REPORT OF THE MARKET MISCONDUCT TRIBUNAL OF HONG KONG

on whether a breach of the disclosure requirements has taken place

in relation to the listed securities of

Mayer Holdings Limited

(Stock Code 1116)

and other related questions

The Report of the Market Misconduct Tribunal on whether a breach of the disclosure requirements has taken place in relation to the listed securities of
Mayer Holdings Limited
(Stock Code: 1116)

A report pursuant to section 307J1(a) and (b) of the Securities and Futures Ordinance, Cap. 571

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Chapter 1

The Institution of Disclosure Proceedings

The Notice Filed by the SFC

Pursuant to section 307I(2) of, and Schedule 9 to, the Securities and Futures Ordinance, Cap 571 ("the SFO"), the Securities and Futures Commission ("the SFC") filed with the Market Misconduct Tribunal ("the Tribunal") a Notice, dated 4 March 2016, in which it stated that it appears to the SFC that:

> "… a breach of the disclosure requirements within the meaning of sections 307B and 307G of Part XIVA of the Ordinance has or may have taken place in relation to the securities of Mayer Holdings Limited (Stock Code: 1116) listed on the Stock Exchange of Hong Kong Limited, the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:
>
> (a) whether a breach of a disclosure requirement has taken place; and
>
> (b) the identity of any person who is in breach of the disclosure requirement."

2. Section 307I(2) of the SFO requires that the Notice must contain "a statement specifying the matters prescribed in Schedule 9". By section 14A of Schedule 9 the section 307I(2) statement must specify, amongst other matters:

> "(b) the identity of the person, and brief particulars that are sufficient to disclose reasonable information concerning the nature and essential elements of the breach."

3. The Notice specifies the corporate body, Mayer Holdings Limited (Stock Code: 1116) ("Mayer"), and 10 individuals who were officers of it[1], as the persons appearing to the SFC to have breached or may have breached a disclosure requirement. Thus, the company and the 10 individuals are referred to as Specified Persons. The ten individuals, and the offices within the company that they occupied, are as follows:

SP1: **Mayer Holdings Limited**

SP2: **Chan Lai Yin, Tommy** (the Financial Controller and Company Secretary)

SP3: **Hsiao Ming Chih** (an Executive Director and the Chairman of the Board)

SP4: **Lai Yueh Hsing** (an Executive Director responsible for the day to day management of the business of Mayer)

SP5: **Huang Jui Hsiang** (an Independent Non-Executive Director and the Chairman of the Audit Committee)

SP6: **Chiang Jen Chin** (an Executive Director)

SP7: **Lu Wen Yi** (an Executive Director)

SP8: **Xue Wenge** (an Executive Director)

SP9: **Li Deqiang** (a Non-Executive Director)

SP10: **Lin Sheng Bin** (an Independent Non-Executive Director and an Audit Committee Member)

[1] Being persons within the definition of "officer" that is contained in Part 1 of Schedule 1 of the SFO.

SP11: **Alvin Chiu** (an Independent Non-Executive Director and an Audit Committee Member)

The Context to the Particulars of the Breach Described in the Notice

4. Before setting out the "brief particulars … concerning the nature and essential elements of the breach" it is necessary to describe their factual context in order to properly understand them. What follows is taken from the Further Revised Statement of Agreed Facts marked Annexure "A" that has been agreed by all the Specified Persons that have participated in the Tribunal hearing:

> "1. Mayer Holdings Limited (美亞控股有限公司) ("**Mayer**") (SP1) was incorporated in the Cayman Islands under the Companies Law as an exempted company with limited liability on 9th October 2003. It was registered on 20th January 2004 as an overseas company in Hong Kong under Part XI of the then Companies Ordinance (Cap. 32).
>
> 2. Mayer was listed on the Stock Exchange of Hong Kong Limited on 21st June 2004 (Stock code: 1116). Trading in the shares of Mayer was suspended between 22nd November 2011 (Tuesday) and 6th January 2012 (Friday). At the request of Mayer, the trading of its shares was suspended again on 9th January 2012 (Monday). The shares of Mayer resumed trading on 21st November2018."[2]

[2] Further Revised Statement of Agreed Facts, RTB 4/26.

5. Mayer was required to have its 2011 accounts audited and to have published that audit report by March 2012. For this purpose, on 11 June 2010, it engaged Crowe Horwath (HK) CPA Limited ("Crowe Horwath"), but on 16 February 2012 this company resigned its engagement. The Notice then relates the following relevant events:

> 7. Following Crowe Horwath's resignation, the Company appointed Grant Thornton Hong Kong Limited ("**Grant Thornton**") as auditors on 29th February 2012.
>
> 8. Between April and August 2012, Grant Thornton had repeated communications with the Company's management regarding issues identified in the course of auditing the Group's financial statements for the year ended 31st December 2011. The Company failed to give satisfactory answers to those inquiries.
>
> 9. The salient issues identified by Grant Thornton include, among other things, the following (collectively, the "**Outstanding Audit Issues**"):
>
> (a) The nature of the disposal of a wholly-owned subsidiary of the Company, Advance Century Development Limited, for a consideration of HK$15,500,000, is questionable;
>
> (b) The Company's projects in Vietnam, including the Dan Tien Port Project and Phoenix Project which were acquired by the Company at a consideration of HK$620,000,000, were not under the Company's control and their prospects were far less promising than originally valued and contemplated; and
>
> (c) Two subsidiaries of the Company's jointly controlled entity, namely

Elternal Galaxy Limited ("**Elternal**") and Sinowise Development Limited, had entered into two supply agreements with two different suppliers and had made substantial prepayments of US$10,000,000 and US$4,000,000 respectively, without security, to those suppliers which appeared to Grant Thornton as irrecoverable.

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

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

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

    (a) in unequivocal and unconditional terms, that Grant Thornton gave "*formal notice of [their] resignation as auditors of the Company with*

immediate effect" (the "**Resignation**");

(b) that during "*the course of the audit for the financial statements for the year ended 31 December 2011", Grant Thornton had "identified and reported certain significant matters to the [Company's] Management, the Board of Directors and the Audit Committee including [the Outstanding Audit Issues]*";

(c) that despite Grant Thornton's "*continuing efforts to take the audit forward and resolve the [Outstanding Audit Issues], the [Company's] Management is unable to provide information [Grant Thornton] requested and update [Grant Thornton] in respect of the developments of these matters on a timely basis*"; and

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

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

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

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

(a) It was not until 22nd January 2013 that the Company called a Board meeting, more than three weeks after the Resignation Letter was sent to Chan; and

(b) A Board meeting was held on 23rd January 2013 to discuss the Resignation Letter. An announcement concerning Grant Thornton's resignation was published on the same day (the "**Resignation Announcement**").

The Matters that the Notice Asserts had to be Disclosed

6. At [16] of the Notice the matters that the SFC asserts have not been disclosed are identified as follows:

"III. FAILURE TO DISCLOSE INSIDE INFORMATION

16. Three categories of "inside information" within the meaning of section 307A of the Ordinance have not been adequately disclosed by the Company, namely:

(a) the Resignation;

(b) the Outstanding Audit Issues referred to in paragraph 9 above and the indication by Grant Thornton as at 23rd August 2012 that they would issue a qualified audit report as referred to in paragraph 10 above **("Potential Qualified Audit Report")**; and

(c) the circumstances surrounding the substantial prepayment made by Elternal **("Prepayment by Elternal")**."

7. Because [16(b)] refers back to [9] the Chairman asked Mr John Scott SC, counsel for the SFC, to re-draft these particulars so that the factual matters it is alleged have not been disclosed could be more clearly seen. He redrafted the particulars as follows:

> "The SFC's allegation of non-disclosure is the failure to disclose as soon as reasonably practicable after 1/1/2013 the subject information which comprises of the following 3 categories:
>
> (1) Grant Thornton's resignation on 27 December 2012.
>
> (2) The audit issues which Grant Thornton had identified but were not resolved (the **"Outstanding Issues"**) and the fact that Grant Thornton had indicated it would issue a qualified audit report if the issues were not resolved. The Outstanding Issues were:
>
> (a) That the disposal of Advance Century for HK$15.5 million was questionable;
>
> (b) The Vietnam Project were not under Mayer's control and its projects were far less promising than originally valued and contemplated; and
>
> (c) Two subsidiaries of a jointly controlled entity (**"Elternal"** and **"Sinowise"**) had entered into supply agreements with 2 suppliers and had made prepayments of US$10 million and US$4 million, without security, to the suppliers which appeared to Grant Thornton to be irrecoverable.
>
> (3) The circumstances surrounding the prepayment by Elternal."

8. However, throughout the hearing the Chairman continued to have concern at the lack of precision and clarity of this re-draft and Mr Scott then handed in to the Tribunal an amended second re-draft which incorporated suggestions made by the Chairman. This became the basis of a later application to amend the Notice. The final version of the particulars contained in the Amended Notice filed by Mr Scott with the Tribunal on 30 August 2022, is marked Annexure "B" and is as follows:

> "16. The SFC's case of non-disclosure against the Company is that, in breach of section 307B(1), the Company failed to disclose as soon as reasonably practicable after 1st January 2013 specific information about the Company (being inside information as defined in section 307A of the Ordinance) which comprised the following:
>
> (a) The fact of Grant Thornton's resignation on 27th December 2012.
>
> (b) The fact that Grant Thornton had indicated it would issue a qualified audit report ("**Potential Qualified Audit Report**") if the audit issues which Grant Thornton had identified in respect of three transactions of the Company (the "**Outstanding Issues**") were not resolved. The three transactions, and the inside information in respect of them that should have been disclosed, were:
>
> (i) The disposal of Advance Century for HK$15.5 million which was alleged by the Company to have been a sale of all the issued share capital of Advance Century to Golden Tex Limited. The inside information that should have been disclosed in respect of this transaction was that Grant Thornton regarded this transaction as questionable;

(ii) Investment by the Company in respect of the Vietnam Project. The inside information that should have been disclosed in respect of this transaction was that Grant Thornton regarded as questionable that the Company had control of it and that it was not as promising as originally valued and contemplated;

(iii) The supply agreements that two subsidiaries of the Company's jointly controlled entity, namely Elternal and Sinowise had entered into, with 2 suppliers. The inside information that should have been disclosed in respect of these transactions is that Elternal and Sinowise had made prepayments of US$10 million and US$4 million, without security, to the suppliers and that these prepayments appeared to Grant Thornton to be irrecoverable.

These outstanding audit issues remained unresolved as at 1st January 2013 and thereafter.

(c) The fact that Grant Thornton was concerned that Elternal's prepayment of US$10 million to the supplier may be irrecoverable and/or lacked commercial substance.

17. The facts referred to in paragraph 16 above:-

(a) were specific information about the Company; and

(b) were not generally known to the persons who were accustomed to or would be likely to deal in the listed securities of the Company but would if generally known to them have been likely to materially affect the price of those securities.

…

21. By reason of the matters set out above, the Company failed to disclose to the public the information as set out in paragraph 16(a) to 16(c) above, each of which constituted "*inside information*" (within the meaning of section 307A(1) of the Ordinance) as soon as reasonably practicable after the said inside information had come to its knowledge, contrary to section 307B(1) of the Ordinance.

22. Further or alternatively, SP2 – SP11, as officers of the Company, were in breach of section 307G(2)(b) of the Ordinance by failing to take all reasonable measures from time to time to ensure that proper safeguard existed to prevent a breach of the Company's disclosure requirement."

9. There was one other amendment to paragraph 19 of the Notice but it was only of a stylistic nature.

10. Mr Derek Chan SC, counsel for SPs 2, 3, 5, 6, 10 and 11 and Ms Ferrida Chan, counsel for SP4, did not object to the application to amend the Notice. Mr Laurence Li SC, counsel for SP1 and SP9 objected to the application asserting that the order of the Court of Appeal binds this Tribunal to the statement in the Notice that specifies the matters prescribed in Schedule 9 of the SFO and any new particulars must not change or go beyond those issues. Mr Li does not assert that his clients will suffer any irremedial prejudice from the particulars being amended. This argument, being a purely legal matter, is for the Chairman alone to decide.

11. The varied order of the Court of Appeal remits this matter to the Market Misconduct Tribunal for a re-hearing of the issues in the Notice issued by the Securities and Futures Commission. The phrase "the issues in the Notice" is not a term of art and it is not defined in the SFO. I have no doubt that the phrase "the issues in the Notice" is no more than a reference by the Court of Appeal to the issues that the Notice requires the Tribunal to determine and they are:

(a) whether a breach of a disclosure requirement has taken place; and

(b) the identity of any person who is in breach of the disclosure requirement.

12. When the Court of Appeal ordered that a hearing *de novo* take place with leave to the parties to adduce fresh evidence, I have no doubt that it never intended to limit the Tribunal's powers to allow amendments to be made to the Notice.

13. The amendments that are sought provide greater clarity and precision to the particulars and this can only benefit the parties and the Tribunal without altering, in any significant way, the scope of the case the parties expected they would have to meet. Indeed, as has been noted, Mr Li does not claim that his clients are prejudiced by the amendment. That being so the Chairman allows the amendment to the Notice. The Tribunal accepts the Amended Notice in substitution of the original Notice filed with the Tribunal by the SFC.

The Claim by the Notice of the SP's Failure to Disclose

14. It is the SFC case that the information in the redrafted particulars of the Amended Notice which it asserts is inside information, satisfies the elements of the definition of "inside information" in that they are all:

(i) specific information;

(ii) about Mayer;

(iii) information that was not generally known to the persons who are accustomed or would be likely to deal in the listed securities of Mayer; and

(iv) information which would if generally known to such persons be likely to materially affect the price of the listed securities of Mayer.

15. All of this information became known to the company in the course of the audit and no disclosure of this information was ever made by Mayer. Nor was any disclosure ever made by the company that, on 23 August 2012, Grant Thornton had indicated that if these audit issues remained outstanding it would issue a qualified audit report. Because the audit issues remained unresolved as at 1 January 2013, the SFC asserts that from that date Mayer was obliged by section 307B of the SFO to disclose the information relating to it to the public as soon as reasonably practicable. Similarly, in respect of the information that Grant Thornton had indicated that if it could not resolve these audit issues it would issue a qualified audit report.

16. In respect of the resignation of Grant Thornton, it is the SFC case that once it came to the knowledge of the company on 27 December 2012 it was obliged to disclose that information as soon as reasonably practicable. However, no disclosure was made until 23 January 2013 and this unjustifiable delay, it is said, constitutes a failure to disclose "as soon as reasonably practicable".

17. In respect of SP2 to SP11, it is the SFC case that, as officers of the company, they had a duty to ensure that the company complied with its disclosure obligation and this they failed to do.

18. Thus, the Notice, as amended with the redrafted particulars, claims that there was a failure to disclose as soon as reasonably practicable after 1 January 2013 the following specific information about Mayer:

(i) the fact of Grant Thornton's resignation on 27 December 2012;

(ii) the fact that Grant Thornton had indicated it would issue a qualified audit report if the audit issues which Grant Thornton had identified in respect of three transactions of Mayer were not resolved. The three transactions were the sale of Advance Century, the investment in Vietnam and the supply agreements, together with the prepayments made pursuant to them, that were entered into by Elternal and Sinowise, two wholly owned subsidiaries of Mayer's jointly controlled entity;

(iii) The inside information in respect of each of these three transactions that should have been disclosed were:

(a) in respect of the sale of Advance Century, that Grant

Thornton regarded this transaction as questionable;

(b) in respect of the investment in Vietnam, that Grant Thornton regarded as questionable that Mayer had control of it and that it was not as promising as originally valued and contemplated; and

(c) in respect of the Elternal and Sinowise supply agreements, that these two companies had made prepayments of US$10 million and US$4 million, respectively, without security, to the suppliers and that these prepayments appeared to Grant Thornton to be irrecoverable.

(iv) the fact that Grant Thornton was concerned that Elternal's prepayment of US$10 million to the supplier may be irrecoverable and/or lacked commercial substance.

19. However, it should be noted that even though the information came to the knowledge of the Specified Persons on various dates throughout 2012, the requirement to disclose did not arise until 1 January 2013. This is the date from which time began to run for Hong Kong companies to disclose inside information and so it is the date that must be used for the purpose of determining whether any of the information that came to the knowledge of Mayer and the Specified Persons was inside information which was subject to the section 307B requirement that it be disclosed as soon as reasonably practicable.

20. The Notice concludes with the allegation that there was a failure by both Mayer and the Specified Persons to disclose inside information.

Chapter 2

Procedural History of the Disclosure Proceedings

The First Disclosure Proceedings

21. In response to the Notice that the SFC gave to the Tribunal, disclosure proceedings commenced under the Chairmanship of Mr Kenneth Kwok, SC, together with Dr Yuen Wai-kee and Mr Leroy Yau as the Ordinary Members of the Tribunal. Chairman Kwok's Tribunal heard evidence between 1st and 11th November 2016 and issued its report in respect of liability on 7 February 2017 and its report in respect of sanctions on 5 April 2017.

22. The proceedings against SP7 were stayed by this Tribunal as it received information that this Specified Person was deceased. SP3, SP5, SP6, SP8 and SP10 did not attend the disclosure proceedings, either personally or by legal representatives. However, Chairman Kwok's Tribunal accepted that they had all been properly notified of the proceedings and so it was satisfied they had been given a reasonable opportunity of being heard, in accordance with their right under section 307K of the SFO, but had chosen to be unresponsive.

23. In its report of 7 February 2017, Chairman Kwok's Tribunal found that a breach of the disclosure requirement had taken place by Mayer and the identities of the persons who were in breach of the disclosure requirement were all of the Specified Persons, other than SP7. In its report of 5 April 2017, this Tribunal made various orders against Mayer and the other individual Specified Persons.

The Appeal to the Court of Appeal

24. Thereafter, the Specified Persons, other than SP8, appealed to the Court of Appeal in respect of both liability and sanctions. The appeal on liability concerned the statutory construction of section 307A(3) of the SFO, which provides:

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

25. Chairman Kwok's Tribunal had construed section 307A(3) to mean that in determining whether information not disclosed would if generally known "be likely to materially affect the price of the listed securities", it should have regard only to the pre-suspension price of Mayer's shares and not take into account events occurring during the period Mayer's shares had been suspended. The Court of Appeal handed down its judgment on 5 June 2020, deciding that this was a wrong interpretation of the section and explaining its reasons for so deciding as follows:

> "36. … All that subsection says is that a listed company does not stop being a "listed" company (for Part XIVA to apply) simply because dealing on that market has been suspended. In other words, the *status* of being a listed company is not affected and the Part applies, even though the *activity* of dealings in its shares on that stock market has been suspended.
>
> …
>
> 37.2. … what is important is the plain and ordinary meaning of the words which

makes it clear beyond argument that the Part would apply to listed companies even though dealing in its shares has been suspended.

…

39. …what s.307A(3) does *not* say is that a listed company shall be regarded as continuously dealing at the pre-suspension price despite the fact of suspension of dealing. It does not follow as a matter of logic, nor is there anything in the language of the statute to justify treating the status of "listed" and the activity of "dealing" as synonymous in all respects, so as to require the issue of materiality to be determined on an admittedly false factual premise.

…

40.2. Thus Part XIVA does not contain a list of information which shall be regarded as having a material impact on the shares of all companies generally. Rather the language of s.307A(1) makes it clear that the information must be material to the price of the *particular securities* in question. Therefore, one must consider the individual circumstances of each company at the time the information is made available to that company and its directors.

40.3. It is understandable that there is more difficulty in deciding this issue when one is faced with a company whose shares have not been traded for more than a year, in the course of which many negative events have occurred which (even on the SFC market expert's evidence) would have led to the price falling significantly below its pre-suspension level. However, to consider only the impact of the information on the pre-suspension price, and to reject outright that suspension could have had an effect on the pre-suspension price, is to turn a blind eye to these important events which admittedly would have affected the price at the time the information fell to be considered.

> 40.4. Whether, in light of those events, the information would then still have a "material" effect on the price would involve an assessment of the particular facts of the company involved, including the impact of the post-suspension events on the share price. If there is no data of off-market dealings, one would have to assess what the hypothetical price of the share would have been when the subject information became available."[3]

The Court of Appeal, by its order of 5 June 2020, remitted the matter to Chairman Kwok's Tribunal to reconsider its determination of this issue on the correct legal basis.

The Remitted Disclosure Proceedings

26. Consequent upon the order of the Court of Appeal, Chairman Kwok gave directions for the further progress of the remitted proceedings. These directions concerned the filing and serving of expert reports by the parties which would take into account the post-suspension events in accordance with what had been said by the Court of Appeal in its judgment. These directions also stipulated that the experts would have to attend for examination at a hearing fixed to take place from 16 – 18 August 2021.

27. Unfortunately, ill-health prevented Chairman Kwok from attending the Tribunal at any time during the dates in August 2021 that had been set aside for the remitted disclosure proceedings. New dates of 25 – 28 January 2022 were then fixed for the hearing of these remitted disclosure proceedings. However, on that date Chairman Kwok was still unwell and it became apparent that ill health

[3] [2020] 3 HKLRD 266 at 283 – 285.

would prevent him from further involvement with this Tribunal. His appointment as a Chairman of the Market Misconduct Tribunal subsequently expired without him being able to resume his duties.

The Second Disclosure Proceedings

28. Having been appointed by the Chief Executive of the Hong Kong SAR to be a Chairman of the Market Misconduct Tribunal, it was decided by internal administrative action that Mr Ian McWalters SC, GBS should assume the role of Chairmanship of the Tribunal whilst at the same time retaining the existing ordinary members of the Tribunal, namely Mr Leroy Yau and Dr Yuen Wai-kee. From 25 – 28 January 2022 this newly constituted Tribunal received evidence from expert witnesses called by the SFC and the Specified Persons.

29. There were, however, two matters that were of concern to the Tribunal, namely:

(i) the validity of the assumption by Mr McWalters to the Chairmanship role of an ongoing Tribunal merely by internal administrative action of the Market Misconduct Tribunal; and

(ii) whether the newly constituted Tribunal under the Chairmanship of Mr McWalters should deal only with the issue remitted by the Court of Appeal to Chairman Kwok's Tribunal or whether there had to be a hearing *de novo* by the Tribunal under its new Chairman.

30. Ultimately both these issues were resolved by all the parties agreeing that the prudent course was to ask the Court of Appeal to vary its original order. The parties placed before the Court of Appeal a joint application for a variation of the order that had been made by the Court of Appeal on 5 June 2020.

31. In response to this joint application, Madam Justice Yuen JA ordered that:

> "the matter be remitted to the Market Misconduct Tribunal for a re-hearing of the issues in the Notice issued by the Securities and Futures Commission dated 4 March 2016, as referred to in paragraph 4.1 of the Court of Appeal's Judgment, with Mr Ian McWalters, GBS, JP, Mr Leroy Yau and Dr Yuen Wai-kee constituting the tribunal; and that the fresh expert evidence adduced before the tribunal at the hearing on 25 to 28 January 2022 do stand as evidence in the re-hearing."

32. Thereafter, the Tribunal resumed the disclosure proceedings and conducted directions hearings on 14 February and 30 April 2022, received evidence on 14 May, 4 June, 4 to 7 July and heard closing submissions on 30 August 2022.

33. Notwithstanding that the Tribunal would now be conducting a hearing *de novo* of the SFC's Notice, the Specified Persons expressly consented to the appointment to this new Tribunal of the same ordinary members, namely Mr Leroy Yau and Dr Yuen Wai-kee, who constituted the original Tribunal under the Chairmanship of Mr Kwok. Consequently, the parties invited the Court of Appeal to include them in the constitution of the new Tribunal.

Chapter 3

Part XIVA of the Securities and Futures Ordinance

34. The Chairman gave directions to the Tribunal in respect of the operation of Part XIVA of the SFO and the issues it had to address in the course of determining whether there had been a breach of the disclosure requirement and, if so, by whom. These directions and an explanation of the provisions contained in Part XIVA are set out in this chapter.

Introduction

35. The provisions dealing with the disclosure of inside information are contained in Part XIVA of the SFO to which there are four divisions. This Part was added to the SFO by the Securities and Futures (Amendment) Ordinance No. 9 of 2012 and came into operation on 1 January 2013.

36. The requirement imposed on a listed corporation to disclose inside information is set out in Section 307B(1) of the SFO and is as follows:

> "A listed corporation must, as soon as reasonably practicable after any inside information has come to its knowledge, disclose the information to the public."

The duty of officers of listed corporations to prevent a breach by the listed corporation of the disclosure requirement and the manner of disclosure are set out in sections 307B – 307G of Division 2. Importantly, as discussed later in this Chapter, liability for a breach by a company of the disclosure requirement is

imposed on officers of a listed corporation when conduct by them that is intentional, reckless or negligent results in the breach by the company or when the officer has not performed the duty that is imposed on him by section 307G(1) to ensure that proper safeguards exist to prevent the corporation from breaching the disclosure requirement.

37. These provisions reflect the legal reality that a corporation is a separate legal entity on which can be imposed duties, obligation and liabilities and the factual reality that the corporation can act only through those who represent its controlling mind and will, namely its officers. Thus, the primary legal entity on whom the disclosure requirement is imposed is the listed corporation and the secondary legal entities on whom it is imposed are those individuals, namely the officers of it, who, in reality, are responsible for its operation.

Section 307A: Interpreting the Terms in Part XIVA

38. The definitions of the various terms used in sections 307B – 307G can be found in section 307A in Division 1 of Part XIVA. That section contains the following definitions of key words used in section 307B(1) in enacting the disclosure requirement, the most important of which is "inside information" which is defined as:

> "in relation to a listed corporation, means specific information that –
>
> (a) is about –
>
> (i) the corporation;
>
> …

(iii) …; and

(b) is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities."[4]

The term "listed corporation" is defined to mean:

"a corporation which has issued securities that are, at the time of the breach of a disclosure requirement in relation to the corporation, listed."

The definition of the word "listed" is:

"**listed** means listed on a recognized stock market – see also subsection (3)."

Importantly, for the circumstances of Mayer, subsection (3) provides:

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

39. When a company fails to comply with its disclosure duty it is said that there has been a "breach of a disclosure requirement" and this term is a defined term in section 307A(1). However, to understand the meaning of this term it is necessary to go to section 307A(2) and section 307G(2). Section 307A(2),

[4] There is no dispute that the information relied on by the SFC is "specific information" and that it is about the corporation, Mayer. What is in dispute is that this information "would if generally known to them be likely to materially affect the price" of Mayer's shares.

which concerns the liability of the listed corporation, directs the reader to sections 307B and 307C by providing:

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

40. Section 307G(2) sets out the circumstances in which an officer of the listed corporation may become liable for the breach by the listed corporation of the disclosure requirement. The provisions of section 307G are discussed in detail later in this chapter.

Section 307B: The Requirement to Disclose Inside Information

41. Section 307B(1) imposes on the listed corporation the requirement that it disclose any inside information and section 307B(2) lays down the test for when inside information comes to the knowledge of a listed corporation. This test has two limbs to it. The first limb, in section 307B(2)(a), deals with the acquisition of the information and the second limb, in section 307B(2)(b), deals with awareness that the information is *inside* information.

42. For the first limb, a listed corporation acquires knowledge of the information when that information "has, or ought reasonably to have, come to the

knowledge of an officer of the corporation in the course of performing functions as an officer of the corporation"[5]. This test has both subjective and objective elements, in the alternative, to it. This prevents the listed corporation from avoiding liability by its officer claiming unawareness of the knowledge, for the officer will be found to be aware of it if it "ought reasonably to have come to the knowledge of an officer in the course of performing functions as an officer of the corporation".

43. For the second limb, an officer of a corporation will have the requisite knowledge attributed to him i.e. that the information qualifies as inside information, if "a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation"[6]. Awareness that the information of which the officer has knowledge is *inside* information is, thus, by a wholly objective test of what a reasonable person would consider in respect of the information.

Performing the Disclosure Requirement

44. The first thing to note about fulfilling the disclosure requirement is that what is disclosed must not be "false or misleading as to a material fact" and must not be "false or misleading through the omission of a material fact.[7]

45. Other characteristics that the disclosure must take are set out in section 307C(1) which mandates that the disclosure "must be made in a manner

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5 Section 307B(2)(a) of the SFO.
6 Section 307B(2)(b) of the SFO.
7 Section 307B(3) of the SFO.

that can provide for equal, timely and effective access by the public to the inside information disclosed".

46. Standing back from all these statutory definitions and provisions it can be seen that any disclosure that is made by the listed corporation will have to satisfy conditions of timeliness[8], accuracy[9] and accessibility[10].

Section 307G: The Liability of Officers of the Listed Corporation

47. Turning now to the liability of officers of a listed corporation which has breached the disclosure requirement, the first step is to note that section 307G(1) imposes a duty on officers of a listed corporation, which is as follows:

> "Every officer of a listed corporation must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement in relation to the corporation".

48. Section 307G(2) goes on to provide how it is that an officer of a listed corporation will become liable for a breach by a listed corporation of the disclosure requirement. The first route is by positive conduct by an officer when that conduct by him is intentional, reckless or negligent and it has resulted in the breach[11] i.e. an act of commission that has a causal link to the breach. The second route is where there has been a failure by the officer to take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the

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[8] Section 307B(1): "… as soon as reasonably practicable after any inside information has come to its knowledge…".
[9] Section 307B(3): "… the information disclosed is false or misleading as to a material fact ...".
[10] Section 307C(1): "… equal, timely and effective access by the public to the inside information disclosed".
[11] Section 307G(2)(a) of the SFO.

breach[12] i.e. an act of omission by the officer in respect of his subsection (1) duty.

Determining Whether there has been a Failure of Disclosure

49. By its Notice the SFC requires this Tribunal to determine:

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

50. Before it can determine these issues the Tribunal should first answer the following questions in order to conclude that the company specified in the SFC's Notice was subject to a requirement to disclose inside information:

(i) is the information "inside information" i.e. does it qualify as inside information by satisfying the elements of the definition of that term;

If the answer is "yes" then the following questions must be answered:

(ii) did that information come to the knowledge of the listed corporation i.e. by in fact coming to its knowledge or by knowledge being attributed to the corporation under section 307B(2)(a); and

(iii) was the corporation aware that the information was "inside information" by awareness being attributed to the corporation under section 307B(2)(b);

[12] Section 307G(2)(b) of the SFO.

If the answer to these two questions is "yes" then, under section 307B(1), the listed corporation must disclose the inside information to the public in conformity with the requirements of the legislative provisions.

51. The next issue is whether the listed corporation has made any disclosure at all and in order to determine this issue the Tribunal first asks the question:

> (iv) was there a failure by the corporation to disclose the inside information to the public?

If the answer to this question is "yes", then there has been a breach by the listed corporation of its disclosure requirement.

52. But a failure to perform the disclosure obligation as the SFO requires will also constitute a failure to disclose. Thus, where a listed corporation relies on having made disclosure of the inside information, a second question arises:

> (v) where there has been a disclosure of the inside information, was that disclosure:
>
> (a) made as soon as reasonably practicable after the inside information had come to the listed corporation's knowledge;
>
> (b) false or misleading as to a material fact or false or misleading through the omission of a material fact; and
>
> (c) made in a manner that provided for equal, timely and effective access by the public to the inside information.

53. If the answers are not "yes" to (a) and (c) and "no" to (b) then the

disclosure will not satisfy the requirements of the SFO and there will have been a failure by the listed corporation to disclose the inside information.

54. That deals with the liability of the listed corporation. Turning now to the determination by the Tribunal of "the identity of any person who is in breach of the disclosure requirement", the questions the Tribunal must ask become:

(i) is any person specified in the SFC's Notice an officer of the listed corporation i.e. is the person within the definition of officer in section 1 of Schedule 1[13].

If so, then:

(ii) (a) has the corporation's breach of the disclosure requirement, resulted from intentional, reckless or negligent conduct by the officer; or

(b) has the officer taken all reasonable measures from time to time to ensure that proper safeguards exist to prevent the corporation from breaching the disclosure requirement.

55. If the answer to (ii)(a) is "yes" or the answer to (ii)(b) is "no" then the officer is also in breach of the disclosure requirement.

56. This, in summary, is the effect of the provisions in Part XIVA of the SFO.

[13] An officer of a corporation is defined to mean "a director, manager or secretary of, or any other person involved in the management of, the corporation."

Chapter 4

Legal Issues Relating to Inside Information

57. The definition of "inside information" requires that the information not be "generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities". There are a number of legal issues arising from this part of the definition that are relevant to the circumstances of Mayer and they are addressed in turn below by the Chairman indicating the directions he gave to the Tribunal in respect of them.

"Likely"

58. The definition of inside information uses the word "likely" on two occasions. On the first occasion it is employed it is being used to describe one of two classes of persons who are potential dealers in the securities of the listed corporation. This class is made up of persons who "would be likely to deal in the listed securities" of Mayer. On the second occasion that it is employed within the definition, the word is being used to describe the likelihood of there taking place an impact of a specified degree (a material affect) on the price of the listed securities if the two classes of persons who are potential dealers in the securities had known the inside information. This different use of the word on each occasion that it is employed requires consideration being given to whether it bears a different meaning on each of those occasions.

59. There is no Hong Kong court decision on the meaning of "likely" and ultimately it is a legal issue of construing the term in the context of the legislation in which it is used. There does not appear to be any discussion of the meaning of "likely" in the phrase "likely to deal", but there has been some discussion of "likely" in the phrase "likely to materially affect".

60. In Hong Kong the only discussion of "likely" in "likely to materially affect" has been by previous Tribunals who referred to a decision by Foenander SDJ of the Subordinate Courts of Singapore in respect of almost identical language in that country's Securities Industry Act. In *Public Prosecutor v Alan Ng Poh Meng*[14], Foenander SDJ said:

> "What has to be decided is whether the information would be 'likely materially to affect the price'. Information that is *likely* materially to affect the price, is information which *may well* materially affect the price. Put in another way, it is more likely than less likely that the price will be affected materially."

61. In this passage Foenander SDJ appears to employ two standards of probability in describing the likelihood of the response by others to the information having a material affect on the price. His first standard of probability is "may well" and his second standard of probability is "more likely than less likely" which is, presumably, the standard of more likely than not. In the synonymous way in which he expresses the two standards, Foenander SDJ appears to have regarded them as identical in their levels of probability or at least as not having any meaningful difference between them. But they do not connote

[14] [1990] 1 MLJ v at x.

the same standard of probability. The phrase "may well" connotes a lower standard of probability than the more likely than not standard.

62. The observations of Foenander SDJ were discussed by Stock J (as Stock NPJ then was) when sitting as Chairman of the Insider Dealing Tribunal in *Public International Investment Ltd*[15]. In its report the Tribunal quoted the commentary of the authors of *Insider Crime – The New Law*[16] in their discussion of the price sensitivity element of inside information. The authors referred to a case from the United States of America where "it was held that in order for information to be price sensitive there must be a substantial likelihood that the disclosure of the fact would have been viewed by the investor as having significantly altered the total mix of information made available".[17] The Tribunal then concluded:

> "19.4.5. There is no inconsistency in the various tests which are propounded, save that the approach in TSC Industries refers to a "substantial likelihood" that the disclosure would impact on the investor's decision, whereas Judge Foenander in the Alan Ng case applies the test on a "more likely than less likely" footing, and that some suggested tests speak in terms of a significant alteration to the mix of information, and others merely of a factor which will influence the decision of investors. We think that the word "materially" speaks for itself - it is to be contrasted with "slight", "insignificant" and "immaterial"; and we shall approach the question of likelihood as meaning a real or substantial likelihood."

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[15] 5 August 1995 at pages 240 – 241, [19.4.3] – [19.4.5]. It has also been cited with approval in a number of other Tribunal reports. See, for example, *Hong Kong Parkview Group Limited*, page 41; *Chinese Estates Holdings Limited*, page 46.

[16] "*Insider Crime – The New Law*" by Barry Rider and Michael Ashe, Jordans, 1993.

[17] Ibid, page 37.

63. Apart from these comments by this Tribunal, there has been no discussion by a Hong Kong court of this issue.

64. I note the SFC has followed the language of Foenander SDJ in its explanation of inside information. Its June 2012 *Guidelines on Disclosure of Inside Information* states:

> "Information that is *likely* materially to affect the price is information which "may well" materially affect the price. Put another way, it is more likely than less likely that the price will be affected materially."

65. There is, however, a discussion of the word "likely" in three House of Lords judgments of *In re H (Minors) Sexual Abuse: Standard of Proof*[18], *Cream Holdings Limited v Banerjee*[19] and *SCA Packaging Limited v Boyle*[20]. In the *Cream Holdings Limited* case Lord Nicholls of Birkenhead referred to the different shades of meaning that the word "likely" can convey. At page 259, [12] of the report, he said:

> "As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'."

[18] [1996] AC 563.
[19] [2005] 1 AC 253.
[20] [2009] UKHL37; [2009] All ER 1181.

66. In the *Re H* case, the House of Lords was addressing the meaning of "likely" in section 31(2)(a) of the Children Act 1989. Section 31(2) empowered a court to make an order placing a child in the care of a local authority if it was satisfied of certain conditions, one of which, under s.31(2)(a), was "that the child concerned is suffering, or is likely to suffer, significant harm …".

67. Lord Nicholls gave the judgment of the House of Lords and explained how the word "likely" could be used to convey two quite different meanings. At page 584G he said:

> "In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?"

68. Lord Nicholls examined the purpose of the legislation and the role of the prerequisite conditions in section 31(2) in drawing a boundary line between two differing interests, namely the interests of parents in caring for their child and the interests of the child which "may dictate a need for his care to be entrusted to others".[21]

69. He concluded:

> "In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of

[21] Ibid, page 585A.

> leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not.
>
> …
>
> In my view, therefore, the context shows that in section 31(2)(*a*) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."[22]

70. In the most recent House of Lords decision of *SCA Packaging Limited* the House was dealing with the construction of a provision in Schedule 1 of the Disability Discrimination Act 1995 in which the word "likely" was used. Under the Act a person is regarded as having a disability if the person "has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". The section in Schedule 1 provides:

> "An impairment which would be *likely* to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect." (Italics added)

71. In respect of the word "likely" in the above provision the Court of Appeal, *per* Girvan LJ, said it was being used in the sense of "could well happen" and the House of Lords agreed with that construction. After examining the

[22] Ibid, page 585C – 585F.

context, Lord Hope of Craighead said that a standard of more probable than not was inappropriate and that "the purposes of the act are best served by adopting the broader and less exacting test as to what is "likely" that Girvan LJ had identified."[23]

72. The main judgment of the House of Lords was given by Baroness Hale of Richmond who saw the issue before the House as being the degree of likelihood in the provision and posed the question:

> "Does 'likely' in [the provision] mean probable or 'more likely than not' or does it mean simply that it is a real possibility, something which 'could well' happen?"[24]

73. In answering this question, Baroness Hale said:

> "It is probable that an event will happen if it is more likely than not that it will do so. Probability denotes a degree of likelihood greater than 50%. Likelihood, on the other hand, is a much more variable concept."[25]

74. Before embarking on a contextual exercise of construction, she cited the comments of Lord Nicholls in the cases of *Re H* and *Cream Holdings Limited* and observed that no case had been drawn to the attention of the court where "likely" had been held to mean "more likely than not" and commented:

> "This is scarcely surprising, as Parliament can always use the word 'probable' if that is what it means."[26]

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[23] *SCA Packaging Limited v Boyle* [2009] UKHL 36, [2009] 4 All ER 1181, 1185 at [4].
[24] Ibid, at 1196 [51].
[25] Ibid, at 1199 – 1200 [65].
[26] Ibid, at 1200 [68].

75. These House of Lords' judgments are useful in illustrating the shades of meaning that the word "likely" can convey and how the appropriate meaning of this word, when used in a statutory provision, is to be ascertained by a contextual and purposive construction of the legislation in which the word is employed.

76. Because these three House of Lords' judgments concern such vastly different legislation, they can only be of illustrative value. But that cannot be said of the next case that falls for consideration where the issue arose of construing "likely" in insider dealing legislation. This issue was argued before the United Kingdom's Upper Tribunal (Tax and Chancery Chamber) which hears appeals from decisions made by a number of bodies, one of which is the Financial Conduct Authority. The Financial Conduct Authority is a regulatory body equivalent to our SFC. The case in which there was argument over the construction of "likely" is *Hannam v The Financial Conduct Authority*[27].

77. The appellant in this case was found to have engaged in market abuse, contrary to section 118(3) of the Financial Services and Markets Act 2000, and the form of market abuse was conduct which is commonly known as insider dealing. The U.K. legislation also employs a definition of 'inside information' in section 118C(2) and it is quite similar to ours. It is as follows:

> "inside information is information of a precise nature which –
>
> (a) is not generally available,
>
> …

[27] [2014] UKUT 0233 (TCC).

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying instruments or on the price of related instruments."

78. The Upper Tribunal described the task of construction before it as determining "the level of probability which is introduced by the use of the word 'likely'".[28] The Upper Tribunal had two competing versions placed before it which it described as follows:

> "The Authority's case is that "likely" indicates a low level of likelihood. Mr Hannam's case is that "likely" means "more likely than not"."[29]

79. Counsel for the appellant argued that it had to be something more than a mere possibility, a level of probability that he equated with "may well". The Upper Tribunal rejected this characterization of "may well" saying that the words "may well" convey "something considerably stronger than mere possibility".[30]

80. The parties relied on the purpose of the legislation which was accepted as being "concerned with preventing behaviour that amounts to an abuse of the financial markets, and penalizing that behaviour where it does occur".[31]

81. It was also accepted that the definition has a further role to play in respect of the misconduct that is before our Tribunal, namely a failure to disclose inside information, and accepted that the meaning of "likely" had to be assessed in the context of it performing both these roles.

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[28] Ibid, at page 21, lines 32 – 33.
[29] Ibid, at page 25, lines 18 – 19.
[30] Ibid, at page 25, line 46 to page 26, line 1.
[31] Ibid, at page 26, lines 8 – 9.

82. The Authority argued that information should be disclosed if it is information that reasonable investors are likely to take into account. Of such persons the argument went as follows:

> "Reasonable investors are concerned about the return they will receive on their investments. Information which has no prospect of significantly affecting the price of the investment is not relevant to them, and there would in general be no reason to require a listed company to make it public. Reasonable investors will often take into account information which gives less than a 50% assurance about the future. It would be irrational to exclude such information when making investment decisions. If such information is excluded from the definition of inside information, issuers will not be obliged to announce it publicly and insiders will be free to disclose it selectively to their favoured acquaintances. That is exactly the sort of behaviour that the Market Abuse Directive is intended to prevent because it undermines confidence in the markets. Investors need information which might, but also might not, have an effect on price in order to make their investment decisions on a properly informed basis.
>
> 114. The Authority also makes a practical point. It would be highly impractical if issuers had to decide whether information was more likely than not to affect prices significantly – one person might consider that a particular piece of information had a 40% chance of affecting prices, but another person might put the chance at 60%. Reasonable investors do not reject as irrelevant information which has a less than 50% chance of affecting prices significantly. The utility of the reasonable investor test is that it avoids any need for such fine (and irrelevant) distinctions."[32]

[32] Ibid, at page 26, line 42 to page 27, line 26.

83. Recognising that a line had to be drawn somewhere and that there will always be some cases which cannot be categorised as falling on one side of the line or another, the Upper Tribunal noted that some lines are easier to draw than others, saying:

> "The line which the Authority would seek to draw – not "may well" as Mr Rabinowitz might like but "more than a mere possibility" or having a real prospect" as we would suggest – is one which makes categorization easier than the one which he seeks to draw – "more likely than not"."[33]

It concluded:

> "For the reason given by the Authority, we reject the "more probable than not" conclusion. Our conclusion is that the Authority's approach is correct and that the word "likely" in section 118C(2)(c) FSMA is properly to be construed as meaning that there is a real (in contrast with fanciful) prospect of that information having an effect on the price of qualifying instruments."

84. A similar exercise of construction must now be done by this Tribunal in respect of the use of the word "likely" in the definition of "inside information" in the SFO. But, before commencing on that exercise it is necessary to remind ourselves of certain matters, trite though they may be. First, is the importance that capital markets and the trading in listed securities play in the societal and financial life of Hong Kong and in promoting and maintaining Hong Kong as an international financial centre. Reminding ourselves of this also serves to remind us of the vitally important public interests that are at stake. The second obvious point that needs to be mentioned is the critical role played by the SFO in regulating

[33] Ibid, at page 27, line 23 – 25.

these markets. The SFO is replete with provisions designed to promote, protect and preserve healthy markets in Hong Kong; markets in which Hong Kong residents and the wider international community can participate with confidence. The disclosure requirement is simply one of those provisions.

85. Consequently, any exercise of construction involving the disclosure requirement must be made against the backdrop of the very important role that the disclosure requirement plays and the way in which it performs that role. Its role is, in conjunction with other provisions in the SFO, to safeguard the integrity of the market, promote public confidence in the market and protect the interests of the investing, and wider, public. It performs this role by: (i) ensuring that actual investors and potential investors all have equal access to material information that affects their investment decision making; (ii) cultivating a corporate culture of transparency and accountability, thereby enhancing the standard of corporate governance; and (iii) deterring and inhibiting, and thereby reducing the opportunity for, abusive behaviour within the market.

86. The purpose of a disclosure regime and the public interests that it serves were helpfully summarised by the New South Wales Court of Appeal in *James Hardie Industries v Australian Securities and Investments Commission*.[34] It said:

> "The continuous disclosure regime, contained in s. 674 and the listing Rules, is designed to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to informing the accountability of company

[34] (274) ALR 85 at 162 – 163, [355] – [356].

management. It is also integral to minimizing incidences of insider trading and other market distortions.

It is also to be noted that s. 674 is remedial legislation to enhance the public interest and to protect individual investors. It should be construed beneficially 'so as to give the fullest relief which the fair meaning of its language will allow'."

These comments are equally applicable to Hong Kong and the SFO.

87. It is against the backdrop of these important public interests, and bearing in mind the role of the SFO in promoting, protecting and preserving them, that the Tribunal must address the task of construing the words of the definition of "inside information".

88. The first thing to note about the phrase "likely to materially affect the price of the listed securities" is that it plays a role of drawing a demarcation line between what is within the disclosure requirement and what is not, and it does this by focusing on the impact that the information could have on the price of the listed securities. Because its role within the definition is in drawing the line between what is disclosable and what is not it has a major influence in how effective the disclosure requirement will be in achieving its statutory purpose. If the bar for disclosure is set too high then the disclosure requirement is at risk of being undermined and rendered much less effective; if set too low then it may become too difficult for people to exercise discretion and judgment in deciding what is required to be disclosed.

89. It is apparent from the efforts of courts and tribunals to construe the

word “likely” that there are a number of different levels of probability that are encompassed by it. This word may mean, in ascending levels of probability of the information materially affecting the price of the listed securities:

(i) there is a *mere possibility* of the information having this affect;

(ii) the information *may well* have this affect;

(iii) there is *a real possibility* that the information will have this affect;

(iv) there is *a real prospect* that the information will have this affect;

(v) it is *more likely than less likely* that the information will have this affect; and

(vi) there is a *substantial likelihood* that the information will have this affect.

90. Before determining what the level of probability should be, it is necessary to take account of another, very important, part of the context, namely, the provisions of the SFO concerned with insider dealing. This is because, within the SFO, the concept of inside information performs two duties. This Tribunal is concerned with its duty in respect of the statutory obligation imposed on a listed corporation to disclose inside information. The other duty that it performs is in respect of the prohibited conduct known as insider dealing which encompasses various activities by a person, amongst which is the dealing in a listed corporation’s securities by a person who has knowledge of inside information in respect of that corporation.

91. Despite having identical concepts of inside information there is one

very important distinction in the way the SFO treats insider dealing from the way it treats a breach of the disclosure requirement.

92. Insider dealing can be treated as a form of market misconduct and dealt with civilly by the Market Misconduct Tribunal. But it may also be treated as a criminal offence and be prosecuted in the courts of Hong Kong. When prosecuted on indictment it carries a maximum penalty of 10 years' imprisonment.

93. The provisions relating to insider dealing when treated civilly before the Market Misconduct Tribunal, can be found in Division 4 of Part XIII of the SFO with the definition of "inside information" in section 245(2) being identical to the definition in section 307A(1). The provisions relating to insider dealing, when treated criminally, can be found in Division 2 of Part XIV of the SFO with the definition of "inside information" in section 285 being identical to the definitions in sections 245(2) and 307A(1).

94. The consequence of having identical definitions was summarised in *Securities and Futures Ordinance Commentary and Annotations*[35] as follows:

> "Hence, the information which listed companies are required to announce under the new statutory disclosure obligation is the same information which, if possessed by a listed company's directors and other insiders, prohibits them from dealing in the company's securities under the insider dealing offences in Parts XIII and XIV of the SFO."

95. The public interest purposes of the SFO and, within that ordinance, of

[35] *Securities and Futures Ordinance Commentary and Annotations* General Editor Laurence Li SC, Sweet and Maxwell 2019 at page 857.

the disclosure requirement, have already been addressed and much of what is said there is relevant to the purpose behind the prohibition on insider dealing. Insider dealing is completely contrary to the disclosure requirement as it involves profiting from knowledge of price sensitive information before the market has become aware of it. The disclosure requirement is, in fact, a measure that contributes to reducing the opportunity for insider dealing to take place.

96. The importance to Hong Kong of its role as an international finance centre has already been emphasised. However, crucial to the success of that role is local and international confidence in the integrity of our markets for investors will only participate in our markets if they believe that our markets are well regulated with no tolerance for abusive market behaviour. The disclosure requirement and the prohibition on insider dealing complement each other and operate in tandem to deter and inhibit, and thereby reduce the opportunity for, abusive market behaviour to occur.

97. As the disclosure requirement and the prohibition on insider dealing are very much different sides of the same coin, and as the definition of inside information employed by the SFO in both areas is identical, one would expect that, absent a clear indication to the contrary, the meaning of "likely" in both definitions must be the same. In my view, there is nothing in the SFO to indicate an intention by the legislature that the word should bear different meanings in these two different parts of the SFO in which it is employed. For the purpose of construing the word it thus becomes necessary to give it a meaning, in terms of the level of probability to be ascribed to it, that will advance the purposes for which the legislature employed it in respect of both the disclosure requirement

and the prohibition, and criminalisation, of insider dealing.

