REPORT OF THE

INSIDER DEALING TRIBUNAL

OF HONG KONG

On whether insider dealing took place
In relation to the listed securities of

HANNY HOLDINGS LIMITED

(FORMERLY KNOWN AS HANNY

MAGNETICS (HOLDINGS) LIMITED)

Between 11.7.1994 and 2.8.1995
(both days inclusive) and on other
related questions

APPENDICS

CHAPTER ONE

INTRODUCTION
(An historical overview)

A. Notice from the Financial Secretary directing that an inquiry take place.

The power of the Insider Dealing Tribunal ('the Tribunal') to conduct an inquiry into possible insider dealing in the listed securities of a company is conferred by statute. In this regard, section 16 of the Securities (Insider Dealing) Ordinance, Chapter 395 ('the Ordinance') reads :

> (1) If it appears to the Financial Secretary, whether following representations by the Commission or otherwise, that insider dealing in relation to a listed corporation has taken place or may have taken place, he may in accordance with this section require the Tribunal to inquire into the matter.
>
> (2) An inquiry shall be instituted by the Financial Secretary by notice in writing to the chairman of the Tribunal containing such particulars as are sufficient to define the terms of reference of the inquiry.

In terms of section 16(2), the Financial Secretary, Donald Y.K. TSANG, sent a written notice date 30th November 1998 to the Tribunal requiring it to inquire into and determine whether on various occasions between 11th July 1994 and 2nd August 1995 certain individuals had conducted insider dealing in the securities of a company called Hanny Holdings Limited ('Hanny' or 'the Group'), a company listed on the Stock Exchange of Hong Kong. That notice was amended by a second notice dated 16th December 1998 and it was in terms of that second notice that the Tribunal conducted its inquiry. That second notice gave the following mandate to the Tribunal; namely, to inquire into and determine :

> (a) whether there has been insider dealing in relation to Hanny arising out of the dealings in the listed securities of the company by Messrs. WONG Sun, WONG King Lim, William FUNG Wai Kwong and Louis LO Yuen Fai, Ms.

FAY Loi Loi, Ms. Connie LI Wai Chu and Ms. Sanrita WONG Kwok Mei during the period from 11 July 1994 to 2 August 1995 (both days inclusive);

(b) in the event of there having been insider dealing as described in paragraph (a), the identity of each and every insider dealer; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing.

The terms of reference referred to an extended period of some 13 months and it was within the parameters of this time frame that the Tribunal focused on 3 separate periods of dealing. These periods may be defined as follows :

(i) ***The first period*** : This period extended from 11th July to 1st September 1994 (inclusive). The dealing in question consisted of the *selling* of Hanny shares.

(ii) ***The second period*** : This period extended from 20th January to 6th February 1995 (inclusive). The dealing in question consisted of the *purchase* of Hanny shares.

(iii) ***The third period*** : This period extended from 16th May to 2nd August 1995 (inclusive). The dealing in question consisted of the *selling* of Hanny shares.

The implicated persons; that is, the persons whose alleged dealings in Hanny shares were to be the subject of the Tribunal's inquiry, numbered 7; namely :

1.	Mr. WONG SUN	('WONG Sun')
2.	Mr. William FUNG Wai Kwong	('William FUNG')
3.	Ms. Sanrita WONG Kwok Mei	('Sanrita WONG')
4.	Ms. Connie LI Wai Chu	('Connie LI')
5.	Ms. FAY Loi Loi	('FAY Loi Loi')
6.	Mr. Louis LO Yuen Fai	('Louis LO')
7.	Mr. WONG King Lim	('K.L. WONG')

From this it can be seen that breadth of the Tribunal's mandate – both as to the number of implicated persons and the occasions on which insider dealing may have taken place – was extensive. At the outset, therefore, to better understand the context within which the Tribunal conducted its inquiry, it is necessary to set out in broad terms a relevant history of Hanny and how it was that the majority of the implicated persons were alleged to be connected with the affairs of that company.

B. A brief history of Hanny

(i) Early days …

In or about 1971, WONG Sun started a business known as Hanny Electric which dealt in the retail sale of electrical appliances. The business required capital and this was obtained from an acquaintance, William FUNG, who became a 50% shareholder. WONG Sun remained responsible for the day-to-day running of the business but, as he confirmed in an interview with Securities and Futures Commission ('the SFC'), he kept William FUNG advised of 'major business issues or decisions'. Over the years, the two men became friends.

In or about 1975, WONG Sun began to manufacture audio cassette tapes from premises in Hong Kong. He then expanded the business to include the manufacture of video cassette tapes and, in or about 1986, began to manufacture floppy disks for use in computers. By this time the business employed some 200 staff.

WONG Sun's sister, Sanrita WONG, joined Hanny in the mid 1980s, originally being responsible for personnel matters. Later, she took on the additional responsibility of sales and marketing and was made a minority shareholder. According to Sanrita WONG, she began to forge relationships with major corporations in Europe and America and obtained orders from those corporations to manufacture their magnetic media products; essentially audio and video cassettes and floppy disks for computers. One of the corporations which gave work to Hanny was a corporation which produced magnetic media products under the registered trademark of 'Dysan'.

Connie LI also joined Hanny in the mid 1980s but in the more modest

role of a salaried employee. She was employed as WONG Sun's private secretary and remained employed in that capacity until about March 1995 when she resigned in order to go into business with a friend. It is apparent that over the years of her employment, Connie LI not only dealt with Hanny matters but assisted WONG Sun in his personal dealings; for example, attending to clerical matters concerning his private property dealings and even reconciling his personal bank accounts.

In the late 1980s, the Dysan Corporation ('Dyan') made the decision to discontinue its manufacture of 5.5" floppy disks. The management of Hanny, however, saw an opportunity for the continued manufacture and sale of those floppy disks and entered into an agreement with Dysan enabling it to continue the manufacture and sale. As part of that agreement (and in furtherance of it) Hanny purchased Dysan's machinery and relocated its manufacturing base to Zhuhai; it also took over Dysan's old marketing team. It appears that the agreement was a profitable one for Hanny. In addition, it brought into its stable of brands an internationally recognised brand name.

In or about 1989, WONG Sun approached an investment banker by the name of LEUNG Pak To ('Francis LEUNG') to obtain advice on the possible listing of Hanny on the Hong Kong Stock Exchange. Initially, Francis LEUNG, the Group Managing Director of the Peregrine Group of Companies ('Peregrine'), was of the opinion that it was premature to make such an application. However, he took an active interest in Hanny's affairs and joined the board of directors.

In late 1991, it was decided that the time was now ripe for Hanny to go public and in December of that year, under the name of Hanny Magnetics (Holdings) Limited, Hanny was listed on the Hong Kong Stock Exchange. WONG Sun, William FUNG and Sanrita WONG all held substantial shareholdings in the publicly listed company. WONG Sun was the major single shareholder with some 35% of the issued share capital.

(ii) After 1991 : the constitution of Hanny's personnel …

Even though publicly listed, in many ways Hanny still retained the character of a family business. For example, all the senior management offices and the accounts department were housed on the same floor. Nicholas Bryan-

Brown ('Bryan-Brown'), a director of Peregrine and advisor to Hanny for a period of approximately a year in 1994 and 1995, commented that, from what he could see, important information moved quickly among the senior management. In his opinion, word of mouth discussions concerning what was 'really going on in the business' had to be separated from the formal recording of minutes and the like. Having heard evidence over a prolonged period, despite the protestations of senior executives such as William FUNG and Sanrita WONG that fast, informal communication was (at best) rare, the Tribunal is satisfied that, in the broadest of terms, the observations of Bryan-Brown are accurate and that it is reasonable to infer that there was a good deal of informal passing of information between the directors of Hanny during periods under review.

But what were the functions of the individual personalities within Hanny after its listing in December 1991?

a. WONG Sun

As chairman of the company, WONG Sun had final responsibility for all of Hanny's operations. He told the SFC that the various departments were directly accountable to him. He further said that management meetings were held every one or two weeks and he regularly attended these[1]. Although for reasons to be explained later in this report, WONG Sun did not testify during the inquiry, the Tribunal is satisfied that he was at all material times very much an active chairman.

Mr. LI Wai Ping ('Joseph LI'), a qualified accountant and a senior member of management with Hutchison Whampoa Ltd. ('Hutchison Whampoa') was seconded to Hanny in November 1994 as Chief Financial Officer and thereafter had active, day-to-day dealings with WONG Sun. He described WONG Sun as being a 'hands-on' chairman who actively chaired board meetings and appeared to be keeping himself abreast of developments in the company. Joseph LI said that he regularly discussed the monthly management accounts with WONG Sun.

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[1] By contrast, TAM Kam Biu (William TAM) the Chief Financial Officer and Company Secretary until his resignation in late 1994 testified that there were, in fact, *very few* management meetings, many decisions being made without recourse to the board of directors.

Patrick CHENG, a senior partner of the accountancy firm of Deloitte Touche Tohmatsu ('Deloittes'), who had dealt with Hanny from before its listing, said that WONG Sun was, from what he could see, actively involved in the business affairs of Hanny and appeared to understand the workings of his company. Patrick CHENG said, however, that WONG Sun invariably had colleagues with him at meetings; there was no suggestion that he took the whole burden on his own shoulders; he obviously had his experts.

Concerning financial matters, there was no evidence that WONG Sun considered himself to be an expert in that field. Francis LEUNG of Peregrine recalled that, after Hanny's flotation in 1991, WONG Sun did not have a 'hands-on' role in respect of finances; he recalled that William FUNG and the Chief Financial Officer, TAM Kam Biu ('William TAM'), took a more active role in that regard. However, William TAM himself spoke of reporting to WONG Sun concerning Hanny's finances and there was never any suggestion during the course of the inquiry that WONG Sun was in any way ignorant of at least the fundamental principles of company accounting.

b. William FUNG

The role of WONG Sun's old friend, William FUNG, in the management of Hanny in the period after the public listing appears to have been ambiguous. Although the second biggest individual shareholder in Hanny with some 14% of the issued share capital, and although an executive director, he was given no clearly defined role. He did not devote all his energies to Hanny and did not regularly attend management meetings but he was provided with an office a few paces away from the accounts department and had the services, when needed, of a secretary. Company documents were circulated to him.

As a young man, William FUNG had attended business school in Shanghai. That apparently had been during the years of the Second World War. Thereafter had worked for an extended time with a finance company before moving into the field of textile and garment marketing. He was, therefore, well versed in business matters and had an educated knowledge of company accounts. Francis LEUNG of Peregrine remembered William FUNG taking an active role in Hanny's finances in the period immediately after the listing. He was of the opinion, however, that, as time went by, William FUNG, now into his late sixties or early seventies, appeared to go into a form of 'semi-retirement'.

William FUNG himself was ambivalent as to his role in Hanny. In the early days, he said, long before listing, he had been effectively a sleeping partner but in the year or two before the public listing he had assumed a more active role in Hanny's affairs. In many respects, with the benefit of hindsight, he seemed to recall his role as being not only that of a generalist board member but, at root, that of an investor checking to ensure his investment remained sound. During the course of his testimony, he said the following in this regard :

> FUNG: When I said I was working there … I was not going there all the time; sometimes, I just went over there.
>
> Q: To do what?
>
> A: Just to check around, because I have money invested in there.

The exchange continued :

> Q: Your office, or your room as you call it, was near to the accounts department, was it not?
>
> A: Yes.
>
> Q: Did you check on what was going on there?
>
> A: Yes, I did look, check.

c. Sanrita WONG

After the listing of Hanny, Sanrita WONG – WONG Sun's sister – took on the responsibility of director in charge of sales and marketing. She also had special responsibility for 'OEM [Original Equipment Manufacturer] products', these being products manufactured according to specification for companies which held the intellectual property rights in those products. One of the most important OEM clients at this time was the giant German producer of magnetic storage media products, BASF.

It was Sanrita WONG's testimony that after November 1994, when Peregrine took on an active advisory role and Hutchison Whampoa seconded senior staff to Hanny, she began to lose interest in Hanny and resolved to resign her directorship. That aspect of her evidence will be considered later in this

report. But in the time after the listing, it is clear from all the evidence that Sanrita WONG took an active role in the management of the company. At one time she held the role of Deputy Chairman. On WONG Sun's instructions too, William TAM reported regularly to her on financial matters. Springing from this, her duties included liaison with Hanny's bankers.

d. Louis LO

Louis LO took up employment with Hanny at about the time of the listing. For reasons which will be explained later in this report, Louis LO did not testify. However, his statements to the SFC, read with other evidence, show that he came to know WONG Sun in or about 1988 when WONG Sun was conducting a romantic liaison with Louis LO's sister, Queenza LO. WONG Sun invited Louis LO to take up the position of Assistant General Manager in the Zhuhai factory and Louis LO worked there, occasionally visiting the Hong Kong offices, until his resignation from Hanny in 1996.

(iii) The Memorex acquisition …

In the years immediately after its listing, Hanny made increasing profits. The annual report for the year ended 31st March 1993 revealed that turnover had increased from HK$840.3 million to over HK$1.02 billion. Profits attributable to shareholders had increased by 39%. In his Chairman's Report, WONG Sun attributed this increase *inter alia* to the growth of sales of Dysan products. In respect of Dysan he wrote :

> The Group's flagship brand name, Dysan, is internationally recognised as the leading brand for magnetic media products. It is expected that products marketed under the Dysan brand name will continue to contribute significantly to the Group's profit.

At this time Hanny's association with magnetic media products carrying internationally recognised brand names was central to its business strategy. Branded products, it appears, allowed for higher profit margins. In his Chairman's Report, WONG Sun indicated that Hanny was seeking more brand names to add to its list. In particular, he reported that negotiations were taking place with a major developer of software and magnetic media products.

That developer was the Tandy Corporation of the United States. Tandy ran a number of divisions, two of which developed and marketed products under the trademark of 'Memorex'. The first division, known as Memtek Products, dealt in audio and video tapes and related products. The second division, known as Memorex Computer Supplies, dealt in magnetic media and related accessories used with personal computers.

In acquiring the Memorex business, Hanny believed that it could repeat the success it had enjoyed with the Dysan acquisition. But it was not to be. Instead, in acquiring the Memorex businesses, Hanny encountered difficulties of a profound nature, difficulties that took an extended period of time to overcome and which, in the opinion of several persons intimately connected with Hanny over the next 2 years, almost brought the company to its knees.

As a broker in its negotiations with Tandy, Hanny used the services of a Korean gentleman named Seung Whan Park ('S.W. Park') who was a friend of WONG Sun's. It was agreed that he would receive a substantial reward if his assistance proved to be successful. This included his appointment as President of Hanny's United States operations; payment of various commissions and an entitlement to 22 million Hanny shares[2]. With the assistance of S.W. Park, the negotiations were successful and two separate agreements were concluded : the first on 11th November, the second on 10th December 1993.

In terms of the two agreements, Hanny acquired the business of Memtek Products and Memorex Computer Supplies comprising all of their inventory, their property and their plant and machinery. In addition, Hanny was assigned the agreements in terms of which both those companies were licensed to use the 'Memorex' trademark[3].

The Memtek Products acquisition was by far the greater in terms of money paid. The price paid by Hanny was approximately US$65 million, equivalent at the time to HK$507 million. This price was based on the 'net book value' of Memtek's assets (US$58 million) and the value of the assignment of the right to use the Memorex trademark (US$7 million). The

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[2] In 1994 it was resolved to terminate the services of S.W. Park. A legal dispute then ensued which was only settled (at very considerable cost to Hanny) in June 1995. It was an example of one of the many complex and costly problems that came out of Hanny's acquisition of the Memorex business.

[3] Memorex was at that time (and no doubt remains) the registered trademark of Memorex Telex N.V.

price paid for the Memorex Computer Supplies acquisition was approximately US$10.1 million, equivalent at the time to HK$79 million. This price was based on acquisition of the assets (US$7.5 million); advance royalty payments for the use of the Memorex trademark (US$2 million) and the value of the assignment of the right to use that trademark (US$0.5 million).

After concluding each agreement, Hanny made public announcements to advise shareholders and the investing public. In those announcements, Hanny stated the total purchase price of some US$75.1 million (equivalent to HK$586 million) was to be financed by the use of internal resources and bank borrowings.

In the announcement concerning the acquisition of Memtek Products, the directors of Hanny explained their motives in the following terms :

> … the directors of the Company believe that the Acquisition represents an excellent opportunity for the expansion of its business. They believe that the *Memorex* trademark is one of the best known consumer electronics brands in the United States and European markets. The Company intends to manufacture *Memorex* audio and video tape products at its manufacturing plants in PRC and Macau and distribute these products through Memtek's existing distribution networks in the United States and Europe.

In a second announcement, the directors explained their motives for acquiring the business of Memorex Computer Supplies by saying that this would essentially round off and complement the earlier acquisition.

It must be emphasised that the directors of Hanny were always aware that, in terms of their agreements ('the Memorex acquisition'), they were not taking over profitable businesses. But it was believed that effective rationalisation and restructuring could make the Memorex acquisitions profitable within a short span of time. In this regard, the minutes of a meeting of the Hanny Board of Directors held on 20th December 1993, attended by WONG Sun, William FUNG and Sanrita WONG, records the following :

> The Memorex business acquired was operating at a loss due to low margins of products manufactured in United States of America, high

> level of head count and high overhead costs of about 25% of Net Sales. The Company plans to relocate the production facilities to PRC, Zhuhai, and expects to turn around the Memorex business from loss to profits in less than one year's time by cutting the number of staff, trim overheads, and improve margins.

To the public, at least, the information released by Hanny suggested that the Company would be able to meet the high cost of the Memorex acquisition (HK$586 million) without too much difficulty although this was to prove false.

A month or so later, on 3rd January 1994, Hanny published its interim results for the 6 months ended 30th September 1993, awarding shareholders an interim dividend of 4 cents a share on an increased profit attributable to shareholders of HK$82.36 million compared to HK$60.08 million for the same period in 1992. In announceing the results, WONG Sun said :

> The Group is in a strong financial position with sufficient available resources to take advantage of investment and growth opportunities. *In the absence of unforeseen circumstances, the Directors are confident that the result for the financial year ending March 31, 1994 will continue to show substantial growth.* [our emphasis]

Despite this bullish forecast, one director at least was not confident that a rational programme had been put together to enable Hanny to finance the Memorex Acquisition. That director was Francis LEUNG of Peregrine. Indeed, it resulted in him resigning from the Board of Directors of Hanny in March 1994. In the course of his testimony, Francis LEUNG said that he had advised both WONG Sun *and* Sanrita WONG to arrange long-term financing. His advice, however, was not accepted. He said that WONG Sun *and* Sanrita WONG chose instead to use a short-term syndicated loan to finance the Memorex acquisitions. Repayment in terms of that loan was due in 6 months. According to Francis LEUNG the two were confident that – with the Hong Kong stock market being so bullish – they could, if necessary, raise the necessary funds with a share issue or re-finance the short-term loan.

In the result Hanny committed itself to finding approximately US$80 million to pay for the acquisitions by means largely of short-term syndicated

loans, a commitment that was to place an enormous strain on its cash flow position.

In addition, in general terms, it was the opinion of Francis LEUNG that Hanny did not possess the management resources and skill to handle the sheer size and geographical breadth of the Memorex businesses that had been acquired. To express it in a phrase, it was his testimony that Hanny had bitten off more than it could chew. As he said in the course of his testimony :

> Before I resigned in March 1994, the financial position of the Company was not that bad. That is why they were … able to make the acquisition and borrow money from the banks. However, after the acquisition of Memorex, they could not handle the situation because, I mean, Memorex was a troubled company, it was losing money and its operations were mainly in the States. Hanny Magnetics did not have enough resources to manage the situation.

(iv) Structure and control of the Group …

With the Memorex Acquisition, Hanny now had 10 *operational subsidiaries* in different parts of the world. They may be described as follows :

The Dysan Group

(1) Dysan USA;
(2) Dysan Canada and
(3) Dysan UK.

The sales, marketing, distribution and accounting operations of Dysan in the United States, Canada and the United Kingdom.

The ‘Memorex’ Group

(4) Memtek USA;
(5) Memtek Canada and
(6) Memtek UK.

The sales, marketing distribution and accounting operations of the Memorex acquisition in the United States, Canada and the United Kingdom.

The Hanny Group

(7) Hanny Magnetics (Hong Kong);
(8) Hanny Zhuhai;
(9) Hanny Beijing and
(10) Review Macau.

The manufacturing and distribution operations of the Hanny Group.

In order to ensure the profitable integration of this diverse group of companies, it was necessary to put into effect a system of accounting information that would reveal the consolidated position of the Group month by month. Only with the provision of accurate consolidated accounts could effective management decisions then be made. But, as Francis LEUNG said, Hanny simply did not have the technical or human resources to put into operation an effective system of accounting controls. It is apparent that, while management accounts were prepared, they were not detailed enough to be of real benefit nor – more importantly – were they consolidated.

Even William TAM, Chief Financial Officer at the time, accepted that the task of putting into place an effective system for obtaining regular, accurate and consolidated accounting data was beyond the capabilities of the company's senior management. While he devised a standard monthly financial report to be completed by the operating subsidiaries, William TAM accepted that they were in many respects not adequate nor were they consolidated.

In addition, said William TAM, the Zhuhai factory – the manufacturing centre from where products were shipped to the various companies in the Group – held significant quantities of stock. However, there was no computerised system in place and therefore no up to date stock status reports available to management.

William TAM said that, in between exercises conducted for consolidating the accounts of the Group for the half year and end of year reports, Hanny was essentially 'flying blind'. He appeared to accept that information coming in from individual companies *should* have given some indication of the state of Hanny's fortunes but, when pressed, abided by his testimony that, before the draft consolidated accounts for the year ending 31st March 1994 were produced in July 1994, he had no way of knowing (and did not know) how

Hanny had been faring.

(v) The realisation of a downturn ….

However, in mid-July 1994, while finalising the end of year results for the 1993/1994 financial year, William TAM discovered from draft accounts coming onto his desk that Hanny, far from confirming the bullish sentiments expressed in the half year report, was, in fact, facing a significant loss. One of the earliest of these accounts (bearing the date of 11th July 1994) showed that Hanny Magnetics, just one company in the Group, was looking at a loss of over HK$100 million compared to a profit of HK$18 million at the end of the previous year.

William TAM recalled seeing WONG Sun alone at about this time to tell him that, Hanny was facing a 'big loss'. WONG Sun's reaction, he said, appeared to be one of surprise. WONG Sun demanded that the figures be rechecked and that investigations take place to see if there had been a mistake in stock taking.

By 18th of that month, however, WONG Sun and William TAM were meeting with Hanny's accountants, Deloittes, to see what could best be done, within the strictures of professional accounting principles, to so structure the end of year accounts that they would not present such a gloomy picture to the investing public. By that date, therefore, William TAM and WONG Sun had clearly accepted the inevitability of the end of year results revealing a significant downturn.

One of the central measures adopted to improve the final picture involved a re-assessment of the value of stock purchased in the Memorex acquisition. In carrying out this exercise, instructions had to be passed to senior management accompanied by an explanation of the implications. As it was still within the year of acquisition, it was proposed that the wastage provision for the newly acquired Memorex inventory be increased from 2.7% to somewhere between 23-25%[4]. This would reduce the net asset value of what had been purchased and would thus increase the tangible goodwill factor of the purchase price. The increased goodwill would then be capitalised as a Group

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[4] William TAM testified that, to the best of his knowledge, it was normal within the industry to provide for a wastage of between 5-10%. A figure of 23-25% was, therefore, 'very high'.

asset and amortised over an extended period of time. This meant, of course, that, while only a small percentage of the amortised goodwill would have to be accounted for in that financial year, Hanny would have to demonstrate in future years that its profits merited the inflated value of its goodwill. If not there was a real danger that the auditors would reduce the value of the goodwill or eliminate it entirely as a capital asset. It was, therefore, an exercise of some risk.

Indeed, in the course of his testimony, William TAM accepted that, in down-to-earth, realistic terms, the accountancy measures being taken from 18th July onwards were, in his opinion, 'pretty desperate'.

During the period of time when measures to put a more acceptable gloss on the end of year financial results were taking place no announcement of Hanny's difficulties was made to the investing public.

In the interim report published in January 1994 the directors had predicted substantial growth. Media announcements coming from Hanny had also been bullish. On 2nd July 1994, Sanrita WONG, in her capacity as Deputy Chairman of Hanny, announced that Hanny had issued depositary receipts in the United States. *The South China Morning Post* of that date reported :

> Hanny Magnetics (Holdings) has launched a sponsored American depositary receipt (ADR) programme in the United States to raise its international profile. Deputy chairman and deputy managing director Sanrita WONG said the programme would expand the company's shareholder base. … The programme, for which Citibank serves as depositary, will trade on the over-the-counter market. East depositary share represents 10 ordinary shares. Tony Leigh, Citibank's assistant vice-president on ADR sales, said the programme would help the share price performance of Hanny.[5]

A week later, on 8th July 1994 – just days before evidence of Hanny's significant downturn in profits was received – William TAM was reported in

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[5] It was an element of Sanrita WONG's defence to allegations of insider dealing that she did not possess the required knowledge of financial matters to enable her to understand the import of what was happenning at Hanny. In interviews given to the press – for example, in respect of such relatively sophisticated matters as the issue of depositary receipts – she testified that she acted as a mouthpiece only, speaking essentially in ignorance of her subject matter.

The Standard newspaper in the following optimistic terms :

> Hanny Magnetics should see a turnaround in its Memorex operations by next month, financial controller William TAM says. Memorex, which was acquired by Hanny recently, posted losses of $9.2 million in fiscal year 1993. However Mr. TAM said yesterday that by acquiring Memorex, the company had gained new customers for its magnetic storage media and related products. These customers included K Mart, Sears Roebuck, Radio Shack and Rank Video.

It was not until 2nd September 1994 that Hanny made a public announcement concerning its downturn in profits. That was in the formal publication of its results for the year ended 31st March 1994 in which *inter alia* the following was said :

> The profit attributable to shareholders decreased to HK$30,818,000 compared to HK$130,116,000 in the last year, a drop of 76 per cent. Basic earnings per share was HK4.22 cents, while fully diluted earnings per share was not applicable.

This was qualified by the statement that :

> Memorex Acquisition had a slight and temporary negative impact on the profitability of the Group for the year 1993 – 94.

In fact, the year and results showed that – in the second 6 months of the year – Hanny had sustained a loss approaching HK$50 million.

(vi) The first period of trading, 11th July – 1st September 1994 …

On 11th July 1994 – the date on the first draft account showing a material downturn in Hanny's profits – Hanny shares closed at HK$1.96. In the weeks that followed the share price dropped markedly, so much so, in fact, that, as will be mentioned shortly, the Stock Exchange demanded Hanny give a public explanation. On 2nd September, after publication of the year end results, the share price closed at 97 cents, on a turnover of more than ten million shares. In very broad summary, from 11th July until early September 1994, Hanny shares lost close to 50% of their value.

It was alleged that it was during this period that a number of implicated persons conducted insider dealing in Hanny's shares. The dealings during this period of time were as follows :

(1) American Express Bank
(account held in the name of *Connie LI*)

On 13th July 1994, 1.7 million Hanny shares were sold on the instructions of Connie LI, the account holder, WONG Sun's private secretary. The proceeds of sale were transferred to an account controlled by WONG Sun.

(2) American Express Bank
(account held in the name of *Diamond Delight Assets Ltd*.)

On or about 13th July 1994 (the 'value date' being 15th July) 2.3 million Hanny shares were sold through this account. WONG Sun was the sole director and a shareholder of Diamond Delight Assets Ltd. ('Diamond Delight').

(3) Emperor Finance Ltd.
(account held in the name of *FAY Loi Loi*)

Between 11th and 18th July 1994 (inclusive) 2.738 million Hanny shares were sold through this account. FAY Loi Loi was the wife of a broker well acquainted with WONG Sun. The proceeds of sale were transferred to an account controlled by WONG Sun.

(4) Tung Tai Finance Co. Ltd.
(account held in the name of *FAY Loi Loi*)

This account was opened on 16th August 1994. Between 17th and 31st August 1994, 2 million Hanny shares were sold through this account. The shares that were sold had been transferred from WONG Sun's Diamond Delight account and the proceeds used in September (after the announcement of the year end results) to purchase Hanny shares at reduced prices.

(5) Emperor Finance Ltd.
(account held in the name of *Louis LO*)

Between 18th July and 3rd August 1994, 6.676 million Hanny shares were sold through this account. The proceeds of sale were transferred to an account controlled by WONG Sun.

(6) South China Finance Co. Ltd.
(account held in the name of *Louis LO*)

This account was opened on 5th August 1994 by Louis LO. Between the opening date and 26th August 1994, 4 million Hanny shares were sold through this account. Although WONG Sun had no formal mandate to operate this account, unchallenged evidence before the Tribunal showed that he was able to do so informally.

As the inquiry progressed, it was alleged that all the dealings in the various accounts detailed above were, in fact and substance, WONG Sun's dealing. In short, it was alleged that, in order to avoid declaring his trading to the Stock Exchange (and to the investing public), WONG Sun used a network of nominee accounts.

(7) Onshine Finance Ltd.
(account held in the name of *Clement FUNG*)

Between about 19th July and 19th August 1994, 2.22 million Hanny shares were sold through this account. Clement FUNG was the son of William FUNG, his father having power of attorney to operate the account.

(8) Credit Lyonnais Hong Kong
(account held in the name of *K.L. WONG*)

On 15th July 1994, 3.522 million Hanny shares were transferred from the account of Sanrita WONG with Credit Lyonnais into the account of K.L. WONG. Between 18th July and 30th August 1994 all of those shares were sold. K.L. WONG was a friend of Sanrita WONG's and was employed in Beijing. Sanrita WONG had power of attorney to operate his account.

(vii) Depreciation in the Hanny share price – Stock Exchange enquiries …

At the beginning of 1994, with the Hang Seng Index standing at over 12,000, Hanny shares had been HK$3.60. However, as the trading statistics attached to this report as Annexure 'XIV' (1-13) reveal, both the share price and the Hang Seng Index then began to experience a decline in value.

By 1st March 1994, the Hang Seng had dropped to 10,148 while Hanny shares stood at HK$3.25. By 1st June 1994 the Hang Seng had further declined to 9,512 and Hanny shares had declined too to a closing price on that day of HK$2.225. The nadir was reached on or about 11th July 1994 when the Hang Seng Index stood at 8,394 and Hanny shares (as earlier indicated) closed at HK$1.96. However, from that date onwards the Hang Seng began to regain value, climbing back over 9,000 and by 18th August 1994 had exceeded 9,500. In stark contrast, Hanny shares dropped from a closing price of HK$2.00 on 13th July to HK$1.34 on 22nd August 1994 : a drop in value (over some 5 weeks) of 33%.

This precipitous decline prompted the Stock Exchange to demand a public explanation. As a result, on 23rd and again on 31st August 1994 Hanny published announcements in the press. The announcement of 23rd August read in part :

> We have noted the recent decreases in the price of the shares and warrants of the Company. The Directors do *not* know the reason for the decreases. For the information of the shareholders, we summarize the financial arrangements for the two Major Transactions announced towards the end of 1993 as follows :
>
> The Borrowings of the Company increased by US$57.5 Million to finance the acquisition of certain parts of the business of Memtek and Memorex Computer Supplies by the Company in November 1993 and December 1993 respectively. A Syndicated Bank Loan of US$35 Million was secured by the Company on August 3, 1994. The US$35 Million Syndicated Bank Loan, together with other sources of funds, were used to fully repay the US$57.5 Million Bridge Loan, and thereby release all Securities and Pledges of Assets in the Company and its subsidiaries created under the Bridge Loan. These arrangements were fully anticipated at the time of the Memtek Acquisition.

> Apart for the above, we also confirm that there are no negotiations or agreements relating to intended acquisitions or realisations which are discloseable under paragraph 2 of the Listing Agreement, *neither is the Board aware of any matter discloseable under the general obligation imposed by paragraph 2 of the Listing Agreement, which is or may be of a price-sensitive nature.* [our emphasis]

The announcement was not issued by WONG Sun, the Chairman, but by William TAM. William TAM was questioned as to why – at a time when certainly he and WONG Sun were aware of the current loss and that the end of year results were going to show a significant downturn in profits – he had leant his name to an announcement of this kind, an announcement which protested that the Directors did not know why there had been such a decrease in the share price and could only speculate that it was due to concern over the heavy borrowings made to finance the Memorex acquisition. William TAM admitted that he had been concerned at the prospect of the announcement being issued in his name. He said that he had, in fact, asked WONG Sun for written confirmation that he was duly authorised.

Some 8 days later, on 2nd September 1994, Hanny published its end of year results showing that the profit attributable to shareholders had decreased to HK$30.818 million compared to HK$130.116 million for the previous years, a drop of 76%. Not surprisingly, both investors and the media were less than charitable. The share price fell below the one dollar mark. Concern was expressed in the media as to how, in light of the European Union's anti-dumping laws, and the saturation of the market for 3-inch disks, Hanny would be able to dispose of much of its Memorex inventory. Nor had the Stock Exchange ceased its interest. It required an explanation for the large discrepancy between the forecast given in the half yearly report and the final results. Expressed in blunt terms : how could the Board of Directors not have seen it coming?

It is clear from all the evidence that in September 1994 Hanny was in a state of crisis.

(viii) The 'rescue package' provided by Hutchison Whampoa and Peregrine …

It was at this time that Hutchison Whampoa and Peregrine came to Hanny's assistance.

On 26th September 1994, it was announced that Hutchison Whampoa (through its subsidiaries) had entered into a conditional agreement with Hanny to subscribe in cash for a US$36.38 million convertible redeemable note to be issued by Hanny at par. Hutchison Whampoa agreed forthwith to advance that sum of money to Hanny, the loan to be extinguished in due course either by Hutchison Whampoa completing the subscription agreement or by Hanny repaying the capital together with interest.

Hutchison Whampoa's injection of capital provided only the most temporary support for Hanny's shares which climbed back above the one dollar mark, closing on 27th September 1994 at HK$1.14. But the market still harboured serious misgivings especially in respect of the capability of Hanny's management. As an indication of this, the *South China Morning Post* reported in its edition of 28th September 1994 :

> '[Hanny's] interim results announced four weeks ago gave little comfort to investors, who saw profits dip 73 per cent, with little information on how management might change the situation. A credibility gap still exists, but certainly Mr. Li's decision to take up the US$36.38 million convertible bond will restore some much needed confidence to the stock. The note, which is held by Hutchison Whampoa, will give the group 26.73 per cent in Hanny if fully converted.

The crisis continued. At the annual general meeting, chaired by Sanrita WONG[6], investor dissatisfaction was made manifest. In light of this, the Stock Exchange demanded that an explanation be published concerning the disparity between the interim and end of year results. It was in respect of this required explanation (and its problems generally) that Hanny once again sought the assistance of Peregrine.

Bryan-Brown, a director of Peregrine Capital, attended a series of meetings with Hanny's senior management in order to assist in the preparation

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[6] Sanrita WONG chaired the meeting at the last minute when WONG Sun was temporarily indisposed.

of a suitable explanation. In respect of these meetings, Bryan-Brown recalled that the most active roles were taken by WONG Sun, Sanrita WONG, and Eugene KUO who was a director of the company. He remembered William FUNG attending a number of the meetings but recalled that he appeared to play a passive role. He described William TAM, the Chief Financial Officer and Company Secretary, as being 'very much a functionary, a low-level executive' who would not say anything without first clearing it with one of the directors.

Although the Stock Exchange expressed impatience at the delay in supplying an explanation – trading in Hanny shares was, in fact, suspended pending a reply which may well have contained price sensitive information - Bryan-Brown said that, as advisors, Peregrine faced a number of difficulties :

> "When we started work, it was apparent that the company's information system, its management controls and everything else, really, was in such poor shape that it was very difficult to get a basic answer to really any question at all, whether historical or future, and therefore the process of getting a sensible and comprehensive reply to the Stock Exchange questions was going to take a long period of time.

In the course of correspondence, the Stock Exchange emphasised that an unambiguous answer was required as to *when* the directors of Hanny 'became aware of the substantial downturn in profitability for the second half of the year'. Bryan-Brown was in no doubt as to the importance of providing an answer. The reason why the directors had not made an earlier announcement concerning the deterioration in Hanny's position was, he said, crucial to their credibility as directors of a listed company. However, according to him, difficulties were encountered in obtaining an answer that was 'sufficiently clear' for it to be drafted and a number of meetings extending 'over a period of some days or may be even some weeks' was required.

Hanny's announcement was finally signed on behalf of the board of directors by WONG Sun on 8th October 1994 and published two days later. As to when the directors first became aware of the downturn, the announcement read :

> The Directors regret that the confidence regarding the Company's results for the year ended 31st March, 1994, expressed in the interim

> report, was not reflected in the final results for that year. The Company does not produce monthly consolidated management accounts *and the Directors did not receive draft consolidated accounts for that financial year until early August.* In the second half of the financial year a significant amount of management time was devoted to the integration of the Memorex Business with the Company's existing operations. The receipt of the draft consolidated accounts was the first clear indication to the Directors of the extent of the downturn and resulted in an extensive examination of the underlying causes of the deterioration which was not completed until shortly before the Company's scheduled date for the announcement of its results. In consequence, it was decided to proceed with that announcement as planned without making a separate, earlier announcement. [our emphasis]

Despite publication of this explanation, trading in Hanny shares remained suspended pending a further announcement as to the company's prospects. This announcement came on 18th October and heralded what one Hong Kong newspaper described as a 'dramatic bid' to rescue Hanny from its financial difficulties and managerial inadequacies.

Although a month earlier, Hutchison Whampoa had entered into an agreement with Hanny in terms of which Hanny received an injection of capital in excess of US$36 million, Peregrine (through two of its wholly-owned subsidiaries) now entered into a share subscription agreement with Hanny to take up 200 million new shares at 90 cents a share, thereby injecting another HK$180 million into Hanny.

It was further agreed that Hutchison Whampoa would strengthen Hanny's management capabilities, especially in the area of financial control, by seconding 'key personnel' to Hanny. These personnel would include both a Chief Executive Officer and a Chief Financial Officer. The Chief Executive Officer was Fergus Wilmer, the Chief Financial Officer was Joseph LI. Both men were made Executive Directors of Hanny.

Clearly, having invested so heavily by way of subscribing for shares in order to sheperd Hanny through its difficulties, Peregrine was anxious that the principal existing shareholders; namely, WONG Sun, William FUNG, Sanrita

WONG and Eugene KUO, should not in any way undermine the scheme by disposing of their own shares. Accordingly, in terms of an agreement dated 18th October 1994, these 4 shareholders agreed to refrain from disposing of any Hanny shares in which they had a beneficial interest for a period of 6 calendar months, that period expiring in early May 1995.

(ix) The BASF deal …

In the last quarter of 1994 – despite the injection of capital by both Hutchison Whampoa and Peregrine – the problems facing Hanny remained severe. A rationalisation of management systems, especially in respect of accounting procedures, was a critical requirement. But so too was the need to reduce inventory and to raise cash; that is, to ensure a healthy cash flow position. One Peregrine advisor stated in a memorandum : 'unfortunately, cash is king for Hanny at the moment'. Joseph LI, the man seconded to take over responsibility for finances at Hanny, testified that at the time the need to raise cash was more important even than the need to make profits.

An illustration of the serious cash flow problem facing Hanny is the fact that the Board of Directors agreed that it would be necessary to obtain factoring facilities. Negotiations took place with finance houses in this regard and factoring arrangements were put in place although, in the final analysis, never implemented. Whatever the 'commercial culture' concerning factoring in other parts of the world, it was accepted that in Hong Kong in the early 1990s factoring was not favoured. It was expensive and, by passing invoices over to the finance house that provided the factoring facilities, a clear signal was given to clients that the company was experiencing financial difficulties. Despite this, the minutes of a Hanny Directors' meeting record that factoring facilities were 'absolutely necessary' for the purpose of 'improving the liquidity' of the company'.

Largely because of the Memorex Acquisition, Hanny was burdened with huge debts and with a grossly oversized inventory of ageing and sometimes obsolete merchandise. There was, therefore, a pressing need to sell assets in order to raise cash and, at the same time, to reduce inventory. A number of possibilities were considered but the one that came to fruition in early 1995 was contained in an agreement entered into with the giant German producer of audio magnetic products, BASF. In terms of that agreement BASF

acquired from Hanny a sub-licence to distribute and market Memorex merchandise in Europe. It was a term of the agreement that BASF would purchase Hanny's inventory of Memorex products stored in England and that, in addition, future stock would be manufactured by Hanny. Hanny thereby raised cash by granting a sub-licence and selling inventory and assured itself of a future revenue stream.

It was on a visit to Germany in October 1994 that Sanrita WONG first discussed with BASF the possibility of an agreement in terms of which BASF would distribute and market Memorex products in Europe and, in doing so, would purchase Hanny's Memorex inventory. Thereafter negotiations took place between Hanny and BASF, Hanny's need to secure an agreement being motivated by its increasing cash flow problems. Minutes of a Hanny management meeting held on 25th November 1994 record Joseph LI reporting to the meeting that the Group was now in a 'very severe cash position', the prognosis for early improvement being gloomy.

Although Sanrita WONG had initiated discussions with BASF, a time came when Bryan-Brown assumed responsibility for the negotiations. These negotiations gathered momentum in January 1995 when – on or about 20th of that month – BASF sent their representatives to Hong Kong.

In late 1994 it had been hoped that BASF would effectively acquire Memorex in *both* Europe and the United States. BASF, however, made it clear that they were not at that time interested in the United States. Negotiations therefore took place in Hong Kong between 21st and 24th January 1995 in respect of Europe only. On 27th January, the Hanny Board of Directors formally approved the agreement reached by Bryan-Brown and that same day Bryan-Brown sent a letter to the Stock Exchange to say that 'within the next few days' Hanny proposed to enter into agreements with BASF concerning its Memorex operations in Europe. He wrote that, in the view of the board, the agreements represented 'discloseable transactions' but sought permission to delay any public announcement for approximately one week until the agreements were drafted in final form and were signed. He did this on the basis that, if for any reason the agreements were not completed, it would inevitably result in 'serious damage' to Hanny's European operations. On 28th January, the Stock Exchange granted the waiver. This was, however, subject to the condition that an immediate announcement would have to be made if there

was evidence of any unusual share dealing.

On 7th February 1995, Hanny published a formal announcement confirming the agreements reached with BASF. It was stated that, the agreements were consistent with Hanny's strategy of 'reducing inventory and costs' and gave a list of reasons why they would benefit the company :

(i) cash received from the sale of inventory together with the release of working capital would enable Hanny to improve its liquidity and devote greater financial resources to other operations;

(ii) the agreements would allow Hanny to significantly reduce overheads;

(iii) the agreements would provide Hanny with a recurring revenue stream for over HK$100 million a year and provide a continued sales outlet for its manufactured goods in Europe.

(x) The second period of trading …

At the end of December 1994, Hanny had published its interim report for the first 6 months of the 1994-1995 financial year. It recorded a loss of HK$137,764,000 attributable to shareholders (including exceptional items of HK$58,453,000). The story told in the interim report had been one of a continuing struggle to reduce costs and reorganise. As to future strategy, the report said :

> The rationalisation of the Group's operations in North America and Europe, referred to above will, in the opinion of the Directors, result in a more integrated and focused business with resulting reduction in general and administration costs. In addition, efforts will continue to be made to reduce costs, to improve efficiency and to position the Group more competitively in its core markets.

Media comment at about this time had been at best cautious but, in the main, clearly negative. On 4th January 1995 *Sing Tao Daily* had published a

report in which it was said :

> Notwithstanding the series of reorganization moves, there seems apparently no sign of stabilization yet. The buying of its shares for short-term speculation is therefore not recommended.

On 26th January 1995, the *Hong Kong Economic Times* had written in similar fashion :

> Despite the group's efforts in improving its business to restore it to its heyday, its core products are getting obsolete and will one day be replaced by new products such as CD-ROM's. In addition, since the benefits of the current reorganisation are not yet shown, investors are advised to adopt a wait-and-see strategy.

Further concerns had been expressed as to Hanny's vulnerability to European Union anti-dumping measures. For example, the *Hong Kong Daily News* of 20th January 1995 had printed an article under the headline :

> Hanny Magnetic shares under heavy selling pressure amid rumours of the European Union stepping up its anti-dumping campaign

The price of Hanny shares reflected this history of lacklustre sentiment. On 3rd January 1995, the price closed at 61 cents. Turnover was just 1,156,282 shares. Ten days later it had dropped to 55 cents on a slightly increased turnover of 2,770,000 shares. By 3rd February the price had fallen to 48.5 cents on a turnover of 3,482,000 shares.

However, on 6th February 1995, the day *before* the formal announcement of the BASF deal, the turnover of Hanny shares increased dramatically to 15,102,000 and the price rose to 56 cents. There was that day no news in the market to account for this marked change – unless it is inferred that rumours were circulating concerning the BASF deal. On the day of the announcement, the turnover increased to 21,040,000 and the price closed at 64 cents, an increase of some 14%. The day following the announcement – 8th February 1995 – the share price peaked at 72 cents, closing the day at 67 cents. Turnover remained high at 16,898,000. In the three trading days spanning 6th – 8th February, therefore, on a materially increased turnover, the price of Hanny

shares had risen in excess of 34%[7]. Despite fluctuations in both turnover and price, the share price then remained above 60 cents until 17th February 1995 when it closed 59 cents.

To those intimately involved in the affairs of Hanny, the BASF deal was clearly one of importance in shoring up the fortunes of the company. Bryan-Brown (who, of course, as head of Hanny's negotiating team, would have held a subjective view) said :

> I think it was much more than a single piece of good news. I think without that deal, Hanny could easily have gone under …

It was in the period between 20th January and 6th February 1995; that is, during the time when Hanny was in the final stages of its negotiations with BASF and was then reducing the agreement to writing, that is alleged the second period of insider dealing took place. On this occasion, in anticipation that the price of Hanny shares would rise on the news of the BASF deal, it is alleged that the dealing took place in one account only; namely :-

Tung Tai Finance Ltd.
(account held in the name of *FAY Loi Loi*)

This was the account referred to earlier, the account opened on 16th August 1994. Between 20th January and 6th February 1995 (inclusive) 4 million Hanny shares were purchased through this account. Funds to cover these purchases were transferred from an account held in the name of WONG Sun with the same finance house. On 9th February – 2 days *after* the public announcement of the BASF deal – 3 million of the 4 million Hanny shares that had been purchased were sold.

It was alleged that these dealings in the Tung Tai Finance account were WONG Sun's dealings.

(xi) Memorex USA, the news worsens …

It was never suggested that the BASF deal was a panacea for all that

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[7] The Tribunal accepts that with second and third line stocks valuation swings are often more volatile than with 'blue chip' stocks.

ailed Hanny. Profound problems, especially with the Memorex operation in the United States, still had to be resolved. The Hong Kong media was not blind to this. For example, on 9th February 1995 the *Hong Kong Daily News* came out with a manifestly bearish article in which an anonymous 'securities practitioner' was quoting as saying that the BASF deal did not mean an end to the troubles that had dogged the Memorex acquisition and that, despite the historically low price of Hanny shares, it was not an appropriate time to buy, not until 'obviously good news' emerged.

In early March 1995, Fergus Wilmer, Hanny's Chief Executive Officer seconded from Hutchison Whampoa, gave a press interview in which he admitted the fallibility of the old management team and accepted that considerable re-organization was still required in order to improve efficiency of production and cut down on overheads. Fergus Wilmer was, however, bullish concerning Hanny's prospects, hoping that Hanny would show a profit in the 1995-1996 financial year. The interview was published in the *Hong Kong Economic Times* on 6th March 1995 and read in part :

> Wilmer said that the Group's reorganization was still underway. The major task was to reorganize the US business and its structure. … the number of warehouses in the US would be reduced from the existing 5 to 2, with one on either coast. At present there were about 400 staff members in the states. It was planned to cut down the number of staff to about 260 … so that recurrent expenses could be reduced from about US$4.2 million to about US$3 million per month. Operating costs would be cut further by closing offices and through the more efficient use of resources.

Fergus Wilmer was candid in the interview in accepting that the principal motive behind the BASF deal had been to raise cash in order to repay debts but he went on to say (optimistically) that :

> … most of the reorganization expenses had been reflected last year and the losses caused by the write-off and write-down of inventory in the second half of the year should not be too big.

Within the confines of the Hanny boardroom, however, it was apparent that the mood remained embattled. In an operation report compiled by Joseph

LI towards the end of March 1995 he was able to report positively that account receivables had been reduced by HK$77 million in the first 3 months of the year while, in the same period, inventory had been reduced by HK$294 million. However, at a meeting of the Executive Directors held on 27th of that month, he was forced to report that financial information being received from the operating subsidiaries was not encouraging and in certain respects compared with the year before, 'the combined total operating expenses of Dysan and Memtek did not appear to be under control'.

At a meeting of the Executive Directors held on 3rd April 1995, Joseph LI presented 2 draft budgets for the 1995/1996 financial year. The first of these, predicated on a 'no real change' basis, indicated a loss of HK$42 million. Joseph LI made it clear to the meeting, however, that Hanny's bankers would never accept a budgeted loss of such a figure and there was thereby a danger of loans being called in. The second draft budget, predicated on the basis of reducing business volume and making Hanny's operations leaner, could, he said, result in a profit of some HK$50 million. This second budget, however, demanded that something be done about the 'dismal' situation in the United States. At that same meeting it was recorded that morale in the United States was low and that there appeared to be a 'loss of direction' in most divisions there.

Clearly, decisive action was required and towards the end of April 1995 WONG Sun and Joseph LI flew to the United States.

By 15th May 1995, WONG Sun had already compiled strategic plans to restructure operations in the United States and had relayed those plans back to Hong Kong where they were then passed on to Francis LEUNG of Peregrine and Canning FOK of Hutchison Whampoa for consideration.[8]

However, 2 matters arose while WONG Sun and Joseph LI were in the United States which neither had anticipated. To that extent they may accurately be described as 'bolts out of the blue'.

The first of these matters was an approach made by the Chief Executive Officer of Memtek USA proposing what is commonly called a management

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[8] The fax cover sheet forwarding the plans to these 2 gentlemen bears a handwritten endorsement : /c.c. Sanrita WONG/Eugene KUO.'

buy-out. In a letter dated 28th April 1995, handed to Joseph LI in the United States, he wrote :

> I have assembled a team of respected investors and lenders. I plan to present a cash purchase offer to Hanny as soon as possible, and in any event within the thirty day period.

Wong Sun's reaction was one of indignation; put bluntly, he felt he had been betrayed by the American management team. He was determined that the proposed management buy-out should not be successful. Dismissals of senior management in the American offices followed.

The second matter concerned the accounts for the year ended 31st March 1995 which were at that time in the process of being prepared. Joseph LI was at a meeting in California with the senior management of Memtek USA when he was told that it would be necessary to make provision for exceptional losses to obsolete and damaged inventory and accounts receivable of US$30 million. Memtek USA was, therefore asking that provision be made for exceptional losses of approximately HK$233 million, a loss of such proportions that it would change the entire complexion of the Group's end of year accounts.

Joseph LI testified that the suggested provision had come out of nowhere; there had been no advance warning given by the senior management of Memtek USA. In such circumstances, he said he was suspicious and believed that it could well have been a tactical move to secure the buy-out at bargain prices; it would be to the management's advantage if they could write off everything of supposedly dubious value and obtain a 'clean balance sheet' of reduced value.

But while Joseph LI harboured suspicions concerning the good faith of the Memtek senior management, he could not ignore a request for such a large provision, not in light of the flawed history of the whole Memorex acquisition. Nor could he ignore the fact that members of the proposed management buy-out team included highly experienced and competent accountants. He therefore sent instructions back to Hong Kong to his Finance Manager, Milly WONG (who had also been seconded from Hutchison Whampoa in late 1994) requesting that she investigate the matter.

Joseph LI flew back to Hong Kong on 17th May 1995. By the evening of that day Milly WONG had been able to produce initial (and necessarily tentative) figures to show that the provision for exceptional losses should be nearer to US$11.6 million. This was nevertheless a figure of some HK$89.9 million.

The following morning; that is, 18th May 1995, WONG Sun returned to Hong Kong, passing through immigration at around 6:45 a.m. He went directly to Hutchison House and there he addressed a meeting of the Hanny board of directors which commenced at 8:00 a.m. When WONG Sun described the sorry state of the Memtek USA management, one witness described him as being an 'angry man'.

The meeting that morning was not a routine one. The early hour was unusual and several senior members of both Hutchison Whampoa and Peregrine attended. The included Canning FOK and Susan CHOW (from Hutchison Whampoa) and John Nicholls (from Peregrine). William FUNG did not attend the meeting but it *was* attended by Sanrita WONG. Milly WONG, the Finance Manager for Hanny, attended the meeting with Joseph LI and described those present as being very unhappy. First, there was a bleak report from WONG Sun on the state of the United States operation and the need for very significant restructuring and, second, Joseph LI told the meeting that the management of Memtek USA had suggested that provision would have to be made for exceptional losses for the year ended 31st March 1995 of about US$30 million.

It does not appear that Joseph LI placed any of Milly WONG's tentative figures before the meeting. He told the meeting of his suspicions that the claim may be tactical and that he objected strongly to it. It was agreed that the matter would be further investigated. The minutes of the meeting record the event in just one paragraph :

> Joseph LI mentioned that at one of the meetings with the local management, it was proposed that the US operation need to take up about US$30 million year end accounts in the March accounts to allow for provisions and write offs of inventory and receivables. This was strongly objected. Joseph LI would give details of the proposal at next meeting.

Francis LEUNG of Peregrine did not attend the meeting on the morning of 18th May but was perturbed by the reports he received. The possible need to make provision for exceptional losses of US$30 million in the 1995 end of year accounts was, he believed, price sensitive information. He therefore advised WONG Sun to issue an immediate circular to all Hanny directors warning them not to trade in shares of the company. Help was provided to WONG Sun to draft the circular which was dated 19th May 1995 and began :

> You will be aware that the Board has now commenced discussions on Hanny's business plan, budget and related matters. For this reason, I do not believe that it is appropriate for directors to deal in Hanny's shares at the current time.

William FUNG was one of the directors who received this circular and placed his signature upon it in recognition of that fact. Sanrita WONG also received the circular but refused to sign her name on it. As will be seen later, she was by this time already openly selling her Hanny shares.

