Lew Chee Fai Kevin *v* Monetary Authority of Singapore
[2012] SGCA 12

Case Number	: Civil Appeal No 123 of 2010
Decision Date	: 10 February 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Thio Shen Yi SC, Leow Yuan An Clara Vivien and Charmaine Kong (TSMP Law Corporation) for the appellant; Cavinder Bull SC, Yarni Loi and Gerui Lim (Drew & Napier LLC) for the respondent.
Parties	: Lew Chee Fai Kevin — Monetary Authority of Singapore

Financial and Securities Markets – Insider Trading

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 209.]

10 February 2012

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the judgment of the trial judge ("the Judge") for Suit No 71 of 2009 in *Monetary Authority of Singapore v Lew Chee Fai Kevin* [2010] 4 SLR 209 ("the Judgment"). The appellant, Kevin Lew Chee Fai ("Lew"), was found liable for insider trading under s 218 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") and was penalised with a civil penalty under s 232(2) of the SFA. The gist of the case against Lew was that he sold 90,000 of his shares in WBL Corporate Private Limited ("WBL") on 4 July 2007 ("the material time"), when he was in possession of non-public price-sensitive information about WBL which he had acquired at an internal executive meeting held on 2 July 2007. We dismissed the appeal and now give the detailed grounds for our decision.

2 By way of general background, the SFA imposes both civil and criminal penalties for the offence of insider trading as defined in s 218 (which applies to "connected persons" as defined in s 218(5)) and s 219 (which applies to all other persons) of the SFA, respectively. Section 218 is the relevant section in this appeal. Under s 221 of the SFA, a defendant may be criminally prosecuted for contravening s 218 (which we will refer to hereafter as "criminal insider trading"). Alternatively, the Monetary Authority of Singapore ("MAS"), the respondent in this appeal, may bring a civil action against the defendant for the same (which we will refer to hereafter as "civil insider trading"). This was the first civil insider trading case to be litigated under the SFA since it was passed in 2001 and the first to be appealed to the Court of Appeal. In previous cases of civil insider trading, MAS had availed itself of its power under s 232(5) of the SFA to enter into agreements with the alleged insider traders to pay civil penalties, thereby dispensing with the need for litigation. In fact, since Parliament eschewed the "person-connected approach" (see [50] below for elaboration) under the now-repealed Securities Industries Act (Cap 289) in favour of the "information-connected approach" (see [51] below for elaboration) under the SFA, this was the first opportunity for this court to holistically examine the elements that constitute inside information (which elements would, of course, apply equally to criminal insider trading).

3 This appeal was heard together with Civil Appeals Nos 149 and 150 of 2010, which were, respectively, an appeal and a cross-appeal from a separate but related suit, Suit No 129 of 2008. Suit No 129 of 2008 was also jointly heard with Suit No 71 of 2009 before the Judge. In Suit No 129 of 2008, Lew sought specific performance of WBL's obligation to issue him shares under its Executive Share Option Scheme. It was undisputed that the funds Lew had used to exercise his share options under WBL's Executive Share Option Scheme had come from his sale of 90,000 of his shares in WBL (see [1] above), which was the transaction alleged to constitute insider trading in the context of the present appeal. The substantive merits of Civil Appeals Nos 149 and 150 of 2010 will be dealt with in a separate judgment (see *WBL Corporation Ltd v Lew Chee Fai Kevin* [2012] SGCA 13).

The parties involved

Lew

4 Lew was a senior employee at WBL. He was a trained accountant and had joined WBL as its Group Financial Controller in 1998. At the material time, he was the Group General Manager of WBL's Enterprise Risk Management group, which was in charge of developing and implementing an enterprise-wide risk management strategy for WBL. Lew resigned from WBL on 19 July 2007.

MAS

5 MAS is the respondent in the appeal and the plaintiff in Suit 71 of 2009 below. Under s 232 of the SFA, MAS may, with the consent of the Public Prosecutor, seek a civil penalty against a person whom it believes has contravened any provision in Pt XII of the SFA (*ie*, the "Market Conduct" provisions). This was in fact MAS's approach in the present case.

WBL and its senior personnel

6 WBL is the company whose shares (referred to hereafter as "WBL shares") were the subject of the alleged insider trading. It is a public company listed on the Singapore Exchange Ltd ("SGX"). At the material time, it had about 90 active subsidiaries. Its principal business is in Technology Manufacturing, Automotive Distribution, Technology Solutions and Investments. Its Technology Manufacturing Division was the main contributor to WBL's turnover, contributing more than 50% in 2006 and 2007. The substance of the alleged inside information concerned the financial performance of three subsidiaries under the Technology Manufacturing Division: Multi-Fineline Electronix Inc ("M-Flex"), MFS Technology Ltd ("MFS") and Wearnes Precision (Thailand) Limited ("WPT"), respectively.

7 At the material time, in addition to Lew, who (as just mentioned) was WBL's Group General Manager for Enterprise Risk Management, WBL's senior management consisted of the following persons: (a) Mr Tan Choon Seng ("C S Tan") as its Chief Executive Officer ("CEO"); (b) Mr Wong Hein Jee ("Wong") as its Chief Financial Officer; and (c) Mr Tan Swee Hong ("Swee Hong") as its Company Secretary and Group General Manager for Legal and Compliance.

8 C S Tan, Wong and Swee Hong were MAS's witnesses at the trial. Mr Soh Yew Hock ("Soh"), a non-independent and executive director of WBL, testified for Lew. Soh retired on 16 July 2007 and was no longer with WBL at the time of the trial. He was not present at the internal executive meeting at which the inside information was allegedly acquired by Lew (see [12]–[14] below).

The expert witnesses

9 Lew's expert witness was Mr Timothy James Reid, a partner at Ferrier Hogdson, a firm that

specialises in corporate turnover and restructuring. MAS's expert witness was Mr Christopher Chong Meng Tak ("Chong"). Chong is a financial and corporate consultant based in Singapore and is currently a director of ACH Investments Pte Ltd, a specialist corporate advisory firm with operations in Australia, China, India, Singapore and the US.

The chronology of events

10 An insider trading transaction generally comprises three important events:

(a) the acquisition of inside information by the alleged insider/defendant;

(b) the *acting* on the inside information by the alleged insider/defendant (*eg*, by buying or selling the shares of the company concerned); and

(c) the subsequent release of the inside information into the public domain.

11 In the present case, the factual background was not disputed by the parties. What was disputed was *the significance and reliability* of the information which Lew received and the interpretation of the market behaviour of WBL's share price after that information was released to the public.

Event No 1 – The 2 July 2007 General Management Council meeting

12 General Management Council ("GMC") meetings were instituted in WBL in 2004 to support the Board of Directors in strategic, operational and financial matters. The weekly GMC meetings were chaired by C S Tan and attended by members of WBL's senior management. The agenda for the meetings depended on whether the meetings were operational or financial meetings. At financial meetings, it was common for financial forecasts to be presented by WBL's finance department. The presentation materials were not distributed because of their confidential nature. It was at such a GMC meeting, held on 2 July 2007 ("the 2 July 2007 GMC Meeting"), that Lew acquired the alleged inside information.

Information (A): WBL's forecast loss for the third quarter of the financial year for 2007

13 The 2 July 2007 GMC Meeting was a financial meeting. It was held two days after 30 June 2007, the date on which the third quarter of the financial year for 2007 ("3Q FY07") ended. At the meeting, there was a presentation of WBL's financial forecasts for 3Q FY07 and the fourth quarter of the financial year for 2007. The presentation forecasted that WBL would make a loss of either $2.3m (*excluding* M-Flex's and MFS's forecasted performance) or $0.4m (*including* M-Flex's and MFS's forecasted performance). The forecast was based on the actual results for April and May 2007 as well as the estimated results for June 2007. The forecast did not take into account the possible impairment charge on WPT that is referred to in [14] below.

Information (B): The impairment charge over WPT

14 WBL's subsidiary, WPT, had been making significant losses for some time. During previous GMC meetings, the possibility of WBL taking an impairment charge over WPT had already been discussed. An impairment charge is a one-time write-off against a company's assets. The effect of the impairment charge would be to adjust the book value of the company's assets downwards to reflect their fair value, and this is reflected as a *loss* on the company's profit and loss statement. In the present case, *the parties did not dispute that the need for WBL to take an impairment charge over*

WPT was discussed at the 2 July 2007 GMC Meeting. Rather, they disputed the degree of *likelihood*, as evinced during the discussion at the 2 July 2007 GMC Meeting, of such an impairment charge being taken. MAS argued that it was very likely that an impairment charge would be taken over WPT, whereas Lew argued that no actual decision was made at the 2 July 2007 GMC Meeting on whether or not such an impairment charge would be taken and that, even if a decision had been made, the quantum of the impairment charge had not yet been decided.

Lew's conversation with Swee Hong after the 2 July 2007 GMC Meeting

15 After the 2 July 2007 GMC Meeting, Lew had a conversation with Swee Hong. The exact nature of the conversation was disputed. MAS contended that Lew sought Swee Hong's advice, in her capacity as WBL's Group General Manager for Legal and Compliance, as to whether he could sell his WBL shares in the light of what had been revealed at the 2 July 2007 GMC Meeting. Lew denied that he had sought Swee Hong's advice and contended that the conversation "did not amount to advice" [note: 1] from Swee Hong that he should not sell his WBL shares because the information disclosed at the meeting was price-sensitive. In our view, this dispute of fact is immaterial. Regardless of whether Lew had actually sought Swee Hong's advice, it was undisputed that Swee Hong had told Lew that it would not be prudent for him to sell his WBL shares because the information at the 2 July 2007 GMC Meeting was price-sensitive.

Event No 2 – Lew's sale of 90,000 of his WBL shares on 4 July 2007

16 Two days after the 2 July 2007 GMC Meeting, *ie*, on 4 July 2007, Lew sold 90,000 of his WBL shares in three tranches of 30,000 shares each at $4.98 per share (collectively, "the Transaction").

17 On 5 July 2007, Lew e-mailed Swee Hong to inform her about the Transaction. This was in accordance with WBL's internal procedures for the sale and purchase of WBL shares by WBL's senior management. On 9 July 2007, Swee Hong replied stating that, in her view, the Transaction might be construed as insider trading because Lew possessed price-sensitive information from the 2 July 2007 GMC Meeting. On the same day (9 July 2007), Lew replied stating that he had sold his shares to raise cash to exercise his share options under WBL's Executive Share Option Scheme. He also stated that he did not think the matters discussed at the 2 July 2007 GMC Meeting were price-sensitive, but that if Swee Hong considered his explanation insufficient, he would promptly buy back the same number of WBL shares at no less than the price at which he had sold his WBL shares. On the same day, Lew also submitted the requisite notices under the WBL's Executive Share Option Scheme as were necessary to exercise his share options.

18 Swee Hong replied on 10 July 2007 pointing out that Lew had sought her advice on 2 July 2007, and that she had advised then that it would not be prudent for him to deal in WBL shares in the light of the 2 July 2007 GMC Meeting. She then advised that it would nevertheless be improper for him to repurchase the same number of WBL shares from the market.

Event No 3 – Release of the alleged inside information by WBL after the 2 July 2007 GMC Meeting

19 The following table reflects the information released by WBL after the 2 July 2007 GMC Meeting:

Date and Time	**Event**

12 July 2007, 12.40pm	WBL issued a profit warning on the SGX website in respect of M-Flex, *ie*, that M-Flex had experienced an unanticipated sequential decline in earnings for 3Q FY07 and that it expected its net income to decline sequentially to a loss.
17 July 2007, 6.16am	MFS issued a profit warning in the range of a $2.5m to $3m loss in 3Q FY07.
17 July 2007, 5.48pm	WBL issued its own profit warning, without advising as to the quantum of the expected loss. It specifically mentioned the losses suffered by M-Flex, MFS and WPT as reasons for its expected loss.
14 August 2007	WBL released its financial statement for 3Q FY07. This included a loss of $27.3m, of which $26.6m consisted of an impairment charge taken over WPT's assets.

20 The market evidence regarding how the stock market reacted to the release of the information tabulated above will be examined below (see [122]–[136]). We note that the nature of the information released by WBL as tabulated above was similar but not completely identical to the inside information Lew was alleged to possess (explained further at [109] below).

Subsequent developments for Lew

21 On 12 July 2007, C S Tan asked Lew to give a statement to the law firm, Allen and Gledhill LLP ("A&G"), in respect of the Transaction. After A&G took a statement from Lew, he was summarily suspended from duty with immediate effect. On 17 July 2007, WBL lodged a Suspicious Transaction Report with the Commercial Affairs Department in respect of the Transaction. On 11 September 2007, MAS examined Lew pursuant to s 154 of the SFA and took a statement from him.

22 It should be noted that Lew did not sell all his WBL shares and still possessed 227,771 of such shares at the time of these proceedings.

The issues arising in this appeal

23 MAS's claim against Lew was based on s 218 of the SFA ("s 218"), which sets out what is "prohibited conduct by [a] connected person in possession of inside information". Section 218 reads as follows:

> **Prohibited conduct by connected person in possession of inside information**
>
> **218.**—(1) Subject to this Division, where —
>
> (*a*) a person who is connected to a corporation possesses information concerning that corporation that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of that corporation; and
>
> (*b*) the connected person knows or ought reasonably to know that —
>
> (i) the information is not generally available; and
>
> (ii) if it were generally available, it might have a material effect on the price or value of

those securities of that corporation,

subsections (2), (3), (4), (5) and (6) shall apply.

(1A) Subject to this Division, where —

(*a*) a person who is connected to any corporation, where such corporation —

(i) in relation to a business trust, acts as its trustee or manages or operates the business trust; or

(ii) in relation to a collective investment scheme that invests primarily in real estate and real estate-related assets specified by [MAS] in the Code on Collective Investment Schemes and all or any units of which are listed on a securities exchange, is the trustee or manager of the scheme,

possesses information concerning that corporation, business trust or scheme, as the case may be, that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of that corporation, of securities of that business trust or of units in that scheme, as the case may be; and

(*b*) the connected person knows or ought reasonably to know that —

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities of that corporation, of those securities of that business trust or of those units in that scheme, as the case may be,

subsections (2), (3), (4A), (5) and (6) shall apply.

(2) The connected person must not (whether as principal or agent) —

(*a*) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities referred to in subsection (1) or (1A), as the case may be; or

(*b*) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities referred to in subsection (1) or (1A), as the case may be.

(3) Where trading in the securities referred to in subsection (1) or (1A) is permitted on the securities market of a securities exchange or futures market of a futures exchange, the connected person must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the connected person knows, or ought reasonably to know, that the other person would or would be likely to —

(*a*) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(*b*) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

(4) In any proceedings for a contravention of subsection (2) or (3) against a person connected to a corporation referred to in subsection (1), where the prosecution or plaintiff proves that the connected person was at the material time —

(*a*) in possession of information concerning the corporation to which he was connected; and

(*b*) the information was not generally available,

it shall be presumed, until the contrary is proved, that the connected person knew at the material time that —

(i) the information was not generally available; and

(ii) if the information were generally available, it might have a material effect on the price or value of securities of that corporation.

(4A) In any proceedings for a contravention of subsection (2) or (3) against a person connected to a corporation which —

(*a*) in relation to a business trust, acts as its trustee or manages or operates the business trust; or

(*b*) in relation to a collective investment scheme, is the trustee or manager of the scheme,

as the case may be, referred to in subsection (1A), where the prosecution or plaintiff proves that the connected person was at the material time —

(i) in possession of information concerning the corporation, business trust or scheme, as the case may be; and

(ii) the information was not generally available,

it shall be presumed, until the contrary is proved, that the connected person knew at the material time that —

(A) the information was not generally available; and

(B) if the information were generally available, it might have a material effect on the price or value of securities of that corporation, of securities of that business trust or of units in the scheme, as the case may be.

