

The report of the Market Misconduct Tribunal into dealings in the shares of Warderly International Holdings Limited on and between the 28th of March and 2nd of May 2007

**A report pursuant to sections 252(3)(a), (b) and (c) of the Securities and Futures Ordinance, Cap. 571**

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## CHAPTER 1

### NOTICE AND STATEMENT FOR THE INSTITUTION OF PROCEEDING GIVEN BY THE SECURITIES AND FUTURES COMMISSION

1.

“IN THE MATTER OF THE LISTED SECURITIES OF  
WARDERLY INTERNATIONAL HOLDINGS LIMITED  
(STOCK CODE 607)

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NOTICE TO THE MARKET MISCONDUCT TRIBUNAL  
PURSUANT TO SECTION 252(2) AND SCHEDULE 9 OF THE  
SECURITIES AND FUTURES ORDINANCE CAP. 571 (“THE  
ORDINANCE”)

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Whereas it appears to the Securities and Futures Commission (“the Commission”) that market misconduct within the meaning of Section 270 (“insider dealing”) of Part XIII of the Ordinance has or may have taken place arising out of the dealings in the securities of Warderly International Holdings Limited (Stock Code 607), the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:

- (a) whether any market misconduct has taken place;
- (b) the identity of any person who has engaged in the market misconduct found to have been perpetrated; and
- (c) the amount of any profit gained or loss avoided, if any, as a result of the market misconduct.

Persons suspected to have engaged in market misconduct activities

LO Hang Fong (“LO”)

LUU Hung Viet, Derrick (“LUU”)

### **Statement for institution of proceedings**

1. Warderly International Holdings Limited (“Warderly”) was at all material times a listed company on the Stock Exchange of Hong Kong Limited with stock code number 607.
2. LO is a partner of Stevenson Wong & Co., Solicitors. He was appointed as the Company Secretary of Warderly from the time it was listed in December 2002 until he resigned on 20 March 2007. Stevenson Wong & Co. provided legal services to Warderly at all relevant times.
3. LUU was a lender and potential investor who was interested in acquiring the Warderly shareholding interests of YEUNG Kui Wong (“YEUNG”), the Chairman and majority shareholder of Warderly, and restructuring Warderly at the relevant time.
4. Warderly began to encounter cash flow problem in mid 2006 due to a surge in the price of raw materials and the settlement of a large tax claim from the Inland Revenue Department. From July 2006 onwards, Warderly defaulted in repaying bank loans and banks tightened their credit lines to Warderly. Suppliers stopped providing raw materials. The cash flow problem also led to several labour strikes in its factory on the Mainland between September 2006 and April 2007 due to unpaid wages.
5. On 17 November 2006, Sharp Venture Holdings Limited (“Sharp Venture”, Warderly’s subsidiary) borrowed HK\$2 million from LIU Su Ke (“LIU”) at an interest rate of 5% per month. The loan was to be repaid in one month.
6. On 11 December 2006 LIU lent a further sum of HK\$1.2 million to Sharp Venture at the same interest rate of 5% per month and promised to lend another HK\$6 million after documentation was prepared as Warderly could not pay wages to its workers over Chinese New Year.
7. On 28 December 2006 LIU (via his company Vision Eagle Limited) lent a further sum of HK\$6 million to Housely Industries Limited (Warderly’s subsidiary) for one month at an interest rate of 5% per month. A loan agreement was signed between the parties at the office of Stevenson Wong & Co. A letter of authorisation was also executed by YEUNG by pledging all his 231.8 million shares in Warderly to LIU as security. The documents were prepared by Stevenson Wong & Co. LO was responsible for explaining to LIU the contents of the documents.

8. On 15 February 2007, LUU lent a total sum of HK\$10 million to Housely Industries Limited at a monthly interest rate of 3% per month with YEUNG agreeing with LUU to pledge 50 million of his Warderly shares at HK\$0.20 per share. LUU further committed himself to take up an additional HK\$12.8 million debt owed by Warderly to a financier subject to due diligence. LO was involved in the discussions as to how to structure the HK\$10 million transaction, and was aware of the pledge.

### **Trading in Warderly shares**

#### **LO**

9. LO had 1,597,500 Warderly shares in his securities account held with CITIC Securities Brokerage (HK) Limited (formerly known as CITIC Capital Securities Limited). He bought those shares around late 2003 and early 2004. Before the public was made aware of the poor financial situation of Warderly, LO sold all of them in 3 batches on 28, 29 and 30 March 2007, details of which are set out below:

Date	No. of shares	Price per share (HK\$)
28 Mar 2007	572,500	0.52-0.53
29 Mar 2007	437,500	0.51
30 Mar 2007	587,500	0.52-0.53

#### **LUU**

10. On LUU's instructions, 50 million Warderly shares held through the following 3 nominees of his were sold as follows:

##### *(a) LIU Ping*

Date	No. of shares	Price per share (HK\$)
3Apr 2007	5,680,000	0.4713
3 Apr 2007	6,752,500	0.4724
4 Apr 2007	250,000	0.4554
4 Apr 2007	7,317,500	0.4567

*(b) Grand Access Finance Limited*

Date	No. of shares	Price per share (HK\$)
4 Apr 2007	10 million	0.3969

*(c) CHAN Kar Yee*

Date	No. of shares	Price per share (HK\$)
30 Apr 2007	7,650,000	0.4866
2 May 2007	12,350,000	0.4603

**Relevant information**

11. The Commission relies on the following specific events as comprising the relevant information within the meaning of section 245 of the Ordinance:
  - (1) Tightening of banking facilities since July 2006, and the subsequent events such as loans overdue, rescheduled payments, demand letters and writs issued by banks etc; and /or
  - (2) The HK\$2 million loan from LIU on 17 November 2006 at an interest rate of 5% per month; and/or
  - (3) Further loan from LIU totalling HK\$7.2 million at an interest rate of 5% on 11 and 28 December 2006; and/or
  - (4) Warderly was unable to repay the loan plus interest to LIU when they became due on 28 January 2007; and/or
  - (5) The HK\$10 million loan from LUU in February 2007 that carried an interest rate of 3% per month and was secured by 50 million Warderly shares.
12. The relevant information was specific information about Warderly which was not generally known to the persons who are accustomed or would be likely to deal in the shares of Warderly but which would, if it were generally known to them, be likely to materially affect the share price of Warderly.
13. In possession of the relevant information concerning the poor financial position of Warderly, LO and LUU sold their Warderly shares as set out above.



14. Both LO and LUU were connected with Warderly within the definition of section 247 of the Ordinance, by virtue of their position as set out in paragraphs 2 and 3 respectively. The evidence will show that at the time they sold the Warderly shares they had the relevant information, and must have known it to be relevant information.
15. Accordingly, by reason of the matters set out above, LO and LUU engaged or may have engaged in market misconduct, namely insider dealing contrary to section 270 of the Ordinance.

Dated this 27<sup>th</sup> day of April 2015.

Securities and Futures Commission”

2. Shortly after the issue of the Notice, the SFC served a synopsis dated the 27th of April 2015, giving a summary of what it considered to be relevant factual background together with details of the trading in the shares of Warderly International Holdings Limited (“Warderly”) said to constitute the market misconduct by way of insider dealing.
3. The first directions hearing took place on the 26th of June 2015 before The Honourable Mr. Justice Hartmann NPJ, Chairman. The dates for the hearing were set and also a date for a further directions hearing.
4. The second directions hearing was heard by me on the 1st of February 2016 and the timetable for service of documents and opening agreed.
5. The start of the hearing was delayed by four days because Mr. Bell had to undergo an emergency operation and Mr. Duncan took over representing the first specified person. The hearing commenced on the 17th of June 2016, the evidence was completed on the 8th of July 2016 and final submissions were presented on the 15th and 18th of July 2016.

CHAPTER 2  
THE BACKGROUND AND FACTUAL BASIS  
FOR THE INQUIRY

The alleged facts

6. The Company, the subject of these proceedings is Warderly and also involved were various subsidiary companies to which reference will be made. Warderly was listed on the Hong Kong Stock Exchange in December 2002 with the stock code number of 607. Its shares were suspended from trading on the 14th of May 2007. Trading of Warderly shares did not resume until the 16th of December 2013. As of the date of suspension, its shares traded at \$0.48<sup>1</sup> per share and on resumption at \$0.148. In the intervening years, the Company had gone through a major corporate restructuring.

7. The first specified person in the inquiry is Mr. Lo Hang Fong, Hank (“Lo”), an equity partner of Stevenson Wong and Co. Solicitors (“Stevenson Wong”). He was the appointed, named Company Secretary of Warderly from the time of listing in 2002 until his resignation on the 20th of March 2007. Stevenson Wong provided legal and company secretarial services to Warderly at all relevant times.

8. The second specified person is Mr. Luu Hung Viet, Derrick (“Luu”), a business man of Canadian nationality who loaned money to Warderly and was a potential investor in the Company. Luu, certainly in the initial stages appears to have been interested in acquiring the shareholding of the then Chairman and majority shareholder Mr. Yeung Kui Wong (“Yeung”). Yeung resigned as Chairman of Warderly at the same time as Lo resigned as Company Secretary, the 20th of March 2007.

9. Warderly after initially performing well began to encounter cash flow problems in mid 2006. These in the main were attributable to a rise in the cost of raw materials and the enforced settlement of a large unexpected tax claim by the Inland Revenue Department. This led to defaults by the

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<sup>1</sup> Throughout this report prices quoted are in Hong Kong dollars except where indicated to the contrary.

Company in the repayment of bank loans and this in turn led to banks tightening their credit lines from July 2006 onwards. Also there were problems over payments to suppliers for raw materials and thus a disruption to the provision of essential raw materials needed for production. Between September 2006 and April 2007, the cash flow problems led to strikes in the Company's Mainland factory as wages were not paid or delayed.

10. On the 23rd of August 2006 Warderly's annual report for the year ending the 30th of April 2006 showed a dramatic fall in net profits from \$58 million the previous year to just \$398,000.

11. In September 2006 the workers at Warderly's factory in the Mainland, Dongguan Kalee Electrical Co. Limited ("Kalee") came out on strike as wages had not been paid for the previous 4 months.

12. On or about the 17th of November 2006 Warderly approached Bayerische Hypo-und Verinsbank AG, Hong Kong Branch ("HVB"), a major creditor of Warderly and its subsidiaries to indicate that there would be problems in the repayment of the syndicated loan of \$200 million due in August 2007 due to cash flow problems. At the insistence of HVB, the firm of Ferrier Hodgson Limited ("FHL") was engaged to monitor the financial matters of the Company and review the workings of the whole Warderly group on the 6th of December 2006. From that time on, a representative of FHL was attached to Warderly to monitor cash flow and review all payments over \$50,000.

13.. On the 17th of November 2006, a subsidiary of Warderly, Sharp Venture Holdings Limited ("Sharp Venture") borrowed from Mr. Liu Su Ke ("Liu") \$2 million, the terms of which were interest payable of 5% after one month, but if not paid, thereafter at 1.5% per month, the same conditions as a subsequent loan for \$6 million.

14. Around this time a management committee was formed to operate Warderly on a daily basis. The committee comprised Yeung, Mr. Godfrey Hung ("Hung"), an Executive Director, Mr. John Lai ("Lai"), a Director and Head of Sales and Marketing, Mr. Leung Ping Chung, Hermann ("Hermann Leung"), an alternate Non-Executive Director and Mr. Anthony Kong, Chief Operations Officer. The Securities and Futures Commission ("SFC") alleged

that some of the meetings of this committee were attended by Lo. However, Lo denies ever attending any of its meetings.