(xii) The SFC seeks information on possible insider dealing by persons connected with Hanny …

In late April 1995, the SFC sent letters to WONG Sun in his capacity as chairman of Hanny to advise that it was making enquiries into certain dealings in Hanny shares prior to publication of the 1993-1994 year end results and prior to the formal announcement of the BASF deal. Draft replies were prepared and - so that they would receive the consent of *all* directors - they were circulated for approval, being attached to a board resolution stating that WONG Sun be authorised to sign the replies.

The board resolution was signed by both William FUNG and Sanrita WONG, it being recorded that they were directors present in Hong Kong on 18th May 1995. The replies to the SFC that were signed by WONG Sun were dated the following day; that is, 19th May 1995.

Accordingly, in the absence of protestations to the contrary, it may be assumed that by about 19th May 1995 *both* William FUNG and Sanrita WONG had received notice from WONG Sun that they were not to trade in Hanny shares and had, in addition, by reason of receiving notice of the SFC

investigation, been reminded (if only indirectly) of the prohibition against insider dealing.

(xiii) Continued concern over Hanny's prospects …

In the weeks following the meeting of 18th May 1995, while a drastic restructuring and 'down-sizing' of the Memorex business in North America was taking place, Hanny's senior management attempted to address the numerous problems facing the Group.

On 26th May 1995, a preliminary draft of the essential figures constituting the profit and loss account for the year ended 31st March 1995 was tabled at a meeting. It indicated an estimated loss of HK$334.7 million. This included a provision of HK$30 million for Memorex in the United States. It was stressed, however, that these were preliminary figures only and that 'further adjustments' may arise. In fact, as will be seen, as a result of these further adjustments the loss was to be increased by another HK$254 million, an increase of some 43%. In short, and in the most general terms, the picture was not getting better, it was getting bleaker.

It is clear that Peregrine, Hanny's advisors, were deeply concerned. This is revealed in a letter dated 6th June 1995 signed by Francis LEUNG and John Nicholls in their capacities as non-executive directors of Hanny. The letter was directed to 'The Directors' of Hanny. The letter expressed concern that the executive directors had not yet presented a business plan that could be successfully implemented and which would ensure that Hanny had sufficient financial resources to allow it to continue 'to meet its financial obligations'.

As for the need for a rational business plan, the letter read :

> The business and financing plans can only be produced by the executive directors and must carry their recommendation. It is not the proper function of Peregrine or Hutchison, either as shareholders or advisers, to do this instead of the Board. In our view, these plans should have been presented by the executive directors to the Board some time ago and we now feel that it is essential they are presented within a very short period of time. Given that WONG Sun and Joseph LI will be in the US for up to two weeks, we do not see how the

> business and financing plans can be produced within an acceptable period of time. This reinforces the concerns we express above regarding the lack of effective control by the executive directors over the operations and strategic direction of the Hanny Group.

Hanny's debt burden was a matter of concern :

> Hanny's continuing debt burden, the short term nature of most of its borrowings, the fact that it remains in breach of covenants relating to a number of its loan facilities and the resultant concern and pressure from its bankers is a matter of grave concern to us. It is essential that the business and financing plans referred to above are used, in part, to assist in an orderly and comprehensive restructuring of Hanny's borrowing arrangements.

The Group's continuing operational difficulties was a matter of even greater concern.

> It now appears, from the budget presented to the Board on 26th May, 1995 that the Zhuhai facility is projected to operate on a significantly worse basis than was the case in the budget prepared for the Board less than two months ago. *This raises serious concern as to the effect this information will have on Hanny's bankers and creates real doubt in our minds as to whether Hanny will be able to continue to operate on a going concern basis*. [our emphasis]

Hanny's results for the year ended 31st March 1995 were finally announced on 21st September 1995. From a small profit of HK$30,818,000 at the end of the previous financial year, the results revealed a loss attributable to shareholders of HK$588,772,000. In respect of that figure, exceptional losses contributed HK$212,123,000. The results were reported as being 'unsatisfactory'.

It was reported that operating expenses had increased significantly due largely to the incorporation of the full year's results of the Memorex business. It was accepted that it had taken 'longer than expected' to integrate the various Memorex business into Hanny's North American operations.

In respect of exceptional losses, the following was said :

> The restructuring of the Group's resources and operational structure, including stocks, receivables, and raw material purchase policies, contributed significantly to exceptional losses for the year of HK$212.1 million, compared to HK$6.2 million in 1994. Reorganisation expenses and other expenses incurred arising from the acquisition of the Memorex Business accounted for approximately HK$70.8 million of these exceptional losses. In addition, a thorough review of and provisions relating to obsolete and defective stocks and fixed assets led to a further exceptional loss of HK$112.4 million, mostly occurring during the second half of the Group's reporting year. A provision for a permanent diminution in the value of goodwill was also made during the year in the amount of HK$24.8 million which your Board believes was a prudent measure taken in light of the potential income from the Memorex Business in the future years.

In reaction, one newspaper[9] commented that the Memorex Acquisition – especially its North American business – had sucked Hanny into a 'black hole'.

It appears that eleventh hour negotiations had again resulted in outside investors coming to Hanny's rescue. On the day the losses were published, it was also announced that Hanny was to issue 3 billion new shares in order to raise some Hk$300 million, the great majority of those shares being taken up by subsidiaries of Hutchison Whampoa, Cheung Kong and Chinese Estates Ltd. Hanny further announced that it hoped to raise a further HK$303 million through a rights issue.

But even the news that Hong Kong 'tycoons'[10] were again coming to the rescue failed to prop up the share price. When share trading resumed on 21st September 1995, after a month's suspension, close to 140 million shares changed hands and the price plummetted from 36 cents to 15.7 cents, a single day collapse of 56.39%.

(xiv) The third period of trading …

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9 The Hong Kong Economic Journal of 22nd September 1995.
10 The *Eastern Express*, 21st September 1995.

On 1st March 1995 Hanny shares closed at 56 cents. They then began a gradual decline in value on fairly thin trading. By 1st May 1995 they closed at 36 cents. However, the price then began to rise, climbing back to 43.5 cents on 12th May. From that date onwards until the end of July (in the main) the price held above 40 cents. Indeed, it closed on 31st July at 45.5 cents.

In August, however, the price slipped below 40 cents, dropping to 36 cents when, on 23rd August 1995, trading was suspended pending presentation of the Group's results for the year ended 31st March 1995. As already mentioned, when trading resumed after the announcement of the end of year results, the share price lost 56.39% of its value in the one day. From that time until the end of October – although there was a further protracted period of suspension – the share only climbed above 20 cents on 3 days.

It was alleged that against the background of Hanny's deepening troubles and in the knowledge that the results for the year ended 31st March 1995 would show a material loss, 2 of the implicated persons sold Hanny shares. Those dealings may be described as follows :

(1) Credit Lyonnais Hong Kong
(account held in the name of *Sanrita WONG*)

On 16th May 1995, Sanrita WONG began to dispose of Hanny shares held in this account. Steady selling took place until the end of May when she transferred more shares into the account and continued to sell. By 28th June 1995 *all* Hanny shares in her account had been sold : this amounted to 43.098 million shares which sold for HK$17.723 million.

(2) Onshine Finance Ltd.
(account held in the name of *William FUNG*)

On 30th May William FUNG deposited 3.7 million Hanny shares into this account and on 18th July 1995 deposited a further 33 million. From 20th June until 3rd August 1995 he authorised the almost continual selling of these shares, disposing of 28.71 million shares. During that time he made only one purchase; that is 10,000 shares purchased on 5th July 1995 for 41.5 cents a share.

CHAPTER TWO

THE CONDUCT OF THE INQUIRY
(Procedures adopted and rulings made)

A. Constitution of the Tribunal

Having received notice from the Financial Secretary to conduct an inquiry, it was necessary to constitute the membership of the Tribunal. Section 15(2) and (3) of the Ordinance requires the Tribunal to consist of 3 persons, the Chairman to be a judge. Pursuant to the provisions of the Ordinance, the membership of the Tribunal was constituted as follows :

Chairman : The Hon. Mr. Justice Hartmann, judge of the Court of First Instance of the High Court.

Member : Lawrence LOK Yuen-ming, Chief Investment Officer and a Director of China Success Group (Hong Kong) Ltd. His professional qualifications include the following : Associate member of the Hong Kong Society of Accountants, Associate member of the Institute of Chartered Accountants (Australia) and Member of the Hong Kong Securities Institute.

Dickson V. LEE, Managing Director of Lee & Lam Financial Consultants Co. Ltd. His professional qualifications include member of the United States Securities and Exchange Commission Practice Section; Certified Public Accountant; Financial Advisor licence holder; licensed United States securities broker (series 7) and Fellow of the Hong Kong Society of Accountants.

B. Legal Assistance

Although Mr. Peter Davies, a member of the Department of Justice, was originally appointed as Counsel to the Tribunal, he was constrained by other work commitments. For the hearing itself (and the necessary preparation

work) the Tribunal therefore appointed Mr. Michael Lunn S.C. to be its counsel together with Ms. Cynthia TANG. Mr. Lunn is a senior counsel practising at the private bar, Ms. TANG is with the Department of Justice.

C. The despatch of 'Salmon letters'

The evidential information available to the Tribunal in early 1999 was drawn solely from the records of investigation conducted by the SFC and it was based on that information, pursuant to paragraph 17 of the schedule to the Ordinance, that the Tribunal determined that only those persons named in the Financial Secretary's direction would (at that time) be the subject of the inquiry. As a result, letters were sent to the following 7 persons : WONG Sun; William FUNG; Sanrita WONG; Connie LI; FAY Loi Loi; Louis LO and K.L. WONG.

The letters that were despatched were of the kind commonly called 'Salmon letters' named as such after Lord Justice Salmon who in 1996, in the United Kingdom, sat as Chairman of the Royal Commission on Tribunals of Inquiry. The purpose of the 'Salmon' letters was to give notice to all of the recipients that their conduct would be the subject of the inquiry. The letters had annexed to them a document called a 'Summary of Evidence'. The summary set out a broad history of Hanny's affairs during the period which would be the subject of the inquiry and gave an indication to each recipient of the allegations made against them. With the exception of Louis LO, whose address was not known at the time, the letters were all dated 12th February 1999. A sample letter; namely, the letter addressed to WONG Sun (*not* including the 'Summary of Evidence') is annexed to this report as Annexure 'XV'.

D. Implicated persons *outside* of the jurisdiction

At the time of the despatch of the 'Salmon' letters, 3 of the intended recipients were no longer resident in Hong Kong. They were FAY Loi Loi, Louis LO and K.L. WONG. As they were outside of the jurisdiction and not therefore subject to the powers of the Tribunal to compel them to attend[11], it is necessary to record what results were obtain by the despatch to them of the

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[11] Section 17(b) of the Ordinance empowers the Tribunal to issue a notice requiring 'any person' to appear before it to testify and/or produce documentary evidence. Failure to comply with such a notice is, in terms of section 20(1)(a), a criminal offence. The Tribunal is satisfied that the phrase 'any person' includes implicated persons. The Tribunal, therefore, possesses the statutory power to compel implicated persons to attend. However, nothing in the Ordinance suggests that such a power is extra-territorial.

'Salmon' letters :

(i) FAY Loi Loi

FAY Loi Loi, who in early 1999 was living in Canada, acknowledged receipt of her letter. Indeed she flew from Canada (with her husband who was called as a witness) in order to testify. The Tribunal was therefore able, without impediment, to come to a determination concerning her alleged culpability as an insider dealer.

(ii) K.L. WONG

When originally interviewed by officers of the SFC in 1996, K.L. WONG had given 2 addresses where he could then be contacted. The first was his residential address in California in the United States of America, the second was the address of his employer in Hong Kong : Mobil Oil Ltd. As a result, 2 copies of his 'Salmon' letter were despatched, one to each address. The letter sent to his residential address was delivered by courier. A signature was obtained by the courier but it is common cause that the signature was *not* that of K.L. WONG. Mobil Oil acknowledged receipt of the letter sent to its offices but said that it had not employed K.L. WONG since the end of December 1998. Mobil Oil was unable to say where K.L. WONG was now employed.

At no time thereafter was evidence received that K.L. WONG had received either of the letters. As a result, there being no affirmative evidence that K.L. WONG had (or must have) received notice of the inquiry and, despite some suspicion, there being no suggestion of involvement on his part in avoiding service, the Tribunal did not pursue the inquiry into his dealings nor come to any determination as to his culpability.

(iii) Louis LO

When the 'Salmon' letters dated 12th February 1999 were despatched, the whereabouts of Louis LO were not known. However, by April 1999 his address in Canada had been obtained and a 'Salmon' letter dated 20th April 1999 was then sent to him. On 3rd May 1999, a solicitor by the name of LU Chan, having his officers in Vancouver, wrote to the Tribunal, saying :

> … please be confirmed that Mr. LO is not able to attend the inquiry as scheduled. Family matters prevent him from travelling overseas. It is not expected that these matters will be resolved in the near future. I have been authorized by Mr. LO to receive correspondence from you.

The letter did not say that Louis LO had given instructions to the solicitor to act as anything other than a 'post box' nor that any representations would be made on behalf of Louis LO. Indeed, nothing further was heard from Louis LO or his solicitor until 7th January of this year when a further letter was received from the solicitor re-confirming that he had been retained and wanting to know the 'status' of the case. This letter made no reference to a faxed letter from Michael Lunn, the Tribunal's counsel, dated 21st September 1999[12] which read :

> I write to inform you that final submissions of Counsel to the Tribunal and implicated persons of this inquiry are likely to be heard in the week beginning 4 October 1999. As an implicated person, your client, Mr. LO Yuen Fai [Louis LO], is entitled to make oral and/or written submission to the Tribunal either by himself or through his lawyer if he so wishes. Please note that the Tribunal has indicated that it would like to receive written submission, if any, on or before 4 October 1999.

It is apparent, therefore, that Louis LO did receive the 'Salmon' letter addressed to him which contained a summary of evidence; it is further apparent that he considered the matter to be serious enough to warrant briefing a lawyer. However, he chose not to request further information or make representations, not even when notified that final submissions were expected and that he remained an 'implicated person'.

While an implicated person is entitled to be present during an insider dealing inquiry and/or to be legally represented[13], the Ordinance does not make it mandatory for that person to be present. An inquiry into a person's trading activities may therefore proceed even if the person decides not to attend the inquiry or not to obtain legal representation. Nor did Lord Salmon, in laying down the cardinal principles that should be followed in public inquiries, suggest

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[12] Confirmed by a fax transmission report to have been received.

[13] In this regard, see paragraph 16 of the schedule to the Ordinance.

any such principle of mandatory attendance. He too spoke rather of persons being given the opportunity to attend and to make representations personally or through counsel. Manifestly, Louis LO was given those opportunities but chose not to avail himself of them. In the circumstances, the Tribunal saw no impediment, either in law or in the fundamental interests of fairness, that prevented it from pursuing its inquiry into Louis LO's alleged insider trading.

That being said, the Tribunal faced a number of profound difficulties occasioned by the dearth of evidence relevant to Louis LO's dealings. If Louis LO had been within the jurisdiction, he could have been summoned under pain of sanction to appear and testify. As he was in Canada, the Tribunal had no such power. To compound matters, the one person who had seemingly dealt intimately with Louis LO was WONG Sun but he too - for reasons that will be detailed later in this chapter – did not testify. Accordingly, despite the availability of his records of interview, the Tribunal did not pursue the inquiry into Louis LO's dealings. In the opinion of the Tribunal, fairness dictated that course.

However, it must be stressed that, in the opinion of the Tribunal, should either K.L. WONG or Louis LO return to Hong Kong at any time in the future, they will then fall under the jurisdiction of the Tribunal. It will then be proper to re-open the inquiry so that a determination can be made as to the true nature of their dealings. As a matter of principle, it is imperative that implicated persons realise that they cannot absent themselves temporarily from Hong Kong in order to avoid an inquiry. Even in the absence of an implicated person who makes the decision not to be present or to be legally represented, it may still be possible for the Tribunal to complete its inquiry. But even if that is not the case, a departure will do no more than suspend an inquiry into the dealings of an implicated person who is absent. The powers of the Tribunal are not restricted by any period of prescription; put simply, no time bar operates.

E. The preliminary hearing

The preliminary hearing was held on 5th March 1999 in the courtroom of the Tribunal in the Lippo Centre, Queensway. The purpose of the hearing was (broadly) to announce the Tribunal's terms of reference given to it by the Financial Secretary, to give notice of the manner in which the Tribunal would conduct the inquiry and to agree a date for the commencement of the inquiry.

No matters of contention arose during the course of the preliminary hearing.

As to when the substantive inquiry should begin, the Tribunal agreed to extend the normal time granted for preparation. This was done largely to accommodate one of the implicated parties, WONG Sun, who was not in good health and who, as a result, required extra time to fully instruct his legal representatives. It should be mentioned that WONG Sun's continuing health problems became a matter of concern during the course of the inquiry and regrettably led to extensive delays in the Tribunal completing its work. More is said of this later in this chapter under the heading : 'WONG Sun's inability to testify'.

F. Legal representation for the implicated persons

FAY Loi Loi (who came from Canada to testify) chose not to be legally represented. In light of this, the Chairman explained to her the rights and obligations of an implicated person and assisted her, where he thought it proper, to so give her testimony that she would not be prejudiced by her lack of legal representation.

All the other implicated persons (in respect of whom the Tribunal has come to findings of fact concerning alleged insider dealing) chose to obtain legal representation. During the inquiry they were represented as follows :

(i) WONG Sun was represented by Mr. Kenneth C.K. CHOW, assisted by Ms. Vivian M.F. YEUNG, they being instructed by Messrs. Raymond Cheung & Chan;

(ii) William FUNG was represented by Mr. Joseph Pethes, assisted by Ms. Isabella CHU, they being instructed by Messrs. Eli K.K. Tsui & Co.;

(iii) Sanrita WONG was represented by Mr. Wilson CHAN, instructed by Messrs. Fairbairn, Catley Low & Kong;

(iv) Connie LI was represented by Mr. S. Sakhrani, instructed by Messrs. Chao & Chung.

G. The length of the inquiry

It was originally hoped that the inquiry could be completed within about 3 months. That aspiration, however, turned out to be unrealistic. In the event, the substantive hearing commenced on 10th May 1999 and endured until 20th January 2000 when final oral submissions were completed. During that period of some 8 months the Tribunal sat on 74 days.

What must be remembered in inquiries of this kind is that, while the Chairman and the legal representatives appearing before the Tribunal may devote their entire energy to the inquiry, the 2 members are invariably practising professionals in the fields of investment, accountancy or commerce who must give part of their day to their careers and, in the event of an inquiry being extended, may well have to go on business trips. That is one of the few penalties for ensuring that the Tribunal members are persons of reputation and professional skill in fields of endeavour which have a direct relevance to the subject matter of the inquiry.

In respect of *this* inquiry, however, it must be stressed that the 2 members ordered their working lives in such a manner as to ensure that they had to absent themselves as little as possible. Both Mr. LOK and Mr. LEE are to be commended in this regard.

It was agreed that, largely for purposes of work, there would be a short summer adjournment. This, however, was not the main cause of the delay in completing the inquiry. The main cause of that delay was the unfortunate indisposition of WONG Sun who, in September 1999, was forced to receive a new kidney at a hospital on the Mainland. As already mentioned, more will be said of that matter later in this chapter.

H. Witnesses called during the inquiry

During the course of the inquiry a total of 36 witnesses (including implicated persons and expert witnesses) were called to give oral testimony. The witnesses are listed below in alphabetical order together with a brief reference to the relevance of their testimony :

	Name		*Relevance*
1.	AU Shiu Mo, Peter	:	The husband of FAY Loi Loi and a finance

broker well acquainted with WONG Sun.

2.	AU Wing Ye	:	An employee of Peace Town Securities Ltd.
3.	Bryan-Brown, Nicholas	:	A director of Peregrine Capital Ltd. and from about October 1994 one of Hanny's advisors.
4.	CHAN HUI Siu Ying	:	A senior Immigration Officer who testified as to Sanrita WONG's exit and entry records.
5.	CHENG, Patrick	:	A partner of Deloitte Touche Tohmatou, chartered accountants, the accountants who represented Hanny.
6.	CHEUNG Shui Chun, Brenda	:	WONG Sun's secretary.
7.	CHOW Kar Chun	:	An employee of Asia Investment Management Ltd.
8.	CHOW WOO Mo Fong, Susan	:	The Deputy Managing Director of Hutchison Whampoa Ltd. and one of Hanny's advisors.
9.	FAY Loi Loi	:	An implicated person.
10.	FANG Wen Ming, Jeanie	:	A marketing director at Credit Lyonnaise (private banking) who had extensive dealings with Sanrita WONG in respect of her private finances.
11.	FUNG William	:	An implicated person.
12.	HUNG Lo Wai, Ivan	:	An audit manager with Deloitte Touche Tohmatou.
13.	LAM Kit Lan, Cynthia	:	An SFC investigator.
14.	LEE Wai Ming, Lawrence	:	An SFC investigator.
15.	LEUNG Pak To, Francis	:	The Group Managing Director of Peregrine.
16.	LI Wai Ping, Joseph	:	An accountant seconded to Hanny from Hutchison Whampoa to act as Chief Financial Officer.
17.	LIU Man See	:	The personal secretary to Joseph LI.
18.	LI Michael H	:	An employee of Peregrine.

19.	LI Connie	:	An implicated person.
20.	LO Kam Yuk, Annie	:	An account executive employed by American Express.
21.	LO Wai Hing, Henrietta	:	An estate agent advisor to Sanrita WONG.
22.	NG Chun Sang	:	An employee of South China Securities Ltd.
23.	POW Wei Ning, Stella	:	A broker employed by Onshine Finance Ltd.
24.	Rigby, Clive	:	An expert witness called by Counsel to the Tribunal.
25.	SUEN Man Tak	:	A director of the SFC.
26.	SUEN Pak Ling	:	An acupuncturist who gave medical care to Sanrita WONG.
27.	SUEN, Geoffrey	:	An employee of Hanny in the accounts department.
28.	TAM Kam Biu, William	:	Chief Financial Officer and Company Secretary at Hanny until his departure in late 1994.
29.	TAM, Dr. Vincent	:	A nephrologist who testified as to WONG Sun's medical problems.
30.	TSANG Kwok Shek	:	An employee of Onshine Finance Ltd.
31.	TSAI Wing Chung, Philip	:	A partner of Deloitte Touche Tohmatsu.
32.	Witts, Arthur	:	An expert witness call by William FUNG.
33.	WONG Chun Man, Horace	:	An employee of Credit Lyonnais.
34.	WONG Hon Kit	:	An employee of Onshine Finance Ltd.
35.	WONG, Sanrita	:	An implicated person.
36.	WONG NG Kwok Kwan, Milly	:	An accountant seconded to Hanny from Hutchison Whampoa to act as Financial Manager.

It will be seen that 2 witnesses were called during the inquiry to give expert evidence. Something more should be said of these gentlemen and, in particular, of their qualifications and experience :

(a) *Mr. Clive Rigby* ('Clive Rigby') was called as a witness by Counsel to the Tribunal. He has over 30 years experience as a broker in commodities, futures and general stock broking. He has passed the New York Stock Exchange examinations and has worked in Hong Kong since 1977. He was at the time he gave evidence the Managing Director of Lippo Securities Ltd.

(b) *Mr. Richard Arthur Witts* ('Richard Witts') was called as a witness by William FUNG. He is a chartered accountant by profession and for 9 years was secretary and general manager of the Hong Kong Stock Exchange. He has served on the Council of the Hong Kong Stock Exchange and, at the time of giving evidence, was managing director of United Mok Ying Kie Ltd., a broking house.

Both men have testified on previous occasions before the Insider Dealing Tribunal and have been accepted as expert witnesses by those tribunals. This Tribunal also accepted them as expert witnesses.

I. The application by WONG Sun to quash the proceedings against him on the basis they were *ultra vires*

At the commencement of the substantive hearing, Kenneth CHOW, counsel for WONG Sun, made an application to quash the proceedings against his client.

The application was made on the basis that the original direction by the SFC instructing its employees to investigate WONG Sun's dealings in the listed securities of Hanny was *ultra vires* the provisions of the Securities and Futures Commission Ordinance, Chapter 24. It was argued that, the direction being *ultra vires*, it was thereby null and void and all that flowed from it was similarly rendered of no force or effect. In short, the fundamental defect in the original direction fatally undermined the entire SFC investigation.

This, in turn, it was argued, rendered the direction of the Financial Secretary to the Tribunal to commence the inquiry null and void because that direction was based upon the SFC investigation and was therefore - to employ trans-Atlantic jurisprudence - the fruit of a poisoned tree.

After two days of hearing, the Tribunal ruled that the SFC, in issuing its original directive to its employees, did so within the powers bestowed upon it by statute. It further ruled that there was no defect in the Financial Secretary's direction to the Tribunal. Accordingly, the application to quash was dismissed and the inquiry proceeded in respect WONG Sun.

A copy of the ruling (delivered on 11th May 1999) is annexed this report as Annexure 'XVI'.

J. WONG Sun's inability to testify

As already stated, throughout the length of the inquiry WONG Sun's ill health was a matter of concern. Although initially it was made plain by Kenneth CHOW that his client had no desire to testify, later in the course of the inquiry, as WONG Sun's health worsened, the Tribunal was informed that he now wished very much to be given the opportunity to present his defence by way of oral testimony but would, of course, only be in a position to do so when (and *if*) his health improved sufficiently.

WONG Sun's ill health and the manner in which the Tribunal dealt with that regrettable situation is a matter of such materiality that a history of the rulings made and their outcome must be given.

(i) The preliminary hearing …

At the preliminary hearing on 5th March 1999, WONG Sun's counsel at that time, Mr. Boey CHUNG, described his client's medical difficulties in the following terms :

> For the past ten years or so my client has been suffering from diabetes and for the past year his condition has been deteriorating and he has been in and out of hospital on six occasions in the last year. For this year, so far he has spent 30 days in hospital. I was told that his diabetic condition is affecting his kidneys, his eyes and his nerves. He was diagnosed as suffering from kidney failure sometime in 1998. He is currently required to attend for treatment - chemo-dialysis treatments - three times a week.

Mr. WONG Sun's health problems were made known because they had the consequence of making it a longer process than normal for the legal representatives to obtain instructions. What was at issue, therefore, at the preliminary hearing in March 1999 was the *time* it would take to obtain full instructions not Mr. WONG Sun's *ability* to give those instructions.

Having regard to Mr. WONG Sun's difficulties, the Tribunal allowed a period of nine weeks for preparation. In this regard, the following was said :

> We accept that, regrettably, if Mr. WONG Sun is suffering from the illnesses described, no doubt his day-to-day activities are severely curtailed and he will not be able to give instructions as easily and readily as a person in robust health. Having said that, however, it is always the case, when a serious investigation is to take place, of making sure that the order of your day is so structured that you are in a position to give instructions and that your legal representatives are in a position to go out and obtain relevant evidence …

(ii) The early days of the inquiry …

On the first day of the substantive hearing, Kenneth CHOW (who had taken over as WONG Sun's counsel) informed the Tribunal that his client's ill health persisted but he made no complaint that the legal representatives had been unable to obtain instructions. Indeed, Kenneth CHOW deemed it proper to place a psychiatric report before the Tribunal, one that spoke of WONG Sun's mental and emotional health. The report, prepared by Dr. CHUNG See Yuen, stated that WONG Sun, despite his physical ailments and bouts of depression, was 'mentally fit to attend the enquiry' and would be able to give evidence. It is significant that Dr. CHUNG in his assessment said that WONG Sun's speech was 'spontaneous, relevant and coherent' and that he was able, with a good understanding of his circumstances, to express his ideas and feelings.

Dr. CHUNG stated in his report that WONG Sun tended to become tired after about 45 minutes of conversation. He also wrote that WONG Sun's memory of the turbulent days of 1994 and 1995 when he was the chairman of Hanny may be impaired. This was because during those years WONG Sun

had been a heavy drinker and over an extended period such drinking could cause a degree of memory loss. Loss of memory, of course, for whatever reason, is a failing which, to greater or lesser degree, we are all subject. With all witnesses the Tribunal has made due allowance for this, especially as the events in question have taken place several years ago.

Despite Dr. CHUNG's assessment that WONG Sun would be able to testify, in the earlier stages of the hearing Kenneth CHOW made it clear that his client had no desire to give evidence, believing that his poor memory of events would render it an almost useless exercise.

It should be mentioned, however, that in the early days of the inquiry WONG Sun came to listen to the hearings on several occasions, remaining for an hour or so at a time. On these occasions he appeared to be assisted by someone, a nurse perhaps.

It should also be mentioned that at the preliminary hearing the Tribunal stated that it intended to use a computer-based form of transcription during the course of the hearing, this system having a number of sophisticated enhancements. One such enhancement was the ability to forward the almost simultaneous transcription of the evidence to outside centres such as homes or offices. This would enable implicated persons to keep abreast of what was being said - word for word - without having to come and sit in the Tribunal room. The Tribunal is aware that in an earlier inquiry use had been made of that facility. It appears, however, that WONG Sun chose not to avail himself of it.

(iii) WONG Sun's health worsens …

It appeared to the Tribunal that WONG Sun suffered from a number of medical conditions. His kidney functions were poor, he was diabetic and, from time to time, his blood pressure became unstable. As the hearing progressed, it was, however, the condition of his kidneys which caused most concern. After some 40 days of the hearing, it was discovered that WONG Sun had entered a hospital on the Mainland to receive a kidney transplant and was spending a good deal of his time there in anticipation of the operation.

As a result, although in the ordinary course of events WONG Sun

would have been the first implicated party to testify, the Tribunal ruled that any decision as to whether he should or should not testify would be adjourned until *all* the other implicated parties had been given the opportunity to take the witness stand and to call such witnesses as they desired.

Despite this concession, it was apparent that WONG Sun - at that time at least - still had no desire to testify. For example, in this regard, on 25th August 1999 (day 46 of the hearing) Kenneth CHOW said :

> If it helps my learned friend at all, I think unless Mr. WONG Sun is going to be compelled to give evidence before this tribunal … I do not think Mr. WONG Sun will surprise my learned friend with an appearance.

Despite WONG Sun's professed desire not to testify, although the Tribunal never expressed an intention to compel him to do so in terms of the powers conferred on it by statute, it recognised that he may still change his mind. If he did so, of course, he would only be able to testify when his health allowed and that might be at some extended time in the future. By 30th August 1999 (day 49 of the hearing), the possibility of delay so concerned the Tribunal that the Chairman was constrained to speak in the following terms :

> The difficulty that we have may be stated as follows. If Mr. CHOW receives confirmation from Mr. WONG Sun that Mr. WONG Sun would like to be able to give testimony at a time when he is medically fit to do so, that may result in a delay. The delay may be extensive. In addition, the delay may be uncertain because Mr. WONG Sun may not know exactly when he is going to received his kidney. These things are dependent upon the vagaries of fate. A delay that is too extensive is prejudicial, maybe not to Mr. WONG Sun but to those others who are involved such as Miss Sanrita WONG, Mr. William FUNG, Miss Connie LI and others…

The Chairman continued by addressing counsel :

> … I would ask all of you consider what should be done in the event that Mr. WONG Sun indicates a desire to give evidence at some time in the future when he is medically fit to do so, what sort of time

> limits do we place on that? It is question of fairness to Mr. WONG Sun balanced against prejudice to others. It is not an easy question …

By early September 1999 a clearer indication was given of the extent of WONG Sun's medical problems when Kenneth CHOW presented a report from the Medical University of Chung Shan, Guangdong Province. The report said that WONG Sun was suffering from terminal failure of his kidney functions and from diabetes, a complicating factor. It said that he would be given a kidney transplant when, to quote from the report, 'the time was ripe'. It was at about this time that Kenneth CHOW informed the Tribunal that WONG Sun, after due consideration, had now decided that he *did* wish to testify before the Tribunal in order to answer the allegations made against him.

The Tribunal could be forgiven for, initially at least, harbouring a degree of scepticism as to WONG Sun's true motives for this *volte face*. After all, it was only when the giving of oral testimony was faced with almost insurmountable difficulties that WONG Sun had decided that it was imperative for him to give it. But despite such initial scepticism, the Tribunal accepted that, as an implicated person facing serious allegations, WONG Sun had a fundamental right to be given the opportunity of being heard in his defence and if he now wished to do so by way of giving oral testimony he should, in so far as it was reasonably possible, be afforded that opportunity. The Tribunal further accepted that there may be *bona fide* reasons for the change of mind.

In the absence of WONG Sun, the other evidence was completed by 9th September 1999 (day 57 of the inquiry) and the hearing was then adjourned pending an updated report on WONG Sun's condition.

On 23rd September 1999, WONG Sun received a kidney transplant. His recovery from the surgery, however, was beset with complications. The Tribunal, being informed of his progress, made a decision in late October to further adjourn the hearing to 20th November 1999. This was on the basis that his medical advisor, a respected nephrologist by the name of Dr. Vincent TAM, was at that time cautiously optimistic that WONG Sun *may* be in a position to testify before the end of the year, if only by means of video link-up to his home or hospital.

However, on 20th November 1999 it was made clear to the Tribunal by

WONG Sun's medical advisors that it would not be possible to give any indication of whether WONG Sun would be fit to testify for at least another 3 months or so; that is, until February or March 2000. In light of this, the Tribunal was forced to rule that there could be no further adjournment. A copy of the full ruling is annexed to this report as Annexure 'XVII'. The concluding paragraphs of that report read :

> With respect, it seems to us that Dr. Vincent TAM was saying in effect that he cannot, within the next two to three months, come anywhere near to giving an optimistic prognosis. That begs the question : will there be a more optimistic prognosis in two to three months' time? Dr. TAM was unable to commit himself in that regard. In the opinion of the tribunal, the end result is that it is as likely as not that, even in two to three months' time, Dr. TAM will only be able to say : "Give me some more time and then I will be able to tell you." For how long does this process continue? We must balance the needs of justice against the individual desire of Mr. WONG Sun, if he is ever well enough, to testify.
>
> In so doing – and having considered the matter with anxiety – the tribunal has come to the conclusion that it would not be proper in this matter to adjourn further to see whether Mr. WONG Sun will, in or around Chinese New Year, then be in a position to begin the process of preparing himself for the possibility of then giving evidence at some time thereafter. This hearing must come to finality. It cannot be allowed to drag on with no realistic end in sight. The other implicated parties will be materially prejudiced, the public perception of the just and expeditious workings of this tribunal may be called into question. For that reason, with a degree of regret, the tribunal has come to the inevitable conclusion that the application for adjournment must be refused.

Having ruled that - in the absence of an unexpected recovery by WONG Sun - the inquiry would be concluded without him being able to testify, it was then necessary to decide how that ruling would affect the Tribunal's ability to fulfil the mandate given to it by the Financial Secretary to inquire into WONG Sun's dealings in Hanny securities and also the dealings of other implicated parties. Accordingly, opportunity was given to the implicated

parties to make submissions. These submissions were heard in late December 1999 after a month's further adjournment necessitated by the Chairman having certain pre-existing judicial obligations.

When the Tribunal re-convened in late December, evidence was led to show that WONG Sun's medical condition remained unstable. It was not possible, therefore, to have any firmer indication of when - if it all - he might be able to testify. Kenneth CHOW then submitted that there should be a stay of proceedings in respect of his client. He based his submission on the contention that it was no longer possible in the interests of fairness, with WONG Sun being unable to testify on his own behalf, to make any findings in respect of his dealing in Hanny securities.

Wilson CHAN, counsel for Sanrita WONG, also applied for a stay of proceedings in respect of his client. He based his submission on the contention that his client's brother, WONG Sun, would have been a witness of central importance to Sanrita WONG's defence and his inability to testify had so prejudiced her defence that it would be inequitable to continue the inquiry into her dealings.

The other implicated parties appear to have taken a neutral stand on the matter.

On 24th December 1999, the Tribunal rejected both applications for a stay, ruling that the inquiry would continue to conclusion in respect of both WONG Sun and Sanrita WONG. A copy of the ruling is attached to this report as Annexure 'XVIII'.

While the ruling explains the reasoning of the Tribunal at the time, three matters have flowed from it which merit mention.

(a) The invitation to WONG Sun to provide evidence

It is to be emphasised that, either in anticipation of the fact that WONG Sun would not be able to testify or in the knowledge that his testimony was now not possible, the Tribunal at all material times made it clear that it would do its best to assist him in putting his case before the Tribunal in whatever form he deemed fit. In this regard, the Tribunal relied on its broad powers in terms of

section 17 of the Ordinance to receive evidential material. The relevant portions of that section read :

> The Tribunal may, for the purpose of any inquiry under this Ordinance-
>
> (a) receive and consider any material whether by way of oral evidence, written statements, documents or otherwise, notwithstanding that such material would not be admissible in evidence in civil or criminal proceedings in a court of law; …
>
> (g) determine the manner of which any material mentioned in paragraph (a) shall be received;

Other than in respect of certain documentary evidence to show that his solicitors had written (without success) to certain potential witnesses, WONG Sun chose not to avail himself of that opportunity either by submitting papers to the Tribunal or by calling witnesses.

It was argued that WONG Sun's health did not allow him, if he so wished, to take advantage of section 17. This was - to an extent - recognised by the Tribunal. For example, in its ruling of 24th December 1999 at page 4 and 5, the following was said :

> The matters to which we have referred further indicate that it would not be reasonably possible *at this time* to expect Mr. WONG Sun to prepare and sign a detailed written statement of any complexity *if that statement has to be prepared from scratch.* I mention this because one of the possibilities put to Mr. CHOW by the tribunal was that perhaps, even if Mr. WONG Sun were not fit enough to give oral testimony, he may well, given sufficient time, be able with the assistance of his legal team to put before the inquiry a written statement containing those matters that he believed should be made known in his defence. Mr. CHOW took instructions and, through him, we learned that Mr. WONG Sun did not feel strong enough to begin the task of preparing such a document. It would appear that the medical certificates to a substantial degree support his protestation in that regard.

> It goes without saying, of course, that even if a statement is not available *to be prepared from scratch*, this Tribunal, which has a broad discretion in receipt of documentation by way of evidence, would still be content to receive any form of statement that Mr. WONG Sun thought proper. [our emphasis]

In the opinion of the Tribunal, what must be remembered is that, even if WONG Sun's medical condition was precarious in the latter part of 1999, it was not always in such a state of high concern as to prohibit him from giving instructions to and assisting his legal team in respect of his defence. Before the inquiry began, at the specific request of WONG Sun's counsel, a period of nine weeks was granted for preparation. When the inquiry began in May 1999, no complaint was made that WONG Sun had been unable to give instructions. Nor indeed was any such complaint made at any time during the inquiry which ran for some four and a half months before WONG Sun had his kidney transplant. In such circumstances, the only reasonable inference to be drawn was that the legal team was duly instructed, the more so as witnesses were cross-examined, often at length and in detail, and on occasions specific propositions put to those witnesses.

The fact too that WONG Sun, having initially expressed the view that his poor recollection of events would make it a useless exercise to testify, later changed his mind leads to the compelling inference – in the absence of it being a 'tactical' device only – that he must at some stage have been able to instruct his legal representatives with sufficient detail that he came then to believe it would be worthwhile to give oral testimony.

It is true that in the last weeks of 1999 WONG Sun's medical difficulties, especially his diabetes, made it difficult for him to conduct conversations for any length of time in respect of complex matters but it was never suggested by his medical advisors that he was utterly incapable of giving rational instructions or of scrutinising documents. While Dr. John MA, a doctor specialising in diabetes, said on 22nd December 1999 that, in his opinion, WONG Sun would for the time being not be able to sustain any lengthy conversation or answer questions of a detailed commercial nature, Dr. Vincent TAM recognised that, depending on his condition and his blood sugar levels, he would be able to work for up to one hour a day. Of course, in such circumstances, patience would be required in consulting with WONG Sun but

the Tribunal had never indicated a sudden desire for speed.

Even towards the close of submissions (on 20th January 2000), the Tribunal indicated that it would do it best to assist WONG Sun in receiving and considering any form of evidence that he sought to put forward : statements (short or long), schedules, lists, accounts and the like. But other than the letters to which reference has been made,[14] WONG Sun chose not to place any evidence before the Tribunal.

There was, of course, no obligation of any kind on WONG Sun to produce evidence and the fact that he did so only to the limited extent mentioned was in no way held against him. The Tribunal seeks only to stress that, until the very end of the inquiry, it did the best it could to give him the opportunity to offer his defence. As was said in Re Brook and Delcomyn 16 C.B. (N.S.) 402 in respect of a commercial arbitration matter :

> Although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental [principle] of justice which declares that no man shall be condemned, either civilly or criminally, *without being afforded an opportunity of hearing the evidence addused against him and offering his defence.* [our emphasis]

(b) The use of favourable evidence appearing in the statements of witnesses who did not testify before the Tribunal

Invariably, witnesses (including implicated persons) who testified before the Tribunal had earlier either made a statement to the SFC or had been interviewed by its officers. It was a common procedure for each witness to be given the chance to clarify and amend his or her SFC record of statement or interview and thereafter to confirm the truth of its contents. It then became part of that witness's testimony.

It transpired that a number of witnesses who had made statements to the SFC or been interviewed by it officers did not attend the hearing to give oral testimony. As a result, the Tribunal was unable to receive confirmation direct

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[14] Which were placed into evidence only after the Tribunal itself had raised the issue.

from those witnesses that the statements did or did not require amendment and were true and accurate. During the course of the hearing the use to which these statements could be put became a matter of debate. Where such 'unadopted' statements were favourable to an implicated person it was understandable that the implicated person desired them to be taken into account; where they were not favourable it was equally understandable that the implicated person did not desire to have them taken into account.

When (on day 69 of the hearing) submissions were first made on the issue, the Tribunal adopted the approach of earlier Tribunals; namely, that such 'unadopted' statements would not be used to make any findings of facts in relation to the implicated parties or indeed other witnesses who had testified.[15] Where, however, an implicated person, in the course of their testimony, was referred to the 'unadopted' statement of a witness and chose to comment, such comments were a matter which within the narrow parameters of fairness, the Tribunal could consider.

When final submissions were made, it was argued by Kenneth CHOW on behalf of WONG Sun that there should be a divergence from the normal rule in respect of his client because of his inability to testify. This divergence was to apply in respect of one witness only; namely, Louis LO who had not testified before the Tribunal but who had made statements to the SFC, the contents of which partially supported WONG Sun's defence but partially conflicted with it too.

Effectively, as the Tribunal understood it, it was Kenneth CHOW's contention that, where Louis LO's statements supported WONG Sun, they should be taken into account by the Tribunal but where they conflicted with WONG Sun they should either be ignored or else WONG Sun's version should be preferred. Kenneth CHOW submitted that Louis LO's statements were not admissible *against* WONG Sun but might be used (and therefore be admissible) where they were *for* him. As he expressed the second part of his submission :

> The only two persons who could really give the lie to the documentary evidence would be Louis LO and WONG Sun and neither of them are before the court [the Tribunal]. Louis LO was absent, we

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[15] See, for example, the Hong Kong Worsted Mills report dated 18th November 1997 at page 32.

> can say, voluntarily from this hearing, but WONG Sun was not. So in the circumstances, whatever you can find in Louis LO's statements which might support or corroborate WONG Sun's version should be taken into account.

The Tribunal ruled, however, that if a statement was to be admissible it was to be so for all purposes and that, in this instance, where there were a number of fundamental conflicts between the statements of WONG Sun and Louis LO, the statements of Louis LO would play no part in the Tribunal's deliberations. In an *extempore* ruling, the Chairman expressed it thus :

> There are – on the face of it at least – a number of fundamental conflicts between what Mr. Louis LO said at the time and what Mr. WONG Sun said at the time. I as Chairman made it clear to Mr. CHOW that, in such circumstances, it would be artificial and wrong in principle for the Tribunal to search among the undergrowth of such conflicts for matters supporting Mr. WONG Sun and be forced at face value to accept them. Accordingly, the ruling given earlier … will still prevail. This Tribunal will not in this instance take into account anything said against Mr. WONG Sun, or that it finds may tell against Mr. WONG Sun, appearing in the statement of Mr. Louis LO. Similarly, it will not undertake the arduous and artificial task of searching among the undergrowth to try to find matters that support Mr. WONG Sun and to somehow pluck out those matters in isolation from their context.

The Tribunal did accept, however, that there may be circumstances where an implicated person was able, without fault (such as neglect to call a witness), to show the foundations of a defence which could only be corroborated by the unequivocal statement or record of interview of a witness who had not testified. In such circumstances, having regard to its broad powers to receive evidence, the Tribunal accepted that it may be proper to have regard to that statement. Such occasions, however, would be exceptional and only exercised where the interests of justice made it obligatory. Such exceptional circumstances did not apply in the case of WONG Sun nor, in the opinion of the Tribunal, in the case of William FUNG whose son Clement made SFC statements but did not appear to testify.

(c) Consideration of the 'Holgate' principle

In reaching its findings in this report in respect of WONG Sun and other implicated persons who may have been affected by his absence, the Tribunal has at all times borne in mind the fact that, because of his medical condition, WONG Sun was unable to testify on his own defence and to give evidence that (potentially) may have assisted other implicated persons, more particularly Sanrita WONG. In this regard, the Tribunal has been conscious of the dicta in R v. Holgate [1996] 3 HKC 315 which is to the effect that, having refused a stay on the basis that the unavailability of a witness did not undermine a fair trial, it was then incumbent upon a court to consider how the accused in the trial may nevertheless have been handicapped in his or her defence by the absence of the witness. In applying that principle to the inquiry, the Tribunal has at all relevant times borne in mind how the defence of WONG Sun and other implicated persons may have been handicapped by WONG Sun's inability to testify.

CHAPTER THREE

THE LAW
(A consideration of relevant legal principles)

This Chapter is divided into 3 parts. In the first part, a number of general legal principles are stated, these being principles which the Tribunal considered to be of particular importance in the course of its deliberations. In the second part, the relevant provisions of the Ordinance concerning proof of insider dealing are considered and, in particular, the essential elements of insider dealing are listed. Finally, in the third part, the parameters of the defence afforded by section 10(3) and 10(4) of the Ordinance to persons proved to have committed the act of insider dealing are defined.

Before moving to those individual matters it should be stated that, concerning matters of law, paragraph 13 of the Schedule to the Ordinance provides that :

> Every question before the Tribunal shall be determined by the opinion of the majority of the members except a question of law which shall be determined by the chairman.

Accordingly, whenever in this report a decision on a matter of law is referred to in terms indicating that it is a decision of the Tribunal, it must be understood that it has been a decision made on the direction of the Chairman.

A. General Legal Principles

1. The standard of proof

At the preliminary hearing, in the course of the Chairman's opening statement, the standard to be applied by the Tribunal was stated in the following terms :

> As regards the standard of proof, the standard of proof applicable in these proceedings is a civil standard. But that is not to say that it is a standard of a mere balance of probabilities. Allegations of insider trading are akin to allegations of professional misconduct involving

> deceit or moral turpitude and, as such, demand a higher standard than that, though the standard will not be so high as beyond a reasonable doubt which is the standard applied in criminal matters. Unless otherwise submitted by counsel and/or by solicitors appearing before this Tribunal and unless accepted by it, the Tribunal will therefore adopt the standard of proof to a high degree of probability. This is a standard which has been adopted by previous Tribunals.

At the end of the hearing, when submissions of law were made, it was never contended that the standard should be a different one from that stated. Accordingly, the Tribunal adopted the standard of requiring proof to a high degree of probability.

Finally, for the sake of completeness, it is recorded that the Tribunal was always aware in the course of its deliberations that no burden of proof lay upon any of the implicated persons.

2. The manner in which the Tribunal considered factual evidence

One of the great strengths of the constitution of the Tribunal is that 2 of its members are drawn from Hong Kong's business and professional community. These members bring to the Tribunal a wealth of relevant experience and expertise. As Burrell J. commented in an earlier report.[16]

> Juries in criminal trials are often directed to use their common sense as men and women of the world. Tribunal members have the added dimension of being men and women of the financial and business world.

But while the members may use their experience and expertise in considering evidence, they have been directed that they are not entitled to use it in substitution for the evidence called. In this regard the applicable principles are set out in **Wetherall v. Harrison** [1976] QB 773 which involved a consideration of how far members of a bench of justices may make use of their own specialist knowledge in a trial matter before them, one of the members

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[16] See *Hong Kong Parkview Group* report, page 21.

being a medical doctor. Lord Widgery C.J. said (at page 778) :

> So I start with the proposition that it is not improper for a justice who has special knowledge of the circumstances forming the background to a particular case to draw on that special knowledge in interpretation of the evidence which he has heard. I stress that last sentence because it would be quite wrong if the magistrate went on, as it were, to give evidence to himself in contradiction of that which has been heard in court. He is not there to give evidence to himself, still more is he not there to give evidence to other justices; but that he can employ his basic knowledge in considering, weighting up and assessing the evidence given before the court is I think beyond doubt.

3. The drawing of inferences

The Tribunal has warned itself that it may not base its findings on conjecture or speculation, no matter how 'educated' or 'informed' that conjecture or speculation may be. An inference may, of course, be drawn from the evidence provided that the evidence consists of primary facts which have been admitted or proved to a high degree of probability and the inference is a compelling one and is the only reasonable inference which can be drawn from those primary facts.

4. Good character

In past inquiries, where applicable, the Insider Dealing Tribunal has, during the course of its deliberations, taken into account the good character of those implicated persons who were the subject of those deliberations. This Tribunal has done so too. No evidence was placed before the Tribunal to show that any of the implicated persons had criminal convictions recorded against their names nor was there evidence of their condemnation by any professional or disciplinary body. Accordingly, in respect of all the implicated persons, the Tribunal directed itself that their good characters were relevant in 2 ways. First, it bolstered their credit in deciding what weight to attach to the answers they gave to the SFC and/or the evidence they gave before the Tribunal; second, it established that, as they had remained of good character throughout their careers, they were less likely as a result to commit the civil wrong of insider dealing.

5. Demeanour

While the ability to watch and listen to a witness giving his or her evidence is of considerable assistance in deciding what weight to give to that witness's evidence, the Tribunal has at all times reminded itself that demeanour alone is an imprecise concept and invariably subjective. The difficulties are increased when a member of the Tribunal is forced to hear testimony through an interpreter. In **R v. NG Wing-ming** [1995] 1 HKCLR 64 Litton J.A. (as he then was) described the difficulties of relying too heavily on demeanour in the following terms :

> Demeanour is a notoriously uncertain guide to the truth for obvious reasons. A witness comes into court as a total stranger to the judge who can hardly be expected to read from his or her facial expressions or "body language" indications as to truthfulness or otherwise. The inherent probabilities in most cases would be the first point of reference for the trial judge in seeking to ascertain the truth. Demeanour could only be a point of last resort.

In assessing the credibility of various witnesses (including implicated persons) and the weight generally to be given to their evidence, the Tribunal has cautioned itself in accordance with that *dicta*.

6. Lies

During the course of deliberations, the Tribunal determined that on occasions one or more of the implicated persons told lies. This was either in their interviews with the SFC or in the course of their testimony.

In respect of lies, the Tribunal cautioned itself that lies in themselves can never prove the culpability of an implicated person. An implicated person, apprehensive of the stigma of being identified as an insider dealer, may lie for any number of reasons which are essentially 'innocent'. An implicated person may lie in order to bolster; that is, enlarge upon and make more credible, an already valid defence. He or she may lie because there is a belief that the truth will not be believed or because he or she has been guilty of some form of conduct deserving reproach but which falls short of insider dealing itself. The

Tribunal warned itself that where it was satisfied to the require standard that an implicated person did lie for a reason that could have no 'innocent' explanation, that lie did no more than discredit the testimony of that person in respect of that evidence so as to leave in place only credible evidence – if, in fact, that existed – which Counsel for the Tribunal argued went to proving culpability.

B. The essential elements of insider trading

The Ordinance defines the civil wrong of insider dealing in section 9(1)(a) in the following terms :

> (1) Insider dealing in relation to a listed corporation takes place –
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> (a) when a person connected with that corporation who is in possession of information which he knows is relevant information in relation to that corporation deals in any listed securities of that corporation or their derivatives (or in the listed securities of a related corporation or their derivatives) or counsels or procures another person to deal in such listed securities knowing or having reasonable cause to believe that such person would deal in them;

In terms of that section, therefore, for insider dealing to be proved to the requisite standard, it is incumbent upon counsel to the Tribunal to prove 5 essential elements. Those 5 elements may be listed and explained as follows :

1. The securities must be those of a 'listed corporation'

It has never been disputed that Hanny was at all material times a listed corporation; that is, a corporation which has its shares and other issued securities listed on the Hong Kong Stock Exchange.

2. The person dealing in the securities must be 'connected' to the corporation

Section 4 of the Ordinance defines a 'connected person' and includes in that definition, *inter alia*, the following categories :-

a. a person who is a director or employee of the corporation;

b. a person who is a substantial shareholder in the corporation; that is, a person who has an interest in 10% or more of its share capital;

c. a person who occupies a position which may reasonably be expected to give him or her access to 'insider' information concerning the corporation.

d. A person who may no longer be 'connected' but who, within the 6 months immediately preceding the alleged insider dealing, was then 'connected'.

During the course of the inquiry it was never disputed that the following implicated persons were 'connected' to the company –

a. **WONG Sun** – by reason of being the chairman and the single biggest shareholder;

b. **Sanrita WONG** – by reason of being an executive director and employee;

c. **William FUNG** – by reason of being a director, an employee and a substantial shareholder or by reason of having been so in the preceding 6 months.

d. **Connie LI** – by reason of her being an employee.

FAY Loi Loi (the remaining implicated person in respect of whom the Tribunal came to findings of fact concerning dealing in Hanny shares) was not made an implicated person by reason of her being 'connected' to Hanny. She was subject to enquiry because it was averred that she fell under the provisions of section 9(1)(e) of the Ordinance. In terms of that section, it was averred that she may have been someone to whom 'insider' information was disclosed by a 'connected person' in the knowledge or expectation that she would use that information to deal in Hanny shares.