(5) In this Division —

(*a*) "connected person" means a person referred to in subsection (1) or (1A) who is connected to a corporation; and

(*b*) a person is connected to a corporation if —

(i) he is an officer of that corporation or of a related corporation;

(ii) he is a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act (Cap. 50) in that corporation or in a related corporation; or

(iii) he occupies a position that may reasonably be expected to give him access to information of a kind to which this section applies by virtue of —

(A) any professional or business relationship existing between himself (or his employer or a corporation of which he is an officer) and that corporation or a related corporation; or

(B) being an officer of a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act in that corporation or in a related corporation.

(6) In subsection (5), "officer", in relation to a corporation, includes —

(*a*) a director, secretary or employee of the corporation;

(*b*) a receiver, or receiver and manager, of property of the corporation;

(*c*) a judicial manager of the corporation;

(*d*) a liquidator of the corporation; and

(*e*) a trustee or other person administering a compromise or arrangement made between the corporation and another person.

Hence, under s 218(1) of the SFA, a person is liable for insider trading if:

(a) he is a "person who is connected to a corporation";

(b) he possesses "information concerning that corporation";

(c) that information is not "generally available";

(d) a reasonable person would, if that information were generally available, expect it to have a "material effect on the price or value of securities of that corporation";

(e) the connected person knows or ought reasonably to know that the information is not generally available; and

(f) the connected person knows or ought reasonably to know that if the information were generally available, it might have a material effect on the price or value of those securities of that corporation.

24 It was undisputed that limbs (a) and (b) had been satisfied in the context of the present appeal. Lew, as a senior employee of WBL, was "connected" to WBL within the meaning of s 218(5) of the SFA, and the information he allegedly possessed at the material time "concern[ed]" WBL. The issues arising in this appeal were therefore as follows:

(a) What information concerning WBL did Lew possess at the material time ("Issue 1")?

(b) Was the information concerning WBL which Lew possessed at the material time (referred to

hereafter as "the Information") generally available ("Issue 2")?

(c) If the Information was not generally available, would a reasonable person expect it to have a material effect on the price or value of WBL shares if the Information were generally available ("Issue 3")?

(d) Did Lew know or ought he reasonably to have known that:

(i) the Information was not generally available ("Issue 4(a)"); and

(ii) if the Information were generally available, it might have a material effect on the price or value of WBL shares ("Issue 4(b)")?

25 Under s 218(4) of the SFA, if MAS proves that Lew possessed information concerning a company to which he was connected (*ie*, WBL) and, that such information (*ie*, the Information, in the context of the present appeal) was not generally available, the *presumption* arises that Lew *knew* that:

(a) the Information was not generally available; and

(b) if the Information were generally available, it might have a material effect on the price or value of WBL shares.

The burden of proof would then be shifted to Lew to rebut this presumption ("the presumption of knowledge under s 218(4)").

Issue 1: What did the Information consist of?

26 The Judge found (at [53] of the Judgment) that the Information consisted of the following pieces of information:

(a) WBL had forecasted a loss of either $2.3m (excluding M-Flex's and MFS's forecasted performance) or $0.4m (including M-Flex's and MFS's forecasted performance) in 3Q FY07 ("the Loss Forecast");

(b) it was *very likely* for WBL to take a *significant* impairment charge on WPT in 3Q FY07 ("the Significant Impairment Prospect"); and

(c) as a result of (a) and (b) above, it was *very likely* that WBL would incur a *significant* overall loss for 3Q FY07 ("the Significant Overall Loss Forecast").

27 Lew argued that the Judge was wrong to make the above findings because she failed to fully consider the surrounding facts which affected the *reliability or certainty* of the results presented. In particular, Lew submitted that the Judge was wrong to find that WBL had made a *reliable* forecast of loss. As we point out below, however (at [31]), although the argument with regard to reliability is an important one, it was not appropriate to raise it at this threshold stage of ascertaining what the Information consisted *of*.

28 Lew argued that what was discussed at the 2 July 2007 GMC Meeting was too uncertain and preliminary to be reasonably relied on. Implicit in Lew's argument at this stage of the inquiry was the proposition that information of an *uncertain* or *unreliable* nature could not be treated as part of the

Information. To resolve this issue, we need to examine what constitutes "information" under the SFA.

Legal interpretation of "information"

29 Under s 132A(1) of the Companies Act (Cap 185, 1970 Rev Ed) , "information" was interpreted more specifically as "knowledge of a particular event or situation such as advice, communication, intelligence, news, notification and the like" (see the Singapore Court of Criminal Appeal decision of *Public Prosecutor v Choudhury* [1979–1980] SLR(R) 766 at [19]). However, it is quite clear from the present s 214 of the SFA that "information" is meant to be interpreted more widely. Section 214 of the SFA does not define "information" exhaustively but adopts an inclusive definition that includes a wide range of information as follows:

> "[I]nformation" includes —
>
> (*a*) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;
>
> (*b*) matters relating to the intentions, or the likely intentions, of a person;
>
> (*c*) matters relating to negotiations or proposals with respect to —
>
> (i) commercial dealings;
>
> (ii) dealing in securities; or
>
> (iii) trading in futures contract;
>
> (*d*) information relating to the financial performance of a corporation or business trust, or otherwise;
>
> (*e*) information that a person proposes to enter into, or had previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
>
> (*f*) matters relating to the future[.]

30 Our current provisions on insider trading are based on Australian legislation and Australian courts have taken a wide approach in interpreting the term "information". The New South Wales decision of *R v Rivkin* [2004] NSWCCA 7 at [126] (reported in part in (2004) 59 NSWLR 284, but not with regard to the points that are germane to the present appeal) concerns a case of insider trading pursuant to the Australian Corporations Act 2001 (the Australian legislation on insider trading). The New South Wales Court of Criminal Appeal agreed with McInerney J's decision in the Supreme Court of Victoria case of *Commissioner for Corporate Affairs v Green* [1978] VR 505 at 511 ("*Green*"), that information did not have to be "factual knowledge of a concrete kind". McInerney J also held in *Green (at 5*11) that:

> In many cases a hint may suggest information or may enable an inference to be drawn as to information. Information about impending stock movements or share movements may often be veiled. Discussion concerning such a movement may often take the form of "mooting" but not deciding a matter.

It is also significant to note that the leading local author in this field observes that "[t]he reference

to 'matters of supposition' in [limb (a) of the definition of "information" in s 214 of the SFA] in effect means that information may include rumours circulating in the market" (see Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (2nd Ed, LexisNexis, 2011) ("*Tjio*") at para 8.12); in this regard, the learned author has also referred to the following (italicised) observations by Young J in the Supreme Court of New South Wales decision of *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd & Ors* (1986) 10 ACLR 462 (at 468) as having been reflected in the phrase "matters of supposition" in limb (a) of the definition of "information" in s 214 of the SFA (see *Tjio* at para 8.12, note 54):

> To my mind information in [s 128(1) of the Securities Industry (NSW) Code] goes further than knowledge and includes the situation where someone has been informed of something which he does not know to be true nor does he care whether it is true or not. In other words, *information may include a rumour that something has happened with respect to a company which a person neither believes nor disbelieves*. [emphasis added]

31 Indeed, as alluded to above (at [27]), the issue of reliability is not relevant at this particular juncture, although it is certainly significant with regard to Issue 2 (*ie*, whether the Information was "generally available") and Issue 3 (*ie*, if the Information had been generally available, whether a reasonable person would expect it to have had a "material effect" on the price or value of WBL shares). Put simply, Issue 1 relates to the very broad and general question as to *what* constitutes "information" in the first place, whereas the issue of reliability (and, we might add, certainty) relates to the quite separate question as to the nature *and* quality of that "information". Indeed, in so far as Issue 1 is concerned, "information" might well include knowledge of an uncertain, predictive or speculative nature. Therefore, while Lew disputes the *certainty* and *reliability* of the information which he acquired from the 2 July 2007 GMC Meeting, this did not prevent that information from being information which he possessed within the meaning of s 218. It bears repeating that s 218 has various cumulative stages of inquiry (as seen above at [23]) and, therefore, *parties should be careful that their respective arguments do not conflate the different stages of inquiry*. Whilst the definition of "information" under s 214 of the SFA might appear wide, as the leading local author in this area of the law perceptively observes (referring to the relationship, which we have just noted, between Issue 1 on the one hand and Issue 2 and Issue 3 on the other; see *Tjio* at para 8.12):

> But the *width* of the definition [in s 214 of the SFA] *is tempered by the fact that information is only considered inside information if it is not generally available and is materially price-sensitive*. [emphasis added]

However, as the parties have joined issue on the questions of certainty and (especially) reliability at this threshold stage, we will proceed to consider the Judge's findings – bearing in mind the fact that the arguments in relation to reliability are more relevant and appropriate when we consider Issue 2 and Issue 3 later on in these grounds of decision.

The Judge's findings on Lew's knowledge

32 It is well-established that an appellate court should defer to the trial judge's finding of fact unless it is established that the finding of fact is plainly wrong or unjustified on the totality of the evidence before the trial judge (see, for example, the decision of this court in *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543), particularly where the veracity and credibility of witnesses are concerned (see, for example, the decision of this court in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307). In this vein, we noted that the Judge's findings were largely based on: (a) the finding that Lew was an unreliable witness; and (b) a preference for the testimonies of C S Tan, Wong and Swee Hong over that of Lew.

(A) Finding relating to the Loss Forecast

33 Lew does not dispute that he *knew* WBL made the Loss Forecast at the 2 July 2007 GMC Meeting. As noted above, Lew's case against the reliability of the Loss Forecast was a red herring at this stage.

(B) Finding relating to the Significant Impairment Prospect

34 Although the Judge did not cite Lew's admissions against himself in the Judgment, Lew made important admissions in his affidavit of evidence-in-chief ("AEIC") and during cross-examination with regard to the need for WBL to take a significant impairment charge on WPT. In his AEIC, Lew admitted that "WPT's problems and need for assets impairment were discussed since the last quarter of 2006 and throughout 2007 during GMC meetings and other 'offline' meetings". [note: 2]

35 In his cross-examination, Lew made the following admissions: [note: 3]

> Q: … On 2 July, the CEO [*ie*, C S Tan] had made it very clear, he said that there was a need to take a *full* impairment, a *full* impairment for Q3, and move on; right?
>
> A: Right, yeah.
>
> …
>
> Q: … But you knew what the ballpark figure was for the impairment for WPT because you had heard the discussions at the audit committee meeting on 8 May; correct?
>
> A: Ballpark, as in maximum -- the value at risk was a figure of about 22 to 30.5 million.
>
> Q: If it was a full impairment, that would be the size; right?
>
> A: That is if the assets are worth nothing, yeah.
>
> [emphasis added]

Lew clearly admitted that he knew that C S Tan, the CEO of WBL, had made it very clear at the 2 July 2007 GMC Meeting that there was a need for WBL to take a full impairment charge on WPT for 3Q FY07. Lew also admitted that he knew that a full impairment charge on WPT would involve a substantial sum of about $22m to $30.5m.

36 The Judge accepted, at [46] of the Judgment, the testimony of C S Tan, Wong and Swee Hong that "any attendee of the 2 July 2007 GMC Meeting would know that the decision to impair was almost a certainty". Lew admitted that no one else at the meeting could corroborate his evidence that he did not know an impairment charge on WPT was very likely to materialise. Furthermore, Lew's argument that it was not likely for him to know that an impairment charge would be taken on WPT in 3Q FY07 was in direct contradiction to the objective evidence on record, *ie*, the minutes of the Audit Committee meetings ("ACM") and GMC meetings from February 2007 to 2 July 2007, which showed the growing inevitability and increasing likelihood of an impairment charge being taken on WPT. Lew was present at all those meetings.

37 To elaborate, in the 9 February 2007 ACM minutes, it was stated that: [note: 4]

… the Committee agreed that no impairment charge be recorded at 31 December 2006. However, the Committee said that the performance of WPT will need to be monitored; an impairment of the assets will need to be considered if WPT performs worse than the projections of a $3.1m loss for Q207 (excluding the effects of one-off charges such as the retrenchment payments).

Hence, at the time of the 9 February 2007 ACM, WPT had already recorded, for the first quarter of the financial year for 2007 ("1Q FY07"), losses that were greater than the projected losses, and there were already discussions on the necessity of taking an impairment charge on WPT. WBL's management deferred the decision because of the possibility of WPT securing contracts from new customers and undertaking cost reduction initiatives to reduce its losses.

38 In the 9 April 2007 GMC meeting minutes, C S Tan was quoted as saying: [note: 5]

Patience is short now for WPT. In last 12 months, we hv [*sic*] lost more than ever … By end up [*sic*] June. Board meeting and strategy meeting coming up.

39 For the 8 May 2007 ACM, Microsoft Powerpoint presentation slides were prepared and the slides presented three options to deal with the continuing losses suffered by WPT, as follows: [note: 6]

1. Re-build

- Only if JVC and/or [Panasonic] HDD business firmed up within [the] next 30 days
  - Analysis clearly shows viable [and] profitable business under any normal situation
  - WPT operations not viable without HDD business
- Little confidence that current WPT team able [*sic*] to deliver

…

- *Very high risk option* since still require [*sic*] several more quarters of losses before turnaround

2. Immediate Shutdown

- *Most predictable* outcome
- High one-time write-off of up to S$30 million
- Reputation related risks

3. Sell off WPT as an ongoing business concern

- Attractive to potential buyer only with HDD business secured
- Risk of not finding buyer within short time frame
  - Continued operational losses in meantime
- No asset impairment in current quarter

[emphasis added]

40 More importantly, in the minutes of the 8 May 2007 ACM, which was chaired by Dr Cham Tao Soon, it was recorded that: [note: 7]

> [Wong] stated … the key assumptions made by management and mentioned that the updated impairment analysis is heavily dependent on a key assumption of getting a new key customer … WPT is in an advanced stage of negotiation with [the new customer] for hard-disk drive business and believe that WPT will be able to turnaround with this key customer who offers a much better pricing and volume.
>
> In response to Dr Cham Tao Soon's question on the value of fixed assets at risk, Ms Tan Bee Nah [an external auditor] stated that the value at risk is $22 million, excluding freehold land and building. If freehold land and building are included, the value at risk is $30.5 million.
>
> …
>
> Dr Cham Tao Soon enquired about the expected date that the [deal with the new customer] will be completed, and that a cut-off date should be set to decide when impairment charge is to be recorded. *[C S Tan] proposed a cut-off date of Q307, and an impairment charge should be recognised if there is no progress by then. The AC [Audit Committee] agreed.*
>
> Ms Tan Bee Nah added that the benchmark should not be against the Q3 forecast (as it is now May 2007 and discussion with [the new customer] is still on-going), but rather milestones such as whether agreement has been signed.
>
> [emphasis added]

Based on the 8 May 2007 ACM Powerpoint slides and minutes, it was clear that WBL's senior management recognised that taking an impairment charge on WPT was the "most predictable outcome" [note: 8] and that the only thing holding back the taking of an impairment charge was the prospect of WPT obtaining a new key customer. WBL's senior management also recognised that the final decision as to whether or not to take an impairment charge over WPT could not be deferred indeterminately as WPT struggled to get a new customer, and agreed that WPT's progress would be determinatively evaluated in 3Q FY07.

41 In the 2 July 2007 GMC Meeting minutes, in reference to WPT's continued losses being more than the forecast losses, it was stated as follows: [note: 9]

> 1.1.1 Decision point on divesting the plant must be made by next week. [C S Tan] points out that [the] original drop dead date was June 30th. Would like to see an end by 31st July and greater sense of urgency. *Likely to take an impairment this quarter for the entire Group and write it off totally instead of continuing to lose money as has been the last 3 quarters*.
>
> 1.1.2 [Wong] updates that the past 2 weeks, there were visits related to a big buyer looking into WPT. This week the buyers are going to make a decision and that it may be necessary to get a new valuer as the old valuation was unrealistically high.
>
> …

5 Action Items

5.1 *Need to take a full impairment for Q3 and move on*.

