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Market Misconduct Tribunal finds Mayer Holdings Limited and its senior management culpable of late disclosure of inside information

7 Feb 2017

The Market Misconduct Tribunal (MMT) today found that Mayer Holdings Limited (Mayer) and nine of its current and former senior executives failed to disclose inside information as soon as reasonably practicable as required under the Securities and Futures Ordinance (SFO) following proceedings brought by the Securities and Futures Commission (SFC) (Notes 1 & 2).

The current and former senior executives of Mayer who were found in breach of the corporate disclosure requirements are: former chairman and executive director, Mr Hsiao Ming-chih; former company secretary and financial controller, Mr Chan Lai Yin Tommy; former executive directors, Mr Lai Yueh-hsing, Mr Chiang Jen-Chin and Mr Xue Wenge; former independent non-executive directors, Mr Huang Jui-hsiang, Mr Lin Sheng-bin and Mr Alvin Chiu; and current non-executive director, Mr Li Deqiang.

The MMT was told that between April and August 2012, Mayer's auditors at the material time repeatedly communicated with the management about issues they identified while auditing Mayer's financial statements for the year ended 31 December 2011.

These issues included:

- the suspicious nature of the disposal of a wholly-owned subsidiary of Mayer, for HK\$15.5 million;
- Mayer did not control projects in Vietnam, which it bought for HK\$620 million, and their valuations appeared to have been inflated; and
- two subsidiaries of Mayer's jointly controlled entity had made substantial prepayments of US\$10 million and US\$4 million respectively without security to suppliers which appeared to be irrecoverable (collectively, outstanding audit issues).

In August 2012, the auditors indicated to Mayer that they would qualify their audit opinion for the financial statements if the outstanding audit issues were not resolved (potential qualified audit report).

Mayer received a resignation letter from the auditors on 27 December 2012, but it only disclosed the auditors' resignation together with brief details of the outstanding audit issues on 23 January 2013.

The MMT found that the auditors' resignation, the outstanding audit issues together with the potential qualified audit report and the US\$10 million prepayment to the supplier were specific information regarding Mayer, and price sensitive, in that investors would have viewed it negatively and it would have affected Mayer's share price, and it was not generally known to the public at the time.

The MMT will hold a hearing on 15 March 2017 on the orders to be imposed on Mayer and its current and former senior executives.

End

Notes:

1. The MMT found that Mayer breached the disclosure requirement pursuant to section 307B(1) of the SFO. The MMT also found that the current and former senior executives had not taken all reasonable measures to ensure that proper safeguards exist to prevent the breach of the disclosure requirements under section 307G(2) of the SFO.
2. Listed corporations must by law disclose inside information that has come to their knowledge as soon as reasonably practicable. Timely disclosure of inside information is central to the orderly operation of the market and underpins the maintenance of a fair and informed market.
3. For more details, please see the SFC's press release dated [11 March 2016](#).
4. The MMT's report is available on its website (www.mmt.gov.hk).

IN THE MARKET MISCONDUCT TRIBUNAL

REPORT ON WHETHER

A BREACH OF THE DISCLOSURE REQUIREMENTS

HAS OR MAY HAVE TAKEN PLACE

IN RELATION TO THE SECURITIES OF MAYER

HOLDINGS LIMITED (STOCK CODE 1116)

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Attestation to the Report

CHAPTER 1

NOTICE GIVEN BY THE SECURITIES AND FUTURES COMMISSION

1. The Market Misconduct Tribunal (“**the Tribunal**”) received a notice from the Securities and Futures Commission (“**SFC**”) dated 4 March 2016 (“**Notice**”) which read as follows:

“IN THE MATTER OF THE LISTED SECURITIES OF
MAYER HOLDINGS LIMITED (STOCK CODE 1116)

NOTICE TO THE MARKET MISCONDUCT TRIBUNAL
PURSUANT TO SECTION 307I(2) OF AND SCHEDULE 9
TO THE SECURITIES AND FUTURES ORDINANCE CAP
571 (‘ORDINANCE’)

Whereas it appears to the Securities and Futures Commission (“**SFC**”¹) that a breach of the disclosure requirements within the meaning of sections 307B and 307G of Part XIVA of the Ordinance has or may have taken place in relation to the securities of Mayer Holdings Limited (Stock Code 1116) listed on the Stock Exchange of Hong Kong Limited, the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:

- (a) whether a breach of a disclosure requirement has taken place; and
- (b) the identity of any person who is in breach of the disclosure requirement.

Persons and/or corporate bodies appearing to SFC to have breached or may have breached a disclosure requirement

1. Mayer Holdings Limited (美亞控股有限公司) (“**Mayer**” or “**SP1**”²)

¹ Except where the contrary is expressly stated in this Report, the Tribunal adopts the same abbreviations as the SFC’s abbreviations. The abbreviation used by the SFC is “Commission”.

² The abbreviation used by the SFC is the “Company”.

2. Chan Lai Yin, Tommy (陳禮賢) (“**FinancialController**” or “**SP2**”³)
3. Hsiao Ming-chih (蕭敏志) (“**Chairman**” or “**SP3**”⁴)
4. Lai Yueh-hsing (賴粵興) (“**EDLai**” or “**SP4**”⁵)
5. Huang Jui-hsiang (黃瑞祥) (“**AuditChair**” or “**SP5**”⁶)
6. Chiang Jen-chin (蔣仁欽) (“**SP6**”⁷)
7. Lu Wen-yi (呂文義) (“**SP7**”⁸)
8. Xue Wenge (薛文革) (“**SP8**”⁹)
9. Li Dequiang (李德強) (“**NED**” or “**SP9**”¹⁰)
10. Lin Sheng-bin (林聖斌) (“**SP10**”¹¹)
11. Alvin Chiu (趙熾佳) (“**AuditComMember**” or “**SP11**”¹²)

Statement of Institution of proceedings

I. PARTIES

1. Mayer (the 1st Specified Person) is a Cayman Islands incorporated company. At the material times, Mayer and its subsidiaries (the “**Group**”) were principally engaged in the processing and manufacturing of different kinds of steel sheets and steel pipes which are used by its customers in the manufacture of 3C products, sports equipment, as well as spare parts of household appliances and motor vehicles.

2. Mayer was listed on the Stock Exchange of Hong Kong Limited on 21st June 2004 (Stock code: 1116). At the request of Mayer, the trading of its listed securities has been suspended since 9th January 2012.

³ The abbreviation used by the SFC is “Chan”.

⁴ The abbreviation used by the SFC is “Hsiao”.

⁵ The abbreviation used by the SFC is “Lai”.

⁶ The abbreviation used by the SFC is “Huang”.

⁷ SFC does not use any abbreviation for this person.

⁸ SFC does not use any abbreviation for this person.

⁹ SFC does not use any abbreviation for this person.

¹⁰ SFC does not use any abbreviation for this person.

¹¹ SFC does not use any abbreviation for this person.

¹² SFC does not use any abbreviation for this person.

3. At all material times, FinancialController (the 2nd Specified Person) was the Company Secretary and Financial Controller of Mayer.

4. At all material times, the 3rd to 11th Specified Persons were members of the board of directors of Mayer (the “**Board**”). In particular, Chairman, (the 3rd Specified Person) was the chairman of the Board, EDLai (the 4th Specified Person) was an executive director responsible for the day to day management of the business of Mayer, and AuditChair (the 5th Specified Person) was the chairman of the audit committee (the “**Audit Committee**”) of Mayer.

5. All of the Specified Persons (except Mayer) were at all material times “*officers*” of Mayer as defined in Part 1 of Schedule 1 of the Ordinance.

II. THE AUDIT FOR FINANCIAL YEAR ENDED 31ST DECEMBER 2011 AND RESIGNATION OF GRANT THORNTON AS AUDITORS

6. Crowe Horwath (HK) CPA Limited (“**Crowe Horwath**”) was appointed as Mayer’s auditors on 11th June 2010. Crowe Horwath resigned as Mayer’s auditors on 16th February 2012.

7. Following Crowe Horwath’s resignation, Mayer appointed Grant Thornton Hong Kong Limited (“**Grant Thornton**”) as auditors on 29th February 2012.

