

HONG KONG / JUDGMENT

WANG RUIYUN v. GEM GLOBAL YIELD FUND LTD

COURT

Court of First Instance

DECIDED

6 March 2007

CASE / FILE NUMBER

HCCL16/2006

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bjbj HCCL 16/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMMERCIAL ACTION NO. 16 OF 2006 (transferred from
HCA 623/2006)

BETWEEN WANG RUIYUN Plaintiff and GEM GLOBAL YIELD FUND LIMITED Defendant

Before : Hon Stone J in Chambers (Open to public) Dates of Hearing : 9 January and 2 February
2007 Date of Handing Down Judgment : 6 March 2007

J U D G M E N T / R E A S O N S F O R J U D G M E N T

Introduction

AUTONUMOUT There is before the court the plaintiff's summons dated 14 September 2006, the hearing of which took place over a period of two days. AUTONUMOUT By the terms of that summons, the plaintiff sought, inter alia, an order for (1) summary judgment under Order 14, rule 1, and/or judgment on admissions under Order 27, rule 3 to be entered for the plaintiff for the sums of HK\$40,503,237.28 and HK\$930,412.15, alternatively (2) an order for interim payment under Order 29, rule 10(1) in the like sums, (3) an order under Order 22, rule 8(2) for the payment out of court to the plaintiff of the sum of HK\$40,237.28, together with interest accrued thereon, and (4) an order under Order 18, rule 19(1) that certain parts of the defendant's Defence and Counterclaim be struck out. AUTONUMOUT At the conclusion of the hearing, this court ordered that the sum of HK\$40,503,237.28, which had been paid into court by the defendant, be paid out to the plaintiff, together with interest accruing thereon, and that the reasons underpinning this

decision would be set out in a judgment to be handed down, which in addition would include judgment upon other matters raised. AUTONUMOUT This is that judgment. The factual background AUTONUMOUT The background to this case relates to financial transactions which took place between the plaintiff, a mainland investor and resident of the PRC, and the defendant, a corporation incorporated in the West Indies, and a member of the Global Emerging Markets Group. AUTONUMOUT In this action, the plaintiff, who directly and indirectly through a holding company owned some 7.28% of a Hong Kong listed company Bestway International Holdings Ltd (Bestway), sues the defendant in relation to transactions undertaken pursuant to a contractual option whereunder the defendant had the option of acquiring custody and authority to purchase/on-sell tranches of the plaintiff's 107.9 million shares in Bestway. AUTONUMOUT As Mr Barlow, who appeared for the plaintiff, described it, the position was that under three linked February 2006 contracts, respectively termed the Equity Line of Credit Agreement (ELC Agreement), the Cash Escrow Agreement and the Side Letter Agreement, the parties agreed that :

- (i) the plaintiff would be entitled to deliver to the defendant a Draw Down Notice for a tranche of Bestway shares and on the same day deposit those shares into the defendant broker's CCASS account; (ii) pursuant to a contractual formula, the plaintiff's Draw Down Notice was to stipulate a floor price below which he would not sell his shares to the defendant, the actual price being ascertained by a formula within the ELC Agreement; (iii) the business day following receipt of confirmation of the CCASS deposit, the defendant was to deposit into the Escrow Account held by an Escrow Agent an amount equal to 90% of the trading price for Bestway shares prior to the issue of the draw down notice multiplied by the number of shares deposited into the defendant broker's CCASS account; (iv) the defendant then had 15 trading days (or longer, if a contractual formula applied) to purchase for itself or by on-selling the Bestway shares concerned, subject to various conditions concerning the volume or prices at which Bestway shares were trading during that period; and
- (v) at the end of the relevant period the defendant or the Escrow Agent was to account to the plaintiff either for the sale proceeds from the sale of the shares to the defendant or, if not required by the contractual terms to purchase the shares, for the return of the unsold shares, or a combination of both. AUTONUMOUT On the facts it is undisputed that pursuant to the foregoing arrangements, the plaintiff delivered a Draw Down Notice dated 17 February 2006, requesting that the defendant purchase 926 million Bestway shares with a floor price of HK\$0.18 per share; the terms of this initial notice later were amended to permit the deposit into the defendant's broker's account this number of shares in 3 tranches, and in fact the plaintiff deposited 2 tranches only, the 1st tranche of 312 million shares on 27 February 2006 and the 2nd tranche of 312 million shares on 6 March 2006. AUTONUMOUT On 1 March 2006 the defendant deposited into the Escrow Account approximately HK\$69 million in respect of the sale of the 1st tranche of shares only; no deposit was made in respect of the 2nd tranche. AUTONUMOUT It appears that at some stage in early March 2006 the defendant formed the view that there was market rigging in the market for Bestway shares, and thus declined further to perform its side of the agreement. AUTONUMOUT On 21 March 2006 the defendant sent the plaintiff a draft Closing