15. On the 5th of December 2006 there was another strike at the factory in China, again over non-payment of wages for the previous 3 months.

16 On the 11th of December 2006 Liu loaned a further \$1.2 million to Sharp Venture at the same terms and promised a further \$6 million once documentation was prepared. The purpose appeared to have been to enable Warderly to pay workers over the Chinese New Year.

17 On or about the 22nd of December 2006 Yeung lodged all of his 231.8 million shares in Warderly with Stevenson Wong. This appears to be for the purpose of addressing the liquidity problems. Lo was aware of this.

18. On the 28th of December 2006 Liu via his company Vision Eagle Limited (“Vision Eagle”), loaned \$6 million to another of Warderly’s subsidiary companies, Housely Industries Limited (“Housely”) for one month with interest set at 5% but to reduce to 1.5% per month thereafter if the loan was not paid off. A loan agreement was signed between the parties at the office of Stevenson Wong. Also, a letter of authorization was executed by Yeung pledging all his 231.8 million shares in Warderly to Liu as security. The documents were prepared by Stevenson Wong. Lo was involved to some extent in the structure of the loan.

19. On the 23rd of January 2007 Warderly issued a half year interim report ending on 31st October 2006. This showed the net profit decreased from \$20.4 million to \$2.2 million and the bank balance from \$116.2 million to \$27.8 million. The shares fell to the lowest level ever on the 24th of January 2007 closing at \$0.214 per share.

20. The loans plus interests were due to Liu on the 28th of January 2007. Warderly could not repay.

21. The workers in China went on strike again before Chinese New Year due to unpaid wages.

22. On the 7th of February 2007 FHL was informed of a potential investor who was interested in acquiring Yeung's shareholding and restructuring the Group. This was Luu who was introduced to Hung by Mr. Johnny Tang ("Tang"). The latter was Luu's representative and financial advisor. There was some dispute as to how much Luu had been told of Warderly's difficult financial circumstances.

23. For some reason, two days later, on the 9th of February 2007, shares in Warderly showed a rise of 55.81%. They moved from \$0.215 on the 8th of February to \$0.335 on the 9th of February 2007.

24. Luu loaned \$10 million to Warderly. This was in the following sequence:

15th of February 2007	\$3 million to Housely
16th of February 2007	\$1 million to Housely
6th of March 2007	\$5 million to Housely
4th of April 2007	\$90,000 to Wing Fat Transportation Co.
4th of April 2007	\$909,950 to Stevenson Wong
4th of April 2007	Bank charges \$50
	Total: \$10 million

The interest rate thereon was to be 3% per month but this would fall to 1.5% per month after Luu served notice on Warderly for repayment. The new rate applied two business days after the service of such a notice. Yeung also agreed to pledge 50 million of his Warderly shares as security. This was based on a notional valuation of \$0.20 per share. Luu also agreed to take over the additional debt of \$12.8 million owed to Liu, subject to due diligence. Luu never paid over this \$12.8 million. Lo was involved in the discussion and structure of this loan. A loan document was prepared and signed between Lanakia Investments Limited ("Lanakia Investments") which was Luu's

nominee and Housely dated the 6th of March 2007. The document was drafted by Ms. Cornelia Chu (“Chu”), a solicitor and partner in Stevenson Wong. Lo was the supervisor of Chu.

25. On the 9th of March 2007 representatives of HVB and other syndicated lenders and FHL had a meeting with Luu. Luu revealed little of his plans but indicated he may be willing to invest further in Warderly.

26.. On the 12th of March 2007 Warderly issued an announcement about a potential acquisition of an oil related project in China. This announcement was drafted by Chu and prepared on the instructions of Tang. However, Luu denied any knowledge of it.

27. On the 20th of March 2007, Yeung resigned as Chairman of Warderly and an announcement was made to this effect. Also that Lo resigned as Company Secretary. On the 21st of March 2007, Luu paid Yeung \$1 million which was claimed to be to cover outstanding salary.

28. On the 21st of March 2007, at the request of Tang, 20 million Warderly shares which had been deposited with Stevenson Wong were transferred to Ms. Liu Ping, Luu’s nominee. Another 10 million were at the same time transferred to another of his nominees, Grand Access Finance Limited (“Grand Access”). The transfer documents were prepared by Chu. Lo was made aware of these transfers.

29. On the 23rd of March 2007 Luu’s accountant, Mr. Steven Kwok visited Kalee and was detained by staff. A ransom of RMB 257,400 was paid for his release. Ultimately, this sum was paid by Luu.

30. Between the 24th and 25th of March 2007 Tang asked Lo to make arrangements for the transfer of another 20 million Warderly shares to Luu’s designated account. Tang claimed to have informed Lo that Luu was no longer interested in investing in Warderly. However, in evidence he admitted he could not recall doing so. Lo denied this was ever said. The shares were transferred at a later date.

31. Tang accepted that Luu never told FHL that he did not intend to proceed with the restructuring of Warderly as the financial situation was much worse than anticipated. He claimed this was because Luu wanted to get his money back. Luu on the other hand maintained he told Tang he wanted nothing further to do with the Company after the incident of the 23rd of March 2007.

32. On the 16th of April 2007, 20 million shares, which had been deposited by Yeung to Stevenson Wong were transferred at the request of Tang to Luu's nominee, Madam Chan Kar Yee ("Chan"). The transfer documents were prepared by Chu.

33. There was another strike by the labour force at Warderly's factory in China in April 2007. The factory was then closed and taken over by local government.

34. On the 23rd of April 2007 FHL issued a report disclosing the dire financial situation of Warderly to the syndicated lender.

35. On the 11th of May 2007 the SFC issued a show cause letter to Warderly requiring it to address the concerns revealed in the report by FHL. Receiving no explanation, Warderly's shares were suspended from trading on the 14th of May 2007. The closing price prior to suspension was \$0.48.

36. Six and a half years later, that is on the 16th of December 2013, after a major corporate restructuring that fundamentally changed the core trading base of Warderly, trading resumed in the shares. The opening price was \$0.148 which on the face of it showed a drop of 69% from its closing price prior to suspension. However, this may be somewhat misleading as there was a share option to anyone holding Warderly shares to purchase 4 for each 1 held at \$0.05. Also the historic share data shows that rapidly the shares rose in value trading at \$0.27 per share after one week and \$0.385 per share after a month.

## The share trading of specified persons 1 and 2

### Lo

37. Lo had 1,597,500 Warderly shares which he bought in late 2003 and early 2004. He had paid between \$1.14 and \$1.20 per share. He then sold 572,500 shares on the 28th of March 2007 for \$0.52 to \$0.53 per share, 437,500 on the 29th of March 2007 for \$0.51 per share and 587,500 on the 30th of March 2007 for \$0.52-0.53 per share.

### Luu

38. The 20 million Warderly shares that were transferred from Primer Capital Investments Limited (“Primer Capital”), Yeung’s company to Liu Ping, a nominee of Luu on the 21st of March 2007 were deposited into her securities account held with KGI Asia Limited (“KGI”) on the 4th of April 2007. Luu instructed Pau Chin Hung, Andy (“Pau”), a stockbroker of KGI to sell them as soon as possible without giving instructions on the sale price. They were sold on the 3rd and 4th of April 2007 as set out:

3rd April 2007	5,680,000 shares	at \$0.4173 per share
3rd April 2007	6,752,500 shares	at \$0.4724 per share
4th April 2007	250,000 shares	at \$0.4554 per share
4th April 2007	7,317,500 shares	at \$0.4567 per share

39. The 10 million shares transferred from Primer Capital to Grand Access (Luu’s nominee) on the 21st of March 2007 were deposited into the securities account of Grand Access held with KGI on the 4th of April 2007. Luu instructed Pau to sell them within one to two days without giving instruction on the sale price. They were sold on the 4th of April, details as below:

4th April 2007	10 million shares	at \$0.3969 per share
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40. The 20 million shares transferred from Imperial Profit Enterprises Limited (“Imperial Profit”), Yeung’s company to Chan, Luu’s nominee, on the 16th of April 2007 were deposited into her securities account held with KGI on the 30th of April. Luu instructed Pau to sell them as soon as possible without giving instructions as to the sale price. They were sold on the 30th of April and 2nd of May 2007 as detailed below.

30th April 2007	7,650,000 shares	at \$0.4866 per share
2nd May 2007	12,350,000 shares	at \$0.4603 per share

## CHAPTER 3

### THE ADMITTED FACTS

#### The admitted facts of specified person 1

41. Warderly was incorporated in the Cayman Island on the 18th of March 2002 and listed on the Stock Exchange of Hong Kong on the 18th of December 2002. Its stock code is 607.

42. At all relevant times, its legal advisors were Stevenson Wong.

43. Lo is a solicitor and partner in that firm. He was appointed Company Secretary in December 2002 and remained in that post until he resigned on the 20th of March 2007.

#### Reports and announcements published by Warderly

44. On the 23rd of August 2006 Warderly published its annual results for the year ending 30th of April 2006. This showed net profit had decreased from \$58,014,000 in the year ending 30th of April 2005 to \$398,000. The Inland Revenue Department had claimed an under provision profits tax of \$16,554,000.

45. On the 23rd of January 2007 Warderly announced its interim results for the 6 months ended the 31st of October 2006. This showed net profit had dropped to \$2,194,000 from \$20,443,000 for the same period in 2005 and the bank balance had reduced from \$116,168,000 to \$27,775,000.

46. On the 12th of March 2007 Warderly issued an announcement about a potential acquisition of an oil project in China.

47. On the 20th of March 2007 Warderly released an announcement regarding the resignation of Yeung as Chairman and Lo as Company Secretary.

Demands from and claims commenced by banks against Warderly for overdue loans and debts

48. Bank of East Asia, Guangzhou Branch

- 1) A demand letter was issued by the Bank of East Asia (“BEA”) on the 21st of July 2006 in relation to \$10 million which was granted to Warderly’s subsidiary Kalee.
- 2) On the 11th of October 2006 BEA took civil action in China against Kalee.
- 3) On the 15th of November 2006 a demand letter was issued by solicitor on behalf of BEA to Warderly as a guarantor for an outstanding sum of \$8,002,750.

49. Bangkok Bank

- 1) Bangkok Bank (“BB”) issued demand letters on the 9th of November 2006 to Warderly’s subsidiary, Housely for an outstanding sum of \$2,038,224 due on 3rd of October 2006. As of the 2nd of February 2007, \$541,223 was still outstanding.
- 2) A demand letter dated 23rd of January 2007 was issued to Yeung as guarantor for Housely for \$11,039,223 plus interest.
- 3) BB took civil action against Yeung as guarantor for Housely on the 13th of February 2007 for a debt of \$10,591,467.

50. Sumitomo Mitsui Banking Corporation

- 1) Sumitomo Mitsui Banking Corporation issued demand letters on the 23rd of October and 14th of November 2006 respectively to Housely and Yeung for \$11,736,138 and US\$700,940.
- 2) On the 18th of April 2007 demand letters were issued to Warderly and Housely for the remaining balance of \$8,002,684.

51. Bank of Communications Limited

- 1) On the 2nd of November 2006 the Bank of Communications issued a demand letter to Warderly as guarantor for Housely for \$14,152,789 and US\$604,813.
- 2) Further demand letters were sent to Housely and Warderly respectively on the 11th of April and 2nd of May 2007. As of the latter date the outstanding amounts were \$13,583,505 and US\$327,489.

52. Overseas Chinese Banking Corporation

- 1) On the 10th of November 2006 the Overseas Chinese Banking Corporation issued a demand letter to Housely and Warderly as guarantor for \$17,800,457.
- 2) On the 12th of January 2007 solicitors for the Bank sent a demand letter to Warderly for \$17,636,534.

