

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)

PART II : SANCTIONS ON SPECIFIED PERSONS

DETERMINED TO BE IN BREACH OF

THE DISCLOSURE REQUIREMENTS

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Attestation to Part II of the Report

CHAPTER 10

SANCTIONS ON SPECIFIED PERSONS DETERMINED TO BE IN BREACH OF THE DISCLOSURE REQUIREMENTS

135. In the “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)” dated 7 February 2017 (“**Report on Liability**”), the Market Misconduct Tribunal (“**the Tribunal**”) determined 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) (“Mayer” or “SP1”)
2. Chan Lai Yin, Tommy (陳禮賢) (“FinancialController” or “SP2”)
3. Hsiao Ming-chih (蕭敏志) (“Chairman” or “SP3”)
4. Lai Yueh-hsing (賴粵興) (“EDLai” or “SP4”)
5. Huang Jui-hsiang (黃瑞祥) (“AuditChair” or “SP5”)
6. Chiang Jen-chin (蔣仁欽) (“SP6”)
7. Xue Wenge (薛文革) (“SP8”)
8. Li Deqiang (李德強) (“NED” or “SP9”)
9. Lin Sheng-bin (林聖斌) (“SP10”)
10. Alvin Chiu (趙熾佳) (“AuditComMember” or “SP11”)

136. (1) On 15 March 2017, the Tribunal heard the parties on sanctions.

(2) SFC, Mayer and NED were represented by the same legal teams as before. FinancialController, EDLai, and AuditComMember were represented by Mr Jacky Lam on the instructions of K & L Gates.

(3) The other Specified Persons, including SP7, were absent and unrepresented.

(4) Proceedings against SP7 have been stayed⁴⁰.

(5) This Report is the Tribunal’s Report on Sanctions (“**Report on Sanctions**”) and is a continuation of the Report on Liability. The paragraph numbering and the page numbers in the Report on Sanctions continue from the paragraph numbering and page numbers in the Report on Liability and start at paragraph 135 and page number 58. References in the Report on Sanctions to the “Specified Persons” exclude SP7.

Section 307N

137. Section 307N 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

⁴⁰ §27 of the Report on Liability.

- (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, directly or indirectly, in any way 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 any body 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.
- (2) When making an order in respect of a person under subsection (1), the Tribunal may take into account any conduct by the person which —
 - (a) previously resulted in the person being convicted of an offence in Hong Kong;
 - (b) previously resulted in the person being identified by the Tribunal —
 - (i) under section 252(3)(b) as having engaged in any market misconduct; or
 - (ii) under section 307J(1)(b) as being in breach of a disclosure requirement; or
 - (c) at any time before the commencement of Part XIII resulted in the person being identified as an insider dealer in a determination under section 16(3), or in a written report prepared and issued under section 22(1), of the repealed Securities (Insider Dealing) Ordinance.
- (3) 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.
- (4) An order made under subsection (1)(a) may specify a corporation by name or by reference to a relationship with any other corporation.
 - (5) 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 taxation of any sum ordered under subsection (1)(e) or (f) for costs reasonably incurred in relation or incidental to the proceedings.
 - (6) In this section —

chief executive (最高行政人員) has the meaning given by section 308(1).”

138. Section 308(1) defines “chief executive” as meaning “the person employed or otherwise engaged by a corporation who, either alone or together with one or more persons, is or will be responsible under the immediate authority of the board of directors for the conduct of the business of the corporation”.

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

139. Mr John Scott SC asked for disqualification orders against all the Specified Persons except Mayer. He submitted that this case was in the middle to top end of the lower bracket and suggested 15 – 18 months for FinancialController and EDLai and around one year for the other individual

Specified Persons. On the classification into 3 brackets, see §§56 and 57 of the Report on *Yorkey Optical International (Cayman) Limited* where it was said:

“56. Mr Horace Wong SC drew our attention to what *Dillon LJ said In re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at p. 174:

‘I would for my part endorse the division of the potential 15-year disqualification period into three brackets, which was put forward by Mr. Keenan for the official receiver to Harman J. in the present case and has been put forward by Mr. Charles for the official receiver in other cases, viz.: (i) the top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. (ii) The minimum bracket of two to five years’ disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (iii) The middle bracket of disqualification for from six to 10 years should apply for serious cases which do not merit the top bracket’.