3. The 'connected' person must 'deal in' the securities or else counsel and procure another person to deal in them

In terms of section 6 of the Ordinance, 'dealing' is defined as follows :-

> For the purposes of this Ordinance, a person deals in securities or their derivatives if (whether as principal or agent) he buys, sells, exchanges or subscribes for, or agrees to buy, sell, exchange or subscribe for, any securities or their derivatives or acquires or disposes of, or agrees to acquire or dispose of, the right to buy, sell, exchange or subscribe for, any securities or their derivatives.

During the course of the inquiry it was disputed by a number of the implicated persons that they had 'dealt' in Hanny shares as defined by the Ordinance. The implicated persons were :

a. **FAY Loi Loi** – It was her assertion that, as the wife of a broker who had business dealings with WONG Sun, she was persuaded by her husband to lend her name to an account that would enable WONG Sun to trade for his exclusive benefit. It was her case that she did no more. She gave no instructions concerning buying, selling or the transfer of funds to other accounts.

b. **WONG Sun** – he did not concede that dealing in the accounts of Connie LI, FAY Loi Loi and Louis LO was, in reality, his sole dealing and put Counsel to the Tribunal 'to proof' in this regard.

c. **William FUNG** – in respect of the first period of trading only, it was alleged that he conducted his dealings in an account held in the name of his son, Clement FUNG. William FUNG asserted, however, that the relevant dealing constituted independent dealing by his son without any advice or counsel from him.

d. **Sanrita WONG** – in respect of the first period of trading only, it was alleged that she conducted her dealings in an account held in the name of a male friend named K.L WONG (the implicated person who received a 'Salmon' letter but chose to remain in

> Canada[17]) Sanrita WONG asserted, however, that the relevant dealing constituted independent dealing by K.L. WONG and that her role consisted purely of relaying K.L. WONG's instructions in terms of a power of attorney granted to her for that purpose. She did not, therefore, 'deal'.

By reason of the denials (and assertions) detailed above, the Tribunal was obliged to make findings in respect of each account under scrutiny to decide who, in fact and in substance, had used them to deal in Hanny shares and who, therefore, in respect of each account, was the true dealer. The findings of the Tribunal in this regard are contained in Chapter Seven.

4. At the time of 'dealing' the 'connected' person must be in possession of information which he or she knows to be 'relevant information'

It was the contention of all the implicated persons that the information about Hanny known to them at material times did not constitute 'relevant information'. It was further their contention that even if, judged objectively, the Tribunal found that their state of knowledge constituted 'relevant information', they did not know it to be so. This essential element of insider dealing, therefore, took on particular significance in the inquiry.

Section 8 of the Ordinance defines 'relevant information' in the following terms :

> In this Ordinance "relevant information" in relation to a corporation means specific information about that corporation which is not generally known to those persons who are accustomed or would be likely to deal in the listed securities of that corporation but which would if it were generally known to them be likely materially to affect the price of those securities.

'Relevant information' must, therefore, possess 3 elements, each of which must be proved by Counsel to the Tribunal. Those elements may be described in the following manner :

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[17] See Chapter Two, page 41.

(i) The information must not be generally known to the market; that is, to those individuals and institutions accustomed or likely to deal in the securities of the company;

(ii) It must be specific information;

(iii) It must be information of the kind which, if it were known to the market, would be likely materially to affect the price of that company's listed securities.

(i) It must be information not generally known to those persons who are accustomed or would be likely to deal in the securities of the company …

By its very nature, inside information is information which is known only to a few and is not generally known to the market, the market being defined as those persons who are accustomed or would be likely to deal in the securities of the company. But who makes up that class of persons who are accustomed or would be likely to deal in the listed securities of a particular company?

The 2 experts who testified before the Tribunal (Clive Rigby and Richard Witts) agreed that at one time Hanny had been favoured by investors. They said that over the extended time span under scrutiny in the inquiry Hanny could accurately be described as a 'second' or perhaps 'third liner'. It was a company in which broadly there were 3 categories of investors; namely, the financial institutions and investment funds; high net-worth individuals and, finally, the smaller investor. In respect of the smaller investor, in an earlier inquiry[18], the Tribunal had described that person in the following terms :

> … the smaller investor made up what one witness called the 'retail market'; namely, the investor on the street, often a speculator, the sort of investor who looked to the newspapers for tips and did not have access to the electronic, data-laden inner sanctums of the market

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[18] The Chinese Estates Holdings inquiry, page 38.

professionals.

Neither expert took exception to this description of the 'small investor' in relation to Hanny. In such circumstances, the Tribunal is satisfied that those persons accustomed to dealing in the securities of Hanny in 1994 and 1995 or likely to deal in its securities constituted the 3 categories described above or, to express it more broadly, they constituted not one esoteric corner of the market but the wider investing public.

(ii) It must be specific information …

In an earlier inquiry into share dealings which took place in Chinese Estates Holdings Limited[19], the Tribunal considered in some detail the meaning of the phrase 'specific information'. The present Tribunal finds no cause to disagree with the words of that earlier Tribunal and much of what follows, therefore, mirrors what was written in that earlier report.

Specific information is information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed[20]. In this primary sense it is to be contrasted with mere rumour, with vague hopes and worries or with unsubstantiated conjecture. Of course, in the ebb and flow of business affairs, what begins, for example, as a vague hope or worry may over time acquire sufficient substance and particularity to be properly defined as specific information. If and when such a transformation takes place is a question of fact.

'Specific' information is to be distinguished from 'precise' information. The word 'precise' does not appear in our legislation. The distinction between the two words was of particular importance in this inquiry and something more must therefore be said of the distinction.

Several texts have distinguished 'specific' information from 'precise' information. In considering section 56(1)(b) of the Criminal Justice Act, 1993 which defined 'inside information' as being *inter alia* 'specific or precise', one text[21] has commented :

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[19] See Chinese Estates Holdings Limited report, pages 38 – 44 (inclusive).
[20] See the *dicta* of the Singapore High Court in Public Prosecutor v. GCK Choudrie (1981) 2 Co. Law 141.
[21] See *Insider Crime* by Bider and Ashe, page 32 (1993, Jordan Publishing Ltd.).

> The second characteristic of inside information is that it must either be 'specific' or 'precise'. Information is precise when it is exact. The reason for putting in the word 'specific' was because, if left on its own, the word 'precise' might have the effect that, for example, information that there will be a huge dividend increase would not amount to inside information without also details of the quantum of the increase. The word 'specific' is intended to ensure that information about a huge dividend cut can be inside information, whilst mere rumour and untargeted information cannot … information may still be specific even though, as information, it has a vague quality. *Thus, information that a company is having a financial crisis has been held to be specific*. Also, information as to the possibility of a takeover may be regarded as specific information and will certainly rank as precise, given that it is more than mere rumour. [our emphasis]

An earlier Tribunal in Hong Kong crystallised the distinction in the following terms[22] : "Information is not rendered general, as opposed to specific, merely because the information is broad and allows room, even substantial room, for particulars". In addition, as Brenda Hannigan has commented[23] :

> … the whole point of insider dealing frequently is to deal while the transaction is only contemplated, for once it has actually occurred the market is likely to be aware of it and will move to reflect that fact in the price, thereby preventing any profiting by insiders.

Contemplated transactions, by reason of the fact that they have not yet been 'signed and sealed', are invariably imprecise as to all details. Nevertheless, if the most probable consequence is that they will be concluded and that news of the finalised transaction will be likely to affect share prices, as Brenda Hannigan has pointed out, that is the time for the insider dealer to 'steal a march' on the wider investing public.

Having said that, earlier Tribunals have recognised the dangers of interpreting the description 'specific' too broadly. In the ordinary course of

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22 Public International Investments report (chaired by Stock J.) at page 236.
23 *Insider Dealing* (2nd edition) published by Longman, United Kingdom.

business, directors and others connected with public companies should be encouraged to invest in the listed securities of their companies. They should not be barred from the market for fear that anything of significance happening or contemplated within their companies will be deemed to be specific and price sensitive information. As a result, earlier Tribunals have cited with approval the distinction drawn in some texts between, on the one hand, day to day activities which may, by normal analysis and deduction, be an indicator of the health of a company and, on the other hand, important, singular events (or contemplated events) which are likely to change a company's course. In 1979, the Minister of Trade in Parliament in London, when addressing the insider dealing provisions in the proposed Companies Act of 1980, emphasised that he was anxious not to discourage directors and employees from holding shares in the companies for which they worked. He continued by saying[24] :

> I do not believe that the general body of information which a businessman has about his business for long periods in the year falls into the bracket of "unpublished price sensitive information". Of course he knows more about his business than people outside do, but the kind of knowledge we are after is knowledge of dramatic events, major happenings, and things which will transform the company's prospects. When someone has information about such matters, he should not be dealing. But I do not believe that the day-to-day running of major enterprises is full of day-to-day dramas.

What then of results (such as a financial loss) that are foreseen but not yet certain? What also of transactions (such as a commercial agreement) that are contemplated but not yet signed and sealed? When, in respect of these matters, does knowledge amount to specific information? In every case, of course, it is a question of fact. As said earlier, what begins as a vague worry or hope may over time acquire sufficient substance and particularity to be properly defined as specific information. But when does that time arrive? How is it to be measured? The Tribunal in the Chinese Estates Holdings inquiry adopted what may be called the 'probable consequence' test. This was, however, in respect of contemplated commercial transactions such as the sale of assets, joint venture agreements and the like. In the opinion of this Tribunal it is a test which ensures fairness while at the same time reflecting the true meaning and

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[24] See House of Commons, Standing Committee A, at page 593, on 6th December 1979.

intent of the legislation. It is also a test which may be extended to events (such as a financial loss) which are foreseen but not yet certain. This Tribunal has therefore adopted the test.

The earlier Tribunal defined the 'probable consequence' test in the following manner[25] :

> … knowledge of a contemplated commercial agreement is capable of amounting to specific information, even if all the terms have not yet been agreed, provided the probable consequence is that the agreement will be successfully concluded and the implicated person knows this to be so. Whether such knowledge, in each individual case, amounts to specific information is a matter of fact to be decided having regard to all relevant circumstances.
>
> Does this test of 'probable consequence' unduly hamper a director or employee in being able to buy and sell securities in his company? This Tribunal does not believe so. It must be remembered that for 'specific information' to amount to 'relevant information' it must also be information which is price sensitive; that is, information which, when known to the investing public, will be likely materially to affect the price of the company's shares. If a director or employee has knowledge of a contemplated transaction which he knows will be likely materially to affect his company's share price and if, despite the inherent uncertainty of commercial negotiations, because of the substance and particularity of his knowledge, he reasonably expects the contract to be successfully concluded then he should at that time step back and stop dealing. The Tribunal does not consider this to be an undue handicap.

In respect of events which are foreseen but not yet certain the test may be applied in the same manner. If a director or employee has knowledge of a foreseen event which he knows will be likely materially to affect his company's share price and if, despite the need for further checks, discussions and/or decisions to be made by company personnel or advisors, because of the substance and particularity of his knowledge, he reasonably expects the event to

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[25] See Chinese Estates report, pages 43 and 44.

take place then he should at that time step back and stop dealing.

5. Information which would be likely materially to affect the share price …

Even though information about a company may be specific, it does not constitute 'relevant information' unless it is also information which would, if generally known to the wider investing public, be likely materially to affect the price of the company's listed securities. As Stock J. said[26] :

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

In their text, *Insider Dealing* (The Round Hall Press, Dublin), the authors, Ashe and Murphy, expand on this by saying :

> In many cases the actual market impact of the information becoming generally available will be determinative of the impact on price. However, the test of price sensitivity has to be applied at the time the deal by the insider or tippee took place and conditions in the market may not be the same at the time of the release of the information. So it cannot always be assumed that the impact of the news on the market will be finally determinative of the issue.

It is to be emphasised that the test is not simply whether the news, along with other matters already known, would have been likely to affect the price of Hanny's securities; the test is whether it would have been likely to have

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[26] See the Public International Investments report, page 239 and 240.

affected the price to a *material* degree. In a 1986 report (made under earlier legislation) Clough J., in considering the same test; that is, whether information, if generally known, would be likely to bring about a material change in share price, considered the practical meaning of the word 'material' by saying :

> 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.

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. It is the likely impact on *those* investors that must be considered not the impact on insiders such as directors or employees who may well hold a different view because they are privileged to possess far greater in-depth knowledge of the company's prospects than outsiders.

During the course of the inquiry, the impact of 'mixed' information was considered. In this regard, the Tribunal accepts that information concerning the affairs of a company which is of a 'neutral' or 'mixed' nature may influence same investors to buy and some investors to sell but will not thereby be likely to affect the price either up or down to a material degree; namely, to a degree that causes more than a mere fluctuation or slight change. The 'materiality test' therefore is founded on the basis that the share price must be likely to move to a material degree in one direction, either up or down.

C. The defences under section 10(3) and 10(4)

(i) Section 10(3)

It was the case of both WONG Sun and his sister, Sanrita WONG, that even if the Tribunal determined that they had committed acts of insider dealing, they were not to be identified as insider dealers because they had established defences under section 10(3) of the Ordinance. At this juncture, therefore, the meaning of the defence and its scope must be considered.

Section 10(3) of the Ordinance reads as follows :

> A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction otherwise than with a view to the making of a profit or the avoiding of a loss (whether for himself or another) by the use of relevant information.

The burden of proof rests on the implicated person who seeks to rely on the defence. But the burden is not as high as the one that rests on Counsel to the Tribunal in proving each essential element of insider dealing; namely, proof to a high degree of probability. The burden (or standard) of proof required is on the balance of probabilities.

The Tribunal accepts, of course, that the words 'if he establishes' in section 10(3) do not mean that the burden can only be discharged if the defence relied on is supported by the evidence of the implicated person. The fact, therefore, that WONG Sun did not testify before the Tribunal did not act in any way as a bar to his establishing a defence under the section. As was said in an earlier inquiry[27] :

> Even if an implicated person seeks to advance a totally different answer to the allegation of insider trading the Tribunal must still consider the whole of the evidence and decide if *the* evidence (not just his evidence) discharges the burden on a balance of probabilities. Mr. Justice Stock in the "Success Holdings" inquiry put it this way :- "We do not construe the phrase "if he establishes" so narrowly as to preclude us from making a finding that section 10(3) avails the implicated parties even though the facts upon which it might avail them are the facts we find rather than those they would have us find."

Accordingly, once the essential elements of insider dealing have been proved to a high degree of probability, the implicated person will nevertheless avoid being identified as an insider dealer if the evidence – that is all of the evidence, not just his or her evidence – establishes on a balance of probabilities that the dealing was otherwise than with a view to making a profit or avoiding a

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[27] See the Hong Kong Parkview Group report (chaired by Burrell J.) at page 72.

loss by the use of the relevant information.

But what are the parameters of the defence? It may, for example, be argued that a good many directors of public companies have affluent lifestyles which are built on a reasonably complex structure of finances. In such circumstances, a good many directors could, if the need arose, find some 'need' to dispose of shares that would be explained by the sophistication of their lifestyles : the arrival, for example, of a pleasure boat that needed to be financed or the purchase of a holiday home. How easily would a defence of such broad scope sit with a director's duty of good faith to shareholders or any contractual duty owed to the company itself? Flowing from that, there is the defence of mixed motives; for example - 'yes, I saw an opportunity as an insider to sell and avoid a loss but that was not my primary motive; my primary reason for selling was to raise funds to pay off my mortgage'.

In earlier legislation; that is, the Securities Ordinance, Chapter 333, section 141C(3), the defence was then defined in the following terms :

> A person who enters into a transaction which is an insider dealing … may be held not culpable if his purpose is not, or is not primarily, the making of a profit or the avoiding of a loss.

The words *or is not primarily* have been taken out of the present legislation. As was said by an earlier Tribunal[28], 'had the legislators intended that the defence should apply in cases where there were mixed motives the words would have been included as before'.

Earlier Tribunals have considered academic writings on the true nature and extent of the section 10(3) defence and have considered the few authorities that are available. No purpose is served in marching the same road, step for step, as those earlier Tribunals. Rather, the conclusions reached by those Tribunals have been considered and are adopted by this Tribunal in the manner summarised below :

a. Section 10(3) is to be construed narrowly. It is not intended to provide an implicated person with a defence which would succeed

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[28] See the Chevalier (OA) International report (chaired by Burrell J.) at page 81.

on proof, on a balance of probabilities, that a genuine non-profit motive at least contributed to that person's reason or reasons for dealing.

b. The defence is available to an implicated person only if the evidence shows, on a balance of probabilities, that the true reason or reasons for dealing were wholly unconnected with any desire or intention to make a profit or avoid a loss.

c. In light of that test, in the case of a disposal of securities, the evidence must, on a balance of probabilities, show that circumstances compelled the implicated person to sell and that, without alternative resources, he or she had no choice but to sell at that time whether or not he or she had come into possession of the price sensitive information.

(ii) Section 10(4)

Section 10(4) of the Ordinance provides a defence to those persons who act as agents but who, in the discharge of their duties as agent do not in any way advise on 'the selection' of the shares. The section reads :

> A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if her establishes that he entered into the transaction –
>
> …
>
> (4) A person who, as agent for another, enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction as agent for another person and he did not select or advise on the selection of the securities to which the transaction relates.

Both FAY Loi Loi and Connie LI sought to avail themselves of this defence, the burden being on them to establish such defence on a balance of probabilities.

FAY Loi Loi contended that she did nothing more than agree to the opening of certain accounts in her name; she took no steps to activate any form

of dealing in those accounts, indeed she was ignorant of any such dealing. However, in so far as she may be found to have acted as an agent, it was her case that she did not in any way select or advise on the selection of the securities that were traded.

Connie LI did not dispute the fact that, as WONG Sun's secretary, she may have acted as his agent in activating certain dealings in his accounts. It was however, her contention that she acted purely as his secretary, following his instructions, and that she did not in any way select the securities to be dealt in by him or advise him in that regard.

CHAPTER FOUR

THE FIRST PERIOD
(A consideration of whether relevant information
came into existence in the first period)

A. Information placed into the public arena during the first period

By announcements dated 11th November and 10th December 1993 Hanny informed the Hong Kong market of the Memorex acquisition. Naturally, the announcements were bullish in tone. The announcement of 11th November explained the reason for the acquisition in the following terms :

> As the Company is principally engaged in the manufacture and sale of magnetic media products under the Dysan brandname, the directors of the Company believe that the Acquisition represents an excellent opportunity for the expansion of its business. They believe that the Memorex trademark is one of the best known consumer electronics brands in the United States and European markets.

The announcement that followed a month later read in part as follows :

> … the acquisition will enable the Company and its subsidiaries (the "Group") to enlarge its product lines and strengthen its distribution network thereby increasing its competitiveness. In addition, the Company will be able to take advantage of the low cost manufacturing capability at its factories in the PRC and Macau for these products. The Acquisition will allow the Group to further build on these advantages by the manufacture and distribution of an entire range of magnetic media products under the Memorex trademark …

At the time of the acquisition, Hanny made no public proclamation that meeting the purchase price would in any way inhibit growth or profitability. No evidence was placed before the Tribunal that in late 1993 the media expressed concern nor was any evidence received that the acquisition was viewed in a generally negative manner by investors. In light of the earlier success of the Dysan acquisition, it appears that, in general terms, the market

saw the Memorex acquisition as another positive step in Hanny's continuing growth.

1994 opened with the publication of Hanny's results for the first six months of the 1993/1994 financial year. The report, dated 3rd January 1994, revealed a profit attributable to shareholders of HK$82.36 million compared to HK$60.08 for the same period in the 1992/1993 financial year. In respect of the Memorex acquisition, the report said :

> As The Group already owns the Dysan brandname for floppy disks, the acquisitions resulted in the Group being the only magnetic media manufacturer in the world with two internationally popular trademarks for two complementary lines. This will help position The Group as a world class magnetic media products company.

Even though it was known that, at the time of acquisition, the Memorex companies had not been profitable businesses, the interim report expressed no reservations in this regard. To the contrary, the report expressed satisfaction with Hanny's financial ability to exploit the opportunities presented by the Memorex acquisition :

> The Group is in a strong financial position with sufficient available resources to take advantage of investment and growth opportunities. In the absence of unforeseen circumstances, the Directors are confident that the result for the financial year ending March 31, 1994 will continue to show substantial growth.

On 17th February 1994, Peregrine issued a research paper that punted Hanny and Memorex as a 'winning combination'. It 'strongly recommended' investors to accumulate Hanny shares and estimated that the Memorex acquisition would generate an additional HK$384 million in sales for the Group for the 4 month period ending 31st March 1994. Its forecasts were optimistic, even in light of falling prices for Hanny's products :

> Prices for commodity items such as video tapes, audio tapes and floppy disks decline as the products mature and as new competitors enter the market. Faced with shrinking profit margins, less efficient players are forced out of the market. However, companies which can

> utilize economies of scale, a low-cost production base and a strong distribution network, will not only be able to weather price wars and declining margins, but can continue to reap a healthy profit. We believe that Hanny is such a company.

Thereafter, there appears to have been little publicity concerning Hanny's fortunes until early July 1994 when Sanrita WONG, in her capacity as Deputy Chairman, announced that Hanny had launched a sponsored American depositary receipt programme with Citibank as depositary which would make it easier for overseas investors to invest in Hanny. Although the evidence is neutral as to investor reaction, the press article reported the Citibank representative as saying that the programme would 'help' Hanny's share price.

A few days later, on 8th July 1994, William TAM, Hanny's company secretary and financial controller, gave an interview to the *Standard* newspaper in which he predicted that Hanny would 'see a turnaround' in the previously loss making Memorex operations 'by next month'. That was a most optimistic forecast – one that proved to be disastrously wrong - but there was little of real substance in the public domain at that time to suggest that it should not have been accepted by the average reader at face value.

What then of other information freely available to investors; more particularly, the record of Hanny's price movement?

Hanny shares opened 1994 at HK$3.60 but in the first 4 months of the year lost approximately one third of their value, closing on the last trading day of April at HK$2.40. However, during that same period of time the Hang Seng Index dropped just over 25%, falling from 12,086 to 8,966. Therefore, while Hanny's decline may have been more marked, it was nevertheless shadowed by a similar decline in the Hang Seng Index.

The nadir for the Hang Seng Index was reached on 11th July 1994 when it closed at 8,394. However, it then rallied for a time, closing on 1st August at 9,683. Hanny's share price, however, did not rally and on thin trading – with an average daily turnover of only about one million shares – closed on 1st August 1994 at HK$1.90.

Hanny's decline accelerated in the month of August, closing at

HK$1.54 on 18th of that month, a drop of close to 20% in less than 3 weeks. On that same date; namely, 18th August 1994, the Hang Seng Index closed at 9,518, a drop of just 165 points since 1st August.

The precipitous drop in the price of Hanny shares so concerned the Stock Exchange that it demanded on 2 occasions in August that Hanny publish an explanation. On 22nd August Hanny sent out a teletext message and the next day published an announcement similarly worded to the teletext saying that the directors did not know of any reason for the decrease in the share price. A second announcement was published on 31st August. In the first announcement, details were given of the debt incurred by Hanny in acquiring the Memorex operations and the manner in which that debt would be liquidated. Considered objectively, these details could only have been given because the Board could think of no reason why the share price should fall other than concern over Hanny's debt burden. The tone of the announcements suggested that investors should not be alarmed at Hanny's debt burden. The first announcement concluded with the words :

> Apart for the above, we also confirm that there are no negotiations or agreements relating to intended acquisitions or realisations which discloseable under paragraph 2 of the Listing Agreement, *neither is the Board aware of any matter discloseable under the general obligation imposed by paragraph 2 of the Listing Agreement, which is or may be of a price-sensitive nature*. [our emphasis]

This announcement was not issued in the name of WONG Sun, the Chairman. In a departure from normal procedure, it was William TAM, in his capacity as the Company Secretary, who allowed his name to appear at the foot of the announcement. It was a departure from normal procedure which, according to William TAM, caused him concern.

Hanny's announcements, however, did nothing to bolster investor confidence. To the contrary, on 24th August – on a turnover of 4,692,000 shares – Hanny shares lost over 13% of their value, falling to HK$1.16. Clive Rigby testifying as an expert witness and a Hong Kong broker of many years experience, commented that 'the directors' denial of knowledge of the reason for the decrease would probably have been taken with a pinch of salt by experienced market players'.

The announcements (coupled with the continued fall in the share price) excited press comment. On 25th August 1994, the *South China Morning Post* wrote :

> Hanny magnetics made the spotlight for the second time this week with a large stock price fall yesterday. The share was the worst performer of the day, falling 17.5 cents or 13 per cent to $1.165 on a turnover of $5.72 million. *On Monday the company told the stock market there had been no new financial development to explain that day's fall.* Late last year the stock outperformed the Hang Seng Index. Its fortunes changed after interest rates rose frequently this year, … [our emphasis]

A week later, on 2nd September 1994, Hanny published its results for the financial year ending 31st March 1994. The results did not make for happy reading. The profit attributable to shareholders had decreased to HK$30.818 million compared to HK$130.116 million for the previous year, a drop of 76%. No final dividend was awarded. However, WONG Sun, in the report, would only admit that the Memorex acquisition had had 'a slight and temporary negative impact on the profitability of the Group'. Clive Rigby testified that, in his opinion, the report constituted an 'appalling' example of communication with shareholders.

As said in Chapter One, both investors and the media were less than charitable. Investors demanded answers and, as a result, the annual general meeting held on 30th September 1994 was a heated gathering. As Chairman, WONG Sun went to the meeting but found himself suddenly indisposed, the press describing it as a 'mystery illness'. In WONG Sun's absence, the meeting was chaired by his sister, Sanrita WONG. In a report published on 1st October 1994, the day after the meeting, the *South China Morning Post* wrote about the Annual General Meeting in the following terms :

> Brokers from some of the largest houses in the territory were at the meeting, armed with clients' proxies – and some hard questions. At issue is the company's dismal share and profit performance since it bought Memorex last year.

> Hanny was on top of the world in January when it announced interim profits to September were up 37 per cent to $82.3 million and the share price hit a high of $3.80. At the time of interims in January, a chirpy WONG Sun told shareholders the group was in a strong financial position and the "result for the financial year ending March 31 will continue to show substantial growth". Brokers bought the story and investors the shares, but it soon became obvious something was amiss. From a high of $3.80 in January, Hanny's share price haemorrhaged 78 per cent over the summer, reaching a low of 85.5 cents earlier this month.
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> In August, the Stock Exchange was so alarmed by the fall it asked the company twice to explain the unusual share price movement. Hanny said it knew of no reason why the shares were falling. But the answer was about to become clear.

The article continued :

> When shareholders saw the figures it became obvious why the stock price had fallen so much. *They wanted to know when Hanny knew the forecast in its interim statement was not accurate and why they did not tell shareholders*. [our emphasis]

The Stock Exchange too was concerned and pressed Hanny to make a public announcement. Such announcement was to include an explanation for the disparity between the interim results announced in January and the year end results. It was further to include a statement detailing *when* the directors of Hanny became aware that the statements made in the interim report had become 'factually incorrect and misleading to the general public'[29].

In a letter to Hanny dated 30th September 1994, the Stock Exchange summarised its concerns – and no doubt the concerns of a great many investors too – when it wrote :

> … we remain extremely concerned about the fact that there was a statement made in the announcement of interim results of the Company

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[29] See the letter from the Stock Exchange to Hanny dated 17th September 1994.

> on 3rd January, 1994 that "The Group is in a strong position with sufficient available resources to take advantage of investment and growth opportunities. In the absence of unforeseen circumstances, the Directors are confident that the results for the financial year ending 31st March, 1994 will continue to show substantial growth". In addition, on 22nd and 31st August 1994, the Company issued two public announcements pursuant to Paragraph 2 of the Listing Agreement which stated, inter alia, that there were no particular reasons as to why there had been a decrease in the share price. These statements have to be seen in the light of the actual results of the Company for the year ended 31st March, 1994 which were announced on 1st September, 1994 and which contained a profit after tax of $30.8 million as compared to $130.1 million for the year ended 31st March, 1993.
>
> Given the significant disparity between the results for the previous financial year and the results for the financial year just ended, the false picture given in the announcement of 3rd January, 1994 and the statements made by the directors of the Company as recently as the end of August in relation to this matter, the Listing Division, pursuant to Chapter 2A of the Listing Rules, will refer the matter to the Listing Committee for its consideration.

What then had been happenning within Hanny and what had become known to Hanny's management in the first 9 months of 1994? Had the management come into possession of information that Hanny was going to experience a material setback in profitability and, if so, when? Or had the protestations of ignorance appearing in the public announcements made on 22nd and 31st August 1994 been accurate?

B. Information known to the management of Hanny during the first period

In Chapter One, it was explained that with the Memorex acquisition Hanny brought under its control 10 operational subsidiaries, companies carrying on business in the United States, Canada, the United Kingdom, Mainland China, Macau and Hong Kong. In order to ensure the profitable integration of this diverse group of enterprises it was necessary to put into effect a system of accounting information that would reveal the consolidated position

of the Group month by month. On the uncontested evidence, however, it is apparent that, while management accounts were prepared, they were not detailed enough to be of real benefit nor – more importantly – were they consolidated. Consolidated reports were only drawn up twice a year : for the half year and end of year reports.

William TAM, who was then the Company Secretary and the Chief Financial Officer at Hanny, accepted that, because of deficiencies in the accounting systems, in between the preparation of the half year and end of year reports, Hanny was essentially 'flying blind'. He appeared to accept that he *should* have obtained some indication of how Hanny was faring from the unconsolidated information that was being received. But he denied that he had any real way of knowing (or did know) how badly Hanny had been faring since the Memorex acquisition until preparation work began in July 1994 on the consolidated accounts for the year end report. This was starkly illustrated in the following exchange during the course of his testimony :

> Chairman: So this is a publicly listed company, trading daily on the stock market, and those at the helm of the company have no idea whether the results will be good, bad or awful?
>
> A: Yes. There are a lot of companies like this … if they do not invest in the software and the systems and put enough resources behind [them].

William TAM was an experienced accountant and held an MBA. It may, therefore, seem unlikely that he could have been as ignorant of Hanny's looming woes as he professed. But in late 1994, when Hutchison Whampoa seconded a team of senior managers to Hanny, reports compiled under their direction indicated that Hanny's existing systems were simply not adequate. One memorandum[30] stated a large number of deficiencies which included :

- Although Hanny management has specified a standard package of financial information to be submitted by subsidiary companies, it is not consistently conformed to by all subsidiaries;

- There is no standard costing control system for the manufacturing

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[30] This was a memorandum dated 31st October 1994 issued by Hutchison Whampoa's Internal Audit Department. It was addressed to Joseph LI.

subsidiary (Hanny Magnetics (Zhuhai) Ltd.) in China;

- There is no monthly consolidated financial statements. Therefore the monthly reported profit would be overstated by the intercompany profit;

- On the human side, our contacts with the account staff gave us the impression that the staff morale is not high; …

Joseph LI, the man seconded in early October 1994 to Hanny as Chief Financial Officer, testified that, from what he could see upon his arrival at Hanny, William TAM had not been able to cope. In his opinion, he said, it would be a fair remark to say that in the first half of 1994, with a less than satisfactory accounting system, senior management at Hanny would not have had an accurate, consolidated picture provided to them on a monthly basis.

It must also be stressed that none of the implicated parties suggested anything to contradict William TAM's assertion that, until his office began to prepare consolidated accounts in July, he had no idea of how well or badly Hanny had fared since the beginning of that year. While WONG Sun did not testify, it was manifestly his case that when William TAM broke the bad news to him he simply did not believe it; in short, it was his case that, as Chairman, he too was ignorant on a month to month basis of Hanny's true financial position.

In all the circumstances, the Tribunal is satisfied that, even if in the first half of 1994 individuals within Hanny may have harboured concerns as to the company's ability to finance the Memorex acquisition, it was only in July that such concerns (if they existed) were made concrete – and that was brought about by the tangible evidence contained in the end of year draft accounts.

What then of those accounts? When were they prepared and what information did they contain?

William TAM was shown (and recognised) a number of draft accounts that were prepared in his office between 9th and 15th July 1994. The documents were printed by computer and bore both the date and time at which they were printed. It is understandable that after a lapse of approximately 5

years, in the absence of some contemporaneous note to refresh his memory, William TAM could no longer recall which account (or printed portion of a set of accounts) alarmed him sufficiently to cause him to consult senior management. The accounts to which he was referred in particular were :

(i) A draft profit and loss account for the Group was printed on *9th July (at 4:38 p.m.)*. It revealed a loss for the Group of HK$22.8 million, the largest single loss coming from Hanny Magnetics Ltd. with a loss of HK$103.8 million. That draft, however, bore the hand-written endorsement 'rough work' and for that reason, said William TAM, he could not say whether he had been shown it or not. On that date, he said his staff may not have 'fully determined that this should be the final figure'.

(ii) A further draft profit and loss account for the Group was printed on the following day; that is, on *10th July (at 8:51 p.m.)*. This second account showed a loss for the Group in the lesser sum of HK$16.948 million. The single biggest loss remained with Hanny Magnetics in the same sum of HK$103.8 million. Although this document was endorsed with some handwritten figures, it was *not* marked 'rough work'.

(iii) The next day; that is, on *11th July (at 4:38 p.m.)* a draft profit and loss account for Hanny Magnetics only was printed. This confirmed the amount of loss appearing in the 2 earlier consolidated profit and loss accounts; namely, HK$103.8 million (compared to a profit of HK$18.63 million in the previous financial year).

(iv) A further draft profit and loss account for the Group was printed on *15th July (at 4:08 p.m.)*. This revealed a Group loss of HK$72.76 million. That figure, however, was crossed through and next to it a handwritten figure was inserted showing a loss of HK$60.04 million. The Hanny Magnetics loss remained at HK$103.8 million.

One of those involved in preparing the accounts was Geoffrey SUEN who, having identified the drafts described above, was asked whether he had

reported to William TAM. In respect of this matter, the transcript reads :

> Q: Did you have discussions with William TAM about the developing consolidated calculations that we have seen; 9th, 10th & 15th?
>
> A: Well, usually, after we have put in some figures in any preliminary results, after checking, it is usually conveyed to him.
>
> Q: Why?
>
> A: Well, because he is my boss.
>
> Q: We have changing dates on these documents. As a matter of practice, when would you go to see William TAM in relation to, say, some figures that are punched out on the 9th?
>
> A: I would say within a few hours.

The Tribunal can well understand Geoffrey SUEN recalling that he would have reported to William TAM 'within a few hours'. A loss of HK$22.8 million (after a profit in the previous year of HK$130.116 million and an interim profit in the current year of HK$82.36 million) was news of such clear importance that it would no doubt act as strong motivation to any person in his position to report to a superior, even if only to voice provisional fears with the *caveat* that the figures still constituted 'rough work'.

But what steps, if any, were taken by William TAM to advise WONG Sun and other board members?

William TAM testified that, as soon as he realised that Hanny was facing a material reversal, he reported directly to WONG Sun. There was no formal, pre-arranged meeting, he said, and only he and WONG Sun were present. A conversation took place, he said, and in that conversation he told WONG Sun that Hanny was facing a 'big loss'. When he passed on the news, he said, WONG Sun seemed surprised. WONG Sun instructed that immediate steps be taken to verify the results including a fresh check of inventory at the Zhuhai factory.

However, it is apparent that, within a matter of days, WONG Sun had accepted that the dismal figures appearing in the draft accounts were essentially

correct. William TAM said that he was instructed by WONG Sun to find ways to attempt to minimise the year end loss. He considered a number of options, he said, which were discussed with Hanny's accountants, Deloittes.

On 18th July 1994, a meeting took place with Deloittes. WONG Sun and William TAM represented Hanny while 3 accountants from Deloittes were in attendance. A record of the meeting held on 18th July was kept by William TAM. The record was headed 'Discussion Notes' and a copy is attached to this report as Annexure 'XIX'.

William TAM, when pressed to describe the true nature of the measures being taken at that time, accepted that in down-to-earth, realistic terms, they were, in his opinion, 'pretty desperate'.

One of the strategies employed in an attempt to present a brighter end of the year picture involved a very material increase in the wastage provision for the newly acquired Memorex inventory. This would reduce the net asset value of what had been purchased and thus increase the goodwill factor of the purchase price which could in turn be capitalised as an intangible asset and then amortised over an extended period of time[31]. By 8th August it was a strategy being vigorously pursued by Hanny. This is illustrated by a faxed letter of that date from William TAM to senior personnel in the North American operations, copied to Eugene KUO and S.W. Park. The faxed letter bears the endorsement : *URGENT!* and begins :

> We had a meeting with Deloitte Hong Kong yesterday and it was agreed that additional inventory provision could be made and capitalized as Goodwill to be written off over 18 years. As Deloitte HK has instructed Deloitte US/Touche Ross UK to re-audit Memtek accounts using lower materiality levels, this gives us the opportunity to <u>maximize</u> the Stock Provision, and to reduce negative impact in 1993/94 and future years due to inventories sold at losses (after deducting selling expenses) or inventories being written off.

On the same date, William TAM sent a faxed letter to Sanrita WONG and Eugene KUO at the United States headquarters. Sanrita WONG was at

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[31] This matter is dealt with in more detail in Chapter One, page 14.

that time travelling outside of Hong Kong, one of her destinations being the United States. That letter too bore the same endorsement – *URGENT!* – and read :

> Mr. WONG Sun requested me to issue this memorandum to explain the implication of capitalizing additional inventory provision as Goodwill, to be written off over 18 years :
>
> 1) As Deloitte HK has instructed Deloitte US/Touche Ross UK to re-audit Memtek accounts, this gives us the opportunity to <u>maximize</u> the Stock Provision, and to reduce the negative impact on profit in 1993/94 and future years, due to inventories sold at losses (after deducting selling expenses) or inventories being written off. However, since Stock Provision and other Assets Provision amounting to US$8,547,334 has already been capitalized as Goodwill in current year balance sheet (which is before future adjustments, if any, to be made after this re-audit), this assumes that the Memorex brand name will continue to have positive contribution to our Group. However, if the financial results of Memorex Business in 1994/95 turns out to be in loss situation, according to Deloitte, they may have to write off the Goodwill to Profit and Loss account, which has a very significant impact on 94/95 results. Deloitte suggested that our ITP practice for 1994/95 should ensure the Memorex Business Division within the Hanny Group will generate profits.
> 2) …
> 3) The stock provision for Memtek International Ltd. already made in existing account package is about 2.75%, and WONG Sun wish to attain 25%. I already requested the assistance of Anne Scorey and Michael Osborne (the New Memtek F.C.) to follow up on the detail work (per attached memo) and WONG Sun wishes to ensure the work is completed within this week *under the supervision of Sanrita WONG.…* [our emphasis]

Clearly, therefore, from mid-July until mid-August steps were taken by Hanny to obtain a situation where, in accounting terms, the best possible light could be shed on an otherwise sombre picture. In this regard, the auditors

were consulted and instructions sent to the senior management of the recently acquired Memorex operations to take all necessary action. S.W. Park, Eugene KUO and Sanrita WONG were sent explanatory letters. Sanrita WONG was, in fact, directed to supervise one of the re-assessment exercises. However, it does not appear that at that time – at least among the senior management of Hanny – there was any code of confidentiality being imposed.

While this exercise was taking place, of course, Hanny's share price was falling. Indeed it was falling so precipitously that the Stock Exchange requested Hanny on 2 occasions to publish an announcement to the investing public. The first such announcement published on 23rd August 1994 began with the following words :

> We have noted the recent decreases in the price of the shares and warrants of the Company. *The Directors do not know the reason for the decreases*. [our emphasis]

The announcement concluded with the words :

> *… neither is the Board aware of any matter discloseable under the general obligation imposed by paragraph 2 of the Listing Agreement which is or may be of a price-sensitive nature.*[32]

What, therefore, was the position at the time to justify such a protestation of ignorance? Since the middle of July it is clear that both WONG Sun and William TAM had known that Hanny was facing a 'big loss'.

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[32] Paragraph 2 of the Listing Agreement reads in part as follows :

Generally and apart from compliance with all the specific requirements of this Agreement, the Issuer shall :-

(1) keep the Exchange, members of the Issuer and other holders of its listed securities informed as soon as reasonably practicable of any information relating to the group (including information on any major new developments in the group's sphere of activity which is not public knowledge) which :-
  (a) is necessary to enable them and the public to appraise the position of the group;
  (b) is necessary to avoid the establishment of a false market in its securities; and
  (c) might be reasonably expected materially to affect market activity in and the price of its securities; and

  2.1 …

  2.2 When developments are on hand which are likely to have significant effect on market activity in or the price of any listed securities, it is the direct responsibility of the directors to ensure that such information is kept strictly confidential until a formal announcement is made. To this end the directors must ensure that the strictest security is observed within the Issuer and its advisers and if at any time it is felt that the necessary degree of security cannot be maintained or that security may have been breached, an announcement should be made.

In order to put the best light possible on the end of year figures, an exercise of some magnitude was then undertaken. However, at no time was there a direction that matters must be kept strictly confidential. The chance of adverse information leaking to the wider market must, therefore, have been a real possibility. Hanny's share price had continued to drop although the Hang Seng Index had essentially stabilised. Clearly, investors were concerned. Yet the announcements said that Hanny's Board of Directors did not know the reason for the drop in share prices. Further, the announcements indicated that the Board was not aware of any matter which would be likely to have a significant effect on market activity[33].

If the intention of the Hanny announcements was to re-assure the market and prevent a further decline in its share values, it did not succeed.

On 24th August, *Sing Tao* published a negative article under the headline : 'Brokers expect Hanny's results to fall below expectation'. The article quoted the opinion of 2 financial analysts. The first analyst was quoted as being of the view that :

> … the dumping of Hanny shares by fund managers may have been related to the high asset-liability ratio of 1:1 for the company. Moreover, given the fierce market competition and the glut of floppy disks globally, profit margins of the industry are now depreciating. He originally forecast Hanny's profits for 1994 and 1995 at HK$156 million and HK$215 million respectively. However, due to the huge loans piled up by Hanny, its bloated interest burdens and the write-off provisions for the companies acquired, *the upcoming announcement next week is likely to fall seriously below expectation.* For the time being, it is apt to adopt a wait-and-see strategy pending the publication of its results. [our emphasis]

As earlier stated, a week later, on 2nd September 1994, Hanny published its results for the 1993/1994 financial year. Market reaction was negative.

C. Did 'relevant information' come into existence

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[33] See paragraph 2 of the listing agreement *supra*.

at any time during the first period?

The Tribunal has had no difficulty in coming to the finding that relevant information *did* come into existence in the first period. The reasons why the Tribunal came to this finding, are set out below under separate headings, each listing an essential element of relevant information.

(i) The information must be specific in nature …

The Tribunal is satisfied that, for those persons who knew of them, the draft accounts for the year end report compiled between 9th and 15th July 1994 constituted a watershed in the history of Hanny's affairs. Prior to those accounts, Hanny's history had been one of almost unabated success. In the Memorex acquisition unprofitable operations may have been purchased but the belief was there that rationalisation would rapidly turn them into profitable enterprises. As late as 8th July 1994, William TAM gave an interview in which he advised the media that Hanny expected to see a 'turnaround' in the Memorex operations by the following month. By early July, therefore, on the public front, all was looking good. The draft accounts, however, showed that such optimism had been utterly unfounded. The Memorex acquisition had brought with it the most profound problems.

In his report, Clive Rigby commented in respect of the draft accounts that their 'high shock value' was clear. The evidence shows that, when WONG Sun was first informed that the accounts revealed a 'big loss', he expressed disbelief and demanded that figures be re-checked. However, within a matter of a week or so he was instructing William TAM to come up with creative solutions to place the best possible gloss on the end of year figures. Clearly, therefore, whatever his initial state of incredulity, the Tribunal is satisfied that it did not take him long to accept the sobre reality of the situation.

While news of a 'big loss' may not be precise, it nevertheless remains specific. As mentioned in Chapter Three of this report, quoting the *dicta* of an earlier tribunal[34], information is not rendered general, as opposed to specific, merely because the information is broad and allows room, even substantial room, for particulars. In any event, even though the accounts prepared in July

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[34] See page 75, a quotation from the Public International Investments report.

were in draft form, they were precise each time as to the amount of loss suffered by individual subsidiaries or by the Group as a whole. In this regard, for example, the early draft accounts remained constant in reflecting Hanny Magnetics as suffering a loss of HK$103.8 million. They also remained constant in showing a Group loss.

The Tribunal accepts that there may well have been a need for further internal rationalisation; for example, in respect of the Group's inter-pricing policy, but the Tribunal is satisfied that those first consolidated draft accounts were accepted by William TAM and his staff as being essentially accurate in the damaging result portrayed and that it was this clear message which was passed to WONG Sun.

The Tribunal is further satisfied that what took place after the shock of the early draft accounts had been absorbed was a determined attempt to put the best gloss possible on what the average investor would correctly see as being disastrous results. As mentioned earlier, William TAM was constrained to accept that the accountancy measures taken were 'pretty desparate'. The Tribunal is satisfied that members of the Hanny management team who learnt of those measures, even if they were not qualified accountants or sophisticated in financial matters, must have appreciated that far-reaching - indeed drastic - measures were being taken, such measures being necessitated by the unexpectedly grave picture of Hanny's position that had emerged from the preparation of the end of year accounts.

Certainly, both William TAM and Geoffrey SUEN were despondent, so much so that both men resigned from Hanny in the following months. In this regard, William TAM testified to the following effect :

Q: Were you happy at Hanny?
A: Is that relevant?
Q: Towards, say, from June 1994 onwards?
A: Is that relevant?
Q: Yes.
A: I was not happy.
Q: Why?
A: Because the company was going down and I was working very hard, but there seemed to me no future.

Geoffrey SUEN testified that he left Hanny towards the end of 1994 because he did not think it was a 'viable proposition'.

Evidence shows that on 18th July 1994 WONG Sun and William TAM conferred with Hanny's accountants to consider proposals for various major adjustments in the manner of presenting Hanny's end of the year results. As to the meeting held that day, Clive Rigby commented in his report :

> Different companies frequently treat similar events or items in different ways. This is often regarded as acceptable. However, when a given company changes its own treatment on the capitalization or write off of items such as goodwill from one year to the next, this is often regarded as troubling. An analyst would quite rightly question whether or not a company was trying to "dress up its accounts". The discussion notes [of 18th July meeting] covering other items such as changes in methods of depreciation and capitalization of fees would definitely raise a red warning flag to any interested observer.

By 8th August 1994, senior management was being informed of the 'implication' of the measures being taken, including the fact they were being taken to 'reduce the impact on profit' for the 1993/1994 financial year.

It is true, of course, that the final end of year results did not reveal a Group loss but rather a profit of HK$30.818. But, when compared with the previous financial year, it still represented a drop of 76% in profits attributable to shareholders. Equally stark was the fact that, when compared with the interim results published in January of that year, it showed that, since the purchase of the Memorex operations, Hanny had sustained a loss of some HK$50 million. In short, the Tribunal is satisfied that those persons inside Hanny who knew what was being done in respect of the end of year accounts must have appreciated that, even with a small profit declared, those results, when compared with what had gone before, would still be seen by the investing public as being disturbingly poor.

(ii) The information must be of the kind that would be likely materially to affect the share price

When Clive Rigby testified before the Tribunal, he was certain that in his professional opinion, news of the reversal in Hanny's fortunes, if known generally to the market would have brought about a material drop in Hanny's share price. In this regard, his testimony reads in part as follows :

> Q: The question is the basic one that you are here to answer : what is the relevance of this information that this company, Hanny, is going to incur a big loss? How material is that piece of information? How likely materially to affect the price of the shares would it have been, had it been known to those accustomed to deal in the shares or likely so to do, if known?
>
> A: As I have said in my written statement, it would have a very bearish effect on Hanny Magnetics' share price if the public knew of it. My reason for thinking that is that, up until that period, the information available to the public was essentially good news; it was growth, it was expansion, it was optimism, and all of a sudden we are looking at a complete reversal of fortune.
>
> Q: So would it likely materially affect the price of the shares?
>
> A: Oh, very much so, yes. *I would expect it to drop the share price meaningfully*.
>
> Chairman: If this information were in the public domain, it would be information based on draft accounts, not final accounts; would that alter your view at all?
>
> A: No, not really because markets hardly ever wait for final confirmation. Markets will react to rumours, they will react to opinion, they will react to news articles that can be quite general and quite vague, so you do not need formal, official published results. [our emphasis]

As to the events that took place after the shock of the draft accounts had been absorbed, Clive Rigby was of the opinion that, if the investing public was aware of these measures being taken and *why* they were thought necessary by Hanny's senior management, that information too would bring about a material drop in Hanny's share price. For example, in respect of William TAM's faxed letters of 8th August 1994 to members of Hanny's senior management then in the United States, Clive Rigby said :

A. I think there would be at least a sector of the market that, if they knew of this – if someone found a piece of paper like this in the back of a taxi – I think that quite a few people would regard it cynically. On page 98 [of my report] I wrote :

> "These notes clearly indicate high-level management concern over the audit results and a definite interest in presenting the figures in as good a light as possible or at least trying to mitigate the damage by taking maximum advantage of accounting flexibility."

I go on to say that a critic – somebody of a cynical frame of mind – might think this is pushing the envelope.

Q: You conclude by saying this "Clearly this background information would be very negative as concerns the stock price were all the details made public".

A: Yes.

The Tribunal has accepted the accuracy of Clive Rigby's evidence in this regard. The Tribunal has no doubt that if information of what was really happenning at Hanny from about 11th July 1994 onwards had been shared with the investing public it would have brought about a material drop in the value of Hanny's shares. The very nature and extent of Hanny's reversal of fortunes makes that obvious.

If further proof was needed, the reaction to Hanny's results when they were formally published on 2nd September 1994 is sufficient. Despite a major fall in value over the previous weeks, when Hanny's end of year position was spelt out in black and white the drop in value continued. Between 2nd and 7th September 1994 Hanny shares dropped from HK$1.01 (which was the closing price on 1st September) to 85.5 cents (which was the closing price on 7th September), a further fall in value over 5 trading days of some 15%.

(iii) The information must not be generally known to the market …

The Tribunal has had no difficulty in finding that, whatever rumours may have circulated in some segments of the market, especially during late July

and August, the market did not know generally what was happenning in Hanny concerning its end of year results.

Hanny's interim results published at the very beginning of 1994 had shown an increased profit. WONG Sun, in his report, had predicted that, in the absence of unforeseen circumstances, the directors were confident of continued growth. Shortly thereafter, Peregrine had promoted Hanny shares as a good buy. Even in July the news coming from Hanny to the market generally was bullish. William TAM's press interview indicated that loss-making Memorex operations would be made profitable within a matter of weeks.

During the critical period of July and August 1994, Hanny made no official announcement warning the market that its results for the 1993/1994 financial year were going to be worse than expected. This was despite a fall in its share price during that time that was so marked that the Stock Exchange demanded that Hanny print an explanation for the collapse. Hanny made a teletext announcement on 22nd August and published a formal announcement in the press the next day stating that the directors did not know of the reason for the decrease nor did they know of anything of a price sensitive nature that should be disclosed.

In the opinion of the Tribunal, it is understandable that William TAM, who Bryan-Brown described as a 'low-level executive' who would not say anything without clearing it first with WONG Sun or one of the other directors[35], was so concerned at the prospect of his name being placed on the announcements. It was, in fact, William TAM's evidence that, before agreeing to place his name on them, he demanded that WONG Sun give him written authority. In this regard, the transcript reads :

> Chairman: I am sorry, why would you ask the chairman to sign a piece of paper saying to him : "You put your name on this piece

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[35] Bryan-Brown gave this description when testifying about his early dealings with Hanny. The transcript of his evidence reads :

> As far as I recall, all information were given orally. The source was from one of the three directors, WONG Sun, Sanrita WONG and Eugene KUO. William TAM led a lot of the conversations like details on sales; increase in expenses. He appears to have sought the information directly from WONG Sun, Sanrita WONG and Eugene KUO. … Those three were the most actively involved in giving views and decisions. William TAM was very much a functionary, a low-level executive, and he would not really say anything at all without clearing it first with WONG Sun or one of the others. This is against the background of a company where it was difficult to get any sensible information at all out of them …

of paper saying that you have authorised me"?

A: Why? Because I could not just take his verbal, I have to keep a record.

Chairman: But why do you have to go to the chairman and say : "All right, I will put my name to this, but I want you to sign a little piece of paper that I am going to keep, saying that you have authorised me." I am not a businessman, but I will tell you what springs to my mind: you were unhappy about putting your name to it; am I right or am I wrong?

A: Yes, I did not feel comfortable.

It was William TAM's testimony, which the Tribunal accepts, that he urged WONG Sun to take professional advice before any announcement was made. This suggestion, however, was rejected by WONG Sun. Although during cross-examination William TAM avoided any admission, it was quite patent that his concern back in August of 1994 was based on his clear knowledge that the announcement was misleading. William TAM did not impress the Tribunal as a man of much moral courage. As Bryan-Brown commented, he was very much in the thrall of WONG Sun and his inner circle of directors : that was apparent to the Tribunal. His job was at stake. He simply lacked the courage to say no. So he allowed his name to be used.

But a lack of moral courage, while a failing to be considered carefully in respect of credibility, does not mean *ipso facto* that the person is not to be believed. Indeed, the Tribunal accepted William TAM as being a witness who, while he attempted tepidly to protect his own reputation, was nevertheless essentially a witness of the truth. William TAM was uncomfortable in being associated with the public disclaimers made on 22nd, 23rd and 31st August 1994 because he knew that, whatever the language used, those announcements misrepresented what he and a number of the board members knew to be the truth; namely, that Hanny would be announcing very poor results for the 1993/1994 financial year; that the matter had not been kept confidential within the Group and that accordingly, the alarming drop in the share price could very well be caused to a material degree by rumours of the bad news being acted upon in the market.

In the opinion of the Tribunal, while William TAM's supine involvement in the publication of the announcements deserves censure, that

censure must also be directed at WONG Sun. Even though WONG Sun did not testify before the Tribunal and was not therefore able to advocate his own side of the story, the Tribunal is at a loss to see how that could have affected its findings in regard to his role in the publication of the disclaimers.