8. Between April and August 2012, Grant Thornton had repeated communications with Mayer’s management regarding issues identified in the course of auditing the Group’s financial statements for the year ended 31st December 2011. Mayer failed to give satisfactory answers to those inquiries.

9. The salient issues identified by Grant Thornton include, among other things, the following (collectively, the “**Outstanding Audit Issues**”);

- (a) The nature of the disposal of a wholly-owned subsidiary of Mayer, Advance Century Development Limited, for a consideration of HK\$15,500,000, is questionable;
- (b) Mayer’s projects in Vietnam, including the Dan Tien Port Project and Phoenix Project which were acquired by Mayer at a consideration of HK\$620,000,000 were not under Mayer’s control and their prospects were far less promising than originally valued and contemplated; and

- (c) Two subsidiaries of Mayer’s jointly controlled entity, namely Elternal Galaxy Limited (“**Elternal**”) and Sinowise Development Limited, had entered into two supply agreements with two different suppliers and had made substantial prepayments of US\$10,000,000 and US\$4,000,000 respectively, without security, to those suppliers which appeared to Grant Thornton as irrecoverable.

10. In view of the Outstanding Audit Issues, on 23rd August 2012, Grant Thornton sent a list of ‘*potential qualifications to the audit report*’ to Mayer indicating that they would have to qualify their audit opinion if the Outstanding Audit Issues were not resolved. The Outstanding Audit Issues referred to in paragraph 9 above and the indication by Grant Thornton as at 23rd August 2012 that they would issue a qualified audit report did, or alternatively, ought reasonably to have come to the knowledge of the 2nd to 11th Specified Persons, in the course of their performing their functions as officers of Mayer. From about September 2012 onwards, no constructive response had been provided by Mayer or its directors or Audit Committee to Grant Thornton to address the Outstanding Audit Issues.

11. On 27th December 2012, Calvin Chiu (Partner of Grant Thornton) verbally informed FinancialController that Grant Thornton intended to resign as Mayer’s auditors. Later on the same day, FinancialController received Grant Thornton’s resignation letter dated 27th December 2012 (the “**Resignation Letter**”) by email.

12. The Resignation Letter was addressed to ‘*The Audit Committee and the Board of Directors*’. The Resignation Letter expressly stated, among other things, the following:-

- (a) in unequivocal and unconditional terms, that Grant Thornton gave ‘*formal notice of [their] resignation as auditors of Mayer with immediate effect*’ (the “**Resignation**”);
- (b) that during ‘*the course of the audit for the financial statements for the year ended 31 December 2011*’, Grant Thornton had ‘*identified and reported certain significant matters to [Mayer’s] Management, the Board of Directors and the Audit Committee including [the Outstanding Audit Issues]*’;
- (c) that despite Grant Thornton’s ‘*continuing efforts to take the audit forward and resolve the [Outstanding Audit Issues], [Mayer’s]*

Management is unable to provide information [Grant Thornton] requested and update [Grant Thornton] in respect of the developments of these matters on a timely basis'; and

- (d) a reminder that Mayer was required under ‘*the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (‘SEHK’) ... to inform the SEHK immediately of any decision made and to publish an announcement as soon as practicable, in regard to any change in auditors, the reason(s) for the change and any other matters that need to be brought to the attention of the holders of securities of Mayer*’.

13. On 28th December 2012, FinancialController verbally informed EDLai (the 4th Specified Person) of the receipt and contents of the Resignation Letter.

14. As the Resignation Letter was addressed to the Board and the Audit Committee, the Resignation did or alternatively, ought reasonably to have come to the knowledge of the 2nd to 11th Specified Persons, in the course of performing their functions as officers of Mayer.

15. There was substantial delay on the part of Mayer and its officers in reacting to and making an announcement regarding the Resignation:

- (a) It was not until 22nd January 2013 that Mayer called a Board meeting, more than three weeks after the Resignation Letter was sent to FinancialController; and
- (b) A Board meeting was held on 23rd January 2013 to discuss the Resignation Letter. An announcement concerning Grant Thornton’s resignation was published on the same day (the “**Resignation Announcement**”).

III. FAILURE TO DISCLOSE INSIDE INFORMATION

16. Three categories of ‘*inside information*’ within the meaning of section 307A of the Ordinance have not been adequately disclosed by Mayer, namely:

- (a) the Resignation;

- (b) the Outstanding Audit Issues referred to in paragraph 9 above and the indication by Grant Thornton as at 23rd August 2012 that they would issue a qualified audit report as referred to in paragraph 10 above (“**Potential Qualified Audit Report**”); and
- (c) the circumstances surrounding the substantial prepayment made by Elternal (“**Prepayment by Elternal**”).

17. The three categories of information referred to in paragraph 16 above:-

- (a) were specific information about Mayer; and
- (b) were not generally known to the persons who were accustomed to or would be likely to deal in the listed securities of Mayer but would if generally known to them have been likely to materially affect the price of those securities.

18. The Resignation came to the knowledge of Mayer on 27th December 2012. Once such information came to the knowledge of Mayer, it was obliged, under section 307B(1)¹³ of the Ordinance, to disclose the information to the public as soon as reasonably practicable. However, no disclosure was made until the Resignation Announcement was issued on 23rd January 2013.

19. Grant Thornton alerted Mayer on 23rd August 2012 that the Outstanding Audit Issues (including the Prepayment by Elternal) might lead to the Potential Qualified Audit Report. Once such information came to the knowledge of Mayer, it was obliged, under section 307B(1)¹⁴ of the Ordinance, to disclose that information to the public as soon as reasonably practical. However, no disclosure was made.

20. It was the responsibility of the 2nd to 11th Specified Persons, as officers of Mayer, to ensure that Mayer complied with its disclosure obligation. They failed to so ensure. Their intentional, reckless or negligent conduct resulted in Mayer’s breach of a disclosure requirement under section 307G of the Ordinance.

¹³ Part XIVA (sections 307A-ZA) of the Ordinance came into effect on 1 January 2013. Mayer and its officers were obliged to make a disclosure under section 307B(1) as soon as reasonably practical on or after 1 January 2013.

¹⁴ Please see footnote 13.

21. By reason of the matters set out above, Mayer failed to disclose to the public (i) the Resignation, (ii) the Outstanding Audit Issues and the Potential Qualified Audit Report as from 23rd August 2012 and (iii) the Prepayment by Elternal, each of which constituted ‘*inside information*’ (within the meaning of section 307A(1) of the Ordinance) as soon as reasonably practicable after the¹⁵ inside information had come to its knowledge, contrary to section 307B(1)¹⁶ of the Ordinance.

22. The 2nd to 11th Specified Persons, as the officers of Mayer, were also in breach by virtue of section 307G of the Ordinance by failing to ensure Mayer complied with its disclosure obligation.

Dated this 4th day of March 2016

Securities & Futures Commission”

¹⁵ The word “said” before “inside information” in the SFC Notice has been omitted here as it is mere verbiage.

¹⁶ Please see footnote 13.

CHAPTER 2

THE SUBSTANTIVE HEARING

Preliminary Conference

2. The Chairman held a Preliminary Conference on 13 April 2016. Mr John Hui attended as Assistant Presenting Officer. Mr Tony Chow, instructed by C.L. Chow & Macksion Chan, represented Mayer and NED. FinancialController attended in person. The other Specified Persons were unrepresented and absent at the Preliminary Conference.

3. After consultation with counsel for the represented parties, 15 days (i.e. 1 – 21 November 2016) were fixed for the substantive hearing and directions for the filing and service of witness statements, expert reports, opening submissions, chronology of events, legal authorities and *dramatis personae* (cast of characters) were given.

The substantive hearing

4. In early May 2016, FinancialController, EDLai and AuditComMember retained K & L Gates who in turn instructed Mr Derek Chan and Mr Jacky Lam to represent these 3 Specified Persons. K & L Gates, Mr Derek Chan and Mr Jacky Lam have since been representing FinancialController, EDLai and AuditComMember.