Notice whereunder the defendant was to return to the plaintiff 407,933,333 of the plaintiff's unsold shares, and late on the following day, that is, 22 March 2006, the plaintiff obtained from Yam J an ex parte Mareva injunction restraining the defendant from first, dealing in the Bestway shares transferred to it, and second, from withdrawing money from the Escrow Account. AUTONUMOUT Subsequently the defendant returned to the plaintiff a total of 402,970,000 of the plaintiff's shares, leaving a shortfall of 4,963,333, which the defendant reported as having been unsold. AUTONUMOUT In purely mathematical terms, the cumulative result of the dealings that took place was that, in addition to returning the unsold shares, the defendant was obliged to pay the plaintiff for the 221,030,000 shares which the defendant itself had bought from the plaintiff; the purchase price for 216,066,667 of these shares bought by the defendant was HK\$40,503,237.28, which was payable to the plaintiff. AUTONUMOUT However, such price was not so paid. AUTONUMOUT On 23 March 2006 the defendant's solicitors offered, on the defendant's behalf, to pay into court the sum of HK\$40,503,237.28 and return the unsold shares to your client in return for a discharge of the injunction. AUTONUMOUT This offer was accepted, and this sum paid into court, and thereafter the defendant returned 402,970,000 of the unsold shares, rather than the 407,933,333 as in fact were due. AUTONUMOUT The defendant initially refused to consent to the sum in court, namely, HK\$40,503,237.28, being paid out to the plaintiff, although it is unclear why this should have been the case given that, on any basis, this sum represented the proceeds of sale of the defendant's purchase of 216,066,667 shares belonging to the plaintiff. The pleaded shape of this case AUTONUMOUT Against this factual background, in its Amended Statement of Claim dated 17 May 2006 (in an action which, prior to transfer to the Commercial List, originally was HCA 623 of 2006), seeks special damages in the sum of HK\$40,503,237.28, together with an order that the plaintiff return all unsold shares, and if and in so far as the proceeds of sale have been paid out of the Escrow Account to the defendant declaratory relief that such proceeds of sale are held on trust for the plaintiff by the defendant, an account of the proceeds of sale held on trust by the defendant, and an order for payment of such monies to the plaintiff. AUTONUMOUT By its Defence and Counterclaim, dated 24 July 2006, the defendant fund joins issue with the plaintiff's claim, and pleaded, inter alia, a conspiracy on the part of the plaintiff with others unidentified to misrepresent the true state of the trading of Bestway shares on the Hong Kong Stock Exchange, the only particulars of which then available, pending discovery and interrogatories, being the bald allegations that between 13 December 2005 and 14 February 2006 the plaintiff with his broker and others formed a pool with the purpose of continually buying and selling the Shares amongst themselves and/or amongst other [associated] parties, and that the result was that this had artificially increased the price and volume of the Bestway shares which were traded in that period. AUTONUMOUT It further is alleged that the defendant had entered the ELC Agreement only because of the misrepresentation perpetrated as to the true state of Bestway share trading, that the defendant had discovered the situation only on about 7 March 2006, that the pool buying and selling which had taken place contravened specified sections of the Securities and Futures Ordinance, Cap 571, that the defendant was entitled to rescind the ELC Agreement, which it did by email on 9 March