53. China Construction Bank (Asia) Corporation Limited

- 1) On the 6th of November 2006 the China Construction Bank issued a demand letter to Housely for \$3,288,815.
- 2) The Bank issued a writ against Housely on the 7th of March 2007 for \$1,539,813. This was discontinued on the 13th of March 2007 as a repayment schedule was agreed.
- 3) The Bank issued a further writ on the 3rd of April 2007 for the outstanding balance of \$1,016,201.

54. DBS Bank (Hong Kong) Limited

- 1) Demand letters were issued on the 26th of March 2007 by DBS to Housely for \$5,395,094 and US\$89,562 and Warderly as guarantor for an outstanding amount of \$4,990,675.

- 2) Writs were issued on the 20th of April 2007 against Warderly for an outstanding balance of \$5,060,326 plus interest and Housely for an outstanding balance of \$5,449,275 and US\$90,227.

55. United Commercial Bank

Demand letters were issued on the 7th of May 2007 to Housely and Warderly acting as guarantor for overdue loans of \$17 million.

56. Bank of Tokyo Mitsubishi UFJ

- 1) On 23rd of March 2007 a demand letter was issued by the Bank of Tokyo Mitsubishi UFJ to Housely for \$4,984,658.
- 2) A further demand letter was sent to Warderly as guarantor on the 10th of April 2007 for the same amount.
- 3) On the 14th of April 2007 writs were issued against Housely and Warderly for the full amount plus interest.

57. Bayerische Hypo-und Vereinsbank AG

- 1) Demand letters were issued on the 3rd of April 2007 by HVB to Housely and Warderly (acting as guarantor) for \$1,195,668 being interest accrued on the loan facility of \$200 million.
- 2) A further demand letter was issued to Housely on the 3rd of May 2007 for the immediate repayment of \$200 million plus interest.

The strikes at Dongguan Kalee Electrical Co. Limited

58. On the 5th of December 2006, the Guangzhou Daily reported a strike at Kalee.

### Setting up of a management committee

59. In November 2006, a management committee was set up. The members included Yeung, Hung, an Executive Director and Hermann Leung, alternate Non-Executive Director.

### Appointment of Ferrier Hodgson Limited as independent financial advisor

60. On the 6th of December 2006 FHL was appointed by Warderly at the request of HVB as an independent financial advisor to monitor the cash and carry out a financial review. Mr. Joe Tam of FHL stationed in Warderly to monitor cash outflow and validate payments over \$50,000.

### Loans from Liu Su Ke (“Liu”) and his group of financiers

61. Mr. Leung Kwong Choi (“Leung”), an investment intermediary, was acquainted with Hung. On the 17th of November 2006 \$2 million was transferred from the account of Hermann Leung, who was Liu’s business associate to the bank account of Sharp Venture, a subsidiary of Warderly.

62. On the 11th of December 2006 \$1.2 million was transferred from the account of Hermann Leung to Sharp Venture.

63. On the 28th of December 2006, a loan agreement was executed between Liu through his company, Vision Eagle and Yeung representing Warderly for a loan of \$6 million to be granted to the latter for one month with an interest rate of 5%. This was signed at the office of Stevenson Wong. The loan was drawn down that day and repayment was to be in one month. However, when the loan became due on the 28th of January 2007 Warderly did not repay the loan nor the interest. By April 2007 the loan and interest were still outstanding.

64. On 20th of April 2007 Liu accompanied by Leung attended the office of Stevenson Wong to effect the transfer of 30 million Warderly shares held by Yeung through his company, Imperial Profit to him.

#### Loan from Luu Hung Viet, Derrick

65. On the 6th of March 2007 a loan agreement was executed between Housely and Lanakia Investments (Luu's nominee) at the office of Stevenson Wong for a loan facility of \$22,800,000 at interest of 3% per month.

#### The trading of Warderly shares by Lo

66. Lo opened a securities trading account with Citic Securities Brokerage on the 22nd of December 2003. He deposited 1,800,000 Warderly shares into his account in January 2004.

67. As of 28th of February 2007 he still had 1,597,500 Warderly shares in the account.

68. But on the 28th, 29th and 30th of March 2007 all 1,597,500 shares were sold at an average price of \$0.51 to \$0.53 per share.

#### Suspension of trading in Warderly shares

69. On the 14th of May 2007 trading in Warderly shares was suspended. The closing price was \$0.48 per share.

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### Resumption of trading in Warderly Shares

70. The shares resumed trading on the 16th of December 2013. The closing price on the day being \$0.148.

### The admitted facts of specified person 2

71. Warderly was incorporated in the Cayman Islands under the local Companies Law as an exempted company with limited liability on 18th of March 2002. It was registered under Part XI of the Companies Ordinance as an oversea company on 6th of June 2002. Its shares were listed on the Stock Exchange of Hong Kong Limited on 18th of December 2002 with stock code number 607 and remained so listed at all material times.

72. Stevenson Wong were the legal advisors to Warderly at all relevant times.

73. Lo is a solicitor practicing in Hong Kong and a partner of Stevenson Wong. He was appointed as the Company Secretary of Warderly in December 2002 until he resigned on 20th of March 2007.

### Reports and Announcements published by Warderly

74. On 23rd of August 2006, Warderly announced its annual result for the year ended 30th of April 2006. The report showed that Warderly's net profit had decreased from HK\$58,014,000 in the year ended 30th of April 2005 to HK\$398,000. The Inland Revenue Department had claimed an under-provision profits tax in the sum of HK\$16,554,000.

75. On 23rd of January 2007, Warderly announced its interim results for 6 months ended 31st of October 2006. The report showed its net profit had dropped to HK\$2,194,000 from HK\$20,443,000 for the same period in 2005; and bank balance had reduced from HK\$116,168,000 as at 30th of April 2006 to HK\$27,775,000.



76. On 12th of March 2007 Warderly issued an Announcement about a potential acquisition of an oil project in China.

77. On 20th of March 2007, Warderly released an announcement regarding the resignation of Yeung as Chairman and Lo as Company Secretary of Warderly.

Demands from and claims commenced by banks against Warderly for overdue loans and debts

78. Bank of East Asia, Guangzhou Branch

- (1) On 20th of July 2006, Warderly defaulted in repayment of a bank loan from the Bank of East Asia in the sum of HK\$10,000,000 which had been granted to Warderly's subsidiary, Kalee. A demand letter was issued by the Bank of East Asia on 21st of July 2006.
- (2) On 15th of August 2006, Warderly repaid the HK\$10,000,000 loan to the Bank of East Asia but defaulted in repayment of another loan in the sum of HK\$10,000,000 which was due on 11th of August 2006.
- (3) On 11th of October 2006, the Bank of East Asia took civil action in China against Kalee in respect of the overdue loan of HK\$10,000,000.
- (4) On 15th of November 2006, a demand letter was issued by the solicitors on behalf of the Bank of East Asia to Warderly as a guarantor for an outstanding sum of HK\$8,002,750.

79. Bangkok Bank

- (1) Bangkok Bank started issuing demand letters from 9th of November 2006 to Warderly's subsidiary, Housely, for an outstanding sum of HK\$2,038,224 which had fallen due on 3rd

of October 2006. As at 2nd of February 2007, a sum of HK\$541,223 was still outstanding.

- (2) A demand letter dated 23rd of January 2007 was issued to Yeung as guarantor for Housely for an outstanding sum of HK\$11,039,223 plus interest accrued.
- (3) Bangkok Bank took civil action (HCA No. 316 of 2007) on 13th of February 2007 against Yeung as guarantor for Housely's outstanding indebtedness of HK\$10,591,467.

80. Sumitomo Mitsui Banking Corporation

- (1) Sumitomo Mitsui Banking Corporation issued demand letters on 23rd of October 2006 and 14th of November 2006 respectively to Housely and Yeung for outstanding amounts of HK\$11,736,138 and US\$700,940.
- (2) Demand letters were issued through the bank's solicitors on 18th of April 2007 to Warderly and Housely for the remaining balance of HK\$8,002,684.

81. Bank of Communications

- (1) On 2nd of November 2006, the Bank of Communications issued a demand letter to Warderly (as guarantor for Housely) for outstanding amounts of HK\$14,152,789 and US\$604,813.
- (2) Similar demand letters were sent on 11th of April 2007 and 2nd of May 2007 to Housely and Warderly respectively. As at 2nd of May 2007, the outstanding amounts were HK\$13,583,505 and US\$327,489.

82. Overseas Chinese Banking Corporation Limited

- (1) On 10th of November 2006, Overseas Chinese Banking Corporation Limited issued a demand letter to Housely and

Warderly (acting as guarantor) for an outstanding sum of HK\$17,800,457.

- (2) On 12th of January 2007, a demand letter was sent from the solicitors representing the bank to Warderly for an outstanding sum of HK\$17,636,534.

83. China Construction Bank (Asia) Limited

- (1) On 6th of November 2006, China Construction Bank (Asia) Limited issued a demand letter to Housely for an overdue sum of HK\$3,288,815.
- (2) The bank issued a writ of summons on 7th of March 2007 (HCA No. 438 of 2007) against Housely for an outstanding amount of HK\$1,539,813 which was discontinued on 13th of March 2007 upon reaching a repayment schedule.
- (3) The bank issued another writ of summons on 3rd of April 2007 for an overdue balance of HK\$1,016,201 which remained outstanding.

84. DBS Bank (Hong Kong) Limited

- (1) Demand letters were issued on 26th of March 2007 by DBS Bank (Hong Kong) Limited to Housely for outstanding amounts of HK\$5,395,094 and US\$89,562 and Warderly (acting as guarantor) for an outstanding amount of HK\$4,990,675.
- (2) Writs of summons were issued on 20th of April 2007 against Warderly (HCA No. 797 of 2007) for an outstanding balance of HK\$5,060,326 plus interest and Housely (HCA No. 798 of 2007) for an outstanding balance of HK\$5,449,275 and US\$90,227.

85. United Commercial Bank
- (1) Demand letters were issued by solicitors representing United Commercial Bank on 7th of May 2007 to Housely and Warderly (acting as guarantor) for overdue loans totaling HK\$17 million.
86. Bank of Tokyo Mitsubishi UFJ, Limited
- (1) On 23rd of March 2007, a demand letter was issued by the Bank of Tokyo Mitsubishi UFJ, Limited to Housely for an outstanding amount of HK\$4,984,658.
  - (2) A further demand letter was issued on 10th of April 2007 to Warderly as guarantor for the outstanding amount.
  - (3) A writ of summons was issued on 14th of April 2007 (HCA No. 733 of 2007) against Housely and Warderly for the outstanding amount of HK\$4,985,658 and interest accrued.
87. Bayerische Hypo-und Vereinsbank AG
- (1) Demand letters were issued on 3rd of April 2007 by HVB to Housely and Warderly (acting as guarantor) for an outstanding amount of HK\$1,195,668 being interest accrued for a loan facility of HK\$200 million.
  - (2) A further demand letter was issued to Housely on 3rd of May 2007 for immediate repayment of \$200 million plus interest.

Labour strikes at Dongguan Kalee Electrical Co. Limited

88. In September 2006, workers from Kalee went on strike due to the failure of Kalee to pay wages to them for 4 months.

89. The workers' strike at Kalee on 4th of December 2006 was reported in the Guangzhou Daily.

#### Setting up of a management committee

90. In November 2006, a management committee was set up to solve the financial problems faced by Warderly.

91. Members of the committee comprised Yeung, Hung, Lai (Executive Director), Hermann Leung (Alternate Non-executive Director) and Anthony Kong Kwok Pun, the financial controller of Warderly.