57. As the maximum period of disqualification under section 307N(1)(a) is 5 years, compared with the maximum period of 15 years, the periods for the 3 brackets should be adjusted proportionately.”

140. The Tribunal had given directions in this case on filing of written submissions on sanctions. This was to enable the Tribunal to pre-read counsel’s arguments and the opponent(s) to be prepared for the hearing.

141. Mr Jacky Lam argued that there was no finding in the Report on Liability of unfitness to be directors. To start with, Mr Jacky Lam lacked discipline in not mentioning this argument in his written submission. Secondly, he cited cases where unfitness was an *express* statutory requirement. In contrast, there is no such express requirement in section 307N(1)(a). Most importantly, the Report on Liability was the Tribunal’s report on liability. As Mr Jacky Lam well knew, sanctions were to be dealt with after the hearing on 15 March 2017.

142. We agree with the starting point suggested by Mr John Scott SC. There was a breach for 23 days⁴¹. All Specified Persons have a clear record. There is no suggestion that any investor has suffered any financial loss. None of the Specified Persons has gained any profit or avoided any loss. With the notable exception of FinancialController and EDLai, the breach by the other Specified Persons was not intentional.

143. The breach of the disclosure requirements was a continuing one. It is thus inappropriate to argue that this was a “one-off” case.

144. The Specified Persons have not taken any measures to ensure that any or any proper safeguards exist to prevent the breach of the disclosure requirements. None of the Specified Persons took any step to discharge his “inescapable personal responsibility”⁴² to comply with the disclosure requirements. Plainly, all the Specified Persons (other than Mayer) are *unfit* to be directors of a listed corporation.

145. NED was and still is a director, albeit non-executive. As a director, he has inescapable personal responsibility to comply with the disclosure requirements. His own ignorance and incompetence as a director is neither an excuse nor a mitigating factor.

146. In all the circumstances of this case, with the exception of the FinancialController and EDLai, a disqualification period of 12 months is appropriate for the Specified Persons (except Mayer).

⁴¹ §104 of the Report on Liability.

⁴² Per Lord Woolf, MR in *Re Westmid Packing Services Limited* [1998] 2 BCLC 646 at 654g; per Kwan J in *The Official Receiver v Wong Kwan Pui and others* [2003] 1 HKLRD 621 at §21, quoted in footnote 19 in §54 in the *Yorkey Report*.

147. As for FinancialController, he was in breach of the disclosure requirements *despite* the following written reminders by Grant Thornton, ONC Lawyers and SEHK:

- (1) The Resignation letter itself ;
- (2) The email by Winnie Chiu of ONC Lawyers sent on 31 December 2012 to Job Tang and FinancialController ;
- (3) SEHK's fax dated 15 January 2013 ; and
- (4) Calvin Chiu's email to FinancialController on 16 January 2013⁴³.

148. It is clear from his draft letter to SEHK attached to his email of 18 January 2013 that FinancialController was aware of the disclosure obligation under Rule 13.51(4) of the Listing Rules⁴⁴.

149. It is plain and obvious that FinancialController's breach of the disclosure requirement was *intentional*. It is a clear case of *deliberate flouting* of the disclosure requirements. This is an aggravating factor.

150. The FinancialController *lied* in the proceedings on liability. The Tribunal held that his allegation on Baker & McKenzie's advice was a recent invention on his part⁴⁵. The Tribunal also rejected his allegation of Grant Thornton's agreement to re-consider or postpone their resignation⁴⁶. These 2 matters demonstrate dishonesty and lack of integrity on the part of FinancialController. This is another aggravating factor.