2006, and that as a consequence the defendant was under no obligation further to perform its obligations under the ELC Agreement. AUTONUMOUT In this original pleading the defendant counterclaimed for loss and damage, although no particulars of such could be furnished prior to discovery and interrogatories. AUTONUMOUT This, therefore, was the state of play at the time of the first hearing of the plaintiff's summons the subject of this judgment. AUTONUMOUT At that stage, also, the defendant itself had taken out its own summons, dated 15 December 2006, wherein it had sought that the money paid into court by the defendant pursuant to the Order of Chung J dated 24 March 2006, together with accrued interest thereon, be paid out to the defendant forthwith. AUTONUMOUT The basis for this application is not evident, and entirely sensibly Mr Man, who appeared for the defendant on both applications, ultimately opted not to proceed with this summons. The plaintiff's applications: adjournment. AUTONUMOUT At the initial hearing of the plaintiff's summons, on 9 January 2007, the broad picture which emerged demonstrably was not in the defendant's favour. AUTONUMOUT In short, and putting to one side the market rigging allegation aimed at the plaintiff, it was tolerably clear that a significant parcel of the plaintiff's shares 216,066,667 had been purchased by the defendant itself, and that the defendant had declined to transfer to the plaintiff the fruits of such sale HK\$40,503,237.28 which was part of the funds in the Escrow Account which now had been paid into court as part of the bargain whereby the injunction of 22 March 2006, granted by Yam J against the defendant, had been discharged. AUTONUMOUT At first blush, therefore, it seemed reasonable to infer that since this sum no longer was in the Escrow Account, but instead had been paid into court, the court effectively now was in the position in which the Escrow Agent would have been had such funds remained therein, namely that such funds were held on trust for and on behalf of the unpaid vendor of the shares, the plaintiff. AUTONUMOUT Nor, for that matter, was it entirely clear what loss and damage had been suffered by the defendant in the transactions the subject of its pleading and counterclaim; to the contrary, in the circumstances it was difficult to see how there could have been any such loss and damage at all. AUTONUMOUT Accordingly, although not vouchsafed on the face of the evidence which had been filed, the court inquired of Mr Man, the defendant's counsel, as to the profit, if any, which the defendant itself had made as a result of the now disputed transactions with the plaintiff; it seemed a safe bet that the defendant had not been acting as a charitable institution in lending its services to these transactions, even though, in effect, the game had been called off before half time because of the defendant's apparent concern in relation to the alleged market rigging, which activity it now placed at the plaintiff's door. AUTONUMOUT Man duly made such inquiry, and informed the court from the Bar that his client had made a profit in the range of HK\$3.1-3.2 million, a figure considerably below that which had been suggested by the plaintiff (which had suggested the sum of in or around US\$1 to 1.5 million) and one which Mr Barlow, counsel for the plaintiff, crisply observed had been gained by the defendant entirely without risk to itself, since the on-sale of the plaintiff's shares as had been effected by the defendant had been of shares acquired from the plaintiff on a discounted basis under the ELC Agreement. In the event, at the adjourned hearing of these applications Mr Man was good enough to clarify the figure originally given to the court, and