98. A construction of the word "likely" in the definition of "inside information" that ascribes to it an overly high level of probability could have the affect of undermining the effectiveness of the disclosure requirement and preventing it from fully realizing the societal goal for which it was enacted. Moreover, the less effective the disclosure requirement, the greater the opportunity there will be for insider dealing. Ensuring that the disclosure requirement retains its effectiveness would point to it having to bear a meaning that does not carry with it too high a level of probability.

99. On the other hand, it would not be right to set the level of probability so low that it caught those whose breach was due to not unreasonably, but mistakenly, adjudging the likelihood of the information materially affecting the price of the listed securities. Given the substantial penal consequences flowing from a prosecution for insider dealing any construction should take account of the need to ensure that persons are not unfairly exposed to that risk. These considerations point to the need for "likely" to bear a meaning that does not carry with it too low a level of probability.

100. Trying to find the right balance prompts me to eliminate the two extremes of "mere possibility" and "substantial likelihood". As much as I am hesitant to disagree with the view of Stock J, I cannot see any justification for adding such a strong qualifying word as "substantial" to likely. It was not enacted by the legislature and neither context nor purpose points to the legislature having an intention to elevate the level of probability to such a high standard.

101. Having rejected levels of probability at the upper and lower end of the spectrum I now turn to the middle of the spectrum and here the choice is between more than 50% ("more likely than less likely", "more probable/likely than not") or less than 50% ("real possibility", "real prospect", "may well").

102. If the word "likely" is construed as "more likely than not" then, to paraphrase and apply the words of Lord Nicholls in *Re H*, "it would have the effect of leaving outside the scope" of the disclosure requirement, cases where there is a real possibility that the information would materially affect the price of the listed securities "but that possibility falls short of being more likely than not". Consideration has been given to whether setting the level of probability at a standard lower than more likely than not would produce unfairness in insider dealing cases and I have concluded it would not. For these reasons, it is my view that the more likely than not standard of probability would not be consistent with the context and purpose of the concept of "inside information" within the SFO.

103. Whether there is a meaningful difference between "may well", "real possibility" and "real prospect" is questionable but, of the three terms, "real prospect" is the one term that best lends emphasis to the need for a standard that is higher than a possibility but not as high as "more probable than not." Such a standard of probability best advances the public interest purposes for which the disclosure requirement and the prohibition on insider dealing were enacted.

104. Consequently, the Tribunal is directed that in applying the word "likely" in the definition of "inside information", the Tribunal should determine whether, as at 1 January 2013, there was a real prospect that the information that was not

disclosed would have materially affected the price of the listed securities.

"Persons who are accustomed or would be likely to deal in the listed securities of the corporation"

105. There are three legal issues arising in respect of this element of the definition of inside information. They are:

(i) the construction of the two classes of persons;

(ii) the use of expert evidence to identify the membership of each class; and

(iii) the characteristics possessed by the members of each class.

(i) The construction of the two classes of persons.

106. The definition describes two classes of persons. The first is "persons who are accustomed to deal in the listed securities" and the second is "persons who would be likely to deal in the listed securities". In referring to the potential dealers by these phrases, the legislature has clearly created two distinct classes of persons and so every effort should be made when construing these terms to do so in a way which gives effect to the legislature's intention and, if possible, provides a meaningful distinction between them.

107. However, trying to give effect to the distinction between each class does not mean that there cannot be overlap between the two classes. Whether there

is overlap and the extent of the overlap will vary from listed corporation to listed corporation and the circumstances in which a particular listed corporation finds itself.

108. In construing these two classes, the first thing to note is the presence of the words "in the listed securities of the corporation". The definition of "listed securities" can be found in section 307A(1) and is:

> "**listed securities**" means –
>
> (a) securities which, at the time of the breach of the disclosure requirement in relation to a corporation, have been issued by the corporation and are listed;
>
> … "

The use of this defined term is a clear indication that the identity of the persons within the two classes must be determined by reference to the particular company under consideration.

109. In *Public International Investments Limited*, dated 5 August 1995, the Insider Dealing Tribunal employed the same reasoning to identify the members of the two classes in the case before it. Rejecting a commentary in a textbook that the words "likely to deal in securities" was a reference to the general public, the Tribunal said at page 237, [19.3.4]:

> "In many, perhaps most, cases, the investing public at large will be the same class as those likely to deal in the shares of a particular corporation. But the analysis to which the preceding paragraph refers ignores on its face the words "in those securities". Section 10(b) of the 1985 Act, and section 8 of the Ordinance, do not

> say "those likely to deal in listed securities", and no more. We are directed, therefore, that the test to be applied is one which looks to that class of person that was, at the material time, likely to deal in the securities of PIIL."

110. Placing the identification of the members of each of these classes in the context of the specific company under consideration necessarily means having regard to the circumstances in which that company, and here that is Mayer, found itself at the time it became subject to the disclosure requirement, and here that was 1 January 2013.

111. The first class of "persons accustomed to deal", according to Mr Scott SC, for the SFC, suggests a characteristic of habitualness. That must be correct and persons who possess a familiarity with the dealing in securities that is obtained from prior experience with such activity would obviously include professional traders and some of the existing owners of shares in the listed corporation. The mere fact that a person is a shareholder does not necessarily mean that person habitually deals in securities.

112. In respect of the second class of "persons likely to deal", the meaning of the word "likely" has already been addressed and there is nothing in the context in which it is used or the purpose which it serves that would indicate an intention by the legislature that it should bear a different meaning. There is no reason to construe it any differently. That being so the Tribunal is directed to ascribe to it the same meaning of real prospect, so that the class is composed of those persons of whom it can be said there is a real prospect that they will deal in the securities of Mayer, it being a suspended company which, by 1 January 2013, had endured

an eventful and difficult 2012.

(ii) The use of expert evidence to identify the membership of each class

113. Having decided that the parameters and membership of each class will have to be determined against the backdrop of the condition in which Mayer found itself on 1 January 2013, the question then becomes how this is to be done. An example of how a Tribunal addressed this issue of defining those parameters and identifying the members can be found in the *Public International Investment Limited* Report. There, the Tribunal had expert evidence to assist them in identifying the members of this class. At page 238, [19.3.6] it found the class to be composed as follows:

> "The group or class was a large one. It comprised not only professional dealers and investors who dealt in second and third liners, but also those of the investing public including small investors who dealt in second and third liners. It is not restricted to those who only dealt in such securities, and none other. But it excludes those who did not."

114. Thus, the answer to this question is that it is done by reference to the evidence and on this issue expert evidence might be needed to assist the Tribunal. There is no reason why the expert opinions of properly qualified persons cannot be relied upon by the Tribunal to assist it in identifying the persons who would be within each class.

115. That necessarily involves fact finding in respect of the circumstances in

which Mayer found itself on 1 January 2013, its financial position and its future prospects at that time. That is a task which this Tribunal performs in Chapter 13 of this Report.

(iii) The characteristics possessed by the members of each class

116. The concept of the ordinary reasonable investor has been developed to assist in the application of the price sensitivity test and it does this vesting the prospective buyers and sellers with particular characteristics prior to assessing how such persons might react to the undisclosed information. This notional concept was described by Foenander SDJ in his judgment in the *Alan Ng* case in a passage which has often been quoted by Hong Kong Tribunals.[36] He said:

> "However, the standard by which materiality is to be judged is whether the information on the particular share is such as would influence the ordinary reasonable investor, in deciding whether or not to sell that share. A movement in price which would not influence such an investor, may be termed immaterial. Price is, after all, to a large extent determined by what investors do. If generally available, it is the impact of the information on the ordinary reasonable investor, and thus on price, which has to be judged in an insider dealing case."

117. The concept of the ordinary reasonable investor has also been applied in Hong Kong by the Court of Appeal in *HKSAR v Du Jun*,[37]a case which is referred to later in this chapter.

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[36] See for example the report of the Insider Dealing Tribunal on *Hong Kong Parkview Group Limited*, dated 5 March 1997, at page 41.

[37] [2012] 6 HKC 119.

118. In a report of the Insider Dealing Tribunal in *Hanny Holdings Limited*, dated 15 June 2000, the Tribunal said at page 76:

> "In assessing whether information would be likely, in all the circumstances, to bring about a material change in price, the Tribunal must judge whether it would influence ordinary reasonable investors (who are accustomed or likely to deal in those securities) to buy or sell."

119. This would suggest that the concept of the ordinary reasonable investor is capable of wearing many coats, depending upon who he or she is. Thus, this notional person may wear the coat of a trader, a professional investor or a member of the general investing public. Consequently, there is a range of market knowledge and investor sophistication possessed by the ordinary reasonable investor and the level of market knowledge and investor sophistication that this person possesses will depend upon what "coat" he or she is wearing.

120. When the ordinary reasonable investor is wearing the coat of the general investing public it is worth remembering the cautionary comments of the Insider Dealing Tribunal in *Chee Shing Holdings Limited*, dated 27 June 2001 and be wary of attributing too great a knowledge and level of analytical skills to this notional person. The Tribunal observed, at page 43:

> "The emphasis in that definition should be on the word ordinary rather than reasonable. Very often the ordinary investor is not reasonable in the sense that the purchases are not made after reasoned and considered research."

In this report the Tribunal suggested that a better term to describe the class of

persons by whose reactions the price sensitivity test was to be judged was the ordinary average investor. These comments in *Chee Shing Holdings Limited* serve to remind us that the purpose of the disclosure requirement is to protect all who may be contemplating participating in the market – it is not to be confined to protecting only the professional trader/investor or highly sophisticated investor.

"Likely to Materially Affect the Price of the Listed Securities"

121. In order to qualify as inside information it is not enough simply that the information relates to the company or that it is even important information relating to the company. It may well be important information that relates to the company and may even be information which significantly affects the company and perhaps, in most cases, inside information will bear these characteristics. But it is not these characteristics that qualifies the information as inside information. Rather, it is the impact that this information may have on the persons who are accustomed to, or likely to, deal in Mayer's shares and whether their response to the information would be likely to have a material affect on the price of the company's shares.

122. This impact and response, in consequence of the information becoming generally known, is described in the definition as the information being *likely* to affect the price *and* to affect it in a *material* way. So the impact of the information on the price on the company's shares must possess two attributes. The first attribute is that there must be a likelihood, in the sense of a real prospect, of the information having an affect on the price of the shares and the second attribute is that the affect on the price of the shares must be of a material degree.

The meaning of "likely" in this part of the definition has already been addressed and so the focus of the present discussion is on the meaning of the qualifying adverb "materially".

(i) The meaning of "materially"

123. In the report of the Insider Dealing Tribunal on *Public International Investments Limited* dated 5 August 1995, the Tribunal said at page 241, [19.4.5] of the word "materially":

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

124. In the report of the Insider Dealing Tribunal on *International City Holdings Limited*, dated 27 March 1986, the Tribunal said at paragraph 2.6 of the requirement that the affect on the price of the securities be material:

> "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 change of sufficient degree in any given circumstances to amount to a material change."[38]

125. Thus, a mild or slight fluctuation in price will not be sufficient. But what change in price will be sufficient to be regarded as material? This is a question to which there is no universal answer and that is because what is material for one company may not, necessarily, be material for another company.

[38] These comments were followed by the Insider Dealing Tribunal in its report on *Chinese Estates Holdings Limited*, dated 25 June 1999 at pages 45 – 46 and also by the Market Misconduct Tribunal in its report on *China Huiyuan Juice Group Limited*, dated 1 March 2013, at page 33.

Materiality can only be judged in the case of a particular company's circumstances at the time that it becomes aware of the information that is said to qualify as inside information or, as in the present case, when it came under a statutory duty to disclose "inside information". Thus, no figure can be seized upon, whether expressed as an amount or a percentage change in the price, that can then be employed universally as a benchmark to assess whether a particular change in price is "material".

126. The Tribunal notes that it has been said of the test that the standard by which materiality is to be judged is whether the information on the particular share is such as would influence persons who are accustomed or would be likely to deal in the share, in deciding whether or not to buy, or whether or not to sell, that share. A movement in price which would not influence such an investor would not, for that reason, be material.[39]

(ii) Conducting the materiality test

127. The question of how persons accustomed to deal or likely to deal would have reacted to the information on the day it became available to the listed corporation is, necessarily, a hypothetical one and, as we have said, can only be answered by an assessment of the situation of the company and other relevant circumstances as at that day or, as in the present case, as at the day the disclosure requirement provisions became law.

128. In *HKSAR v Du Jun* the Court of Appeal was faced with a submission

[39] Report of the Insider Dealing Tribunal on *Hong Kong Parkview Group Limited*, dated 5 March 1997, at page 41.

that, in respect of a prosecution for a number of insider dealing offences, the trial judge had relied excessively on common sense when determining if the information would "materially affect the price of the listed securities". Stock VP, in giving the judgment of the Court of Appeal, made some helpful comments on the materiality test and the use of expert evidence to determine if particular information would have the requisite material affect. He said at pages 143 – 144, [107]:

> "There is much to commend the value of the common sense approach in this case because we feel bound to say that on its face the contents of P1 strike us as important information likely to be of interest to the ordinary reasonable investor – not passing interest, but interest of a kind that would, were the information released to the public, be likely to lead to investment such as would effect a material change in the price of the security. With no disrespect whatsoever to Mr White's expertise, the intricacy of his analysis and of the arguments before us tends, in our judgment, to obfuscate what at the end of the day is in truth not so complex; for the issue is not whether an expert analysis would necessarily result in a positive assessment of the news. Rather, the issue is the likely impact upon the ordinary reasonable investor."

129. There are a number of comments in this passage which warrant emphasising. They are:

(i) the assessment of price sensitivity or materiality is, ultimately, an assessment for the Tribunal to make;

(ii) though expert evidence is admissible to this issue the relevance and probative value of that evidence is a matter for the Tribunal; and

(iii) the Tribunal may use its commonsense, just as a jury is directed to do, in assessing the credibility and weight of any evidence and as an aid in the fact finding process.

130. It must be remembered that applying legal standards to human behaviour and types of human activity, whether they be objective or subjective standards, has long been an integral part of our legal system and recognized as peculiarly the responsibility of the jury who, in reaching their conclusions, are expected to use their knowledge of the world and their commonsense. The position is no different when the body applying the legal standard is a tribunal. Here, the Tribunal benefits from having amongst its number persons with particular knowledge and work experience relevant to the legal standard being applied. They are expected to bring that knowledge and work experience, together with their commonsense, into the application of the standard to the persons accustomed to or likely to deal in the securities, amongst whom in the present case is the ordinary reasonable investor wearing the coat of, amongst others, a member of the general investing public, and their assessment of whether the impact on such persons, and the responses that such persons may have, would likely materially affect the price of Mayer's securities.

131. It is precisely because the test is concerned with human behaviour – the impact of certain information on a person and that person's response to it – that models created to show how that behaviour translates into a precise affect on the price of a company's share must be treated with a certain degree of caution. No modelling can take account of the full range of human emotions, reasoning power (or lack thereof), knowledge and analytical skills that go into the decision-making

process. That is why the test has been referred to as an "assessment" by the Tribunal. It is precisely because it is an assessment rather than a formulaic calculation, that mathematics and science will usually be limited to only assisting in the making of that assessment; rarely will they determine the outcome of the assessment.

132. In *Public International Investments Limited*, the Tribunal, chaired by Mr Justice Stock, referred to another way of approaching the assessment. This is to ask the question:

> "If the inside information is placed in the market place along with the information mix about the securities which is already there, then will it materially affect the price?"[40]

The Role of Expert Evidence

133. The role of expert evidence in MMT proceedings is no different from its role in a court of law. It is to be used by the fact finder to assist it in making findings of fact or in reaching conclusions in respect of the issues before it. The expert evidence is not binding on the Tribunal and the Tribunal can choose whether or not to accept it. The Tribunal determines whether it should accept the evidence of the expert by assessing the expertise of the witness, the credibility of the witness, the reasoning underlying the expert's opinions and after having regard to all the other evidence presented to the Tribunal. Even if the Tribunal accepts the evidence of the expert that is not the end of the matter for it will then

[40] *Public International Investment Limited*, 5 August 1995 at 240. See [62] herein of our Report.

be for the Tribunal to decide what weight it should give to the expert's evidence. Of course, in some cases the expert evidence may be of considerable assistance, perhaps even decisive, in determining the outcome but in other cases it may not. The probative value of the expert's evidence in respect of each of the different issues that must be addressed will always be a matter for the Tribunal to determine.

The Standard of Proof in MMT Proceedings

134. Section 307J(2) of the SFO provides:

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

135. This being in the nature of an inquisitorial proceeding there is no burden of proof on the SFC. The SFC, as the presenting party, is only required to present evidence which it believes will assist the Tribunal to determine any question or issue before it, being the questions or issues set out in its Notice, to the civil standard of proof.

136. The "standard of proof applicable to civil proceedings in a court of law" is proof on a preponderance of probability. In *Solicitor (24/7) v Law Society of Hong Kong*[41], Bokhary PJ, with whose judgment the other members of the Court of Final Appeal agreed, explained that the strength of evidence that will be needed to satisfy this standard of proof will vary depending on what it is that is sought to

[41] (2008) 11 HKCFAR 117.

be proved. He said at page 145H, [61]:

> "The strength of the evidence needed to establish such a preponderance depends on the seriousness and therefore inherent improbability of the allegation to be proved."

and at page 167D – E:

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

137. This led Bokhary PJ to discuss the position when "an allegation of grave or even criminal conduct is made in a civil case." In doing so, he accepted the following statement of Lord Nicholls of Birkenhead in *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)*[42]:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. …
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that

[42] [1996] AC 563, 586 D – G.

> the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

138. This approach of Lord Nicholls had previously been adopted by the Court of Final Appeal in *Aktieselskabet Dansk Skibsfinansiering v Brothers & Ors*[43] where Lord Hoffmann NPJ, in giving a judgment with which the other members of the Court agreed, summarised the approach as follows:

> "… the court is not looking for a higher degree of probability. It is only that the more inherently improbable the act in question, the more compelling will be the evidence needed to satisfy the court on a preponderance of probability."[44]

139. The approach the law has taken in this area is relevant to the position of SPs 2 – 11 should the Tribunal be called on to make any finding of fact that involves, explicitly or implicitly, a finding that one or more of the Specified Persons has been complicit in serious misconduct. This is so whether proof of any of the matters is by direct evidence or by the drawing of an inference from circumstantial evidence. For example, allegations of serious, and even criminal, misconduct are implicit in the claim by the plaintiffs in the Capital Wealth litigation for if the HK15.5 million was, truly, money which was lent to Mayer, then the Specified Persons' claim that it is the proceeds from the sale of Advance Century must be untrue and the documents created to substantiate that claim must

[43] (2000) 3 HKCFAR 70.
[44] Ibid, at page 78 F – G.

be false.

140. When allegations of grave impropriety are being levelled against persons of good character then evidence of propensity, or the lack thereof, must also go into the balance. In the Court of Final Appeal case of *Nina Kung v Wang Din Shin*[45] the allegations were that certain persons had been involved in the forgery of a will and a conspiracy to promote a forged will. At pages 560 – 561 at [626]: Lord Scott of Foscote NPJ made the following observations after quoting from Lord Nicholls' judgment in *Re H*:

> "The passage from Lord Nicholls' opinion in *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 that I have cited stresses the need to concentrate on the inherent probability or improbability of the serious allegation being true. In the present case there are two such allegations. The principal allegation is that Mrs Wang procured the forgery of her husband's signature on each of the four 1990 documents. The other allegation is that Mr Tse became a conspirator with Mrs Wang in a conspiracy to utter a forged will. The probability of these allegations being true must be judged on the evidence adduced in the case. But it must also take account of propensity. If such an allegation is made against a person with a record of involvement in forgery or fraud, the strength of the other evidence necessary to satisfy the balance of probability test is obviously less than would otherwise be required. Evidence of propensity must go into the balance. In the present case, however, there is no such evidence to go into the balance either against Mrs Wang or against Mr Tse. Evidence to a very high standard of cogency indeed is necessary before the court can be justified in finding either to be

[45] (2005) 8 HKCFAR 387.

dishonestly involved in a conspiracy to promote a forged will."

141. Consequently, if it is implicit in the inference that the Tribunal draws that one or more of SPs 2 – 11 have engaged in gravely improper or dishonest conduct then the Tribunal must be satisfied that the inference is a compelling one – so compelling as to overcome the inherent improbability that the Specified Persons, as persons, hitherto, of good character, would have been involved in such conduct.

Chapter 5

The Second Disclosure Hearing

Introduction

142. The SFC's case on what it alleges was undisclosed inside information can be divided into two areas. The first area is the resignation of Grant Thornton and the fact that it was likely to issue a qualified audit report had it not resigned. The second area is the reasons expressed by Grant Thornton on why it resigned and the concerns it had about the underlying commercial activities of Mayer in respect of three significant matters. Chapter 6 of this Report sets out the evidence in respect of the first area and Chapter 7 the second area.

143. In the present case the task of applying the test of "likely to materially affect the price of the listed securities" must be done at the date when the statutory requirement in section 307B(1) came into force on 1 January 2013. That requires the Tribunal to have regard to the condition that Mayer was in as at this date and this is discussed in Chapter 13 of this Report.

144. However, understanding the condition of Mayer as at 1 January 2013 can only be done by taking into account all that happened to the company in the years immediately prior to its suspension at the close of trading on 6 January 2012 and from that date to 1 January 2013. The events that occurred in the first period of time provide background to some of the events that occurred in the second period of time. The relevant events occurring in the first period of time are set

out in Chapter 11 of this Report. The relevant events that occurred in the second period of time are set out in Chapter 12 of this Report.

The Post-Suspension Events

145. In respect of the second period of time, there are a number of events that occurred during this period that the parties have agreed should be taken into account. These have been referred to as post-suspension events and the following are those referred to by the Court of Appeal in its judgment:

(1) the litigation against Make Success in respect of the Yield Rise acquisition (i.e. the Vietnam Project) initiated by the filing of a writ on 12 January 2012;

(2) the resignation of Crowe Horwath as Mayer's auditors on 16 February 2012;

(3) the failure to release Mayer's 2011 Annual Report which was due in March 2012;

(4) the litigation against Mayer by persons claiming to have lent it money (i.e. the Capital Wealth litigation);

(5) the litigation against SP2 and SP4 for repayment of loans of more than HK$61 million which was reported in the media in April 2012. The lender was also one of the Capital Wealth companies;

(6) the resignation of the non-executive director Lam Chun Yin in May 2012 because of disagreement with the Board on a number of matters;

(7) the litigation in May 2012 by SP9 against Mayer and the Board for access to Mayer's documents.

But, of course, this list was not intended to be comprehensive and regard must be had to any significant event occurring after 9 January 2012. The most significant events were those which lay behind the battle for the takeover of the company. They were;

(8) the making of a voluntary cash offer by Wang Han at HK$0.12 per share. This was announced on 18 January 2012 by Wang. Wang had obtained 70 million Mayer shares from Make Success which had acquired them as part of the consideration for the sale of Yield Rise. However, Mayer was refusing to register this share transfer to Wang and the transfer was the subject of litigation. Meanwhile, Wang had entered a conditional agreement with Make Success for the purchase of an additional 166,363,636 Mayer shares;

(9) the announcement, and subsequent termination, of a proposed placement of up to 185 million new shares by Mayer at HK$0.11 per share. The purpose of this new share placing was to dilute Wang's shareholding and place shares in the hands of allies of the Mayer Board;

(10) the litigation by Mayer against Make Success in order to prevent it from transferring its Mayer shares to Wang Han; and

(11) the litigation over ownership of the shares in Mayer held by its parent, Taiwan Mayer, through Mayer Corporation Development International Limited.

146. These events were specifically referred to in the evidence of the expert witnesses and represent the major contextual circumstances when applying the

test of materially affecting the price of securities, as at 1 January 2013. However, ultimately the application of this test must be against all the circumstances in which Mayer and its officers found themselves on this date. That requires the test to be applied having regard to not just these post-suspension events, but to all that happened from the date of Mayer's suspension to 1 January 2013. That is why it is crucial to come to a conclusion about the condition that Mayer was in as at this date.

The Evidence Presented to the Tribunal

147. In order to establish the circumstances surrounding the alleged failure to disclose, the parties placed before the Tribunal a detailed Further Revised Statement of Agreed Facts which contained much background material to the two areas of undisclosed information. In addition to this document the Tribunal received the evidence of three witnesses from Grant Thornton who were involved in the audit of Mayer. They were Ms Anthea Han Pu Yu, who testified on 14 May 2022, Mr Calvin Chiu Wing Ning, on 4 June and 4 July 2022, and Mr Daniel Lin Ching Yee on 5 July 2022. All these witnesses were presented by Mr Scott S.C. for the SFC.

148. In respect of the Specified Persons only SP9 chose to give evidence and he testified by video link on 6 July 2022. None of the other Specified Persons testified. However, SPs2, 3, 4, 5, 6, 10 and 11 all participated in records of interview. A summary of those records of interview and of SP9's evidence are set out in Chapter 9.

149. The expert witnesses testified before the Tribunal in January 2022. They were Ms Winnie Pao who testified on behalf of the SFC from 25 January to 28 January and Mr Clive Derek Conway Louis Rigby who testified on behalf of SPs2, 3, 4, 5, 6, 10 and 11 on 28 January 2022. Both these persons filed expert reports with the Tribunal and these reports were adopted by them in the course of their evidence. Their evidence is discussed in Chapter 8 of this report.

150. There was also an expert report prepared by Mr Charles Li and filed with the Tribunal on behalf of SP1 and SP9. However, counsel for these Specified Persons chose not to call Mr Charles Li and the Specified Persons do not rely on his report. The Tribunal treats his report as not being before it and has no regard to its contents.

Chapter 6

The Audit Process

The Engagement of Auditors for Mayer's 2011 Accounts

151. Mayer had to audit its 2011 accounts and for this purpose continued to employ its existing auditors, Crowe Horwath, but they resigned before completing the audit. Their resignation took effect from 16 February 2012 and in their letter of resignation Crowe Horwath gave two reasons for resigning:

(i) not being informed of the details of the litigation Mayer was pursuing against Make Success in respect of the Yield Rise acquisition; and

(ii) not being able to reach a consensus with Mayer on the audit fee.

152. Mayer made an announcement of this resignation on 21 February 2012 and in it quoted what Crowe Horwath had written in its letter of resignation. In respect of the first reason relating to Mayer's investment in Vietnam, the letter referred to the recently instituted litigation against Make Success and said:

> "Disregard[46] various enquiries we made in the past few weeks, we, as the auditors of the Group and the reporting accountants of Yield Rise acquisition, were not informed of the substance of such claims nor provided with any details on such."[47]

[46] It was suggested that when Crowe Horwath wrote "Disregard" it mistyped the word "Despite" but no evidence was received on this. However, notwithstanding the odd use of the word "Disregard" the meaning is quite clear, namely certain requests that Crowe Horworth made for information were not satisfied.

[47] BE1/2/3.

The lack of information which the company's auditors received from Mayer resonates with the difficulties faced by Crowe Horwath's successors, Grant Thornton, throughout 2012. It is also noteworthy that, unlike the way Mayer delayed announcing Grant Thornton's resignation on 27 December 2012, it did not delay in announcing the resignation of Crowe Horwath which was announced five days after it took effect.

153. Grant Thornton was appointed as the new auditors with effect from 29 February 2012 and Mayer announced its appointment on that day. By this time, trading in Mayer's shares had been suspended. In the engagement letter, drafted by Grant Thornton and signed by SP3 on behalf of Mayer, Grant Thornton indicated it anticipated completion of the audit field work in early April 2012.

154. Under this letter of engagement the directors of Mayer were reminded in paragraph 1.1 of the duty they had of assisting the auditors:

> "You are also responsible for making available to us, as and when required, all the Company's books of account and all other relevant records and related information, including minutes of all management and shareholders' meetings."[48]

155. The scope of the audit would include "such tests of transactions and of the existence, ownership and valuation of assets and liabilities as we consider necessary".[49] The clause on "Scope of Audit" at paragraph 2.1 of the letter of engagement concluded with:

> "We shall expect to obtain such appropriate evidence as we consider sufficient to

[48] BE1/3/7.
[49] BE 1/3/8.

enable us to draw reasonable conclusions therefrom."[50]

156. The possibility of resigning from the engagement was adverted to in clause 1.5 which read:

> "However, it is possible that because of unexpected circumstances, we may determine that we cannot render a report or otherwise complete the engagement. If, in our professional judgment, the circumstances require, we may resign from the engagement prior to completion."[51]

157. There was a team of Grant Thornton staff working on the Mayer audit. The team was headed by a senior partner, Daniel Lin, and under him was another partner, Calvin Chiu, and under him was the engagement manager, Anthea Han. All three testified before the Tribunal and their records of interview with the SFC were treated as the basis of their examination in chief.

158. Grant Thornton worked on the audit of the 2011 accounts from 29 February 2012 to its resignation as auditor on 27 December 2012. This is the time line of its relationship with Mayer and locating key occurrences in this relationship within this 2012 time line helps in understanding how that relationship unravelled in the course of 2012.

159. Throughout 2012 Mayer made a number of disclosures to the market of its audit difficulties. On 21 March 2012 it announced to the market that with the appointment of new auditors there would be a delay in issuing the Annual Report

[50] BE 1/3/8.
[51] BE 1/3/8.

of the company. It made a further announcement on 31 August 2012 informing the market that the interim results for the six months ended 30 June 2012 would not be announced by the company before 31 August 2012 and the interim report for those six months not issued before 30 September 2012. It said it would issue a further announcement when the company would be able to announce a date for the release of this report and also the 2011 annual report and this it did on 22 November 2012.

The Audit Process: 29 February 2012 – 21 May 2012

160. As the Grant Thornton audit team worked on the audit of Mayer it encountered a number of areas where it sought further clarification and asked for documentary proof. That, in itself, is not particularly surprising but over the course of its work it became clear that there were three matters in respect of which the audit team continued to have concerns. The team's efforts to resolve these concerns with Mayer over the months following Grant Thornton's appointment can be seen in email communication between them and the officers of Mayer, predominantly SP2.

161. The matters in respect of which they had concerns are referred to in this report as "significant matters" as this was the way Grant Thornton described them in its resignation letter. The three significant matters that concerned Grant Thornton were the Advance Century sale whose "substance" Grant Thornton was querying because the monies allegedly received from it were also the subject of litigation against Mayer for repayment of a loan; the ownership and control of the Vietnamese port and residential development investment; and the trading business

of Elternal and Sinowise where Grant Thornton queried "the existence and commercial substance of prepayment to suppliers".[52]

162. In an email dated 12 April 2012 Anthea Han attached a document she called "key audit findings" for discussion at a meeting to be held on 16 April 2012. This document contained columns which identified a particular item, summarised the "key finding/potential issue", flagged follow-up questions and provided for Mayer's management response. In this document the three significant matters were all mentioned.

163. After the meeting on 16 April 2012, this key audit findings document was updated by Grant Thornton to take into account the information provided by Mayer at the meeting, and sent by Anthea Han by email to SP2 on 17 April 2012. Under "Management responses" this document recorded Mayer's claim in respect of Advance Century that the HK$15.5 million was consideration for the sale of this company; Mayer's claim that it had problems with the suppliers to Elternal and Sinowise; and Mayer's lack of control in respect of the Vietnam investment, including lack of knowledge on the sale of land in the Phoenix project.

164. In this email of 17 April Anthea Han confirmed the need for the auditors to have a meeting with the management of Mayer and with members of the Audit Committee. In her SFC record of interview she explained at counter 217 why this request was being made:

> "… As we as the *auditors* found that the *management* er - - may not be able to

[52] The quoted words come from the resignation letter of Grant Thornton which is quoted in full at [198] of this Report.

resolve (the matter) even after we had gone *through* those *findings* with it, then we believed that we had, er - - it was necessary (for us) to further discuss (the matter) with the *management* (people) of the *upper level*, and it was necessary to *report* to the *au - - audit* '*committees*' (committee) on the *key findings* we now - - that means obtained *up to* that *moment*."[53]

165. This request for a meeting was an important development in the audit process as it clearly reflected a degree of frustration that Grant Thornton was experiencing over its inability to progress the audit. In his record of interview Calvin Chiu explained how they were hoping the Audit Committee, and especially the independent non-executive directors, could provide meaningful assistance in resolving the concerns that Grant Thornton had. He said:

"490. C. … I recall that, at that time we completed a stage of auditing and found those big issues and ah - - *Daniel* and I and *Jeffrey* came together and said, er, the issues were quite cute, I mean quite special and er the *directors* themselves could not explain clearly. Then, we said - - (we) found and decided that (we) needed to er ex(plain) - - explain it to the er *audit committee* and see the *audit committee* - - I mean we hoped that the independent directors, er, they - - to these things in the business - - previously, mm …

491. D: …[indistinct]

492. C: … - - we believe that they would know about these - - these - - these - - these transactions of the - - the company, and we hoped to know their views as they - - they were the in(dependent) - - independent

[53] BWE D/11/3107.

directors [B: Hm.] and members of the *audit committee*. Then, er - - because after all we knew that we would need to - - to *report* something to the *audit committee* in - - in the future (and) therefore [B: Hm.] er - - at that time (we) also hoped to bring the issues er to the *audit committee* for - - for discussion and er exchange of views."[54]

166. This meeting, which SP11 attended, took place on 24 April 2012 but, as subsequent events show, it did not resolve Grant Thornton's concerns. Calvin Chiu said of it:

"593. C: Ah, (I make a) claim. Actually we hoped *AC* would give us their [D: … [indistinct]] independent views. Well, (we were) quite disappointed (because) during the meeting they were - - I mean talked about their previous - - no - - (they were) ambiguous and failed to really answer the questions. Then - - [D: …[indistinct]] er, I - - I remember *Alvin Chiu* also could not - - at that time could not - - not give us any special - - additional explanations or tell us his views.

…

600. C: …well, actually - - actually no - - I mean the *audit committee*, as I just said, [D:… [indistinct]] (they) just listened and did nothing, er, and didn't very anxiously say, "ah *auditor*, listen, you must, er, er, help us watch out for this (and) be cautious of something". He (sic) (They) didn't express any opinions. Well, the meeting [D: Hm.] finished very routinely, and then - - er, er, we felt very disappointed. Then, we continued to - - to follow up on the issues with the management,

[54] BWE E/13/3533 – 3534.

uh, and did not follow up with the *audit committee*. Well, as for our questions, we also think the explanations given by - - ah - - ah - - ah - - ah - - ah *Tommy* were not quite …

601. D: … [indistinct]

602. C: … explained (to us) at - - the standard that we were satisfied with, [B: Hm.] then, so we continued to - - to - - to talk with them, that was it."[55]

167. A number of matters stand out in respect of this meeting. Firstly, the fact that the auditors considered it necessary to meet with the Audit Committee, and to seek the assistance of the independent directors on it, reflects the depth of their concerns about the unresolved matters and the extent of their inability, to date, to obtain from management the information they needed in order to resolve these matters. Secondly, and crucially, this meeting failed to provide the auditors with the assistance they needed. Thirdly, the date of the meeting within the 2012 period and its location within the time line of Grant Thornton's relationship with Mayer is noteworthy.

168. It will be recalled that Grant Thornton commenced its engagement as Mayer's auditors on 29 February 2012, anticipating at that time that field work for the audit would be completed by early April 2012. Yet, two months later, the field work was nowhere near completion and the audit staff were becoming so concerned with the lack of cooperation they were receiving from the management of Mayer that they felt the need to approach Mayer's Audit Committee. Elevating their concern to Audit Committee level is a clear indication of the

[55] BWE E/13/3541 – 3542.

impatience and frustration the audit staff were feeling. In these circumstances, not receiving from the Audit Committee and the independent directors the assistance they required must have been both disappointing and very troubling to the auditors.

169. The meeting with the Audit Committee having failed, cracks started to appear in the relationship between Mayer and its auditors. There seemed to be a total failure by everyone at Mayer to appreciate the strength of Grant Thornton's concerns about the unresolved matters and a certain amount of indifference towards addressing them.

The Audit Process: 22 May 2012 – 22 August 2012

170. The next significant event in the course of the audit is the sending of an email by Anthea Han to SP2 on 22 May 2012. This email attached an updated key findings document which was referred to in the email as containing "significant matters identified up to date".[56] Also attached was a letter addressed to both the "Audit Committee of The Board of Directors" and "The Board of Directors of Mayer", for the attention of SP2 and SP3. The letter drew the attention of the addressees to the significant matters which it identified by item numbers. Amongst the significant matters were the sale of Advance Century, the supply agreements of Elternal and Sinowise and the Vietnam investment. The letter contained the following:

> "We would like to request the Board of Directors to address and respond the significant matters … and to provide relevant information and supporting

[56] BE 1/12/59.

documents accordingly."[57]

171. When asked in her record of interview why Grant Thornton sent this letter, Anthea Han answered at counter 233:

> "… It was because the letter (was sent in) M(ay) - - the *e-mail* was sent on 22 May, it seemed that it was already one month after the er - - the last *meeting*. Now I - - I mean I cannot quite remember now, but I - - I believe that there was not much progress - - not much *progress* with our *audit* (work) during (the month), and that's why we believed it was necessary to *send* a letter to the *management* and to ask the *management* to *respond*."[58]

172. Calvin Chiu in his record of interview answered the same question, saying:

> "619. C: ... Well, because at that time, as I just said, er, after (the meeting with) the *audit committee*, (we) were very disappointed. Then, er afterwards we got, er, a bit er impatient because - - afterwards the company did not follow up. Then, we *formalized* the …"
>
> 620. D: … [indistinct]
>
> 621. ... - - I mean formal - - er, …
>
> 622. D: *Summary*.
>
> 623. C: … (as for the) *key findings* (we) formally iss(ued) - - issued a letter to the company, er, as an official record to request them to - - to explain

[57] BE 1/12/60.
[58] BWE D/11/3108.

in detail - - I mean to explain the issues of each matter to us."[59]

173. Daniel Lin, the partner in charge of the audit who would be responsible for signing the audit opinion, explained in his record of interview how he was getting anxious at the lateness of Mayer in publishing its annual results and said that the letter to the Audit Committee was written in the hope that by identifying the issues that needed to be resolved:

> "… the *audit committee* sometimes could help us to I mean - - I mean to *check and balance* and to force the company's *director* to - - I mean (to force) the *executive director* to give us more information, or to resolve the issues as soon as possible."[60]

174. There are a number of features about this letter that clearly indicate a growing level of frustration and impatience being felt by the auditors. Firstly, this letter was addressed to both the Audit Committee and the Board of Directors as well as being sent to SP2. Secondly, in the letter the auditors described the matters as significant. Thirdly, even though the language employed in the letter is of a request being made for information and documents, the tone of the letter is very serious and is more in the nature of a demand. All of these features indicate that this action by the auditors was clearly not just a further attempt by them to communicate their concerns; rather, they were expressing to Mayer a very real anxiety at the lack of cooperation they were receiving in resolving what they perceived were matters that were important to their audit.

175. Again, Grant Thornton failed to achieve anything from sending this

[59] BWE E/13/3543.
[60] BWE D/12/3291 at counter 151.

email and letter. Daniel Lin said of the Audit Committee that it was "not particularly helpful".[61] Calvin Chiu said that as far as he could remember there was no feedback from the Board of Directors and the Audit Committee.

176. By now, it was difficult to attribute the reaction of Mayer to indifference, incompetence or neglect and seemed to the auditors that Mayer may be seeking to conceal the truth from them. Calvin Chiu said of the responses that SP2 sent to Grant Thornton:

> "637. C: … Their answers were irrelevant to the questions (and they) did not tell the truth."[62]

177. The 22 May 2012 email from Anthea Han to SP2 is important for two reasons. Firstly, because it was the second attempt by the auditors to have their concerns addressed by the Audit Committee and the Board of Directors. Secondly, because it occurred at a date which is only mid-way within the time line of Mayer's relationship with its auditors, well before Grant Thornton's 27 December 2012 resignation. All this time Mayer remained suspended from trading and everyone knew that it would remain suspended until the audit was completed. This makes Mayer's management's lack of urgency in responding to their auditors' request quite incomprehensible.

178. The auditors at Grant Thornton were now increasingly frustrated by the lack of progress in the audit and increasingly desperate to obtain assistance and cooperation from Mayer in resolving their concerns. The lack of progress

[61] BWE D/12/3291 at counter 153.
[62] BWE E/13/3545.

prompted Calvin Chiu to email SP2 on 8 June 2012 as follows:

> "Dear Tommy,
>
> Further to Anthea's e-mail and our letter to the Board dated 22 May 2012, we did not receive any response from the directors on the issues we mentioned in the attachment.
>
> I would like to follow up with you about the status of the response. Please note that the information to be provided from the directors will be critical for our finalization of the audit on the various transactions.
>
> …
>
> Could you please kindly follow up the matters."[63]

179. In response to this plea there were emails from Mayer to Grant Thornton on 4 July 2012, 9 August 2012 and 15 August 2012. A meeting with Mayer was held on 13 August 2012 but this appears to be the last meeting that was held and thereafter all communication was by telephone.

The Audit Process: 23 August 2012 – Mid-November 2012

180. The lack of progress in resolving the concerns the audit team harboured in respect of the significant matters is apparent from the emails and the letter to the Audit Committee. Then came the email from Anthea Han to SP2 dated 23 August 2012. In this email there is a reference to an attached "action plan on the key audit matters with potential modifications in the audit report for further

[63] BE/1/13/74.

discussion". The attachment is described at the head of the email as "potential qualifications to the audit report", although Anthea Han did say in her evidence to the Tribunal that she believed there may have been occasions prior to 23 August 2012 when the possibility of a qualified audit report was raised with Mayer.

181. In respect of each of the three significant matters, Grant Thornton indicated it would have to record a "Limitation of Scope" or a "Disclaimer". A limitation of scope is an indication by the auditor that, for the reasons set out, the auditor cannot reach a conclusive view in respect of a certain matter. The limitation of scope will be the consequence of the auditor not having sufficient proof, information or explanation of a particular matter. A disclaimer is more serious and is, itself, a qualified opinion. It occurs when the issue is so significant that the auditor simply cannot express an opinion on the matter.[64] In respect of each of the significant matters, the prospective qualifications to their auditor's opinion were as follows:

> For Advance Century: "Limitation of scope – we are unable to obtain appropriate and sufficient audit evidences that the settlement of the disposal of Advance Century Development Limited by Golden Tex Limited and we are unable to obtain appropriate and sufficient audit evidences in respect of substances of the fund transfers from Capital Wealth. We are therefore unable to satisfy ourselves that the proceeds from the disposal of Advance Century Development

[64] Transcript, day 6, page 19, lines 12 – 18.

Limited has been received."[65]

For Elternal: "Limitation of scope – we are unable to obtain appropriate and sufficient audit evidence in respect of economic substance of deposits of US$10 million paid by Elternal Galaxy Limited as at 31 December 2011. In addition, we are unable to obtain appropriate and sufficient audit evidence in respect of certain sales transactions of Elternal Galaxy as we are unable to obtain shipping documents of the customers. We are unable to obtain appropriate and sufficient audit evidence in respect of the settlement of the trade receivables of the customers of Elternal Galaxy Limited for the year ended 31 December 2011. As a result, we are unable to satisfy ourselves that the interests in jointly controlled entities of RMB37.7 million and the share of profit/loss of the jointly controlled entities for the year then ended are fairly stated.

Any adjustments to the amount would affect the net assets as at 31 December 2011 and the loss for the year ended 31 December 2011."[66]

For Sinowise: "Limitation of scope – we are unable to obtain

[65] BE 1/19/100.
[66] BE 1/19/101.

appropriate and sufficient audit evidence in respect of the recoverability of the prepayment made of around US$6.6 million. As a result, we are unable to satisfy ourselves that the interest in jointly controlled entities of RMB22 million and the share of profit/loss of the jointly controlled entities for the year then ended are fairly stated.

Any adjustments to the amount would affect the net assets as at 31 December 2011 and the loss for the year ended 31 December 2011."[67]

For Yield Rise: "Disclaimer – the Company is unable to obtain the financial information of Yield Rise Limited and its subsidiaries as at 31 December 2011, and therefore we are unable to obtain appropriate and sufficient audit evidence to verify as to whether the Company has control over Yield Rise Limited for the year ended 31 December 2011. Hence, Yield Rise Limited and its subsidiaries have not been consolidated to the Group's consolidated financial statements. As a result, we are unable to obtain appropriate and sufficient evidence in respect of the investments in Yield

[67] BE 1/19/101.

Rise Limited of approximately HK$620 million as at 31 December 2011.

Any adjustments to these amounts would affect the net assets as at 31 December 2011 and the loss for the year ended 31 December 2011."[68]

182. At counter 305 in her record of interview, Anthea Han said that when Grant Thornton alerted Mayer to the possibility of a qualified report, SP2 "hardly had any responses".[69] In his record of interview Calvin Chiu was asked if there was any feedback in response to the proposed qualifications. He answered:

> "1140. C: Ah, cl(aim) - - ah, (I make a) claim. There was no *feedback*. I mean - - I mean again - - it seemed that the management didn't - - didn't - - didn't quite care. I mean - - I mean I - - our *message* was almost like, "hey, well, going forward, er, *at the end*, you will have such a *qualified report*." Er, if - - I mean I think that a normal management ought to immediately respond by saying, "hey, *auditor*, what's the matter now? Er, so, so, so, it's not like that. I have some further information to provide." Well, (but) they didn't respond, uh."[70]

183. Thus, to date, there had been a meeting with the Audit Committee on 24 April 2012 and a strongly worded email and letter to the Audit Committee and Board of Directors on 22 May 2012 and neither had produced a meaningful response from Mayer. Now, three months later, Grant Thornton was formally

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[68] BE 1/19/101.
[69] BWE D/11/3116.
[70] BWE E/13/3589 – 3590.

placing on record the possibility of having to issue a qualified audit opinion. Extraordinarily, this did not provoke any particular response from Mayer and, even more extraordinary, did not prompt an urgent effort by its management to address their auditor's concerns.

184. There was also growing concern within Grant Thornton at the delay in completing the audit. Their original estimate of two months to complete the field work had long passed and progress on the audit had, effectively, come to a halt. This Grant Thornton attributed to the failure by Mayer's management in providing them with answers to all the issues that were left unresolved.

185. On 18 September 2012 Daniel Lin and Anthea Han had a meeting with Lam Chin Chun, the CEO of Capital Wealth. This person provided the two Grant Thornton representatives with a lot of background information on, and details of, his case in respect of the loans of HK$15.5 million and, as we note in Chapter 7, this meeting would only have increased Grant Thornton's anxiety to resolve this significant matter.

186. On 8 October 2012 Anthea Han sent SP2 an updated "outstanding matters list" and on 12 October 2012 SP2 replied to that email leaving many of the outstanding enquiries to be resolved on revisits to Mayer. Thereafter, there appears to have been little communication, if any at all, between Grant Thornton and Mayer. Anthea Han testified that she could not say that any revisit took place and so, as a result, she regarded the outstanding issues as still unresolved. It was also Calvin Chiu's recollection that no revisits took place after 12 October 2012.

187. Clearly, by this stage the relationship between Mayer and its auditors had broken down. The trust that is necessary for such a relationship had evaporated. Mayer could not have been unaware that there had been no progress on the audit. The audit was crucial to Mayer ending its suspension yet there was no attempt by the management of Mayer to progress the audit. Where one would expect to see urgency, there appeared to be only indifference.

The Audit Process: Mid-November 2012 – 26 December 2012

188. Around Mid-November 2012 the lack of progress in completing the audit, together with the approaching new year, a peak season for auditing, prompted Grant Thornton to consider resigning the audit of Mayer.

189. In his record of interview Calvin Chiu explained how it was that Grant Thornton came to this point. He said:

> "333. C: … I think, (it should be) around mid-November - - when the idea first came up … Then up to mid-November, we had been - - had been chasing them (for the information) and then in mid-November - - the client er was still unable to make the arrangement. Uh, then we started to feel that, well, in the - - because er we had manpower issue, (and) we …
>
> 334. D: … [indistinct]
>
> 335. C: … - - at that time we were arranging our er manpower for the peak season in early 2013 … Then, so at that time we started to feel *f-frustration* (sic) (frustrated), then (we) started to think about, er, to discuss whether it was necessary to, er, er, er - - I mean we could hardly

continue with our work, (we were) unable to do our work (and) unable to continue to help the client. Then, at that time the idea of, er, resigning started to simmer, uh.[71]

And, later in his interview, he said:

"1154. C: … I mean, when the situation remained and the client kept delaying, then it would only increase our cost if we did other work (for them) and, er, er, an end could not be put on the matter, uh. [B: Hm.] Well, therefore - - we didn't know what was going on inside the company given their - - their such attitude. I mean, in the meantime, in September, October and November, there was no - - no response to the matters we discussed in the meetings. Well, so we decided, ah, not to - - not to - - to call it quits. I mean it was a - - a - - a waste of our energy to continue working for this client, [B: Hm.] uh, and - - and [B: Hm.] they - - they were too irresponsive (and) then we could hardly continue working for them, uh."[72]

190. This was the context on 22 November 2012 when Mayer made its final announcement to the market about the position of the audit. In this announcement Mayer informed the market of the following:

"The Company is in the course of handling various matters of price-sensitive in nature, mainly including finalising the audited annual results of the Company for the year ended 31 December 2011 (the "**Annual Results**") and the interim results of the Company for the six months ended 30 June 2012 (the "**Interim Results**").

[71] BWE E/13/3516 – 3517.
[72] BWE E/13/3592.

The Company is currently focusing on the Annual Results. The Company has collated and finalised most of the information required. The outstanding material issues involved in preparing the Annual Results are set out as follows:

1. To finalise the on-site inventory rollback procedures at the Company's plants located in Guangzhou, the People's Republic of China;

2. To finalise auditing work for the Company's port and logistic business in Vietnam and to clarify the accounting treatment with respect to Dan Tien Port Development Joint Venture Company Limited; and

3. To clarify and ascertain status and information relating to certain legal proceedings involving the Company and to analyse the contingent liabilities of the Company (if any).

