Report of the
Market Misconduct Tribunal
of Hong Kong

on whether a breach of the disclosure requirements has taken place in relation to the listed securities of

Magic Holdings International Limited

and other related questions

Part II

INDEX

CHAPTER 9

CONSEQUENTIAL ORDERS

540. Following the delivery of the first part of our report to all the parties and its publication to the public on 19 March 2020, the Tribunal gave directions to the parties on the same date as to the provision of written submissions in respect of consequential orders that the Tribunal might make pursuant to section 307N and 307P of the Ordinance. Having received written submissions on behalf of all the parties, the Tribunal received oral submissions on 25 April 2020.

541. At that hearing, as foreshadowed in a letter from the Tribunal to the parties, dated 24 April 2020, that, subject to the submissions of the parties, it was minded to do so, the Tribunal requested the Presenting Officer, Mr. Scott SC, to present expert evidence relevant to the issue of "the notional losses suffered by the investors due to the delay in Magic's disclosure of inside information", a matter raised in the written submissions of the SFC, dated 2 April 2020,[1] with which issue was taken in their written submissions, dated 16 April 2020, by counsel on behalf of various Specified Persons.[2] In the result, the Tribunal adjourned the hearing in respect of the 1st to 6th Specified Persons to a date to be fixed, acceding to the request of counsel representing those Specified Persons that they be given until 8 May 2020 to consider and comment on the terms of reference Mr. Scott proposed be given to the expert witness. The chairman said that further directions would be given as and when required in due course. At the invitation of Mr. Scott and with the agreement of their counsel, the Tribunal proceeded to receive oral submissions in respect of the applications for orders for costs to be made in their favour by the 7th to 10th Specified Persons.

542. In the Summary of the Tribunal's determinations in respect of culpability, set out in Chapter 8, it was noted that:

(i) contrary to section 307B (1) of the Ordinance, Magic did not disclose to the public information, which constituted inside information, as soon as reasonably practicable after the inside information had come to its knowledge;[3]

[1] Submissions for the SFC, paragraph 42.
[2] Submissions for the 1st Specified Person, paragraph 9; Submissions for the 2nd to 5th Specified Persons, paragraph 38; and Submissions for the 6th Specified Person, paragraph 13.
[3] Report, paragraph 397.

(ii) contrary to section 307G (2) (a) of the Ordinance, the negligent conduct of Mr. Stephen Tang and Mr. Chris Cheng resulted in the breach by Magic of the disclosure requirement and each of them is in breach of the disclosure requirement;[4]

(iii) contrary to section 307G (2) (b) of the Ordinance, Mr. Sun Yan[5], Mr. Stephen Tang, Mr. Chris Cheng, Mr. She and Mr. Luo did not take all reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic's breach of the disclosure requirement and are each in breach of the disclosure requirement.[6]

543. In addition, the Tribunal determined that it was not satisfied that either Mr. She or Mr. Luo was culpable of negligent conduct that resulted in the breach of Magic's disclosure requirement, contrary to section 307G (2) (a) of the Ordinance. The Tribunal said that it was satisfied that Mr. Dar Chen, Mr. Thomas Yan, Professor Yang Rude and Professor Dong had taken all reasonable measures to ensure that proper safeguards existed to prevent the breach of Magic's disclosure requirement.[7]

The powers of the Tribunal

(i) Orders of the Tribunal

544. Section 307N of the Ordinance provides that:

"(1) Subject to section 307K, at the conclusion of any disclosure proceedings the Tribunal may make one or more of the following orders in respect of a person identified under section 307J(1)(b) as being in breach of a disclosure requirement—

(a) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance—

(i) be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation; or

(ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation;

(b) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance, in Hong Kong,

[4] Report, paragraph 436.
[5] Report, paragraph 531.
[6] Report, paragraphs 534 and 537.
[7] Report, paragraphs 526-30.

directly or indirectly, in anyway acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme;

(c) an order that the person must not again perpetrate any conduct that constitutes a breach of a disclosure requirement;

(d) if the person is a listed corporation or is in breach of the disclosure requirement as a director or chief executive of a listed corporation, an order that the person pay to the Government a regulatory fine not exceeding $8,000,000;

(e) without prejudice to any power of the Tribunal under section 307P, an order that the person pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings;

(f) without prejudice to any power of the Tribunal under section 307P, an order that the person pay to the Commission the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission, whether in relation or incidental to—

(i) the proceedings;

(ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or

(iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings;

(g) an order that anybody which may take disciplinary action against the person as one of its members be recommended to take disciplinary action against the person;

(h) if the person is a listed corporation, any order that the Tribunal considers necessary to ensure that a breach of a disclosure requirement does not again take place in respect of the corporation including, but not limited to, an order that the corporation appoint an independent professional adviser approved by the Commission to review the corporation's procedure for compliance with

this Part or to advise the corporation on matters relating to compliance with this Part;

(i) if the person is an officer of a listed corporation, any order that the Tribunal considers necessary to ensure that the officer does not again perpetrate any conduct that constitutes a breach of a disclosure requirement including, but not limited to, an order that the officer undergo a training program approved by the Commission on compliance with this Part, directors' duties and corporate governance."

545. In respect of a regulatory fine, section 307N (3) provides that:

"The Tribunal must not impose a regulatory fine on a person under subsection (1)(d) unless, in all the circumstances of the case, the fine is proportionate and reasonable in relation to the breach of the disclosure requirement. For that purpose, the Tribunal may take into account, in addition to any conduct referred to in subsection (2), any of the following matters—

(a) the seriousness of the conduct that resulted in the person being in breach of the disclosure requirement;

(b) whether or not that conduct was intentional, reckless or negligent;

(c) whether that conduct may have damaged the integrity of the securities and futures market;

(d) whether that conduct may have damaged the interest of the investing public;

(e) whether that conduct resulted in any benefit to the person or any other person, including any profit gained or loss avoided;

(f) the person's financial resources."

(ii) Costs

546. Section 307P of the Ordinance provides that:

"(1) Subject to subsection (4), at the conclusion of any disclosure proceedings, or as soon as reasonably practicable after the conclusion of the proceedings, the Tribunal may by order award to any of the following persons a sum it considers appropriate in respect of the costs reasonably incurred by the person in relation to the proceedings—

(a) a person whose attendance, whether as a witness or otherwise, has been necessary or required for the purposes of the proceedings;

(b) a person whose conduct is the subject, whether wholly or in part, of the proceedings.

(2) Any costs awarded under this section are a charge on the general revenue.

(3) Subject to any rules made by the Chief Justice under section 307X, Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A) applies to the award of costs, and to the taxation of any costs awarded, by the Tribunal under this section.

(4) Subsection (1)(a) and (b) does not apply to—

(a) a person who has been identified under section 307J(1)(b) as being in breach of a disclosure requirement;

(b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider the person's conduct during the course of the disclosure proceedings; or

(c) a person whom the Tribunal considers has by the person's conduct caused, whether wholly or in part, the institution of the disclosure proceedings."

Notional loss

Written submissions for the SFC

547. In support of his submission that Magic's breach of the disclosure requirements "…had grave consequences for the investing public", Mr. Scott contended that:[8]

> "… investors who sold shares in Magic during the period between 29th April 2013 to 26th July 2013 were denied material information about Magic and sold shares at prices which were lower than they should have been. As the mere leakage of inside information had already caused a material rise in the price of Magic shares of 21.25%, the disclosure of the inside information would have caused at least the same (if not a higher than 21.25%) rise in the price of Magic shares. As the total turnover of Magic's shares from 29th April 2013 to 26th July 2013 amount to HK$$763,765,778.97 (see Appendix C to the Part I Report), the notional losses suffered by investors due to the delay in Magic's disclosure of inside information, using an increase of 21.25% in the price of the shares, amounted to an aggregate amount of HK$162,300,228."

[8] Submissions for the SFC, paragraph 42.

Written submissions for the 1st Specified Person

548. In his written submissions, on behalf of Magic, Mr. Li SC contended that there was "no evidence of any loss to investors" in consequence of Magic's breach of its disclosure requirement. The SFC's contention that, the leakage of the information having caused a 21.25% increase in Magic share price, disclosure of the information would have caused an equal rise in the share price was fallacious in fact and logic. In those circumstances, investors were already trading as though some disclosure had been made, so that disclosure was likely to have "little effect".[9]

Written submissions for the 2nd to 5th Specified Persons

549. Whilst it was accepted by Mr. Dawes SC in his written submissions, on behalf of the 2nd to 5th Specified Persons, that the investing public had suffered "some loss" due to Magic's delay in making disclosure and that was "a matter which should be taken into account", he invited the Tribunal to reject as "plainly unreliable" the contention advanced on behalf of the SFC that the notional loss was $162 million.[10] The computation was based on a number of unsustainable assumptions. First, that the volume of trading in Magic shares would have remained constant, even if the inside information had been disclosed. Secondly, that the difference between the price at which Magic shares traded and the notional price at which they would have traded if the inside information had been disclosed as soon as required remained a constant of 21.25%. That assumption was false.[11] If the SFC wished the Tribunal to rely on its computation, it ought to have sought to adduce expert evidence in support. It had not done so. In the result, there was no basis for the SFC's assertion that the delay in making disclosure had "grave consequences for the investing public."

550. Mr. Dawes suggested the actual loss suffered by investors was likely to be substantially smaller. The Tribunal had found that the inside information came into existence on Saturday, 27 April 2013. He submitted that the Specified Persons were entitled to take legal advice on the issue of whether the 'safe harbour' defence applied before complying with their obligation

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[9] Submissions for the 1st Specified Person, paragraphs 25-8.

[10] Submissions for the 2nd to 5th Specified Persons, paragraphs 38-43.

[11] Submissions for the 2nd to 5th Specified Persons, paragraph 40.

> "(a)… Magic's share price remained steady between HK $4.89 and HK $5.06 per share even after the Inside Information was announced on 2 August 2013.
> (b) for a substantial portion of the period between 29 April and 26 July 2013, the difference between (1) Magic's actual share price and (2) the price of HK $5.06 was only 5-10%. The difference between the two figures never reached 21.25%."

to make disclosure as soon as reasonably practicable. He suggested that they were entitled to take up and until Friday, 3 May 2013 to procure and understand such legal advice. Having closed at $4.10 on Friday, 26 April 2013, the closing price of Magic shares on 3 May 2013 was $4.34. On 8 May 2013, the closing price of Magic shares was $4.85. Thereafter, Magic shares traded in the range of a daily closing price of around $4.50 to $5.20.

551. In the result, Mr. Dawes submitted that Magic shares were not traded at an artificially low price for an extended period of time, in the absence of disclosure of the inside information. Rather, he submitted that Magic shares traded at "an artificially low level" for "around 4 business days."

Written submissions for the 6th Specified Person

552. In his written submissions, on behalf of the 6th Specified Person, Mr. Chan SC invited the Tribunal to reject the calculation of notional loss of around $162 million, being 21.25% of the total turnover of Magic shares from 29 April to 26 July 2013, set out in the SFC's written submissions.[12] It was not supported by any expert evidence, in particular expert evidence of the re-rated price of Magic shares, if the inside information had been made known to the public at the material time. It ignored the evidence of both experts, accepted by the Tribunal, that beginning at the closing of the market on 7 May 2013 the inside information was no longer materially price sensitive. Further, it did not take into account the individual prices at which shares were bought and sold. Rather, the calculation assumed that all buyers of the shares suffered the same notional loss.

Written submissions for the SFC in reply

553. In the SFC's written reply to the submissions made on behalf of the 1st Specified Person, that there was no evidence of any loss, Mr. Scott invited the Tribunal to note that, trading having been suspended in Magic shares on 26 July 2013 at a closing price of HK $4.60, the price at which shares traded rebounded to over HK $5.00 " in less than a few days following the interim announcement on 2nd August 2013 (which did not include a price)." Having regard to the total turnover in Magic shares traded in the period 29 April to 26 July 2013 of more than $763 million, Mr. Scott asserted "On any basis, the non-disclosure must have resulted in significant loss to investors."[13]

[12] Submissions for the 6th Specified Person, paragraphs 12-3.
[13] Submissions in Reply for the SFC, paragraph 9.

554. In reply to the submissions made on behalf of the 2nd to 5th Specified Persons, in the context of the total turnover in Magic shares of $763 million in the period, Mr. Scott contended "At any rate, the non-disclosure of *price-sensitive* inside information would have resulted in significant loss to investors. Even if one adopts a modest price differential of 5% or 10% (as alluded to at paragraph 40(b)), the loss would be in the region of HK $38-76 millions."[14] In that reply and in the reply to the submissions made on behalf of the 6th Specified Person it was contended:[15]

> "Whilst the notional loss is not addressed by expert evidence, the Tribunal (assisted by a member in the financial industry) has had the benefit of expert evidence and empirical data on changes in share price and trading volume throughout (including the period of 26th April to 26th July 2013)…The Tribunal cannot turn a blind eye to figures of such magnitude."

The hearing

555. At the hearing Mr. Scott said that the SFC agreed to present the expert evidence requested by the Tribunal and, having indicated that it was proposed to approach Mr. Karl Lung to provide that evidence, provided the Tribunal and the parties with skeleton proposed terms of reference.

556. For their part, Mr. Li, Mr. Dawes and Mr. Chan all opposed the Tribunal ordering that it be presented with such expert evidence. Mr. Li said that it was not necessary. Even if the evidence to be obtained had some relevance, inevitably it would cause delay and incur increased costs. He said that he wished to clarify the position of the 1st Specified Person, "It's not that there hasn't been any loss." He added, "I am not saying that… there could not be further effect on the market if there was full disclosure." Rather, he submitted that, "the exact magnitude of the notional loss would not, at the end of the day, be a major factor." In supporting those submissions, Mr. Dawes said that it would be necessary for the Specified Persons first, to consider any such report and secondly, the need for them to obtain their own expert evidence and, if necessary, to make application to adduce the evidence before the Tribunal. He said that those were matters that went to "time, cost and prejudice." If these matters were of importance, they ought to have been addressed in Mr. Karl Lung's first statement. For his part, Mr. Chan asserted that the prejudice to Mr. Sun Yan was that any order of disqualification made against him would begin later rather than sooner.

[14] Submissions in Reply for the SFC, paragraph 18 (3).
[15] Submissions in Reply for the SFC, paragraphs 18 (4) and 24 (2).

Discussion

557. In determining to request that the SFC obtain and present to the Tribunal the evidence of an expert witness in respect of the notional losses suffered by the investors due to the delay in Magic's disclosure of inside information, the Tribunal is acutely aware of the inevitable delay in the Tribunal making its final orders and of the increased costs and expenses that will result. Nevertheless, we are satisfied that it is appropriate that the evidence is presented to the Tribunal to enable it to discharge its duties properly. We are mindful, in particular, of the requirement of section 307N (3) of the Ordinance that the Tribunal must not impose a regulatory fine unless, in all the circumstances of the case, the fine is proportionate and reasonable in relation to the breach of the disclosure requirement and that, in considering those matters, the Tribunal may take into account the matters there listed, including "(d) whether that conduct may have damaged the interest of the investing public". Moreover, the economic consequences of the conduct may be relevant to other orders that the Tribunal might make.

Costs: section 307P

Written submissions for the 7th Specified Person

558. Having noted that in its report the Tribunal had dismissed the proceedings brought against Mr. Dar Chen, the 7th Specified Person, and had found that he had taken all reasonable measures to ensure proper safeguards existed to prevent Magic's breach of disclosure requirement, in his written submissions Mr. Wadham contended that, in accordance with the usual rule that costs should normally follow the event, the Tribunal ought to make an order in his favour in respect of costs reasonably incurred in relation to the proceedings, to be taxed if not agreed. There was no basis to displace the normal outcome.

559. Mr. Wadham submitted that Mr. Dar Chen's conduct did not cause the institution of the proceedings nor did it cause or prolong the investigation and consideration of his conduct by the Tribunal in the proceedings.

Written submissions for the 8th to 10th Specified Persons

560. Having noted that in its report the Tribunal had dismissed the proceedings brought against the 8th to 10th Specified Persons and had found that they had each taken all reasonable measures to ensure that proper safeguards existed to prevent Magic's breach of disclosure requirement, in his written submissions Mr. Chan invited the Tribunal to make an order of costs in their favour, pursuant to section 307P(1) of the Ordinance with a certificate for two counsel, to be taxed if not agreed.

561. Mr. Chan submitted that in such circumstances, subject to section 307P (4) (b) and (c)[16], that was the normal order that the Tribunal should make. He said that the question that arose was whether the Specified Person had brought suspicion upon himself. He invited the Tribunal to note that in its report in *Greencool Technology Holdings Limited*, the Tribunal, of which Mr. Michael Hartmann was chairman had said of a similarly worded provision in section 260 (4) of the Ordinance:[17]

> "Costs may not be granted to a person whose conduct, the Tribunal considers, has caused, whether wholly or in part, the investigation or whose conduct, the Tribunal considers, has caused, whether wholly (or) in part, the institution of the proceedings. In short, costs may not be awarded if the Tribunal is satisfied that, even though cleared of culpability, the specified person brought suspicion upon himself."

562. Of conduct relevant to a consideration of whether the person brought suspicion upon himself, the Tribunal determined[18] the appropriate approach was that taken in criminal proceedings as articulated in the judgment of Chan PJ, with whom all the other judges agreed, in the Court of Final Appeal in *Hui Yui Sang v HKSAR*:[19]

> "…the judge must consider the conduct of the appellant generally and that the most relevant conduct must be his conduct during the investigation and at the trial, including how he responded upon inquiry, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, the strength of the case against him and the circumstances under which he came to be acquitted. See Litton PJ in *Tong Cun Lin v HKSAR* (1999) 2 HKCFAR 531 at p.535."

563. Mr. Chan submitted that there was no evidence that the 8th to 10th Specified Persons had brought suspicion on themselves.

Written submissions in reply for the SFC to the applications for costs: section 307P

The 7th and 8th Specified Persons

564. In their written submissions in reply Mr. Scott and Mr. Suen said that the SFC did not oppose the order sought on behalf of the 7th and 8th Specified Persons, Mr. Dar Chen and Mr. Thomas Yan, that the Tribunal make an order, pursuant to section 307P (1), in their favour in respect of the costs reasonably incurred by each of them in relation to the proceedings, to be

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[16] "(4) Subsection (1)(a) and (b) does not apply to—

(b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider the person's conduct during the course of the disclosure proceedings; or

(c) a person whom the Tribunal considers has by the person's conduct caused, whether wholly or in part, the institution of the disclosure proceedings."

[17] *Greencool Technology Holdings Limited* (24 January 2018), paragraph 445.

[18] *ibid*, paragraphs 446-7.

[19] *Hui Yui Sang v HKSAR* (2006) 9 HKCFAR, page 314, paragraph 13.

taxed if not agreed. In his oral submissions, Mr. Scott confirmed that to be the position of the SFC.

