

DT Case No. 2021-04(M)
Decision No. DT 08/2021

**DISCIPLINARY TRIBUNAL
OF THE HONG KONG CHARTERED GOVERNANCE INSTITUTE
AND CHINA DIVISION OF THE CHARTERED GOVERNANCE INSTITUTE**

**DECISION
relating to a complaint against
Ms Wong Nam Marian ACG HKACG (membership no. 4002839)**

Date of Hearing: 6 December 2021

Date of Decision: 28 January 2022

1. In this Decision, The Hong Kong Chartered Governance Institute is referred to as the 'Institute'. The Institute is, and represents, the China Division of The Chartered Governance Institute, ('CGI') in this Decision.

A. Background

Facts of the complaint

2. The Institute's Secretariat had a case referral from the Market Misconduct Tribunal ('MMT') on 9 April 2021. This related to Ms Wong Nam Marian (the 'Respondent'), an Associate of the Institute, who was found culpable of insider dealing as set out under the MMT's report of 31 March 2021 (the 'MMT 2021 Report'). The Respondent, was, at all material times, the Company Secretary of Asia TeleMedia Limited ('ATML'). The Securities and Future Commission ('SFC') alleged that the Respondent had engaged in the market misconduct of insider dealing contrary to s.270 of the Securities and Futures Ordinance ('SFO') in relation to her dealings with ATML's shares between 5 February 2007 and 6 June 2007.

MMT's case

3. In 2015, the Respondent became subject to proceedings at the MMT. Although, at the time, the MMT did not find the Respondent culpable of insider dealing, she was nevertheless criticized for her failure in discharging her chartered secretarial profession duties and obligations. The Institute saw a case for, and commenced disciplinary action against the Respondent in March 2016, the details of which are set out under heading B below.
4. In the meantime, the SFC appealed the MMT decision which did not find the Respondent culpable of insider dealing. The Court of Appeal ('CA') dismissed the SFC's appeal on 26 April 2017. The SFC then appealed the CA decision to the Court of Final Appeal ('CFA') which, by a majority of 4:1 on 12 October 2018, allowed the appeal. That is, the Respondent was found culpable of insider dealing.



5. The matter was remitted to the MMT for the appropriate sanctions. The MMT, as set out in the MMT 2021 Report, made the following orders against the Respondent, namely :
- She shall be banned from dealing in securities for 3 years.
 - She shall not to engage in any market misconduct activities again.
 - The losses of \$1,076,937.97 she avoided in the insider dealings be disgorged.
 - She shall pay the costs of SFC and MMT.

B. Initial Disciplinary Action

IG's observations

6. As noted under paragraph 3 above, the Institute, began in March 2016 disciplinary proceedings against the Respondent. Specifically, the Institute's Secretariat referred the matter to the Investigation Group of the Institute and CGI (the 'IG') to consider whether it was appropriate to launch a disciplinary investigation against the Respondent.
7. The IG conducted its investigation from the material facts that it independently extracted from the MMT's Report of 26 November 2015 ('MMT 2015 Report'). The Respondent admitted all these facts, and that the SFC had found the elements for culpable insider dealing under s.270 of the SFO, including that: (a) the Respondent was a 'connected person' to AMTL ; (b) she had 'relevant insider information relating to AMTL' ; (c) she knew that was 'relevant insider information relating to AMTL' and (d) she dealt with AMTL's shares between 5 February 2007 and 6 June 2007. However, the Respondent submitted that as set out in the MMT 2015 Report, the Respondent successfully invoked the statutory defence under s.273(1) of the SFO, and the MMT did not find her culpable of being an insider dealer. The MMT nevertheless expressed its criticism against the Respondent's competency as a company secretary by citing the Institute's "The Essential Company Secretary".

IG conclusion on the initial complaints

8. Following the MMT 2015 Report, the IG saw fit to lay two complaints against the Respondent, namely:
- *Complaint 1 - Company Secretary related competency issues*
 - *Complaint 2 - Insider dealing related issues*
9. The IG, based on its own independent judgment and assessment, including of the material facts under the MMT 2015 Report, was of the view that the Respondent was potentially in breach of the Institute's professional rules and requirements under the two complaints. Accordingly, The IG referred the two complaints to the Disciplinary Tribunal of the Institute and CGI (the 'DT') for further consideration.

