REPORT OF THE INSIDER DEALING TRIBUNAL OF HONG KONG

on whether insider dealing took place
in relation to the listed securities of

HONG KONG PARKVIEW GROUP LIMITED

between

13th and 16th August 1993 (inclusive)

and on other related questions

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CHAPTER 1

BACKGROUND INFORMATION

The purpose of this introductory chapter is to provide non-contentious details about the personalities and companies involved in this inquiry, which for ease of reference we refer to as the "Parkview" inquiry. The inquiry has centred on two purchase orders for Parkview shares (i.e. shares in the listed company Hong Kong Parkview Group Limited "HKPVG") made on Friday August 13th 1993. The first order was for 1 million shares (of which only 974,000 were actually purchased) placed by Mr. HWANG Chou-shiuan. The second was for 100,000 shares placed by Mr. Peter SIN Kit-leung.

By our terms of reference (with which we shall deal in more detail in Chapter 2 - "Procedure") it is our task to decide if, having heard and considered all the evidence before us and having considered counsel's submission thereon, these two purchase orders amount to insider dealing pursuant to s. 9 of the Securities (Insider Dealing) Ordinance CAP 395 and whether Mr. Hwang and/or Mr. Sin should be identified as insider dealers.

Hong Kong Parkview Group Limited

Prior to January 5th 1993 the listed company was called Ming Ren Holdings Company Limited but on that date changed its name to HKPVG.

Ming Ren Holdings Company Limited became the holding company of Ming Ren Investment and Enterprises Limited on November 24th 1992. The latter had been a listed company in Hong Kong since 1973; the change of entity was effected by a "scheme of arrangement" for the sole purpose of redomicile. In all material respects the new company Ming Ren Holding Company Limited, was the same as the old one, Ming Ren Investment and Enterprises Limited.

On August 13th 1993 there were 445,824,938 issued shares in

HKPVG. 74.84% were owned by the "Hwang Family" as follows:-

Mr. C.S. Hwang owned 30,000,000 (6.73%)
Mr. George WONG Kin-wah owned 10,000,000 (2.24%)
Kompass International Limited owned 293,674,138 (65.87%)

The remaining 112,150,800 (25.16%) were in the public domain.

Kompass International Limited ("Kompass") is a British Virgin Islands company. It was incorporated on October 6th 1992. From that date until December 20th 1993 (i.e. covering the key dates of August 13th - August 18th 1993) Kompass's three directors were three of Mr. C.S. Hwang's sons namely George Wong, Victor Hwang and Tony Hwang, each of whom also owned one share each. On December 20th 1993 C.S. Hwang himself and his 4th son Richard also became directors and holders of one share each in Kompass.

The Family

One of the key issues in this inquiry has been the connection, if any, between Mr. C.S. Hwang and HKPVG. If we are not satisfied that Mr. Hwang is a "connected person" as defined in s. 4 of CAP 395 then he cannot be identified as an insider dealer. The only subsection of s. 4 which could apply to Mr. Hwang is s. 4(c). The law relating to s. 4(c) and the evidence we have considered when deciding this issue are dealt with in Chapters 3 and 4.

Since his arrival in Hong Kong Mr. Hwang has built up a substantial family based business empire. His eldest son, Mr. George Wong, when giving evidence said of his father - "he's the man who built up the empire ... but I'm running Hong Kong Parkview Group". Mr. Hwang started in business in Taiwan upon his arrival there in 1948 when he was in his early twenties. The family business in Taiwan is called the Chyau Fwu Group. It is even more substantial than the Hong Kong based business. The Hong Kong interests have expanded and diversified over the years. Major projects in property, travel, entertainment and oil have been undertaken or considered. We give this introductory thumb-nail sketch to emphasize that the "empire" to which

Mr. George Wong referred is - in the most general of terms - one of those south-east Asian success stories which has been family based, family controlled and family run.

Having made such a general observation it is equally important to set out the agreed facts in relation to each member of the family relating to their actual position at the relevant time (August 1993).

George, Victor, Tony, Richard and Sally are the five children of C.S. Hwang who have been referred to in this inquiry. George, Victor and Tony were Directors of HKPVG at the key dates. George was the Chairman. Sally worked for her father at the offices in the Parkview residential complex. In the course of the inquiry we have heard evidence from C.S. Hwang himself, George Wong and Sally Chen. We have received into evidence an affidavit from Victor Hwang. Tony and Richard Hwang have played no material part in the inquiry.

Mr. C.S. Hwang resigned from the Board of Directors of Ming Ren Investment on June 4th 1992. Since HKPVG came into existence (January 1993) he has never been the Chairman or on the Board of Directors. Neither was he, in August 1993, a substantial shareholder or officer or employee of HKPVG as defined by the Securities (Insider Dealing) Ordinance CAP 395. He is and always has been the Chairman of the Taiwanese company - the Chyau Fwu Group. As we shall mention later in our report the Chinese characters for the Chyau Fwu Group and for HKPVG are the same.

<u>The key events</u>

There are three undisputed events which provide the cornerstones of the whole inquiry. They are:-

(i) On Friday August 13th 1993 Mr. C.S. Hwang and Mr. Peter SIN Kit-leung purchased HKPVG shares. Mr. C.S. Hwang purchased 974,000 and Mr. Peter Sin purchased 100,000.

(ii) On Friday August 13th Mr. C.S. Hwang flew to Beijing where, in the evening, he met Mr. JIANG Yun-long, the general

manager of "UNIPEC" (China International United Petroleum and Chemicals Company Limited).

(iii) At 10:02 a.m. on Tuesday August 17th a teletext announcement was made at the Hong Kong Stock Exchange that HKPVG had arranged a placement of 89 million of its shares to UNIPEC at $2.85 per share. A more detailed announcement was made in the press on the following day.

The closing prices of the HKPVG share around the key dates were:-

Thursday	August 12th 1993	- $2.650
Friday	August 13th 1993	- $2.850
Monday	August 16th 1993	- $3.200
Tuesday	August 17th 1993	- $3.575
Wednesday	August 18th 1993	- $3.825
Thursday	August 19th 1993	- $4.325

An investigation of these events will play a major part in this Report. Further details of the events of each day between the 13th August and the 18th August (also undisputed) are:-

Friday August 13th:

(a) The purchases at (i) above were made. Mr. C.S. Hwang's order was placed in the morning before he flew to Beijing. The order was carried out by his broker, Mansion House Securities. It was carried out by a number of transactions throughout the day, some in the morning and some in the afternoon when he was in Beijing. Mr. Peter Sin's order for 100,000 shares was made through his broker, Mayfair Securities Limited. The prices at which the purchases were made indicate that they were carried out in the afternoon.

(b) Mr. C.S. Hwang and his daughter Sally flew to Beijing on flight CA102. They went through Immigration at Kai Tak at 11:47 a.m., the flight took off at 12:56 p.m. and it arrived at Beijing, at

the parking bay, at 3:38 p.m. They travelled on one-way first class tickets.

Saturday August 14th:

(a) Mr. C.S. Hwang and Sally Chen returned to Hong Kong on CA101 which left Beijing at 7:50 a.m. and arrived at Hong Kong at approximately 11:00 a.m.

(b) George Wong went through Immigration at Kai Tak at 9:39 a.m. on his way to Shanghai.

Monday August 16th:

(a) A fax was received by HKPVG at 11:09 a.m. from UNIPEC, at Worldwide House in Central. It was from Mr. JIANG Yun-long and was marked for the attention of Mr. C.S. Hwang who was in the office at the time of its arrival. The fax is at Annexure D of this Report.

(b) At 4:54 p.m. George Wong arrived back at Kai Tak having returned from China.

Tuesday August 17th:

(a) Before the H.K. Stock Exchange (SEHK) opened Sammy Leung of Goodwill Capital Limited, the financial adviser of HKPVG informed the SEHK of the intended placement of 89 million HKPVG shares to UNIPEC. He further suggested that HKPVG shares be suspended but the SEHK decided not to.

(b) At 10:02 a.m. the HKPVG made a teletext announcement about the placement (Annexure F of this Report).

(c) At 10:22 a.m. UNIPEC sent another fax to Mr. C.S. Hwang to the offices at Worldwide House concerning the reasons for its decision to buy the HKPVG shares and detailed background about UNIPEC.

(d) The HKPVG Board of Directors met and passed a resolution to issue 89 million new shares to Kompass at $2.85 cents each

(e) Kompass sold 89 million shares to UNIPEC at $2.85 each. Settlement date was to be August 19th.

Wednesday August 18th:

(a) The placement was formally announced in both Chinese and English language newspapers (Annexure G).

These events prompted certain inquiries to be made by the SEHK of Goodwill and HKPVG. It is useful at this stage to highlight the most significant pieces of correspondence upon which many of the witnesses have been closely examined:

Annexure H
(dated 19.8.93) - an enquiry by the SEHK addressed to Goodwill for the attention of the Managing Director (as he then was) Mr. Sammy Leung.

Annexure I
(dated 20.8.93) - a draft reply to Annexure H - prepared by Ms Charlmane Wong to be signed by Mr. Sammy Leung.

Annexure J
(dated 25.8.93) - an amended reply signed by Mr. Sammy Leung which was later sent to the SEHK dated 31.8.93.

Annexure K
(dated 21.9.93) - a letter from HKPVG signed by George Wong to the SFC responding to inquiries made about the placement.

Annexure L
(dated 7.10.93) - a letter from Richards Butler, solicitors for HKPVG to the SFC in reply to further enquiries about the placement.

The Key Questions

The primary issues which flow from the key events are:-

(i) Was Mr. C.S. Hwang a person connected to HKPVG as defined by s. 4(1)(c) CAP 395? [There is no dispute that Mr. Peter Sin was so connected by virtue of s. 4(1)(a).]

(ii) Were Mr. Hwang and Mr. Sin in possession of relevant information at the time they made purchases on August 13th? We will address this issue by answering 3 questions:-

(a) What is the least amount of information, in the context of this case which would satisfy the requirements of relevant information as defined by s. 8 of CAP 395?

(b) Were Mr. Hwang and/or Mr. Sin in possession of at least that amount [as in (a) above] of information?

(c) Did they know that it was relevant information?

CHAPTER 2

PROCEDURE

1. The Tribunal

By a notice dated July 9th 1996 issued pursuant to s. 16(2) of the Securities (Insider Dealing) Ordinance CAP 395 ("the Ordinance") the Acting Financial Secretary Mr. Rafael S.Y. Hui directed that a Tribunal be instituted to inquire into and determine:-

> "(a) whether there has been insider dealing in relation to Hong Kong Parkview Group Limited arising out of the dealings in the listed securities of that company by Mr. Hwang Chou-shiuan during the period from 13 to 16 August 1993 (inclusive); and
>
> (b) in the event of there having been insider dealing as described in paragraph (a), the amount of any profit gained or loss avoided as a result of such insider dealing."

By an amended notice signed by the Financial Secretary Mr. Donald Y.K. Tsang dated October 22nd 1996 the name of Mr. Peter SIN Kit-leung was added into paragraph (a).

Pursuant to section 15 of the Ordinance the Tribunal was duly constituted as follows:-

Chairman : The Hon. Mr. Justice Michael Burrell

Member : Mr. Kennedy LIU Tat-yin (Hong Kong Certified Public Accountant, fellow of the H.K. Society of Accountants, fellow of the U.K. Chartered Association of Certified Accountants, fellow of the U.K. Institute of Chartered Secretaries and Administrators and fellow of the H.K. Institute of Company Secretary) - a partner in the firm of Arthur Andersen and Company

Member : Mr. Simon LAM Siu-lun (Hong Kong Certified Public Accountant, associate member of the Institute of Chartered Accountants in England and Wales, associate member of the Hong Kong Society of Accountants and fellow of the Taxation

Institute of Hong Kong) - a partner in the firm of Au Young, Lam & Wu

2. Legal Representation:

The Tribunal appointed Mr. Daniel Marash, instructed by the Attorney General's Chambers, as the counsel to the Tribunal. He was assisted by Miss Serlina LAU Suet-ching of the Civil Division of the Attorney General's Chambers.

Clause 16 of the Schedule to the Ordinance states:-

> "A person whose conduct is the subject of an inquiry or who is implicated, or concerned in the subject matter of an inquiry shall be entitled to be present in person at any sitting of the Tribunal relating to that inquiry and to be represented by a barrister or solicitor."

Mr. HWANG Chou-shiuan was represented by Mr. Ronny K.W. Tong Q.C. leading Mr. Godfrey W.H. Lam instructed by Richards Butler, Solicitors.

Mr. Peter SIN Kit-leung was represented by Mr. Jonathan Harris instructed by Hastings & Co., Solicitors.

One of the witnesses who gave evidence before us also elected to be legally represented. Ms Irene So was represented by Ms Selina Lau instructed by Woo, Kwan, Lee & Lo, Solicitors.

In an Insider Dealing Tribunal it is not essential for counsel to be present on every occasion that the Tribunal sits. Mr. Tong was present at every sitting, with one or two minor exceptions so was Mr. Harris. Ms Selina Lau however, quite properly, only attended when her lay client was giving evidence.

3. "Salmon" Letters

The first task of the Tribunal and its counsel was to identify to whom "Salmon" letters should be sent. The purpose of a Salmon letter

is to give any person advance notice that they may be affected by the inquiry. They are called "Salmon" letters after Lord Justice Salmon who was the Chairman of the Royal Commission on Tribunals of Inquiry in the United Kingdom in 1966. We decided, in keeping with a procedure recently adopted by the Hong Kong Insider Dealing Tribunal, to issue two different types of Salmon letters, which we have called Salmon "A" letters and Salmon "B" letters. Examples of each are at Annexure A of this Report. A Salmon "A" letter is sent to any person against whom a finding of insider dealing could, based on the material available before the commencement of the inquiry itself, be made. A Salmon "B" letter is sent to any person who, based on the same material, may be concerned in the subject matter of the inquiry but against whom there is, at the time of sending the letter, no suspicion of insider dealing. It is a feature of an inquisitorial function that, in the course of the inquiry, a suspicion against an individual may emerge where none existed at the outset. If that were to happen a Salmon "A" letter would be sent to such an individual as soon as the suspicion arose so that he could be legally represented if he had, hitherto, not been. In the Parkview inquiry this did not arise.

The material which the Tribunal and counsel to the Tribunal considered when deciding to whom Salmon letters should be sent comprised the statements and documents gathered by the Securities and Futures Commission (the "SFC") as a result of its investigation into possible insider dealing. We also read and considered the Report produced by the SFC at the conclusion of its investigation. The Report is a useful document in that it summarizes the material gathered in the course of the SFC investigation, we emphasize however, that it is not evidence.

We decided to serve Salmon "A" letters on two individuals:-

Mr. HWANG Chou-shiuan and
Mr. Peter SIN Kit-leung

In addition they were provided with a summary of the evidence which was a condensed version of the SFC Report. They have also received or had opportunity to inspect all the relevant statements and documents.

Salmon “B” letters were sent to:-

Mr. FUNG Ka-pan - Chairman of Goodwill International Holdings Limited
Mr. Sammy LEUNG Chi-chiu - a Director of Goodwill International Limited
Ms Charlmane WONG Shu-man - Senior Manager of Goodwill Capital in 1993
Ms Alice LEE Kwan-fong - Secretary to Mr. Sammy Leung
Ms Daisy LO Mee-lin - The personal Assistant/Senior Secretary to Mr. C.S. Hwang

Mr. George WONG Kin-wah - Chairman of the HKPVG Board of Directors
Ms Irene So - Dealing Director at Mansion House Securities F.E.) Ltd.
Mr. JIANG Yun-long - General Manager of “UNIPEC” in the People‘s Republic of China in 1993

4. Preliminary Hearings

All the Salmon letters were served on September 5th 1996. The information in the letters included the date of the first preliminary hearing which was fixed for September 17th.

On September 17th Mr. C.S. Hwang and Mr. Peter Sin were represented by solicitors. The main purpose of the first preliminary hearing was for the Chairman to make an opening statement and to discuss a future timetable.

In so far as the opening statement dealt with procedural matters we emphasized the following:-

i) The Tribunal’s function is inquisitorial rather than adversarial. This is a fundamental distinction between an inquiry by a Tribunal and conventional litigation. The distinction gives rise to a number of consequences. For example, the Tribunal

directs the inquiry - it is empowered to investigate new matters should they arise, provided they are relevant to the terms of reference. Also, the Tribunal may adopt flexible procedures as it sees fit. Rules relating to, for example, leading questions, hearsay, examination on previous statements and the scope of re-examination are not applied with the same strictness as in conventional litigation.

ii) The role of counsel to the inquiry is to present the evidence objectively, regardless of which way the evidence falls. He does not however have to remain neutral throughout. If he considers the evidence provides proof of insider dealing he should employ his skills of advocacy in the usual way to that end.