5. C.L. Chow & Macksion Chan and Mr Tony Chow have continued to represent Mayer and NED.

6. The other Specified Persons were unrepresented and absent at the substantive hearing.

7. FinancialController, EDLai and AuditComMember and NED and Mayer have indicated in writing that they did not intend to cross-examine any of the following witnesses on any aspect of their evidence:

- (1) Mr Kong Ka Ming, legal executive employed by SFC;
- (2) Ms Tse Ka Yan, Margaret, SFC's investigator;
- (3) Ms Anthea Han of Grant Thornton;
- (4) Mr Calvin Chiu of Grant Thornton; and
- (5) Mr Daniel Lin of Grant Thornton.

8. These 5 persons had been tendered for cross-examination but neither Mr Tony Chow nor Mr Derek Chan asked any question of any of these 5 persons.

9. Mr Derek Chan stated that he did not intend to call any of his clients. In response to this, Mr John Scott SC, the Presenting Officer for the SFC, indicated that he would wish to cross-examine FinancialController, EDLai and AuditComMember. Mr Derek Chan produced the *Evergrande* case which was not on his list of authorities and asserted that the practice of the tribunals was to respect the election of the Specified Persons. Mr John Scott SC asked for a copy of that case. Later in the day, Mr John Scott SC told the Tribunal that the *Evergrande* case did not support Mr Derek Chan's assertion. Mr Derek Chan did not

dispute what Mr John Scott SC said and made no attempt to make good his assertion.

10. The Tribunal is at a loss to understand why Mr Derek Chan made his assertion in the first place.

11. Having regard to section 253¹⁷, we allowed the application of Mr John Scott SC.

12. SFC called Mr Lung Hak Kau Karl (“**Karl Lung**”) as its expert witness.

13. None of the Specified Persons adduced any expert evidence.

14. FinancialController, EDLai and AuditComMember attended for cross-examination. NED, on his own volition, also attended to give oral evidence and was cross-examined.

15. Openings and evidence were heard on 1, 2, 3, 4 and 7 November 2016. Closing submissions were heard on 11 November 2016. The Tribunal then adjourned for consideration of the liability of each of the Specified Persons¹⁸.

¹⁷ See §54 below.

¹⁸ Except SP7, as to which see §27.

CHAPTER 3

REASONABLE OPPORTUNITY OF BEING HEARD

Section 252(6) & section 307K

16. Section 252(6) of the Ordinance provides that:

“The Tribunal shall not identify a person as having engaged in market misconduct pursuant to subsection (3)(b) without first giving the person a reasonable opportunity of being heard”.

17. Section 307K of the Ordinance provides that:

“Before the Tribunal—

- (a) identifies a person under section 307J(1)(b); or
- (b) makes an order under section 307N(1) in respect of a person,

the Tribunal must give the person a reasonable opportunity of being heard.”

18. We now consider section 252(6) and section 307K in relation to each of the 11 Specified Persons.

Mayer Holdings Limited (美亞控股有限公司) (SP1)

19. Mayer has been legally represented since the Preliminary Conference. We are satisfied that Mayer has been given a reasonable opportunity of being heard.

Chan Lai Yin, Tommy (陳禮賢) (FinancialController or SP2)

20. FinancialController attended the Preliminary Conference in person and has been legally represented since early May 2016. We are satisfied that FinancialController has been given a reasonable opportunity of being heard.

Hsiao Ming-chih (蕭敏志) (Chairman or SP3)

21. The Notice and its Chinese translation and the Synopsis and the rest of the Tribunal documents had been served on Chairman's last known address at Taipei City. We are satisfied that Chairman had been notified and was aware of these proceedings, including the present substantive hearing. We are satisfied that Chairman has been given a reasonable opportunity of being heard but has chosen to be unresponsive.

Lai Yueh-hsing (賴粵興) (EDLai or SP4)

22. EDLai has been legally represented since early May 2016. We are satisfied that EDLai has been given a reasonable opportunity of being heard.

Huang Jui-hsiang (黃瑞祥) (AuditChair or SP5)

23. The Notice and its Chinese translation and the Synopsis and the rest of the Tribunal documents had been served on AuditChair's last known address at Taipei City. We are satisfied that AuditChair had been notified and was aware of these proceedings, including the present substantive hearing. We are satisfied that AuditChair has been given a reasonable opportunity of being heard but has chosen to be unresponsive.

Chiang Jen-chin (蔣仁欽) (SP6)

24. The Notice and its Chinese translation and the Synopsis and the rest of the Tribunal documents had been served on SP6's last known address at Taipei City. We are satisfied that SP6 had been notified and was aware of these proceedings, including the present substantive hearing. We are satisfied that SP6 has been given a reasonable opportunity of being heard but has chosen to be unresponsive.

Lu Wen-yi (呂文義) (SP7)

25. SFC has received information that Lu Wen-yi (呂文義), the 7th Specified Person, might have passed away, but has not obtained definitive confirmation of the correctness of the information.

26. If SP7 has passed away, it is not possible to give him, and he has not been given, a reasonable opportunity of being heard.

27. On SFC's application, we stayed the proceedings in respect of SP7, with liberty to restore. This was to give SFC time to confirm whether SP7 has passed away.

Xue Wenge (薛文革) (SP8)

28. SFC was informed by Mayer's former legal advisers that a certain email address was the email address of SP8. The Notice and its Chinese translation and the Synopsis and the rest of the Tribunal documents had been sent to the email address and had not bounced back. SFC's internet search revealed that SP8 was the principal of a law firm at an address in Shanghai. All the Tribunal documents had been sent to

SP8 at that law firm's address in Shanghai. We are satisfied that SP8 had been notified and was aware of these proceedings, including the present substantive hearing. We are satisfied that SP8 has been given a reasonable opportunity of being heard but has chosen to be unresponsive.

Li Dequiang (李德強) (NED or SP9)

29. SP9 has been legally represented since the Preliminary Conference. We are satisfied that SP9 has been given a reasonable opportunity of being heard.

Lin Sheng-bin (林聖斌) (SP10)

30. The Notice and its Chinese translation and the Synopsis and the rest of the Tribunal documents had been served on SP10's last known address at Taipei City. We are satisfied that SP10 had been notified and was aware of these proceedings, including the present substantive hearing. We are satisfied that SP10 has been given a reasonable opportunity of being heard but has chosen to be unresponsive.

Alvin Chiu (趙熾佳) (AuditComMember or SP11)

31. AuditComMember has been legally represented since early May 2016. We are satisfied that AuditComMember has been given a reasonable opportunity of being heard.

Summary

32. With the exception of SP7, we are satisfied that all the Specified Persons have been given a reasonable opportunity of being heard.

33. As stated in §27 above, we have stayed the proceedings in respect of SP7, with liberty to restore.

CHAPTER 4

FACTUAL BACKGROUND

34. The following facts are not in dispute and we find them as facts:

- (1) Mayer was incorporated in the Cayman Islands on 9 October 2003. It was registered on 20 January 2004 as an overseas company in Hong Kong under Part XI of the then Companies Ordinance, Cap. 32.
- (2) At all material times, Mayer and its subsidiaries are principally engaged in the processing and manufacturing of different kinds of steel sheets and steel pipes which are used by its customers in the manufacture of 3C products, sports equipment, as well as spare parts of household appliances and motor vehicles.
- (3) Mayer was listed on the Stock Exchange of Hong Kong Limited (“SEHK”) on 21 June 2004 (Stock code: 1116). At the request of Mayer, the trading of its listed securities has been suspended¹⁹ since 9 January 2012.
- (4) At all material times, FinancialController was the company secretary and financial controller of Mayer, but not a member of Mayer’s Board.
- (5) At all material times, the 3rd to 11th Specified Persons were members of the Board. In particular, Chairman was the chairman of the Board; EDLai was an executive director responsible for the day to day management of the business of

¹⁹ Section 307A(3) of the Ordinance will be discussed in §§73 - 82 below.

Mayer; AuditChair was the chairman of the Audit Committee of Mayer; NED was a non-executive director and AuditComMember was a member of the Audit Committee.

- (6) All the Specified Persons (except Mayer) were at all material times “officers” of Mayer as defined in Part 1 of Schedule 1 of the Ordinance²⁰.