92. On or about 22nd of December 2006, Yeung deposited 231,800,000 Warderly shares registered under his nominee companies namely, Imperial Profit and Primer Capital, with Stevenson Wong. Yeung signed a letter of authorization and blank bought and sold notes.

#### Appointment of Ferrier Hodgson Limited as independent financial advisor

93. On 6th of December 2006, FHL was appointed by Warderly at the request of HVB as an independent financial advisor to monitor the cash position and carry out a financial review of Warderly because it had difficulty in repayment of a syndicated loan of HK\$200 million from HVB.

94. A staff member of FHL, Joe Tam, was stationed in Warderly on a daily basis since the appointment of FHL to monitor the cash outflow and validate payments over HK\$50,000.

### Trading of Warderly shares by Luu

95. Pau was a stock broker of KGI at all material times. He was responsible for the sale of the Warderly shares by Luu through his nominees namely Liu Ping, Grand Access and Chan.

### Liu Ping

96. On 29th of January 2007, Liu opened a securities trading account with KGI at the request of Luu, who was her employer in Beijing, China.

97. Liu Ping agreed to let Luu use her securities trading account with KGI for trading of shares.

98. On or about 21st of March 2007, Liu, accompanied by Luu and his financial advisor, Tang, attended the office of Stevenson Wong, to sign the documents for the transfer of 20 million Warderly shares from Yeung's nominee company, Primer Capital, to her.

99. A written instruction to sell the 20 million Warderly shares was given to Liu Ping for signature by Tang on 3rd of April 2007.

100. 12,432,500 Warderly shares were sold on 3rd of April 2007 before they were physically deposited into the securities trading account of Liu Ping. The average sale price was between HK\$0.4713 and HK\$0.4724 per share.

101. The remaining 7,567,500 shares were sold on 4th of April 2007 at an average price of HK\$0.4554 and HK\$0.4567 per share.

102. Liu Ping signed some blank cheques to Tang for him to deal with the proceeds of sale of the Warderly shares. She received no rewards from the sale of the Warderly shares.

## Grand Access Finance Limited

103 Grand Access was established by Ching Ci Lan in around February or March 2007 through the introduction of Luu who is the son-in-law of Ching's older sister. Ching leased a property to Luu as his residence.

104. Ching attended the office of Stevenson Wong at the request of Luu, on 21st of March 2007, to sign the documents for the transfer of 10 million Warderly shares from Yeung's nominee company, Primer Capital to Grand Access.

105. At the request of Luu, Ching opened a securities trading account with KGI under the name of Grand Access on 29th of March 2007. The account opening documents were given to her for signature by Luu.

106. Ching agreed to let Luu use Grand Access' securities trading account with KGI for trading of shares.

107. On 4th of April 2007, 10 million Warderly shares were physically deposited into the securities trading account of Grand Access with KGI.

108. 10 million Warderly shares held in the securities trading account of Grand Access were sold on 4th of April 2007 at an average price of HK\$0.3969.

109. Ching had not given any instructions to KGI to trade in Warderly shares.

110. She signed some blank Hang Seng Bank cheques of Grand Access to Luu.

111. Grand Access had no business operation at all material times.

## Chan Kar Yee

112. Chan was a housewife and director of a family business in respect of which she did not participate in the management.

113. On 12th of April, Chan opened a securities trading account with KGI at the request of Pau, her son-in-law.

114. Chan seldom traded in shares. She had not done any trading through that securities trading account.

115. On 16th of April 2007, Chan attended the office of Stevenson Wong, at the request of Pau, to sign the documents for the transfer of 20 million Warderly shares from Yeung's nominee company, Imperial Profit, to her.

116. On 30th of April 2007, 20 million Warderly shares were physically deposited into Chan's securities trading account with KGI.

117. On the same day, 7,650,000 Warderly shares held in Chan's securities trading account were sold at an average price of HK\$0.4866 per share. The remaining 12,350,000 Warderly shares were sold on the next trading day, 2nd of May 2007, at an average price of HK\$0.4603 per share.

118. At the request of Pau, Chan signed some blank cheques drawn on her DBS bank account and gave them to Pau. She had no idea what they were for.

#### Enquiry by the Securities and Futures Commission

119. On 11th of May 2007, the SFC issued a show cause letter to Warderly requiring it to address the concerns revealed in the report to lenders of Warderly prepared by FHL dated 23rd of April 2007.

#### Suspension of trading of Warderly shares

120. Trading Warderly shares was suspended on 14th of May 2007 for the failure of Warderly to provide an explanation to the SFC. The closing price was HK\$0.48.



### Resumption of trading of Warderly shares

121. The shares resumed trading on 16th of December 2013. The closing price was HK\$0.148.

### Rider

122. It is agreed between the SFC and Luu that the admissions are not to be construed as an admission that Luu had any personal knowledge of the matters stated therein before 3rd of May 2007 except to the extent that it is expressly admitted that Luu had personally participated in the event being admitted.

## CHAPTER 4

### THE BASIC ALLEGATIONS AGAINST THE TWO SPECIFIED PERSONS

#### The allegation of insider dealing

123. The basis for this inquiry is the allegation against each of the two specified persons, Lo as SP1 and Luu as SP2, that they engaged in insider dealing using knowledge which should have been made public and was not, to avoid a loss by selling their shares in Warderly.

#### The listed corporation

124. To establish that the specified persons have engaged in insider dealing, it has to be proved that they dealt in the securities of a listed company. There is no challenge to the fact that Warderly was a listed company at all relevant times. It had been incorporated in the Cayman Islands in accordance with the law applicable thereto as an exempted company with limited liabilities on the 18th of March 2002. It was registered under Part XI of the Companies Ordinance as an overseas company on the 16th of June 2002. Its shares were listed on the Stock Exchange of Hong Kong on the 18th of December 2002.

#### That SP1 and SP2 were connected persons in respect of Warderly

##### Lo (SP1)

125. That Lo was a connected person in respect of Warderly in accordance with the terms of s.247(1) of the Securities and Futures Ordinance (“the Ordinance”) in that as the Company Secretary and by profession a solicitor and partner with Stevenson Wong who provided company secretarial services and legal advice to Warderly,

“he occupies a position which may reasonably be expected to give him access to insider information in relation to the corporation by reason of (i) a professional or business relationship existing between (A) himself... or a firm of which he is a partner; and (B) the corporation”

Luu (SP2)

126. He was a lender and potential investor in Warderly who was interested in acquiring shares held by Yeung and restructuring the Company. He instructed Tang to provide information to Lo to prepare the announcement in respect of a possible acquisition by Warderly of an oil processing business. He involved himself in Warderly presenting himself to senior management of FHL as a potential investor. That allegedly he gave instructions leading to the dismissal of 19 members of staff to trim costs. Thus his business relationship with Warderly gave him a position which may reasonably be expected to give him access to relevant information in respect of the Company.

127. He was also a substantial shareholder who acquired 50 million shares in the Company.

The 5 specific events comprising “relevant information” relating to Warderly

128. It is the SFC’s case that Lo and Luu were in possession of information relating to some or all of the following events which comprise relevant information when they sold their shares in Warderly.

- (i) The tightening of banking facilities since July 2006 and the subsequent events such as overdue loans rescheduled payments, demand letters and writs issued by banks etc.

129. Around July 2006 banks started to tighten credit facilities granted to Warderly and called for repayment of overdue loans.

130. Cash flow problems led to detrimental affects on the production of household electrical appliances at Warderly's factory, Kalee in Dongguan. These were the core products of the Group. Suppliers who had not been paid stopped providing the necessary raw materials and unpaid workers went on strike. Between September 2006 and March 2007 there were 5 or 6 strikes. That of the 4th of December 2006 was reported in a Guangzhou Daily newspaper.

131. By October 2006, suppliers pressed for payment and threatened Lai if payments were not made. By January 2007 production was suspended.

132. In November 2006 a management committee was set up to address the financial problems. Yeung said it was his impression that Lo attended meetings in December 2006 when liquidity problems were discussed. Yeung of course did not give evidence for medical reasons. After the setting up of this committee, Yeung deposited all of his 231,800,000 shares with Stevenson Wong. He agreed to sell his shares to solve the liquidity problem if loans could not be repaid. He signed a letter of authorisation and blank bought and sold notes. During November and December 2006 the Company's financial problems were discussed by the board.

133. On 6th of December 2006 FHL was appointed by Warderly at the request of HVB, a syndicated creditor of Warderly, as an independent financial advisor and to monitor the cash flow and carry out a financial review. This was because Warderly perceived a problem in repaying a syndicated loan of \$200 million which would be due in mid to late 2007. FHL stationed a member at Warderly.

134. FHL issued a report on 23rd of April 2007 to HVB disclosing the dire financial situation of Warderly. Warderly's bank borrowing as at the 30th of April 2007 was \$303,849,000.

(ii) Loan from Liu and/or his group of financiers

135. Through the introduction of Leung, Liu agreed to grant a loan of \$2 million to Warderly to be repaid in a month at an interest rate of 5%. There was no written agreement.

136. Therefore, on the 17th of November 2006, \$2 million was transferred from the account of Hermann Leung, Liu's business associate to Warderly's subsidiary, Sharp Venture.

(iii) Loans totaling \$7.2 million

137. At the beginning of December 2006, Hung asked Leung for a further loan of \$6 million to pay wages prior to Chinese New Year. Before the loan agreement was prepared, Hung asked for a further short term loan of \$1.2 million to Warderly. On the 11th of December 2006 the money was transferred to Sharp Venture. The terms were the same, to be repaid in one month with interest of 5%. There was no written agreement.

138. On the 28th of December 2006 a loan agreement was executed between Liu through his company Vision Eagle and Yeung representing Housely for a loan of \$6 million for one month at 5% interest. Thereafter, the interest rate would be 1.5% per month. The loan agreed was signed at the office of Stevenson Wong. Lo knew of this. The loan was drawn down that day.

(iv) Warderly's inability to repay the loans from Liu

139. When the loans became due on the 28th of January 2007, Warderly did not repay. As security for the loans, the letter of authorisation was given to Liu. Lo knew of the non-payment because Liu called him. In April 2007 the loans were still outstanding.

(v) Loans from Luu

140. In February 2007, Tang introduced Luu to Hung. Luu agreed to grant a loan of \$10 million prior to due diligence being carried out as he expressed an interest in becoming the majority shareholder of Warderly. The interest was 3% per month. Luu also agreed to take up a debt of \$12.8 million owed by Warderly to a financier.

141. Lo was involved in the structure of the loan. It was agreed that Yeung would pledge his shares at a valuation of \$0.20 each as security. On the 15th of February 2007 Luu loaned \$10 million to Housely. This was effected by 3 payments of \$3 million, \$1 million and \$5 million on the 15th and 16th of February and 6th of March 2007. A payment of \$90,000 was made to Wing Fat Transportation Co. and the balance of \$900,000 plus was used to settle outstanding fees of Stevenson Wong.

142. On the 6th of March 2007 a loan agreement was executed between Housely and Lanakia Investments at the office of Stevenson Wong for a loan facility of \$22,800,000 at interest of 3% per month. However, this was not as straightforward as it seemed. The loan was set in terms of the initial interest being 3% per month but the lender was to serve on the borrower a form of demand for repayment and thereafter the rate fell to 1.5% per month. This is clear from the agreement.