The 9th and 10th Specified Persons

565. On the other hand, Mr. Scott and Mr. Suen said that the SFC opposed the application made on behalf of the 9th and 10th Specified Persons for a similar order for costs. It was submitted that the exceptions to the making of such an order stipulated in section 307P (4) (b) and (c) were applicable.[20] That was the test. The test applicable in criminal proceedings, namely whether the defendant had brought suspicion upon himself, was not appropriate. Whilst that approach in criminal proceedings was appropriate having regard to the presumption of innocence, it was not applicable to civil proceedings.

566. In advance of the SFC instituting the disclosure proceedings by service of its Notice on the Tribunal, dated 29 March 2018, it was asserted that the overall upshot of the SFC's investigation was that Magic "did not have any written guidelines or written internal policies to comply with the disclosure of inside information." That much was made apparent from the reply of Linklaters, on behalf of Magic, to the SFC, dated 14 June 2016, in which material used in training seminars in March 2010 and June 2012 together with a memorandum from Messrs Chiu & Partners, dated July 2013, was identified as the only material that had been located that was responsive to the SFC's enquiry seeking the provision of such material.[21] Given that the *Guidelines* made it clear that, even as non-executive directors, Professor Yang Rude and Professor Dong had a role to play in ensuring that the board discharged its "responsibility for establishing and monitoring key internal control procedures"[22], the institution of proceedings against them was justified.

567. Mr. Scott said that the email, dated 21 December 2012, sent by Mr. Chris Cheng to all his fellow directors of Magic, attached to which was a copy of Part XIVA of the Ordinance and the *Guidelines*,[23] was only provided to the SFC after the commencement of these proceedings.[24] It is to be noted that copies of that material was attached to each of the witness

[20] Submissions for the SFC in Reply, paragraph 33.
[21] Exhibit Bundle, pages 1055-78.
[22] *Guidelines*, paragraph 59.
[23] Exhibit Bundle, pages 2962-3171.
[24] Submissions for the SFC in Reply, paragraph 33 (2).

statements of various Specified Persons, including the statements of Professor Rude and Professor Dong, dated 29 January 2019.

568. The Tribunal was invited to note that it had determined that Professor Yang Rude and Professor Dong were "passive" in their approach to discharging their duty to take all reasonable measures to ensure that proper safeguards existed to prevent a breach of a disclosure requirement by Magic.[25] The Tribunal had found that, although the circulation of the email, dated 21 December 2012, and its attachments by Mr. Chris Cheng begged the question of what measures Magic had taken/were to take, neither of them took any steps. Each of them merely asserted that they believed Magic had taken reasonable measures. Neither of them did anything. Professor Dong was unable to say if any measures had been taken.[26]

569. Given that evidence, Mr. Scott submitted that Professor Yang Rude and Professor Dong had been "let off the hook" by the Tribunal, "only because of their lack of business experience and reliance on others." In those circumstances, there should be no order as to costs in their favour. Alternatively, they should be awarded only a portion of the costs.

The hearing

570. At the hearing, Mr. Scott indicated that he had nothing to add to the SFC's written submissions in respect of the applications for costs by the 9th and 10th Specified Persons, other than suggesting that it could be said that they brought the proceedings on themselves, the Tribunal having found that they had done nothing at all to ensure compliance with Part XIVA.

571. For his part, Mr. Chan refuted the assertion made by Mr. Scott that the email sent by Mr. Chris Cheng to all his fellow directors, dated 21 December 2012, to which was attached Part XIVA of the Ordinance and the *Guidelines*, had only been provided to the SFC after the institution of proceedings against Professor Yang Rude and Professor Dong. He reminded the Tribunal that in the course of the evidence of Professor Yang Rude an issue had arisen of whether a copy of the email existed in the 'Unused material' disclosed by the SFC, which a little later resulted in Mr. Chan stating to the Tribunal "We have identified the same email from the unused material. That is the email box of Mr. Chris Cheng. We have managed to find the

[25] Report, paragraph 517.
[26] Report, paragraphs 521-3.

same email and it's in the exact same form as we have it in the bundles and in the attachment."[27] It is to be noted that Mr. Scott accepted that to be the case.[28]

Discussion

572. There is no dispute that the specific provisions set out in sub-sections 4 (b) and (c) of section 307P of the Ordinance describe the exceptions to the power of the Tribunal to make an order for costs in favour of a person alleged to be, but found not to be, culpable of a breach of disclosure requirement. For our part, we are satisfied that, having identified the gravamen of the provision, the appropriate approach was identified correctly and summarised succinctly in the report of this Tribunal in *Greencool Technology Holdings Limited* as being:[29]

> "In short, costs may not be awarded if the Tribunal is satisfied that, even though cleared of culpability, the specified person brought suspicion upon himself."

The email of 21 December 2012: in the possession of the SFC

573. The reliance by the SFC in its written submissions in reply, as part of the basis for asserting that the 9th and 10th Specified Persons ought to be denied their costs, namely that the SFC had not been provided with the email circulated by Mr. Chris Cheng to all his fellow directors, dated 21 December 2012, until the SFC had initiated these proceedings, is most surprising. It does not accord with the evidence adduced before the Tribunal.

574. In the course of his evidence, Professor Yang Rude said that he had located the email, dated 21 December 2012, from his own email records, which was then attached to his witness statement. Of the issue, which arose during his testimony, of whether that material was available from other sources, Mr. Scott told the Tribunal "During the course of the execution of the search warrant-the SFC did obtain Chris Cheng's computer, and we would expect to find that there."[30] As Mr. Chan pointed out in his oral address, as noted earlier, during the evidence of Professor Yang Rude Mr. Scott's expectation was vindicated. During Professor Yang Rude's evidence, a copy of the email was located in the unused material.

575. Earlier in the proceedings, having been told by Mr. Scott that the provenance of an email, dated 19 April 2013, from Mr. Leo Liu to Mr. Stephen Tang but copied to him, was material obtained as a result of the execution of a search warrant in December 2013, Mr. Chris

[27] Transcript; Day 14, pages 65-6.
[28] Transcript; Day 14, page 66.
[29] *Greencool Technology Holdings Limited*, paragraph 445.
[30] Transcript; Day 14, page 51.

Cheng agreed that was its provenance.[31] Later, he confirmed that the "SFC seized the emails".[32] For her part, in a witness statement, dated 29 March 2018, Ms. Wong Mei Mei said that the SFC had executed a search warrant on the officers of Magic on 18 December 2013 and seized material, including multiple emails to and from Mr. Chris Cheng.[33]

576. Clearly, the SFC had possession of the email, dated 21 December 2012, years before it initiated these proceedings in March 2018. Probably, the SFC came into possession of the email in December 2013. It appears that the fact of its possession was overlooked by the SFC.

577. Whilst the SFC may have been misled to some extent by the reply of Linklaters on behalf of Magic, dated 14 June 2016, in respect of the limited ambit of the material in the possession of Magic relevant to the question of the existence of written guidelines or policies in relation to inside information and its disclosure, which made no reference to the email dated 21 December 2012, that conduct is not attributable in any way to the 9th and 10th Specified Persons, who had ceased to be directors of Magic in 2014.

578. As it is apparent from our report, whilst we determined that the 9th and 10th Specified Persons were "passive" in their approach to taking all reasonable measures to ensure that proper safeguards existed to prevent a breach of disclosure requirement by Magic, in determining that they had done so the Tribunal had regard to all the circumstances, and in particular the general knowledge, skill and experience of each of them and those of their fellow directors,[34] together with the short period of time, namely four to five months, during which Part XIVA had been in operation at the material time.[35]

579. In the result, we are not satisfied that the conduct of either the 9th or 10th Specified Persons has caused, whether wholly or in part, the institution of these proceedings or caused, whether wholly or in part, this Tribunal to investigate or consider their conduct during these proceedings.

[31] Transcript; Day 11, page 18.
[32] Transcript; Day 11, page 51.
[33] Witness Evidence Bundle; pages 752-76, at pages 764-5.
[34] Report, paragraphs 528-9.
[35] Report, paragraph 530.

Conclusion

580. Accordingly, pursuant to section 307P (1) we order that the 7th to 10th Specified Persons have the costs reasonably incurred by each of them in relation to these proceedings, to be taxed if not agreed.

Mr. Michael Lunn, GBS

(Chairman)

Mr. Patrick Sun

(Member)

Ms. Cheung Man Kok, Christine

(Member)

Dated 5 May 2020.

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Part III

INDEX

CHAPTER 10

NOTIONAL LOSS

Expert evidence

581. In response to the Tribunal's Directions, dated 13 May 2020, requesting the SFC to provide expert evidence on the issue of notional loss and affording the specified persons the opportunity to respond to such evidence, the Tribunal received from the SFC a statement of Mr. Karl Lung, dated 7 July 2020, and from the 2nd to 5th Specified Persons a statement of Mr. Richard Witts, dated 1 September 2020. No statements were received from the other Specified Persons.

Mr. Karl Lung

582. In his statement, dated 7 July 2020, Mr. Karl Lung addressed the SFC's instructions of calculating the notional loss suffered by Magic's investors on the basis that Magic ought to have made an announcement in the form of Magic's Announcement made on 2 August 2013, on either 8 May 2013 or alternatively 13 May 2013.

2 August 2013 Announcement

583. Having noted that in its Announcement, dated 26 July 2013, Magic had said that trading in the shares of Magic had been suspended "pending the release of an announcement containing inside information relating to the Company", in the Announcement, dated 2 August 2013, Magic disclosed:

> "…it and certain of its shareholders are in discussion with an independent third party **("Potential Offeror A")** of a possible transaction, which if materialised, may lead to an offer **("Potential Offer A")** for all the issued Shares. During the course of the negotiation with **Potential Offeror A**, the Company was approached by another independent third party **("Potential Offeror B"**, and collectively with Potential Offeror A, the **"Potential Offerors")** regarding an indicative offer which, if materialised may lead to an offer for the entire issued Shares by Potential Offeror B **("Possible Offer B"**, and collectively with Possible Offer A, the **"Possible Offers")**.

584. Having referred to the report of the Insider Dealing Tribunal in *Lippo China Resources Ltd*,[1] cited with approval by Macrae J, as Macrae VP was then, in *SFC v Chan Pak Hoe Pablo*,[2] Mr. Lung said that the issue was: if the information had been made generally known to the

[1] *HKCB Bank Holding Company Ltd. & Hong Kong China Ltd. (now renamed as Lippo China Resources Ltd.*) [5 August 1995.]

[2] *SFC v Chan Pak Hoe, Pablo* [2011] 5 HKC 484, at paragraph 42.

investing public when Magic ought to have made an announcement, what would have been the likely impact on Magic's share price?[3] That test was a hypothetical one. Mr. Lung said that it was well established that the reaction of the market once the information became generally known provided a basis to provide an answer to the hypothetical test.[4]

585. Mr. Lung said that in calculating the notional loss to Magic's investors, assuming that the requisite announcement was made on either 8 May 2013 or alternatively 13 May 2013, it was necessary to make an assessment of Magic share price between either one or other of those two dates and 26 July 2013. However, he said that, given that price at which Magic shares traded in that period was affected by "a number of different factors (which changed from time to time)" it was impractical to calculate what its share price would have been. Rather, he said he had sought to estimate the impact of an announcement on Magic's share price over that period based on the impact on Magic's share price of the 2 August 2013 Announcement. That calculation did not purport to be a calculation of "the exact losses suffered by Magic's investors, nor the loss suffered by a particular investor or a prediction of Magic's share price on a particular trading day."[5]

The information compared to the contents of the 2 August 2013 Announcement

586. Mr. Lung acknowledged that there were differences between the contents of the 2 August 2013 Announcement and the information. The Announcement only disclosed that Magic and certain of its shareholders were in discussions with a party for an acquisition of all the shares and the takeover of Magic, during which negotiations Magic was approached by another party interested in the same objective. The Announcement did not disclose: (i) the offer price: (ii) the form of the offer, namely cash and/or shares; and (iii) the attitude of the shareholders in those negotiations.[6]

587. By contrast, the information as it existed in late April/early May 2013 did not include the fact that a second party was interested in the acquisition. That approach occurred much later. Knowledge of the latter fact would have tended to have increased the positive impact on trading in Magic shares, as it implied a possibility of competing and higher bids for Magic. So, the impact of the Announcement of 2 August 2013 on Magic's share price was thereby

[3] Mr Lung's 2nd supplemental statement, paragraph 6.
[4] Mr Lung's 2nd supplemental statement, paragraph 7.
[5] Mr Lung's 2nd supplemental statement, paragraphs 8 and 9.
[6] Mr Lung's 2nd supplemental statement, paragraph 12.

increased. The impact of the disclosure of the information available in late April/early May 2013, which did not include that factor, would have been smaller.[7]

588. On the other hand, Mr. Lung said that a countervailing factor was that leakage of the information was more likely as more time elapsed. A greater leakage of the information would result in an increase in Magic share price. So, the impact of the 2 August 2013 Announcement would have had a reduced effect than if it had been made at an earlier date. An announcement at an earlier date would have caused a greater increase in Magic's share price than that it caused in August 2013.[8]

589. It was Mr. Lung's opinion that two separate factors were likely "to cancel out the effect of each other", so that they would not have caused a material net increase/decrease on his assessment.[9]

The impact of the 2 August 2013 Announcement on Magic's share price

590.

5 August 2013

The closing price of Magic shares when trading was suspended in the shares at 2:27 pm on 26 July 2013 was $4.60. Mr. Lung noted that when trading was resumed on 5 August 2013, the closing price of Magic shares was $4.89, in trading of 13.7 million shares. That represented an increase of 6.3% on the previous closing price. In his opinion, that evidenced speculation in the market on the impact of the Announcement. He noted that trading volatility was 12%. That was an unusually high trading volatility.[10]

6-9 August 2013

On 6 and 7 August 2013, the closing price of Magic shares was $4.90 and $4.93 respectively, against Daily falls in the Hang Seng Index of 1.3% and 1.5%. On 6 August 2013 trading volatility was a high 12.7%. On 8 August 2013, the closing price of Magic shares was $5.06, an increase of 2.6% on the previous day's trading. The Hang Seng Index had risen by only 0.3% on 8 August 2013. On 9 August 2013 the closing price of Magic shares was $5.05, a fall of 0.2%. By contrast, the Hang Seng Index had risen by 0.7%[11].

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[7] Mr Lung's 2nd supplemental statement, paragraph 22 (a).
[8] Mr Lung's 2nd supplemental statement, paragraph 22 (b).
[9] Mr Lung's 2nd supplemental statement, paragraph 23.
[10] Mr Lung's 2nd supplemental statement, paragraph 14.
[11] Mr Lung's 2nd supplemental statement, paragraph 15.

591. In Mr. Lung's opinion, the impact of the 2 August 2013 Announcement remained "the key factor" driving Magic's share price up until 9 August 2013.[12] Trading in Magic shares in the period on and between 5 and 7 August 2013 was "active". Given that the volume and price of trading in Magic shares began to stabilise on 9 August 2013, Mr. Lung said that, for the purpose of calculating the increase of the price at which Magic shares traded from its closing price on 26 July 2013 of $4.60 caused by the Announcement, in his opinion it was appropriate to take the average of the closing price of Magic shares on 8 and 9 August 2013, namely $5.055. In the result, it was his opinion that the 2 August 2013 Announcement caused an increase of 9.89% in the traded price of Magic shares.[13]

The effect on the price at which Magic shares would have traded if an announcement of the requisite information had been made on either 8 or 13 May 2013

592. Mr. Lung said that it was his opinion that the increase of 9.89% in the traded price of Magic shares following the 2 August 2013 Announcement "could be used as a reference point" in calculating the likely impact on the trading price of Magic shares, if the announcement had been made on either 8 May or 13 May 2013. In his opinion, "the share price of Magic would on average be trading at around 9.89% higher during the period."[14]

The impact on Magic's investors

593. Mr. Lung said that Magic shareholders who sold their shares during the period from 8 May, or alternatively 13 May 2013, did so without being aware of the takeover negotiations between Magic and the potential buyer. As a result, they sold their shares at a lower selling price than they would have been able to sell them if the information was known to them, namely "at a price of around 9.89% higher on average."[15] Mr. Lung noted that in the period 8 May 2013 to 26 July 2013, 141,037,332 Magic shares were traded, in the range of $4.13 and $5.31 per share, at an aggregate price of $669,214,954. The average price at which those shares had been traded in that period was $4.74495 per share.[16]

Notional Loss

594. For the purposes of calculating notional loss, he excluded from that trading those who had only bought Magic shares or who had bought an equal or greater number of Magic shares

[12] Mr Lung's 2nd supplemental statement, paragraph 16.
[13] Mr Lung's 2nd supplemental statement, paragraph 17.
[14] Mr Lung's 2nd supplemental statement, paragraph 21.
[15] Mr Lung's 2nd supplemental statement, paragraph 24.
[16] Mr Lung's 2nd supplemental statement, paragraphs 24 and 29.

than the Magic shares that they sold. On that basis, he said that a total of 638 investors had sold a total of 76,301,941 Magic shares.[17]

595. In his opinion, if the information about the negotiations taking place between Magic and the potential buyer have been known to the investing public on 8 May 2013 or alternatively on 13 May 2013, after the market had learned and absorbed that information, there would have been an increase in the price at which Magic shares traded. Those investors suffered a notional loss due to Magic's delay in disclosure of that information. In his opinion, that loss was "around 9.89% of the share price on average."[18] The average price at which Magic shares were traded in that period was $4.74495 per share. Given that 76,301,941 shares had been traded by those traders, he calculated that the notional loss suffered by them in that trading was $35,806,636.[19]

The SFC's earlier submissions to the Tribunal

596. Mr. Lung said that he did not agree with the submissions made to the Tribunal by the SFC, dated 2 April 2020, that the aggregate notional loss suffered by investors due to the delay in Magic's disclosure of the information was $162,300,228.[20] First, it had been contended that the cause of the loss was that holders of Magic shares had been denied the material information about Magic, so that those who sold their shares in the period 29 April 2013 to 26 July 2013 sold at prices which were lower than they should have been had the information being disclosed. That methodology assumed that all investors who had sold Magic shares during the relevant period were affected.[21] Secondly, it was asserted that, given the mere leakage of information had caused a rise of 21.25% in the price at which Magic shares were traded, disclosure of the information "would have caused at least the same (if not a higher than 21.25%) rise in the price of Magic shares." The SFC had calculated the percentage loss on the basis of the application of that percentage, namely 21.25%, to the "total turnover of Magic shares" in that period, namely $763,765,778.97.[22]

597. For his part, Mr. Lung said that the figure of 21.25% was merely an estimate of the impact of the leakage of the information on the price of which Magic shares traded. By contrast his calculation of 9.89% as the notional loss was a result of his assessment of what would have

[17] Mr Lung's 2nd supplemental statement, paragraph 30.
[18] Mr Lung's 2nd supplemental statement, paragraph 31.
[19] Mr Lung's 2nd supplemental statement, paragraph 32.
[20] Mr Lung's 2nd supplemental statement, paragraph 33.
[21] Mr Lung's 2nd supplemental statement, paragraph 36.
[22] Submissions for the SFC, dated 2 April 2020, paragraph 42.

been the impact on the share price of the disclosure of the information on either 8 May or 13 May 2013 if an announcement had been made in a similar form to that made on 2 August 2013.[23] Also, the SFC had wrongly assumed that all investors who had sold Magic shares in the market were affected. That method wrongly included those traders who both bought and sold Magic shares.[24]

Mr. Richard Witts

598. In his supplemental statement, dated 1 September 2020, Mr. Richard Witts said that he had been asked to review Mr. Karl Lung's statement, dated 7 July 2020, and to give his observations on the opinion expressed by the latter as to the issue of the notional loss suffered by investors in Magic.