His role also involves a high degree of administration. For example, he is responsible for the attendance of witnesses, drafting notices to secure the attendance of witnesses, drafting notices to require the SFC to carry out further investigation, disclosing all relevant information to solicitors and counsel involved in the inquiry, and generally ensuring that the inquiry progresses as smoothly and fairly as is reasonably practicable. To this end, it is sometimes necessary for counsel to the Tribunal and the members of the Tribunal to meet in Chambers. Prior to the commencement of the inquiry this is inevitable. After the start of the evidence however, although it is necessary from time to time, it should be kept to a minimum.

iii) We emphasized also that we were conscious of the fact that the mere making of an allegation in a Salmon "A" letter could adversely affect a person's reputation. We stressed that the making of an allegation is never evidence of the truth of the allegation. A person against whom an allegation is made may have a complete answer to it. There is no burden of proof on such a person (except by virtue of s. 10 CAP 395 to which we shall refer in Chapter 7) and the Tribunal will make no judgment until all the evidence has been heard and submissions made.

iv) We noted that the costs of inquiries such as this can become very high. We stated that a balance between expediency and focussing on the main issue on the one hand and not proceeding at a pace which might prejudice the parties on the other was a balance to be aimed for. We asked for evidence to be agreed and put in writing whenever possible.

In addition to i) above we wish to add that the Tribunal is always conscious of the danger that an excess of flexibility could disadvantage an implicated person. Although it is important that the Tribunal retains its inquisitorial function and its inquisitorial powers, it should not lose sight of the fact that the recipient of a Salmon "A" letter is a person against whom serious allegations of wrongdoing have been suggested and against whom findings of such wrongdoings may be made. Accordingly, should counsel to the inquiry form a view that the evidence points to insider dealing by one or more persons then, inevitably, the proceedings take on the characteristics of adversarial litigation. When this happens this Tribunal would not wish to restrain counsel from conducting the case with skills that had been developed and honed in an adversarial atmosphere but on the other hand would not permit an excess of flexibility to be utilized to such an extent as might be regarded as unfairly prejudicing the implicated person. The need to be fair overrides everything. Thus, in inquisitorial proceedings the tendency to be flexible in matters of procedure and evidence gathering stops when it ceases to be fair.

A second preliminary hearing was held on October 11th 1996 by which time counsel had been instructed. At this hearing the date for the commencement of the inquiry itself was fixed for October 23rd. Therefore the lapse of time from the service of the Salmon letters to the start of the inquiry was approximately 7 weeks. The legal representatives accepted this time frame but not without some reluctance. From October 23rd onwards we heard evidence on 26 days. We then adjourned for one week after which we heard submission and legal argument which lasted 4 days. It was a "medium" sized inquiry. We have some sympathy with the view that the implicated parties had a relatively short time to prepare for the hearing. As it turned out the parties were ready by the appointed day and the hearing started on

schedule. This is to the credit of all counsel and solicitors. Also to their credit is the fact that many facts in the case were agreed (A statement of the Agreed Facts may be found at Annexure B).

5. Procedure during the Inquiry

In Lord Justice Salmon's Report of 1966 he lists 6 cardinal principles which should be followed in public inquiries. Principles 4-6 are:-

"(4) (The accused person) should have the opportunity of being examined by his own counsel and of stating his case in public at the inquiry.

"(5) Any material witness he wishes called at the inquiry should if reasonably practicable, be heard.

"(6) He should have the opportunity of testing by cross examination conducted by his own solicitor or counsel any evidence which may affect him."

Counsel to the Tribunal called nine witnesses. He examined them in chief. Counsel for the implicated parties had the right of cross examination. Counsel to the Tribunal re-examined and finally the members of the Tribunal had the opportunity to ask questions.

After these witnesses had given evidence the two implicated parties gave evidence and they called a further four witnesses. For these witnesses the procedure was reversed. They were examined in chief by their own counsel.

Finally, two statements were included as agreed evidence and one affirmation from Mr. Victor Hwang (son of Mr. C.S. Hwang) was included in the evidence for our consideration. Mr. Victor Hwang is resident in London.

At this stage reference should be made of one witness who was served with a Salmon "B" letter who did not give evidence and whose

statement was not included in the evidence as an agreed statement. Mr. JIANG Yun-long was at the material time the general manager of UNIPEC and has at all material times been resident in Beijing. Attempts to arrange his attendance in Hong Kong to give evidence before us were unsuccessful. He was undoubtedly an important witness as he was the person to whom Mr. C.S. Hwang spoke at dinner on the evening of August 13th 1993 in Beijing about the placement. At one stage in the inquiry all parties said they wanted him to come and give evidence. Consequently every effort was made to secure his attendance.

We can only speculate as to the reasons for the breakdown in communications which resulted in all parties and the Tribunal agreeing that it would be fruitless to wait indefinitely in the hope that he would attend.

In his final submission Mr. Ronny Tong, Q.C. urged us to place some weight on some parts of his statement to the SFC. Whilst it is open to us to attach such weight as we deem fit to a statement, even unsworn, to the SFC we consider it dangerous to attach any weight of any significance to the important parts of Mr. Jiang‘s statement. The reasons for this are that his statement is controversial and unsworn and we cannot exclude the possibility that his failure to attend to give evidence was deliberate. (Although we realize also that it may have been due to administrative difficulties, health problems or misunderstanding - we simply don’t know.)

CHAPTER 3

LAW

In this chapter we will set out:

1) Those parts of CAP 395 which have direct relevance to the Parkview inquiry. In this chapter we will not elaborate on them. We will refer to them in detail when we consider their application to each of the key issues which we deal with in the subsequent chapters.

2) Some general legal principles which have been of particular importance in our decision making process.

1. The Ordinance

Of the six different types of insider dealing which are set out in s. 9 of CAP 395 we are only concerned with s. 9(1)(a) which states:

s. 9 When insider dealing takes place

(1) Insider dealing in relation to the listed securities of a corporation takes place -

(a) when a person connected with a 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 in the listed securities of a related corporation) 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 fact our inquiry is only concerned with the first half of s. 9(1)(a) as there has been no suggestion that any alleged insider dealing was counselled or procured.

The two key ingredients of s. 9(1)(a) which concern us are further defined in CAP 395:-

(i) "connected with a corporation" is defined by s. 4:-

4. "Connected with a corporation"

(1) A person is connected with a corporation for the purposes of section 9 if, being an individual -

- he is a director or employee of that corporation or a related corporation; or

- he is a substantial shareholder in the corporation or a related corporation; or

- he occupies a position which may reasonably be expected to give him access to relevant information concerning the corporation by virtue of -

  i) any professional or business relationship existing between himself (or his employer or a corporation of which he is a director or a firm of which he is a partner) and that corporation, a related corporation or an officer or substantial shareholder in either of such corporations; or

  ii) his being a director, employee or partner of a substantial shareholder in the corporation or a related corporation; or

- he has access to relevant information in relation to the corporation by virtue of his being connected (within the meaning of paragraph (a), (b) or (c)) with another corporation, being information which relates to any transaction (actual or contemplated) involving both those corporations or involving one of them and the listed securities of the other or to the fact that such transaction is no longer contemplated; or

- he was at any time within the 6 months preceding any dealing in relation to listed securities within the meaning of section 9 a person connected with the corporation within the meaning of paragraph (a), (b), (c) or (d).

It is common ground that the only part of s. 4 by which it could be said that Mr. C.S. Hwang was a person connected to HKPVG or Kompass International is s. 4(1)(c)i)

(ii) "Relevant information" is defined in s. 8

> 8. "Relevant information"
>
> 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.

The third ingredient which must be proved before a finding of insider dealing can be made is that the person "deals" in the listed securities. No issue has arisen in the Parkview inquiry concerning this ingredient. Both Mr. C.S. Hwang and Mr. Peter Sin admit that their agreed purchases of HKPVG shares on August 13th 1993 constitute "dealing" for the purpose of the Ordinance.

The only remaining provision of CAP 395 which falls for our consideration is s. 10(3):-

> 10. Certain persons not to be held insider dealers
>
> (3) 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.

This provides a defence to insider dealing. It arises only if a transaction has been proved to the required standard to have been an insider dealing. If so, once it is raised the burden of proof is on the person who seeks to rely on it and that burden is discharged on a balance of probabilities. If that burden is discharged the person will not be identified as an insider dealer.

2. General Legal Principles

A. Standard of Proof

Since the decision of Mr. Justice Stock in the "Success Holdings Limited" Report the standard of proof adopted in subsequent inquiries has been proof "to a high degree of probability". We stated in our opening statement that this would be the standard that would be applied in the Parkview Inquiry. The SHL ruling adds that the degree of probability has to be "commensurate with the occasion" or "proportionate to the subject matter".

The standard of proof should be simply stated and remain the same throughout. It is a high standard of proof - not the highest reserved for criminal allegations - but nonetheless high. It is not appropriate to say that within a given inquiry the more serious the allegation the higher the standard should be. The standard at all times is high. "A high degree of probability" refers to the top end of the civil standard. It is set high because the issues are serious. A finding of insider dealing against an individual is a finding of wrongdoing which will adversely affect his or her reputation. It carries with it penal sanctions and public obloquy.

Save as already referred to in Chapter 2 (s. 10 Defences) no burden of proof lies on an implicated person.

B. Circumstantial evidence and inferences

It is more likely than not that proof that there has been insider dealing will depend to a large degree on the drawing of inference from proven facts. By its very nature insider dealing has conspiratorial characteristics. People who set about to make a profit by insider dealing do not do so openly. A person's "knowledge" or "intention" at a material moment is likely to be significant and requires strict proof.

We have therefore directed ourselves carefully on the proper approach when evaluating such evidence. We have directed ourselves

in the following terms:

We may infer from any of the facts which have been agreed or proved before us the existence of some further fact. Such an inference must be a compelling one - the sort of inference that no reasonable man would fail to draw. It should be the only reasonable inference, which is not the same thing as the only possible inference, which may be drawn from the facts already agreed or proved to the required standard.

In this context our attention has helpfully been drawn to the words of Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd. [1940] AC152.

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

C. Lies

A court hearing in which no lies are told is an endangered species. This inquiry is no exception. As will be seen later in this report we have concluded that on more than one occasion and in relation to material issues we have not been told the truth. As it is open to us to rely on a lie told by an implicated person as evidence in support of the allegation against that implicated person we emphasize that certain conditions must apply before a lie can be used in this way.

Accordingly our approach to the significance of "lies" in our decision-making process has been to follow to the letter the observations made at 4-28 (page 30) of the Public International Investments Limited Report which we cite herein in full:-

"To the extent that we may decide that lies have been told to the SFC or to this Tribunal we are conscious of the fact that there may be reasons for lies consistent with absence of any wrongdoing, or of the particular wrongdoing alleged, and that it is only if we exclude such reasons that lies may support the allegation of that particular wrongdoing. We are also conscious of the fact that although a lie of itself proves nothing, save that the lie has been told, "lies can in conjunction with other evidence tend to support an inference of guilt in the sense that they can confirm or tend to support other evidence which of itself is indicative of guilt. ... we have ... borne well in mind the question whether a lie may have been motivated not by a realization of guilt of insider dealing, but by a realization of guilt of some other wrongdoing or by a conclusion or fear (whether justified or not) that certain conduct would be viewed by others as improper, or by a feeling that the truth was unlikely to be believed ... also that before a lie may be used to support a particular allegation, we have first to be satisfied that the lie was deliberate, and that it is material to the issue we have to decide".

D. Law/Fact

All matters of fact are decided by the Tribunal. All matters of law are decided by the Chairman. In this inquiry all findings of fact have been made by the Tribunal's unanimous decision. In the absence of unanimity the Ordinance permits findings based on a majority to 2 to 1. Where decisions on law are referred to as "the Tribunal's decision" it should be implied that it has been on the Chairman's direction.

In deciding matters of fact the Tribunal acts as a jury of three. One purpose of a Judge sitting with two members of the business and professional community of Hong Kong is for the two members to bring their experience and expertise into the decision making process. 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. We quote from Phipson on Evidence 14th Edition page 32:-

"where a tribunal is composed of or includes specialists in the field

wherein the litigation arises, and that situation is brought about by legislation specifically directed to that end, it may act on its own knowledge. Thus, the lay members of an industrial tribunal may use their own experience in assessing the evidence given by witnesses. If that leads them to take a different view to that of a witness, the witness should be given an opportunity of dealing with the view of the tribunal: but the tribunal are entitled to prefer their own opinion."

In this chapter we have only outlined the main matters of law which have been relevant to this inquiry. As already referred to, we shall consider some of them in much greater detail in the following chapters.

The following chapters will contain our findings. They can be conveniently dealt with under 5 headings (which approximately follow the key issues set out at page 4 herein):-

Chapter 4 - Was Mr. C.S. Hwang a "connected person"?

Chapter 5 - What information would qualify as a matter of law as relevant information on August 13th 1993?

Chapter 6 - What information did Mr. Hwang have - and did he know it was "relevant" on August 13th 1993?

Chapter 7 - If there was an insider dealing transaction does s. 10(3) apply?

Chapter 8 - Mr. Peter SIN Kit-leung

CHAPTER 4

CONNECTED PERSON

Of all the issues in the Parkview inquiry the one that has caused us the least difficulty is whether or not the evidence proves to a high degree of probability that Mr. C.S. Hwang was, on August 13th 1993 a person connected to HKPVG as defined by s. 4 of CAP 395. We are satisfied that it does and we accordingly find Mr. C.S. Hwang to be a "connected person" for the purpose of this inquiry.

We will summarize our reasons at the conclusion of this chapter. First of all however we outline the evidence and submissions on either side of the issue.

The part of s. 4 which applies to Mr. C.S. Hwang is that:

> "he occupies a position which may reasonably be expected to give him access to relevant information concerning the corporation by virtue of the professional or business relationship existing between him and that corporation."

(A) In support of the proposition we have been reminded of a number of matters:-

1. Mr. C.S. Hwang's office accommodation

When Mr. C.S. Hwang was Chairman, up until June 1992, of Ming Ren Investments and Enterprises Limited his office, as Chairman was on the 11th floor of Worldwide House in Central, Hong Kong. When he ceased to be Chairman no one moved into this office. It is still his office today. The 11th floor premises are now HKPVG's offices.

The company of which Mr. C.S. Hwang remains the Chairman, namely the Chyau Fwu Group has its office suite in the Parkview residential complex in Tai Tam. At the invitation of Mr. C.S.

Hwang's legal representatives the Tribunal visited both premises. As we understood it the main reason for the "view" was to see the relative sizes of the two offices as evidence that he was not a person connected to HKPVG. As a result of the visit we acknowledged that the Worldwide House office was indeed smaller than the Parkview office in Tai Tam (a fact which could have been agreed or produced by way of a plan). In other respects however the result of the view had the opposite effect on us from the one intended by Mr. Hwang's legal team. Both offices were lavishly, tastefully and expensively appointed. No observer could fail to be impressed by either of them. The offices in Tai Tam were vast and the office in Worldwide House, bearing in mind its location in the city centre, was also substantial.

In an attempt to distance Mr. C.S. Hwang from the Worldwide House office we were told that it was left as it had been before he resigned as Chairman as a "sort of shrine" to him and that his son George had not moved in when he became Chairman "out of respect". We think that a person who was revered in this way and who commanded so much respect is not a person who, in reality, became disconnected from HKPVG overnight on the day he resigned as Chairman in 1992.

Furthermore, as the evidence unfolded, we learnt that Mr. C.S. Hwang used the Worldwide House office more frequently than initially suggested. He told the Tribunal that it was his habit to go there early each day before the other senior staff arrived. He was also there at significant times over the week-end in question (August 13th - August 18th 1993) in connection with the placement at the centre of this inquiry.

Whilst we accept the respect in which the sons held the father we do not accept that this was the primary reason for C.S. Hwang's office in Worldwide House being left in tact for his use after his resignation as Chairman. We are satisfied that a more accurate explanation is that although his title, on paper, may have gone his authority, influence and power, in reality, continued.

Under this heading we mention two further matters which contribute to our finding that Mr. C.S. Hwang was a connected person.