in his helpful supplemental submission this figure was amended to an effective return of around HK\$4.46 million. AUTONUMOUT In the circumstances, said Mr Barlow, the situation which confronted the court was that, by reason of the defendant speculative market rigging plea, wherein no loss had been caused to the defendant to the contrary, a substantial profit had been made it was apparently wished to compel the plaintiff to retain in court that which undoubtedly represented its funds pending trial of the other claims in these proceedings. AUTONUMOUT Looked at in the round, this submission had considerable force; however, prior to ruling on the plaintiff's summons the court indicated to Mr Man that it would afford the defendant the opportunity, if so wished, to reframe its case, Mr Man not having been the author (nor being then even instructed) of the original Defence and Counterclaim. AUTONUMOUT Accordingly, the plaintiff's summons was stood down for a short period in order for any such amendment to be considered. Amendment to the defendant's case AUTONUMOUT By a draft Amended Defence, submitted to the court shortly before the adjourned hearing on 2 February 2007, a number of significant changes were made to the defence case as originally framed. AUTONUMOUT First, the defendant's Counterclaim is deleted, as are the claims for rescission of the ELC Agreement and the claims based on the Securities and Futures Ordinance, and the causes of action based on conspiracy and misrepresentation have been removed. AUTONUMOUT The primary case as now put forward is in contract, and is based on an implied term (or true construction) of the ELC Agreement to the effect that the purchase price and volume of the Bestway shares determined under that Agreement should not be affected by any, and that there was no, market rigging to which the plaintiff was privy or of which the plaintiff had knowledge, and that the particulars as pleaded at paragraph 15 in the draft Amended Defence (representing the best particulars the plaintiff could give pending discovery and interrogatories) revolve around a startling increase in trading volume of Bestway shares in the market on 14 February 2006, the date of the ELC Agreement, and on the following two days, and that (at subpara 15(vi)) there was no market development that could support such a drastic increase in the trading volume of the Shares during the three Trading Days between the execution of the ELC Agreement (14th February 2006) and the Draw Down Notice Date (17th February 2006). AUTONUMOUT In the premises, it is asserted that the plaintiff is not entitled to the amount claimed of HK\$40,503,237.28, and further that the plaintiff is in breach of the terms of the ELC Agreement which would entitle the Defendant to damages to be assessed, which would operate to set off against any damages that the Plaintiff is entitled to. AUTONUMOUT The way in which this would work, explained Mr Man, is that the plaintiff's damages claims as presently pursued are for the crystallized sums of HK\$40,503,237.28 and/or HK\$930,412.15, and that these are sums representing the alleged contractual purchasing price due from the defendant to the plaintiff in respect of the Bestway shares, as calculated by using the formula set out under Unit Price in the ELC Agreement, a formula that involves using market data of the Closing Trade Prices during the Pricing Period, as defined. AUTONUMOUT Hence, he said, if the market had not been rigged, as is alleged, different figures would have been entered into the formula, yielding a different purchase price owing from the defendant to the plaintiff and thus (so the argument goes) had there been no