…

5.3 Need a solid decision on WPT.

[bold in original] [emphasis added]

The objective evidence clearly demonstrated a strong likelihood of a full impairment charge on WPT being taken in 3Q FY07. C S Tan testified that it was clear that an impairment charge had to be recognised since WPT had failed to get the new key customer discussed during the 8 May 2007 AMC (see above at [40]).

42 Lew attempted to discount the effect of the GMC minutes set out above by arguing that GMC meetings were not taken seriously by WBL's senior management. To this end, he labelled GMC meetings as being a "grand master's circus" [note: 10] and argued that no substantive decisions were taken at such meetings and that decisions made were not implemented. However, we agreed with the Judge that the evidence did *not* support Lew's case: even Lew's own witness, Soh, admitted that GMC meetings were important to WBL's business. Lew later admitted that confidential information such as financial data was in fact discussed at GMC meetings. Indeed, it seems incredulous, in our view, that the senior management of WBL would have carried out weekly GMC meetings since 2004, only to make no substantive decisions at such meetings or to fail to implement decisions made at such meetings.

43 Lew also argued that no actual decision to take an impairment charge on WPT for 3Q FY07 was made at the 2 July 2007 GMC Meeting. He argued this on the basis that: (a) previous meetings were inconclusive as to whether an impairment charge on WPT would be taken; (b) there was no quorum at the 2 July 2007 GMC Meeting to make a decision on whether or not such an impairment charge should be taken; and (c) there was no discussion at the 2 July 2007 GMC Meeting of a profit warning, which would have to be issued in the event of WBL taking an impairment charge on WPT. The Judge did not find that an *actual* decision to take an impairment charge on WPT for 3Q FY07 was made at the 2 July 2007 GMC Meeting – instead, her finding was that it was *very likely* that a significant impairment charge on WPT would be taken for 3Q FY07. Lew's arguments were, in contrast, pegged at the higher threshold of an *actual* decision on the taking of an impairment charge being made at the 2 July 2007 GMC Meeting. This is not surprising, not least because it would have been disingenuous, in the light of the evidence on record, for Lew to have argued that it was not very likely for an impairment charge to be taken over WPT.

44 We also agreed with the Judge's rejection of Lew's argument that the management of WBL had extended the deadline for taking the impairment charge on WPT to 31 July 2007 (see [48] of the Judgment). The extension of the deadline to 31 July 2007 was in reference to possible plans to divest the plants of WPT, which would affect only the *quantum* of the impairment charge taken on WPT but *not* the decision to take an *impairment charge* itself.

45 However, Lew argued that he could not have known the quantum of the impairment charge on WPT or that it was very likely the impairment charge would be significant. We found this difficult to believe in the light of his admission that he knew the value-at-risk on WPT's assets was a ballpark figure ranging from $22m to $30.5m (see above at [35]). Lew's argument was based on the following statement in the minutes of the 2 July 2007 GMC Meeting, as follows: "[in] the past 2 weeks, there

were visits related to a big buyer looking into WPT. This week the buyers are going to make a decision and that it may be necessary to get a new valuer as the old valuation was unrealistically high". [note: 11] However, we rejected this argument; in particular, we agreed with the Judge that "[e]ven taking into account any possibility of a sale of WPT (at a distressed price or any other valuation), the evidence strongly suggested that the impairment would still be a substantial one, even if it may not be at $30 million)" (see [52] of the Judgment).

(C) Finding relating to the Significant Overall Loss Forecast

46 We also agreed with the Judge's finding that, based on the Loss Forecast and the Significant Impairment Prospect, it was very likely that WBL would incur a significant overall loss in 3Q FY07. We acknowledged that the Loss Forecast was small *in itself*, being only $0.4m in the best-case scenario (*ie*, with M-Flex's and MFS's forecasted performance included). However, the *combination* of the Loss Forecast (which projected a loss of either $0.4m or $2.3m) and the Significant Impairment Prospect (which projected a write-off of between $22m to $30.5m) led to the inference that it was very likely WBL would incur a significant overall loss in 3Q FY07 because WBL would not be able to offset the substantial losses arising from a significant impairment charge being taken on WPT with profits from WBL's other subsidiaries. Put simply, the Loss Forecast and the Significant Impairment Prospect were not only significant pieces of information in themselves, but also had to be viewed holistically, particularly in the context of the issues in this appeal in general and this issue (Issue 1) in particular.

Conclusion for Issue 1: Particularising the Information

47 Having regard to the above analysis, we upheld the Judge's findings with regard to the specific pieces of information comprised in the Information. However, the inquiry into the *nature* of the Information (which is crucial to the resolution of Issue 2 and Issue 3 to be considered below) would have been clearer if Lew's knowledge had been specifically particularised. With respect, the Judge should have distinguished between what Lew knew about WBL's state of affairs with *full certainty* (see (a), (b), (c) and (d) below) and what Lew knew about WBL's state of affairs with *a high degree of probability* (deduced, in the main, from what he knew about WBL's state of affairs with full certainty) (see (e), (f) and (g) below). Specifically, the Information should be particularised as follows:

(a) Lew knew WBL's senior management had forecasted a loss for 3Q FY07;

(b) he knew the Loss Forecast was based on actual results in April and May 2007 but estimated results for June 2007;

(c) he knew WBL's senior management had discussed the possibility of taking an impairment charge on WPT and had been discussing this possibility since the last quarter of 2006 ("4Q FY06");

(d) he knew that WBL's senior management had estimated an impairment charge on WPT to be in the range of $22m to $30.5m;

(e) he knew that it was very likely an impairment charge on WPT would be taken in 3Q FY07;

(f) he knew that it was very likely the impairment charge on WPT would be significant; and

(g) he knew that it was very likely WBL would incur significant overall loss for 3Q FY07.

48 The importance of particularising the Information became especially apparent in relation to the inquiry with regard to Issue 2, which involved determining if the Information was "generally available". In *Hannes v Director of Public Prosecutions (Cth) (No 2)* (2006) 60 ACSR 1 ("*Hannes v DPP*"), another case under the Australian insider trading legislation (see [30] above) *in pari materia* with ours, the Supreme Court of New South Wales Court of Criminal Appeal likewise stressed the importance of particularising the information known by the alleged insider trader in determining if the inside information was "generally available". In particular, the court stated (at [382]) that:

> … even if it can be said that *aspects* of the particularised information were generally available, that did not lead to the conclusion that the particularised information *as a whole* was generally available … It was the *combination* of information particularised which was significant in relation to the offence charged. [emphasis added]

49 The importance of particularising the Information is especially critical when it is disputed whether the Information can be *deduced* from information that was generally available. In the present case, even if the public could reach the same conclusions as those contained in the Information (*eg*, even if the public could deduce that WBL would incur a significant overall loss for 3Q FY07), the *grounds* on which the public made such deductions could be completely different. If the Information is not sufficiently particularised so as to state clearly the *bases* of Lew's knowledge, it would be difficult to compare the qualitative differences in the Information with the deductions made by the public. We therefore bore this in mind with regard to the next issue, *ie*, whether the Information was "generally available" within the meaning of s 218 of the SFA; and it is to this issue (*ie*, Issue 2) that our attention must now turn.

Issue 2: Was the Information "generally available"?

Legislative history of the insider trading regime under the SFA

50 Before considering the statutory definition of "generally available" under the SFA, it is important to consider the legislative history of the insider trading regime under the SFA. The previous legislative framework for insider trading under s 103 of the Securities Industry Act (Cap 289, 1985 Rev Ed) followed almost exactly s 128 of the Australian Securities Industry Act 1980 (Act 66 of 1980), which was repealed in Australia sometime towards the end of the 1980s. The previous scheme emphasised a person's connection with the company (the "person-connected approach"). In particular, there were, historically, five elements for the offence of insider trading under s 103(1) of the Securities Industry Act, as follows:

(a) the person in question was an insider at the material time;

(b) he was in possession of price-sensitive information;

(c) he obtained the information *by virtue of his position as an insider*;

(d) the information was not generally available; and

(e) he dealt in the securities of the corporation.

Thus, the previous framework made it very difficult to catch "tippees", *viz*, persons who acquired price-sensitive information from an insider. Section 103(3) of the Securities Industry Act required the "tipee" to be aware that the person who tipped him was an insider. Under this framework, there was no statutory definition of "generally available" information.

51 The Securities and Futures Bill (Bill 33 of 2001) ("the Bill") "redefine[d] the laws on insider trading" (*per* BG Lee Hsien Loong ("BG Lee"), Deputy Prime Minister, during the second reading of the Bill (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 ("*Singapore Parliamentary Debates* (5 October 2001)") at col 2137)). The Bill transformed our legislative framework on insider trading from a person-connected approach to an "information-connected" approach (*id* at col 2159). This was a clear move away from the position in the US, where the theory of insider trading is based on fiduciary duties. Under the new information-connected approach, there is no longer a need to trace the information back to its original source, which was needed under the person-connected approach. The examination focuses, instead, on the *nature* of the information and whether it: (a) was generally available; and (b) would have a material effect on the price or value of the shares in question – which is the *present* legal position under s 218.

52 Our shift to an information-connected regime was inspired by Australia's own shift from a person-connected approach to an information-connected approach. Our insider trading provisions in Pt XII, Div 3 of the SFA were based wholly on the insider trading provisions in the Australian Corporations Act 2001. Hence, the judicial and academic interpretations in Australia are of particular importance in interpreting the provisions of the SFA. While the specific Australian provisions on which the SFA was based have since been repealed, those provisions were reproduced as different sections in the same act, *ie*, the Australian Corporations Act 2001 (see [54] below); the law of insider trading in Australia has therefore not changed in substance. The only significant amendment to the law of insider trading in Australia was the Financial Services Reform Act 2002, which added the option of a civil penalty for insider trading.

53 The main policy reason for the transformation of our insider trading regime to a focus on the *nature* of the information was as follows (*per* BG Lee, Deputy Prime Minister, in *Singapore Parliamentary Debates* (5 October 2001) at col 2136):

> At the core, the mischief of insider trading lies in tilting the playing field unfairly against other market participants. Those who knowingly have inside information should be prohibited from trading, whether or not they are connected with the company. The intent is to address the *core evil of trading while in possession of undisclosed market sensitive information*, instead of having liability depend on a person's connection with the company. [emphasis added]

Hence, under an information-connected approach, the identification of what constitutes *inside* information is central to the enforcement of the regime. The significance of the Australian Corporations Act 2001, which (as noted above) we followed in the SFA, was the insertion of a statutory definition for "generally available" information.

Statutory definition of "generally available" information

54 The statutory definition of "generally available" information is to be found in s 215 of the SFA ("s 215"), which reads as follows:

> For the purposes of this Division, information is generally available if —
>
> (*a*) it consists of readily observable matter;
>
> (*b*) without limiting the generality of paragraph (a) —
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might

be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or

(*c*) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(i) information referred to in paragraph (*a*);

(ii) information made known as referred to in paragraph (*b*)(i).

Section 215 was based on the (then) s 1002B of the Australian Corporations Act 2001, which is now s 1042C of the Australian Corporations Act 2001.

55 Hence, while the genesis of the Australian provisions recognised the need to define what was inside information so that the insider trading regime would be easier to enforce (see generally Alan Griffiths, *Fair Shares for All, Insider Trading in Australia* (Australian Government Publishing Service, 1989) ("the *Griffiths Report*")), the statutory definition in the SFA and in Australia is, in fact, a *negative* formulation of what is inside information, *ie*, information that is *not* generally available. The problem with a negative formulation of inside information is that if the definition of "generally available" is not interpreted properly, it may lead to over-regulation, *ie*, the capturing as insider trading transactions of those transactions that do not actually involve the kind of "undisclosed market sensitive information" (see *Singapore Parliamentary Debates* (5 October 2001) at col 2137) that Parliament originally aimed to regulate.

56 The Judge referred to the test in s 215(*a*) as the "readily observable test", the test in s 215(*b*) as the "publishable information test" and the test in s 215(*c*) as the "market analysis test" (see the Judgment at [55]). This is the same terminology referred to in the Australian academic material. Whilst these terms are helpful, they should nevertheless not replace the language of the statute itself. While the Judge recognised (at [55] of the Judgment) that "these definitions [were] not without difficulty" and made observations on the s 215(*a*) "readily observable test" and the s 215(*b*) "publishable information test", she decided (at [63] of the Judgment) not to lay down a definitive view as to what legal interpretation should be adopted for s 215(*a*) and s 215(*b*). The Judge held (at [63] of the Judgment) that it was "not strictly necessary" to decide which interpretation should be adopted in the Singapore context since "MAS, in its submissions, did not dispute that the information which Lew sought to rely on (*viz*, the press releases and announcements of companies listed in Singapore or the US) satisfies the readily observable test or publishable information test". The Judge thus only decided on the legal interpretation of the s 215(*c*) "market analysis test" – more specifically, she considered whether the Information could consist of "deductions, inferences and conclusions" drawn from the information referred to in s 215(*a*) and s 215(*b*) and, on that basis, be regarded as "generally available" information within the meaning of s 215(*c*).

57 With respect, we beg to differ from the Judge's approach of interpreting s 215(*c*) without considering the legal interpretations of s 215(*a*) and s 215(*b*), since (as we have just noted) the scope of the information which falls within s 215(*c*) is clearly and necessarily dependent upon what information is generally available under s 215(*a*) and s 215(*b*). The Judge compared the deductions which could be made from information indisputably available in the public domain with the Information (as determined in Issue 1), held that the deductions were not of the "same character" or "quality" as the Information, and thus held that the Information was *not* "generally available" under s 215. However, the Judge failed, with respect, to state *exactly who* made the deductions, inferences and

conclusions from the generally available information for the purposes of s 215(*c*). The Judge mentioned "the market", "a person", "an investor", "a reasonable investor", "the public" and the "investing public" at different points of her analysis as the perspective from which the deductions, inferences and conclusions were made (see [74]–[81] of the Judgment). We are of the view, however, that a *consistent* point of reference must be identified, because different people with different viewpoints and skills would necessarily make different deductions, inferences and conclusions.

58 Without interpreting s 215(*a*) and s 215(*b*) in conjunction with s 215(*c*), the Judge had in fact interpreted s 215(*c*) in a vacuum. Considering the fundamental importance of the statutory definition of "generally available" information in establishing the offence of insider trading under the SFA, all three limbs of s 215 ought to be interpreted clearly and rationally in relation to each another. Indeed, the Judge recognised that there was a tension between the policy of efficiency embodied in s 215(*a*) and s 215(*c*) and the policy of fairness in s 215(*b*) (see the Judgment at [58]). Furthermore, while s 215(*a*) and s 215(*c*) do not identify *to which parties* the information must be readily observable (for s 215(*a*)) and *which are the parties who* make the deductions, conclusions and inferences (for s 215(*c*)), s 215(*b*) in fact identifies the parties that the information must be made known to: the information must be brought to "*the attention of persons who commonly invest in securities* of a kind whose price or value might be affected by the information" [emphasis added]. For ease of reference, we will refer, collectively, to "persons who commonly invest in securities" as "Common Investors". The significance of the Common Investor will be emphasised again when we consider Issue 3, as the Common Investor is also reflected in s 216 of the SFA in determining if a reasonable person would expect the Information, if it were generally available, to have a material effect on the price or value of the WBL shares. The only difference between the Common Investor in s 216 and in s 215(*b*) of the SFA is that the Common Investor in s 215(*b*) ("the s 215(*b*) Specific Common Investor") is one who commonly invests in securities of a *kind whose price or value might be affected by the information* in question, and this group of s 215(*b*) Specific Common Investors will vary depending on the nature of the information. In contrast, the Common Investor in s 216 is the Common Investor of securities generally. As already mentioned, we will return to this point later when we consider Issue 3. In conclusion, the differences in, and the relationship between, the three limbs of s 215 must be reconciled satisfactorily within the entire statutory framework of s 215. However, before attempting to reconcile the three limbs of s 215, we ought to discuss the correct approach to be adopted in interpreting this section.