DT's determination

10. The Respondent, through her solicitors, provided two written submissions to the DT on 15 September 2016 and 28 June 2017 and her verbal representations during her attendance at the DT's disciplinary hearing on 16 August 2016.
11. After considering the material facts, the IG's observations and the Respondent's written submissions and verbal representations, the DT accepted and adopted the finding of the material facts of the IG. Nevertheless, as the case was being brought to CFA for further appeal, the DT made its determination under the DT Order No. 23/2017 dated 19 July 2017 that Complaint 1 was established, while Complaint 2 was held in abeyance until exhaustion of the Court appeal procedures. Under paragraph 12 of the DT Order, the DT reserved its right to re-consider Complaint 2 following future judgments or decisions of the Court.

C. Resumption of disciplinary action

Referral back to IG

12. As noted under paragraph 2 of this Decision, the MMT eventually referred the case relating to the Respondent to the Institute on 9 April 2021 after the CFA had determined that the Respondent was culpable of insider dealing. The IG then sought to re-consider the remaining complaint (Complaint 2) which was kept in abeyance by the DT under the Institute Article 25.2 and CGI Byelaw 23.1.

IG's Observations

13. The IG observed from the MMT 2021 Report:

(a) *Insider Dealing*

- During February and May 2007, the Respondent sold her ATML shares and avoided a loss on the basis of her knowledge that an assignment of a debt due from ATML (the "Assignment") and a winding up statutory demand (the "Statutory Demand") had been served by the debt assignee on ATML (5 February and 26 April 2007 respectively), which was price-sensitive information to the market and very likely to create negative effect to ATML's share price if they were made known to the public.
- On 15 June 2007, ATML announced that it had been served with a winding-up petition. Trading was suspended until 18 October 2007 and the share price dropped 62% on the resumption of trade.

(b) *Findings by MMT in November 2015*

- The Respondent was found to be knowingly in possession of the relevant information at the time of certain of her later dealings.
- The Respondent was not identified as an insider dealer on the basis that she could establish the defence under s.273(1) of the SFO that her possession of the relevant information was not a factor inducing her to deal in ATML's shares.

(c) *Decision by CFA in October 2018*

- The Respondent was identified as an insider dealer by the CFA with a 4-1 majority, meaning that she failed to invoke the s.271(3) defence, and she needed, but failed, to prove that the purchase or sale of the shares was unconnected with the inside information.

14. The IG observed that the CFA's decision overturned the MMT's judgment on the s.271(3) defence but did not challenge MMT's findings of facts. Accordingly, the IG determined on 22 June 2021 that the IG's prior observations of *prima facie* breaches of the Institute's professional rules and requirements remained valid, and warranted further consideration by the DT, especially the charges that were held in abeyance relating to the Respondent's insider dealings.

D. IG Report to the DT

15. On 18 August 2021, the IG prepared a report (the 'IG Report') under the Institute Article 25.2 and CGI Byelaw 23.1, which contained details of its investigation, the supporting materials it considered relevant, and the grounds for bringing the charges against the Respondent. The IG concluded that there were *prima facie* breaches, and other potential breaches by the Respondent, of the Institute Articles and CGI Byelaws by the Respondent.

16. Under the IG Report, the IG asked the DT to determine whether the Respondent :

Breach of Codes, Rules & Regulations

- (a) **CGI Byelaw 23.8(c)** - had failed to uphold the code of professional conduct and ethics
- (b) **CGI Byelaw 23.8(f)** - had breached any of the CGI's bye-laws or Charter or Regulations
- (c) **Institute Article 25.1(d)** - had breached any of the Articles of Association of the Institute or any

rules, regulations, codes of practice or conduct, directions or instructions made or established by or under the authority of the Council

Disrepute of the Institute or Profession

- (d) **CGI Byelaw 23.8(d)** - had behaved, by doing something or not doing something, in a way considered by the DT to bring the CGI or the profession into disrepute
- (e) **Institute Article 25.1(c)** - had conducted himself whether by act or default in a manner that might or was likely to be discreditable to the Institute or the profession

E. Disciplinary proceedings

Before Disciplinary Hearing

- 17. On 23 August 2021, the DT, having considered the IG Report, resolved that there was a *prima facie* case against the Respondent and decided to convene a disciplinary hearing of the present case. On 31 August 2021, the Respondent was served with a copy of the IG Report and the 'Notice of Disciplinary Hearing'. The Respondent informed the DT on 29 September 2021 that she opted out of providing any further submissions or attending the hearing.
- 18. On 28 October 2021, the DT fixed the hearing date for 6 December 2021, and informed her accordingly.

