of severity of the penalty. These criteria have been adopted in Britain in *Han*, and in *R (McCann) v Manchester Crown Court* [2003] 1 AC 787, a decision of the House of Lords. In *Han*, Potter LJ said of the relative weight of these criteria that: The Strasbourg court does not in practice treat these three requirements as analytically distinct or as a three-stage test, but as factors together to be weighed in seeking to decide whether, taken cumulatively, the relevant measure should be treated as criminal. When coming to such decision in the course of the court's autonomous approach, factors (b) and (c) carry substantially greater weight than factor (a). Mr Duncan, SC, appearing on behalf of the Financial Secretary, did not contend that these are not the correct criteria, or that some other criteria should be adopted. He submitted, however, that having regard to the local circumstances, in particular, the desire that Hong Kong should become an international financial centre, these criteria should not be applied with the same emphasis as in the case of *Han*. *Han* was concerned with the imposition of civil penalties for dishonest evasion of value-added tax under section 60(1) of the Value Added Tax Act 1994 and excise duty under section 8(1) of the Finance Act 1994. The court in *Han* held by a majority that the classification of the penalties as civil was no more than a starting point where the levying and enforcement of the penalty concerned was designed to punish and to deter members of

the public at large in respect of dishonest conduct. In *Han*, it was also held that crime may have both a Convention meaning as well as a quite separate domestic meaning. In other words, it was possible for proceedings to be criminal in nature for the purposes of the European Convention but not for the purposes of domestic legislation. It was said that legislation applicable to domestic criminal proceedings such as Police and Criminal Evidence Act 1984, may not necessarily be applicable to some proceedings even though those proceedings were criminal for the purposes of the Convention. (See per Potter LJ at para. 84, and Mance LJ at para. 88.) In Hong Kong, it may be that no question of a different classification for the purpose of the HKBOR or for other domestic purposes will arise, since the effect of Article 39 of the Basic Law is that any legislation which is inconsistent with HKBOR is ineffective. However, given absence of full submission on this point we express no view on this matter. For the purpose of this decision, we are prepared to assume that it is possible that certain proceedings may be classified as criminal for the purpose of the HKBOR, albeit not for other purposes. However, such assumption would make no difference to our conclusion on the protection available under Articles 10 and 12 of HKBOR. Nor, as it will be seen, on the applicable burden of proof in these appeals. We accept that the legislature clearly regarded insider dealing proceedings under SIDO as civil proceedings. When the Securities (Insider Dealing) Bill was debated in the Legislative Council on 25 July 1990, the Financial Secretary observed: insider dealing should not for the present be made a criminal offence but that the position should be reviewed in the light of experience of the effect of increased Tribunal sanctions and the effectiveness of enforcement action. Since the enactment of SFO in 2003, insider dealing could be prosecuted as a criminal offence: See Part XIV of SFO. But it is clear that in SIDO, insider dealing was not regarded as criminal proceedings. Nevertheless, given that we have to examine the effect of SIDO it is incumbent upon us to look at the substance rather than the form of the legislation. Mr Duncan has rightly accepted that if the legislation had permitted the Tribunal to impose a term of imprisonment, he would find it impossible to contend that the proceedings were not in fact criminal for the purpose of HKBOR, even if the legislature had chosen to label it otherwise. *Han* was concerned with the imposition of a financial penalty of an amount equalled to the VAT or excise duty evaded, and the English Court of Appeal held that Article 6 applied by reason of the fact that the proceedings for such penalty were criminal proceedings. Potter LJ said: 67. However, outside the context of disciplinary proceedings, and in particular in the field of tax evasion, it appears that a substantial financial penalty which is imposed by way of punishment and deterrence will suffice: see *Bendenoun v France* 18 EHRR 54 and *Georgiou (trading as Marios Chipperry) v United Kingdom* [2001] STC 80. In the present case, we are not concerned with disciplinary proceedings, since the offence of insider dealing: 66. is one which applies generally to the public at large and is not restricted to a specific group. per Potter LJ. As for the nature and degree of severity of the penalty, there is no doubt that the section 23(1)(c) penalty is punitive and deterrent in nature, and not compensatory. There also can be no doubt about its severity, although the maximum penalty depended on the size of the actual or potential gain or loss. In this context, Sir John also argued (though he did not press the point) that the power to disqualify under section 23(1)(a) could on its own be a