The testimony of all parties involved (supported by documentary evidence) makes it clear that WONG Sun remained throughout that first period very much in command of Hanny and directed what should or should not be done. The Tribunal is satisfied that there is no truth in the suggestion made during the course of the inquiry that, in the face of Stock Exchange demands, William TAM proceeded on his own - without any reference to WONG Sun or any member of the Board - and published the disclaimers. Bryan-Brown, an incisive, perceptive witness, not afraid to honour his oath and speak the truth, testified that William TAM struck him as a man who would make no decision of any consequence without first clearing it with WONG Sun or his sister or some other director. The Tribunal is satisfied that, in respect of the published disclaimers, that observation reflects the truth of the matter. William TAM *did* confer with WONG Sun and it was WONG Sun who persuaded William TAM to issue the announcement in his name as Company Secretary. The only reasonable inference to be drawn from the primary facts accepted by the Tribunal is that WONG Sun did not wish his name to appear because he too knew that, at best, the announcement was being economical with the truth.

While, to employ Clive Rigby's observation, Hanny's public disclaimers, would probably have been taken 'with a pinch of salt' by experienced market players, it does not detract from the fact that Hanny attempted to keep the news of its poor results out of the public arena until the results themselves were published.

But news that will materially affect the share price of a company may become 'generally known' before any formal announcement is made. A combination of widespread, credible rumour; leaks perhaps from the company itself and also newspaper opinion may (in restricted circumstances) constitute general knowledge. The question to be asked, therefore, is when did the news of the true nature of Hanny's poor results become generally known to the market, was it only when the results were published by Hanny or was it before that time?

Clive Rigby accepted that, when Hanny published its first disclaimer in August, it resulted in a material fall in the share price. It was his evidence that many in the market would have read that disclaimer as *not* reflecting the truth and would have traded on the basis that there had been bad developments in Hanny that the investing public was not being told about. In addition, he accepted that on 24th August, the day after the disclaimer, those accustomed to dealing in Hanny would no doubt have become aware of an article in *Sing Tao* warning that Hanny's results were likely to fall seriously below expectations[36].

It was put to Clive Rigby that this combination of factors would have resulted in a situation in which, by 24th August, the market generally would be expecting end of year results 'substantially worse' than earlier expected. Clive Rigby agreed with his suggestion.

The Tribunal does not criticise Cilive Rigby's evidence in this regard. But what must be remembered is that the market on 24th or 25th August was still trading essentially on the basis of rumour and speculation, indeed speculation in the face of Hanny's denial that it knew of any reason for the fall in the share price. The market was not trading on the basis of information given out by Hanny so that investors generally would *know* the true situation and be able to deal with each other on level terms.

Hanny itself had publicly announced that it knew of no reason to explain the fall. Certainly, cynics and shrewd investors may have accepted that to be a plain falsehood but there has been no evidence that cynics constitute the general Hong Kong market or that investors generally are shrewd enough to read behind the plain language and intent of such protestations. Why else would the Stock Exchange and investors themselves have demanded an explanation from Hanny concerning its perceived duplicity after the formal results were published? Why would such apparent anger have been expressed at the annual general meeting? Why do so if the language contained in Hanny's announcements of 22nd and 23rd August was generally taken to be some sort of stock market code for : 'do not accept a word we are saying'?

Yes, the *Sing Tao* article of 24th August was bearish. But while it was based no doubt on analysis of current public data, it remained essentially

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[36] Extracts of that article are reproduced *supra* : see page 95 of this chapter.

speculative. The language used in the article spoke of the forthcoming results being *likely* to be seriously below expectation; it did not state the matter as one of fact. Speculative articles abound : some get it right, some get it wrong.

The Ordinance defines relevant information as information which is *not generally known* to those persons who are accustomed or would be likely to deal in the shares. In light of that definition the occasions must be rare when those with inside information can say : 'yes, we knew the true situation and purposefully held it from the market but the market sensed something wrong and a number of press articles gave warning signals and consequently we have not offended the legislation'.

Clive Rigby was no doubt correct when he said that by about 24th or 25th August, a week, before publication of Hanny's results, the market would have expected poor results. But the gravemen of the matter is that the expectation would have been built on rumour, on the collapse of the share price and on speculative press articles. It was not built on knowledge of the true state of affairs in Hanny. Only the 'insiders' at that time possessed such knowledge of the true state of affairs.

It must also be noted that Clive Rigby made it plain that the 15% fall in the share price in the days after publication of the results was evidence that the market had not fully discounted the degree of the bad news that had been expected. In the opinion of the Tribunal, even in respect of a company like Hanny, a 15% fall in a matter of days is a material fall not a mere blip, especially following a history of major decline prior to the publication of the results. It constitutes evidence that, even though the great majority of investors may have expected poor results, the market generally did not *know* the full dimension of the poor news until it was formally presented in black and white and could be rationally analysed.

In all the circumstances, the Tribunal is satisfied that the information of Hanny's difficulties was not generally known to the market until 2nd September 1994 when the results were published.

CHAPTER FIVE

WHO POSSESSED RELEVANT
INFORMATION IN THE FIRST PERIOD

(Did any of the implicated parties come into possession of relevant information during this period and, if so, when?)

As to the implicated persons who came into possession of relevant information during the first period, the Tribunal is satisfied that 3 of them did so. They were WONG Sun, Sanrita WONG and William FUNG. Whether they traded on that information will be considered in Chapter Six.

A. WONG Sun

As earlier stated, the Tribunal is satisfied that relevant information first came into existence when accounts were being prepared under the direction of William TAM for Hanny's 1993/1994 annual report. Those draft accounts (which have been detailed earlier in Chapter Four[37]) were compiled and printed between 9th and 15th July (inclusive).

In respect of these accounts, William TAM testified that, as soon as he realised that Hanny was facing a material reversal, he reported directly to WONG Sun. He said that only he and WONG Sun were present. He said he told WONG Sun that Hanny was facing a 'big loss'. WONG Sun, he said, appeared very surprised; incredulous may be more accurate. WONG Sun demanded that the figures be checked again, especially inventory figures at the Zhuhai factory.

As Chairman of Hanny, it was never disputed that WONG Sun learnt that the Group had suffered a material reversal. It is clear, for example, that he gave instructions to William TAM to put measures into effect to make a number of major changes to the manner in which the end of the year accounts would be presented. The real question in issue, therefore, was *when* WONG Sun came into possession of relevant information?

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[37] See page 90.

William TAM remembered just one occasion when, based on the figures in the draft accounts, he told WONG Sun that Hanny was facing a 'big loss'. However, he had no independent recollection of when exactly that had been. In this regard, for example, his testimony read :

> Q: Can you help the tribunal with this single matter; did you draw to Mr. WONG Sun's attention the consolidated figure downturn?
>
> A: Okay, put it this way …. My memory is not very reliable, and it could have been the consolidation schedules or these schedules (indicating). I could not remember vividly which one it was, because even on the basis of Hanny Magnetics Limited alone, the big difference in the results could have alerted me to go to WONG Sun, or the consolidated figures. It could be either one of them. So I could not recall which particular documents alerted me to go to WONG Sun.
>
> Q: In simple terms, what was the message you were giving him?
>
> A: The company is going to incur a big loss.

The Tribunal considers William TAM's evidence in this regard to be entirely credible. He was attempting to remember back over 5 years and had no written record to refresh his memory. But what cannot be ignored is his evidence that he went to WONG Sun *as soon as he realised that the figures revealed a significant reversal*. It was never part of his evidence that he sat on the accounts for a few days hoping that somehow a fresh set of calculations would present a rosier picture.

Geoffrey SUEN testified that, while he too had no independent recollection, having studied the consolidated profit and loss account printed on 9th July, he believed that he would have gone to William TAM within a few hours to tell him of the figures. As mentioned earlier in this report, the Tribunal finds it entirely credible that he would have done so, even in respect of an account that was endorsed : 'rough work'. That first account was printed on a Saturday in the late afternoon. But it is notable that the next day – a Sunday – a second consolidated profit and loss account was run off. This was done late on Sunday evening. Evidence shows that this second account

contained new figures and revealed a reduced loss although a loss nevertheless and therefore a reversal for Hanny of some magnitude. All the evidence indicates that personnel in the accounts department must have been working through Sunday to bring out the amended figures.

In the opinion of the Tribunal it defies reality, having accepted the truth of William TAM's evidence, to hold that he would not have gone to WONG Sun with this second consolidated account. Nothing appears on the face of this second draft of a consolidated loss to suggest that somehow its contents were still being queried within the accounts department. Once this second account was printed, William TAM would have been made aware of its contents and would then, as soon as possible, have confronted WONG Sun with the bad news. On a consideration of all the evidence and in light of the primary facts found, the Tribunal has concluded that the overwhelming inference – indeed the only inference that can reasonably be reached – is that William TAM must have spoken to WONG Sun by the latest at some time on 11th July; that is, on the Monday.

In an interview with the SFC on 7th May 1997, William TAM was asked about certain documents, including the Hanny Magnetics profit and loss account dated 11th July 1994. In his answer he said :

> "Normally these documents are some of the internal documents of the accounts department. We would not show the whole document to the management. But I remember informing WONG Sun *immediately* as soon as I knew that there was such a big loss. But he did not seem to believe (in what I said), and even asked me to look for the figures, such as stock figures, to see if any figures were missing." [our emphasis]

While William TAM in this interview was referring to an account printed on 11th July, there is no evidence on the face of the recorded interview document that he was at that time shown all the draft accounts in chronological order. In addition, the words spoken by him in that interview are general in nature; he does not identify the draft account of 11th July as being the single document which motivated him to report to WONG Sun.

But was WONG Sun present in Hong Kong on Monday, 11th July?

Immigration records show that, while WONG Sun was travelling a fair amount at this time, he was not out of Hong Kong on 11th July. The records show that in the early afternoon of 12th July (at 12:50 p.m.) he boarded a ferry for Macau, no doubt en route to the Zhuhai factory, returning to Hong Kong the following day in the late afternoon (at 3:44 p.m.). Again, on 16th July he left Hong Kong for the Mainland by ferry, departing in the late afternoon (at 4:58 p.m.) and returning the next day in the early afternoon (at 2:23 p.m.).

But what of WONG Sun's initial state of incredulity? WONG Sun demanded an inventory check at Zhuhai and travelled there himself on 2 occasions over the next few days. In light of that, it was his counsel's submission that WONG Sun could only have 'begun to smell trouble' after he returned from Zhuhai.

The Tribunal does not agree. WONG Sun did not dismiss the news out of hand. It had been brought to him by his chief financial officer. He may well have been incredulous and demanded a check. The shock of receiving unexpected news of this kind often brings with it a sense of incredulity. But demanding a check and dismissing it as not capable of belief are different things. WONG Sun took immediate steps to check matters. In addition, as will be seen in Chapter Seven, the Tribunal is satisfied that WONG Sun acted on the news by beginning to sell Hanny shares.

In all the circumstances, the Tribunal is satisfied that it was at least by 11th July 1994 that WONG Sun received the news from William TAM that Hanny had suffered a 'big loss'. The Tribunal is satisfied that WONG Sun did not dismiss the news as nonsense. As Chairman, having received news of such seriousness, he approached the matter with equal seriousness. By (or on) that day he was in possession of specific information which, if known to the market, would have caused a material drop in the price of his company's shares.

B. Sanrita WONG

When she testified before the Tribunal, Sanrita WONG denied knowing of the loss revealed by the draft accounts compiled in July 1994; she also denied knowing about measures taken to present a brighter end of year picture when the annual results were published. It was her evidence that she only learnt of the marked downturn when – along with the rest of the investing

public – she read the published results and presumably the press comments concerning those results. She was at the time an executive director and Deputy Chairman of Hanny but she testified that she knew nothing of matters which must have been consumming the senior management of Hanny throughout July and August 1994.

She would not even accept that she had read a draft of the final figures circulated to the directors a week or so before the formal publication of the results. In this regard, when pressed on the point, her testimony read :

> Okay, first of all, if they are going to give me some document, and if I do not understand those figures, even if they have given it to me, because I do not know how to read it, I have not paid attention to those things. I do not know if they have given it to me or not, because I do not know how to read it. So I just put it aside.

Her protestation that she possessed an alarming ignorance of financial matters could not be misinterpreted.

> A: … anyway. If you are talking to me about goodwill here – I do not even know what they mean by goodwill.
>
> Chairman: Sorry, are you saying that you do not know the business concept called “goodwill”?
>
> A: I really do not know. There are a few terms which you brought out which I do not understand.
>
> Chairman: Deputy Chairman of a publicly listed company in a financial centre such as Hong Kong – you do not know what goodwill means?
>
> A: I really do not know.
>
> Chairman: You really do not know?
>
> A: I really do not know.

Sanrita WONG protested that not only was she ignorant of the most basic financial concepts but she was in no position to be helped by her fellow directors. Contrary to the observations of Bryan-Brown that information flowed rapidly on an informal basis between the directors, Sanrita WONG spoke of an isolated, non-communicative group of directors, each staying hermit-like in their offices. Discussions did not take place, seemingly not

between brother and sister or between old friends (i.e. WONG Sun and William FUNG) and not even when matters of considerable moment were affecting Hanny's fortunes. One portion of Sanrita WONG's testimony illustrates her contention :

> Q: Did you discuss how well the company was doing with your brother, the chairman – you the deputy chairman, "how are we doing this year? What are our 1994 figures going to look like?" Did you have any discussions like that with him?
>
> A: No, I really did not.
>
> Q: Any reason why not?
>
> A: The company's results – I mean, the way it came out, that will be it, then there is no need for me to discuss.
>
> Chairman: Sorry, if you are working in a business and it is trading, and you have several million shares in the business and you are the deputy chairman, do you not on a day-to-day basis discuss with other directors at board meetings, in the office, over coffee, problems, good things and generally how it is going?
>
> A: I am sure everyone here finds it very surprising why, in the company, we are not talking. Because in fact, between me and Mr. WONG, or Mr. WONG and Mr. FUNG, or me with Mr. FUNG – *we have nothing to talk about*. We seldom talked. I mean, other people find it very surprising too. [our emphasis]

To the Tribunal's recollection, however, no witness spoke of such isolation. To this end, it must be remembered that Hanny had a relatively small board, just 4 persons at that time. It must also be remembered that WONG Sun and Sanrita WONG were brother and sister; WONG Sun and William FUNG were old friends who lived in the same residential development (where they owned properties) and socialised together. Even Louis LO, who held positions of authority in Zhuhai, was the brother of WONG Sun's mistress. Sanrita WONG, however, would not be dissuaded from her contention that the directors did not confer with each other outside of the boardroom. For example, when asked if, during the critical period of late July and August 1994 she had detected any concern by her fellow directors or whether they had

expressed any concern, she answered :

> They did not mention this to me, and at the same time I could not tell from their expression that they have shown concern, because in the office, we are sitting in different corners of the office and we do not see each other. Besides, my office – there is a curtain around it. I cannot see who is coming in and what they are doing. And all I know is that I just went on with my own work. If I have any need, I will look them up.

Sanrita WONG's defence was described by Michael Lunn, Counsel to the Tribunal, as an 'ostrich defence'. The Tribunal agrees. In broad terms, it was her defence that she did not know what was happenning around her because nobody told her; if, however, she received documents referring to matters then she did not read them or, if she read them, she did not understand them. In summary, because of the failure of others to communicate with her, compounded by her own ignorance, her head was constantly in the sand. What did the Tribunal make of these protestations by her of isolation and ignorance? The Tribunal rejected them.

Far from being a passive woman, a neophyte in the world of big business who, because of her shortcomings, kept her head down and got on with her own small area of responsibility, the Tribunal came unanimously to the conclusion that Sanrita WONG had a determined, often wilful personality. She was loquacious, assertive and patently believed that she possessed an intuitive guile that would assist both herself and the company. As a witness, she was, to express it charitably, unimpressive.

The Tribunal has, of course, accepted the dangers of relying too heavily on demeanour. It is a fallible tool of judgment. What then was the evidence to support the Tribunal's findings?

Francis LEUNG, an investment banker of considerable experience, was at one time on the board of Hanny. The Tribunal found him to be a balanced, fair and credible witness. During the course of his testimony he said that he came to know Sanrita WONG when Peregrine was first engaged as financial advisor, that would have been shortly before Hanny went public :

Q: How well did you come to know [Sanrita WONG] in the following years?

A: Because she was an executive director of the company, so I came across her on many occasions when we acted as the financial advisers of the company in respect of various matters.

Q: In respect of what kind of matters did you have dealings with her?

A: Mainly for financing. She was in charge of the finance of Hanny Magnetics.

Q: What were the kind of occasions when you would meet her in that capacity in charge of finance of Hanny Magnetics?

A: Sorry, may I correct that statement? Actually, she was more involved in marketing and sales, *but after Hanny Magnetics acquired Memorex, she was then involved in finance as well*. I mean, initially I did not deal with her very often, because she was involved in marketing, rather than the financial matters of Hanny, but as I said, after the acquisition of Memorex she was more involved in the finance area. [our emphasis]

Later, when questioned by Wilson CHAN, Sanrita WONG's counsel, Francis LEUNG spoke directly of his assessment of Sanrita WONG's abilities :

Q: I think you have already told us that Sanrita WONG was essentially a sales and marketing person before she got involved with the financing of the acquisition of Memorex?

A: Yes.

Q: From your dealing with Sanrita WONG, would you say that she was someone knowledgeable in accounting and financial matters in general?

A: Although financing was not her expertise, *I thought she had a general understanding of financing*.

Q: Financing of the acquisition?

A: General financing. [our emphasis]

Joseph LI, a cautious, credible witness who preferred the art of understatement, joined Hanny in October 1994 as Chief Financial Office.

While he did not speak directly of Sanrita WONG's financial expertise, he testified that he had close dealings with her and saw her as an important member of the management team, hardly an observation consistent with Sanrita WONG's assertion of knowing little and being informed of less. Joseph LI recalled Sanrita WONG chairing at least one board meeting and observed that, from what he could see, she worked closely with her brother, WONG Sun. Joseph LI said that WONG Sun liked to have her at meetings : an indication of trust between brother and sister. Joseph LI was seconded from Hutchison Whampoa to Hanny in October 1994 with a mandate to improve both financial and management efficiency. Like Bryan-Brown, he was a perceptive individual. At no time did he disparage Sanrita WONG as a useless appendage, best disposed of. His testimony, to the contrary, was that he saw her as an important member of management, albeit to some degree (in late 1994) under-employed and at odds with the new management.

William TAM was, of course, one of the witnesses best positioned to comment on Sanrita WONG's involvement in the management of Hanny, especially its finances. During the course of William TAM's testimony, it became apparent to the Tribunal that he still harboured a degree of enmity towards Sanrita WONG and that this, to some degree, marked the tenor of his comments. The Tribunal, therefore, approached his evidence concerning Sanrita WONG with caution on the basis that his dislike of her no doubt tended to cloud his objectivity.

The Tribunal was satisfied, however, that during his tenure of office, William TAM did work closely with Sanrita WONG in respect of Hanny's finances. This was because WONG Sun had delegated her to oversee those finances. In an interview with the SFC in August 1996, William TAM is recorded as saying :

> 'Unfortunately, WONG Sun trusted in Sanrita WONG, his younger sister, too much. This was to the extent of giving her control over financial matters. She was almost in charge of my areas too.'

When testifying before the Tribunal, William TAM said that, as a result of this delegation, in respect of day-to-day financial matters, he worked most closely with Sanrita WONG :

A: I would discuss with her on monthly financials, budgets and cashflow matters, and also arrangement of bank loans and external financing.

Q: How frequent were these meetings with her?

A: Quite frequent.

Q: Try to help the tribunal.

A: Say two times a week.

Q: At whose request?

A: At my own initiation and at her request sometimes.

It is true that William TAM had little respect for Sanrita WONG's abilities in the field of accounting. In his opinion, she was poor at arithmetic and had difficulty understanding the significance of financial reports. However, despite her limitations in the field of accountancy, William TAM said that Sanrita WONG was not shy in assuming her role as the director most immediately responsible for financial matters. Indeed, he suggested that she was so confident that she was prepared to make decisions without recourse to the board. In this regard, in his August 1996 interview with the SFC, he said. :

> There were very few so-called management meetings. In most cases, I only reported to Sanrita WONG who was obsessed by a lust for power. I remember an occasion on which I wanted to arrange financing and suggested a board meeting should be held. However, I was reprimanded by Sanrita WONG who said she was the board. Therefore, seldom were management meetings held and I was virtually working under her alone.

In the course of his testimony, William TAM returned to his assertion that Sanrita WONG had at least once assumed for herself the role of 'the board' :

A: Put it this way : WONG Sun specifically told me to report to Sanrita WONG.

Q: Yes, but did she make decisions on the spot or did she say, "Oh, I will talk to my brother and come back to you in a few days' time"?

A: It depends on what circumstances.

Q: Important matters?

A: In one case, as I mentioned in my notes, she just said, "I was the board".

…

Q: On important matters, on those occasions when you could directly reach WONG Sun, you would go to him directly – is that right?

A: If Sanrita was not present.

The Tribunal recognises that assertions by William TAM that Sanrita WONG was possessed by a 'lust for power' were emotive and subjective. However, while William TAM may have been prone to exaggeration in this area of his evidence, the Tribunal did not dismiss his evidence as being distorted beyond credibility. William TAM painted a portrait in his evidence of a woman who was assertive, confident and not without ambition. In his portrait, he also painted a picture of a woman who was prepared, despite her shortcomings, to assume responsibility for much of the day-to-day financial decisions of a publicly listed company. To that broad extent, the Tribunal accepted his evidence as being accurate.

Sanrita WONG also protested that she did not have sufficient command of the English language to understand documents, letters and the like which came to her in English. This, she contended, was a further handicap and increased her isolation within the company when it came to understanding and discussing the contents of such papers. However, Bryan-Brown – who had dealings with Sanrita WONG from September 1994 until June 1995, albeit intermittently – testified that her command of English was perfectly reasonable; certainly good enough, he said, to communicate for business purposes. For example, he recalled attending Hanny's Annual General Meeting on 30th September 1994 at which WONG Sun suddenly became indisposed. As a result, he said, the meeting was chaired – effectively with no notice – by Sanrita WONG who, to the best of his memory, gave the address in English but no doubt answered most questions in Cantonese.

In the opinion of the Tribunal, the chairing of that fractious meeting by Sanrita WONG is significant in that it reveals a number of matters. First, it reveals that she felt confident enough to express herself in public in English. Second, it reveals that she was aware of her importance in Hanny's hierarchy; she was not just the sister of the Chairman, she was the Deputy Chairman and a

regular spokesman for the company. Third, it reveals that she must have known sufficient of Hanny's affairs at that time to feel confident enough to face a fairly hostile gathering. If, as she has protested, she was only as informed as the average investor, if she lacked confidence to assert herself at that difficult time, why not report the illness of her brother to the meeting and have it adjourned?

Finally, when assessing Sanrita WONG's character and her place in Hanny, her attitude to her shareholding in the company must be considered. In this regard, in the annual report published on 2nd September 1994 the interests of the directors were stated to be as follows :

Name of director	**Personal Interest**	**Number of shares issuable on exercise of warrants held**
WONG Sun	318,360,736	-
William FUNG	89,020,000	15,600,000
Sanrita WONG	39,120,000	7,824,000
Eugene KUO	23,235,264	-

In respect of her shareholding, Sanrita WONG professed disinterest. In the course of her testimony, for example, she said :

> Mr. Chairman, you did mention that with the few million shares there, how come I am not concerned. Actually, stocks are something like wealth on paper. You can be rich one day and then tomorrow you can be poor. For me, I would just do what I have to do, do it properly, and I do not put that much importance on money.

That statement, however, must be placed in context. In March 1989, Sanrita WONG had opened what is commonly called a 'trading account' with the private banking division of Credit Lyonnais. In July 1994, the facilities offered to her in that trading account were enhanced. A copy of the relevant letter dated 22nd July 1994 is annexed as Annexure 'XX'. Ms. FANG Wen Ming ('Jeanie FANG'), a marketing director in the private banking division, was responsible for Sanrita WONG's trading account and, as a result, had considerable dealings with her. Jeanie FANG said that she would, as a general

rule, speak regularly to Sanrita WONG, perhaps as often as twice a week.

Jeanie FANG testified that in July banking facilities of up to HK$20 million were provided to Sanrita WONG and a company controlled by her called Barkfield Ltd. The facilities, of course, had to be secured. This was done by a pledge of different forms of assets : cash, shares, bonds, mutual funds and the like. The more liquid and stable the assets pledged, the greater the banking facility they secured. As an example, for each HK$111 deposited in cash Sanrita WONG (or Barkfield Ltd.) would be entitled to a facility of HK$100. This ratio was described in percentage terms as 111%. Hanny shares were acceptable as security but the ratio was 3 times less favourable than cash, being set at 333%. To ensure that pledged securities matched the banking facilities utilised, Credit Lyonnais maintained a 'comparative chart'. A copy of this chart from 30th June 1994 to 11th August 1995 is attached as Annexure 'XXI'. More than adequate security was expressed as a figure in excess of 100% while less than adequate security was expressed as less than 100%.

A study of the comparative chart reveals that in June and July 1994 *100% of the security provided by Sanrita WONG was in the form of Hanny shares*. However, as the share price fell over this period so the shares lost their security value and by 12th August 1994 the security/debt ratio had fallen to 93.8%. A week later it was down to 84.01%. It was at this time (for the first time) that cash was paid into the account in order to ensure that adequate security was available to cover the banking facilities that Sanrita WONG had utilised. A study of the comparative chart shows that for this purpose, on 19th August 1994, Sanrita WONG was forced to pay into the account a cash sum of HK$2.7 million. It appears that more cash was paid in thereafter so that by 9th September 1994 the security/debt ratio had risen to 105.67%.

In summary, during the critical months of July and August 1994, when Hanny was faced with a marked downturn in profits and was taking steps throughout the Group to be able to present an end of the year report that would be more 'acceptable' to the investing public, Sanrita WONG was availing herself of substantial banking facing facilities with Credit Lyonnais that were secured 100% with Hanny shares. But those shares were losing value and, as a direct result, Sanrita WONG was forced to 'top up' her account with a substantial sum of cash.

In such circumstances, the Tribunal cannot accept that Sanrita WONG had no interest in the fluctuating value of Hanny shares or what should be happenning behind the doors of Hanny to possibly cause that fluctuation. The overwhelming inference to be drawn from the primary facts is that she had a keen interest to know.

Sanrita WONG was not disinterested in material matters. Indeed, a little earlier that year, in terms of a provisional agreement of sale dated 13th May 1994, Barkfield Ltd. (controlled by her) had purchased a residential property in the course of construction. The property was described as House 25, Las Pinadas. The agreement provided for payment of deposits amounting to HK$11.9 million in May and June 1994 and for payment of the balance of HK$27.1 million upon completion of the building works and issue of an occupation permit. The total purchase was therefore, HK$39 million.

In all the circumstances, in respect of Sanrita WONG's character, abilities and her place in Hanny in an about the summer of 1994, the Tribunal has come to the following findings of fact :

(i) That she possessed a sufficient working knowledge of the English language to converse about business matters in English and to understand ordinary business documents written in English.

(ii) That she had a close relationship with her brother, WONG Sun, who trusted her in respect of company matters and delegated responsibility to her not only in respect of sales and marketing but also in respect of overseeing Hanny's on-going financial welfare.

(iii) That she was not woefully ignorant of financial matters and unable to comprehend financial documents. While she may not have been gifted in accountancy and may have had difficulty understanding some accountancy concepts, her responsibility for liaising with Hanny's bankers and her on-going association with William TAM in overseeing Hanny's finances must (and did) give her at least a working knowledge of finances and

accountancy matters.

(iv) That, whatever her shortcomings, she was not reluctant to assume responsibility for financial matters and certainly at the time believed herself competent to make financial decisions.

(v) That by reason of her position as Deputy Chairman and an executive director, she was an integral, working member of the board of directors and assumed that role with confidence.

(vi) That she was not in any way an 'outsider' who was kept ignorant of important developments in the company; she had a central role to play and she played it, to the extent even of chairing (at short notice) the annual general meeting at the end of September 1994.

(vii) That, as one of a relatively small board of 4 directors, she did not restrict her involvement to just one area of marketing; namely, OEM contracts and sales; she held a position (in practical terms) of seniority to Eugene KUO, a marketing director, and took on responsibility not only for marketing but for a broad range of managerial matters in Hanny.

(viii) That her large shareholding in Hanny- in excess of 39 million shares – was not something in which she lacked interest, as she protested. Her Hanny shares at the time were being used as security for a HK$20 million trading account that she ran with a private banking house. She would, therefore, have been interested at the material time in the price movement of her shares.

In light of all these findings of fact, the Tribunal finds it inconceivable that, as WONG Sun's trusted sister and a dominant member of the Board, Sanrita WONG remained ignorant of the events concerning Hanny's finances that took place in July and August. The fact that William TAM, in the course of his testimony, said that he conferred only with WONG Sun in respect of the July draft accounts in no way alters or places doubt on that finding. The Tribunal has had no hesitation in coming to the finding of fact that at some

stage during the first period Sanrita WONG did come into possession of relevant information. The only question remaining is *when* she came into possession of that information.

During the course of the inquiry, no evidence was given to show directly when Sanrita WONG came into possession of that information. It was, therefore, necessary for the Tribunal, having made findings of fact, to draw inferences from those facts.

In considering the relevant evidence, the Tribunal considered it as a whole. While, of course, individual findings of fact had to be made, it was necessary to consider the full picture. This 'full picture' included her close relationship with her brother, her role in liaising with Hanny's bankers, her responsibility in respect of Hanny's accounts, her receipt of correspondence and the fact of her dealing in Hanny at the material time. In respect of this last matter, the Tribunal is satisfied that the dealing conducted in Hanny shares in July and August 1994 in the account of K.L. WONG was, in truth and substance, dealing conducted by Sanrita WONG for her own benefit; in short, it was *her* dealing and not K.L.WONG's dealing. The reasons why the Tribunal came to this finding are set out in Chapter Seven of this report.

In the previous chapter[38], reference was made to a faxed letter endorsed – *URGENT!* – dated 8th August 1994 sent by William TAM to Sanrita WONG and Eugene KUO, both of whom were in the United States at the time. That faxed letter opened with the following paragraph :

> 'Mr. WONG Sun requested me to issue this memorandum to explain the implication of capitalizing additional inventory provision as goodwill to be written off over 18 years'.

It then went on to state that, having had the go-ahead from Deloittes : 'this gives us the opportunity to <u>maximize</u> the stock provision and to reduce the negative impact on profit in 1993/1994 and future years …' But nothing appears in that fax to explain *why* it should be necessary at that time to maximize stock provisions. The faxed letter was clearly drafted on the basis

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[38] See Chapter Four, pages 93.

that the recipients already knew of the bad news and needed only to understand the implications of the measures being taken to address the common problem.

That, of course, is not evidence that the recipients (Sanrita WONG and Eugene KUO) *did* know the bad news. But if that letter had come as a surprise to them surely it would have elicited a query from them as to *why* such drastic steps were necessary. But when William TAM gave evidence, he said that he did not receive any communication from the recipients asking why such steps were necessary. Neither Sanrita WONG nor Eugene KUO, he said, came back to him expressing surprise. In this regard too it must be remembered that – on WONG Sun's instructions – Sanrita WONG was to take charge of the new stock provision assessment for Memtek International Ltd. As it turns out, Sanrita WONG did not supervise that exercise. The work was done by Geoffrey SUEN. But it does not detract from the finding that the writer of the faxed letter (and by implication, WONG Sun) presumed Sanrita WONG already knew of the bad news when the faxed letter was despatched on 8th August 1994. Nor does it detract from the validity of the question : 'why, if the faxed letter came as a surprise, did not Sanrita WONG contact William TAM to ask why such drastic steps should be necessary?' It must be remembered that at this time Sanrita WONG was working closely with William TAM in respect of Hanny's finances and so communication with him would have been the norm not the exception.

In his final address, Michael Lunn, Counsel to the Tribunal made the following submission :

> 'The fact that such an extraordinary change in the stock provision from 2.75% to 25% should have been entrusted by WONG Sun to Sanrita WONG in the context of the letter as a whole is highly supportive of the inference to be drawn that WONG Sun was acknowledging that Sanrita WONG knew of both the need for the steps to be taken, namely a prospective loss for 1994, and the method by which that loss was going to be reduced.'

The Tribunal accepts the strength of that submission.

However, when she testified, Sanrita WONG asserted that she never received the faxed letter of 8th August and was not, therefore, in a position to

query it. She said that at the time she was on holiday in the United States and did not visit Hanny's offices there. In a statement made by Sanrita WONG on 14th July 1999 (after the substantive hearing had commenced) and adopted in her evidence she said the following concerning her absence from Hong Kong :

> 'I left Hong Kong on 17th July 1994 for the U.K. for business purpose and then to North America for leisure and visiting my brother-in-law who lived in Los Angeles. When I left U.K., I first went to Canada on 23rd July 1994. My daughter and niece joined me there for leisure before we went to Los Angeles on 29th July 1994 to visit my brother-in-law. I did not return to Hong Kong until 13th August 1994.'

If Sanrita WONG was purely on holiday in North America, it is puzzling why William TAM should see fit to fax the letter to her at a number which the Tribunal is satisfied was (at the time) the number of Hanny's California offices. Could it have been a mix-up or a simple mistake on the part of William TAM? Or does evidence exist that Sanrita WONG went to North America not purely for leisure, as she claimed when she testified, but also on business?

In a statement made by Sanrita WONG to the SFC in May 1997 (in the presence of her solicitor) she said nothing then about leaving Hong Kong to go on holiday. In fact, she spoke *only* of going on a business trip. In short, her assertions at that much earlier time were the opposite of her later assertions made at a time when no doubt she understood the need to deny receiving William TAM's faxed letter of 8th August 1994. In that statement of May 1997 she spoke of liaising with people at Credit Lyonnais before her departure :

> 'I even told the lady that I had to leave Hong Kong for business reason …'

Shortly thereafter, so that there could be no ambiguity, the following is recorded :

> Q: You said just now that Hanny sent you to the States in July 1994. Why did you have to go to the States?
>
> A: The company asked me to check on the sales (people), to meet clients, to monitor how (staff) were doing. (The visit)

> did not come all of a sudden. I remember that I went on business trips quite frequently at that time.

The Tribunal is satisfied that the earlier statement reflects the true position. In July and August 1994 Sanrita WONG was in the United States principally for business purposes. That was why William TAM sent the faxed letter to Hanny's office. He knew that she would be there.

It was argued by Wilson CHAN, Sanrita WONG's counsel, that there was no positive proof that the faxed letter was, in fact, received and that, in the face of her denial of receipt, positive proof was needed. The Tribunal is satisfied, however, that proof does exist. The fax was sent in the ordinary course of business to Hanny's California offices at a time when Sanrita WONG was there and at a time when the Tribunal is satisfied Sanrita WONG was visiting that office. The faxed letter bore an 'urgent' endorsement and was addressed to the Deputy Chairman of the Group, as well as Eugene KUO, another director. If Sanrita WONG had not been available to receive it, some response to William TAM would have been expected together with evidence of an attempt to contact her elsewhere. There was no evidence of any such attempt.

Although the Tribunal in its deliberations has attempted to be meticulous in matters of fairness, it must also adhere to the object and spirit of the Ordinance in terms of which it obtains its powers. If every denial of receipt of a document placed upon the Tribunal a burden of strict proof it would rapidly make it impossible for the Tribunal to carry out its work. Insider dealing cases, by their very nature, invariably contain large archives of documents written at the time in the ordinary course of business and despatched without the need for the sort of checks that a person considering litigation may deem prudent. Invariably, in the ordinary course of business, if 'internal' documents are not received, there exist practical checks and balances to rectify the situation and some note appears on file. There may, of course, be occasions when fairness dictates strict proof of receipt of documents but the Tribunal does not consider that, in making a finding of fact that Sanrita WONG did receive that faxed letter, it has acted unfairly. Each and every case is different. It must be remembered that, in seeking out the truth; namely, the reality of what happenned, the Tribunal has broad powers. In this regard, section 17 reads :

> The Tribunal may, for the purpose of an inquiry under this Ordinance –
>
> (a) receive and consider any material whether by way of oral evidence, written statements, documents or otherwise, not-withstanding that such material would not be admissible in evidence in civil or criminal proceedings in a court of law;

Having assessed all the relevant evidence, the Tribunal is satisfied to the required standard that when Sanrita WONG received the faxed letter of 8th August 1994 she already knew of Hanny's prospective loss for the 1993/1994 financial year. But how long before did she know?

As mentioned earlier, a detailed assessment of Sanrita WONG's interest in the account of K.L WONG will be given in Chapter Seven. At this stage it suffices to say that the account was, along with Sanrita WONG's own trading account, held with the private banking division of Credit Lyonnais and she held a power of attorney enabling her to deal in that account at her discretion.

Monthly portfolio statements were issued in respect of the account. An examination of those monthly statements for the months of April, May and June 1994 reveal that it did not hold any Hanny shares or indeed any Hong Kong equities. However, on 15th July 1994 Sanrita WONG directed Credit Lyonnais to withdraw 3,552,000 Hanny shares from *her* account and transfer them into the account held in the name of K.L. WONG.

By 15th July, of course, WONG Sun had known for several days of the loss stated in the consolidated draft accounts prepared by Hanny's accounts department and had ordered that figures be re-checked. He had even made a visit to the Zhuhai factory and, according to submissions made by his counsel, that must have been for the purposes of verifying the accuracy of information concerning inventory held there. The 15th July was just 3 days before the meeting with Deloittes at which a change in accounting strategy was discussed to try to put a more acceptable gloss on the end of year figures.

From 18th July through until 30th August, on the instructions of Sanrita WONG, the full 3,552,000 Hanny shares held in the account were sold, the

details being as follows :

Date	Number of shares	Price	Turnover on the market
18th July	10,000	2.01	1,810,000
25th July	80,000	1.93	160,000
26th July	20,000	1,835	810,000
28th July	350,000	1.93	1,030,000
29th July	540,000	1.9309	1,518,000
5th August	136,000	1.8644	586,000
26th August	588,000	1.1612	2,090,000
30th August	1,798,000	1.1846	5,328,000

An important question to be asked is whether between 15th July and 30th August 1994 anything was known of Hanny in the market generally that might cause Sanrita WONG legitimately to resolve to sell. In the judgment of the Tribunal there was nothing. Why then should she resolve to consistently sell at that time? The Tribunal is satisfied that the single, compelling inference to be drawn from all the evidence – indeed the only reasonable inference that can be drawn – is that Sanrita WONG resolved to sell (and to do so in a disguised fashion) because she was at that time in possession of information concerning the losses revealed in the draft consolidated accounts.

The faxed letter sent to her and Eugene KUO by William TAM in August was worded as it was because it was accepted that both recipients already knew of Hanny's troubles, Sanrita WONG knowing before her departure but no doubt a day or so after WONG Sun had first been informed.

Why then, if she was so concerned, did she not sell more rapidly and in larger numbers? First, of course, a buyer must always be found. A study of the table above shows that the daily turnover of Hanny shares for much of the time was thin. For example, on 25th July only 160,000 Hanny shares were traded on the market. Second, too many shares being dumped on the market would exacerbate the problem of the sliding share value. When she gave evidence, Sanrita WONG accepted that she was aware of the damage that could be caused if too many shares were sold too quickly. She would not, therefore, have been ignorant of the required strategies.

C. William FUNG

When he gave evidence before the Tribunal, William FUNG, who was born in June 1924, was 75 years of age. Attempting to recall complex matters over a 5-year span would present difficulties for even the most astute witness and it was clear that William FUNG sometimes had difficulty recalling intricate matters. On occasions he appeared confused. Having said that, however, it was clear that he still retained a sound understanding of commercial matters and did retain a broad memory of the relevant events.

William FUNG first learnt of commercial matters when he attended a business school in Shanghai in the last years of the Second World War. On his return to Hong Kong, he worked in a Chinese finance house but, because of lack of promotion opportunities, he moved into the garment industry. In this new field of endeavour, specialising in sales, he worked for a time with an American company and then joined the Lai Sun Group where he was made a director in the early 1970s.

As to his role in Hanny at about the time the company was listed and in the time thereafter, William FUNG gave somewhat ambiguous evidence. In truth, other witnesses were not certain of his true role either. But it is noteworthy that in the course of William FUNG's testimony before the Tribunal an exchange took place which has been cited earlier in this report but should be repeated :

FUNG : When I said I was working there … I was not going there all the time; sometimes, I just went over there.

Q : To do what?

A : Just to check around, because I have money invested in there.

The exchange continued :

Q : Your office, or your room as you call it, was near to the accounts department, was it not?

A : Yes.

Q : Did you check on what was going on there?

A : Yes, I did look, check.

In the opinion of the Tribunal, what emerged from this evidence and similar statements made elsewhere in the course of his testimony was that William FUNG - even if in 1994 and 1995 he had no specific role to play in the management of the company, other than acting as a signatory of cheques - was not prepared to sit back in ignorance. Like any rational investor, he was determined to keep an eye on his investment. What further emerged was that William FUNG was no stranger to company accounts. He well knew, therefore, that the surest way to satisfy himself that all was well was to read relevant company documents, speak to senior people in the accounts department and to study company accounts.

What must be remembered is that at all times material to the inquiry William FUNG was a substantial shareholder in Hanny, indeed the second biggest individual shareholder after WONG Sun[39]. He therefore had a compelling motive to guard his interests.

It should also be noted that from 2nd December 1991 William FUNG was employed by Hanny at a monthly salary of HK$45,000. This employment agreement was only terminated on 30th May 1995. At all material times, therefore, he was not only a director he was an employee of Hanny with his own office and, even if his duties were limited, he had access to company documents that were regularly distributed to him. William FUNG's office was only a few paces away from the accounts office. In short, in such a confined physical area, and with nothing to prevent access to other members of senior management, it would not have been difficult for William FUNG to make the enquiries necessary from time to time to protect his investment. Nor was anything said to suggest that he would have been denied access to such knowledge.

Nor, in the opinion of the Tribunal, can the fact that William FUNG and WONG Sun were old friends who lived in the same development and met socially be entirely ignored. It was William FUNG's testimony that when the two met socially they *never* discussed business. That may have been the case if there were third parties present but the Tribunal cannot accept that when alone, the two men assiduously avoided mention of Hanny. Hanny was their

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[39] For his declared shareholding in the 1993/1994 annual report, see page 117 *supra*.

paramount investment, both had seen the company grow from small beginnings. Both were businessmen.

But was William FUNG interested at all in dealing in Hanny shares or did he prefer rather to sit on his investment? The evidence shows that he was very much interested in dealing in Hanny shares, to the extent even of knowingly breaking the law. In this regard, William FUNG accepted that in 1994 he was speculating in Hanny shares not in his own name but in the name of his son, Clement FUNG. During the course of his testimony he admitted that he knew at the time that, in terms of the Securities (Disclosure of Interests) Ordinance, he was committing an offence punishable by imprisonment. In this regard, the following exchange that took place during his testimony is revealing :

> Chairman: The question was : you were aware of the duty imposed upon you by the statute; you knew that a failure to carry out that duty carried criminal punishment; but –
>
> Q: But you set out to breach that duty regardless of the penalty?
>
> A: Yes. Yes, I made a mistake.

Despite the respect due to his age, and with due deference to the dignity with which he gave his evidence, it became apparent during the inquiry from a number of matters canvassed that back in 1994 and 1995, when it suited him, William FUNG had been more than willing to deceive the authorities concerning his dealing in Hanny shares.

Against this background, the question must then be asked : was there evidence adduced in the inquiry that William FUNG came into possession of relevant information during the first period? The answer is yes, there was evidence adduced and it was evidence that came from William FUNG himself.

When interviewed by the SFC in September 1996, just 2 years after the events in question, William FUNG was asked about Hanny's draft annual report for the 1993/1994 financial year. The record of interview reads :

> Q: Before reading this draft annual report, did anyone inform you of your company's financial position?

A: I remember that when I chatted with colleagues from the accounts department (I don't remember who they were) in *June to July 1994*, they said that the company had not made any profit, so no dividend would be declared.

A little later in the same interview the subject is raised again. This time William FUNG brought the dates forward a little. But he did so after he had been informed that Hanny's results had only been published in September 1994. He did not then say, for example, that he only knew a short time before the publication date. He spoke instead of knowing several months before :

Q: In September 1994, Hanny announced to the public its results as at 31st March 1994. Approximately when did you know Hanny's results?

A: In around *May, June 1994.*

Q: What was the source of your information?

A: It was around *May, June 1994* at that time, and the company already had a draft report. There was only a discrepancy of 10 to 20 million dollars between the results in this draft report and that announced.

In a much later interview with the SFC (on 11th May 1998), William FUNG was asked :

Q: … you mentioned that you knew in May/June 1994 that the company's results were not so good. How did you know that?

A: (I knew about it) during my chatting with other colleagures of the accounts department. People knew about it. But they did not know the exact figures. Only profit or loss was mentioned.

Q: Which colleague of the accounts department did you talk to?

A: YU Wai Chun and William TAM. But when (I) was chatting with them, (I) did not particularly ask about the business conditions. We only talked about that during chatting. (I) did not ask them formally.

While the exact months may not be accurate it is apparent that in July and August 1994 the accounts department at Hanny was wrestling with the draft accounts, verifying figures and making amendments where they were warranted. It would, therefore, be correct to say that the senior accounts staff would not have known the exact final figure only that the figures as a whole revealed that no profit had been made and that, as a result no dividend would be declared.

When he testified, William FUNG said that he had been confused with the dates and it would only have been much later, in August, shortly before the published results came out, that he learnt of matters from personnel in the accounts department. While the Tribunal accepts that William FUNG could not hope to be exact in recalling dates and while, therefore, he was clearly not accurate, it does not accept that he only came to know of Hanny's poor results at such a late stage. There are 3 reasons for coming to this findings :

(i) On his own admission, William FUNG was keen to check on his investment in Hanny; he was only a few paces from the accounts department and it seems incredible in such circumstances that he would have remained ignorant of the crisis besetting Hanny for a period of a month or more, especially when at that time he was seemingly attending his office regularly, if not on a daily basis.

(ii) When dealing with the issue in his SFC interviews, William FUNG was given the month when the results were published by Hanny. In such circumstances it would have been easy to use that month as a guide and state that he only learnt of the poor results near to September. But in the interviews he spoke of a time several months before September.

(iii) (a) During 1994, William FUNG was using an account opened in the name of his son, Clement, to buy and sell Hanny shares; that is, to speculate in those shares. For the reasons stated in the next chapter, the Tribunal is satisfied that this trading was, in truth and substance, William FUNG's trading carried out for his own benefit. The account was held with a broking house called Onshine Finance Ltd. and a copy of the statement of account from 30th December 1993 until 31st March 1995 is attached as Annexure 'XXII'.

(b) A study of that account shows that in the first half of the year William FUNG bought and sold Hanny shares. However, the 'settlement dates' in the account show that from about 18th or 19th July through until 17th or 18th August he continuously sold. In the opinion of the Tribunal, the only reasonable inference to be drawn from that pattern of trading is that William FUNG became aware of Hanny's poor results and, even though the share price was falling, resolved to sell also and did so systematically until about 17th or 18th August, a month later.

(c) At about that time in August, he then began to buy Hanny shares. In the opinion of the Tribunal, the only reasonable inference to be drawn from this reversal of trading pattern is that William FUNG believed the market had over-reacted and he was looking, therefore, to pick up Hanny shares at bargain prices. Insiders may use inside knowledge to speculate. It does not always mean, however, that such speculation will be successful. Stock markets are notoriously difficult to predict.

(d) The Tribunal, however, is not prepared to accept that William FUNG would have continuously sold Hanny shares in July and August when he was totally ignorant of the crisis in Hanny but would then, when he *first* learnt the truth of Hanny's poor results, begin to buy Hanny shares.

But did William FUNG appreciate that the information passed to him during the course of his 'casual chatting' with William TAM and after accounts staff was information that, if generally known, would cause a material drop in Hanny's share price? Clearly he did. He said so himself :

> Chairman: … The question, Mr. FUNG, is simply : if this casual chat with the colleagues in the accounts department – who told you that the company was not going to make a profit and there was not going to be any dividend – was shared by loudspeaker with the investing public in Hong Kong, what

do you think the investing public in Hong Kong would do as far as the shares were concerned? Do you think the shares would stay at the same price? Do you think they would go down, or do you think they would go up?

A: It is not going to be good, of course.

In the circumstances, upon a consideration of all the relevant evidence, the Tribunal is satisfied that William FUNG did come into possession of relevant information during the first period and would have been in possession of that information when he commenced selling Hanny shares on or about 18th or 19th July 1994, this being about the time when WONG Sun and William TAM were meeting with Hanny's accountants to decide how to put the best face on a very disappointing set of results.

CHAPTER SIX

FAY LOI LOI AND CONNIE LI

(A consideration of whether they were
at any time culpable of insider dealing)

The Tribunal had no difficulty in coming to a finding of fact that neither FAY Loi Loi nor Connie LI were at any time to be identified as being culpable of insider dealing. However, as both persons were implicated parties and both testified, something should be said, in broad terms at least, of the Tribunals reasons for coming to its decision.

A. FAY Loi Loi

In 1972, FAY Loi Loi married AU Shiu Mo ('Peter AU'), a broker by profession. It was her evidence that at all material times she was a housewife; she may have dabbled in the share market on one or two occasions but she could never be described as a regular investor.

She said that it was in or about March 1992 that she was first approached by her husband who at the time was employed as a broker with a company called South China Finance Ltd. She knew, she said, that WONG Sun was an important client of her husband's. Her husband asked if she would sign certain documents to open a trading account in her name which would be used by WONG Sun to trade in Hanny shares. She said that she agreed in order to help her husband. She said, however, that she had nothing to do with the running of the account. Later, she said, when her husband joined new employers, she was aware that her name was used to open new accounts to continue to facilitate WONG Sun's trading.

FAY Loi Loi said that she had met WONG Sun only once, to the best of her memory, at a ball given by Hanny. She said she had never had a conversation with the man and would not recognise his voice. She never took instructions from him to deal in any of the trading accounts bearing her name. It is to be emphasised that there was never any suggestion made during the course of her evidence that she ever visited the Hanny offices or was on good terms with Hanny employees or other directors. Nor was it ever suggested to her that she had ever possessed inside information in respect of Hanny's affairs;

information obtained either directly or indirectly through her husband.

Her husband, Peter AU, supported her testimony. He testified that it was in March 1992 when WONG Sun first approached him and said that he wished to use a nominee account in order to trade in Hanny shares without having to make disclosure. It was agreed, he said that an account would be opened in his wife's name and on 4th March 1992 a trading account was opened in his wife's name with his employer, South China Finance Company Limited ('South China').

Peter AU said that he subsequently left South China and joined Emperor Securities Limited ('Emperor'). He then arranged to close the old account with South China and open a new trading account in his wife's name with Emperor. This account was opened on 9th March 1994, the papers being signed by himself, he said, 'on behalf of' his wife.

After his departure from Emperor, Peter AU joined Tung Tai Securities Company Limited ('Tung Tai'). Again, he said, the same procedure was adopted. The old account was closed and a new account was opened in his wife's name. Again, he said, he signed 'on behalf of' his wife. This time the relevant opening papers were signed on 16th August 1994.

Peter AU said that his wife only signed the first set of account opening documents. Thereafter, he said, she did not want to be bothered signing personally and said he could do it for her.

According to Peter AU, WONG Sun was the *sole* trader in all 3 accounts. All dividends due and moneys credited to the accounts because of share sales found their way to WONG Sun's own accounts, he said, without any deduction other than lawful commissions and other charges deducted by the broking houses.

Peter AU said that he knew he was breaking Stock Exchange Rules in helping WONG Sun in this way. WONG Sun knew it too, he said, so there was no need to advise him on that point.

What then did WONG Sun say of these allegations? When interviewed by the SFC in January 1998, WONG Sun asserted that he had given

Peter AU a full and general mandate to buy and sell securities on his behalf. In this regard, he said :

> First, Peter AU was fully authorised by me to exercise full discretion in regard to my dealings. Moreover, Peter AU had the right to buy any stocks on my behalf, acting just like my fund (manager). As to what stocks Peter AU would like to buy or transfer, you'd better ask Peter AU. It's because Peter AU did say to me, "You are so busy. You go to Zhuhai so often." So, he suggested the management of my investment be left to his discretion.

As the Tribunal understands it, WONG Sun went on to say that in respect of the dealings in FAY Loi Loi's account, he was unable to comment as these were essentially the independent dealings of Peter AU or his wife :

> … because in regard to FAY Loi Loi's account, I don't know the first thing about how he operated it. Perhaps he might have spent some (of the funds) on purchases and sometimes he might trade on behalf of his wife or he might be keen on buying Hanny personally.

However, despite these protestations, WONG Sun did accept that a material percentage of the transactions made in FAY Loi Loi's account were in fact his transactions. In this regard, he said :

> … not all the transactions executed through FAY Loi Loi's account were mine. He himself also engaged in tradings in *some* of the shares. I extended loans to him once or twice to enable him to deal in securities. You may ask my secretary. In other words, he might account for perhaps half of the transactions *and for the other half I would give instructions to him to buy which stocks*. However, for half of the transactions, the tradings were conducted on my behalf at his own discretion. After buying the shares, he would notify Connie by phone. Since this account of FAY Loi Loi was neither controlled by me nor registered under my name, I don't know the first thing about his dealings through this account. [our emphasis]

However, on a consideration of all the relevant evidence, the Tribunal is satisfied that it was not merely a percentage of the transactions in the

accounts of FAY Loi Loi which belonged to WONG Sun, it was all of the transactions. In short, the Tribunal is satisfied that the accounts were WONG Sun's nominee accounts controlled by WONG Sun who dealt through Peter AU.

As evidence that the first account at least was opened solely for WONG Sun's benefit, Peter AU testified that he asked WONG Sun to sign a guarantee covering any losses incurred by his wife in that account. A copy of the guarantee was produced by him. The Tribunal can find no reason why WONG Sun should have signed such a guarantee unless it was out of a realisation that any losses were in reality *his* losses and not those of either Peter AU or his wife.

In considering all relevant evidence the Tribunal bore in mind Peter AU's admission when first interviewed by the SFC that he had opened the accounts in his wife's name so that he personally could trade in Hanny shares and to enable him to do this he had borrowed large parcels of Hanny shares from WONG Sun. For example, in the interview given on 1st August 1996, he said :

> I remember two days before 6th April 1994 – I don't remember the exact date – I phoned WONG Sun to check if he could lend some Hanny shares to me. I did not indicate the quantity I wanted to borrow but WONG Sun promised me. We neither discussed the terms and conditions of the loan nor signed any loan documents. A few days later, WONG Sun delivered Hanny shares to me at Emperor by way of special instructions (through CCASS). … He was purely doing me a favour… Borrowing stocks from him could increase my trading turnover, enabling me to get more commissions and bonus.