35. The following facts are taken from undisputed contemporaneous documents and we find them as facts.

36. By an announcement dated 21 February 2012, Mayer announced:

- (1) That Crowe Horwath had resigned as the auditors of Mayer with effect from 16 February 2012;
- (2) The “reasons for the resignation [as] extracted from the letter of resignation issued by Crowe Horwath to the Board and the Audit Committee of [Mayer] on 16 February 2012”; and
- (3) That the “Board will try its best endeavours to fill the casual vacancy occasioned by the resignation of Crowe Horwath”.

37. By an announcement dated 29 February 2012, Mayer announced that Grant Thornton had been “appointed as the auditors of [Mayer] with effect from 29 February 2012 to fill the casual vacancy following the resignation of Crowe Horwath”.

²⁰ Part 1 of Schedule 1 of the Ordinance defines an “officer (高級人員)” as, “in relation to a corporation, [meaning] a director, manager or secretary of, or any other person involved in the management of, the corporation”.

Correspondence between April 2012 and October 2012

38. Between April 2012 and October 2012, Grant Thornton corresponded with Mayer seeking various information and documents in the course of its audit of Mayer's financial statements for the year ended 31 December 2011.

39. By email sent on 12 April 2012 to FinancialController, Anthea Han of Grant Thornton attached a list of key audit findings.

40. By email sent on 17 April 2012 to FinancialController, Anthea Han attached the update of the draft key audit findings for his comment and feedback. Anthea Han also requested FinancialController to help arrange meetings with the management of Mayer (including Chairman or EDLai or SP6 or SP7) by that Thursday and with members of the Audit Committee (after the meeting with the management of Mayer) by that Friday, with a request to meet AuditComMember.

41. By an email sent on 7 May 2012 to FinancialController, Anthea Han attached the then latest "Outstanding matter list".

42. By letter dated 22 May 2012 sent by Grant Thornton to the Audit Committee and the Board, Grant Thornton attached a list of significant matters and requested the Board to address and respond.

43. By an email sent on 8 June 2012 to FinancialController, Calvin Chiu of Grant Thornton noted that they had not received any response from the directors on the issues mentioned in the list of

significant matters sent on 22 May 2012 and requested FinancialController to follow up.

44. By an email sent on 4 July 2012 by Job Tang of Mayer to Daniel Lin, Calvin Chiu, Jeffrey Chan and Anthea Han of Grant Thornton, Job Tang attached what he called “our response to the outstanding matters and related documents”. However, numerous items under the “Response” column were left blank or contained the remark “Pls. review during revisit”.

45. By an email sent on 15 August 2012 by Job Tang to Daniel Lin, Calvin Chiu, Jeffrey Chan and Anthea Han of Grant Thornton, Job Tang stated that “[EDLai] will schedule to come back from Taiwan to Hong Kong on next Monday (20 Aug) and will probably stay a couple of days to follow up with the progress of the audit and other corporate matters. We would be grateful if you would provide us with a detailed request list and timelines such that we would review it beforehand and to have another meeting with you to fix the detailed course of actions and allocate sufficient staff to work with you”.

46. By an email sent to FinancialController on 23 August 2012, Anthea Han attached “the action plan on the key audit matters with potential modifications in the audit report for further discussion”. The attachment stated the terms of the “Potential qualifications to the audit report” consequent upon “failure to obtain the respective documents”. The key audit matters referred to in the action plan included all the Outstanding Audit Issues identified in §9 of the Notice.

47. By an email sent to Anthea Han on 12 October 2012, FinancialController attached “the reply of the outstanding matter” and stated that they were “arranging the revisit of GZ Mayer and will inform [Grant Thornton] the schedule once we got it”. Numerous items under the “Response” column were conspicuously left blank or contained the remark “to be provided in due course”. 12 October 2012 was more than 9 months after the 2011 year end (31 December 2011) and many months after the expiry of the deadline under the Listing Rules for publishing the annual results for the year ended 31 December 2011.

Grant Thornton’s resignation (the Resignation)

48. By an email sent on 27 December 2012 at 6:38 pm by Jeffrey Chan of Grant Thornton to FinancialController, Jeffrey Chan attached a copy of the Resignation Letter to Mayer.

49. The Resignation Letter was dated 27 December 2012; signed by Daniel Lin, Grant Thornton’s senior partner; addressed to the Board and the Audit Committee; and read as follows:

“The Audit Committee and
the Board of Directors
[Mayer]
[Address omitted here]
Attn: [Chairman/EDLai/
AuditChair/FinancialController]
27 December 2012
Dear Sirs

[Mayer]

We hereby give you formal notice of our resignation as auditors of [Mayer] with immediate effect.

Pursuant to the Code of Ethics of Professional Accountants Section 441 ‘Change of Auditors of a Listed Issuer of The Stock Exchange of Hong Kong’ issued by the Hong Kong Institute of Certified Public Accountants, we set out below the circumstances leading to our cessation as [Mayer’s] auditors that in our opinion affected the auditor-client relationship between [Mayer] and ourselves.

During the course of the audit of the financial statements for the year ended 31 December 2011, we have identified and reported certain significant matters to the Management, the Board of Directors and the Audit Committee including the substance of disposal of an available-for-sale financial asset, ownership and control of the Vietnam project, and the existence and commercial substance of prepayment to suppliers by [Mayer’s] jointly controlled entities; we have requested the Management to address, respond to and resolve these matters as soon as possible. However, despite our continuing efforts to take the audit forward and resolve these significant matters, the Management is unable to provide information we requested and update us in respect of the developments of these matters on a timely basis.

In addition to the above, in reaching a conclusion on the resignation, we take into account many factors including professional risk associated with the audit and our available internal resources in light of current work flows.

Other than the foregoing, there are no matters in connection with our cessation to act as [Mayer’s] auditors that we consider need to be brought to the attention of shareholders or creditors of [Mayer].

We take this opportunity to remind you that Rule 13.51(4)²¹ of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (‘SEHK’) issued by the SEHK, amongst other things, requires [Mayer] to inform the SEHK immediately of any decision made, and to publish an announcement as soon as practicable, in regard to any change

²¹ Rule 13.51(4) of the Listing Rules provides that an “issuer must publish an announcement as soon as practicable in regard to ... any change in its auditors ..., the reason(s) for the change and any other matters that need to be brought to the attention of holders of securities of the issuer (including, but not limited to, information set out in the outgoing auditors’ confirmation in relation to the change in auditors)”.

in auditors, the reason(s) for the change and any other matters that need to be brought to the attention of the holders of securities of [Mayer].

Yours sincerely

Grant Thornton”

Period from 27 December 2012 (notification of resignation) to 23 January 2013 (publication of announcement)

50. The following correspondence took place between 27 December 2012 (notification of resignation of auditors) and 23 January 2013 (publication of announcement):

- (1) FinancialController sent an email at 9:55 am on 28 December 2012 stating that (written exactly as it stands in the original):

“FYI

Calvin and I had a phonecall last night²² but I was told will give us more time to discuss.

I’m still trying to contact Daniel but was on his voicemail this morning. Will update the progress. Job, do you have other source that know what’s going on. Cos its really shock to us.

Regards

Tommy”

- (2) Winnie Chiu of ONC Lawyers, Mayer’s legal advisers, sent an email at 11:03 am on 31 December 2012 to Job Tang and FinancialController stating that:

²² FinancialController here acknowledged the existence of a conversation between Calvin Chiu and him the night before, i.e. on 27 December 2012.

“Dear all,

An announcement will be required in relation to this.

The Resignation was stated to take immediate effect ie 27th December 2012

whether Baker has been informed/consulted in relation to this as it is dealing with HKSE’s request for an update announcement by today?

We shall ask baker to try to seek an extension of time for us to make the update announcement if that can not (*sic*) be done by today.

Best regards,

Winnie”

- (3) FinancialController responded to Winnie Chiu by email sent at 12:04 pm on 31 December 2012 stating that (written exactly as it stands in the original)²³:

“Dear Winnie,

Per Job last week, Calvin of GT promised that more time for us to dealing with new auditor or chance to talk with their senior partner. I told SEHK that the case and possibly I am able to get in touch of GT partner on Wednesday 2 Jan 2013. In most case, SEHK will expect us to issue announcement to the change of auditors and update the market on the progress and way forward to the resumption of trading of shares of [Mayer].

Regards

Tommy”

²³ There was no mention of any advice said to have been given by Baker & McKenzie. Indeed, there was no documentary evidence of any advice said to have been given by Baker & McKenzie.