⁴³ §102 of the Report on Liability.

⁴⁴ §50(12) of the Report on Liability.

⁴⁵ §115 of the Report on Liability.

⁴⁶ §§110-113 of the Report on Liability.

151. EDLai and FinancialController seemed to run the show⁴⁷. They acted in concert. They are equally culpable and far more so than the other Specified Persons. They are both plainly and unquestionably *unfit* to be directors of listed corporations.

152. In all the circumstances of this case, a disqualification period of 20 months is appropriate for each of FinancialController and EDLai.

“Cold shoulder” order – section 307N(1)(b)

153. SFC does not ask for any “cold shoulder” order.

“Cease-and-desist” order – section 307N(1)(c)

154. SFC takes on board the Tribunal’s observation at §§45-48, 71 and 83 of the *Yorkey* Report and does not seek any cease-and-desist order. §48 of the *Yorkey* Report states the approach as follows:

“48. The Tribunal is given the discretion to decide whether to make a cease-and-desist order and is not bound to do so in every case of breach of the disclosure requirement. The question is whether it is proportionate and appropriate in all the circumstances of each case to make such an order against a first offender, bearing in mind the other sanctions which the Tribunal intends to impose. This is a fact sensitive balancing exercise. As against Yorkey, the Tribunal intends to impose a regulatory fine of HK\$1 million; to order Yorkey to pay the costs and expenses of both SFC and the Government; and to order the appointment of independent professional advisers. In the circumstances and having regard to the mitigating factors accepted by the Tribunal, we have decided to give Yorkey a chance to behave itself without a cease-and-desist order.”

⁴⁷ §123 of the Report on Liability.

Regulatory fine – section 307N(1)(d)

155. Mr John Scott SC asked for a regulatory fine of around HK\$1 million against each of Mayer, FinancialController and EDLai and around HK\$900,000 against each of the other Specified Persons.

156. Only listed corporations, directors or chief executives of a listed corporation may be liable for a regulatory fine.

157. Mr John Scott SC submitted that FinancialController was a chief executive of Mayer within the meaning of section 308.

158. FinancialController was the Company Secretary and Financial Controller of Mayer⁴⁸. FinancialController was the central character in this case. Evidence showed he was responsible for the conduct of the business of Mayer under the immediate authority of the Board. The Tribunal concluded that FinancialController (together with EDLai) seemed to run the show. It was not until 18 January 2013 that FinancialController reported the resignation of Grant Thornton to the Board⁴⁹. Mr John Scott SC also drew attention to the interview records of the Specified Persons which suggested that Mayer’s Board heavily delegated management duties of the company to FinancialController.

159. Mr Jacky Lam who represented FinancialController submitted in §13 of his written submission that:

“SP2, 4 and 11 accept that this Tribunal may impose a regulatory fine under s.307N(1)(d) ...”

⁴⁸ §34(4) of the Report on Liability.

⁴⁹ §50(12) of the Report on Liability.

160. In the premises, we hold that FinancialController was a chief executive within the meaning of section 308(1) and is liable for a regulatory fine.

161. Mr Tony Chow asserted in §9 of his written submission that NED's annual salary was HK\$100,000; NED had "a full time job in the PRC with monthly salary of about RMB4,000 per month"; NED was the breadwinner of the family comprising of his wife and their only son [who is] currently studying⁵⁰ and his wife lost the ability to work due to her fight with [a named sickness] first diagnosed in 2007".

162. Apart from NED and apart from Mayer's bare assertion of dire financial circumstances, no Specified Person has raised the issue of financial resources.

163. On financial resources, the Tribunal held in §66 of the *Yorkey* Report that:

"A specified person's financial resources is a matter peculiarly within the personal knowledge of the specified person. 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. Making selective and partial disclosure does not prove his financial position. It is not open to him to hide under the excuse of privacy and disclose only such information as he chooses to let the Tribunal know."