The SFC basic case

143. Thus, the SFC alleged that the specified persons 1 and 2 being connected persons to Warderly, a listed corporation had knowledge of all or various of these 5 events which constituted relevant information which if made public would have caused the share price in the Company to be adversely affected in a material way and they knew this to be the case. They also had knowledge that this relevant information was not in the public domain. They used this knowledge in their decisions to sell the shares they held and that having done so when trading in the shares resumed after a suspension of trading lasting from the 14th of May 2007 until the 16 of December 2013 they avoided a loss. The shares at suspension were trading at \$0.48 and resumed at \$0.148.

According to Mr. Karl Lung (“Mr. Lung”) the loss avoided by Lo was \$492,841 and by Luu \$12,071,675.

## CHAPTER 5

### THE LAW AND THE SCOPE OF THE INQUIRY

#### Preliminaries – Chairman’s directions and task of the Tribunal

144. The Chairman has given the following directions as to law to the members of the Tribunal in accordance with s.24(c) of Schedule 9 of the Ordinance.

145. The SFC Notice has requested the Tribunal to determine whether market misconduct in the nature of insider dealing took place between the 28th of March 2007 and the 2nd May 2007. Whether insider dealing took place between those dates is therefore to be determined in accordance with the provisions of the Ordinance as those provisions were at that time.

#### The essential elements of insider dealing

146. At the relevant time, s.270(1) of the Ordinance provided that –

“Insider dealing in relation to a listed corporation takes place –

a) when a person connected with the corporation and having information which he knows is relevant information in relation to the corporation

–

i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives;”

147. In the context of this inquiry, the constituent elements of insider dealing are:

(A) the person must be a connected person to the listed corporation;



- (B) the person must have relevant information in relation to the corporation;
- (C) the person must know it is relevant information in relation to the corporation and the person must deal in the listed securities of the corporation.

(A) Connected person

148. At the relevant time, s.247(1)(a) of the Ordinance provided that, in respect of insider dealing a person shall be regarded as connected with a corporation if, being an individual –

“... (b) he is a substantial shareholder of the corporation

... (c) he occupies a position which may reasonably be expected to give him access to inside information in relation to the corporation by reason of (i) a professional or business relationship existing between (A) himself... or a firm of which he is a partner; and (B) the corporation.”

149. In this present case –

- i) The first specified person, Lo was at all times a solicitor and partner practicing in Hong Kong with Stevenson Wong, the legal advisers to Warderly. Also he was the official Company Secretary of Warderly from December 2002 until his resignation on the 20th of March 2007. He accepts being a connected person so far as the 2 loans which were documented, are concerned. These are events 3 and 5. He contested being a connected person in respect of events 1, 2 and 4. The Tribunal determined this later at Chapter 6, paragraph 173.
- ii) Luu, the second specified person was a lender and potential investor who was interested in acquiring Warderly shares held by Yeung, the Chairman of Warderly and majority shareholder. He also became a substantial shareholder after acquiring 50

million shares in return for a non-settled loan of \$10 million. He does not challenge being a connected person.

### Status of Warderly

150. There is no challenge to the designation of Warderly as at the time being a corporation listed on the Hong Kong Stock Exchange.

### (B) The information possessed must be relevant information

151. Relevant information is often referred to as price sensitive information. At the relevant time relevant information in relation to a corporation was defined as:

“specific information about –

- a) the corporation;
- b) a shareholder or officer of the corporation; or
- c) the listed securities of the corporation or their derivatives, which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the listed securities.”

### i) Meaning of “Specific”

152. Specific information is defined as information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed. This is to be contrasted with information which fails to achieve the required degree of specificity being too vague, inchoate or speculative (see the Report of the MMT dated 26th November 2015 relating to Asia Telemedia Limited).

153. In the present case whilst the events 2 to 5 which the SFC relies on in the allegation of insider trading are accepted as attaining the requisite level of specificity the first event is not so accepted by both specified persons. That is:

“the tightening of banking facilities since July 2006 and the subsequent events such as loans overdue, rescheduled payments, demand letters and writs issued by banks etc.”

The lack of specificity was supported to some extent by the SFC own expert witness Mr. Lung in his own oral evidence. Or at least he acknowledged there were problems with this. However, Mr. Clive Rigby (“Mr. Rigby”) the expert called on behalf of SP1, Lo agreed in his report that these events were specific but clarified in his oral testimony that he was using this in a layman’s way not a legalistic one and the events could only be said to be specific to Warderly. This then is a matter to be resolved.

ii) Information likely to materially affect the price of the shares

154. In the report of the Insider Dealing Tribunal in Public International Investments Limited dated 5th of August 1995 the issue of whether or not information was likely to affect the price of the Company shares if known to those accustomed to dealing in them was addressed and the nature of the test was described in paragraph 19.4.2:

“... hypothetical in that on the date that the insider acts on inside information, he acts when the investing public, not in possession of the inside information, either does not act, or acts in response to other information or advice. The exercise in determining how the general investor would have behaved on that day, had he been in possession of that information, has necessarily to be an assessment. It is true that an examination of how those investors react once the information is stripped of its confidentiality and becomes public knowledge, will often provide the answer, although care must be taken to ascertain whether the investors’ response is indeed attributable to the information released or whether it is wholly or in part attributable to other events or considerations.”

However, in the present case we do not have the luxury of resolving the issues with reference to the information entering the public domain because this simply did not occur. The 5 events referred to were never made public except that part of the first event, namely, the issue of writs for non-payment of debt by the banks were by its way nature public being published in the press.

155. In paragraph 19.4.5 of the Report the term “materially” was addressed:

“We think that the word “materially”, speaks for itself – it is to be contrasted with “slight”, “insignificant” and “immaterial”.”

156. In the report of the Insider Dealing Tribunal in The International City Holdings Limited dated the 27 of March 1986 the Tribunal observed in paragraph 2.6 of the requirement of materiality that the information –

“being likely to bring about a material change in the price of those securities. Thus information that would be likely to cause a mere fluctuation or a slight change in price would not be sufficient, there must be the likelihood of changes of sufficient degree in any given circumstances to amount to a material change.”

It has to be noted that Mr. Lung the expert witness called by the SFC presented as somewhat vague and uncertain when cross examined as to the impact the 5 events relied upon either collectively or individually on the price of the shares in Warderly. He could only say in his opinion had the information been made known it would have had a negative impact on the price of the shares but insisted he could not quantify it. Neither in his evidence nor in his report was he able to give evidence on the issue of materiality.

### (C) The element of knowledge

157. A person is not to be found guilty of market misconduct by insider dealing simply because he possesses information which determined objectively is found to constitute price sensitive information. The person can only be found to be culpable if the Tribunal is satisfied he possesses the requisite

knowledge at the time he deals in the shares that the information in his possession was price sensitive. Whether a person possesses such necessary knowledge is an evidential point that has to be proved by the SFC for example by admission made or drawing inference from relevant facts and/or circumstances.

158. The Tribunal has further directed itself that knowledge includes the state of mind of a person who willfully shuts his/her eyes to the obvious; such a person denies what, in truth, he/she knows to be the case by contriving a façade of ignorance.

(D) The person must “deal”

159. This is not an issue in this matter, both specified persons accepted by selling their shares in Warderly they did deal.

The defence under s.271

160. Both Lo and Luu have raised this statutory defence to deny insider dealing. In 2007, s.271(3) of the Ordinance stated:

“A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives or his disclosure of information if he establishes that the purpose for which he dealt in... .. the listed securities or derivatives in question or disclosed the information (as the case may be) was not or, where there was more than one purpose, the purposes for which he dealt in... .. the listed securities or derivatives in question or disclosed the information in question (as the case may be) did not include the purpose of security or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.”

161. To successfully raise this defence a person must establish on a balance of probabilities that, although at the time of dealing he was knowingly in possession of price sensitive information, that was not a factor inducing him to deal.

162. It has to be emphasised that it is no defence to establish that the price sensitive information, while a factor was only a subsidiary one. To successfully raise the defence it must be established that the price sensitive information was not in any way a motivating factor (Henry Tai Hon Leung v Insider Dealing Tribunal CACV 333/2004).

### The standard of proof

163. The standard of proof was the same in 2007 as it is today. That is for determining any question or issue before the Tribunal it is “the standard of proof applicable to civil proceedings in a court of law”. That is on a balance of probabilities. In *A Solicitor v The Law Society* (2008) 11 HKCFAR 117, Bokhary PJ held –

“... only two standards of proof are known to our law. One is proof beyond reasonable doubt and the other is proof on a preponderance of probability.”

He also went on to say in that same case that where serious allegations are made and insider dealing must per force be included that the court/tribunal must take extra care.

“The more serious the act or omission alleged, the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability.”

164. In his judgment in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336, Sir Anthony Mason addressed the proper approach to the drawing of inferences in circumstances of gross misconduct. He said:

“... that conclusion was not to be reached by conjecture nor, as the respondent submitted, on a mere balance of probabilities. It was to be plainly established as a matter of inference from proved facts. It is not possible to state in definitive terms the nature of the evidence which the court will require in order to be satisfied, in civil proceedings, that a serious allegation of this kind is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn... for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li’s conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so...”

### Good character

165. The Chairman has directed the Members that positive good character has to be taken in to account. This was put forward by Lo and not challenged. The relevance of good character is to render a person less likely to have committed the alleged misconduct and supports his credibility in respect of both his oral testimony and the record of interview given to the SFC.

### Each to be considered separately

166. The case against and for each of the specified persons has been considered separately by the Tribunal.

### The evidence of the experts

167. The Tribunal has received evidence from 3 witnesses accepted as experts. Those experts gave opinions based on facts or perceived facts

supplied to them for their consideration whilst the 2 experts for the specified persons gave evidence without the benefit or perhaps, impediment of considering each other's report they were aware of the opinions of the expert for the SFC, Mr. Lung. They each gave information and evidence of matters likely to fall outside the experience and knowledge of the Tribunal.

168. The Tribunal has been directed that it is not bound to accept the evidence of an expert witness in so far as it forms an expression of opinion. Although those opinions should be weighed carefully. The Tribunal is entitled to accept or reject all or part of that evidence, coming to its own conclusion on such matters based on a consideration of the totality of the evidence.

#### The scope of the inquiry

169. This has already been defined and can be restated now in brief. At the time that Lo and at the time that Luu disposed in their shares were they in possession of relevant information which was known to be relevant information and based on this did they in whole or even in part sell their shares to avoid a loss?



## CHAPTER 6

### WHETHER ALL OR ANY OF THE 5 EVENTS IDENTIFIED BY THE SFC CONSTITUTED RELEVANT INFORMATION

#### Reminder of the 5 events

170. The 5 events identified by the SFC and alleged to be specific events constituting relevant information not generally known to the persons who are accustomed or would be likely to deal in the listed shares of Warderly were and here we repeat what has been stated previously:

- i) the tightening of banking facilities since July 2006, and the subsequent events such as overdue loans overdue, rescheduled payments, demand letters issued by banks etc.
- ii) A loan of \$2 million from Liu on the 17th of November 2006 that carried an interest rate of 5% per month.
- iii) A further loan totaling \$7.2 million borrowed from Liu on the 11th and 28th of December 2006.
- iv) Warderly was unable to repay the loans plus interest from Liu after they became due on the 28th of January 2007.
- v) A loan from Luu in February 2007 that carried an interest rate of 3% per month.