At Disciplinary Hearing

- 19. At the DT's disciplinary hearing on 6 December 2021, at 6:00 pm, at the Institute's Office, the DT considered:
 - (a) The material facts under MMT 2021 Report as summarised under paragraphs 3 to 5 above,
 - (b) The IG's observations in the IG Report,
 - (c) The Respondent's verbal representations on 16 August 2016,
 - (d) The Respondent's two submissions of 15 September 2016 and 28 June 2017, and
 - (e) The Respondent's reply on 29 September 2021.

F. Assessment of Charges

Findings of Facts

- 20. The DT considered the CFA's Judgment which affirmed certain facts, and made its own independent judgment and assessment on which of these are material facts of the present case. The DT finds that the material facts are as set out under paragraph 7 of this Decision, which has in fact already been admitted by the Respondent, that is, the Respondent did commit insider dealing.

Defence

- 21. Although the Respondent chose neither to file any written submission nor give any verbal representations at the hearing, the DT nevertheless still determined and did consider the Respondent's defences raised under her two submissions four years previously, namely:
 - (a) Justified by legal advice – The Respondent was advised by ATML's legal advisor that "it was not necessary to announce the Assignment or the Statutory Demand", and so she argued that she did nothing wrong.
 - (b) Not price sensitive – In subsequent, ATML's legal advisor suggested to her that Statutory Demand was not regarded as price sensitive information because "the relevant debt had already been disclosed to the public and it was irrational for anyone to institute winding-up proceedings against the Company at the time."
 - (c) Judicial findings as inadmissible – The Respondent argued that MMT's findings were inadmissible as evidence to the DT. Her argument was supported by a precedent court case of **Re Prudential Enterprises Ltd (No 2)** that, "*The rationale behind the principle is that the findings only represent the*

conclusion or opinions of the judge in the earlier action. Unlike facts that are evidence, the judge's opinions are not relevant."

22. As the s.271(3) defence has already been overturned by the CFA in October 2018, the DT considers her defences under paragraphs 20 (a) and (b) no longer relevant.
23. In further reply to paragraphs 20(a) and (b) of the Respondent's Defence, ignorance of the law or wrong has done pursuant to wrong legal opinion is no defence. In reply to paragraph 20(c) of her Defence, it is taken out of context of the cited sentence in **Re Prudential Enterprises Ltd (No.2)** to say that judicial findings are inadmissible. Findings of facts in a court case are final unless overturned on appeal. The same applies to a judicial decision based on the findings of facts. The CFA has accepted the findings of facts in the lower courts and arrived at a different conclusion based on the same facts. Both findings of facts and legal conclusions are binding. In the present case, subject to the law on findings of facts as explained above, the DT has assessed the relevant Court decisions, the IG's findings, the Respondent's submissions and arrived at its own determination on the material facts.

Breaches of Code, Articles & Byelaws

24. Having considered all relevant matters, the DT finds that there are breaches of the Institute's and CGI's Code of Professional Ethics and Conduct ('Code of Conduct'), the Institute's Articles and CGI's Byelaws.
25. The Respondent's breaches of Code of Conduct from the insider dealing in violation of law, as determined by the Court, are identified as follows: **(a)** she failed to respect the confidentiality of information acquired through professional relationships save where there is a legal or regulatory requirement to disclose or report that information; **(b)** she failed to display proper understanding and appreciation of her role and responsibilities; **(c)** she failed to avoid involvement in any unethical, misleading, illegal or covert behaviour; **(d)** she failed to avoid conflicts of interest, or, where a conflict arises, making sure that everyone involved is aware of the interest; **(e)** she failed to be open and frank in any business dealings; and **(f)** she failed to act in a way which conforms to the relevant laws of the jurisdiction in which she is residing and/or undertaking business transactions.
26. In addition to the above, the Respondent's actions or omissions were likely to be discreditable to the Institute or the profession and/or the Respondent behaved, by doing something or not doing something, as considered by the DT to bring CGI or the profession into disrepute. The DT finds that there are breaches not only to the Institute's Code of Conduct and Articles, and CGI's Byelaws.