- (4) FinancialController's email drew the following response by Job Tang in his email to Winnie Chiu, cc FinancialController, 10 minutes later at 12:14 pm stating that:

“Dear all,

Daniel is on leave until 7th Jan, Calvin said he needs to talk with Daniel when he will return office.

Best regards

Job Tang”

- (5) By fax dated 15 January 2013 sent to Mayer for the attention of FinancialController, SEHK asked Mayer to address:

“ ...

- (b) On 27 December 2012, we have been informed by [Mayer] that [Mayer's] current auditors have tendered their resignation and [Mayer] is now looking for a new incoming auditor as a replacement. However, [Mayer] subsequently advised that the auditors will not resign until a new auditor is appointed. We remind [Mayer's] obligation under Rule 13.51(4) that [Mayer] must as soon as practicable announce the resignation and state clearly the reasons for the resignation as set out in the outgoing auditors' resignation letter.

...

Please let us have your reply by 18 January 2013 ...”

- (6) Calvin Chiu sent an email to FinancialController at 7:12 pm on 16 January 2013 reminding FinancialController again of the requirements of Rule 13.51(4) of the Listing Rules:

“Dear Tommy,

Further to our resignation letter dated 27 December 2012, we note that [Mayer] has not yet make (*sic*) announcement about the change in auditors.

I would like to remind you again that the Rule 13.51(4) of The Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (‘SEHK’) issued by the SEHK, amongst other things, requires [Mayer] to inform the SEHK immediately of any decision made, and to publish an announcement as soon as practicable, in regard to any change in auditors, the reason(s) for the change and any other matters that need to be brought to the attention of the holders of securities of [Mayer].

Best regards,

Calvin”

- (7) FinancialController sent an email to Calvin Chiu at 19:23 hours on 16 January 2013 stating that:

“Dear Calvin,

As discussed with Daniel and yourself between our Job Tang and myself on separate phone calls, it is our understanding that you will give us more time to look for a new auditors as replacement. Until then, we will publish an announcement as soon as practicable. I also noted that the proposed new coming auditors already issue (*sic*) a clearance letter to your firm, please kindly pay attention to it at your earliest convenience.

If you have any question, please let me know.

Regards

Tommy Chan”

- (8) FinancialControlller’s email drew a response from Calvin Chiu 22 minutes later stating:

“Hi Tommy,

To clarify, our resignation letter dated 27 December 2012 is effective.

We will make prompt reply to the new coming auditors if we receive the clearance letter.

Best regards

Calvin”

- (9) By letter dated 16 January 2013²⁴, Zenith CPA Limited, the accountants which Mayer proposed to appoint as auditors, wrote to Grant Thornton asking for a clearance letter.
- (10) By letter dated 17 January 2013, Grant Thornton provided the clearance.
- (11) By email sent at 12:06 pm on 18 January 2013 by Anthea Han to FinancialController, she provided a copy of Grant Thornton’s letter of 17 January 2013 to Zenith CPA Limited.
- (12) By email in Chinese sent at 16:52 hours on 18 January 2013 by FinancialController to Chairman, the secretary of EDLai in Taiwan, AuditChair, SP6, SP7, SP8, NED, SP10 and AuditComMember (i.e. to all the Specified Persons²⁵ who were directors of Mayer) enclosing a copy of SEHK’s letter dated 15 January 2013 notifying Mayer that according to the Listing Rules, the auditors’ resignation and the new auditors’

²⁴ In Zenith CPA Limited’s email sent at 10:13 am on 17 January 2013 to FinancialController, Zenith attached a copy of the professional clearance letter dated 16 January 2013 which Zenith said it “will” send.

²⁵ Except EDLai who had no email address himself and the email was sent to his secretary in Taiwan to be forwarded to EDLai.

appointment should be announced as quickly as possible. A draft letter to SEHK was enclosed and FinancialController asked for comments by 8 pm on “8 (*sic*) January 2013”²⁶. In the draft reply, FinancialController, signing as Mayer’s Company Secretary, stated somewhat unhelpfully that “[Mayer] is aware of its disclosure obligation under Rule 13.51(4) of the Listing Rules, and it is in our best endeavor to comply with the Rule and published (*sic*) the Announcement as soon as practicable”. No draft announcement was attached.

(13) By email in Chinese sent at 10:05 am on 21 January 2013 by FinancialController to Chairman, the secretary of EDLai in Taiwan, AuditChair, SP6, SP7, SP8, NED, SP10 and AuditComMember (i.e. to all the Specified Persons who were directors of Mayer) stating that according to SEHK’s request, Mayer is required to publish an announcement about its auditors’ resignation “today” and FinancialController enclosed a copy of Mayer’s draft announcement dated “[18] January 2013”.

(14) In the event, Mayer’s announcement on “Resignation of Auditors”, i.e. the Resignation Announcement, was not published until 23 January 2013 after a Board meeting on the same date. It was stated in the announcement that “the Board will use its best endeavours to fill the casual vacancy

²⁶ The relevant part read as follows: “有關聯交所 2013.1.15 之函件(見附件)，提問到: ... (二) 於 2012 年 12 月 27 日本公司知會聯交所有關會計師辭任及新會計師之正式委任，應根據上市規則第 13.51(4) 條的披露義務盡快作出公告...我們現提供本公司之回覆中英文譯本(見附件)給參考，請各位於 2013 年 1 月 8 日下午 8 時前提任何意見。”

following the resignation of Grant Thornton as soon as practicable and will make an announcement in this regard”.

CHAPTER 5

RELEVANT STATUTORY PROVISIONS

Object of Market Misconduct Proceedings

51. Section 252(1) – (3) of the Ordinance provide that:

- “(1) Subject to section 252A, if it appears to the Commission that market misconduct has or may have taken place, the Commission may institute proceedings in the Tribunal concerning the matter.
- (2) The Commission institutes proceedings under this section by giving the Tribunal a notice in writing containing a statement specifying the matters prescribed in Schedule 9.
- (3) Without limiting the generality of section 251(1), the object of the proceedings instituted under this section is for the Tribunal to determine –
 - (a) whether any market misconduct has taken place;
 - (b) the identity of any person who has engaged in the market misconduct; and
 - (c) the amount of any profit gained or loss avoided as a result of the market misconduct.”

Standard of proof

52. Section 252(7) lays down the standard of proof as follows:

“Subject to section 261(3)²⁷, the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law.”

²⁷ Not applicable here.

53. Section 307J(2) is to the same effect:

“Subject to section 261(3)²⁸, the standard of proof required to determine any question or issue before the Tribunal in disclosure proceedings is the standard of proof applicable to civil proceedings in a court of law.”

Powers of the Tribunal

54. The powers of the Tribunal under section 253 include the following:

“(1) Subject to the provisions of Schedule 9 and any rules made by the Chief Justice under section 269, the Tribunal, for the purposes of any proceedings instituted under section 252, may, on its own motion or on the application of any party before it-

(a) receive and consider any material by way of oral evidence, written statements or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;

...

(i) stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;

(j) determine the procedure to be followed in the proceedings;

(k) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the proceedings or the carrying out of its functions.

...

(4) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the

²⁸ Not applicable here.

ground that to do so might tend to incriminate the person.”

Definition of inside information

55. Section 307A(1) defines “inside information” as follows:

“inside information (内幕消息), in relation to a listed corporation, means specific information that —

- (a) is about—
 - (i) the corporation;
 - (ii) a shareholder or officer of the corporation; or
 - (iii) the listed securities of the corporation or their derivatives; and
- (b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities”.

Breach by listed corporation of disclosure requirement

56. Section 307A(2) defines a breach by a listed corporation of a disclosure requirement as follows:

- “(2) For the purposes of this Part—
- (a) a breach of a disclosure requirement takes place if any of the requirements in section 307B or 307C is contravened in relation to a listed corporation; and
 - (b) in those circumstances, the listed corporation is in breach of the disclosure requirement.”

Listed securities during any period of suspension

57. Section 307A(3) is a *unique* Hong Kong provision, with no known equivalent or similar provision in other jurisdictions. It provides that:

“(3) For the purposes of this Part, securities listed on a recognized stock market are to continue to be regarded as listed during any period of suspension of dealings in those securities on that market.”