Approach to s 215 – unique aspects of Singapore's insider trading regime

59 It has been observed that Australia's insider trading legislation contains one of the broadest prohibitions against insider trading in the world (see Keith Kendall, "Information that is 'generally available' under the insider trading provisions in Australia" (2006) 21 (1) Journal of International Business Law 29). It is interesting to note that our legislation is even stricter than Australia's legislation inasmuch as Singapore is the only jurisdiction to have legislatively removed (via s 220 of the SFA) the requirement of "prov[ing] intention to use" the inside information. Our Parliament has made it clear that s 220 was enacted to legislatively overrule the decision in *PP v Ng Chee Keong* [1999] 2 SLR(R) 1176, which required proof of an "intent to use" the inside information for insider trading (see *Singapore Parliamentary Debates* (5 October 2001) at cols 2137 and 2138). There is therefore no longer any requirement of proving the *mens rea* to use inside information in order to prove a contravention of either s 218 or s 219 of the SFA.

60 Instead, we have the presumption of knowledge under s 218(4) that applies where "connected persons" (as defined in s 218(5)) are involved. This presumption is also unique to Singapore. The *Griffiths Report* in the Australian context did consider if the evidential burden of proving lack of *mens*

rea should be placed on the insider trader, but this was not accepted in the final legislation enacted in Australia. Singapore's framework for insider trading is therefore very strict where connected persons are concerned: once a connected person is proved to be in possession of information concerning the company to which he is connected and once such information is proved to be *not* "generally available", the connected person is *presumed* to know that: (a) the information was not generally available; and (b) if the information were generally available, it *might* be material to the price or value of the company's securities. As was stated in the parliamentary debates on the Bill, the intention of the presumption of knowledge under s 218(4) was to impose "greater discipline on those in fiduciary positions" (*per* BG Lee in *Singapore Parliamentary Debates* (5 October 2001) at col 2149). However, it was also recognised that "without the need to prove any intent, a balance ha[d] to be struck *so that it would not be too onerous for operators*, especially non-executive directors" [emphasis added] (*ibid* at col 2149).

61 Although there is much truth in the Judge's view (at [63] of the Judgment) that "the efficacy of the insider trading regime would be best maintained by imposing a *narrow* view of what is 'generally available information'" [emphasis added], it must nevertheless be borne in mind that a *balance* needs to be struck, lest the SFA result in regulating the use of information in an *over*-expansive fashion contrary to Parliament's intent – a point which is illustrated by the preceding paragraph.

62 Adopting too narrow an interpretation of what is "generally available" information may capture information that is fortuitously (yet legitimately (within the confines of the legislation)) gained. For example, the Supreme Court of New South Wales Court of Criminal Appeal held in *R v Firns* (2001) 51 NSWLR 548 ("*Firns*"), that information could be gained simply by the defendant being fortuitously present in court during the release of a judgment (in that case, a judgment of the Supreme Court of Papua New Guinea). Alternatively, information can also be gained from inferences and deductions gained through extra diligence or exceptional analytical skills by a sophisticated investor. Fortuitously gained information and information gained through diligence or analytical prowess were not, in our view, part of the mischief Parliament intended to address when it stated that the core evil of insider trading was in "tilting the playing field unfairly against other market participants" (see *Singapore Parliamentary Debates* (5 October 2001) at col 2137). The insider trading regime is not intended to have a chilling effect on the trading of securities. The approach to s 215 should therefore be neither narrow nor broad, but commonsensical. Once the interpretation of each limb of s 215 is rationalised with its underlying policy consideration, what constitutes "generally available" information will be neither under- nor over-inclusive. With these considerations in mind, let us turn to a consideration of the various limbs of s 215.

The relationship between s 215(a) and s 215(b)

Introduction

63 The information Lew relied on as being "generally available" under either s 215(*a*) or s 215(*b*) ("the Generally Available Information on WBL") was as follows:

(a) various press releases from WBL;

(b) announcements regarding WBL posted on SGX's or WBL's websites; and

(c) public announcements by WBL's subsidiaries such as WPT and M-Flex.

The Judge held that there was "no real dispute that such information satisfie[d] the readily observable test [under s 215(*a*)] *or* publishable information test [under s 215(*b*)]" [emphasis added]

(see the Judgment at [72]). Implicit in the Judge's statement is that s 215(*a*) and s 215(*b*) have *separate* spheres of application.

64 We agree with the Judge that s 215(*a*) and s 215(*b*) have *separate* spheres of application. In particular, s 215(*b*) is far more specific than s 215(*a*) and contains clearer and more stringent requirements. Put simply, under s 215(*b*), the information has to be "made known in a *manner* that would, or would be likely to, bring it to the attention" [emphasis added] of specific parties (namely, the s 215(*b*) Specific Common Investors), and has a time requirement of a "reasonable period for [the information] to be disseminated among [the s 215(*b*) Specific Common Investors]" (see also *Firns*). Under a literal interpretation of s 215, s 215(*a*) should not be constrained by s 215(*b*) since s 215(*b*) is stated to be "without limiting the generality of paragraph (*a*)". Hence, Parliament clearly intended that information that falls within the scope of s 215(*b*) should be subject to more stringent requirements in order to be considered "generally available" information, compared to information that falls within the scope of s 215(*a*). Such a construction is supported by not only the literal language of s 215(*a*), but also the relevant legislative history of s 215(*a*) and s 215(*b*) – a point to which our attention now briefly turns.

The legislative history of s 215(a) and s 215(b)

65 The *Griffiths Report* only proposed the "publishable information" test (as reflected in the Australian version of s 215(*b*)) for "generally available" information. The Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 at para 327 highlighted that the "readily observable" test (as reflected in s 215(*a*)) was added because of concerns that:

> … *information directly observable in the public arena* would not be regarded as generally available, as it has not been 'made known'. It was considered that a person could be liable for insider trading where he/she traded in securities on the basis of, for example, an observation that the body corporate had excess stocks in a yard. This was not the intention of the provisions. [emphasis added]

The relevant legislative history of the Australian equivalent of s 215(*a*) and s 215(*b*) has in fact been thoroughly and perceptively explored by Mason P in *Firns*, whose analysis we gratefully adopt.

66 Put simply, there are at least two *contrasting* theories of insider trading. The first is the "market fairness" or "equal access" theory (which mandates a strict approach towards insider trading), whereas the second, *viz*, the "market efficiency" theory, mandates a far more benevolent approach towards insider trading (see generally *Firns* at [40]–[52]). The *Griffiths Report* endorsed the *former* theory, which is reflected in the "publishable information" test under the Australian equivalent of s 215(*b*) (see *Firns* at [55]). Indeed, had the relevant recommendation in the *Griffiths Report* been adopted (see *Firns* at [55]), "s 1002B(2) [the Australian equivalent of s 215] would have contained s 1002B(2)(b) [the Australian equivalent of s 215(*b*)] (or something similar), *but not* s 1002B(2)(a) [the Australian equivalent of s 215(*a*)] *and perhaps not s* 1002B(3) [the Australian equivalent of s 215(*c*)]" [emphasis added] (see *Firns* at [56]). However, when the Australian equivalent of s 215 was enacted, the Australian equivalent of s 215(*a*), which endorsed the *latter* theory (*viz*, the "market efficiency" theory), was *also* promulgated. Mason P perceptively observed that the Australian Parliament had wanted to avoid "[penalising] individual initiative and diligence" and to endorse (as well as encourage) "cleverness, swiftness and efficiency", at least with respect to "some types of information" (see *Firns* at [57]). Therefore, the "market efficiency" theory was also embraced by inserting "the opaque words 'readily observable matter'" (*ibid*) in the Australian equivalent of s 215(*a*).

67 The result, as stated in Mason P's perceptive analysis in *Firns*, was that "the Griffiths

Committee's clear vision of an underlying policy of promoting fairness in the market through equal access to information *became badly blurred in the legislative process*" [emphasis added] (see *Firns* at [53]). What further resulted was, in the learned judge's view, "*a form of legislated astigmatism* because *the attempt to converge essentially incompatible policy goals* … produced *a patchy blurring* of the image" [emphasis added] (*ibid*).

68 As Mason P correctly observed, "[t]hese policy and drafting decisions left the courts with *a difficult interpretative task*" [emphasis added] (see *Firns* at [58]); the learned judge proceeded to observe thus (*ibid*):

> The task is focussed by provisions requiring the Court to give effect to legislative purpose and permitting recourse to extrinsic material ..., *but* the assistance is *blurred by the conflicting goals embedded in the essentially two-pronged definition of "information generally available"*. [emphasis added]

69 He also astutely pointed out, as follows (see *Firns* at [61]–[62]):

> It is unnecessary to go further than recognising that endorsement of the concept of economic efficiency appears to underlie the Parliament's decision to insert s 1002B(2)(a) [the Australian equivalent of s 215(*a*)] into s 1002B(2) [the Australian equivalent of s 215], in preference to the exclusive market fairness paradigm espoused by the Griffiths Committee and trumpeted in the general parts of the Explanatory Memorandum [to the Australian Corporations Legislation Amendment Bill 1991]. Whether or not this means that the Australian legislative regime is out of step with insider trading regulation in other countries ... is neither here nor there. This Court's task is to enforce Australian law, but only after having determined the proper scope of its prohibition.
>
> A legislative commitment to an efficient as well as a fair market does not translate automatically into deciding that the "efficient" single trader is to be encouraged at all costs. *But it does reinforce my decision to interpret s 1002B(2)(a) literally, without forcing its language into a predetermined purposive mould*.
>
> [emphasis added]

70 In the circumstances, Mason P's following conclusion as to what is "readily observable matter" (here, in the context of the Australian equivalent of s 215(*a*)) is not at all surprising (see *Firns* at [68]):

> The *Corporations Law* does not define "readily observable matter". ***The drafting history and the opening words of s 1002B(2)(b) [the Australian equivalent of s 215(* b *)] shows that the generality of the words in s 1002B(2)(a) [the Australian equivalent of s 215(* a *)] are not to be limited by s 1002B(2)(b) [the Australian equivalent of s 215(* b *)]. What also emerges*** clearly from a comparison between s 1002B(2)(a) and s 1002B(2)(b) is that ***in s 1002B(2)(a) the legislature deliberately held back from placing information under an embargo until the lapse of a fixed time or even a reasonable time from some fixed point of actual disclosure. Section 1002B(2)(a) [the Australian equivalent of s 215(* a *)] was inserted as an alternative in order not to penalise the efficient, the speedy or the diligent*** – at least to the degree encompassed by the opaque "readily observable matter". [emphasis in original; emphasis added in bold italics]

71 The learned judge also observed that "[s]ometimes information [would] consist of matter that

[was] directly visible, yet … not … ['']observable['], at least not ['']readily['] so", with "[e]xamples [being] a message which is widely published yet encrypted or a gold nugget lying in a remote corner of a desert" (see *Firns* at [73]). Mason P was also of the view that interpreting "readily observable matter" as "facts directly observable in the public arena", whilst "helpful in some contexts", nevertheless "[could not] be taken too far" (citing the example, just noted, of the published encrypted message (*ibid*)). Indeed, the learned judge pertinently pointed out that "[a]t other times", such an approach would be "too narrow", citing the facts of *Firns* itself as an example (at [74]). In his view, "[s]ome information has the capacity to generate its own dissemination" inasmuch as "[i]ts initial disclosure may be limited, yet the type of information involved and the initial group of persons to whom it is disclosed may ensure that it gets abroad" (*ibid*). In this regard, "[f]or the purposes of s 1002B(2)(a) [the Australian equivalent of s 215(*a*)] it does not matter how many people actually observe the relevant information", and neither is this particular provision "concerned with the time that is likely to elapse between the information becoming ['']readily observable['] and when it was in fact observed" as "[i]nformation may be readily observable even if no one observed it" (see *Firns* at [77]). This is, of course, entirely consistent with the broad ambit of the provision, as noted below (at [78]).

72 Mason P also emphasised the important impact that *modern technology* has on the interpretation of what is "readily observable matter"; in the learned judge's words (see *Firns* at [78], which was cited by Gzell J in the Supreme Court of New South Wales decision of *Australian Securities and Investments Commission v MacDonald and others (No 11)* (2009) 71 ASCR 368 at [1130]):

> Even if ready observability were to be limited to perceptibility by the unaided human senses, the published judgment of a Supreme Court is readily observable. A fortiori if, as I believe to be the case, one is not confined to the unaided human senses. *Since the demise of the pony express and semaphore and the advent of telephone, telex, facsimile, television and the internet we have come to observe information immediately yet indirectly. Our human senses are engaged, but with the aid of modern means of telecommunication. Absent statutory clarification or restriction, there will be cases where failure to advert to this modern reality skews the true scope of s 1002B(2)(a) [the Australian equivalent of s 215(*a*)] despite emphasis on the modifying adverb "readily".* [emphasis added]

73 At this juncture, we pause to observe that although there was a dissenting judgment by Carruthers A-J in *Firns*, the difference between the majority (Mason P, with whom Hidden J agreed) and the minority (Carruthers A-J) turned, in the final analysis, on their respective views as to what constituted the "public" domain. The majority held, consistently with the principles set out above by Mason P, that ready observability ought *not* to be tested by reference to a hypothetical person "within Australia". Elaborating on his views above, Mason P opined thus (see *Firns* at [81]–[82]):

> There is a further difficulty with the direction that ready observability is to be tested from the stance of a hypothetical person "within Australia". I have already touched upon it. The direction suggests or infers that the *readiness* of the perceptibility is also to be judged from the viewpoint of individuals located in Australia using their natural senses but without regard to modern methods of telecommunication. The unelaborated direction referring to "those in Australia" carries the seeds of miscarriage when it is recognised that television, the internet (including e-mail) and other means of telecommunication such as the phone and fax are part and parcel of how Australians generally and investors in particular readily perceive events.
>
> A sudden crisis in the Middle East may have an immediate impact upon the value of Australian oil shares. That crisis may generate immediate coverage through a cable television provider such as CNN and/or it may be objectively of such a nature that one would expect people to jump on to

> the telephone, facsimile or e-mail to communicate price-sensitive information almost instantaneously. If the crisis occurs in the dead of the Australian night but during prime time in the United States of America the information is only *not* readily observable if one reads "in Australia" into the statute and then construes those words in a manner divorced from the realities of the modern world of global telecommunication.
>
> [emphasis in original]

74 On the other hand, Carruthers A-J was of the view, in agreement with counsel for the respondent, "that the matter must be *readily observable* by the public at large as it is that group of persons who are capable of trading on the share market in Australia, or in shares of corporations which are formed or carry on business in Australia" [emphasis in original] (*id* at [113]). The learned judge proceeded to observe as follows (*ibid*):

> The public at large in that sense must, at least, include the Australian public, as the provisions contained in the *Corporations Law* are clearly designed principally to protect Australian investors by promoting equal access to information for investors. For information to be generally available on the basis that it consists of "readily observable matter", it must, at least, be *readily observable* by members of the Australian public. [emphasis in original]

75 Significantly, however, the issue of who should properly constitute the "public", which was the crux of the disagreement between the majority and the minority in *Firns*, does *not* arise in the context of the present appeal. More importantly, the perceptive analysis by Mason P of the Australian equivalent of s 215(*a*) and s 215(*b*) is *not* affected by this disagreement. Indeed, there may, in our (provisional) view, be no real need for a definitive definition as such of the "public", with everything depending, in the final analysis, on the precise facts and circumstances of each case, bearing in mind the observation in *Firns* that information may be "readily observable" notwithstanding the fact that nobody has observed it (see above at [71]). Furthermore, any interpretation of "public" must be careful to allow the market efficiency policy, as exemplified by s 215(*a*), to be facilitated lest over-regulation of information leads to a situation where the standards and quality of information drops to the "lowest common denominator" for the market. Indeed, investors would be deterred from taking the initiative to find out information of a higher quality from public resources if they are going to be penalised for their diligence on the basis that the information acquired is not readily observable in "public".