599. However, before he embarked on that task Mr. Witts expressed his own opinion on the issue. He asserted that the Tribunal had "estimated $4.52 as being the price at which the matters discussed between the parties at the April 27 meeting had been broadly reflected in the share price." That was the closing price at which Magic shares were traded on 7 May 2013.[25] Having noted that there were only a "handful" of trades at lower prices on days when the closing price at which Magic shares traded was lower than $4.52, namely 13 May, 3, 6 and 7 June 2013, Mr. Witts said that, apart from those transactions, it was his opinion that there was no notional loss suffered in the trading of Magic shares after 7 May 2013.[26] Subsequently, he said that such trading was "of little consequence" when having regard to trading over the three months period from 8 May to 4 August 2013.[27]

Mr. Witts's observations on Mr. Lung's statement

600. Mr. Witts criticised Mr. Lung's application of what he called "a notional loss levy", on the trading of the balance of Magic shares sold in the period 8 May to 26 July 2013, of a "fixed figure" of 9.89%, as "very arbitrary".[28] Mr. Witts said that Mr. Lung's statement that, "the share price of Magic would on average be trading at around 9.89% higher during the period", was an opinion which "stretches credulity." Having noted that the lowest and highest closing prices in that period were $4.46 and $5.25 on 13 May and 25 July 2013 respectively, Mr. Witts

[23] Mr Lung's 2nd supplemental statement, paragraphs 34 and 35.
[24] Mr Lung's 2nd supplemental statement, paragraph 36.
[25] Mr Witts's supplemental statement, paragraph 6(a).
[26] Mr Witts's supplemental statement, paragraph 6(b).
[27] Mr Witts's supplemental statement, paragraph 20.
[28] Mr Witts's supplemental statement, paragraph 7.

said that it could not be "fair and reasonable" to calculate that sellers of Magic shares at $5.25 per share did so at $0.55 less than the price at which Magic's share would have been trading at if the information had been made available.[29] Furthermore, he disagreed with what he called Mr. Lung's "arbitrary application" of the figure of 9.89% to all trades in Magic shares over a period of almost 3 months in calculating notional loss.[30]

601. Mr. Witts noted that, although Mr. Lung acknowledged that there were a number of different factors which affected the price at which Magic shares traded from time to time, nevertheless he had regard to the whole period of time. The period of three months was an unusually long period of time to do so. Further, Mr. Witts pointed out that the information discussed at the meeting on 27 April 2013 was not the same as that which was disclosed in the Announcement of 2 August 2013, which disclosed the existence of a competitor for the acquisition. Mr. Witts criticised Mr. Lung's opinion that this additional positive element of that information, absent from the information of late April/early May 2013, was equalised by the fact that the leakage of information in the months leading up to 2 August 2013 was greater and, therefore, the impact of the announcement less. That was "obviously over simplistic."[31] Similarly, Mr. Witts said that Mr. Lung's statement that, at the early stage, leakage of the information had not yet been "widely spread" was not borne out by the comparative steadiness of the closing price at which Magic shares traded in May and June 2013. On 8 May and 28 June 2013, trading in Magic shares closed at $4.85 and $4.80 respectively.[32] Mr. Witts invited the Tribunal to note that trading in Magic shares closed at $4.89 on 5 August 2013, following the 2 August 2013 Announcement. That, was a mere 4 cents higher than its closing price on 8 May 2013. He said that was a clear indication that from 8 May 2013 Magic's share price reflected the possibility of Magic being the subject of the takeover bid. In those circumstances, it was his opinion that the making of an announcement by Magic from 8 May 2013 onwards, in the form of the 2 August 2013 Announcement, but without reference to two competing interested parties, "would have not had a material impact on its share price."[33]

[29] Mr Witts's supplemental statement, paragraph 14.
[30] Mr Witts's supplemental statement, paragraph 23.
[31] Mr Witts's supplemental statement, paragraph 14.
[32] Mr Witts's supplemental statement, paragraph 14.
[33] Mr Witts's supplemental statement, paragraph 16.

The date at which to determine the impact of the Announcement of 2 August 2013

602. Mr. Witts said that it was generally accepted that the reaction to information contained in an announcement was best measured by reference to the change in the price at which shares traded on the next day.[34] That was the normal practice.[35] Having noted that Mr. Lung had determined to take the average of the price at which Magic shares closed on 8 and 9 August 2013, namely the fourth and fifth trading days after the Announcement, Mr. Witts said that he could recall no such precedent. Mr. Witts noted that the volume of Magic shares traded on 5 August 2013 was the highest volume in the period 1 March to 9 August 2013. Mr. Lung had acknowledged that was a "high turnover". So, there was no argument that lack of trading activity dictated taking a subsequent date. In addition, Mr. Witts was critical of Mr. Lung's comparison between the performance of the Hang Seng Index on particular days, with trading in Magic shares on those days. In his opinion, their respective performance was "almost irrelevant". Magic could not be compared to the constituents of that Index.[36]

The date with which to compare the price at which Magic shares traded after the 2 August 2013 Announcement

603. Mr. Witts criticised Mr. Lung's determination to compare the price at which Magic shares traded after the Announcement on 2 August 2013 with the closing price on 26 July 2013 of $4.60 as being a determination that cannot "be considered reasonable or fair." Of the fall of 12.38% in the closing price of Magic on 26 July 2013, Mr. Witts said, "this fall has never been fully explained. There was a suggestion that the catalyst may have been the release of weak sales figures by a competitor L'Occitane." He said that on 25 July 2013 Magic's closing price was $5.25, its highest of 2013.[37] In that context, he invited the Tribunal to note that the last date on which Magic shares had closed at $4.60 or lower was 25 June 2013, namely at $4.58. Mr. Witts suggested that it was "not appropriate" to use "the depressed closing price of $4.60" when calculating notional loss.[38]

[34] Mr Witts's supplemental statement, paragraph 8.
[35] Mr Witts's supplemental statement, paragraph 11.
[36] Mr Witts's supplemental statement, paragraph 10.
[37] Mr Witts's supplemental statement, paragraph 12.
[38] Mr Witts's supplemental statement, paragraph 22.

Submissions

The SFC's submissions

604. In the SFC's submissions, dated 16 September 2020,[39] Mr. Scott specifically resiled from the position taken by the SFC in its written submissions, dated 2 April 2020,[40] acknowledging that:

> "It no longer contends that the disclosure of information would have caused a 21.25% increase in Magic's share price…"

Rather, Mr. Scott submitted:[41]

> "The SFC respectfully asks the Tribunal to accept the conclusion in the Lung's Report and find that the notional loss suffered by Magic's investors was HK $35,806,636, or alternatively a substantial amount in that region…"

605. In his oral submissions, on 23 February 2021, Mr. Scott reminded the Tribunal of the alternative position that he had taken in his written reply, dated 23 April 2020, in which he had asserted that the "non-disclosure of *price-sensitive* inside information would have resulted in significant loss to investors".[42] In that reply he had suggested that, even if the Tribunal accepted the point made by Mr. Dawes in his submissions, dated 16 April 2020,[43] that for a substantial portion of the period 29 April to 26 July 2013 the price at which Magic shares had traded was not less than 5-10%, never reaching 21.25%, below the range of the closing price of Magic shares on 5 and 9 August 2013, namely $4.89 and $5.06 respectively, the loss to investors "would be in the region of HK $38-$76 millions." In his oral submissions, Mr. Scott suggested that the calculation of "an entirely hypothetical loss" involved "very difficult theoretical calculations."[44] Nevertheless, Mr. Scott accepted that the assertion made in the SFC's submissions, dated 2 April 2020, that the aggregate net loss to investors was about $162 million

[39] The SFC's submissions, paragraph 11.

[40] The SFC's submissions, paragraph 42:

> "As the mere leakage of inside information had already caused a material rise in the price of Magic shares of 21.25%, the disclosure of the inside information would have caused at least the same (if not a higher than 21.25%) rise in the price of Magic shares. As the total turnover of Magic's shares from 29th April 2013 to 26th July 2013 amount to HK $763,765,778 .97… the notional losses suffered by investors due to the delay in Magic's disclosure of inside information, using an increase of 21.25% in the price of the shares, amounted to an aggregate amount of HK $162,300,228."

[41] The SFC's submissions, paragraph 4 (5).

[42] The SFC's submissions in Reply, dated 23 April 2020, at paragraph 18(3).

[43] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, at paragraph 40.4(b).

[44] Transcript; 23 February 2021, page 41.

was made without any assistance having been sought from Mr. Karl Lung. Rather, it was a "broad brush approach, not justified by any proper analysis."[45]

606. Mr. Scott submitted that the "arguments advanced" and the "conclusion" reached in Mr. Witts's report were without merit.[46] It was wrong for Mr. Witts to contend that disclosure of the information would only cause a notional loss if Magic's shares were sold at a price that was less than $4.52 per share. Disclosure of the information, in the form of the 2 August 2013 Announcement, without an indication as to price per share, would have permitted speculation likely to cause a rise in the price at which Magic shares were traded whether or not prior to the announcement Magic shares were trading at, above or below $4.52. That is what happened after the 2 August 2013 Announcement.[47]

The submissions of the 2nd to 5th Specified Persons

607. In the submissions of the 2nd to 5th Specified Persons, Mr. Dawes contended that there were two contentious issues:

(i) when ought Magic have disclosed the inside information; and

(ii) what was the extent of the loss to the investing public if that information had been disclosed at the relevant time?

The time of disclosure

608. Section 307B of the Ordinance required Magic to disclose inside information that had come to its knowledge "as soon as reasonably practicable". Magic was entitled to take "proper legal advice leading to a rational and comprehensive understanding" of whether disclosure was required.[48] The relevant information was that emerging from the meeting on 27 April 2013. First, it was necessary to determine if that constituted inside information. Secondly, if so, had it come to the knowledge of Magic. That required a consideration of the circumstances and capacity in which Magic's directors, the three Founders, had attended the meeting and become possessed of knowledge of the inside information. Thirdly, was the safe harbour defence provided by section 307D relevant?[49]

[45] Transcript; 22 February 2021, page 15.
[46] The SFC's submissions, paragraphs 13 and 33.
[47] The SFC's submissions, paragraph 14.
[48] Report of the Market Misconduct Tribunal in respect of the listed securities of AcrossAsia Limited, paragraph 199.
[49] The submissions of the 2nd to 5th Specified Persons, paragraph 8.

609. Mr. Dawes submitted that, having regard to the complexity of the task, Magic required until 13 May 2013, namely 10 business days after 27 April 2013, first to obtain proper legal advice from its lawyers and secondly, thereafter for its board of directors to form a view on the necessity of disclosure.[50]

The extent of the loss to Magic's investors by Magic's failure to make disclosure

610. Mr. Dawes submitted that calculation of the notional loss to Magic's investors by its failure to make disclosure required regard to be had to:[51]

(i) a determination of the period in which appropriate disclosure of the information would have had a material impact on the price at which Magic shares traded;

(ii) a determination of the impact that the appropriate disclosure of the information would have had on the price at which Magic shares traded; and

(iii) a multiplication of the difference in price by the net number of Magic shares sold by investors who sold a net number of shares during the relevant period.

611. Mr. Dawes asserted that the price at which Magic shares traded would only have been materially impacted on days when its shares traded at $4.52 per share or below, at which trading in Magic shares closed on 7 May 2013.[52] That was the price at which the inside information that came into being on 27 April 2013 would have been broadly reflected in Magic's share price. Disclosure of the information thereafter would not likely have materially affected the price at which Magic shares traded.[53] In his evidence, Mr. Lung accepted as much. There were four such days, namely: 13 May, 3 June, 6 June and 7 June 2013. Only investors who engaged in a net sale of Magic shares on those days would have suffered a loss.[54] In the result, Mr. Dawes submitted that Magic's breach of its disclosure requirement "did not cause the investing public to suffer a substantial notional loss."[55]

Mr. Lung's calculation of notional loss to Magic's investors

612. Mr. Dawes said that Mr. Lung's calculation of a 9.89% loss to investors who sold Magic shares in the overall period of 8 May 2013, or alternatively 13 May 2013, to 26 July 2013 was

[50] The submissions of the 2nd to 5th Specified Persons, paragraph 10.
[51] The submissions of the 2nd to 5th Specified Persons, paragraph 12.
[52] The submissions of the 2nd to 5th Specified Person, paragraph 14.
[53] The submissions of the 2nd to 5th Specified Person, paragraph 15.3.
[54] The submissions of the 2nd to 5th Specified Person, paragraph 14.
[55] The submissions of the 2nd to 5th Specified Person, paragraph 25.

"plainly untenable".[56] It was based on a calculation of a 9.89% increase in the price at which Magic shares traded between 2 August and 9 August 2013. First, there was no evidence that the increase in the share price in that period would have lasted more than a few days. Also, it did not support the proposition that a similar increase would have occurred in the price at which Magic shares traded over the overall three-month period.[57] Secondly, Mr. Lung had failed to have regard to the variations in the price at which Magic shares traded in that overall period.[58] Mr. Dawes contended that the impact of disclosure of the information would have depended invariably on the price at which the share was trading at that particular time. It was incorrect to suggest that it would have the same impact irrespective of the price at which the share was trading. The price at which Magic shares traded fluctuated significantly in that period. In July 2013, Magic shares traded consistently at more than $5.10 per share. That was higher than the price at which Magic shares traded after the 2 August 2013 Announcement. An application of Mr. Lung's approach of taking a notional loss of 9.89% of shares sold in the period implied that those who sold their Magic shares in July 2013 would have been able to do so at between $5.57 and $5.77 per share. Even after the 2 August 2013 Announcement, trading in Magic shares did not reach that price range. Such an "assumption is both unsustainable and unfair."[59]

613. Mr. Dawes said that in addition Mr. Lung had failed to have regard to the factors which contributed to the price at which Magic shares traded in August 2013, but which were not present in May 2013. First, the 2 August 2013 Announcement contained reference to possible offers for Magic's entire issued share capital by two different offerors. That was "a highly material factor".[60] Mr. Lung's attempts to discount that positive effect in August by asserting that it would have been cancelled out by the greater impact of an earlier announcement, at which point the leaked information would not have been widely spread, had no evidential basis. There was no evidence of a significant increase in the spread of leaked information over the period May to August 2013. Indeed, that assertion was inconsistent with the fall of 12.38% in the price at which trading in Magic shares closed on 26 July 2013.[61] That fall in the share price "may have resulted from the release of weak sales figures by a competitor, L'Occitane."[62] Secondly, it was likely that part of the increase in the price at which Magic shares traded on

[56] The submissions of the 2nd to 5th Specified Persons, paragraph 18.
[57] The submissions of the 2nd to 5th Specified Persons, paragraph 19.
[58] The submissions of the 2nd to 5th Specified Persons, paragraph 20.
[59] The submissions of the 2nd to 5th Specified Persons, paragraph 20.4.
[60] The submissions of the 2nd to 5th Specified Persons, paragraph 21.2.
[61] The submissions of the 2nd to 5th Specified Persons, paragraph 21.4.
[62] The submissions of the 2nd to 5th Specified Persons, paragraph 21.6.

and between 2 August and 9 August 2013 was a belief in investors that, as a result of the earlier fall in price, Magic shares were undervalued, and rather than the impact of the 2 August 2013 Announcement.[63]

Conclusion

614. In light of his criticism of Mr. Lung's analysis, Mr. Dawes invited the Tribunal to prefer the analysis of Mr. Witts. In those circumstances, he invited the Tribunal to find that "the notional loss suffered by the investing public would not have been substantial" and to have regard to that when determining the appropriate sanctions and consequential orders to be made.[64]

The submissions of the 1st Specified Person

615. In the submissions of the 1st Specified Person, dated 30 September 2020, Mr. Laurence Li did not engage the issue of the validity of the opinions expressed by Mr. Lung and Mr. Witts. Rather, he invited the Tribunal to note that Mr. Lung's assessment of the notional loss as being $35,806,636 was a "whole order of magnitude lesser than the SFC's initial, untenable figure of HK $162,300,228."[65] He submitted that in consequence the fine of $1 million that the SFC had suggested be visited on Magic should be adjusted downward. Having noted that Mr. Witts was of the opinion that there was "no notional loss save for a handful of trades in May and June 2013", Mr. Li simply said "Magic does not need to rely on this evidence."[66]

The submissions of the 6th Specified Person

616. In the submissions of the 6th Specified Person, Mr. Derek Chan stated that Mr. Lung's assessment of notional loss, suffered by Magic investors in the period 8 May to 26 July 2013, as being $35,806,636 was not accepted, whilst that of Mr. Witts that there was such a notional loss, but that it was limited to those who sold Magic shares on 13 May, 3, 6 and 7 June 2013, was accepted.[67] Mr. Chan was critical of the fact that, in determining the effect of Magic's 2 August 2013 Announcement, Mr. Lung had taken an average of the closing price on 8 and 9 August 2013, the fourth and fifth days of trading after the 2 August 2013 Announcement, but had taken a single date, 26 July 2013 as the date against which that increase was measured.

[63] The submissions of the 2nd to 5th Specified Persons, paragraph 21.7.
[64] The submissions of the 2nd to 5th Specified Persons, paragraph 23.
[65] The submissions of the 1st Specified Person, paragraph 4.
[66] The submissions of the 1st Specified Person, paragraph 5.
[67] The submissions of the 6th Specified Person, paragraph 6.

That was illogical and unexplained.[68] He invited the Tribunal to note that Mr. Witts had calculated that the average closing price for Magic shares in the five-day trading days before the 2 August Announcement was $5.076 per share. Further, Mr. Chan took issue with Mr. Lung's application of the resulting calculation of an increase of 9.89% to all trades in the overall period from 8 May to 26 July 2013. He endorsed Mr. Witts's opinion that that "stretches credulity". He invited the Tribunal to note that Mr. Lung acknowledged that the share price of Magic in that overall period was affected by a number of different factors which change from time to time.[69]

The SFC's Reply submissions

617. In the SFC's Reply submissions, dated 12 October 2020, issue was taken by Mr. Scott with a range of the criticisms advanced by the Specified Persons in their submissions.