The Company anticipates that the Annual Results will be completed and published within 3 months from the date of the announcement. Upon completion and publication of the Annual Results, the Company will immediately commence preparation of the Interim Results."[73]

191. There are a number of interesting features to this announcement. Firstly, it clearly implies that some of the matters associated with the audit are price sensitive in nature, mainly the audit of the company. Secondly, it confirms that as at 22 November 2012 there are still "outstanding *material* issues" relating to the preparation of the 2011 Annual Results. (Emphasis added.) It says that those material issues are, inter alia, the Vietnam investment and how it should be treated in accounting terms, and other litigation which it does not identify but

[73] BE 1/18/28 – 29.

which, on the assumption it is separate from the Vietnam investment and is associated in some way with "the contingent liabilities" of Mayer, can only be the Advance Century/Capital Wealth litigation. The announcement clearly implied that it is because these matters remain outstanding that the audit of the company and the issue of the Annual Results cannot be completed. Thirdly, given the history of Mayer's management's relationship with Grant Thornton, the statement in the announcement that the company "anticipates that the Annual Results will be completed and published within 3 months from the date of the announcement" was completely without foundation. At best, it was absurd wishful thinking; at worst, it was a dishonest statement intended to deceive the market.

192. By 22 November 2012 the company's relationship with Grant Thornton was severely damaged and nothing had been done by Mayer in the months after the 23 August 2012 email to repair that relationship and address the auditors' requirements. As we have said, the Mayer management could not have been unaware that there had been no progress with the audit. The history of the company's relationship with its auditors over the time line gives the lie to the way Mayer's management reacted on receipt of the letter of resignation.

193. The inability of Grant Thornton to get the information it required in order to satisfactorily resolve the three significant matters led the firm to resign its engagement. In her record of interview Anthea Han was asked why Grant Thornton decided to resign. She gave the following explanation:

> "386. A: Um, do you know why such a decision was made?
>
> 387. C: I (make a) claim. I believe - - I mean looking back at the whole *audit* (process), I find that from March *up to* December and then the time

when we *identify* (sic) (identified) the *issues*, actually none - - I mean the *client* did not make much *effort* to *resolve* (the issues), [A: Um.] well, therefore, I mean, after taking several (factors) into consideration, we finally *make* (sic) (made) the *decision* to *resign* in December.

388. A: Um, you said that er the *client* did not make much *effort*. What do you mean?

389. C: Er, I (make a) claim. I mean, I mean we started to *communicate* with the *client* on our *findings* in April, and I mean the progress was not good all along up to May, June and July. [A: Um.] Well, they did verbally give (us) some (information) but failed to give (us) er any *supporting documents*. Then, up to, actually I mean, er, October, for the *outstanding matters* which (we) have just mentioned, well, it said (they) had (information) for some (of the items) but not some others. Then, the reason for our - - I am not sure whether we made a *revisit*, (but we) felt that - - if (we) revisited the *company* simply for the reason of those two *documents*, it was not something *efficient* for the *audit*. Well, therefore, (we) believed that the *client* should actually '*make it ready*' (sic) (make everything ready) before our audit as the audit could be *more efficient* then. However, this was not what actually happened. It only said that (we) could go and have access to part of (the information) but not others. Well, (we) were not even sure whether (we) would certainly (have access to the relevant information) if (we) did go there."[74]

[74] BWE D/11/3126 – 3127.

194. It is clear that Grant Thornton had lost confidence in Mayer's management's ability and/or willingness, to fulfil their obligations under the letter of engagement as set out at [154] and [155] of this report. Anthea Han actually said in her Record of Interview that Mayer "did not put effort to, I mean provide us with these er supporting documents."[75] Daniel Lin said in respect of the October – December period:

> "… in fact one to two months before we *resigned*, that is - - they were very "quiet", that is suddenly it seemed there was no -- no response whatsoever."[76]

Daniel Lin later qualified this answer explaining there was still some contact but nothing that helped to resolve the outstanding issues. He said:

> "There must be some contacts (between us), … but at least was there anything concrete or was there anything which - - which would be helpful for our resolving the issues, in fact these were few and far between. Well, and also that is - - that is - - that is relatively few - - relatively few (things that were helpful), uh. Then, that's why we felt that we could not do what we had to do."[77]

195. In his record of interview, Calvin Chiu said the first occasion he told SP2 that Grant Thornton would resign as auditors was around mid-December 2012. He said:

> "337. C: … Well, at that time I verbally - - er, talked with ah *Tommy*, uh. It was around mid-December, uh. I *indicated* [B: Hm.] to him that, "Hey, ah - - ah - - ah" - - I - - I mean I *called Tommy* and said, "Hey,

[75] BWE D/11/3128 at counter 391.
[76] BWE D/12/3312 at counter 237.
[77] BWE D/12/3314 at counter 253.

hey, er, your side has been delaying too much, er, sorry as we will be *full* very soon - - (in) the peak season. Well, we don't know when you will complete your stuff. Er, and I mean we are not quite satisfied that, er, you - - always ignored - - ignored the questions we asked you. It doesn't - - doesn't - - doesn't - - doesn't - - doesn't - - doesn't - - doesn't really work that way, uh." Then - - then, so (I) said, "Er, we, er, have no alternative but to, we want - - we want to make the decision - - er, er, to er resign", that was it. Well - - as a matter of courtesy, I told him in advance, uh."[78]

196. In his testimony to the Tribunal, he said:

"CHAIRMAN: In that conversation was it that you would be resigning or that you might be resigning?

A. I did tell him clearly that we would resign.

…

MEMBER YAU: So the exchange between yourself and Tommy, was it purely based on the excuse that Grant Thornton is busy? Or was there any communication around the difficulties in coming to an agreement on the audit?

So what was the perception of Tommy? Was he under the perception that Grant Thornton was just busy, they did not have time to take up the account, or there was some issues around agreeing to the overall account of the company?

[78] BWE E/13/3517.

INTERPRETER: I had to clarify a few things.

A. Well, we did say that -- I did say that in the -- in the conversation that it was really difficult to work with them, and I did mention -- the thing about the information coming in.

MEMBER YAU: No, I think -- excuse me, I think the interpreter -- the version that I got was it was under the witness's personal impression, but he never communicated the impression to Tommy directly; all he communicated to Tommy directly was that Grant Thornton is busy.

Was that your interpretation of the Chinese version?

A. In the conversation, I did say that we were busy -- that's the main thing that I told him in that conversation. I did touch on lightly about the matters that have to do with how they provide the information.

CHAIRMAN: Did you identify the three matters to which you referred in your letter of 27 December?

A. Not in that conversation. But in previous emails with their company, there were repeated exchanges about how these problems existed and I am sure that over that process they were aware of those problems."[79]

197. Calvin Chiu went on to explain that Grant Thornton took more than a week drafting the resignation letter.

[79] Transcript, day 7, page 21, line 20 – page 23, line 20.

Grant Thornton's Resignation as Auditors of Mayer: 26 – 27 December 2012

198. The resignation letter was signed by Daniel Lin on 27 December 2012 and emailed to Mayer the same day. SP2 received the Grant Thornton resignation letter as an attachment to an email from a Grant Thornton staff. In that letter, which was addressed to "The Audit Committee and The Board of Directors", Grant Thornton wrote:

> "Dear Sirs,
>
> **Mayer Holdings Limited (the "Company")**
>
> We hereby give you formal notice of our resignation as auditors of the Company with immediate effect.
>
> Pursuant to the Code of Ethics of Professional Accountants Section 441 "Change of Auditors of a Listed Issuer of The Stock Exchange of Hong Kong" issued by the Hong Kong Institute of Certified Public Accountants, we set out below the circumstances leading to our cessation as the Company's auditors that in our opinion affected the auditor-client relationship between the Company and ourselves.
>
> During the course of the audit for the financial statements for the year ended 31 December 2011, we have identified and reported certain significant matters to the Management, the Board of Directors and the Audit Committee including the substance of disposal of an available-for-sale financial asset, ownership and control of the Vietnam project, and the existence and commercial substance of prepayment to suppliers by the Company's jointly controlled entities; we have requested the Management to address, respond to and resolve these matters as soon as possible. However, despite our continuing efforts to take the audit forward and resolve these significant matters, the Management is unable to provide information we requested

and update us in respect of the developments of these matters on a timely basis.

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

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

We take this opportunity to remind you that Rule 13.51(4) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("SEHK") issued by the SEHK, amongst other things, requires the Company to inform the SEHK immediately of any decision made, and to publish an announcement as soon as practicable, in regard to any change in auditors, the reason(s) for the change and any other matters that need to be brought to the attention of the holders of securities of the Company.

Yours sincerely"[80]

199. A number of things are apparent from the contents of this letter. First, the letter was "formal notice" in contradistinction to the earlier verbal notice given by Calvin Chiu. Secondly, it was to take immediate effect. There is no suggestion of any flexibility in the time of its operation. Thirdly, the company is reminded of its obligation under Rule 13.51(4) of the Stock Exchange Rules to publish an announcement, as soon as practicable of "any change in auditors, the reason(s) for the change and any other matters that need to be brought to the

[80] BE 1/21/115 – 116.

attention of the holders of securities of the Company". The contents of paragraphs three and four of the resignation letter would be encompassed by the obligation to publish an announcement revealing the "reasons for the change and any other matters".

200. The obligation in the Stock Exchange Rules matches similar obligations in the then Companies Ordinance and in section 441 of the Code of Ethics of Professional Accountants. These are all discussed in Chapter 14 of this Report.

201. When what is stated in the third and fourth paragraphs of the letter are read with the fifth paragraph it becomes clear that the auditors considered that the matters in those paragraphs, particularly the third paragraph, were circumstances connected with Grant Thornton's resignation which it had to reveal in order to comply with its legal and ethical duties.

202. What lay behind the reference to "professional risk" in the fourth paragraph of the letter was explained by Anthea Han in her Record of Interview and her evidence on this reference is particularly relevant to understanding why the management of Mayer delayed in announcing the resignation:

> "416. A: … Er, can (you) tell (us) er what the *professional risks* er '*associate*' (sic) (associated) *with the audit* refer to?
>
> 417. C: It's because, er - - I (make a) claim. It's because in course of our *audit*, (we) found that the *client* actually did not have a good understanding of the *rule* - - *li* - - *Listing Rules*, well, in view of, I mean, that situation, well, we, with the- - I mean (we) found that (we) may face higher *professional risk* if we continued with the *audit*. [A:

Um.] That means, the situation had become different from the *client acceptance* (procedures), (I mean) the *assessment* we did earlier for accepting this client.

418. A: Um, how different was it? Can you briefly talk about that?

419. C: It's because - - er, I (make a) claim. It's because in the course of (our) *audit*, we found that some of the *directors* may have *litigation* but it (the company) had not er issued *announcements* to inform its *shareholders* of that. Well, that means, in this may, maybe - - in view of (that situation), it seemed that the (company's) *management* was not very clear about the relevant *rules*, that's it.

420. A: Um, do (you) have anything to add regarding the (") *professional risk* '*associate*' (sic) (associated) *with*("), this (issue)?

421. C: Well, I - - I (make a) claim. Well, I mean, as (I) have just said, (we) found that from time to time, actually it casually, (I mean) it omitted to provide some *information* which '*supposingly*' (sic) (supposedly) had to be provided to the *auditors*. Well, that would h - - have an impact of our '*work through*' (sic) (workflow)."[81]

In a nutshell, there was concern that should Mayer conceal significant matters from the auditors, there could be adverse consequences to Grant Thornton.

203. Calvin Chiu, in his record of interview, explained what lay behind the reference to "professional risk". He said:

"1181. C: Well - - well, after all, we were worried that the client hadn't - -

[81] BWE D/11/3131 – 3132.

[D:…[indistinct]] hadn't dis(closed) - - some - - [D:… [indistinct]] hadn't - - hadn't er explicitly explained to us some problems that existed, uh. [B: Hm.] Therefore - - if I - - in case they didn't explain clearly, then for us - - er, even we *qualify* (sic) (qualified) (the account), what we *qualify* (sic) (qualified) might be wrongly *qualify* (sic) (qualified). Uh, well, so, er, er, er, [D:… [indistinct]] this was a professional risk that we as the auditor needed to bear when doing - - doing - - helping (our clients) do, issue - - issue a report, uh.

1182. B: Mm. You mean you could not obtain what you wanted from the management, [C: Uh, uh.] then (you were) worried that what you er had - - had in hand was not complete, is that what you mean?

1183. C: Ah, cl(aim) - - ah, (I make a) claim. Yes, correct. Since through our numerous communications, I mean the e-mails or the several - - er, two - - one meeting with - - ah, with ah Mr LAI and the independent directors, [D: Hm.] we could not obtain from them - - explanations for the issues which we found clear enough at that time, then we were sort of worried that the manage(ment) - - er, the management concealed something, uh. I mean (it seemed that) they concealed a lot - - lot of things in the tran(saction) - - er, transactions or (other) matters. Well, in case there were a lot of things concealed, we would bear a considerable risk too."[82]

204. In his testimony Calvin Chiu was asked about Mayer concealing information from the auditors:

"CHAIRMAN: When you say that you were unable to quantify certain matters,

[82] BWE E/13/3594 – 3595.

and by that you meant because issues relating to those matters were hidden, what do you mean by "hidden"? Do you mean deliberately concealed from you or simply unable for you to find out?

A. We felt that the explanations or information Mayer provided was not sufficient. In particular, their explanations about some of their business operations and their transactions were -- to us they were not -- we couldn't completely believe what they were telling us. And because of that, we were not confident that we could actually understand what is really going on with them.

CHAIRMAN: In respect of any matter, were you ever concerned that you might be being lied to?

A. I felt that they did."[83]

Post-Resignation Events: 28 December 2012 – 21 January 2013

205. The third and fourth paragraphs of the letter of resignation were quoted, and the fifth paragraph paraphrased, in the announcement that Mayer made to the market on 23 January 2013. By this time almost four-weeks had elapsed since the receipt of the Grant Thornton resignation letter. The Further Revised Statement of Agreed Facts details only some of what happened in this period:

"12. From 27th December 2012 to 14th January 2013, Chan (SP2) had telephone conversations with SEHK's representative Tracy Lee. On 15th January 2013, SEHK sent a fax to Mayer for Chan (SP2)'s attention, stating *inter alia* that

[83] Transcript, day 6, page 10, line 14 – page 12, line 2.

on 27th December 2012, Mayer had informed SEHK that Mayer's current auditors (i.e. Grant Thornton) have tendered their resignation.

13. On 28th December 2012, Chan (SP2) verbally informed Lai (SP4) of the receipt and contents of the Resignation Letter.

14. On 15th January 2013, SEHK sent a fax to Mayer for Chan (SP2)'s attention, raising three matters for Mayer to address. One of the matters related to the Resignation, in which the SEHK reminded Mayer of its obligation under the Listing Rules to, as soon as practicable, announce the Resignation and state clearly the reasons for the Resignation as set out in the Resignation Letter.

15. On 16th January 2013, Chiu and Chan (SP2) exchanged several emails over a 33-minute time frame. In the first email, Chiu stated that "*further to our resignation letter dated 27 December 2012, we note that the Company has not yet make* (sic) *announcement about the change in auditors*" and reminded Mayer (SP1) again to issue an announcement concerning "*any change in auditors, the reason(s) for the change and any other matters that need to be brought to the attention of the holders of securities of Mayer (SP1)*", pursuant to the Listing Rules as soon as practicable, to which Chan (SP2) replied that "*it is our understanding that you will give us more time to look for a new auditors as replacement. Until then, we will publish an announcement as soon as practicable*." Chiu then replied in a further email stating that "*to clarify, our resignation letter dated 27th December 2012 is effective*"

16. On 18th January 2013, Chan (SP2) sent an email to Hsiao (SP3), Lai (SP4), Huang (SP5), Chiang (SP6), Lu (SP7), Xue (SP8), Li (SP9) Lin (SP10) and Alvin Chiu (SP11) enclosing *inter alia* SEHK's fax of 15th January 2013 which represented the first time any information/notice of Grant Thornton's

resignation was sent/passed in writing to the directors of Mayer."

206. However, as is readily apparent, the Further Revised Statement of Agreed Facts is silent on the contact that took place between the staff of Grant Thornton and the management of Mayer between 27 December 2012 and 16 January 2013. In his record of interview Daniel Lin said that he was on leave from the time he issued the letter until early January 2013. On some day after his return, but before 16 January 2013, he said SP2 called him and asked him not to resign or, if that was not possible, to delay the implementation of the resignation until SP2 had arranged replacement auditors. Daniel Lin was quite adamant that he refused both requests, maintaining very positively that neither was possible because the resignation was a fact that had already occurred; in effect, what was done, could not be undone. Interestingly, SP2 asked Daniel Lin if he could try "not to write so much" in the resignation letter but in his record of interview Lin stated that he refused this request, saying:

> "I said no way, the letter had been issued. Once (it was) issued, it was issued, that was it, uh"[84]

207. Calvin Chiu said that SP2 made the same requests of him in a telephone call that SP2 made to him around a few days of receiving the letter on 27 December 2012. Calvin Chiu described SP2's repeated requests as "a bit - - like pestering us."[85] This comment suggests that there may have been more than one occasion that SP2 raised these matters with him. Calvin Chiu said he was not quite sure of the number of occasions SP2 raised this issue with him but said

[84] BWE D/12/3319 at counter 287.
[85] BWE E/13/3522 at counter 381.

"… it should have been either once or twice."[86]

208. Calvin Chiu was just as adamant as Daniel Lin that he refused both requests of SP2 and that SP2 understood Grant Thornton's position. He said he emphasised that the letter of 27 December 2012 was final.

209. He was asked if he accepted that in his conversations with SP2 he may have given SP2 the impression that Mayer may have more time in order to discuss the matter with Daniel Lin. He answered:

> "No. I was very clear and certain about that. I myself had done a lot of work and I told him as much, and it was more his own wish that he kept saying that, "Let's have Mr Lai talk with Daniel again". But I was very clear about this. I don't think I gave him the wrong impression."[87]

210. Thereafter Calvin Chiu had no further contact with SP2 until, about two weeks later, he realized that Mayer had still not made a public announcement of Grant Thornton's resignation. This resulted in the exchange of emails that Calvin Chiu had with SP2 on 16 January 2013.

211. Calvin Chiu was asked in his record of interview about the statement by SP2 in his email that his understanding was that Grant Thornton would give Mayer more time to arrange a replacement auditor. Calvin Chiu answered:

> "435. C: … So I myself also don't - - I don't quite understand this, so I - - at that time I said, "hey *sor*(ry)" - - I said to ah *Tom(*my) - - ah - - ah

[86] Transcript day 7, page 15, lines 20 – 21.
[87] Transcript day 7, page 80, lines 4 – 9.

Tommy, "hey, *sorry*, our (letter) dated 27 December was - - we will only issue one (letter), (and) won't con(spire) - - conspire with you on anything."[88]

Calvin Chiu clearly did not regard SP2's request as a proper one and would have no part of it.

Post-Resignation Events: 22 – 23 January 2013

212. The Further Revised Statement of Agreed Facts reveals some of what then happened:

> "17. On 22nd January 2013, Mayer called a Board meeting, to discuss *inter alia* Grant Thornton's letter of resignation.
>
> 18. A Board meeting was held on 23rd January 2013 to discuss the Resignation Letter.
>
> 19. An announcement concerning Grant Thornton's resignation was published on the same day (the "**Resignation Announcement**"). A letter dated 23rd January 2013 signed by Chan (SP2) on behalf of Mayer (SP1) was sent to SEHK, in which it stated *inter alia* that it is aware of its disclosure obligation under Rule 13.51(4) of the Listing Rules, and that "*it is in our best endeavour to comply with the Rule and published the Announcement as soon as practicable*"."

213. Thus, there was no reply to the Stock Exchange letter of 15 January

[88] BWE E/13/3526 – 3527.

2013 until 23 January 2013. A draft reply was placed before the Board at its meeting on 23 January 2013 and this would have formed the basis of its discussions.

214. The minutes of the Board of Directors meeting held on 23 January 2013 make interesting reading for the disingenuous explanation for the delay:

> "**5. Resignation of Auditors**
>
> IT WAS NOTED THAT Grant Thornton had gave to the Board and Audit Committee a resignation letter of their resignation as auditors of the Company dated and with effect on 27 December 2012. *Since then, the Company had put best endeavours to resolve the issues with Grant Thornton in the hope that the resignation be withdrawn or if that was not possible, the effective date of the resignation be postponed until another auditor was appointed. However, the issues could not be solved and on 18 January 2013, the Managing Partner of Grant Thornton informed the Company that the effective date of the resignation shall remain unchanged (i.e. 27 December 2012).*" (Emphasis added.)[89]

The italicized words, which constitute the explanation for delay, were repeated in the announcement issued by Mayer on 23 January 2013. The relevant parts of the announcement are as follows:

> "The board of directors (the "**Board**") of Mayer Holdings Limited (the "**Company**") announces that Grant Thornton Hong Kong Limited ("**Grant Thornton**") had handed in its resignation as the auditors of the Company to the Board and the audit Committee of the Company on 27 December 2012. Since then, the Company had put best endeavours to resolve the issues with Grant Thornton in the hope that the resignation be withdrawn or if that was not possible, the effective date of the

[89] BE 1/37/188.

resignation be postponed until another auditor was appointed. However, the issues could not be solved and on 18 January 2013, the Managing Partner of Grant Thornton informed the Company that the effective date of the resignation shall remain unchanged (i.e. 27 December 2012).

The following paragraph setting out reasons for the resignation is extracted from the letter of resignation issued by Grant Thornton to the Board and the Audit Committee of the Company on 27 December 2012:

(Paragraphs 3 and 4 of the resignation letter are quoted.)

Other than the foregoing, Grant Thornton have confirmed that from their perspective there are no circumstances in connection with their resignation that need to be brought to the attention of the shareholders and creditors of the Company.

Both the Board and the Audit Committee have acknowledged that save as the reasons disclosed above, there are no matters in respect of the resignation of Grant Thornton as the auditors of the Company that need to be brought to the attention of the shareholders and creditors of the Company.

During the entire audit process, the Board and the Company's Audit Committee did work hard trying to deal with the issues identified by Grant Thornton and are continuing to do so, and the management of the Company did provide full co-operation to Grant Thornton audit team at all time."

215. In respect of the explanation for the delay that appeared in the Board Minutes and the company's announcement, a number of matters should be noted. First, there is no evidence from the Grant Thornton witnesses that any effort was made by SP2 to resolve the issues which led to the resignation. Secondly, although there is evidence that SP2 hoped Grant Thornton might withdraw the resignation and that should the Company not be persuaded to do so that it might, at least, postpone the date on which the resignation was to take effect, at no stage did anyone in Grant Thornton say or do anything to suggest that either of these options would be entertained.

216. The most senior person within Grant Thornton that was involved in the Mayer audit was Daniel Lin and he was the person that SP2 claims he spoke to about withdrawal and postponement and whom SP2 describes in the Board Minutes and the announcement as the Managing Partner to whom he spoke on 18 January 2013. The explanation as set out in the Board Minutes and company announcement suggests there were on-going negotiations about, at the very least, postponement of the date that Grant Thornton's resignation would take effect and these negotiations only came to an end, unfavourably for Mayer, on 18 January 2013. Daniel Lin, and his colleagues, deny that such a scenario was ever the case and their denials are supported by the email exchange between Calvin Chiu and SP2 on 16 January 2013.

217. It is quite apparent from the evidence that the hope of withdrawal was wholly futile with no chance of occurring and the hope of postponement was similarly doomed. The minutes of the Board of Directors, and the subsequent announcement containing the same explanation, do not accurately reflect the reality of the situation.

218. The minutes, in the second paragraph of point 5, then proceed to record the discussion that took place in respect of Grant Thornton's reasons for resigning as stated in its resignation letter:

> "IT WAS ALSO NOTED THAT the Board and the Audit Committee have reviewed the reasons as disclosed in the Resignation Letter and confirmed that no matters in respect of the resignation of Grant Thornton as the auditors of the Company that need to be brought to the attention of the shareholders and creditors of the

Company."[90]

219. This paragraph is clear evidence that the Board gave thought to what would "need to be brought to the attention of the shareholders and creditors of the Company" and it was the Board's considered view that nothing about the underlying reasons for the resignation needed disclosure above and beyond what was in the resignation letter. A similarly worded paragraph appeared in the announcement that was issued to the market on 23 January 2013.

220. In respect of the Stock Exchange's letter of 15 January 2013, the Board noted that the Stock Exchange had "raised questions on … (ii) the matter of auditors resignation as discussed in point 5 above". The reference to point 5 is a reference to the two paragraphs quoted above at [214] and [218].

221. The Board minutes record the decision in respect of the Stock Exchange letter of 15 January 2013 as follows:

> "**6. Fax from Stock Exchange of Hong Kong dated 15 January 2013**
>
> IT WAS NOTED THAT the Board has reviewed and Reply and are of the view that:
>
> (i) the Company is fully aware of its disclosure obligation under the Listing Rules, and it is always in the best endeavour to comply with the Rule and published the announcement to inform the shareholders and public on information of the Company when the Board deemed necessary as soon as practicable,

[90] BE 1/37/188.

(ii) the announcement in relation to the resignation of Auditors should published as soon as possible and the Company should states the reasons why the announcement is not published on 27 December 2012 (the date of Resignation Letter) but on 23 January 2013, and …"[91]

222. In his reply on 23 January 2013 (paragraph 19 of the Further Revised Statement of Agreed Facts above) to the Stock Exchange's letter of 15 January 2013 (paragraph 14 of the Further Revised Statement of Agreed Facts above), SP2 never actually referred specifically to the resignation but did refer to the audit of the company. Paragraph 1 of the reply letter is revealing. It reads as follows:

"The Company is currently focusing on the completion of the Annual Results, however, as discussed with your Tracy Lee and our Tommy Chan, a new auditor is yet to be formally appointed by the Company. Such proposed change in auditors may have a significant impact on the Company's handling of its affair and the Company anticipates that the Annual Results will be completed and published within 3 months from the date of the Company's announcement dated 22 November 2012. Therefore, the Company would like to publish another announcement to address the revised timetable and update the status when the new auditors are formally appointed by the Company."[92]

223. It would appear from what SP2 wrote that SP2 believed that the change in auditors "may have a significant impact on the Company's handling of its affair …". It is also very clear that SP2 was aware of the disclosure obligation, under Rule 13.51(4) of the Listing Rules, and the requirement that the market be

[91] BE 1/37/188.
[92] BE 1/38/191.

kept informed of matters that might have "a significant impact" on Mayer's affairs.

224. SP2 was, of course, asked by the SFC why there was a delay in announcing to the market the resignation of its auditors. However, it is not necessary to examine that explanation as it is now clear that it is not relied upon by any of the SPs. The following paragraph is in the Further Revised Statement of Agreed Facts:

> "20. Chan (SP2) has given an explanation for the timing in making the Resignation Announcement. It is the position of Chan (SP2), as well as Hsiao (SP3), Lai (SP4), Huang (SP5), Chiang (SP6), Lin (SP10) and Alvin Chiu (SP11), that they do not rely on the explanation Chan (SP2) has given for the timing in making the Resignation Announcement as a defence to a potential breach of sections 307B or 307G of the Ordinance in these proceedings. For the avoidance of doubt, such SPs would not rely on Chan's (SP2) explanation, or any other explanation, as a defence to a potential breach of ss 307B or 307G of the Ordinance. Such admission, however, is made only on the basis that the Market Misconduct Tribunal finds the information (as identified by the SFC) amounts to "*inside information*" as defined under s 307A of the Ordinance."

225. Thus, in relation to the information that Grant Thornton had resigned, it is not disputed that the disclosure was not made as soon as reasonably practicable; the only issues are, for all SPs, whether that information was inside information as at 1 January 2013 and, if it was, in respect of SP9 only, is he liable for the non-disclosure under section 307G(2) of the SFO.

Chapter 7

The Three Significant Matters

The First Significant Matter: The Disposal of Advance Century

226. In Grant Thornton's resignation letter the sale of Advance Century is referred to as "the substance of disposal of an available-for-sale financial asset". Advance Century was a wholly owned subsidiary of Mayer which Mayer used to invest in Bridge Semiconductor Corporation. In 2010 Mayer had written off this investment of US$2,140,980. Notwithstanding this earlier write-off, on 28 January 2011 the Board resolved to sell Advance Century for no less than US$2 million. The fact that the sale took place after Advance Century had earlier been written off was a highly unusual feature of the transaction. When Grant Thornton later became aware of a competing explanation for the supposed proceeds of this sale, namely that the monies were loans from Capital Wealth and Capital Wealth Finance, it sought proof from Mayer that it had actually received these monies and, if it had, that the monies it received were truly the proceeds of the sale of Advance Century. By the end of 2012 it was clear that Mayer had received the sum of HK$15.5 million but the issues of why, and from whom, it had received it remained unresolved in the minds of the auditors.

227. By a sales and purchase agreement dated 28 April 2011 Mayer purported to sell the entire issued share capital of Advance Century to Golden Tex Limited ("Golden Tex") for a consideration of HK$15.5 million. SP4 signed the agreement for Mayer and a woman by the name of Wang Shu Mei signed for

Golden Tex. The agreement was completed on 28 June 2011 with Mayer claiming it had received payment for the sale by two cheques of HK$10 million and HK$5.5 million paid to its HSBC savings account. The Further Revised Statement of Agreed Facts provides the following details of these payments:

> "23. On 28th June 2011:-
>
> (a) Two cheques of HK$10,000,000 and HK$5,500,000 respectively (the "**Cheques**"), totalling HK$15,500,000, were cleared in favour of Mayer and credited to Mayer's HSBC savings account (account number: 640-115994-838); and
>
> (b) A notice was given by Wang on behalf of Golden Tex to Mayer, stating that, regarding the sale and purchase of Advance Century:-
>
> "*full consideration of HK$15,500,000.00 (US$2,000,000) has been fully settled to your HSBC saving account (A/C no: 640-115994-001) today*"."

228. There are two matters that should be mentioned about the way Mayer received the monies, bearing in mind the competing explanations for the receipt of them. Capital Wealth and Capital Wealth Finance claimed that the monies came from cheques that they drew in favour of Mayer and which were paid to Mayer as loans. Mayer claimed that the monies were the consideration for the sale of Advance Century. It is not disputed that the cheques deposited on 28 June 2011 were the Capital Wealth and Capital Wealth Finance cheques. If the cheques were drawn to fund Golden Tex's acquisition of Advance Century, then it is rather unusual that Golden Tex deposited them into Mayer's account rather

than giving them to Mayer. Whatever the reason for so doing, the effect would be to conceal or obscure the involvement of the Capital Wealth companies within the records of Mayer. It is also unusual that Wang's notice to Mayer refers to the wrong bank account of Mayer when stating the account into which the cheques were deposited. Given that Capital Wealth and Capital Wealth Finance were alleging that Mayer had been creating false documents, these unusual features were only likely to add to the suspicions surrounding this transaction.

229. The disposal of Advance Century was not the subject of any announcement but it was disclosed to the market in the interim report for the six months ending 30 June 2011. The interim report was published on 1 September 2011.

(i) The Post-Suspension Events

230. On 29 March 2012 two writs were issued out of the High Court. One was by Capital Wealth Corporation Limited for repayment of a loan of HK$10 million and the other by Capital Wealth Finance Company Limited for repayment of a loan of HK$5.5 million. The writs alleged that both loans were due for repayment by 28 December 2011. The Further Revised Statement of Agreed Facts details the allegations in the writs as follows:

> "24. On 29th March 2012, two writs (High Court Action Nos. 522 and 524 of 2012) were issued against Mayer by Capital Wealth Corporation Limited ("**Capital Wealth**") and Capital Wealth Finance Company Limited ("**Capital Finance**") respectively, alleging that:
>
> (a) Mayer drew a loan of HK$10,000,000 from Capital Wealth on

28th June 2011;

(b) Mayer drew a loan of HK$5,500,000 from Capital Finance on 28th June 2011; and

(c) Mayer agreed to repay the loans to Capital Wealth and Capital Finance respectively by 28th December 2011."

231. Mayer denied these loans were ever made and maintained that the HK$15.5 million payment that it had received was the consideration for the sale of Advance Century. It accepted that the source of these monies was the two Capital Wealth companies but suggested that these monies must have been paid to it on the direction of Golden Tex who must have been the true borrower of them and who must have used loans it obtained from the Capital Wealth companies to fund its purchase of Advance Century.

232. Mayer announced this litigation to the market by way of two announcements, both dated 23 April 2012. The Further Revised Statement of Agreed Facts sets out the contents of these announcements and what happened thereafter as follows:

"26. The proceedings commenced by Capital Wealth and Capital Finance were announced by two separate announcements on 23rd April 2012 (the "**23rd April 2012 Announcements**"). The market was informed by the 23rd April 2012 Announcements that:-

(a) On 29th March 2012, Capital Wealth issued legal proceedings against Mayer claiming a sum of HK$10,000,000 being the outstanding

principal of a loan to Mayer together with interest and costs;

(b) On 29th March 2012, Capital Finance issued legal proceedings against Mayer claiming a sum of HK$5,500,000 being the outstanding principal of a loan to Mayer together with interest and costs; and

(c) Mayer was seeking legal advice in respect of the proceedings and would make further announcement in due course as to any material development in connection with the proceedings.

27. By an announcement dated 30th May 2013 Mayer announced that the High Court had ordered the proceedings in HCA 522 and 524 of 2012 to be consolidated into a single set of proceedings against the Company and that on 20th May 2013 Capital Wealth and Capital Finance had been granted leave to amend their Writ and Statement of Claim.

28. Capital Wealth and Capital Finance applied for summary judgment against Mayer in HCA 522 and 524 of 2012. By a decision dated 12th October 2012, the Court granted Mayer unconditional leave to defend. The Court's said decision was reported in the Oriental Daily News on 13th October 2012."

233. Grant Thornton knew from quite an early stage what the Capital Wealth companies were alleging for Capital Wealth Finance had set out its allegations in a pre-action letter it had written to Grant Thornton on 26 March 2012 in respect of its loan of HK$5.5 million when it said:

"We are given to understand that upon receipt of the said loan, your client, its directors or representatives have falsely entered accounting records in Mayer

Holdings Limited in breach of fiduciary duties"[93]

234. Given the seriousness of these allegations, it is hardly surprising that Grant Thornton was anxious to obtain some support for Mayer's claims. However, the support that Grant Thornton sought was not forthcoming. As previously noted at [181] of this report Grant Thornton, as at 23 August 2012, was anticipating having to incorporate a "limitation of scope" in its audit in respect of the proceeds of the sale of Advance Century.

235. Two other important events took place before 1 January 2013 in respect of this significant matter and both occurred after the 23 August 2012 email from Anthea Han. The first event was a meeting that the senior staff of Grant Thornton had with the CEO of Capital Wealth on 18 September 2012[94] and it is relevant to Grant Thornton's auditors' state of mind in respect of this significant matter. At this meeting they received from him further background details to the allegation he was making that the Capital Wealth monies were loans to Mayer. The explanation was that SP2 had requested the loans "in order to clear the assets/liabilities of Mayer and prepare a 'clean shell' in 2011. No agreement has been signed".[95] What the CEO of Capital Wealth was claiming was that the management of Mayer wanted to improve the company's worth as a listed corporation should it be decided to sell it solely for its shell value as a company listed on the Hong Kong Stock Exchange. This was not an incredible explanation and it would explain why the loan was undocumented.

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93 RTB 4/20/167.
94 See [185] of this Report.
95 RTB 4/21/174: Minutes of the meeting as prepared by Grant Thornton.

236. The second important event was a decision of the High Court on 12 October 2012 granting Mayer unconditional leave to defend the Capital Wealth litigation. In this decision the judge noted that Mayer denied the existence of the loans and had documentary evidence to support its defence that the monies were the proceeds of the sale of Advance Century's shares to Golden Tex. The plaintiff, on the other hand, had not produced documentary evidence to show how the transactions were recorded in their own books and accounts.[96] The decision was reported the next day by Oriental Daily News and in this article it was written:

> "The judge doubted Capital Wealth side for not producing any documentary evidence such as books and accounts … etc to support the "loan" allegation."[97]

237. This event is relevant to how investors might react to the undisclosed information in respect of this significant matter on 1 January 2013. When asked about how investors would react to this news Ms Pao, the expert witness presented by the SFC, said she accepted that the article portrayed Mayer as having evidence whilst the plaintiffs did not and this, she accepted, would suggest Mayer had the stronger case. She then conceded that, contrary to what she had written in her expert report, investors would not assume a worst outcome in the litigation for Mayer.

(ii) The Audit Concerns

238. The unresolved issue that concerned Grant Thornton was its uncertainty over the true source of the HK$15.5 million and so it sought documentary proof

[96] RTB 4/7/75 – 79.
[97] RTB 4/5/64.

that the monies came from Golden Tex as opposed to being loans Mayer obtained from the Capital Wealth companies. From the auditor's point of view there was a possibility that Mayer did not have income of HK$15.5 million from the sale of an asset, but rather had a liability to repay two loans totalling that amount.

239. It is clear from Daniel Lin's evidence that the Grant Thornton team were quite anxious about this matter. There were aspects to it which simply didn't make sense and coincidences associated with it which strained credulity. He explained what lay behind their concerns in his record of interview:

> "351. C: … But now we query why - - the (company that was) not worth money, the company that you yourself - - they themselves *write* (sic) (wrote) *off* (the balance of that company), there being no longer [B: Hm.] no longer any *value,* [B: Hm.] well, why (it) could suddenly be sold for 15 million (dollars). Well, who would the buyer be? Well, why the coincidence that - - that somebody sued him to say that the money - - was (borrowed) like what. Then - - then - - then let's take - - then he said coincidentally there was (money) *invested* by others, that is - - the er - - how (should I) put it? Er that is - - that is - - I mean he said coincidentally it was they who *in*(structed) - - *instructed* him - - him - - him to put the money in (the company as an investment). Then, we wrote down here to say the "*substance of the disposal*" as we - - frankly speaking the litigation was in progress and (we) didn't know which side, I mean he had his own reasons (and) er the other side also er had its own reasons. … Well, I mean many of the things were not explained clearly, uh, so we mainly queried that - - er that - - that

substance, uh. (We asked) mainly (about it), uh."[98]

And then:

"353. C: … Not because somebody was suing it that we thought that there were problems (with it). [B: Hm.] Well, but we had considered many things. Firstly, this company had already *write* (sic) (written) *off* the *investment cost*, [B: Hm.] I mean the - - the value also - - also (made people) feel not worthwhile (to invest in it). How come somebody would give you money for no reason? Also coincidentally somebody - - that somebody sued him for no reason? … *Okay*, then that - - that bloke - - (I) don't know why he got my mobile (number) and kept *calling me*. [B: Hm.] Well, I - - I did go to see him. [B: Hm.] (He is) Mr LAM Chin Chun [transliteration] of *Capital Wealth*, [B: Hm.] *okay*."[99]

240. Calvin Chiu explained in his record of interview that before they could qualify this transaction they had to be satisfied as to its nature.[100] Hence, the desire of Grant Thornton for documents supporting Mayer's case. It is true that Grant Thornton did finally obtain a copy of the two cheques issued in respect of the loans, but all they proved was that the Capital Wealth companies were the source of the funds. What was being disputed was the identity of the borrower of these loans and the purpose of them. Grant Thornton recognised that, on their own, the cheques were not sufficient audit proof of Mayer's claim.[101]

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98 BWE D/12/3329 – 3330.
99 BWE D/12/3330.
100 BWE E/13/3605 – 3606.
101 Transcript, day 7, page 46, line 19 – page 47, line 19.

241. This was why proving, by sight of the cheques, that the money had been received, was not enough to satisfy the auditors' concerns. Calvin Chiu explained what they needed:

> "MR SCOTT: … Having seen these cheques, would that have satisfied you about the substance of the disposal of Advance Century?
>
> A. No, it does not satisfy our requirements and that's why we told Mayer Holdings to once more confirm the situation and go to the relevant department to complete such a confirmation.
>
> Q. You mean concerning the cheques, you still wanted to see certified true copies of the cheques from Mayer? Is that your evidence?
>
> A. The confirmation I just mentioned means that it is not just the cheques. They also need to confirm the transaction of this sale with all the relevant departments, the staff in those departments that had to do with the transaction to confirm that the transaction is really what they say it is.
>
> Q. Which was a sale?
>
> A. Yes. So the relevant departments, meaning that the buyer, the seller and whoever was involved in both."[102]

242. Calvin Chiu said they spoke to SP4 about this transaction and he said that SP4 "did not give us a very clear oral explanation by himself in person. … And in my recollection, he was stuttering over this topic. He was reluctant to explain. So that's why we still had concern."[103]

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[102] Transcript, day 7, page 46, line 16 – page 47, line 12.
[103] Transcript, day 7, page 54, line 22 – page 55, line 5.

243. SP4 went on to speculate what may have happened and this speculative suggestion demonstrates the dilemma that confronted the auditors when faced with an incredible explanation that was being advanced by the client:

> "… according to Mr Lai, Mr Lai also said they had no idea why the other party had such claims about them, having borrowed that money from them. He said they had no idea why the other party was suing them for that.
>
> He said that maybe – Mr Lai said maybe its the party that bought the company borrowed from them, so the buyer of the company, the party that bought the company from Mayer Holdings, borrowed that money, used that money to buy that company, so Mayer Holdings received that money from that party and then Capital Wealth or Capital Finance just assumed them to have borrowed that money. So that's what they said could have happened. But then again, we could not find out whether either claim was true."[104]

244. Calvin Chiu described in his evidence his reaction to SP4's explanation:

> "Before such discussions, we had no reason to doubt whatever they told us, but then after he came up with this explanation of the possibility of that money being borrowed in order to buy the company, then we had like a series of doubts in relation to that because if he - - what he claims is true, then does he have any solid proof that's the case or maybe it's just his guess, which one is it, and that's why we had to confirm like with different sources to find out what actually happened behind that transaction."[105]

[104] Transcript, day 6, page 26, lines 5 – 18.
[105] Transcript, day 6, page 46, lines 15 – 24.

245. Seeking confirmatory evidence for what Mayer was suggesting may have happened is the reason why, at one stage, Grant Thornton prepared a document for all the parties to sign which, in effect, confirmed the truthfulness of Mayer's speculative explanation for the loan. It is worth setting out this document in full:

> "Messrs Grant Thornton
> 20/F., Sunning Plaza
> 10 Hysan Avenue
> Causeway Bay
> Hong Kong
>
> **Re: <u>Disposal of Advance Century Development Limited ("Advance Century")</u>**
>
> We, Mr. Lai Yueh-hsing, on behalf of Mayer Holdings Limited (the "Vendor"), Ms. Wang Shu-mei, on behalf of Golden Tex Limited (the "Purchaser"), and Mr. Lam Chin Chun, on behalf of Capital Wealth Finance Company Limited and Capital Wealth Corporation Limited (collectively the "Proceeds-providers"), confirm that the disposal of Advance Century, which was agreed between the Purchaser and the Vendor on 28 April 2011 and completed on 28 June 2011 in a consideration of HK$15,500,000. In addition, we further confirm that, the proceeds were transferred to the Vendor on 28 June 2011 by ways of Capital Wealth Finance Company Limited cheque's no. 641858 amounted HK$5,500,000 drawn on Bank of China (Hong Kong) Limited and Capital Wealth Corporation Limited cheque's no. 821611 amounted HK$10,000,000 drawn on Chong Hing Bank Limited in accordance to the [verbal] agreement between the Proceeds-providers and the Purchaser, in which, the Proceeds-providers provided source of funding to the Purchaser to complete the transaction.

Yours faithfully

Mr. Lai Yueh-hsing	**Mr. Wang Shu-mei**	**Mr. Lam Chin Chun**
for and on behalf of	for and on behalf of	for and on behalf of
Mayer Holdings Limited	**Golden Tex Limited**	**Capital Wealth Corporation Limited and Capital Finance Company Limited**"

246. Of course, Capital Wealth could not be expected to sign such a document, but Mayer also did not sign it and, more importantly, did not procure the purchaser of Advance Century to sign it. This document, described as a confirmation, was referred to in the Action Plan attachment to the 23 August 2012 email from Anthea Han to SP2. Calvin Chiu said in his evidence that this document would have been helpful to Grant Thornton, as auditors, if the purchaser of Advance Century had signed it. However, Grant Thornton was told by Mayer that they could not procure the signatures sought but gave no explanation for why they could not. This failure by Mayer would have done nothing to reduce Grant Thornton's concerns; rather it would only have added to them.

247. When asked if it was about this time that he started to have doubts about the honesty of Mayer's management, he answered "yes."[106] This is not surprising as the fact that someone was lying necessarily followed from the irreconcilability of the two explanations; a fact of which the auditors were well aware, as is clear from the following exchange with the Chairman of the Tribunal:

[106] Transcript, day 6, page 48, line 14.

"CHAIRMAN: Would it be fair to say that both stories of Capital Wealth and Capital Finance and Mayer could not stand together?

A. That's correct.

CHAIRMAN: Someone was telling a lie.

A. Yes.

CHAIRMAN: And if it was Mayer, then they were engaged in false accounting?

A. You could say that."[107]

248. Calvin Chiu was asked in his evidence what the consequence would be to Grant Thornton, as Mayer's auditors, if they concluded that Capital Wealth's claims were true. He answered:

"If that was the case, then it means that Capital Wealth did lend that money to Mayer Holdings; therefore, Mayer Holdings' claim that they received that money from the sales of a company would be false, so they made that false claim to cover up the fact that they borrowed money. So if that's the case, we had to point it out in the report."[108]

249. When asked if the Grant Thornton team ever became concerned that persons within Mayer were involved in the creation of fraudulent documents, he answered:

"We did have that concern. That's why we had the requests for these documents

[107] Transcript, day 7, page 51, lines 18 – page 52, line 1.
[108] Transcript, day 6, page 28, lines 2 – 8.

so that we would - - by having those we could confirm what actually happened."[109]

250. Thus, the Advance Century issue had a significance beyond the amount involved; namely the possibility of the two Capital Wealth companies' claims being true and the consequence that then flowed should they, indeed, be the truth. For, the two claims as to the source of the monies were not just competing claims, they were directly contradictory and mutually exclusive claims. Only one could be true and if Capital Wealth's claim was the truth then it had to follow that the Mayer claim was false and, as the CEO of the Capital Wealth companies alleged, that those in control of Mayer were involved in some form of fraud.

251. The explanation coming from Capital Wealth was not inherently incredible, although it is surprising that there does not seem to have been any signed loan agreement, perhaps explained by the purpose for which the loans were obtained, as alleged by the CEO of the Capital Wealth companies. In contrast, the explanation of Mayer that the Capital Wealth companies had paid it HK$15.5 million on behalf of Golden Tex as the consideration for the sale of Advance Century does not withstand close scrutiny. No one at Mayer could explain why these monies came from the Capital Wealth companies. Instead of simply being able to positively assert that Golden Tex had financed its purchase of Advance Century by loans from the Capital Wealth companies, the management of Mayer could only speculatively suggest that this is what *may have* happened. That they did not know how or why the Capital Wealth companies were involved in this transaction, and could not, or would not, ascertain how it was that the consideration was not paid by Golden Tex, is extraordinary enough. But, even

[109] Transcript, day 6, page 28, line 24 – page 29, line 1.

more extraordinary, on this explanation, is that they were being sued as the borrower of these monies. For, if Mayer's speculative suggestion was true, then the Capital Wealth companies were either confused as to whom they had lent HK$15.5 million or were deliberately, and inexplicably, pursuing Mayer for repayment of monies they had lent to Golden Tex. All Mayer had to do to defeat the litigation was to procure the assistance of Golden Tex in showing that company was the true borrower of these monies from the Capital Wealth companies. That it could not, or would not, do so is astounding as such evidence would not just assist Grant Thornton, it would also strengthen enormously their defence to this litigation and, potentially, might have immediately brought it to an end. The Mayer explanation defied both common and commercial sense, as did their attitude to involving Golden Tex. Grant Thornton was well justified in regarding this matter as significant and in being troubled by being unable to resolve it.

The Second Significant Matter: The Vietnam Project

252. In the Grant Thornton resignation letter the concern about this significant matter was expressed as "ownership and control of the Vietnam project".

253. Dan Tien Development Joint Venture Company Ltd is principally engaged in property development and was licensed to carry out two projects in Vietnam. One was the Dan Tien Port Project in Mong Cai Town (building a port and related infrastructure) and the other was the Phoenix Trade and Tourism Urban Area Project (building residential properties in Mong Cai Town).

254. On 8 November 2010 Mayer entered into a sales and purchase agreement to purchase the entire share capital of Yield Rise Limited from Make Success Limited for HK$620,000,000. Yield Rise indirectly owned 70% of Dan Tien Joint Venture. Mayer made an announcement regarding the Yield Rise Acquisition on 12 November 2010 in which it set out the terms by which the consideration of HK$620 million would be paid, for what it characterised as a Very Substantial Acquisition. It made a further announcement in relation to it on 13 April 2011. This announcement attached a very lengthy letter from the Board containing extensive details on the acquisition and the proposed developments of both the port and the residences in the town. This letter concluded with a recommendation by the Board that shareholders approve the acquisition at an extraordinary general meeting of the company. Finally, on 9 May 2011, Mayer announced that the Yield Rise acquisition had been completed.

255. However, even before Grant Thornton became involved in the audit of Mayer, it had become apparent to the Board of Directors of Mayer that there was an issue in relation to the valuation of the Vietnam investment.

(i) The Valuation of the Investment

256. Mayer had obtained a valuation of both projects from Grant Sherman Appraisal Limited ("Grant Sherman") who valued the port project, as at 31 October 2010, at HK$809,140,000 and the residential property project, as at 28 February 2011, at HK$215,000,000. It is an agreed fact that based on these

valuations, Mayer's 70% interest in these projects was worth around HK$717,000,000.

257. After the completion of the Yield Rise purchase, Mayer obtained a second valuation of the two projects. It is an agreed fact that in November 2011, the management of Mayer came to the conclusion that the Vietnam Project was overvalued. Savills Vietnam Co. Ltd ("Savills") was engaged and, in a report dated 19 December 2011, it valued the land of the port at US$475,000 (approximately HK$4,000,000) and the residential property project at US$19,000,000 (approximately HK$148,000,000). Both these valuations were as at the date of the report. It is an agreed fact that based on these valuations, Mayer's 70% interest in the Vietnam Project was worth only HK$106,000,000.