Listed corporation’s disclosure requirements

58. Section 307B lays down a listed corporation’s disclosure requirement as follows:

- “(1) A listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public.
- (2) For the purposes of subsection (1), inside information has come to the knowledge of a listed corporation if—
 - (a) information has, or ought reasonably to have, come to the knowledge of an officer of the corporation in the course of performing functions as an officer of the corporation; and
 - (b) a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation.”

59. Section 307C prescribes the manner of disclosure as follows:

- “(1) A disclosure under section 307B must be made in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed.
- (2) Without limiting the manner of disclosure permitted under subsection (1), a listed corporation complies with

that subsection if it has disseminated the inside information required to be disclosed under section 307B through an electronic publication system operated by a recognized exchange company for disseminating information to the public.”

Officers’ disclosure requirements

60. Section 307G lays down the circumstances when an officer of a listed corporation is also in breach of the disclosure requirement:

- “(1) Every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation.
- (2) If a listed corporation is in breach of a disclosure requirement, an officer of the corporation —
 - (a) whose intentional, reckless or negligent conduct has resulted in the breach; or
 - (b) who has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach,

is also in breach of the disclosure requirement.”

CHAPTER 6

INSIDE INFORMATION

Matters for our determination

61. We are required by the Notice to conduct proceedings and determine:

- (1) whether a breach of a disclosure requirement has taken place; and
- (2) the identity of any person who is in breach of the disclosure requirement.

62. As the disclosure requirement relates to “inside information”, the first step is to identify the “inside information”.

63. SFC alleges the following 3 categories of “inside information”²⁹:

- (a) the Resignation;
- (b) the Outstanding Audit Issues referred to in paragraph 9 [of the Notice] and the indication by Grant Thornton as at 23rd August 2012 that they would issue a qualified audit report as referred to in paragraph 10 [of the Notice] (‘Potential Qualified Audit Report’); and
- (c) the circumstances surrounding the substantial prepayment made by Elternal (‘Prepayment by Elternal’).

²⁹ See §16 of the Notice.

64. By virtue of section 307A(1), “inside information”, in relation to a listed corporation, means specific information that –

“(a) is about—

(i) the corporation;

(ii) a shareholder or officer of the corporation;
or

(iii) the listed securities of the corporation or their derivatives; and

(b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities.”

The Resignation

65. The Resignation of Grant Thornton as auditor of Mayer is information about Mayer, the listed corporation.

66. Resignation was with immediate effect. It was stated in clear and unequivocal terms. The information is plainly specific. There are no “ifs” and “buts” about it.

67. The requirements of section 307A(1)(a) are disjunctive. Once (i) is satisfied, and in the considered opinion of the Tribunal, (i) is satisfied, it is irrelevant whether (ii) or (iii) is satisfied.

68. Until the publication of the Resignation Announcement, the Resignation was not generally known to the persons who were accustomed or would be likely to deal in the listed securities of Mayer.

69. Auditors of a listed corporation are independent professionals who play a very important role by auditing the accounts of the listed corporation. A clean audit report tends to boost confidence in the accounts of the listed corporation. We accept the opinion of Mr Lung Hak Kau Karl (“**Karl Lung**”), the expert called by SFC, that the resignation of an auditor is typically viewed very negatively by the public as it is a strong signal that the auditor has probably encountered problems during the audit and this will cast serious doubt on the reliability of the listed corporation’s accounts, or may even suggest the possibility of fraud in the company. We accept his opinion that the Resignation, if generally known to the persons who are accustomed or would be likely to deal in the listed securities of Mayer, would be likely to materially affect the price of Mayer shares.

70. Mr Derek Chan sought to rely on the drop of about 75% - 80% in price of Mayer shares in the 5 months prior to suspension on 22 November 2011. He seemed to be contending that the price of the listed securities would or could not be materially affected by any of the information contended by SFC to constitute inside information.

71. We reject his argument. The pre-suspension price of Mayer shares had not dropped to zero. A low price could still be materially affected. In our opinion, the Resignation was sufficiently and materially negative and would still be likely to materially affect the price of the listed securities. We accept what Karl Lung said on this point under cross-examination. A share which had been dropping in price was not incapable of materially dropping in price.

72. We would add that the resignation of Crowe Horwath earlier in 2012 had no relevance on the question of whether the Resignation [of Grant Thornton] constituted inside information.

Suspension of trading

73. Mr Derek Chan sought to rely on the suspension in trading of the shares in Mayer. With all due respect, his submission flies in the face of section 307A(3) which provides that:

“For the purposes of this Part, securities listed on a recognized stock market are to continue to be regarded as listed during any period of suspension of dealings in those securities on that market.”

74. Thus, section 307A(3) mandates that shares of Mayer:

“are to continue to be regarded as listed during any period of suspension of dealings in those securities on that market.”

In other words, *no* regard shall be had to suspension of trading. This is imperative and applies across the board for the purposes of the *whole* of Part XIVA.

75. (1) The overseas authorities cited by Mr Derek Chan in support of his contention were dealing with disclosure regime(s) with a crucial difference from ours. None of the overseas regime(s) has any provision equivalent or similar to our section 307A(3). These overseas authorities dealt with materially different regime(s). They are of no assistance for present purposes.

- (2) None of the local authorities cited by Mr Derek Chan dealt with section 307A. These local authorities provide no assistance for present purposes.

76. Mr John Scott SC sought to place heavy reliance on what the Head of Listing of SEHK said in SEHK's News Release on the "Criticism of the China Water Affairs Group Limited". *China Water Affairs Group Limited* was a case where the listed company was publicly criticised "as a consequence of a settlement". Robert Williams of the Listing Division was quoted in the News Release as saying:

"There is a misguided perception in some quarters of the market that selective disclosure of unpublished price sensitive information during a trading suspension is acceptable or of little or no regulatory significance because as no one can trade on the Exchange there can be no harm. This is far from the case. First, the recipients of such information are placed in the privileged position of having greater time to analyse and consider their response to the unpublished position. Second, recipients can conduct off-market transactions with certain counterparties. Third, selective disclosure damages the integrity of the market. It corrodes investor confidence and primarily for this reason the Exchange will continue to take actions to enforce the requirement that disclosure must be through HKEx EPS first."

77. Robert Williams was an executive of SEHK. He was not the decision maker for disciplinary cases brought before the Disciplinary Committee of SEHK. More importantly, as head of listing which initiated the complaint before the Disciplinary Committee, he was head of the "prosecution" or "complainant". It is *wrong in principle* to regard what the head of "prosecution" or "complainant" said as "authority".

78. Secondly, the Disciplinary Committee's public statement involving criticism came about as a result of a "settlement". There is no evidence that the issue had been argued, fully or at all, before the decision maker, the Disciplinary Committee. It would also appear that Robert Williams's statement did not form part of the decision of the Disciplinary Committee.

79. Thirdly, the Disciplinary Committee is not a "court" of law within the meaning of Article 35 of the Basic Law, see *The Stock Exchange of Hong Kong Limited v New World Development Co. Limited* and others (2006) 9 HKCFAR 234 at §88.

80. Further and in any event, the constitution and composition of the Disciplinary Committee are not designed for resolution of nice questions of law.

81. The correct approach is simply one of statutory interpretation of sections 307A(1) and 307A(3). The statutory test for determining what constitutes "inside information" is a *hypothetical* one, that is to say, whether "if [the information is] generally known to the persons who were accustomed or would be likely to deal in the listed securities of Mayer", it would be likely to materially affect the price of the listed securities. In considering this question, one is enjoined by section 307A(3) to continually regard the shares of Mayer as listed during any period of suspension of dealings in those securities on the SEHK.

82. Applying this hypothetical test under section 307A(1), regard being had as mandated by section 307A(3), we hold that the

Resignation would, if generally known to the persons who were accustomed or would be likely to deal in the listed securities of Mayer, be likely to materially affect the price of the listed securities.

83. We hold that the Resignation constitutes inside information.

Potential Qualified Audit Report

84. The Potential Qualified Audit Report is referred to in §46 above.

85. This information was about Mayer, the listed corporation, and was clearly specific.

86. This information has never been announced and was not generally known to the persons who are accustomed or would be likely to deal in the listed securities of Mayer.