Conclusion

76 Although there is some potential inconsistency between s 215(*a*) and s 215(*b*) when viewed against the backdrop of their Australian origins (and as set out clearly by Mason P in *Firns* above), the SFA itself does in fact embody both the "market fairness" or "equal access" theory *as well as* the "market efficiency" theory. Although the main policy aim of the insider trading provisions in the SFA is to prevent insiders from taking advantage of their position to use information unfairly (see [53] above), this does not detract from the legislation itself recognising that insider trading legislation should not impede *economically efficient* exchange of information. The Judge also recognised (see [62] of the Judgment) that the SFA provisions on insider trading were part of MAS's "continuing efforts to ensure that our markets operate *fairly* and *efficiently*" [emphasis added] (see MAS's Insider Trading Consultation Document (27 January 2001) at para 21). The defences and exceptions to insider trading found in ss 222 to 231 of the SFA also reflect the recognition of economic efficiency as an equally vital policy consideration in Singapore's insider trading legislation (see Alexander Loke, "From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the U.K., Australia and Singapore" (2006) American Journal of Comparative Law 123 at p 166).

77 Given the fact that the SFA attempts to accommodate *both* the seemingly disparate theories of insider trading as noted briefly in the preceding paragraph, the following question remains: can s 215(*a*) and s 215(*b*) nevertheless be reconciled (a point which was not considered in *Firns* itself)? In fact, when we examine how the parity of information defences in s 231 of the SFA work with s 215, we can identify *some* reconciliation of these seemingly disparate policies. While s 215(*b*) embodies the policy of market fairness, s 231(1)(*a*) of the SFA read with s 215(*b*) also allows the policy of market efficiency to operate. Section 231(1)(*a*) of the SFA makes it clear that s 215(*b*) is largely intended to control "insiders" who have "made known" the information. Under s 231(1)(*a*), it is a defence in any proceedings for a contravention of s 218(2) or s 219(2) if the court is satisfied that "the information came into the … person's possession *solely* as a result of the information having been made known as referred to in section 215(*b*)(i)" [emphasis added]. Therefore, s 215(*b*) does not penalise the efficient and speedy Common Investor who acted on the information in question *immediately* after it was made known as long as he did not, as an insider, know of the information before it was released. How s 215(*a*) and s 215(*b*) can be *completely* reconciled is indeed an interesting issue. However, as the parties did not address us on it, we will not venture to say anything more in the context of the present appeal.

78 Nevertheless, what *is* clear – and this is of the first importance from a *practical* perspective – is that s 215(*a*) is *clearly broader in scope* than s 215(*b*). As recognised above at [64], s 215(*a*) and s 215(*b*) have separate spheres of application. Hence, there must be fact situations that fall within the ambit of s 215(*b*) but *not* within s 215(*a*). However, while we need not, for the purposes of the present case, define the precise contours of s 215(*b*), we note that there must be certain types of information that Parliament intended to subject to the more stringent requirements of s 215(*b*) and, for those types of information, s 215(*a*) cannot be used as a backdoor to avoid the more stringent requirements of s 215(*b*). It is, nevertheless, likely that, with the broad purview of s 215(*a*), the sphere of application of s 215(*b*) will be narrow.

7 9 *However*, as already noted above (at [63]), the Generally Available Information on WBL relied upon by Lew would clearly fall within *both* s 215(*a*) *and* s 215(*b*). The issue that next arises, therefore, is whether or not s 215(*c*) is satisfied on the facts of the present appeal.

Section 215(c)

Introduction

80 It is clear that the central figure with regard to both s 215 and s 216 of the SFA is the Common Investor. As we noted above (at [58]), unlike s 216 (which relates to "persons who commonly invest i n securities" *generally*), s 215(*b*) focuses on the narrower category of Common Investors of securities "of a *kind whose price or value would be affected by the information*" [emphasis added]. Section 215(*b*) requires a more specific *focus* on a particular group of Common Investors in order to ensure effective and fair disclosure of a specific type of inside information as defined by that provision itself. Section 216, on the other hand, relates to the issue of *materiality* pursuant to *Issue 3* in the present appeal and, in that regard, the materiality of the inside information has to be determined from the *perspective of the Common Investor of securities generally*. However, despite this difference which may lead to different specific characteristics depending on the nature of information in each case, at a general level, the s 216 Common Investor and s 215(*b*) Specific Common Investor should both possess the same basic level of professional knowledge as elaborated below in [82].

81 Under s 215(*c*), it is the Common Investor who has to make the deductions, conclusions or inferences mentioned. Hence, it is from the Common Investor's perspective from which it is deduced, concluded or inferred from the generally available information in s 215(*a*) and s 215(*b*) what

information exists in the market itself. This perspective requires that *an objective standard* be applied to such deductions, conclusions and inferences, which must also be reasonable.

82 Both parties in the appeal agreed that the Common Investor possesses general professional knowledge and adopted the definition of the "reasonable investor" as set out in the Sarawak High Court decision of *Public Prosecutor v Chua Seng Huat* [1999] 3 MLJ 305 at 329–330 ("*Chua Seng Huat*"). In *Chua Seng Huat* (at 328), the reasonable investor was described as "an investor who possesses general professional knowledge as opposed to the said daily retailer or a person who has made specific researches". Therefore while the s 215(*b*) Specific Common Investor and s 216 Common Investor may have different specific characteristics depending on the specific nature of information in each case, at a general level, both the s 216 Common Investor and s 215(*b*) Specific Common Investor should possess the same basic level of professional knowledge. In this regard, we adopt the definition of the "reasonable investor" as set out in *Chua Seng Huat* which refers to an investor with "general professional knowledge" with an additional dimension added to the Common Investor in [112] for the inquiry under Issue 3. This particular definition strikes a balance between daily retailers out to make a quick buck without the general knowledge of the considerations that would inform an investor as to whether or not to buy or sell securities on the one hand, and expert investors who specialise in the research of investing in securities on the other. The court in *Chua Seng Huat (at 3*28) elaborated that "general professional knowledge" included:

(a) the ability to analyse and determine the quality and the prospect of shares, which goes towards deciding when to buy;

(b) the ability to do technical and fundamental analysis on information that is freely available;

(c) the knowledge that fundamental analysis is the intrinsic valuation of a stock, which involves studying financial stock ratio, operating ratio and profitability ratio, and which also involves the use of variation measures like price earning ratio, dividend yield and price-to-book ratio;

(d) the knowledge that technical analysis is concerned with examining the price and the volume behaviour of a share; and

(e) the knowledge of how to read and analyse financial accounts and statements.

We now proceed to analyse the Generally Available Information on WBL from the perspective of a Common Investor in accordance with the criteria set out above.

The Judge's findings with regard to the Generally Available Information on WBL

83 Whether or not the information in question was generally available is to be assessed *at the time of the alleged insider trading transaction* (see the Supreme Court of Victoria decision of *R v Evans & Doyle* [1999] VSC 488), in the present case, as at 4 July 2007. Although the Judge did not clarify precisely from whose perspective the deductions, conclusions and inferences from the Generally Available Information on WBL were made, we agree that the Generally Available Information on WBL that Lew relied on was too weak for the Common Investor to draw the deductions, conclusions and inferences that would enable him or her to arrive at the same content as that contained in the Information. We will not set out the Generally Available Information on WBL in detail again (which includes the financial results and announcements made by WBL regarding its results and its subsidiaries) as the Judge has already succinctly set it out in the Judgment at [9]–[14]. It would suffice for us to hold that the financial results of WBL and its subsidiaries, which showed decreasing

profits, as well as the cautiously-worded forward-looking statements by WBL could not have led the Common Investor to deduce that: (a) WBL would suffer a loss in 3Q FY07; (b) WBL would take an impairment charge on WPT in 3Q FY07, (c) the quantum of the impairment charge would be significant; and (d) because of the significant impairment charge, WBL would suffer significant losses in 3Q FY07. The logic behind Lew's proposal of a "regression analysis" based on the fact that the profits of WBL had been consistently declining was not credible: in particular, a regression analysis based on six points (which represent the available financial results for 2006 and the first two quarters of 2007, see [118] below) of declining profits was a very weak basis from which to lead the Common Investor to infer that WBL would suffer a loss in the next quarter. Indeed, Lew himself admitted the weakness of this logic: [note: 12]

> Q: … The mere fact that a company has suffered declining profits for two quarters does not mean that the less [*sic*] quarter is going to have even less profit; right?
>
> A: Yeah. Absolutely. I agree.

84 The Judge was also correct to find it "significant that no profit warning was issued" (see Judgment at [78]). There was no basis in the Generally Available Information on WBL for the Common Investor to deduce that WBL was going to take an impairment charge on WPT in 3Q FY07 and that even if such an impairment could be deducible, the Common Investor could not from the Generally Available Information deduce the quantum of the impairment charge. Lew himself admitted this during cross-examination:

> Q: You are saying that these announcements [as referred to in [19] above] allow a reasonable investor to read these three announcements and they would be able to deduce that there is going to be an impairment for WPT?
>
> A: I wouldn't say it is going to, but I say it allows the investor to deduce that the impairment may be *possible*.
>
> Q: May be possible?
>
> A: Yes.
>
> Q: Likely?
>
> A: I think the man in the street wouldn't know the details of the impairment test.
>
> Q: So the man in the street, or the common investor, would have no way of knowing whether or not an impairment for WPT was likely or not; right?
>
> A: That's correct. [note: 13]
>
> …
>
> Q: … So your evidence is that the investing public could deduce that sizable impairment would have to be taken for WPT by WBL, right?
>
> A: I don't think we should use the word "sizeable". I think that the impairment on WPT would not be surprising to the market.

Q: So the fact of an impairment for WPT, you felt, would not be surprising to the market?

A: Yes.

Q: There was an impairment of about $26 million; right?

A: Yes.

Q: Was an impairment of that magnitude deducible by the investing public prior to the release of the Q3 FY 07 results?

A: No.

Q: No?

A: Yeah, I think that the public would not know what is the quantum. [note: 14]

[emphasis added]

85 We hold, therefore, that the Common Investor would not have been able to deduce, conclude or infer from the Generally Available Information on WBL the same conclusions as those contained in the Information. Further, even if we accept that the Common Investor could have arrived at the same conclusions as those contained in the Information, we would find that the deductions, inferences and conclusions from the Generally Available Information on WBL would not satisfy the legal test embodied in s 215(*c*) – an issue to which we now turn.

The legal test for s 215(c)

86 We are of the view that the Judge applied the correct legal test in relation to s 215(*c*) of the SFA. MAS submitted that our courts should follow the New South Wales Court of Criminal Appeal decision of *R v Hannes* (2000) 36 ACSR 72, which interpreted the Australian equivalent of s 215(*c*). In *R v Hannes*, the "generally available" information was of a relatively higher quality than the information in our case. The insider was an executive director of a bank that had advised a company, TNT Ltd ("TNT"), in relation to a possible takeover. The "generally available" information, comprising contemporaneous brokers' reports and newspaper articles, referred to TNT as a takeover target whose shares were valued in excess of AU$2 each. The Common Investor could therefore have, arguably, arrived at the *same conclusion* as the insider from the generally available information – *viz*, that there was going to be a takeover of TNT and that the shares of TNT were worth more than AU $2 each.

87 However, this is where *R v Hannes*, like *Hannes v DPP*, emphasised the importance of *particularising* the information concerned. The insider in *R v Hannes* knew two particular pieces of information which the Common Investor did *not* – namely: (a) the fact that the insider's bank was advising TNT in relation to the possible takeover; and (b) the fact that TNT's securities were placed on the bank's embargo list. These two particular pieces of information made the insider's information "*qualitatively different*" from the informed analysis of the generally available information. Put simply, it changed the "*quality*" of the insider's information to information that was of a higher reliability and certainty than the deductions, conclusions and inferences arrived at by the Common Investor. As Spigelman CJ (with whom Studdert and Dowd JJ. agreed) observed (at [276]–[277]):

[**276**] In my opinion, the information specified in the particulars [the subject of the charge of

insider trading] was **not of the same character** as that contained in the brokers' reports [which were generally available to the public]. Those reports deduced from the objective circumstances of the company the ***possibility*** *of a takeover*. The brokers' reports also computed, on a variety of bases, the brokers' valuations, some of which were in excess of $2.

[**277**] The "information" particularised, although it could have been more felicitously expressed in this respect, has an element of ***probability*** which is not present in any of the brokers' reports. ... In my opinion, nothing in the nature of the "deductions, conclusions or inferences" contained in any of the brokers' reports suggested that it was based on **information of the same character as that contained in the "information" as particularised**.

[emphasis in italics and bold italics in original; emphasis added in bold]

This approach is not only logical and practical, but also consistent with the legislative purpose of the SFA. We note, in particular, the *qualitative* distinction drawn with regard to the character of the information (*ie*, whether what is available to the general public is of the "*same character*" as that available to the insider) as well as the (corresponding) distinction drawn between the concept of what is *possible* on the one hand and what is *probable* on the other. Applying the test in *R v Hannes*, information would only qualify as "generally available" under s 215(*c*) if the Common Investor could make deductions, conclusions or inferences from information which were of the "same character" or "quality" as the information the insider possessed.

88 There is also another decision handed down by the Federal Court of Australia – *viz*, *Catena v Australian Securities and Investments Commission (No 2)* [2010] FCA 865 ("*Catena*") – that briefly considered the Australian equivalent of s 215(*c*) (affirmed in *Catena v Australian Securities and Investments Commission* [2011] FCAFC 32). *Catena* was an appeal from the decision of the tribunal (*viz*, *YFFM and Australian Securities and Investment Commission* [2010] AATA 340), and while *R v Hannes* was not cited in *Catena*, the applicant relied on *R v Hannes* before the tribunal *albeit* for a different legal point. The tribunal was reviewing an order made by the Australian Securities and Investments Commission ("ASIC") under the Australian Corporations Act 2001 in prohibiting the applicant (a broker) from providing any financial services for a period for 5 years. This was because the applicant had failed to comply with section 1043A(1) of the Australian Corporations Act 2001 by procuring another person to acquire shares in a company while in possession of inside information of that company. The tribunal affirmed the order of the ASIC and *Catena* affirmed the decision of the tribunal. The specific facts were that a broker knew that there would be a likely merger or takeover proposal for a company at a price of about AU$2.15 by mid-August 2006 at the latest and, with this information, he tried to solicit his clients to acquire shares in that particular company. The broker tried to argue, on appeal in *Catena*, that there was evidence of market rumours speculating that the company was a likely takeover target and, therefore, the information about the merger or takeover proposal was generally available. At [65] of *Catena*, the Federal Court of Australia accepted that the tribunal found, not unreasonably, that:

[The broker's] evidence merely established that there was *high level rumour or market speculation*, but *it did not suggest that there existed market rumour or speculation that* ***extended both to the likely price and timing of a takeover*** . It was ***that part of the information possessed by the applicant*** – that the price was about $2.15 and that the timing of the takeover was in about the middle of August – ***that was critical to the Tribunal's assessment that information was not generally available.*** [emphasis added in italics and bold italics]

Therefore, a similar test to that in *R v Hannes* was implicitly applied in *Catena*, as the information

which the broker possessed was clearly of a different and better character and quality than the market rumours that were generally available.

89 Lew, on the other hand, proposed a "rationality" test for s 215(*c*), utilising the test formulated by the US Supreme Court in *Basic Incorporated, et al, Petitioners v Max L Levinson et al* 485 US 224 (1988) ("*Levinson*"), *ie*, whether the information would significantly alter the total mix of information available to common investors (see [95] below). However, this *conflates* the materiality test (to be determined pursuant to Issue 3) with the general availability test (which is the issue presently being considered) inasmuch as the test in *Levinson* only applies to determine if the information in question would have *material* effect (indeed, the decision of the US Supreme Court in *TSC Industries, Inc, et al, Petitioners, v Northway, Inc* (1976) 426 US 438 ("*TSC*"), which dealt with the test of *materiality* (and which will be dealt with in more detail below at [95]), was referred to in *Levinson*). Further, the logic of Lew's "rationality" test, with respect, was singularly unpersuasive. Lew suggested that so long as it was reasonable for a Common Investor to arrive at the same conclusion as the insider, the insider's information should be considered as generally available under s 215(*c*). However, this ignores the *qualitative* difference between the Common Investor's deduction on the one hand and the insider's information on the other, inasmuch as whilst both the Common Investor and the insider may arrive at the same conclusion, the insider's information is nevertheless of a higher quality simply because it is based on information not available to the Common Investor, which thus allows the insider to deduce the conclusion with *greater certainty* and *reliability*. In the circumstances, to allow Lew's "rationality" test to prevail would reduce greatly the effectiveness of the legal framework of our insider trading regime.