258. Mayer also engaged Deloitte and Touche Financial Advisory Services Limited ("Deloitte") to evaluate the report of Grant Sherman. The Further Revised Statement of Agreed Facts reveals the following about that report:

> "37. Grant Thornton received from Mayer a draft report prepared by Deloitte & Touche Financial Advisory Services Limited ("**Deloitte**") dated 9th January 2012. This report was titled "*Evaluation of the Valuation Analysis of Dan Tien Port*" (the "**Deloitte Report**").
>
> 38. Deloitte's opinion on Grant Sherman's valuation was as follows:-
>
> (a) Based on the construction progress of Dan Tien Port after 31st October 2010, it would be impossible to achieve Grant Sherman's forecast capacity of ten million tonnes in the first year of operations. Dan Tien Port would only enjoy a maximum capacity of 6.2 million tonnes per

year; and

(b) The pricing of US$6.5 per tonne assumed by Grant Sherman appeared to be aggressive, given that in 2010 the comparable ports in the region earned, on average, US$4.41 per tonne.

39. In short, the Deloitte Report found that material aspects of Grant Sherman's assumptions were too aggressive and unrealistic, leading to an over-valuation of the Vietnam Project."

(ii) The Post-Suspension Events

259. On 12 January 2012, Mayer commenced litigation against Make Success, and others, alleging conspiracy to defraud, and it announced this to the market on 16 January 2012.

260. On 9 March 2012, Mayer announced to the market that, on 6 March 2012, it had filed an amended writ of summons and an amended indorsement of claim. This announcement consisted of just over 4 pages and set out in considerable detail the various defendants, the allegations being made against them and the relief the company was seeking.

261. The allegations by Mayer included conspiracy to defraud, misrepresentation and deceit against Make Success and three individuals for using "an inflated valuation arrived at by the use and supply of false and/or misleading information" in respect of "the right to develop a designated port and certain real

estate projects in the Socialist Republic of Vietnam …"[110]. The announcement also mentioned that damages were being claimed for misrepresentation or deceit and rescission of the agreement to purchase the Yield Rise shares.

262. On 23 March 2012 Mayer issued a Response Document relating to a takeover offer that it had received. This document consisted of, amongst others, a letter from the Board of Directors recommending against acceptance of the offer. In this letter the Board referred to the Vietnam investment and the on-going litigation in respect of it and in the course of so doing acknowledged the difficulties it had obtaining information on the construction progress and accessing the books and records of the project. It said:

> "Depending on the outcomes of the litigations in relation to the above projects which are uncertain, the Acquisition may or may not be rescinded. Since legal proceedings against Make Success has been commenced, the Company considers that disclosure of details of the development of Vietnam projects at the current stage may prejudice the Company's claim. The Company will announce the development of the Vietnam projects as and when appropriate. The Company is seeking legal advice and thus it is not in a position to provide any details/information as requested at this stage.
>
> The "Dan Tien Port Project" and the "Phoenix Trade and Urban Area Project" to be developed by Yield Rise Group (the "**Vietnam Project**") is still under construction and on-going capital investment will be required. In this regard, positive contribution to the Group's operating results is not expected in the near future. *However, the Company was unable to assess the construction progress of the*

[110] BE 2/77/1221.

Vietnam Project and to obtain its books and records due to the matters in relation to litigation against Make Success. Until recently, the Company has been in contact with the management of the Vietnam Project in order to update the construction progress on which its viability will be assessed in view of the recent development and to obtain latest financial information on which to compile management accounts of Yield Rise and its subsidiaries."[111] (Italics added.)

263. Calvin Chiu said that he had read these paragraphs in the course of the audit, but they did not give him a concrete feeling that Mayer had lost control of its Vietnam investment. He said he had only got such a concrete feeling when Grant Thornton sent staff from its Vietnam office to Mong Cai and found that the management of the project was not cooperative and would not provide the information that Grant Thornton needed.[112]

264. On 5 April 2012 Mayer made another announcement to the market in respect of this matter. This announcement informed the market that Mayer had obtained an interim injunction against Make Success in respect of the block of Mayer shares which had been given to Make Success as part of the consideration for the purchase of the Yield Rise shares and which Make Success was proposing to sell to a person called Wang who was making a takeover offer for Mayer.[113]

265. On 3 October 2012 Mayer announced to the market that it had been granted leave by the High Court to join another company as the 10th defendant in its action. The announcement concluded with the assurance that Mayer would

[111] RTB 3/23/14 – 15.
[112] Transcript, day 7, page 35, line 1 to page 36, line 6.
[113] See [550] – [561] of this Report.

keep the shareholders and public informed of any material development in its action by way of further announcement as and when appropriate.

(iii) The Audit Concerns

266. In the course of its audit, Grant Thornton identified two concerns in respect of the Vietnam investment. The first was the true value of that investment which Mayer itself had come to doubt after receipt of the two reports prepared by Savills and Deloitte. The second concern was whether Mayer was actually in control of this investment.

267. The reasons for Grant Thornton's concern over Mayer's control of its Vietnam investment are succinctly described in the Further Revised Statement of Agreed Facts as follows:

> "40. In auditing the 2011 Financial Statements, Grant Thornton raised *inter alia* the following matters:-
>
> (a) Construction of the Dan Tien Port was suspended in 2005 and construction for the Phoenix Project ceased in September 2011;
>
> (b) Plots of land for the Phoenix Project had apparently been sold for US$9,000,000 but Mayer had no information regarding the date of sale, the terms of sale, and the whereabouts of the sale proceeds;
>
> (c) Mayer did not have access to the management accounts of Dan Tien JV as at 31st December 2011. Mayer only had available to Grant Thornton management accounts of Yield Rise (and its subsidiaries) for the period ended 30th June 2011; and

(d) Mayer did not have control over the operations of Dan Tien Port and the Phoenix Project, as all business and management decisions were apparently made by a Hui Yau Tso, a local general manager of Dan Tien JV."

268. In her record of interview, Anthea Han described the difficulties her staff faced in gaining access to all the books and records in Vietnam relating to the port and residential development project. She related these difficulties to the management of Mayer and said of their response:

> "Well, er, according to the *management* of Mayer Hong Kong, they would not have *control* and would not be able to provide assistance. Well, therefore, in - - in the *audit* for er the Vietnam *project*, we really faced a lot of *constraints*."[114]

And also:

> "We - - I (make a) claim. Well, we have just - - er, we told the *management* that we could access - - er did not have access to some er *documents*; and (when) we identified subsequently, (I mean we) had some *findings* and wanted to see whom could take *further actions* to *resolve* (the problems), well, the (company) in Hong Kong - - Hong - - Mayer Hong Kong's (people) told (us) that they would not be able to do anything. Well, it turned out that, that means, (we) managed to *identify* (the problems), well, but, (we) did not know how - - I mean whom could help (us) *resolve* (them)."[115]

269. In his record of interview, Calvin Chiu described the staff in control of

[114] BWE D/11/3144 – 3145 at counter 543.
[115] BWE D/11/3145 – 3146 at counter 549.

the Vietnamese company as not willing to let the auditors do the audit. Anthea Han said in her evidence that when this was raised with Mayer, Grant Thornton was told by Mayer staff that "they couldn't really control the local company over there …"[116]

270. The over-valuation of the Vietnam investment and the lack of control that Mayer had over what was happening in Vietnam, prevented Grant Thornton from verifying that Mayer had control over Yield Rise, confirming the value of Mayer's investment of HK$620,000,000 and consolidating the financial position of Yield Rise into the 2011 Financial Statements. This is expressed in the Further Revised Statement of Agreed Facts as follows:

> "41. Grant Thornton was unable to:-
>
> (a) obtain appropriate and sufficient audit evidence to verify whether Mayer had control over Yield Rise as at 31st December 2011;
>
> (b) obtain appropriate and sufficient audit evidence in respect of Mayer's investment in Yield Rise for HK$620,000,000 as at 31st December 2011; and
>
> (c) consolidate the financial position of Yield Rise and its subsidiaries into the 2011 Financial Statements."

271. Given the litigation that existed between Mayer and the vendors of the Vietnam investment and the allegations that Mayer was making against the vendors in that litigation and the remedies it was seeking, it is not that surprising

[116] Transcript, day 5, page 36, lines 3 – 4.

that Mayer had no access to the records that Grant Thornton sought and no control over what was happening to its investment in Vietnam.

272. Yet, Mayer appeared unwilling to concede to Grant Thornton that it had in fact lost control. Calvin Chiu said in his evidence that although SP2 "didn't outright say that there were problems with taking control. It was that the - - what they told us made us have doubts about their ability to take control of the business."[117] It was put to Calvin Chiu by counsel for SP2 that Mayer's management had told Grant Thornton that Grant Thornton might not be able to get access to the books of the Vietnam project. Calvin Chiu answered:

> "I can't say that was the case at the time of accepting the work. I think that kind of talk came after the acceptance."[118]

And later:

> "Well, they never admitted that they could not access the accounting records. It's only that we found out about it.
>
> …
>
> They could not provide it when we asked, and when we had people on the ground, we could not get it ourselves either, but they never told us they could not get a hold of those and they did not consult us about what to do about it and so on."[119]

273. There appears to have been a distinct lack of frankness and openness by Mayer with their auditors on this issue and yet this issue was crucial to the audit.

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[117] Transcript, day 7, page 68, lines 11 – 14.
[118] Transcript, day 7, page 69, lines 5 – 7.
[119] Transcript, day 7, page 71, line 22 to page 72, line 6.

274. Mayer asked Grant Thornton to send its own staff to determine what was happening in Vietnam. Why they thought Grant Thornton would be any more successful than they could be, is unclear. In any event, Grant Thornton did so and, unsurprisingly, found that it could not get any cooperation from the local management or any access to the records of the operating companies. Calvin Chiu described what happened as follows:

> "A. We also did our own work in this regard. Because there was also request for it that we sent people from GT's branch in Vietnam to go to do some work on site to try and get information from them to see if it is possible to get sufficient information for us to carry out the audit. But then our team in Vietnam -- well, they spoke Vietnamese to communicate with locals -- realised that the management of that project was not cooperative and did not provide the information that we needed. (To also be translated as "indeed unable to obtain documents") So that was when we had the concrete feeling that they were not in control of the project.
>
> CHAIRMAN: Wouldn't it follow from what they were alleging that they weren't in control? They're alleging they're the victims of a fraudulent scheme.
>
> A. That's what they also told us about that situation, but they also requested that we sent people to carry out our own investigation and try to do the audit. So on the one hand they were saying that, yes, they were victims of fraud and therefore they should not have control, but yet they said that, "You should get your people to go there and work with that project". Describing that as if they still have control. So we had to send people over to see for ourselves."[120]

[120] Transcript, day 7, page 35, line 21 to page 36, line 18.

And later he said:

> "But then when we went there, we realised that they had no control. We realised that they did not control the local management. So there was a contradiction there."[121]

275. Because the Vietnam investment absorbed a large amount of Mayer's capital and represented the company's main asset, the consequences to the audit were huge. The disclaimer that Grant Thornton was contemplating, as set out at [181] of this report, would have, in effect, removed the Vietnam investment from Mayer's accounts.

276. In his record of interview, Calvin Chiu explained the consequence, from the auditor's point of view, of Mayer not having control of the Vietnamese acquisition. He said:

> "818. C: At - - at that time we saw that (and) immediately said, he spent so much money on the acquisition (and) ended up having no control over the - - the assets, then - - definitely, at - - at last, what - - what - - what did they buy in this transaction? The - - the - - the cost that they spent was probably - - I mean if really at - - *at* - - *at* - - *at the end*, he - - he - - he could not *take control*, ah, and could not exercise the rights they were entitled to, then the company's asset would be - - probably be lost, and, uh. [B: Hm.] I mean (they) gave (the seller) money but ended up having no - - no control over - - over that."[122]

[121] Transcript, day 7, Page 42, lines 23 to 25.
[122] BWE E/13/3560.

And at counter 1270:

> "1270. C: (I make a) claim here. Er, I myself think that, er, for the Vietnam *project*, as far as the company is concerned, when it needed to be *quantify* (sic) (quantified), then at that moment, the largest *impact* would be that in case they could not *control* the cost, then the cost for their - - their acquisition of the company would become nil, [D: Uh.] lost - - lost, [A: Hm.] I mean …
>
> …
>
> 1276. C: Well, if - - since we were saying that they - - our present - - preliminary - - our view then was that, er, they - - they could not *take control*. [A: Hm.] So if *take* - - in case the company admitted that it was the truth, then (we) would need to make a *full provision*."[123]

277. In these circumstances the auditors would look to the client to see what view it is taking in respect of its asset. This was the subject of questioning in Anthea Han's record of interview. The following excerpt from the interview is illuminating:

> "682. A: If it was the case that (it) had no *con* - - *con* - - *control*, well - - well, er, was any *impairment* needed to be done or was it even necessary to *write off* the investment?
>
> 683. C: Regarding this - - er, I (make a) claim. Regarding this, that means the company, my understanding was that (the company) was er *considering* the *accounting treatment*, [A: Um, um.] and therefore, (it) still had not

[123] BWE E/13/3603 – 3604.

reached a er *conclusion on* what its *accounting treatment* should be.

684. A: Um, um.

685. B: Well, however, in *Grant Thornton*'s view as the '*auditors*' (sic) (auditor), if even the client itself was not sure - - whether it had *control on the investment* or it was not sure about the *value* of its (investment), then would you ask the client to *write off* (the investment) or take some other similar measures?

686. C: I - - I (make a) claim. Well, the client itself should first have its own *position* on how - - [B: Um.] the matter should be - - I mean, in their own view, how (the matter) should be treated. As the client itself had not - - not formed a *position* on whether this stuff was its *subsid*. - - *subsidiary* or whatever, well, it - - the client itself was still thinking about (what) the *accounting treatment* (should be)."[124]

278. Calvin Chiu had a conversation with SP4 about this issue and when asked in the course of his testimony if there was any disagreement between Grant Thornton and Mayer on how to treat the Vietnam investment, he said:

> "You could say that because in our meeting with Mr Lai he did not positively say how to deal with this situation. He did bring up that they had these difficulties, and yet they did not have any concrete idea on how to deal with it."[125]

279. In his evidence Calvin Chiu said that he and his staff discussed with Mayer the possibility that Grant Thornton would not be able to consolidate the

[124] BWE D/11/3161 – 3162.
[125] Transcript, day 7, page 37, lines 13 – 20.

Vietnam investment into Mayer's accounts and when asked if Mayer agreed to this he said:

> "They had no opinion given to us, but the feeling was that they still wanted us to consolidate that project"[126]

280. Even though Mayer may not have reached a concluded view on the Vietnam project, it was clear to it that Grant Thornton would be giving a qualified opinion in respect of it. Anthea Han said in her record of interview:

> "694. C: I (make a) claim. We had not *formed* (such a view at that time). I mean we also had no idea - - first of all, (we) really had no idea whether the company, in fact, really (treated it) as its *subsidiary* or an *in* - - *investment* of the company. (We) just told it that, '*anyways*' (sic) (anyway), we also had - - I mean, there were quite a number of things which we planned but was not able to do. And - - and the company told us - - I mean (it) *followed up* (the matter), well, and then the *feedback* (we) r - - received was that (it) would prefer not to put so much *effort on* this *part*. Well, both of us had a little - - this is what I felt, that both of our two parties *mutually* er *understand* (sic) (understood) that, regarding this *project*, we would *qualify* - - I mean, (we) would give a *qualified opinion* on this *project no* - - *no matter* it was an *in* - - *investment* or a *subsidiary*, because (we) failed to proceed with (our) work despite our intention to do so and the company also felt (it) should not *put* so much *effort* (in the matter)."[127]

[126] Transcript, day 7, page 39, lines 24 – 25.
[127] BWE D/11/3163.

281. She later went on to say that it seemed to her that SP2 could accept the qualified audit opinion that Grant Thornton had proposed. It was in fact put to Calvin Chiu by counsel for SP2 that given that Mayer was alleging it was the victim of fraud, that Grant Thornton was not able to get access to the books of the Vietnam project and given that Grant Thornton found out that Mayer had lost control of the Vietnam subsidiary, it was inevitable that Grant Thornton would have to qualify its audit opinion. Calvin Chiu agreed to this.[128]

282. It would be incomplete to not mention that Mayer made an announcement to the market on 31 December 2013 informing the market of the very matters the SFC says it should have disclosed as soon as practicable after 1 January 2013. The announcement contained the following statement:

> "**Current status of Yield Rise and the Very Substantial Disposal**
>
> As the transfer of the ownership of Yield Rise is under dispute although the Company has completed the acquisition of Yield Rise in May 2011, the Company has not been involved in the management of Yield Rise and its group companies at all. On the other hand, the Company will try to remain its status quo of the acquisition of Yield Rise and until the final outcome of the Action.
>
> The Company received no or limited books and records from the local management in Vietnam. As a result, the Company will not be able to provide sufficient information about the Dan Tien Port business for our auditors to perform their audit.
>
> The investment sum in Yield Rise has been set aside for the account of the Company and subject to the Auditors' professional opinion whether there is impairment. The Company is yet to determine the amount of impairment and the current

[128] Transcript, day 7, page 72, line 24.

financial impact on the Group for the time being."[129]

283. There is no evidence on what prompted Mayer to make this announcement at this time and no evidence as to why it was not made earlier.

The Third Significant Matter: The Prepayments made under Supply Agreements

284. These agreements were described in Grant Thornton's resignation letter as "the existence and commercial substance of prepayment to suppliers by the Company's jointly controlled entities". Mayer had a jointly controlled entity, called Glory World, which had two subsidiaries. One of the subsidiaries was Elternal and the other was Sinowise.

285. On 15 September 2010 Elternal entered into an exclusive supply agreement with Vietnam Minerals Holding Corporation (VMC) for the supply of iron ore, under which Elternal had the sole distribution right of the iron sand and would earn commission of US$20 per tonne of iron sand sold.

286. On 27 September 2010 Sinowise entered into an exclusive supply agreement with Dynamic Natural Resources Pte. Ltd. for the supply of thermal coal. Mayer intended to resell the coal to customers in China.

287. Both agreements are similar in their terms and both require Elternal and Sinowise to make substantial prepayments. For Elternal the amount of

[129] BE 2/80/1237.

prepayment was US$10 million and for Sinowise it was US$4 million.

288. The supply agreements were approved by Mayer's Board at a meeting on 13 September 2010. On 15 October 2010 Elternal made its prepayment and on 2, 23 and 29 November and 17 December 2010 Sinowise did likewise.

(i) The Post-Suspension Events

289. However, both suppliers fell significantly short in fulfilling their contractual supply obligations. The Further Revised Statement of Agreed Facts describes what subsequently happened as follows:

> "51. The Supply Agreements were revised:-
>
> (a) For Elternal, in 2011, VMC agreed to settle the prepayment of US$10,000,000 by future supplies. Based on the cash flow projection of VMC, the forecast suggested that Elternal should be able to fully recover the US$10 million deposit in 2018, subject to certain conditions. As at April 2014, VMC still owed Elternal US$9,137,000; and
>
> (b) Sinowise and Dynamic entered into a supplemental agreement on 25th March 2012, containing terms describing how the exclusive supply agreement would be terminated and Dynamic would repay an amount of US$6,767,966, in ten monthly instalments by December 2012. Mayer received around US$1,300,000 between April and August 2012, representing the settlement of only two instalments. As at September 2012, Dynamic owed Sinowise around US$5,470,000."

(ii) The Audit Concerns

290. The Further Revised Statement of Agreed Facts reveals the attitude that Grant Thornton had to these agreements:

> "52. In auditing the 2011 Financial Statements, Grant Thornton observed that:-
>
> (a) It was unclear why the Purchasers decided to make substantial prepayments to the Suppliers upfront;
>
> (b) It was unclear if the Purchasers conducted any evaluation on the recoverability of the prepayments; and
>
> (c) They were unable to satisfy themselves that the value of Mayer's interest in Sinowise and Elternal was fairly stated in Mayer's financial statements."

291. In his record of interview Daniel Lin explained these concerns. In respect of both Elternal and Sinowise he could see no need for the prepayments, describing them as "very unusual" and "very strange"[130] and that was why he queried in the letter of resignation the "commercial substance" of these prepayments.

292. In respect of Sinowise, it was not just the prepayment that Daniel Lin found very strange. He could not understand Mayer's sudden interest in trading coal, saying:

> "Why out of the blues (they would) want to *trade* coal? Well, (in fact) this

[130] BWE D/12/3356 – 3357 at counter 488.

company did not know how to *trade* coal. Also each and every *trade* (sic) (trading) (transaction) - - if (I) remember correctly, suffered a loss. [B: Hm.] That is, when these things were also counted, then we felt that this - - this *transaction* seemed very strange."[131]

293. In his record of interview, Daniel Lin explained Grant Thornton's position:

"They believed it was certain that (the money) could be recovered, (but) we thought that it could not be recovered. Then, er we straightforward asked them to give (us) more (information). … When he failed to provide (us with the information), then we would - - we could only perhaps say, "hey if - - if you still can't give (the information) to me, I shall qualify you, even though you said (the money) could be recovered, but you failed to give me anything (to prove it)." Well, that's why I would do - - do it this way, uh."[132]

294. Calvin Chiu, in his evidence before the Tribunal, expressed his concern as follows:

"MR SCOTT: …

Why were you asking for evidence about the recoverability of that US$6.6 million?

A. The reason was that this deal with Sinowise, which is also a company in Vietnam, basically it was quite a recent development back at that time and basically that company traded in iron ore, and the thing was that the supplier

[131] BWE D/12/3357 at counter 488.
[132] BWE D/12/3305 – 3306 at counter 213.

> of that company, the supplier was of -- did not trade in a very large amount, whether in terms of the iron ore it could supply or the trading volume, both were not very large, and it did not justify paying them such a large sum as prepayment for such a modest trading volume. So we asked them for proof because of that, because it did not justify that sum. Even if they were looking at future development, maybe -- we thought it would make more sense for them to only make such a large sum in prepayment once that trading volume actually reached that desirable amount. So we were -- we had doubts about that."[133]

295. Anthea Han said in her evidence that underlying supporting documents that Grant Thornton requested in respect of Sinowise and Elternal were sought so that Mayer could prove to Grant Thornton "that what the management told us were actually true."[134] This resonates with what Daniel Lin had said in characterising the prepayments as unusual or strange. The auditors had difficulty in seeing why it was commercially necessary or, at the very least, desirable, for Mayer to make prepayments, as opposed to partial deposits, for these commodities.

296. Furthermore, both experts who testified before the Tribunal, Ms Pao and Mr Rigby, also queried the need for prepayments and both saw that they could be used as a tool by a fraudulent management to loot the company.

297. As at 23 August 2012, the consequence for the audit was that Grant

[133] Transcript, day 6, page 36 – page 37.
[134] Transcript, day 5, page 34, line 24.

Thornton may have to qualify its audit in respect of these monies with the "limitation of scope" that is set out in [181] of this report.

298. If the monies were to be written off then, according to Calvin Chiu, it would have had a material impact on the profit and loss or net assets of Mayer.

Chapter 8

The Expert Evidence

299. Two expert witnesses testified before the Tribunal. The SFC presented the report and oral testimony of Ms Winnie Pao, and the Specified Persons, other than SP1 and SP9 who did not present any expert evidence[135], presented the report and oral testimony of Mr Clive Rigby. Both experts relied on quite different approaches in determining whether the information which the SFC asserted was inside information was "likely to materially affect the price of the listed securities".

300. In short, Ms Pao adopted a statistical and mathematic approach in answering this question whilst Mr Rigby analysed the circumstances of Mayer in 2012 to reach what he regarded as a realistic view of the state the company was in and, given that state, of the persons likely to deal in its shares.

The Evidence of Ms Pao

(i) Identifying the investors

301. In her report Ms Pao expressed the opinion that the persons who were likely to deal in Mayer shares were the general investing public, including traders and speculators. These persons she described in her report as "The Investors". Her opinion on who the investors would be, was based upon who the actual

[135] See [150] of this Report.

investors were between 2011 and 2013 and the list of Disclosure of Interests filed by substantial shareholders within the same period. However, in her testimony she agreed with Mr Rigby's assertion that there could be substantial investors acting as "White Knights". Where she disagreed with Mr Rigby was in limiting the persons to only those he said would be the persons likely to invest for she was of the view that all existing shareholders of Mayer were prospective buyers and sellers of its shares.

302. In cross-examination by Mr Chan, Ms Pao explained what she understood was meant by the Phrase "likely to deal" and why she understood the phrase to encompass shareholders of Mayer who fell into the category of the general investing public. The following excerpt from the transcript of her evidence helps in setting out her position:

> "Q. So you say the general investing public would be those who were likely to deal in the shares of Mayer during the long period of suspension?
>
> A. Yes. Because I take a wider interpretation of persons likely to deal. I think we need to identify persons likely to deal not only limited to persons who were actually going to buy and sell those stocks, but persons who would care about what was happening in the company.
>
> Q. So that's --
>
> A. So -- sorry.
>
> Q. Please finish. Don't let me interrupt you.
>
> A. In this case, due to the long suspension, nobody could actually buy or sell except for if there were general offers and off-market transactions, but there

were a lot of investors, *the general investing public who were then shareholders of Mayer,* would care very much about what was happening in Mayer."[136]

(Emphasis added.)

303. However, in re-examination she qualified her opinion in so far as likely buyers were concerned. She said:

"A. I really don't think realistically there would be a willing buyer of the stock at the end of 2012 from the general investing public group. The other shareholders who were fighting for control of the company I would imagine wanted control of the company maybe for its listing value. So -- go on.

Q. No. I interrupted you.

A. No, so -- at the end of 2012, in reality, the only willing buyers in practice were the groups -- the three groups of shareholders that were fighting for control of the company."[137]

304. As for the sellers, they, obviously, would have been the existing shareholders of the company. Some would have been associated with one of the parties involved in the takeover battle and others would have been independent of them. These independent shareholders were assessed by Ms Pao as representing over 20% of shareholders.

305. Thus, from Ms Pao's point of view, the phrase "persons likely to deal"

[136] Transcript, day 3, page 69, line 15 to page 70, line 6.
[137] Transcript, day 4, page 27, lines 9 – 19.

must encompass, on the buy side, a possible White Knight and those fighting for control of the company. On the sell side, the "persons likely to deal" were the general investing public for members of the general investing public made up a significant proportion of Mayer's shareholders and every existing shareholder of Mayer must be a person likely to deal in Mayer's shares.

(ii) Determining whether the undisclosed information was specific information

306. Ms Pao then went on to consider whether the information she was asked to assess is specific information. This information she described as follows:

> "4.2 The resignation of Grant Thornton as auditors of Mayer on 27 December 2012 ("**GT's resignation**") was specific information about Mayer.
>
> 4.3 The unresolved accounting issue of the substance of disposal of Advance Century was specific information about Mayer.
>
> 4.4 The unresolved accounting issue of the ownership, control and valuation of the Dan Tien JV was specific information about Mayer.
>
> 4.5 The unresolved accounting issues concerning the economic substance and/or recoverability of the prepayments to suppliers by Elternal and Sinowise respectively was specific information about Mayer.
>
> 4.6 All the above information was individually and collectively specific information about Mayer."[138]

Ms Pao referred to items 4.3 to 4.5 collectively in her Report as the Unresolved

[138] Page 16 of Ms Pao's Report.

Accounting Issues.

(iii) Determining whether the undisclosed information was generally known

307. Ms Pao then considered the question of whether this information was generally known to the general investing public during the Relevant Period, a term which she used in her report to refer to the period from the first suspension of Mayer (i.e. 22 November 2011) up to 23 January 2013. She was of the view that because the Grant Thornton letter of resignation was silent on the detail of the Unresolved Accounting Issues, and because the announcement by Mayer of the resignation did no more than quote that letter, "it was unlikely that the Unresolved Accounting Issues would be generally known to the Investors during the Relevant Period".[139]

308. She examined each unresolved accounting issue and expressed the opinion in respect of Advance Century that although investors would have been aware of the Capital Wealth and Capital Finance litigation, they would not have linked it to the sale of Advance Century.

309. In respect of the Vietnam project Ms Pao said that investors would have realised from the litigation that the valuation of the Dan Tien JV was probably grossly inflated but "they would not generally have known about all the accounting issues related to the Vietnam project".[140]

310. The prepayments by Elternal and Sinowise were private transactions

[139] [5.9] of Ms Pao's Report.
[140] [5.11] of Ms Pao's Report.

about which there were no public announcements. Investors would not, therefore, have had any knowledge of this unresolved accounting issue.

(iv) Determining the pre-suspension valuation of Mayer's shares

311. In order to determine how the post-suspension events and the undisclosed information would have affected Mayer's share price, Ms Pao said it "is essential to understand the behaviour and valuation of Mayer shares prior to its suspension on 9 January 2012".[141]

312. Ms Pao noted that the decline in the value of Mayer's shares started on 11 May 2011, the first trading day after Mayer announced it had completed the acquisition of Yield Rise. She expressed the opinion that "the price decline reflected the extreme pessimism of the market towards Mayer's Vietnam investments".[142]

313. She then compared the closing share price on 6 January 2012 of HK$0.123 with a value of the shares of HK$0.58 derived from the value of Mayer's net assets. Ms Pao concluded:

> "The fact that Mayer's share price traded at values substantially below its reported net asset value per share strongly suggested that The Investors were very pessimistic towards Mayer's business prospects and expected the company's net asset value to decrease significantly in the future."[143]

[141] [5.13] of Ms Pao's Report.
[142] [5.14] of Ms Pao's Report.
[143] [5.18] of Ms Pao's Report.

314. Ms Pao then expressed the following views on the pre-suspension valuation of Mayer's shares:

> "4.8 At the pre-suspension closing price of HK$0.123 on 6 January 2012, Mayer's market capitalization was only approximately RMB93 million, as compared with the net asset value of RMB447 million as disclosed in Mayer's interim results for the 6 months ending 30 June 2011.
>
> 4.9 It is my opinion that Mayer's significant share price decline from 11 May 2011 to 6 January 2012 was mainly due to Investor's pessimism towards the Dan Tien JV investment. I also opine that HK$0.123 was an overly pessimistic valuation for Mayer."[144]

315. She found support for her opinion that the market valuation of Mayer was overly pessimistic in the fact that by 12 May 2012 there was only 2.8% acceptance of the Wang General Offer of HK$0.12 a share, of which she commented in her testimony:

> "So that suggests to me that the investors' valuation of Mayer should be meaningfully higher than $0.12 per share. That's why they didn't want to sell at $0.12."[145]

316. Ms Pao noted that this market perception of Mayer's valuation would have been after the market had become aware of the post-suspension events of the Make Success litigation, the lawsuit of Capital Wealth and Capital Finance and the delay in the publication of the annual results.

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[144] Page 17 of Ms Pao's Report.
[145] Transcript, day 1, page 60, lines 11 – 15.

(v) The effect of the post-suspension events on the valuation of Mayer's shares

317. In her report Ms Pao considered in turn the effect that each of the post-suspension events was likely to have on investors' valuation of Mayer shares. This valuation would inform investors' investment decisions about Mayer shares and their investment decisions, executed if and when trading resumed, would ultimately affect Mayer's share price. She disagreed with Mr Rigby that the effect of negative post-suspension events was rolled into the price collapse of Mayer's share and that consequently it wouldn't collapse further.

(i) The individual effect of each post-suspension event

(a) The litigation arising from the Vietnam Project

318. Ms Pao was of the view that investors would be happy at the prospect that Mayer may be able to have the Vietnam project rescinded. She expressed the view that the litigation, "singly on its own, would likely have affected investors' sentiment and their valuation of Mayer's shares positively"[146] and that "The investors would likely revalue Mayer shares to around HK$0.278 from HK$0.123 after they learnt about this litigation."[147]

(b) The resignation of Crowe Horwath

319. Ms Pao said that, generally, the resignation of auditors would impact negatively on a company's share price but the extent of any decline in that share

[146] [4.12] of Ms Pao's Report.
[147] [4.13] of Ms Pao's Report.

price would depend on the reasons for the resignation. In respect of Crowe Horwath's letter of resignation she was of the view that the reasons given by the auditors suggested that there was a strained working relationship between them and Mayer and such a reason was unlikely to cause investors to have concerns about Mayer.

320. In respect of this event, Ms Pao was of the opinion that, on its own, investors would view it slightly negatively and their valuation of the shares "would likely have been negatively affected, but not in a material way".[148]

(c) Mayer's failure to publish audited results for the year ending 31 December 2011

321. Ms Pao explained that a failure to publish financial results is viewed negatively by investors as it may indicate that serious accounting issues exist within the company and may be a sign of poor management control.

322. Ms Pao's opinion was that the information of this failure, on its own, "would have negatively affected Mayer's investors' sentiment and share value".[149]

[148] [4.14] of Ms Pao's Report.
[149] [4.15] of Ms Pao's Report.

(d) The Capital Wealth and Capital Finance litigation against Mayer by lenders for HK$15.5 million

323. Ms Pao noted that because the litigation was just an untested allegation it could not be assumed that Mayer would have to pay the sum being claimed as owing.

324. Ms Pao's view was that, on its own, this event "would unlikely have affected investors' sentiment and Mayer's share value".[150]

(e) The litigation against SP2 and SP4 for repayment of loans of over $61 million

325. This litigation related to the personal affairs of these officers and did not directly relate to Mayer's businesses or finances. Consequently, Ms Pao concluded that knowledge of this litigation, on its own, "would unlikely have affected Mayer's investors' sentiment or Mayer's share value".[151]

(f) The resignation of a non-executive director Lam Chun Yin on 9 May 2012

326. Ms Pao said that this event might have a mildly negative effect if perceived by investors as indicating discord amongst management. However, because so little detail was revealed in the announcement, Ms Pao concluded that this event, on its own, "would unlikely have affected Mayer's investors' sentiment and share price much".[152]

[150] [4.16] of Ms Pao's Report.
[151] [4.17] of Ms Pao's Report.
[152] [4.18] of Ms Pao's Report.

(g) The litigation against Mayer by SP9 for access to Mayer's records

327. Although this information would have been negative news, Ms Pao was of view that it "would unlikely have affected Mayer's share price".[153]

328. Each of these post-suspension events could be said to fall into one of four categories:

(i) events that would positively and materially effect investors' valuation of Mayer's shares. This was the litigation arising from the Vietnam project ((a) above);

(ii) events that would negatively and materially effect investors' valuation of Mayer's shares. This was the delay in publishing the company's financial results ((c) above);

(iii) events that would negatively, but not materially, effect investors' valuation of Mayer's shares. These were the resignation of Crowe Horwath ((b) above), disagreements of non-executive director with Mayer's board and management ((f) above) and allegations of management's lack of transparency by a non-executive director ((g) above); and

(iv) events that would unlikely impact investors sentiments and so not effect their valuation of Mayer's shares. This was the litigation against Mayer for repayment of a HK$15.5 million debt ((d) above) and the litigation against SP2 and SP4 ((e) above).

[153] [4.19] of Ms Pao's Report.

(ii) The cumulative effect of the post-suspension events

329. Having examined the likely impact that each of these post-suspension events would have had on Mayer's share price, she then expressed her view as to the likely effect that, cumulatively, they would have had. Noting that "the material positive impact of the hope of the possible rescission or settlement of the Vietnam project on The Investors' sentiment would outweigh all the negatives",[154] she concluded in her report:

> "4.20 On balance, it is my opinion that cumulatively, the post-suspension events would likely have impacted Mayer's share price positively."

330. Ms Pao thought that a successful rescission of the Vietnam project could lead to a reversal of the erosion in Mayer's share price that had taken place. The hope of this rescission occurring would prompt investors to realise that HK$0.123 was a much too pessimistic valuation for Mayer. Noting that from 11 May 2011 to 6 January 2012 only 6.68 million shares traded at this price or lower, Ms Pao calculated that the weighted average price of all trades in this period was in fact HK$0.278. Ms Pao was of the opinion that investors were likely to revalue Mayer's shares to around this amount upon seeing the good news of the Vietnam litigation. Such a revaluation would, effectively, give back to Mayer the RMB116.9 million in net asset value that it had lost in this period of 11 May 2011 to 6 January 2012. Ms Pao did not think that the cumulative negative effect of some of the post-suspension events would prevent this revaluation of Mayer's share price from occurring. Thus, she concluded in her report:

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[154] [5.34] of Ms Pao's Report.

"4.21 I opine that The Investors would likely value Mayer at a price above HK$0.123 but below HK$0.278 just prior to the announcement of GT's resignation."

331. However, as a consequence of lengthy probing in cross-examination, Ms Pao changed her view in re-examination, as is apparent from the following excerpt from the transcript of her evidence:

"Q. … Overall -- I'll ask you to review your conclusions, but would you say that the post-suspension events looked at overall were -- now you're come to the nearly end of your evidence, were they positive or negative?

A. The post-suspension events overall?

Q. Yes.

A. They were probably plus and minus probably neutral overall.

CHAIRMAN: Can I ask you to be more precise in terms of the date, because the date with which I am concerned is 1 January 2013.

A. Yes. The post-suspension events would be applicable to --

CHAIRMAN: They were occurring throughout the 2012 period.

A. Yes.

CHAIRMAN: So in terms of their effect, what would have been their effect as at 1 January 2013?

A. I think at the end of the day it would be on 1 January. If the Grant Thornton announcement hadn't been released, I would say it was neutral on the share price after all these things happened. So we are probably looking at

somewhere around 12.3 cents, 13 cents, approximately in that arena."[155]

(vi) Assessing what impact on Mayer's share price the undisclosed information would have had if it had been generally known

332. Ms Pao then went on to provide her assessment of what the impact on Mayer's share price would have been had the specific information identified in [4.2] – [4.5][156] of her report been generally known. She conducted this assessment firstly by determining whether each piece of specific information would cause investors to conclude that the valuation of Mayer shares would decrease sufficiently to prompt them to sell the shares if they could. Secondly, she went on to consider whether any share price movement resulting from investors' action could be classified as material.

333. In conducting this assessment Ms Pao said she had regard to both qualitative and quantitative factors. Her qualitative assessment addressed the question of whether the specific information "would cause The Investors' valuation of Mayer to change sufficiently so as to cause The Investors to buy or sell Mayer shares (if they could)".[157] Her quantitative assessment addressed the question of whether The Investors' investment actions would result in a share price movement that could be described as material.

334. Without any trading taking place during the relevant period she had no information on share prices and share trading volume to assist her and so she

[155] Transcript, day 4, page 56, lines 1 – 23.
[156] These are quoted at [306] of our Report.
[157] [5.40] of Ms Pao's Report.

"applied the statistical theory of standard deviation … to evaluate whether the relevant specific information would likely cause a material change in The Investors valuation of Mayer's shares".[158] By this means she formed the opinion that "a material daily increase in Mayer shares would be an increase of greater than 7.31% … from the closing price of the previous trading day. A material daily price decline would be a decline greater than 7.89% … from the closing price of the previous trading day".[159]

335. She described her approach in respect of a material decline in price at [5.46] of her report as follows:

> "5.46 I therefore opine that a piece of specific information would materially negatively affect the share price of Mayer if The Investors, having considered the information, would come to the conclusion that the valuation of Mayer shares would decrease (from their last valuation) sufficiently, so as to cause them to want to sell Mayer shares (if they could). Their investment action would cause Mayer's share price to decline should Mayer resumed trading. Based on the historical volatility of Mayer shares and the statistical theory of standard deviation, it is my opinion that a valuation decline of 7.89% or more would be quantitatively material."

336. Ms Pao then examined each of the pieces of specific information, expressing her opinion on the impact that each would have on Mayer's share price.

[158] [5.41] of Ms Pao's Report.
[159] [5.45] of Ms Pao's Report.

(i) Grant Thornton's resignation

337. Ms Pao analysed the reasons cited in Grant Thornton's resignation letter and expressed the following opinion on how investors would react to it:

> "5.49 … It is my opinion that upon seeing this resignation announcement on its own, The Investors would likely have deduced from the reasons cited that Mayer's management control was very poor and problematic, which would very likely lead to the company losing significant amount of money in the future. *Some of The Investors might even have qualms about Mayer's management's integrity, a nightmare of every investor in the stock market.* Moreover, the fact that Mayer had two auditors resigned from the company within a span of around ten months would likely confirm to The Investors that serious accounting and control issues existed. I therefore opine that had GT's resignation and the reasons thereof, even without specifics, been generally known to The Investors at any time during the Relevant Period, *The Investors would likely have sold shares of Mayer if they could, which would likely have materially affected Mayer's share price negatively*."
>
> (Emphasis added.)

338. Her conclusion that the Grant Thornton resignation, and the reasons given for it, "would likely have materially and negatively affected Mayer's share price"[160] was challenged by Mr Li when he cross-examined Ms Pao. He put to her that there was nothing knew in the auditors of Mayer resigning over their inability to obtain information from the company and consequently the

[160] [4.26] of Ms Pao's Report.

resignation of Grant Thornton for this reason would not have had any material price effect. Ms Pao disagreed with this proposition.

(ii) Substance of disposal of an available-for-sale financial asset

339. In her report Ms Pao said that "The Investors would find it incredulous that Mayer could not provide proof that they received the proceeds from the sale of Advance Century unless they actually didn't receive it, and that they could not prove that they did not borrow HK$15.5 million from lenders".[161] Thus, Ms Pao's opinion on the reaction of investors was based on two assumptions; one concerned Mayer's receipt of the monies and the other concerned the source of the monies and Mayer's ability to disprove, by supporting documents, the allegation that the monies were loans. She concluded that "Mayer either had extremely poor accounting procedures or that some suspicious activity was going on".[162]

340. From this conclusion, and using her formula, Ms Pao calculated that this unresolved accounting issue, on its own, "would lead to a diminution of HK$0.033 in Mayer's NAV per share, which would be equivalent to a drop of between 11.9% to 26.8% in Mayer's share value".[163] On this basis she expressed the opinion that "this specific information would have materially negatively affected the price of Mayer shares"[164] and thus would have constituted inside information.

[161] [5.51] of Ms Pao's Report.
[162] Ibid.
[163] [5.53] of Ms Pao's Report.
[164] Ibid.

341. As we have said, underlying her opinion were two assumptions. The first was that the sum of HK$15.5 million had never been received by Mayer and that consequently the total financial impact on Mayer was HK$31 million, (what she called "a double whammy"). However, in cross-examination she accepted that this assumption was wrong and the total financial impact on Mayer, on the basis that investors assumed a worst possible outcome of the litigation, was now only HK$15.5 million.

342. The second assumption was that Mayer could not prove the source of the HK$15.5 million that it had received. On this matter, Ms Pao was referred by Mr Li to the 13 October 2012 Oriental Daily News report on the High Court decision allowing Mayer to defend this litigation. This article portrayed the plaintiff as being regarded by the High Court judge as being in a weaker position, evidentially, relative to Mayer.

343. Conceding that the two assumptions on which she based her opinion that investors "would likely react to this information very negatively, by factoring in the worst possible outcome to this issue in Mayer's share price", were erroneous, Ms Pao then accepted that investors would not assume a worst possible outcome for Mayer. She said:

> "Q. On the Advance Century issue, I put it to you that events had already overtaken what Grant Thornton said in August 2012.
>
> A. Agree.
>
> Q. Further, that your assessment of whether that issue is price-sensitive or not, your assessment is incorrect.

A. Agree -- the issue singly on its own, my assessment in the report was incorrect, agree."[165]

344. Ms Pao was also cross-examined by Mr Chan on this issue and she agreed with him that it would be reasonable for the informed investor who read the 12 October 2012 High Court Decision to take the view that, on a simplistic analysis, Capital Wealth's claim of an oral loan as large as HK$15.5 million would seem quite weak.

345. Mr Chan put to Ms Pao that her conclusions in respect of Advance Century that are contained in paragraph 5.51 of her report were completely wrong. Ms Pao agreed, saying:

> "Based on all this extra information obtained today, I agree that 5.51, my conclusion was incorrect."[166]

346. In re-examination she was asked to recalculate the diminution without the first assumption and came up with a figure of half her original; that is a drop of "a little less than 6 percent to 13.4 per cent".[167] This meant that it was possible the same price could drop enough to bring it to her threshold of 7.89% or more.

347. Because the two assumptions on which Ms Pao made her calculations were no longer valid, Ms Pao found it hard to assess the likely material impact of the Advance Century disposal on Mayer's share price. In order to accurately set

[165] Transcript, day 3, page 61, line 25 – page 62, line 7.
[166] Transcript, day 3, page 133, line 13 to page 134.
[167] Transcript, day 4, page 66, lines 17 – 18.

out her position it is necessary to quote the following excerpts from the transcript of her evidence during her re-examination by Mr Scott:

"Q. Let us just try and understand, Ms Pao. What is your assessment of the material impact, if any, of the Advance Century disposal and the questions that Grant Thornton were asking in their -- the issue that they were referring to in their resignation letter at the announcement of --

A. Actually, Mr Scott, to be honest, I am very confused about this point because on one hand I saw I've been given the news article and I've been -- I saw very quickly about the judgment of the lawsuit between Capital Finance, Capital Wealth and Mayer, so I was told that actually the whole thing was resolved in October of 2012. And my question at that point was why did Grant Thornton still have that audit issue? And I don't believe I got a proper answer. So to answer your question, because of my confusion, I don't quite know what to make of it.

…

CHAIRMAN: So in terms of the single-whammy, the only thing really that made it questionable was who sent the money and why.

A. Yes.

…

CHAIRMAN: So as at 1 January, trying to express the auditor's concern, or as at 27 December when they resigned, would it be an inability to confirm that 15.5 million received by the company was received as consideration for the sale of whatever the company is?

A. Yes. Yes.

…

A. I think it depends on whether Mayer could work with the auditors to convince them that -- I don't know why it is so difficult to obtain something from Golden Tex to say that they actually paid the money. I really don't quite understand it. But --

CHAIRMAN: There is that email where they say they paid the money.

A. Yes.

CHAIRMAN: But they quote the wrong account number.

A. Yes. So if Grant Thornton can be satisfied, then there would be no issue, but by December for some reason they still felt they had an issue. Unfortunately, it wasn't explained very well in the resignation."[168]

348. These answers by Ms Pao serve to remind us that the issue is not whether Grant Thornton should have still been concerned about this transaction at the time of its resignation, but rather whether the fact that it was still concerned constituted inside information. In this respect the fact that Mayer seemed unable or unwilling to readily assist its auditors in resolving this issue, such as by enlisting the cooperation of Golden Tex, would be relevant to assessing the impact this undisclosed information might have on investors.

(iii) Ownership, control and valuation of the Vietnam Project

349. Ms Pao recognized that the undisclosed information in respect of this

[168] Transcript, day 4, page 75, line 8 – page 82, line 1.

investment all pointed to the investment being a shambles. But, in her view, the investors had already formed an unfavourable view of this investment and reflected that unfavourable view in the "hefty discount to the value of Mayer's share".[169] That being so, Ms Pao concluded it was unlikely that the price of Mayer's shares would be affected by information about this investment in any further material way.

350. In respect of this unresolved accounting issue, Ms Pao was of the view that had it been generally known to investors it would unlikely have affected their valuation of Mayer's shares in a material way and so did not amount to inside information.

351. In cross-examination by Mr Li, Ms Pao agreed that the problems with the Vietnam project were already well known. The following excerpt from her evidence clearly reveals her position:

> "Q. By the end of 2012, I put it to you that the negative effect of this problem would have wiped out any positive effect of the company announcing this litigation on 12 January 2012. Agree or disagree?
>
> A. By the end of 2012?
>
> Q. Yes.
>
> A. Agree.
>
> Q. Therefore, Grant Thornton saying that management could not give them some information about the Vietnam project would be nothing new and

[169] [5.56] of Ms Pao's Report.

would not have had have any price effect; agree?

A. Agree. That's what I said in my report." [170]

(iv) Existence and commercial substance of prepayments to suppliers by Elternal and Sinowise

352. In her report, Ms Pao said that if investors realized that Mayer could not provide evidence of the recoverability of the prepayments they would assume the worst outcome. The loss of the Elternal prepayment would likely cause a decline in the price of Mayer's shares of HK$0.042 which would be "equivalent to a drop of between 15.1% … to 34.1% … in the value of Mayer shares".[171]

353. Ms Pao was also cross-examined by Mr Li on what investors would know of the amount of the prepayments and she accepted that they would not know these amounts and so could not do the calculations she had done. The following excerpt sets out this part of her evidence:

"Q. Here what you did was to take the $10 million figure and say Mayer owns about half of Elternal, 49.99 per cent of Elternal?

A. Yes.

Q. So you half that 10 million into 5 million and you divide it by the number of shares and say the effect on the share price would be 0.042 per share?

A. Yes.

[170] Transcript, day 3, page 59, lines 8 – 19.
[171] [5.60] of Ms Pao's Report.

Q. But investors would not know the amount of the prepayment; correct?

A. Yes.

Q. And therefore could not do the calculations you have done; correct?

A., Yes.

Q. And in any event would not have assumed the worst, as you have; correct?

A. That we don't know because they don't have the information."[172]

354. She conducted a similar exercise in respect of Sinowise and reached an identical conclusion. The calculation for the likely decline in Mayer's share price should the Sinowise prepayment be wholly unrecoverable was between 10.1% to 22.8% in the value of Mayer shares.

355. However, in cross-examination by Mr Li, Ms Pao agreed that she erred in working on the basis of an outstanding debt of HK$6.6 million for Sinowise and that she should have used a figure of HK$5.3 million. She also agreed that, as with the Elternal prepayment, investors would not know this figure.

356. Ms Pao's opinion was that had each of these been generally known then each, on its own, would likely have caused investors' valuation of Mayer shares to decline materially and so both amounted to inside information on 23 August 2012 when Anthea Han, in the Action Plan attached to her email of that date, alluded to the potential reduction to Mayer's net asset value should the accountants make a limitation of scope in respect of this unresolved accounting

[172] Transcript, day 3, page 47, line 10 – page 48, line 2.

issue.

357. In her testimony Ms Pao also referred to the suspicions of fraud that would be created in investors' minds by the unusual action of making a pre-payment. She said:

> "Once you get into the issue of pre-paying for something there's plenty of room for foul play and fraud. So if there are issues with prepayments, investors would immediately associate them with fraud. Once you get down that road, they're not going to - - investors are not going to say, "Hm, 30 per cent provision, hm, 50 per cent provision". They would just assume worst-case scenario."[173]

358. Ms Pao was cross-examined about this issue by Mr Chan who suggested to her that, with her limited background and contextual information on these transactions, it was, in effect, presumptuous of her to pre-judge the commercial merits of Glory World's subsidiaries, Elternal and Sinowise, not Mayer, making prepayments for the purchase of these commodities. The exchange with Mr Chan can be found in the following excerpts from the transcript of the evidence:

> "Q. … But the business sense here is that Elternal needs iron ore so that it can supply to other people. Isn't that basic business sense here?
>
> A. Yes.
>
> Q. And it's pre-paying, admittedly on its face a big amount to ensure continuing supply; is that correct?