Firstly, when the SFC team searched his office at Worldwide House they found in a drawer of his desk a name card. Only Mr. Hwang had the key to this drawer. The card is reproduced in Annexure M of this report. The Chinese Characters for "Hong Kong Parkview Group" and "Chyau Fwu Group" are the same. Mr. C.S. Hwang explained that he allowed his son George, to use the same characters and the same logo when the Parkview Group was so named on its incorporation in late 1992. There was considerable examination and cross-examination on the card which we do not consider it necessary to recite. The simple point is that Mr. C.S. Hwang's possession of this card in his desk is a small piece of evidence in support of the contention that if Mr. C.S. Hwang had, in truth, become wholly disconnected from Ming Ren, as it then was, in June 1992 no action or conduct or effort was undertaken to demonstrate this new state of affairs to the public. Mr. Ronny Tong, Q.C. has urged that the public's perception of Mr. Hwang's position in the company is not relevant. We agree in the sense that the perception or opinion of the man in the street is not, on its own, reliable evidence of Mr. Hwang's connection to HKPVG.

However we do place some weight on evidence of public perception. If we find, on the whole of the evidence, that Mr. C.S. Hwang is a person connected to HKPVG and we further find that the public's perception supports this finding almost universally, then it is open to us to conclude that the company approved of and even encouraged the public to think this way. If the company wanted him to be regarded as a connected person then that is a factor we should properly take into account in deciding if s. 4(1)(c) applies to him. We consider this aspect more fully in the following pages.

Secondly, we note the evidence of how certain members of staff and other business associates regarded him. Situated at the Worldwide House premises, wearing HKPVG staff uniform was Ms

Daisy Lo. She was described by George Wong as Mr. Hwang's Personal Assistant and the Senior Secretary of HKPVG. She was the longest serving secretary of the company. In 1993 she worked for both Mr. C.S. Hwang and George Wong. This is another minor matter when looked at in isolation but it nonetheless a carries some weight when assessing the overall picture. Why would someone with no connection to Parkview have his secretary in Parkview uniform at Parkview offices?

In evidence different witnesses described his connection to HKPVG in various ways such as, "the boss", the "senior man", the "role of a chief commander", "advisor to the board" and "the big boss".

2. Involvement with HKPVG business

Concerning the placement of 89 million HKPVG shares to UNIPEC, it was Mr. C.S. Hwang's evidence that when the subject first came up for discussion with Mr. Jiang in Beijing he was representing the family interests and was not negotiating on behalf of the listed company. Ultimately, as we know, it was "Kompass" who placed the shares to UNIPEC and HKPVG issued 89 million new shares to Kompass at the same price upon Kompass's application for that amount. The use of Kompass as an intermediate vehicle was purely to facilitate the completion of the placement to UNIPEC and was a very common mechanism for a placement. Here then was an example of a business deal with Mr. C.S. Hwang playing a crucial role which ended up as HKPVG business.

As evidence that he was a person who would "reasonably be expected to have access to relevant information ... by virtue of ... a business relationship existing between him and (HKPVG)" [as per s. 4(1)(c)] we note similar instances of deals, since his retirement, in which he was obviously involved which ended up as HKPVG business. In effect his involvement after his "retirement", brought business to the listed company. Some examples are:-

(i) The Beihei oil refinery: Mr. C.S. Hwang accepted in evidence that he was a party to negotiations concerning the possible development of an oil refinery at Beihei. On one occasion a newspaper article reported Mr. C.S. Hwang as having made an announcement on behalf of the company in connection with this project. We heard evidence that the press had "got it wrong". We acknowledge, of course, that press reports are from time to time factually incorrect and we would be wary in placing too much reliance on an individual newspaper article. When however we see a number of reports from different publications which have a consistent theme, then the cumulative effect is that they can and do provide support for the original contention, namely that Mr. C.S. Hwang was actively involved in deals which either were at the time or later became HKPVG business. In the Beihei example a deal was later signed between the listed company and UNIPEC.

(ii) The Hainan oil refinery: This provides a similar example. According to a press report Mr. C.S. Hwang made a detailed press statement about this project.

(iii) Indonesian oil: For several years Ming Ren had been involved in a search for oil in Indonesia. The two projects above (Beihei and Hainan) were possible refinery sites had the Indonesian exploration venture been successful.

There was a connection between all of them. Mr. C.S. Hwang was reportedly involved in all of them and HKPVG was involved in all of them. The company which was set up to pursue the Indonesian oil project was a company called Superpower Resource Limited. Originally Superpower was owned by Ming Ren Investments. In April 1993 it became a joint venture project and one more share was allotted to Superpower.

(iv) In November 1993 Mr. C.S. Hwang on behalf of Chyau Fwu Investment Limited sold the premises at 11/F Worldwide House (valued at HK$150 million) to HKPVG. Up until then HKPVG

had occupied the premises as Chyau Fwu's tenant.

(v) We quote two questions and answers from the evidence of Mr. Peter Sin:-

> "Q: ... had Mr. C.S. Hwang ever approached one of his sons and told him that he had become aware of a business opportunity which he thought they and the Parkview group might usefully explore further ...
>
> A: It happens very often.
>
> Q: Can you give the Tribunal any examples?
>
> A:For the vessels that travel between Hong Kong and Shenzhen, that is a deal negotiated by Mr. Hwang with the Mayor of Shenzhen; and also the property development site in Yangpao of Shanghai, that was also referred by Mr. Hwang; and also the placement of 20 per cent new shares to UNIPEC."

When considering the weight to be attached to references in newspaper articles which suggest to the reader that Mr. C.S. Hwang is a person connected to HKPVG we have observed that the company itself seems to have taken no steps to correct the impression which, in this inquiry, they say is an incorrect impression. We conclude that either the company did not want to correct the impression or it was not a false impression at all. Whichever it was the company was clearly content with the fact that he was regarded as a connected person. Such an attitude by the company is a factor which is relevant to ascertain whether or not the definition in s. 4(1)(c) fits Mr. C.S. Hwang. It is by no means conclusive but is nonetheless a factor. In this context we also recall the evidence of Mr. George Wong when he said words to the effect that "titles are not important in this company". He was not specifically referring to his father when he said this but it is nonetheless telling.

3. Mr. C.S. Hwang's role in going to Beijing on August 13th 1993

We remind ourselves that to be a "connected person" he must hold a position which may *reasonably be expected* to provide access to relevant information .... In this context it is useful to consider, briefly, the circumstances of his trip to Beijing when he met Mr. Jiang and some subsequent documentation relating to it. We say "briefly" at this stage because we will consider the trip in greater detail in the following chapter.

As will be seen from our conclusions in Chapter 6 we have found that Mr. C.S. Hwang had specific knowledge of the proposed offer of a placement to UNIPEC before leaving for Beijing on August 13th. It is in our view impossible to sustain an argument that a person who was able to and did make such an offer was not a connected person to HKPVG. Some time was spent in the course of the evidence on the issue as to whether the placement was to be an offer by HKPVG directly or whether the family company, Kompass, would sell the shares. In either event it was Mr. C.S. Hwang making the offer. On paper it would appear he had no authority to represent either. He was a director of neither. Nonetheless, the deal went through on Monday August 16th when the HKPVG Chairman Mr. George Wong returned from Shanghai. After landing at Kai Tak he was driven straight to Worldwide House where, within a very short space of time, he approved the deal, as Chairman. We consider that both his approval on the Monday evening and the Board meeting on the Tuesday morning were mere formalities. The deal itself, with Mr. C.S. Hwang as a prime mover, had been effectively sealed before George Wong's return.

Finally, we note some further aspects of the evidence which support the proposition of Mr. C.S. Hwang being a connected person.

(a) Contemporaneous documents: The contents of documents written soon after the placement have been closely examined in evidence. It has been submitted that they contain mistakes. Their meaning has also been carefully considered. Again, we

shall make closer reference to these documents later. However, we simply list, at this stage, some extracts from correspondence made at the time.

- The fax from UNIPEC was received at 11.09 a.m. on Monday August 16th 1993. It was sent to Mr. C.S. Hwang at HKPVG, 11/F Worldwide House. It reads "Reference is made to the agreement between you and the undersigned dated August 13th 1993,. We hereby agree to take up 89 million shares in the capital of your company ...."

- On September 21st 1993 a letter from HKPVG, signed by George Wong was sent to the SFC in answer to certain inquiries. It states, inter alia "Mr. George Wong ... Mr. HWANG Chou-shiuan (father of Mr. George Wong) and Mr. JIANG Yun-long ... commenced discussions on 27th April 1993 about various possibilities of mutual co-operation between the company and UNIPEC in pursuing business developments. On Friday 13th August 1993 Mr. JIANG Yun-long contacted Mr. HWANG Chou-shiuan to indicate UNIPEC's interest in pursing the aforesaid matters. A meeting was called the same afternoon at Beijing in which Mr. Hwang and Mr. Jiang were present."

- On October 7th 1993 HKPVG's solicitors Messrs Richards Butler sent a letter to the SFC, again in response to a request for information. It said "during the period from 28th April 1993 to 12th August 1993 there were various discussions between HKPVG and UNIPEC. However none of these discussions concerned the placement of HKPVG shares to UNIPEC. The discussions ... were of a general commercial nature .... All of the discussions were with Mr. Jiang of UNIPEC and HKPVG was represented either by Mr. George Wong or Mr. HWANG Chou-shiuan ...."

(b) The timing of these "discussions" involving Mr. C.S. Hwang is also important. Evidence was adduced that in December 1992 a proposed placement of 90 million HKPVG shares to another

company, also at $2.85 per share, fell through (see Annexure S). Thus at the time of Mr. C.S. Hwang's (and others) discussions with UNIPEC there was, in the background a desire of the Hwang family, which was very likely a continuing desire, to place out approximately 20% of the company and thereby inject over HK$250 million into the company.

(c) In this context we also note that Mr. C.S. Hwang's evidence to the Tribunal was different from what he had said in his statement to the SFC. It is clear that his original intention was to distance himself as much as possible from any prior knowledge of the placement. Accordingly he told the SFC that the very first mention of any placement was when Mr. Jiang raised the subject at dinner in Beijing. In evidence however he explained that he told Mr. Jiang that the net asset value of the HKPVG shares was considerably higher than its trading price. The conversation developed from there. It is highly probable that he abandoned his original version because he realized it was untenable.

(d) The air fares to Beijing for Mr. C.S. Hwang and his daughter Sally Chen were subsequently paid for by HKPVG. The company paid because the trip was related to HKPVG business. (The invoice is at Annexure R in this report.)

(B) Against the proposition that s. 4(1)(c) applies to Mr. C.S. Hwang we have considered the following matters:-

As Mr. Tong, on behalf of Mr. C.S. Hwang correctly stated, the evidence must show to a high degree of probability that Mr. C.S. Hwang is connected to either HKPVG or Kompass. In either case (proof of either will suffice) the relationship had to exist on August 13th 1993.

Mr. Tong emphasizes that the definition of a "connected person" in s. 4(1)(c) refers to a position which gives him *access to* relevant information by virtue of any *professional* or *business* relationship.

He makes the following submissions:-

(i) The relationship is a family and personal relationship not a professional or business one.

Whilst we agree that there are strong and obvious family ties between himself and his sons, such ties do not exclude the fact that such a relationship can be a business relationship as well. The existence of the former does not exclude latter. Where members of the same family work together in the same business their personal and business relationship has to co-exist. In this family based company we find that when Mr. C.S. Hwang resigned as Chairman of Ming Ren Investments it did not mark a sudden end to his business relationship with the company. The strength of the family connection is such that it would be very difficult to regard the personal and business relationships as separate.

(ii) The evidence suggests that although Mr. C.S. Hwang was involved in discussions with Mr. Jiang and UNIPEC prior to August 13th 1993 those discussions were confined to the oil business.

We do not accept this. By the very nature of Mr. C.S. Hwang's role in HKPVG business since his retirement as Chairman we do not think one can realistically compartmentalise the discussions and negotiations in which he was involved. To say that on one particular occasion he was wearing one particular hat and on another occasion a different hat is not a realistic reflection of his business life. Some people never completely retire - Mr. C.S. Hwang is, in our view, such a man. As already mentioned, although he was retired in name, he made daily visits to the office at Worldwide House. To contend therefore that on August 13th 1993 he went to Beijing wearing the Chyau Fwu oil business hat and none other is not consistent with the true picture.

(iii) It is argued that Mr. C.S. Hwang had no authority to act on

behalf of or represent HKPVG either in general or more particularly in the placement to UNIPEC.

It is of course true that there was no official delegation by the Board of Directors to empower Mr. C.S. Hwang to act on its behalf. Our attention was also drawn to the evidence which suggested that neither George Wong nor Peter Sin knew in advance that Mr. C.S. Hwang would make an offer of a placement to Mr. Jiang over dinner in Beijing.

Our response to this submission is substantially the same as already stated in (i) and (ii) above. However, Mr. Tong makes an additional point. He submits that even if Mr. C.S. Hwang had been given the express authority to represent HKPVG on August 13th then he still could not be regarded as a connected person within s. 4(1)(c) because the section expressly requires the relationship between the person and the company to be an *existing* one. He argues that only a pre-existing on-going business relationship will suffice. We do not agree. An "existing" relationship is one that has come into existence at the time of or at any time prior to the time of the dealing which is alleged to be insider dealing. Existing means in existence. It would be sufficient for example if the relationship had come into existence by virtue of and only because of being given authority to act on the company's behalf for that particular deal.

In our case of course the point is academic because we have found that Mr. C.S. Hwang's unwritten power within the company (power that may have been diluted but was not dissolved at the time of his resignation) caused the necessary relationship to exist.

(iv) It is submitted that the name card found in Mr. C.S. Hwang's locked desk at Worldwide House is a "red-herring".

(v) It is submitted that the perception of Mr. C.S. Hwang's position by the press is irrelevant.

We have dealt with points (iv) and (v) in the first half of this chapter.

(vi) Finally, it is submitted that the use of the expression in s. 4(1)(c) that the position is one which "may reasonably be expected to *give him access to* relevant information" means that the information must have been given to him by virtue of his position.

Provided that it is remembered that the words must be read together with those which precede them, namely "reasonably be expected to" we agree with this submission. Put another way, if his position is such that he is likely to be privy to inside information then this ingredient of s. 4(1)(c) is satisfied. We deal with the issue of what information he actually had on August 13th 1993 in Chapter 6. It will be seen that we have concluded that the offer of the placement to Mr. Jiang over dinner on August 13th could not have been a sudden frolic of his own.

Conclusion

One has to look at the definition in s. 4(1)(c) as a whole. If one dissects it into small components and analyses each component separately, one loses sight of the sort of relationship which the legislation intended. By adding this more general sub-section i.e. (1)(c) after the more specific categories in s. 4(1)(a) and (b) it is plain that the legislation intends to include in the definition of connected persons, persons who are not connected by easily definable positions such as directors and employees but are connected in some other more general way.

We have no hesitation in deciding that the position occupied by Mr. C.S. Hwang on August 13th 1993 in relation to HKPVG was the very type of relationship envisaged by this sub-section. The logical conclusion of the submission advanced on behalf of Mr. C.S. Hwang is that he was a connected person to Ming Ren Investments on June 3rd 1992 but was not on June 5th 1992. In view of the evidence we have heard, with respect, that cannot be right.

CHAPTER 5

RELEVANT INFORMATION - LAW

This chapter deals with the question of what constitutes "relevant information" for the purposes of insider dealing as defined in s. 9 of CAP 395.

We start by repeating the statutory definition in s. 8 of CAP 395 which defines "relevant information" as:-

> "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."

The definition sub-divides into three parts and we will examine the submissions on law made in respect of each three in order to determine the test to be applied for each part in the context of this inquiry.

The three ingredients which flow from the definition are:-

(i) It must be "specific"

(ii) It must be "not generally known to those persons who ... etc. ...."

(iii) It must be "likely materially to affect the price"

At the conclusion of this chapter we will state what information Mr. C.S. Hwang and Mr. Peter Sin must have been in possession of at the time of buying before a finding of insider dealing can be made. Text books list examples of "information" which has, on the facts of each case, qualified as relevant information. So, in this chapter, our task is to say what sort of information, as a matter of law, should be included in such a list.

1. “Specific”

We are concerned in the Parkview inquiry with information relating to a placement. By the evening of Monday August 16th 1993 the placement was finalised upon approval by George Wong. The material details were that it was with UNIPEC (a PRC oil conglomerate) for 89 million HKPVG shares at $2.85 per share. The method of the placement was by the “top-up” method through Kompass whereby the shares would be sold by Kompass who would then subscribe for 89 million new shares to be issued by HKPVG.