sufficient penalty to turn the insider dealing inquiry into criminal proceedings. With respect, we do not agree with this submission. The power to disqualify was not designed to punish but to protect the investing public. On the other hand, we believe the purpose of the penalty provision under section 23(1)(c) was to punish and to deter. In *Insider Dealing Tribunal v Shek Mei-ling* [1999] 2 HKCFAR 205, Lord Nicholls of Birkenhead NPJ described the penalty as potentially swingeing at 208C: Although not so described, an order under section 23(1)(c) 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 such conduct substantially out of pocket. at 209J. In the Court of Appeal, *Nazareth VP at Shek Mei-ling and Ors v The Insider Dealing Tribunal* [1998] 4 HKC 37, 55E spoke of the punitive and deterrent elements of s.23(1)(c) . In *Han*, Sir Martin Nourse, who dissented, would have attributed a greater importance to the first criterion. Mr Duncan submitted that we should do the same. Sir Martin Nourse said: 109 What ought to be the approach of an English court to the question we have to decide? In relation to the second and third criteria the penalties are not so serious as to require their imposition to be treated, without more, as a criminal charge. Everything seems to depend on whether it is open to us to attribute a greater importance to the first criterion than has been the tendency of the more recent Strasbourg decisions. In my judgment it is. We were consistently told by those who advocated the incorporation of the Convention in our law that it would enable our courts to make a beneficial contribution to its jurisprudence. In my opinion that contribution ought to start with a recognition of the widely differing traditions and institutions of the contracting states. What ought to be treated as a criminal charge in some of them may not need to be so treated in others. In this country we have, since 1689, developed a system of civil administration in which the executive, being subject to review by the courts, acts responsibly and fairly towards the individual citizen, the protection of whose rights is an integral part of the system. With respect, we agree with the majority in *Han* that the other two factors should carry a substantially greater weight. Indeed, we are of the view that the 3rd criterion is the most important because it is this element that will usually be decisive in tipping the scales as to whether any given set of proceedings is to be regarded as civil or criminal for the purposes of HKBOR. McCann further supports the view that the third criterion should carry substantially greater weight than the legislature's classification of the act. In *McCann*, the House of Lords was concerned with the making of an anti-social behaviour order under Section 1 of the Crime and Disorder Act 1998. Section 1 falls into two distinct parts. The first part deals with the making of the application, the requirements for the making of an order, the making of an order and consequential matters. The second part deals with the consequences of a breach of the order, which included imprisonment. It was common ground that the second part was criminal in character under domestic law, and fell within the autonomous concept of a criminal charge under Article 6 of the European Convention. The questions posed before the House of Lords were whether the proceedings for the making of the order under the first part was also criminal in character under domestic law, and under Article 6. Their Lordships concluded that the proceedings were not criminal under domestic law or under Article 6. It is clear from the judgments of Lords Steyn, Hope and Hutton (with the concurrence of Lords Hobhouse and Scott) that it was

accepted that for the purpose of Article 6, the domestic classification was only a starting point (per Lord Steyn at 30), It provides no more than a starting point, (per Lord Hope at 57). the classification of the proceedings in domestic law is of limited value and that the other two criteria are considerations of greater weight: see *rk v Germany* 6 EHRR 409, 422, para. 52. per Lord Hutton. Moreover, the absence of a penalty under the first part of Section 1 was important to their Lordships decision. Thus, 30. It is right, however, to observe that the third factor is the most important. Here the position is that the order itself involves no penalty. (per Lord Steyn) 64. the critical question as I see it is whether the making of such an order amounts to the imposition of a penalty. (per Lord Hope)