[173] Transcript, day 1, page 59, line 9 – 16.

A. Now, I don't know anything about the iron ore business, whether there is such a --

…

A. So I don't know whether this iron ore is so difficult for Elternal to secure that they had to pre-pay to secure the supply.

Q. Yes, nobody knows. But my concern is you seem to be drawing conclusions against Mayer in this case, but there are a lot of facts you don't know about drawing that conclusion. That is what I'm concerned about.

A. Ah, okay. Well, I base my conclusion on the fact I've been given in my instructions, that despite VMC promise to fulfil the prepayments in installments, in how many -- I forgot how many installments -- I think in one year's time they were only able to deliver about less than $500,000 worth of iron ore."[174]

359. The Chairman then asked a number of questions of Ms Pao and Mr Chan followed up on them. It is worth quoting this passage of the transcript in full:

"CHAIRMAN: Very well. But my question of Ms Pao is that as of 1 January 2013, if Elternal has come to a revised agreement with VMC that they will wait longer than they expected to wait for the supplies and offset the prepayment against that, is that something that would be material that would have to be disclosed?

[174] Transcript, day 3, page 140, line 1 – page 141, line 8.

A. If Elternal's --

CHAIRMAN: Would be material in terms of the share price?

A. If Elternal's auditors agree with Elternal they didn't have to write any of that off, they did not have to provide for the 10 million prepayment which they only got, I don't know, a few hundred thousand dollars worth of goods for --

CHAIRMAN: We're not going to know that, are we?

A. If they decided that Elternal did not have to write that down or make any provisions for that, then it would not impact Mayer's books at all. And of course then it would have no impact -- no negative impact on Mayer's share price.

But I would just like to highlight an observation. Elternal paid US$10 million for iron ore which they expected to get in one year, a one-year supply. They only got 15 per cent of it, or less than 15 per cent of it due to bad weather and machinery malfunction.

And then when they went back to renegotiate, the balance of the iron ore will take nine years to fulfil. Either they expect nine years of bad weather or they can never repair their machinery or this VMC never had the capacity to supply $10 million of iron ore in a year. *So that's why I think the prepayment, even though securing a long-term supply may make business sense, but the scale of it is a bit suspicious*."[175]

(Emphasis added.)

[175] Transcript, day 3, page 148, line 5 – page 149, line 11.

360. In response to questions from the Chairman, she explained why she was of the view that the act of making a prepayment would generate suspicions in investors' minds, making it something which should be disclosed:

"CHAIRMAN: Can I just ask this question of Ms Pao. In relation to Elternal, what is it about the Elternal audit issue that makes it likely to materially affect the price of Mayer?

A. Yes. Now, there are two issues here basically. The investors, because they have not been informed, they would not be able to see the numbers behind, so they would not be able to do the calculations that I did. However, I did say that, having seen the resignation, *once you see problems with prepayments, that would easily suggest suspicions with frauds, foul play*. Typically, if you made prepayments and then you end up not -- you ended up with problems with it, then investors would question, because unless you're really talking about very, rare hard-to-secure goods, typically in the business world you do a deposit, you don't do prepayments. *So investors would react to this in terms of suspicion of foul play.*

CHAIRMAN: So you're saying that because these subsidiaries engaged in unusual commercial transactions, there would be suspicions of fraud.

A. Yes.

…

CHAIRMAN: The concept of a company making a prepayment, is that extraordinary a commercial action, is it?

A. It is not common unless it's for some hard-to-secure raw materials or goods.

In the business world, you don't usually make a prepayment for the whole contract. You would make a deposit, and then as you received the goods, you would pay for the goods as you go."[176]

361. In re-examination she was questioned further on this and her responses, as set out in the following excerpts from the transcript, are helpful:

"Q. Where are we now on this? Would the investing public believe that a statement that the auditors have resigned because of doubts about the existence and commercial substance of prepayment, would that have had a material impact on the price of Mayer's securities in your view?

A. Yes.

…

A. Okay. Well, then in general, as I said, when I come across prepayments, and I think a lot of investors will also share the same feeling, then you relate it to something that is -- a raw material or whatever that is hard to get, that's why you have to prepay for it. Otherwise, then you may associate it with some special relationship with the supplier that you have to make a prepayment. So it may be associated with some wrongdoing or fraud.

CHAIRMAN: That's just amongst the possibilities?

A. Yes.

CHAIRMAN: But there may be -- it may be a legitimate commercial decision?

A. It may be, but if the auditors have raised it, then maybe they have a concern.

[176] Transcript, day 3, page 48, line 10 – page 50, line 11.

Because if --

CHAIRMAN: That's clear, they say that this is one of their concerns.

A. Yes, exactly.

CHAIRMAN: But they don't identify why.

A. Yes. So there must be something not quite right in this relationship for them to raise it.

CHAIRMAN: Isn't that a fairly big assumption to make?

A. No. Because if it's a normal business relationship. I don't think the auditor would comment on it. So they commented on it and said, "We're concerned" and they made some -- they gave some pretty general reason, but very descriptive in the sense that they are not sure about the commercial reason for having to make these prepayments.

So I think investors, having read this, would have doubts in their mind, suspicions of wrongdoing."[177]

(v) The cumulative effect of the specific pieces of information

362. Finally, Ms Pao turned to assess the combined impact of the Grant Thornton resignation and the unresolved accounting issues. She did so by analyzing how investors would respond to Grant Thornton's inability to resolve the accounting issues. Once investors realized that this inability was due to

[177] Transcript, day 4, page 85, line 10 – page 87, line 17.

Mayer's management not producing the requested information the question would arise of whether fraud was involved. She said:

> "The prepayments to Elternal and Sinowise, the missing proceeds of the sale of Advance Century and the grossly inflated valuation of the Dan Tien JV could all arouse investors' suspicion of foul play."[178]

363. The alternative conclusion that investors might reach was that Mayer's management was "so lax or incompetent that they did not see the need to procure all the necessary documentation in advance to support these transactions".[179]

364. It was, therefore, Ms Pao's opinion that "The Investors would likely view GT's resignation and the Unresolved Accounting Issues very negatively and thus it would be reasonable for them to price in the worst possible outcomes for all the issues".[180]

365. In her report Ms Pao concluded:

> "5.71 In conclusion, I opine that had the GT's resignation along with the Unresolved Accounting Issues been generally known to The Investors at any time during the Relevant Period after all the specific information had emerged, Mayer's share price would likely decline by at least HK$0.103. The decline of HK$0.103 did not take into account the negative impact on *The Investors' sentiment due to their loss of confidence in Mayer's management's competence and integrity. The decline in the value of*

[178] [5.70 (b)] of Ms Pao's Report.
[179] [5.70 (c)] of Ms. Pao's Report.
[180] [5.70] of Ms Pao's Report.

Mayer's shares would likely be greater if this factor was taken into consideration." (Emphasis added.)

366. Ms Pao calculated that a decline of HK$0.103 would be equivalent to a drop of 37.1% from a base of HK$0.278 and a drop of 83.7% from a base of HK$0.123. Either of these drops in the value of Mayer shares would be material. Thus, it was her opinion that "had GT's resignation and the Unresolved Accounting Issues been generally known to The Investors at any time during the Relevant Period after all the specific information had emerged, it would likely materially negatively affect the value of Mayer shares".[181]

367. She then ended her report by saying:

> "5.73 It is my opinion that GT's resignation and the Unresolved Accounting Issues, being new information and independent of all the Post-suspension Events, would seriously undermine investors' confidence in Mayer and thus would likely materially negatively affect the value of Mayer shares, regardless of the hypothetical value of Mayer shares perceived by The Investors prior to the emergence of this information."

368. Ms Pao was also of the opinion that these matters constituted "new information, which was independent of the Post-suspension Events, and would likely seriously undermine The Investors' confidence in Mayer's management competence and integrity. As such, I opine that had this new information been generally known to The Investors at any time during the Relevant Period, it would

[181] [5.72] of Ms Pao's Report.

likely materially negatively affect the value of Mayer's shares".[182]

The Evidence of Mr Rigby

(i) Identifying the Investors likely to deal in Mayer shares

369. By 1 January 2013 Mayer had been suspended from trading for nearly a year and as a consequence of this fact Mr Rigby was of the view that "the general investing public" would not have been likely to deal in Mayer shares.

370. Buyers of Mayer shares would have been either existing shareholders or substantial investors acting as a "White Knight". A "White Knight" is "an incoming investor who could be regarded as rescuing a company by the infusion of new management and or capital".[183]

371. Mr Rigby explained that other potential buyers would be deterred by the "very real practical difficulties of executing trades in a suspended share as well as the issue of illiquidity and the total lack of clarity as to when resumption of trading might occur".[184] Mr Rigby also noted that the longer the shares were suspended the more concerned investors would become that Mayer might be delisted.

372. As for potential sellers, Mr Rigby was of the view that they would have been limited to those few investors who were in such desperate need of funds that

[182] [4.34] of Ms Pao's Report.
[183] [2] of Mr Rigby's Report.
[184] [3] of Mr Rigby's Report.

they would be inclined to accept a buyer's General Offer, even at a low price. He said it was also possible that some shareholders might become so fed up with Mayer and its misfortunes that they sell their shares at a discount.

373. Mr Rigby thought that, realistically the number of shareholders likely to accept a low General Offer would be very small. This was because Mayer's share price had dropped so much that it was trading at only 20.8% of its then net asset value. He described the discounting of the share price as overshooting on the downside of Mayer's future prospects. He agreed with Ms Pao that the market's view of Mayer was overly pessimistic and that its pessimism was due to the Dan Tien JV.

374. Mr Rigby pointed to the low acceptance of Wang Han's Conditional General Offer of HK$0.12 on 16 February 2012 as support for his views. As we have mentioned, only 2.8% of shareholders accepted this offer.

375. Mr Rigby also claimed that further support for his view that Mayer's post-suspension share price of HK$0.123 had already discounted the bad news could be found in the prices at which its shares traded on resumption of trading on 21 November 2018. Then, the shares traded at prices ranging from HK$0.28 and HK$0.24 on a turnover of 124 million shares.

376. Mr Rigby said it was worth noting that Mayer had no activities capable of generating a meaningful income and that the company was effectively a shell. It would have value as a shell that could be used for a potential backdoor listing.

(ii) Assessing the State of Mayer at 1 January 2013

377. Mr Rigby was of the view that in order to make this assessment it is essential "to understand the behaviour and valuation of Mayer's share prior to its suspension on 9 January 2012".[185] Mr Rigby went back as far as August 2010 as he was of the view that from then until the end October 2010, there was "a very marked, short term price and trading volume surge"[186] that peaked on 15 October 2010 when the Yield Rise acquisition was announced. In this period the price of Mayer shares rose from HK$0.55 to HK$0.78 before returning to about HK$0.55. Mr Rigby said that this "had the appearance of a manipulated 'Pump and Dump'".[187] The later decline in share price to HK$0.123 he described as a collapse which "clearly put the value well into the range of prices of a listed Shell".[188]

378. Mr Rigby summarised his assessment of the state of Mayer as follows:

> "16. In short, Mayer represented a very messy case of a share that appeared to have been ramped and dumped as well as being looted through mal-investment after which a declining share price turned into a collapse resulting in an oversold situation."

379. It was an important element of Mr Rigby's opinions on the effect of the post-suspension events on Mayer's share price, and of the likely effect of the specific information on that share price, that Mayer's share price had already

[185] [13] of Mr Rigby's Report.
[186] [14] of Mr Rigby's Report.
[187] [14] of Mr Rigby's Report.
[188] [15] of Mr Rigby's Report.

dropped enormously. He said in the course of his testimony:

> "What I've neglected to remind everybody of, and it's very obvious, is that $0.12 was something like a 75 per cent or 80 per cent discount on the net asset value. And again shares don't trade at such huge discounts without cause. They're reflecting concerns in the market. Whether you can see those reasons on a Bloomberg screen or in Apple Daily is another matter but it doesn't mean that the concerns aren't voiced -- aren't routed around the market. They're very real. It's why the share has collapsed.
>
> CHAIRMAN: So it's not so much the price of the share, it's more the reflection of the shares as against the net asset value, and that would show something was wrong with the company.
>
> A. Yes, exactly."[189]

380. He later explained that at HK$0.12 per share the value of the company was only about HK$100 million or RMB93 million. He continued:

> "And that $100 million is decidedly at the cheap end of the range of prices for a shell.
>
> CHAIRMAN: A shell being a listed company?
>
> A. Exactly. Which you can use to inject other businesses into or what have you. And it is my belief that by the time that the price before suspension got down to $0.12, it was trading primarily as a speculative shell. It wasn't trading as an ongoing concern. It wasn't trading on the basis of this is – it's a fabricator of steel sheet and steel pipe with, you know, an 8 per cent

[189] Transcript, day 4, page 128, lines 9 – 25.

margin. It wasn't. It was trading as a shell. And as a shell, it was arguably cheap. Shell prices back then would probably run about 200, $300 million, could be more or less depending how clean the company is, how suitable it is for the potential acquirer to insert whatever business he intends to insert into it."[190]

(iii) Assessing the effect of the post-suspension events on Mayer's share price

381. In addition to the post-suspension events identified by the Court of Appeal, Mr Rigby thought that regard should also be had to:

(1) the appearance that Mayer's share price had been subjected to manipulation;

(2) Mayer's internal realization of the fraud and over-valuation in the Vietnam investment;

(3) the SFC concentrated warning of 30 July 2009;

(4) apparent disputes over ownership and control of substantial shareholdings;

(5) the conviction in Taiwan of SP4;

(6) the absence of any substantial revenue generating business; and

(7) the collapse of Mayer's share price.

382. In the context of such a company Mr Rigby identified what he

[190] Transcript, day 4, page 131, lines 3 – 18.

considered the most important pieces of information relating to Mayer. He said:

> "17. In my view, in a vacuum had the shares not been suspended, the three most important pieces of information are:
>
> 1) The bad investment in Vietnam;
>
> 2) The resignation of the first auditors – Crowe Horwath;
>
> 3) The resignation of the replacement auditors – Grant Thornton along with the delay to the publication of results;
>
> The remaining events were lost in the bigger picture."

383. Mr Rigby regarded all these pieces of information as bad news which "would have been bearish and would have had a depressing effect on prices had the share price not already collapsed before the suspension".[191]

384. The other five post-suspension events[192] Mr Rigby regarded as "inconsequential in their effects on the share price, even had the stock not been suspended, cumulatively they would have been a minor part in a drum roll of bad news that collectively would have explained why the price had already collapsed prior to suspension".[193]

385. Mr Rigby was not denying that certain events would not evoke a response from investors. For example, he accepted that the Vietnam litigation would evoke a favourable response and the Grant Thornton resignation an

[191] [18] of Mr Rigby's Report.
[192] These are items (c), (d), (e), (f) and (g) as set out at [321] – [328] ante.
[193] [19] of Mr Rigby's Report.

unfavourable response. But, whatever response any particular event might evoke in the minds of investors it would not make any difference to the share price for the simple reason that Mayer was "not trading like an on-going concern. People are just punting on the value of a shell".[194]

(iv) Mr Rigby's Response to Ms Pao's Methodology and Conclusions

386. Mr Rigby then discussed Ms Pao's methodology whereby she sought to use statistical concepts to mathematically calculate the increases and decreases in valuation of Mayer shares and arrive at a valuation of 7.89% or more as being quantitatively material. He explained why he disagreed with the use of this methodology:

> "21. Bullish or bearish judgment in a vacuum may be easy, but judging the extent of the effect on a future price is certainly not. Stock markets are not electronic calculators. Share prices do not raise and fall by predictable, quantifiable amounts in response to new developments. Prices at any given moment are usually the distillation of imprecise emotional reactions affected by a variety of attitudes of varying numbers of participants with varying degrees of financial sophistication, experience and information. Markets are subject to periods of both unreasonable optimism and excessive pessimism leading to prices overshooting, sometimes wildly, both on the upside as well as the downside.
>
> …
>
> 33. Most market observers can generally judge whether a piece of news is, in

[194] Transcript, day 4, page 141, lines 18 – 19.

and of itself, in a vacuum, positive or negative from a qualitative point of view. However in over five decades of observing and trading many financial markets, I have never met, heard or read of anyone capable of consistently quantifying, in advance, the effect of news on price. I say this having worked with, met and read about some of the most successful investors on the planet. Those traders who do use statistical models for the purposes of trading, base their trust on making as many different bets as possible, believing that their losing trades will in the aggregate be more than covered by their wins. I have never heard of any trader using statistical modeling strategies assuming that any particular prediction will be correct.

34. Furthermore whilst a few of these statistical trading models have been very successful for a number of years, many of them eventually succumbed to a change in market conditions resulting in large, occasionally disastrous, losses despite having built lustrous reputations for their managers over a number of years."

387. In the course of his evidence, whilst being re-examined by Mr Scott, Mr Rigby articulated the basis of his objection to Ms Pao's methodology. He said:

"A. Ms Pao, in my view, at various stages in her report seems to me to equate a change in value with a commensurate and equal change in price. So what I believe that Ms Pao does, and I'm very uncomfortable with, is that she thinks that if an event occurs which can be reflected in a change in the net asset value, that the share price would reflect that. And I simply don't accept that. It just doesn't work like that.

Take off the starting-off point. At the last reference price of 0.123, we're trading at -- I forget, 75 per cent, 80 per cent discounted net asset value. Now, perhaps I'm unfairly characterizing or exaggerating my suspicion of what Ms Pao does, is in her methodology she would then point to an event that she thinks is bearish, that should give you a decline of X number of cents, and because that is her estimation of the change in net asset value. So the net asset value in her opinion drops by five cents a share, the price should drop by five cents a share. No, it's already done it. Otherwise, you wouldn't be trading at an 80 per cent discount in the net asset value."

So to me, I'm just fundamentally opposed to that way of doing it. It's just too mechanistic."[195]

388. In summary, he:

(i) disagreed with Ms Pao on the identity of the likely investors;

(ii) agreed with Ms Pao that the undisclosed information was specific information and was not generally known to investors;

(iii) agreed with Ms Pao that Mayer's share price decline to HK$0.123 would have been mainly due to investor's pessimism towards the Dan Tien JV investment;

(iv) he agreed with Ms Pao that the price of HK$0.123 was overly pessimistic given Mayer's market capitalization of RMB93 million and given that upon resumption of trading in late 2018 its

[195] Transcript, day 4, page 136, lines 3 – 25.

share price rose to as high as HK$0.28;

(v) disagreed with Ms Pao on the methodology she used in assessing the impact the specific information would have on Mayer's share price; and

(vi) disagreed with Ms Pao on the conclusion she reached on the impact the specific information would have on Mayer's share price.

(v) Mr Rigby's Opinion on the Price Sensitivity of the Specific Information

389. His opinion on this key issue of the impact the specific information would likely have on Mayer's share price was as follows:

> "26. As Mayer was suspended from trading during the Relevant Period, the price impact, if any, of the relevant specific information could not be reflected in Mayer's share price on the Hong Kong Stock Exchange platform when the information became known. It is my view that the information had effectively been discounted prior to suspension and that therefore the news and events as they unfolded were regarded by the market as a belated explanation for the price drop that had already occurred and taken prices down to HK$0.123. Accordingly the specific information would have had no material impact on prices."

390. The reasoning by which Mr Rigby reached this conclusion becomes apparent from the immediately following paragraphs of his report where he said:

"27. Whilst Mayer's shares were suspended from trading, with no clear likelihood of resumption, the precise order of unfolding events, whether positive, negative or neutral in a vacuum, was irrelevant until the point in time when events to date would be weighted in total so as to assess whether a price was acceptable in the event of any off market trading or in the case of a General offer. Post suspension news, including the specific information (per paragraph 24 above), would not necessarily affect the price at which such an offer might be made as a buyer's price is arrived at by purely commercial opportunism. The buyer's reasoning does not have to be based on value. The buyer's offering price is designed to tempt sellers whose preparedness to accept is based mainly on the last open-market traded price of HK$0.123. In effect the offer price would be arrived at primarily by the buyer's opportunism or his preparedness to be generous or mean.

28. In short, whether for an inside buyer, a seller or a White Knight, the relevant specific information (per paragraph 24 above) would have no price impact on their individual trading decisions during the Relevant Period."

391. That is not to say that Mr Rigby did not see certain matters as significant for Mayer; only that he did not think that those matters would affect Mayer's share price. For example he agreed that the Elternal and Sinowise prepayments were "commercially unusual."[196] He was asked about the Grant Thornton resignation and said:

"Q. Would you agree with me that the reasons given for the resignation of Grant Thornton as announced in the announcement are serious.

[196] Transcript, day 4, page 149, lines 3 – 11.

A. If these things -- you know, if the announcement of these problems was a bolt out of the blue, of course I would regard them as being very bearish. If you had a relatively stable narrowly fluctuating share price and all of a sudden you get resignations of auditors, I would expect the price to drop sharply. But the price has already dropped. It's already been tanking. Somebody used the expression of "basket case".

It's already been tanking. It's already trading at 80 per cent a discount in net asset value. It's already dropped from 75, 80 cents to $0.12. How much more do you want it to go down? It is now trading as a speculative shell The fundamental news it makes a profit, it makes a loss, irrelevant. It recoups $10 million on this contract or that contract or this piece of litigation or that piece of litigation, it's irrelevant. It's peanuts."[197].

392. Mr Rigby's comments emphasise the fundamental distinction between information that is of significance to a company and information that is likely to materially affect its share price.

393. It is noteworthy that in his evidence Mr Rigby adverted to the possibility of the market being worried about the company being looted and being worried about this as far back as the Crowe Horwath resignation announcement. He noted the bare character of the reasons given by Crowe Horwath in its resignation letter and said of those reasons:

"… I can only suppose would very likely have included other concerns that they had and answers that they've not received that they haven't

[197] Transcript, day 4, page 151, lines 18 to page 152, line 12.

actually listed."[198]

394. He also referred to the possibility of the market being suspicious of Mayer being looted when he explained why he regarded the Elternal and Sinowise prepayments as "unusual". He said:

> "When I say "unusual", I really do mean unusual. The market, looking at this, is almost part and parcel -- you know, the Dan Tien, the Vietnam deal, here's a company being looted. There's an overvalued asset being sold for very meaningful sums of money, huge sums of money in relation to this company. I think the total cost was around about $700 million.
>
> The supply contracts, the iron ore, the coal, that's -- that's how bad guys loot companies. They procure the companies to get into deals that are bad for the public shareholders and good for the people that are doing it. And again this is a pattern that occurs in Hong Kong again and again and again."[199]

395. As is clear from what we have noted earlier in this Chapter, both Ms Pao and Mr Rigby could detect conduct by the management of Mayer which could give rise to suspicions in investors' minds that the company's management might be involved in dishonest conduct to the detriment of Mayer. This is a matter to which we shall return in Chapter 15 of this report.

[198] Transcript, day 4, page 146, lines 16 – 19.
[199] Transcript, day 4, page 151, lines 3 – 16.

Chapter 9

The Evidence of the Specified Persons

396. The evidence of the Specified Persons that was before the Tribunal consisted of a witness statement presented to the Tribunal on behalf of SP1, records of interview conducted with SP2 – SP6 and SP10 – SP11, and the witness statement and oral testimony of SP9.

The Witness Statement Presented for SP1

397. SP1 presented a witness statement made by Lee Kwok Leung who had been appointed an Executive Director of Mayer on 9 October 2014. He is also the sole shareholder and sole director of Capital Wealth Finance Company Limited. He said that Mayer would not be disputing any factual allegation made by the SFC but that it was the company's position "that it was at the time being controlled by a board of directors, controlled mainly by Lai [i.e. SP4] and Hsiao [i.e. SP3], which had not been acting in the interest of the Company and was in fact perpetrating fraud against it." Consequently, Mr Lee said, Mayer should not be made liable for this conduct or, alternatively, should not be punished for it even if found liable.

398. It was Mr Lee's evidence that around May/June 2009 SP4, on behalf of Mayer's parent company, had entered an agreement with Capital Wealth for Capital Wealth to find buyers for 300 million shares of Mayer that were held by Mayer's parent company. Two buyers of 100 million shares each were found.

They were Aspial Investment Limited ("Aspial") and Bumper East Limited ("Bumper"). However, when, in or about December 2011, these two companies tried to register the share transfers their application was rejected because SP4 had reported the Aspial and Bumper share certificates as having been lost. Capital Wealth, itself, owned 24,588,000 Mayer shares and the effect of registering the disputed Aspial and Bumper share transfers would be to give Capital Wealth control of Mayer.

399. Aspial and Bumper commenced proceedings in the High Court and on 16 July 2012 obtained judgment in their favour and each company was declared as the owner of 100 million shares of Mayer. The parent company of Mayer appealed unsuccessfully to the Court of Appeal and then to the Court of Final Appeal. Its appeal to the Court of Final Appeal was dismissed on 3 July 2014 and it was only thereafter that Aspial and Bumper were able to have their share transfers registered. Capital Wealth, with its shares and the shares of these two companies, took control of Mayer and removed SP3 – SP8, SP10 and SP11 from the board and appointed Lee Kwok Leung and others to the board. All of this happened by two extraordinary general meetings held on 9 October 2014.

The Records of Interview of the SPs

400. There is no need to set out in great detail the contents of the SPs' Records of Interview as they do not dispute that they were aware of the matters that the SFC allege constituted inside information. The summaries of their contents focus only on those matters that are relevant to the issues before the Tribunal.

(i) The Record of Interview of SP2

401. SP2 was asked if he knew what the issues were which prompted Grant Thornton to resign. In an extraordinary answer, SP2 displayed remarkable indifference, saying:

> "Well, just then -- because basically we also found it unnecessary to *clarify* with *Grant Thornton* what issues they had because its already the past."[200]

402. SP2 was also asked if any issues were raised with the Audit Committee or with the Board between April and December 2012 and in his answer he sought to downplay the efforts that were being made by Grant Thornton to resolve the "significant matters". He said:

> "Actually nothing -- ah, nothing in between the period from April to December. There're only some *outstanding lists*, I mean, (they're) *ongoing* already, *okay*, there're some, for example, er some *outstanding lists* that were dealt with by relatively -- relatively -- relatively normal auditing."[201]

403. In another interview SP2 was asked if any meetings were arranged with the directors to discuss the qualifications to the audit report that Grant Thornton was proposing in its August 2012 email. He answered that "no particular *formal* meeting has been held, er, (for) all the directors - - all directors to - - [A: Um.] to have a look."[202] Nor was there between August and December any formal discussion within Mayer about these potential qualifications. When asked what

[200] BWE/A/230 at counter 1820.
[201] BWE/A/233 at counter 1830.
[202] BWE/A/729 at counter 1514.

Mayer's position was in respect of these potential qualifications, SP2 answered:

> "1540. C: Er, the *potential qualifications*, these were - - were not particularly - - I mean, *agreed*, not *agreed*, everyone *agreed*, uh.
>
> …
>
> 1545. A: Well, so it turned out that you, or perhaps the management shouldn't have any further particular *discussion with* the *auditor* because you - - when - - because in April everyone has already reached a consensus that [C: Um.] they, the *auditors* would have some *potential qualifications*, [C: Right, right.] well, so when you received this copy, you did not do anything special to further discuss with the *auditor*, (to figure out) actually [C: No.] what *issues* were really required to be *qualify* (sic) (qualified) and [C: Right.] (what issues) were not required, there's no further discussion on this?
>
> 1546. C: I - - I make a claim. I haven't personally, uh."[203]

404. We note that SP2's evidence confirms what was said by the Grant Thornton witnesses that there was no active response to their concerns from Mayer's management. We observe that this lack of urgency in addressing Grant Thornton's concerns is completely at odds with Mayer's management's expressed desire to get the company out of suspension and back to trading.

405. SP2 was then asked about each of the three significant matters but at one stage stated, quite extraordinarily, that he did not know which were the

[203] BWE/A/731 – 732.

matters that the resignation letter was referring to.[204] He also said that after receipt of the resignation letter the focus of his efforts was on finding replacement auditors.

406. In respect of the Vietnam project, SP2 said that around November or December 2011 he came to believe that it was "a scam".[205] He went on to explain that the auditors (at that time Crowe Horwath) went to Vietnam but "came across difficulties"[206] and reported to Mayer that it had not received any cooperation in obtaining the information it needed for the audit from the local manager, a person called Hui, and may not be able to issue its audit report as scheduled and that this would affect Mayer's resumption of trading. Then SP5 visited the project and on his return reported that the situation was rather bad.[207] Work had stopped and no progress was being made. It was around December 2011, SP2 said, that Mayer made the decision to sue.

407. SP2 admitted that once the litigation started, Manager Hui "actually stopped seeing us"[208] and as a consequence the new accountants, Grant Thornton, would have a limitation of scope as they would not have enough information to give their opinion. He admitted that Mayer did not have access to the accounts of Dan Tien Port and had lost control of the companies that were running the project. When pressed he conceded:

> "So *effectively*, you may -- may say that (we) have no -- no *effective control*, uh."[209]

[204] BWE/A/270 at counter 2116.
[205] BWE/A/162 at counters 1401 – 1403.
[206] BWE/A/163 at counters 1405 and 1418.
[207] Ibid.
[208] BWE/A/183 at counter 1525.
[209] BWE/A/252 at counter 1978.

408. SP2 said that on 28 December 2012 he informed the directors of Mayer by phone of the Grant Thornton resignation.

409. SP2 agreed that he did not make any announcement in respect of the audit issues referred to in Grant Thornton's letter of resignation. In his second record of interview he explained that he regarded the issues as being not yet finalised and as only at the draft stage. He was then asked:

> "559. B: … Well, have you considered if these *issues* were *significant* and was it necessary to make some *announcements*?
>
> 560. C: Um, I make a claim. Er, the company has not considered (them), uh, these were not - - not *discussed*."[210]

410. Later, in the same interview, he was asked if all the directors knew of the issues identified by Grant Thornton. He answered that they would know because he circulated the audit issues to them.[211]

411. SP2 was also asked about how decisions were made in respect of the disclosure of information and said that in January or February 2011 the company had engaged the solicitors firm of Baker & McKenzie to provide it with legal advice. He said it would be he who sought the legal advice. He was then pressed on who within Mayer made the decision on whether it was necessary to seek legal advice and he replied:

> "681. C: I think it's mainly that if the board of directors has such a need, it can

[210] BWE/A/645.
[211] BWE/A/652.

> seek the '*advise*' (sic) (advice) from *Baker & McKenzie* through me, or when I find that the company got something, has such a need, I - - I would seek their '*advise*' (sic) (advice), uh."[212]

(ii) The Record of Interview of SP3

412. SP3 was Chairman of the Board of Mayer. In his record of interview he explained that in 2008 he had been asked by SP4 to take over from him the Chairmanship of the Board of Mayer. He agreed to do so but on the understanding that he would remain a resident of Taiwan and would not be required to do any more than in his previous position as a non-executive director. He said he only came to Hong Kong to attend Board of Directors' meetings and left the management of Mayer to the company secretary, the chief financial controller and SP4 and other directors. He also maintained that he could read only simple English and so at Board meetings he was unable to read English documents and relied on the explanation of them by the staff. Any emails he received that were in English he would, in effect, ignore and assume that they were being dealt with by the relevant staff.

413. SP3 said he did not know of any requirement to announce the resignation of auditors and was unfamiliar with the relevant listing rules in Hong Kong. He said SP2 was responsible for handling any announcements that had to be made.

414. SP3 said he was unaware of the auditor's concerns in respect of the

[212] BWE/A/656.

three significant matters. He explained that those concerns would be handled by SP2 and SP4 unless they were of board level importance.

415. In respect of the Advance Century litigation SP3 said he and other directors found it incomprehensible as they had never authorised the borrowing of monies from the Capital Wealth companies. Furthermore, the staff of Mayer denied borrowing any money from these companies. He claimed not to have heard of Wang Shu Mei, the owner of Golden Tex. He said it was SP4's recommendation to sell Advance Century and it was he who determined the sale price.

416. SP3 claimed he had not seen the email and attachments from Grant Thornton dated 22 May 2012 and had not attended a meeting with Grant Thornton on 24 April 2012. SP3 said that, in fact, he had never met any representative from Grant Thornton. He said that, generally, he would not deal with accountants. This assertion prompted the following exchange:

> "237 A: So, that means, the significant matters, eh, the matters that the auditor thinks are significant would generally not reach you?
>
> 238. C: No (they) wouldn't, (they) wouldn't. Because I have also said earlier and have also expressed clearly that the work that I participate in Mayer is only attending meetings, attending the board of directors' (meetings). Up till now, um - - except some board of directors' (meetings), I almost have not participated its meetings, I almost seldom participated because personally I am also very busy in Taiwan,

hm."[213]

417. In respect of the Vietnam investment SP3 said:

> "I was unable to judge and understand the details, personally I - - my personal knowledge has not reached that level."[214]

It is clear from what SP3 said that he relied very heavily on SP4 in gaining an understanding of the Vietnam project. He did not read the documentation relating to it and was unable to properly understand the details of it.

418. He was asked if it was necessary to make an announcement of the problems with the Vietnam investment and his answer is illuminating for what it reveals of his perceived role in such matters:

> "665. C: I know what you mean, hm, I make a claim, because concerning what matters are required to be announced, generally speaking, since I'm personally not responsible for the matters of announcement, so the matters concerning announcement, in general, I mean, we have to rely on the staff to tell us whether it's necessary to announce this or not.
>
> 666. A: Which staff do you mean?
>
> 667. C: Mr CHAN - - CHAN Lai Yin, right."[215]

419. It is also clear from what SP3 said in his record of interview that the Board of Directors relied on what the Chief Financial Controller and the Mayer

[213] BWE/C/2400.
[214] BWE/C/2417 at counter 378.
[215] BWE/C/2446.

staff reported to the Board about matters concerning the auditor and about what matters should be disclosed.

420. As the record of interview proceeded it became increasingly apparent that SP3 was a very passive Chairman and was only active in this role when required to be. At all other times he left it to SP4 and the staff of Mayer to run the company. But, it was not just SP3 who was a passive member of the Board. According to him, other members of the Board were also quite passive. This emerged in the following excerpt from his record of interview when SP3 was being asked whether SP4 would report to him on Mayer matters:

> "759. B: But to whom is Mr LAI required to report his work?
>
> …
>
> 762. C: Um, I make a claim, actually I put it this way, actually he should be - - he should be the one who has the highest power on matters in Hong Kong, for the entire Hong Kong (office), so for reporting, he should, at least he's not required to report to me, it's not necessary for him to report to me. On the contrary, if I have to understand something, I have to ask him. In fact, well, well, er, where, I - - I remember that our - - our - - previous report seems to have an introduction stating that in fact he is even the person in charge of all the - - the - - matters of the company.
>
> 763. B: So you are the chairman in name only?
>
> 764. C: Hm, I make a claim, personally I think that it's the case.
>
> …

766. C: Um, I make a claim, actually I don't quite know the details of the obligations of a director of a listed company in Hong Kong. Well, generally I am still having the past concept of eh, attending meetings, well, to discuss according to the agenda and then make decisions. My - - my understanding - - understanding of (the obligations of) a director is - - is - - like this.

…

773. B: But you're an executive director, as an executive director, you have to execute, uh, the daily operation, uh, matters of the company, not just making decisions. [C: Hm.] You're not an independent [C: Hm.] non-executive director, [C: Hm.] (if you're) an independent non-executive director, you can say you won't - - won't participate in the operation of the company, [C: Hm.] but you all are executive directors.

774 C: Hm. So I make a claim, well regarding this issue, I just, you asked me if it's in name only, I also said yes, I think I'm (the chairman) in name only.

775. B: Then for the other executive directors of the company, is their situation more or less the same as yours? Other than this Mr LAI who's in charge of the matters of Mayer Hong Kong, for the other executive directors of the company, do (they) just participate in the relevant meetings, etc. like you?

776. C: I make a claim, I think this is the case.

777. A: This is the case that you're aware of.

778. C: Right, what I'm aware of is also like this."[216]

421. It is clear that SP3 was simply the puppet of SP4. SP3 had no meaningful understanding of his duties of Chairman of the Board and no genuine desire to perform those duties.

422. For the Elternal and Sinowise contracts SP3, as he did in respect of the Advance Century sale, attributed full responsibility to SP4.

(iii) The Record of Interview of SP4

423. SP4 revealed that he had been a director of Mayer since before it was listed in Hong Kong and was still a director at the date of his interview. He said that when he was in Hong Kong he would work at Mayer's offices but he spent most of his time in Taiwan.

424. As an executive director of Mayer, SP4 said he reports on company matters to the other directors. The company secretary, SP2, would mention to SP4 matters relevant to the organisation of Board meetings or certain agenda items.

425. SP4 said SP2 told him, and all the other directors, of the Grant Thornton resignation on the day it was received or the morning of the following day. He said he also received a phone call from SP2 about the resignation letter. SP4 maintained that he and some of the other directors were shocked by the resignation. He claimed that he wanted to discuss the resignation letter with Grant Thornton

[216] BWE/C/2458 – 2460.

but the responsible person, Daniel Lin, was overseas on holiday. After Daniel Lin returned to Hong Kong, SP2 contacted him but he did not want to meet with Mayer and was unwilling to withdraw the resignation or change the terms of the letter. SP4 said SP2 made contact with Daniel Lin at Grant Thornton about 10 days to 2 weeks after receiving the resignation letter.

426. SP4 was asked the reasons for the delay in announcing the resignation. He said it was because of the Christmas and new year's holidays and secondly because Daniel Lin was away from Hong Kong.

427. SP4 said he did not think that the reasons that Grant Thornton stated in its letter were the real reasons for its resignation. He had this belief because, in meetings with Mayer, Daniel Lin never talked about these problems and in fact assured them that the audit report would soon be ready. The meeting was in September 2012 and Daniel Lin said his signed report would be available in October. SP4 also referred to a similar meeting in late August or early September 2012, and he is, presumably, referring to the same meeting as he said it was with 3 or 4 Mayer directors and SP2 and Grant Thornton. He said that at this meeting Calvin Chiu told them about all of the issues and said that the matters later referred to in the resignation letter were not a problem.

428. SP4 later explained that it was because the accountant had said in the August meeting that the report would be ready if Mayer gave him another 1 – 2 months, that he and the Mayer directors were so angry when they suddenly received Grant Thornton's resignation letter.

429. SP4 said that at meetings with Grant Thornton the accountants indicated they had qualified opinions as a consequence of all the lawsuits. SP4 maintained that he respected the professional opinion of the accountants and was of the view they could write whatever they felt their professional expertise required. All SP4 was concerned about was for Mayer to resume trading and Grant Thornton had told them that the qualified opinion would not prevent this from happening. Grant Thornton also assured them that Mayer would not have to reset its investments to zero. It was either Calvin Chiu or Daniel Lin that told them these things.

430. In respect of the Vietnam project, SP4 now thought it was a scam from the very beginning. He said that before Mayer engaged Grant Thornton he knew there could be a problem in accessing the accounts in Vietnam because Mayer had already started the lawsuits.

431. SP4 said he wasn't involved, on behalf of Mayer, in the completion of the management response in the accounting forms.

432. SP4 was asked why Mayer had not disclosed that it was having trouble exercising control over the Vietnam project and he answered that Mayer had received legal advice from its solicitors that it did not have to make a statement; it wasn't necessary to announce it. He was also asked why Mayer did not announce that the Vietnam project had been overvalued and was no longer valued at HK$620 million. He replied that no announcement would be made until the financial statements had been released.

433. In his second record of interview SP4 was asked about the Elternal Galaxy and Sinowise Exclusive Supply Agreements involving the payment of substantial deposits. In respect of the Elternal Galaxy agreement, which required a deposit of US$10 million, he was asked to explain why VMC could not supply the iron ore under the contract. SP4 said it could be because of the weather, the climate and the unstable power supply. When asked if the Board had considered the possible affect of these factors on the ability of VMC to deliver the contracted for sales volume, SP4 replied:

> "186. C: Er, because we don't know so -- so well about the industry know-how in -- in, er, mining. I'm sorry, I make a claim, that is, because we don't know so well about the industry know-how about -- about the mining industry or even processing, so we -- as far as we're concerned, in fact we couldn't consider things so thoroughly, mm, mm."[217]

434. SP4 was later asked if he understood this Exclusive Supply Agreement was being referred to in the Grant Thornton resignation letter when it mentioned "prepayments to suppliers". He said he did. He was then asked if he knew the reason Grant Thornton believed this to be a significant issue and he replied as follows:

> "295. C: Er, I make a claim, er, I don't know what thoughts they had on this matter, but I know that the several actual issues they mentioned then, they would actually make a *qualify* (qualified) opinion, some -- some qualified opinions. With regard to these qualified opinions, at the very beginning, they -- they have also explained them to us and we

[217] BWE/B/1555.

> said that there were no problems, rather, *actually* rather (if) you truly express your opinion, I would respect your views, mm, so in actual fact, I think that with regard to these opinions, actually, er, as long as they don't affect our resumption of trading, then to me -- I, at that time, I just was just concerned about being able to resume trading soon, so we didn't really care too much what these -- these *qualify* (qualified) opinions w--were at that time. They had raised these and discussed with us at that time, mm, mm."[218]

435. In respect of the Sinowise Exclusive Supply Agreement, which involved a deposit of US$4 million, SP4 agreed that it was discussed with Grant Thornton who informed Mayer that it would have to qualify its opinion in respect of this agreement.

436. SP4 was then asked about the Advance Century sale and he said because its book value had been written down to zero, he wished to sell it. SP4 was later asked how he settled on a price of US$2 million for the sale and he said that, although its book value had been written down to zero because it didn't have a satisfactory business income and hadn't achieved very good returns, he still hoped to get a good price on it.

437. When asked how a buyer was found, he said that the buyer approached Mayer. When asked how the buyer became aware of Mayer's intention to sell Advance Century, SP4 replied:

[218] BWE/B/1565.

"Because we had been letting out information to see if anyone was interested in buying it, mm."[219]

438. When pressed on this issue he could not add to this answer and could not explain how the buyer came to hear of the proposed sale. The buyer was a Ms Wang and SP4 said he only met her after he signed the agreement. SP4 said he didn't participate in the discussions with Ms Wang in relation to the sale and claimed these would have been conducted by SP2.

439. SP4 said Lam Chin Chun was also interested in purchasing the company and after the Capital Wealth litigation started SP4 said he was told by Ms Wang that Lam Chin Chun had funded her purchase of Advance Century.

440. SP4 denied borrowing any money from the Capital Wealth companies and did not know why they transferred money to Mayer or how they got Mayer's bank account number.

441. SP4 was asked who was responsible for matters related to announcements and he said that SP2 was responsible for everything that had to be announced in Hong Kong and this included being responsible for considering whether something needed to be announced.

(iv) The Record of Interview of SP5

442. SP5 was an Independent Non-Executive Director of Mayer and had

[219] BWE/B/1577 at counter 429.

occupied this position since 2004, when Mayer was listed. He was recruited to this position by SP3 whom he had known for 20 years. As an Independent Non-Executive Director he didn't get involved in the operation of the company and only became aware of matters to be decided upon prior to a Board meeting taking place.

443. He had also been Chairman of Mayer's Audit Committee since 2004. He said his primary task as Chairman of the Audit Committee was to work on the financial statements with the accountants. He and the members of the Committee would examine the draft audit report in order to identify any potential problems that might be created by it. When the final report is prepared they would then decide whether to accept the adjusted audit report.

444. SP5 said he saw the Grant Thornton resignation letter when it was circulated to directors prior to the Board meeting on 23 January 2013. He never received the letter when it was first sent to Mayer as the company did not forward it to him.

445. SP5 was asked about the delay in dealing with the resignation and he said that SP2 explained to the Board that there were no prior signs or indications that the accountants would resign and he tried to understand the ultimate reason behind the resignation. SP2 also told the Board that he tried to persuade the accountants to change their mind. SP5 said he found SP2's explanation unreasonable as, being a former auditor, he knew the accountants must have been raising difficulties before they resigned. He said that during the process of the Grant Thornton resignation SP2 did not notify them promptly.

446. In respect of the key findings documents prepared by Grant Thornton, SP5 said that the management responses would have been provided by SP2 and SP4.

447. SP5 said he went to the accountants' office in August 2012 where he met Daniel Lin. At this meeting the accountants did not ask for any specific documents and did not say that the absence of anything made it impossible for the report to be prepared. The purpose of the meeting, for SP5, was to find out the current progress of the audit. However, SP5 admitted that he didn't ask the Grant Thornton accountants if they had encountered any trouble during the audit process.

448. As regards the email of 23 August 2012 with the list of potential qualifications, SP5 said it wasn't sent to him but he heard of it during a Board meeting at which it was agreed to increase Grant Thornton's fees. SP5 explained that SP2 would not normally notify members of the Audit Committee about documents that are exchanged during communications with the accountants. When asked what he did in response to Grant Thornton's proposed qualifications he said that his attitude was to provide the accountants with everything they needed and then leave it to their professional judgment on how any issue should be treated.

449. SP5 said he was reassured that everything the accountants wanted would be provided to them. However, he went on to say that he did not follow up on whether this was in fact done. He explained that it was not for him, as an Independent Non-Executive Director, to become involved in the operation of

Mayer, otherwise he would be taking the place of the financial controller. Nor did anyone tell him about the progress of the audit after he gave the instruction to provide the auditors with everything they wanted.

450. SP5 was asked about the issues referred to in the resignation letter and said he knew about them. SP5 was asked in the interview many questions in respect of the Vietnam investment and the Elternal and Sinowise contracts but they covered matters not relevant to the issues before the Tribunal.

451. In respect of the Advance Century sale, SP5 had little knowledge. He did not know how the purchaser was found or how the amount of the consideration was determined. He said he had a conversation with SP2 who denied knowledge of any loans from the Capital Wealth companies. SP5 said he felt that he had no choice but to believe SP2.

452. He was also asked whether Mayer had any manuals or procedures on compliance with the disclosure requirements of the Listing Rules. He answered that he had never seen anything. He said SP2 was responsible for disclosure matters and it was for the executive directors to tell him what needed to be disclosed.

453. SP5 was asked who was in charge of Mayer's daily operation in Hong Kong and he said that he understood SP4 should be the main person in charge.

(v) The Record of Interview of SP6

454. SP6 had been with Mayer from when the company had been acquired and had assisted with its listing in Hong Kong. He said SP4 joined the company in 2008 as Chairman of the Board and as SP4 had free time he led the work of Mayer in Hong Kong.

455. SP6 was working for Taiwan Mayer and so did not come to Hong Kong very often. He was surprised by Grant Thornton's letter of resignation as he was not aware that it was encountering any difficulties in the audit process. SP6 said he had never spoken to anyone from Grant Thornton and had never received any emails or letters from it. He also said that at the Board meeting on 23 January 2013 almost all the directors were surprised by the Grant Thornton resignation.

456. SP6 did not know what the term "significant matters", that was employed by Grant Thornton in its letter of resignation, referred to, and had never discussed them with the auditors. Even at the time of his SFC interview he claimed not to know the reason why Grant Thornton had resigned. He said he had never been told by his colleagues in Mayer of any queries or concerns that Grant Thornton had in respect of significant matters.

457. At the Board meeting on 23 January 2013 many of the directors wondered what the issues were that Grant Thornton found problematic but the Board was told that Mayer had not been able to contact Grant Thornton. SP6 explained what SP2 told the board on 23 January 2012:

> "208. … The chief financial controller (said) in the board (meeting) that, including

> that period of time, that is, during - - throughout t - - t - - t - - the work period, (the period of) appointment of *Grant Thornton* as the auditor, it never expressed that, er, no - - no - - no - - no - - there was - - there was anything - - anything - - anything wrong, orr, that is to say, there was anything wrong, any issues, etc. with the company er as discovered (in course of) its audit work. No. Well, I heard from (some of) my colleagues that (its) work proceeded quite smoothly and (they all) wondered why (the auditor) would suddenly resign. …"[220]

458. If SP6 can be believed, then the whole history of Grant Thornton's difficulties in the audit was concealed from him and from some of his co-directors. When shown some of the documents Grant Thornton had emailed to Mayer, SP6 claimed he had never seen them before and this included the email of 23 August 2012 with the attached list of proposed qualifications.

459. SP6 was asked about the Vietnam investment and said that SP4 was responsible for it. SP6 claimed ignorance of many matters relating to it other than those matters which SP4 had reported to the Board at its meetings.

460. SP6 was aware of the problems with Elternal and Sinowise as the commercial arrangements with these two companies also involved Taiwan Mayer. He expected that when the accounts were audited some allowance would have to be made for the problems associated with their commercial arrangements.

461. In respect of the sale of Advance Century he said he enquired of SP2 if

[220] BWE/B/1335.

there were any loans made with the Capital Wealth companies and was told there were none and that there were no loan documents in existence which evidenced the loans that were being claimed in the lawsuit.

(vi) The Record of Interview of SP10

462. In his record of interview SP10 explained that he had been an Independent Non-Executive Director of Mayer from the time of its listing in Hong Kong. He had got to know SP3 and it was through him that SP10 became involved with Mayer. He said that as an INED he felt his priorities are to ensure that Mayer's decision making procedures are legal and that the interests of minority shareholders are not undermined by the actions of the majority shareholders.

463. He explained the operation of Mayer and said that SP3 was Chairman of the Board but the general administration of Mayer was the responsibility of SP2 as Company Secretary and Chief Financial Controller. The director who did the majority of presentations at board meetings was SP4.

464. As to disclosure, SP10 said that originally, at the time of Mayer's listing, there was a lawyer performing the company secretary role but this person was succeeded by SP2 who was now responsible for making disclosures. He was not aware of any guidelines or material within Mayer that were available to directors and that were relevant to compliance with the disclosure requirement.

465. SP10 was asked about the delay in announcing the Grant Thornton

resignation and he said that SP2 explained that he was trying to get Grant Thornton to continue with, and finish, the audit. He said he was not aware of the resignation until SP2 notified the directors of the board meeting of 23 January 2013.

466. In respect of the three significant matters referred to in the resignation letter, SP10 said he knew what they were but apart from the Vietnam project was not aware of Grant Thornton's concerns in respect of them.