The starting point of Mr. Tong’s submission is that to qualify as relevant the information known at the time of dealing must have consisted of, at least, the above details. His first submission is that no relevant information had come into existence until the evening of Monday August 16th when HKPVG’s Chairman, Mr. George Wong formally approved the deal. As a fall back position he submits that if (which he does not accept) relevant information could have been in existence on Friday 13th it must be knowledge that the placement in its detailed form was about to be offered together with knowledge that its acceptance was a mere formality - a virtual certainty.

Mr. Marash submits the test need not be so precise. In our legislation only the word “specific” appears whereas the definition in U.K. legislation includes the words “specific or precise”. It is generally accepted that the definition of specific includes information which may be precise but it does not have to be precise to be specific. Non precise information can be specific. Non precise specific information can be even vague provided it is not mere rumour.

In the text “Insider Dealing” 2nd Edition by Brenda Hannigan she cites, at page 63, as the best example of information which is specific as knowledge of an impending take-over bid. She goes on to say:-

> “Equally specific would be knowledge of a forthcoming share placing even if the details were not known.”

The authority she cites in support is R v. Cross [1991] IBCLC 125, a decision of the Court of Appeal in England. There was much debate in our inquiry as to whether R v. Cross was in fact an authority for such a proposition or not. Mr. Tong submits that it is an authority for the proposition that information that a placement is about to be made is price-sensitive information but it is not authority for the proposition that it is specific information.

He observes in further support that in s. 9(1)(b), (d) and (f) of CAP 395 which are sub-sections which deal with take-over situations, the word "contemplated" is included. Whereas in sub-sections (a), (c) and (e) the word "contemplated" does not appear. Therefore, he argues that a contemplated placement without further details should not be regarded as specific information.

He directed our attention to authorities from a variety of jurisdictions. The cases referred to included:-

> Green v. Charterhouse Group Canada Ltd. [1973] 35 DLR 161 and [1976] 68 DLR 592, the latter reference being the decision on appeal by the Ontario Court of Appeal.
>
> Ryan v. Triguboff [1976] 1 A.C.L.R. 337 - a successful appeal in the New South Wales Supreme Court against a Magistrates conviction
>
> Commissioner for Corporate Affairs v. Green [1978] V.R. 505 (Supreme Court of Victoria). Another Magistrates appeal
>
> Charles Chan Sing-chuk v. Innovisions Ltd. [1992] 1 HKLR 254 C.A.

On the cases generally we make a few cautious observations. Firstly, the exact words of the statutes which were under discussion in these cases were not always the same as each other nor the same as H.K. legislation. For example the Supreme Court of Victoria was considering a section which did not require the information to be "specific". In Canada the decision concerned a person making use of

"specific confidential information". Secondly, each counsel was able to extract different parts of the various judgements both in support of and in opposition to a given proposition. Thirdly, the facts of the cases were in general complex and in one particular case, extremely complex. Each is a decision on its own facts (none of which could be said to be strikingly similar to our case) and whilst this Tribunal finds them helpful and of interest, bearing in mind their status as authority is no more than "persuasive", we are unable to glean from them any ruling which is of obvious and direct application to the facts of our case.

There are a number of facts which are peculiar to our case which inevitably have an influential bearing on how we determine what information passes the test of relevant information on Friday August 13th 1993. Such factors, if proved, include

- the placor was a H.K. 2nd or 3rd liner stock

- the placee was related to very large PRC oil companies. UNIPEC was a joint venture company formed between SINOPEC (China Petrochemical Corporation) and SINOCHEM (The China National Chemicals Import and Export Corporation)

- the placement involved a substantial sum of money which would result in an injection of cash in excess of HK$250 million to HKPVG

- at the material time (mid 1993) there was a positive sentiment among investors in the Hong Kong market which favoured "China concept" shares

- the time frame within which the placement was negotiated, offered, finalized and announced.

Accordingly, a detailed examination of the cases would not serve a useful purpose. The decision in R v. Cross was the centre of most of the debate between counsel. Brenda Hennigan cites it in support of a particular example of information being specific. Mr. Marash argues that it is an authority for such a proposition. Mr. Tong

argues that it is not. This Tribunal accepts that as an authority for a particular proposition (viz. that knowledge of a forthcoming placement is specific information even if the details are not known) it is not a perfect authority. The distinguishing features which Mr. Tong highlighted are valid. However it does not follow that the proposition is wrong. A good authority is not a pre-requisite of a good proposition, especially when dealing with relatively recent legislation. This Tribunal considers the proposition in general terms to be correct. However it need not apply in every case. We respectfully venture to improve the text by adding one qualifying word and also by adding one further condition.

Firstly, the words "capable of" should be inserted as follows: Knowledge of a contemplated placement is capable of being specific information even if the details are not known.

Secondly, these conditional words should be added "provided that the offeror has reason to believe that the offer will be accepted".

This does not go as far as Mr. Tong urged in his alternative submission, namely that there should be a very high degree of probability of acceptance. Nor does it accord with Mr. Marash who submitted that mere knowledge of a contemplated placement would suffice.

In conclusion if there is evidence which satisfies the Tribunal that Mr. C.S. Hwang and/or Mr. Peter Sin, at the times they dealt, were in possession of information that Mr. C.S. Hwang on behalf of HKPVG would offer Mr. Jiang on behalf of UNIPEC a substantial placement of shares and that Mr. C.S. Hwang had reason to believe that the offer would be accepted, then the information they possessed was specific for the purposes of s. 8 and s. 9(1)(a) CAP 395.

2. "Not generally known ..."

To be relevant it must be "not generally known to those persons who are accustomed or would be likely to deal" in HKPVG shares.

No issue has arisen in this inquiry that the information may have been generally known at the time of dealing. It is common ground that

if any relevant information did exist it must have been confidential information which had not been released to the public.

The second half of this ingredient, namely "persons who are accustomed or would be likely to deal in the listed securities of that corporation", was canvassed by Mr. Tong in his final submissions. He submitted that the group of people envisaged by this phrase is the ordinary reasonable investing public ascertained objectively and not confined to a particular group. We agree. It should be observed that the definition concludes with the words "the listed securities of *that corporation*". It could be successfully argued that some stocks are simply never considered by some classes of dealer. That argument could only rarely be sustained. It does not arise in this case. If HKPVG shares are shares which from time to time are bought and sold by small investors on the one hand and also fund managers and institutional buyers on the other, then the investing public at large is what is envisaged by this part of the definition.

Accordingly the information ceases to be "relevant information" for the purposes of insider dealing when it is publicized. In our case nothing turns on when that moment is because on any view the alleged insider dealing took place days beforehand. It is nonetheless a matter of fact and accordingly we will deal with it in the following chapter.

3. Likely materially to affect the price of those securities

Under this heading we emphasize at the outset that we are concerned here with the information in possession, if any, of those who dealt *at the time they* dealt. We are conscious of the fact that there are at least some differences between the information which was ultimately made public and the high water mark of the information which may have been available on the Friday morning. We are only concerned with the latter. Thus we take as our starting point when deciding the law relating to the "materiality" issue the test we have laid down in part 1 of this chapter. The question therefore is - is information, known on Friday 13th 1993 in the morning, that Mr. C.S. Hwang was going to offer Mr. Jiang on behalf of UNIPEC a substantial placement of shares and that Mr. C.S. Hwang had reason to believe that it would be accepted, information

which was likely materially to affect the share price?

The evidence and our findings in relation to this issue are more fully dealt with in Chapter 6. It is necessary however to touch on some of the factual matters when considering the legal aspects.

Our attention was drawn first of all to the oft quoted passage on the Malaysian case of Public Prosecutor v. Alan Ng Poh Meng [1990] 1 MLJ in which SDJ Foenander elaborated on the same phrase in the following way:-

> "Information that is *likely* materially to affect the price is information which *may well* materially affect the price. Put another way, it is more likely than less likely that the price will be affected materially. The further element of the statutory test concerns materiality .... It may be that what is a material price increase in one case may not necessarily be a material price increase in another case. It all depends on the share and the circumstances obtaining at the time. However, the standard by which materiality is to be judged is whether the information on the particular share is such as would influence the ordinary reasonable investor, in deciding whether or not to buy or whether or not to sell that share. A movement in price which would not influence such an investor, may be termed immaterial. Price is, after all, to a large extent determined by what investors do. If generally available, it is the impact of the information on the ordinary reasonable investor, and thus on price, which has to be judged in an insider dealing case."

Quoting this passage Mr. Tong submits that the evidence of Mr. Alex Pang (who headed the surveillance unit at the SFC at the material time) is of no assistance to the Tribunal because he merely interpreted the causes of the share movement after the announcement on Tuesday 17th August i.e. it was with hindsight and was not an evaluation of what effect the information known on Friday 13th would be likely to have had, had it been known to the public at that time.

There is some merit in his criticism. However it is based on the premise that "the information" alleged was merely that an offer was

going to be made whereas the information announced on the Tuesday was that an agreement on a placement had been reached.

Our ruling (p. 39 supra) however is that the minimum requirement to satisfy the test of "specific" is that the "information" must, additionally, include a "reason to believe that the offer would be accepted". The question therefore becomes this - was there a real likelihood that the investing public would react, so as materially to affect the price, if it were known that an offer was going to be made and the offeror believed that agreement would be reached. When testing, objectively, the likely public reaction it is therefore reasonable to start with the premises of a forthcoming successful placement rather than a forthcoming possible placement. It is on this basis that we will decide, in the next chapter, what inferences can be properly drawn from the evidence particularly that of Mr. Alex Pang and Mr. Andrew Biggs.

Of course there can be no certainty about what will happen to the share price in the future. Both Mr. Pang and Mr. Biggs have considerable knowledge and experience about H.K. stocks. Using that knowledge and experience they are able to make a valuable assessment of the likely effect on the share price. However, it can, necessarily only be an assessment. The P.I.I.L. report at p. 239 puts it as follows:

> "The test is hypothetical in that on the date that the insider acts on insider information, he acts when the investing public, not in possession of the insider 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."

So, now that we have made a ruling as to what amounts, in this

case, to specific information and now that we have defined the test of materiality, our next task is to determine as a question of fact whether the information he had at the material time passes the test of being relevant.

Knowledge.

Before moving on to consider the facts the final matter of law, in this chapter (we deal with the law relating to the s. 10(3) defence as a separate issue in Chapter 7), concerns the question of knowledge.

If we decide that relevant information as defined by s. 8 existed at the time of the alleged insider dealing we must return to the definition of insider dealing in s. 9(1)(a) and remind ourselves that the evidence must show that the dealer "knew" that the information in his possession was relevant information. Did C.S. Hwang or Peter Sin know on Friday 13th August that the fact that an offer was going to be made and had reason to believe would be accepted was a fact which, if generally known, would have a real likelihood of materially affecting the price? The question is not did he know the price would go up, the question is, in short, did he know he was privy to specific price sensitive information?

The test of "knowledge" is a subjective test. It is usually determined by inference. If it is part of a man's case that he did not know something there is unlikely to be any direct evidence of what he did actually know. One has to examine the surrounding circumstances and consider what events occurred before and after the material time to see if they throw any light on what he truly knew. Our attention has been drawn to authorities in criminal law on the meaning of "knowledge". We accept that as the Ordinance uses the word "knows" on its own and does not, as it could have done, add words such as "or believed", then only actual knowledge will suffice. Thus the evidence must satisfy us that it was highly probable that he knew the information in his possession was relevant.

CHAPTER 6

RELEVANT INFORMATION - THE FACTS

The events of the morning of August 13th 1993 are undoubtedly the most crucial part of our inquiry. What happened and where and in whose presence are key factors from which inferences may be drawn concerning Mr. C.S. Hwang's knowledge at the time he instructed his broker to buy one million HKPVG shares.

It is an agreed fact that the order was placed in the morning on August 13th. It is agreed that a total of 974,000 shares were bought by a number of lots purchased throughout that morning and afternoon. It is agreed that Mr. C.S. Hwang and his daughter Sally Chen left Hong Kong on his way to Beijing at 12:09 p.m.

In this chapter we make our findings in relation to a number of other matters which are not agreed and about which we have heard conflicting evidence.

It is suggested that Mr. C.S. Hwang attended a meeting during the morning of August 13th at his office in Worldwide House. It is suggested that, at least Mr. K.P. Fung was present at the meeting and that the purpose of the meeting was to discuss the forthcoming placement which, at the time, C.S. Hwang knew was to be with UNIPEC. Mr. C.S. Hwang's evidence is that there was no such meeting because the question of a possible placement did not arise until it was mentioned by chance at the dinner in Beijing with Mr. Jiang on the evening of August 13th. The first question to be answered therefore is:-

A. Was there a meeting in the morning of August 13th 1993?

The Tribunal is satisfied that the evidence proves to a high degree of probability that a meeting did take place on this morning at which, at least, Mr. C.S. Hwang and Mr. K.P. Fung of Goodwill were present. The witnesses whose evidence, in part, touched on this question included C.S. Hwang, Peter Sin, K.P. Fung, Sammy

Leung, Charlmane Wong, Alice Lee, Sally Chen and George Wong. There were differences in everybody's recollections. Simply because the totality of the evidence results in a confusing picture does not mean that we cannot make a firm finding of fact. This is particularly so when we conclude, as we do, that one of the reasons for the confusion is a desire on the part of some of the witnesses to conceal the fact that there was such a meeting and not solely because of poor recollection on the part of all the witnesses.

We highlight those parts of the evidence which have made the most significant contributions to our coming to this conclusion.

(i) Mr. K.P. Fung's evidence

Mr. K.P. Fung and Mr. C.S. Hwang had known each other for many years. They were friends. There is no doubt that K.P. Fung met C.S. Hwang in connection with the placement. He was Mr. Hwang's financial advisor and had been, either formally or informally, on many occasions in the past. Mr. K.P. Fung told us that prior to mid August 1993 he and Mr. C.S. Hwang had often met for business purposes. As to the date on which they first met to discuss the placement Mr. Fung's evidence to the Tribunal differed somewhat from what he had said to the SFC when he made his first statement to them.

His first interview was on November 18th 1993, 3 months after the events about which he was being questioned. His evidence to the Tribunal included his confirmation that the November 18th statement contained the truth as best he could remember it at that time. The statement contains the following passage:-

> "In mid-August, the Director of Corporate Finance, Sammy Leung and I went to Parkview to have a meeting about the technical matters about the placement and the procedure for the notice to be put up as required by the SEHK rules. The meeting was in a great hurry. As I remember, on the day, the people present might include George Wong, the

son of Mr. Hwang and Peter Sin. After the meeting was over Mr. Hwang said he had to leave Hong Kong. He was in a hurry to catch a plane. Mr. Hwang didn't say he wanted to place shares. He only asked me about the procedures. Therefore I didn't know who the placee was. It should be 2-3 days later. It was only when Mr. Hwang came back from Beijing did I know the placee is UNIPEC."

When giving evidence before the Tribunal his recollection about the date of the first meeting and the number of meetings he attended was more vague and uncertain. He said his actual memory on the first meeting was quite confused. He said that since making his first statement and as a result of discussing the events with Sammy Leung he was relying on Sammy Leung's recollection (Sammy Leung on the other hand, in evidence, said that he was relying of K.P. Fung's recollection). In answer to Mr. Marash he confirmed that there must have been 3 meetings on the matter but in answer to Mr. Tong he said he had only attended 2 meetings. In re-examination by the Tribunal he agreed there could have been a meeting on the 13th but finally to Mr. Tong again, said he "I don't think so".

We will refer as this chapter progresses to the evidence and statements of other witnesses on this issue. We have considered it all. In concluding that there was a meeting in the morning on Friday 13th we have taken into account on K.P. Fung's first statement to the SFC. We accept that it does not accord with his evidence in court but it does assist us decide where the truth lies.

Even in an inquiry such as this where the rules of evidence are not applied with the same strictness as in conventional litigation, placing reliance on a previous inconsistent statement should only be done with caution. Such a statement is clearly relevant to the issue of the witnesses' credibility. Here, we take it one stage further because we find that particular parts of the content accurately reflect what happened. The statement was made nearer the material time and was "the truth as best he could

remember it at that time".

The "particular parts" to which we refer are that:

- "the meeting was in a great hurry"
- "he had to leave Hong Kong. He was in a hurry to catch a plane"
- "he only asked me about the procedures"

Mr. Fung could not have been confusing Mr. Hwang's desire to catch a plane in a hurry with any other occasion other than his departure to Beijing on Friday 13th. Mr. Hwang made no other trips at that time about which any confusion could have arisen.