By the end of that year, however, he had admitted that his original explanation was a lie. In a letter he wrote :

> The entire incident is pretty simple. I shall explain it once again. The account of FAY Loi Loi was opened some years ago (I'm afraid I don't remember the exact year) by one of my clients, Mr. WONG Sun. He requested to open an additional account to trade in the securities of Hanny Magnetic Holdings because he had to declare to the Stock

> Exchange each time he traded in the shares of Hanny and he felt this was very troublesome.

As to his motive for initially lying, Peter AU insisted that it was to help an old client whom he considered a friend. He accepted that, if he told the truth, he too may have been subject to investigation for assisting in the breaking of Stock Exchange Rules but believed that this would have been no more than a 'censure'.

Peter AU was always a loqacious witness, often verbose and confusing in his testimony. Clearly, where possible, he attempted to protect his reputation. This led him into a number of difficulties. One example concerned his discussion with WONG Sun during which, he said, the two of them decided what best to do in respect of the SFC investigation. He was asked whether he spoke to WONG Sun before he himself saw the SFC or after he had seen them. He had difficulty, however, in dealing in a simple manner with what was a reasonably simple issue. In the end result, what, in effect, he said was that he went to see WONG Sun in hospital to discuss the problem with him but he could not be sure whether that was *before* he had his SFC interview or a day or so *after*. In short, he could not now remember if the two of them planned what he was to say or whether Peter AU decided on his own what misinformation to give to the SFC and then, after the interview, agreed with WONG Sun that it was the best solution.

By the manner in which Peter AU initially obstructed the SFC in its investigation and then gave his testimony before the Tribunal he did himself no service or indeed much credit. However, upon a consideration of all the evidence,[40] the Tribunal is satisfied that, despite his original falsehoods given to the SFC, the testimony he gave to the Tribunal was essentially, subject to the vagaries of memory, truthful evidence.

In his testimony before the Tribunal, Peter AU accepted that he had considered himself to be friends with WONG Sun and trusted by him. He accepted that at all relevant times WONG Sun had been his biggest client. However, he denied that he had personally traded in the accounts, buying and

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[40] The evidence taken into account includes evidence of the movement of shares and funds in and out of various accounts in which it was alleged that WONG Sun had an interest. These matters are considered in the next chapter, Chapter Seven.

selling Hanny shares in order to make money for himself. He denied that he had been given any sort of general mandate to 'churn' Hanny shares to make it look as if the shares were being actively traded.

In the opinion of the Tribunal, if he had such a mandate, it would have been a remarkable coincidence that he had 'churned' Hanny by resolving *only* to sell at the time that WONG Sun (from whom he had received his mandate) had come into possession of relevant information that dictated that the shares must only be sold.

When he testified, Peter AU remained insistent that the accounts in his wife's name were only opened to enable WONG Sun to buy and sell his own company's shares without the need for disclosure to the Stock Exchange and that it was always WONG Sun who gave the instructions to buy or sell.

Both FAY Loi Loi and Peter AU came from Canada to give their evidence. Although an implicated person, FAY Loi Loi chose to testify at a very early stage of the inquiry before all the evidence that may have implicated her was led. She was an anxious witness, clearly distressed at the predicament in which she found herself.

The Tribunal is satisfied that, other than acting as a 'blind signatory', FAY Loi Loi never played a part in operating the accounts opened in her name and never had a financial interest in them. The Tribunal is further satisfied that FAY Loi Loi barely knew WONG Sun and did not enjoy any sort of relationship with him (or other persons 'connected with' Hanny) which would reasonably have given her access to relevant information concerning Hanny's affairs. The Trubunal is satisfied that she never took instructions from WONG Sun to act as his agent. Her predicament arose from a foolish agreement to assist her husband. She must have known that what was being done was, at best, underhand but she nevertheless signed when told to do so. To a degree, therefore, although not an insider dealer herself, she brought the troubles of the SFC investigation down upon her own head.

Similarly, Peter AU (although not an insider dealer himself; at worst, no more than an agent who played no part in selecting the shares to be traded) could only look to himself to explain his predicament. At all relevant times, Peter AU was engaged in the honourable profession of a stock broker. He was

well aware of the Stock Exchange rules that governed his mode of conduct. He was nevertheless content, when it suited him financially, to flout those rules with impunity, involving his wife in his activities. As a result, he has done no credit to himself or his profession.

B. Connie LI

Connie LI was named as an implicated person because, on 13th July 1994, at the time when William TAM and WONG Sun were first grappling with the unexpected news of Hanny's poor end of year results, a total of 1.7 million Hanny shares were sold through a trading account in her name with the American Express Bank.

Connie LI denied that the shares belonged to her. It was her evidence that she had done nothing more than agree to put her name to a couple of trading accounts and that, in reality, they were WONG Sun's accounts. Connie LI said that she did not trade in those accounts for her own benefit. She said that all dealings in the account took place because WONG Sun had instructed her to ensure that they took place.

Connie LI joined Hanny in 1984. She worked there for a little over 10 years, resigning in about March 1995. During her years at Hanny, she worked as WONG Sun's personal secretary. She remained at all times a salaried employee. When she left Hanny she was earning approximately HK$15,000 per month. There was never any suggestion that she was independently wealthy.

When he was interviewed by the SFC in January 1998, WONG Sun said that from time to time he had leant moneys to Connie LI so that she could trade in securities in her own name. Although he seemingly had great difficulty remembering (even approximately) the size of the loans, at one time, he hazarded an estimation that sometimes the loans might have amounted to 'several hundred thousand or one million odd'. No evidence emerged during the course of the inquiry to indicate why WONG Sun should gratuitously lend several hundred thousand dollars to his secretary to let her independently trade in shares. There was never, for example, any suggestion of a more intimate relationship between them. Connie LI said that she never borrowed money from WONG Sun, 'not even one penny'.

During the course of the inquiry it became evident that, as WONG Sun's secretary, Connie LI undertook a lot of purely personal work for him. She helped to manage his private property portfolio and evidence emerged that she was given the regular task of reconciling his personal bank statements, checking, for example, that his girlfriend's rent had been paid. It was evident that a bond of trust existed between the two.

In such circumstances, the Tribunal was not surprised by Connie LI's evidence that WONG Sun had asked her to act as nominee in opening 2 trading accounts. The 2 accounts (used essentially as vehicles for trading in Hanny shares) are detailed below :

a. Peace Town Investments Ltd. …

This trading account was opened in May 1992 in Connie LI's name. However, in early June WONG Sun paid HK$8.436 million into the account using a cheque drawn on his American Express Bank account. When the account was closed in early 1993, 4 cheques were drawn on the account to produce a nil balance; 3 of those cheques (totalling some HK$6.5 million) were drawn for amounts which match 3 deposits made at about the same time into WONG Sun's account with the American Express Bank. The Tribunal is satisfied that the bank records support Connie LI's evidence that this account was, in reality, WONG Sun's account.

b. American Express Bank …

This account was opened at the end of March 1992 in Connie LI's name. After the sale on 13th July 1994 of 1.7 million Hanny shares held in the account, Connie LI gave immediate written instructions for the account to be closed and for all funds in the account (totalling some of HK$3.3 million) to be transferred to an account in the name of Diamond Delight Assets Limited. As will be seen in the next chapter, WONG Sun was the sole director of that company. In respect of this account too, the bank records support Connie LI's evidence.

In any event, in respect of the sale of the 1.7 million Hanny shares in the American Express Bank account, WONG Sun admitted to the SFC that this

had been *his* transaction and not Connie LI's. In an interview in October 1996, when asked about the transfer of some HK$3.3 million to his account, he said :

> … [the documents] show a deposit of around $3.3 million which had been transferred to me by Connie LI. I therefore believe Connie LI helped me to sell the securities at that time and then transferred the proceeds back to me. Therefore, for the sale of shares … it was probably Connie LI who helped me do the dealings.

A little earlier, WONG Sun had said :

> It was possible that I had told Connie to open a securities trading account with the American Express Ban to facilitate my dealings … I believe for the shares sold in July 1994 generating proceeds of $3,352,000, the disposal was done by Connie LI on my behalf. *It was in fact my dealing*. However, I would go back to check. [our emphasis]

Clearly, on all the evidence, the sale of 1.7 million shares in Connie LI's account was, in reality, a sale of WONG Sun's shares. The Tribunal is satisfied that the sale constituted insider dealing and that Connie LI, as the personal secretary, acted as WONG Sun's agent in passing on relevant instructions. However, no evidence emerged that Connie LI was, at the relevant time, in possession of relevant information. Nor was there any evidence that she was vested with any sort of discretion in respect of the selection of shares to be traded. Connie LI did not advise WONG SUN. The Tribunal is therefore satisfied, on all the evidence, that she established a defence in terms of section 10(4) of the Ordinance.

Connie LI was another witness who did herself no service in the manner of her evidence. She admitted that, when interviewed by the SFC, she had told a material untruth. Her desire to distance herself from anything that smacked of insider dealing so coloured her testimony that on occasions it distorted it. However, that being said, the Tribunal came to a positive finding that at all relevant times, as a salaried employee, she acted under WONG Sun's instructions; she did not offer counsel. She was no more than a factotum.

CHAPTER SEVEN

THE USE OF NOMINEE ACCOUNTS

(A consideration of whether, during the first period, implicated persons used accounts in the name of third parties to deal in Hanny shares)

As earlier stated, the Tribunal is satisfied that 3 of the implicated persons came into possession of relevant information in the first period. In this chapter, the extent to which those 3 persons dealt in Hanny shares, while knowingly in possession of that relevant information, will be considered.

A. WONG SUN

In October 1996, when the SFC asked WONG Sun about his trading in Hanny shares, he denied any trading at all :

> After the floatation, I have never traded in a single share of Hanny Magnetics until December 1995 when I resigned from the directorship of the company. After that, I started trading in Hanny Magnetics shares. However, all tradings were disclosed to the Stock Exchange.

In later interviews, he qualified that blanket denial. One example has already been given in Chapter Six; namely, the sale of 1.7 million Hanny shares in an account in the name of Connie LI which he admitted constituted his dealing.

During the course of the inquiry, however, Counsel to the Tribunal made reference to an exhaustive archive of records which the Tribunal is satisfied demonstrate that during the first period WONG Sun made use of a complex structure of nominee accounts to disguise his dealing in Hanny shares.

(i) Dealing in the Louis LO accounts

In and about 1994, WONG Sun was romantically involved with a woman named Queenza LO. Louis LO is Queenza's brother. He and WONG Sun had been on friendly terms for several years and in 1994 Louis LO worked at Hanny. He was not a director but he held positions of authority at the

Zhuhai factory. WONG Sun travelled regularly to that factory and did so on several occasions in the days and weeks following William TAM's shock announcement to him that Hanny's 1993/1994 year end results were set to show a Group loss.

It was during this critical time in Hanny's history time that Louis LO opened 2 trading accounts. Those accounts, however, were not for general trade in equities and other securities. The records show that they were used *exclusively* during the first period for dealing in Hanny shares. Both accounts were opened at brokerage houses where WONG Sun held accounts himself or was known to the management. A brief description of the 2 trading accounts are as follows :

a. Account opened with Emperor Securities Ltd.

Louis LO opened this account on 18th July 1994. On that same day one million Hanny shares were sold through the account. Over the following days the only activity in the account consisted of the receipt of Hanny shares, their sale and payment out of the proceeds. The sale of Hanny shares was as follows :

Date of sale	**Number of shares**
18th July	1,000,000
19th July	564,000
20th July	10,000
22nd July	64,000
1st August	1,486,000
2nd August	1,572,000
3rd August	1,980,000
Total	6,676,000

b. Account opened with South China Securities Ltd.

This account was opened by Louis LO on 5th August 1994. NG Chun Sang, a dealing director at South China Securities testified that WONG Sun was already a client and it was WONG Sun who introduced Louis LO.

The account records show that between 5th and 30th August all dealings were in Hanny shares and all dealing consisted of sales which may be summarised as follows :

Date of sale	**Number of shares**
5th August	1,180,000
8th August	240,000
9th August	230,000
10th August	1,608,000
12th August	242,000
17th August	320,000
25th August	48,000
26th August	100,000
30th August	32,000
Total	4,000,000

As already stated, Louis LO was 'connected' to Hanny by reason of his employment and was a friend of WONG Sun. He had good reason to deal in Hanny shares for his own benefit. However, when SFC officers searched WONG Sun's offices in 1996 they came across a number of documents related to Louis LO. They included account statements in respect of the South China Securities account. WONG Sun was unable to offer any form of *positive* explanation why such documents should be found in his offices :

> Q: On 23rd September 1996, we visited your office to execute our warrant and let you review a document … which sets out the records of Louis LO's securities tradings done through South China Securities. Why were the trading records of Louis LO found in your office?
>
> A: I don't know. Louis LO does not have a secretary. He might have asked my secretary to do things for him …
>
> Q: However, the document … was found in your cabinet?
>
> A: I don't know. It was possible that other people's belongings had been placed into my own cabinet as well.

> Besides, at that time, IDC[41] had kept away the documents of all my staff in Hanny Magnetics, which had been kept for a whole month before such respective personal documents of ours were returned to us. It was possible that under such circumstances Louis LO's documents had been mixed up with mine.

In an interview a few days later, WONG Sun was asked if any of Louis LO's trading in Hanny shares in July and August 1994 through the 2 trading accounts could have been his trading. WONG Sun did not deny this, instead he said that he could not remember. He then went on to say :

> As to whether Louis LO had got any financial information on Hanny Magnetics before the publication of the financial results I don't know. Louis LO did not tell me why he had to sell the Hanny Magnetics shares … *Some of the trading might be the disposal of shares by Louis LO on my instructions*. But, I really do not remember which are my sale of shares. [our emphasis]

WONG Sun was referred to copies of a series of 7 cheques found in his offices. These cheques were made out to WONG Sun and drawn on Louis LO's Dah Sing Bank account. The cheques had all been presented for payment in August 1994. They totalled in value some HK$13.7 million. Why should WONG Sun have received payment from Louis LO in such a large amount in August 1994? WONG Sun's explanation was ambivalent :

> I believe [the cheques] probably show the return of the proceeds to me by Louis LO *after he had sold Hanny Magnetics shares on my behalf*. As to why Louis LO had so many shares … they were probably bought by him after the company went public. This had nothing to do with me at all, since I have never transferred any Hanny Magnetics shares … to Louis LO from my account or any nominee account under me. [our emphasis]

In separate answers, therefore, WONG Sun had spoken of Louis LO selling Hanny shares either 'on his instructions' or 'on his behalf'. The

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[41] IDC is a company which moved into Hanny's premises.

Tribunal accepts, of course, that WONG Sun was unable to testify and thereby to explain the true intent and meaning of these answers. Was there then any independent evidence to identify the origin of the Hanny shares sold in the 2 trading accounts?

a. *The account opened with Emperor Securities*

Records show that on 20th July 5.176 million Hanny shares were deposited into this account. This was followed on 4th August by a further deposit of 1.5 million shares. Both deposits were made on the written instructions of Louis LO who said that the shares should be taken from an account in the name of a company called Right Enhancement Ltd.

b. *The account opened with South China Securities*

Records show that 4 million shares were deposited into this account : 3.5 million on 5th and a further half million shares on 22nd August. The 3.5 million shares were deposited on the written instructions of Louis LO who said that these shares too should be taken from an account in the name of Right Enhancement Ltd.

The balance of half a million shares, however, was withdrawn under cover of a 'Stock Withdrawal Form' from the American Express Bank. The form was dated 18th August. As will be seen, WONG Sun had an account with the American Express Bank in the name of Diamond Delight Assets Ltd. That account held Hanny shares and, by written instruction, WONG Sun directed that exactly half a million shares were to be withdrawn from this account on 18th August; the same date appearing on the Stock Transfer Form.

But what of Right Enhancement, the source of the rest of the Hanny shares? When interviewed by the SFC in October 1996, WONG Sun denied ever hearing of a company of that name.

How then was the company to be identified? When interviewed by the SFC, Louis LO said that at one time he had used a company called Havana Corporation to hold Hanny shares. At a later time, however, in April 1992, he decided to use a company registered in the British Virgin Islands. That company was called Right Enhancement and it assumed control of all the shares

and other assets held by Havana Corporation.

As for WONG Sun's interest in Havana Corporation or Right Enhancement, it is necessary to refer again to the search of WONG Sun's offices by the SFC. When that search took place, 4 typed schedules were found. They were dated 15th October 1992; 1st February 1993; 20th October 1993 and 10th March 1994. Copies of those schedules are annexed to this report as Annexure 'XXIII' (a-d).

Connie LI, WONG Sun's secretary, testified that she had prepared these schedules. She had done so, she said, under WONG Sun's instructions. The purpose was to calculate dividends payable on various parcels of shares held in different accounts. The shares, she believed, belonged to WONG Sun. In this regard, the transcript of her testimony reads :

> Q: Did you not believe you were gathering together the shareholding of Mr. WONG in respect of all these shares and their dividends?
>
> A: I believe so.
>
> …
>
> Q: When you had done your work and produced … the schedule … did you give the end result information to Mr. WONG Sun?
>
> A: Yes, yes, I got him to look at it.
>
> Chairman: In general terms, therefore, would it not be right to say that WONG Sun trusted you to effectively draw up detailed schedules concerning a number of accounts in which you believed, in any event, he had interests in shares, in Hanny?
>
> A: I believe that he did trust me …

An examination of the schedules shows that shares were held initially with a brokerage house called Asia Investment in an account entitled : 'Havana'. That name, however, only appeared on the first schedule. Thereafter the account with Asia Investment was entitled : 'Right'. In context, the shortened names can only refer to Havana Corporation and Right Enhancement.

In the opinion of the Tribunal, the schedules show clearly that, despite

his denial to the SFC, WONG Sun had for several years been holding Hanny shares in an account in the name of Right Enhancement, the account from which Hanny shares were deposited into Louis LO's 2 trading accounts.[42]

The schedule dated March 1994 (compiled some 3 months before the first period trading) indicates that WONG Sun was then holding in excess of 9 million Hanny shares in the right Enhancement account.

A total of 3.5 million shares were transferred on 5th August 1994 to Louis LO's account with South China Securities. The Tribunal is satisfied that the balance of half a million shares came from an account controlled solely by WONG Sun; namely, Diamond Delight. But in respect of the trading account held with South China Securities, the matter does not end there. For it was the evidence of NG Chun Sang, the director, that WONG Sun, despite lack of any formal authority, was nevertheless allowed to *operate* the account.

In this regard, it was NG Chun Sang's testimony that sometimes WONG Sun would give instructions 'on behalf of' Louis LO, requesting that Hanny shares be sold. He would make those calls by telephone, give instructions to sell Hanny shares and his instructions would then be acted upon. This was despite the fact that Louis LO had not lodged a power of attorney or other formal mandate. Further than that, the evidence revealed that WONG Sun or Connie LI were sometimes contacted in order to *confirm* instructions already given.

In the opinion of the Tribunal this was a state of affairs that not only contravened good practice but was also blatantly open to abuse. During the course of NG Chun Sang's testimony, the matter was put squarely to him :

> Chairman: … you were a senior member of this broking house. You knew that chairman of listed companies could not deal in their own shares without notifying the Stock Exchange.
>
> A: Yes.
>
> Chairman: Here comes the chairman of a listed company, saying "I want to introduce you to my friend, Mr. LO, and he is going to open an account", and Mr. LO opens an account?

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[42] The schedules also show that accounts in the name of FAY Loi Loi and Connie LI were WONG Sun's accounts.

A: Yes.

Chairman: … and he starts selling very large quantities of Hanny Magnetics and nothing else … the very company which Mr. WONG Sun is chairman of, and Mr. WONG Sun gives a number of the orders. Did it not pass your mind, "I wonder if this is not a nominee account of some sort, or a dummy account of some sort, and Mr. WONG Sun is operating it to avoid Stock Exchange Rules, and I might be unwittingly involved in this deception"? I mean, are those not the sort of things that senior members of broking firms are meant to look out for? The answer is yes, is it not?

A: No –

It was apparent from the tenor of his evidence that NG Chun Sang could see nothing wrong with the conduct that he sanctioned. The Tribunal, however, is of a very different opinion.

Suffice to say, it was apparent that in August 1994 WONG Sun not only had the unfettered ability to operate the account of Louis LO but on occasions he did so.

As for the proceeds received from the sale of the 4 million shares, records of the account show 3 payments made by cheque into the account of Louis LO with Dah Sing Bank, leaving a credit balance of some HK$200,000. From the end of August 1994 – *after* the selling – the account became dormant.

In respect of Louis LO's account with Emperor Securities, the proceeds received from the sale of the shares were again paid into Louis LO's Dah Sing Bank account.

But, as earlier stated, when the SFC searched the offices of WONG Sun, they discovered a copy of Louis LO's Dah Sing statement of account for the month of August 1994, the month when a high proportion of payments were being made into that account from the sale of Hanny shares. In addition, they discovered copies of 7 cheques drawn on that account and made out to WONG Sun. Those cheques totalled HK$13.72 million. No evidence was placed before the Tribunal to show that such a large sum of money had been paid over

for a matter unrelated to the sale of Hanny shares. In such circumstances, the only reasonable inference to be drawn is that the payments must have (and did) constitute the channelling of funds back to WONG Sun in respect of the sale of his Hanny shares.

In his final submissions, Counsel to the Tribunal, invited the Tribunal to come to the finding that the 2 accounts set up by Louis LO on 18th July and 5th August 1994 for the purpose of dealing in Hanny shares were no more than nominee accounts created to enable WONG Sun to deal in a disguised manner in his own Hanny shares. Upon a consideration of all the evidence, while making due allowance for WONG Sun's inability to testify, the Tribunal is satisfied that it can come to no other finding.

(ii) Dealing in the FAY Loi Loi accounts

For the reasons detailed in Chapter Six, the Tribunal is satisfied that the 2 trading accounts in the name of FAY Loi Loi in which Hanny shares were sold in the first period were both nominee accounts; they were accounts created to enable WONG Sun to speculate in Hanny shares without having to make disclosure. A brief description of the 2 accounts are as follows :

a. *Account opened with Emperor Securities Ltd.*

This account was opened on 9th March 1994. On the same date, an account was opened in WONG Sun's name. A document entitled 'Discretionary Authority' was also executed. This permitted Emperor Securities to transfer moneys between the 2 accounts, making them essentially collateral, linked accounts.

The records reveal extensive dealings in Hanny securities in the account. However, between 11th and 18th July 1994 only *sales* of Hanny shares took place as follows :

Date of sale	**Number of shares**
11th July	112,000
12th July	718,000
13th July	308,000
14th July	190,000

15th July		862,000
18th July		548,000
	Total	2,738,000

While the sales were taking place and immediately thereafter funds were transferred across to WONG Sun's 'collateral' account. The transfers took place on 3 occasions and totalled HK$3.97 million.

b. *Account opened with Tung Tai Finance Ltd.*

This account was opened on 16th August 1994 and 2 days later an account was opened in the name of WONG Sun. On 1st September a 'Discretionary Authority' was executed. As with Emperor Securities, this enabled Tung Tai Finance to transfer moneys between the 2 'collateral' accounts.

The account records reveal that between 17th and 31st August 1994 the following sales of Hanny shares took place :

Date of sale	**Number of shares**
17th August	120,000
24th August	580,000
25th August	300,000
30th August	690,000
31st August	310,000
Total	2,000,000

Evidence revealed that the 2 million Hanny shares sold through this account were transferred from WONG Sun's account with the American Express Bank, the transfer dates being 19th August and 2nd September.

As for the proceeds of sale, *after* the announcement of Hanny's end of year results, Hanny shares were then purchased through this account. To assist in funding these purchases, WONG Sun paid in a million dollars drawn on an

account he held with Peace Town Securities Ltd. That company confirmed that the cheque had been issued on WONG Sun's instructions.

Upon a consideration of all the evidence, the Tribunal is satisfied that all the dealings in FAY Loi Loi's accounts in the first period were, in substance and reality, WONG Sun's dealings.

(iii) Connie LI

For reasons given in Chapter Six, the Tribunal is satisfied that the 2 trading accounts opened by Connie LI in order to deal in Hanny shares were nominee accounts only, created to enable WONG Sun to deal without making disclosure.

Only one account was used during the first period; namely, the account with the American Express Bank. On 13th July 1994, 1.7 million Hanny shares were sold through this account. WONG Sun admitted to the SFC that the dealing was his.

(iv) WONG Sun's own account in the name of Diamond Delight Assets Ltd.

This account was opened in March 1993. The account opening documents indicate that Diamond Delight Assets was a company registered in the British Virgin Islands; WONG Sun was the sole director. LO Kam Yuk, the account executive at American Express Bank who had responsibility for the account, testified that she received all her instructions from WONG Sun. She was able to recognise WONG Sun's signature on a number of letters related to dealings in the account. To put the matter beyond doubt, in an interview with the SFC in October 1996, WONG Sun admitted : 'Diamond Delight is an account of mine'.

In the first half of 1994, Hanny shares were accumulated in this account. However, the records show that in July a sale of 2.3 million Hanny shares took place, the 'value date' being 15th July 1994. It was not contested that the sale date would have been (in all likelihood) 13th July.

(v) A summary of WONG Sun's dealing in the first period

The Tribunal is therefore satisfied that WONG Sun dealt in the following Hanny shares by selling or causing their sale :

Account	Number of shares
Louis LO, Emperor Securities	6,676,000
Louis LO, South China Securities	4,000,000
FAY Loi Loi, Emperor Securities	2,780,000
FAY Loi Loi, Tung Tai Finance	2,000,000
Connie LI, American Express	1,700,000
Diamond Delight	2,300,000
Total	19,456,000

B. SANRITA WONG

The Tribunal has not been able to come to a finding of fact that K.L. WONG's account was at all times Sanrita WONG's account, his name being used solely as a nominee name. On the face of the documents, it may well be that the account was originally opened by K.L. WONG with the *bona fide* intent of trading for his own benefit. However, what is required is a finding of fact as to who, in truth and substance, 'dealt' in Hanny shares in that account during the first period. Was it K.L. WONG or Sanrita WONG? If it was Sanrita WONG it does not matter that the shares in question were not her property, not if it was her decision to deal, a decision made at a time when she was knowingly in possession of relevant information.

Upon a consideration of the evidence, he Tribunal is satisfied that the sale of 3,552,000 Hanny shares made through that account between 18th July and 30th August 1994 was in reality a sale of Sanrita WONG's own Hanny shares authorised by her for her own benefit. The Tribunal is satisfied that she sold at that time because she was in possession of relevant information concerning the marked reversal in Hanny's fortunes and wished to avoid the material loss that she knew was likely, indeed inevitable. The account of K.L. WONG was used by her in order to disguise her own dealing. But even if the Tribunal is wrong in that regard, it is satisfied that Sanrita WONG, being

knowingly in possession of relevant information, dealt in K.L. WONG's Hanny shares at her own absolute discretion as effectively as if they were her shares.

There has been no direct evidence that Sanrita WONG enjoyed anything more than bare ownership of the 3,552,000 Hanny shares sold during the first period and no direct evidence that the sale was solely for her benefit. The Tribunal has had to reach its findings on the basis that it is a compelling inference – indeed, the only reasonable inference – to be drawn from the primary facts found.

(i) The relationship between Sanrita WONG and K.L. WONG

Although she denied any romantic attachment, Sanrita WONG admitted that she and K.L. WONG were good friends. Who had known each other for many years. They were not, therefore, acquaintances or business associates who would be expected to deal with each other at arm's length. Their relationship was closer. In short, they would be expected to discuss matters of mutual interest or to the advantage of one or other of them as close friends would do.

(ii) The issue of a power of attorney by K.L. WONG

K.L. WONG opened his trading account with the private banking division of Credit Lyonnais on the recommendation of Sanrita WONG who already enjoyed such facilities with that same organisation. The account was opened on 28th May 1992. A little over one week later, on 8th June 1992, K.L. WONG gave Sanrita WONG full power of attorney to operate that account. That power of attorney remained valid throughout the first period.

(iii) The 'agreed' scope of Sanrita WONG's mandate to deal in the account

Being friends of long standing, and with Sanrita WONG holding K.L. WONG's power of attorney to use the account at her discretion, it would be expected that there would be some relaxed intercourse between the two concerning how best to trade in the account.

When interviewed by the SFC in February 1997, K.L. WONG accepted that had essentially been the position. He said, in fact, that he had dealt heavily in Hanny shares because Sanrita WONG had run his account and because she and her brother, WONG Sun, were directors of Hanny who would know best how to successfully speculate in Hanny shares. It was the clear import of what he said that Sanrita WONG made the decisions when to buy and when to sell Hanny shares held in his account. The following extract from the record of interview illustrates the point.

> Q: According to your retirement plan with Mobil and your property investment, you are a conservative investor. Why have you invested in that high risk stock, Hanny Magnetics?
>
> A: I don't care about money. Besides I know Sanrita WONG is a director of that company. She runs that company. She and WONG Sun were the directors of that company. That's why it is more convenient to let Sanrita WONG run my account with Credit Lyonnais and invest in shares of Hanny Magnetics.

A little later in the interview, K.L. WONG said :

> … I have no idea of any particular transactions item by item in my account with Credit Lyonnais. That account belongs to me but I don't run that account. What I know is Sanrita WONG buys stocks on my behalf. I have no idea of how Sanrita WONG placed the orders to buy or sell the stocks.

By contrast, however, when Sanrita WONG testified, she denied that she had had any sort of 'general mandate' of the kind suggested by K.L. WONG. Her testimony was clear :

> Chairman: Just so that we understand, he [K.L. WONG] would instruct you as to the quantity of shares to be sold?
>
> A: And the Price.
>
> Chairman: And he would give you the top and bottom price within which they were to be sold?
>
> A: Yes. Every time he sells shares, he asks, "What is the

closing price now? What kind of price is at the market, and so you would sell how many shares for me at which price."

Chairman: So you merely acted as the go-between?

A: Correct.

Chairman: You did not make decisions yourself as to how many be sold or at what price?

A: I do not, because that money does not belong to me.

Chairman: And that information always came from Mr. K.L. WONG?

A: Correct.

It was Sanrita WONG's persistent testimony that she had *never* used here knowledge gained as a director to advise K.L. WONG when to buy or sell Hanny shares. She insisted that every decision had been made independently by K.L. WONG. However, when shown what K.L. WONG had told the SFC about the manner in which he operated his own account and asked to comment, she made no suggestion that K.L. WONG had been mistaken or had in some way distorted the truth. Instead, she went to great lengths to place upon the plain meaning of his words some other meaning that harmonised with her own version. Her attempts in this regard were confused, rambling and utterly unsuccessful.

It is clear that, when she wished, Sanrita WONG could (and did) make independent decisions in respect of that account. In short, she used her own judgment when and in what numbers to buy or sell. It should be said that, in coming to this finding, the Tribunal has at all times borne in mind the fact that K.L. WONG did not testify before the Tribunal and that Sanrita WONG's counsel was therefore unable to cross-examine him. The Tribunal felt it proper, however, to take cautious cognisance of those portions of his interviews with the SFC in which he spoke of the manner in which he ran his own account with Credit Lyonnais. It did so because Sanrita WONG was given an opportunity to comment and did not specifically aver that what was said by him was incorrect. Instead she attempted to infuse the words with a meaning that patently they would not bear.

It was the unanimous opinion of the Tribunal, however, that even if K.L. WONG's statements to the SFC were ignored, sufficient evidence remained to prove to the required standard that the dealings in question were Sanrita

WONG's dealings.

(iv) The origin of the Hanny shares sold and the destination of their sale proceeds

As mentioned in Chapter Five, monthly portfolio statements were issued by Credit Lyonnais in respect of K.L. WONG's trading account. The statements issued in April, May and June show that the account during those months held no Hanny shares or indeed any Hong Kong equities. However, the records show that on 15th July 1994, Sanrita WONG directed Credit Lyonnais to withdraw 3,552,000 Hanny shares from her own account and transfer them into the account in the name of K.L. WONG. In short, all the shares sold during the first period came from Sanrita WONG's account and were shares, ostensibly at least, which belonged to her.

How is it suggested then that the shares were nevertheless K.L. WONG's shares and not her shares? According to Sanrita WONG, in order to avoid custodial charges, K.L. WONG had physically entrusted his Hanny share certificates to her safe keeping. She had held a total of 3,552,000 such shares. However, when she was required to lodge Hanny shares as security with Credit Lyonnais, a mistake was made and K.L. WONG's shares were physically removed from a cabinet and handed to Credit Lyonnais. Sanrita WONG testified that it was only when K.L. WONG instructed her to sell all his shares on or about 15th July that she realised that a mistake had been made. She, therefore, transferred 3,552,000 of her own shares into K.L. WONG's account as a replacement.

The explanation may sound unlikely. However, such accidents do sometimes occur and, taken in isolation, the Tribunal may have been inclined to give Sanrita WONG the benefit of the doubt. But what then happenned to the sale proceeds?

According to Sanrita WONG, the shares belonged to K.L. WONG and the proceeds were, therefore, due to him. The proceeds, however, did *not* go to K.L. WONG. Instead they went either to an account in the name of Sanrita WONG or to an account in the name of Barkfield Ltd. This was the company that was controlled by Sanrita WONG and was used by her to buy a home in

Hong Kong in a development called Las Pinadas.[43] In this regard, it was Sanrita WONG's assertion that she had asked K.L. WONG if she could borrow money from him. He agreed. She therefore took that money from the sale proceeds. As for the moneys paid into the Barkfield account, it was her evidence that K.L. WONG, who had invested with her in the past in Hong Kong property, had agreed to take just a 1% share in Las Pinadas. As she said in a witness statement made by her in July 1999 :

> … I roughly calculated that KL [WONG] had to pay around HK$160,000.00 for his 1% interest and treated the sum of HK$153,529.83 as KL's payment on account. As a result of the developer's delay, completion could only take place in April 1995 subsequently.

In summary, it was Sanrita WONG's assertion that the Hanny shares sold in the first period had only come from her account because K.L. WONG's equivalent number of shares had been pledged by mistake with Credit Lyonnais to secure her trading account. The shares transferred by Sanrita WONG were, therefore, replacement shares. But once those shares were sold, the moneys did not go to K.L. WONG because it was agreed she would borrow the proceeds. That was why the funds were returned to her. The balance of the funds which she did not borrow constituted K.L. WONG's 1% interest in the house that Sanrita WONG had purchased and so she took charge of those funds even though, as it turned out, they were not due to the developer for another 8 months. Frankly, this version of events strained credulity to breaking point and when placed in context; that is, when considered together with the numerous other conflicts and inconsistencies that littered her evidence the Tribunal had little hesitation in rejecting it. The Tribunal was satisfied that the shares transferred into K.L. WONG's account were Sanrita WONG's own shares and the money went back to her because it was her money.

During the course of the inquiry, Sanrita WONG produced letters showing written confirmation of the matters referred to above. She did not produce an entire bundle of such written confirmations to cover, as a regular practice, all the dealings between herself and K.L. WONG, only these neatly written, formal letters to cover the matters under investigation. The Tribunal

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[43] See page 119 *supra.*

accorded them no weight.

(v) *The manner in which instructions were given to sell the Hanny shares*

Sanrita WONG spelt out a reasonably simple set of circumstances in which, she said, she instructed Credit Lyonnais to dispose of K.L. WONG's shares. But even in this regard, her version of events came into fundamental conflict with other credible evidence, much of it in the form of day-to-day business records. As to the manner in which she had instructed that the shares be sold, her evidence was clear :

a. She was instructed by K.L. WONG to sell all of his Hanny shares but only *above* a certain price and this was the instruction she passed on to Jeanie FANG at Credit Lyonnais.

b. After she left Hong Kong (on 17th July) she made *no* contact with Credit Lyonnais until her return on 13th August.

c. On her return, she learnt that not all the shares had been sold. She therefore obtained instructions from K.L. WONG to sell the balance but again only *above* a certain price.

However, while K.L. WONG told the SFC in his interview in February 1997 that he instructed Sanrita WONG to 'get rid of' all his shares, he spoke only of passing on that general instruction :

> I only know I and Sanrita WONG have an agreement to sell the stocks. How to sell, when to sell is Sanrita WONG's decision. It's probably Sanrita decision to sell the remaining shares in my account on 26th and 30th August 1994.

If, Sanrita WONG retained and exercised her discretion how best to deal with the Hanny shares in K.L. WONG's account, it follows that to exercise such discretion on 8 separate occasions required her to keep an eye on the market, it was not something to be done by her in ignorance, certainly not as Deputy Chairman of Hanny.

It was, however, Sanrita WONG's evidence that, after she departed Hong Kong on 17th July, she took no further interest in Hanny shares. She was then solely on holiday – an assertion disbelieved by the Tribunal[44] – and had no contact with Credit Lyonnais. Was that a truthful assertion on her part?

The Tribunal is satisfied that it was not and that, in truth, Sanrita WONG, while away from Hong Kong, kept in regular contact with Credit Lyonnais and gave to the personnel there several separate sell orders, sometimes changing her instructions as to what should be done with the proceeds.

Jeanie FANG, Sanrita WONG's main contact at Credit Lyonnais, had no recollection of receiving any general mandate from Sanrita WONG to immediately proceed to sell the full parcel of shares. It was instead her evidence, which the Tribunal accepted, that the shares were sold between 18th July and 30th August by reason of a number of *individual* instructions received and *later confirmed in writing by Sanrita WONG*.

Jeanie FANG impressed the Tribunal as an experienced, well-versed professional in the field of assisting private banking clients. Clearly, of course, she had to rely largely on contemporaneous Credit Lyonnais records and on her adherence to set procedures used within Credit Lyonnais. But in many respects those day-to-day business records gave the most accurate picture of what must have happenned.

Jeanie FANG testified that, if she had received a general mandate of the kind described by Sanrita WONG, she would have made out an internal memorandum. She said that the traders who executed the sales would also have noted the verbal instructions given to them by her (or her staff) in their record book. There was, however, no trace of any kind of memorandum or record book endorsement.

By looking at the record of sales, it was Jeanie FANG's evidence that it did not have the appearance of sales being made pursuant to a general mandate to sell a full parcel above a stated minimum price. If Credit Lyonnais was given an instruction to sell a parcel of shares above a certain price, she said, it would immediately move to sell the entire parcel. If that was not possible in

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[44] See Chapter Five, page 119 onwards.

one day then the brokers would try again the next day. They would not leave it for several days before trying again. In this regard, the Tribunal noted, as an example, that the first sale was made on 18th July (10,000 shares) while the second sale (80,000 shares) was only made on 25th July. There had been 4 trading days in between those 2 dates.

In the opinion of the Tribunal, however, what puts the matter beyond doubt are handwritten endorsements appearing on various internal execution dockets which indicate that, while Sanrita WONG was out of Hong Kong, Credit Lyonnais received verbal instructions to sell and to pay the proceeds into specific – *but changing* – accounts. For example, the proceeds of an early sale were to be paid into Sanrita WONG's account but in late July a 'fund in/out' docket bears a handwritten note from one of Jeanie FANG's assistants saying that - on verbal instructions - the proceeds of sale were to be paid into an account in the name of Barkfield Ltd. Such changes of fund destination, said Jeanie FANG, would not be made unless specific instructions were received from the client at that time and those instructions would have been noted in the client file.

Accordingly, even without reference to K.L. WONG's SFC statements, the Tribunal is satisfied that Sanrita WONG did not, before her departure, give Credit Lyonnais a general mandate to sell all of the shares in K.L. WONG's account. If that had been the case there would have been some indication in the form of a written record of that instruction. The Tribunal is satisfied that what happenned is what the Credit Lyonnais records clearly show happenned; namely, that individual 'sell orders' were given over the telephone at a time when both Sanrita WONG and K.L. WONG were out of Hong Kong. It was never suggested, not even by Sanrita WONG, that such orders must have been given by K.L. WONG himself. The Tribunal is therefore satisfied that it was Sanrita WONG who telephoned to give the orders. For her to do so in that manner on several different occasions means that she must have been keeping an eye on the market and must have done so when she was knowingly in possession of relevant information concerning the state of affairs then prevailing in her Hanny. Sanrita WONG never said that when she was outside of Hong Kong, she spoke to K.L. WONG and could therefore have received instructions from him at that time. Indeed, she went to some lengths to deny any such contact. Accordingly, whether she was dealing in her own shares (which the Tribunal is satisfied is the case) or dealing in K.L. WONG's shares, the decision

when to sell and in what quantities was always *solely* her decision.

C. WILLIAM FUNG

In the first period, all transactions alleged to have constituted insider dealing by William FUNG were recorded in a trading account with Onshine Finance Ltd. That account was not in the name of William FUNG but was in the name of his son, Clement FUNG. A copy of the trading record from 31st December 1993 to 31st March 1995 is annexed to this report as Annexure 'IX'.

The account was opened in the name of Clement FUNG on 11th September 1989. Hanny was only listed on the Hong Kong Stock Exchange in December 1991, two years later. In such circumstances, what evidence was placed before the Tribunal to suggest that the sale transactions in that account during the first period were, in fact and in substance, those of William FUNG and not his son, Clement? A number of evidential matters were placed before the Tribunal including admissions made by William FUNG. The argument was made that, when these individual matters were taken together, the single compelling inference - indeed the only inference that could reasonably be drawn - was that all the relevant transactions must have been those of the father and not the son. What then were those individual matters of evidence?

a. William FUNG's authority to operate the account as if it was his own

It was originally William FUNG who introduced his son to Onshine Finance in order to open a trading account. In terms of a document signed by both father and son on 12th September 1989 (the day after the account was opened), Clement FUNG gave his father full power of attorney to use the account. At no time was that authority withdrawn. Accordingly, at all material times William FUNG had full authority to use the account as if it was his own.

b. William FUNG's motive for using the account to trade in Hanny shares

During the course of his testimony, it became clear that William FUNG had a material motive for wishing to use his son's account as a vehicle for his

own trading in Hanny shares. As mentioned earlier, on his own admission, he used his son's account to trade in Hanny shares so that he would not have to make disclosure to the Stock Exchange and thereby alert the market. He carried out this clandestine trading in his son's account even though he knew he was committing a criminal offence. His use of the account to trade in Hanny shares was therefore a calculated deception.

c. The extent to which the account was used for trading only in Hanny shares

A study of the transactions recorded in the account reveal that it was used almost exclusively as a vehicle for trading in Hanny shares. In particular the first 9 months of 1994 show that all the transactions, with the exception of one, related to Hanny shares. The single exception was the purchase of 400 HSBC shares. In that first 9-month period there were in excess of 100 transactions related to Hanny. Nor can it be said that the transactions were insignificant in value.

William FUNG said that he never shared information with his son concerning Hanny to enable his son to trade successfully. In such circumstances, the question may legitimately be asked : why would the son chose to trade so heavily in Hanny shares to the almost total exclusion of other stocks?

Flowing from this, it is pertinent to note that, when interviewed by the SFC, William FUNG said that his son traded in a 'small number' of securities. But this was not guesswork. The answer arose when the SFC questioned William FUNG why he should be holding account opening documents in respect of his son's account. In answer, William FUNG said :

> I referred him to open an account at Onshine. He trades in a *small number* (of securities). He would also authorize me to take care of his account when he is not around. [our emphasis]

Later, however, William FUNG alleged that he leant his son very substantial sums, totalling HK$1 million or more so that his son could trade independently. The level of financing apparently advanced to the son does not sit easily with a suggestion that the son traded in only a small number of

securities.

d. The financing of the trading account and to whom funds from the account were paid

In the ordinary course of events, if Clement FUNG had traded in the account for his own benefit, the records would be expected to show some evidence of Clement FUNG paying in margin deposits and being paid money from the account. But there is no such evidence, not at least for the period of time covered by the trading records produced into evidence.

The records do reveal a number of cash payments with no identifying details. It is impossible to know whether it was the father or son who made these payments or received them. But the payments that are identified all relate to William FUNG and not the son.

A number of payments were either from or in favour of a company called Woodford Investments Ltd. William FUNG admitted that only he dealt with this company. It will further be seen that on 15th August 1994 a margin deposit of HK$250,000 was paid into the account by a person named Benson LEE. William FUNG accepted that Benson LEE was an old friend or associate of his. None was never any suggestion made that he was also associated with the son.

In order to explain these sources of funding, William FUNG said that he was effectively financing his son's trading in what the records show to be almost exclusively Hanny shares.

When interviewed by the SFC in October 1996, William FUNG said that he recalled on a number of occasions lending his son a total of HK$1 million odd to assist him in his share trading. He also said that :

> It might also be possible that Clement had incurred losses when trading in securities, and asked me to lend him money to make up the losses. As for the details, I have to go back and check first before giving you an answer.

It is, of course, possible that William FUNG did give his son some

financial assistance to fund his trading. If that was the case, moneys to repay such loans would be expected to be made payable to William FUNG himself or the finance company through which he had obtained the funds. But that does not detract from the observation that it is strange that no payments at all are clearly identified as being paid in by Clement FUNG or received by him. Did he not finance *any* of his own trades between January 1994 and the end of March 1995? Or did he not receive *any* payments from Onshine that were, in the day-to-day course of things made out to him and recorded as such? By studying the account details only (and leaving aside the cash sums which, evidentially, are neutral) there is nothing to suggest that Clement FUNG either financed the account or received any of its proceeds. Yet in an interview with SFC on 2nd October 1996, William FUNG (who said he had handled his son's trading when the son was out of Hong Kong) estimated that his son's share of the trading had been greater than his. In this regard, his record of interview recorded him as saying :

> In fact, this account is jointly used by me and Clement. That means both Clement and I have shares in the trades. I think the ratio is about 4:6; I have 40%, while Clement has 60%.

Such an assertion does not rest easily with the evidence of the trading records. The trading records provide clear, admitted evidence of the father paying in funds and receiving funds. Those same records, however, do not provide even one instance of clear evidence showing a payment in by Clement FUNG or a payment out in his favour. This evidence, of course, must be considered in light of the fact that, almost exclusively, the shares being traded were Hanny shares and William FUNG on his own admission, wished to trade in Hanny shares in a disguised manner.

e. Lack of records to support joint use of the account and to show who was the true dealer in respect of individual transactions

The Tribunal accepts that, between family members or friends, an informal use of another's account may take place. In Hong Kong there is nothing particularly out of the ordinary in this. But even if such a practice is not particularly out of the ordinary, if each user of an account is to be responsible for his or her own transactions then there must be some way to

identify and distinguish those transactions.

In his interview with the SFC on 7th October 1996, Clement FUNG was specific as to how he went about distinguishing his transactions from those of his father. In this regard he said the following :

> I don't know the percentage of his share in the account. I only know which trades were mine and then the rest would belong to William FUNG. Trading statements were sent to me. After finished reading, I would put a tick against my own trades and give the statements to William FUNG, who would keep the statements.

When asked by the SFC to identify their own transactions, both William and Clement FUNG said that they would first need to check their records before they could do so.

One week after he had been requested to identify his transactions, Clement FUNG sent a letter dated 13th October 1996 to the SFC containing a copy of his Onshine Finance account. That account had been hi-lighted to identify his transactions as opposed to those of his father. Clement FUNG did not identify the source material from which he had been able to identify his transactions but if, as he had said in the earlier interview, the original statements marked by him and then given to his father were still in existence that would have been the obvious source.

Knowing that they were under investigation, such records – whatever their nature – would, of course, have constituted important documents for both father and son. They would have been documents to safeguard as they were evidence of the truthfulness of their assertions.

Based on the records that he was able to check, Clement FUNG asserted that between 11th July and 1st August 1994 *all* the transactions that appeared on the statement of account bearing July dates had been his transactions and not his father's. These were all sales of Hanny shares – 680,000 in total – which fetched HK$1,336,191. In May 1998 William FUNG confirmed the accuracy of the information given by his son. All the 'July sales' had been his son's transactions. William FUNG said that his first transaction at that time had been a sale of 230,000 shares shown on the

statement as having been made on or about 1st August 1994.

After the inquiry itself had commenced and evidence was being heard by this Tribunal, William FUNG submitted a statement of admitted facts. This statement, dated 6th July 1999, purported to identify all of his transactions carried out between 1st June and 31st August 1994. A copy of the table detailing the transactions is attached to this report as Annexure 'XXIV'. This statement too confirmed the accuracy of the information given by Clement FUNG; namely, that all the 'July sales' had been his and not his father's.

Of course, the weight to be given to these various written identifications depended substantially on the nature of the source material from which they were drawn. The original statements of account received from Onshine and marked by Clement FUNG before handing them to his father would have been the very best evidence. However, none of the source material was placed before the Tribunal, either by the SFC which had conducted a search of William FUNG's premises or by William FUNG. The obvious question is : why not?

William FUNG did not deny that such records had at an earlier stage of the investigation been in existence; he even gave a vague description of them. In this regard the following was said during his testimony :

A: I really had to check, because even at that time I did not remember.
Q: What did you check?
A: Checked those receipts – statements, checked the statements.
Q: Account statements?
A: Yes.

However, when pressed to state the exact nature of these important records and their present whereabouts, William FUNG could only say that he had lost some of them and/or thrown others away. In this regard, his testimony was as follows :

Chairman: I think the question is : did you find any kind of records which enabled you to check anything at all concerning any

part of this period?

A: I just looked at the Onshine statements. I do not know if I still have them, but if I do, I only checked it from there.

Q: Are the Onshine statements the same ones that we are looking at here in core bundle C, page 272, for example?

A: Yes, something like this type.

Q: Did the ones that you checked have notes on them, perhaps ticks or initials, to indicate trades?

A: Some of them have.

Q: Where are these records?

A: Now I could not find them. I would have to look for them, because it has been a few years, and some of them I have lost and some of them I have thrown away. I cannot remember.

Q: But are you saying that you had them available to you so that you could answer the SFC in May 1998?

A: I cannot remember, with such a lot of figures.

William FUNG, a businessman of many years experience and a board member of 2 public companies, *must* have appreciated the importance of preserving the source material, both for his own benefit and that of his son who at that time may have been made an implicated party too. The Tribunal cannot accept that William FUNG may have decided to throw away such records or that, without explanation, he simply had no idea of their whereabouts.

f. William FUNG's admissions made during the course of oral testimony

In respect of the first period, it was alleged that William FUNG had engaged in insider dealing from about 20th July to about 18th August 1994 when he consistently sold Hanny shares through his son's Onshine account. The 'July' and 'August' sales were, therefore, the relevant ones.

When the son, Clement, was afforded the opportunity to check his records and give the SFC a detailed disclosure of his transactions during the relevant July and August period, he stated that *all* the sales appearing as the Onshine statements against July dates had been his transactions and not his father's. These 'July' sales were made on 21st and 29th of that month. A total

of 680,000 shares were sold. On 11th May 1998, when interviewed by the SFC, William FUNG confirmed the assertion that all the 'July sales' had been his son's. William FUNG said that his first sale had been shown on the statement as being on 1st August 1994; this was a batch of 230,000 Hanny shares sold for HK$1.93 per share. In his witness statement made on 6th July 1999, William FUNG affirmed the accuracy of what had been said earlier, his table of transactions – Annexure 'X' – showing clearly that none of the sales made in July were for his account.

William FUNG consistently accepted, however, that the sales made in August had been his transactions. In the result, only the 'July sales' remained in issue. What then did William FUNG say about those 'July sales' during the course of his oral testimony before the Tribunal?

When questioned by Counsel to the Tribunal and the Tribunal itself, William FUNG contradicted his earlier assertions and said without equivocation that all the 'July sales' and all the 'August sales' had been his transactions, his son having no interest in them. In short, he admitted that *all* the relevant sales in the first period were, in truth, his dealings.

As there were was a chance that William FUNG may have been confused in his answers, he was taken through each page of the Onshine trading records (Annexure 'IX') in order to dispel any possibility of innocent confusion. In respect of page one of those records; that is, the period from 30th December 1993 to 16th March 1994, William FUNG said that all these transactions were his son's. His testimony (in part) read :

FUNG:	These are all his trading.
Chairman:	So all of that page, page 270, are your son's trades and they are his shares?
…….	
Q:	So you had no equity or interest in any of these trades shown on page 270?
A:	No.

In respect of the second page; that is, the period from 21st March to 27th June 1994, William FUNG was equally clear in his answers; namely, that all the transactions were his son's and not his :

Chairman: I am sorry to interrupt again – that page goes from March to June. Whose trades are those? Are those the same as the earlier page, namely, all your son's?

A: Yes.

Q: So they are all your son's and you do not have any interest in this money?

A: Yes.

In respect of the third and fourth pages; that is, the statement covering the period from 28th June to 29th September 1994, William FUNG's assertions clearly emerge from the following extracts from his testimony :

Chairman: You have told us that in July and August you started to trade in your shares in your son's account. Do you remember when in July you started to trade, because up until now, according to you, it was all purely for your son?

A: I do not remember those transaction by transaction, but I just remember that it was during this time.

Q: Do you have any idea of when you finished? We go from 1st July, there are some Hanny Magnetics shares bought, and we can go right to the end of August, I suppose, month end "ADJ", whatever that means – presumably, it means "adjustment", but that would seem to be, unless you tell us otherwise, perhaps a little arbitrary? Was it from the 1st to the 31st that you traded?

A: During that period of time, I did.

Q: From 1st July to 31st August?

A: *Yes, in July or August – it should be 1st July, but whether it was the 1st or 2nd, I do not remember.*

Q: When did it end?

A: The end of August.

Q: Thereafter, in September and October, that was back to your son, was it; all of that was your son?

A: Yes.

Q: And thereafter, from the end of August, you had no further interest of any kind in the equity of those shares or the funds flowing from them?

A: No.
[our emphasis]

A few questions later the following was confirmed :

Q: Just to come back to your testimony, it is your evidence, is it, that you traded in your son's account in Hanny shares only in July and August 1994?
A: Yes.

The evidence could not have been clearer. William FUNG had accepted that all the dealings in Hanny shares in the first period which Counsel to the Tribunal submitted constituted insider dealing were his dealings and not those of his son.