The time for disclosure

618. Mr. Scott invited the Tribunal to reject the submission made on behalf of the 2nd to 5th Specified Persons that, having regard to the various complexities involved in obtaining properly informed legal advice to address all the circumstances it was not realistic to have expected the board of directors of Magic to have formed a view about the necessity of disclosure before 13 May 2013. On the contrary, he submitted that such a view ought to have been formed by 8 May 2013.[70] That itself was generous, affording Magic seven business days to resolve the issue. The Tribunal was invited to note that in its report in *AcrossAsia* the Tribunal had determined that, in the particular circumstances of that case, the period from Friday 4 to Tuesday 8 January 2013, namely two business days, was the appropriate period of time over which the board of directors could have received informed legal advice and made a decision as to disclosure. The Tribunal's findings that the three specific enquiries made of directors of Magic prior to the meeting of 27 April 2013 indicated that "it is likely that there was a leakage of information" ought to have alerted the directors of Magic to act quickly in obtaining legal advice and of the urgent need to make the requisite disclosure.[71]

[68] The submissions of the 6th Specified Person, paragraph 6.
[69] The submissions of the 6th Specified Person, paragraph 5.
[70] The SFC's Reply submissions, paragraph 4.
[71] The SFC's Reply submissions, paragraph 6 (2).

The impact of disclosure of the information

619. Mr. Scott invited the Tribunal to reject the submissions made on behalf of the 2nd to 5th Specified Persons that in calculating notional loss regard was to be had to the common opinion of Mr. Lung and Mr. Witts that disclosure of the information would only have materially impacted the price at which Magic shares traded at a trading price of $4.52 or less. In forming his opinion, Mr. Lung specifically referred to the information of a tentative offer price of not less than $5.5 per share. It was his opinion that, although information about the potential acquisition would have had a positive impact on the price at which Magic shares traded, the impact would no longer have been material when Magic shares traded at $4.52 per share. So, even if the impact on price was no longer material, nevertheless there would still be notional loss.[72] Disclosure of the information in the form of the 2 August 2013 Announcement would not have involved disclosure of all the information. Rather, there would have been a disclosure of a potential acquisition, which would have afforded scope for speculation as to the potential impact. A rise in the price at which Magic shares traded implied the need for a higher offer price if the transaction was to be successful. In the event, that is what happened. The final offer price was $6.30 per share.[73]

Trading on a false premise

620. Mr. Scott invited the Tribunal to accept that in the absence of disclosure of the information by Magic, trading in Magic shares in the months from May until the end of July 2013 had proceeded on a false premise, namely that there was no prospective takeover bid. Those trading in such circumstances had sustained losses.[74]

The calculation of the impact of the 2 August 2013 Announcement

621. Mr. Scott took issue with the complaint of Mr. Chan on behalf of the 6th Specified Person that Mr. Lung had erred in taking a single date, 26 July 2013, as the date against which to compare the impact of the 2 August 2013 Announcement, for which purpose he took the average price of trading in Magic shares on 8 and 9 August 2013. In order to calculate the impact of the Announcement it was necessary to permit the market an appropriate period of time to absorb the information and react to it. There was no such necessity in respect of the date against which that comparison was to be measured.[75]

[72] The SFC's Reply submissions, paragraph 7 (5).
[73] The SFC's Reply submissions, paragraph 7 (3) and (4).
[74] The SFC's Reply submissions, paragraph 9.
[75] The SFC's Reply submissions, paragraph 13.

622. Mr. Scott pointed out that it was Mr. Witts's evidence that the fall in the price at which Magic shares traded on 26 July 2013 was not explained. The suggestion in the submissions made on behalf of the 2nd to 5th Specified Persons that it may have resulted from the release of weak sales figures by a competitor was "mere speculation".[76]

623. Of the criticism of Mr. Lung, that he had failed to have regard to variations in the price of Magic shares in the period May to the end of July 2013, Mr. Scott pointed out that the disclosure requirement of Magic was not of the tentative offer price of not less than $5.50 per share, rather it was of a prospective takeover bid only. It was to be noted that, at the material time, Magic shares traded in the general range of $4.00 to $5.00. There was no basis to suggest that information of a prospective takeover bid would have an impact only at the lower figure and not the higher figure.[77]

624. Of the criticism of Mr. Lung's approach to the content of the 2 August 2013 Announcement, Mr. Scott reminded the Tribunal that Mr. Lung accepted that one difference in the information contained in the Announcement from the information existing in late April/early May 2013 was the emergence of a second bidder for Magic. Mr. Lung had acknowledged that information would have had an additional positive effect on the price at which Magic's shares traded. On the other hand, Mr. Scott accepted that, even if Mr. Lung was wrong in determining that factor was balanced by the increasingly widespread leakage of information as time elapsed, the consequence would be merely to reduce the figure of 9.89% he had calculated was the impact of the Announcement. It would not have had the effect of rendering it of no or little impact.[78]

625. Finally, Mr. Scott reiterated the criticisms of Mr. Witts made in the initial Submissions for the SFC. Although Mr. Witts was critical of Mr. Lung's methodology and analysis in calculating notional loss, Mr. Witts had not advanced his own calculation of notional loss. He had failed to provide the Tribunal with any assistance.[79]

[76] The SFC's Reply submissions, paragraph 10 (4).
[77] The SFC's Reply submissions, paragraph 10 (2).
[78] The SFC's Reply submissions, paragraph 10 (3).
[79] The SFC's Reply submissions, paragraph 11.

Conclusion

626. In the result, irrespective of the calculation of a precise figure of notional loss, it was submitted that a "substantial" loss was sustained by the investing public.[80]

Discussion

627. In Part 1 of our Report we said that we were satisfied that the inside information in relation to Magic and its shares, which came into existence at the meeting of 27 April 2013, came to Mr. Stephen Tang's knowledge in the course of performing functions as an officer of Magic and that a reasonable person, acting as an officer of Magic, would consider that the information was inside information in relation to Magic. In the result, we determined that the inside information came to the knowledge of Magic. Accordingly, subject to the operation of section 307D, Magic had a duty to disclose information to the public as soon as reasonably practicable.[81]

628. There is no dispute that Magic did not make any disclosure at all to the public of the discussions with L'Oreal with any of its shareholders which "may lead to an offer… for all the issued shares" of Magic until 2 August 2013.[82]

The requisite date of disclosure

629. In discharge of its duty to disclose the information to the public as soon as "reasonably practicable" the board of directors of Magic was entitled to take sufficient time to understand the circumstances of those events and to obtain and understand legal advice of the consequences before being required to make disclosure to the public "as soon as reasonably practicable".

630. We are satisfied that the factual and legal issues involved were not complex. We do not accept Mr. Dawes's submission that the board of directors of Magic was entitled to take until 13 May 2013 to be informed of the circumstances, to obtain and consider legal advice and determine to disclose the appropriate information. We note that in his written submissions, dated 16 April 2020, in addressing the issue of the reasonable time to be afforded to the board of directors of Magic in discharging those duties, Mr. Dawes adverted to disclosure being made by 3 May 2013, which he said afforded five days for the task.[83] In context, Mr. Dawes was

[80] The SFC's Reply submissions, paragraph 15 (2).
[81] Report, paragraph 243.
[82] Report, paragraph 390.

there acknowledging that disclosure to the public of the information by the board of directors of Magic by 3 May 2013 was the earliest date at which such disclosure was required.

631. At the hearing on 25 April 2020 the Tribunal granted the parties an opportunity until 8 May 2020 to agree upon the terms of reference to be provided to expert witnesses. By a letter, dated 12 May 2020, the SFC informed the Tribunal that the SFC and those representing the 2nd to 5th Specified Persons "…cannot reach agreement on the date on which disclosure ought to have been made." In those circumstances, the parties asked that the expert witness be asked to calculate notional loss suffered by Magic investors, as set out in the attached 'Proposed terms of reference', "…on the basis that on 8 May 2013 (or alternatively, on 13 May 2013), Magic ought to have issued an announcement in the form of its announcement dated 2 August 2013." By a letter and Directions, dated 13 May 2020, the Tribunal directed, *inter-alia*, that Mr. Karl Lung be given those terms of reference in preparing his expert report.

632. There is some force in Mr. Scott's submission that affording the board of directors of Magic a period of seven business days to perform the task, namely until 8 May 2013, was "very generous".[84] Nevertheless, we are satisfied that the board of Magic ought to have made disclosure of the information to the public by 8 May 2013.

The relevance of the response of the market to Magic's 2 August 2013 Announcement

Two, not only one, bidders

633. There is no dispute that the information disclosed in Magic's 2 August 2013 Announcement was different from the information that would have been required to have been in the requisite announcement if it had been made on 8 May 2013. Whilst the 2 August 2013 Announcement informed the public of two competitors seeking to buy Magic's shares, there was only one such party in late April/early May 2013. As Mr. Lung acknowledged, the 2 August 2013 Announcement implied the possibility of "competing and higher bids than where only one party was interested in the takeover". By contrast, given that there was only one interested party at the time, he noted that if an announcement had been made by Magic of the requisite information on 8 May 2013, "such factor would not have been applicable and hence the impact on Magic's share price ought to be smaller."[85] It is to be noted Mr. Lung's opinion

[83] The submissions of the 2nd to 5th Specified Persons, paragraph 43.4:

> "If one only grants the SPs 5 days to procure and understand the legal advice, this means that the Inside Information ought to have been disclosed by 3 May 2013."

[84] The SFC's Reply submissions, paragraph 6.

[85] Mr Lung's 2nd supplemental statement, paragraph 22(a).

on that issue accorded with the opinion expressed by Mr. Witts. Of the reaction on 5 August of Magic's share price to Magic's 2 August 2013 Announcement, Mr. Witts said "It also would have reacted to the new news that there were two contenders for Magic and not just one. This must have been a positive."[86]

634. With respect, we are satisfied that Mr. Lung and Mr. Witts are correct in expressing the opinion that a greater positive impact on the price at which Magic shares were traded was to be expected from an announcement that there were two competitors, rather than one only, bidding to acquire Magic shares. We are satisfied that Mr. Dawes was correct to describe the difference between the two pieces of information as "material". So, it was to be expected that the price at which Magic shares traded after the market had absorbed the information contained in the 2 August 2013 Announcement would have been greater than an announcement of one bid only, such as ought to have been made on 8 May 2013.

635. However, Mr. Lung has not sought to calculate in any way the increased positive effect on trading in Magic shares of disclosure of information that there were two competitors rather than one competitor. Rather, Mr. Lung simply calculated that the 2 August 2013 Announcement "…had caused an increase of about 9.89%" in the price at which Magic's shares traded after the information had been absorbed by the market.

The effect of leakage of information/delay in making an announcement on the response of the market to disclosure

636. Mr. Lung said that the increased positive effect on the price at which Magic shares traded in response to the information that there were two competitors bidding to acquire all the shares of Magic, rather than a sole bidder, was negated by the fact that the Announcement was not made until 2 August 2013. He said that an announcement of the information that existed in late April/early May 2013 would have had different effects depending on the time at which it was made. He explained that was because "leakage of the takeover information is more likely as time passes." He asserted that an announcement made at an earlier date was one that would have been made "when the leaked information had not yet been widely spread." He said that in consequence the impact of such an announcement at that stage on the price at which Magic shares traded would have been of "greater magnitude" than if it had been made "on a later date."

[86] Mr Witts's supplemental statement, paragraph 6.

637. It is to be noted that Mr. Lung has not condescended to identify the different points in time at which he asserts that the information "had not yet been widely spread" in contrast to the point at which it was more widely spread. In particular, Mr. Lung did not attempt to calculate the impact that a measure of leakage of information to the market in respect of the agreement reached on 27 April 2013 might have had on the reduction in the positive reaction to an announcement of the requisite information in the form of the 2 August 2013 Announcement if it had been made on dates after 8 May 2013. In particular, Mr. Lung did not seek to calculate the measure of the reduced positive reaction, compared with it having been announced on 8 May 2013, if that information had been the information contained in the 2 August 2013 Announcement.

638. On his analysis, Mr. Lung identified circumstances in which the impact on the price at which Magic shares traded was of an increased positive nature (the existence of two competing bidders in the 2 August 2013 Announcement) and of a sliding scale of a negative nature depending on the time of the disclosure of the information known in late April/early May 2013. However, in seeking to calculate the net respective effects of those two competing impacts, Mr. Lung merely asserted blithely:[87]

> "It does not appear to me that the combined effect of the above factors (which is likely to cancel out the effect of each other) would cause a material net impact (either to increase or decrease) on my assessment."

Mr. Lung offered no explanation whatsoever as to why, in his opinion, the combined effects of the factors would likely cancel each other out.

639. It was on that basis that Mr. Lung felt able to go on to assert that an announcement on 8 May 2013 of the requisite information known in late April/early May 2013 "would have a positive impact on the share price of Magic",[88] so that "Magic's shares would, on average, be trading at a price of around 9.89% higher."[89]

640. With respect to Mr. Lung, we do not accept that there was a proper foundation for him to express the opinion that the two factors would likely cancel out the effect of each other. As noted earlier, the figure of 9.89% was his calculation of the effect on the price at which Magic shares traded in consequence of the information in the 2 August 2013 Announcement. As such,

[87] Mr Lung's 2nd supplemental statement, paragraph 23.
[88] Mr Lung's 2nd supplemental statement, paragraph 19.
[89] Mr Lung's 2nd supplemental statement, paragraph 21.

it was not directly relevant to the calculation of what would have been the effect that disclosure on 8 May 2013 of the different information that existed in late April/early May 2013. The superficial attractiveness of a calculation, supposedly accurate to two decimal points, does not conceal the fundamental flaws in the calculation. In the result, we do not accept Mr. Lung's evidence that an announcement on 8 May 2013 of the information known in late April/early May 2013 would have positively impacted the price at which Magic shares traded by around 9.89% and that the loss suffered by Magic's investors was $35,806,636."

The appropriate date at which to assess the impact of a company's announcement on the price at which its shares traded

641. Of the assessment of the impact of an announcement on the price at which the shares of a company traded, Mr. Witts said that "the normal practice" was for such impact "to be assessed by reference to the price at closing on the day immediately following the announcement".[90] Earlier, Mr. Witts had said, "It is generally accepted that a reaction to news is best measured by the increase or decrease in a share price from one day to the next."[91]

642. Trading in Magic shares had been suspended at 2:27 p.m. on 26 July 2013. The Announcement was made on Friday, 2 August 2013. The first day of trading thereafter, was Monday, 5 August2013.

643. However, having noted that the volume of trading in Magic shares on 5 August 2013 was "the highest for the period March 1 to August 9, 2013", with a closing price of $4.89, and that the volume of trading on 6 August 2013, with a closing price of $4.90, was "the second highest for the period", Mr. Witts acknowledged:[92]

> "I can see an argument that the impact of the announcement be considered to be that figure, but no later date."

It is to be noted that the volume of Magic shares traded on 5 and 6 August 2013 was 13.6 million and 9.9 million shares respectively.

[90] Mr Witts's supplemental statement, paragraph 11.
[91] Mr Witts's supplemental statement, paragraph 8.
[92] Mr Witts's supplemental statement, paragraph 11.

644. Of the volume of trading of Magic shares on 7, 8 and 9 August 2013, Mr. Witts said that, whilst "still high", it was "moderating". In fact, the volume of Magic shares traded on those dates was 4.5 million, 4.2 million and 5.1 million respectively.

Absorption of/reaction to the information by the market

645. By close of trading on 6 August 2013, the market had had four days in which to absorb the information contained in the 2 August 2013 Announcement, two of which days were trading days which had seen high volumes of trading. The relevant information was succinct: Magic and certain of its shareholders had been in negotiations with an independent third party, which might have led to an offer for all of the issued shares of Magic, when Magic had been approached by another independent third party with an indicative offer which also might lead to an offer for all of the issued shares of Magic. The board of directors of Magic had not been notified of any firm intention to make an offer by either of the potential offerors. No legally binding agreements had been entered into in respect of the possible offers. Nevertheless, clearly that information laid a foundation for obvious speculation that competing offers might be forthcoming.

646. There is force in Mr. Witts's observation of the volume of trading on 5 August 2013, namely that it could not be argued that there was a lack of activity in trading which "indicated that a reaction to the announcement had not been shown." Having closed on 5 August 2013 at $4.89, a rise of $0.29 on the closing price of 26 July 2013, on 6 August 2013, although the 9.9 million Magic shares that were traded continued to be at a high level, the closing price on that date was a very modest increase over the previous closing price to only $4.90. In those circumstances, it is difficult to see why it is that Mr. Lung found it necessary to have regard to 3 further days of trading in calculating the impact of the announcement.

647. Mr. Lung's justification for his approach was that the gain in the closing price on 7 August 2013 to $4.93 was against a loss on the Hang Seng Index and that the gain in the closing price on 8 August 2013 to $5.06 was against a very much smaller gain on the Hang Seng Index. Mr. Lung noted that this pattern ended on 9 August 2013 when the closing price of Magic shares was lower at $5.05, whereas the Hang Seng Index had increased 0.7%. Of that he concluded, "…the impact of the August Announcement remained as the key factor driving Magic's share price up to August 9, 2013." Again, in context there is force in Mr. Witts's criticism that reliance on the relative performance of Magic shares compared to that of the

Hang Seng Index was "almost irrelevant".[93] Of that, he noted that "Magic's trading history as a second/third liner industrial stock shows little relevance to general market sentiment."

Conclusion

648. We are satisfied that the closing price at which Magic shares traded on 6 August 2013, namely $4.90 per share, is the appropriate point at which to seek to start to determine the impact of the information contained in the 2 August 2013 Announcement. By that date the market had had four days in which to react to the information. It did react with greatly increased volume of trading on 5 August 2013, with an increase in the closing price of 6.3% over the closing price on 26 July 2013. On 6 August 2013, although the volume of trading continued at an elevated level, nevertheless it was significantly reduced from the previous day. More significantly, the closing price on 6 August 2013 was only 0.2% higher than the previous closing price. In relative terms, Magic's share price had stabilised. The closing price on 6 August 2013 represented an increase of 6.52% over the price at which Magic shares had traded on 26 July 2013. We do not accept that it is appropriate to have regard to subsequent trading in making that determination.