103. In relation to the third criteria, I consider that the making of an anti-social behaviour order does not constitute a punishment or penalty imposed on the defendant. (per Lord Hutton) Lord Hutton went on to explain:
108. The fact that the defendant would be liable to imprisonment under section 1(10) of the 1998 Act if he chooses within the period specified in the order without reasonable excuse to do anything which he is prohibited from doing by the order, does not mean that the order itself constitutes a punishment or penalty. In my opinion, the reasoning of Lord Bingham of Cornhill CJ in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 352, para 25 in respect of a sex offender order made under section 2 of the 1998 Act applies with equal force to section 1: The rationale of section 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him. Here, the penalty which could be imposed under section 23(1)(c) is treble the potential profit or loss; also elements of dishonesty (or at least the absence of bona fides) are involved in the nature of insider dealing. Mr Duncan submitted that the penalty was linked to the elements of profit and loss but, with respect, this does take him very far. There is no question that the penalty that can be imposed under section 23(1)(c) of the SIDO is somehow restitutionary in nature. The fact that a penalty is expressed in terms of a percentage makes no difference if otherwise the effect of the penalty is to deter and punish. It is true that a finding of insider dealing will not result in a criminal record. But this would follow from, and should carry no greater weight than, the classification of insider dealing as non criminal by the legislature. Nor do we believe the absence of a formal charge constitutes any reason for a different conclusion. The relative informality of the insider dealing tribunal with the warning in the form of a Type Salmon letter is hardly a redeeming feature having regard to the serious punitive consequence of an adverse finding. Having regard to the seriousness of the penalty, which was intended to punish and to deter, we are therefore obliged now to conclude that the proceedings involved the determination of a criminal charge within the meaning of the HKBOR. It is this element of the penalty that in our opinion received insufficient emphasis in *R v Securities and Futures Commission ex parte Lee Kwok-hung* (see para. REF

_Ref167611920 \r \h * MERGEFORMAT above). There, Jones J regarded the penalty that could be imposed under section 23(1)(c) as being merely disciplinary in nature and he also emphasised the fact that the legislature had chosen to classify proceedings as being civil. The issue of whether insider dealing tribunal proceedings were criminal in nature was not dealt with on appeal; indeed the point was conceded: see [1993] 2 HKLR 51, at 55 (lines 8-12). In our view, the analysis of Jones J was incorrect and that decision must now no longer be regarded as good law. Insider dealing tribunal proceedings are not disciplinary in nature and the fact that the legislature had chosen to classify such proceedings as being non-criminal carries less weight, for, as stated above, one looks at the substance more than the form. We should add that Jones J also regarded as significant the fact that the penalty that could be imposed under section 23(1)(c) was linked to the profit or loss generated by the relevant transaction. With respect, this was again a matter of little significance in our view: see para. REF _Ref167611994 \r \h * MERGEFORMAT above. Mr Duncan then submitted that even if the insider dealing proceedings led to the determination of a criminal charge against the appellants, it is a question for the court, whether, viewed in the round, the appellants had been deprived of a fair trial. He also made the point that the right against self-incrimination is not absolute: when necessary or desirable to achieve a legitimate aim within the public interest, the privilege can be subject to restrictions, and that a proportionality test is applied to any such restriction, and the question is whether a fair balance has been struck between the general interest of the community in realising the legislative intent and the protection of the fundamental rights of the individual. Lee Ming-tee is authority for the principles contended for by Mr Duncan. Mr Duncan has also referred us to *Brown v Stott* which, as seen, was quoted by Ribeiro PJ in *Lee Ming-tee*. *Brown v Stott* was concerned with section 172(2)(a) of the Road Traffic Act 1988, whereby the defendant was required to say who had been driving the car by which she travelled to a superstore where she appeared to have been drinking alcohol. However it is clear from passages in the judgment of Lord Bingham of Cornhill that he thought that section 172(2)(a) did not represent a disproportionate response to the serious social problem of the high incidence of death and injury on the roads caused by the misuse of motor vehicles, in this connection Lord Bingham noted (at page 705):