Not surprisingly, when William FUNG's counsel had the opportunity to re-examine his client, he led him back, with patience and the skills of an experienced advocate, to the assertions made before he had given his oral testimony. Was it reasonably possible, therefore, that William FUNG's *volte face* had, in fact, been the result of innocent confusion despite the opportunity given to him to go through the Onshine statement page by page ?

The Tribunal does not accept that this could have been the case. Of course a witness may become confused but the matter of identifying the July and August transactions had been a matter of *central importance* since late 1996. William FUNG may now be mature in years but he was certainly no fool nor, in the Tribunal's opinion, could there be any suggestion that he was simply befuddled. Whatever he may have meant to say, in terms of a rehearsed defence, whatever he and Clement had agreed in 1996 in order to protect him from allegations of insider dealing, the Tribunal is satisfied that William FUNG acknowledged responsibility for *both* the 'July' and 'August' sales because in truth they had been his transactions.

At this juncture it must be said that generally, in regard to William FUNG's various allegations concerning his trading in his son's account, the Tribunal is satisfied that from the outset he was deliberately evasive. For example, when Clement FUNG's account opening documents were found in the premises of William FUNG and William FUNG was asked whether he had ever

traded in this account, his answer at the time was at best ambiguous. He said it was "not impossible" that he had done so but would need to check. This is to be contrasted against his later admission that about 40% of all transactions in the account had been his. Of course, when first confronted with evidence so potentially damaging, it would not be uncommon for a person under investigation to respond cautiously. But, when questioned during the course of his oral testimony, William FUNG was prepared to make no admission that he had, in fact, been perhaps wisely taking the most cautious route. His answer, he said, had not been deliberately evasive :

> Q: Are you telling the tribunal that you did not know that at the time, that this account that you had used deliberately to avoid SDI disclosure contained your trades? Are you saying that you did not know that?
>
> A: At that time, I really do not know. I just learned about that afterwards.
>
> Q: So that was a genuine answer, was it, not you trying to cover up and delay?
>
> A: Yes.

A little earlier, however, when asked if he had been worried when originally questioned by the SFC about his son's account opening documents, he agreed that he had been worried for fear that his undisclosed trading would now be uncovered. That answer does not sit happily with his protestation that he could not at that time remember if he had traded in the account or not. The rhetorical question has to be asked : if William FUNG had used one account only to conduct undisclosed trading and that one account was in his son's name, and if he knew that such trading was prohibited, how could he possibly – in a span of less than three years – forget whether he had traded in the account or not? The Tribunal is satisfied that from the outset, appreciating the allegations made against him, William FUNG was not honest with the investigating authorities or indeed with the Tribunal itself.

In summary, in light of all the matters of evidence considered earlier in this chapter, the Tribunal has been drawn to a clear finding of fact that, whatever the reasons may have been for opening the account, during the first period William FUNG used that account to trade in Hanny shares and the sales reflected in the account running from 21st July to 18th August 1994 were his

dealing and not those of his son.

CHAPTER EIGHT

THE SECOND PERIOD

(A consideration of whether WONG Sun possessed relevant information during the second period and whether, as a result, he dealt in Hanny shares as an insider dealer)

During the inquiry, it was alleged that a second period of insider dealing took place between 20th January and 6th February 1995. In this second period, it was alleged that only one of the implicated persons; namely, WONG Sun, dealt as an insider, buying 4 million Hanny shares in anticipation of the market's favourable reaction to what was throughout the inquiry called 'the BASF deal'. In this chapter, WONG Sun's alleged insider dealing during this second period is considered.

A. A brief historical background

At the time Hanny published its results for the 1993/1994 financial year on 2nd September 1994, it is apparent that the senior management of the company was in a state of disarray. Certainly, by late August or early September 1994, the Board knew that it had to seek outside assistance. This was when Hutchison Whampoa and Peregrine came to Hanny's aid. The details of the 'rescue package' provided by them are detailed in Chapter One.[45] However, despite substantial injections of capital and the secondment to Hanny of senior accounting and managerial staff from Hutchison Whampoa, the problems facing Hanny remained severe. Many of those problems were immediately apparent to the staff seconded to Hanny and to Hanny's Peregrine advisors; other problems were only to emerge later.

A rationalisation of management systems, especially in respect of accounting procedures, was a critical requirement. But so too was the need to reduce inventory (much of which was of dubious value) and to raise cash; that is, to ensure a healthy cash flow position. Indeed, the need to ensure a viable cash flow position was considered so important that in a memorandum dated 27th January 1995 John Nicholls, a senior member of Peregrine, stated :

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[45] See section *(viii) The rescue package provided by Hutchison Whampoa and Peregrine …* pages 20 – 24 inclusive.

'unfortunately, cash is king for Hanny at the moment'. Joseph LI, the man seconded from Hutchison Whampoa to take over the responsibility of Chief Financial Officer at Hanny, agreed in his evidence that at the time the need to raise cash was more important even than the need to make profits.

By late 1994, investors knew of the manner in which the Memorex acquisition had dragged Hanny down. They knew of its bloated debt burden and the need for restructuring. The intervention of Hutchison Whampoa and Peregrine, however, was evidence that the necessary restructuring would now be done. For example, on 25th October 1994 – under large headlines that read : 'Hutchison sets tough conditions for Hanny' – the *South China Morning Post* wrote :

> Hutchison Whampoa has tied Hanny Magnetics to a series of conditions on how the troubled computer disk maker can run its business. The tough terms over the kind of deals the company can do are attached to the taking up of a US$36.38 million convertible note. Details of the note came as Hutchison appointed one of its employees as chief executive officer to Hanny Magnetics yesterday.
>
> Fergus Wilmer has joined Hanny as chief executive on secondment following a stint at Hutchison's French cellular telephone division. He has been with Hutchison for 14 years since Husky Oil, his then employer, was acquired and has served the company in the territory and in Australia as well as in France …
>
> Mr. Wilmer's arrival marks the start of a process of management strengthening promised by the firm. He promised early action to help turn around Hanny. "We have some targets and budgets to meet," he said. The shareholders expect us to really go through things.

The following day, in response to a rise in Hanny's share price, the same newspaper published an article under the bullish headline : 'Hanny shines as investor confidence returns'. The article began :

> Hanny Magnetics came through with flying colours as investors started to rebuild confidence in the troubled computer-disk maker after Hutchison Whampoa set though conditions on running its business.
>
> Hanny was the strongest performer, rebounding to $1.05, a gain of 12.9 percent. The counter was among the heaviest traded stocks in

> volume terms, with 13.59 million shares worth $14.06 million changing hands.
>
> Analysts said its surge in price was a result of a series of conditions tied to Hanny by Hutchison, which has taken up a US$36.38 million convertible note. Its tough terms to Hanny was a 'guarantee' to investors who now believed the company would be run properly, an analyst said.

Clive Rigby testified that the secondment of a professional management team to Hanny with a mandate to impose a tough restructuring regime would have been seen by the market generally as a 'very positive sign'. The Tribunal accepts that fully. However, the Tribunal is also of the view that evidence would have to emerge that the injection of capital and management expertise was working. This became especially important after Hanny published a poor set of interim results for the first 6 months of the 1994/1995 financial year. The interim report published on 30th December 1994 revealed a loss for that period of HK$137.764 million.

The interim report spoke of an operating loss of HK$76.681 million brought about largely by a reduction in the international market price of floppy disks and higher operating expenses : a direct consequence of taking over the 'existing organisational and administrative costs' of the various Memorex operations. WONG Sun, however, remained optimistic. In this regard, the report concluded :

> The rationalisation of the Group's operations in North America and Europe, referred to above will, in the opinion of the Directors, result in a more integrated and focused business with resulting reduction in general and administration costs. *In addition, efforts will continue to be made to reduce costs, to improve efficiency and to position the Group more competitively in its core markets.* The Directors will continue to review the Group's operations with a view to concentrate the Group's resources on its core product ranges. This review may result in a further rationalisation the Group's operations. [our emphasis]

There was, therefore, no secret about Hanny's need for further rationalisation, for the need to dispose of ageing inventory and reduce the debt burden. But how was that to be done?

A number of possibilities were considered by Hanny's re-vamped management team but the one that came to fruition in early 1995 was contained in an agreement reached with the German producer of audio magnetic products, BASF. In terms of the agreement, BASF acquired from Hanny a sub-licence to distribute and market Memorex merchandise in Europe. It was a term of the agreement that BASF would purchase Hanny's inventory of Memorex products stored in Europe and that, in addition, future Memorex stock for BASF would be manufactured by Hanny. Hanny thereby raised cash by granting a sub-licence and selling inventory and, in addition, assured itself of a future revenue stream.

B. The BASF negotiations

It was on a visit to Germany in October 1994 that Sanrita WONG first discussed with BASF the possibility of an agreement in terms of which BASF would distribute and market Memorex products in Europe and, in doing so, would purchase Hanny's Memorex inventory. Thereafter continuing negotiations took place between Hanny and BASF, Hanny's need to secure an agreement being motivated by its increasing cash flow problems. Minutes of a Hanny management meeting held on 25th November 1994 record Joseph LI reporting to the meeting that the Group was now in a 'very severe cash position', the prognosis for early improvement being gloomy. The rest of those minutes concern plans to sell assets in order to raise cash; one of the plans being a sub-licence agreement with BASF.

By the end of the year, a sole distributorship agreement with Hanny was being contemplated rather than a sub-licence agreement and it was hoped that BASF would assume responsibility for distribution and marketing in *both* Europe and the United States. There were, however, concerns that there may be difficulties in obtaining the consent of Memorex Telex to such an agreement, Memorex Telex being the ultimate holder of all intellectual property rights in Memorex merchandise.

Although Sanrita WONG had initiated discussions with BASF, the Tribunal is satisfied that, in or about early January 1995, Bryan-Brown assumed responsibility for the negotiations. In this regard, he testified as follows :

> It was basically agreed that I … would lead it and that no-one else from the company would get involved with negotiations with BASF. That was agreed at a point before the deal was done; I forget how long before. *Maybe a few weeks, maybe a month, I do not recall how long* … just to be clear, when I took over negotiating solely with BASF - that is, when people within the company were prevented then from negotiating directly themselves with the company – BASF was on the point of walking away from negotiations. My confidence in the fact that they would do a deal was based on my professional judgment of their appetite for that deal but not for the state of negotiations. So when I took over sole responsibility for it, there were major issues outstanding. [our emphasis]

By 9th January 1995 BASF had made it clear that it was not (at that time) interested in assuming responsibility for the distributorship and marketing of Memorex products in the United States, *only* in Europe. However, any concern on Hanny's part that Memorex Telex may withhold its consent had fallen away, the only question at issue being the percentage of royalties to be paid to Memorex Telex which was at that time demanding a royalty of 25%. All of these matters are recorded in the minutes of a Hanny meeting held on 9th January 1995, a meeting attended by, among others, WONG Sun, Sanrita WONG and Bryan-Brown.

On 16th January 1995, BASF proposed that the agreement be in the form of a sole distributorship and further proposed that such agreement should commence in just two weeks time; that is, on 1st February 1995. Not only was an early date for the successful completion of negotiations now being contemplated but, to ensure speed, BASF was sending a team to Hong Kong to negotiate face-to-face. Clearly, in the opinion of the Tribunal, the likelihood of a successful conclusion was growing stronger.

On 17th January, Hanny held a meeting for the sole purpose of discussing the BASF deal. WONG Sun attended that meeting. In addition, among those who attended were senior members of Hutchison Whampoa and Peregrine; they included Canning FOK, Susan CHOW, John Nicholls and Bryan-Brown. The presence of such senior personnel from both Hutchison Whampoa and Peregrine is testimony to the importance of the meeting.

At that meeting on 17th January, Hanny's new CEO, Fergus Wilmer, spelt out the opposition of the United Kingdom's Memorex operation to any proposed deal with BASF.[46] Despite this, however, it was resolved that negotiations with the BASF team - which would be in Hong Kong in a few days time - should proceed 'with full speed'. The need for an agreement was spelt out in the minutes of that meeting :

> … the meeting agreed that the fundamental financial objective of the Company for the time being was to down-size its balance sheet and reduction of inventory together with the exercise of cash raising …

In the opinion of the Tribunal, by the end of this meeting WONG Sun could have been in no doubt as to the determination of his new management team to reach an agreement with BASF. The Tribunal accepts, of course, that invariably agreements of the kind being sought after would not be all good news for Hanny. When he testified, Joseph LI, Hanny's Chief Financial Officer, agreed that in almost all contracts there were opportunity costs to be considered. In respect of the UK concerns, he commented that, in his experience, subsidiaries that are sold off always adopt a negative attitude. Such concerns had therefore been anticipated but would not stand in the way of an agreement being reached.

On 18th January, Bryan-Brown sent a faxed letter to BASF accepting its proposal that the agreement should be in the form of a sole distributorship. He wrote :

> Hanny's Board of Directors has now decided, in principle, to pursue such an agreement with BASF and we would hope to conclude detailed discussions and due diligence procedures with you as soon as possible in order to permit a final decision to be taken by Hanny's Board of Directors and by BASF.

Bryan-Brown had a telephone conversation that same day with the

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[46] The United Kingdom subsidiary of Hanny was always against the BASF deal. For example on 23rd January, Richard Lavender (the United Kingdom CEO) sent a faxed letter to Bryan-Brown dealing with a number of outstanding problems, especially in respect of old and obsolete inventory which he estimated, out of a total inventory value of £9.3 million, comprised £4.2 million. He ended his letter with the words : "Whilst appreciating the critical financing position of the Group, I believe it will be nothing short of a tragedy for the UK if this deal goes through".

chief negotiator for BASF, Michael Becker. In a faxed letter of that same day, Michael Becker confirmed their conversation, ending his letter with the words :

> I was pleased to learn that you share our desire to complete quickly. To help this objective, I have made arrangements to stay in Hong Kong until the end of next week, if necessary.

In his testimony, Bryan-Brown said that by this time he was of the belief that a successfully concluded deal with BASF was likely. The Tribunal found Bryan-Brown to be a charismatic individual, confident in his abilities, the kind of individual who would clearly be able to instil confidence in those relying upon his professional skills.

Two days later, on 20th January, after further negotiations with BASF, Bryan-Brown sent a memorandum to all Hanny directors setting out the state of negotiations at that date. *Inter alia*, he advised the directors that :

(a) On legal advice, the form of agreement had reverted to that of a sub-licence *but* BASF was happy with that form.

(b) If 'certain commercial issues' concerning Memorex operations in Australia and Canada could be resolved (and Nicholas Bryan-Brown was confident this could be done in the next few days) Memorex Telex was prepared to grant its consent and would also consider a *lower* royalty than 25%.

(c) BASF was prepared, in principle, to acquire *all* of the inventory of Memorex merchandise in the United Kingdom including 'discontinued, obsolete and other lines'. In addition, a method of valuing inventory had been agreed.

The memorandum concluded with the following statement :

> If the above proposals are agreeable in principle I will convey this message to BASF whilst making it clear that a final decision remains to

> be taken by the Board of Hanny. In particular, I will arrange an exchange of faxes so that the agreed terms of the proposals are clear. Once this has been done I will ask Richard Lavender [CEO of the United Kingdom operation] to make key personnel in London available to BASF as part of the due diligence process. *There is clearly a commercial risk in allowing a competitor such access before a contract is signed but I believe we need to take this risk to achieve an early resolution.* [our emphasis]

Bryan-Brown explained his last sentence by saying :

> I was just flagging to the directors that, *although I thought the deal was going to happen*, it was always possible that it would not; and if it did not and they had access to this information, then it puts Hanny's business at a competitive disadvantage. That was really the only point … [our emphasis]

When Clive Rigby was asked to comment on this memorandum, he said that, in his opinion, a general reading of the document implied 'a very strong likelihood of a deal going through' which would, knowing Hanny's recent history, be of material benefit to the Company. He explained himself in the following terms :

> I believe – if I can put it in very simple, practical terms, if I, as someone interested in this share, found this piece of paper in the back of a taxi – it is the way I like to think of things – would I put an interpretation on it that would imply a movement in the share price? The answer to that would be : yes, I would, and I think the share would go up.

In particular, Clive Rigby referred to the final sentence (which we have placed into italics), commenting :

> The fact that they refer to the commercial risk is meaningful. The fact that they are prepared to take the risk of giving away commercial information which would be useful to a competitor if the deal does not go through I think implies very clearly that they assume there is a very strong likelihood of the deal going ahead. I would put it stronger than

that; they assume – Bryan-Brown is assuming that it is basically a done deal.

That same day - 20th January - during the lunch hour, a meeting of the Hanny directors took place. Both WONG Sun and Sanrita WONG attended. Bryan-Brown was not present but it is clear from the minutes that his memorandum had been considered because it was formally resolved that, *upon his advice*, the BASF agreement should be in a sub-licence rather than sole distributorship form. It was further resolved that, if a lower royalty could not be negotiated with Memorex Telex, then a royalty payment of 25% would be acceptable. No business other than the BASF negotiations was discussed at that meeting.

C. By the conclusion of the meeting on 20th January did WONG Sun reasonably expect the BASF deal to be concluded?

The Tribunal has at all times been conscious of the fact that WONG Sun was not able to testify in order to describe what he himself thought of the prospects of success by the conclusion of that meeting on 20th January. Did he interpret that final sentence of Bryan-Brown's memorandum in the same optimistic manner as Clive Rigby; namely, that Bryan-Brown was implying that he believed the deal was 'in the bag'? Clearly, if due diligence was being undertaken and Bryan-Brown was recommending such access to BASF, he was optimistic. But was WONG Sun equally optimistic? It is for such reasons that the evidence of Bryan-Brown and Clive Rigby has been considered with caution. However, while Bryan-Brown confirmed in testimony that he did not keep the Hanny board of directors (and, in particular, WONG Sun) advised on a daily basis of developments in the negotiations with BASF, the Tribunal is satisfied that by the end of the meeting held on 20th January 1995, WONG Sun would have known the following :

(a) That the senior management of Hutchison Whampoa and Peregrine considered it important to conclude the deal and the negotiating team, led by Bryan-Brown, would do all it could to ensure that this happenned. In addition, BASF appeared eager to reach a deal and to do so as early as possible. *Both* parties, therefore, firmly desired

an early agreement.

(b) That Bryan-Brown, Hanny's chief negotiator, was clearly optimistic.

(c) That everything indicated that the essential consent of Memorex Telex, the holder of the intellectual rights, would be obtained on acceptable terms.

(d) That the form of the agreement had been agreed between the parties (i.e. a sub-licence).

(e) That BASF had agreed, in principle, to purchase *all* Memorex inventory in the United Kingdom, including stock that was obsolete or discontinued, and that a basic method of inventory valuation had been agreed.

(f) That all of these things were acceptable to the board as a whole which had now sanctioned the 'go-ahead'.

On the basis of these findings, the Tribunal is satisfied that, by the afternoon on 20th January, WONG Sun knew that, although all the terms had not yet been agreed, the probable consequence of the final negotiations was a successful conclusion. To express it another way, the Tribunal is satisfied that, despite the inherent uncertainty of commercial negotiations, because of the substance and particularity of his knowledge, WONG Sun must have reasonably expected that an agreement would be reached between the parties.

D. The successful conclusion of negotiations

As it transpired, of course, negotiations were successful. Records indicate that negotiations continued until 24th January 1995. Thereafter what had been agreed between the negotiating teams and what remained still to be agreed was drafted in the form of a memorandum (dated 27th January) which was placed before the Board. That memorandum began with the following paragraph :

> Substantive negotiations with BASF regarding the European

> operations of Memorex have now been concluded. This memorandum sets out the principal commercial terms agreed with BASF and the issues which remain outstanding. Board approval is sought for Hanny to enter into a sub-licence agreement and an asset purchase agreement with BASF substantially on the terms set out in this memorandum, conditional on the consent of Memorex Telex.

For the benefit of the board, the memorandum detailed the financial implications. These revealed that, if the agreements were concluded, Hanny would receive a cash injection of approximately HK$125 million.

On the same day; that is, 27th January, the board of Hanny met to formally approve what had already been agreed and to authorise the negotiating team to conclude matters as soon as possible. WONG Sun attended that meeting and was one of two people appointed to sign the agreements on behalf of Hanny.

That same day Bryan-Brown sent a faxed letter to the Stock Exchange to say that 'within the next few days' Hanny proposed to enter into agreements with BASF concerning its Memorex operations in Europe. He accepted that, in the view of the board, the agreements represented 'discloseable transactions' but sought permission to delay any public announcement for approximately one week until the agreements were formally signed. He did this on the basis that, if for any reason the agreements were not completed, it would inevitably result in 'serious damage' to Hanny's European operations. On 28th January, the Stock Exchange granted the waiver. This was, however, subject to the condition that an immediate announcement would have to be made if there was evidence of any unusual share dealing. The Tribunal is satisfied that these communications with the Stock Exchange prove the importance to which *both* Hanny and the Exchange accorded the BASF deal.

By 4th February 1995 all matters had, in fact, been agreed and reduced to writing. On 6th February Hanny formally approved and adopted the agreements and the following day; that is, on 7th February, formal announcements appeared in the press and were circulated to shareholders. These announcements stated that the agreements were consistent with Hanny's strategy of 'reducing inventory and costs' and gave a list of reasons why they would benefit the Group :

(i) The sale of inventory would bring much needed cash, improving liquidity and would allow Hanny to reduce overheads;

(ii) The licence agreement would provide Hanny with a recurring revenue stream of some HK$11 million per year, and

(iii) The fact that only the Memorex operations in Europe were sold meant that Hanny could continue to develop the 'more established' North American operations.

E. Did those inside Hanny appreciate the importance of the BASF deal?

It was argued on behalf of WONG Sun that the BASF deal was just one more step in the long and arduous process of rehabilitating Hanny and as such was of only limited significance. The Tribunal accepts, of course, that, in securing the deal with BASF, Hanny had not solved all its problems. Nevertheless, the Tribunal is satisfied that the BASF deal was a matter of considerable significance in shoring up Hanny's fortunes and in demonstrating to investors that the new management was able to promise better days ahead.

On a consideration of all the evidence it is clear that those intimately involved in Hanny, while not blind to the remaining problems, saw the BASF deal as a milestone in Hanny's anticipated recovery. In the course of his testimony, it was put to Bryan-Brown that, seen in the full context of Hanny's problems at that time, the deal was only one piece of good news. He replied :

> I think it was much more than a single piece of good news. I think without that deal, Hanny could easily have gone under, without some sort of substantive action to sort out its finances.

Milly WONG, who since October 1994 had been acting as Hanny's financial manager and who the Tribunal accepted as a credible witness, said that she considered the BASF deal to be 'really significant' because the Company needed funds to 'keep going'. The significance of the deal, she said, had to be

seen in light of the mood of the management at that time; that is, one of optimistic belief that Hanny could be turned around. During cross-examination, she expressed her opinion in the following terms :

> A: … we all thought that there was a possibility to turn around the company. Because we worked so hard and we tried to consolidate the business in the US, combine the two different kinds of business in the US. So at around that time, we thought that we still could make the company prosper.
>
> Q: There was a possibility?
>
> A: Yes, there was a possibility.
>
> Q: Of course. But were there also uncertainties?
>
> A: Well, of course.
>
> Q: Of course?
>
> A : That was a fact of life.

During the course of his testimony, Francis LEUNG of Peregrine emphasised that he had probably been the one most concerned about Hanny's broader financial position at about that time and had, therefore, taken a more conservative approach than some of his colleagues. In light of this, he said, as a director of Hanny and having an intimate knowledge of the difficulties that still lay ahead, he believed at the time that the BASF announcement would have a positive effect on the price of Hanny shares but he could not say it would be materially positive. He emphasised, however, that –

> *… I made that statement as an insider not as a market participant.* The market could react differently to this piece of news because the market might not be appreciative of all the problems of the Company at the time. [our emphasis]

Concerning the reaction of the market to the BASF deal, Milly WONG recalled that a number of bankers had telephoned to congratulate her on the deal. She said that the news was 'well received by the bankers and also the market'.

Clive Rigby was of the opinion that, if news of the essential terms of the BASF deal had leaked out to the market prior to the official announcement on 7th February 1995, that news would have had a material impact on the price

of Hanny shares. As he expressed it : 'I do not see how it could have any other effect'. In his report, he stated his opinion in fuller terms when he wrote :

> Deals such as this are not necessarily immediately quantifiable in terms of the effect that they will have on a company's fortunes nevertheless the short term appraisal would focus on the clearly positive aspects such as the impending receipt of cash in exchange for inventory, the potential future cash flow from royalties and the association with a world famous brand name such as BASF. This was a development whose effect on Hanny's share price could only be bullish.

The reaction of media analysts to the announcement, was largely neutral or, to use Clive Rigby's expression, 'mixed'. On the morning after the announcement, the *South China Morning Post* reported a rise in Hanny shares, commenting that they had been some of the day's most heavily traded stock and saying that the deal was expected to enable Hanny to devote more resources to other areas of its operations. The *Hong Kong Daily News* of the same date recorded that the price of Hanny shares had risen on the day of the announcement by a higher percentage than the Hang Seng Index but otherwise devoted most of the article to the rumour that Hutchison Whampoa had played 'match-maker' in order to secure the deal. The following day, however, that same newspaper came out with a bearish article, quoting an anonymous 'securities practitioner' who said that the BASF deal did not mean an end to the troubles that had accompanied the Memorex acquisition.

When asked to comment on the 'mixed' tone of the media reaction, Clive Rigby said :

> … the press, having got it very wrong the year before, is being a little bit more cautious this time. They are not prepared to start talking about how the Company has really turned around yet. They do not want to get suckered again. A journalist thinks of his reputation in making predictions, like most people. Like stockbrokers, they like to get it right, so they will be reasonably cautious on the whole.

He remained of the view, however, that inevitably the market reaction to the news would have been positive to a degree that would have had a material impact on Hanny's share price; a view, he said, that was supported by

the actual movement of the share price at the time of the announcement. Increases of the kind recorded, he said, were material increases.

F. What was the impact of the BASF deal on the share market?

When news of the BASF deal became public knowledge, there may not have been a prolonged rally in the price of Hanny shares. The Tribunal is satisfied, however, that there was nevertheless a material price rise, if only in the shorter term.

Looking at it historically, from a high of about HK$1.19 at the beginning of November 1994, the price of Hanny shares had steadily lost value, closing 1994 at 64 cents. January 1995 saw no improvement. In fact, the share price then fell further, closing at just 39 cents on 24th January. In the last days of January it consolidated a little, trading at around 45 – 50 cents. The average daily turnover in January was only 1.693 million shares. On 3rd February the share price closed at 48.5 cents on a turnover of 3.842 million shares.

However, on the next trading day, 6th February – the day before Hanny officially announced the BASF deal – the share price rose to 56 cents on a hugely increased turnover of 15 million shares. There was on that day no other news in the market to account for the sudden reversal other than the circulation of rumours concerning the BASF deal.

On 7th February - *the day of the announcement* - the turnover increased to 21 million shares and the price closed at 64 cents. The day following the announcement – 8th February – the share price peaked at 72 cents, closing the day at 67 cents. Turnover remained high at 16.98 million shares.

In the three trading days spanning 6th – 8th February, therefore, on a dramatically increased turnover, the price of Hanny shares had risen some 35%. In the view of the Tribunal that was a material increase, enabling an insider to substantially profit. Despite fluctuations in both turnover and price, the share price then remained above 60 cents until 17th February when it closed 59 cents.

G. Did WONG Sun possess relevant information?

The Tribunal has had little difficulty in coming to the finding that WONG Sun did possess relevant information during this second period and that he came into possession of it on 20th January 1995. It has reached this finding on the following basis :

(a) Information concerning the BASF deal did not become generally known in the market until Hanny's formal announcement. At no time during the inquiry was it suggested that the BASF negotiations were, at the time they were taking place, a matter of public knowledge;

(b) For the reasons already given in section C of this chapter, the Tribunal is satisfied that by the afternoon of 20th January 1995 WONG Sun knew that the probable consequence of the on-going negotiations would be a concluded agreement. He may not have been sure of all the terms and conditions but knowledge of that kind was not rendered general, as opposed to specific, merely because some of the information possessed by him remained broad. On 20th January, therefore, WONG Sun possessed specific information about Hanny;

(c) Against the historical background of a need to reduce inventory and raise cash, with the investing public already re-assurred to some limited degree by the intervention of Hutchison Whampoa and Peregrine, the Tribunal is satisfied that WONG Sun appreciated that, whatever the reservations of some sections of the media, the market reaction to the news of the BASF deal would be favourable, indeed favourable to the extent of increasing the share value to a material degree. That was why he traded and what he had anticipated did, in fact, come to pass, if only for a limited period.

H. An examination of WONG Sun's trading during the second period

Between 20th January and 6th February (inclusive) the following Hanny shares were purchased in an account in the name of FAY Loi Loi held with

Tung Tai Finance, that account bearing the number M7000 :

Date		Number of shares
20th January		1,000,000
23rd January		500,000
26th January		60,000
6th February		410,000
6th February		1,440,000
6th February		590,000
	Total	4,000,000

It is a point of relevance that these were the first *purchases* of Hanny shares in the account since early October 1994, more than 3 months previously. But how were the purchases funded?

At that time WONG Sun also held an account with Tung Tai Finance. That account was in his own name. The records of his account show that on 24th and 25th January the exact sums necessary to cover the first 2 purchases were transferred to FAY Loi Loi's account while on 8th February sufficient funds were transferred to cover the balance of the purchases.

A study of the records further reveals that on 9th February – *after* the public announcement of the BASF deal – 1.3 million Hanny shares in FAY Loi Loi's account were sold, the exact amount received being transferred several days later back to WONG Sun's account.

The Tribunal is satisfied that these were WONG Sun's dealings.

CHAPTER NINE

THE THIRD PERIOD

(Whether relevant information came into existence in this period and, if so, when?)

A. Information in the public arena during the third period

Despite its positive effect, it was recognised that the BASF deal was not a panacea to cure all of Hanny's ills. This was appreciated by Hanny's senior management and Richard Witts, one of the 2 expert witnesses who testified before the Tribunal, said that it was also 'well known' in the market. For example, on 8th February 1995, the *Ming Pao Daily News* published an article quoting a financial analyst to the effect that Hanny's debt burden still remained above $1 billion and that further asset sales would be necessary. The article continued by saying that the analyst :

> … does not believe that the inventory and exclusive license sales [the BASF deal] have brought an end to Hanny Magnetic's losses caused by the acquisition of Memorex. Furthermore, the competitive environment of the magnetic disks business is still fierce and would, therefore, weaken the company's earning power. *He estimated that the company would have a deficit of $200 million for the 6 months ending March 1995*. [our emphasis]

The Tribunal is satisfied, however, that the market retained faith in Hanny's new management team. Hutchison Whampoa and Peregrine constituted a formidable – and well recognised – source of management expertise. On 6th March 1995, the *Hong Kong Economic Times* prominently published an interview with Fergus Wilmer, Hanny's CEO, in which he recognised the problems still facing the Group and spoke of how those problems would be tackled. In the article, he was quoted as saying that :

> … the major tasks in the coming 6 months would continue to be reorganization of the company to improve the efficiency of production and utilization of resources in a bid to cut down on cost and debts. The purpose of doing so is to help the Group revert loss to profits in the

financial year of 1995 to 1996.

The article continued :

> … specific tasks included the reduction of inventory and cutting down on the time needed for recovering accounts receivable so that there would be a faster and more efficient flow of operating capital, thus reducing the Group's indebtedness and interest expenses. On the other hand, reorganization would continue by mainly reducing expenses of the American operations. … Wilmer said that European patent rights and inventory [the BASF deal] were sold so that there would be cash for repaying debts. *The Group did not intend to sell further Memorex's patent right in other regions*. [our emphasis]

In respect of Hanny's existing debts, Fergus Wilmer was quoted as saying that :

> … debts amounted to about $1.2 billion before the sale of the patent rights and that indebtedness must be reduced to about $1 billion as quickly as possible. … He said that the Group's debts were not heavy but had to be trimmed, mainly by 2 methods. The first was to reduce inventory by shortening the inventory period from the existing 2 months to 45 days. The other method was to shorten the time needed for recovering accounts receivable so that there would be a faster and more efficient flow of operating capital in order to release funds for debt repayment.

In respect of structural rationalisation, Fergus Wilmer was quoted as saying that :

> The major task was to reorganize the US business and its structure. *But most of the reorganization expenses had been reflected last year and the losses caused by the write-off and write-down of inventory in the second half of the year should not be too big*. He pointed out that the number of warehouses in the US would be reduced from the existing 5 to 2, with one on either coast. At present there were about 400 staff members in the States. It was planned to cut down the number of staff to about 260 by March so that recurrent expenses could be reduced from

> about US$4.2 million to about US$3 million per month. [our emphasis]

Towards the end of the article, Fergus Wilmer admitted that Hanny's past management had been poor but spoke of a new professionalism. His job, he said, was to 'clear up the problems left over from the past'.

Clive Rigby described the article as one that would have been viewed positively by the market. Many would have been assured by the fact that it was Hanny's CEO speaking, a respected manager seconded from Hutchison Whampo. He accepted, understandably, that it would not, however, have engendered much excitement. Richard Witts described the article as 'a mixed bag'. Some parts of it would not have been happily received by the market, some aspects were more positive.

After the publication of this article in early March, media attention waned. On 3rd May, an announcement was made that a final valuation of inventory sold under the BASF deal had resulted in Hanny refunding BASF HK$11 million. It does not appear to have excited any press comments.

A few days later, on 9th May, the *South China Morning Post* published a small item saying that 'for accounting purposes' ownership of Hanny shares in 2 Peregrine subsidiaries had been merged. As a result, Peregrine had announced that one of its companies, Peregrine Investments, now held almost 20% of the 'loss-making computer-disk' business. The price of Hanny shares surged that day by some 17%, suggesting perhaps that the public disclosure of the size of Peregrine's investment was well received in some quarters. But again, while the *Hong Kong Daily News* made comment in its edition of 10th May, there was little media coverage.

On 3rd July 1995 the *Ming Pao Daily News* reported that Cheung Kong [described in this report under the conglomerate description of Hutchison Whampoa] had not converted the convertible notes issued to it in late 1994 into shares but had instead been repaid a total of HK$68.6 million in principal and interest by Hanny. However, it had then advanced that same sum as working capital back to Hanny. The headline to the article said that the decision not to convert had been dictated by Hanny's 'miserable' share price. Despite the bearishness of the article, it did not have any significant effect on Hanny's share

price which dropped just 1.2% on 3rd July and recovered by that same percentage the following day.

Thereafter, it was not until late August that any news of substance concerning Hanny came into the public arena. On 23rd August, at Hanny's request, the Stock Exchange suspended trading in the Group's shares. The following day, the reason for the suspension was contained in a public announcement which read in part :

> The directors of Hanny Magnetics (Holdings) Limited announce that the meeting of the board of Directors scheduled to take place on 24th August, 1995 to approve the preliminary announcement of results for the year ended 31st March, 1995 has been postponed. The company is presently conducting negotiations with a third party which could lead to a subscription for new shares which might result in a change in control of the company. The Directors believe that it would not be appropriate to make the preliminary announcement of the company's results for the year ended 31st March, 1995 until the current negotiations have been concluded.

Clive Rigby commented that the announcement spawned a series of speculative articles, the majority of which were negative. That is true. For example, the *Sing Tao Daily* spoke of heated rumours that a looming financial crisis had led to Hutchison Whampoa re-assessing its investment. But whatever the content of the rumours, it was too late to deal.

Trading remained suspended until the results for the year ended 31st March 1995 were published. Those published results showed that Hanny had suffered a loss attributable to shareholders of HK$588.772 million. This was compared with a loss for the previous year of HK$30.818 million. The loss was made up of an operating loss of HK$376.601 million and exceptional items of HK$212.123 million. In respect of the exceptional losses, the report said that :

> … a thorough review of and provisions relating to obsolete and defective stocks and fixed assets led to a further exceptional loss of HK$112.4 million, mostly occurring during the second half of the Group's reporting year. A provision for a permanent diminution in the

> value of goodwill was also made during the year in the amount of HK$24.8 million which your Board believes was a prudent measure taken in light of the potential income from the Memorex Business in the future years.

On the same day that the annual results were published, Hanny announced that it had been forced to raise some HK$600 million by means of a rights issue and the placing of new shares. The *Hong Kong Economic Journal* described it in the following terms :

> Hanny Magnetics announced yesterday a huge loss of $590 million in its results for the year ended 31 March 1995. The company also announced at the same time large scale fund-raising programmes, including a rights issue in the proportion of 3 rights shares for every one share held and the placing of shares to Chinese Estates, Cheung Kong and Hutchison Whampoa, raising in total about $600 million. After the placement, Chinese Estates would become Hanny Magnetics' largest shareholder.

One financial analyst commented that it represented essentially a change of management. WONG Sun, the previous single largest shareholder, would now hold only some 4.5% of the issued shares capital while Chinese Estates would hold more than 20%.

Market reaction was predictable. One newspaper described Hanny's acquisition of Memorex as being the equivalent of Hanny being sucked into a black hole. On the last day of trading before suspension, Hanny shares had closed at 36 cents. However, on the day of the announcements, on a staggering turnover of 139.79 million shares, the price collapsed to 15.7 cents. It was a one day loss of 53.3%. By any rational standard, it was a debacle.

B. Information available to those within Hanny during the third period

On 27th March 1995 a meeting of Hanny's executive directors took place. The minutes record that both WONG Sun and Sanrita WONG were present. At that meeting, Joseph LI presented a report which showed that the Group had achieved a measure of success in reducing inventory and accounts

receivable. Since the beginning of the year inventory stocks had been reduced by HK$79 million and accounts receivable by HK$77 million.

However, the United States remained an area of major concern. Joseph LI's figures showed that operating expenses were not being significantly reduced and net operating losses were still being sustained each month. The minutes record his assertion that operating expenses in the United States appeared to be out of control. On the restructuring side, there was, however, some measure of positive news. Hagemeyer Electronics Inc. had made an approach to acquire certain of the Memorex inventory in the United States and to use the Memorex name under licence.

Joseph LI's other major concern was focused on Hanny's short term debt burden. The minutes listed debts due for repayment that year which totalled HK$379 million. The meeting directed that Fergus Wilmer was to devise a scheme in terms of which the debts could be paid.

The minutes also make it clear that factoring was being considered as a necessary way of ensuring cash flow. In this regard Joseph LI reported that the Bank of America had been approached for a US$30 million factoring facility but the financial covenants that were demanded would, he said, 'kill' Hanny. During the course of his testimony, Richard Witts said that factoring was not welcomed 'in any circumstances'.

Fresh problems were also being uncovered. A bizarre development was an unexpected claim by the Zhuhai Electricity Bureau for RMB35 million in respect of shortfalls in Hanny's electricity bill. This had apparently resulted from a failure to read a meter. Joseph LI reported that the debt would be repaid by 60 monthly instalments, each well in excess of half a million renimbi, a further drain on the operating costs of the Zhuhai factory.

When asked to consider what impact the minutes of 27th March 1995 would have had on the market if generally known, Clive Rigby said that, in his opinion, the impact would have been 'very bearish' :

> Concerns over bank financing are very frightening for a manufacturing company. A manufacturing company invariably has to have bank financing to survive, and there are clear concerns expressed

> over the bank financing. Operating expenses being out of control is the sort of thing – financial journalists would love to use expressions like that in an article.

Richard Witts, on the other hand, was far more neutral. He did not see the minutes having any real impact. In his opinion, it had to be remembered that Hanny's problems were no surprise; these were the minutes of a company which had been making losses for well over a year :

> So it is not surprising that the general tenor of the minutes is going to be a little bit gloomy. It is just not a surprise. You also have to take into consideration, or at least I have to take in consideration, in deciding whether it is sensitive or not, price-sensitive, the fact that, over the previous year, the movement of the share price – I think there is some Peregrine research which was published in February 1994 which showed the share price as being $3.30 per share – but by the time you get to the end of March/early April 1995, you have a share price of about 48 cents a share; a decisive fall has already taken place.

On 4th April 1995, a further meeting of the executive directors was held. The minutes record that again both WONG Sun and Sanrita WONG were present. At this meeting, Joseph LI presented 2 draft budgets for the 1995/1996 financial year. Budget A was predicated on a 'no real change' basis and indicated a Group loss of HK$42 million, due in greatest measure to the 'dismal' operations in the United States. The minutes record Joseph LI cautioning that Hanny's bankers would never accept a budgeted loss of such a figure. The only viable option was, therefore, budget B which indicated an operating profit of HK$50 million. Budget B, however, demanded a far leaner operation in the United States with a greater reliance on sub-licensing. This was to be achieved by disposing of much of the United States operations to buyers who would be more efficient than Hanny's existing management. The proposed buyers were Hagemeyer Electronics and BASF which was now showing an interest in acquiring the Memorex business in the United States. But agreements had to be concluded. If budget B was to be viable; Hanny's operations in the United States had to be cut back, said Joseph LI, by some 54%.

When cross-examined by Counsel to the Tribunal, Richard Witts

agreed that budge B proposed a new direction from that which Hanny, through the voice of Fergus Wilmer, had recently announced to the market. In this regard the transcript reads :

> Q: … The last word the company has given, through Mr. Wilmer, to the shareholders has been that debt is to be dealt with by accounts receivable and by inventory, is it not?
>
> A: Correct.
>
> Q: But here we are considering an enormous – and we will come to its extent in a moment – asset sale, are we not?
>
> A: Correct.
>
> Q: And patent granting?
>
> A: Correct.
>
> Q: Completely contrary to what the shareholders had been told by the chief executive three weeks earlier?
>
> A: So the analyst with the European broking house was right. Correct.

Counsel to the Tribunal then move to the size of the effective asset sale that was being proposed :

> Q: What I am asking you to confirm is that this was not a tinkering asset sale; this was 54 per cent of Memorex in the US, was it not?
>
> A: Substantial, correct.
>
> Q: So what the company were considering as the way forward was completely and totally different from what Mr. Wilmer had outlined in that newspaper article a couple of weeks or three weeks or four weeks earlier?
>
> A: True, it is dramatically different.
>
> Q: Would you not expect the man in the back of the taxi, had he known of these matters that we have been through, to have been worried about this company's grip on reality?
>
> A: It is difficult to say.

Clearly, Hanny's circumstances dictated that drastic measures were required in respect of its United States operations. Alex LEE tabled a report at the meeting saying that he had visited the United States divisions. Morale was

low and there was a loss of direction.

In respect of these April minutes, Clive Rigby was of the view that, if known to the market, the information they contained would be disastrous for the share price. In his opinion, the minutes gave a 'sense' of problems getting worse not better. Concerning the minutes, he said :

> A: If the general import of this were understood or described properly by a journalist or the press, I think it would be disastrous for the share price. We are not talking about a share dropping 3 per cent or 5 per cent on news breaking like this. We are talking 20 per cent, 30 per cent, 40 per cent – who knows.
>
> Q: Despite the fact that the shares have already dropped so much?
>
> A: Yes. There is an old adage in markets about : the trend is your friend. Trends tend to continue until they are reversed.

Richard Witts, however, remained far more neutral. In his opinion, if the contents of the April minutes were known, they would not have materially affected the share price.

Richard Witts did accept, however, that investors may have been concerned at Joseph LI's caution that Hanny's bankers would never accept a budgeted loss of HK$42 million for the 1995/1996 financial year. In this regard, he said :

> What is more frightening is Joseph LI's comment here that the bankers would not accept a $42 million loss. It is not the quantum of the figure that I am worried about, it is Joseph LI's comment, and I do think this is a worry and this is not profitability per se, this is cashflow and liquidity and paying off the debts. But we have a choice. What Joseph LI to my mind seems to be saying is, "Plan A is not actually an option. The board has been presented with Plan A and Plan B, but do not waste any time on Plan A because it is not really an option" that is how I read it, so downsizing is the only way to go.

In the opinion of the Tribunal what in substance the minutes of 27th March and 3rd April 1995 reveal, when taken together, is a deepening sense of crisis within Hanny, a mounting realisation that the Group's problems, especially in the United States, were more profound than anticipated. On 6th March – just weeks earlier – Fergus Wilmer had told the press that Hanny did not propose to sell further Memorex patent rights but now that was being actively sought after. Indeed, central to Hanny's plans was a second BASF deal. Factoring was being considered despite the vigorous objections of the United States management. Indeed the minutes even reveal plans to sell plant and machinery in both Macau and Zhuhai, Hanny's manufacturing base. In this respect, the minutes record the following :

> Sanrita WONG advised she was negotiating a deal to dispose of our 3.5" floppy disks production lines and also our 5.25" plants and machineries. She wanted to know who were the owners of these plants and machineries. Sanrita briefly mentioned the original cost of the 3.5" production line was about US$139 million. The deal if successful would be completed by the end April.
>
> WONG Sun advised he was all for selling plant and machineries if we could buy cheaper from contractors. Plant and machineries included those in Zhuhai.

On 24th April 1995, WONG Sun and Joseph LI flew to the United States. In his testimony, Joseph LI explained the reason for the trip in the following terms :

> … we knew that we had some serious problem about the US operation, we had to find a way how to deal with this US operation …WONG Sun put up a suggestion to the board that the US operation was not totally out of control; he can handle it. So he said : "Okay, I will make a trip there and let me handle it and find a way out". Because he said : "With a little bit of discipline, we can handle the US operation by cutting the US operating costs, downsizing it." Nobody would want to do this dirty job except WONG Sun. Hanny is his baby. He is the Chairman.

However, two matters arose while WONG Sun and Joseph LI were in

the United States which neither could have anticipated.

The first of these matters was an approach made by Philip Gregory, the CEO of Memtek USA, proposing what is commonly called a management buy-out. In a letter dated 28th April 1995, Philip Gregory described his offer as being a management buy-out and wrote :

> I have assembled a team of respected investors and lenders. I plan to present a cash purchase offer to Hanny as soon as possible, and in any event within the thirty day period.

According to Joseph LI, WONG Sun's reaction to the offer was one of outrage. He felt he had been betrayed by the United States management.

The second matter concerned the accounts for the year ended 31st March 1995 which were at that time in the process of being prepared. According to Joseph LI, he attended a meeting in California with the management of Memtek USA when he was advised that it would be necessary to make provision for exceptional losses (covering obsolete and damaged inventory and accounts receivable) of US$30 million. When translated into Hong Kong dollars, Memtek USA was asking that provision be made for exceptional losses of approximately HK$233 million.

Joseph LI testified that the suggested provision of some HK$233 million had come out of nowhere; there had been no advance warning given by the senior management of Memtek USA. In such circumstances, he testified that he was at the time deeply suspicious and believed that it could well have been a tactical move by the senior management to secure the buy-out at bargain prices. He said that it would be to the management's advantage if they could write off everything of supposedly dubious value and obtain a 'clean balance sheet' of reduced value.

But while Joseph LI harboured deep suspicions concerning the good faith of the Memtek senior management, he could not ignore the request for such a huge provision. John Hoffman, for example, one of those proposing the management buy-out, was a highly experienced accountant. Accordingly, Joseph LI sent instructions to Milly WONG in Hong Kong to investigate and it appears that by the evening of 17th May 1995 – the day of Joseph LI's return to

Hong Kong – initial (and, of necessity, very tentative) investigations had reduced the exceptional losses to US$1l.6 million, a figure nevertheless, in Hong Kong dollar terms, of HK$89.9 million.

On the morning of 18th May 1995 Wong Sun also returned to Hong Kong, touching down at Kai Tak Airport at 6:45 a.m. He went directly to Hutchison House and there he addressed a meeting of the Hanny board of directors which commenced at 8:00 a.m. When WONG Sun described the sorry state of the Memtek USA management, one witness described him as being an 'angry man'.

The meeting was not attended by William FUNG but Sanrita WONG was present and so were several senior members of Hutchison Whampoa and Peregrine; they included Canning FOK, John Nicholls and Susan CHOW. It is clear that the meeting was considered by all who attended to be one of importance. This was not a standard meeting of the executive directors. WONG Sun had come straight off his aircraft. Both Canning FOK and Susan CHOW from Hutchison Whampoa attended. The meeting lasted for 3 hours. Matters of considerable moment were discussed. A copy of the minutes of the meeting appear as Annexure 'XXV' to this report.

A number of witnesses spoke of the tenor of the meeting. Milly WONG attended the meeting with Joseph LI and described those present as being very unhappy. First, there was the bleak report from WONG Sun on the state of the United States operation and the need for drastic restructuring and, second, Joseph LI advised the meeting that the management of Memtek USA had suggested that provision would have to be made for exceptional losses for the year ended 31st March 1995 of about US$30 million. According to Milly WONG those who were at the meeting demanded an investigation and Joseph LI said that this would be done.

Regrettably, in respect of such an important matter, the minutes of the meeting of 18th May 1995 are less than clear. The matter of the proposed US$30 million provision is contained in just one paragraph which reads :

> Joseph LI mentioned that at one of the meetings with the local management, it was proposed that the US operation need to take up about US$30 million year end accounts in the March accounts to allow

> for provisions and write offs of inventory and receivables. This was strongly objected. Joseph LI would give details of the proposal at next meeting.

Susan CHOW, Deputy Managing Director of Hutchison Whampoa, recalled that Joseph LI spent a considerable amount of time on the issue of the proposed US$30 million write-off and did not agree with it. She never made any suggestion, however, that the meeting simply dismissed the proposed write-off as some sort of palpable tactic being employed by the United States management. It was, for example, suggested to her that, before the quantum of the write-off was verified, it was a meaningless figure. She answered by saying that it was not meaningless. It was a figure, she said, that 'we had to deal with'.

Clive Rigby was asked about the meeting that took place on the morning of 18th May and whether, in his opinion, if the matters debated had been generally known, that would have affected the share price to a material degree. He answered :

> Yes, it would. The size of that write-off is enormous.

It was then put to him that, of course the US$30 million write-off was not a confirmed figure. He answered :

> The very fact that a company is talking about it would worry me, as a broker or an investor. If I was holding a share in it and I thought the company was *seriously* talking about numbers like that, I would not hang around waiting for them to be confirmed. I would want to get out before I – as soon as I could. [our emphasis]

In the judgment of the Tribunal, there is merit in those comments. It is always, of course, a matter of understanding the context within which a subject is raised and in this regard the Tribunal is satisfied that those who attended the meeting – one of some gravity – would have appreciated the following :

a. That the Memorex acquisition had from the beginning proved to be a 'can of worms', constantly giving up unpalatable revelations. It

was not, therefore, inconceivable that yet further provisions would have to be made for obsolete or damaged stock and accounts receivable; indeed it must have been very much a possibility. In this regard, it is to be remembered that the Memorex operations were substantial. Fergus Wilmer had spoken of 5 warehouses and some 400 staff spread across the United States.

b. That, even if the management buy-out team in the United States had a tactical advantage to gain in pressing for such a large provision, there could be no suggestion that the claim had simply been invented. The buy-out team contained men of professionalism including accountants. This presupposed that there had to be some substance in the claim. Accordingly, by way of example, even if it turned out that only half the figure had to be written off; namely, some US$15 million, it still amounted to a figure in excess of HK$100 million which would have to be reflected in the year end accounts and *added* to operating losses which must already have been anticipated.

c. That losses in the year end results materially exacerbated by further United States provisions could well jeopardise Hanny's relationship with its bankers.

d. That, even if the claim for a US$30 million write-off was not proven to be a precise figure, it nevertheless represented a serious threat to Hanny's attempt to prove to investors that most of the reorganization expenses had already been reflected in Hanny's published results.

It is clear that Francis LEUNG of Peregrine appreciated the effect that publication of the news could have on the market. He did not attend the meeting. However, he received reports of what occurred and acted immediately. In this regard, the transcript of his evidence reads :

Q: Going back to your record of interview : "During the board of directors meeting of Hanny, I remember there was a discussion regarding a possible write down of an investment in the US. There was a large discrepancy

between the draft accounts reviewed by the auditors and management accounts. We asked the financial officer for the reason, but he could not answer. The figure was around US$30 million. *I thought this information is price sensitive and I thought that I and the other directors could not deal in shares of Hanny. I then told WONG Sun and advised him to circulate a statement in this regard.* As a result, this document is drafted and WONG Sun signed on 19th May 1995 and distributed to the other directors for them to sign." Is that accurate?

A: Yes.

Q: Do you know who it was, the financial officer who could not provide the answers to the provision?

A: Joseph LI.

[our emphasis]

The statement referred to by Francis LEUNG was circulated in the form of a memorandum the very next day; that is on 19th May 1995. It was addressed by WONG Sun to all the directors and read :

RE : Hanny Magnetics Limited ("Hanny") – Dealing in Hanny's shares

You will be aware that the Board has now commenced discussions on Hanny's business plan, budget and related matters. For this reason, I do not believe that it is appropriate for directors to deal in Hanny's shares at the current time. With immediate effect and until further notice, please ensure that you do not deal in Hanny's shares and that you ensure that no dealings take place by your spouse or by or on behalf of any child and that no other dealings take place in which you would be treated as interested by the Securities (Disclosure of Interests) Ordinance. If you have any doubt you should seek appropriate advice.

Signatures of acknowledgment were sought from all the directors. William FUNG signed but Sanrita WONG refused to do so. As will be seen, she was by then actively selling her Hanny shares.

The memorandum was not open to misunderstanding. It was not just advice, it was a clear directive not to deal in Hanny shares until further notice.

Nor, in the opinion of the Tribunal, could the timing of the memorandum be overlooked by those who received it. The memorandum was circulated the day after WONG Sun had returned from a visit of critical importance to the United States to decide how best to deal with Hanny's troubled operations there. It was circulated the day after a 3-hour meeting attended by senior members of Hutchison Whampoa and Peregrine at which those present were told of a claim by the United States management for an exceptional write-off of HK$233 million.

The Tribunal is satisfied that all those who read the memorandum – including William FUNG and Sanrita WONG – must have appreciated that, if they proceeded to sell Hanny shares, they did so against the clear direction of the chairman who had told them, albeit in general terms, that price sensitive matters were now being discussed and acted upon; that is, matters which could materially affect Hanny's share price if known generally to the market.

The evidence reveals that there was, in fact, considerable activity after the meeting on 18th May. Aside from meetings concerning Hanny's end of year results, Sanrita WONG herself attended meetings of the executive directors on 23rd and 24th May. The minutes of the first meeting are brief but *inter alia* record the following :

> US Further Laid Off
>
> Fergus had to inform WONG Sun and Joseph LI before dismissing further staff. Joseph LI to advise Fergus of this.
>
> US Commercial Department
>
> The Commercial Division would be sold to Anacomp but all staff must go together or else Anacomp would be responsible for the severance day.
>
> US Graphic Department
>
> The whole Graphic Department would have to go also.
>
> Target Bonus
>
> No more target bonus would be allowed for the US operation.