market rigging by the plaintiff, the profit to be made by the defendant on the onsale of the Bestway shares may well have been higher, which sum could be set off against the current figure purportedly payable to the defendant. AUTONUMOUT This, therefore, is the form of the amended draft pleading which Mr Man asks that the defendant be given leave to file and serve, and this also represents the revised backdrop against which Mr Barlow's various applications including in particular his strike out application henceforth are to be evaluated. The plaintiff's applications : the argument AUTONUMOUT In terms of his arguments on the strike out, Mr Barlow remained opposed to certain of the amendments as proposed, notwithstanding that, inter alia, the allegation of conspiracy now had been abandoned. AUTONUMOUT As matters now stood, save for the formal denial within paragraph 15 of the draft amendment (regarding paragraph 21 of the claim, namely the allegation of breaches by the defendant of the ELC Agreement), Mr Barlow nevertheless objected to the remainder of that paragraph, which averred a further answer to the such allegation of breach, and on the basis that the ELC Agreement is valid and enforceable, asserted that it was incorrect for the plaintiff to adopt data from the market in calculating the Closing Trade Prices and the Pricing Period Obligation as the market was rigged at the relevant time and that It is averred that the Plaintiff was privy to such market rigging or had knowledge of the same, there following 8 particulars thereof. AUTONUMOUT Thereafter follow the conclusionary pleas (at 15(b)) that Plaintiff is accordingly not entitled to the amount alleged (HK\$40,503,237.28) and (at 15(c)) the further plea that the Plaintiff is in breach of the terms of the ELC Agreement which would entitle the Defendant to damages to be assessed, which would operate to set-off against any damages that the Plaintiff is entitled to AUTONUMOUT Barlow observed that the proposed plea was just as speculative and unparticularised as before, and that paragraph 15(c) of the draft pleading was hopelessly confused in light of the fact that now there was no counterclaim indeed, it had been specifically removed and further that there was no entitlement to damages since, on the plaintiff's own case there had been no loss and thus, on either basis, there was nothing to set off AUTONUMOUT To this Mr Man was undaunted. He submitted that, notwithstanding removal of the conspiracy plea and the defendant's counterclaim, that nevertheless his client was entitled to approach the case in this manner, and that if and in so far as there had been market rigging, in proving its case the plaintiff simply was not entitled to the sums it now claimed, but, to the contrary, only to such sums which would enure in terms of a share price which would have prevailed absent any such market manipulation. AUTONUMOUT In terms of his monetary applications, namely for summary judgment/interim payment/judgment on admissions, Mr Barlow accepted that it made little practical difference to his client under which juridical head he succeeded, provided that he was able now to obtain money which indubitably had been acquired and retained by the defendant consequent upon the sale of the plaintiff's Bestway shares, and which now formed the basis of the payment into court; however, whilst maintaining that he was entitled to the payments sought under any of the heads invoked, he nevertheless primarily asked for summary judgment in terms of the sums of HK\$40,503,237.28 and HK\$930,412.15, as pleaded on the face of his summons. AUTONUMOUT For his part Mr Man recognized, I think, the force of the submission as to the payment out of court of monies

which, on any basis, represented the fruits of the purchase by the defendant of the plaintiff's shares, although he stoutly maintained the line that such sum could and should be subject to adjustment if and in so far as the market rigging allegation was to be sustained. The plaintiff's applications : decision AUTONUMOUT As outlined, the plaintiff pursues the defendant on two fronts : the strike out and the application for immediate monetary award, whether by way of summary judgment, judgment on admissions or interim payment. AUTONUMOUT On reflection, it seems to me that the strike out application necessarily informs the approach of the court to the question of immediate monetary relief, and thus I take this element first.

- (i) Strike out AUTONUMOUT I am intrigued (and, also somewhat nonplussed) by the amendments to the defendant's case proposed by Mr Man whom, as earlier noted, was afforded the opportunity to move to amend his client's case at the conclusion of the initial hearing. AUTONUMOUT Whilst the case as now pleaded, in terms of the proposed draft amendment, produces greater clarity of approach, for my part I find it difficult fully to understand the deletion of the Counterclaim. AUTONUMOUT If, as Mr Man now submits, it remains open to the defendant even to mount a case on market rigging on the part of, inter alia, the defendant, this would make a material difference to the monies claimable by the plaintiff (and hence to the right to the entirety of the funds currently standing in court); however, absent any counterclaim on the part of the defendant (and none now is propounded), it is not easy to appreciate how this might assist the defendant, even were such a case successfully to be made. AUTONUMOUT As Mr Barlow pointed out, whilst Order 18, rule 17 makes provision for a defence of monetary set-off whether or not such also is added as a counterclaim, as M/N 18/17/2 makes clear, a set-off is a monetary cross claim, but in the present case the defendant now specifically disavows any such cross-claim. AUTONUMOUT This submission seems to me to be well-founded. Were, for example, the case to be made that the plaintiff in fact is not to be entitled to the monies which represent the fruits of the sale of the plaintiff's shares, it is unclear precisely what is said to be the status of such monies, or at least a part thereof, given that the defendant now apparently makes no claim thereto; perhaps it stands upon what it perceives to be its contractual rights, although notwithstanding the ingenuity of the approach, I confess that I do not fully grasp how this would work, given that it remains the defendant's case that it has suffered no loss per contra, it has made a significant profit consequent on the arrangements in place between the parties. AUTONUMOUT In light of that which factually has occurred, whereby the plaintiff's money from the share sales was paid into the Escrow Account by the defendant from which, of course, it subsequently was withdrawn and paid into court that there is no question but that this prima facie is money to which the plaintiff is entitled; indeed it must have been held in the Escrow Account upon trust for the plaintiff, and thus that if and in so far as the defendant does not wish the plaintiff to have it, it must itself claim it, a course which now appears to be eschewed. In short, on these facts the plaintiff's prima facie entitlement is a given these monies having been placed in the Escrow Account to the credit of the plaintiff and if the defendant now wishes to gainsay such entitlement and to