87. A clean audit report tends to boost confidence in the accounts of the listed corporation. A qualified audit report is typically viewed very negatively by the public as it is a strong signal that the auditor has probably encountered problems during the audit and this will cast serious doubt on the reliability of the listed corporation's accounts with a qualified audit opinion. It may even suggest the possibility of fraud in the company. We hold that the Potential Qualified Audit Report, if generally known to the persons who were accustomed or would be likely to deal in the listed securities of Mayer, would be likely to materially affect the price of Mayer shares.

88. We hold that the Potential Qualified Audit Report constitutes inside information.

Prepayment by Elternal

89. It is one of the items under Potential Qualified Audit Report.

90. Prepayment by Elternal is about Mayer in relation to the auditing of its consolidated group financial statement.

91. This information was clearly specific.

92. This information has never been announced and was not generally known to the persons who are accustomed or would be likely to deal in the listed securities of Mayer.

93. Mr Karl Lung opined that the information about prepayment by Elternal might have affected the price of Mayer shares in a negative way because:

- (1) The amount involved could exceed 10% of Mayer's shareholders' fund; and
- (2) Based on Grant Thornton's description of the issue in the 23 August 2012 email to Mayer, fraud might be involved.

94. Mr Karl Lung was not challenged on his aspect of his evidence which we accept.

95. We accept that Prepayment by Elternal, if generally known to the persons who were accustomed or would be likely to deal in the listed securities of Mayer, would be likely to materially affect the price of Mayer shares.

96. We hold that Prepayment by Elternal constitutes inside information.

Summary

97. We hold that all 3 categories of alleged inside information constitute inside information.

CHAPTER 7

MAYER'S DISCLOSURE REQUIREMENTS

98. Section 307A(2) provides that a breach of disclosure requirement takes place if any of the requirements in section 307B or 307C is contravened in relation to Mayer, a listed corporation, and in those circumstances, Mayer, the listed corporation, is in breach of the disclosure requirement.

99. Section 307B provides that:

- “(1) A listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public.
- (2) For the purposes of subsection (1), inside information has come to the knowledge of a listed corporation if—
 - (a) information has, or ought reasonably to have, come to the knowledge of an officer of the corporation in the course of performing functions as an officer of the corporation; and
 - (b) a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation.”

100. The Resignation Letter was dated 27 December 2012, signed by Grant Thornton's senior partner and addressed to the Board and the Audit Committee³⁰. A copy of the letter was attached to the email sent on 27 December 2012 at 6:38 pm by Jeffrey Chan of Grant Thornton to FinancialController. Thus, the Resignation came to the knowledge of FinancialController, an officer of Mayer, the listed corporation, in the

³⁰ See §49 above.

course of performing functions as an officer of Mayer, the listed corporation. FinancialController's knowledge is attributed to Mayer. Mayer's receipt on 27 December 2012 of a copy of the Resignation Letter was acknowledged by Mayer in its communication with SEHK, see §50(5) above. We reject FinancialController's allegation that the Resignation only came to his knowledge on 28 December 2012.

101. A reasonable person, acting as an officer of Mayer, the listed corporation, would consider the information was inside information in relation to the corporation.

102. Mayer was repeatedly reminded in writing of its disclosure requirement:

- (1) The Resignation letter itself³¹;
- (2) The email by Winnie Chiu of ONC Lawyers sent on 31 December 2012 to Job Tang and FinancialController³²;
- (3) SEHK's fax dated 15 January 2013³³; and
- (4) Calvin Chiu's email to FinancialController on 16 January 2013³⁴.

103. Disclosure of the Resignation is a straight forward matter which could easily have been made within a day or two after 1 January 2013. Grant Thornton's reasons for resignation were given in the Resignation Letter. If Mayer should disagree with any of those reasons,

³¹ See §49 above.

³² See §50(2) above.

³³ See §50(5) above.

³⁴ See §50(6) above.

Mayer could state their disagreement in the announcement on the Resignation or in a subsequent announcement.

104. The period between 1 January 2013 and 23 January 2013 exceeded what was reasonably practicable. We conclude that the requirement of section 307B was contravened in relation to Mayer, the listed corporation, and in those circumstances, Mayer, the listed corporation, was and has been in breach of the disclosure requirement.

105. This is the conclusion we arrived at independently of Mayer's admission of breach. It is necessary to reach a conclusion on this issue because breach of a disclosure requirement is the prerequisite of a breach by an officer.

106. FinancialController relied on the "disclosure" to SEHK on 27 December 2012. "Disclosure" to SEHK is quite beside the point. What section 307C(1) requires is disclosure "in a manner that can provide for equal, timely and effective access by the public to the inside information disclosed", not to the exchange.

Allegations of Grant Thornton's agreement to re-consider or postpone resignation

107. As stated above, FinancialController, EDLai and AuditComMember and NED and Mayer have indicated in writing that they did not intend to cross-examine any of the witnesses listed in §7 above on any aspect of their evidence³⁵.

³⁵ See §§6 and 7 above.

108. Daniel Lin stated categorically and emphatically in his witness statement (see item 285 in particular) that Grant Thornton had already resigned on 27 December 2012 and thus there could be no question of “holding” the resignation.

109. Calvin Chiu stated categorically and emphatically in his witness statement that the Resignation Letter was “formal” (see item 375 in particular); that they would not issue another letter upon Mayer having a new auditor (see item 379 in particular); and that their letter was “final” (see item 381 in particular).

110. Mr Derek Chan’s lay clients informed SFC, and through SFC, the Tribunal was informed, that they did not intend to cross-examine Daniel Lin and Calvin Chiu. At the substantive hearing, Daniel Lin and Calvin Chiu had been offered for cross-examination and Mr Derek Chan chose not to avail himself of the opportunity to cross-examine Daniel Lin and Calvin Chiu.

111. Further and in any event, having regard to:

- (1) the contemporaneous correspondence from April – 27 December 2012;
- (2) the clear and unequivocal terms in which the Resignation Letter was written;
- (3) the fact that it was written by Grant Thornton’s senior partner;

- (4) the reference in the Resignation Letter to “professional risk associated with the audit”³⁶;
- (5) Calvin Chiu’s email of 16 January 2013³⁷; and
- (6) Calvin Chiu’s second email of 16 January 2013³⁸;

it is inherently improbable that Grant Thornton would have agreed to re-consider or postpone their resignation. Either course would have involved Grant Thornton in professional risk which they had no reason to assume and had every reason to avoid.

112. Moreover, the allegations of Grant Thornton’s agreement to re-consider or postpone resignation are no more than bare assertions, conspicuous in the absence of any or any material particulars. There is nothing in writing and no evidence in support of the bare assertions. The bare assertions are contradicted by the contemporaneous documents referred to in §111 above. There is no allegation of the date when, the place where, the persons between whom, and the terms in which the alleged agreement is said to have been made.

113. Indeed, the FinancialController confirmed on oath that Daniel Lin had *not* agreed to any reconsideration or postponement. FinancialController testified that:

“A. I don’t have a clear recollection of what he said at that time.

CHAIRMAN: You don’t have a clear recollection.

³⁶ See §49 above.

³⁷ See §50(6) above.

³⁸ See §50(8) above.

A. (Chinese spoken).

CHAIRMAN: What recollection do you have?

A. My impression was that he need more time to consider about it.

CHAIRMAN: Sorry, I may not have made myself clear. I'm not asking you for your impression. I'm asking you as to what he said.

A. I cannot recall.

CHAIRMAN: So you can't recall this one? The second one was could he hold it, or postpone it. What was his response?

A. When I raised the question of holding it or delaying it, he did not refuse immediately. So after the phone call we proceeded to make arrangement for the alternative options.

CHAIRMAN: What did he say?

A. My recollection was that he didn't really say anything. It was neither a refusal or acceptance.

CHAIRMAN: Did he respond at all or did he respond in a non-committal way? What is it?

A. *I believe that it was a non-committal response* (emphasis added).

CHAIRMAN: How was that? What did he say?