At the meeting the next day, the minutes record Sanrita WONG,

playing an active role :

> Hagemeyer
>
> Sanrita tabled an offer from Hagemeyer. In general the offer was not satisfactory. We would insist that it would also acquire our Memorex Drive at market value. WONG Sun preferred Rekotan better than Hagemeyer. He requested Eugene to look into the turnover figures of the offer letter and report back to the meeting.
>
> James Capel – Brokers
>
> Sanrita WONG requested the meeting to look into the matters of maintaining good relationship with investment brokers. James Capel was frustrated as no one seemed to be interested in seeing them. Joseph LI was requested to meet them.
>
> BASF Offer
>
> Sanrita tabled again further communication from BASF regarding an offer. In general the offer was not acceptable and we had to decline it.
>
> VO Business
>
> Sanrita WONG questioned whether VO was still a viable business and wasting our resources…

In the judgment of the Tribunal, when all relevant matters are viewed as a whole, those within Hanny with a knowledge of what was happenning must have known that the company was at that time in a state of deep crisis. There was now quite patently an air of desperation in Hanny's workings. If any of those within Hanny's senior management were blind to the obvious, their eyes would have been opened when Peregrine sent a letter dated 6th June to Hanny's directors. Counsel to the Tribunal has described the letter as a 'devastating critique'. The letter was jointly signed by Francis LEUNG and John Nicholls. It hi-lighted the need for detailed business and financing plans which could only be produced by the executive directors and had to carry their recommendation. Despite the public impression that new and highly competent management was at the helm, concerns were now expressed at a perceived 'lack of effective control by the executive directors over the operations and strategic direction of the Hanny Group'. In particular, reference was made to Hanny's financing

arrangements, that portion of the letter reading :

> Hanny's continuing debt burden, the short term nature of most of its borrowings, the fact that it remains in breach of covenants relating to a number of its loan facilities and the resultant concern and pressure from its bankers is a matter of grave concern to us.

In respect of the operating difficulties then facing Hanny, the letter read :

> It now appears, from the budge presented to the Board on 26th May 1995, that the Zhuhai facility is projected to operate on a significantly worse basis than was the case in the budget prepared for the Board less than two months ago. *This raises serious concern as to the effect this information will have on Hanny's bankers and creates real doubt in our minds as to whether Hanny will be able to continue to operate on a going concern basis.* [our emphasis]

In his expert's report, Clive Rigby was of the opinion that this letter (read with other contemporary correspondence), if placed in the hand's of an investor, would indicate that Hanny was at that time 'in extreme jeopardy'.

On a plain reading of the letter, the directors of Hanny must have been impressed by the fact that Peregrine, Hanny's business advisors and experts in the field, were gravely concerned at the company's position and did not see early signs of recovery. In short, to echo the words of Clive Rigby, that the year end results for 1995 would reveal a substantial loss, far greater than earlier anticipated.

C. Did relevant information come into existence at any time during the third period?

The Tribunal has had no hesitation in finding as a fact that relevant information did come into existence in the third period. It was not, however, one single piece of news that brought it into existence, it was rather an accumulation of matters, a growing awareness that, despite public assertions to the contrary, the worst of the restructuring difficulties were not over, that very substantial exceptional losses were still accruing and that, without drastic action,

Hanny could not meet its debts.

It was Susan CHOW who said that Hanny had 'so many problems'. The full extent of those problems, however, was only known to the market in late September when, after a lengthy suspension of share trading, Hanny published its results for the year ended 31st March 1995 and revealed a loss of HK$588.772 million. By that time Hanny's debt problems were so bad that it had to be rescued by third parties who effectively took over control of the company. Investors reacted with alarm. In a single day, on a turnover of 139.79 million shares, Hanny shares lost more than 50% of their value.

The question in issue, therefore, is *when* during the third period had the accumulation of information so grown in substance and particularity that it constituted relevant information?

The Tribunal is not satisfied that the meetings of 27th March and 3rd April would of themselves, even taken together, have constituted relevant information. In the opinion of the Tribunal, however, a meeting of defining importance was the one held on the morning of 18th May, the one which WONG Sun went to directly from his aircraft. Those who attended that meeting, by the time it was concluded, could have been left in no doubt that Hanny was now facing a crisis of material proportions, one that almost certainly would have to be reflected in the results for the year ending 31st March 1995. In this report, Clive Rigby commented :

> Based on the documents I have considered, my opinion is that by 18 May 1995 at the latest, relevant information existed and it is likely that the price of Hanny Magnetics shares would be materially affected if that information was known to the public.

Having heard all the evidence and considered the relevant documents, the Tribunal is satisfied that Clive Rigby was correct in his opinion.

It is evident that Francise LEUNG, even though he did not attend the meeting and only received reports of it, appreciated that a critical moment had been reached. That is why he ensured a memorandum was circulated to all directors stating that they were not to deal in Hanny shares until further notice. That memorandum was in circulation on 19th May, the day after the meeting.

It was unambiguous in its terms. The directors who received it and read it could not simply turn a blind eye to it.

Obviously the assertion by management in the United States that a provision of US$30 million would have to be made in the year end accounts was a matter of central importance. But that matter was not to be seen in isolation as the *single* element dictating the creation of relevant information. It was to be seen rather in its recent historical context as one of a number of disturbing matters that showed that Hanny was in deepening crisis. Simplistically perhaps it could be described as the final blow. But no single matter is to be considered in isolation; the one had an impact on the other. For example, continuing losses meant (almost certainly) that the auditors would write down the goodwill. That in turn would increase the loss to be reported in the end of year results.

In the course of his testimony as an expert, Richard Witts said that, in his opinion, investors would have been expecting a loss for the year ending 31st March 1995 of substantial proportions. In this regard, he said (in part) :

> If we had taken, shall we say, the operating loss – let us round it off to $77 million for the first six months. Let us double that and make it a $154 million loss. Then we had exceptional losses of $58 million. So if we add those on, we are getting to $212 million. And there has been a hint in the interim report that there will be some further exceptional losses. Whether they will be the same as the first half losses of $58 million or not, one does not know. I think something in the range of $250 million, it could be argued, may not be a surprise sufficiently to move the share price. As I say, it is a very simplistic approach. But the ordinary, reasonable investor would probably do such a thing. Two hundred and seventy million is starting to get a little bit further away. It is difficult to say, to pick various figures – when does it suddenly become a figure that would materially move the share price? I think 250 million I would be happy to say to you would not be significant.

It was argued by Wilson CHAN, counsel for Sanrita WONG, that, even if some allowance was made for the US$30 million write-off suggested by the United States Management, nothing was said at the meeting on 18th May which

made an end of year loss materially in excess of HK$250 a probable scenario. There was, therefore, nothing arising at the meeting which, if generally known, would have had a material affect on the share price.

But, of course, on several occasions Richard Witts himself said that the matters to be considered were more complex than the simple quantum of a loss. The crisis enveloping Hanny encompassed an inter-related structure of factors. Richard Witts spoke of sinister implications in respect of cash flow problems; Clive Rigby spoke of investors reacting with apprehension a the spectre of Hanny's relationship with its bankers collapsing.

During the course of the third period, Hanny failed to honour certain covenants in respect of a syndicated loan of US$35 million. Bankers Trust Company, acting as agent for the various banks, agreed to waive action for the present time but only subject to further stringent terms and conditions being agreed. A right to call in the loan if Hanny's business continued to deteriorate was one of those conditions.[47] It is evident that during the third period concerted efforts were being made to sell off assets. No need to raise cash was critical. Management accounts showed that operations in the United States were continuing to incur monthly losses. Joseph LI spoke of costs in the United States being out of control. Then unexpectedly came the assertion by the United States management that, in addition to accruing losses, an exceptional provision should be made for a sum in excess of hk$230 million. As said earlier, perhaps simplistically, it was the final blow.

It was further argue by Wilson CHAN that little, if any, weight could be given to the assertion made by the United States management that it was necessary to make a US$30 million provision. It was submitted, first, that the claim was false, misleading or untruthful and, as such, could never constitute relevant information and, second, it was submitted that it did not constitute information that was 'specific'.

In respect of the first submission, the Tribunal does not accept that the assertion by the United States management was false, misleading or untruthful. As it turned out, Hanny was forced to make substantial provisions. The amount of those provisions may have been considerably less than originally

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[47] In this regard, see next chapter, page 234.

claimed but evidence during the inquiry revealed that, in general terms, decisions on such matters as when stock does or does not become obsolete or when a debt does or does not become a bad debt are essentially subjective, leaving broad room for disagreement. Despite Joseph LI's initial suspicions, there was no evidence in the final analysis that the United States management had acted in bad faith. The worst that can be said is that, after due investigation, Hanny was satisfied that the suggested provisions, while they needed to be made, had been calculated too liberally.

As for the second submission, the Tribunal is satisfied that the claim for a $US30 million write-off was 'specific'. It was argued by Wilson CHAN that in May it was only a 'possible' write-off and, as such, was incapable of affecting the fortunes of Hanny until it materialised. The Tribunal does not agree. For the reasons stated earlier in this chapter, the Tribunal is satisfied that, when they learnt of the claim, the senior management of Hanny and their advisors took it most seriously. It was not an empty threat. It was a claim made by a team of professional business persons, some of them accountants. While no doubt it was hoped that the amount of the suggested provisions could be reduced, it must have been appreciated that, in all likelihood, very substantial provisions would nevertheless have to be made; sufficiently substantial to materially drag down the end of year results. That was going to be the probable consequence and that was why Francis LEUNG took the steps he did. That also was why Joseph LI had directed Milly WONG from the United States to commence immediate investigations.[48]

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[48] The evidence showed that before the meeting of 18th May, Milly WONG had (tentatively) found that at least HK$89.9 million of the suggested provisions had to be accepted as valid. All the probabilities suggest that she must have appraised Joseph LI of this before the meeting. He was the man who had commissioned her investigation and was her immediate superior. In such circumstances, when the meeting took place, even if nothing was said of her investigations, neither Joseph LI nor Milly WONG would have been dismissive of the *entire* claim of the United States management.

CHAPTER TEN

POSSESSION OF RELEVANT INFORMATION
IN THE THIRD PERIOD

(A consideration of whether any of the implicated parties knowingly possessed relevant information during this period and, if so, whether they dealt in Hanny shares.)

Having considered the evidence, the Tribunal is satisfied that 2 of the implicated persons knowingly possessed relevant information during the third period and dealt in Hanny shares. They were Sanrita WONG and William FUNG. The Tribunal's reasons are set out in this chapter.

A. Sanrita WONG

It was not disputed that from mid May through until the end of June 1995 Sanrita WONG sold 43.098 million of her Hanny shares through her account with Credit Lyonnais. There had been no sales previously in that account in 1994 or 1995. Her selling began on 16th May when she sold 310,000 shares. The following day she sold 430,000. However, from 18th May onwards she began to sell in far greater volume. Indeed on 18th May – the day of the morning meeting to which so much reference has been made – she sold 5.69 million shares. Her sales are summarised as follows :

Date	Number of shares	Price
18th May	5,690,000	43.28 cents
19th May	2,820,000	42.77 cents
22nd May	1,490,000	42.44 cents
24th May	470,000	42.61 cents
25th May	3,650,000	42.03 cents
26th May	4,200,000	40.45 cents
29th May	3,168,000	40.25 cents
30th May	1,140,000	40.43 cents
31st May	1,500,000	40.00 cents

This left a balance of 120,000 shares in her Credit Lyonnais account. However, on 1st June she transferred into that account a further 18.2 million

Hanny shares. The selling continued :

1st June	481,000	40.00 cents
5th June	1,452,000	38.86 cents
6th June	8,728,000	40.52 cents
7th June	5,640,000	40.56 cents
14th June	882,000	40.00 cents
28th June	1,120,000	40.00 cents

That last sale exhausted her stock of shares in the account with Credit Lyonnais. In less than 2 months she had sold more than 43 million shares for a sum of HK$17,723,323.

The evidence shows that in March and April Sanrita WONG had been attending meetings of the executive directors. The evidence further shows that she was at the meeting held on 18th May and attended meetings of the executive directors shortly thereafter. Indeed, the minutes record that she took an active part in the meeting of 24th May, dealing with a broad range of matters.[49] Nor was it ever disputed that Sanrita WONG received and read WONG Sun's memorandum warning the directors not to deal in Hanny shares until further notice. It was, in fact, her evidence that she refused to sign this document. What then were her stated reasons for selling in such volume in face of a clear direction from the chairman (her brother) that she was *not* to do so?

On 22nd May - after she had already sold more than 9 million of her shares - Sanrita WONG wrote a letter to WONG Sun. That letter was written in English and gave her reasons for selling :

> As you are aware, I planned to sell part of my holding of Hanny's shares six months ago. The agreement by Hanny's directors with Peregrine not to sell any of their shares in Hanny has now expired. I am therefore no longer bound by this restriction. *I have some urgent financial commitments* which will necessitate my disposing of my Hanny shares as soon as possible. [our emphasis]

It is clear from what she said a little later in her letter that Sanrita

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[49] In this regard, see Chapter Nine, page 207 to 208.

WONG was aware of her obligation not to trade in Hanny securities if that trading would constitute insider dealing. In this regard, she wrote :

> You mentioned in your memorandum that the Board has now commenced discussion on Hanny's business plan, budget and related matters. To my knowledge, Hanny does not as of now have any plans or potential deals that may cause any change in its share price. *As I do not possess any unpublished price sensitive information that may breach the insider dealing rules* … I do not think it appropriate that restrictions should be placed on myself or on my family to deal in Hanny's shares. [our emphasis]

Sanrita WONG spoke only of 'plans or potential deals' that may cause a change in Hanny's share price. She made no mention of the crisis that was consuming Hanny at that time; namely, the restructuring and/or disposal of the North American operations, Hanny's debt burden and the claim by the United States management that the year end accounts should contain an exceptional loss of US$30 million. However, she invited the chairman to correct her if her assertion that she possessed no price sensitive information was wrong. In this regard her letter ended :

> Please let me know if you disagree with my assertion that I do not have knowledge, by virtue of my directorship with the company, of unpublished price sensitive information. If so, please could you specify.

The senior management of both Peregrine and Hutchison Whampoa were sufficiently perturbed at Sanrita WONG's disposal of Hanny shares that they took it upon themselves to ensure that she was told exactly why it was believed she was in possession of price sensitive information.

Francis LEUNG requested WONG Sun to pass a message to his sister that it was not right for her to be trading in Hanny securities at that time. Thereafter, he said, he received a telephone call from her. This would have been on or about 28th or 29th May. During the conversation, Francis LEUNG recalled Sanrita WONG saying that she had pressing reasons to sell her shares : *that her bankers were forcing her to sell*.

This was different from what had been said a few days earlier in her letter to WONG Sun; namely, that she had urgent financial commitments. He recalled her saying that she had no inside information and that she wished to resign from Hanny. Francis LEUNG told Sanrita WONG that he did not agree that she was ignorant of any price sensitive inside information as they were all considering the company accounts for the year ended 31st March 1995 and there was a big question mark as to how the US$30 million provision in respect of the United States operations was to be treated. This, he told her, would have a big impact on the group results and on the share price. He further recalled telling her that her resignation as a director would not change matters as she already possessed price sensitive information concerning Hanny. In summary, Francis LEUNG reminded her of the nature of the information in her possession and its implications.

During the conversation, he said, Sanrita WONG told him that she had taken legal advice and had been told that it was permissible for her to sell. He said that he advised her to seek further legal advice. He also urged her not to trade further until WONG Sun had given her permission to do so. It was put to Francis LEUNG that his conversation with Sanrita WONG had been a heated one and he had slammed down the telephone. He said that he did not recall it being so acrimonious. However, if tempers were lost, it shows how strongly Francis LEUNG must have felt about the matter. After that conversation, Francis LEUNG sent a letter. It was dated 29th May and read (in part) :

> I must repeat Peregrine's oral advice, as a major shareholder and as Hanny's financial adviser, that *in the light of the information which is currently available to Directors regarding Hanny's results for the year ended 31st March, 1995, its budget for the year ending 31st March, 1996 and related matters*, it is not appropriate at the present time for Directors to deal in Hanny's shares… [our emphasis]

Sanrita WONG, however, continued to sell. She was determined to sell. Perhaps it was panic, perhaps it was a desire to save some of her wealth before the share price collapsed further. What is apparent, however, is that, despite the advice of experienced professionals, she went ahead. Their advice was ignored.

The concern of Hanny's advisors grew. On 5th June, Susan CHOW,

recorded a minute to the effect that she had spoken to Sanrita WONG to advise her of the legal position. In her testimony, Susan CHOW said that her purpose in speaking to Sanrita WONG had been to dissuade her from selling Hanny shares. Four days later, on 9th June, Bryan-Brown received written notification of sales by Sanrita WONG and wrote a minute to Francis LEUNG and John Nicholls that read :

> Sanrita has now disposed of virtually her entire holding. *She says she had no choice as they were pledged to her bank.* This obviously raises concerns *on insider dealing* and the public reaction when the results are announced. It also raises the question : who is buying as the share price has remained reasonably firm. [our emphasis]

Here again Sanrita WONG was speaking of being forced to sell her shares by her bank, of having no choice in the matter. Was there then any substance in this allegation; sufficient, that is, to raise a doubt in the minds of the Tribunal?

(i) Her dealings with Credit Lyonnais in the third period …

When interviewed by the SFC in September 1996, Sanrita WONG made it clear that Credit Lyonnais had made the decision to sell her shares and had, in effect, proceeded unilaterally to do so. In respect of the sales made between 16th and 22nd May 1995, she said :

> I have not given any instructions to Jeanie FANG as to how many shares were to be sold. It was Credit Lyonnais which *unilaterally decided on the price and the quantity*. I only knew that Credit Lyonnais would sell my Hanny shares and I told Credit Lyonnais to try their best not to cause fluctuations in the market. [our emphasis]

When asked about the sales which took place from 23rd May until the end of June, Sanrita WONG said :

> All the proceeds from the sale of around 24 million Hanny shares were used to repay the debts I owed Credit Lyonnais (which amounted to around $10 million odd). At that time, I had not yet made

> repayment in full. Therefore, I took out the remaining 18.12 million Hanny shares from my cabinet in the office and gave them to Credit Lyonnais. In order to avoid further troubles, I deposited all my Hanny shares in favour of Credit Lyonnais and let Credit Lyonnais take whatever action they deemed appropriate.

Jeanie FANG, who acted as Sanrita WONG's account executive, testified before the Tribunal. She said that all the sales, without exception, were made on the instructions of Sanrita WONG. She denied that Sanrita WONG was the victim of any kind of 'formalised' forced sale. If that had been the case, she said, Credit Lyonnais had set procedures which would have been followed. Lawyers would have been consulted and letters sent by them. There were no such letters in the files of Credit Lyonnais nor any produced by Sanrita WONG.

However, as the hearing progressed, it became apparent that Sanrita WONG, was no longer alleging any 'formalised' sale but rather some form of moral pressure. The following extract of Jeanie FANG'S cross-examination by Sanrita WONG's counsel illustrates this :

> Q: In fact, you required Sanrita WONG to top up her account by cash and not Hanny shares?
>
> A: When?
>
> Q: That is around mid-May 1995.
>
> A: No.
>
> …
>
> Q: Sanrita told you that she could not afford to pay the amount you mentioned?
>
> A: No.
>
> Q: Sanrita WONG again told you that her only readily disposable assets were Hanny shares?
>
> A: No.
>
> Q: You told her words to the effect, "In that case, sell the shares"?
>
> A: No.
>
> Q: Sanrita then said words to the effect, "If you have to sell my shares I cannot stop it, but I will however request Credit Lyonnais to sell my shares gradually so as not to disturb the

market"?

A: No.

Q: And she did not fix any price?

A: No.

Q: I put it to you that although technically it may not have been a forced sale, but nevertheless you put tremendous pressure on Sanrita WONG for her to sell the shares?

A: No.

As seen, Jeanie FANG denied that she placed Sanrita WONG under any moral pressure. She accepted that, in or about the end of April 1995, she may have expressed concern at the fall in Hanny's share price. She further accepted that she may also have indicated to Sanrita WONG that, if prices fell further, it may be necessary to 'top-up' the security ratio in the trading account. It was her evidence, however, that she did not express serious concern, not so long as the security/debt ratio remained at 100% or above. The Tribunal was impressed by Jeanie FANG's testimony; she remained calm, prudent and professional. The Tribunal is satisfied that any advice given by her to Sanrita WONG would not have amounted to coercion or any form of moral blackmail.

During the course of her testimony, Jeanie FANG was shown an 'internal report' drawn up by her. It referred to a meeting that she had had with Sanrita WONG on 21st April 1995 and spoke of what had subsequently happenned in the account. This contemporary document (produced in the ordinary course of business) does not speak of any form of pressure being placed on Sanrita WONG to sell her shares. To the contrary, it indicates that it was Sanrita WONG who reached an independent decision to 'gradually unload her holdings' and that Credit Lyonnais assisted her to do that. The 'internal report' reads :

> Ms. WONG had drawndown another new loan in Mid April during JF's [Jeanie FANG's] absence. According to client's latest intention, she wanted to gradually unload her holdings in Hanny Magnetic. In fact she wanted to check whether it was feasible to have a placement of 10 million shares in one lot at a slight discount to the current market price. JF suggested her to await for market rebound and to sell in the market gradually. She would consider and come back to us. Recently her health was not in good condition and she needed daily

physiotherapy treatment. Meeting was harmonious.

Action/Results :

She agreed with our recommendation and had sold altogether 11 million shares of Hanny Magnetic in the market. If prices improve, she may consider unloading another 5 million shares.

It should also be noted that in the months following Sanrita WONG's sale of shares, there is no evidence that those who were worked with her were satisfied that she had, in fact, been forced to sell her shares and was not, therefore, to be personally blamed. For example, the minutes of a board meeting held on 22nd August (at which Sanrita WONG was not present) record :

> The meeting noted a demand of Sanrita WONG for bonus or commission due or to be due to her and her claim of the alleged new service agreement. It was resolved that the board's view was very firm on these allegations. WONG Sun and Joseph LI were requested to pass on to her a serious message that she should resign on her own accord for breaching her fiduciary duty as director as she carried on disposing her shares ignoring the formal advice of the Chairman. All her claims were denied and if she chose not to resign, the company would have to summarily dismiss her.

It appears that the request for Sanrita WONG to resign for a breach of her fiduciary duties was 'tactical' in the sense that it was in opposition to her claim for various commissions. That, however, does not of itself detract from the fact that the board believed that she was culpable of a breach of her fiduciary duties, not a belief that would have been held if the board believed the shares had been sold by Credit Lyonnais in terms of some legal right that was exercised by the bank in the absence of Sanrita WONG's consent.[50]

On all the evidence, the Tribunal is, therefore, satisfied that Sanrita WONG was not placed under any form of duress from Credit Lyonnais to sell

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[50] a) In the event, Sanrita WONG refused to resign from the board of Hanny and pressed her claim for commissions. The matter was later compromised, Sanrita WONG agreeing to receive a sum in excess of $800,000 by way of terminal benefits.

b) Sanrita WONG testified that her brother, WONG Sun, gave her permission to sell her shares after she approached him personally. But if that was the case, the Tribunal cannot see how WONG Sun would have placed his signature on these minutes.

her shares. She made the decision herself. But even if the decision was her own decision, Sanrita WONG denied that she was knowingly in possession of relevant information at the time that the sales were made. In this regard she referred to a number of matters.

(ii) Sanrita WONG's poor health and her disinterest in Hanny's affairs …

It was Sanrita WONG's evidence that during the third period she was severely troubled by a chronic back complaint. This, she said, caused her both physical and mental distress and absorbed so much of her energy that she was unable (even if she wished to do so) to concentrate on Hanny affairs.

It seems that she did not receive any Western-style treatment for her back condition. Madam SUEN Pak Ling, a practitioner of acupuncture and Chinese manipulative therapy, testified that she diagnosed Sanrita WONG to be suffering from a spinal condition called spondylotic radiculopathy. She said that she treated her for this condition at least three to five times a week between March and July 1995, each treatment lasting several hours. Sanrita WONG's condition at that time, she said, was so serious that she was unable to turn her head and one arm was numb.

It was never disputed that Sanrita WONG was suffering from a back complaint at this time. Several witnesses spoke of it. What was at issue, however, was the degree to which this problem affected her ability to receive and digest information concerning important financial and management issues.

When questioned about the treatment she had given Sanrita WONG, Madam SUEN admitted that she had not kept any records of either her diagnosis or the frequency and nature of the treatments. After a lapse of more than 4 years she was therefore relying solely on memory. This greatly reduced the reliability of her evidence. Madam SUEN described her patient's condition in terms that made it appear that she would have been rendered almost immobile. Yet immigration records showed that during the period of treatment Sanrita WONG made 2 business trips to China, events of which Madam SUEN had no memory. Madam SUEN further accepted that she had no idea of the extent to which, in between treatments, Sanrita WONG conducted an ordinary business and social life.

It was Sanrita WONG's testimony that she experienced such acute discomfort having to sit for prolonged periods at company meetings that invariably she would remain in her office and only be called in to participate when one of her matters arose. Once her matters were dealt with, she would retire back to her office or some other place where she could achieve a modicum of comfort. Her purely temporary attendance at meetings, she said, explained why in most instances, even though she was recorded as being in attendance, she was not in fact present for most of such meetings and would not, therefore, have known what was said during her absence.

In addition to her poor health, it was Sanrita WONG's evidence that, after Hutchison Whampoa and Peregrine had effectively seized the reins of Hanny, she rapidly lost any personal feeling of involvement in the Group's affairs. She had little to do, was alienated from core decision making and resolved to resign. This apathy towards the affairs of Hanny was compounded, she said, by her ignorance of sophisticated financial matters. She said that she concentrated on her narrow area of responsibility for OEM sales and effectively blocked out other matters. It was her evidence that business papers sent to her were never read by her. This was because she made a conscious decision to remain ignorant. The letter of 6th June sent by Francis LEUNG and John Nicholls to the directors of Hanny was one example. Counsel to the Tribunal described the letter as a 'devastating critique'. It was Sanrita WONG's evidence, however, that she remained ignorant of its contents just as she remained ignorant of the contents of other documents which would have made her aware of what was truly happenning within Hanny. The following is an extract from her testimony :

Q: … is it the situation that you cannot exclude the possibility that it may have been sent to your secretary and filed away?

A: Correct. Yes, there is the possibility of it being delivered to the tray and then being filed away by the secretary.

Chairman: … did you give an instruction to your secretary, "Whatever comes in, just file it away and do not show it to me"?

A: I have spoken to my secretary, that because there is a special file where faxes come in from customers and I will read them. *As for company matters like this, I have told*

her that firstly I do not know about it and I do not want to read it, so I have told her to file it away.

Chairman: *So you have said, "If matters arrive on my desk related to company matters, I do not know about company matters and I do not want to know about them, so just file them all away"*?

A: *Yes*. Because at the time I had decided to leave the company and I had no interest in knowing things about the company. [our emphasis]

Sanrita WONG's professed ignorance covered all matters that could damage her. For example, on 15th May 1995, Alex LEE circulated WONG Sun's proposals for restructuring the United States operations. WONG Sun had written out the proposals in Chinese characters while in America and faxed them back to Hong Kong. Alex LEE's fax cover sheet was addressed to Canning FOK and Francis LEUNG. However, it was endorsed to the effect that it should also go to Sanrita WONG. WONG Sun's proposals set out important matters of strategy for the survival of the Group. The following is an extract from Sanrita WONG's evidence concerning this matter :

A: I only knew that he went to the United States, but I do not know why he went there and I do not know the details of anything that they are negotiating.

Q: Was he on holiday?

A: No. I do not think so.

Q: Do you see that that fax cover sheet in front of you has in handwriting at the bottom, "CC WONG Sun/Sanrita WONG/Eugene KUO"? Do you see that?

A: Yes, I can see that. As I said before 100 times, any documents to me – some of them I did not look at and I just filed them.

Chairman: But this is a document from your brother talking about re-organisation of the largest subsidiary in the Hanny Group. Did you not realise that your brother had gone across to America to look at and study the problems in America with Memorex?

A: By looking at the documents, I only knew that he was in the United States, *but I did not know what he was doing*

there.

Chairman: … Casting your mind back to that time, he is your brother and he was off to the United States; did you not at that time know that he was there to see what could be done to try to fix the trouble with Memorex in the United States?

A: As I explained to you before, Mr. WONG Sun, in my opinion, does not speak much independent, and all along, as an older person and also as a director, the boss, *he would not tell me any problem about Memorex.*

Chairman: But these were problems, with the greatest of respect, which were aired at directors meetings that you attended, so this was not a secret that he kept unto himself?

A: I know this is not a secret. But I have explained before, I had no interest whatsoever in the company matters, because I have said before that I wanted to resign from the company.

Chairman: I appreciate that, but even with a lack of interest, you knew that Memorex in the United States was a big problem; you knew that your brother was going to the United States; you knew that he was going with Joseph LI; you knew that the big problem had to be solved. *Did you not put two and two together and say : my brother and Joseph LI are going there in order to review the problem and hopefully solve it*?

A: *I really do not know*. [our emphasis]

Sanrita WONG's ill health and her apathy were compounded, she said, by her limited knowledge of the English language and her ignorance of company matters. For example, when questioned about the meeting she attended on 18th May, the following appears in the transcript :

Q: Do you remember being unhappy yourself at learning that the provision of US$30 million was being sought by the American subsidiary?

A: Number one, at the meeting, I believe they were speaking English. I do not understand the term "write-off". I do not understand the US$30 million write-off, what is meant by that?

What then did the Tribunal make of these protestations? Did they raise any doubt that Sanrita WONG may have remained ignorant of what others in Hanny knew? The Tribunal accepts that Sanrita WONG was suffering a back complaint at the time, a complaint which required treatment. But it does not accept that her distress was so acute that it prevented her from participating in management matters. The Tribunal also accepts that Sanrita WONG may have felt disenchanted and may have harboured a desire to resign. No doubt Hanny's troubles caused morale problems for many working within the Group. But the Tribunal does not accept that this brought about the kind of all-enveloping disinterest that Sanrita WONG described. Nor – for reasons given earlier in this report[51] – does the Tribunal accept that Sanrita WONG was as ignorant of financial and corporate matters as she said.

It must be remembered too that Sanrita WONG remained a substantial shareholder and was still an executive director. The records show that she still regularly attended meetings and not merely as an apathetic witness. For example, the minutes of the meeting held on 24th May record the following :

> VO Business
>
> Sanrita WONG questioned whether VO was still a viable business and wasting our resources …

The minutes of meetings such as this were in most case written up by Joseph LI, a cautious and experienced accountant. Their essential accuracy cannot really be questioned. The meeting of 24th May shows her actively canvassing a broad range of important matters from the sale of plant and machinery to continued negotiations with BASF. During the course of questioning, she was asked about her involvement in the Hagemeyer Electronics negotiations. She said that from 'beginning to end' she had *never* been involved. And yet Hanny documents show her being specifically assigned responsibility on 18th May and the minutes of 24th May record her dealing with the Hagemeyer Electronics matter. Her protestations about this and other matters continually flew in the face of cogent, independent evidence to the contrary.

If Sanrita WONG was so disinterested, if she was so consumed by the

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[51] See Chapter Five, pages 109 – 126.

pain of her back problem, why did she go to meetings so regularly? Why did she not simply excuse herself? Her ill health would have provided adequate reason. She could give no satisfactory answer. The Tribunal cannot (and does not) accept that she was somehow summoned for her piece of business and then allowed immediately to retire. No other director has spoken of that happenning.

In the circumstances, the Tribunal is satisfied that Sanrita WONG remained an important member of the board and ensured that she was kept up to date with business documents. The Tribunal rejects her suggestion that she had all documents filed away without reading them. In short, the Tribunal is satisfied that Sanrita WONG knew full well what was happenning in Hanny. As to when she came into possession of relevant information, the Tribunal is satisfied that from 18th May 1995 she possessed that information and knowingly sold in the light of that information on that date and thereafter.

B. William FUNG

On 13th April 1994, William FUNG opened a trading account in his own name with Onshine Finance Ltd. A few days later he deposited 14 million Hanny warrants into the account and then converted them into shares. Thereafter there was no activity in the account until he deposited a further 3.7 million Hanny shares on 30th May 1995. There had been no sales up to that date but from about 18th June through until 1st or 2nd August, William FUNG proceeded to sell 28.71 million of the shares in the account. The records of the account show only settlement dates. These records show the first sales settlement date to be 20th June and the last to be 3rd August 1995.

In that period of time, William FUNG made only one purchase of Hanny shares; buying one small parcel of 10,000 shares with a settlement date of 5th July. A copy of the trading records from the opening of the account through until 25th September 1995 is attached to this report as Annexure 'XXVI' (1-3).

On a consideration of all the evidence, the Tribunal is satisfied that William FUNG was speculating in Hanny shares at that time and sold because he was knowingly in possession of relevant information. The Tribunal's findings are based on a number of matters :

(i) William FUNG's access to relevant information …

On 1st December 1994, William FUNG was given notice of the termination of his service agreement with Hanny in terms of which he was employed as an executive director on a monthly salary. The notice was to be effective on 31st May 1995.

However, it is apparent that even after May 1995 William FUNG continued to do work for Hanny, not as an executive director but in his capacity as an ordinary director. This was work for which he was paid, a fact which he himself confirmed. It was only on 10th July 1995 that William FUNG resigned as an ordinary director. However, even after 10th July, he continued to receive Hanny papers, albeit intermittently. This was also confirmed by him as the following extract from the transcript shows :

> Chairman: Are you able to say – just to assist us – why it is that with no formal connection of Hanny, Hanny thought it still proper to send you company documents?
>
> A: Maybe some of them, they just get used to it and maybe some thought that I am still a director – I am still a shareholder.

Although there is no suggestion that after 31st May 1995 William FUNG continued to go regularly to Hanny, the evidence reveals that up until that time he did go regularly to his office (which was only a few paces from the accounts department) and remained there for substantial periods of the day. Milly WONG, seconded from Hutchison Whampoa, confirmed this in her evidence :

> Q: To try to help the Tribunal, how often did you see him in the offices?
>
> A: Not very often. But he is always in his office though. When I come to the office – because his office is just next to mine – I can see him sitting in the office …
>
> Q: Let us just deal with "he is always in his office". What do you mean by that – every day, all day, what do you mean?
>
> A: It is almost every day, all day.

Milly WONG said that, to her knowledge, William FUNG was at that time responsible for signing cheques and dealing with shipping.

In summary, it is clear that William FUNG had *access* to information of what was happenning inside Hanny until well after 10th July 1995.

(ii) William FUNG's desire to utilize his access to relevant information …

When he testified, William FUNG stressed that in April and May 1995 he was getting ready to retire from Hanny and, as a result, he said that he took less and less of an interest in Hanny's business. One of the principal reasons stated by him was his inability at this late stage to influence events within Hanny. But, of course, influencing events and understanding the likely ramifications of those events are two different things.

In the opinion of the Tribunal, what is important is the fact that in the third period, whatever his intentions as to retirement, William FUNG clearly continued to use his privileged position as a director to check on his investment in Hanny. This has been spoken of earlier in this report.[52] However, one piece of his testimony bears repeating :

> FUNG: When I said I was working there … I was not going there all the time; sometimes, I just went over there.
>
> Q: To do what?
>
> A: *Just to check around, because I have money invested in there*. [our emphasis]

The Tribunal has spoken earlier of William FUNG's quite rational (indeed, sensible) desire to learn what was happenning within Hanny in order to protect his investment. As we said earlier :

> Like any rational investor, he was determined to keep an eye on his investment. What further emerged was that William FUNG was no stranger to company accounts. He well knew, therefore, that the surest

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[52] See Chapter Five, pages 184 and 185.

> way to satisfy himself that all was well was to read relevant company documents, speak to senior people in the accounts department and to study company accounts. What must be remembered is that at all times material to the inquiry William FUNG was a substantial shareholder in Hanny, indeed the second biggest individual shareholder after WONG Sun. He therefore had a compelling motive to guard his interests.

In the opinion of the Tribunal, on the basis of the evidence, those findings in respect of William FUNG remain equally valid in respect of mid 1995.

William FUNG was, of course, an old friend of WONG Sun. They had been in the business from its very early days. When asked if he and WONG Sun were still discussing Hanny's business affairs in or about mid 1995, William FUNG at first denied any such discussions but then he changed his evidence and admitted that there had been discussions :

> Chairman: … I think Mr. Lunn is asking this : on the basis of a long-standing friendship with Mr. WONG Sun; on the basis that you were still – in name, at least – an employee of the company; on the basis that you were a director of the company; and on the basis that you had more than [103] million shares in the company, did you not discuss matters at all with Mr. WONG Sun?
>
> …
>
> A: Because at that time we did talk about it. But then we did not discuss the matter in detail, because at that time I was relying on them. It is not a situation that they are relying on me.
>
> Chairman: So, you did discuss, but not in detail?
>
> A: Yes, not in detail.
>
> Q: Well, what you were you told, "The company is going down?" "Big black hole of losses"?
>
> A: He did not say that it is going down, he is just saying that, like, it is not as good as last year – it is not as good as last year, or not as good as before.
>
> Q: And was this Mr. WONG Sun who told you this?

A: Not WONG Sun, even other staff. But sometimes it may be WONG Sun, so even if it is not so good, but we will do our best to make it right.

…

Q: Well, who else told you then?

A: With such scenes, there would be people from the accounts department, it is just like through casual conversation.

William FUNG, therefore, admitted that he had conversations concerning Hanny's further deterioration with *both* WONG Sun and 'other staff' within Hanny; that is, people in the accounts department. It appeared to be his evidence, however, that they only spoke to him in generalities; feeding him such platitudes as 'we will do our best to make it right'. But why would William FUNG allow himself to be fobbed off in this manner? He was an astute businessman; he understood accounts, he was a major investor. The Tribunal is satisfied that if, through his discussions, he had learnt of a continuing deterioration, he would have taken steps to discover the degree of that deterioration and its causes. Indeed (somewhat grudgingly) William FUNG admitted that he did just that :

Chairman: But would it be correct, Mr. FUNG, just so that we can clarify the situation, that some time towards the end of your association with Hanny, that is while you remained a director of Hanny, you became aware of the fact that things were not as good as before, not as good as last year?

A: Yes, there is something, that is a kind of feeling.

Chairman: You were told that by people, were you, casual chat, "Things are not as good as last year"?

A: Yes, maybe like it is not as good.

Chairman: Now, there is an old Russian saying which is that if the workers see a fire in the village, everybody wants to know if it is their house. Now, you had a house in this village, did you not; you had a very big house?

A: Yes.

Chairman: Once you knew there was a fire in the village, did you not want to find out the extent to which was it going to burn down your house -–that is your investment?

A: I do not have the ability to put out the fire, so I have to rely

on those group of people to put out the fire.

Chairman: I appreciate that. But did you not want to find out something? Because you had the means to find out, did you not? You were, no doubt, receiving circulars and memoranda, or you had the ability to obtain them, simply by asking the accounts department for them, so that you could check and see, "Is my house on fire? How bad is the damage?"

A: Yes, I did that but –

Chairman: *So you checked the papers just to try to get an idea of how bad things were at that time*?

A: *Yes, I did check around*. [our emphasis]

The Tribunal readily accepts that William FUNG was in April, May and June 1995 not involved in the centre of events; he was very much on the sidelines. Information would not, therefore, have reached him with the same compelling immediacy as it reached others such as Sanrita WONG. However, it is clear from all the evidence that William FUNG remained keenly interested in protecting his investment in Hanny and used his position of privilege to obtain information not available to the ordinary investor. In summary, he not only had access to relevant information, he also – on his admission – used that access to check to see just how bad things were within Hanny.

(iii) The purpose for which William FUNG opened his account with Onshine Finance Ltd.

When he was interviewed by the SFC in October 1996 – little more than a year after his trading – William FUNG was asked why he had opened an account in his own name with Onshine Finance. At that time he said :

> In 1995, when I was about to leave Hanny, I felt that I might trade in Hanny shares in relatively substantial amount, and I felt that it might be better if I trade in Hanny shares in my own name. So I opened a securities trading account at Onshine. Since I wanted to cash in at that time, I thought of selling Hanny shares.

In a later interview, he spoke of using his account for both buying and selling :

Q: But you also traded in Hanny shares between June and August 1995. Why?

A: I regarded (myself) to be doing trading. Through the buying and selling of Hanny shares, I wanted to make other people feel that there was active trading in this stock.

Q: Which period did you refer to during which you did the above?

A: I mean June to August 1995.

In this interview he was quite plainly talking about 'trading'; that is buying and selling. However, in a witness statement (dated 31st August 1999), made by him in anticipation of his testimony, he said that the account had been opened by him essentially as a vehicle for *disposing* of his shares when he retired from Hanny :

> In fact, it was in 1994 that I was thinking about leaving Hanny as a director and in that event, I would sell a large portion of my shares. For these reasons, I opened my own account at Onshine in April 1994.

On several occasions during the course of his testimony, William FUNG indicated that, as he was getting older and wished to retire, he was looking essentially to liquidate his holdings in Hanny so that he could secure his retirement savings in a more stable and conservative manner. In short, the impression he sought to give was that he was doing no more than selling in order to fund his retirement and intended to sell as soon as he had resigned as a director. But if that was the case, why would he have started to buy Hanny shares in August 1995? Why also would have spoken earlier to the SFC of using the account to 'trade'; that is, to both buy and sell? On all the evidence, the Tribunal is satisfied that William FUNG did not use his account with Onshine Finance in June, July and August 1995 solely as a vehicle to raise cash for his retirement. It was a vehicle for speculating in Hanny shares. How well he speculated, of course, is another matter.

(iv) What did William FUNG know of relevant events…?

It is understandable that, after a lapse of close to 5 years, William FUNG had difficulty remembering whether certain documents had been

circulated to him or not and/or whether he had read those documents. On several occasions, when asked about specific documents, he said words to the effect that it was possible he had read them but he could not remember. He did not, therefore, totally exclude the possibility of ever having read such documents; it was simply a case that he could not remember.

It is worthy of note, however, that in late 1996 the SFC seized a number of documents from William FUNG's office which included a draft summary of the Hanny's balance sheet and profit and loss account as at the end of January 1995. These had been prepared in February and circulated to 'all directors' under a memorandum dated 1st March 1995. Even at that early juncture, the draft profit and loss account showed a Group loss of some HK$160 million.

As to Hanny's serious debt burden and the difficulties that the Group was encountering in honouring the terms of its loan agreements, the evidence shows that William FUNG signed a resolution which related to a syndicated loan of US$35 million managed, as agent, by Bankers Trust Company. Hanny had failed to comply with certain covenants under the syndicated loan agreement. The banks that had leant the money had, however, agreed to waive any action provided Hanny agreed to a series of further terms and conditions. The letter from Bankers Trust was attached to the resolution signed by William FUNG and stated *inter alia* :

> Should [Hanny], in the reasonable opinion of the Majority Banks, fail to provide the additional information and analysis or respond to the Banks questions or to negotiate in good faith on restructuring the Credit Agreement, all as provided above, or should in the reasonable opinion of the Majority Banks *there be further material adverse change in the business, assets, liabilities, conditions (financial or otherwise) or prospects of [Hanny]* and it subsidiaries taken as a whole, the Agent reserves the right if so instructed by the Majority Banks, to revoke such waiver by notice to the Borrower and [Hanny]. [our emphasis]

William FUNG was questioned about this matter and admitted knowledge of it :

> Q: Do you see that the letter offers to waive breach of

covenants on condition – and it sets out the conditions?

A: Yes.

Q: As someone who has worked in finance, as you have told us, do you not read bankers' letters carefully before you put your name as a director to a resolution agreeing to something?

A: The heading and those topics I am aware of. But I may not have read it line by line.

As for the cash flow problems being specifically encountered by the United States operations, William FUNG placed his signature on a resolution of the board of directors dated 29th May 1995 in terms of which Hanny provided certain guarantees to enable Memtek USA to obtain factoring facilities in the sum of US$25 million (approximately HK$193 million). As a Hong Kong businessman – as the evidence showed – William FUNG must have been aware that factoring was a most unwelcome development.

The Tribunal is satisfied that, as an experienced businessman with a knowledge of finance and also as a major investor in Hanny, William FUNG would have read the letter from Bankers Trust and the wording on the face of the factoring resolution. He would, therefore, have known that, in addition, to continuing losses, the Group was still experiencing severe cash flow problems resulting in an inability to service debt and that, in particular, cash flow problems were affecting Hanny's principal subsidiary in the United States.

William FUNG attempted to say that he did not have the energy to fully digest the content of company papers. The following extract from the transcript (in respect of the Bankers Trust matter) illustrates this :

A: May be I have glanced through it, but then I cannot remember now.

Q: Is there any reason why you should merely glance through documents? Was your day so busy that you could not read them?

A: Maybe physically and energywise, it is not so good, so if they think that this is okay, then I will just sign on it. Maybe it is like that.

Q: That is how you discharged your duties as a director of a

publicly listed company?

A: that is why I have prepare myself for retiring, because I am not capable of discharging the duties.

…

Chairman: Sorry, but with respect, that was back in 1995. That is four years ago. And you are still a director of another publicly listed company four years later?

A: the other one – I do not work there on a daily basis.

In his final submissions, William FUNG's counsel, Joseph Pethes, referred to the fact that William FUNG had had laser work done on his eyes and had, at some earlier time, been forced to have brain surgery. Counsel submitted that : 'these conditions affected Mr. FUNG's ability to read in any detail minutes with supporting material'. But, with respect, there was no such evidence before the Tribunal; indeed, no relevant medical evidence at all. The evidence showed that until the end of May 1995 William FUNG regularly went to his office at Hanny and stayed there most of the day. The evidence shows that thereafter he continued to do work, signing documents and the like. There was no suggestion that he ever pleaded ill health as rendering him unable to read company papers. He was asked to stay on at Hanny to fulfil certain duties and he agreed to do that. He was paid for doing so.

William FUNG, in his testimony, admitted that he knew of WONG Sun's trip to the United States (which was with Joseph LI) but said he was not aware of the details and said he was not aware of any kind of 'serious problem'.

As to the suggested provision for a write-off of US$30 million, he testified that he was not clear what effect this would have on the end of year accounts. But, of course, the evidence showed that management accounts had been circulated regularly to the directors during 1995. Those accounts showed that in or about March 1995 Memtek USA – the largest North American subsidiary – was anticipating a loss of only HK$20.788 million. By 25th May 1995, however, that had increased to HK$90.033 million, making for a Group loss of HK$267.823 million. That later account – printed out at a time when William FUNG was still an executive director – makes no provision for the exceptional write-off claimed by Memtek USA.

There was, of course, no direct evidence that William FUNG regularly

received and read the management accounts; no direct evidence that he specifically received the accounts dated 25th May. But he was still at that time an executive director of Hanny. On his own admission, once he knew of Hanny's continuing deterioration, he 'checked around'. He himself said he spoke to the accounts people. Hanny was not a grand bureaucracy in which William FUNG was just a small cog. Hanny's senior management was housed on one floor. There was WONG Sun, his old friend with whom he spoke; Sanrita WONG, Eugene KUO, Joseph LI and Milly WONG. There were 5 others, that is all. In such circumstances, the Tribunal is satisfied that the only reasonable inference to be drawn from all the primary facts is that William FUNG did come to learn the contents of management accounts, including those drawn up in late May 1995, and did come to learn of the proposed write-off of US$30 million proposed by Memtek USA.

(v) The memorandum of 19th May 1995…

William FUNG was one of the persons who signed this memorandum from WONG Sun directing that there was to be no further dealing in Hanny shares until further notice because the Board 'has now commenced discussions on Hanny's business plan, budget and related matters'.

He well knew, therefore, that, as a director, it could be said that he now had access to price sensitive information and, as a result, he should refrain from dealing. Despite this injunction, while he still remained a director, he began to deal by way of selling his shares.

In October 1996, when interviewed by the SFC, William FUNG admitted that he personally had been 'bearish' about Hanny's prospects from as early as March 1995. However, he had refrained from selling his shares at that time. When asked why, he answered :

> I thought that while I was still a director of Hanny, I had to publicly announce my trading in Hanny shares. If people outside knew that there were directors selling their own company's shares, Hanny shares, this would further affect their confidence in Hanny. In that case, Hanny's share price would fall even faster and more substantially. And then Hanny's other major shareholders might be unhappy with me. As I was still a director of Hanny, I didn't want to

> do that. After my service contract expired on 31st May 1995, I reckoned that as I was no longer a director of Hanny, I did not have to announce publicly my sale of shares.

But, of course, he remained a director *after* the end of May (when he started selling) and was aware of that fact. He was still going to Hanny to fulfil duties there, including signing cheques, a responsibility undertaken because of the authority of his position. Why then, knowing, as he must have done, that he was still a director (at least for a month or two longer) did he start selling Hanny shares in such large quantities?

William FUNG protested that he was somehow mistaken as to his position after the end of May. But when questioned, he accepted that, when he began his selling of Hanny shares, he knew he was still a director.

> Chairman: But the point I am making is : is it not correct, with your experience, and the fact that Milly WONG had asked you to stay on as director, and that Milly WONG, no doubt, had told you you would be given some compensation for staying on as a director, that on 20th June, you knew that you were still formally and legally a director of the company?
>
> A: Yes.
>
> Chairman: Yes, you knew that.
>
> Q: And you had done that to help the company out, is that the position?
>
> A: Yes.

In short, on his own admission, while still knowingly a director, William FUNG dealt in Hanny shares. This was in defiance of WONG Sun's directive not to deal. William FUNG also knew that, whether a director or not, if he possessed inside information he could not deal.[53] Yet he went ahead and did so without discussing the matter first with WONG Sun or Joseph LI : a prudent step that would have protected his position. The Tribunal is satisfied

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[53] On or about 18th May 1995, William FUNG signed a board resolution to the effect that a letter be sent in particular terms to the SFC. That letter concerned SFC inquiries into earlier insider dealing by persons connected to Hanny. At about that time, therefore, William FUNG could not fail to have been especially aware of the risks of insider dealing.

that William FUNG did not consult WONG Sun or Joseph LI because he knew what he would be told and that, as a result, he would be directed not to sell. In truth, and in fact, he already knew that Hanny was in profound crisis and by not 'clearing matters' first with the chairman or the Chief Financial Officer he was simply avoiding obtaining the confirmation which he neither wanted nor needed.

Nor should it be forgotten that William FUNG submitted late returns in respect of his sales and - more importantly - returns that were materially incomplete; in short, returns that did not reflect the true extent of his selling :

> Q: Why were you addressing only 3.7 million shares and not the 20 or 30 million shares that had been sold by you?
>
> A: I thought it was just like they asked me, I will just answer them.
>
> Q: Did you not realise that on 3rd August, when this matter was raised, that if you had resigned on 10th July, as the letter states, that there were other trades that you had not made reports on by way of SDI notices? Did you recognise that?
>
> A: They did not ask me, but do you mean the reporting to the Stock Exchange?
>
> Q: Yes. Did this not draw your attention - three weeks after you had resigned as a director, you are now apparently in correspondence with the Stock Exchange, copied to the SFC, do you see that, and you are giving an explanation for a late submission in relation to a small parcel of 3.7 million shares - did that not draw to your attention the fact that you had not declared all these other millions of shares?
>
> A: I did not pay attention to those, because I thought that as long as they ask me I will answer.

A little later, William FUNG described his failure to render an accurate return as a 'mistake'. But how could it possibly – just a day or two after a prolonged period of selling – have been a simple mistake or oversight? The Tribunal is satisfied that this was a deliberate failure on the part of William FUNG. It was a lie and the purpose of that lie was to try and hid the true extent of his dealing. William FUNG's testimony in that regard was

discredited.[54]

The question that the Tribunal has had to consider is whether all of the evidence relevant to William FUNG's dealings in the third period simply raises suspicions or goes further than that and allows the Tribunal to draw the inference that he was in possession of relevant information and knowingly dealt in Hanny shares while in possession of that information.

It is, of course, true, that he was not a 'main player' in Hanny's management. But it is the essence of insider dealing that a person *comes into possession* of relevant information and then deals. In that regard, a witness to events is placed equally with a participant. On his own admission, once he knew matters were deteriorating at Hanny, William FUNG took steps to discover the extent of that deterioration. He was ideally placed to do so. Despite the fact that he was warned, as a director, not to trade until further notice, he defied that injunction. Despite his later protestations of confusion, at the time he commenced selling he well knew he was still a director.

The Tribunal accepts that it has been forced to reach its findings by way of inference and that it has, to a material extent, been forced to rely on findings of broad fact; not, for example, immediate participation in specific meetings and the like. For this reason, the Tribunal has approached its findings with particular caution. In the final analysis, however, the Tribunal has found itself in a position where, on its findings of primary fact, it has been drawn inexorably to the conclusion – the only reasonably conclusion open to it – that by about mid June 1995, and certainly by the time he commenced selling, William FUNG must have had sufficient information in his possession to know that Hanny was in a state of profound crisis. A realistic, rational approach to the evidence allows for no other finding.

The Tribunal cannot say that William FUNG was in possession of 'precise' information by mid-June. But it can say to the required degree of assuredness that William FUNG knew by that time that Hanny had such a complex cross-array of problems that when the results came out for the 1994/1995 financial year the reflection of those problems in the results would bring about a material decline in Hanny's share price. To know that a

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[54] The approach of the Tribunal to lies has been detailed in Chapter Three.

company is in deep crisis; that crisis including critical cash flow problems and larger than expected losses, is very much ‘specific’ information.

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CHAPTER ELEVEN

DEFENCES UNDER SECTION 10(3)
OF THE ORDINANCE

(A consideration of whether any of the implicated persons had proved a defence under this section)

It was the case of both WONG Sun and Sanrita WONG that, even if the Tribunal determined that they had committed acts of insider dealing, they were not to be identified as insider dealers because they had established defences under section 10(3) of the Ordinance. That section reads :

> A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction otherwise than with a view to the making of a profit or the avoiding of a loss (whether for himself or another) by the use of relevant information.