G. Decisions & Penalties

Decision

27. The DT **DECIDES** that the charges against the Respondent, as set out under the IG Report, are established and the Respondent by reason of the matters set out under paragraph 12 was in breach of:

Breaches of Codes, Rules & Regulations

- (a) **CGI Byelaw 23.8(c)** – she had failed to uphold the code of professional conduct and ethics
- (b) **CGI Byelaw 23.8(f)** – she had breached any of the CGI's bye-laws or Charter or Regulations
- (c) **Institute Article 25.1(d)** –she had acted in breach of the Articles of Association of the Institute or any rules, regulations, codes of practice or conduct, directions or instructions made or established by or under the authority of the Council

Disrepute of the Institute or Profession

- (d) **CGI Byelaw 23.8(d)** – she had behaved, by doing something or not doing something, in a way considered by the DT to bring the CGI or the profession into disrepute, and

- (e) **Institute Article 25.1(c)** – she had conducted himself whether by act or default in a manner that might or was likely to be discreditable to the Institute or the profession

Sanctions

28. The DT considers that insider dealing is a serious matter. Not only is it a contravention to the law, but it is a serious market misconduct under the SFO. In the present case, the role of Respondent was significant as she, as the Company Secretary in ATML, dealt her company's securities with knowledge of price-sensitive information. Being a Chartered Secretary of 15 years' experience at the material time, she should have known that her act constituted insider dealing.
29. The DT observes that the Respondent knowingly used the insider information and avoided a loss of around \$1 million for herself, despite being disgorged by the MMT.
30. The DT notes that the Institute's name was quoted in the MMT 2021 Report. The Respondent was described as a Chartered Secretary and the Institute's publication of "The Essential Company Secretary" was cited. The Institute's Secretariat received this case referral by the MMT's letter dated 9 April 2021, requesting disciplinary action against the Respondent enclosing a copy of the MMT 2021 Report.
31. The Respondent has never admitted her breaches since 2016. The Respondent's involvement in the long drawn out Court actions was brought on her by herself.
32. Taking account into consideration of the above factors, the DT **ORDERS** that:
- (a) The Respondent shall be **reprimanded** under the Institute Article 27.1(f) and CGI Byelaw 24.1(a), to indicate disapproval for her lapses in the professional standards expected of a Chartered Secretary and Chartered Governance Professional,
 - (b) The Respondent's membership shall be **suspended** for 2 years under the Institute Article 27.1(c) and CGI Byelaw 24.1(f),
 - (c) The Respondent shall be **fined** at HK\$25,000 under the Institute Article 27.1(e) and CGI Byelaw 24.1(c), and to pay within 28 days from the date when the notice of this Decision is served on the Respondent,
 - (d) The Respondent shall **pay the Institute's costs** of HK\$5,000 under the Institute Article 27.1(g) and CGI Byelaw 24.1(b) within 28 days from the date that notice is served on the Respondent. In case there is a failure to pay the Institute's costs and penalties, the Institute shall be at liberty to commence recovery actions, and
 - (e) This Decision shall be **published** on the Institute's website, with a summary in the CSj journal, and shall take effect after the expiry of the period to file an appeal with the Appeal Tribunal ('AT') or, in case of there being an appeal, until after exhaustion of the appeal procedures.

Note: According to the Institute Article 28 and CGI Byelaw 25, the Respondent shall be entitled to appeal against the decision or any part of it by submitting, in writing, a request that the matter should be considered by the AT, specifying in the request the grounds to be relied on in support of the appeal. The notice of intention to appeal must be received by the Institute within 28 days from the date of the Respondent being advised of this DT decision and may be given to the person by whom the notice of the decision was given or to the Secretary of the Institute or any person authorized to receive such notice. If the notice of intention to appeal is given by telephone or other electronic methods, it must be confirmed in writing within 14 days.

Duffy Wong FCG(CS, CGP) HKFCG(CS, CGP)
Chairman, the Disciplinary Tribunal
The Hong Kong Institute of Chartered Secretaries
China Division of The Chartered Governance Institute