- (1) Section 172 provides for the putting of a single, simple question. The answer cannot of itself incriminate the suspect, since it is not without more an offence to drive a car. An admission of driving may, of course, as here, provide proof of a fact necessary to convict, but the section does not sanction prolonged questioning about the facts alleged to give rise to criminal offences such as was understandably held to be objectionable in *Saunders*, and the penalty for declining to answer under the section is moderate and non-custodial. There is in the present case no suggestion of improper coercion or oppression such as might give rise to unreliable admissions and so contribute to a miscarriage of justice, and if there were evidence of such conduct the trial judge would have ample power to exclude evidence of the admission. In the instant appeal, we are concerned with the guarantee of a fair trial under Article 10 of HKBOR. The corresponding question must be whether the direct use of the

section 33 evidence by virtue of section 33(6) in an insider dealing inquiry is permissible? We are not concerned with the putting of a single, simple question, we are concerned with the complete abrogation of the right of silence in relation to insider dealing proceeding. In our judgment this is not proportionate, nor is a fair balance struck if this right is abrogated altogether. Moreover, we believe Lee Ming-tee is authority that direct use should not be permitted. Lee Ming-tee was concerned with derivative use immunity, under which the company inspector under section 145(3A) of the Companies Ordinance, Cap. 32 had the power to compel a person to give incriminating answers although neither the question nor the answers would be admissible in evidence against him in criminal proceedings, other than proceedings which are irrelevant. At page 177D Ribeiro PJ said: The Legislature has struck a balance which allows the Inspector to abrogate the privilege but subjects the elicited evidence to a direct use prohibition, inferentially permitting derivative use. In evaluating this balance, it is important to bear in mind that the purpose of the privilege is to respect the will of the accused to remain silent, thereby ensuring that the accused is not compelled to provide proof of his or her guilt. The privilege has no application to evidence which exists independently of the will of the accused. Earlier at 176, the learned PJ asked rhetorically: Is it not true that the direct use prohibition in the present case was enacted because such use of compulsorily obtained evidence would be unfair? If so, does it not logically follow that derivative use of that excluded self-incriminating evidence is also unfair? Section 17 directly impacts Article 11(2)(g). We believe the right not to be compelled to testify against himself or to confess guilt after a person has been charged, should probably be regarded as an absolute right permitting of no qualification, and we would equate the service of the Type Salmon letter as the laying of a formal charge. It is difficult to conceive of a situation whereby, after a person has been charged, he should be compelled to testify against himself. Certainly, insider dealing proceedings should not represent an exception, and nor has Mr Duncan so contended. Instead, Mr Duncan submitted that as a matter of law there is no express abrogation of the privilege against self-incrimination, and such a person might still claim the privilege which the Tribunal could uphold. We believe this is unreal, and certainly so in the case of these appellants who were appearing before a Tribunal which was bound by authority to regard the proceedings as civil. We regard it as artificial to suggest that an implicated person could be required only to answer non incriminating questions but that he could somehow claim privilege in relation to potentially incriminating ones. The mandatory language of section 17 of the SIDO (see para. REF _Ref167605548 \r \h * MERGEFORMAT above) suggests otherwise. We do not believe that an implicated person should be required to testify at all. The language of Article 11(1)(g) is clear. He should not be required to testify against himself, and thus he would not be a compellable witness. It is not permissible to require him to testify in proceedings that are criminal in nature. Accordingly, while it can readily be accepted that the integrity of Hong Kong's financial market is a matter that the legislation can rightly regard as of great importance, we nevertheless believe section 17 to be a disproportionate response. As Part XIV of the SFO illustrates, it is possible to prosecute insider dealing as a crime. On conviction, there is a power to fine as well as the power to imprison. Nor is Hong Kong alone