467. SP10 was a member of the Audit Committee but couldn't recall whether he had seen the email and letter attachment dated 22 May 2012 that Grant Thornton had addressed to the Audit Committee. He said he did not attend the meeting that took place with Grant Thornton on 24 April 2012 and, in fact, had never met with them.

468. SP10 said SP5 was the convenor of the Audit Committee and it was he who attended meetings with Grant Thornton. He would have been the director to have any face-to-face discussions that were necessary. SP10 can recall the Audit Committee having a discussion about the difficulties being encountered by the auditors and in the end they authorised SP5 to attend a meeting with Grant Thornton.

469. SP10 was aware of the Advance Century sale and the litigation with the Capital Wealth companies but had very little knowledge of it and none of his knowledge was of any real significance. Likewise in respect of the state of his knowledge in relation to Elternal and Sinowise.

470. SP10 said he was aware of Grant Thornton's qualified opinion in respect of the Vietnam investment but had no impression of it proposing qualified opinions in respect of other matters. He could recall having discussions with SP5 about a qualified opinion in respect of the Vietnam investment and said that SP5 was authorised to speak to Grant Thornton staff about their difficulties. But, he seems to have been under the impression that the main issue for Grant Thornton was getting Mayer's agreement to an increase in its audit fee. Once this was done SP10 expected the audit would be completed. However, he did recognise that on-going litigation in the Vietnam investment may cause difficulties for Grant Thornton. As a consequence of the litigation, Mayer and Grant Thornton received no cooperation in the audit from the staff of the Vietnam subsidiary.

471. SP10 said that he and SP5 discussed qualifying the Vietnam investment and agreed that if the auditors wanted to value the investment at zero then Mayer would accept that. He said they agreed that Mayer would not restrict the auditors in any way.

(vii) The Record of Interview of SP11

472. Like SP10, SP11 was also an Independent Non-Executive Director of Mayer and had been so from 2004 when Mayer was listed. He was recommended to Mayer by a person who was assisting in the company's listing. He said his duties were to participate in board meetings and to be a member of the Audit Committee. He was occasionally called upon to give advice on certain projects, such as the real estate market in Hong Kong.

473. It was SP11's impression that it was SP6 who mainly monitored the operation of Mayer as he was the director, together with SP4, who most frequently came to Board meetings. He thought SP6 was more responsible for the Taiwan side. But in recent years the Board meetings were conducted mostly via telephone conference and so SP11 saw his co-directors less often and came to deal more with SP2.

474. SP11 was asked about his membership of the Audit Committee. He said that this committee was chaired by SP5 and that his, SP11's, duties were to make sure the financial reporting process was in compliance with the relevant requirements.

475. In respect of the Grant Thornton resignation letter, SP11 could not remember when he first saw it but acknowledged it was probably sent to him. He said he did not react actively to it by asking who would follow up on it as he seldom got involved in the daily operations of the company.

476. SP11 said he couldn't recall if he had any prior indication that Grant Thornton would resign but he thinks that probably he did not hear anything. He said he had the impression that he was shocked by the resignation and vaguely remembers that there was hardly any prior notice, or even no prior notice, by Grant Thornton before it resigned.

477. When asked about the significant matters referred to in the letter he said he knew of the existence of problems with the Vietnam project but couldn't remember all the details. Later, he said that he did know of the issues referred

to in the Grant Thornton letter at that time, but at the time of his interview was not able to recall them.

478. SP2 was responsible for issuing announcements for Mayer and the Board usually just followed up on matters brought to it by him. SP11 couldn't say if anyone supervised SP2 but SP4 was the director most actively involved in giving instructions on the operation of the company.

479. SP11 was then asked about the email history between the company and Grant Thornton. He couldn't recall if he had received the email of 22 May 2012 or the letter of Grant Thornton to the Audit Committee dated 20 May 2012 but thought he probably didn't attend the meeting with Grant Thornton on 24 April 2012.

480. He was asked whether during 2012 up to the date of Grant Thornton's resignation, there were any significant matters that Grant Thornton needed to discuss with the management and he replied that he had no recollection. He claimed he had never attended any meetings with Grant Thornton or any meeting in respect of the audit. He had met Grant Thornton staff at the very beginning when it was engaged, but had no meetings with audit staff thereafter.

481. SP11 was then asked about each of the three significant matters referred to in Grant Thornton's letter of resignation. He could recall the Vietnam investment because it was so large. He knew this project went wrong and was preventing Grant Thornton from doing the audit.

482. However, he did not know what the other two significant matters were. SP11 said he could remember that there were some tricky problems causing Grant Thornton to be unable to continue working further. He had very little knowledge of the Elternal and Sinowise contracts but was aware there were problems with them. He seemed to have even less knowledge of the Advance Century sale.

483. He said that in the course of the audit he was never notified of any problems or requested to handle them. No one came to him and told him of any problems in the audit. Consequently, he never participated in any meetings between management and Grant Thornton about issues in the audit.

484. SP11 said he had never seen the email of 23 August 2012 and the attachment containing Grant Thornton's potential qualifications to the audit. Furthermore, he was never aware that Grant Thornton was proposing qualifications to its audit report. Then he qualified his answer by saying that he may have heard of it during directors' meetings but never saw the emails that were exchanged.

485. SP11 said SP2 was responsible for informing the Audit Committee of these matters.

The Evidence of SP9

486. The evidence of SP9 had an extra dimension to it as SP9 was the only Specified Person who challenged his liability under section 307G of the SFO.

487. SP9 was a Non-Executive Director of Mayer during 2012 and up to the announcement of Grant Thornton's resignation on 23 January 2013. As such he was, at the material time, an officer of Mayer for the purposes of section 307G.

488. A statement by SP9 stood as his evidence-in-chief and attached to it were copies of letters he wrote to the Board and to the Stock Exchange of Hong Kong. Letters that he wrote to one, were copied to the other. The Further Revised Statement of Agreed Facts refers to letters dated 20 March 2012, 23 March 2012, 30 March 2012, 12 April 2012, 19 April 2012, 24 April 2012, 8 May 2012, 9 May 2012, 21 May 2012, 21 July 2012, 17 August 2012, 21 December 2012, 23 March 2013 and 20 April 2013. In addition, he wrote letters to Baker & McKenzie (Mayer's solicitors) on 25 May 2012, 31 May 2012, 6 June 2012, 18 June 2012 and 2 July 2012.

489. Also in the Further Revised Statement of Agreed Facts there is the following summary of SP9's unconcluded litigation against Mayer:

> "64. On 23rd May 2012, Li (SP9) commenced HCMP1016/2012 and HCMP1017/2012 against Mayer and the Board for discovery of documents including inter alia audit papers for the financial year ended 31 December 2011, all correspondence with auditors, documents relating to the Vietnam Project and Advance Century…etc."

490. In his statement SP9 denied that Mayer had failed to comply with its disclosure obligation and, if it did, denied that he was in any way at fault for such a failure. He contended that he used his best endeavours to ensure that the

company was being managed in compliance with its many obligations. He alleged that he had been wrongfully excluded from the management of Mayer by SP2 – SP4. Consequently, he was unable to participate in any management decisions and his views and opinions were ignored and neglected.

491. He asserted that any failure by Mayer to disclose inside information could not have been due to any intentional, reckless or negligent conduct on his part and, as a result, he is not in breach of any disclosure requirement under section 307G of the SFO.

492. SP9 said he was invited to join the Board of Mayer by SP4 for his expertise in geological research. Prior to him joining the Board of Mayer he had never been a director of any company, let alone a Hong Kong listed company.

493. However, in 2012 SP9 said he began to query the actions of the Board and claimed that he "discovered that the Board, through the manipulation of Lai, have been acting against the interest of the Company, its members, and in breach of the listing rules. Worse still … the Board made allegations against me which were untrue and thereafter undertook measures to ensure that I was not properly informed and deprived me of my powers as officer of the Company"[221]. In support of this contention he referred to various correspondence he wrote to the board from March 2012. This voluminous correspondence was produced as part of his evidence. Much of it was copied to the HKEx and part of it involved complaints he made to that body.

[221] Witness statement of SP9 at [6].

494. After explaining particularly significant pieces of correspondence he went on to describe the litigation he instituted against the company and SP3 – 8, SP10 and SP11 for the production of documents.

495. His correspondence and the litigation he instituted demonstrated, so he contended, "the inhibition and exclusion from management I was facing at the material time".[222]

496. In a nutshell, it is SP9's case that he tried his best to perform the duties required of his office but that he was unlawfully excluded and prevented from doing so by the Board of Mayer. He complained that he was only given short and unfair notice of Board meetings and so was not properly informed about the company; he was deprived of underlying documents relating to the affairs of the company and he was prevented from participating in Board meetings.

497. In his oral evidence SP9 adopted his witness statement as his evidence-in-chief and confirmed that its contents were true and correct. He was then cross-examined.

498. In response to questions from Mr Scott, SP9 said he was appointed to the Board of Mayer in October 2010 and he remained a director until he resigned his position in 2017. He testified that he could not call Hong Kong on his mobile phone but he could receive calls. He also had an email account and could communicate with Hong Kong by email. SP9 said that during 2012 and 2013 he was resident in the PRC and his communications with the Board of Mayer and its

[222] Witness statement of SP9 at [23].

other officers was by email.

499. He said that in 2012 and 2013 he attended Board meetings by phone. When he was appointed a director he didn't understand clearly the duties of a director so he did some research on the internet and that gave him a broad understanding of his duties. This was from around the end of 2011 to the beginning of 2012. Asked why he did not seek guidance from Mayer on his duties he answered:

> "Because at that time I was busy with the prospecting side, so I was not too clear about the duties as a director and I did not ask them."

500. When pressed on his internet research he said:

> "In the time between 2010 to 2013, I only took a very cursory browsing online about the definition of director's duties but I did not go into details."[223]

501. As to his knowledge of a company's disclosure duty he said he obtained information from PRC websites on the duties of PRC company directors but he did not access the website of Hong Kong's SFC.

502. SP9 said his remuneration for being a director of Mayer was HK$100,000 per year. In return he was prospecting for Mayer by finding people in China to go prospecting for minerals in Yunnan.

503. It was pointed out to SP9 that directors had a duty to ensure that

[223] Transcript, day 9, page 21, lines 17 – 19.

appropriate systems and procedures are put in place in their company and reviewed periodically to enable the company to comply with the disclosure requirement. SP9 was then asked if he had taken any steps in carrying out this duty. He answered:

> "I wasn't sure whether this particular regulation was in place at the time, but since Mayer was a listed company, I was sure that for all the important information that should be disclosed they had the right procedures in place to ensure that would happen and whether it was important."[224]

504. It was put to SP9 that he didn't, but should have, educated himself on the rules relating to the announcement of important information and SP9 disagreed. He maintained that Mayer should have provided him with this information. Mr Scott referred SP9 to the SFC's "Guidelines on Disclosure of Inside Information" dated June 2012 and specifically to [60] of the Guidelines which imposed a responsibility on officers, including non-executive directors, "to ensure that appropriate systems and procedures are put in place and reviewed periodically to enable the corporation to comply with the disclosure requirements". SP9 said he understood this responsibility but when asked whether he accepted that he had this responsibility he answered:

> "I wasn't clear about the circumstances and I only learned about this afterwards."[225]

By "afterwards" he explained that this was in June 2015 after he had read the SFC's guidelines.

[224] Transcript, day 9, page 30, lines 17 – 22.
[225] Transcript, day 10, page 26, lines 21 – 22.

505. SP9 was asked about the resignation of Grant Thornton and he said that he only became aware of it between 8 – 13 January 2013 via an email. He later corrected himself and confirmed it was the email of 18 January 2013. But the attachments to the email were in English and SP9 said he cannot read English. When pressed on why he didn't get the attachments translated he replied:

> "So I thought that I had no comment about the resignation of Grant Thornton as set out in the email and therefore I didn't go on further."[226]

506. SP9 said he knew there was an obligation to announce the resignation as soon as possible. He was referred to an email by SP2 dated 2 January 2013 attaching a draft announcement of the resignation and informing all directors that the Stock Exchange required Mayer to issue the announcement that day. He was then asked why Mayer didn't issue the announcement on that day and SP9 answered:

> "At the time I wasn't too sure about the guidelines. What I thought was that for important information it should have been disclosed within a week, and of course the earlier the better."[227]

When pressed on this issue he said:

> "I was of the view that as long as they could make an announcement within one to three days of that, it should be okay."[228]

507. He later explained that when he saw the announcement was made on 23 January 2013 he thought it was okay. SP9 was then asked about the email of

[226] Transcript, day 10, page 31, lines 7 – 10.
[227] Transcript, day 10, page 32, lines 18 – 21.
[228] Transcript, day 10, page 33, lines 7 – 9.

22 January 2013 informing directors of a Board meeting the following day. He said he did not see this email until sometime after 1:30 pm the next day as he was doing outdoor work in the mountains where there was no signal. By the time he read the email the Board meeting had already finished.

508. It was put to SP9 that he had ignored his duty to ensure reasonable measures were taken and that appropriate systems and procedures were in place to announce important matters concerning Mayer. SP9 did not agree.

509. When asked about Mayer's internal controls and written guidelines relating to disclosure, SP9 said he was unaware that Mayer was lacking in these and that at the time he believed Mayer would have had them. Although, he admitted he had never enquired of anyone at Mayer if this was so; he had just assumed that it had. He agreed that there had been occasions when he had been concerned that Mayer was failing to disclose important information to the public. He cited as an example SP5 being sentenced to a term of imprisonment by a Taipei court. He also agreed that from the date of a letter he wrote on 24 April 2012 he had been concerned about Mayer's compliance with its disclosure obligation and that there were problems in this area.

510. SP9 was then referred to his correspondence and his litigation against Mayer and was asked when in all of this he ever requested to see written guidelines or the internal control policies of Mayer in relation to its compliance with the disclosure of inside information. He said he had not, and repeated his assumption that Mayer, as a listed company, should have complied with its obligation.

Chapter 10

The Tribunal's Findings in Respect of Absent Parties

SP7

511. The first disclosure proceedings against SP7 had been stayed by Chairman Kwok as SP7 was deceased.

SP8

512. Although a Specified Person in the first disclosure proceedings, SP8 did not participate in those proceedings and did not appeal the findings and orders made against him. Nevertheless, the SFC accepts that he enjoys the benefit of the Court of Appeal's judgment setting aside Chairman Kwok's Tribunal's determination of liability. In addition to that judgment there is the order of the Court of Appeal, consequent upon the assumption of the Chairmanship of the Tribunal by Mr McWalters, that the hearing of the Tribunal is now a hearing *de novo*. The result of this is that SP8 remains a Specified Person for the purposes of the second disclosure proceedings.

513. However, SP8 did not participate in any hearing of the Tribunal that has taken place since the Court of Appeal proceedings. That is, perhaps, not surprising given that there is no evidence that prior to 25 January 2022 SP8 was aware of the Court of Appeal proceedings and of the judgment of that Court. It is, therefore, quite possible that he may have been unaware that disclosure

proceedings would take place on 25 – 28 January 2022 and that may explain his absence during those proceedings.

514. In order to address this possibility, on 19 April 2022 the SFC informed SP8 by email of all that had happened since their last email to him on 26 April 2017. On 3 May 2022 the SFC sent him a further email attaching a copy of the directions that were made by Chairman McWalters, sitting alone, at a Directions Hearing on 30 April 2022. The information available to the SFC is that SP8 is a registered lawyer in the Mainland practicing full-time in Shanghai and it sent both these emails to an email address which it had good reason to believe was SP8's current email address. The SFC has not received any notification that these emails were not successfully delivered. The Tribunal is satisfied that SP8 has received these emails. Since receiving them he has not made any contact with the SFC or the Market Misconduct Tribunal, either personally or by a legal representative.

515. Before this Tribunal can make any finding in respect of SP8 or make any order against him, it must be satisfied that he has been given "a reasonable opportunity of being heard". This right is guaranteed and protected by section 307K of the SFO, which, under the heading "Right to be heard", provides:

> "Before the Tribunal –
>
> (a) identifies a person under section 307J(1)(b); or
>
> (b) makes an order under section 307N(1) in respect of a person,
>
> the Tribunal must give the person a reasonable opportunity of being heard."

516. The question now to be determined by this Tribunal is whether, given that SP8 was not alerted to the proceedings that took place on 25 – 28 January 2022, it can be satisfied that SP8 has been given a reasonable opportunity of being heard.

517. Answering this question requires the Tribunal to determine whether SP8 is aware of his right and how he may exercise it and whether he has been given a reasonable opportunity to exercise it. To this end the Secretary to the Tribunal wrote to SP8 at his email address informing him that:

(i) he has a right to a reasonable opportunity to be heard;

(ii) in exercising this right he may appear before the Tribunal by:

(a) attending personally before it in Hong Kong;

(b) attending personally before it by means of video conferencing from another location;

(c) engaging a legal representative to attend before the Tribunal on his behalf; or

(d) attending before the Tribunal by any combination of the above.

SP8 was further informed that should he choose to appear before the Tribunal by either one or more of these methods then he would have the rights to:

(iii) question any witness yet to testify before the Tribunal;

(iv) apply for the recall of any witness who has already testified before the Tribunal so that he may question them:

(v) give evidence before the Tribunal;

(vi) call witnesses to testify before the Tribunal and present any other evidence to the Tribunal; and

(vi) make representations to the Tribunal.

518. Finally, SP8 was informed that even if he chose not to formally appear before the Tribunal by one of the methods described above, but nevertheless wished to make written representations to the Tribunal, he may forward such representations to the Secretary of the Market Misconduct Tribunal who would place them before the Tribunal for its consideration. All these rights were contained in emails sent to SP8 by the Secretary of the Tribunal on 13 June 2022.

519. To enable SP8 to decide what, if any, action he might wish to take in exercising his right to a reasonable opportunity to be heard, SP8 was provided with a full transcript of the disclosure proceedings. The first set of transcript was sent to SP8 on 13 June 2022.

520. The undisputed facts are:

(i) SP8 was aware he was a Specified Person in the first disclosure proceedings;

(ii) SP8 chose not to participate in the first disclosure proceedings;

(iii) the Report of the Market Misconduct Tribunal was published on its website and so SP8 should have been aware of the adverse findings and orders made against him in the first disclosure

proceedings;

(iv) SP8 chose not to appeal the first disclosure proceedings;

(v) SP8 has not contacted the Market Misconduct Tribunal since the Court of Appeal proceedings and has not participated in the remitted proceedings or the second disclosure proceedings;

(vi) SP8 has been aware of the existence of the second disclosure proceedings since 19 April 2022 but has not contacted either the SFC or the Market Misconduct Tribunal;

(vii) SP8 has been fully informed of his rights before the Tribunal by two emails sent to him by the Secretary of the Tribunal dated 13 June 2022 and has not, since receipt of those emails, contacted the Tribunal; and

(viii) SP8 has received a full transcript of the proceedings of the Tribunal by emails sent on each of the hearing days of 4 – 7 July 2022.

521. In light of all these undisputed matters the Tribunal is satisfied that SP8 has made a deliberate decision, consistent with the decision he made in respect of the first disclosure proceedings, not to participate in the second disclosure proceedings. Choosing not to participate in disclosure proceedings is a choice he is entitled to make but not participating does not mean that he ceases to be a Specified Person and does not confer on him any immunity from adverse findings being made in respect of him by the Tribunal and orders being made by it against him.

522. The Tribunal is further satisfied that SP8 made the decision not to participate even after he was fully aware of the compendium of rights that he enjoyed under his section 307K right to "a reasonable opportunity to be heard".

523. The Tribunal concludes that SP8 has been given a reasonable opportunity to be heard but has deliberately made an informed decision not to take advantage of that opportunity and not to exercise any of the rights that accompany it. Section 307K having been satisfied, there is no impediment to this Tribunal making any finding in respect of him under section 307J(1)(b) and any order against him under section 307N(1).

Chapter 11

The Tribunal's Findings in Respect of Mayer from 2009 to 2012

Introduction

524. It is not necessary to examine the history of Mayer since its listing in Hong Kong on 21 June 2004 in order to understand its financial and corporate circumstances as at 1 January 2013. The key events for our purpose occurred in 2012 but all during that period the company was suspended from trading. In order to understand why that was so and why its share price was so low at the time it was suspended, it is necessary to go back into all that happened to the company in 2011. However, in view of a number of observations made by the expert witness Mr Rigby, mention should be made of some of the circumstances that affected the company in 2009 and 2010.

Mayer: 2009 and 2010

525. An appropriate starting point is the announcement by the SFC on 30 July 2009 in respect of the high concentration of the shareholding in the hands of a limited number of shareholders. The consequence of such a concentration of shareholding is that the price of the shares could fluctuate substantially even when only a small number of shares were traded. Of the 576 million shares held, 200 million (34.72% of the total number of issued shares) were held by Mayer Corporation Development International Limited, a BVI company wholly owned by Taiwan Mayer. An amount of 303,120,000 shares were owned by just

23 shareholders and this represented 52.63% of the total number of issued shares. The SFC said in its announcement:

> "The SFC has recently completed an enquiry into the shareholding of the Company. Our findings suggested that, as at 3 July 2009, 2 substantial shareholders held 240,000,000 Shares representing 41.7% of the issued Shares and 23 shareholders controlling 303,120,000 Shares representing 52.6% of issued Shares. They in aggregate held 543,120,000 shares representing 94.3% of entire issued Shares. As such, only 32,880,000 Shares, representing approximately 5.7% of the issued Shares, were in the hands of other investors.
>
> …
>
> On 25 June 2009, the controlling shareholder Mayer Corporation Development International Limited sold 100 million Shares (the "Disposal") representing 17.3% of the issued share capital on the open market at an average price of $0.5521. Despite the Disposal, shareholding in the Shares remained highly concentrated as at 3 July 2009. In fact on the date of the Disposal, the share price of the Company surged 63% from the previous closing price of $0.65 to close at $1.06. The share price continued to stay above $1.00 although turnover has eased significantly since the Disposal. As at 29 July 2009, the share price closed at $1.28."

526. However, a share price above $1 did not last and by mid-2010 the price of Mayer shares had dropped to $0.53 cents.

527. The noteworthy events that occurred during 2010 related to the appointment of auditors, the pre-payments made by Elternal and Sinowise and the reaching of an agreement with Make Success for the purchase of Yield Rise (what

we have referred to in this Report as the Vietnam Project).

528. At the Annual General Meeting of the company held on 11 June 2010 it was resolved to appoint Crowe Horwath as the auditors of the company. Between 2004 and 2010 Mayer's auditor was CCIF CPA Ltd but this company later changed its name to Crowe Horwath (HK) CPA Ltd and so the appointment on 11 June 2010 was, in reality, the continuation of a long standing relationship between Mayer and its auditors. This relationship continued until 16 February 2012 when Crowe Horwath resigned its engagement.

529. In September 2010 two subsidiaries of a jointly controlled entity of Mayer entered into two supply agreements. The two subsidiaries were Elternal and Sinowise and under the supply agreements both subsidiaries were contractually obliged to make pre-payments to the companies from whom they were purchasing iron ore (for Elternal) and thermal coal (for Sinowise). On 15 October 2010 Elternal made a prepayment of US$10 million and in November and December 2010 Sinowise made its prepayment of US$4 million. Ultimately, as previously discussed in Chapter 7, the suppliers did not comply with the contracts in the amounts of iron ore and coal they were obliged to supply and in 2011 the Elternal contract was revised and the Sinowise contract terminated. What was of concern to Mayer's auditors was the commercial need to make these prepayments and whether there was any realistic likelihood of recovering them. The experts, Ms Pao and Mr Rigby, expressed the opinion that investors were likely to view these prepayments with suspicion as they could be an indication of foul play within a company.

530. On 15 October 2010 Mayer announced that it was negotiating with Make Success to acquire a company, Yield Rise, which held a controlling interest in a port and real estate development in Vietnam. On 12 November 2010, Mayer announced that it had entered into an agreement with Make Success to acquire Yield Rise for HK620 million. It was a very substantial acquisition (VSA) under the Listing Rules of the Hong Kong Stock Exchange.

531. Between 1 June 2010 and 3 September 2010 Mayer stock generally traded in the range of 0.53 cents – 0.58 cents per share. From 6 September 2010 to 18 October 2010 the range was generally 0.55 cents to 0.77 cents. Thereafter, in an apparent response to the Yield Rise announcement, it dropped down to a range of 0.40 cents – 0.53 cents where it stayed until February 2011.

532. Mr Rigby said that between August 2010 and the end of October 2010 there was "a very marked, short term price and trading volume surge"[229] that peaked on 15 October 2010 when the Yield Rise acquisition was announced. During this period the price of Mayer shares rose from HK$0.55 to HK$0.78 before returning to HK$0.55. Mr Rigby said that this "had the appearance of a manipulated 'Pump and Dump' ".[230]

533. Thus, the end of 2010 ushered in a new commercial future for the company. The Vietnam Project was one for which the management of Mayer may well have had high hopes, but the response of the market was not one of buoyant optimism. Its pessimistic assessment of the commercial prospects of this project was reflected in the decline in the price of Mayer shares.

[229] [14] of Mr Rigby's Report.
[230] See [377] of this Report.

Mayer: 2011

534. Between February and June 2011 Mayer's shares traded in a range of 0.42 cents – 0.49 cents but then dropped to under 0.40 cents per share. There are only two significant events in this period and they both concern the Vietnam Project. The first is a letter dated 13 April 2011 that the Board of Mayer wrote to shareholders in which the Board explained the reasons for the Vietnam Project. In its letter to shareholders the Board wrote:

> "REASONS FOR AND BENEFITS OF THE ACQUISITION
>
> The Group is principally engaged in manufacturing and trading of steel pipes, steel sheets and other products made of steel, property investment and leasing of aircrafts for rental purposes. As announced by the Company on 15 September 2010, a joint venture has been established for the purpose of carrying out trading of non-ferrous metals and other minerals resource worldwide.
>
> Given the challenging business environment in the existing business, the Board is eager to expand the business of the Group into the other field which is expected to be able to provide a favourable and sustainable development opportunity for the Group."[231]

535. The second significant event in this period was an announcement by Mayer on 9 May 2011 that the VSA of the Vietnam Project had been completed on that date and that Yield Rise was now its wholly owned subsidiary. It is likely that increasing market pessimism in respect of the Vietnam Project led to the continuing slide in Mayer's share price.

[231] BE 2/62/713.

536. On 28 June 2011 Mayer received HK$15.5 million which it claimed was the proceeds of the sale of its company Advance Century to Golden Tex pursuant to a sale and purchase agreement dated 28 April 2011. The questionable nature of this transaction subsequently became of major concern to Grant Thornton after it succeeded Crowe Horwath as Mayer's auditors in February 2012.

537. On 4 July 2011 Mayer's share price closed at 0.275 cents per share and throughout that month the closing price kept dropping. On 23 August 2011 the share price closed at HK$0.195 cents and, thereafter, kept dropping. The expert witnesses called by the SFC and SPs 2 – 6 and 10 – 11 both agreed that this dramatic drop in share price was attributable to extreme market pessimism about the Vietnam Project.

538. On 1 September 2011 Mayer published its 2011 Interim Report. However, this report was not only unaudited but not even reviewed by the auditors.

539. By November 2011 Mayer's Board had come to have doubts about the accuracy of a valuation that they had obtained on the Vietnam Project that had been made by Grant Sherman and came to the conclusion that the project had been overvalued. A second valuation was obtained from Savills and it was substantially lower than the Grant Sherman valuation. Mayer also had the Grant Sherman valuation reviewed by Deloitte who, in a report dated 9 January 2012, confirmed that the Grant Sherman valuation was, indeed, an overvaluation.

540. On 21 November 2011 Mayer entered an agreement to sell its subsidiary,

Bamian Investments for RMB 184 million. At the end of this day Mayer voluntarily suspended itself from trading on the SEHK, pending its announcement of this very substantial disposal. Its share price closed at HK$0.120 cents per share.

541. Bamian Investments was an investment holding company whose principal asset was an 81.4% direct interest in Guangzhou Mayer. Guangzhou Mayer was principally engaged in the manufacturing and trading of steel pipes, steel sheets and other steel projects. In its announcement on 5 January 2012 of this very substantial disposal, Mayer informed shareholders of the future direction of the company:

> "Upon completion, the Company will cease to operate any steel manufacturing business and will focus on its trading business of steel and non-ferrous metal worldwide. In addition, the Company will continue to assess the development potential of port and logistics business and property development in Vietnam."[232]

542. 2011 was a watershed year for Mayer. Between April and November 2011 its share price had dropped by 75%. It had divested itself of its steel manufacturing business, its main source of revenue, and replaced it with the Vietnam Project. But, by the end of 2011, the Board of Mayer had realized that the company had acquired Yield Rise on the basis of an incorrect valuation of the Vietnam Project and that it was unable to access the accounts of the Dan Tien Port. Indeed, SP2 said in a record of interview that around November or December 2011 he had come to realise that the Vietnam Project was a scam and that it was

[232] RTB 3/2 at page 9.

around December 2011 that Mayer made the decision to sue.[233] Finally, trading in Mayer's shares was suspended and the 2011 Interim Report it published had not even been reviewed by its auditors.

543. CCIF CPA, the earlier incarnation of Crowe Horwath, had written to Mayer on 12 December 2011 identifying this inability to access the accounts of the Vietnam Project as a critical issue and that if it was not resolved the worst case would be that Mayer would be suspended for its inability to audit the Dan Tien Port. Ms Pao agreed that Mayer would have to remain suspended if it couldn't have the Vietnam Project audited.[234] This was an inauspicious conclusion to 2011 and augured ill for the company's prospects in 2012.

[233] See [406] of this Report.
[234] Transcript, day 2, page 58, lines 4 – 18.

Chapter 12

The Tribunal's Findings in Respect of Mayer During 2012

Introduction

544. As previously mentioned, 2011 was not a good year for Mayer and did not end well for it. Mayer's share price started 2011 trading in a range of HK$0.42 – HK$0.49 and finished the year at HK$0.12. The company had no revenue source and by year's end the Board knew it had been deceived into paying far more for the Vietnam Project than it was worth and, furthermore, could not now access the accounts of the project. Conscious that it had been the victim of a fraud, the company decided to sue Make Success to recover the monies it had paid and the shares it had transferred as consideration and to rescind the contract. That was the condition of Mayer at the beginning of 2012.

January 2012

545. After ending 2011 so badly, the company's prospects did not improve in early 2012. As soon as Mayer resumed trading on Friday 6 January 2012 it had to again suspend itself from 9:00 a.m. on Monday 9 January 2012. Its resumption of trading was for just the one day and at the close of trading Mayer's share price was HK$0.123. No detailed reason was provided to the market for this second suspension. The company's announcement revealed only that the suspension was "pending the release of an announcement by the company which is of price-sensitive in nature". The company then remained suspended for the

whole of 2012, and for many years thereafter.

546. On 5 January 2012 Mayer made an announcement in respect of its sale of Bamian Investments and in it the company said it would provide further information to shareholders on this very substantial disposal, together with other information required by the Listing Rules, on or before 31 January 2012. However, on this date Mayer announced that the issue of this circular would be postponed to on or before 31 March 2012. It said that additional time was required "for the preparation of, inter alia, … (iii) the unaudited pro-forma financial information of the Remaining Group …". The "Remaining Group" was a reference to the Vietnam Project, and this statement was an admission by the company that, as at the end of January 2012, it didn't have even unaudited accounts for the Vietnam Project for 2011. This was significant for it was a clear indication that there was something wrong with Mayer's accounts for the Vietnam Project and without such accounts the audit could not proceed. Thus, from an early stage in the new year the only news emanating from the company was bad news and that bad news centred on its Vietnam Project.

547. The seriousness of the problems facing Mayer in respect of the Vietnam Project cannot be understated as is apparent from the cross-examination by Mr Li of Ms Pao. He questioned her about the impact the problems with the Vietnam Project could have for Mayer and she agreed that if Mayer had no control of the Vietnam project then it didn't have sufficient operations to warrant a listing. She accepted that it needed the Vietnam Project to show sufficiency of operations.[235]

[235] Transcript, day 2, page 90, line 14 – page 91, line 1.

548. Thus, the compounding effect of all the problems with this project was potentially disastrous for Mayer. Without access to the accounting records of the Vietnam Port Project, Mayer had no realistic chance of issuing audited results for 2011. That, in turn, would mean no realistic prospect of the company being able to resume trading in the short term. But, of even greater significance, was the possibility that without control of the Vietnam Project, Mayer might be regarded as having insufficient operations to warrant a listing on the Hong Kong Stock Exchange.

549. On 16 January 2012 Mayer announced the resignation of one of its Executive Directors, Mr Cheng Koon Cheung, which was explained as being due to "personal engagement and health reason" and not as being due to any disagreement with the Board of Directors of Mayer. Although in itself this event may seem quite innocuous, given the troubles that Mayer was experiencing, any departure of an Executive Director would do nothing to settle the nerves of anxious shareholders and might be perceived as the actions of an important officer of the company "jumping ship".

The Attempted Takeover of Mayer by Wang Han

550. On 6 January 2012, unknown to the market, the first shot had been fired in an attempted takeover of Mayer by a person by the name of Wang Han. On this day he informed the Board of Mayer that he was considering making a voluntary cash general offer for all outstanding Mayer shares not owned by him, and parties acting in concert with him, at the offer price of HK$0.12 per share. This attempted takeover bid played out over the ensuing months until it came to

an end on 8 May 2012.

551. Given the coincidence of timing, it is likely that Wang's takeover attempt was the matter "of price-sensitive nature" that caused Mayer to suspend itself for a second time from 9 January 2012. When asked about this, Ms Pao agreed that this is what shareholders may have guessed was the case.[236] Ms Pao, agreed that some, but not all, investors would see a link between the company's public actions and the attempted takeover by Wang. Those that saw a link would also realise that there was a big fight going on for the control of Mayer and that this fight was tied to the acquisition of the Vietnam Project.[237]

552. Mr Wang's takeover bid was based upon his acquiring ownership of over 50% of Mayer's shares. His acquisitions would come from three sources. The first was the Mayer shares that had already been transferred to him by Make Success; the second were shares in Mayer that he had contracted to purchase from Make Success and the third source was the shares in Mayer he hoped to acquire from persons who would be persuaded to accept his offer of HK$0.12 per share.

553. The shares in Mayer which Wang had either already acquired or was seeking to acquire from Make Success were part of the consideration that company had received from the Vietnam Project agreement with Mayer. Mr Wang had, in fact, bought 70 million shares of Mayer from Make Success representing 7.55% of Mayer's issued share capital and this acquisition had been completed except for registration of the share transfer, which Mayer was opposing. Preventing the registration of this transfer was the first step Mayer took in its

[236] Transcript, day 2, page 27, line 25 – page 28, line 8.
[237] Transcript, day 2, page 32, line 21 – page 33, line 7.

efforts to defeat Wang's takeover bid.

554. But Wang had access to another tranche of Mayer's shares and this was revealed to the market on 18 January 2012 when he made public his takeover plan by himself announcing, rather than Mayer, the details of his possible voluntary cash offer. In his announcement Wang revealed that he had entered a conditional agreement with Make Success to purchase an additional 166,363,636 Mayer shares from it, representing 17.94% of Mayer's share capital.

555. If this transaction with Make Success was completed, Wang would own, together with his existing, but unregistered, 7.55% shareholding, just over 25% of Mayer. He was hoping that his offer of HK$0.12 per share would provide him with a further 25% of Mayer's shares and so take him over 50% ownership of Mayer.

556. In order to neutralise the effect of the Make Success share transfers, if Mayer could not prevent them from happening, Mayer entered into a Conditional Placing Agreement with a Placing Agent for the placing of up to 185 million newly issued Mayer shares. Mayer entered this agreement on 6 January 2012, but only revealed it to the market by an announcement on 8 February 2012. If successfully placed with friends of the Board of Mayer, it would have the effect of both diluting Wang's shareholding and increasing the shareholding of those opposed to the takeover.

557. Another element in Mayer's strategy to defeat Wang's takeover bid was to institute legal action against Make Success. On 16 January 2012, Mayer

announced that on 12 January 2012 it had issued a writ against Make Success in which it alleged misrepresentation and sought rescission of its agreement and an account of profits.

558. On 15 February 2012 Wang's possible voluntary cash offer became a firm offer by a document released on his behalf. The offer was conditioned upon there being sufficient valid acceptances to take Wang's shareholding in Mayer to over 50%. This document revealed that the total value of the offer, that is, what it would cost Wang to buy control of Mayer, was HK$102,582,000, of which HK$82,944,000 was needed to buy shares and HK$19,638,000 was needed to buy convertible notes.

559. Having instituted legal action against Make Success on 12 January 2012, the next step that Mayer took in order to defeat Wang's takeover bid was to prevent Make Success from transferring its Mayer shares to Wang. In an announcement of 5 April 2012 Mayer informed the market that it had, that day, obtained an interim injunction to prevent Make Success from transferring ownership of its Mayer shares which had been provided to it as part of the consideration for the Vietnam Project.

560. Thus, by its actions, the Board of Mayer had shown it was implacably opposed to the takeover bid. It had:

(i) prevented registration of the first share transfer from Make Success to Wang;

(ii) initiated legal action against Make Success and obtained an

interim injunction against it to prevent it from making a second share transfer of Mayer shares to Wang; and

(iii) started the process of issuing new Mayer shares in order to dilute Wang's prospective shareholding and to place more of its shares in friendly hands.

561. The fight for control of Mayer also extended to Mayer's Boardroom. Three directors of Mayer were excluded from discussion of the Wang offer because they were perceived to have a conflict of interest "given their close relationship with Make Success".[238] The takeover bid by Wang finally came to an end on 8 May 2012 when the Voluntary Conditional Cash Offers lapsed for lack of sufficient acceptances.

February – March 2012

562. In the course of this turbulent first quarter of 2012 Mayer received further bad news when the company's auditors, Crowe Horwath, resigned on 16 February 2012. This was announced to the market on 21 February 2012 and on 29 February 2012 Grant Thornton was appointed as replacement auditor. In its letter of resignation Crowe Horwath effectively indicated it could not get from Mayer information in respect of the Vietnam Project to which it was entitled and which it needed in order to complete the audit. Ms Pao agreed that investors would take the resignation, and the explanation for it, very seriously.[239]

[238] Page 7 of Mayer's Response Document to Wang's General Offer at RTB 3/23.
[239] Transcript, day 2, page 54, lines 19 – 24.

563. This, unsurprisingly, was followed in March by Mayer's failure to issue its 2011 Annual Report. This failure was announced by Mayer on 21 March 2012. In its announcement Mayer explained the reasons for the failure as follows:

> "The board of directors (the "**Board**") of the Company announces that there will be a delay in the publication of the annual results of the Company and its subsidiaries (the "**Group**") for the year ended 31 December 2011 (the "**Annual Results Announcement**") and the dispatch of the annual report of the Company for the year ended 31 December 2011 (the "**Annual Report**"). Due to the change of auditors, additional time is anticipated for the new auditors to complete the audit procedures for the consolidated financial statements of the Group for the year ended 31 December 2011. *The Company will use its best endeavors to coordinate with the new auditors, and for the time being, the expected date of the Annual Results Announcement and dispatch of the Annual Report has yet to be agreed with the new auditors.* Further announcement will be made as and when appropriate to keep the shareholders of the Company informed of the development." (Emphasis added.)

The Notice concluded with the warning:

> "Trading in the shares of the Company on the Stock Exchange will remain suspended until further notice."

564. But, the reality of what it would take to complete the audit was a little different, as is apparent from the evidence of Ms Pao, under cross-examination by Mr Li:

> "Q. But the dominant issue remains access to the Vietnam project; correct?
>
> A. Yes.

Q. Without solving that, nothing else could proceed; correct?

A. Yes.

Q. And as at this point in time, there really was no cause for any optimism that the company could access the Vietnam project; correct?

A. Could --

Q. Could access the Vietnam project and information there; correct?

A. After they've sued them, yes.

Q. So you see over at page 2 overleaf, the company in fact said the expected date was yet to be agreed with the new auditors. Do you see that?

A. Yes.

Q. So whatever the company promised, because it did promise to use its best endeavors, so on and so forth, whatever the company promised, until it could solve the Vietnam issue, the auditors would not realistically estimate a time; correct?

A. Yes."[240]

565. A very important event for the market at this time was the issue of a letter by the Board of Mayer that it wrote to its shareholders on 23 March 2012 and which accompanied a letter from the Independent Financial Adviser to the Independent Board Committee on the Wang offer. In its letter to shareholders the Board provided an update on the Vietnam project, saying:

[240] Transcript, day 2, page 75, line 21 – page 76, line 18.

> "The "Dan Tien Port Project" and the "Phoenix Trade and Urban Area Project" to be developed by Yield Rise Group (the "**Vietnam Project**") is still under construction and *on-going capital investment will be required*. In this regard, *positive contribution to the Group's operating results is not expected in the near future*. However, the Company was unable to assess the construction progress of the Vietnam Project and to obtain its books and records due to the matters in relation to litigation against Make Success."[241] (Emphasis added.)

566. This statement sets out the future of Mayer in respect of the Vietnam Project, on the assumption that, for the moment, Mayer retained ownership of it. On that assumption, then:

(i) Mayer would be involved in on-going capital investment in the project to fund construction work;

(ii) what construction work might be required couldn't now be assessed because Mayer didn't know what had already been done and could not obtain access to the books and records of Yield Rise; and

(iii) Mayer could not expect any revenue from the Vietnam Project in the new future.

The frankness, and bleakness, of these remarks revealed to the market just what a disaster the Vietnam Project had become for Mayer.

567. On 25 March 2012 the Sinowise and Dynamic supply agreement was

[241] RTB 3/23/15.

terminated with Dynamic agreeing to repay Sinowise a total of US$6.9 million by ten instalments. But by the end of 2012 there was still US$5.3 million outstanding.

568. Finally, on 29 March 2012, the Capital Wealth litigation against Mayer for the repayment of loans totalling HK$15.5 million commenced by the issue of two writs out of the High Court. Mayer did not announce this litigation to the market until 23 April 2012.

The Takeover of Mayer by the Capital Wealth Group

569. In March 2012 there was another important development for the company and one which would have a further destabilising effect upon it. This development was the existence of another challenge to the ownership of Mayer in addition to, and quite separate from, that which emanated from Wang and the Make Success camp. This other takeover bid became known to the market when there were media reports of litigation in the High Court of Hong Kong in respect of the shareholding in Mayer that was held by Mayer's Taiwanese parent company, Taiwan Mayer, through its wholly owned subsidiary, Mayer Corporation Development International Limited. The 200 million Mayer shares held by the parent company represented 21.56% of Mayer's shares. Prior to the completion of the Vietnam Project, this shareholding made Taiwan Mayer the dominant shareholder of Mayer. Now, this litigation placed at risk Taiwan Mayer's control of the company. The litigation involved Mayer Corporation Development and two companies, Bumper and Aspial, who were claiming that

they were the lawful owners of this tranche of Mayer shares.[242] Behind these two companies was Capital Wealth Finance. With this litigation there was now in play a third party seeking to take over Mayer.

570. Whether what is known now about the takeover battles would have been known to Mayer's small shareholders that were independent of the parties involved in the takeover battle is, as far as Ms Pao is concerned, questionable. In response to questions by Mr Li on the impact of the takeover battle on shareholders' hopes to sell their shares, she said:

> "A. But by saying so, you're assuming that the shareholders, not the big shareholders, the small shareholders were all clear, they knew about all these three camps fighting for control. Was that clear to them? Because it wasn't – I don't think it's that clear to them.
>
> Q. For those who don't get themselves informed, their hopes would be unrealistic anyway, right? You can't help someone who doesn't get informed. By definition, this hope would be uninformed, correct, Ms Pao?
>
> A. You took a lot of time going through all these announcements and then pointing out here, there, there, there, therefore they are fighting, blah, blah, blah, blah. Shareholders, they read an announcement, they're informed by the announcement. Not all shareholders do the thinking and thinking and thinking and tie all the announcements together to get the big picture."[243]

571. And later, when asked if retail investors could, as it were, join the dots

[242] This litigation is discussed at [598] in Chapter 13 of this Report.
[243] Transcript, day 2, page 106, line 18 – page 107, line 8.

and so work out what was happening behind the scene, she said:

"CHAIRMAN: It's not a question -- not also a question of just being informed, I presume. It's a question of, as I said, connecting the dots, doing the analysis.

A. Yes, which would be very difficult, in my opinion, to untie this shareholder fighting, all the – all the scheming and things like that. Even though you can say the information, they didn't hide anything deliberately, but to pick up that information to connect the dots would be quite a task for the average retail investor."[244]

572. Later, she explained the reasoning behind her opinion:

"A. The second point is about you remember we talked about whether the investors were able to connect the dots?

CHAIRMAN: Yes.

A. And I clarified my view yesterday by saying that I believe some investors were able to and some were not. I'd like to further clarify my view that it is my view that the majority of the investors belonging to the general investing public was not able to connect the dots.

If I may, I can provide my reasoning if you would like to hear that.

CHAIRMAN: Yes.

A. It's based on -- initially based on the result of the VGO by Wang Han, only 2.88 per cent acceptance rate when the VGO lapsed in early May. Now, at

[244] Transcript, day 2, page 125, line 23 – page 126, line 6.

that time, the number of shares in the hands of the investing public was probably over 20 per cent of the outstanding shares of Mayer. Now, only 2.88 per cent accepted. Based on what Mr Li said yesterday, they informed the ones who were able to connect the dots would know that if they didn't sell then, they would never get the chance to sell, because of the tangled web of lawsuits, et cetera, et cetera.

So only 2.88 per cent out of a little over 20 per cent were informed from the results. So I think the majority of investors were not informed, were not -- they were not able to connect the dots based on publicly available information.

CHAIRMAN: You were saying if they were informed they would likely to recognise that was likely to be perhaps the only immediate opportunity to offload their shares?

A. Yes. That was Mr Li's case, yes."[245]

573. Ms Pao was also cross-examined on this topic by Mr Chan. She agreed with him that investors would be able to work out that there were three camps vying for control of Mayer. They were, firstly Taiwan Mayer, the existing dominant shareholder, secondly, Aspial and Bumper who were claiming ownership of Taiwan Mayer's shareholding and thirdly the Wang/Make Success camp. She also said that investors would definitely have a sense that there's a lot of discord amongst the members of Mayer's board. Investors would realise that they did not know who would be controlling Mayer in the future. The statement that three directors had a conflict of interest would send a message that

[245] Transcript, day 3, page 8, line 7 – page 9, line 13.

there are board members close to the Make Success camp and investors would know that Mayer was alleging it had been defrauded by Make Success. On whether investors would realise that directors on Mayer's board had aligned themselves with Make Success, she said:

CHAIRMAN: He's certainly going so far as suggesting that there was within the board of Mayer directors who could be perceived by investors as aligning themselves with Make Success.

MR CHAN: Yes, that is precisely what I'm suggesting. Actually, Mr Chairman, I was looking for the question myself.

A. And the question is whether it's easy for investors to connect that dot?

Q. Yes. At least it wouldn't be so hard. There are always going to be those who never connect any dots.

CHAIRMAN: And this is on the assumption we are dealing with investors who read the announcements.

A. Yes, I think investors who bother to really think about it would connect the dots, but it's not like really obvious. So it depends on how you interpret the word "easy". Whether you just read it and immediately it pops into your head, then my answer is no. But if you're interested in it and you read it and you think about it and you read it carefully, yes, you could connect that dot.

CHAIRMAN: Given the proximity of the announcement in relation to the amended writ and -- they're going to be able to work out that there is, as you said, discord within the board.

A. Yes."[246]

574. In a nutshell it was her evidence that some investors would have been able to work out what was going on within the company and with the Vietnam Project but the majority would not.

The Position of Mayer at the End of March 2012

575. Thus, as the first quarter of 2012 was coming to an end there was an on-going fight for control of Mayer with great uncertainty as to who were the lawful owners of some 47% of its shares. Furthermore, there was disunity within the Board of Mayer in respect of the Wang takeover offer. Finally, Mayer had, in effect, no source of revenue and no control over its only and over-valued asset. It is noteworthy that from towards the end of March 2012, whenever Mayer described the Dan Tien Port Project it no longer talked about its business prospects as it had done in its circular on this very substantial acquisition. Indeed, it was the opinion of Mr Rigby that Mayer was trading as a shell and this was its true value; that is, to be sold as a vehicle for a back-door entry to listing on the Stock Exchange.

April – May 2012

576. The second quarter of 2012 only provided more pain for Mayer. It would have been in this quarter that the auditors had hoped to complete their audit, but that was not to be. The months of March and April 2012 were key months

[246] Transcript, day 3, page 107, line 23 to page 108, line 23.

for the Grant Thornton audit team. As we have set out in Chapter 6 of this Report,[247] during these months the audit team identified matters of concern to them in respect of which they required further information. When meetings with Mayer's management failed to resolve all their concerns, Grant Thornton requested a meeting with Mayer's Audit Committee. This meeting took place on 24 April 2012 but, as with their contact with Mayer's management, this meeting also failed to provide the audit team with the assistance they needed.

577. In April 2012 the media reported the litigation against SP2 and SP4 for repayment of loans of more than HK$61 million. The lender of these monies was one of the Capital Wealth companies. The Capital Wealth companies were also the source of the funds in the Advance Century transaction and were the third group trying to take control of Mayer.

578. May 2012 saw the end of the takeover bid by Wang Han but otherwise was a bad month for the company. Two events occurred in this month which presented the company in a poor light. The first was the resignation of the Non-Executive Director Lam Chun Yin because of disagreement with the Board on a number of matters. The second was the litigation by SP9 against Mayer and the Board for access to Mayer's documents. These two events reflected more than just discord within the Board of Mayer. For a member of the Board to sue his company and fellow board members is, in itself, quite extraordinary. But, what is even more extraordinary, and what would have been very disturbing to the market, is the fact that SP9 was basing his claim on an allegation that he was being deliberately prevented from properly performing his directorial duties by being

[247] See [160] – [169] of this Report.

refused access to the records of Mayer and having matters concerning the company concealed from him.

June – August 2012

579. The months between May and September were occupied with further attempts by Grant Thornton to get Mayer to address their concerns.[248] On 22 May 2012 Grant Thornton wrote a letter to the Board of Mayer requesting the Board to address their concerns about a number of significant matters. When the Board failed to respond to Grant Thornton's letter Calvin Chiu wrote to SP2 on 8 June 2012. This and other emails did not produce the response that Grant Thornton sought and culminated in the Grant Thornton email of 23 August 2012 in which it proposed a number of qualifications to its audit opinion. As previously set out in Chapter 6 of this Report, very little happened in the ensuing months and Grant Thornton became so frustrated it finally tendered its resignation.