90 The "same character" or "quality" criteria (pursuant to the test in *R v Hannes*) may appear difficult to apply, but this test, which is also the legal test for the purposes of s 215(*c*), is not, in the nature of things, an exact science – a point which, we add, would apply to any other test for that matter. The fact that the insider's information is more particularised than the Common Investor's does *not necessarily* mean the information relied upon by the Common Investor to make his deductions, conclusions and inferences is not of the "same character" or "quality" as the insider's information. This would depend upon whether the additional particularisations of the insider's information were such that they changed the "character" or "quality" of the insider's information (compared to the information relied upon by the Common Investor to make its deductions, conclusions and inferences). The yardstick for comparison is whether the particulars of the insider's information would have made the information *more certain* or *reliable*, such that the probability of the occurrence of what was deduced, concluded or inferred from the information would have increased. This would reflect Parliament's concern to ensure a level playing field in the stock market inasmuch as insiders should not be investing with more favourable odds (that were gained unfairly) compared to the Common Investor.

91 In this regard, we refer again to the particularisation of the Information at [47] above. Even if we accept that based on the Generally Available Information on WBL, the Common Investor could have arrived at the same conclusions as those contained in the Information, the particularisation of the Information clearly demonstrated that the deductions based on that information were of a better quality. The Information was based on actual financial results in April and May 2007 as well as on actual knowledge of the board's discussion of an impairment charge on WPT, including estimates of the quantum of the impairment charge. *R v Hannes* also highlights that the source of the information is an important factor in ascertaining its reliability. Hence, the fact that the Information came directly from the senior management of WBL made it more certain and reliable than information from external sources. Thus, the Information was not of "same character" or "quality" as the Generally Available Information on WBL in which the Common Investor relies upon to make its deductions, inferences and conclusions.

Conclusion on Issue 2: The Information was not generally available

92 We thus found that the Information was not generally available under all three limbs of s 215, especially s 215(*c*). In the circumstances, the presumption of knowledge under s 218(4) would be triggered and the burden of proof would be shifted to Lew to rebut the presumption of knowledge under s 218(4) (see [24]–[25] above).

Issue 3: If the Information was not generally available, would a reasonable person expect it to have a "material effect" on the price or value of WBL shares if it were generally available?

93 Once it is established that the information at issue is "not generally available", the next element to be fulfilled under s 218(1)(*a*) of the SFA is that if the information *had been* generally available, a reasonable person would expect it to have had a "material effect" on the price or value of the shares concerned. In this regard, s 216 provides, in turn, that this requirement is fulfilled "if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the … securities", *viz*, the Common Investor, to whom we have already made reference above (at [82]).

94 It was common ground between the parties – correctly, in our view – that materiality was to be assessed on the date of the Transaction, *ie*, 4 July 2007.

The general test for materiality

95 In interpreting s 218 read with s 216 of the SFA, the parties agreed, and the Judge correctly held, that the legal test for materiality is that established in the US Supreme Court decision of *TSC* (see above at [89]) at 449, *ie*, information is *material* if:

> … there is a *substantial likelihood* that a reasonable shareholder would consider it important in deciding how to vote. … *It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote*. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. *Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.* [emphasis added]

Although the test of materiality in the US has been furnished by common law rather than by statute, the test in *TSC* ("the *TSC* test") is essentially the same as that provided under the Australian Corporations Act 2001 (see Baxt, Black & Hanrahan, *Securities and Financial Services Law* (Chatswood, N.S.W.: LexisNexis Butterworths, 7th Ed, 2008) at para 18-17), and, by logical extension, also the same as that under the SFA (see [52] above, where it is noted that the insider trading provisions of the SFA were derived from the Australian Corporations Act 2001). US and Australian cases are thus both relevant to the interpretation of s 218 read with s 216 of the SFA. We pause to also note that the *TSC* test, whilst originally formulated with reference to the test of materiality in relation to Rule 14a-9 of the General Rules and Regulations promulgated under the US Securities Exchange Act 1934, has since been applied in a variety of other contexts, including the present (see, for example, Yvonne Ching Ling Lee, "The Elusive Concept of "Materiality" Under U.S. Federal Securities Law" (2004) 40 Willamette L Rev 661 ("*Lee*") at pp 662–663). This is not surprising in view of the fact that the *TSC* test is based on *general principle* and is therefore of *general applicability*. It is by no means a perfect test (see, for example, *Lee* at pp 663–669), but every test would, in the general nature of things, engender difficulties – especially in the sphere of application.

96 We note that s 216 of the SFA does not expressly state the *degree* of likelihood that the information must have of influencing the Common Investor before that information can be regarded as having a material effect on the price or value of the shares in question. We are of the view that, in accordance with the *TSC* test, there must be "a *substantial* likelihood" that the information will influence the Common Investor in order for a reasonable person to consider that information as having a *material* effect on the price or value of the shares. It goes without saying that, in applying the *TSC* test, the influence cannot be *de minimis.*

97 Despite the parties' agreement as to the legal test to be applied, the question of how much weight is to be accorded to evidence of how the market actually reacted when the information became generally available ("Market Impact Evidence") was controversial. This controversy was borne out in the respective parties' submissions. Both parties agreed that Market Impact Evidence could be a relevant consideration, [note: 15] but Lew went much further, submitting that the qualitative or predictive analysis of whether a Common Investor would have been influenced by the Information should "ultimately be verified and validated" [note: 16] by actual market impact, pursuant (so Lew argued) to US and Australian authorities. [note: 17] This particular issue was crucial to the resolution of this part of the present appeal because a major part of Lew's case was based on the argument that the Transaction had no *actual impac*t on the market. We disagreed with Lew and agreed with the Judge (at sub-para (b) of [85] of the Judgment) that, based on the language of s 216, there was no need for there to be an *actual impact* on a company's share price in order to establish the element of materiality. The Judge arrived at this conclusion based on the plain language of s 216, and we agree. Nevertheless, given what has been a tendency in some cases to ignore the plain statutory language (in so far as some Australian cases are concerned) as well as the plain formulation of the *TSC* test (in so far as some US cases are concerned), we find it necessary to address the conflicting case authorities on the weight which should be accorded to Market Impact Evidence. This is especially so since Lew cited some of these cases in support of his contention.

How much weight should be given to Market Impact Evidence?

98 Even though the *TSC* test focuses on the likely importance of information to a Common Investor's decision-making process, courts in the US and Australia have sometimes ignored any qualitative assessment from the Common Investor's point of view and have relied, instead, solely on Market Impact Evidence in order to determine materiality (as shorthand, we will refer to this approach as "the Market Impact Approach").

99 For example, in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited (No 4*) [2007] FCA 963 ("*Citigroup*"), the only factor relied on to establish materiality (albeit by way of *obiter dicta*) was a rise in the price of the stock concerned before the close of trading on Friday and the opening price of the stock after it had been made known on Monday morning that the company was the subject of a takeover offer (see *Citigroup* at [578]). Taken to the extreme, under the Market Impact Approach, price movements (or the lack thereof) have been treated as determinative *even when they contradicted expert evidence on how Common Investors would be expected to react*. In *Securities and Exchange Commission v John F Mangan Jr* 598 F Supp 2d 731 ("*Mangan*") at 735–737, for example, the court found the information immaterial because there was no significant change to share prices despite expert evidence that Common Investors would likely be influenced by the information. Courts have even gone so far as to state that if a company's disclosure of information has no actual effect on its share price, the information disclosed must be immaterial *as a matter of law* (see *In re Burlington Coat Factory* 114 F 3d 1410 (3rd Cir, 1977) ("*Burlington*") at 1425, which was cited in *Mangan* at 735). Indeed, Lew cited both *Burlington* and *Mangan* in support of his position that Market Impact Evidence was necessary in order

to successfully invoke s 218 of the SFA. [note: 18]

100 In contrast, some cases maintain that Market Impact Evidence is *not* determinative proof of materiality. For example, the court in *United States of America v Paul A Bilzerian* 926 F 2d 1285 (1991) ("*Bilzerian*") at [16] expressly rejected the defendant's argument that the absence of any market fluctuation in the relevant stock demonstrated that the information was not important to investors. Although this was not a decision on insider trading as such, it was nevertheless one in relation to other types of securities fraud which, under US legislation, contain the *same* materiality requirement as that which applies in the context of insider trading. The court clarified at [16], on the basis of *TSC*, that:

> … whether a public company's stock price moves up or down or stays the same after [disclosure] does not establish the materiality of the statements made, though stock movement is *a factor the jury may consider relevant*. [emphasis added]

101 In our view, the court in *Bilzerian* was correct to treat Market Impact Evidence as relevant *but not* conclusive, and the other cases cited above were wrong to treat Market Impact Evidence as *conclusive*, for the following reasons.

102 First, this approach (*viz*, the Market Impact Approach) is precisely what the drafters of the Australian provisions, from which our s 218 is adopted, sought to avoid. The Griffiths Committee, in recommending the adoption of the "reasonable person" standard, explained that it was a concept familiar to courts and *removed the need to rely on expert opinion* (see The *Griffiths Report* at para 4.4, in particular, para 4.4.6). The *Griffiths Report* also expressed the desire that Australian law converge towards the "reasonable person" standard already applicable in the US. Defining the "reasonable person" standard in the US, the court in *TSC* made clear (at 449) that:

> It does *not* require proof of a substantial likelihood that disclosure of the omitted fact *would have* caused the reasonable investor to change his vote. [emphasis added]

103 Hence, our objective test of the likely impact of the information on the Common Investor does *not* require the Common Investor to have *actually* changed his buying or selling behaviour (see above at [95]), which change the Market Impact Approach necessarily presumes. The plain language of the Australian and Singapore statutory provisions, together with the *TSC* test, indicates that materiality turns upon *a reasonable person's view* of how the information *would* be likely to influence the decision-making processes of the Common Investor, as assessed *at the time of the alleged insider trade*.

104 In contrast, the Market Impact Approach has made the question of materiality one to be determined on an almost purely or entirely *ex post facto* basis (see *Lee* at p 664). In the US, at least, there has been concern that this has made the standard of materiality elusive and "subject to scrutiny with the gloss of hindsight" (see Steinberg & Myers, "Lurking in the Shadows: The Hidden Issues of the Securities and Exchange Commission's Regulation FD" (2002) 27 Journal of Corporation Law 173 at p 189).

105 Secondly, the Market Impact Approach assumes that one can precisely attribute a certain market movement to the release of certain information. This assumption may not be realistic depending on the nature of the information. In the words of one commentator (Richard C Sauer, "The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws" (2007) 62(2) Business Lawyer 317(41) ("*Sauer*") at 325):

> [T]he market rarely presents a clean sheet on which to read the significance of an issuer's individual disclosures; *on any given day the price of a security reflects a variety of developments* concerning the issuer, its industry sector, and the market in general, not exclusively information released by the issuer. [emphasis added]

Even the court in *United States of America v Kevin Heron* 525 F Supp 2d 729 (2007) ("*Heron*"), which Lew also cited as authority for the conclusiveness of Market Impact Evidence, acknowledged (at [9]–[10]) the limitations of such evidence, as follows:

> In this Internet age, so much information is available to investors that no disclosure ever takes place in isolation … it is at least conceivable that two material items of information, released more or less simultaneously, could cancel each other out and produce the appearance of immateriality. [emphasis added]

Indeed, even professional stock analysts often find themselves at a loss to explain why market reactions differ so greatly from expectations (see *Sauer* at p 322).

106 Thirdly, treating Market Impact Evidence as being conclusive requires the court to rely heavily on expert evidence, which can be greatly subjective. It is for good reason that the Griffiths Committee preferred to adhere to a concept of the reasonable person standard (as stated above in [102]) familiar to courts and avoid over-reliance on expert opinion. In *Mangan*, for example, the experts' opinions diverged simply because the experts had used different time windows. One expert also looked at intraday price movements whereas the other did not. As we have already established above (at [102]), it is clear that s 216 of the SFA *never intended that a finding of insider trade should stand and fall based purely on which expert's opinion the court prefers.*

107 It is appropriate here to make a clarification about the role of expert evidence. It has been argued that expert evidence is necessary in establishing materiality (see Lyon & du Plessis, *Law of Insider Trading in Australia* (Sydney: The Federation Press, 2005) ("*Lyon & du Plessis*") at p 29). However, it is important to be clear *as to what the expert evidence should pertain*. *Lyon & du Plessis* does not refer to expert evidence pertaining to how to interpret market movements, but, rather, expert evidence pertaining to whether information would be likely to influence persons who commonly acquire securities. To this end, the learned authors view expert evidence as "necessary to eliminate speculative, subjective and disparate reasoning by individual members of the jury" (see *Lyon & du Plessis* at p 29). The proper role of expert evidence, therefore, is to assist the court in establishing how *a reasonable person*, *at the time of the alleged insider trade*, would expect the information to influence a Common Investor, and *not* to establish, on hindsight, what actually happened to the market upon the release of the information.

108 In summary, Market Impact Evidence may be considered as a relevant consideration in determining whether s 216 of the SFA is fulfilled, but should not be taken – in and of itself – as conclusive. We found it crucial to clarify this in the light of the cases cited above, and in the light of Lew's contention (see [97] above) that the qualitative or predictive analysis of whether a Common Investor would have been influenced by the information in question should "ultimately be verified and validated" [note: 19] by Market Impact Evidence. If this had been appreciated earlier, we could have avoided the misplaced type of argumentation that we saw in this case, where the parties, instead of focusing on whether and to what extent the Information was likely to operate in a Common Investor's decision-making process, focused their evidence and their argumentation on extremely fine points of interpretation of WBL's share price movements. In fact, these fine points of interpretation were a pithy demonstration of the difficulties with the Market Impact Approach as we explained above at [102]–[106], a point which we will elaborate upon below when we consider the parties' arguments

on the Market Impact Evidence in the present case (see, in particular, [126] and [134] below).

109 Finally, we should also emphasise that, in using Market Impact Evidence as one of the factors, care should be taken not to draw false equivalences between the information subsequently released into the market on the one hand and the alleged inside information on the other. In our case, for example, Lew knew that: (a) WBL had forecasted a loss of either $0.4m or $2.3m, depending on what financial data was included; (b) it was very likely that WBL would take a significant impairment charge on WPT in 3Q FY07; and (c) it was very likely that WBL would suffer a significant overall loss in 3Q FY07. Such information was *not* equivalent to the information that was actually released on 14 August 2007, *ie*, that WBL *had in fact* suffered an overall loss of $27.3m, of which $26.6m consisted of an impairment charge on WPT (and thus, the actual loss was $0.7m, compared to the forecasted loss of either $0.4m or $2.3m). When considering Market Impact Evidence, the court must be sensitive, both in this case as well as in future cases, to the fact that the quality of the information released (thereby generating the Market Impact Evidence) is usually couched *in terms of factual events that have already taken place*, whilst the information possessed by the alleged insider trader at the *material time* may be couched in terms of *probability*, even if the probability is high (as in the instant case).

Application of the TSC test to the Information Lew possessed

110 The Judge held that both the Loss Forecast and the Significant Impairment Prospect – and therefore, by definition, the Significant Overall Loss Forecast too – were material. We had some reservations with regard to the materiality of the Loss Forecast *in itself*, which we articulate below for the purpose of giving direction to parties conducting future cases, but we ultimately found there to be sufficient evidence that the Judge was correct on both counts. In any case, the materiality of the Significant Impairment Prospect was sufficient, in and of itself, to render Lew's sale of 90,000 of his WBL shares a contravention of s 218 of the SFA.