A. WONG Sun

In his final written submissions, Kenneth CHOW, counsel for WONG Sun, argued that, in respect of his client's dealings in the first period, the Tribunal should consider whether WONG Sun had dealt, not for the purpose of avoiding a personal loss, but for 'the purpose of realising funds for injection into the company'. Kenneth CHOW continued :

> It must be remembered that not only did WONG Sun lend $17 million to the company in September 1994, there is also some evidence to suggest that WONG Sun had further mortgaged his house in order to secure advances to the company and that there was another loan of $100 million from WONG Sun to the company. In any event, these loans clearly showed that at the time, WONG Sun had been willing to sacrifice his own financial interests for the benefit of the company. WONG Sun did not always act for the purpose of personal gain. He did not seek to benefit at the expense of the company. There is therefore a reasonable possibility that WONG Sun may have a genuine section 10(3) defence …

In the opinion of the Tribunal, however, these submissions were fatally flawed in a number of ways :

a. There was no evidence of any kind placed before the Tribunal to show that all (or even some) of the funds obtained from WONG Sun's dealings in the first period were later used to constitute his loan or loans to Hanny. Indeed, the Tribunal has found that some funds were used to buy back Hanny shares after the price had fallen.

b. There was no evidence of any kind placed before the Tribunal to show that WONG Sun had to sell the shares in the various nominee accounts in order to raise funds for any loan or loans because there were no other funds or other sources of finance available to him.

c. Kenneth CHOW could not point to any answer given by WONG Sun in the course of his interviews with the SFC in which he said that he had to sell in order to inject funds back into his company.

d. It is noticeable too that WONG Sun advanced funds to Hanny on the basis of a commercial loan and was paid back in the end with interest. He was, therefore, able to avoid a loss by selling and – assuming the same funds were used – was then able to make a profit by way of interest. It cannot be suggested therefore that commercial self-interest played no role.

The Tribunal has at all times been conscious of the fact that WONG Sun was unable to testify. But, with respect, there was nothing to prevent him placing documents and the like before the Tribunal to demonstrate some nexus between the funds obtained from dealing and the funds used in the loan or loans. Similarly, there was nothing to prevent him placing accounts and the like before the Tribunal to demonstrate that the only source of funds available to him came from his dealing. WONG Sun's testimony was not essential for such an exercise. His counsel would have been able to demonstrate the flow of funds and matters of a similar kind on the face of the documents. As it was, WONG Sun did not see fit to place any such documents before the Tribunal.

Was WONG Sun compelled to sell his Hanny shares whether or not he

had come into possession of the relevant information? The Tribunal has been unable to consider that central issue? What funds were available to WONG Sun at that time? We have no idea. What properties did he own? We have no idea. What credit facilities did he have with his bankers at that time? Could he have borrowed the funds? Did he, in fact, borrow them? The Tribunal has been left in ignorance of these critical matters.

In the circumstances, the Tribunal is satisfied that WONG Sun failed to establish a defence under section 10(3) of the Ordinance.

B. Sanrita WONG

It was only in respect of the third period of dealing that Sanrita WONG attempted to establish a defence under section 10(3) of the Ordinance.

In respect of the third period, it was submitted on her behalf that she had fallen badly into debt and had to find a way to extricate herself from that debt. The only way open to her was by the sale of her shares. In this regard, she had spoken publicly of her intention to dispose of her shares as early as December 1994. She was, therefore, doing nothing more than fulfilling a clearly stated desire and the true reason for selling was wholly unconnected with an intention to avoid a loss.

But is that, in fact, the case? The evidence does not indicate that. Earlier in this report, the Tribunal referred to an internal memorandum prepared by Jeanie FANG of Credit Lyonnais which spoke of a meeting with Sanrita WONG on 21st April 1995. The memorandum was prepared in the ordinary course of business; there is nothing to suggest that it was in any way biased or inaccurate. It began :

> According to client's latest intention, she wanted to gradually unload her holdings in Hanny Magnetic. In fact she wanted to check whether it was feasible to have a placement of 10 million shares in one lot at a slight discount to the current market price. Jeanie FANG suggested her to await for market rebound and to sell in the market gradually. She would consider and come back to us.

On a plain reading of that document, Sanrita WONG intended to sell *if*

and *when* the price made it feasible to do so. Jeanie FANG recorded that she had given advice to Sanrita WONG to wait for the market to rebound and then sell gradually. Sanrita WONG was apparently considering that advice. In short, Sanrita WONG was not saying : 'sell now no matter what the price because I have no alternative and must sell'. The memorandum went on to say :

> She agreed with our recommendation and had sold altogether 11 million shares of Hanny Magnetic in the market. If prices improve, she may consider unloading another 5 million shares.

Here again was a clear indication that Sanrita WONG wanted to ensure that the price was right before she sold.

The Tribunal accepts that Sanrita WONG may have had debts but there has been no evidence to show that those debts compelled her to sell *at the time she did*. Sanrita WONG did not submit any form of balance sheet to show the general state of her finances at that time.

In Chapter Three, in dealing with the elements of a defence under section 10(3), the Tribunal said :

a. Section 10(3) is to be construed narrowly. It is not intended to provide an implicated person with a defence which would succeed on proof, on a balance of probabilities, that a genuine non-fit motive at least contributed to that person's reason or reasons for dealing.

b. The defence is available to an implicated person only if the evidence shows, on a balance of probabilities, that the true reason or reasons for dealing were wholly unconnected with any desire or intention to make a profit or avoid a loss.

Sanrita WONG's 'true reason' for dealing was not, in the judgment of the Tribunal, wholly unconnected with an intention to avoid a loss. On all the evidence it is clear that her true reason for selling when she did was, in fact, to obtain the best price possible before the price sensitive information in her possession became generally known.

During the course of her testimony, Sanrita WONG was asked why she had placed shares with Credit Lyonnais for sale. In reply, she said in part :

> From my standpoint, having worked so hard over the years, the thing is to repay all the outstanding of the bank, so that nobody is going to go after me for repayment of borrowings, so that I will feel better and I can start all over again. That was why I placed those shares with Credit Lyonnais, and I told them to sell them and to pay off my outstanding and, if there is any money left, then they can give it back to me so that I can repay the other bank.

There was no evidence that, at the time she embarked on her selling of shares, Sanrita WONG was under any form of pressure from Credit Lyonnais to sell. The Tribunal has rejected any suggestion of a forced sale. It was Sanrita WONG's decision, made seemingly in order to 'clean the slate' and start again. That may be a laudable motive but it does not establish a defence under section 10(3) of the Ordinance.

In his final submissions, Counsel to the Tribunal commented as follows :

> Her calculated and careful disposal of her shares over a 6 week period enable her to dispose of those shares within a stable price range. The sales were a 'damage control' operation to avoid the looming loss in share price that lay ahead, with all the severe consequences that would have to her overstretched borrowing.

The Tribunal agrees with those comments. It is satisfied that Sanrita WONG failed to establish a defence in terms of section 10(3) of the Ordinance.

CHAPTER TWELVE

CONCLUSIONS

In answer to the Financial Secretary's notice issued in terms of section 16(2) of the Ordinance, the Tribunal has made the following findings :

A. WONG Sun

(1) By unanimous decision, the Tribunal found that the dealings in the listed securities of Hanny in the following accounts in the general period from 11th July to 1st September 1994 (the first period) constituted insider dealing by WONG Sun :

(i) Account with Emperor Securities Ltd. in the name of Louis LO between 18th July and 3rd August 1994 (both dates inclusive);

(ii) Account with South China Securities Ltd. in the name of Louis LO between 5th August and 30th August 1994 (both dates inclusive);

(iii) Account with Emperor Securities Ltd. in the name of FAY Loi Loi between 11th July and 18th July 1994 (both dates inclusive);

(iv) Account with Tung Tai Finance Ltd. in the name of FAY Loi Loi between 17th August and 31st August 1994 (both dates inclusive);

(v) Account with American Express Bank in the name of Connie LI on 13th July 1994;

(vi) WONG Sun's account with American Express Bank in the name of Diamond Delight Assets Ltd. on 15th July 1994.

(2) By unanimous decision, the Tribunal found that the dealings in the listed securities of Hanny in the following account in the general period from 20th January to 6th February 1995 (the second period) constituted insider dealing by WONG Sun, that is, in the account with Tung Tai Finance in the name of FAY Loi Loi between 20th January and 6th

February 1995 (both dates inclusive).

B. Sanrita WONG

(1) By unanimous decision, the Tribunal found that the dealings in the listed securities of Hanny in the following account in the general period from 11th July to 1st September 1994 (the first period) constituted insider dealing by Sanrita WONG; that is, in the account with Credit Lyonnais in the name of K.L. WONG between 18th July and 30th August 1994 (both dates inclusive).

(2) By unanimous decision, the Tribunal found that the dealings in the listed securities of Hanny in the following account in the general period from 16th May to 2nd August 1995 (the third period) constituted insider dealing by Sanrita WONG; that is, in the account in her own name held with Credit Lyonnais between 18th May and 28th June 1995 (both dates inclusive).

C. William FUNG

(1) By unanimous decision, the Tribunal found that the dealings in the listed securities of Hanny in the following account in the general period from 11th July to 1st September 1994 (the first period) constituted insider dealing by William FUNG; that is, in the account with Onshine Finance Ltd. in the name of Clement FUNG between 20th July and 18th August 1994 (both dates inclusive).

(2) By unanimous decision, the Tribunal found that the dealings in the listed securities in the following account in the general period from 16th May to 2nd August 1995 (the third period) constituted insider dealing; that is, in an account held in his own name with Onshine Finance Ltd. between 18th June and 2nd August 1995 (both dates inclusive).

D. Connie LI

By unanimous decision, the Tribunal found that any dealing ostensibly in the name of Connie LI during the period from 11th July 1994 to 2nd August

1995 did not constitute insider dealing by her.

E. FAY Loi Loi

By unanimous decision, the Tribunal found that any dealing ostensibly in the name of FAY Loi Loi during the period from 11th July 1994 to 2nd August 1995 did not constitute insider dealing by her.

F. WONG Kim Lim

The Tribunal, upon a direction of law, resolved to report to the Financial Secretary that it was unable to make any finding in respect of WONG Kim Lim and that the inquiry should remain open in respect of that person.

G. Louis LO

The Tribunal, upon a direction of law, resolved to report to the Financial Secretary that it was unable to make any finding in respect of Louis LO and that the inquiry should remain open in respect of that person.

In light of the above findings, Chapters One to Twelve of the Tribunal's report are now sent to the Financial Secretary.

In respect of the requirement to determine the amount of profit gained or loss avoided and thereafter to assess consequential orders and penalties, the Tribunal shall proceed to hear representations.

The Honourable Mr. Justice Hartmann
Chairman

Mr. Lawrence LOK Yuen-ming
Member

Mr. Dickson V. LEE
Member

10th April 2000

CHAPTER THIRTEEN

COSTS AND EXPENSES
(Awards made by the Tribunal to
witnesses and implicated persons)

A. The Power to award costs to implicated persons who have not been identified as insider dealers

Section 26A of the Ordinance empowers the Tribunal to award to any person whose conduct has been the subject of an inquiry the costs reasonably incurred by that person. For present purposes, the relevant portions of section 26A read as follows :

> (1) Subject to subsection (5), at the conclusion of an inquiry or as soon as reasonably practicable thereafter, the Tribunal may award to –
>
> (a) any witness;
>
> (b) Any person whose conduct is, in whole or in part, the subject of the inquiry,
>
> such sum as it thinks fit in respect of the costs reasonably incurred by him in relation to the inquiry.
>
> (2) …
>
> (3) …
>
> (4) Subject to any rules made by the Chief Justice under section 36, Order 62 of the Rules of the Supreme Court shall apply to the award and taxation of any costs awarded by the Tribunal under this section.

Section 26A(1) therefore gives the Tribunal a discretion to award costs to an implicated party. However, the exercise of that discretion is subject to the provisions of subsection (5) which reads :

> (5) This section shall not apply to any person referred to in subsection (1) who is –
>
> (a) A person who has been identified as an insider dealer in a determination under section 16(3);
>
> (b) …
>
> (c) …
>
> (d) any other person who and in respect of who it appears to

> the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the institution of the inquiry under section 16.

Any discretion to award costs is therefore removed from the Tribunal if, *inter alia*, the person applying for costs has been identified as an insider dealer or if it appears to the Tribunal that the person applying for costs has by his own acts or omissions caused or brought about – whether wholly or in part – the institution of the inquiry.

Subsection (5) therefore does not present the Tribunal with the exercise of any discretion but rather with the task of deciding whether, in the factual circumstances of each individual case, there is reason to find that an implicated party seeking costs has, by his or her own acts or omissions, caused or brought about the institution of the inquiry, whether wholly or in part.

The Tribunal in the Chinese Estates inquiry understood the phrase 'wholly or in part' to apply only when the acts or omissions of the implicated persons contributed *materially* to the institution of the inquiry. This Tribunal will adopt the same test.

The earlier Tribunal also considered the correct test to be applied :

> It may be argued, of course, that virtually all inquires will be caused to the material degree by the acts or omissions of the implicated parties, no matter how innocent. How then are such acts or omissions to be considered? Silke V.P., in R v. Kwok Moon-yan [1989] 2 HKLR 396, held that costs may be refused where the conduct of the individual has brought suspicion on himself and/or has misled the investigation authorities into thinking that the case against him is stronger than it is. In this regard, the Vice President said :
>
> > We do not view this as meaning that there must be both a bringing of suspicion *and* a misleading before a successful [party] will deprived of his cost. If it is the view of the Court that a man has brought suspicion on himself, or having done that, he has also misled the prosecution, either by the very bringing of that suspicion, or some other matter, into thinking the case against him is stronger than it is

> then these, either separately or combined, are factors which lie for the consideration …
>
> The collegiate principles laid down in R v. Kwok Moon-yan (which have been applied in criminal matters since 1989 and continue to be applied) would appear to provide the jurisprudential genesis for the wording of subsection (5) of section 26A of the Ordinance. The Tribunal is satisfied that those principles offer the most appropriate guidance to it in interpreting subsection (5) and it has reached its findings in accordance with those principles.

The Tribunal will adopt the same test.

B. FAY Loi Loi

Although an implicated party, FAY Loi Loi was not identified as an insider dealer. When interviewed by the SFC, the Tribunal is satisfied that she co-operated fully and truthfully with the investigating officers. There can be no suggestion therefore that to any material degree she brought about the inquiry conducted by the Tribunal.

FAY Loi Loi did not engage legal representation. However, she came voluntarily from Canada to testify before the Tribunal. In doing so, she incurred travel expenses by way of an airfare and accommodation in Hong Kong. The Tribunal is satisfied that she is entitled to reasonable reimbursement in respect of these costs and expenses.

Section 26A refers only to 'costs' which may be interpreted as meaning 'legal costs'. However section 26 reads :

> (1) Every witness giving evidence or attending to give evidence at an inquiry shall be entitled in the discretion of the Tribunal to such sum *for his expenses and loss of time* as the Tribunal may determine.
>
> (2) All such witnesses' expenses shall be paid out of moneys appropriated for that purpose by the Legislative Council. [our emphasis]

Although an implicated person, FAY Loi Loi was also a witness.

Accordingly, whichever section is employed, the Tribunal is satisfied that there is power to provide for FAY Loi Loi's reimbursement.

C. Connie LI

Connie LI too was an implicated person who was found not to be culpable of insider dealing. However, her request for costs in terms of section 26A of the Ordinance was resisted by Counsel to the Tribunal who contended that she had, to a material degree, caused or brought about the inquiry.

Connie LI was at all material times WONG Sun's private secretary. She was entrusted by him with co-ordinating the various accounts which the Tribunal found constituted nominee accounts used by WONG Sun to trade illicitly in Hanny shares. One such account was in her own name.

When the SFC investigation began, it was important to ascertain whether the various parties who held those accounts were acting solely as nominees for WONG Sun or were acting independently.

In light of her close relationship with WONG Sun, it was imperative that Connie LI co-operate fully and truthfully with the SFC. However, when questioned by the SFC, she indicated that Louis LO, one of WONG Sun's nominee account holders, had – to the best of her knowledge – traded independently. More particularly, she said that Louis LO had telephoned her seeking a broker and she had recommended Peter AU simply because she knew of him and for no other reason. But, as Counsel to the Tribunal, said in his written submission :

> The explanation given by Connie LI to the SFC as to her role in respect of the opening of accounts by Louis LO with Peter AU's companies implies an independence of Louis LO from WONG Sun. Such implication was at variance with the considerable documentary evidence that the SFC had gathered to the contrary.

This, said Counsel to the Tribunal, raised 'serious doubts' as to Connie LI's general credibility :

> In particular, credibility was a central issue to the account that she

had given of her role as mere nominee not possessed of relevant information in respect of the Amex account in her own name. If she was lying about the role of Louis LO was she being less than frank with the SFC about her own position in respect of the sale of 1.7 million shares in the account in her name with Amex?

When she came to testify before the Tribunal, Connie LI changed her evidence. She said that she had not recommended Louis LO to Peter AU; she went so far as to say, in fact, that she had been asked to say that by WONG Sun and Peter AU. In this regard, the transcript of her testimony reads :

A: … there is one point here which I want to clarify, and that was about Louis LO, whether I introduced him to Peter AU to open the account. Actually, it was not me.

…

Q: What do you want to clarify?

A: Actually, it was not me who introduced him. Louis just asked me about Peter AU's phone number. Actually, it was Mr. WONG and Mr. AU, Peter AU, who told me to say it this way.

Q: What did they ask you to say?

A: To say that I introduced them, to open the account.

When questioned on to why she should have told a deliberate lie to the SFC, she accepted that the lie would have had ramifications :

Q: what did you think was the purpose of telling that story when you told it to the SFC in September 1996?

A: I never thought about the purpose, because I thought such doing would not affect the entire matter.

Q: But it affected you, because you were lying to the SFC, did it not?

A: Yes, I realise it now.

What must be remembered, is that an inquiry has a broader ambit than a criminal trial. If a person, under investigation by the SFC and under an obligation to co-operate fully and truthfully, conspires with others to tell an

falsehood to the SFC – especially a person caught up in the middle of events – that person cannot complain if, as a result of his or her central role and questionable co-operation, he or she is implicated in an inquiry. The falsehood told by Connie LI was a material one. The Tribunal is satisfied that it coloured a great deal of her testimony during the inquiry and would no doubt have increased the scepticism of the SFC during the course of the investigation as to her true role. As the Tribunal has said earlier in this report (page 142) :

> Connie LI was another witness who did herself no service in the manner of her evidence. She admitted that, when interviewed by the SFC, she had told a material untruth. Her desire to distance herself from anything that smacked of insider dealing so coloured her testimony that on occasions it distorted it.

In the circumstances, the Tribunal is satisfied that positive reasons exist to deny Connie LI her costs. It is satisfied that, to a material degree, her own conduct during the course of the investigation brought about the inquiry into her actions.

D. Witness expenses for Peter AU

Peter AU (the husband of FAY Loi Loi) was not made an implicated person. He was asked to come to Hong Kong as a witness only.

It is true that, when the SFC investigation first commenced, he and WONG Sun conferred and, on his own admission, Peter AU was at that time less than truthful with the SFC. He was at that juncture no doubt all too aware of his own unethical conduct in assisting WONG Sun in his trading in Hanny shares. However, the Tribunal is satisfied that, when Peter AU came to Hong Kong from Canada as a witness, his testimony was, in the main, truthful. In the circumstances, the Tribunal is satisfied that Peter AU must be awarded his reasonable witness expenses in terms of section 26 of the Ordinance.

The expenses shall include the costs of his airfare from Canada and his accommodation for the time necessary for him to give his evidence.

CHAPTER FOURTEEN

ORDERS OF THE TRIBUNAL
(A consideration of relevant legal principles and the manner in which the Tribunal decided upon its various orders)

A. Representations made by those identified as insider dealers

The Tribunal sat on 8th, 9th and 25th May 2000 in order to hear representations concerning the appropriate orders to be made by it in light of its earlier findings.

Section 23(2) of the Ordinance directs that persons who may be the subject of any order by the Tribunal under section 23(1) must first be given an opportunity to be heard. The section reads :

> The Tribunal shall not make an order in respect of any person under subsection (1) without first giving the person, and, in the case of a person that is a corporation, an officer concerned in the management of the corporation, an opportunity of being heard.

The three persons who had been identified as insider dealers; that is, WONG Sun, William FUNG and Sanrita WONG, were each sent notice of the date when the hearing was to commence. Notices were also sent to those persons who may have wished to make representations concerning costs.

(i) WONG Sun

WONG Sun chose to be represented by a new solicitor, Edward CHAN of Messrs. Chan, Wong & Lam. On the first day of the hearing, Mr. CHAN professed that he had only been able to take preliminary instructions a few days earlier. At that time, he was therefore not in a position to proceed further to represent his client.

WONG Sun did not personally attend the hearing. The Tribunal was advised that some time earlier, although not in a life-threatening condition, WONG Sun had discharged himself - *against the advice of his doctors* - from

the Hong Kong Sanatorium and had since returned to the Mainland where he had been admitted to hospital; to the same hospital, in fact, where he had received his new kidney. He was apparently still in that hospital. Mr. CHAN undertook before the adjourned hearing on 25th May 2000 to obtain further instructions from his client. This was done and at the adjourned hearing he advised the Tribunal that he had no instructions to act further for his client. He said that he had seen WONG Sun in hospital. WONG Sun had been rational, coherent and capable, he believed, of conveying instructions. WONG Sun instructed him that he wished to take no further part in the hearing; that he wished to make no further representations. WONG Sun, of course, had the right, if he so wished, to remain silent, to decline to make representations or to be legally represented. What was of importance was the fact that he had, however, been given the opportunity to be heard.

(ii) William FUNG

Most regrettably, William FUNG had in recent weeks been diagnosed with cancer. He had undergone an operation and was receiving post-operative treatment. William FUNG did not personally attend the hearing. However, he was represented by his counsel, Mr. Joseph Pethes, who made representations on his behalf.

(iii) Sanrita WONG

Sanrita WONG appeared at the first day of the hearing without legal representation. Written submissions were handed to the Tribunal in respect of which, she said, she had received the assistance of her old lawyers. She said that she intended to speak for herself.

On the first day, a couple of matters of some technicality arose. Sanrita WONG was given the assistance of an interpreter during the mid-morning adjournment to assist her in understanding relevant documents. In addition, Ms. Cynthia TANG, junior counsel to the Tribunal, agreed to assist in explaining matters.

It should be mentioned that during the hearing mention was made of Sanrita WONG's assets. She confirmed that *inter alia* she had certain property investments in New York. She agreed to obtain further details of her

investments before the adjourned hearing and also – of importance – to obtain details of how she had disposed of a sum of approximately HK$30 million received by her in 1998.

However, at the adjourned hearing; that is on 25th May 2000, Sanrita WONG chose not to attend. Nor did she send a legal representative. The Tribunal was therefore deprived of the information that had been promised of her various investments and how they had fared. Sanrita WONG sent a letter to the Tribunal explaining her absence. She said she was under great stress. She concluded the letter by saying :

> It is my understanding that my presence at the hearing is not strictly necessarily and my decision to be absent at the hearing on 25 May 2000 will not unnecessarily delay the conclusion of the Inquiry. The assessment of quantum of loss avoided is a very technical legal matter and I do not believe that I can offer the Tribunal any assistance in that regard. As to my personal circumstances and mitigation, they are all stated in the "skeleton submissions" and there is no additional matter I wish to add.

Sanrita WONG did not, therefore, object to the hearing proceeding in her absence. The Tribunal is satisfied that she was, therefore, given the opportunity to be heard.

B. Correction of a patent error

When the hearing commenced on 8th May, Counsel to the Tribunal referred to Chapter Twelve of this report; more particularly to the section that dealt with Sanrita WONG. In paragraph (2) of that section, the report spoke of her dealings in the third period and found that those dealings constituted insider dealing. However, it identified those dealings as taking place only between 18th and 31st May 1995. That was no more than a typing mistake. It is patently apparent from the body of the report that the Tribunal was satisfied that Sanrita WONG's dealings constituted insider dealing in the third period up to and including 28th June 1995. Having given an opportunity to all parties present (including Sanrita WONG) to make submissions, the Tribunal ordered that the error be rectified. The final version of the report contains this rectification.

C. Orders that may be made by the Tribunal

Section 23(1) of the Ordinance gives to the Tribunal the power to make a number of orders in respect of persons identified as insider dealers. In this regard, the section provides as follows :

> (1) At the conclusion of an inquiry or as soon as is reasonably practicable thereafter, where a person has been identified in a determination under section 16(3) or in a written report prepared under section 22(1) as an insider dealers, the Tribunal may in respect of such person make any or all of the following orders -
>
> (a) an order that that person shall not, without the leave of the High Court, be a director or a liquidator or a receiver or manager of the property of a listed company or any other specified company or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company or any other specified company for such period (not exceeding 5 years) as may be specified in the order;
>
> (b) an order that that person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the insider dealing;
>
> (c) an order imposing on that person a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the insider dealing.

D. Measuring 'profit gained or loss avoided'

Section 23(1)(b) and (c) empowers the Tribunal to make orders based on its measurement of the profit gained or loss avoided by an insider dealer. The Ordinance, however, does not stipulate how the profit gained or the loss avoided is to be calculated.

Past Tribunals have adopted what is called 'the American approach', that approach being defined in section 2 of the United States Insider Trading

Sanctions Act 1984 :

> For purposes of this paragraph 'profit gained' or 'loss avoided' is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

This is a clear cut method of measurement. But it has been contended before several Tribunals that it ignores the influence on the price of factors other than the piece of relevant information used by the insider to gain his or her advantage. A 'profit gained' may, for example, be influenced by a general rise in the stock market or by speculative articles of a bullish nature in the press. It has been contended that these 'extraneous factors' must be placed in the scale by the Tribunal in assessing the *true* profit gained or loss avoided by the use of inside information.

However, the Tribunal in the Public International Investments Ltd. enquiry rejected such contentions. The Tribunal ruled that section 23(1) of the Ordinance require an assessment of profit gained (or loss avoided) as a result of the insider dealing; that is, flowing from the illicit act :

> It is the act of insider dealing that is prohibited, and it is the profit which results from that act which is the target. That too is the scheme of the power of disgorgement provided by the 1984 Act in the United States : the basis of the penalty to which the court is enjoined to look is the profit "gained as a result of such unlawful purchase or sale," where "such unlawful purchase or sale" means the purchase or sale of a security "while in possession of material nonpublic information". *The test is whether the profit is attributable to the unlawful transaction, and not whether it is attributable to the use of a particular item of information the receipt of which has induced that transaction*. Not only is there no reference to such a limitation, but the Act itself defines the profit gained as "the difference between the purchase and sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information". That is the long and the short of it; and it allows for no whittling down on the basis urged upon us in this Inquiry.

> In the context of Hong Kong's statutory framework, the act of insider dealing is constituted by the act of dealing or of counselling or procuring a deal whilst in possession of relevant information. What is prohibited is the transaction, or the encouragement of a transaction, or the passing of information in contemplation of a transaction, and it is to those acts that the penalty is directed. The fact of the matter is that Mr. Don Lau should not have purchased PIIL shares on 8th December for, as he well knew, he was then in possession of relevant information. Looked at in the light of the provisions of section 23, the effect of his submission is that he should be penalised only in respect of that part of his transaction which was unlawful, namely, that part which was motivated by information not already in the public domain. There is no such concept. There was but one transaction, and the entire transaction was unlawful, even if part of the motivation was hope of a profit arising from factors other than the information yet unreleased to the investing public. The profit gained on 16th December was the profit gained as a result of his transaction on 8th December, which transaction was an act of insider dealing. The whole profit was gained as a result of that act of insider dealing. [our emphasis]

This approach was endorsed by the Court of Final Appeal in **Insider Dealing Tribunal v. Shek Mei Ling** [1999] 2 HKC 1. Lord Nicholls of Birkenhead, giving the judgment of the court, said :

> Markets do not operate in a sterile vacuum. The difference between the purchase and sale prices is likely to be affected, for better or worse, by many factors beside the disclosure of this information. The longer the period of time that elapses between the purchase and the sale, the more likely it is that there will be fluctuations in the market price for other reasons. The factors involved may be general, affecting share prices of most companies or most companies in the relevant sector of the market, or they may be peculiar to the particular company but unrelated to the price sensitive information. In one sense, any increase in the insider dealer's profit due to favourable extrinsic factors such as these might be said not to form part of the insider dealer's profit gained 'as a result' of the insider dealing. On this approach, when calculating the insider dealer's profit for the purposes of s 23, the profit made on

> the sale should be adjusted, downwards or upwards, to reflect the extent to which the sale price was increased or diminished by favourable or unfavourable extraneous factors.
>
> This is not the approach adopted in practice by the Tribunal, nor do I think it would be correct. *I do not believe the Ordinance envisages that any such problematical exercise is to be undertaken for the purpose of s 23. The context of s 23 is dealings with listed securities. References to profit gained are to be read, naturally and consistently with the purpose of financial orders, as references to profits arising from buying and selling in the market, without any allowance for the ordinary incidents affecting market prices. When the insider dealing consists of an improper purchase, the profit gained comprises the difference between the cost of purchase and the net sale price.* That is the general rule, although I would not exclude altogether the possibility there might be exceptional circumstances when some allowance would be called for. [our emphasis]

Lord Nicholls accepted that there might be 'exceptional circumstances' when some allowance for the impact of 'extraneous factors' may properly be made. Past Tribunals have essentially defined those 'exceptional circumstances' as existing only when they are wholly unforeseeable and unrelated to the corporate activity which caused the insider dealing in the first place; they must, in addition, be factors which have a significant impact on the trading price of the shares. The Tribunal accepts that as being a correct definition and will follow it.

E. Were such 'extraneous factors' in existence in the third period?

Mr. Pethes submitted on behalf of William FUNG that the culmination of the third period was the announcement on 21st September 1995 that Hanny had suffered losses of HK$588.772 million for the year ended 31st March 1995. This was accompanied by a 'bail-out' announcement in terms of which Hanny intended to raise capital by means of a rights issue and a share placement. Up until the time he ceased his insider dealing on 2nd August 1995, said Mr. Pethes, neither William FUNG nor anyone on Hanny's Board of Directors could have foreseen a loss of such magnitude or the need for such an unpopular device as a

rights issue. These were, in his submission, 'supervening events' which must have had a significant impact on the price of Hanny shares after the public announcement. Accordingly, a discount or allowance should be given in the calculation of the loss that William FUNG avoided by selling his shares.

The Tribunal, of course, has accepted that, when William FUNG disposed of his shares in the third period, he did not know at that time precisely how bad Hanny's losses for the 1994/1995 financial year were going to be. By extension, he could not have known in precise terms what 'bail-out' package would be required or even, for certain, whether Hanny would be compelled to seek one. In this regard, in the final paragraph of Chapter Ten, the Tribunal has said the following :

> The Tribunal cannot say that William FUNG was in possession of 'precise' information by mid-June. But it can say to the required degree of assuredness that William FUNG knew by that time that Hanny had such a complex cross-array of problems that when the results came out for the 1994/1995 financial year the reflection of those problems in the results would bring about a material decline in Hanny's share price. To know that a company is in deep crisis; that crisis including critical cash flow problems and larger than expected losses, is very much 'specific' information.

From evidence led during the inquiry, it appears that nobody in Hanny's senior management or close advisory teams had any real idea of precisely how bad the end of year figures would be; in short, just how deep the crisis would prove to be. Bryan-Brown, one of Hanny's advisors, when testifying as to conversations with Sanrita WONG in early June 1995, was asked if he had been able to give 'actual figures' to her. The relevant extract from the transcripts reads :

A: She knew the issue. She knew the information, so there was no need for me to remind her exactly what it was.

Q: So you did not remind her of the figures?

A: Of actual numbers, you mean?

Q: Yes.

A: *Well, no, the numbers changed by 50 per cent from day to day*. I never reminded her what the actual numbers were

because – [our emphasis]

Bryan-Brown was employing a degree of poetic licence but his answer graphically illustrates the difficulty being encountered at that time by those tasked with the job of attempting to define the precise magnitude of the crisis. Put bluntly, the Tribunal is satisfied that both William FUNG and Sanrita WONG, when they sold their shares, knew that Hanny was in deep crisis and that the end of year results would reflect that crisis. But just how bad the crisis was nobody, at that time, could tell. Everything was still in a state of flux.

Indeed, it appears that William FUNG misjudged the degree of the crisis when into August, as a speculator, he started to buy Hanny shares again. Clearly, he believed that the share price had plunged too far.

In general terms, the question, therefore, may be posed as follows : if an insider, knowing that a company is in crisis and that the results, when made public, will reflect that crisis, proceeds to dispose of his shares, is he entitled to say that he was not in a position to know the precise magnitude of the crisis and accordingly should only be forced to disgorge any loss avoided that he was able reasonably to have foreseen at the time of his sales?

The Tribunal, by way of answer, does not accept that an insider in such circumstances would be able – other than in the most exceptional circumstances – to take advantage of such a foreseeability test.

First, a foreseeability test of this kind would throw up all sorts of problems. A simple analogy illustrates the point : “I knew that the information, when published, would be received well by the market but I could not foresee that it would be received *that* well. The market moved into a bullish mode : how could I have foreseen such optimism? I cannot, therefore, be held responsible for the full price rise, some allowance must be given for the general bull market”. But what allowance : how is it to be calculated? That is exactly the sort of ‘problematical exercise’ that the Court of Final Appeal (per Lord Nicholls *supra*) has ruled is not envisaged by the Ordinance.

Second, in respect of the crisis faced by Hanny, there were no ‘supervening events’ as such; it was instead a case that the *known* events proved

more damaging than anticipated. But that, with respect, is invariably part of the motivation of the insider dealer for selling – 'I do not know just how bad this is going to get, all I know is that I must get out now' – and consequently must be part of the risk that he takes in the event that his illicit activities are identified.

Third, even if the precise magnitude of Hanny's published losses and the need for a rights issue are deemed to constitute 'extraneous factors', the Tribunal has already stated the law, as it understands it to be; namely, that extraneous factors will only be taken into account in exceptional circumstances; that is, when they are *wholly unforeseeable and unrelated to the corporate activity which caused the insider dealing in the first place*. The published losses of Hanny were not unrelated to the corporate activity which caused the insider dealing in the first place, they were simply an extension of it. Similarly, in respect of the rights issue, it was accepted by both expert witnesses that, if a company knows it is going to incur losses which may well result in the need to raise more cash, a rights issue is one of the obvious mechanisms available for raising that cash. William FUNG, as a businessman of many years experience, could not have been ignorant of that fact.

The fact, therefore, that William FUNG, at the time he sold his shares, could not anticipate the magnitude of the loss to be published in the end of year accounts and/or whether a rights issue would come into effect is of no avail to him.

What then of Sanrita WONG, is she able to avail herself of a similar argument? Sanrita WONG may not have possessed William FUNG's knowledge and experience in financial matters. She may not, therefore, have been able to anticipate the possibility of a rights issue. But in all other respects the same broad reasons stated in respect of William FUNG apply to her.

As for the rights issue, the magnitude of the published loss made it almost inevitable. If there had been no 'bail-out' proposals put forward by credible outsiders, one of the experts, Clive Rigby, was of the view that Hanny's share price would have collapsed altogether. The rights issue, therefore, while unwelcome – especially to the smaller, retail investor, and a matter of grave concern to them – was a vital transfusion of funds required to

stop the complete collapse of the share price and would have been seen as such by institutional investors. In any event, the rights issue was clearly a measure made necessary by Hanny's deepening crisis, a crisis which Sanrita WONG had identified at the time she sold her shares. The rights issue was not, therefore, unrelated to the corporate activity which caused her insider dealing; it was an organic extension of it.

The Tribunal is therefore satisfied that the submissions made on behalf of William FUNG are of no assistance to Sanrita WONG.

F. The quantum of losses avoided and profits gained

In the absence of extraneous factors, the Tribunal has followed the practice approved by the Court of Final Appeal *supra* in calculating profits gained or losses avoided. It has done so by calculating the difference between the price actually received on purchase or sale of the shares and the value of those shares a reasonable time after the inside information, which motivated the original purchase or sale, had been made public.[55] A 'reasonable period' is allowed so that the news, once public, may be fully digested and acted upon.

In respect of the first and second periods, the Tribunal has accepted the evidence of Dennis Ho Shu Kin, a senior manager with the SFC and a chartered accountant, that a 3 day period of gestation would be reasonable. Because of the unusual circumstances prevailing when information was published at the end of the third period, the Tribunal has accepted the agreed evidence of the experts that a 5 day period should be allowed. The figures in the tables appearing below have been calculated on this basis.

There should be some brief explanation of the tables that appear below. They show the account through which the dealing took place, the number of shares and the price obtained on their purchase or sale. Under the heading of 'market value' is given the market value of the shares a 'reasonable time' after the relevant information had been made public. The final column shows the calculated profit gained or loss avoided.

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[55] Both sets of figures are calculated after deduction of transaction costs.

The First Period (losses avoided)

Account	Shares	Price	Market Value	Losses avoided
WONG Sun				
Louis LO	10,676,000	19,642,379	10,152,759	9,486,620
FAY Loi Loi	4,738,000	7,785,811	4,505,786	3,280,025
Connie LI	1,700,000	3,352,000	1,161,681	1,735,319
Diamond Delight	2,300,000	4,500,959	2,187,275	2,313,684
			Total	16,815,648
William FUNG				
Clement FUNG	2,220,000	4,153,950	2,111,196	2,042,754
Sanrita WONG				
K.L. WONG	3,522,000	4,966,166	3,349,383	1,616,783

The Second Period (profit gained)

WONG Sun				
FAY Loi Loi	4,000,000	1,969,172	2,609,852	640,680

The Third Period (losses avoided)

William FUNG				
Own name	28,710,000	12,046,489	5,832,241	6,214,248
Sanrita WONG				
Own name	42,368,000	17,330,041	8,606,771	8,723,270

Total profits gained and/or losses avoided

(a)	*WONG Sun* :	total losses avoided	16,815,648
		total profits gained	640,680
			$17,456,328

(b) *William FUNG* : total losses avoided **$8,257,002**

(c) *Sanrita WONG* : total losses avoided **$10,340,053**

G. Factors to be considered in assessing appropriate orders

In assessing appropriate orders, the Tribunal is endowed with a broad discretion. In the Success Holdings enquiry, the Tribunal bore in mind a number of guiding principles which, where relevant, have been adopted by this Tribunal; in particular :

(1) The fact that persons identified as insider dealers originally presented to the SFC a false story does not go in aggravation of the penalties which would otherwise be imposed. It is merely that he who admits fault at the outset will be credited for that fact.

(2) Financial penalties are to accord with the gravity of the wrong-doing, and are not to be increased by reason of the substantial wealth of the insider dealer.

(3) In making its orders under section 23(1)(b) and (c), the Tribunal should have regard to the totality of the financial burden imposed by these orders and, where appropriate, any order for costs.

(4) In determining whether to disqualify an insider dealer from holding office as a director of a listed company, there come into play a number of considerations. The determination will take into account the need to ensure the integrity of the securities market; to protect the public from further abuse by that person of the privileged position of trust which that office carries; to deter others from breaching that trust; and to mark the disapproval of the investment community with the conduct of the insider dealer.

The Tribunal has also borne in mind 2 matters concerning the quantum of financial orders made against persons identified as insider dealers :

(1) Although the Ordinance allows the Tribunal to impose a penalty not exceeding 3 times the amount of any profit gained or loss

avoided, this cannot be a simplistic mathematical exercise that ignores the size of the figures involved. For example, it is one thing to order a penalty of HK$400,000 when a profit gained was HK$200,000. It is another matter – when personal resources are finite – to order a penalty of HK$40 million when a profit gained was HK$20 million. Justice (and an adherence to reality) demands that the size of the penalties – except in exceptional cases – should begin to taper off as they become greater. That is essentially an aspect of having regard to the totality of the financial penalties imposed.

(2) In assessing the quantum of financial orders, the Tribunal must also look to ensuring some justice as between one person identified as an insider dealer and another. This is necessary to avoid a justifiable sense of grievance. As an extension of this, although each case must be decided on its own facts, the penalties imposed by earlier Tribunals cannot be ignored.

H. Matters of aggravation and mitigation and consequent orders made

(i) WONG Sun

WONG Sun chose not to make any representations concerning his personal circumstances, especially concerning his current financial circumstances and the degree to which his problems of ill health have or have not impacted on his financial resources. However, during the course of the enquiry the evidence indicated that he was a man of very considerable affluence. Even after his departure from Hanny, he seemingly retained the services of a secretary to manage his extensive property and other investments. The Tribunal has, therefore, proceeded on the basis that WONG Sun will be able to meet the financial orders made against him.

The greatest extent of WONG Sun's insider dealing took place in the first period. During this period he used a complex network of nominee accounts. One was in the name of his personal secretary, a woman who was his salaried employee and over whom he therefore held some sway. Other nominee accounts were in the names of friends and colleagues all of whom had

suspicion brought upon them when the SFC began its investigations. During the first period, WONG Sun was very much a 'hands-on' Chairman of Hanny. His actions as an insider dealer were devious and calculated and intended solely to save him money. He was in a position of highest trust to his shareholders and he abused that trust.

In the second period, however, his insider dealing was (comparatively) modest while there is no evidence that in the disastrous third period he sought to save himself moneys through insider dealing. The Tribunal is, in these circumstances, prepared to accept that WONG Sun came around to appreciating the central position of trust that he held as Chairman and that by the third period he was honouring that position of trust. This stands to his credit.

In respect of his personal circumstances, WONG Sun has not been a well man. He has had to bear the stress of both his medical problems and the enquiry. Nor can the fact that the SFC investigation began in 1996 but took several years to come before the Tribunal be ignored. It is a delay for which WONG Sun - and the others identified as insider dealers - cannot be blamed.

In the circumstances - the Tribunal (by unanimous decision) makes the following orders :

(a) That WONG Sun shall not, for a period of 4 years from 1st June 2000, without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of any listed company or in any way, whether directly or indirectly, be concerned in, or take part in the management of a listed company.

(b) That he shall, in terms of section 23(1)(b), pay to the Government a sum of HK$17,000,000, this being approximate to the total profit gained and losses avoided as a result of his insider dealing.

(c) That he shall, in terms of section 23(1)(c), pay to the Government a penalty of HK$25,000,000.

(d) The moneys due in terms of paragraph (b) and (c) shall be payable on or before 15th July 2000.

(ii) William FUNG

At no time did William FUNG stand in a position of such central trust to the shareholders as WONG Sun. He was not at the helm of decision making. Most inside information was not generated by his actions but rather came to him in the form of company papers and through conversations with work colleagues. William FUNG was looking towards retirement. He stood on the periphery of events. The Tribunal accepts that no doubt, to some degree, a certain panic motivated his actions, a desire to try and conserve what he had spent so many years acquiring.

In respect of the third period especially, when William FUNG traded in his own name, the Tribunal accepts that panic may have been a fundamental motivating force. The Tribunal also accepts that, having resigned as a director and having only limited connection now with the company, William FUNG may, in some muddled fashion, have felt that somehow he had greater freedom to trade, even if it was on the basis of inside information. That may have been misguided but, on a purely personal basis, the Tribunal accepts that (to a limited degree) it is mitigating factor as it goes to his moral blameworthines.

The Tribunal also takes into account William FUNG's present illness. He will have to be under constant medical attention with all its consequent stresses. He too, of course, has had this matter hanging over his head for an extended period of time and has had to endure a very lengthy inquiry, this is despite the fact that his counsel, Mr. Pethes, conducted an exemplary representation : focused, learned and timeous in the sense that the minimum of delay was used to make all relevant points.

Finally, it should be mentioned that William FUNG has made no representations concerning inability to pay. Mr. Pethes has asked simply that he be given time to liquidate the necessary investments. He has asked for 6 months. The Tribunal considers this to be excessive but is prepared to grant a period of 3 months.

In the circumstances, the Tribunal (by unanimous decision) makes the following orders :

(a) That William FUNG shall not for a period of 3 years from 1st June

2000 without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of any listed company or in any way, whether directly or indirectly, be concerned in, or take part in the management of a listed company.

(b) That he shall, in terms of section 23(1)(b) pay to the Government a sum of HK$8,000,000, this being approximate to the losses avoided as a result of his insider dealing.

(c) That he shall, in terms of section 23(1)(c) pay to Government a penalty of HK$8,000,000.

(d) The moneys due in terms of paragraph (b) and (c) shall be payable on or before 15th September 2000.

(iii) Sanrita WONG

Sanrita WONG protested that she was no longer a person of affluence. Reference was made in her submissions to the principle set out in **R v. Clemison** (1985) 7 Cr App R (S) 128 (C.A.) at page 129 –

> We think the proper approach is to decide what is appropriate for the offence and for the offender and then to consider, having decided what prima facie is an appropriate financial penalty, what are the offender's resources and whether he or she is capable of paying a penalty of those proportions.

The Tribunal accepts the correctness of the principle. Nothing is served by imposing financial penalties which are beyond the person's means to pay. In her submissions, Sanrita WONG gave details of her present financial worth. In summary, she said :

(i) That she lives in an apartment in Hong Kong which is owned by a private company controlled by her called Barkfield. There is, however, a mortgage on the property equivalent almost to the market value of the property. In short, there is no available equity in the property or, if any, only a modest amount.

(ii) That she manages a small company called Kingswood which pays her a salary of some HK$27,000 per month and supplies her with a Toyota motor vehicle. For the year ended 31st March 1999, Kingswood made a profit (after taxation) of HK$519,000.

(iii) That she and her daughter own 3 apartments in New York as investment properties. They are situated in a building called the Grand Millennium at 1965 Broadway. The apartments were purchased for US$987,000. They are, however, mortgaged for a sum of US$640,000, leaving an equity in the properties (assuming no appreciation since purchase) of only US$347,000. If Sanrita WONG is entitled to a half share of that sum, it gives to her an equity of some US$173,500 (equivalent to HK$1,345,000).

But what of the very large sum obtained when Sanrita WONG sold her property at Las Pinadas? What of the balance (albeit limited) of HK$17 million that she obtained from the sale of her shares in the third period?

In her written submissions, Sanrita WONG accepted that the company controlled by her paid 'its directors' in excess of HK$32 million when Las Pinadas was sold. Virtually all of that sum – if not all – would have been due to Sanrita WONG. That payment was made in or about April 1998, just 2 years ago. But no credible details were given of how this sum was used. In her written submissions, Sanrita WONG could only say the following :

> To the best recollection of Sanrita WONG, the said sum has partly been used to repay her creditors, partly been lost in subsequent investments in shares, partly been used for her living expenses, and partly been used to purchase investment properties in New York ... Sanrita WONG is trying her best to locate the relevant supporting documents and evidence. She requires further time to complete this exercise so that the full picture can be presented to the Tribunal.

At the first day of the hearing, when Sanrita WONG attended in person, Mr. Michael Lunn, Counsel to the Tribunal, made it clear that Sanrita WONG should have her papers ready by the adjourned hearing as he wished to question her about the state of her finances. Sanrita WONG agreed to obtain the papers.

However, as stated earlier, Sanrita WONG did not attend the adjourned hearing on 25th May 2000. Nor did she supply any further documentation concerning the central core (and greatest extent) of her alleged assets. Sanrita WONG must have appreciated the importance of her admitted receipt of the proceeds of the sale of Las Pinadas. Yet she chose to absent herself from the hearing when she was to be questioned about the matter and chose to submit no further documents.

Regrettably, the Tribunal has, throughout the length of the inquiry, found it difficult to place any reliance on Sanrita WONG's assertions of fact. Her defences have shifted like sand to suit her immediate needs. The Tribunal is satisfied that she has lied with impunity when she believed it would help her. Her various protestations; for example, of being naïve and ignorant in commercial matters, of playing no real role in Hanny's affairs, all have been shown on the evidence to be calculated, emotionally-laden disguises. The Tribunal is satisfied that her absence from the hearing on 25th May was again tactical. In the circumstances, it is compelled to draw the only reasonable inference open to it; namely, that she does, in fact, possess far greater assets than she now admits. The Tribunal accepts that they are not limitless but it is satisfied they will enable her to meet the orders made.

In respect of other matters, the Tribunal accepts that, in the third period, Sanrita WONG had been hoping to dispose of her shares for some time; she wanted to cash-in her interest. However, she was at that time still a core member of management. In that regard, she stood in a very different position to William FUNG. Yes, it appears that she did sell, in the third period, in a panic. But against that, she was advised several times by professionals of the highest calibre of the danger of her actions. She was, however, so intent on selling that she ignored their advice. It was the culminating example of the wilfulness that has marked so many of her actions.

The Tribunal also accepts that, in the third period, Sanrita WONG sold in large measure with a view to paying off her creditors and that this was done.

In the circumstances, the Tribunal (by unanimous decision) makes the following orders :

(a) That Sanrita WONG shall not, for a period of 4 years from 1st June

2000 without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of any listed company or in any way, whether directly or indirectly, be concerned in, or take part in the management of a listed company.

(b) That she shall, in terms of section 23(1)(b), pay to the Government a sum of HK$10,000,000, this being approximate to the total losses avoided as a result of her insider dealing.

(c) That she shall, in terms of section 23(1)(c), pay to the Government a penalty of HK$12,000,000.

(d) The moneys due in terms of paragraph (b) and (c) shall be payable on or before 15th July 2000.

I. Costs to be paid by those identified as insider dealers

In addition to the orders contemplated by section 23(1), the Ordinance also empowers the Tribunal to make orders that persons identified as insider dealers should pay costs. In this regard, section 27 provides as follows :

> At the conclusion of an inquiry or as soon as is reasonably practicable thereafter, the Tribunal may order any person who has been identified as an insider dealer in a determination under section 16(3) or as an officer of a corporation in a determination under section 16(4), as the case may be, to pay to the Government such sums as it thinks fit in respect of the expenses of and incidental to the inquiry and any investigation of his conduct or affairs made for the purposes of the inquiry.

Again, the Tribunal is endowed with a broad discretion. The Tribunal starts, however, with the principle that in most cases a section 27 order will follow the event. It is a compensatory order and is not punitive.

Where possible, guidance is obtained from the approach adopted by past Tribunals. In this regard the Tribunal will follow the guidelines set out in the Hong Kong Parkview inquiry where (on page 91 of the report) that Tribunal said :

> "… we propose that the costs order in this inquiry be confined to the expenses incurred as a result of holding the inquiry only. This means that the costs of SFC investigation will not be included. We do not state that as a matter of law that it cannot be included, however we have decided to exclude those expenses (a) as a matter of fairness and (b) to keep in line with the previous costs orders in previous inquiries. Secondly the cost of this inquiry will be divided into two heads:- (a) the costs of the [Department of Justice] and (b) the Tribunal's costs.
>
> As to (a) – the Tribunal will in due course receive a schedule of the costs of the Department of Justice and counsel briefed by it.
>
> As to (b) – the Tribunal's costs, we will include some or all the witness' expenses, the costs of the salaries and fees of the three members of the Tribunal, the costs of the verbatim reporters, the court interpreters and the costs of the Tribunal's costs for stationery, machinery or accommodation. The Chairman's costs have been rounded down to reflect the amount of time actually spent on this inquiry."

On this basis, it has been calculated that the costs and expenses of the inquiry have amounted to HK$11,998,120. In light of the complexity and length of the inquiry, the Tribunal considers this to be a reasonable sum.

(i) WONG Sun

Time spent in the inquiry dealing with WONG Sun's ill-health in so far as it required adjournments will not be the subject of any order for costs against WONG Sun. Nevertheless, although WONG Sun did not himself testify, a material proportion of the time taken up by the inquiry was directly attributable to the manner in which WONG Sun chose to be represented. No matters were formally agreed; issues were not confined; cross-examination, often lasting several days, probed the broadest gamut of issues. A compensatory order must take these matters into account.

The Tribunal (by unanimous decision) has therefore resolved that WONG Sun be ordered to pay approximately 45% of the expenses of and

incidental to the inquiry; that is, a sum of HK$5,400,000.

(ii) William FUNG

The Tribunal has already recorded the fact that William FUNG's counsel ensured that time was never wasted. There was a clear, concise focus on issues. A large number of facts were agreed in writing, saving considerable time.

The Tribunal (by unanimous decision) has therefore resolved that William FUNG be ordered to pay approximately 15% of the expenses of and incidental to the inquiry; that is, a sum of HK$1,800,000.

(iii) Sanrita WONG

It must be said that despite Sanrita WONG's evident shortcomings as a witness, the best attempts were made by her counsel, Mr. Wilson CHAN, to confine the issues and deal with matters concisely. The issues, however, were extensive, many raised by Sanrita WONG and later found to be without merit by the Tribunal.

The Tribunal (by unanimous decision) has therefore resolved that Sanrita WONG be ordered to pay approximately 20% of the expenses of an incidental to the inquiry; that is, a sum of HK$2,400,000.

The Honourable Mr. Justice Hartmann
Chairman

Mr. Lawrence LOK Yuen-ming
Member

Mr. Dickson V. LEE
Member

15th June 2000

ACKNOWLEDGEMENTS

The Chairman personally would like to record his appreciation for the assistance given to him by the two members of the Tribunal, Mr. Dickson V. LEE and Mr. Lawrence LOK Yuen-ming in what turned out to be a very long and arduous inquiry. Their patient and highly professional approach to their consideration of the evidence was to be admired. Tribunal members play a vital role in Insider Dealing inquires and Hong Kong is fortunate to be able to enlist the services of people of such calibre.

The Tribunal was ably administered during the inquiry by its staff; namely, Mr. Eric NG Kwok-yung, Secretary to the Tribunal, Miss Wanda SIN Sui-ping, Secretary to the Chairman, Mr. Michael SO Wai-shan and Ms. HO Yuk-ying.

The Tribunal also wishes to express its gratitude for the assistance given to it by all the counsel and solicitors involved in this protracted inquiry which has lasted 12 months. Without exception they carried out their respective duties with professionalism, vigour and courtesy. Their level of assistance, especially in the submission of detailed, written arguments, made the work of the Tribunal a good deal easier.

Finally, appreciating the technical complexity of this inquiry, the Tribunal wishes to extend its thanks to all the expert witnesses who prepared reports and who testified. The Tribunal appreciates that they have busy, professional careers. But without their experience and time-consuming research, the Tribunal would have been greatly hampered in its work.