The validity of a comparison with the last day of trading, 26 July 2013

649. Mr. Witts took issue with the comparison performed by Mr. Lung between the closing price of trading after the 2 August 2013 Announcement with the closing price on the last day of trading, namely 26 July 2013. He noted that when it was suspended from trading, Magic's shares closed at $4.60 per share, a fall of 12.38% from its previous closing price of $5.25 per share. As noted earlier, he said, "this fall has never been fully explained. There was a suggestion that the catalyst may have been the release of weak sales figures by a competitor L'Occitane."[94] Later, he added that the decisive movement in share price appeared to be a prime example of movements which defy explanation, "unless one accepts the suggestion that the price was influenced by the unexpectedly poor sales performance of a competitor."[95]

650. In his first statement, dated 28 February 2019, Mr. Witts addressed the same issue. He noted that in an email, sent at 15:12 hours on 26 July 2013, by Mr. Leo Liu BNP Paribas to various parties at L'Oreal under the subject, 'Martha-Suspension', the former noted that he had

[93] Mr Witts's supplemental statement, paragraph 10.
[94] Mr Witts's supplemental statement, paragraph 12.
[95] Mr Witts's supplemental statement, paragraph 22

called Mr. Stephen Tang, who said that he had no idea why there had been the "big drop" in the price at which Magic shares traded.[96] The email continued:[97]

> "There is a industry news. L'Occitane-HK listed skincare company announced decline of the sales for the second quarter in 2013 compared to the last two quarter. Company to the last quarter 2012, the sales dropped about 11.29% (.) The share price drops 8.23% till now."

651. Of Mr. Leo Liu's reference to that information, Mr. Witts said that, "suggests that the catalyst for this drop may have been the skincare competitor L'Occitane had announced some weak sales figures for the three months ended 30 June 2013 on the day before."

652. Attached to Mr. Witts's statement were the 'Unaudited Trading Update' for: (i) the three months ended 30 June 2013, dated 25 July 2013; (ii) the six months ended 30 September 2012; and (iii) the nine months ended 31 December 2012.[98] Of those results, Mr. Witts said, "Group net sales were up only 1.9% compared with the equivalent period in the previous year… This contrasted with growth of 21.9% in Group net sales for the six months ended 30 September 2012…and 17.6% growth for the nine months ended 31 December 2012." Mr. Witts concluded:

> "Sales growth for L'Occitane was clearly slowing and I would agree with Mr. Liu that *it probably precipitated the weakness of Magic's share price on the same day*. It is also an indicator that sentiment surrounding Magic's share was still primarily influenced by factors concerning its business performance rather than takeover rumours." [Italics added.]

653. In fact, as is readily apparent from the email, Mr. Leo Liu had made no such statement. Similarly, there was no such statement in Mr. Leo Liu's record of interview or in his oral testimony in the Tribunal.

654. For his part, in his subsequent statement Mr. Witts went on to speculate that the upward movement of the closing price at which Magic shares traded on and between 5 and 8 August 2013 "could easily be principally a partial recovery from the bigger collapse of 12.38% on July 26 should the negative rumours surrounding Magic more than a week earlier have been dismissed."[99]

[96] Mr. Witts's statement, paragraph 25.
[97] Exhibit Bundle, page 1042.
[98] Expert Evidence Bundle, pages 993-1002.
[99] Mr Witts's supplemental statement, paragraph 22.

655. It is to be noted that, having referred to the Announcement, dated 26 July 2013, in respect of suspension of trading in the shares of Magic, the Announcement of 2 August 2013 merely stated:

> "…the Board confirms that, save as disclosed in this announcement, it is not aware of any reasons for the movement in price of the Shares or of any information which must be announced to avoid a false market in securities of the Company or of any inside information that needs to be disclosed…".

The statement that the board of directors of Magic was not aware of any reasons for the movement in its share price resonated with the contemporaneous statement of Mr. Stephen Tang reported by Mr. Leo Liu in his email, dated 26 July 2013, namely that he had "no idea what happened. And he will not guess anything."

The relevance of L'Occitane's results

656. As is readily apparent from the various announcements of L'Occitane's results referred to by Mr. Witts, those results were of the Group and specifically included descriptions of sales in nine specified countries/regions, including China, France, the United States of America and Russia. The description of a reduction in the growth of sales in the three months ended 30 June 2013 to 1.9% was in respect of those overall sales. Separately, it was noted that:

> "Growth was primarily driven by China, France, the United States, Hong Kong and Russia.
>
> China and Russia remain the fastest-growing countries (28% and 16% respectively)."

657. The 28% growth in net sales in China reflected an increase in the year ended 30 June 2013 of €3,288,000 from €11,319,000 to €14,607,000. Those net sales represented 6.6% of the total net sales of the Group. The growth in net sales in China for that period was an increase over the growth in net sales reported for the six months ended 30 September 2012 and for the nine months ended 31 December 2012, namely 22.7% and 26.8% respectively.

658. Given that Magic's sales were entirely domestic within China such relevance as L'Occitane's results might have had to Magic was likely primarily limited to L'Occitane's results in China. At a macro level, those results reflected a pattern not only of ongoing increased growth of net sales but also growth at an increasing rate. However, importantly, the Tribunal has received no evidence of any comparison of similarities or dissimilarities between the range of products and the nature of the sales by L'Occitane in China and those of Magic and, more

particularly, no evidence of the relevance of L'Occitane's results in China to an understanding or an evaluation of Magic's sales performance in China.

Conclusion

659. We are satisfied that in all the circumstances there is no evidential basis to support Mr. Witts's opinion that the L'Occitane results dated 25 July 2013 "probably precipitated the weakness of Magic's share price" on 26 July 2013.

660. In the result, we are satisfied that there is no evidence of why Magic's shares closed down 12.38% on 26 July 2013. Equally, the cause of that fall not being known, there is no evidence of what, if anything, might have assuaged such concerns that might have existed in the market and might have led to that fall in the closing price at which Magic shares were traded. They were two unknowns.

661. On the other hand, in seeking to calculate the impact of the dissemination to the public of the information contained in the 2 August 2013 Announcement, clearly the fact that the significant fall in the closing price of Magic shares on 26 July 2013 was unexplained is a relevant *caveat* to bear in mind in determining the validity and utility of such a calculation.

662. In addition, as noted earlier, the usefulness of seeking to calculate the impact of the information contained in the 2 August 2013 Announcement as a means of inferring the impact that an announcement of the requisite information on 8 May 2013 would have had on the price at which Magic shares traded is limited by the fact that there was a material difference between that information and that which was announced on 2 August 2013. Only the latter related to potential offers by two separate independent third parties and implied the possibility of competing bids for the issued shares of Magic.

The loss to net sellers of Magic shares

663. On the other hand, as Mr. Dawes has always conceded, we are satisfied that there was some loss to investors who were net sellers of Magic shares after the date on which the information ought to have been disclosed publicly, namely on 8 May 2013, up and until the markets closed on 26 July 2013.

664. We do not accept that their loss was restricted to those who sold their Magic shares at $4.52 or below. That was the closing price of Magic shares on 7 May 2013 and was the date in respect of which Mr. Lung, endorsed by Mr. Witts, expressed the opinion that disclosure of the

information thereafter would not likely "materially" affect the price at which Magic shares traded. It is to be noted that Mr. Lung expressed that opinion in the context of the tentative offer price of not less than $5.50 per share. It was by reference to that tentative offer price that Mr. Lung noted that it was at a premium of only 21.6% over the closing price of $4.52 at which Magic shares traded on 7 May 2013. Of that specific information, he said that whilst it might still have a positive impact on Magic's share price, nevertheless it "might not reach a material effect on the price."

665. Of course, information as to the minimum tentative price offer would not have featured in the requisite disclosure of information in an announcement on 8 May 2013, if one had been made, in the form of the 2 August 2013 Announcement. Mr. Lung is not to be taken as having testified that disclosure of the information in the form of the 2 August 2013 Announcement would not have had a positive impact on Magic's share price. As Mr. Scott submitted, disclosure of a potential acquisition would have afforded scope for speculation as to the potential impact on the price at which Magic shares traded.

666. There is no dispute that, with the exception of some who may have benefited from leakage of information, those who sold their Magic shares in the period 29 April to 26 July 2013 did so in ignorance of the agreements reached in the meeting on 27 April 2013. Magic ought to have disclosed the requisite elements of that agreement to the public by 8 May 2013. So, generally, those that sold their Magic shares thereafter did so in ignorance of information to which they were entitled. We are satisfied that disclosure of the information of a potential acquisition of Magic shares in an announcement on 8 May 2013, in the form of the 2 August 2013 Announcement would have had a positive impact on the price at which Magic shares traded. It follows that those who thereafter were net sellers of Magic shares sold at a loss. We are satisfied that is the case, albeit that we have rejected Mr. Lung's quantification of the aggregate net loss to such investors.

Conclusion

667. As noted earlier, Mr. Dawes invited the Tribunal to conclude that, although there was some loss to those investors, it was "not substantial". For his part, having acknowledged the difficulties in determining a precise figure of notional loss, Mr. Scott nevertheless invited the Tribunal to conclude that a "substantial" loss was sustained by the investing public. Neither of them suggested any numerical calculation in terms of dollars of such loss. For our part, we are satisfied that such loss was "significant" and in the range of millions of dollars in total.

CHAPTER 11

ORDERS

The SFC's submissions: section 307N

668. In its written submissions, dated 2 April 2020, the SFC invited the Tribunal to have regard to the orders made in earlier reports[100] of the Tribunal in respect of breaches of the disclosure requirements in relation to the securities of the respective companies, contrary to section 307G of the Ordinance, as providing "useful guidance and a benchmark" to a consideration of the orders to be imposed by the Tribunal in respect of Magic and its officers, having regard to the particular features relevant to their respective cases.

Seriousness of the breaches of the disclosure requirements: relevant features

669. Mr. John Scott SC and Mr. Jenkin Suen SC, for the SFC, identified various features in the commission of the breaches of the disclosure requirements, which they submitted were relevant to the seriousness of those breaches.

(i) There was a delay of around three months from the time in early May 2013 when Mr. Stephen Tang, whose knowledge was attributable to Magic, became aware of the failure to preserve the confidentiality of the inside information which he knew to have come into existence on 27 April 2013 and the first disclosure at all by Magic of that information by its announcement on 2 August 2013.[101]

(ii) Magic's breach of the disclosure requirement was all the more serious because the Tribunal had found that not only had it had not taken all reasonable measures to monitor the confidentiality of that inside information but also it had not disclosed it to the public as soon as reasonably practicable after Magic became aware that the confidentiality of that information had not been preserved.[102]

(iii) Of the Tribunal's determination[103] that the negligent conduct of Mr. Stephen Tang and Mr. Chris Cheng had resulted in Magic's breach of its disclosure requirement, in particular their respective failures to provide their fellow directors and Magic's legal advisers with all the information which they possessed that was relevant, it

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[100] *AcrossAsia Limited* (29 November 2016); *Mayer Holdings* Limited (7 February and 5 April 2017); *Yorkey Optical International (Cayman) Limited* (27 February 2017); and *Fujikon Industrial Holdings Limited* (22 May 2019).

[101] SFC's Submissions, 2 April 2020, paragraphs 31-33.

[102] SFC's Submissions, 2 April 2020, paragraphs 34-35.

[103] Report, paragraphs 410-436.

was submitted that conduct was "serious and deliberate misconduct".[104] Further, the Tribunal found that Mr. Chris Cheng had lied in testifying that he had raised with Mr. Stephen Tang the question of when the preliminary discussions had taken place but also had lied in testifying that, at the meeting of 24 May 2013, Ms. Susana Lee asked Mr. Stephen Tang what had been discussed at the preliminary meetings with L'Oréal.

(iv) Of the Tribunal's determination that Mr. Stephen Tang, Mr. Chris Cheng, Mr. She, Mr. Luo and Mr. Sun Yan failed to take all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach of Magic's disclosure requirement[105], having regard to the highly deficient measures of Magic to monitor the confidentiality of information, the failure was particularly serious: in particular, there was no or a wholly deficient audit trail of meetings and discussions concerning the assessment of inside information; there were no written policies or procedures dealing with any of the measures suggested in paragraph 60 of the *Guidelines*; and, in acknowledging that he did not take any steps to ensure that proper safeguards existed to prevent the breach of Magic's disclosure requirement, Mr. Sun Yan had abdicated his responsibilities for doing so.[106]

(v) Magic, whose current management was not privy to the events inside Magic at the material time, could have taken a neutral stance but rather had disputed "almost each and every issue in these proceedings", thereby lengthening the proceedings and increasing the costs of the SFC.[107]

Proposed orders

Disqualification order: section 307N (1)(a)

670. Mr. Scott invited the Tribunal to approach the making of a disqualification order, pursuant to section 307N (1)(a) of the Ordinance having regard to the approach taken by the Court of Appeal of England and Wales in *Re Sevenoaks Stationers (Retail) Ltd*[108], which approach was adopted by this Tribunal in *Mayer*, namely to identify three brackets:

(i) the top bracket was reserved for "particularly serious cases";

[104] SFC's Submissions, 2 April 2020, paragraphs 38.
[105] Report, paragraphs 473-516; 531-534; and 535-537.
[106] SFC's Submissions, 2 April 2020, paragraph 39.
[107] SFC's Submissions, 2 April 2020, paragraph 44.
[108] *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 174.

(ii) the middle bracket for "serious cases which do not merit the top bracket"; and

(iii) the third bracket for cases that were "relatively not very serious".

671. Section 6 of the *Company Directors Disqualification Act, 1986* provided for a power to impose maximum period of disqualification of 15 years and a minimum period of two years. Dillon LJ identified the three brackets as comprising 10 to 15 years; 6 to 10 years; and 2 to 5 years. In applying that approach to the maximum of 5 years disqualification provided for by section 307N (1)(a) of the Ordinance, in its report in *Mayer* this Tribunal, of which the chairman was Mr. Kenneth Kwok SC, said that "the periods for the three brackets should be adjusted proportionately."[109]

672. Mr. Scott submitted that:[110]

(i) Mr. Stephen Tang and Mr. Chris Cheng-30 to 36 months' disqualification

Having regard to the delay of around three months in disclosing the inside information and the notional loss caused by the grave consequences of their negligent conduct, Mr. Stephen Tang and Mr. Chris Cheng's conduct was to be regarded as coming within the "top end of the middle bracket", in consequence of which he invited the Tribunal to consider imposing a disqualification order on each of them in the range of 30 to 36 months.

(ii) Mr. She and Mr. Luo-20 to 24 months' disqualification

Having regard to the fact that they were executive directors of Magic, Mr. Scott submitted that the conduct of Mr. She and Mr. Luo was to be regarded as falling in the middle bracket, in consequence of which invited the Tribunal to impose a disqualification order in the range of 20 to 24 months on them.

(iii) Mr. Sun Yan-16 to 20 months' disqualification

Having submitted that Mr. Sun Yan was to be regarded as falling at the top end of the lower bracket, Mr. Scott invited the Tribunal to impose a disqualification order on him in the range of 16 to 20 months.

[109] *Mayer Holdings Limited*, paragraphs 56-7.
[110] SFC's Submissions, 2 April 2020, paragraphs 48 and 49.

Regulatory fine: section 307N (3)

673. Having regard to the requirement of section 307N (3) that the Tribunal must not impose a regulatory fine unless "the fine is proportionate and reasonable in relation to the breach of the disclosure requirement", Mr. Scott submitted that, of the factors identified there to which the Tribunal may have regard, of particular relevance was the fact that the conduct of the Specified Persons found to be culpable may have damaged the integrity of the securities and futures market, section 307N (3)(c), and may have damaged the interests of the investing public, section 307N (3)(d), in that shareholders sold shares at prices which were lower than they should have been had they and the market been aware of the inside information. Moreover, the Tribunal was to have regard to the individual culpability of the respective Specified Persons, in particular the finding that the conduct of Mr. Stephen Tang and Mr. Chris Cheng was negligent, section 307N (3)(b).[111]

674. Further, Mr. Scott invited the Tribunal to have regard to the regulatory fines imposed by this Tribunal in other cases.

(i) In *AcrossAsia*, where there was a delay of around one week in disclosing the information that the party, in whose favour an arbitration award had been made in respect of *AcrossAsia*'s failure to repay a loan of US $44 million, had filed a petition for the appointment of administrators as a result of which the court in Indonesia had issued a summons to *AcrossAsia* to appear in court, the Tribunal imposed a fine of:

- $800,000 in respect of the non-executive director and chairman; and
- a fine of $600,000, discounted from $800,000 to reflect early admission of culpability, in respect of each of *AcrossAsia* itself and the chief executive officer.

(ii) In *Mayer*, where the delay in disclosing the information that the company's auditors had given notice of their resignation was 23 days, the Tribunal imposed a fine of:

- $1.5 million in respect of each of the financial controller/company secretary and the executive director responsible for the day-to-day running of *Mayer* whose conduct was intentional;
- and a fine of $900,000 for *Mayer* and all the other directors who likewise had not taken all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach, but whose conduct was not intentional.

[111] SFC's Submissions, 2 April 2020, paragraph 51.

(iii) In *Yorkey*, where the admitted delay in disclosing information of material losses in the second half of the financial year was around three months during which time there was an admitted total notional loss of around $1.5 million for those who had bought *Yorkey* shares at a higher price than would have been the case had information being disclosed, the Tribunal imposed a fine of:

- $1 million on *Yorkey* for breach of section 307B; and
- a fine of $1 million on the chief executive officer, who was an executive director, for his admitted reckless conduct which had resulted in that breach and for his admitted failure to take all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach.

(iv) In *Fujikon* where the admitted delay in disclosing information of a discontinuance of a long-standing customer's significant orders for the supply of audio equipment was around seven weeks, the Tribunal imposed a fine of:

- $1 million on *Fujikon*, for their admitted negligent conduct, which had resulted in that breach and for their admitted failure to take all reasonable measures from time to time to ensure that proper safeguards existed to prevent the breach;
- a fine of $300,000 on the chairman/chief executive officer; and
- a fine of $200,000 on the chief financial officer/company secretary.

675. In the result, Mr. Scott invited the Tribunal to impose the following regulatory fines:[112]

(i) $2.5 million in respect of each of Mr. Stephen Tang and Mr. Chris Cheng, having regard to the evidence that they had "run the show and acted in concert", so that they were not only equally culpable but also more culpable than the other Specified Persons;

(ii) $1.5 million in respect of each of Mr. She and Mr. Luo, having regard to their positions as executive directors; and

(iii) $1 million in respect of each of Magic and Mr. Sun Yan.

Recommendation to take disciplinary action: section 307N(1)(g)

676. In inviting the Tribunal to make a recommendation to the Hong Kong Institute of Certified Public Accountants that they take disciplinary action in respect of their members Mr. Stephen Tang and Mr. Chris Cheng, Mr. Scott pointed out that this Tribunal had made a similar recommendation in respect of the financial controller in *Mayer* and the financial controller/company secretary in *Yorkey*. Each of them had failed to take all reasonable

[112] SFC's Submissions, 2 April 2020, paragraph 51.

measures from time to time to ensure that proper safeguards existed to prevent the breach of the disclosure requirement by the respective company and the latter had been found culpable of reckless conduct which had resulted in that breach.[113]

677. In his oral submissions, on 22 February 2021, Mr. Scott took issue with the submission made by Mr. Dawes in his written submissions that, given that Mr. Stephen Tang and Mr. Chris Cheng had been found to be in breach of section 307G (2)(a) by negligent, rather than intentional or reckless conduct, it was unnecessary for the Tribunal to make a recommendation that disciplinary action be taken against them by their professional body. Mr. Scott pointed out that section 34 (1)(a)(iv) of the Professional Accountants Ordinance, Cap. 50 provided that conduct that might be the subject of complaint entertained by the Disciplinary Committee of the Institute of Certified Public Accountants was a complaint that a certified public accountant "has been negligent in the conduct of his profession". Mr. Scott submitted that they had been found culpable of seriously negligent conduct, namely by way of deliberate omissions.