#### Listed Corporation

171. There is no issue that Warderly was a listed corporation at the relevant time.

### Resolution of whether both or either specified persons were connected persons

172. The Tribunal therefore had to consider whether the SFC had shown on a balance of probabilities that both or either of the specified persons were connected persons. The Tribunal had no difficulty in respect of Luu, there being no contrary submission or challenges to his designation as a connected person. He was a lender, a potential investor and a person interested in acquiring shares in Warderly which were held by the Chairman, Yeung. He made his interest in Warderly clear to senior management as well as FHL. Eventually he held 50 million shares in the Company. S.247(1) defines connected person as:

“A person shall be regarded as connected with a corporation if, being an individual... (b) he is a substantial shareholder of the corporation... (c) he occupies a position which may reasonably be expected to give him access to insider information in relation to the corporation by reason of (i) a professional or business relationship existing between (A) himself... or a firm of which he is a partner; and (B) the corporation.”

Luu is clearly a substantial shareholder and therefore a connected person as far as Warderly is concerned.

173. Counsel for the first specified person Lo submitted that he should not be regarded as a connected person for all of the five events, only those for which there is a provable and demonstrable connection by evidence. The Tribunal did not accept this given the wide definition contained in the section and found that as the Company Secretary and a senior partner in the solicitor firm used by Warderly to conduct company secretarial assistance and legal advice he was “reasonably expected to be given access to insider information”. Therefore the Tribunal ruled him to be a connected person for the purpose of this inquiry.

### The question of whether the information was specific

174. There was no challenge mounted as to the specificity of events 2 to 5 that is the Liu loans, the non-payment of those loans and the Luu loan.

175. However counsel for each of the specified persons did submit that the first event was insufficiently specific. This was challenged by the presenting officer, Mr. Grossman. This of course is not the main plank of the defence against the accusation of insider dealing as it applies only to one of the events. In paragraph 152 reference has already been made to the definition the Tribunal applies to the test of specificity. That is “information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed. This is as opposed to information which is vague, speculative or inchoate”. Also it must not be interpreted too broadly and does not include normal day-to-day activities which may be an indicator of the health of the Company and nothing more. This can be gleaned from the Report of the Insider Dealing Tribunal in Chinese Estates Holdings Limited, 19th to 21st November 1996 at pages 42 to 43. That event was “the tightening of banking facilities since July 2006 and the subsequent events such as loans overdue, rescheduled payments, demand letters and writs issued by banks etc.” This is described by counsel for Lo as merely a general description relating to Warderly’s financial circumstances and that the use of “et cetera” further evidences its general nature. Counsel for Luu complained it is equivocal as to what the information actually is, that at least part of the first event was public knowledge by the time all the shares were sold, namely, the issue of writs by the banks and that it is no more than the day-to-day activities which may, by normal analysis and deductions be seen as an indicator of the health of a company. In short it is simply not sufficiently specific.

176. As to the experts Mr. Lung appears slightly to concede this when cross examined by Mr. Westbrook (Counsel for Luu). Against this, Mr. Rigby, the expert for Lo accepts at paragraph 16 of his report that all five events were specific. Although he qualified this in his evidence to the effect he meant specific to Warderly and he used it in a non-legal way.

177. The Tribunal considered the evidence of Mr. Lung on this point. In his evidence in chief he was asked by Mr. Grossman to go through all 5 events and he said this –

A: “... The first one is relating to the tightening of banking facilities since July 2006 and the subsequent events such as overdue loans, rescheduled payments, demand letters issued by banks, writs issued

by banks.” (It is noted he did not fully quote the event, missing off “et cetera”.)

Q: “And why do you say that’s a specific event?”

A: “Because this is directly related to Warderly, and it is also something if people are aware of this, that MAY have an impact on the way that they... on the price of Warderly.”

Then cross examined by Mr. Westbrook –

Q: “... Now forgive me, but there seems to be a certain vagueness here in this specific event that you’ve talked about when you say “subsequent events such as this, that and the other et cetera. You accept... that information for the purposes of insider dealing, has to be specific?”

A: “Well, my apologies if you think that it is not clear enough but what I am referring to is the schedule provided by the SFC to me, that describes how the banks are issuing the writ of summons.”

178. However Mr. Rigby in his report says he agrees with Mr. Lung’s assertion in his report that all 5 events were specific. However, in his evidence in chief he says this –

A: “No, that’s not what I’m saying. When I say that the information was specific, what I mean is that it’s specific to Warderly, not Hong Kong Bank or to the index generally, it’s specific to that company. I’m using it in the way a layman might use it.”

He did however admit that if he were a person trying to analyse the Company he would have liked to know about it.

179. The Tribunal considered this point. We noted and deprecated the addition to the description of the event the term “et cetera”. This is immediately suggestive of something vague, imprecise, and non-specific. It is also totally meaningless in the context and on that basis the Tribunal ignored it and treated it as mere verbiage. The Tribunal went on to consider the true

construction of the defining description of the first event and came to the conclusion that the event was in fact “the tightening of banking facilities” followed by examples or a breakdown of the occurrences leading to the overall event. The Tribunal felt that Mr. Lung had not truly resiled from his opinion merely made concessions and were surprised that Mr. Rigby would having accepted this event as being specific then claimed as an expert to be using terms as would a layman. The conclusion by the Tribunal was that event 1 did not fall by reason of lack of specificity and would stand amongst the other events be considered. In other words, this was a specific event to be addressed.

Consideration of whether any or all of the 5 specific events constituted relevant information

180. The Tribunal had reached a point where we were satisfied on a balance of probabilities that the Company, Warderly was a corporation listed on the Hong Kong Stock Exchange, that both Lo and Luu in respect of all 5 events were connected persons to Warderly and they had dealt in the listed securities of the corporation. Further the Tribunal had found that all 5 events were specific events. We then went on to decide if the SFC had proved to the requisite standard that all or any of the 5 specific events constituted relevant information at the time that either or both the specified persons disposed of their shares in Warderly. Clearly the evidence of the 3 experts, Mr. Lung, Mr. Rigby and Mr. Richard Witts (“Mr. Witts”) had to be considered carefully and in some depth.

181. Mr. Lung provided two reports. For this section of our considerations only the first report was relevant, the second deals with compilation of loss.

182. Mr. Lung said this at paragraph 21 in his report –

“I consider that the events listed below, which were related to Warderly’s operations and financial position during the Relevant Period (“events”), were specific events for Warderly as they had direct relationship to the operation and financial position of Warderly.”

183. He then went on to list the 5 events which have previously been referred to in this report and need not be referred to again.

184. Then at paragraph 34 Mr. Lung said this –

“The events listed in paragraph 21 (a) through (e) were thus evidence that Warderly had problems with working capital and a high probability that these would cause continuous and material impact on Warderly’s business operations and were likely to materially affect the share price if they were known to persons who were accustomed or would be likely to deal in the shares of Warderly.”

185. Then at paragraph 35 –

“In my opinion each of the events listed below in paragraph 21, on a stand-alone basis, was relevant information which was specific, non-public and price sensitive.”

186. Mr. Lung then went into more detail about the specific events. However it was clearly established on the evidence of the first specified person, Lo that in respect of events 2, 3 and 5 the loans of \$2 million and \$7.2 million and \$10 million that Mr. Lung was working from a misconception believing that the interest rates of 5% per month in respect of events 2 and 3 and 3% per month for event 5 continued until these loans were discharged. This was clearly and demonstrably was not the case. The loan agreement is between Vision Eagle (Liu’s company) and Housely (subsidiary of Warderly). Clause 6(b) shows the default interest rate after the repayment of the loan was due (1 month from the draw down). This initial interest rate of 5% became 1.5%. Thus the true rate of interest of the Liu loans was 5% for the first month and if not repaid fell to 1.5%. This is an annual percentage of just over 18% not the 79.6% asserted by Mr. Lung.

187. In respect of event 5 (the \$10 million loan) the loan agreement is between Lanakia Investments (Luu’s company) and again Housely. There the repayment due date is in Clause 24 –

“Repayment date” means the date following 2 Business Days from the date on which a Form of Demand is served by the Lender or the Borrower.”

Clause 7 speaks of Interest initially at 3% per month but once the borrower fails to make payment on the due date then the interest is again 1.5% per month.

188. The Tribunal took the view that this meant that once the lender served the requisite notice then after 2 working days, interest on the default was 1.5% not 3%. Again Mr. Lung was in error with his calculation of 42.6% per year.

189. The Tribunal felt this was a material oversight by the SFC, Mr. Lung being misled into basing his views on false information of the interest to be charged. The Tribunal noted that whilst the interest remained high compared to the normal bank interest rate it was not “extraordinarily high” as asserted.

190. The Tribunal noted also that Mr. Lung never related his opinion that the 5 events were relevant information to any time scale or date, specifically the 28th to 30th of March 2007 in respect of Lo and the 3rd to 4th of April, 30th of April and 2nd of May 2007 in respect of Luu. He did concede that what may be relevant information on a given day may not be so on a later date. Clearly he was giving an opinion that as each of the events occurred they were relevant information at the outset and remained so until at least the 2nd of May 2007 when the final batch of shares was sold by Luu.

191. Mr. Lung in his evidence in chief gave reasons why he felt the events to be relevant information. They are perhaps self-evident and what it amounted to was that each demonstrated the dire financial condition of Warderly. This of course is accepted with due allowance for the opinion expressed of the interest rate of the Liu and Luu loans which had strayed into error.

192. Mr. Lung also took a position on the half year interim report for the period which ended on the 31st of October 2006 and was released on the 23rd of January 2007. In his opinion this showed an improved position over that as stated in the annual report for Warderly for the year ended 30th of April 2006 on a rolling half yearly basis. Comparing the six months ending April 2006 with the following six months ending October 2006, the turnover was stable and net profit before tax improved from \$1.6 million (six months to April 2006) to \$2.2 million (six months to October 2006). Mr. Lung drew positives from these figures and an optimistic projection from the board.

193. At paragraph 27, page 1058 of his report he said this –

“..., under the section ‘Prospects’, there was the statement “The Directors believe that our continuous improvement in the quality and variety of products will steer the Group to achieve a better performance in the future.” This would most likely cause persons who were accustomed or would be likely to deal in the shares of Warderly to have the impression that the business would improve. As the statement was made on January 23<sup>rd</sup> 2007, which is almost halfway through the second half of Warderly’s 2007 fiscal year, persons who were accustomed or would be likely to deal in the shares of Warderly would also most likely have considered this to be a reliable statement.”

194. He continued in a similar vein in his evidence in chief –

Q: “The prospects seem to be quite optimistic, and what do you say about that?”

A: I won’t say very optimistic but at least they are looking for a better future. ... .. But this half, for the six months ended October 2006, compared to the previous annual report, it’s already much better, because the previous year they only made less than \$400,000, and here, in six months they make 2 point something million, so that’s an improvement. So it seems things appear to be going in the right direction.”

195. However Mr. Lung did accept that the decline in gross profit margins and cash balance revealed in the financial report did suggest that Warderly was in poor financial health.

196. The Tribunal noticed that Mr. Lung never referred to what occurred to the share prices in the market after the publication of either the annual report nor more importantly the interim report on the 23<sup>rd</sup> of January 2007. From the evidence it was clear and from the historical price data that on publication of the interim report the share price in Warderly fell to its lowest value on record that is \$0.214 per share – prior to suspension. Likewise the publication of the annual report was followed by a substantial fall in the share price of about 14%.



197. The Tribunal noted that Mr. Rigby and Mr. Witts, the experts for the two specified persons who had prepared their reports independently, both concluded that the annual report of Warderly published on the 23rd of August 2006 contained bad news leading to a fall in the Warderly share price and that the interim report published on the 23rd of January 2007 was very bad news which led to a further fall in the share price. This contrasts with Mr. Lung's view "that things appeared to be going in the right direction". He of course had done no analysis of market movements.