(i) The Loss Forecast

111 The reason we had some reservations as to whether the Loss Forecast was likely to have influenced the Common Investor was because of three factors *taken in combination*, as follows:

(a) the fact that the Loss Forecast projected only a loss of $0.4m (including M-Flex's and MFS's forecasted performance);

(b) the relativity of this figure to the last reported profit of $1.6 million for 2Q FY07 (*ie*, only a small profit); and

(c) the fact that the Loss Forecast was a *quarterly* loss forecast, and, in this regard, it is questionable whether sophisticated investors of the kind intended to be captured by the Common Investor test assess their investments on a quarterly basis rather than on a more long-term basis.

112 Factors (a) and (b) above are self-explanatory. In so far as factor (c) is concerned, this revealed the gaps in the *Chua Seng Huat* definition of the Common Investor (see above at [82]). The *Chua Seng Huat* definition only addresses the level of knowledge and skill which the Common Investor is assumed to have. This leaves out the dimension that investors, even of comparative levels of knowledge, may have different risk appetites or investment horizons time-wise. *Sauer* (at p 325) distinguishes between holders of a small amount of a company's securities on the one hand and its institutional investors on the other, who have different priorities and thus react differently to

particular corporate developments. We find it necessary, therefore, to clarify this aspect of the Common Investor test.

113 In our view, the Common Investor test excludes speculators. The fact that the *Chua Seng Huat* definition of the "Common Investor" excludes buyers and sellers of shares who are "*out to make a quick profit* … and would not bother about *the matters or factors which prompt an investor* to buy or sell shares and when to do so" [emphasis added] (*Chua Seng Huat* at 328A-B) suggests that this ought to be the case. It is also important for policy reasons to exclude speculators from the materiality test. Virtually any information is capable of influencing the behaviour of people dealing in shares for short-term capital gains, but the court must be careful not to cast the net of materiality too wide.

114 Returning to the facts of the instant case, we had some reservations as to how much Common Investors, as opposed to mere speculators, would be likely to be influenced by a quarterly forecast *in isolation*, especially one that forecast a loss which was as small as $0.4m. It seemed to us at least questionable whether longer-term investors, who would usually have already done their homework as regards the long-term value of the company whose shares they are interested in, are likely to reassess every quarter whether they should buy or sell the company's shares, especially when the information pertaining to that quarter comprises merely forecasts. Ideally, we would have liked to have seen more evidence adduced with regard to investor behaviour in this regard. Unfortunately, this was an unexplored dimension because the nature of the expert evidence adduced was confined to Market Impact Evidence. In future cases, this problem may be avoided if parties adduce expert evidence of the right sort (see above at [107]).

115 These observations notwithstanding, we ultimately found that the evidence in this case, on balance, crossed the threshold required in order to demonstrate that the Loss Forecast was material. The *TSC* test merely requires a substantial likelihood that the disclosure of the Loss Forecast would be viewed by the Common Investor as having significantly altered the "total mix" of information made available. The question centred on whether the Information *assumed actual significance in the deliberations of the Common Investor*; there was no necessity to prove that the Common Investor would actually change his position, for example, from selling WBL shares to buying WBL shares (see above at [102]–[103]).

116 We agreed with the Judge (at [93] of the Judgment) that even if we accepted Lew's submissions that the Loss Forecast was unreliable from a Common Investor's perspective (which we did not), the fact that the Loss Forecast was unreliable did not have any relevance at this stage. The Common Investor would not know that the forecasts provided by WBL were generally unreliable, unless he could infer from the generally available information that the forecasts provided by WBL's senior management were unreliable. There was no such generally available information from which such an inference could be made.

117 We also agreed with the Judge (at [94] of the Judgment) that weight should be given to the fact that the Loss Forecast was based on the most recent financial information of WBL, including the actual financial results for April and May 2007. We agreed with the logic in the expert evidence of Chong that *ceteris paribus*, the more recent a financial result, the more weight a Common Investor would attach to it.

118 The net attributable profit of WBL for the last few quarters prior to 3Q FY07 is as follows ("Q1 FY 06", for example, refers to the first quarter of the Financial Year of 2006) – the figures are rounded to the nearest one decimal place: [note: 20]

1Q FY 06	2Q FY06	3Q FY06	4Q FY06	1Q FY07	2Q FY07
$25.8m	$14.5m	$9m	$9.6m	$7.4m	$1.6m

As can be seen from the above figures, WBL announced a net attributable profit of $58.9m for the whole financial year of 2006. It cannot be that the first loss forecast by WBL (*ie*, the Loss Forecast), even though it was a small loss of $0.4m, would not have significantly altered the total mix of information which the Common Investor possessed or would not have assumed significance in the Common Investor's deliberation as to whether to hold, buy or sell WBL shares. The current information which the Common Investor possessed (for example, the announcements by WBL in its financial reports) generally consisted of forward-looking statements that were optimistic about WBL's future performances. The Loss Forecast would have significantly altered the positive outlook of the totality of the information that the Common Investor possessed. There was a substantial likelihood that the Loss Forecast would have affected the Common Investor's perception of the value of WBL shares and would have increased the probability of the Common Investor deciding to sell WBL shares. We were therefore of the view that the Loss Forecast assumed *actual significance* in the Common Investor's deliberation as to whether to hold, buy or sell WBL shares.

(ii) The Significant Impairment Prospect

119 First and foremost, we need to make an important comment on the fact that the bulk of Lew's case on the materiality of the Significant Impairment Prospect repeated his earlier submissions that the Information was not generally available. This was wrong in law: under s 218 of the SFA, *the analysis of materiality proceeds on the premise that the previous element has been fulfilled*, ie*, on the premise that the Information was not generally available*. It is important to clarify this point because courts and litigants have sometimes conflated the two elements. In so far as Lew's case conflated these two elements, we had to dismiss it once we held that the Information was not generally available.

120 Lew's other argument was that a Common Investor would understand that an impairment charge was not bad news because it was simply "*ex post facto* recognition of an existing problem". [note: 21] However, he did not substantiate this, and the evidence of MAS's expert that impairment charges "tend to have a very negative impact" on business [note: 22] therefore remained unrebutted. Lew's argument discounted the effect of an impairment charge as a matter of accounting principle inasmuch as an impairment charge was a write-off against the company's assets and would cause the net total value of the company's assets to decrease. Even if we agreed with Lew that the quantum of the impairment charge to be taken on WPT had not been decided yet at the 2 July 2007 GMC Meeting or at anytime before 4 July 2007 (the date of the Transaction), the value-at-risk had already been identified, at a minimum, to be $22m (excluding freehold land and buildings). An impairment charge (which is recorded as a loss in a company's profit and loss statements) of this magnitude would clearly have a substantial likelihood of influencing a Common Investor to buy or sell WBL shares, especially when the magnitude of the loss was compared to the amount of total profits in the previous few quarters prior to 3Q FY07 (see [118] above). It was clear that the Significant Overall Loss Forecast, which was based largely on the Significant Impairment Prospect, would similarly have been likely to influence the Common Investor to buy or sell WBL shares.

Conclusion on the application of the TSC test to the Information

121 For the above reasons, we upheld the Judge's findings that (i) the Loss Forecast was material,

(ii) the Significant Impairment Prospect was material and, cumulatively, (iii) the Significant Overall Loss Forecast was material.

Evaluation of the actual Market Impact Evidence in the present case

122 As already noted above, the test of materiality under s 216 of the SFA is an objective and prospective one, *viz*, it is based on a reasonable person's view of how the information in question *would* be likely to influence the decision-making processes of a Common Investor, as *assessed at the time of the alleged insider trade*. The parties' overwhelming reliance on actual Market Impact Evidence in the context of the present appeal was therefore, with respect, misplaced, particularly in the light of our cautionary note above (at [109]) that the Information was *not* equivalent to the information subsequently released into the market. However, given the sheer amount of time that the parties and the Judge devoted to analysis of the actual Market Impact Evidence in the present case, and given that Market Impact Evidence is only (as mentioned above) one factor going towards proving whether the Common Investor test has been fulfilled, we feel it is appropriate to deal briefly with Lew's arguments that the actual Market Impact Evidence in the present case demonstrated that the fall in WBL's share price was insignificant, and thus supported Lew's argument that the Information was not material because the Common Investors had not been influenced by the Information to buy or sell WBL's shares.

123 We agreed with the Judge that while the actual Market Impact Evidence supported the objective analysis above to the effect that the news of the impairment charge on WPT was material, the Market Impact Evidence relating to the Loss Forecast was "not as strong" (the Judgment at [115]) and even equivocal. However, the actual Market Impact Evidence would, in any case, not prevent us from finding that the Loss Forecast was material under s 216 of the SFA if it would or would be likely to influence a Common Investor to buy or sell WBL shares under the objective analysis.

(i) Market impact of news of WBL's loss

124 The analysis centres around 12 July 2007 and 17 July 2007, when M-Flex and MFS, respectively, issued their profit warnings. 17 July 2007 was also the date when WBL issued its own profit warning, specifically mentioning the losses of M-Flex, MFS and WPT as reasons for its loss. A profit warning is an announcement made by a company before it releases its financial statements indicating that the profits to be declared will fall short of expected levels.

125 The following table reflects the movements in WBL's share prices around these pivotal dates:

Date (in July 2007)	**Closing price ($)**	**Volume of trade**
11	5.00	107,000
12 12.40pm: M-Flex's profit warning	4.92	38,000
13	4.92	48,000
14-15	Non-trading days	
16	4.98	75,000

17 6.16am: MFS's profit warning 5.48pm: WBL's profit warning	5.00	67,000
18	4.90	389,000
19	5.00	204,000
20	5.00	106,000

126 The profit warnings did not, on their face, appear to have had any material impact on the price of WBL shares during the above period. The biggest change was the drop from $5.00 to $4.92 between 11 and 12 July 2007. However, it was difficult to ascertain if the price drop could be attributed *solely* to M-Flex's profit warning. On 12 July 2007, WBL also went ex-dividend by 8.5 cents. The price of a company's shares typically decline after they go ex-dividend in order to reflect the fact that the company's net asset value has declined by the total amount of dividends paid out. MAS argued that the fall in price is not always equivalent to the dividend amount, *ie*, the 8-cent drop in WBL's share price between 11 and 12 July 2007 could not be attributed solely to the 8.5 cent dividend. MAS argued that 6 cents of the 8-cent drop could be attributed to the profit warning issued by M-Flex because WBL shares had opened at $4.98 on 12 July 2007, down from the day before, and the 2-cent drop already reflected the ex-dividend date. We agreed with the Judge that it could not be assumed that markets operate with perfect rationality and that the trade throughout 12 July 2007 might still be a response to WBL going ex-dividend. *It was thus difficult to tell exactly which part of the price drop on 12 July 2007 was attributable to M-Flex's profit warning, which in turn pithily demonstrates the fundamental problem with relying on Market Impact Evidence that we highlighted above* (at [105]).

127 Furthermore, even if we accepted MAS's best case, a decrease of 6 cents from $5.00 was only a 1.2% decrease. Even if we took into account the fact that the Straits Times Index ("STI") was rising by 0.8% at the time, as MAS submitted, the net decrease in WBL's share price relative to the STI was 2%. This was a relatively small percentage and, coupled with the fact that WBL shares were inactively traded (which meant that the effect of any trade would be magnified relative to an actively traded counter), a decrease of 2% was too insignificant to constitute evidence that M-Flex's profit warning was material.

128 Finally, if we accept the evidence of MAS's own expert witness that the effect of a piece of news should generally be assessed by looking at the movements in share prices over three days (*ie*, from 12 to 16 July 2007, because there was no trade on 14 and 15 July 2007), WBL's share price had gone up to $4.98 by 16 July 2007, a negligible difference from the "original" share price of $5.00 on 11 July 2007.

129 Both parties agreed that MFS's and WBL's profit warnings released on 17 July 2007 did not have any significant impact on the market. Overall, we agreed with the Judge (at [110] of the Judgment) that the market did not appear to have regarded the information on the possible loss suffered by WBL as a significant factor contributing towards its evaluation of WBL's prospects.

Market impact of news of the impairment charge on WPT

130 The analysis in this particular sphere centres around 14 August 2007, when WBL's 3Q FY07 results were announced, including the news that WBL had made a loss of $27.3m (of which the

impairment charge over WPT represented $26.6m).

131 The following table reflects the trade in WBL shares around 14 August 2007:

Date (in August 2007)	**Closing price ($)**	**Volume traded**
14	4.78	16, 000
15	No trade	
16	4.68	17,000
17	No trade	
18-19	Non-trading days	
20	No trade	
21	4.68	6,000
22	4.46	45,000
23	4.46	69,000

The drop of 10 cents in WBL's share price on 16 August 2007 was small and there were no trades in WBL shares over the next two trading days. MAS argued that despite this: (a) its expert witness, Chong, had demonstrated that WBL's share price was positively correlated to the STI before 15 August 2007 and became negatively correlated after that, indicating that investors had "sharply revised downwards their assessment of WBL"; [note: 23] and (b) an analysis of the Bid-Ask spread over the next four trading days (namely, on 16, 21, 22 and 23 August 2007) demonstrated that buyers had lowered the price at which they were willing to buy WBL shares.

132 In so far as MAS's first argument is concerned, Lew did not challenge Chong's demonstration of the relationship between WBL's share prices and the STI. Instead, Lew contended that it was fallacious to correlate the two in the first place because WBL shares were not a component stock of the STI and Chong had provided no explanation as to why they should be correlated. We found Lew's argument weak because Chong did in fact explain that there was a correlation between the STI and every stock (*including non*-component stocks), and neither Lew nor his expert witness rebutted this explanation. In fact, both Lew and his expert witness (whose testimony Lew, revealingly, preferred not to rely on in this appeal) relied upon the STI's movements to explain the movements in WBL's share prices. We therefore accepted Chong's evidence that the negative correlation of WBL's share prices to the STI after the news of the impairment charge on WPT was released demonstrated that the news had a material effect on the price of WBL shares.

133 In so far as MAS's second argument is concerned, Lew's rebuttals were also unpersuasive. Lew had argued that one could not rely on the Bid-Ask spread during the four trading days after 15 August 2007 ("the material Bid-Ask spread") because the fact that prospective buyers placed lower bids for WBL shares only took into account the demand side of the equation, but not the perspective that prospective sellers had not reduced their asking prices. However, s 216 only requires that the information in question would be likely to influence the Common Investor to buy *or* sell shares. Hence, if Lew accepted that the prospective buyers were influenced to buy WBL shares at lower prices, the material Bid-Ask spread would have satisfied s 216 of the SFA.

134 Lew's other argument was that the bidders in the material Bid-Ask spread should be excluded because their bidding behaviour demonstrated that they "[did] not necessarily represent Common Investors" but "more likely … represent[ed] opportunists". [note: 24] The problem with such an argument is that it requires the court to examine bidding patterns in minute detail and to guess at the knowledge level and the motives of individual bidders. Lew's analysis included the numbers of bidders each day, how many of them deleted their orders and when the orders were deleted, *etc*. This seemed to us to constitute a (wholly) dangerously speculative exercise. Indeed, Lew himself clearly felt unable to pitch his argument at anything higher than the submission that the bidders in the material Bid-Ask spread were "more likely to represent opportunists" instead of Common Investors. In any case, the Judge observed that many of the deleted bids were instantaneously followed by higher bids, which suggested that the bidders were slowly trying to close the material Bid-Ask spread. That, presumably, was more indicative of the bidders being serious bidders as opposed to pure speculators who were merely trying to see what were the best deals they could obtain from low bids. We agreed with the Judge on this point, although *we reiterate that this once again demonstrates how placing undue weight on Market Impact Evidence unduly undermines the objective TSC test* (see above at [102]–[106]).