Training program: section 307N(1)(i)

678. In inviting the Tribunal to make an order that Mr. Stephen Tang, Mr. Chris Cheng, Mr. She, Mr. Luo and Mr. Sun Yan undergo a training program, pursuant to section 307N (1)(i), on compliance with Part XIVA of the Ordinance, directors' duties and corporate governance to be approved by the SFC, Mr. Scott pointed out that this Tribunal had made similar orders in respect of various officers of *AcrossAsia, Mayer,Yorkey* and *Fujikon* and that in *Mayer* those orders had been combined with orders of disqualification in respect of nine officers of *Mayer.*[114]

Costs: section 307N(1)(e) and (f)(i)

679. Mr. Scott asserted that Magic, Mr. Stephen Tang, Mr. Chris Cheng, Mr. She, Mr. Luo and Mr. Sun Yan had all "proactively contested the present proceedings and hotly disputed almost each and every issue" and submitted that, they having failed to defend the proceedings successfully, there was no reason why costs should not follow the event. In the result, Mr. Scott invited the Tribunal to order that they each:

(i) pay the Government the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings, to be taxed if not agreed; and

[113] SFC's Submissions, 2 April 2020, paragraphs 52-53.
[114] SFC's Submissions, 2 April 2020, paragraph 56.

(ii) pay the SFC the costs and expenses reasonably incurred by the SFC in relation or incidental to the proceedings, to be taxed if not agreed, with a certificate for two counsel.

Section 307N(1)(f)(ii) and (iii)

680. Similarly, Mr. Scott invited the Tribunal to order that each of those Specified Persons pay the SFC the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC in relation or incidental to:

(a) any investigation of the person's conduct or affairs carried out *before* the proceedings were instituted; and

(b) an investigation of the person's conduct or affairs carried out *for the purposes of* the proceedings. [Italics added.]

Clearly, the proceedings before the Tribunal are the disclosure proceedings instituted by the SFC's Notice to the Tribunal, dated 29 March 2018.[115]

681. In seeking an order in those specific terms, Mr. Scott adverted to the statements of this Tribunal in *Mayer* in which it was observed that: [116]

"Section 307N (5) does not cover taxation of costs and expenses of any investigation."

682. Section 307N (5) provides that, subject to any rules made by the Chief Justice under section 307X, Order 62 of the Rules of the High Court applies to:

"…the taxation of any sum ordered under subsection 1(e) or (f) for costs reasonably incurred in relation or incidental to the proceedings."

683. To facilitate the Tribunal's task in determining the sum, if any, it was appropriate to order be paid to the SFC for the costs and expenses reasonably incurred by the SFC in relation or incidental to an investigation of the person's conduct or affairs before and for the purposes of the proceedings, the Tribunal directed that the SFC file its 'Statement of costs and expenses'.

684. In advance of the oral submissions made by the parties on 22 and 23 February 2021, the SFC filed an updated 'Statement of Investigation Costs', dated 18 February 2021.[117] It

[115] Section 307I and section 1 of Schedule 9 of the Ordinance.
[116] *Mayer Holdings Limited*, paragraph 179.
[117] Appendix E.

stated that Staff Costs had been computed having regard to "the formula suggested by the MMT in the matter of Fujikon Industrial Holdings Limited."

The submissions of the 2nd to 5th Specified Persons

685. In their written submissions for the 2nd to 5th Specified Persons, dated 16 April 2020, Mr. Dawes, leading Mr. Joshua Chan, suggested that the principles identified by the courts and by this Tribunal in identifying the purpose and nature of the powers available to the Tribunal in insider dealing proceedings under Part XIII of the Ordinance applied equally to a consideration of the purpose and nature of the powers available under Part XIVA. It was submitted that:

- The purpose of the market misconduct regime under Part XIII was to "…protect and maintain the integrity of the financial markets in Hong Kong, thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It is regulatory in nature."[118]
- The Tribunal performs "…a function comparable to that performed by a regulating body or disciplinary tribunal established to self-regulate a particular type of activity amongst a specific class of people in society." The Tribunal "…is there to regulate the conduct of those involved in the financial markets in Hong Kong,"[119] not to impose penalties or adjudicate civil disputes.
- The sanctions available to the Tribunal "…namely disqualification, cold shoulder orders, cease-and-desist orders, disgorgement orders, reference of an identified person to his own professional body for possible disciplinary proceedings, as well as extensive costs orders… are all designed to protect financial institutions and the investing public, or, in the case of costs orders, to serve a compensatory purpose."[120]
- Whilst "… the sanctions are potentially severe, and therefore carry with it a deterrent effect… that does not render the sanctions any less protective in nature …In particular, the power to disqualify is protective rather than punitive in character, namely,… the primary purpose of the power is to protect investors and the public. In so far as the making of such an order has a deterrent effect, that effect is incidental and subservient to the purpose of protecting shareholders, investors and the public from people who are unfit to hold office*: Koon Wing Yee v Insider Dealing Tribunal* at paras. 72 and 73; *Chau Chin Hung v Market Misconduct Tribunal* at paras. 29-32."[121]

686. It was submitted that, in consequence, the question that the Tribunal was required to address was not whether a particular sanction was "reasonable and proportionate" when

[118] *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114, at paragraph 52.
[119] *ibid*, paragraph 54.
[120] *ibid*, paragraph 51.
[121] *ibid*, paragraph 53.

measured against the misconduct, rather the question was "whether the sanction would serve the useful purpose of protecting the investing public from any further infractions."[122]

687. It is to be noted that, whilst the powers provided for by sections 257 and 258 are broadly similar to the powers provided by section 307N, they are not the same. The latter provides a power, not provided by sections 257 and 258, to impose a regulatory fine, order an officer of a listed corporation to undergo a training program approved by the SFC on compliance with Part XIVA and order a corporation to appoint an independent professional adviser to review the corporation's procedure for compliance with Part XIVA.

688. Of the issue of the need to protect the investing public in future from the 2nd to 5th Specified Persons, Mr. Dawes invited the Tribunal to note that none of them had been found to breach the disclosure requirement knowingly or recklessly. Rather, the breaches were unintentional.[123]

Steps taken to comply with the disclosure requirement

689. Further, it was submitted that they had made serious and *bona fide* attempts at compliance.[124]

- First, by entering into non-disclosure agreements with L'Oréal.
- Secondly, by securing non-disclosure agreements from Atlantis, Greenwoods and Baring, before informing them of L'Oréal's proposal to acquire Magic.
- Thirdly, by limiting the number of those who knew of the negotiations with L'Oréal to the three founders, Mr. Mike Liu and Mr. Huang, which restriction of the confidential information on a need-to-know basis was replicated by L'Oréal and BNP Paribas.
- Fourthly, by reminding one another regularly of the need to maintain confidentiality.
- Fifthly, by Mr. Stephen Tang enquiring of Mr. She and Mr. Luo if they had disclosed the confidential information, after Mr. Stephen Tang had come to know of the email enquiry made by CSV Capital Partners of Mr. Chris Cheng, in the context of the rise in the price at which Magic shares traded, if L'Oréal was going to acquire Magic.

Communication with L'Oréal and BNP Paribas

690. In addition, it was submitted that the three founders had communicated frequently with L'Oréal and BNP Paribas in respect of the issue of the confidentiality of the negotiations.

[122] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 9.
[123] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 6.
[124] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraphs 13-20.

(i) Mr. Leo Liu initiated a telephone conversation with Mr. Stephen Tang on 17 April 2013, in face of the sharp rise in the price at which Magic shares were traded and his concerns about confidentiality and leakage. Mr. Stephen Tang informed Mr. Leo Liu that he had answered in the negative enquiries made of him of whether L'Oréal was going to acquire Magic, it being asserted to Mr. Leo Liu that the price rise was the result of the successful roadshow to New York.

(ii) In an email from BNP Paribas to L'Oréal, dated 28 April 2013, the former noted that there had been communication between them in respect of "…the communication in case of leak" and suggested "We can get a memo circulated among us and to the co-founders very shortly. Teresa can also talk about it with their lawyer."[125] In an email from Teresa Ma of Linklaters to L'Oréal of the same date the former said of a prospective telephone call to Mr. Huang "…on confidentiality, I will stress that the law against insider dealing in HK covers dealing, counselling others to deal and tipping off."[126]

(iii) In an email from Alexis Aperakis of L'Oréal to others at L'Oréal and to Linklaters, dated 2 May 2013 the writer reported that "Liu called Zhenzhen to forward the comments of Mr. S." In context, it appears that was a reference to Mr. Mike Liu and Ms. ZhenZhen Gourves of L'Oréal. Amongst the matters described, it was asserted: [127]

"He also told that…. he had a lot of investors calling them because of the rise of the stock and asking them if there was a leak or something going on. ZZ told him that this was the reason why we should go fast now."

(iv) In an exchange of emails, dated 6 May 2013, Linklaters provided L'Oréal with two template "leak announcement", addressing different circumstances in which either L'Oréal or Magic might be required to make an announcement to investors. Of the differing circumstances, it was noted:[128]

"…it is unlikely that you will be the party making the leak announcement (if any!), the primary responsibility for making a leak announcement will shift to Martha (and their counsel) once the Martha board have been approached.

[125] Exhibit Bundle, page 760.
[126] Exhibit Bundle, page 728.
[127] Exhibit Bundle, page 793.
[128] Exhibit Bundle, pages 809-814.

It may be better to send Martha just a draft of the English announcement once the Martha board have been approached for their convenience."

Of the contingent nature of the planning, it was said:[129]

"Once Martha have been approached-we can discuss logistics with them. If they and their counsel are able to pull together template leak announcements quickly then we may not need to send them the English form we have prepared at all."

(v) In emails dated 9 May 2013, having provided Mr. Huang with drafts of the non-disclosure agreements to be signed by the three institutional investors, Linklaters provided copies of the final version to be signed by the respective investors, which emails were copied to L'Oréal.[130]

Steps taken following the receipt of L'Oréal's proposal letter on 15 May 2013

691. The Tribunal was invited to note that, following the receipt of L'Oréal's proposal letter on 15 May 2013, Mr. Stephen Tang had sought to obtain legal advice from Chiu & Partners on the issue of whether the inside information had to be disclosed by way of an announcement. Further, Mr. Stephen Tang repeatedly enjoined his fellow directors to maintain the confidentiality of that information.[131]

The delay in making disclosure of the inside information

692. It was submitted that, given the protective functions of the sanctions available in section 307N, the length of the delay in making disclosure of the inside information was of "limited utility". Of more importance, was the reason for the delay.[132] Of that, it was submitted that the 2nd to 5th Specified Persons had taken *bona fide* steps to preserve confidentiality and had genuinely, albeit mistakenly, believed that the safe harbour defence provided by section 307D was available.

The circumstances of the 2nd to 5th Specified Persons

693. The Tribunal was invited to take into account that the 2nd to 5th Specified Persons had not gained any profit nor avoided any loss as a result of the failure to disclose the inside information as soon as practicable nor was it suggested that they were motivated by any such prospect. Further, they had not been the subject of any market misconduct or criminal

[129] Exhibit Bundle, page 827.
[130] Exhibit Bundle, pages 874-881.
[131] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraphs 24-25.
[132] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 33.

proceedings prior to the material event of 2013 nor was it suggested that they had misconduct themselves in any such way in the seven years that had elapsed since that date.

Mr. Chris Cheng

694. Issue was taken strenuously with the submissions made on behalf of the SFC that the Tribunal had found that Mr. Chris Cheng had lied to the Tribunal in his testimony that he had raised with Mr. Stephen Tang the question of when the preliminary discussions had taken place with L'Oreal and his testimony that, at the meeting of the board of directors on 24 May 2013, Ms. Susana Lee had asked Mr. Stephen Tang what had been discussed at the preliminary discussions and had been given responsive replies. It was submitted that the Tribunal had made no finding of dishonesty and no allegation of dishonesty had been put in cross-examination of Mr. Chris Cheng. The fact that his evidence was rejected did not imply a finding of dishonesty.[133]

The failure to establish a "safe harbour" exemption

695. Mr. Dawes contended that the submissions of the SFC that the failure of the Specified Persons to establish a "safe harbour" exemption pursuant to section 307D, was not an aggravating factor. Regard was to be had to the evidence that some measures were in place, for example information was restricted on a need-to-know basis and confidentiality agreements had been signed.[134]

The appropriate orders of the Tribunal

696. Mr. Dawes submitted that in all the circumstances the 2nd to 5th Specified Persons did not "constitute a serious or severe threat to the investing public".[135]

Training program and costs

697. Mr. Dawes said that no objection was taken to the proposal that the 2nd to 5th Specified Persons be ordered to undergo a training program approved by the SFC on compliance with Part XIVA, directors' duties and corporate governance. Similarly, no objection was taken to the costs orders sought by the SFC.

[133] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 31.
[134] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 49.
[135] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 53.

Disqualification and regulatory fines: length and level

698. Whilst no objection was taken to the submission by the SFC that the Tribunal make disqualification orders and impose regulatory fines on the 2nd to 5th Specified Persons, objection was taken to the suggested length of the disqualification orders and the level of the regulatory fines, which were said to be "grossly excessive" and out of step with the orders made by the Tribunal in other cases.[136]

(i) In *Mayer* the Tribunal ordered that the financial controller be subject to disqualification for 20 months and imposed a regulatory fine of $1.5 million, having found that he had deliberately flouted the disclosure requirement.[137] Having found that there was no internal system or written guidelines to implement compliance with the requirement of the disclosure of price sensitive information[138] and that other directors had not taken any measures to ensure that any or any proper safeguards existed to prevent the breach of the disclosure requirement, the Tribunal ordered that they be disqualified for 12 months and each subjected to regulatory fines of $900,000.

(ii) In *Yorkey*, the Tribunal disqualified the chief executive officer and the financial controller for 18 months, with a regulatory fine of $1 million, and 15 months respectively for reckless conduct which had resulted in the breach of *Yorkey's* disclosure requirement, namely failing to disclose to the public as soon as reasonably practicable that *Yorkey's* financial performance in the second half of the financial year was much worse than was to be anticipated following the statement in the interim results that "significant growth over that in the first half of the year" was to be expected. The chief executive officer of *Yorkey* was aware of the deterioration of the financial performance for 13 weeks, whereas the financial controller became aware of that about one month before the announcement was made. The notional loss suffered by investors who bought shares at a higher price and would have been the case had information being disclosed was around $1.5 million.

699. Mr. Dawes submitted that the misconduct of the financial controller in *Mayer* and the misconduct of the chief executive officer and financial controller of *Yorkey* was much more

[136] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 59.
[137] *Mayer Holdings Limited*, paragraph 149.
[138] *ibid*, paragraphs 121 and 144.

serious than that of Mr. Stephen Tang and Mr. Chris Cheng, although the period of disqualification and the amount of regulatory fines sought by the SFC against them was significantly and disproportionately higher. He submitted that the culpability of the 2nd to 5th Specified Persons was closer to that of the officers in *AcrossAsia* and *Fujikon*, in which some steps had been taken to comply with the disclosure requirement, but which ultimately fell short of what was required. In neither case was disqualification imposed and the regulatory fines were $800,000 in respect of the non-executive director and chairman, $600,000 in respect of the chief executive officer of *AcrossAsia* and $300,000 and $200,000 respectively for the chairman/chief executive officer and chief financial officer/company secretary of *Fujikon*.

Recommendation to take disciplinary action

700. Mr. Dawes submitted that, having regard to the fact that Mr. Stephen Tang and Mr. Chris Cheng had been found to have breached section 307G(2)(a) by negligent, rather than intentional or reckless, conduct, it was unnecessary for the Tribunal to make a recommendation that disciplinary action be taken against them. In *Fujikon* this Tribunal had declined to make a recommendation that the Hong Kong Institute of Certified Public Accountants take disciplinary action against the chief financial officer/company secretary of *Fujikon,* notwithstanding its finding that her negligent conduct has resulted in the breach of the disclosure requirement by *Fujikon*. Having noted that the case against her was one of negligence, the Tribunal said "it is not a proper case" to make such a recommendation.[139] Further, Mr. Dawes invited the Tribunal to note that in making recommendations that the Hong Kong Institute of Certified Public Accountants take disciplinary action against the respective financial controllers in *Mayer* and *Yorkey*, this Tribunal did so having determined that the former's breach of the disclosure requirement was intentional and deliberate flouting of the requirements and that the latter's breach was the result of reckless conduct.

Suggested orders

701. Having categorised the regulatory fines sought by the SFC against the 2nd to 5th Specified Persons has been "grossly excessive and out of step with previous cases"[140], Mr. Dawes did not suggest a specified level of regulatory fines in their respective cases. Rather, he submitted that their culpability was much closer to that of the officers in *AcrossAsia* and

[139] *Fujikon Industrial Holdings Limited*, paragraph 31.
[140] The submissions of the 2nd to 5th Specified Persons, 16 April 2020, paragraph 68.

Fujikon, who were subjected to fines in the range of $200,000-$800,000. However, Mr. Dawes did invite the Tribunal to make the following orders, namely:

- disqualification orders, in respect of "a listed corporation", against Mr. Stephen Tang and Mr. Chris Cheng of 9 months and against Mr. She and Mr. Luo of 6 months;
- that Mr. Stephen Tang, Mr. Chris Cheng, Mr. She and Mr. Luo each undergo a training program approved by the SFC of compliance with Part XIVA of the Ordinance, directors' duties and corporate governance; and
- costs orders, as sought by the SFC.

Mr. Chris Cheng

702. At the hearing on 23 February 2021, without objection from the SFC, at the request of Mr. Dawes the Tribunal received an affirmation of the same date of Mr. Chris Cheng. In the affirmation Mr. Chris Cheng provided "certain information relating to my latest circumstances", which he invited the Tribunal to take into account in considering the appropriate sanctions to be imposed against him. He said that, following the withdrawal of Magic's listing on the SEHK on 9 April 2014, he became an independent non-executive director of Royal Catering Group Holdings Company Limited on 21 July 2016. He resigned from that position with effect from 9 August 2018, after which date he had not been a director of any company listed in Hong Kong or in any other jurisdiction. He was the company secretary of Kangda International Environmental Company Limited, which was listed on the SEHK, from 22 July 2015 to 15 October 2019. On the latter date he left that position and since that date he had not been a company secretary of any company listed in Hong Kong or in any other jurisdiction. He had been unemployed since 15 October 2019.