Furthermore he recalls the *first* meeting as one where technical procedural matters only were discussed. This is only consistent with a meeting which took place before the offer was made to and accepted by UNIPEC. It is clear to us that a preliminary meeting at which no details about volume, price, the identity of the placee or the placement method took place. Such a meeting would not and did not occur after Mr. Hwang's return from Beijing. Mr. Fung confirmed also, in evidence, that after his first meeting he did not take any steps, such as issuing instructions to prepare documentation, because it was a preliminary meeting.

Details, such as price and placee, and instructions to prepare documentation would naturally occur once Mr. Hwang had come back. There is no doubt that Sammy Leung gave Charlmane Wong instructions to start drafting the documentation at about lunch time or early afternoon on Saturday 14th. Sammy Leung told us these instructions followed *his* first meeting on the matter. If this was his first meeting it means that he had not been at the meeting on the previous day. If he was at the meeting the previous day he has either forgotten about it or chosen not to tell us about it. In evidence he said he had no recollection about any conversations or references to being in a hurry to catch a

plane. As we have said, such a conversation could only have been on the Friday. If he had not been there he would not have heard it. However his explanation for not remembering was that sometimes Mr. Hwang speaks in Mandarin and if so he would not have understood it. There was no suggestion that K.P. Fung and C.S. Hwang ever talked to each other in Mandarin. We regarded his reference to the possibility of their conversing in Mandarin as an unnecessary addition by Mr. Sammy Leung consistent with his desire to distance himself from both the fact of and his attendance at the Friday meeting.

It is not necessary for us to make definitive findings of fact about who was in attendance at the Friday meeting once we are satisfied that, at least K.P. Fung and C.S. Hwang met. A "meeting" in this context does not mean a formal "round the table" gathering. It means no more than at least two people discussing a matter together. It is interesting to note that on more than one occasion later correspondence on the matter refers to George Wong being present at an early meeting. Where the correspondence refers to that meeting as being on the 14th it is agreed by all that George Wong could not have been there because he had gone to China on that day. However he was in Hong Kong on Friday 13th and if the correspondence was referring to the *first* meeting George Wong could have been in attendance. As Chairman of HKPVG it would have been logical for him to be there.

(ii) Mr. C.S. Hwang's account:

Having found as a fact that there was a Friday meeting we must now consider Mr. C.S. Hwang's evidence as to what he said he did that morning. It is fundamental to his evidence that there was no meeting. In the same context we consider his evidence as to why he went to Beijing that day.

The tickets had been booked a day or so earlier by Mr. Hwang's secretary, Daisy Lo. The tickets must have been booked on an earlier day because both C.S. Hwang and Sally

Chen described their original plan to catch a flight at about 8.00 a.m. on Friday 13th. When they awoke on the Friday morning they both knew they were going to Beijing that day. Their early departure was only delayed because Sally had to renew her visa in the morning. This version, which we accept, is inconsistent with the account given in the Richards Butler letter of October 7th 1993 in which it is stated -

> "Jiang contacted Hwang on Friday 13th August 1993 by telephone to set up a meeting to discuss a potential oil contract in Indonesia. It was agreed that a meeting be held in the afternoon of the same day subject to flight availability."

We are satisfied that the tickets were booked in advance because Mr. C.S. Hwang's trip to Beijing was planned in advance of the 13th.

He told us that the purpose of the visit was twofold: firstly to see Mr. Jiang and explain to him that the Beihei oil refinery project had fallen through and secondly to visit the grasslands of Mongolia with his daughter, Sally Chen. He had served as a soldier in Mongolia some 40 or 50 years earlier and wanted to revisit the area. The Tribunal rejects his evidence on both these matters.

Our reasons for rejecting the explanation concerning the Beihei refinery are firstly because he never mentioned it to the SFC when they interviewed him. It is surprising that when he was interviewed by the SFC he gave no explanation relating to business at all for his trip to China. He knew that he was being interviewed in connection with an investigation in which the reason for his trip to China would play a very important part and yet his only explanation was that it was part of a sentimental journey. It is only later, after realizing the implausibility of this explanation as the *sole* reason for the trip that the Beihei explanation is given in evidence. Secondly, there is no logical explanation for C.S. Hwang to travel to Beijing to have dinner

with a representative of UNIPEC so as to tell him why a project had fallen through. Such matters could easily have been dealt with by correspondence, fax or telephone or a combination of all three not in the manner suggested by Mr. Hwang.

Our reasons for rejecting the Mongolia explanation are these:

(a) Mr. Hwang says that the reason he and Sally did not actually go to Mongolia that week-end was because the placement matter came up during conversation with Mr. Jiang during or soon after dinner in Beijing and therefore he decided to change his plans and return to Hong Kong urgently the next day. Therefore up till about 8:00 p.m. on the Friday evening the trip was still on. However no plans or inquiries had been made. They had no tickets to go there from Beijing, they had not made any inquiries with travel agents either in Hong Kong or Beijing about travel times, hotels, visas etc. With all Mr. C.S. Hwang's connections in the travel business one would have expected some preliminary arrangements to have been made in Hong Kong before they left. Having arrived in Beijing at about 4:00 p.m. for a trip which was only intended to be a 2-3 day tour at most it would then have been natural to make arrangements for the Saturday and Sunday in the afternoon of Friday 13th, in Beijing, at the latest. Sally Chen was there for that very reason plus as a companion in case there were any problems concerning Mr. Hwang's health.

(b) Mr. Hwang said he changed his mind about going to Mongolia at about midnight. He therefore did not wake up Sally to tell her but waited till he awoke the next morning. In order to catch an early plane at about 8:00 a.m. he woke up at about 5:00 a.m. or even earlier and then woke Sally to tell her about the change of plans. Strangely though he did not tell her why the

plan had been so abruptly changed. According to Sally's evidence she was never told why her trip to Mongolia was aborted - even when they sat next to each other on the return air flight. Furthermore, the sentimental journey to Mongolia has never been revived or ever mentioned as a possibility since.

If, as Mr. Hwang told us the placement was first mentioned after dinner in Beijing and if, as Mr. Hwang told us, he considered it a matter which necessitated a complete reversal of plans we fail to understand why he did not tell Sally of the new arrangement that night. We believe the reason was that there was no "new arrangement". It was always intended to be a one night visit.

(c) There was also a stark conflict of evidence between Mr. C.S. Hwang's version and Sally's version of what they did on the Friday morning before going to the airport. It was common ground that Sally had to get a new visa. Her evidence was that she could not recall which building she went to in order to apply for and get a new visa but she did recall that her mother and father waited with her in the waiting room whilst it was being processed. The chauffeur waited outside. Mr. Hwang however did remember which building it was - it was the China Resources Building in Wanchai but he recalls that he waited in the car together with his wife and the chauffeur for at least an hour. We have been told that it is possible to get a visa for China in about one hour. Even if Sally was fortunate to get one so quickly we do not think that Mr. C.S. Hwang is the sort of person who would wait in the waiting room or in his car not knowing how long it would take. The two different versions have one thing in common. They keep Mr. Hwang away from his office in Worldwide House. However quickly Sally got her visa we are sure that at that time Mr. Hwang was in discussion with

Mr. K.P. Fung at least.

(d) If the first mention of the placement was made on the Friday evening and, as Mr. Hwang suggested, it was only in general terms we find this inconsistent with his desire to return to Hong Kong as a matter of urgency and cancel the main reason for the visit. The little and general information he had gathered over dinner could easily have been passed on to Peter Sin or other executives of HKPVG for them to deal with in Hong Kong.

To conclude this issue we have formed the certain view that the Mongolia trip was first raised to conceal the true reason for the journey. As a piece of untruthful evidence we infer from it simply that the real reason, bearing in mind that there was a Friday morning meeting, was to discuss the forthcoming placement which had a reason to believe would be accepted. It is not a piece of untruthful evidence from which we make an inference of insider dealing but we do draw the inference of fact that the true reason for the journey was as we have stated.

(iii) Contemporary documents:

Once again it is helpful to examine documents created at the time, in this context, to see if they throw light on the issue of whether a meeting took place on Friday morning, August 13th.

On August 20th 1993 Goodwill Capital received an inquiry from the SEHK (Annexure H) in which their first question was:-

"1) When did the negotiation on the placement and the subscription start and what parties were involved?"

The first draft of Goodwill's response was prepared by Charlmane Wong. It is dated August 20th but it was never sent because its contents were amended. This first draft is at

Annexure I. As can be seen it contains crossings out and handwritten notes. The second amended version, which ultimately went out on August 31st is at Annexure J.

The opening remarks in Annexure I are:-

> "The discussion on the placement and subscription commenced on Friday 13th August. A meeting was held in the morning between the company (Mr. HWANG Chou-shiuan and Mr. Peter Sin) and Goodwill Capital Limited (Mr. K.P. Fung and Mr. Sammy Leung).

The amended version reads:-

> "Formal discussion on the placement and subscription commenced on Friday 13th August 1993."

It is submitted on behalf of Mr. C.S. Hwang that no weight should be attached to the first draft because it was never sent out because it contained mistakes which were amended. It is further submitted that the opening sentences of the amended version refers to the meeting in Beijing in the evening. If the purpose of the amendment was to tell the reader that the first discussion on the placement took place in Beijing - on Friday evening - between Mr. Hwang and Mr. Jiang, it is surprising that the document did not say so. It is also surprising that the "mistakes" in the first draft were not specifically corrected. The first draft says it was "in the morning". The second draft does not say it was in the evening. The first draft could only mean that the meeting was in Hong Kong. The second draft does not say it was in Beijing. The first draft states who was present (in answer to the question - "what parties were involved?"). The second draft is silent on the subject of who took part in the discussion.

In the course of the evidence much was said about who made the alterations, who saw them, on whose instructions they were, what they meant and so on.

Charlmane Wong prepared both documents. She said she consulted Sammy Leung before the first draft. We do not accept the suggestion that some of the information contained in the first draft may have been as a result of her own guesswork or assumption. We note here, that when drafting the announcement of the placement on the 14th and 16th August she put, for example "X" Co. or "Y" Co. when she did not know the identity or it had to be excluded for security reasons. We believe that she would not have included any information unless she had been given the information or it was within her own knowledge. This of course begs the question as to whether the information was correct or not. However a phrase such as "in the morning" would not have been included without a reason.

The first draft was sent to Peter Sin for his perusal and comment before it was sent to the SEHK. Sammy Leung signed the fax cover on which is typed:-

> "We enclose a letter from the Stock Exchange containing some inquiries into the placement and our draft reply to the letter. Please peruse our draft reply (especially point(1)) and give us you comments on it, if any, before we submit it to the Stock Exchange."

We do not accept Sammy Leung's evidence that he did not read the draft when he signed the fax cover sheet. We are satisfied that the only reasonable explanation for the fact that the typed request specifically refers to "point (1)" is that he knew what answer had been written to point (1). It logically follows that he had made no attempt to alter it himself albeit knowing what it said.

Our final analysis is that, although we are careful not to place undue weight on the first draft on its own as evidence of what happened on the Friday morning, we do find that the combined effect of both documents and the witnesses'

comments thereon, does add weight to our conclusion that there was a Friday morning meeting.

B. What information did he have at the time of the morning meeting on Friday 13th?

Having established that a meeting took place and having established that the only reasonable inference to be drawn from the fact of the meeting is that its purpose was in connection with the forthcoming placement, we must now consider the extent of C.S. Hwang's knowledge at that time.

If the extent of his knowledge was that he had decided to go to Beijing, arrange a meeting with Mr. Jiang when he got there and then offer him a 20% placement in HKPVG without any previous discussions and having no idea whether Mr. Jiang would find the offer attractive or not then such knowledge would fall short of the test we have laid down as to what, in this case, qualifies as relevant information.

We are satisfied that the information he had was greater than this. Our conclusion is based on a common sense evaluation of the evidence of what was happening generally before the 13th and the pace at which things developed after the 13th. These two things must be considered together and not in isolation of each other.

(i) Before the 13th:

We have already made findings in Chapter 4 about Mr. C.S. Hwang's involvement, directly or indirectly, with HKPVG business. He knew Mr. Jiang, he had met him before. We refer again to HKPVG's letter of September 21st 1993 to the SFC:-

> "George Wong ... and C.S. Hwang ... and Mr. Jiang ... commenced discussions on 27th April 1993 about various possibilities of mutual co-operation between the Company and UNIPEC in pursuing business developments."

(The letter goes on to say that it was Mr. Jiang who contacted Mr. Hwang by phone on the 13th as a result of which Mr. Hwang immediately flew up to Beijing. But see our comments on this at page 49 supra.)

and to Richards Butler's letter of 7th October 1993, also to the SFC:-

> "Between 28th April 1993 and 12th August 1993 there were various discussions between HKPVG and ... UNIPEC .... All of the discussions during the period were with Mr. Jiang ... and HKPVG was represented by either Mr. George Wong or Mr. HWANG Chou-shiuan."

(The letter emphasizes that these "various discussions" never concerned a possible placement.)

We remind ourselves also that an almost identical proposed placement had fallen through in early 1993. The idea of a possible placement of approximately 20% of the Company by placing HKPVG shares through Kompass had been in existence since October 1992 (See Annexure S). We think it probable that the failure of one placement did not result in the abandonment of the strategy generally.

In these circumstances we cannot accept that the first seeds of the placement were sown on Friday 13th. We cannot accept either that Mr. C.S. Hwang flew to Beijing on a secret frolic of his own to offer the placement to Mr. Jiang. We do accept that it may have been embryonic but not conceived on August 13th.

We find support for this finding by considering also the events:-

(ii) <u>After the 13th</u>:

The most significant feature of the post 13th events is the

pace at which they happened. Mr. C.S. Hwang arrived back in Hong Kong in late morning on Saturday, August 14th 1993. The announcement of the finalized deal was made by the SEHK at 10:02 a.m. on Tuesday, August 17th. On the one hand we accept that placements *can* be done quickly. Mr. Andrew Biggs of Richards Butler who gave evidence on Mr. Hwang's behalf used expressions such as "within 24 hours" and "on the back of an envelope" when asked to give his experience (which was considerable) about how and how quickly placements could be done. On the other hand however we have a piece of evidence from Sammy Leung which paints a different picture when dealing with PRC companies. He was referred to Annexure C, the first draft of the public announcement of the placement, on which a number of handwritten queries appear which were written by someone at the SEHK. Query No. 8 states "Please send us a confirmation letter either from the relevant PRC authorities or from the financial advisor that no approval is required to make this investment" (i.e. UNIPEC's purchase of 89 million shares). Mr. Leung told us that if such approval was necessary it could take between several days and several weeks to obtain it. We appreciate that, because we do not know for a fact whether or not approval was required, we cannot conclude that it was impossible to open and close a placement deal between a Hong Kong listed company and a state owned PRC company in a reasonably quick time. However we do not overlook his answer when deciding whether this particular deal could have been conceived on Friday evening August 13th and healthily produced to the public on Tuesday morning, August 17th - one and a half working days. It was said by a number of witnesses that between Saturday lunch time and Monday morning no work was done on the matter in Hong Kong.

On the premise that HKPVG knew in advance of Friday 13th that they would be making an offer to UNIPEC the speed at which they made the necessary arrangements, documentation and held a Board meeting is not surprising. We must consider also the actions of the other party on the other side of the deal -

a very large state run PRC oil and petrochemical company.

There is no direct evidence of what happened in Beijing after dinner on Friday the 13th. According to Mr. Hwang the next contact was a phone call from Mr. Jiang to himself which he received between 9:00 a.m. and 9:30 a.m. on the Monday morning at his office in Worldwide House. The phone call was about the placement. Mr. Hwang told him over the phone to send him a letter of confirmation by fax. The fax duly arrived at HKPVG offices in Worldwide House at 11:09 a.m. less than 2 hours after the phone call. We include this fax and its cover sheet at Annexure D. We note the following matters arising from its content and timing:-

(a) It is addressed to "The Hong Kong Parkview Group Ltd." at "11/F Worldwide House" and starts "Dear Mr. Hwang".

(b) The cover sheet says "To: Parkview Group H.K.
"Attn. Hwang Chou Shiuan"

(c) The cover sheet says "Please pass to Mr. Hwang Chou Shiuan as quickly as possible" The overwhelming inference from (a) (b) and (c) is that the author of the fax, Mr. Jiang, understood that the "deal" they had discussed on the Friday evening was between UNIPEC and HKPVG with Mr. C.S. Hwang as the spokesman for HKPVG.