claim all or part of the crystallised sum for itself, it seems to me that it must formulate a claim thereto. AUTONUMOUT Nor, for that matter, does the defendant condescend to particulars as to any variation in the sum of money it itself has made as a result of the onsale of the plaintiff's Bestway shares is it, for example, to be said that it should have made less, or more, than the effective return of around HK\$4.46 million which the court has been told has ensued to it consequent on these transactions; and, if less, what would/should happen to the resultant balance? AUTONUMOUT Accordingly, in my view the plausible manner in which this case now has been sought to be amended begs more questions than it answers. AUTONUMOUT It also, if I may say so, hides under the veil of the more restrained language of contractual breach essentially the like allegation as to wrongdoing on the part of the plaintiff as existed under the now expurgated version of the original Defence and Counterclaim. AUTONUMOUT True it is that the allegations of conspiracy and misrepresentation now have gone in terms of the proposed draft pleading. However, this document has as its central allegation the plea (at paragraph 15(a)) that It is averred that the Plaintiff was privy to such market rigging or had knowledge of the same AUTONUMOUT In the circumstances I find it difficult to read or to regard this as other than amounting to a plea of fraud/fraudulent conduct, however felicitously it now is re-dressed in contractual garb; indeed, I do not think that the concept of market rigging, as still alleged on the face of the pleading, is susceptible to a non-fraudulent connotation, even if such forensically was desired, and although I bear in mind that this alleged activity now is subsumed under the label of mere contractual breach, in my view the court is entitled to look at the substance and not merely the form. AUTONUMOUT If this be correct, it strikes me that this draft amendment is susceptible to the like criticism as mounted by Mr Barlow with regard to the original version, wherein he emphasized the well-known necessity properly to particularize a plea of fraud/fraudulent conduct, citing in this context the observation of this court in Akai Holdings Ltd (in liquidation) v. Domine Ko Cheong Wing and ors (unreported, HCCL 20 of 2005, judgment dated 9 June 2006, at para Equally, in terms of the pleading of fraud it is well established that, in addition to the requirement of properly-particularised pleadings see Order 18, rule 12(1) there was a special rule that allegations of fraud be pleaded with the utmost particularity : see ADS v Wheelock Marden & Co Ltd [1994] 2 HKC 264, whilst speculative pleading absent proper particularization will not be entertained: see Wharf Properties Ltd v Eric Cumine Associates [1991] 2 HKLR 154(PC). AUTONUMOUT Nor do I consider that Mr Barlow was being unduly unfair when he castigated the plaintiff's approach, in the first pleading instalment, as all surmise and Micawberism, in the celebrated words of Megarry VC, and he maintains the assertion that the proposed second instalment is just as speculative and unparticularised as before AUTONUMOUT In addition, it also seems to me that the case that the defendant wishes to mount is, for all practical purposes, virtually non-justiciable; how, one wonders, could this particular omelette ever fairly be unscrambled, even with the aid of expert surmise (in this context I decline use of the word evidence) as to the likely price of the shares absent any such alleged market manipulation which, as I have observed, in any event has caused no loss to the defendant? AUTONUMOUT In this connection, and specifically to counter the non-justiciability