703. For his part, Mr. Dawes invited the Tribunal to have regard to those circumstances by way of mitigation in consideration of "disqualification and potential penalty".[141]

The submissions on behalf of Magic

704. In their written submissions on behalf of Magic, dated 16 April 2020, Mr. Laurence Li, together with Mr. Byron Chiu, submitted that the company was now very different from 2013. In 2014, it was delisted and became a wholly owned subsidiary of L'Oréal. All the former controlling shareholders and all the former officers of the company had exited pursuant to the very transaction to which the information related. There was no risk of recurrence of a breach of disclosure requirement. Such sanctions as might be imposed on Magic would in reality be

[141] Transcript; 22 February 2021, page 82.

borne by L'Oréal, whose position at the time of the material events was that of a third party, whose commercial position was opposite to that of the controlling shareholders of Magic. Magic's breach was due to its former controlling shareholders. Fault was entirely attributable to a few of the former officers. In the result, Magic was "in substance a victim."[142]

L'Oréal's negotiations with Magic

705. Mr. Li submitted that L'Oréal had conducted itself properly in its negotiations with Magic and was not only mindful of but also took steps to preserve confidentiality. Non-disclosure agreements were secured with the founder shareholders, who were approached *qua* shareholders, as early as 21 February 2013. L'Oréal caused non-disclosure agreements to be secured from the three institutional shareholders on 9 and 10 May 2013. Linklaters, L'Oréal's lawyers, prepared drafts of announcements to be made by either L'Oréal or Magic in the event that confidentiality was breached. L'Oréal's proposal letter to Magic's board, dated 13 May 2013, demanded of Magic that the information contained therein be kept confidential and requested that Magic enter into a non-disclosure agreement. On 7 June 2013, a non-disclosure agreement was entered into with L'Oréal by Magic.[143]

L'Oréal and Magic's cooperation with the SFC's investigation and the proceedings

706. Mr. Li submitted that L'Oréal and Magic had cooperated with the investigation and the conduct of the proceedings. Mr. Evrard had made himself available in Paris on two occasions to be interviewed by an officer of the SFC by telephone. Although he was retired, L'Oréal and Magic had made arrangements with him to give evidence in the proceedings by video link from France. In face of the Tribunal's request that Chiu & Partners, Magic's lawyers in 2013, give evidence relevant to Magic's board meeting of 24 May 2013, Magic had given waivers in respect of potential issues of legal professional privilege.[144]

Magic's participation in the proceedings

707. Mr. Li took strenuous objection to the submission made on behalf of the SFC that Magic had actively contested the proceedings and disputed "almost each and every issue".[145] He contended that Magic had focused its case on the issue of attribution, although he acknowledged that Magic contended that the information was an incomplete proposal or

[142] The submissions of the 1st Specified Person, 16 April 2020, paragraph 7.
[143] The submissions of the 1st Specified Person, 16 April 2020, paragraph 11.
[144] The submissions of the 1st Specified Person, 16 April 2020, paragraph 13.
[145] The submissions of the 1st Specified Person, 16 April 2020, paragraph 14.

transaction and did not accept that, in any event, the alleged information was sufficiently specific to constitute inside information. Further, it was Magic's case that it took reasonable precautions for preserving the confidentiality of the alleged inside information, which confidentiality had been preserved, so that Magic was entitled to rely on the safe harbour defence provided by section 307D (2).[146]

708. Mr. Li invited the Tribunal to note that it had rejected the SFC's primary case on attribution, namely that in the negotiations the three founders had acted in a dual capacity not only as shareholders but also as officers of Magic, and its secondary case, that Mr. Chris Cheng had come to know or ought reasonably to have come to know the inside information. The issue of attribution of knowledge to Magic was ultimately determined against Magic on the basis that Mr. Stephen Tang went beyond acting as a shareholder only.[147]

709. In the result, Mr. Li submitted that, having regard to the fact that the 2nd to 10th Specified Persons all denied any breach, it was incumbent on the SFC to prove its case on each issue. In those circumstances, it could not be said that Magic's participation in the proceedings had added to the length or costs of the proceedings.

The relevance of previous orders of the Tribunal

710. Mr. Li submitted that the reference made by the SFC in its submissions to the sanctions imposed by the Tribunal in previous cases was not helpful, as was evidenced by the observation to that effect by the Tribunal in *Yorkey*: [148]

> "A decision on a case's own facts is hardly helpful."

Suggested orders

711. Mr. Li invited the Tribunal to have regard to the following matters in making suggested orders in respect of Magic:

(i) Regulatory fine- say $500,000

Having regard to the fact that Magic's breach was its first, that it was attributable to the failures of some of its then officers and that there was no risk of recurrence, that it was appropriate to impose a "modest fine of, say, $500,000".[149]

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[146] The submissions of the 1st Specified Person, 16 April 2020, paragraphs 16 and 17.
[147] The submissions of the 1st Specified Person, 16 April 2020, paragraph 18.
[148] *Yorkey Optical International Limited*, paragraph 28.
[149] The submissions of the 1st Specified Person, 16 April 2020, paragraph 31.

(ii) Costs of the proceedings- apportion 20% of the costs of the proceedings to Magic

Acknowledging that apportionment could never be exact, Mr. Li invited the Tribunal to apportion 20% of the costs of the proceedings to Magic.[150] He suggested that reflected appropriately the position taken by the respective Specified Persons in the conduct of the proceedings. Magic ought not to be made liable for the costs of those parts of the proceedings which concerned "defences run by other SPs". He contended that Magic had confined its evidence, cross-examination and submissions effectively to the issue of attribution of knowledge.

(iii) Costs of the SFC's investigation

Mr. Li submitted that Magic ought not to be ordered to bear any of the costs of the SFC's investigation, "which was in reality against other persons." As a repository of evidence, Magic assisted the investigation by collating and supplying that material to the SFC.

Relying on a determination of this Tribunal *'Costs Order Absolute on Costs and Expenses of Investigation'*, dated 26 August 2019, in its report on *Fujikon*, Mr. Li submitted that "staff costs and overhead are not investigation costs."[151]

712. At the oral submissions on 22 February 2021, Mr. Li informed the Tribunal that, having regard to the statement in the SFC's document 'Statement of Investigation Costs', dated 18 February 2021, that Staff Costs had been calculated on the formula suggested by the Tribunal in the Costs Order Absolute made in Fujikon Industrial Holdings Limited, he no longer took issue with the methodology of the calculation of Staff Costs of the SFC.

Submissions made on behalf of the 6th Specified Person

Sanctions: relevance of delay

713. In their written submissions on behalf of the 6th Specified Person, dated 16 April 2020, Mr. Derek Chan SC, together with Ms. Deanna Law, invited the Tribunal to have regard to the delay in bringing the proceedings against Mr. Sun Yan, in determining the appropriate sanctions to impose on him. Although the material events occurred in 2013, it was not until

[150] The submissions of the 1st Specified Person, 16 April 2020, paragraphs 34-35.

[151] *Fujikon Industrial Holdings Limited*: 'Costs Order Absolute on Costs and Expenses of Investigation' (26 August 2019), paragraphs 11, 12 and 16.

29 March 2018 that the SFC instituted the proceedings by serving its Notice on the Tribunal.[152] He invited the Tribunal to note that in its report in *China Huiyan Juice Group Limited* this Tribunal had said that such delay "will inevitably add to the emotional burden placed on persons who know that they are the subject of investigation."[153] Further, in its report in *Sunny Global Holdings Limited*, this Tribunal determined it relevant to take into account the passage of five years that had occurred from the market misconduct to the time at which sanctions were imposed, during which time the Specified Persons had not been culpable of misconduct, in determining some of the orders it made.[154]

714. On 23 February 2021, in her submissions on behalf of Mr. Sun Yan, Ms. Law identified the relevant period of delay as being 25 months, namely from 26 February 2016, the date of Mr. Sun's record of interview by the SFC, to 29 March 2018, the date on which he was informed that proceedings had been instituted. On 26 February 2016, Mr. Sun Yan had been informed that he was "a person under investigation" because he was one of the directors of Magic in 2013 and that the SFC had reasonable cause to believe that on or about 27 April 2013 Magic and/or persons connected with it may have been in breach of a disclosure requirement, contrary to section 307B of the Ordinance, and that offences of insider dealing may have been committed, contrary to sections 270 and 291 of the Ordinance.

Mr. Sun Yan's conduct: previous/subsequent

715. Ms. Law invited the Tribunal to note that in a witness statement filed with the Tribunal, dated 11 September 2020, Mr. Sun Yan described his conduct up and until that date. He said that, other than the findings of this Tribunal, he had not been found culpable of any market misconduct nor had he ever been the subject of any disciplinary proceedings because of his conduct in Hong Kong's financial markets. From 2013 until 11 September 2020, he had not acted as a director of any other company listed in Hong Kong nor had he been involved in the management of any such company. In the result, she submitted that there was no evidence that Mr. Sun Yan was a present threat to the integrity of Hong Kong's financial markets.

[152] The submissions of the 6th Specified Person, 16 April 2020, paragraphs 8 and 9.
[153] *China Huiyan Juice Group Limited* (10 May 2013), paragraph 292.
[154] *Sunny Global Holdings Limited* (29 August 2008), paragraph 373.

Mr. Sun Yan's conduct in Magic

716. In his written submissions Mr. Chan invited the Tribunal to note that as a non-executive director Mr. Sun Yan was not involved in the day-to-day management of Magic.[155] Although the Tribunal had found that Magic's procedures and systems for complying with its disclosure obligations to be deficient nevertheless, there were some arrangements in place. There was an informal understanding amongst the directors that Mr. Stephen Tang and Mr. Chris Cheng would deal with issues of inside information. Mr. Chan asserted that they were "appraised of all necessary information relevant to the performance of an inside information assessment."[156] However, as is apparent from our Report, while that is the case in respect of Mr. Stephen Tang, it is not true of Mr. Chris Cheng. Secondly, Magic had access to legal advice from Chiu & Partners, who were consulted in respect of L'Oréal's proposal.

717. Having regard to the evidence that Mr. Sun Yan was copied in the email communication in April 2013 in respect of the proposed internal control review of Magic to be funded by Barings, it was submitted a result of which Mr. Sun Yan had received an express assurance from the management of Magic of the adequacy of the company's systems and procedures.

718. Whilst Mr. Chan acknowledged that the Tribunal had found Mr. Sun Yan's culpability to lie in abrogating responsibility for taking all reasonable measures to ensure that proper safeguards existed to prevent Magic's breach of disclosure requirement, he submitted that did not result in the breach itself. In context, it was to be noted that Part XIVA had been in operation for only 4 to 5 months at the time of the material events.[157]

Suggested orders

719. Mr. Chan submitted that in all the circumstances Mr. Sun Yan presented no current threat to the integrity of the financial markets in Hong Kong: it was not suggested that he had made any profit or avoided any loss and he had not been involved in any other misconduct or disciplinary allegations. Mr. Chan invited the Tribunal to make the following orders in respect of Mr. Sun Yan:

[155] The submissions of the 6th Specified Person, 16 April 2020, paragraph 15.
[156] The submissions of the 6th Specified Person, 16 April 2020, paragraph 16.
[157] The submissions of the 6th Specified Person, 16 April 2020, paragraph 18.

(i) Disqualification-none or materially less than the 16-20 months sought by the SFC

Mr. Chan invited the Tribunal not to make an order of disqualification. Alternatively, he invited the Tribunal to make an order for a materially shorter period than that sought by the SFC of 16 to 20 months.

(ii) Regulatory fine-materially less than the $1 million sought by the SFC

Having regard to what Mr. Chan categorised as Mr. Sun Yan's limited role in Magic's breach of disclosure requirement, namely a misplaced reliance on the executive directors and a failure to proactively take all reasonable measures, the Tribunal was invited to impose a regulatory fine that was materially lower than the $1 million suggested by the SFC.

(iii) Training program

Mr. Chan said that there was no objection to the order sought by the SFC that Mr. Sun Yan be ordered to undergo a training programme approved by the SFC in respect of compliance with Part XIVA of the Ordinance, directors' duties and corporate governance.

(iv) Costs-5% apportionment to Mr. Sun Yan

Mr. Chan invited the Tribunal to apportion costs between the parties and to do so by ordering that Mr. Sun Yan "…only bear around 5% of the costs sought." He invited the Tribunal to note that in the Tribunal's report in *Greencool Technology Holdings Limited* the Tribunal had noted that it was vested with a wide discretion as to costs.[158]

720. In an answer to the Chairman's question as to the basis on which an apportionment of costs limited to 5% was sought on behalf of Mr. Sun Yan, in her oral submissions Ms. Law acknowledged that it was "really a ballpark and broad-brush figure". She said that regard was to be had to the fact that there were ten Specified Persons. The focus of the enquiry was on the issue of attribution of knowledge to Magic and the roles of the three founders. That was not relevant to Mr. Sun Yan's case. Similarly, Mr. Sun Yan was not involved in the negotiations

[158] *Greencool Technology Holdings Limited* (24 January 2018), paragraph 436.

> "…not only as to whether an order for costs should be made but, when several persons are found to be liable, as to the apportionment of costs between those persons. Although the discretion in both respects is wide, it is well settled that it is a judicial discretion and must be exercised according to fixed principles."

between L'Oreal and the three founders or copied in related emails. He was simply a non-executive director. Candidly, Ms. Law acknowledged that the thrust of the suggestion made on behalf of Mr. Sun Yan was to invite the Tribunal "to consider a number that is lower than 10%." She conceded, "we cannot say that it should be 5% or 7.5%."[159]

The SFC's reply on specific issues

721. In his oral submissions, on 23 February 2021, Mr. Scott took issue with various submissions that had been advanced by the Specified Persons in their oral submissions. First, of the affidavit of Mr. Chris Cheng, he suggested that it was not relevant to the issue of the imposition of sanctions on him. The information did not suggest "any financial impecuniosity" and, therefore, was irrelevant to the imposition of a regulatory fine. His resignation from his position on the boards of listed companies did not permit him to escape the appropriate imposition of disqualification.[160] Secondly, he suggested that the delay of 25 months between the interview of Mr. Sun Yan and the date at which he was informed that these proceedings had been instituted was not an unreasonable period in the circumstances of this case. Thirdly, although he reiterated the position of the SFC in opposing the stipulated apportionment of costs sought by Magic (20%) and by Mr. Sun Yan (5%), he said that the SFC was "agreeable to the apportionment of costs" by the Tribunal.[161] In the SFC's written reply, dated 23 April 2020, having taken issue with what Mr. Li had contended was the ambit of Magic's participation in the proceedings, Mr. Scott had submitted that the proposed apportionment in respect of Magic of 20% cost was "too low."[162] Similarly, Mr. Scott had submitted that the proposed apportionment in respect of Mr. Sun Yan of 5% was "plainly unrealistic and unduly low", given that he had "contested liability throughout."

Discussion

Magic's duty to disclose the information to the public as soon as reasonably practicable

722. In Part I of our Report, we found that inside information in relation to Magic and its shares came into existence as a result of the discussions and agreements between the parties on 27 April 2013.[163] Having determined that the information came to Mr. Stephen Tang's knowledge in the course of performing functions as an officer of Magic, and that a reasonable person acting as an officer of Magic would have considered the information was inside

[159] Transcript; 23 February 2021, pages 29-31.
[160] Transcript; 23 February 2021, pages 36-37.
[161] Transcript; 23 February 2021, page 50.
[162] Reply Submission for the SFC, 23 April 2020, at paragraphs 8 and 11.
[163] Report, paragraph 202.

information in relation to Magic, we found that the inside information had come to the knowledge of Magic and that in consequence, pursuant to section 307B (1) of the Ordinance, subject to section 307D, Magic had a duty to disclose the information to the public as soon as reasonably practicable.[164]

723. Having regard to section 307D, we said that we were satisfied that Magic did not take "reasonable precautions for preserving the confidentiality" of the information.[165] Further, that we were not satisfied that Magic took "reasonable measures to monitor the confidentiality of the information".[166] Moreover, we said that we were satisfied that Mr. Stephen Tang was aware that the confidentiality of the inside information had not been preserved and that, as an executive director and chairman of Magic, his knowledge was attributable to Magic.[167] In the result, we determined that Magic did not disclose to the public information, which constituted inside information, as soon as reasonably practicable after the inside information come to its knowledge.[168]

Negligent conduct that resulted in the breach of Magic's disclosure requirement

724. For the reasons that we set out in our report we said that we were satisfied that the negligent conduct of Mr. Stephen Tang and Mr. Chris Cheng resulted in the breach by Magic of its disclosure requirement, contrary to section 307G (2)(a) of the Ordinance and that each of them was in breach of the disclosure requirement.[169] On the other hand, we said that we were not satisfied that either Mr. She or Mr. Luo were culpable of negligent conduct that resulted in the breach of Magic's disclosure requirement.[170]

All reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic's breach of its disclosure requirement

725. Having noted that Mr. Sun Yan admitted that he "did not take step to ensure" that the executive directors fulfilled their responsibilities for making disclosure of inside information, we found that thereby he had abdicated his responsibilities for doing so and that "Far from taking "all reasonable measures", he deliberately took no measures at all. In the result, we said that we were satisfied that, contrary to section 307G (2)(b) of the Ordinance Mr. Sun Yan did

[164] Report, paragraph 243.
[165] Report, paragraph 373.
[166] Report, paragraph 389.
[167] Report, paragraph 396.
[168] Report, paragraph 397.
[169] Report, paragraph 436.
[170] Report, paragraph 441.

not take all reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic's breach of its disclosure requirement and that Mr. Sun Yan was himself in breach of the disclosure requirement.[171]

726. Having determined that the failures of Mr. Stephen Tang and Mr. Chris Cheng were egregious, we found that, although they were executive directors, Mr. She and Mr. Luo abdicated responsibility for regulatory compliance to them. In the result, we said that we were satisfied that, contrary to section 307G (2)(b) each of Mr. Stephen Tang, Mr. Chris Cheng, Mr. She and Mr. Luo did not take all reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic's breach of disclosure requirement and are each in breach of the disclosure requirement.[172]

Relative responsibility

727. As is readily apparent from his written submissions, in suggesting that the Tribunal impose different levels of regulatory fines on the Specified Persons, Mr. Scott invited the Tribunal to accept that a distinction was to be drawn between them in respect of their responsibility for Magic's regulatory breach. He suggested that first, in the hierarchy of responsibility, were Mr. Stephen Tang and Mr. Chris Cheng. The former was an executive director and chairman and the latter the company secretary of Magic. Each of them have been found culpable of negligent conduct that had resulted in Magic's breach of its duty of disclosure. Second in the hierarchy of responsibility were Mr. She and Mr. Luo. They were executive directors of whom it had been determined that, together with Mr. Stephen Tang and Mr. Chris Cheng, they did not take all reasonable measures to ensure that proper safeguards existed to prevent Magic's breach of disclosure requirement, so that they were each in breach of the disclosure requirement. Third in the hierarchy of responsibility was Mr. Sun Yan, a non-executive director, who had abdicated his responsibilities, placing complete reliance on Mr. Chris Cheng and Mr. Stephen Tang, so that the Tribunal had made a similar finding in his case. Finally, noting that, whilst Magic's liability was attributable to the acts of its officers, Magic was in breach of its duty of disclosure, Mr. Scott suggested that a similar fine to that suggested for Mr. Sun Yan be imposed on Magic.