(d) The fax reads "Re: Application for shares. Reference is made to the agreement between you and the undersigned dated August 13th 1993, we hereby agree to take up 89 million shares in the capital of your company through our nominee Bank of China, Hong Kong particulars of which are set out below at the price of HK$2.85 per share ...". Although the fax reads "the agreement" on August 13th we accept that there could not have been a formal agreement on that date. The fax's heading "Application for shares" is more accurate.

(e) When the fax was received, 11:09 a.m. Monday morning, Mr. C.S. Hwang was in his office at Worldwide House. All the circumstances drive us to the conclusion that it is highly probable that he was there in anticipation of the phone call and fax arriving that morning. A mid-day meeting of significant personnel was immediately called and thereafter all that remained to be done by HKPVG was to await to return to Hong Kong of the Company Chairman, Mr. George Wong, to add the formality of his final approval as HKPVG Chairman.

If, as we are asked to accept, the placement was first proposed on Friday evening and accepted by UNIPEC at 11:09 on Monday morning it follows that between those two times:-

- UNIPEC came into possession or was already in possession of sufficient reliable information about HKPVG's finances to satisfy themselves that the proposed purchase at the proposed price and volume was advantageous to their company.

- Mr. Jiang was able to see and discuss the proposals with the relevant people in Beijing over a week-end so as to seek and obtain their approval for the purchase.

- All the necessary arrangements for the payment of HK$253 million by UNIPEC through the Hong Kong branch of the Bank of China had been made.

- Furthermore, the request for the fax, according to Mr. C.S. Hwang had only been made 1-2 hours earlier. Therefore, the fax with all its details had been drafted in English, approved and sent within that time frame. The fact that it was in English contrasts with the one sent the next day which was in Chinese. It is highly probable that UNIPEC had the details required for the first fax, in English, prior to Mr. Hwang's request at about 9:00-9:30 a.m.

All these factors cause us to conclude that a PRC entity such as UNIPEC could not have responded to a Friday evening discussion with such expedition. These are therefore additional factors which contribute to our finding that it is highly probable that the placement was conceived before the 13th.

(iii) Goodwill's letters of August 20th and 31st:

We refer to these letters once more. We commented on them earlier in the context of "was there a Friday 13th meeting?" In one additional respect they also throw light on the issue "what was known at that time?"

In the opening statement of the first draft the person who was asked to "peruse" it, Mr. Peter Sin, instructed the addition of the word "officially" in manuscript when describing when the placement discussion started on the morning of the 13th. In the amended version which went out on August 31st the word "formal" has been used instead so that it reads "Formal discussions ... commenced on Friday 13th August 1993". In neither draft is any attempt made to suggest that this was the first time there were any such discussions. The specific inclusion of words such as "officially" or "formal" does suggest that there had been informal or unofficial discussions at an earlier date. Mr. Sin was asked what he meant by his addition of the word "officially" in the first draft and "formal" in the final draft. He said the use of such words depended on "the degree of sincerity". This is an indication that there had been discussions about the placement prior to the evening of August 13th but these discussions may have had a lesser degree of sincerity that must have been apparent in the after dinner discussions.

C. "Not generally known":

The ingredient that, in order to be "relevant" the information

must be "not generally known to those persons who are accustomed or would be likely to deal ..." has not been the subject of any contention as far as the facts are concerned. We have made our ruling in so far as the law is concerned in the previous chapter. We state, for the sake of completeness that there is ample evidence in support of this ingredient that the information Mr. C.S. Hwang had when he purchased his 974,000 shares on Friday 13th August was only known to himself, his broker and possibly some other senior HKPVG personnel. The information remained "not generally known" until the announcement on the SEHK teletext at 10:02 a.m. Tuesday August 17th when it first became available to those accustomed or likely to deal. Purchases after that announcement could not be insider dealing, purchases beforehand could be.

D. Price sensitive

We now turn to the final ingredient in the definition of "relevant information". The question is - does the evidence satisfy us to a high degree of probability that the information, if it had been generally known, would be likely materially to affect the price.

The witness called by counsel to the Tribunal to deal with this issue was Mr. Alex Pang. Mr. Pang was the Senior Manager in charge of the Surveillance Unit of the SFC. His professional background is that of an accountant and has 13 years experience with the SFC or its predecessor the office of the Commissioner for Securities and Commodities Trading. He candidly conceded that he was not a share analyst but described himself as a stock watcher.

His evidence-in-chief consisted firstly of producing and explaining the statistics relating to the price and movement of the HKPVG share during the relevant periods in 1993. Those facts and figures are contained in the tables and graphs attached to this report at Annexures N, O, P and Q.

The particular price movements which concern us are those which we have already set out on page 4. In percentage terms the

daily increases after the weekend were 12% on the 16th, 12% on the 17th, 7% on the 18th and 13% on the 19th.

His conclusion, which he invites us to accept, is that

(a) the increase in price on Friday 13th from $2.65 to $2.85 was caused primarily by Mr. C.S. Hwang's purchase of 974,000 shares which represented 58% of the day's turnover and

(b) the increases in the few days after the announcement of the placement were due to the announcement.

Mr. Pang bases his conclusion that the price went up because of the placement primarily on the facts that the placee was a PRC company and the absence of any other news which might have affected the price.

Mr. Tong makes a number of criticisms of Mr. Pang's evidence. We shall attempt to summarize them.

Firstly he submits that as Mr. Pang is not a share analyst his opinion should not be regarded as an expert opinion and the Tribunal should be cautious before placing any reliance on it. He goes on to say that as he is not an analyst he cannot say what is likely to happen in the future, he can only observe what has happened in the past. We do not consider this to be a fair criticism so as to devalue his evidence. It is true that he observes what has happened to a share but goes on to say, in effect, - I would have predicted that increase if I had known about the announcement before it was made. We are satisfied that his experience is sufficient for us to accept such a conclusion as reliable.

Secondly, in an attempt to illustrate the sentiment in the market at the time known as "China enterprises", in which connection between Hong Kong companies and PRC companies was regarded as good news and was likely to increase the share price, Mr. Pang quoted a number of examples of such connections around that time. Mr. Tong criticizes the evidential value of these illustrations because

every one related to a take-over situation and none of them related to placements. We consider this criticism to be perfectly valid. There are indeed a number of differences between the take-overs which Mr. Pang quoted as examples and the HKPVG/UNIPEC placement. It is not necessary to elaborate in this report on those differences. Generally speaking the examples were of PRC companies taking over "shell" companies which were referred to at the time as "backdoor listing". Our situation was nothing of the kind. However we do not agree that because the examples are different it follows that the opinion is wrong. The question remains - was an imminent placement of 20% of HKPVG to UNIPEC at a cost to UNIPEC of HK$253 million good news which would cause the investing public to buy if they knew?

Mr. Tong submits that it was only because the placement *did go through* on the evening of the 16th that the price went up not because Mr. C.S. Hwang may have known *he was going to make an offer* on the 13th. The strength of this submission is diminished by our finding, already made, that Mr. C.S. Hwang had reason to believe that it would go through. The public's reaction on the 17th onwards was clearly to buy. It is highly probable that they would have bought on the 13th as well because a man of Mr. C.S. Hwang's influence and prestige was about to make the offer which he believed would be accepted.

Mr. Tong further points out that the finalized details of the placement were materially different from the outline discussions on the Friday or the deal as contemplated by Mr. Hwang before he left for China. He submits that if the information disclosed on the 17th, which caused or contributed to a rise in the share price, is different from the information allegedly available at the time of the alleged insider dealing on the 13th how can it be said that the earlier information would have caused the same reaction as the later information did? We must look at the similarities as well as the differences. The differences were largely technical. They concerned the method of carrying out the placement. Would such a difference cause a different reaction? We say not when one considers the similarities i.e. the things that did not change between

the 13th and the 17th. The placee was the same, the volume was the same, the price was the same, the PRC connection was the same, the amount of money involved was the same and the benefits to HKPVG were the same.

Thirdly Mr. Tong notes that on the day of the announcement, August 17th, the share price only went up by 37.5 cents. He points out that when a press article was published on the 19th giving further news of co-operation between HKPVG and UNIPEC the price went up 50 cents in the day. He suggests that the price rise was due to the confirmation of ties between the two companies. We do not think it is realistic to separate each daily movement and look for a different cause each day. The simple fact is that the price went up a similar amount each day for 3 days after the announcement. Those closest to the shop floor would have been the early buyers and as more information about the placement reached a wider audience more buyers would have contributed to the upward surge. We are confident that the upward surge would have begun on the Friday morning had the investing public been privy to the same information that Mr. C.S. Hwang had.

Finally Mr. Tong argues that because the SEHK did not suspend the share on August 17th it could be inferred that they did not regard it as price sensitive. We however are satisfied that the only reason they did not suspend the share is because the SEHK considered that sufficient information had been disclosed by the teletext announcement at 10:02 a.m. on that morning.

The criticism of Mr. Pang's evidence came not only from the submissions made by Mr. Tong but also from the evidence given by Mr. Andrew Biggs. Mr. Biggs was and is a partner in the firm of Richards Butler, HKPVG's solicitors and he has considerable experience in corporate finance matters in Hong Kong. His firm was involved in many of the take-overs quoted by Mr. Pang in which he sought to illustrate the China Enterprises phenomena in 1993. In particular Mr. Biggs challenged Mr. Pang's statement that "It was viewed by the market that any involvement with China Enterprises would greatly increase the company's attractiveness and hence its

rating to the investing public." Mr. Biggs disagrees that *any* involvement would have such an effect. He provided the Tribunal with helpful and interesting evidence by which he distinguished Mr. Pang's "take-over" examples and our "placement".

Of course, we do not need to be satisfied that *any* involvement with a PRC enterprise would be regarded as price sensitive information, we have to be satisfied that *this* involvement would have been. Mr. Biggs agrees that there was a general bullish sentiment in relation to China in 1992/3 prior to and as a result of the "H share" listings. When examining one particular involvement we cannot overlook, as Mr. Tong submits we should, the "proof of the pudding being in the eating" argument. The public enjoyed the pudding when they ate it on the 17th and thereafter. The pudding had been baked on the 13th and we are sure that the ingredients which appealed to the public were those referred to above (page 64, line 1). We are satisfied that the suggestion that the rise between the 12th and 20th August could have been due to other factors is too remote to be worthy of serious consideration. The rise in the HKPVG share over that period was 64%, the rise in the Hang Seng Index was 2.8%. The size of the rise does not help us determine its cause, nonetheless, the Tribunal has concluded that it can safely eliminate causes other than the substantial buying on the 13th (buying which the public would have seen and responded to on the 16th) and the announcement on the 17th as being the reasons for the increase over that period.

E. <u>Knowledge</u>

Our report thus far has found that the information C.S. Hwang had when he placed his purchase order was relevant information as defined by section 8 of CAP 395. Before insider dealing is proved the Tribunal must be satisfied that he knew it was relevant information. Not that he hoped or expected or believed it might be relevant information but that he knew.

In other words he must have known that it was specific information, he must have known it was private information and he

must have known it was information which was likely to affect the price had it been generally known.

The first two ingredients of his knowledge, namely that he knew the information was specific and private cause no difficulty. In the circumstance of this case and in the light of our determination as to what constitutes "specific" information, the very fact that he had the information on the 13th answers those questions. It is impossible to imagine that he did not know it was specific or did not know it was private. He knew he was going to make the offer, he knew he had reason to believe it would be accepted and he knew the information was not public.

As to the third ingredient of knowledge - it is not necessary to prove that he knew the price would go up it is only necessary to prove that he knew it was likely to go up. Once this distinction is made, again proof of this ingredient causes us no difficulty. As will be seen from the next chapter we find that his specific strategy behind his purchase on the 13th was to cause an increase - an increase he knew would occur because of the size of the purchase and an increase he knew was likely to continue after the announcement of the placement.

CHAPTER 7

CAP 395 s. 10(3) Defence

Thus far we have found that Mr. C.S. Hwang's dealing on August 13th 1993 was insider dealing as defined by s. 9(1)(a), CAP 395.

By virtue of s. 10(3) we must not identify him as an insider dealer if

> "he establishes that he entered into the transaction otherwise than with a view to the making of a profit ... by the use of the relevant information".

As already mentioned at page 18 of our report the burden of proof is on the person who seeks to rely on it and the standard of proof required is on the balance of probabilities.

In this chapter we will firstly decide, as a matter of fact on the evidence, what was the motive behind Mr. Hwang's purchase order. Secondly, we will consider the arguments advanced as to how s. 10(3) should be interpreted, as a matter of law.

A. Why did he buy?

His defence to both the SFC in his statements and in evidence to the Tribunal was that the purchase order had nothing to do with either the placement or his trip to Beijing. He said he was buying on behalf of a third party, a Taiwanese lady named Madam KAO Su-mei. In his statement to the SFC he said he had been asked by her to buy 10 million HKPVG shares for her and other friends of hers a few days before August 13th 1993. It was while he was going to the airport on his way to Beijing that he remembered this request and so, using the car phone, he called Mr. Peter Sin and asked him to buy just one million shares in response to Miss Kao's request.

In a number of material respects the evidence given in court differed from the above account which had been given to the SFC. Firstly, Mr. C.S. Hwang explained to us that the purchase for Miss Kao was not a purchase for her personally but for a pension fund connected with his Taiwanese company for which Miss Kao worked. Buying for a friend and buying for a pension fund are very different explanations. It is probable that the latter was introduced into evidence because of the inherent implausibility of the former.

Secondly, evidence of Miss Irene So, Mr. Hwang‘s broker at Mansion House, gave rise to another discrepancy. She informed the Tribunal that the order to buy came from C.S. Hwang himself and not from Peter Sin. Mr. Hwang’s evidence to the Tribunal was more consistent with Irene So’s evidence than his own statement to the SFC. We find that he was more interested in the purchases, as the day went on, than the original impression he gave to the SFC. His daughter Sally remembered that he made phone calls both from his car and at Kai Tak. The whole picture is consistent with Mr. C.S. Hwang monitoring the day’s purchases, either directly or indirectly, pushing the price up to $2.85. Thirdly Mr. Hwang said in evidence that he had been buying for Miss Kao for the pension fund for some time prior to the 13th but had not registered them in her name whereas his SFC statement suggests that the first purchase he made for her was when he suddenly remembered about it on the way to the airport.

It is unnecessary to examine the differences between the two accounts in any detail because the Tribunal rejects both of them. The weaknesses in the “pension fund” version are that it had never been mentioned before he gave evidence, the purchases were not registered in the name of any pension fund and there was no other records or documentation to support the explanation.

What inference, if any, do we draw from our finding that there is no truth in the explanations for the purchases given either to the SFC or the Tribunal?

In the same way that we were cautious about what inferences should be drawn from our rejection of the evidence relating to the trip to Mongolia, so here also we approach the question of what inference or inferences can be drawn with care.

We bear in mind that Mr. C.S. Hwang is a very wealthy man. He is a man who almost invariably bought HKPVG shares when he could. Certainly for months prior to August 13th 1993 he almost exclusively bought. When he did buy he often bought in fairly large lots - several hundred thousand at a time was not unusual. He made more large purchases after the announcement when the price had gone up. Facts and figures in relation to these matters are to be found at Annexure O.

For these reasons we do not draw the inferences that Mr. C.S. Hwang's sole motive for buying on August 13th 1993 was to make a personal profit for himself.

On the contrary we find that Mr. Hwang was passionately interested in the Company's affairs and that his purchase was directly related to the Company's strategy in advance of the forthcoming placement. In short, we find that his primary motive was to cause the share price to go up on Friday 13th from its opening price of $2.65 to a price, hopefully which would be $2.85, at which he wanted to agree the price for the placement - the same price that had been proposed for the placement earlier in 1993 which never went through. He knew that a substantial purchase would have that effect. He knew the placement was good for HKPVG.

It was good for HKPVG because primarily, it established a good connection with a large PRC company. A new directorship for the UNIPEC representative would be created on the HKPVG Board. UNIPEC's connections would provide HKPVG with new business opportunities, particularly in the oil business. A second benefit was the quick injection of a large sum of cash.

All these things were well within C.S. Hwang's knowledge and

he knew therefore that the increase of the share price caused by his purchase on the Friday was likely to continue after the announcement.

In the light of this finding we now considers the submission as to whether Mr. C.S. Hwang can avail himself of s. 10(3) in such circumstances.