A. *As I have said just now, when I raised to him about holding or delaying it over the phone, he did not make any feedback* (emphasis added)

CHAIRMAN: Sorry, Mr Scott, to have interrupted you.

MR SCOTT: I'm very grateful, Mr Chairman."

Baker & McKenzie's alleged advice

114. FinancialController said nothing about any advice by Baker & McKenzie in his interview. However, he came up with the following in his oral evidence:

“Q. ... Did you consult them in relation to your thought that because the company was suspended, you had more time to announce the resignation of Grant Thornton?”

A. I have talked with ONC over the phone and I was advised that it should be announced as soon as reasonably practicable. As for Baker, I was advised that since the company was being suspended and things are not clear at that moment, so we should have more time.

CHAIRMAN: Who in Baker advised you?

MR SCOTT: Yes, who in Baker & McKenzie advised you of that?

A. I don't have a clear recollection now, but it could be Rossanna or Rebecca.

Q. So the answer you have just given, you talked to ONC over the phone and you were advised that “it”, by which you mean the resignation of Grant Thornton, should be announced as soon as reasonably practicable. Are you suggesting that Baker & McKenzie gave you some different advice to that?

A. Yes.

Q. You didn't say that in your record of interview, did you?

A. At that time I might have forgotten, or it might not have been mentioned.”

115. If Baker & McKenzie had advised FinancialController about it, it is inherently improbable that there was no record and no prior mention of what they had allegedly advised. FinancialController could not even tell the Tribunal who in Baker & McKenzie gave the alleged advice. He simply made a vague allegation devoid of particulars. We reject his allegation. It was a recent invention on his part.

Conclusion on Mayer's breach of the disclosure requirement

116. By reason of the above, we conclude that the requirements of section 307B were contravened in relation to Mayer, the listed

corporation, and in those circumstances, Mayer, the listed corporation, was in breach of the disclosure requirement. This is the conclusion we arrived at independently of Mayer's admission of breach. Our independent conclusion is necessary because breach of a disclosure requirement is the prerequisite of a breach by an officer.

CHAPTER 8

OFFICERS' DISCLOSURE REQUIREMENTS

117. Section 307G(1) imposes on every officer of a listed corporation a duty to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation.

118. Thus, FinancialController, Chairman, EDLai, AuditChair, SP6, SP8, NED, SP10, and AuditComMember were all under a statutory duty to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation.

119. Section 307G(2) goes on to provide that:

“If a listed corporation is in breach of a disclosure requirement, an officer of the corporation —

- (a) whose intentional, reckless or negligent conduct has resulted in the breach; or
- (b) who has not taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the breach,

is also in breach of the disclosure requirement.”

Breach under section 307G(2)(b)

120. We have already held in §116 that Mayer, the listed corporation, was in breach of the disclosure requirement. We must now

consider whether the officers of Mayer were also in breach under section 307G(2) of the disclosure requirement.

121. (1) FinancialController acknowledged on oath that “at that time, there was no internal system in place to implement this regulation³⁹ at the time”.
- (2) Under cross-examination, EDLai agreed with what FinancialController said, i.e. the company did not have any written guidelines of written internal policies to comply with the disclosure of price sensitive information rules.
- (3) Under cross-examination, NED said so far as he was aware, the company had no written guidelines and/or internal control policies as at April 2013 in relation to the compliance with disclosure of inside information.
- (4) There was no allegation of and no evidence that any of FinancialController, Chairman, EDLai, AuditChair, SP6, SP8, NED, SP10, and AuditComMember had taken any or any reasonable measure at any time to ensure that any or any proper safeguards exist to prevent the breach by Mayer of the disclosure requirement in relation to the relevant inside information.

122. In the premises, we find that each of FinancialController, Chairman, EDLai, AuditChair, SP6, SP8, NED, SP10, and AuditComMember was in breach of the disclosure requirement under section 307G(2)(b).

³⁹ The disclosure regulation.

Breach under section 307G(2)(a)

123. Having found a breach under section 307G(2)(b), it is not necessary to consider whether there was also a breach under section 307G(2)(a) where the officer's "intentional, reckless or negligent conduct has resulted in the breach". An essential ingredient is that the "conduct" must "result" in the breach. A *causal link* between the conduct and the breach is necessary. Many of the officers did not know about the inside information at all or only knew at a relatively late stage. On the evidence, EDLai and FinancialController seemed to run the show and have scant respect for the other Specified Persons. The question of causation is a nice question of law. Causation has not been argued, fully or at all. It has not been raised by any of the Specified Persons. As a decision on section 307G(2)(a) is *not* necessary in this case, we consider it prudent to reserve the question for decision if and when an appropriate case should arise.

NED's arguments

124. Brief mention must be made of an argument put forward by Mr Tony Chow on behalf of NED.

125. Mr Tony Chow argued in §10 of his written Closing Submissions that NED was:

"b. only informed of the Resignation by 18 January 2013, by which time the breach would have already materialized and could not have been undone."

126. The following conversation between Mr Tony Chow and the Tribunal Chairman took place in the course of Mr Tony Chow's submission:

“CHAIRMAN: Is it a continuing breach?

MR CHOW: I would submit not, for the purpose of this charge.

CHAIRMAN: So come the day when it should have been disclosed, you can all forget about it and do nothing about it?

MR CHOW: Not necessarily.

CHAIRMAN: Why? The offence has been committed.

MR CHOW: Yes. It depends on the circumstances.

CHAIRMAN: Why is it not a continuing breach?

MR CHOW: That's because it could not be undone per se, if for example –

CHAIRMAN: Whether it's a continuing breach has nothing to do with whether it can be undone.

MR CHOW: Chairman, if I can just move on in my submission to say that in any event, the conduct of Mr Li between the 18th –”

127. The duty of the listed corporation to publish inside information is to publish as soon as reasonably practicable. If the listed corporation fails to do so, it is in breach of the disclosure requirement. So long as the default continues, the breach continues. A listed corporation's breach of the disclosure requirement is plainly a continuing breach.

128. If the listed corporation's continuing breach was caused by the officer's intentional, reckless or negligent conduct, the officer is in breach under section 307G(2)(a).

129. But that is quite beside the point for present purposes. All that is required under section 307G(2)(b) is that the officer, i.e. NED, has not taken any reasonable measure from time to time to ensure that proper safeguards exist to prevent the breach. Whether the breach can be “undone” is irrelevant.

130. Under cross-examination, NED said so far as he was aware, the company had no written guidelines and/or internal control policies as at April 2013 in relation to the compliance with disclosure of inside information. He also confirmed on oath that he “never made a complaint ever about the failure of the company to set up systems of the type we have just looked at to prevent a breach of the disclosure obligations”.

131. We reject Mr Tony Chow’s submission.

Conclusion on officers’ breach of disclosure requirement

132. We find that each of FinancialController, Chairman, EDLai, AuditChair, SP6, SP8, NED, SP10, and AuditComMember was in breach of the disclosure requirement under section 307G(2)(b).

CHAPTER 9

DETERMINATION BY TRIBUNAL

133. The Tribunal was required by the Notice:

“... to conduct proceedings and determine:

- (a) whether a breach of a disclosure requirement has taken place; and
- (b) the identity of any person who is in breach of the disclosure requirement.”

134. Having conducted proceedings on liability, we determine that:

- (1) A breach of the disclosure requirement has taken place; and
- (2) The identities of the persons who are in breach of the disclosure requirement are:
 1. Mayer Holdings Limited (美亞控股有限公司), SP1;
 2. Chan Lai Yin, Tommy (陳禮賢), SP2;
 3. Hsiao Ming-chih (蕭敏志), SP3;
 4. Lai Yueh-hsing (賴粵興), SP4;
 5. Huang Jui-hsiang (黃瑞祥), SP5;
 6. Chiang Jen-chin (蔣仁欽), SP6;
 7. Xue Wenge (薛文革), SP8;
 8. Li Dequiang (李德強), SP9;
 9. Lin Sheng-bin (林聖斌), SP10; and
 10. Alvin Chiu (趙熾佳), SP11.

Kenneth Kwok

Mr Kenneth Kwok SC
(Chairman)

Leroy Yau

Mr Leroy Yau
(Member)

Yuen

Dr Yuen Wai-kee
(Member)

Dated the 7th day of February 2017