in making it a crime. There is thus no insurmountable difficulty in statutorily making insider dealing a crime and thus ensuring that the protections provided under the HKBOR and the Basic Law are made available. We note that under Part XIII of the SFO, a Market Misconduct Tribunal has been established for the purpose of inquiring into market misconduct including insider dealing. This tribunal is similarly constituted. The only material difference between Part XIII and SIDO is that under Part XIII there is no longer any power to order the payment of any penalty (this of course being the very feature that has persuaded us that IDT proceedings under the SIDO are criminal in nature). It is also revealing to note from the Legislative Council Brief the Government's response to comments on the White Bill: Part XIII Market Misconduct Tribunal (MMT) Part XIV Offences relating to dealings in securities and futures contracts, etc. 13/14.1 The ability of the MMT to impose three times profit or loss fines should be kept as this has proven very effective. The proposed civil sanctions are ineffective and it is difficult to secure a criminal conviction. It is not possible to keep three times fines as a civil sanction on human rights grounds. The criminal provisions are necessary deterrents. They will be used where sufficient evidence exists, that there is a reasonable prospect of a conviction and the public interest favours criminal prosecution. SFC has successfully prosecuted some market manipulation cases. We agree that it is not possible to keep three times fines as a civil sanction on human rights grounds. Mr Duncan submitted that on the authority of *HKSAR v Lam Kwong-wai and Anor* [2006] 9 HKCFAR 574, this court is obliged to: 78. adopt a remedial interpretation of a legislative provision which will, so far as it is possible, make it Basic Law-consistent. Only in the event that such an interpretation is not possible, will the Court proceed to make a declaration of contravention, entailing unconstitutionality and invalidity. See per Sir Anthony Mason NPJ at page 611. Mr Duncan further suggested that if we are of the view that the insider trading proceedings are criminal, because of the penalty provision, then we should simply excise the penalty provision. We do not believe this to be the correct approach. If as a result of section 23(1)(c), the proceedings are criminal in nature, we believe that once that has been recognised, we should read down section 33(6) so that questions and answers in respect of which the claim of privilege has been made may not be used in insider dealing proceedings. So far as section 17 is concerned, it should be read such that there is no power to summon or to require an implicated person to give evidence. At this juncture we turn to consider the question of the appropriate standard of proof. In accordance with existing authorities, the Tribunal adopted the standard of proof of a high degree of probability lying at the top end of the civil scale. Sir John Swaine submitted that given the criminal nature of the proceedings the burden of proof should be proof beyond reasonable doubt. Mr Duncan submitted that even if under HKBOR, the proceedings should be regarded as criminal proceedings, it did not necessarily follow that the standard of proof should be proof beyond reasonable doubt. For present purposes it is unnecessary for us to decide whether it is within the power of the legislature to provide in relation to a certain type of criminal proceedings (whether classified as such for the purpose of HKBOR or domestically) that the standard of proof should not be proof beyond reasonable doubt. We have not heard adequate submission on this point, and for the present we will express no view. In the present instance the

legislature had not purported to impose a lesser standard of proof for a particular offence. Since common law requires proof beyond reasonable doubt for crime, we do not believe this court can, and we certainly decline to adopt, a lower standard absent clear statutory sanction so to do. There is nothing arising from the history of this legislation to suggest that had the legislature realised that insider dealing proceedings in fact were criminal in nature, that they would not have required the matter to be proved beyond reasonable doubt. To conclude, it is our view that the appellants were entitled to the protection of Articles 10 and 11 of HKBOR in the insider dealing proceedings, the subject of this appeal, and as such the evidence obtained under section 33(4) of SFCO, in relation to which the appellants had claimed the privilege against self-incrimination, in any event was inadmissible in the insider proceedings. Nor should they have been compelled to give evidence under section 17 of SIDO in the insider dealing inquiry. Furthermore, the appropriate standard of proof to be applied in the inquiry was proof beyond reasonable doubt. In light of this judgment, this court will reconvene to hear the parties as to directions regarding the further conduct of these appeals. (Geoffrey Ma) Chief Judge, High Court macrobutton nomacro Robert Tang) Vice-President (William Stone) Judge of the Court of First Instance Sir John Swaine, SC, and Mr Bernard Mak, instructed by Messrs William Sin & So, for the Appellant in CACV 358/2005 Mr John S E Swaine, instructed by Messrs Angela Wang & Co., for the Appellant in CACV 360/2005 Mr Peter Duncan, SC, instructed by and Mr Dick Ho, GC of the Department of Justice, for the 2nd Respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H; < Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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