580. On 16 July 2012 the first battle between Taiwan Mayer and the Capital Wealth entities for control of Mayer ended in defeat for Taiwan Mayer. Although this contest would be pursued through the appellate courts, this defeat must have created uncertainty in the minds of investors as to who would ultimately own the company. This uncertainty would last well beyond the end of 2012.

[248] See [170] – [179] of this Report.

September – December 2012

581. Between September and December 2012 there was little of any significance that occurred affecting Mayer. On 18 September 2012 Daniel Lin and Anthea Han had a meeting with Lam Chin Chun, the CEO of Capital Wealth in which he provided the auditors with more background information to what he alleged were loans by his companies to Mayer. In respect of this matter there was also an event on 12 October 2012. This was the decision of the High Court to grant Mayer unconditional leave to defend the Capital Wealth litigation.

582. On 8 October 2012 Anthea Han sent SP2 an email identifying all the outstanding matters and SP2 simply replied that their requests could be addressed on the audit team's revisits to Mayer.

583. Finally, on 22 November 2012 Mayer made an announcement to the market about the position of the audit in which it said that it anticipated that the 2011 annual results would be published within 3 months. As we noted at [191] of this Report that was a statement that was completely without foundation. The management of Mayer could not have been unaware that no progress was being made with the audit and could not have been unaware of the concerns the audit team had and of the team's increasing anxiety at not being able to have those concerns properly addressed by Mayer. The resignation of Grant Thornton on 27 December 2012 was simply the natural consequence of Mayer not adopting a serious and responsible attitude to the auditor's requests.

Chapter 13

The Tribunal's Findings in Respect of the State of Mayer at 1 January 2013

Introduction

584. In previous chapters of this Report we noted that the share price of Mayer had dropped badly during 2011 and on 22 November of that year the first suspension of Mayer took place with the company remaining suspended until 5 January 2012. On 6 January 2012 trading in Mayer's shares resumed for one day only and the last traded price on this day was HK$0.123. This price has been termed as the "pre-suspension price". On 9 January 2012 Mayer announced to the market that trading in its shares would be suspended with effect from 9:00 am that day and the company remained suspended throughout 2012. Events affecting Mayer that took place thereafter have been termed "post-suspension events".

585. In Chapter 5 we set out the post-suspension events to which the Court of Appeal directed regard should be had and in Chapters 6, 7, 11 and 12 of this Report we described those and other relevant events relating to Mayer prior to its suspension and after its suspension up to the end of 2012.

586. Having examined and discussed the post-suspension events, and other events in 2012, it now falls to us to assess how all these events would have impacted upon the market's perception of Mayer.

Assessing the Impact of the 2012 Events on the Market's Perception of Mayer

587. A useful way of assessing the market's perception of Mayer as at 1 January 2013 is by an examination of how the events of 2012 impacted on key aspects of the company and how that impact would have contributed to creating a particular perception of Mayer by those involved in the market. In doing so we are concerned only with what the market would have known about Mayer as at 1 January 2013. Consequently, we are concerned with a market that was unaware of Grant Thornton's resignation.

(i) The Suspension of the Company

588. By 1 January 2013 Mayer had been suspended for, in effect, over a year and the market had not received any annual report on the company since the 2010 report. Prolonged suspension, according to Ms Pao, affects the frustration level of investors, but it is not possible to say when investors would give up on the company and not care what happened to it. But, the long delay in publishing audited accounts, the resignation of Crowe Horwath over an apparent lack of cooperation by the management of Mayer, and the fact there was no clear indication of when the company's suspension would come to an end, would all have contributed to a high level of concern in investors' minds.

(ii) The Lack of Commercial Activity by the Company

589. A reason for investors to feel anxious about the company will have been the fact that by 1 January 2013 Mayer had little in the way of on-going commercial activity and revenue generating business. By then it had disposed of Bamian Investments, its main income earner, and replaced it with the Vietnam Project. But, the Vietnam Project was bogged down in litigation which was not likely to be quickly resolved and which was hindering Mayer's auditors in completing an audit of the company's accounts. Furthermore, even if the Vietnam Project remained under the ownership of Mayer, it was going to require further capital injection before it was likely to generate revenue and when it might generate revenue was a complete unknown.

590. There was no other business of the company which could provide it with a significant revenue. Even other, relatively small, sources of income were beset by problems. The monies that Mayer asserted were from the sale of Advance Century were the subject of litigation with the distinct possibility that the income of HK$15.5 million might become a liability in the form of a loan in that amount which had to be repaid. Although not all investors might have been aware of the link between the Capital Wealth litigation and the sale of Advance Century, they were at least aware of the litigation and that, therefore, there existed the possibility that the company might become liable to repay a loan of HK$15.5 million. Those aware of Mayer's defence to the suit would certainly be able to work out that if that defence was not true, then Mayer's management had been involved in some form of fraud.

591. The other prospective source of revenue was in commodities trading through the Elternal and Sinowise contracts. However, although not yet known widely in the market, the Elternal and Sinowise contracts resulted in money, arguably unnecessarily, going out of these two subsidiaries of Glory World on new areas of business which seemed to fail from the start.

(iii) The Corporate Governance of the Company

592. Apart from concerns about Mayer's commercial activity, there were other areas where investors would have had cause for concern. Doubts about Mayer's corporate governance can be seen as early as the resignation of Crowe Horwath on 16 February 2012 as this had been partly due to a failure by the management of Mayer to inform their auditors of the litigation against Make Success in respect of the Yield Rise acquisition. This was a significant failure as it went, fundamentally, to the ability of the auditors to assess the asset value of this acquisition.

593. On 10 May 2012 Mayer announced that a non-executive director by the name of Lam Chun Yin had resigned with effect from 9 May 2012. The announcement gave the following reasons for Mr Lam's resignation:

> "Prior to Mr Lam's resignation, he has disagreement with the Board on a few issues relating to the overall management and operation of the Company such as whether sufficient notice has been given for the purpose of the Board meeting and whether certain directors are conflicted in some of the matters relating to the Company."[249]

[249] RTB 3/35.

594. Shortly thereafter, on 23 May 2012, SP9 issued two originating summonses against the company and the Board which Mayer announced to the market on 30 May 2012. The implication of what was being alleged in this litigation was that the management of Mayer was deliberately preventing SP9 from performing his non-executive director duties by preventing him from having access to the records of Mayer. To say that this was not a good look for the management of Mayer, especially following on so shortly after the resignation of another non-executive director of the company, is something of an understatement.

595. The litigation in respect of the Vietnam investment showed, at the very least, that Mayer's management had been completely deceived by the vendors into paying far too much for the Vietnam Project. But, knowledge that three of Mayer's directors were aligned with the Make Success camp might cause investors to go further and wonder whether the management of Mayer were really victims of a fraud or in some way participants in it. A choice between incompetence or foul play is not an attractive one for the market and would only add to investors' pessimism about the company. What choice investors might make would inevitably depend on what further information they received about the company.

(iv) The Ownership of the Company

596. The battle for control of Mayer with the takeover offer made by Mr Wang, who had acquired his shareholding in Mayer from Make Success, highlighted how disastrous the Yield Rise acquisition had become for Mayer. It was a divisive issue for the Board and an unfortunate distraction for its office

holders who had other important issues that needed their attention. The efforts by Mayer to defeat the takeover led to extensive litigation by it and Make Success with each suing and counter-suing the other.

597. Notwithstanding all that happened in the course of, or as a consequence of, the takeover battle, Wang only obtained 2.88% of shareholders accepting his offer. The conditions of the General Offer not being satisfied, it lapsed on 8 May 2012. For the task facing this Tribunal, the true significance of the Wang takeover bid is that it demonstrated that there were a substantial number of Mayer shareholders who, in the first 6 months of 2012, valued the company at more than HK$0.12 per share.

598. Quite separately, Mayer was indirectly embroiled in other litigation with Bumper and Aspial, behind which was Capital Wealth Finance, over the ownership of large tranches of Mayer shares that represented 52.08% of Mayer's issued share capital and were owned by Mayer's parent company. The loss of this litigation by Mayer would lead to Taiwan Mayer and its Board representatives losing control of the company. This litigation was, in fact, lost by Mayer in the High Court judgment of Reyes J, handed down on 16 July 2012. In this judgement Reyes J was critical of, and did not accept, the evidence of SP2 and SP4. Although this litigation still had a long way to go as it progressed through the appellate courts,[250] by 1 January 2013 the loss by Taiwan Mayer before Reyes J would have added to the frustration that investors felt about the company and contributed further uncertainty in their minds as to who would ultimately own

[250] We should mention, for the sake of completeness, that in May 2013 the Court of Appeal upheld Reyes J and in July 2014 the Court of Final Appeal did likewise. The latter judgment ultimately led to the removal of most of the Specified Persons from the Board of Mayer.

Mayer and what the long term prospects of the company might be.

The Position at 1 January 2013

599. When trading resumed in Mayer's shares on 6 January 2012 the market displayed a poor view of the prospects of the company. It is difficult to see anything that happened in 2012 as improving the market's long term view of those prospects. The condition that Mayer was in as at 1 January 2013, as known to the market and, therefore, prior to the market being aware of the Grant Thornton resignation, was that:

(i) it still remained a shell of a company with no on-going business and no source of revenue;

(ii) it still remained suspended from trading with the market completely ignorant of when that suspension might end;

(iii) its main asset and future source of revenue, the Vietnam Project, was the subject of litigation against Make Success, and even though the market may have seen this as an encouraging sign it would also have recognized that the result of that litigation was not likely to be known for some time and that an outcome favourable to Mayer could not be taken for granted;

(iv) the annual results of 2011 had been unable to be published. The long-standing accountants of Mayer, Crowe Horwath, had resigned over not being kept informed about the most important asset of the company and, after 10 months, the replacement auditors, Grant Thornton, still showed no sign of completing the

audit;

(v) as a consequence of the Bumper and Aspial litigation, ownership of the company was uncertain and the market would have realised that this uncertainty would continue for some time;

(vi) members of the Board of Mayer had been shown to be in disagreement with each other and the Board's decision-making competence in respect of the Vietnam Project had been shown to be problematic; and

(vii) the Board and the management of the company was the subject of very serious allegations by SP9 that went to the integrity of the company's senior office holders and suggested they were seeking to conceal company affairs.

600. All of these matters would affect the market's view of the company and what that view might be was the subject of cross-examination of Ms Pao. As is apparent from what follows below, Ms Pao was not completely pessimistic about how investors would view the company on 1 January 2013. But, it is important to note that her responses were based on the assumption that the Grant Thornton letter of resignation had not been disclosed:

"Q. Yes. So in this case by 1 January 2013, investors would have lost all confidence in existing Mayer management already. Do you agree or disagree?

A. Disagree.

Q. By 1 January 2013, investors could not trust any of the figures from the

Vietnam project. Do you agree or disagree?

A. Would not trust any --

Q. Of the figures, financial figures from the Vietnam project?

A. Disagree.

Q. And investors will have uncertainty, big uncertainty over what business Mayer would be doing in the future. Do you agree or disagree?

A. Agree.

Q. And the investors will have big uncertainty over who would be running the company in the future. Do you agree or disagree?

A. Agree.

Q. And there will be uncertainty, big uncertainty about how much the company was actually worth. And we are talking about hundreds of millions of dollars of renminbi in uncertainty that was wrapped up in the Vietnam litigation. Do you agree or disagree?

A. Agree."[251]

601. In his cross-examination of Ms Pao, Mr Li sought her agreement to characterising Mayer as "a basket case". Ms Pao replied:

"Mr Li, this is a very bad, messy company, yes. Would I use the phrase "basket case"? I may not. That's all I'm saying."[252]

[251] Transcript, day 3, page 118, line 7 to page 119, line 6.
[252] Transcript, day 2, page 110, lines 6 – 8.

602. Mr Rigby agreed that Mayer was a very messy company, although he added the possibility of the company "being looted through mal-investment."[253]

603. We are in no doubt that by 1 January 2013 investors would have been very frustrated at the continuing suspension of the company and anxious to know when the 2011 audited accounts might become available and the suspension brought to an end. The uncertainty surrounding this would have been a very important concern playing on investors' minds.

604. Equally, we are in no doubt that investors would also have been very anxious at the state of Mayer's business activity, its lack of revenue and the lack of clarity in respect of both its current commercial position and its future commercial prospects. We accept the characterisation of Mayer by Mr Rigby, which was also shared by Ms Pao, that Mayer had little, if any, on-going revenue earning business and as at 1 January 2013 would have presented to investors as an empty shell.

605. Finally, by the end of 2012 there was an issue in relation to the competence of Mayer's management - the debacle that was the Vietnam Project had amply demonstrated that. But, given that three of its directors had been aligned with Make Success and given what Mayer was now alleging against Make Success, there was also an issue as to the integrity of some of Mayer's management. These issues would have been enhanced and highlighted by the litigation, and other actions, taken by SP9. In these circumstances, we accept that some investors might harbour suspicions about Mayer's management and

[253] [16] of Mr Rigby's Report quoted at [378] ante.

how and why it was that Mayer's position as a profit-making business became so dire.

Chapter 14

Grant Thornton's Letter of Resignation

Introduction

606. Grant Thornton's letter of resignation is set out in full at [198] of this Report. The first paragraph of the Grant Thornton letter indicates that the letter is formal notice of resignation. The second paragraph of the letter indicates that the third paragraph of the letter is written pursuant to Section 441 of the Code of Ethics of Professional Accountants. And the third to fifth paragraphs purport to contain the information that Grant Thornton believes ensures their compliance with that section and with provisions in the then Companies Ordinance which laid down certain requirements that auditors must meet in a resignation letter. The sixth, and last, paragraph of the letter reminds Mayer of its disclosure obligation under Rule 13.51(4) of the Stock Exchange Listing Rules.

607. There are, in fact, three disclosure obligations which apply or may apply to the situation of a company that is faced with its auditors resigning. The first is section 140A of the Companies Ordinance; the second is Rule 13.51(4) of the Listing Rules of the Hong Kong Stock Exchange and the third is the disclosure obligation contained in section 307B of the SFO. Supplementing the first and second obligations is the Code of Ethics of Professional Accountants which provides accountants with guidance on how they should comply with their Listing Rules disclosure obligation and, to some extent, section140A.

608. The first and second disclosure obligations are ones which specifically focus on a change in the company's auditors.[254] Under these obligations a company cannot avoid making disclosure of an auditor's resignation and the reasons for it. That is not so in respect of the section 307B disclosure requirement which limits the information to be disclosed to that which is "likely to materially affect the price of the listed securities" and the auditor's resignation would have to satisfy this test before it became disclosable.

609. As we have previously dealt with the legal requirements of section 307B, we shall now address each of the first two of these disclosure obligations, and the accountants' Code, in turn so that we can then better understand what should be in an auditor's letter of resignation.

The Companies Ordinance, Cap 32

610. The resignation of an auditor is controlled by the Companies Ordinance. Given that Grant Thornton's resignation letter is dated 27 December 2012 the relevant version of the Companies Ordinance is Cap 32, the predecessor to the current Companies Ordinance, Cap 622. The relevant section in Cap 32 is section 140A, which provides:

> "**140A. Resignation of auditor**
>
> (1) An auditor of a company may resign his office by depositing a notice in writing to that effect at the registered office of the company; and

[254] Although we should mention that Rule 13.51(4) of the Listing Rules in force at 1 January 2013 also includes within the disclosure obligation "and any other matters that need to be brought to the attention of holders of securities of the issuer (including, but not limited to, information set out in the outgoing auditors' confirmation in relation to the change in auditors).".

any such notice shall operate to bring his term of office to an end on the date on which the notice is deposited or on such later date as may be specified therein.

(2) An auditor's notice of resignation shall not be effective unless – *(Amended 84 of 1995 s. 4)*

(a) it contains either –

(i) a statement to the effect that there are no circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company; or

(ii) a statement of any such circumstances as aforesaid; and *(Replaced 84 of 1995 s. 4)*

…

(3) Where a notice having effect under this section is deposited at a company's registered office the company shall within 14 days send a copy of the notice –

(a) to the Registrar; and *(Amended 30 of 1999 s. 8)*

(b) if the notice contained a statement under subsection (2)(a)(ii), to every person who under section 129G(1) as read with the proviso thereto is entitled to be sent copies of the documents there mentioned. *(Amended 27 of 2001 s. 5; 28 of 2003 s. 53)*."[255]

[255] The current equivalent of these provisions can be found in sections 417, 424 and 426(1) of the Companies Ordinance, Cap 622.

611. The service requirement contained in section 140A(3)(b) refers to section 129G(1). The effect of these two sections read together is that if the notice of resignation contained a statement under section 140A(2)(a)(ii), then Mayer would have been required to send a copy of the notice of resignation to its shareholders and any creditors of the company, and it would have been required to send it within 14 days of receipt of it. Here, Mayer received the notice of resignation on 27 December 2012 and since it contained a statement under section 140A(2)(a)(ii), it would have been required to send a copy of it to all shareholders and creditors by 9 January 2013.

612. The 14 days' time limit in section 140A(3) is a time limit for compliance with an obligation imposed by the Companies Ordinance. It does not, therefore, automatically follow that a disclosure made under Section 307B(1) that is made outside the 14 days will not have been made "as soon as practicable" for the purpose of compliance with that statutory obligation. The words "as soon as practicable" create a context specific test and so regard must be had to the particular circumstances of the company at the time it became subject to the disclosure requirement. Nevertheless, consideration may be given to other statutory time limits that deal with a disclosure obligation imposed on companies when deciding in any particular case whether the time within which a section 307B(1) disclosure was made, was made "as soon as practicable".

613. The provisions in the Companies Ordinance represent the legal framework for the auditor's letter of resignation as at 27 December 2012 and so once a resignation is documented in writing and deposited at the registered office of the company then, from the date that is done, the resignation takes effect unless

the letter of resignation specifies otherwise. Here, Grant Thornton specified in the opening paragraph that the resignation was "with immediate effect", lending emphasis to what otherwise would have been the position by operation of law.

614. Although Grant Thornton's letter makes no mention of section 140A, by describing the letter as the giving of "formal notice of our resignation" we are satisfied that Grant Thornton was making it clear that it was complying with section 140A(1) of the Companies Ordinance and that fact would not have been lost on the management of Mayer.

615. Although the second paragraph of the letter refers to the Code of Ethics of Professional Accountants, to which we shall shortly turn, the primary obligation of a resigning auditor is to comply with section 140A for that is a legal requirement imposed on the auditor. There can be no doubt that, notwithstanding the reference in paragraph 2 of the letter to the Code, paragraphs 3 – 5 of the letter are clearly intended to constitute compliance by Grant Thornton with its section 140A(2) statutory obligation. That, also, is a matter that would not have been lost on the management of Mayer.

Rule 13.51(4) of the Listing Rules

616. As at 1 January 2013 the Rule read as follows:

> "(4) any change in its auditors or financial year end, the reason (s) for the change and any other matters that need to be brought to the attention of holders of securities of the issuer (including but not limited to, information set out in the outgoing auditors' confirmation in relation to the change in auditors);

Note: The issuer must state in the announcement whether the outgoing auditors have provided a confirmation that there are no matters that need to be brought to the attention of holders of securities of the issuer. If no such confirmation has been provided, the announcement must state the reason for this."

617. It is clear from the note that what is being referred to by the words "the outgoing auditors' confirmation" is the statement of circumstances set out in section 140A(2)(a)(i) of the Companies Ordinance.

The Code of Ethics of Professional Accountants

618. As revised in August 2013 the Code provides as follows:

"441.1 The Stock Exchange of Hong Kong Limited (SEHK) and the Securities and Futures Commission (SFC) have raised concerns with the Hong Kong Institute of Certified Public Accountants concerning announcements made by listed issuers of the SEHK of the reasons for changes in auditors. In many cases, fee disputes are stated to be the reason for the change. Concern has been expressed that certain auditors have been relying on purported fee disputes to disguise the real reasons for the change. As a result, potentially significant and fundamental matters about the listed issuer may not be disclosed to investors and creditors and the market is not therefore being kept fully informed. *It is important that the situation concerning the change of auditors should be disclosed in full to avoid the possibility of the market being misled*.

441.2 … The framework requires the outgoing auditors to prepare a letter to the

audit committee and the board of directors setting out the circumstances leading to their resignation or termination.

…

441. 5 Auditors of Hong Kong incorporated listed issuers are reminded that section 140A(2) of the Companies Ordinance requires an auditor who resigns from office before the expiry of its term must, if the resignation is to be effective, *include in his resignation a statement of any circumstances connected with his resignation which he considers ought to be brought to the notice of members or creditors of the company, or a statement that there are no such circumstances*. However, auditors are to note that this section is not intended to provide guidance regarding the requirements of section 140A(2) of the Companies Ordinance.

…

Communication with the Audit Committee and the Board of Directors

441.9 This section requires the outgoing auditors to prepare a letter to the audit committee and the board of directors of the listed issuer, whenever:

(a) the outgoing auditors resign or decline to stand for re-appointment (Resignation); or

…

441.10 … The circumstances to be disclosed in the Letter of Resignation or Termination are all occurrences that, in the opinion of the outgoing auditors, affect the relationship between the listed issuer and the outgoing auditors.

441.11 Occurrences that affect the relationship between the listed issuer and the outgoing auditors include, but are not limited to, "disagreements" and/or "unresolved issues", as discussed below.

…

441.16 The outgoing auditors should note that disclosing the circumstances leading to their Resignation or Termination in the Letter of Resignation or Termination is the appropriate method of discharging their responsibilities during a change in a professional appointment without having to be concerned with the professional duty of confidentiality owed to the listed issuer. In the event that the incoming auditors approach the outgoing auditors for professional clearance and ask whether the outgoing auditors are aware of any unusual circumstances surrounding the proposed change of auditors which may be relevant in determining their acceptance of nomination, as required by Section 440 "Changes in a Professional Appointment", the outgoing auditors can refer the incoming auditors to their Letter of Resignation or Termination.

The Incoming Auditors

441.17 Since the outgoing auditors are required to disclose the circumstances leading to their Resignation or Termination in the Letter of Resignation or Termination, the incoming auditors should request a copy of the Letter of Resignation or Termination and any correspondence referred to in the letter directly from the listed issuer for consideration in addition to requesting professional clearance from the outgoing auditors before accepting the appointment.

441.18 If the listed issuer refuses to provide the incoming auditors with a copy of

the Letter of Resignation or Termination and any correspondence referred to in the Letter of Resignation or Termination, the incoming auditors should decline to accept nomination.

Announcement Made by the Listed Issuer on the Change of Auditors

…

441.20 The outgoing auditors should note that the listed issuer is required to make an announcement pursuant to the Listing Rules setting out the reason(s) for the change of auditors and any other matters that need to be brought to the attention of holders of securities of the issuer (including, but not limited to, circumstances set out in the outgoing auditors' Letter of Resignation or Termination in relation to the change of auditors). In the Letter of Resignation or Termination, the outgoing auditors should remind the listed issuer of this obligation *and should give their express consent to the letter being supplied to the SEHK*.

441.21 The outgoing auditors should read and assess whether the circumstances as reported in their Letter of Resignation or Termination, which, in their opinion, need to be brought to the attention of the shareholders, are reflected in the announcement made by the listed issuer. In the event that the outgoing auditors notice that the circumstances leading to their Resignation or Termination as announced by the listed issuer are materially different from the circumstances as reported by them in their Letter of Resignation or Termination in respect of matters that need to be brought to the attention of the shareholders, they should write to the audit committee and board of directors of the listed issuer regarding those matters.

(Emphasis added)

Compliance with Section 140A(2) and the Code

619. It is quite obvious that the provisions of the Code overlap with section 140A. But, the Code is quick to emphasise that its section 441 "is not intended to provide guidance regarding the requirements of section 140A(2) of the Companies Ordinance". This may be due to the focus of the Code being on the Listing Rules disclosure obligation. Whether that is so or not, we treat the provisions of the Code as supplementing the requirements of section 140A of the Companies Ordinance as well as explaining to accountants what is required of them when complying with Rule 13.51(4) of the Listing Rules.

620. A number of important matters are apparent from the legal and ethical framework. Firstly, in respect of the legal framework created by section 140A, they are:

(i) the documenting of the auditor's resignation by a written notice which is deposited at the registered office of Mayer is compliance by the resigning auditor with a statutory requirement;

(ii) but, compliance with these formal requirements is not, on its own, sufficient to render the notice of resignation legally effective. In order for the auditor's resignation to be legally effective, the auditor's resignation letter must contain "a statement of any circumstances connected with his resignation which he considers ought to be brought to the notice of members or creditors of the company, or a statement that there are no such circumstances". The third to fifth paragraphs of Grant

Thornton's resignation letter purport to comply with this requirement;

(iii) Since Grant Thornton's letter of resignation contains a section 140A(2)(a)(ii) statement of those circumstances described in section 140A(2)(a)(i), the requirement of service of the notice of resignation that is contained in section 140A(3)(b) is triggered;

(iv) thus, under the legal framework, the auditor knows that if its resignation letter contains a statement under section 140A(2)(a)(ii), then its letter will be served on members and creditors of the company in order that they can be informed of the matters set out in that statement;

(v) from (ii), (iii) and (iv) above it follows that in the present case, under the provisions of section 140A, the audience of the contents of the resignation letter were:

(a) the company as the addressee of the letter; and the auditor having considered that there *are* circumstances connected with its resignation which need to be brought to the attention of members or creditors of the company,

(b) the members of the company; and

(c) the creditors of the company;

(vi) the requirement imposed on the auditor to inform the company of "such circumstance connected with the resignation which [the resigning auditor] considers ought to be brought to the notice of members and creditors of the company" is clearly a requirement

that is intended to be beneficial to the members and creditors as persons with an interest in the company; and

(vii) from all of this it must follow that the auditor's section 140A(2)(a)(ii) statement of circumstances must contain sufficient detail about the matters being referred to in it as will enable members and creditors of the company to understand what the auditor is seeking to communicate and what it is about what he seeks to communicate that so concerns him that he feels it has to be drawn to the attention of members and creditors of the company.

Secondly, in respect of the Code, the important matters apparent from the ethical framework are:

(i) the resignation letter must set out the circumstances leading to the auditor's resignation; and

(ii) the circumstances are all occurrences that in the outgoing auditor's opinion affect the relationship between it and the listed issuer;

(iii) such occurrences include, "but are not limited to, 'disagreements' and/or 'unresolved issues' ";

(iii) the Code employs the phrases "disagreement" and "unresolved issues" as terms of art, giving them very specific meanings which are:

"441.12 Disagreements refer to any matter of audit scope, accounting principles or policies or financial statement disclosure that, if

not resolved to the satisfaction of the outgoing auditors, would have resulted in a qualification in the audit report.

441.13 Disagreements include both those resolved to the outgoing auditors' satisfaction which affect the relationship between the listed issuer and the outgoing auditors, and those not resolved to the outgoing auditors' satisfaction. Disagreements should have occurred at the decision making level, i.e., between personnel of the listed issuer responsible for the finalization of its financial statements and personnel of the auditors responsible for authorizing the issuance of audit reports with respect to the listed issuer.

441.14 The term disagreement is to be interpreted broadly. It is not necessary for there to have been an argument for there to have been a disagreement, merely a difference of opinion. The term disagreement does not include initial differences of opinion, based on incomplete facts or preliminary information, that were later resolved to the outgoing auditors' satisfaction, provided that the listed issuer and the outgoing auditors do not continue to have a difference of opinion upon obtaining additional facts or information.

441.15 Unresolved issues refer to matters which come to the outgoing auditor's attention and which, in the outgoing auditor's opinion, *materially* impact on the financial statements or audit reports (or which could have a material impact on them), where the outgoing auditors have advised the listed issuer

about the matter and:

(a) the outgoing auditors have been unable to fully explore the matter and reach a conclusion as to its implications prior to a Resignation or Termination;

(b) the matter was not resolved to the outgoing auditors' satisfaction prior to a Resignation or Termination; or …";

(iv) the purpose of making a full disclosure of the circumstances "connected with" (the language of section 140A) or "leading to" (the language of the Code) the resignation is to ensure that:

(a) the real reason for the resignation is revealed;

(b) potentially significant and fundamental matters about the listed issuer are disclosed to investors and creditors; and

(c) there is no possibility of the market being misled;

(v) so important does the professional body regard this duty that it imposes a further ethical duty on its members to read the listed company's announcement of its resignation to ensure that the announcement does not contain anything materially different from what is written in the letter; and

(vi) if the incoming auditors approach the outgoing auditors for professional clearance they should be referred to the letter of resignation. The incoming auditors should request a copy of the resignation letter from the listed issuer and if that request is refused then the incoming auditors should decline to accept

nomination.

621. It is clear that the legal and ethical framework contemplate that the contents of the auditor's letter will not be confidential given the potentially wide dissemination that is likely to take place in respect of it. Under the legal framework created by section 140A, the audience of the resignation letter will be not just the listed issuer, here Mayer, but potentially also the members of the company and any creditors of the company. Furthermore, under the ethical framework created by the Code it is clear that there is a fourth audience of the letter, namely the incoming auditors. Finally, it cannot be ignored that, as a matter of practical reality, if the reasons for resignation are quoted in the company's announcement then the whole of the market will read this key part of the letter.

622. In order to assess how well the third and fourth paragraphs of Grant Thornton's resignation letter meet the requirements of the legal and ethical framework, it is helpful to repeat them:

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

and update us in respect of the developments of these matters on a timely basis.

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

623. The first feature of the third paragraph that stands out is that it refers to two of the significant matters anonymously. The second feature of this paragraph that stands out is that, other than the Vietnam Project, it does not explain what underlay the concerns that Grant Thornton had about these two matters and what it was about them that made them so significant that Grant Thornton thought they had to be brought to the attention of members and creditors of the company. In respect of paragraph 4 it doesn't identify the "many factors" that Grant Thornton took into account and doesn't explain what it meant by "professional risk associated with the audit".

624. In the course of his testimony before the Tribunal Calvin Chiu was asked about the brevity of the resignation letter and his answer confirms that the auditors drafted the letter on the assumption that the only audience of it would be the management of Mayer and that the management of Mayer would be able to pierce the veil of vagueness surrounding the language Grant Thornton employed and be able to discern what the auditors were complaining about:

"Q. It's been suggested that the third paragraph of this letter, in referring to the outstanding audit issues -- three outstanding audit issues, is fairly brief in describing what might be thought to be complicated issues.

A. Yes, simplified. And as mentioned before, because disclaimer is more

serious so we also mentioned it here, there being a disclaimer.

Q. Did you feel that you were under any obligation to write at greater length and in greater detail to explain these outstanding audit issues?

A. Because we already provided them with lists of the issues that were outstanding, we also had meetings to talk about the same, so we were confident that Mayer knew about these problems and did not need further extra explanation in this letter. So we provided them with just a summary."[256]

625. And a little later in his evidence the same issue arose again, this time in a question asked by the Chairman of the Tribunal:

"CHAIRMAN: When Mayer read the third paragraph, you would expect them to put it in the context of the conversations, meetings and documents that you had already held with them?

A. Yes, that's what I thought when we sent this letter, because we have already communicated over these matters, so yes."[257]

626. But, in view of the much wider audience of the letter, it is not enough that the management of Mayer can read between the lines of the resignation letter and discern what it is that the auditors are referring to. The resignation letter must be a self-contained document with the matters that the auditors are required to disclose by section 140A and the Code clearly described in sufficient detail to enable all for whose benefit the letter is written to understand what it is that is

[256] Transcript, day 6, page 50, lines 4 – 20.
[257] Transcript, day 6, page 53, lines 16 – 22.

being disclosed and what it is about what is being disclosed that so concerns the auditors that they feel the need to disclose it. That, clearly, was not done in the present case.

627. As mentioned in Chapter 7 of this Report, Grant Thornton had serious reservations about the explanations that Mayer's management was providing it in respect of the Advance Century transaction. Grant Thornton decided it had to reveal its concern but was troubled by how to articulate it. In his record of interview Daniel Lin explained why he chose the words that he employed in this letter. He said:

> "359. C: **Right, the whole matter was very strange. That's why I pointed out the *substance*, that is, [B: Hm.] uh. [B: Hm, hm.] I mean it took us quite a long time to consider how to put it in writing, but it was very difficult to write down the full (details) of the matter. [B: Hm, hm.] (We) could not *disclose* too much (information), [B: Hm.] while (we) could not refrain from writing (about that issue). Well, in fact - - in fact I don't understand why this incident would occur - - that is why - - I mean the *substance*.** Why would you yourself *invested* in this thing and then buy (the company) - - er I mean - - I mean er it was *write* (sic) (written) *off* already, then for no reason someone purchased it from you. So (we) asked him how was (the case). (We) asked many times about these - - how the price was set, how the rate was set, (but) he could not explain to us. What followed was - - coincidentally the money came in from two companies. [B: Hm.] as such. Then, he said - - that person would sue him to say he did not - - not this or that. Well, that's why I felt that the whole thing

was very - - very strange, [B: Hm.] uh. [B: Hm.] That's why (for) the *substance*, we would …"[258] (Emphasis added.)

628. The position of the auditors was quite straightforward – their client gave them an explanation in respect of a transaction which they found difficult to believe. What they should do in such a situation appeared to them to be less straightforward. They decided they could not ignore the fact that they had reservations about their client's explanation and so wanted to convey their opinion that the transaction was questionable. But how could they do that without implying that their client could not be believed and might have been involved in dishonest conduct? It is clear from the minimalist way in which they expressed their concern about this in the resignation letter that they decided the best course was to say as little as possible on the assumption that Mayer would know what they were referring to. The problem with such a solution is that it assumes that the only audience of its letter of resignation is Mayer and this, as we have demonstrated, is simply not correct.

629. Given that this Tribunal has not received any submissions on how accountants should comply with their disclosure obligation in the circumstances being faced by Grant Thornton, it is not appropriate for this Tribunal to suggest how Grant Thornton should have resolved its dilemma and articulated the matters it was required to disclose. If accountants need assistance in dealing with these situations then that is something for their professional body to address.

630. All that Mayer did in respect of disclosing the significant matters was

[258] BWE D/12/3332.

to publish paragraphs 3 and 4 of the letter of resignation in the Board's announcement to the market on 23 January 2013. In view of the contents of the Code it may have become common practice for companies, when making an announcement of the resignation and of the auditor's reasons for it in compliance with the Listing Rules disclosure obligation, to simply quote what the auditor has written in its letter of resignation.

631. This raises the issue of whether merely quoting the contents of the auditor's letter of resignation will always, by itself, be a sufficient disclosure. The problem in simply quoting the resignation letter is that the company may be tempted to regard that alone as satisfying *any* disclosure obligation to which it is subject. That, clearly, cannot be correct for the different disclosure obligations have their own different requirements in order to serve their own different purposes. It must follow that the disclosure that is needed to satisfy one obligation will not necessarily be sufficient to satisfy the other obligations.

632. Determining what must be disclosed requires the person or entity who has the disclosure obligation to, as a first step, identify the particular disclosure obligation pursuant to which disclosure is being made. Once that is done, the second step is to note the requirements laid down in the law, or other provision, governing the obligation, particularly, in respect of what must be disclosed and how it is to be disclosed. Finally, consideration should be given to the purpose to be served by this disclosure obligation and an assessment made of whether what has been disclosed serves that purpose.

633. As we have emphasized earlier in this Report, disclosure is an important

tool in creating a culture of transparency and accountability in the market, ensuring a level playing field in the information available to the market and reducing the risk of the market being misled. In this way disclosure enhances the integrity of the market, promotes public confidence in it and protects the interests of the investing public. It is crucial that any disclosure obligation is properly performed.

634. In respect of an auditor's resignation, in some cases the contents of the auditor's letter may contain sufficient information to satisfy the Listing Rules obligation and the section 307B disclosure requirement and in some cases it may not. Consequently, in discharging both of these disclosure obligations the officers of companies should be in no doubt that merely quoting the auditor's letter does not absolve them from performing their duty of making a considered decision of whether anything else arising from the audit, and the auditor's resignation, needs to be disclosed. Indeed, as we have already noted, Rule 13.51(4) itself requires listed companies to disclose "any other matters that need to be brought to the attention of holders of securities of the issuer (including but not limited to,) information set out in the outgoing auditors' confirmation in relation to the change in auditors". This requirement lends emphasis to the duty borne by the listed issuer, when making an announcement, to clearly bear in mind the purpose of the disclosure obligation pursuant to which the announcement is being made, and to ensure that what it discloses in the announcement satisfies the requirements of the obligation in a meaningful way so that those for whose benefit it is being made will readily understand it.

635. The announcement of Mayer on 23 January 2013 has all the hallmarks

of being written without any consideration of section 307B and of being composed solely for the purpose of meeting the requirements of only the Listing Rules. Furthermore, even for that purpose it was hopelessly inadequate, concealing, as it did, far more than it revealed.

Chapter 15

Determination of the Tribunal

Introduction

636. The allegation against the Specified Persons is that SP1, the company Mayer, breached the disclosure requirement imposed on it by section 307B and the other Specified Persons, being officers of Mayer, are also liable for its breach under the provisions of section 307G of the SFO. This allegation is particularised at [8] of this Report and can be summarised as an allegation that SP1 failed to disclose the following pieces of specific information:

(i) the fact that Grant Thornton had resigned as auditors of Mayer on 27 December 2012;

(ii) the fact that Grant Thornton had indicated it would issue a qualified audit report if the audit issues which Grant Thornton had identified in respect of three transactions of Mayer were not resolved;

(iii) in respect of the disposal of Advance Century, one of the three transactions, the fact that Grant Thornton regarded this transaction as questionable;

(iv) in respect of the Vietnam Project, another of the three transactions, the fact that Grant Thornton regarded as questionable that Mayer had control of this project and that it was not as promising as originally valued and contemplated; and

(v) in respect of the Elternal and Sinowise prepayments the followings facts:

(a) that these two companies had made prepayments of US$10 million and US$4 million, without security, to the suppliers and that these prepayments appeared to Grant Thornton to be irrecoverable; and

(b) that Grant Thornton was concerned the Elternal prepayment of US$10 million to the supplier may be irrecoverable and/or lacked commercial substance.

637. In respect of (i) above disclosure was made of this fact by the announcement issued by Mayer on 23 January 2013 but it is asserted that it was made late and not being made "as soon as reasonably practicable" it was not a compliant disclosure for the purpose of section 307B.

638. In respect of all the other pieces of specific information it is alleged there was a complete non-disclosure. Even though Mayer, in its announcement of 23 January 2013[259], quoted paragraphs of the resignation letter[260], it is said that the company did not disclose the facts particularized by the SFC and they should have as these facts constituted inside information.

639. In response to the allegation levelled against them, the Specified Persons have focused on the price sensitivity of the undisclosed information, arguing that by 1 January 2013 Mayer was, in effect, just an empty shell with

[259] See [214] ante.
[260] See [198] ante.

prospects that were so poor that it had value only for its listing status and could be sold on this basis. The consequence of this, they say, is that by 1 January 2013 none of the pieces of specified information was "likely to materially affect the price" of its shares. This being so the information did not qualify as "inside information" and, therefore, the company was not under a duty to disclose the fact of resignation and the other pieces of undisclosed information on which the SFC relies.

Preliminary Matters

640. Before explaining our determination and the reasons for it we should mention a number of matters relevant to the issues we had to decide.

(i) The Merits of Grant Thornton's Resignation and of the Opinions It Held

641. First, in considering whether there has been a failure of disclosure, the SFC emphasises, correctly in our view, that the Tribunal is not concerned with whether Grant Thornton was justified in resigning. Nor is the Tribunal concerned with whether there is merit in the concerns that Grant Thornton had in respect of the commercial activities of Mayer which led it to resign.

642. This does not mean that the fact that Grant Thornton harboured certain concerns or formed certain views cannot be information for the purpose of the definition of "inside information". The section 307B disclosure requirement lays down the criteria for disclosure and for our purposes the criteria that is most relevant to this inquiry is whether the undisclosed information was likely to

materially affect the price of Mayer's shares. From this it follows that the fact that some of the undisclosed pieces of information refer to opinions held, and that those opinions may have been only preliminary, rather than final, ones, are irrelevant. The characteristic of the fact being only that Grant Thornton held a particular opinion, and a preliminary one at that, may make the fact less likely to materially affect the price of Mayer's shares but these characteristics do not automatically mean that the fact does not qualify as "specific information" for the purposes of the definition of "inside information".

(ii) Identifying the Prospective Buyers and Sellers of Mayer's Shares

643. Chapter 4 of this Report sets out how the Tribunal should approach this issue and the use it may make of expert evidence in making its determination in respect of it. As is explained in that Chapter, the first step is to place the issue in context and that means that prior to identifying the prospective buyers and sellers there must be fact finding in respect of the condition of Mayer as at 1 January 2013. That fact finding can be found in Chapters 11 to 12 of this Report which explain the conclusions that the Tribunal reached in Chapter 13 of this Report on the condition of Mayer at this date and how it got into such a poor state.

(a) Trading in Mayer's shares off-market

644. In summary, Mayer can be described as a company with almost no revenue, whose major asset was tied up in litigation and in respect of whose management there were doubts surrounding both their business acumen and the integrity of their corporate governance. The 2011 financial results of the

company could not be published and the market was ignorant as to the future commercial prospects of the company. In addition, it was a company which had been suspended from trading since 6 January 2012 and there appeared to be no likelihood of that suspension ending in the short term. Any dealing in its shares would, therefore, have to be off-market. This characteristic necessarily impacts on the identification of the persons who might be buyers and sellers of Mayer shares.

(b) The persons trading off-market in Mayer shares

645. As set out in Chapter 4, the definition of "inside information" refers to two classes of dealers in the listed company's shares. They are persons "accustomed to deal" and persons "likely to deal".

646. In respect of the class "persons accustomed to deal", the off-market nature of any dealing substantially restricts the breadth of person in this class. On the buy side, the members of this class would be persons who have some experience in dealing with the securities of a suspended company. Ms Pao thought that all existing shareholders of Mayer were potential buyers of Mayer shares and that any member of the general investing public who had an interest in, or cared about, the company would also be prospective buyers of its shares. However, she later revised her view to exclude the general investing public from the prospective buyer class and accepted that "at the end of 2012, in reality, the only willing buyers in practice were the groups -- the three groups of shareholders that were fighting for control of the company".[261] We agree with this realistic

[261] Transcript, day 4, page 27, lines 9 – 19.

view, though we would add to it Mr Rigby's White Knight and any investor who assessed Mayer as an empty shell to be purchased cheaply for a back-door listing.

647. On the sell side, the "persons accustomed to deal" would include all of the existing shareholders who might be able to sell their Mayer shares off-market or who might be approached to do so.

648. Just as with the "persons accustomed to deal" class, the fact that any dealing will be off-market inevitably impacts on the type and number of potential buyers and sellers in the "persons likely to deal" class. There is no real prospect that existing shareholders who were independent of all of the takeover parties, and who fell into the category of the ordinary reasonable investor, would fall into this class as prospective buyers of Mayer shares. Buyers would be composed of a very narrow group of persons and the Tribunal again accepts the evidence of Mr Rigby on this issue. That means that, for both classes, the potential buyers would be existing major shareholders, "White Knights" and any investor who assessed Mayer as a shell company that could be purchased cheaply for a back-door listing.

649. In this class of "persons likely to deal", the potential sellers would, again, be all existing shareholders of Mayer. But, the very low acceptance of Wang's general offer shows that in mid-2012 there was a high level of unwillingness by investors to sell at what was, in effect, the pre-suspension price. This would suggest that, in reality, the potential sellers, in the "likely to deal" class, would be those shareholders who are desperate to sell at almost any price or who have so lost confidence in the company they are now ready to sell just to rid

themselves of it.

650. The longer the period of suspension without any encouraging news about the company then the greater the number of shareholders likely to fall into this class. The size of this class during the period of the Wang offer would not be the same, we are confident, at 1 January 2013. By this time, with all that had transpired with the company, it would have been larger and the members of it would have a heightened desire to sell.

(c) The market sophistication of the off-market traders

651. The membership of the two classes, in the particular circumstances of Mayer as at 1 January 2013, covers a wide range of market sophistication in terms of investor experience, market knowledge, and analytical skills. On the buy side, there would be the prospective "White Knight", persons involved, from one camp or another, in the takeover battles for control of Mayer and persons interested in buying a cheap shell. The level of market sophistication of these persons is likely to be high.

652. On the sell side Mayer's existing shareholders effectively fall into one of two camps. One camp is made up of the shareholders involved on one side or another in the battle for control of the company and the second camp is composed of those that were not, and this group can be described as independent shareholders.

653. For the prospective sellers it is much more difficult to know what level

of market sophistication they might possess. Little is known of the independent shareholders of Mayer and that being so it is only right that, for the purpose of making the price sensitivity assessment, the level of knowledge and investment sophistication that should be attributed to them should be that of the ordinary reasonable investor in the guise of a member of the general investing public who bought shares in Mayer.

(d) The characteristics of the Ordinary Reasonable Investor

654. In the Tribunal's view the ordinary reasonable investor, when wearing the coat of a member of the general investing public who bought shares in Mayer, would not, in respect of a company like Mayer, namely a company under suspension for a long period of time and which last traded at a very low price, make an in-depth study of every business article available in the media in order to locate any information on it. Nor would this person monitor the Judiciary's website on the off-chance that a judgment has been handed down relating to it. Nor would the ordinary reasonable investor possess the knowledge and analytical skills that would enable him or her to pierce the veil over the internal machinations of Mayer and be able to "join the dots" in order to come to a clear view of what was taking place with, and within, the company. The ordinary reasonable investor is entitled to act on the assumption that listed corporations will comply with the provisions of the SFO and specifically with the obligations imposed on them by sections 307B and 307C and will, therefore, keep shareholders truthfully informed on important developments affecting the company.

655. The ordinary reasonable investor would be very anxious at the long

suspension of the company and the delay in issuing the 2011 annual results. The uncertainty as to when the former will end and the latter will take place will only add to the anxiety felt by the ordinary reasonable investor.

656. The ordinary reasonable investor will have recognised that there were problems between Mayer's management and Crowe Horwath and that one of the reasons Crowe Horwath, who had a long association with Mayer, resigned was because it felt that Mayer's management was not being sufficiently open with it and may have been deliberately concealing matters concerning its Vietnam Project.

657. As the 2012 year progressed, the ordinary reasonable investor would have been shocked and angry at the revelations by Mayer at the extent of the fraud in relation to the Vietnam Project and would have become suspicious about what had really taken place at board level once they became aware that three members of the Board were aligned with Make Success.

658. The ordinary reasonable investor would realise that Mayer had no real revenue generating business and that even if the Vietnam Project was to proceed it would only drain more capital from Mayer before it could become profitable. The ordinary reasonable investor would appreciate that at 1 January 2013 it was difficult to assess how much Mayer was really worth.

659. Furthermore, the obvious discord within the Board, as evidenced by the resignation of Lam Chun Yin and the litigation by SP9, would have caused the ordinary reasonable investor to have serious doubts that Mayer, under its present

management, would be able to recover as a profitable company. The lack of any audited results for the company since 2010 left the market ignorant of the financial condition of the company. The ordinary reasonable investor would have been aware that all the takeover battles, with the litigation that accompanied them, and other litigation to which the company was a party, would act as a financial drain on the company at a time when it was generating no revenue.

660. Finally, the ordinary reasonable investor would be aware of the litigation by Bumper and Aspial (behind which was Capital Wealth) for control of the company and the uncertainty of the final outcome of that litigation and what it might mean for Mayer would only add to this notional investor's anxiety about the company.

661. Notwithstanding that at the time of the Wang offer there was insufficient reason for shareholders to sell at the pre-suspension price, by 1 January 2013, with no prospect of a resumption of trading visible on the horizon, and with all the problems besetting the company and its management, the ordinary reasonable investor would have been likely to regard any off-market offer to buy Mayer shares with a much greater level of interest and to regard even a price materially below the pre-suspension price as not unattractive.

(iii) Mayer's Share Price at 1 January 2013: The Impact of the Post-Suspension Events

662. In Chapter 13 we have set out our assessment of the state that Mayer was in at 1 January 2013. Given that state, we now turn to consider the effect that state may have had on the company's share price. In addressing this issue

we are, in effect, addressing the question of how the post-suspension events impacted on Mayer's share price.

663. On this question the disagreement between Ms Pao and Mr Rigby that originally appeared from their written reports disappeared under the questioning of counsel. They both reached essentially the same conclusion but by different routes. The conclusion was that that the 2012 events would not have had any impact on Mayer's share price which at 1 January 2013 would still be around HK$0.12 per share.

664. Ms Pao reasoned that the positive and negative events would have cancelled each other out and ultimately their effect on Mayer's share price would have been neutral.

665. Mr Rigby reasoned that the market's poor perception of the company was already reflected in the very low share price of Mayer on 6 January 2012, representing a 75% or 80% discount on the company's net asset value. At this price the company wasn't trading as an on-going concern but rather as a speculative shell and a cheap speculative shell at that. At this time the price for shells ranged between HK$200 – HK$300 million and at HK$0.12 per share Mayer was worth only HK$100 million. In these circumstances, events involving the company would not necessarily affect its share price and, in his view, none of the post-suspension events would have done so.

666. Thus, the evidence is all one way. The events of 2012 would not have affected Mayer's share price and at 1 January 2013 it would still be around

HK$0.12 per share.

The Definition of "Inside Information"

(i) The Undisputed Elements of "Inside Information"

667. The definition of "inside information" requires that the information is "specific information" and that it is about the corporation i.e. Mayer. It is not disputed that these elements of the definition are proven on the balance of probabilities and we so find.

(ii) The "Not Generally Known" Element of Inside Information

668. This element of the definition of "inside information" is not disputed by the Specified Persons, as we understand their submissions, although in respect of the Advance Century transaction and the Vietnam Project there was information available to the market. Out of more abundant caution we shall address this issue when discussing the specific information relating to these two matters.