argument, I appreciate that Mr Man helpfully invoked the authority of the decision of Chadwick J in *Smith New Court v. Scrimgeour Vickers* [1992] BCLC 1104, wherein the court attempted to value the shares of a listed company whose share price had been affected by fraud, namely a deliberate misrepresentation that a third party was interested in the acquisition of Ferranti shares, and the task fell to the court to attempt to assess the value of the shares had such a false market not been created, and thus, with the assistance of expert evidence, to arrive at a figure for consequential damage. However, whilst I appreciate that in appropriate situations the court must always try to do the best that it can, I do not think that that case is analogous, nor the decision itself of assistance, and on the basis of the present facts, and not least in light of the speculative (and strongly disputed) allegation in the present action regarding the plaintiff being privy to such market rigging, for my part I decline to countenance any such attempt to peer into a crystal ball, which in the particular circumstances in my view would serve only to produce the potential for unfairness and injustice. AUTONUMOUT At the end of the day, therefore, I have decided, albeit not without some degree of reflection, to accede to the strike out application, as amended consequent upon the proposed draft amended pleading. AUTONUMOUT In this regard, Mr Barlow says that he wishes only to strike out that part of the proposed amended Defence commencing from the second sentence of paragraph 15 to the end of that paragraph. AUTONUMOUT Accordingly I grant this application to strike out in consequentially amended form, and thus permit, if so desired, the remainder of this case to proceed on the basis of the proposed draft Defence, subject to the aforesaid excision. I so order. (ii) Monetary relief AUTONUMOUT Having thus disposed of the application to strike out, this leaves outstanding the plaintiff's applications for immediate monetary relief, which are framed on the alternative bases of summary judgment, judgment on admissions, and interim payment. AUTONUMOUT As earlier observed, Mr Barlow accepts that, from his client's viewpoint, little turns on the juridical label to be attached to any such immediate monetary recovery, although he make his primary submission in terms of the grant of summary judgment. AUTONUMOUT As was indicated at the outset, at the conclusion of this hearing this court ordered that the plaintiff was to have relief in terms of the payment out of the sum presently in court that is, the amount of HK\$40.5 million odd, together with accrued interest with the proviso that the reasons underpinning the grant of such relief would be forthcoming. AUTONUMOUT Given that I have decided that the strike out application is to be granted in these circumstances, I further have concluded, out of the three heads proposed, that this is an appropriate case for the grant of summary judgment to the plaintiff in the sum of HK\$40,503,237.28, together with interest accrued thereon as at the date of payment out of court. AUTONUMOUT I so order. AUTONUMOUT At the end of the day the proposed amended Defence (even in unelided form) in my view contains the same central difficulty identified by Mr Barlow at the outset. AUTONUMOUT It is this: however the defence case ultimately is framed, the ineluctable fact remains that the defendant acquired the plaintiff's shares, and onsold them for a profit (now said to be some HK\$4.46 million), absent any real degree of commercial risk, but until very recently it has declined to give to the plaintiff the price thus obtained in this context it is worth noting that, by letter dated 31 January 2007 from the

defendant's solicitors, Lovells, to the plaintiff's solicitors, Robertsons, the defendant did indicate that it was prepared to consent to an order that interim payment in the amount of HK\$40,503,237.28 which it paid into court on 30 March 2006, plus any interest which has accrued thereon at this stage, be made to your client, although this was said to be without prejudice to the defendant's position that the plaintiff is not entitled to this amount because of market rigging and/or manipulation to which your client was privy. AUTONUMOUT This offer to settle this dispute in advance of the hearing did not in fact achieve its objective because, whilst written in open correspondence, it came girt about with conditions, including consent for leave to amend in terms of the new draft Defence, a withdrawal of the plaintiff's strike out application with no order as to costs, and a further order that costs of the interim payment and summary judgment applications be costs in the cause.