164. We agree. NED and Mayer have failed to establish that he or it has any difficulty paying a HK\$900,000 regulatory fine.

⁵⁰ The copy document produced by NED in support purports to record the offer of admission in 2014 to be a research student for a Master's degree.

165. Mayer admitted liability at the hearing on liability. It was so late that it is not much of a mitigating factor.

166. Having considered all relevant matters, we hold that the proportionate and reasonable amount of regulatory fine for each of the Specified Persons (except FinancialController and EDLai) is HK\$900,000.

167. Having considered all relevant matters, including the aggravating factors, we hold that the proportionate and reasonable amount of regulatory fines for each of FinancialController and EDLai is HK\$1.5 million.

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

168. In §§81 and 82 of the *Yorkey* Report, the Tribunal said:

“81. Certified public accountants play an important role under the listing regime. The investing public rely on the expertise and competence of professional accountants. Certified public accountants audit the accounts of listed corporations. They are often appointed to the audit committees of listed corporations and some certified public accountants are appointed to chair the audit committees. They are also appointed as compliance officers of some listed corporations. Ng was appointed as compliance officer of Yorkey. His reckless conduct resulted in breach of the disclosure requirement by Yorkey. Despite acquiring knowledge of the Deterioration on receipt of the draft 2012 financial statements, he did nothing.

82. In this case, Ng is a member of HKICPA. He was the Financial Controller and Company Secretary of Yorkey and was responsible for ensuring Yorkey’s compliance with its legal obligations. But he failed to set up a system to ensure that inside information relating to the performance of Yorkey would be identified and then disclosed in a timely manner. We consider that HKICPA should be recommended to take disciplinary action against Ng.”

169. In this case, FinancialController is a member of the Hong Kong Institute of Certified Public Accountants (“**HKICPA**”). He was the Financial Controller and Company Secretary of Mayer. There is no dispute that he was a

chief executive of Mayer within the meaning of section 308(1). His conduct was appalling. He deliberately flouted the disclosure requirements despite 4 written reminders and tried to lie his way out in the proceedings on liability⁵¹.

170. We consider that HKICPA should be recommended to take disciplinary action against FinancialController.

Appointment of independent professional adviser – section 307N(1)(h)

171. Mayer has no system for compliance with Part XIVA of the Ordinance. Despite its admission of liability for breach, it has taken no step to prevent any future breach. We consider that an independent professional adviser should be appointed under section 307N(1)(h).

Training programme – section 307N(1)(i)

172. Mayer's culture on compliance is pathetic. Each of the Specified Persons (except Mayer) should be ordered to undergo a training programme under section 307N(1)(i).

Government and SFC's costs – section 307N(1)(e) and (f)

173. Both Government and SFC have incurred substantial costs in this matter. There is no reason why such costs should come out of public funds or SFC's funds. The Specified Persons should bear them.

174. Mr Tony Chow contended that costs should be apportioned and each Specified Person should bear a specified percentage. No authority has been cited for this unusual course and we reject his contention.

⁵¹ §147 to §150 above.

175. We were contemplating having all costs under section 307N(1)(e) and (f) to be taxed if not agreed.

176. However, *after* the hearing on sanctions, we spotted a point under section 307N(5).

177. (1) Section 307N(1)(e) provides for payment of Government's costs and expenses "in relation or incidental to the proceedings".

(2) Section 307N(1)(f)(i) provides for payment of SFC's costs and expenses "in relation or incidental to ... the proceedings".

(3) Section 307N(1)(f)(ii) provides for payment of SFC's costs and expenses "in relation or incidental to ... any investigation of the person's conduct or affairs carried out before the proceedings were instituted".

(4) Section 307N(1)(f)(iii) provides for payment of SFC's costs and expenses "in relation or incidental to ... any investigation of the person's conduct or affairs carried out for the purposes of the proceedings".