(iii) The Context for the Application of the Price Sensitivity Test

669. The primary contextual element for Mayer is the pre-suspension price of its shares and the fact that it represented an 80% discount on Mayer's net asset value. To move the share price in a material way down from this value will

require something quite significant. Mr Rigby was asked by Mr Scott whether any of the post-suspension events may affect Mayer's share price:

> "Q. … Now, when you say "post-suspension news would not necessarily affect the price", do you recognise that it may affect the price?
>
> A. I think I've written too loosely here. I can't think of any of the events that have come up that would make me change my view. Could I conceive of something that -- rewrite that paragraph now, I would remove "necessarily" ".[262]

670. Clearly, it is untenable to say that nothing could move Mayer's share price materially lower than its pre-suspension price. What Mr Rigby seeks to do is to inject a strong dose of market realism into the price sensitivity assessment and we are not averse to that. For Mr Rigby, the relationship between pre-suspension price and Mayer's net asset value, which made the company attractive to any seeking a cheap shell, was a very important part of the context and one of the main reasons that he thought the share price could not drop further. We accept that this is an important element in the overall context and that overall context is clearly crucial to the assessment.

671. Mr Rigby left open what it might be that could prompt sufficient shareholders of Mayer to want to sell their shares and so cause Mayer's share price to move further downwards to a material degree. That is a task left to us as we consider whether the undisclosed information was likely to materially affect the price of Mayer's shares.

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[262] Transcript, day 4, page 157, lines 9 – 17.

672. Apart from the news that Mayer was seeking to rescind the contract for the Vietnam Project, all other events in 2012 were bearish in nature. Any optimistic effect created by the litigation to rescind the Vietnam Project would have worn off by 1 January 2013 and been replaced by an attitude of general pessimism about the prospects of the company. But, and this is Mr Rigby's point, bearish events and pessimistic views of the company's prospects may not be enough, on their own, to materially affect Mayer's share price, given the very low value to which it had already dropped.

673. This brings us to what we regard as the other primary contextual element for Mayer, namely the integrity and competence of Mayer's management, and the market's perception of whether that management could be trusted to truly act in the best interests of the company. By the end of 2012 there were already very good reasons for the market to conclude that Mayer had very poor management, but there were also reasons for the market to wonder whether the poor management of the company was due to incompetence by those running it or whether it should be attributed to more sinister reasons. If the undisclosed pieces of information could shed tight on this presently rather murky question and if the light it shed inclined the ordinary reasonable investor to conclude that it was likely to be due to suspicious reasons rather than incompetence, then that will have to be factored into the application of the price sensitivity test.

674. In this respect we accept the evidence of Ms Pao and Mr Rigby which is set out in Chapter 8 of this report, where they explain how the resignation of Grant Thornton, and its auditors' concern about the unresolved issues, would have impacted upon investors' perceptions of the integrity of Mayer's management and

aroused suspicions that the company was being looted.

675. Consequently, as each piece of undisclosed information is analysed the focus should be on what each piece reveals about the integrity of Mayer's management.

The Impact on Investors of the Undisclosed Information

676. We shall now address what impact the undisclosed information would, separately, have had on investors. We shall do this by discussing each piece of undisclosed information in turn. But, it must be borne in mind that all the pieces of undisclosed information are linked with each other and the impact on investors can only be accurately assessed when regard is had to their affect on each other.

(i) The Resignation of Grant Thornton

677. Although Mayer did ultimately disclose the information of Grant Thornton's resignation it is not disputed by any of the Specified Persons that SP1, the company, did not disclose this information "as soon as reasonably practicable".

678. SP2 no longer relies on the explanation he gave in his record of interview for what transpired after 27 December 2012 and for why it took so long for Mayer to announce Grant Thornton's resignation. To ensure there is no misunderstanding the Tribunal wishes to indicate that, in any event, it does not find the contents of that part of his interview credible and unhesitatingly rejects it. The Tribunal accepts the evidence of the Grant Thornton witnesses.

Consequently, the Tribunal finds:

(i) there was communication prior to 27 December 2012 between Calvin Chiu and SP2 in which Calvin Chiu informed SP2 that Grant Thornton would be resigning as auditors of Mayer;[263]

(ii) in respect of the communication that took place between SP2 and Calvin Chiu and Daniel Lin after receipt of the resignation letter on 27 December 2012, neither of these Grant Thornton auditors at any stage gave any indication to SP2 that Grant Thornton was willing to:

(i) withdraw the letter of resignation; or

(ii) amend the contents of the letter of resignation; or

(iii) postpone the coming into effect of the letter of resignation.

679. Specifically, the Tribunal finds that no Grant Thornton staff ever indicated to SP2 that Grant Thornton would agree to delay the coming into effect of its resignation as Mayer's auditors until such time as Mayer had arranged auditors to replace them.

680. Consequently, the Tribunal finds on the balance of probabilities that the disclosure of the Grant Thornton resignation was not made "as soon as reasonably practicable".

681. There are two aspects to the resignation of the auditors that are relevant

[263] This was admitted by SP2 in his Record of Interview – see BWE/A/216, counter 1740.

to the impact it would have on investors. The first is that the auditors felt the need to resign rather than to persevere with the company or to issue a qualified audit opinion. The second aspect is the reasons given by Grant Thornton for deciding to resign. The significance of the first aspect is the fact that the auditors were originally contemplating issuing a qualified audit but, by December 2012, no longer felt that was an appropriate option for them and felt that they should resign instead. This is an important contextual element in assessing the impact on investors of the resignation for it reflected the auditors' concern having become so great that they no longer felt professionally safe in being associated with the audit. When an auditor resigns in such circumstances it sends a far greater shockwave to the market than, for example, a resignation over audit fees. The significance of the second aspect is that the reasons, albeit they are expressed mostly without identifying the particular transactions and not explaining what was meant by "professional risk", are linked to each of the three significant matters that concerned Grant Thornton and which the SFC asserts should have been disclosed.

682. An important part of the context for the purpose of assessing the impact the Grant Thornton resignation would have on investors, is that investors know that one of the reasons for Crowe Horwath's resignation was a failure by Mayer's management to disclose information to it that was important to the audit. Investors would be wondering why Mayer did not learn from its experience with Crowe Horwath and why it continued to be less than frank with Grant Thornton about its lack of control over the Vietnam project. Once aware that Grant Thornton had resigned for a much more substantial lack of cooperation and failure to provide information, investors would wonder whether Mayer's management was very

deliberately trying to conceal matters from the auditors.

683. Compounding these suspicions, investors would be aware that the management of Mayer, throughout 2012, had been less than frank with not just the auditors but also its own shareholders, and the market, about the position of the audit. By the end of 2012, Grant Thornton had worked on the audit for almost 10 months and in that time the management of Mayer had never hinted that it was having difficulties with its auditors. Quite the contrary, in its announcements it always held out the expectation that the audit would be completed within a matter of months. The audit, it must be emphasised, was not just important for the purpose of publishing the 2011 annual results, the real significance in publishing these results was that it was a pre-condition to the preservation of Mayer's listing status and the resumption of trading in its shares.

684. The reasons given by Grant Thornton in its resignation letter would cause investors to wonder whether Mayer's management was being deliberately obstructive with a view to concealing matters from the auditors. We agree with Ms Pao that investors would deduce from the reasons given for the resignation that "Mayer's management control was very poor and problematic".[264] Such a conclusion, as Ms Pao points out, would likely lead to investors thinking that the company could lose a significant amount of money in the future through lack of business competence or that the integrity of Mayer's management was questionable. This latter scenario she described as "a nightmare of every investor in the stock market".[265]

[264] [5.49] of Ms Pao's Report.
[265] Ibid.

685. What the ordinary reasonable investor would take from the resignation letter, in the context of what was already public knowledge, is the following:

(i) the audit had been on-going for 10 months before the auditors resigned;

(ii) in this 10 months period the auditors had identified three transactions which they felt were significant and which had to be resolved before they could finalise their audit opinion;

(iii) the auditors had been unable to resolve these matters to their satisfaction;

(iv) one of the significant matters being described as "the substance" of the disposal of an asset and another as the "commercial substance" of a prepayment to a supplier would, when considered in conjunction with (v) and (vi) below, raise investors' suspicions about the integrity of Mayer's management;

(v) the auditors were so frustrated with the assistance they were receiving from Mayer's management in being able to satisfactorily resolve these issues that they felt impelled to resign;

(vi) one of the factors contributing to the decision to resign was "professional risk", which investors would assume was linked to the auditors' inability to resolve the three significant matters and the reason this inability was of such great concern to the auditors was because they concluded it exposed them to an unacceptable level of professional risk; and

(vii) implied assurances by Mayer's management in its various

announcements during 2012 that the audit was progressing would cause investors to question the honesty of Mayer's management.

686. Had the ordinary reasonable investor known that in August 2012 Grant Thornton was contemplating that it may have to issue a qualified audit opinion if it was to continue with the audit, but by December 2012 had concluded that safeguarding its professional interests meant that such an option was no longer available to it, then this knowledge would have added to the seriousness in investors' minds of all the matters above.

(ii) The Fact of Grant Thornton Being Likely to Issue a Qualified Audit Report

687. In our discussion of Grant Thornton's resignation we have made clear that the true significance of the fact of Grant Thornton being likely to issue a qualified audit report is that over the four months of August to December 2012 Grant Thornton had concluded that such a course was no longer available to it if it was to protect itself from professional risk. Thus, the fact of the likelihood of the auditors issuing a qualified audit report cannot stand alone as a piece of inside information as it really only has meaning once it is linked to the specific concerns that Grant Thornton had and the fact that Grant Thornton's views about these concerns were so strong that it felt both the need to resign over them and the need to refer to them in its resignation letter. As a stand-alone fact it lends emphasis to the fact that Grant Thornton had concerns and it indicates that its concerns were so substantial and so strongly felt that, unless those concerns were addressed and satisfactorily resolved, Grant Thornton would have to qualify its report. But what, and how significant, the qualification would be would vary according to the

particular concern of Grant Thornton to which the qualification was linked.

688. Consequently, what the ordinary reasonable investor would take from this piece of specific information is that Grant Thornton had specific aspects of the audit which so troubled it that it felt that if it couldn't resolve them it would have to go so far, in respect of each aspect, to make an audit qualification. But, after the lapse of four months with no further progress being achieved with the audit, it became clear to Grant Thornton that the prospect of an audit qualification could not move Mayer's management to address its concerns about each of these aspects of the audit. In these circumstances Grant Thornton felt impelled to resign, partly because they felt they were exposed to an unacceptable level of professional risk. It is these circumstances that provide this piece of specific information with great contextual relevance to the other pieces of specific information. We accept that, on its own, it would not have likely moved investors to sell their shares and so cannot, on its own, be regarded as inside information. However, it would have contributed to the fact of the resignation having this effect on investors were the market to become aware of it.

(iii) The Questionable Character of the Advance Century Transaction

689. There are two aspects to this piece of undisclosed information. The first element is that Grant Thornton did not identify the transaction it regarded as questionable, describing it in its letter of resignation only as "the substance of disposal of an available-for-sale financial asset".

690. This, as we have indicated in Chapter 14 of this Report, was an

inadequate description of both the transaction and the particular concern that Grant Thornton had in respect of it. Mayer, and its officers, knew what the transaction was to which Grant Thornton was referring and knew what Grant Thornton's concern was in respect of it.

691. It would only be very astute and knowledgeable investors that might be able to penetrate the veil of vagueness obscuring what Grant Thornton was saying in its resignation letter.

692. We accept that there was some information in the market about the Capital Wealth litigation which, as we have indicated, might have enabled some investors to realise that Capital Wealth was claiming it had lent to Mayer the very money that Mayer was claiming was the proceeds of the sale of Advance Century.

693. But, by no means can it be said that the link was so well publicised that it was "generally known". It could only be known to those that took the trouble of studying, not just reading, the High Court judgment granting Mayer leave to defend. But, ultimately this is not the issue for the specific information is not that there was a link between the two but rather that Grant Thornton was not satisfied, on the basis of what Mayer had provided to it, that the HK$15.5 million was the proceeds of the sale of Advance Century. Hence, the auditors found this assertion by Mayer as to the source of the monies could not satisfy them as to "the substance" of this alleged disposal of a company asset.

694. We are satisfied, on the balance of probabilities, that the specific information that Grant Thornton regarded this transaction as questionable was not

generally known.

695. Although involving a relatively small sum of money, the true significance of this transaction lay in the fact that Grant Thornton's concern about it was due to it not being able to accept Mayer's management's explanation for it at face value. Once it became possible that this explanation was not true, then the spectre was raised of Mayer's management being involved in fraudulent conduct. We are not concerned with whether, in the light of the October 2012 High Court decision granting Mayer leave to defend, Grant Thornton was justified in still questioning the substance of this disposal. The point is that at the time of the resignation the auditors at Grant Thornton still questioned the truthfulness of the explanation provided to them in respect of this transaction.

696. To regard this transaction as questionable could only mean that Grant Thornton was questioning the claim by Mayer that it had sold an asset for HK$15.5 million. This is just another way of saying that Grant Thornton felt unable to rely on Mayer's claim and was concerned that it was not being told the truth. Once the ordinary reasonable investor became aware of Grant Thornton's view of this transaction, this notional person would be troubled by it and would be prompted to inquire further into the matter to find out why the auditors could not rely on the explanation provided by Mayer's management and would make the link to the Capital Wealth litigation. Once that was done, it would be clear to investors that Grant Thornton was concerned that the Capital Wealth allegation might be true and that, if it was, then it followed that the management of Mayer was involved in fraud.

697. This would add to the suspicions in investors' minds in respect of the integrity of Mayer's management. Those suspicions would be strengthened once investors appreciated firstly that the auditors considered this a concern, with others, that merited their resignation, secondly that one of the reasons for the resignation was the auditor's concern that not being able to satisfactorily resolve this and other issues exposed them to an unacceptable level of professional risk, and thirdly that the auditors were so concerned about this transaction that they felt it had to be brought to the attention of shareholders and creditors of the company.

(iv) The Lack of Control and Overvaluation of the Vietnam Project

698. In the present case, conducting the price sensitivity assessment by posing the question in the way suggested by Chairman Stock in the *Public International Investments Limited* Report[266] has the advantage of reminding the Tribunal that, in respect of the Vietnam Project, much was already known in the market place. What was not known was that Mayer's auditors were concerned about the overvaluation of the Project and the lack of control Mayer had over it. We are satisfied on the balance of probabilities that the specific information that Grant Thornton regarded as questionable that Mayer had control of this project and that it was not as promising as originally valued and contemplated, was not generally known.

699. However, we are of the view that notwithstanding that the concerns of Mayer's auditors about the Vietnam Project were not generally known, this fact, on its own, was not likely to significantly impact on the ordinary reasonable

[266] See [132] of this Report.

investor. This is because it would have been clear to the market from various announcements made by Mayer that it did not have operational control of the Vietnam Project and, in its litigation, was asserting that the project had been overvalued. The market was not being told anything it did not already know about the Vietnam Project and the fact that the auditors had become aware of these matters, and were concerned about them, would not have surprised the ordinary reasonable investor and, on its own, would not have been sufficient to move them to sell their shares. The fact that would have had greater impact on investors was that the auditors were so concerned about this matter, along, with the other matters, that they felt the need to resign.

700. In her evidence Ms Pao spoke of the impact on the market once the resignation of Grant Thornton, and the reasons for it, became known:

> "… after the resignation of Grant Thornton, there would be suspicion that maybe they weren't just the victim. Maybe there were people within Mayer that was conspiring with Make Success or Dan Tien Port to make the investment happen at the grossly inflated value."[267]

701. Thus, even though the market was quite well informed about the problems associated with the Vietnam Project it was not aware of the attitude of Grant Thornton to it. We regard all the information about the problems with this Project, and of Grant Thornton's reaction to those problems, as having great contextual relevance to the ordinary reasonable investor's perception of the competence and/or integrity of Mayer's management, but we do not think that the

[267] Transcript, day 3, page 113, line 23 to page 114, line 3.

fact that Grant Thornton had these views was a piece of information which, if generally known, would have moved investors to sell their shares.

(v) The Elternal and Sinowise Prepayments

702. Like the Advance Century transaction, the significance of Elternal and Sinowise lay less in the amounts involved in the prepayments, or how those prepayments were treated in accounting terms in the annual results of Elternal and Sinowise, and more in the concerns they raised about the integrity of Mayer's management. Consequently, matters such as their relationship to Mayer's net asset value or how the prepayments might be treated in accounting terms have little relevance.

703. Like the Advance Century transaction, the companies Elternal and Sinowise were not identified by Grant Thornton in its letter of resignation. As we have made clear in Chapter 14, they should have been. Nevertheless, some more astute and knowledgeable investors may have been able to identify the companies and the transactions to which Grant Thornton's comments related. But, even if some could, it cannot be said that such information was generally known.

704. The auditors had two concerns about these contracts. The first was whether, realistically, the outstanding amounts of the prepayments were recoverable and, secondly, whether they were ever needed to be paid. When Grant Thornton queried these prepayments it was encompassing within its query all the curious features of these contracts including the amounts of the

prepayments, why they were made, the curious similarity in the content of both the Elternal and Sinowise contracts, the coincidence of both suppliers failing to meet their contractual obligations and the further coincidence that both suppliers may not be able to repay the prepayments.

(a) Prepayments made without security appear irrecoverable

705. The reality facing the auditors was that as a revenue generating business for Mayer these contracts had all the signs of being yet further loss-making ventures. It was clear that the contracts were not going to be fulfilled and so the issue became the recoverability of the prepayments. To the auditors, it seemed likely that the monies that were owed under these contracts would not be received for some time and even more likely that they would have to be written off altogether. Given the curious features of the contracts as mentioned above, it is not surprising that the auditors were, again, skeptical of what they were being told by Mayer's management.

(b) The Elternal prepayment may be irrecoverable and/or lacked commercial substance

706. The use of the phrase "lacked commercial substance" reflected the concern of the auditors that there was no real commercial justification for making the prepayment, which was a considerable amount of money. Mayer's management had already demonstrated with the Vietnam project that it could be deceived in the commercial decisions it made and in respect of the sale of Advance Century that it was vulnerable to allegations being made that it was involved in

dishonest conduct. The auditors may well have been wondering whether the Elternal and Sinowise prepayments fell into either of these categories.

(c) The impact of the prepayments on the Ordinary Reasonable Investor

707. It was the view of both Mr Rigby and Ms Pao that the Elternal and Sinowise prepayments, being substantial and with questionable justification, also raised suspicions of fraudulent conduct, perhaps with the object of looting the company. Mr Rigby testified that "the market would quite possibly have been worried about the company being looted."[268] The similarity in the contracts of both these companies, the questionable justification for the need for the prepayments made under them, and the likely loss of these prepayments again would have raised suspicions in the ordinary reasonable investor's mind about the integrity of Mayer's management and the possibility of the company being looted.

708. Even if the ordinary reasonable investor was willing to defer coming to a final conclusion in respect of this latter possibility, the prepayments and the auditors' view of them would have totally dampened the view that investors would take of the future commercial prospects of the company. The inability of the suppliers to fulfil their contractual obligations and the auditor's view that the prepayments were likely to be irrecoverable would cause investors to conclude that Mayer had been involved in yet another doomed commercial venture.

[268] Transcript, day 4, page 146, lines 8 – 9.

The Cumulative Effect of the Undisclosed Pieces of Specific Information

709. Because all the pieces of specific information are linked they have an affect on each other.

710. For example, the fact that Grant Thornton was contemplating qualifying its audit opinion in respect of each of the three significant transactions is relevant to appreciating that by the end of the year it no longer assessed that course of action as acceptable to it and felt it necessary to take the far more dramatic action of resigning and explaining that they were doing so partly out of concern for "professional risk". That is, the decision to resign was taken in order to protect themselves.

711. Likewise, in respect of Advance Century, Grant Thornton had such strong doubts about the credibility of Mayer's explanation that it felt it would have to qualify its audit opinion. However, between August 2012, when it first articulated that likelihood, and December 2012 when it resigned, Mayer had not been able to satisfy Grant Thornton and persuade it that its explanation could be relied upon. As a consequence, Grant Thornton concluded it could no longer be comfortable in simply qualifying a transaction whose "substance" it still regarded as questionable and decided that, in order to protect itself, the only course open to it was to resign. The same can be said of the Elternal prepayment whose "commercial substance" Grant Thornton queried. They would have increased investors pessimism in respect of the commercial future of the company and strengthened their suspicions about the integrity of its management and whether that management was acting in the best interests of the company.

712. In a nutshell the undisclosed information threw substantial doubt on:

(i) the competence of Mayer's management;

(ii) the likelihood of the company, in the short term, engaging in successful commercial activity and generating profits;

(iii) the ability of the company, in the short term, to resume trading;

(iv) the ability of the company to retain its listing status;

(v) the honesty of Mayer's management in what it revealed to shareholders; and

(vi) the integrity of Mayer's management and whether it could be trusted to act in the best interests of the company.

713. More worryingly, the undisclosed information for the first time raised as a real possibility the shareholders' nightmare scenario that the management may be looting the company.

Assessing the Price Sensitivity of the Undisclosed Information

714. The question for the Tribunal now is whether disclosure of any of the undisclosed pieces of information would have been likely to have materially affected Mayer's share price, remembering at all times how each of the pieces of specific information are linked and remembering that by "likely" we mean only whether there was a real prospect that the undisclosed information would have this affect.

715. In conducting the price sensitivity assessment we are not persuaded we should employ the statistical and mathematical approach relied upon by Ms Pao. We agree with Mr Rigby that the ordinary reasonable investor's response to the undisclosed information, once this notional person became aware of it, cannot be gauged in this way. We are more attracted to an approach founded on a greater use of commonsense and the observations of Stock VP in the *Du Jun* case.[269]

716. It is crucial to the proper application of the price sensitivity assessment that it is made in the context of all that was known about the company at 1 January 2013. The importance of context is what prompted Chairman Stock in the Public International Investments Limited Report to rephrase the assessment as:

> "If the inside information is placed in the market place *along with the information mix about the securities which is already there*, then will it materially affect the price?"[270] (Emphasis added.)

717. Adopting a commonsense approach to the application of the test as espoused by Stock J in *Du Jun* and placing the undisclosed information together with what was already known in the marketplace as at 1 January 2013, we ask ourselves what the reaction of investors would be to this new mix of information and would their reaction be sufficient to materially affect Mayer's already very low share price.

718. For the reasons we have articulated, we are satisfied on the balance of probabilities that the cumulative effect of the undisclosed pieces of information,

[269] See [128] of this Report.
[270] See [132] of this Report.

if generally known, would have been to increase the anxiety of existing shareholders in respect of Mayer's commercial prospects and retention of its listing status, and to make more of them suspicious about the integrity of the company's management and whether it was acting in the best interests of Mayer. This heightened anxiety and strengthened suspicions would cause shareholders to become concerned as to whether their shares would hold their value and would prompt more of the shareholders to consider selling their shares at whatever price they could get for them, even if this meant selling at a price below the pre-suspension price.

719. We are satisfied on the balance of probabilities that the effect on potential buyers would be to cause them to perceive the market as a buyer's market and all potential buyers, whether they be White Knights or those looking to buy a cheap shell, would want to take advantage of the market's pessimism at this further bad news in respect of the company. In search of a bargain, potential buyers would offer to potential sellers a price for their shares lower than the pre-suspension price, pitching themselves as the last opportunity for desperate sellers to rid themselves of a company that had no future.

720. The Tribunal is satisfied on the balance of probabilities that in light of the cumulative impact the undisclosed pieces of information would have had on potential buyers and sellers of Mayer shares, the undisclosed information, other than the specific information in respect of the Vietnam Project (paragraph 16(b)(ii) of the Amended Notice) and the fact that the auditors may have to issue a qualified audit report (the opening sentence only of paragraph 16(b) of the Amended Notice), would have been likely to have had a material affect on the price of the

company's shares.

721. We find, therefore, that the undisclosed specific information, set out in paragraph 16(a), (b) (i) and (iii) and (c) of the Notice satisfies all the elements contained in the definition of inside information and is, therefore, inside information.

Conclusion in Respect of Mayer (SP 1)

722. The next question is whether the inside information came to the knowledge of the Specified Persons. This element of the disclosure requirement is not being disputed and rightly so. There can be no doubt that SP2, at the very least, had knowledge of all the specific information and possessed this knowledge as "an officer of the corporation in the course of performing functions as an officer of the corporation". Thus, the inside information had come to the knowledge of Mayer.

723. This brings us to the question of whether "a reasonable person, acting as an officer of the corporation, would consider that the information is inside information in relation to the corporation". For the reasons already set out in our discussion of the price sensitivity test, we are satisfied on the balance of probabilities that in respect of all the specific information that we have found is inside information, a reasonable person would have considered that this information was inside information in relation to Mayer.

724. It follows from what we have said that we are satisfied on the balance

of probabilities that SP1, the company Mayer, was at 1 January 2013, subject to a disclosure requirement under section 307B of the SFO in respect of this inside information and breached that disclosure requirement.

Compliance by Mayer's Officers with their Disclosure Duty

725. The approach to be taken to the task of determining if any officer of Mayer is in breach of the disclosure requirement is set out at [54] – [55] of this Report.

(i) Mayer's Internal Controls for Disclosure

726. In its June 2012 Guidelines on Disclosure of Inside Information, the SFC stated:

> "54. The corporation should establish and maintain appropriate and effective systems and procedures to ensure any material information which comes to the knowledge of one or more of its officers be promptly identified, assessed and escalated for the attention of the Board of directors to decide about the need for disclosure. This would require a timely and structured flow to the Board of information arising from the development or occurrence of events and circumstances so that the Board can decide whether disclosure is necessary."

727. In the Further Revised Statement of Agreed Facts the following paragraph appears:

"53. From 1st to 23rd January 2013, Mayer (SP1) had no written guidelines and/or internal control policies in relation to the statutory requirements to disclose inside information."

(ii) The Different Roles of Executive and Non-Executive Directors

728. The Specified Persons include both Executive Directors and Non-Executive Directors but this distinction does not mean that Non-Executive Directors have no role in ensuring a company does not breach the disclosure requirement. Non-Executive Directors have the same duties of care and skill and fiduciary duties as Executive Directors although Executive Directors have a greater responsibility in monitoring the proper application of internal guidelines and procedures to ensure that any potential inside information is placed before the board. This is emphasised in the current version of Hong Kong Stock Exchange's Corporate Governance Code that is Appendix 14 to the Listing Rules which states in "Part 2 – Principles of Good Corporate Governance":

"**C. DIRECTORS' RESPONSIBILITIES, DELEGATION AND BOARD PROCEEDINGS**

C.1 Responsibilities of directors

Principle

Every director must always know their responsibilities as a director of an issuer and its conduct, business activities and development. Given the essential unitary nature of the board, non-executive directors have the same duties of care and skill and fiduciary duties as executive directors.

Code Provisions

C.1.1 Newly appointed directors of an issuer should receive a comprehensive, formal and tailored induction on appointment. Subsequently they should receive any briefing and professional development necessary to ensure that they have a proper understanding of the issuer's operations and business and are fully aware of their responsibilities under statute and common law, the Exchange Listing Rules, legal and other regulatory requirements and the issuer's business and governance policies.

C.1.2 The functions of non-executive directors should include:

(a) participating in board meetings to bring an independent judgement to bear on issues of strategy, policy, performance, accountability, resources, key appointments and standards of conduct;

(b) taking the lead where potential conflicts of interests arise;

(c) serving on the audit, remuneration, nomination and other governance committees, if invited; and

(d) scrutinising the issuer's performance in achieving agreed corporate goals and objectives, and monitoring performance reporting."

729. The importance on Non-Executive Directors properly discharging their responsibilities is the subject of comment by the SFC in its Guidelines on

Disclosure of Inside Information:

> **"Obligations of non-executive directors**
>
> 59. Given the unitary nature of a board and the indivisible legal duties of all directors, both executive directors and non-executive directors should exercise due care, skill and diligence to fulfil their roles and obligations. However, as acknowledged in the Corporate Governance Code issued by the Stock Exchange, non-executive directors normally are not involved in the daily operations of a corporation and would usually rely on a corporation's internal controls and reporting procedures to ensure that, where appropriate, material information is identified and escalated to the board as a whole. It is for this reason that the board's responsibility for establishing and monitoring key internal control procedures is of particular significance for non-executive directors as this is an area where they are more likely to be directly involved. It is therefore more likely that sections 307G(1) and 307G(2)(b) will be of direct relevance to them."

730. In respect of the distinction between Executive Directors and Non-Executive Directors the SFC's Guidelines on Disclosure of Inside Information has this to say:

> "**Reasonable measures**
>
> 60. Under sections 307G(1) and 307G(2)(b), officers must take all reasonable measures from time to time to ensure that proper safeguards exist to prevent a breach of a disclosure requirement. In this respect, officers, including non-executive directors, are responsible to ensure that appropriate systems and procedures are put in place and reviewed periodically to enable the

> corporation to comply with the disclosure requirements. Officers with an executive role would also have a duty to oversee the proper implementation and functioning of the mechanisms and ensure that any material deficiencies are detected and resolved in a timely manner. …"

731. From all these materials it is quite clear that the officers of listed corporations were made aware that it was their responsibility to "establish and maintain appropriate and effective systems and procedures" in order to recognise information that may potentially be inside information and, once identified, to place it before the Board for it to assess whether this information needs to be disclosed. Particularly important, Non-Executive Directors were made aware that ensuring this was done was as much their responsibility as it was the responsibility of Executive Directors. All officers of listed corporations should have been aware of this responsibility if they had read the SFC's Guidelines as they were duty bound to do.

(iii) The Non-Functioning Nature of Mayer's Board

732. The Specified Persons would have known of the coming into force of the disclosure provisions in the SFO and of the duty imposed on them by section 307G(1). They would have known of the existence of the SFC's June 2012 disclosure guidelines. Thus, all the Specified Persons should have known of their statutory duty to take all reasonable measures "to ensure that proper safeguards exist to prevent a breach of a disclosure requirement" by Mayer. Knowing that this duty would apply to them on 1 January 2013 they should have taken steps before this time to ensure that such safeguards were in place before

this date. It is clear that was not done and, furthermore, that even after 1 January 2013 the Specified Persons other than SP2 regarded disclosure as a matter exclusively for SP2.

733. It is clear from the evidence before us that SP2 and SP4 were well aware that they had an entirely passive Board of Directors who would allow them a free rein in running the company and who would not question their actions. There was no meaningful monitoring by the directors, both Executive and Non-Executive, of the audit progress, the concerns of the auditors and no enquiry into the reasons for the delay in completing the audit. SP4 encouraged the Board to take a "hands off", passive role in performing their directorial duties and the other Executive Directors were more than willing to accommodate him. As a result, a culture was allowed to develop within the Board of allowing SP4, with the assistance of SP2, to run the company, with no meaningful monitoring of what they were doing. There was no real accountability as the other directors accepted everything they were told at face value without probing further. This lack of involvement by the Executive Directors in the running of the company resulted in them never giving thought to whether there might be information that had to be disclosed.

734. In these circumstances it is not surprising that they were not kept informed of what was happening with the company. They were treated by SP4 and SP2 as inconsequential to the running of the company precisely because by their conduct, they had allowed such an attitude to develop. They cannot then complain that they were not informed of Grant Thornton's resignation until the Board Meeting of 23 January 2013.

(iv) The Non-Executive Directors

735. For the Non-Executive Directors there are three who require specific consideration in terms of whether their liability arises under section 307G(2)(a) or (b). They are SP5, SP10 and SP11. All are Independent Non-Executive Directors and their "Independent" status made it even more important that they properly discharge their monitoring and oversight roles. But, all three had been given specific responsibilities in respect of the operation of Mayer and that was membership of the Audit Committee, with SP5 appointed as Chairman of this Committee. All of them neglected their Audit Committee duties to a greater or lesser extent and the question is whether this neglect is sufficiently causally linked to Mayer's breach of the disclosure requirement to render them liable under section 307G(2)(a).

736. In the particular circumstances of Mayer the disclosure requirement arose from the audit and the concerns which the auditors had. Had all these three Specified Persons been doing their job properly they would have been aware of the auditors concerns, the responses that SP2 made to them, and the delay, and the reasons for it, that was occurring in the audit. They could not contribute meaningfully to monitoring what should be disclosed because having done so little as members of the Audit Committee, they were in a state of ignorance about the progress of the audit, the concerns of the auditors and the response by SP2 to those concerns.

737. Once these three Non-Executive Directors accepted the responsibility of being Audit Committee members they took on an operational role within the

company, albeit one limited to the audit of the company's accounts. Even though limited in this way there can be no doubt that they would have been aware that the work of the Audit Committee would bring to their attention information that was potentially price sensitive. They would have to be alert to this and when such information came to their attention to refer it to the Board for its consideration.

738. In this way can it be said that, in the particular circumstances of Mayer with all the inside information relating to the audit, the negligence of SP5, SP10 and SP11 to properly perform their Audit Committee Duties was causally connected to the breach by Mayer of the disclosure requirement in respect of this audit related inside information? We are satisfied that the negligent conduct of these three Specified Persons resulted in the breach by Mayer of the disclosure requirement.

The Liability of the Officers of Mayer

739. We shall now deal in turn with each of the Specified Persons who were officers of Mayer.

740. We note that other than SP9, none of the other Specified Persons dispute their liability under section 307G of the SFO. Nevertheless, the Tribunal must make a finding in respect of each Specified Person not only on whether the Specified Person is in breach of the disclosure requirement but, if so, under which limb of section 307G(2) the Specified Person is liable. If a Specified Person is found liable, then the limb of section 307G(2) under which this finding is made

will be relevant to the Tribunal's assessment of the Specified Person's culpability when it is considering what orders it should make in respect of that person.

(i) SP2: Chan Lai Yin, Tommy (Financial Controller and Company Secretary)

741. SP2's conduct in terms of section 307G(2)(a) can be divided into

(i) his post-resignation conduct in failing to immediately alert the board to Grant Thornton's resignation and the need to make an announcement of it; and

(ii) his performance as Company Secretary in not ensuring that measures were put in place within the company to prevent a breach by the company of the disclosure requirement.

742. SP2 played a pivotal role in taking forward the company's response to Grant Thornton's letter of resignation. It was for him to immediately notify all members of the Board of it; to consult with the Chairman on setting a date as soon as possible for a meeting of the Board to discuss it; to draft an announcement of it and to start the process of identifying a replacement auditor.

743. We have summarised relevant parts of his interviews at [401] – [411] of this Report and at [678] – [680] stated that we reject his evidence in respect of his account of what transpired after receipt of the resignation letter.

744. SP2's delay in doing all of these things was not due to incompetence or negligence. SP2, for reasons best known to him, decided not to notify the Board,

other than SP4, and then embarked on efforts to persuade Grant Thornton to either withdraw its resignation or delay its coming into effect. As we have stated earlier in this report these efforts never had any chance of succeeding and were quite futile from the outset. SP2 was very quickly made aware that they were futile but still did nothing. He completely ignored his duties as Company Secretary and took what can only be described as an attitude of reckless indifference to Mayer's disclosure responsibilities of which he was fully aware. His reckless conduct directly resulted in the breach by Mayer of the disclosure requirement.

745. Clearly, the total lack of any proper safeguards to prevent a breach of the disclosure requirement is due to a failure by SP2 to take all reasonable measures to ensure that such safeguards existed within the company. SP2 is not alone in this regard but as Company Secretary he has the primary burden to ensure that such safeguards existed and that the disclosure requirement was not breached.

746. We are satisfied on the balance of probabilities that SP2 is also in breach of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(ii) SP3: Hsiao Ming Chih (Executive Director and Chairman of the Board).

747. SP3 was the Chairman of Mayer's Board. We have summarised the relevant parts of his record of interview at [412] – [422]. SP3 had no interest in being the Chairman of Mayer and no desire to involve himself in the affairs of the company. He could not read English and was unfamiliar with the Hong Kong

Listing Rules. He was not only wholly ignorant of his responsibilities as a director and Chairman of a Hong Kong listed company but was content to remain so. He knew that nothing was expected of him and he was willing to be the puppet of SP4. His indifferent attitude to his role and to his duty to the company and its shareholders was extraordinarily irresponsible and is to be condemned in the strongest terms.

748. SP3 had been Chairman of the Board since 2008 and in this period there were countless occasions when the Board authorised announcements to be made concerning Mayer and many of them would have been in respect of price sensitive information. Even if SP3 was determined to remain ignorant of the Hong Kong Listing Rules it is inconceivable that he would not have known of a company's duty to disclose price sensitive information. He cannot avoid his responsibilities by simply choosing to ignore them and leaving them to others to deal with.

749. Yet, this is what he did. In neglecting to perform his duties he signalled to SP2 and SP4 that there would be no accountability for their actions. With no oversight, monitoring or accountability of their actions, SP2 and SP4 could do whatever they liked. In this way SP3's negligent conduct in the form of a very deliberate failure to perform his responsibilities as Chairman of the Board of Mayer resulted in the breach by Mayer of the disclosure requirement.

750. Because SP3 did not want to involve himself in the affairs of Mayer, and because he deliberately left everything to do with the running of the company to SP2 and SP4, he clearly failed to take all reasonable measures to ensure that proper safeguards existed within Mayer to prevent a breach of the disclosure

requirement.

751. We are satisfied on the balance of probabilities that SP3 is also in breach of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(iii) SP4: Lai Yueh Hsing (Executive Director)

752. SP4 presents as the grey eminence in this tableau. He was the puppet master of SP3 and, we are sure, was the person giving directions to SP2. He had been an Executive Director of Mayer from before it was listed in Hong Kong and was SP3's predecessor as Chairman of the company. We have summarised the relevant parts of his record of interview at [423] – [441] of this Report.

753. Given his experience in the corporate affairs of Mayer we have no doubt he would have been aware of the company's obligation to disclose price sensitive information.

754. SP4 admits he knew of the resignation of Grant Thornton on the morning after it was received and it was clear he deliberately did nothing in preparation for dealing with it. We find he had no reasonable ground for believing that he could persuade Grant Thornton to withdraw or postpone the coming into effect of its resignation.

755. SP4 intentionally "sat" on the resignation and was quite reckless as to Mayer's compliance with its various disclosure obligations. His reckless and

negligent conduct resulted in the breach by Mayer of the disclosure requirement.

756. Furthermore, as an Executive Director of Mayer he deliberately chose not to involve himself in compliance by Mayer with the disclosure requirement. He said he left everything, in this regard, to SP2.

757. We are satisfied on the balance of probabilities that SP4 is also in breach of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(iv) SP5: Huang Jui Hsiang (Independent Non-Executive Director and Chairman of the Audit Committee)

758. We have summarised the relevant parts of SP5's record of interview at [442] – [453] of this Report. SP5 had been Chairman of Mayer's Audit Committee since 2004 and so had ample time to familiarise himself with this role and the duties that accompanied it. Despite his involvement in this aspect of Mayer's operations he said he never received the resignation letter until it was circulated prior to the Board meeting on 23 January 2013.

759. He claimed he was sceptical of SP2's explanation to the Board in respect of the resignation for, as a former auditor, he knew the accountants must have been raising difficulties before they resigned. Yet, when asked about the meetings he attended with Grant Thornton and the demands the auditors made, he portrayed the situation as normal and was untroubled by their concerns. He assumed that all their queries would be answered by Mayer's staff, in effect SP2.

760. SP5 took the attitude that, notwithstanding his position as Chairman of the Audit Committee, because he was only an Independent Non-Executive Director, he should not involve himself in the daily operation of Mayer. The consequence of SP5 adopting this attitude is that he left everything to SP2 and did not monitor how SP2 responded to the auditors' queries. This left him quite ignorant of the progress of the audit. SP5 had a very narrow view of his duties as Chairman of the Audit Committee; a view that effectively rendered him ineffective in this role.

761. SP5 intentionally limited his duties as Chairman of the Audit Committee and was negligent in performing his monitoring and oversight role as an Independent Non-Executive Director. His failure to properly discharge his role as Chairman of the Audit Committee was egregious.

762. As to the disclosure requirement to which Mayer was subject, he adopted the attitude that this was the responsibility of SP2 and it was for the Executive Directors to tell him what needed to be disclosed. He did not know whether there was anything within Mayer, such as written guidelines, regarding the disclosure of information.

763. SP5 did nothing at all in respect of his statutory duty to take all reasonable measures to ensure that proper safeguards existed within Mayer to prevent a breach of the disclosure requirement. In that, of course, he was not alone. It is a recurring theme in respect of many of Mayer's directors that they had little knowledge of their duties as directors of a Hong Kong listed company and, deploringly, an attitude of total indifference to their state of ignorance.

764. One can't help but feel that SP5 had the attitude that his non-executive status excused him from being held responsible for not performing his duties as a director of the company. But, as we have shown, SP5 cannot hide behind his non-executive status to excuse his failure to properly perform the duties that still resided with him as Chairman of the Audit Committee. We have earlier explained why, given his occupancy of this position and given the special audit related nature of the inside information, SP5 incurs liability under section 307G(2)(a).

765. We are satisfied on the balance of probabilities that SP5 is also in breach of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(v) SP6: Chiang Jen Chin (Executive Director)

766. We have summarised the relevant parts of SP6's record of interview at [454] – [461] of this Report. In his interview SP6 portrays himself as playing a minimalist role as a director of Mayer. This is despite the fact that he was an Executive Director of the company. He did not involve himself in the operations of the company, seldom came to Hong Kong to attend Board meetings, knew nothing of the progress of the audit and knew nothing of the "significant matters" that so concerned Grant Thornton. In short he was totally ineffectual in his role as an Executive Director of Mayer. In order to excuse himself he says that he relied on whatever he was told by SP2 and SP4. He had only vague knowledge

in respect of the disclosure of inside information and attributed to SP2 the responsibility for ensuring compliance with the Listing Rules.

767. SP6 is simply another example of a director of Mayer who had little understanding of his role, no appreciation of his responsibilities and no interest in actively engaging in the commercial activities of the company. His involvement in monitoring and supervising the operation of the company appears to have been limited to making superficial inquiries about Mayer's operation and accepting at face value whatever he was told by SP2 and SP4. Like many of his fellow directors he intentionally played an entirely passive role and was disinterested in discharging any Executive Director responsibilities.

768. As an Executive Director he should have been actively involved in monitoring the work of SP2 and keeping himself informed of important matters affecting the company. Matters pertaining to the audit were clearly important matters as it was the audit which was delaying the company's resumption of trading. Had he properly performed his duties he would have been aware of what was going on with the audit and the reasons for the delay in completing it. By deliberately maintaining a state of ignorance about what was happening within the company he effectively rendered himself unable to carry out his duties in respect of the company's disclosure requirement. By playing a deliberately passive role as an Executive Director he was recklessly indifferent to the interests of the company and negligent in not doing anything to protect those interests, including ensuring that the company discharged its disclosure obligations.

769. We are satisfied on the balance of probabilities that SP6 is also in breach

of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(vi) SP8: Xue Wenge (Executive Director)

770. SP8 did not attend any interviews with the SFC and has not participated in the earlier or the current proceedings. We set out SP8's history with both proceedings in Chapter 10 of this Report and at [523] we conclude that he has been given a reasonable opportunity to be heard in compliance with section 307K of the SFO and that consequently there is no impediment to this Tribunal making any finding in respect of him under section 307J(1)(b) and any order against him under section 307N(1).

771. There being no direct evidence in respect of SP8 the Tribunal must look to the circumstantial evidence and determine what inferences it may draw from this evidence concerning SP8.

772. On the whole of the evidence it is clear that Mayer had no internal guidelines on the disclosure of inside information. It is clear that the Board of Mayer never considered providing, or causing to be put in place, internal guidelines and procedures for identifying inside information and bringing such information to the attention of the Board. In addition, it is clear that we are dealing with a non-functioning Board which left everything to SP4 and SP2. There is no suggestion from any of the Specified Persons or in the overall evidence that SP8 played any different or more active role from his other passive colleagues. As an Executive Director, playing a passive role was not an option

that was open to him. In doing so he was neglecting his directorial duties, one of which was to ensure that there was compliance by the company with the disclosure requirement. His failure to take an active role in this area, along with a similar failure by other Executive Director colleagues, resulted in the companies' breach of the disclosure requirement.

773. We are satisfied on the balance of probabilities that SP8 is also in breach of the disclosure requirement and that his liability arises under both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(vii) SP10: Lin Sheng Bin (Independent Non-Executive Director and member of the Audit Committee)

774. We have summarised the relevant parts of SP10's record of interview at [462] – [471] of this Report.

775. SP10 said he had been an Independent Non-Executive Director of Mayer from the time of its listing in Hong Kong. Thus, he had the opportunity to know what the Board had done to provide, or to cause to be put in place, guidelines on inside information and procedures for bringing the existence of such information to the attention of the Board. He was not aware of any guidelines or materials within Mayer that were relevant to the compliance with the disclosure requirement.

776. He said he only became aware of Grant Thornton's resignation when SP2 notified all directors at the Board meeting on 23 January 2013. He said he

knew what the three significant matters were but did not know what the concerns were that Grant Thornton had in respect of them.

777. SP10 was a member of the Audit Committee but he said that he never met with Grant Thornton. Although he was aware that Grant Thornton was contemplating giving a qualified opinion in respect of the Vietnam Project he said he had no impression of it proposing qualified opinions in respect of other matters. It is apparent from what he said that, as far as he was concerned, Audit Committee matters would be left to SP5 to handle.

778. SP10's awareness of any problems in the audit appears to have been confined to the Vietnam Project. He was unaware, on the basis of what he said, of the seriousness of Grant Thornton's concerns in respect of the other two matters or of the fact that Grant Thornton's concerns were not being addressed.

779. Notwithstanding that he was an Independent Non-Executive Director of Mayer and that he had some awareness of the importance of his office and that he was a member of the Audit Committee, he deliberately limited his involvement in the work of the Audit Committee. In so doing he caused himself to remain largely ignorant of the progress of the audit and of the concerns harboured by Grant Thornton that was preventing it from moving forward with the audit.

780. SP10 is another example of a director who quite consciously limited himself in the performance of his directorial duties. We have previously addressed the question of whether, given his membership of the Audit Committee, and the audit related nature of the inside information, there was a causal

connection between SP10's neglect of his duties and the breach by Mayer of the disclosure requirement. For the reasons there set out we conclude there was such a causal connection.

781. We are satisfied on the balance of probabilities that SP10 is also in breach of the disclosure requirement by virtue of both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(viii) SP11: Alvin Chiu (Independent Non-Executive Director and member of the Audit Committee)

782. We have summarised the relevant parts of SP11's record of interview at [472] – [485].

783. Like SP10, SP11 had been an Independent Non-Executive Director of Mayer since the time of its listing in 2004 and like SP10 was a member of the Audit Committee.

784. His evidence was almost identical to that of SP10's. He had no knowledge of problems with the audit, other than in respect of the Vietnam Project, had little, if any, knowledge of the other two significant matters, did not have any meetings with the auditors and was surprised by the resignation of Grant Thornton.

785. SP11 was another director who had a very narrow and superficial appreciation of his role and his directorial duties and was indifferent to playing a more active role in the discharge of them. He intentionally played a passive role

as a director of Mayer and took no interest in monitoring whether, and how, the company was discharging its compliance with its disclosure obligations.

786. As with SP10, we have had to consider whether SP11's membership of the Audit Committee and the audit related nature of the inside information creates a causal connection with the breach by Mayer of the disclosure requirement. For the reasons earlier set out, we determine that it did.

787. We are satisfied on the balance of probabilities that SP11 is also in breach of the disclosure requirement by virtue of both section 307G(2)(a) and section 307G(2)(b) of the SFO.

(ix) SP9: Li Deqiang (Non-Executive Director)

788. We have summarised the relevant parts of SP9's evidence at [486] – [510] of this Report.

789. SP9 has sought to bring himself within the defence of section 307G of the SFO. What stands out from his evidence is that he made persistent and strenuous efforts to involve himself in the affairs of the company as he felt he was being marginalised by being denied access to the records of the company.

790. SP9's efforts to ensure that he received everything that he needed in order to properly discharge his duties as a Non-Executive Director of Mayer are, of course, laudable. However, as much as they may attract the sympathy of the Tribunal, and as much as they may lessen his culpability, they do not enable him

to escape liability under the strict provisions of section 307G(2)(b).

791. The problem faced by SP9 in bringing himself within section 307G(2)(b) is that he accepted the position on the Board of Mayer knowing very little of what was required of him, knowing nothing of Hong Kong's laws in relation to the requirements imposed on companies and their directors and knowing nothing of the Hong Kong Stock Exchange's Listing Rules. He was conscious of his ignorance but did nothing of any real significance to remedy it.

792. Being isolated on the Board of Mayer and having much of its operations concealed from him may well have hindered him in performing his directorial duties, but it was his ignorance of the law and the Listing Rules that was the reason he did not take all reasonable measures to ensure that proper safeguards existed within Mayer to prevent the company breaching the disclosure requirement. SP9 could not begin to take any reasonable measure if he did not know that the company was subject to the disclosure requirement and his ignorance of the legal requirements imposed on companies and on the directors of companies was largely due to his unwillingness to inform himself of them.

793. We understand that SP9 thought he was being recruited for a narrow area of expertise that he could bring to the Board's deliberations, that he was resident on the Mainland and at times in difficult to contact locations and could not speak or read English. But, just as these features where they apply to Mayer's other directors do not excuse them, they do not excuse SP9. A director of a listed corporation is either fully committed to all of his responsibilities or he is not. He cannot limit himself to providing advice and assistance for certain

purposes only and nor can he allow geography or other work commitments to prevent him from properly discharging his director's duties.

794. We are satisfied on the balance of probabilities that SP9 is also in breach of the disclosure requirement but only by virtue of section 307G(2)(b) of the SFO.

Conclusion

795. We find that the specific information particularised in paragraph 16(a), (b) (i) and (iii) and (c) of the SFC's Notice is inside information.

796. We find that SP1, the company Mayer, was subject to a disclosure requirement under section 307B of the SFO in respect of this inside information and breached that disclosure requirement.

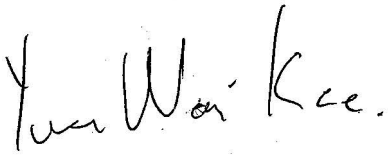
797. We find that SP2, SP3, SP4, SP5, SP6, SP8, SP9, SP10 and SP11 also breached the disclosure requirement in respect of the inside information under section 307G(2) of the SFO.

Mr Ian McWalters, GBS

(Chairman)

Mr Leroy Yau

(Member)



Dr Yuen Wai-kee

(Member)

Dated the 28th day of July 2023