198. The Tribunal accepted that Mr. Rigby and Mr. Witts had prepared their respective reports independently of one another. Of course they had before them the reports of Mr. Lung. The Tribunal noted they were *ad idem* as to whether the five events constituted relevant information on the respective date of dealing. That conclusion was that by the relevant dates the 5 events specified no longer, even if they ever had, constituted relevant information.

199. Mr. Rigby gave evidence. His opinion is most succinctly explained by reference to Q11 and A12 of his statement –

11) Q: "If the specific information about Warderly were generally known to persons, who were accustomed or would be likely to trade in Warderly shares, then would it be likely to materially affect the share price of Warderly?"

12) A: "At the time of Mr. Lo's sales (28th to 30th of March) the specific information had become irrelevant from the point of view of materially, affecting Warderly's share price. I attempt to explain below that Warderly's shares price after early February 2007 was no longer reflecting the company's past business. By then it was trading as a shell company into which new assets and a new business model would be injected."

200. At Q15 and A16 there is further explanation –

15) Q: "Whether each of the five events constitutes relevant information"?

16) A: “Whilst each of the five events might have been of contemporaneous interest to the investing public and they were specific to Warderly’s affairs, by January 2007 price decline had effectively discounted their effect. This was probably as true as early August 2006.”

201. In questions and answers 17 to 22 his opinion was that the annual report of August 2006 and the interim report of January 2007 clearly showed a company with “serious problems” even the most unsophisticated investor would understand. It was a company in “serious difficulties”. That the share price showed a company in dire straits and even by August 2006 the share price was below that of a shell.

202. At paragraphs 41 and 42 he answers Mr. Lung’s paragraph 35 which is his basic statement supportive of market misconduct, in this way:

Para. 41) “I agree with Mr. Lung that each of the events listed in (his) para. 21, on a stand-alone basis was relevant information which was specific and non-public. However I strongly disagree that it was price sensitive. Had news of the events been published I believe there would have been little effect on the share price. The market would have regarded the news as having already been discounted because the share was already trading below the value of a shell company.”

Para. 42) “Beginning in early February 2007 the Warderly price action ceased to reflect the valuation of a business with serious possible terminal difficulties and began to trade like a shell company into which an exciting new business might be injected. Such injections are commonly referred to as back door listings. In instances such as these, the share price often rises dramatically along with market increase in share trading volume and increased volatility as rumour and press comment stoke the flame. This market activity can clearly be seen on my price chart CR1 beginning in the first half of February 2007.”

203. The Tribunal noted the market activity in Warderly stock manifested in the spike in value of the stock beginning on the 9th of February 2007 and the increased volume of dealing compared to the month prior thereto. The activity was maintained until suspension on the 14th of May 2007.

204. The Tribunal noted that these views were fully supported by the evidence of Mr. Witts, the expert for the second specified person. Also that Mr. Lung gave no consideration to Warderly being traded at the value of a shell in his report on his consideration of the facts.

205. In evidence in chief Mr. Rigby also mentioned the announcement of the possible injection of an oil processing company into the Warderly group as support of the shell concept. Plus the increased press comments in March and April 2007.

206. Mr. Rigby was referred to the issue of writs that would be in the public domain as published in the press and the two writs he was referred to caused no adverse reaction. In other words even on issue of these two writs the share price held up or even increased. Mr. Witts deals further with this aspect.

207. Mr. Witts presented his report as the expert called by the second specified person and gave evidence.

208. At paragraph 13 Mr. Witts goes through each of the 5 events and gives his opinion. It is to be noted that in fact all 3 of the experts base their opinions on events 2, 3 and 5 on a false premise as to the actual interest charged. We note, in fact, what it seems from each's report that only Mr. Lung was provided with a copy of the loan agreement form dated the 28th of December 2006 between Vision Eagle and Housely (events 2 and 3) and the loan agreement form dated the 6th of March 2007 between Lanakia Investments and Housely (event 5). Whilst Mr. Witts did agree that in respect of event 1 the tightening of banking facilities and subsequent events, only the issue of writs for non-payment would normally be considered information which is materially price sensitive. The Tribunal noted that these being published in the press were thereby in the public domain.

209. At paragraph 14 Mr. Witts speaking of the event says this –

“Basically, these loans were all quite small when compared to the shareholders' equity of Warderly. I cannot agree that any of them whether jointly or individually would, as Mr. Lung writes in his paragraph 34, have “a high probability” of causing a “continuous and material impact

on Warderly's business operations, and were likely to materially affect the share price if they were known to persons who were accustomed or would be likely to deal in the shares of Warderly." The Company results for the year ended the 30th of April 2006 were spectacularly bad and the interim results for the six months ended the 31st of October 2006 showed the situation had worsened. The investing public would already have anticipated the need for some short term financing from the interim results released in January 2007 and the fact that Warderly did actually obtain them would not have been beyond the market's expectation at the time. The surge of writs from banks from February to April 2007 publicly reinforced the fact that Warderly had serious problems with its working capital.

210. In paragraphs 15 and 16, Mr. Witts puts forward his views, supportive of those of Mr. Rigby that after the fall of the stock on publishing of the interim report on 23rd of January 2007 to a low of \$0.214 that in early February the price increased, hitting a high of about \$0.60 per share on 26th of February 2007. Thus on the 3rd of May 2007 it traded at \$0.460 just prior to suspension. His view on this showed that Warderly then was viewed as a prospective listed shell company which was undervalued at its prevailing share price and which was suitable for acquisition. He also made the point that it is rare that well run profitable companies are selected as suitable shell companies. The worse Warderly's financial position, the more attractive as a shell it appeared. This was why the prices picked up.

211. At paragraph 18 he gave his views on the issue of the 4 writs for non-payment of bank loans. He said this:

"In my opinion, the serving of even one writ regarding non-payment of bank loans would normally constitute extremely bad news for a listed company. The effective receipt of four writs over the space of just two months could only be interpreted as a very perilous situation. I note however that the news of the writs being served on the Company had no noticeable effect on the Warderly share price at the time. In my opinion this is likely attributable to Warderly's financial problems being already generally known to the market and/or then the market's attention was focused more on Warderly's potential as a shell rather than its short term financial woes."

212. In his evidence Mr. Witts clearly maintained his position that both publication of the annual report and interim report were very bad news and the position was getting worse. He confirmed the view of his report –

“The Company results for the year ended the 30th April... were spectacularly bad and the interim results for the 6 months ended 31st of October 2006 showed that the situation had worsened.”

213. The Tribunal was aware that the SFC bore the burden of proving to the requisite level that if all or any of the 5 events were to be found to be relevant information, it would have to be likely to materially affect the price of the shares. We adopted the test of materiality from the report of the Insider Dealing Tribunal in Public International Investments Limited on the 5th of August 1995 at para. 19.4.5 of the report –

“We think that the word “materially”, speaks for itself – it is to be contrasted with “slight”, “insignificant” and “immaterial.”

214. Mr. Lung in his report does not specifically deal with the concept of “materially” but the Tribunal found that it was implicit in his assertions that the 5 events constituted relevant information that he was fully aware of and embraced in his considered opinion the concept that the information had to be likely to materially affect the share price. This in itself is somewhat vague. It clearly is an inexact finding that has to be made.

215. In cross examination by counsel for the second specified person he was asked about the impact on the market price of the shares. He answered:

“It may have some impact, but I can only – it is not – I wouldn’t call it science, that I can precisely tell, if this news came out, what percentage or how many cents it has an impact on the share price. I can only tell it will have a negative impact, and I’m sorry that I cannot quantify. So even knowing this, I am unable to know when all these act together, how one offsets each other. But my opinion is that the additional knowledge of those events that I described in my report will have a negative impact on the share price.”

216. Cross examined again by counsel:

“Q: My question to you is how can you be sure that the impact would be material if you can’t quantify it?”

A: Well, I cannot quantify it precisely, like taking 5% or 6%, but I can have an idea on the magnitude, it’s going to be small or it’s going to be large. So I would base on that judgment.

Q: And that’s purely your judgment?

A: Yes, that’s a judgment.

Q: Because as we’ve seen, for example –

A: Of course that is the judgment after I do my analysis and with reason behind, explained in my report.”

217. The Tribunal concluded on this point that where as in this case the information never came into the public domain then of course it was a question of judgment and analysis as to whether it was likely to materially affect the share price. That in essence is what Mr. Lung said and we accepted that in doing his analysis and in exercising his judgment he would factor in the need for materiality when concluding whether or not the event was relevant information. We would approach our conclusion from this stand point.

## CHAPTER 7

### CONCLUSION

218. The Tribunal then considered whether there was evidence upon which it could conclude to the requisite level of proof that all or any of these 5 events amounted to relevant information at the time either or both the specified persons dealt in the shares. The dates being for Lo, the first specified person the 28th to 30th of March 2007 and for Luu, the second specified person the 3rd, 4th and the 30th of April 2007 and the 2nd of May 2007. The standard of proof applied was that stated in paragraphs 163 and 164 of this report.

219. The Tribunal considered carefully all the evidence relevant to this question but of course as most of it if not all the basic important facts were agreed or not challenged, the experts evidence was of crucial importance.

220. The Tribunal makes the point that it was not a simple matter of a head count in that there was one expert deeming these events to constitute relevant information at the time of dealing and two experts who took a contrary view.

221. The Tribunal was of the opinion that the evidence of Mr. Lung was evidence based on his long experience and analysis of the market. He was in error as to the exact rate of long term interest of the 3 loans which were events 2, 3 and 5. We noted that he had access to the relevant documents and agreements. Whilst we felt his approach was objective and honest but his conclusions were drawn without consideration of external factors which one would have expected him to take into account. For certain given a different scenario his view may have been entirely persuasive.

222. The other two experts were extremely supportive of each other and their opinions seemed to us to be supported by external evidence. In a nutshell their position was that the information regarding the dire financial situation of Warderly was firmly in the public domain given the poor annual report, the poor interim report and the published issue of the writs for non-payment of bank debts. Thus by 24th of January 2006 the Warderly shares hit their lowest value of \$0.214 after publication of the interim report and that effectively given the

overall picture none of the events such as the banks default problems, the small loans even with high interest and the failure to repay them would of any interest as trivial in nature. There was support for this view in that the issue of the writs which were published in the press were demonstrated from the stock historical date to have shown no adverse impact on the Warderly shares at all. That certainly by early February 2007 Warderly was seen to be a shell company and the shares were trading on this basis. That the events mentioned were entirely superfluous information as the Company was being evaluated as its potential to be reinvested with a different core business from the traditional domestic electric appliances which were of little or no consequence by then. Both experts of the specified persons drew the Tribunal's attention to the spike in shares price on the 9th of February 2007 and the volume of trade thereafter. This followed a long period of stagnation and was clearly indicative of the Company be seen as a shell company ripe for speculative investors. This continued until the suspension of trading in its shares on the 14th of May 2007.

223. Given all these circumstances certainly by the end of March 2007 none of the events were or could be shown to be relevant information which was if generally known would be likely be materially affect the price of the shares.

224. The Tribunal was unanimous in finding that the evidence did not support the finding that all or any of the five events relied upon by the SFC had been shown to the requisite standard of proof to constitute relevant information which would if generally known to persons accustomed to or likely to deal in the listed securities of Warderly would be likely to materially affect the price of he listed securities.

225. One rider that the Tribunal would place on record this being an inquiry is that one member in respect of events 4 and 5 inclined to the opinions of Mr. Lung after taking into consideration the views of Mr. Rigby and Mr. Witts. The member observed that events 4 and 5, when disclosed to the public, may drive the share price of the shell to its lowest bounds of \$80 million in value from the then \$100 million value trading in the market since late 2006. However, he was not satisfied on a balance of probabilities that events 4 and 5 were relevant information, given the contrary opinion.