178. Section 307N(5) provides that:

"... Order 62 of the Rules of the High Court (Cap 4 sub. leg. A) 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*", (emphasis added).

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

180. We have therefore decided that investigation costs should be assessed by the Tribunal.

Orders made by the Tribunal

181. Mr John Scott SC has helpfully prepared a draft order. Making such modifications as we see fit, we order that:

- (1) For the period of 20 months commencing on 2 May 2017, Chan Lai Yin, Tommy (陳禮賢) (“**FinancialController**” or “**SP2**”) and Lai Yueh-hsing (賴粵興) (“**EDLai**” or “**SP4**”) 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
 - (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation.

- (2) For the period of 12 months commencing on 2 May 2017, Hsiao Ming-chih (蕭敏志) (“**Chairman**” or “**SP3**”); Huang Jui-hsiang (黃瑞祥) (“**AuditChair**” or “**SP5**”); Chiang Jen-chin (蔣仁欽) (“**SP6**”); Xue Wenge (薛文革) (“**SP8**”); Li Deqiang (李德強) (“**NED**” or “**SP9**”); Lin Sheng-bin (林聖斌) (“**SP10**”) and Alvin Chiu (趙熾佳) (“**AuditComMember**” or “**SP11**”) 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
 - (ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation.

- (3) FinancialController and EDLai each pay to the Government a regulatory fine of HK\$1,500,000.
- (4) Mayer, Chairman, AuditChair, SP6, SP8, NED, SP10, and AuditComMember each pay to the Government a regulatory fine of HK\$900,000.
- (5) The Hong Kong Institute of Certified Public Accountants be recommended to take disciplinary action against FinancialController.
- (6) Mayer appoint an independent professional adviser approved by the Securities and Futures Commission (“SFC”) to review Mayer’s procedure for compliance with Part XIVA of the Securities and Futures Ordinance, Cap. 571, (“the Ordinance”) and to advise Mayer on matters relating to compliance with Part XIVA of the Ordinance.
- (7) FinancialController, EDLai, Chairman, AuditChair, SP6, SP8, NED, SP10 and AuditComMember each undergo a training program approved by SFC on compliance with Part XIVA of the Ordinance, directors’ duties and corporate governance.
- (8) Mayer, FinancialController, EDLai, Chairman, AuditChair, SP6, SP8, NED, SP10 and AuditComMember pay to the Government the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings, to be taxed if not agreed.
- (9) Mayer, FinancialController, EDLai, Chairman, AuditChair, SP6, SP8, NED, SP10 and AuditComMember pay to SFC the costs and expenses reasonably incurred by SFC, in relation or incidental to the proceedings, to be taxed if not agreed, with a certificate for two counsel.
- (10) Mayer, FinancialController, EDLai, Chairman, AuditChair, SP6, SP8, NED, SP10, and AuditComMember each pay to SFC the sum

the Tribunal considers appropriate for the costs and expenses reasonably incurred by 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) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings.

The Tribunal certifies that the attendance and handling of two counsel as being proper in the circumstances of this case. SFC shall lodge and serve within 21 days from the date of this order a statement of costs and expenses not exceeding two pages for each of the Specified Persons. Each Specified Person shall lodge and serve its or his respective succinct Points of Objection in bullet-point format of not more than two pages to SFC's statement of costs and expenses within 14 days thereafter. Unless otherwise directed the Tribunal's summary assessment of costs and expenses will be by paper disposal.

- (11) Liberty to the parties to apply to the Tribunal Chairman for directions on the carrying into effect the orders on costs and expenses in (8), (9) & (10) above.

Further, the Tribunal has determined that, by written notice, it will register the above orders in the Court of First Instance pursuant to sections 307S(1) and 264(1) of the Ordinance.

Kenneth Kwok

Mr Kenneth Kwok SC
(Chairman)

Leroy Yau

Mr Leroy Yau
(Member)

Yuen

Dr Yuen Wai-kee
(Member)

Dated the *5th* day of April 2017