AUTONUMOUT However, given that these package conditions were not accepted in toto, Mr Man was not instructed to concede to the plaintiff's attempt to obtain the monies in court, and as a consequence the matter was fully argued. At the end of the day, however, and given that the plaintiff now has obtained summary judgment, and not merely an order for interim payment, as apparently was envisaged by those acting for the defendant, it may be thought that a more prudent course would have been not to have sought to drive so hard a tactical bargain. AUTONUMOUT Payment out of court of the principal sum of HK\$40.5 million odd as was ordered at the conclusion of the hearing does not finally conclude this matter of immediate monetary payment, of course, because pursuant to the plaintiff's summons there remains in play a further sum, albeit far smaller, which similarly is sought by the plaintiff. AUTONUMOUT This is the amount of HK\$930,412.15, which it is common ground represents the converted price (as per the price stated in the draft Closing Notice) of the shortfall of 4,963,333 shares as returned by the defendant to the plaintiff (402,970,000 in fact were returned as against the projected figure of 407,933,333), which at HK\$0.1874513 per share, produces the sum in question. AUTONUMOUT In this regard, whilst Mr Man was instructed to make no concession as such, as counsel he very fairly observed that he was in position to make no distinction in argument between the sum of HK\$40.5 million odd, and this latter figure of HK\$930,412.15. AUTONUMOUT I agree. It seems tolerably clear that as goes the main sum so goes this smaller figure, and accordingly I grant summary judgment to the plaintiff in the sum of HK\$930,412.15. AUTONUMOUT Unlike its much larger counterpart this sum never was paid into court, and I make an order nisi that interest thereon be paid at the rate of 2% over Hong Kong dollar prime from time to time prevailing from the date of the issuance of the writ to the date of judgment herein, and thereafter that there be interest on such principal sum at the judgment rate from time to time prevailing. Alternative finding AUTONUMOUT Save as to the issue of costs, the foregoing is sufficient to dispose of the matters presently in issue on these applications. AUTONUMOUT I should, however, also make an alternative finding if and in so far as I be wrong in considering that summary judgment should be granted to the plaintiff in the respective sums of HK\$40,503,237.28 and HK\$930,412.15. AUTONUMOUT It seems clear, however, that had this court not granted summary judgment (as it now has), an appropriate alternative finding would have been that there be interim payment to the plaintiff by the defendant in the aforesaid sums (as indeed

was canvassed by the defendant, in terms of the larger amount at least, in the inter-solicitor correspondence prior to the adjourned hearing). AUTONUMOUT Accordingly, had I not otherwise concluded, I would have ordered that there be interim payment of these sums by the defendant to the plaintiff, and that, with regard to the sum of HK\$930,412.15 which was not in court, that such be paid to the plaintiff by way of interim payment within 14 days of the date of judgment herein. Costs AUTONUMOUT Two consequential issues arise.

AUTONUMOUT First, in light of this judgment it seems to me appropriate that the costs of and occasioned by these applications, including the hearings on 9 January and 2 February 2007, be to the plaintiff, and I make an order nisi to this effect. AUTONUMOUT Second, at the conclusion of the hearing of these applications Mr Barlow asked that the court consider making a gross sum order as to costs, and referred the court to the material thereon in the papers, as to which request I do not think that Mr Man demurred in principle.

AUTONUMOUT Whilst I am surprised that the parties should wish to avail themselves of that which is commonly recognised to be the broad brush approach of the Commercial Court to issues of costs/security for costs, if indeed this remains the case I should be prepared to consider the relevant material and to essay such an immediate gross sum order, thereby obviating the necessity for taxation; in this event, however, I require some assistance on the figures, and in this regard I would be prepared to entertain the solicitors for the parties in Chambers on a short 9.30 am application in order to finalise this aspect of the case.

AUTONUMOUT At such hearing, it strikes me that it would be convenient for this court also to essay some form of case management, and to make directions for the further conduct, if thought necessary, of that which remains of this case. AUTONUMOUT I am grateful to both counsel for their assistance. (William Stone) Judge of the Court of First Instance High Court Mr Barrie Barlow, instructed by Messrs Robertsons, for the plaintiff Mr Bernard Man, instructed by Messrs Lovells, for the defendant PAGE - PAGE 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 I J K L M N O P Q R S T U V &`#\$ "&@& 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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