226. The Tribunal found no market misconduct had been identified in this case.

227. The Tribunal further felt there was no point or necessity to rule on the question of knowledge and the defence raised under s.271 of the Ordinance.

## CHAPTER 8

### THE CALCULATION OF NOTIONAL LOSS (IF ANY) IF MARKET MISCONDUCT HAD BEEN FOUND

228. The Tribunal having found no market misconduct to be identified was not then obliged to consider this matter but the situation is unique. Therefore, we felt it incumbent upon us to address and consider this aspect, hopefully to establish guidance should something similar occur in the future.

229. The SFC's approach is to be found in the second report of their expert Mr. Lung.

230. Mr. Lung's methodology was to adopt the approach, as he interpreted it in the decision of the Court of Final Appeal in *Insider Dealing Tribunal v Shek Mei Ling* [1999] 1 HKLRD 879. That case gives guidance as to selection of the relevant date for the calculation of profit gained or loss avoided. Lord Nicholls said this about this date being:

“when the information was made public and the market had had a reasonable opportunity to digest the information”

231. The evidence had established however, that the information, that is the five events the SFC alleged to be relevant information, was never made public so the market never had a reasonable opportunity to digest it.

232. Lord Nicholls continued:

“The amount of profit gained by an insider dealer is an actual amount and can be calculated accordingly. By way of contrast, the amount of a loss avoided by an insider dealer is a notional exercise, because ex hypothesis the loss was not actually sustained by the insider dealer: the loss was avoided. Thus, in the case of a dealing in shares, calculation of the amount of loss avoided will typically involve comparison of two elements, one actual (the shares were sold) and the other notional (what would have happened if the shares had been retained). The actual element in the calculation will comprise the amount realised by the insider dealer from

the shares sold before the market learned the bad news. The notional element will comprise the market value of the shares at a date which has to be identified as the appropriate date. Failing cogent evidence that, in any event, the shares would have been sold before the market announcement, the date will usually be the date by which the market learned and absorbed the information.”

233. It is well established the date and price that both Lo and Luu sold their shares so the first element was easy enough to ascertain.

234. The second element, as all three experts acknowledge is somewhat problematic because:

- i) The information/bad news was never learned by the market so could not be absorbed.
- ii) The shares were suspended for about six and a half years which is a very long time indeed.
- iii) The Warderly then emerged on the 16th December 2013 was a very different animal from the one that went into enforced hibernation on the 14th of May 2007. The new Warderly was no longer manufacturing basic simple domestic electrical goods, it was to deal in real estate on the Mainland.
- iv) The market of 2007 and the market of 2013 were recognised by the Tribunal as also being rather different. The intervening years had seen turbulence and turmoil, though we did not place too much importance on this factor.

235. Mr. Lung noted the high volume and volatility for the first few days of trading and in his opinion the market had absorbed the information by the 6th day of trading, that is the 23rd of December 2013. This information did NOT include in the five events.

236. Therefore for reasons never made entirely clear to the Tribunal he based his calculation on the weighted average trading price of Warderly shares on the five trading days between the 16th of December and 22nd of December

237. He divided the total value involved, \$478,118,476.16 by the number of shares traded, 2,258,946,456 to give an average price of \$0.211656. Using this as the base price per share he deducted this from the price that Lo and Luu received for each share sold to calculate a notional loss allowing for transaction costs. Thus he calculated a loss avoided by Lo to be \$492,841 and by Luu \$12,071,675.

238. The situation was further complicated by a most unusual offer by the restructured corporation. Prior to resumption of trading the existing shareholders of Warderly were made an offer in the nature of an option but clearly not a conventional option which could be sold. They were offered four new Warderly shares at the price of \$0.05 per share for each share they held.

239. Mr. Lung conceded that on the base price he calculated on the basis previously explained of \$0.211656 per share then if one deducts  $\$0.05 \times 4$  per share there would be a notional gain without transaction costs of about \$0.646624 per share. Each Warderly share would be raised to \$0.858280 per share. Thus neither Lo nor Luu would have been shown to avoid any notional loss.

240. Mr. Lung said this at paragraph 16 of his report –

“However, it is my opinion that typical public shareholders of Warderly would be reluctant to subscribe to the open offer. Their investments in Warderly had been locked up for more than 6 years and, without any price from trading in the stock market as a reference, it would be very risky to subscribe the shares, as it is equal to making additional investments in Warderly. The amount involved was as much as 41.67% of value of their shares prior to the suspension (calculated as  $\$0.05 \times 4 / \$0.48$ ) should they decide to subscribe all the shares they were entitled to.”

Paragraph 18 –

“My view regarding the open offer is that due to uncertainty and the requirement of investment, its effect should not be included in the calculation of the notional loss avoided.”

241. The Tribunal noted that in fact approximately 55% of the offered shares were taken up and that Liu who is connected to events 2, 3 and 4 embraced the offer with alacrity.

242. Both Mr. Rigby and Mr. Witts disagreed with this approach. Mr. Witts takes the view that Warderly shares were “not for the faint-hearted” and that as the shareholders are persons of a speculative persuasion they were likely to take up the shares. Indeed he uses the figure of 45% but as there was a corporate investor Cathay Investment Fund Limited too it was 55%, to support his contentions. Mr. Witts says he does not agree that this can be ignored as if it never happened.

243. In paragraphs 19 to 28 of his report Mr. Lung provides “An alternative opinion due to the extended suspension”. This was to put it succinctly to assume that all investments were lost because the reconstruction had not taken place. The basis of all this is the long period of delisting namely six and a half years. That without restructuring Warderly would most likely have been delisted and Warderly shareholders lost their entire investments. Thus Lo avoided losses of \$829,734 and Luu \$22,615,761.

244. This is a scenario which did not happen and in the opinion of the Tribunal surpassed the bounds of speculation. Neither of the other two experts saw any merit in this. Mr. Rigby at paragraph 70 of his report says of this:

“Mr. Lung covers a ‘scenario’ to use his expression, which I consider flies in the face of both common sense and the facts.”

245. Mr. Rigby does make clear his unease with Mr. Lung’s first calculation, and totally disagrees with his discounting of the open offer and his alternate calculation referred to in paragraph 243, a calculation based on a speculative scenario that simply did not take place.

246. Mr. Witts in his report provided a much more detailed contrary argument to Mr. Lung’s propositions. First of all he takes issue with Mr. Lung’s use of the weighted average price during the absorption period. His view was that the correct date to choose would be after the market had had a reasonable opportunity to absorb the information. This he believed was at the conclusion of trading on Monday the 23rd of December 2013, 6 days after

relisting. The shares were then at \$0.27. This would then have set the notional loss avoided for Luu at \$9,165,157.73. However he made it clear that in reality all he was saying was that was a more logical and correct approach.

247. He then took issue with Mr. Lung's contention that the open offer of 4 shares at 5 cents each for every Warderly share already held be discounted. He disagreed that typical public shareholders of Warderly would be reluctant to subscribe. He pointed out that the price of 5 cents for every share was cheap, that Warderly was far from being a blue chip and the shareholders were likely to be persons who were prepared to speculate. He pointed to the ups and downs in the share price prior to suspension and said:

“This was clearly not a share for the faint-hearted”.

248. We know that 55%<sup>2</sup> of the shares were taken up and he said he just could not agree this should be ignored as if it did not happen. In evidence in chief he said this when asked if it was correct to invite the Tribunal to ignore the open offer:

“I can't think of any grounds for doing so. It is an event that happened. I don't understand... no I don't support the argument that you can just ignore it. I don't understand that at all.”

249. He also pointed out that the offer was underwritten by the incoming chairman, Mr. Ji. His company was Magnolia Wealth. Mr. Witts describes this as “thoroughly positive”.

250. Finally on this point both Mr. Lung and Mr. Witts were clear and the Tribunal accepted that to be the case that if the open offer was taken into account then neither Lo nor Luu would have avoided a loss in fact they would have avoided a substantial profit. Liu who gave evidence in the inquiry was a practical example of someone who did quite well out of his shares.

251. Mr. Witts also disagrees with Mr. Lung's alternative approach based on the scenario when the Company was not restructured and the shareholders

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<sup>2</sup> This is made up of 45% taken up by public investors and 10.8% by Cathay Investment Fund Limited.

lost everything. This was entirely speculative, he said and based on event that did not take place. He also made the point that this was all guesswork as no one knew what would have happened to the shares if the shares had not been suspended on the 14th of May 2007.

252. In his report and echoing the point made above, Mr. Witts said this:

“Given the unusually long gap of six and a half years between suspension and resumption, it is my opinion that it is simply not possible to calculate in any meaningful way the notional “loss avoided” – indeed it follows that I cannot even opine that any loss at all was avoided, since, in my view, it is pure guesswork whether Warderly’s share price would have gone up or down, had trading of its shares not been suspended on the 14th of May 2007 and when no one had any idea how long that suspension would be.”

253. To stake the obvious Mr. Witts was firmly of the opinion that there was no meaningful way to calculate any notional loss.

### Conclusions

254. The Tribunal took all these circumstances into account and noted that this was a unique situation given the odd circumstances –

- (1) that the alleged relevant information/bad news in the form of all or any of the 5 specific events never entered the public domain;
- (2) the shares were suspended for six and a half years;
- (3) the Warderly that emerged on relisting bore no resemblance to the Warderly at the time of suspension; and
- (4) the stock market itself was much changed in nature after the trauma and turmoil of the intervening year.

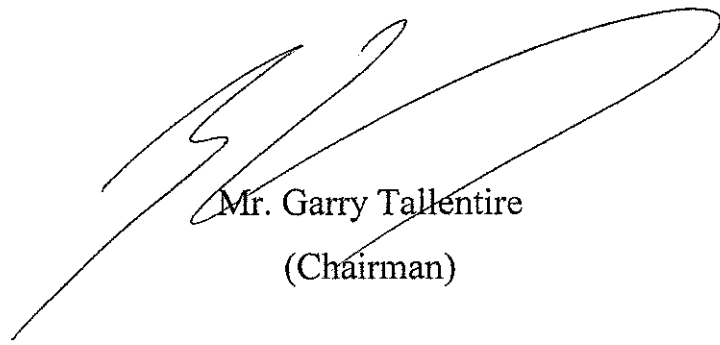
255. The Tribunal found that given the four circumstances set out in paragraph 254 the methodology approved of by the case of *Insider Dealing Tribunal v Shek Mei Ling* [1999] 1 HKLRD 879 was totally inappropriate and impossible to apply with any credibility.

256. The Tribunal could find no cogent reason to discount the open offer. We felt it flew in the face of common sense to ignore an event that did take place.


257. The Tribunal discounted Mr. Lung's "Alternate opinion due to the extended suspension" based on a scenario that simply did not happen. We found it be speculative, fanciful and not well founded.

258. The final conclusion of this Tribunal is that on the evidence in this case the SFC had simply not proved on a balance of probability any meaningful way to calculate any "notional loss avoided". Therefore we were of the opinion that it was not possible to find either Lo or Luu had so avoided any loss by the sale of their shares in Warderly.

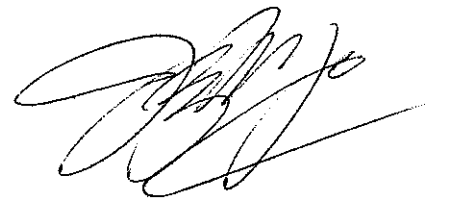




Mr. Garry Tallentire  
(Chairman)



Dr. Wai Chi Kin, Victor  
(Member)



Mr. Yau Yin Kwun, Joseph  
(Member)

Dated 4th August 2016