B. Submissions on s. 10(3)

(1) By Mr. Ronny Tong, Q.C. on behalf of Mr. C.S. Hwang

Mr. Tong submitted that there was no judicial decision on the precise meaning of the wording of the defence. He invited us to consider judicial statements about the meaning of the phrase "*with a view to*" from nineteenth century English cases concerning bankruptcy. For example in New, Prance & Garrard's Trustee v Hunting [1897] 1 QB 607, Vaughan Williams J. said about s. 48 of the Bankruptcy Act 1883 which contained the expression "with a view to prefer":-

> "Now, it is very easy to confuse "motive" and "view". In fact it is so easy to confuse motive and view that there are numberless words in the English language which have a double or equivocal meaning, and are sometimes used to express motive and sometimes used to express view. ... I do not assent to the suggestion that "view" means the primary result aimed at. ... The word "view", as used in the section, is used to express the object aimed at by the bankrupt in bringing about the primary result. Now, although motive is not the thing that we are to look for, but view, it is plain, as was pointed out by Lord Esher in Ex parte Taylor 18 QBD 295, that ascertaining the motive will very often assist you in determining what is the view."

In Ex parte Hill (1883) 23 Ch.D p.704 Lord Justice Bowen said of the phrase "with a view of giving such creditor a

preference over the other creditors":-

> "There are only three conceivable meanings which these words can have. (1) They may conceivably mean the case where the debtor has present to his mind as one view, among others, the giving a preference to the particular creditor. I do not think that this is the true interpretation of the words; (2) Another possible construction of the words is to read them as equivalent to "with the view" - the real, effectual, substantial view - of giving a preference to the creditor, the word *a* being equivalent to *the*. I think that this is the correct interpretation; (3) The other conceivable construction is to treat them as equivalent to "with the sole view or sole motive." I should prefer keeping to the word "view" instead of "motive", though in nine cases out of ten the two words may come to the same thing."

Mr. Tong's submission, in a nutshell is that the correct interpretation of s. 10(3) is that the defence is established if it is shown that "it is not the substantial or effectual view, purpose or object of the implicated person to make a profit by the use of the relevant information." Put in other words he submits that the defence must succeed if it is shown on the balance of probabilities that making a profit for himself was not the primary purpose of the dealing.

In support of his contention that Mr. Hwang either had no motive to make a profit or that his primary motive was otherwise with a view to gain, Mr. Tong highlights some factual matters:-

(i) Mr. Hwang never sold the shares so as to realize a profit. In fact he still has them.

(ii) Mr. Hwang was a steady buyer both before and after the placement.

(iii) He was an accumulator of HKPVG shares rather than a trader in them. His pattern of trading was of long term investment rather than quick profits.

(2) Submissions made by Mr. Marash:

Mr. Marash concedes first of all, and we agree, that the effect of the words "if he establishes" does not mean that the burden can only be discharged if the defence relied on is supported by the evidence of the implicated person. 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 party), even though the facts upon which it might avail them are the facts we find rather than those they would have us find."

In short, Mr. Marash invites the Tribunal to make the following rulings:-

(i) The Ordinance does not say and does not suggest that only quick cash profits are to be considered unlawful. Insider dealing which results in long term paper profits can still be insider dealing. Whether a man sells his shares soon afterwards will clearly be relevant evidence but the absence of such encashment will not preclude a finding of insider dealing.

(ii) For a person to avail himself of s. 10(3) he must satisfy the Tribunal that no part of his intention or motive was profit related. He submits that if the Tribunal concludes

that any part of his motive was profit related the section cannot apply.

(C) The Tribunal's ruling on s. 10(3):

We agree that there is a paucity of authority on the meaning of s. 10(3). Its proper construction is not only of importance in this case but is likely to be raised in future inquiries.

Not only is there a paucity of authority but also there appears to be remarkably little commentary on the subject. We consider it useful to preface our ruling by quoting some extracts from texts on the question.

When commenting on an almost identical provision in the U.K. statute Emmanuel Gaillard in "Insider Trading" at page 181 states:-

> "A person will not be debarred from embarking upon an otherwise prohibited activity where he does so otherwise than with a view to the making of a profit or the avoidance of a loss, whether for himself or another person. It is not clear how the Courts will interpret this particular provision. For example, does the making of a profit or the avoidance of a loss have to be the primary purpose or simply one of the purposes for embarking upon the prohibited activity."

The footnote provides just one authority:-

> "Howard Smith v Ampol (1974) AC 821. This case concerned the fending off of a takeover bid. It can be argued that dealing or communicating information for the purposes of fending off a hostile takeover bid would be within the ambit of this particular exclusion."

A further commentary on the background to the U.K. Legislation is found in "The Regulation of Insider Dealing in Britain" by J. Suter at page 113:-

"This controversial defence provides that an individual is not liable by reason of having any information from:

> 'doing any particular thing otherwise than with a view to the making of a profit or the avoidance of a loss (whether for himself or another person) by the use of that information.'

This provision was introduced to counter any deterrent effect of insider dealing legislation on directors and employees holding shares in their companies.

But defences based on an insider's personal needs have been objected to in principle on the ground that the mere fact of circumstances necessitating a profitable dealing does not mean an insider should retain the profits. In relation to civil liability, this defence is not available to a fiduciary called to account.

In terms of formulation, the difficulty with the defence contained in the IDA *(Companies Securities (Insider Dealing) Act)* 1985 is that the making of a profit or avoidance of a loss is a motive in most dealings. When a similar defence was introduced in the 1978 Bill, the CSI *(Council for the Securities Industry)* recommended that the defence be redrafted on the lines of the one contained in the 1973 Bill so that it applied when making a profit or avoiding a loss was not a primary motive. But the 1973 Bill's distinction between primary and subsidiary motives attracted the criticism that it would facilitate avoidance of liability on a scale that undermined the operation of the proposed legislation. In this context, a preferable approach was proposed by the Law Society in its comments on the 1978 Bill. As the legislative objective was to prohibit an insider exploiting inside information irrespective of whether this occurred with a view to making a profit or loss for himself or another, it supported a provision in terms that:

> 'it shall be a defence to show that the accused did not deal for the purpose of exploiting the inside information in his

possession.'

Judicial interpretation of this statutory defence remains unclear. But the failure to distinguish primary from subsidiary motives points to a narrow interpretation in which case an insider will be unable to rely on the defence when he has alternative assets."

It should be noted that these commentaries on a like provision in the U.K. Legislation pre-date the provision which now applies in the U.K. namely s. 53(1) of the 1993 Criminal Justice Act which provides a defence to act defendant in criminal proceedings if he shows:-

"(a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities; or

(b) ....

(c) that he would have done what he did even if he had not the information."

Mr. Justice Stock at page 81 of the "Success Holdings" report states:-

"The aim of a like provision in the U.K.'s (now repealed) Companies Securities (Insider Dealing) Act 1985 has been the subject of discussion by commentators, and the examples they suggest provide a helpful guide. It is, says one, "... apparently intended to permit trustees or legal personal representatives to sell securities pursuant to their legal duties without incurring criminal penalties for doing so ...." (see L.H. Leigh "*The Control of Commercial Fraud*", page 115). Most writers agree that the provision would protect the person who sells to raise funds "to meet a sudden and pressing need" (Losse, Yelland, and Impey, "*The Company Director*," 7th Edition, page 284); as well as the insider who "[takes up]" qualification shares required under the

terms of a company's articles of association" ("Insider Trading" by Rider, page 34). (The last example is separately provided for by the Ordinance: See section 10(1)(a)).

He later quotes from "Take-overs and Mergers" by Weinberg and Blank:-

"It is not clear whether there must be absolutely no profit motive at all or whether the existence of a profit motive will not be fatal so long as there is an overriding non-profit motive."

The conclusion of the "Success Holdings" report is that the practical interpretation of s. 10(3) is that it will legitimately protect directors and other insiders detected in insider dealing if they can show that circumstances compelled them to realize their holdings and that they would have done so at the time whether or not they had the price sensitive information.

This test is directed particularly at those who sell their shares. Indeed, being unconcerned about the consequential profit when selling shares on inside information is easier to comprehend than when the case concerns a profit from buying shares. This point is made by Brenda Hannigan at page 83 of "Insider Dealing"-

"As with other provisions in this legislation, there is considerable doubt as to the scope of this provision which fails to define with any precision when it would be permissible to deal. What type of situation will bring an insider within the protection of s. 3(1)(a)?[*the same as our s. 10.3*] Certainly compelling circumstances will be required to justify dealing although it is unclear to what extent the circumstances must be beyond the control of the insider. Suggested situation have included: to satisfy an outstanding bill; to pay for repairs for a damaged car; to provide for early retirement or school fees; to pay the fee of a specialist surgeon; to meet a tax demand; or some other pressing financial burden. The difficulty with most of these suggestions is that with the possible exception of the medical expenses they do not suggest circumstances which

would demand the immediate sale of securities while the insider is in possession of unpublished price sensitive information as opposed to their sale when the information has been disseminated. School fees, retirement, tax demands, for example, are situations which in the very great majority of cases represent known and anticipated demands upon resources. Why they should justify, if indeed they do, insider dealing is unclear. After all, if faced with an unexpected financial demand, it may be all the more pressing for an individual to insider deal, in order to ensure the maximum financial gain from his forced realization of securities. This raises another problem which is that while some justification may exist for allowing sales of securities in circumstances when some financial exigency requires it, it is not at all clear when there would be a pressing requirement to purchase shares. One very limited possibility is a purchase to obtain qualification shares by a person appointed as a director."

Conclusion

On consideration of these commentaries this Tribunal is convinced that s. 10(3) is not intended to provide an implicated person with a defence which would succeed on proof on the balance of probabilities that a genuine non-profit motive at least contributed to his reason or reasons for dealing.

This Tribunal makes its decision on the basis that s. 10(3) applies only if the evidence shows that the true reason or reasons for dealing were wholly unconnected with any desire or intention to make a profit or avoid a loss. Profit means simply a resulting increase in the value of the shares which have been purchased. The proof of profit does not depend on the shares being subsequently sold although evidence of when and/or whether they were sold may be relevant evidence, but not proof, of motive.

In other words the section is to be construed narrowly. In most cases it will arise in the situation where a person has non-profit motives for selling shares. It will be even more difficult to establish the defence

in a situation where, as in our inquiry, the shares were purchased. As Brenda Hannigan said "it is not at all clear when there would be a pressing requirement to purchase shares". Furthermore that "pressing requirement" must be shown to be the only reason for the purchase.

Have Mr. C.S. Hwang's purchases on 13th August 1993 been proved to come within this section as so construed? Clearly they have not. We conclude that although personally, he may not have been particularly interested in the increase in the value of the shares he bought he cannot escape the consequence of his certain knowledge that the price would go up on the Friday and that it was likely to continue going up after the weekend and the value of the shares he had purchased would increase.

The Friday purchase and the placement were inextricably connected. The former was a preliminary strategic move to ensure or at least contribute to the success of the latter. His first reason for buying was to see a rise in the price which would in turn see the placement go through which would in turn result in further increase in the share value. A successful and profitable placement was obviously desired and intended. The profit which resulted from the purchase of 974,000 HKPVG shares by Mr. C.S. Hwang cannot be viewed as separate unrelated non-profit motivated purchase.

In short, the situation which we have found to be the case here is not a situation to which s. 10(3) applies. Given the facts as we have found them to be we are satisfied that the provisions of CAP 395 are such as prevent any purchases being made by people such as Mr. C.S. Hwang in the circumstances which prevailed at the time on the morning of Friday August 13th 1993. His purchases contravened s. 9(1)(a). He should have refrained from buying. S. 10(3) does not apply.

CHAPTER 8

MR. PETER SIN KIT-LEUNG

The legal representatives of Mr. Peter Sin and indeed Mr. Peter Sin himself will have noticed, whilst reading through our report thus far, a significant lack of reference to his involvement in alleged insider dealing. This has been deliberate. As will be seen in this short chapter we have concluded that Mr. Peter Sin should not be identified as an insider dealer arising out of his purchase of 100,000 HKPVG shares on Friday August 13th 1993. With this in mind we concentrated on the issues in relation to Mr. C.S. Hwang alone in Chapters 4-6.

The evidence in relation to the two men is different in many respects. Ultimately we have concluded that the evidence concerning Mr. Sin does not satisfy us to a high degree of probability that all the ingredients of insider dealing have been proved. Mr. Sin was one of at least four senior personnel at HKPVG who made significant purchases of the Company's shares after Mr. Hwang's purchase and before the announcement of the placement. His purchase inevitably attracts a cloud of suspicion over it.

In many respects the submissions made by Mr. Jonathan Harris on Mr. Sin's behalf were the same as those made by Mr. Tong. Mr. Sin's case was:-

(1) If, which is not admitted, there was a meeting on Friday morning August 13th, he did not attend it.

(2) His first knowledge of the placement was on the 14th after he had bought his shares.

(3) In any event there was no relevant information available at the time of his purchase.

(4) He did not buy with a view to making a profit and so s. 10(3) applies.

Our decision in relation to Mr. Sin turns on (1) above and it becomes unnecessary therefore to deal with (2), (3) and (4).

We have found that there was a meeting on the morning of Friday 13th but we cannot be satisfied on the evidence that it was highly probably that Mr. Sin attended it. Proof of attendance at that meeting is of the greatest significance in this inquiry. If a person was not or might not have been at that meeting one can only speculate about the person's actual knowledge at the time of the suspected trading.

The Tribunal recognizes that Mr. Sin must have been in close liaison with both Mr. C.S. Hwang and other senior personnel at HKPVG and therefore may have known something. However we cannot say what he knew and if we cannot say what information he actually had we cannot begin to analyse whether or not it was "relevant" for the purpose of s. 8. If Mr. Peter Sin decided to buy shares in the afternoon of August 13th simply because he knew and saw that Mr. C.S. Hwang was buying heavily that would only be evidence of insider dealing by Mr. Sin if he knew, not merely suspected, that Mr. Hwang was insider dealing.

We do agree that much of the evidence in relation to Mr. Sin's activities suggests that he has done everything possible to distance himself from involvement. The evidence does not permit us however to draw the inference that the reason for so doing flows directly from his own culpability.

We consider that it was correct to issue Mr. Sin with a Salmon "A" letter and amend the terms of reference to include his name. He has thus had the opportunity to be fully heard and had his case fully ventilated. To say more would be superfluous.

This does not conclude our report. Our report must include our decisions as to what orders pursuant to s. 23-27, CAP 395 should follow our findings. Before making those orders those against whom findings of insider dealing have been made must have an opportunity of being heard.

We therefore will send Chapters 1 - 8 inclusive to the Financial Secretary and to the legal representatives of Mr. C.S. Hwang and Mr. Peter SIN Kit-leung.

We will arrange a date in the near future when the Tribunal will reconvene for a hearing on the question of consequential orders and penalties.

Following that hearing our orders will be set out in Chapter 9 and the completed report will be sent to the Financial Secretary and published.

CHAPTER 9

PENALTIES AND CONSEQUENTIAL ORDERS

On January 31st 1997 the Tribunal sent Chapters 1-8 of its report to the Financial Secretary. We reconvened on February 26th 1997 to give Mr. Hwang an opportunity to be heard, through his counsel, Mr. Ronny Tong, Q.C., on the question of what order or orders should follow our finding that the purchase of 974,000 HKPVG shares on August 13th 1993 constituted insider dealing by him. We also heard Mr. Jonathan Harris on behalf of Mr. Peter Sin on the question of costs following our finding that Mr. Sin not be identified as an insider dealer.

In relation to Mr. Hwang we are concerned with two sections of the Ordinance. Firstly, the relevant parts of s. 23 are :-

> "(1) At the conclusion of an inquiry 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 dealer, 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."

Secondly s. 27 provides:-

> "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."

In relation to the application for costs on behalf of Mr. Peter Sin the relevant parts of s. 26A are:-

> "(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
>
> (5) This section shall not apply to any person referred to in subsection (1) who is-
>
> (c) a person who and in respect of whom it appears to the Tribunal has by his own acts or omissions caused or brought about (whether wholly or in part) the Tribunal to inquire into his conduct subsequent to the institution of the inquiry under section 16 or during the course of that inquiry; or
>
> (d) any other person who and in respect of whom 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."

The general principles to be followed when considering

penalties and orders have been set out in previous Insider Dealing Tribunal reports. For our purposes we do no more than repeat selected observations from the Success Holdings Report which apply with equal significance to the Parkview inquiry.