[171] Report, paragraphs 532-534.
[172] Report, paragraph 537.

728. Although those representing those Specified Persons each took issue with the quantum of the regulatory fine proposed by the SFC no one submitted that the suggested hierarchy of responsibility was incorrect.

729. We are satisfied that the suggested three bands of the hierarchy of responsibility for the non-corporate Specified Persons is the appropriate approach to the determination of respective regulatory fines. That identification of the relative responsibility and culpable conduct has some relevance in assisting in the determination of whether or not it is now necessary and appropriate to impose a disqualification order and, if so, the length of such orders.

Notional loss

730. Our earlier determination that the notional loss to net sellers of Magic shares in the period 8 May to 26 July 2013 was "significant" and in the range of "millions of dollars", albeit that on the evidence presented to the Tribunal we were unable to be more specific, is directly relevant to the requirement that a regulatory fine must not be imposed on a Specified Person unless "the fine is proportionate and reasonable in relation to the breach of the disclosure requirement."[173] Specifically, as noted earlier, the Tribunal may take into account:

> "(a) the seriousness of the conduct that resulted in the person being in breach of the disclosure requirement;
>
> (b) whether that conduct may have damaged the interest of the investing public."

The relevance of previous orders of the Tribunal

731. As noted earlier, the Tribunal has received submissions from the parties in respect of the various orders made or not made in earlier cases determined by this Tribunal. The factual matrix of those cases has been dissected, so that apparent support can be found for various propositions including the level of appropriate fines, periods of disqualification or references to professional organisations for consideration of disciplinary proceedings. However, as Mr. Li pointed out in his submissions, in its report in *Yorkey* this Tribunal observed that, "It is trite that the purpose of citing authorities is to extract legal principles, not to seek to draw analogies on the facts. A decision on a case's own facts is hardly helpful." It was not suggested to the Tribunal by counsel that any of the previous orders of the Tribunal identified and illustrated a legal principle. In any event, needless to say each case presents its own myriad different facts, which are rarely if ever replicated in another case. Obviously, in imposing orders at the

[173] Section 307N (3) of the Ordinance.

conclusion of its hearing, each Tribunal tailors those orders to the facts determined to be relevant in that particular case. We do not accept that such orders set a "Benchmark" for the imposition of orders in subsequent cases. For our part, we have not derived much assistance in determining the appropriate orders to make in this case by what orders have or have not been made by other Tribunals.

The 1st Specified Person

732. With respect to Mr. Li, the fact that L'Oréal is now the ultimate owner of Magic and that Magic's liability for its breach of disclosure duty is attributable to the conduct of former officers of Magic is irrelevant. Similarly, the fact that L'Oréal strove to preserve confidentiality and avoid leakage of the inside information is irrelevant. Magic is a separate legal person found to be in breach of its duty of disclosure. A change of ownership of Magic is not a mitigating factor for such breach.

The 5th Specified Person

733. We are satisfied that there is force in Mr. Scott's submissions that the evidence contained in the affirmation of Mr. Chris Cheng, adduced into evidence on 23 February 2021, is of limited relevance. We accept that he has not been a director or company secretary of a company listed in Hong Kong since 9 August 2018 and 15 October 2019 respectively. Also, there is no dispute that he has been unemployed since 15 October 2019. However, as Mr. Scott observed, no submission was made by Mr. Dawes that Mr. Chris Cheng was impecunious and unable to pay a regulatory fine. No doubt that is why the Tribunal was not provided with information of his overall financial position, which evidence would be relevant and required to support such a submission.[174] A Specified Person's financial resources is a matter particularly within the knowledge of the Specified Person.

The 6th Specified Person

734. Similarly, we are satisfied that there is force in Mr. Scott's submission that the delay of 25 months from the time that he was informed by the SFC that he was a person under investigation to the time that proceedings were instituted, prayed-in-aid on behalf of Mr. Sun Yan as relevant to the appropriate orders to be made in his case, is of very limited

[174] *Yorkey*, paragraph 66

> "If a specified person wishes to raise financial resources as a ground for a lower regulatory fine, he should make a full and frank disclosure of his financial position, assets and liabilities, income and expenditure."

assistance. We accept that, given the complexities of the enquiries into this matter, that such delay was not unreasonable.

Regulatory fine

735. In determining the appropriate regulatory fine to be imposed on the respective Specified Persons, we have had regard to the fact that Magic was in breach of its duty of disclosure of the requisite information from 8 May 2013 until some measure of disclosure of information was made in the 2 August 2013 Announcement. In that period, net sellers of Magic shares did so at a loss which, in aggregate, we have determined to be "significant" and "millions of dollars". That finding is to be contrasted with the initial submission made by the SFC that the notional loss was about $162 million, in the context of which it invited the Tribunal to impose regulatory fines of $2.5 million on the 2nd and 5th Specified Persons. It is to be noted that, even in face of Mr. Lung's report, dated 7 July 2020, in which he expressed the opinion that the notional loss was about $35 million and which finding Mr. Scott accepted in his subsequent written and oral submissions, nevertheless the SFC did not suggest any reduced regulatory fines.

736. Of the responsibility and culpability of the 2nd and 5th Specified Persons, we determined that they were negligent. That negligence was egregious and sustained. It resulted in Magic's and their own breach of duty. However, it is to be contrasted with intentional or reckless conduct.

737. We are satisfied that the appropriate regulatory fines to be imposed are:

2nd and 5th Specified Persons-$1.5 million;

3rd and 4th Specified Persons-$1 million;

6th Specified Person-$750,000; and

1st Specified Person-$750,000.

Disqualification

738. We are satisfied that the appropriate approach to the making of a disqualification order, pursuant to section 307N (1)(a), is that identified and adopted by this Tribunal in *Mayer*, namely that the impugned conduct is to be regarded as falling within three brackets; namely particularly serious; serious; and relatively not very serious. Having made that determination, regard is to be had to the suggested bands of duration of orders of disqualification. Then, it is

necessary to have regard to the period of time that has elapsed since that conduct in 2013, together with such evidence as there is of the conduct of the Specified Persons both before and after those events. Finally, consideration is to be had as to whether or not the imposition now of a disqualification order is necessary to protect investors and the public and, if so, for what length.

739. We accept that, having regard to our findings in respect of each of the Specified Persons, that the conduct of the 2nd and 5th Specified Persons falls to be regarded as falling in the "serious" category. Similarly, albeit of lesser gravity, the conduct of the 3rd and 4th Specified Persons falls in the same category. The conduct of the 6th Specified Person falls within third bracket, namely "relatively not very serious".

740. Nevertheless, having regard to the fact that more than seven years has elapsed since the impugned conduct and to all the circumstances, in particular the evidence of the subsequent conduct of the Specified Persons, we are satisfied that the appropriate disqualification orders to be imposed are:

2nd and 5th Specified Persons-24 months;

3rd and 4th Specified Persons-16 months; and

6th Specified Person-8 months.

Recommendation to take disciplinary action

741. Having regard to our findings in respect of the 2nd and 5th Specified Persons, we have no hesitation in determining that it is appropriate that we recommend to the Hong Kong Institute of Certified Public Accountants, pursuant to section 307N (1)(g), that they take disciplinary action in respect of the 2nd to 5th Specified Persons.

Training program

742. There being no dispute that it would be appropriate to make an order, pursuant to section 307N (1)(i), we order that the 2nd, 3rd, 4th, 5th and 6th Specified Persons undergo a training program on compliance with Part XIVA of the Ordinance, directors' duties and corporate governance, to be approved by the SFC.

Costs

743. We are satisfied that, there being no objection to the request made by the SFC, that it is appropriate to order, pursuant to section 307N (1)(e) and (f)(i) respectively that each of the

Specified Persons be ordered to pay to the Government in relation or incidental to the proceedings the costs and expenses reasonably incurred by the Government, to be taxed if not agreed, and that each of the Specified Persons pay to the SFC in relation or incidental to the proceedings the costs and expenses reasonably incurred by the SFC, to be taxed if not agreed, with a certificate for two counsel.

The costs and expenses of the SFC's investigation

744. Save for the 1st Specified Person, none of the other Specified Persons objected to the request made by the SFC, pursuant to section 307N (1)(f) (ii) and (iii), that an order be made that each of the Specified Persons pay the SFC the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC in relation or incidental to its investigation of the person's conduct or affairs carried out before the proceedings were instituted and for the purposes of the proceedings.

The 1st Specified Person

745. With respect, we do not accept Mr. Li's submission that Magic ought not to bear any of the costs of the SFC's investigations because in reality they were against "other persons". As noted earlier, Magic's liability for its breach of disclosure duty is attributable to the conduct of former officers of Magic. Needless to say, it was that conduct that was centre and forefront of the SFC's investigations. In those circumstances, we have no hesitation in determining that it is appropriate that Magic be ordered to pay the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC in respect of those investigations.

Assessment of the SFC's costs of the investigations

746. The SFC filed with the Tribunal and served on all the parties a 'Statement of Investigation Costs', dated 23 April 2020. Paragraphs B and C itemised respectively the costs and expenses in relation or incidental to the SFC's investigation carried out before these proceedings were instituted and for the purpose of these proceedings. The work described as having been done before these proceedings were instituted encompassed the period 2013 to 28 March 2018, for which the SFC Staff Costs were calculated to be an aggregate of $890,826. The work described as having been done for the purposes of these proceedings encompassed the period from 29 March 2018 to 2019, for which the SFC Staff Costs were calculated to be an aggregate of $25,201.

747. Another version of the 'Statement of Investigation Costs', dated 24 April 2020, was filed with the Tribunal and served on all the parties at the hearing on 25 April 2020. It bore additions in red at paragraphs B and C, which provided further explanation of the basis on which the SFC Staff Costs were calculated on the formula identified by this Tribunal in *Fujikon*. The description of the work performed and the calculation of the costs remained the same. In advance of the hearing on 22 February 2021, the SFC filed with the Tribunal and served on the parties an updated version of the 'Statement of Investigation Costs', dated 18 February 2021. The matters set out in paragraphs B and C were unchanged.

748. None of the Specified Persons have taken issue with any item of the description of the work performed or the related calculation of the SFC Staff Costs. At the hearing on 22 February 2021, Mr. Li informed the Tribunal that he no longer took objection to the methodology of the calculation of Staff Costs.

749. We are satisfied that that the aggregate sum of $890,826 was costs and expenses reasonably incurred by the SFC in relation or incidental to their investigation before these proceedings were instituted and that, pursuant to section 307N (1)(f)(ii), it is appropriate to make an order in their favour in that amount against each of the Specified Persons on a joint and several basis. Similarly, we are satisfied that the aggregate sum of $25,201 was costs and expenses reasonably incurred by the SFC in relation or incidental to their investigation for the purposes of these proceedings and that, pursuant to section 307N (1)(f)(iii), it is appropriate to make an order in their favour against each of the Specified Persons on a joint and several basis.

Apportionment of costs

750. Although counsel for the 1st and 6th Specified Persons invited the Tribunal to make an order apportioning the costs against each of them to 20% and 5% respectively and, although counsel for the SFC indicated that the SFC was agreeable in principle to apportionment, no agreement was reached between the parties as to the quantum. Indeed, other than taking issue with the quantum identified by counsel for the 1st and 6th Specified Persons as being "too low" Mr. Scott did not attempt to identify or suggest the level of an appropriate apportionment. Mr. Dawes did not even address the issue.

751. In all circumstances, we do not think it is appropriate to make any order of apportionment of costs.

ORDERS

752. Accordingly, we make the following orders.

(i) Pursuant to section 307N (1)(a), that without the leave of the Court of First Instance the following persons must not (i) be or continue to be a director, liquidator, or receiver or manager of the property or business of a listed corporation; or (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation for the following stipulated periods of time:

- the 2nd and 5th Specified Persons-24 months;
- the 3rd and 4th Specified Persons-16 months; and
- the 6th Specified Person-8 months.

(ii) Pursuant to section 307N (1)(d), that each of the following persons pay the Government the stipulated amounts as regulatory fines:

- the 2nd and 5th Specified Persons-$1.5 million;
- the 3rd and 4th Specified Persons-$1 million;
- the 6th Specified Person-$750,000; and
- the 1st Specified Person-$750,000.

(iii) Pursuant to section 307N (1)(g) we recommend to the Hong Kong Institute of Certified Public Accountants take disciplinary action against the 2nd and 5th Specified Persons.

(iv) Pursuant to section 307N (1)(i), we order that the 2nd, 3rd, 4th, 5th and 6th Specified Persons undergo a training program on compliance with Part XIVA of the Ordinance, directors' duties and corporate governance, to be approved by the SFC.

(v) Pursuant to section 307N (1)(e), that each of the Specified Persons pay to the Government in relation or incidental to the proceedings the costs and expenses reasonably incurred by the Government, to be taxed if not agreed.

(vi) Pursuant to section 307N (1)(f)(i), that each of the Specified Persons pay the Commission in relation or incidental to the proceedings the costs and expenses reasonably incurred by the Commission, to be taxed if not agreed, with a certificate for two counsel.

(vii) Pursuant to section 307N (1)(f)(ii), that each of the Specified Persons, on a joint and several basis, pay the Commission $890,826.

(viii) Pursuant to section 307N (1)(f)(iii), that each of the Specified Persons, on a joint and several basis, pay the Commission $25,201.

Mr. Michael Lunn, GBS

(Chairman)

Mr. Patrick Sun

(Member)

Ms. Cheung Man Kok, Christine

(Member)

Dated 10 March 2021.

APPENDIX E

SFC's Statement of Investigation Costs

MARKET MISCONDUCT TRIBUNAL
IN THE MATTER OF THE LISTED SECURITIES OF MAGIC HOLDINGS INTERNATIONAL LIMITED (Stock Code:1633)

Statement of Investigation Costs

A. General Information

A1	Type of Proceedings: Costs and expenses incurred in relation or incidental to the Market Misconduct Tribunal proceedings
A2	Receiving Party: SFC
A3	Details of the officers of the Enforcement Department ("ENF") of the Commission between 2013 and 2020: (1) Angela Wong Mei Mei (AW), Senior Manager of ENF (2) Polly Tse (PT), Manager of ENF (3) Catherine Kai Lai Ying (CK), Assistant Manager of ENF

B. Costs and Expenses in relation or incidental to investigation carried out before the MMT proceedings were instituted

	Description of work	**Time spent on this matter and time spent on investigation of other matters (rounded to the nearest decimal)**	**Staff Costs[1] (rounded to the nearest HK$)**
B1	2013 • Liaison with the Legal Services Division of SFC and internal discussions (AW only) • Onsite inspection / search and related preparation (all officers on the right hand column) • Preparing / reviewing / analysing case materials, reports, legal advices and/or other documents (AW only)	AW – 50 hours (156 hours) CK – 2 hours (203 hours)	397,178[2] 3,556[3]
B2	2014 • Preparing and conducting interviews (AW and CK only)	AW –137 hours (1261 hours)	141,218

[1] Staff Costs are computed based on the formula suggested by the MMT in the matter of Fujikon Industrial Holdings Limited (see paragraph 24 of the Costs Order Absolute on Costs and Expenses of Investigation dated 26.8.2019), being: Time spent on investigation in this case ÷ Time spent on investigation and other matters x Total staff costs (being the fixed emolument of the relevant staff in the relevant year)
[2] For purpose of illustration, this figure comes from 50 hours ÷156 hours x AW's fixed emolument in 2013
[3] For purpose of illustration, this figure comes from 2 hours ÷203 hours x CK's fixed emolument in 2013

	• Discussion with market expert (AW only) • Liaison with the Legal Services Division of SFC and internal discussions (AW only) • Liaison and correspondence with witnesses and other external parties (PT and AW) • Preparing / reviewing / analysing case materials, reports, legal advices and/or other documents (AW only)	CK– 2.9 hours (1479 hours) PT – 3 hours (1103 hours)	885 2,958
B3	<u>2015</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC and internal discussions • Liaison and correspondence with witnesses and other external parties • Preparing / reviewing case materials, reports, legal advices and/or other documents	AW – 78 hours (1258 hours)	85,312
B4	<u>2016</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC and internal discussions • Liaison and correspondence with witnesses and other external parties • Preparing / reviewing case materials, reports, legal advices and/or other documents	AW – 66 hours (1303 hours)	73,602
B5	<u>2017</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC • Liaison and correspondence with witnesses and other external parties • Preparing / reviewing case materials and reports	AW – 32 hours (1176 hours)	41,491
B6	<u>2018 (until 28 March 2018)</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC and internal discussions	AW – 25 hours (295 hours)	144,626

	• Liaison and correspondence with witnesses and other external parties • Preparing / reviewing case materials, reports, legal advices and/or other documents		
		Sub-total of Section B	890,826

C. <u>Costs and Expenses in relation or incidental to investigation carried out for the purposes of the MMT proceedings</u>

	Description of work	**Time spent**	**Staff Costs (HK$)**
C1	<u>2018 (from 29 March 2018)</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC and internal discussions • All other related preparation	AW – 5 hours (888 hours)	9,875
C2	<u>2019</u> • Discussion with market expert • Liaison with the Legal Services Division of SFC and internal discussions • All other related preparation	AW-11 hours (1262 hours)	15,326
		Sub-total of Section C	25,201

D. <u>Disbursements in respect of the Commission's external experts, Mr. Karl Lung and Mr. Felix Fong Chi Wah</u>

D1	Preparation of expert statement; supplemental expert statement; and attendance of the MMT proceedings to give evidence for the Commission (inclusive of all discussions and correspondence with the Commission) • Felix Fong Chi Wah (HK$4,000 x 20 hours) • Karl Lung (HK$5000 x 63.5 hours)	 HK$80,000 HK$317,500
D2	Preparation of the 2nd supplemental expert statement dated 08.07.2020; and considering the expert statement of Richard Witts dated 02.09.2020 (inclusive of all discussions and correspondence with the Commission) • Karl Lung (HK$5000 x 30 hours)	 HK$150,000

	Sub-Total of Section D	$547,500

E. Costs and expenses claimed

Total of investigation costs (Sub-total of Sections B to C)	HK$916,027
Total of investigation costs and expenses (Sub-total of Sections B to D)	HK$1,463,527

Dated the 18th day of February 2021

Securities and Futures Commission