Firstly -

> "To say that the reputation of Hong Kong's securities market is an issue of importance to this territory is not to make a policy statement, but is a statement of the obvious. It is also stating the obvious to remark that insider dealing and the degree to which it may prevail are matters that materially affect that reputation. The legislature has acknowledged these facts by enacting new laws conferring on the Insider Dealing Tribunal significant powers in the form of penalties, absent from the Ordinance's predecessor. Still, the conduct is not a criminal offence, and the maximum disqualification from commercial office is five years. Those are the parameters within which we must address the question of appropriate orders in this case."

Secondly -

> "<u>THE APPROACH TO SECTION 23</u>
>
> (1) The fact that [the insider dealer] presented to the SFC investigators 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 very outset will be credited for that fact.
>
> (4) 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.
>
> (6) In determining whether to disqualify an insider (dealer) from holding office as a director of a listed company, or of listed companies, 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.

(7) In determining whether to disqualify an insider dealer from holding office as a director of a private company, one should have regard to the connection, if any, of the company with the insider dealing, and any relationship between the insider dealer and the private company; and the impact upon the individual of such a disqualification.

(8) Where an incident in, or in connection with, the inquiry, gives rise to a justified sense of grievance, the Tribunal should recognize and take that fact into account in determining the appropriate penalties.

(9) In making its order under section 23(1)(b) and (c) and section 27, the Tribunal should have regard to the totality of the financial burden imposed by these orders."

Mitigation:

Mr. Tong in his helpful submission to us raised a number of matters in mitigation. We accept that much of the mitigation advanced is relevant mitigation and has had a bearing on our decisions which are recorded later in this Chapter. We therefore summarize the more significant matters which we have taken into account in Mr. Hwang's favour.

(1) We accept that although Mr. Hwang was a "person connected" to HKPVG as defined by s. 4(1)(c) of CAP 395, he did not abuse a position of trust which he held in the company when making his unlawful purchases of shares.

(2) As we have already stated his primary motive was not simply to make a profit for himself. His primary motive was to improve

the HKPVG shares price on the day he went to Beijing to make the offer of a large placement to UNIPEC. However he must have realized that this strategy would inevitably result in an increase in the value of his own shareholding when the placement went through. This is the profit for which we impose penalties.

(3) The successful placement was beneficial to HKPVG and, in turn, to its shareholders also.

(4) The fact that Mr. Hwang did not realize at the time of his purchases that they would be in breach of s. 9(1)(a) of CAP 395 does not excuse him but it does, in the circumstances of this case, provide some mitigation. Although the reason he gave to the Tribunal for buying the shares was one we rejected he always said both to the SFC investigators and to the Tribunal that he "accepted responsibility" for the purchases. The rules against insider dealing in CAP 395 are strict. We fear that there are still some members of the business community in Hong Kong who do not fully appreciate or understand the stringency of the provisions. We accept that in August 1993 Mr. Hwang was such a person. Had he been advised, at the time, that because of his privileged position and his knowledge of forthcoming events any purchases by him at that time would be in breach of s. 9(1)(a), he may well have accepted the advice and not purchased the shares.

Penalties

First, we will deal with the question of financial penalties under ss. 23(1)(b) and (c).

(i) s. 23(1)(b) :

By this section the insider dealer may be ordered to repay his profit to the Government. Mr. Tong submits that because the section only says "profit" and does not say, for example, "including any assumed profit or notional profit" we should make no order

under this section because Mr. Hwang never sold his shares and in fact, we are told he still has them. We reject this submission. We find that the fact that he chose not to realize the profit does not preclude the making of an order. We have calculated the profit element in this case in the following way.

The profit is the value of the unlawfully purchased shares after the relevant information became public less their purchase price. The latter figure is easy to calculate. On August 13th 1997 Mr Hwang purchased 974,000 shares at different prices:-

884,000 at $2.725	= $2,408,900
62,000 at $2.75	= $170,500
8,000 at $2.825	= $22,600
20,000 at $2.9	= $58,000
Total	$2,660,000

The true value of the shares after the release of the information to the public is not so straightforward. We have considered three different figures. Firstly the closing price on Tuesday, August 17th ($3.575) - the day the information was available through the SEHK teletext. Secondly the closing price on Wednesday, August 18th ($3.825) - the day the information appeared in the Chinese and English newspapers. Thirdly an average of the closing prices for five days after the first announcement ($4.075).

The Ordinance is silent on how profit should be defined or measured. We have considered the learned commentary on the subject at pages 274-284 of the P.I.I.L. Report. That report cites the American definition which includes the words “the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the non-public information”. The application of this approach would favour the taking of an average closing price over a number of days after the announcement. However one must be careful also to ensure that figure arrived at has not been influenced by any events other than the release of the price sensitive information. Where there is some evidence of other unrelated events which could have had an effect

on the price the averaging exercise becomes less reliable.

Therefore as an exercise in caution and to be fair to Mr. Hwang we have selected the closing price on the day of the press announcement (August 18th) as the relevant figure ($3.825) even though the highest price during that day was $3.875. This is because it is lower than an average over, say 5 days and could not have been influenced by other events that week. This means the profit is:-

($3.825 x 974,000) - $2,660,000 = $1,065,550

We will therefore make an order that this sum be repaid to the Government under s. 23(1)(b).

(ii) s. 23(1)(c)

By this section we are empowered to impose a further financial penalty up to three times of the amount of the profit. The maximum would therefore be $3,196,650.

For the same reason as already stated, namely that Mr. Hwang was not primarily motivated by personal greed we consider a penalty at the lower end of the scale is appropriate under this section. We are not concerned with his ability to pay as he has substantial wealth and we are satisfied that any reasonable penalty can be met. We do not make the penalty higher than would otherwise have been appropriate because of his means.

In all the circumstances we consider a multiplier of one is fair and reasonable and we therefore order the sum of $1,065,550 to be paid.

We turn now to the difficult issue of disqualification under s. 23(1)(a).

(iii) s. 23(1)(a)

This section empowers the Tribunal to disqualify an insider dealer for a maximum of five years from being a director etc. of any company or taking part in its management. The section can be imposed in full or in part. The order could apply to directorships etc. in any company or in specified companies. The order could be confined to directorships only and exclude the element of management. These are all possibilities.

We have considered the matter by answering three questions:-

(1) Should we make any order under s. 23(1)(a)?

(2) If so, in what form? and

(3) For how long?

Mr. Tong has urged us to answer the first question in the negative. In support he invites us to take into account the following mitigating factors:-

(i) The companies of which Mr. Hwang is presently a director, namely Chyau Fwu and Kompass are both private companies and are unconnected with the insider dealing.

(ii) The insider dealing which has been proved is not an example of an abuse of trust for personal gain. Although the Tribunal has found him to be "connected" to the company, it is submitted that he was not involved with the day to day management of the company.

(iii) The insider dealing was an isolated transaction caused partly by ignorance. Such a transaction will not recur as Mr. Hwang now has a greater understanding of the regulations.

(iv) A disqualification is not necessary either to protect the investing public or to protect the integrity of the market.

On the other hand it would cause "difficulty and confusion" in Mr. Hwang's family companies and HKPVG.

These are compelling points and have weighed heavily in our decision to make a lenient order under s. 23(1)(a) but we feel we cannot accede to the plea to make no order at all.

Whereas we accept that there will be cases where no order would be appropriate, we find that this is not such a case. We consider that in spite of the genuine mitigation a disqualification order is necessary primarily to protect the integrity of the securities market but also to emphasize the caution which must be exercised when deciding whether or not to deal at sensitive times and so to deter others from breaching the ordinance in the same or similar way.

However giving full weight to the mitigation advanced we have decided, in answer to our questions (2) and (3) above, to order a disqualification in a restricted form and for as short a period as is reasonable whilst remaining faithful to our public duty.

Our order will be that Mr. Hwang shall not without leave of the High Court, be a director or a liquidator or a receiver or manager of the property of Hong Kong Parkview Group Limited and its subsidiaries or in any way, whether directly or indirectly, be concerned or take part in the management of Hong Kong Parkview Group Limited and its subsidiaries for a period of six months.

In this context we recite also s. 23(5)-

"Every order made in respect of any person under subsection (1) or under section 24(1) shall be notified by the Tribunal in writing to that person and shall take effect from the date on which it is notified to him, or such later date as is specified in the notice, notwithstanding that an appeal against the decision may be made under section 31 or that the time limited for the making of such an appeal has not expired."

Expenses

Section 27 of CAP 395 empowers the Tribunal to make an order for the expenses of and incidental to the inquiry to be paid by the insider dealer to the Government. Like all similar statutory powers it is discretionary. We start with the principle that in most cases a s. 27 order will follow the event.

On the issue of expenses Mr. Tong made a preliminary submission that the "expenses" envisaged by s. 27 do not include the Attorney General's Chambers' legal costs. He submitted that the absence of the word "costs" in s. 27 should be interpreted as meaning that there was no provision to order the insider dealer to pay any legal costs. In support of this submission he drew our attention to s. 26A which does use the words "costs" when providing for a costs order in favour of people who have been involved in the inquiry and who have not been identified as an insider dealer.

We regarded the submission as ingenious but without merit. We are satisfied that "expenses" includes any expense which has been necessarily incurred in order to properly carry out the inquiry. Common sense dictates that this includes the costs or expenses incurred by the Legal Department.

We have decided also to give effect to the provisional remarks made by the Chairman when opening the mitigation hearing. We simply repeat them -

> "Finally on the question of costs we hope it will assist you if we set out our provisional approach to the calculation of costs before you make your submission. Firstly we propose that the potential 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 Attorney General's Chambers

(b) the Tribunal's costs

As to (a) - the Tribunal will in due course receive a schedule of the Attorney General's Chambers' costs.

As to (b) - the Tribunal's costs, we will include some or all of 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 staff. No amount will be included in 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 and in approximate percentage terms since the commencement of the Parkview inquiry as follows:-

October 96	50%
November 96	100%
December 96	60%
January 97	100%
February 97	25%

Had both Mr. Hwang and Mr. Sin been identified as insider dealers we would have apportioned costs between them so as to reflect their respective involvement so far as reasonably practicable. As Mr. Sin has not been so identified we would only condemn Mr. Hwang in costs in that proportion which would have followed had there been findings against both.

All these matters however are of course subject to the overriding principle that any costs award is in the Tribunal's discretion."

Having decided that a s. 27 order should be made and what items should come within the meaning of expenses we come finally to the question of whether Mr. Hwang should pay all or only part of the

expenses incurred. Mr. Tong again makes valid points. He makes them in support of his contention that there should be no order under s. 27. They do not support an argument for no costs but we agree that they merit a reduction from a 100% costs order. There are three matters we are invited to take into account.

(1) The amount of preparation required and the length of the inquiry itself would have been less if Mr. Hwang has been the only implicated person. The costs must have been increased by the presence of Mr. Peter Sin in the inquiry. Mr. Hwang should not be liable for such extra costs. We have considered however that this factor only results in a relatively small reduction because the same witnesses would have given evidence (including Mr. Sin) if Mr. Hwang had been the only implicated person. The length of their evidence may have been slightly shorter.

(2) Part of the original allegation was that Mr. Peter Sin was acting on behalf of Mr. Hwang when purchasing HKPVG shares. This aspect of the inquiry was abandoned during the hearing but not before time and money had been spent on investigating it and inquiring into it.

(3) Mr. Hwang should not be condemned in costs for challenging the allegations because the issues gave rise to difficult legal points concerning the meaning of "relevant information" and the application of s. 10(3) of CAP 395. Whilst we accept the correctness of this observation we do not think it should have a material effect on the quantum of costs.

Mr. Tong also reminded us that an order under s. 27 should be compensatory and not punitive.

Bearing in mind all the above matters we will make an order that Mr. Hwang be liable for 80% of the expenses incurred by holding this inquiry. A schedule of expenses will be provided to Messrs. Richards Butler as soon as it has been finalized and approved by the Tribunal.

Mr. Peter Sin's application for costs

Our final task is to consider Mr. Harris's application for his lay client's costs to be paid by the general revenue pursuant to s. 26A of CAP 395. Section 26A was added to the Ordinance in 1995. Its terms are self explanatory. We have already set them out at page 83 of our report. Mr. Marash has invited us to make no order for costs in Mr. Sin's favour after consideration of ss. 26A(5)(c) and (d). Our choices are to make no order or award him his costs in full or in part.

Again, the starting point when exercising our discretion is that costs follow the event. Mr. Marash reminds us of aspects of Mr. Sin's conduct at the time of the events which were at the heart of the inquiry and at the time he was interviewed by the SFC which, he submits, would qualify for our consideration under s. 26A(5)(d).

For the purpose of determining costs we do not propose to examine in detail those parts of the evidence and the statements upon which Mr. Marash and Mr. Harris have made their respective comments. We have adopted a more general approach. We are satisfied that Mr. Sin is not entitled to all his costs. We have concluded that a fair and just award would be that he recover two thirds of his costs from the general revenue. We have reduced his costs order because of the provisions of s. 26A(5)(d).

The Ordinance is silent on the machinery for payment of such costs [ss. (3) and (4) apart]. The machinery we proposed and with which Mr. Sin's solicitors and counsel agreed was that they would submit their bill of costs to the Attorney General's Chambers for agreement. If they were not agreed the Tribunal would intervene to endeavour to bring about an agreement. If there was still no agreement then the bill would be submitted to a Master of the Supreme Court for taxation.

ORDERS PURSUANT TO SECTIONS 23(1), 26A AND 27 OF CAP 395

The Insider Dealing Tribunal of Hong Kong makes the following orders arising out of its inquiry into the trading of the listed securities of Hong Kong Parkview Group Limited between August 13th 1993 and August 16th 1993 (inclusive):-

(1) Pursuant to section 23(1)(a) of the Securities (Insider Dealing) Ordinance (hereafter referred to as "CAP 395") Mr. HWANG Chou-shiuan shall not without leave of the High Court be a director or a liquidator or a receiver or manager of the property of Hong Kong Parkview Group Limited or any of its subsidiaries or in anyway whether directly or indirectly, be concerned or take part in the management of Hong Kong Parkview Group Limited or any of its subsidiaries for a period of six months commencing from the date of service of this notice on Mr. HWANG Chou-shiuan.

(2) Pursuant to section 23(1)(b) of CAP 395 Mr. HWANG Chou-shiuan shall pay to the Hong Kong Government the sum of HK$1,065,550 forthwith.

(3) Pursuant to section 23(1)(c) of CAP 395 Mr. HWANG Chou-shiuan shall pay to the Hong Kong Government a penalty of HK$1,065,550 forthwith.

(4) Pursuant to section 27 of CAP 395 Mr. HWANG Chou-shiuan is ordered to pay 80% of the expenses of and incidental to the inquiry.

(5) Pursuant to section 26A(1) and (2) it is ordered that two thirds of the costs of Mr. Peter SIN Kit-leung be paid out of the general revenue and that such costs be taxed if not agreed.

ACKNOWLEDGEMENTS

The Tribunal wishes to express its appreciation for the considerable assistance and co-operation given by all concerned in this inquiry. The research and presentation by Mr. Ronny Tong, Q.C. assisted by Mr. Godfrey Lam instructed by Messrs. Richards Butler for Mr. Hwang and by Mr. Jonathan Harris instructed by Hastings & Co. for Mr. Peter Sin was of the highest order. We are similarly indebted to the counsel to the inquiry, Mr. Daniel Marash assisted by Miss Serlina Lau for their fair and thorough presentation of the evidence and the law.

The smooth running administration of the Tribunal was assured by the unfailing reliability of its staff, namely the Tribunal Secretary, Mr. Patrick Chung Chan-yau, the Chairman's Secretary, Miss Mary Au Lai-chun, and Ms Leung Yim-foon and Mr. Michael Wong Kam-chiu.

The Tribunal's Interpreter, Ms Susanna Chan, performed a difficult task with considerable skill and Verbatim Reporters provided their most valuable services with their usual speed, efficiency and accuracy.

Finally, the Chairman would like to express his particular appreciation for the contributions made by Mr. Kennedy Liu Tat-yin and Mr. Simon Lam Siu-lun who have been the two other Tribunal members. It has been a pleasure to work with them. They have been of the greatest assistance both to the Chairman and in the inquiry generally. The business community of Hong Kong is fortunate that people such as Mr. Liu and Mr. Lam are willing and able to offer their time, expertise, experience and skill as Insider Dealing Tribunal members.

The Honourable Mr. Justice Burrell
Chairman

Mr. Kennedy Liu Tat-yin, CPA, MBA, FHKSA,
Member FCCA, FCIS, FCS

Mr. Simon Lam Siu-lun, BA, ACA, AHKSA,
Member FTIHK, CPA

March 5th 1997