135 While WBL's share price did not fall significantly on 16 August 2007, it had fallen to $4.46 by 22 and 23 August 2007. Lew challenged the length of this timeframe, considering that MAS's expert witness himself had testified that a general timeframe for assessing the impact of a piece of news on the market was three days. We were of the view that there could not be any fixed timeframe for assessing the impact of a piece of news on the market. Much would depend on the nature of the shares and, in this case, since WBL was inactively traded, a reasonable period of time (similar to what is suggested in s 215(*b*)) must be given for Common Investors to react to the news. We agreed with the Judge (at [112] of the Judgment) that it was significant that substantial volumes of WBL shares (45,000 and 69,000 shares on 22 and 23 August 2007 respectively) were traded only at the price of $4.46, compared to the earlier volume of 6,000 WBL shares traded at the price of $4.68 on 21 August 2007 – this suggested that the price at which the market valued WBL shares was $4.46 after absorbing the information of WBL's loss and the impairment charge on WPT. It should also be noted that Chong's correlation table demonstrated that the divergence between WBL's share price and the STI continued at least until 29 August 2007.

136 In summary, the difficulty in the interpretation of how the market reacted to the information released by WBL highlighted the difficulties of relying on Market Impact Evidence to assess materiality. However, we agreed with the Judge that the Market Impact Evidence in the present case did support her finding that the information which Lew had with regard to the impairment charge on WPT would cause a reasonable person to expect the impairment charge to have a material effect on the value or price of WBL shares.

Conclusion on Issue 3: Materiality

137 In the circumstances, we were therefore of the view that the Information satisfied the requirement of materiality under s 218 of the SFA, as defined by s 216.

Issue 4: Did Lew know or ought he reasonably to have known that the Information was not generally available?

Legal interpretation of "ought reasonably to know"

138 The fourth limb under s 218 of the SFA is in s 218(1)(*b*), which requires that:

… the connected person *knows* or *ought reasonably to know* that —

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of [the] securities of [the] corporation [in question] …

[emphasis added]

For convenience of exposition, we refer to these as "the *mens rea* elements" of s 218. The *mens rea* elements thus have both subjective as well as objective limbs. Further, s 218(4) of the SFA provides that the *mens rea* of knowledge is *presumed* once it is proved that: (a) the alleged insider trader was in possession of information concerning the company to which he was connected; and (b) such information was not generally available.

139 The Judge did not elaborate on how the objective *mens rea* limb of s 218(1)(*b*) (*ie*, the "ought reasonably to know" limb) should be interpreted. In this regard, we are of the view that the interpretation proffered in *R v Rivkin* with regard to the equivalent Australian legislation ought to be adopted. In *R v Rivkin*, the court held (at [94]) that the "ought reasonably to know" limb "remain[ed] one that [was] *subjective* to the [person], having regard to all of the relevant circumstances, including the [person's] mental state at the time" [emphasis added] ("the *Rivkin* test"). Hence, in examining the issue of whether the alleged insider trader knew or ought reasonably to have known that the information in question was not generally available, the court concerned should first consider if a reasonable person would consider the information not to be generally available. If so, consideration would then be given to the alleged insider trader's circumstances (including his or her mental state, experience and level of commercial expertise) in order to determine if there are *subjective* factors which would prevent him from arriving at the same conclusion. This analysis applies to both s 218(1)(*b*)(i) (*ie*, *mens rea* with regard to general availability of the information) and s 218(1)(*b*)(ii) (*ie*, *mens rea* that the information might have a material effect) (reproduced above at [138]).

Issue 4(a): Did Lew know or ought he reasonably to have known that the Information was not generally available?

140 This was a clear case where, *even without relying on the presumption of knowledge under s 218(4) of the SFA*, there was sufficient evidence, on a balance of probabilities, that Lew *knew* that the Information was not generally available. In his interviews with WBL's counsel (on 12 July 2007) and MAS (on 11 September 2007), Lew did not deny that the Information was not generally available. In addition, Lew had even made several admissions of knowledge during cross-examination:

Q: … I put it to you that prior to the release of WBL's Q3 FY 07 results, the investing public did not know that an impairment was going to be taken; do you agree or disagree?

A: I agree. [note: 25]

…

Q: And that's because the information, [*sic*] in the information is that the company is forecasting a loss itself, that information is price-sensitive, isn't that right?

A: No. I think that information is confidential.

…

Q: … So what you are saying, if I understand you correctly, is that the board or the company would expect financial information of the nature that was presented at the GMC meeting of 2 July 2007, the board would expect employees to keep that information with even more confidentiality?

A: Yes.

Q: A higher level of confidentiality?

A: Yes. [note: 26]

…

Q: So the man in the street, or the common investor, would have no way of knowing whether or not an impairment for WPT was likely or not; right?

A: That's correct. [note: 27]

…

Q: Was an impairment of that magnitude deducible by the investing public prior to the release of the Q3 FY 07 results?

A: No.

Q: No?

A: Yeah, I think that the public would not know what is the quantum. [note: 28]

141 Lew attempted to argue that his admissions that the Information was not generally available were not admissions with regard to how the phrase "generally available" was understood in a legal sense under s 215 of the SFA. However, it was clearly within the court's purview to infer from his statements whether his admissions satisfied how "generally available" was understood in a legal sense under s 215 of the SFA. In the circumstances, we upheld the Judge's finding that Lew knew the Information was not generally available.

Issue 4(b): Did Lew know or ought he reasonably to have known that the Information might have a material effect on the price or value of WBL shares?

142 The *mens rea* element under Issue 4(b) was more easily satisfied in the context of the present appeal. The plain language of "*might* have a material effect" [emphasis added] in s 218(4) indicated that Parliament intended that the threshold for materiality in this context should be pitched at a lower standard than the threshold for materiality under s 216 of the SFA (*vis-à-vis* Issue 3). Under s 218(4), once the alleged insider trader is proved to be in possession of information concerning the company to which he is connected and once such information is proved to be not generally available, it is presumed that the alleged insider trader (here, Lew) knew that the information *might* have a material effect on the price or value of the company's shares. Given how low a threshold the word "might" represents, it is difficult to envision what Parliament requires an alleged insider trader to prove in order to successfully rebut such a presumption. Indeed, short of a subjective circumstance under the

Rivkin test, a successful rebuttal of the presumption would be quite extraordinary. It is important that the presumption of knowledge under s 218(4) (which only applies to "connected persons" – see [2] above) must be applied carefully in order that the s 218 insider trading regime is not more onerous for corporate insiders than Parliament originally intended.

143 In the present case, *even without relying on the presumption of knowledge under s 218(4)*, there was sufficient evidence to demonstrate that Lew knew or reasonably ought to have known that the Information, if generally available, *might* have a material effect on the price or value of WBL shares. First, Lew acknowledged during cross-examination that one danger of internal forecasts being leaked to the public before they were finalised was that people might trade on the basis of that information. This clearly suggested that such information *might* be material. Secondly, it is undisputed that Lew had a conversation with Swee Hong about the price-sensitivity of the Information (see above at [15]). Lew did not dispute that Swee Hong expressed her opinion that the Information was price-sensitive. The opinion of WBL's Head of Legal and Compliance should surely have put Lew on constructive notice that, at the very least, the Information *might* be material.

144 While the Judge's ultimate findings with regard to the *mens rea* elements were correct, we would, with respect, clarify part of the Judge's basis for finding that Lew possessed the requisite *mens rea*. At [126] of the Judgment, the Judge held as follows:

> While it may be fairly said that WPT's troubles were publicly well-documented, *the [C]ommon [I]nvestor would not have known that* a conditional deadline to impair had been imposed by the AC [Audit Committee], and that the condition had, in all likelihood, not been satisfied as of the 2 July 2007 GMC Meeting (and after the deadline imposed). *Therefore, while the [C]ommon [I]nvestor may suspect that an impairment would be taken at some point of time, the news that an impairment would be immediately recognised must surely have a possible impact on WBL share price.* [emphasis added]

The Judge further observed, in a similar vein, as follows (at [128]):

> Lew had information of a better quality than the market. The information related to significant impairments and a forecasted loss after six quarters of consecutive profit. *The market did not know that the impairment or loss was to be recorded. Lew therefore ought reasonably to know* that the information might have a material effect on the price of the share. [emphasis added]

145 The Judge's reasoning as set out in the preceding paragraph was the same as the reasoning which she adopted *vis-à-vis* her earlier finding that the Information was not generally available. The logic was that *because* the market did not yet know about the impairment charge on WPT or WBL's loss, it *therefore* follows that news of these developments must have been material. With respect, this *conflates* the element of general availability with the element of Lew's *mens rea* as to the materiality of the Information.

Conclusion

146 In summary, these were our *main holdings* in the present appeal:

> (a) In so far as *Issue 1* was concerned (*ie*, what information about WBL Lew possessed at the material time (which we defined at [24] as "the Information")), we agreed with the Judge that the Information consisted of the following pieces of information: (i) the Loss Forecast, (ii) the Significant Impairment and (iii) the Significant Overall Loss Forecast (all as defined above at [26]). This was consistent with the fact that "information" in s 214 of the SFA was intended

to be interpreted more widely (see the analysis above at [29] – [30]).

In the circumstances, Lew was wrong to raise the *certainty* and *reliability* of the information which he acquired from the 2 July 2007 GMC Meeting to argue that the information therefore did not constitute "information" within the meaning of s 218. The certainty and reliability of information was only relevant to the inquiry under Issues 2 and 3. Issue 1, on the other hand, relates to the very broad and general question as to *what* constitutes "information" in the first place, not the *quality* of the information and information might include knowledge of an uncertain, predictive or speculative nature. It was also important to specifically *particularise* the Information (see above at [47] – [48]) to proceed with the inquiry under Issues 2 and 3, especially with regard to Issue 2, specifically and especially when it is disputed whether the Information could be *deduced* from information that was already generally available. Nevertheless, as the parties had joined issue on the question of certainty and (especially) reliability at this (albeit inappropriate) threshold stage, we found, on the facts, that the Information was, in any event and in fact, both certain and reliable (see the analysis above, especially at [32] – [46]).

(b) In so far as *Issue 2* was concerned (*ie*, whether the Information was "generally available" under s 215 of the SFA), we agreed with the Judge that the Information was *not* generally available under the respective limbs of s 215 of the SFA, especially under s 215(*c*) of the SFA. Furthermore, we agreed that the Judge had applied the correct legal test as embodied in *R v Hannes* in relation to s 215(*c*) of the SFA, *ie*, information would only qualify as "generally available" under s 215(*c*) if the Common Investor could make deductions, conclusions or inferences from information which were of the "same character" or "quality" as the information the insider possessed. However, we differed from the Judge in so far as she failed to state *exactly who* was contemplated in s 215(*c*) as making the "deductions, inferences and conclusions" from the Generally Available Information on WBL (as defined at [63] above) for the purposes of s 215(*c*) (see above at [57]). A *consistent and objective* point of reference must be identified, and this point of reference is *from the perspective of the Common Investor* as defined at [58] above. To determine what information is generally available in the market, it must be determined what "deductions, conclusions, or inferences" as referred to in s 215(*c*) could have been made by a Common Investor. We agreed with the Judge that the Generally Available Information on WBL that Lew relied on was too weak for the Common Investor to have drawn the deductions, conclusions or inferences that would have enabled him or her to arrive at the same content as that contained in the Information. There was no basis in the Generally Available Information on WBL for the Common Investor to deduce that WBL was going to take an impairment charge on WPT in 3Q FY07 and, even if such an impairment could be deduced, the Common Investor could not from the Generally Available Information on WBL deduce the quantum of the impairment charge. Further, even if the Common Investor could have arrived at the same conclusions as those in the Information, they did not meet the necessary threshold of being of the "same character" or "quality" as the Information as particularised at [47] above: the Information was based on actual financial results in April and May 2007 as well as actual knowledge of the board's discussion of an impairment charge (and, importantly, its quantum) on WPT. Therefore, the Information was not "generally available" under s 218 of the SFA (see generally above at [83] – [85]).

(c) In so far as *Issue 3* was concerned (*ie*, whether, if the Information *were* generally available, a reasonable person would expect the Information to have a "material effect" on the price or value of WBL shares under s 216 of the SFA), we agreed with the Judge that the correct legal test was the *TSC* test as defined at [95] above. Indeed, parties did not dispute that the *TSC* test is the correct test to apply under Issue 3. Rather, parties disputed how much weight should be accorded to Market Impact Evidence (as defined in [97] above), with Lew, in

particular, arguing that Market Impact Evidence should be treated as *conclusive* in demonstrating whether the Information was material or not. For the reasons given at [102] – [106] above, we rejected this approach and held that, whilst Market Impact Evidence may be a *relevant* factor in determining whether the Information was material, it is clearly not conclusive in and of itself given s 216 of the SFA and the *TSC* test. The proper role of expert evidence, in the context of s 216 of the SFA, should be to assist the court in establishing how *a reasonable person, at the time of the alleged insider trade*, would have expected the information to influence a Common Investor, and *not* to analyse in minute detail what, on hindsight, had actually happened to the market upon the release of the information.

Further, we held that the Information here was material within the meaning of s 216 of the SFA (*ie*, a reasonable person would have expected the Information to have a "material effect" on the price or value of WBL shares) because there was a substantial likelihood that the Information would have influenced the Common Investor to buy or sell WBL shares. While we had some reservations with regard to the materiality of the Loss Forecast *in and of itself*, this was not crucial since we agreed that the Significant Impairment Prospective and therefore the Significant Overall Loss Forecast were material. The Market Impact Evidence in this case supported the conclusion that there was a substantial likelihood that the Information would have influenced the Common Investor to buy or sell WBL shares, although, as we held earlier, Market Impact Evidence is *not conclusive proof* of materiality under s 216. Therefore, the Information satisfied the requirement under s 218 of materiality (see the analysis above, especially at [110] – [137]).

(d) In so far as *Issue 4* was concerned (*ie*, whether Lew knew the Information was not "generally available" and that if the Information were generally available, it might have a "material effect" on the price or value of WBL shares), we found that this was a clear case where, even without relying on the presumption of knowledge under s 218(4) of the SFA, there was sufficient evidence, on a balance of probabilities, to find that Lew *knew* the Information was not generally available, and if generally available, might have a material effect on the price or value of WBL shares. Therefore, we upheld the Judge's findings regarding Lew's knowledge.

147 For the reasons set out above, we were satisfied that all the elements of insider trading pursuant to s 218 of the SFA had been established and that Lew was in contravention of the said provision. We therefore dismissed Lew's appeal with costs and the usual consequential orders.

[note: 1] Appellant's Case ("AC") at para 13.

[note: 2] Respondent's Supplemental Core Bundle, p 124 (Kevin Lew Chee Fai's 1st Affidavit sworn on 9 April 2009 at [21]).

[note: 3] Joint Record of Appeal ("JROA") vol III Part R, pp 3770 and 3947 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder Bull SC).

[note: 4] Appellant's Core Bundle, vol 2 ("2ACB"), p 82.

[note: 5] *Ibid*, pp 84-85.

[note: 6] JROA vol V Part D, p 6714.

[note: 7] *Ibid*, pp 6704–6705.

[note: 8] *Ibid*, p 6714

[note: 9] 2ACB, pp 87–88.

[note: 10] JROA vol III Part C, p 806; JROA vol III Part Q, p 3745.

[note: 11] 2ACB, p 87.

[note: 12] JROA vol III Part S, p 3983 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder Bull SC).

[note: 13] *Ibid*, p 3974.

[note: 14] JROA, vol III Part R, p 3946.

[note: 15] Respondent's Case ("RC") at para 449.

[note: 16] AC, para 144.

[note: 17] AC, paras 144–148.

[note: 18] AC, paras 144–148.

[note: 19] AC, para 144.

[note: 20] JROA vol IV, p 5679.

[note: 21] AC, para 183.2.

[note: 22] JROA vol III Part B, p 585 (Christopher Chong Meng Tak's 1st Affidavit affirmed on 8 April 2009).

[note: 23] RC at para 513.

[note: 24] AC at para 193.

[note: 25] JROA, vol III Part S, p 3961 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder Bull SC).

[note: 26] JROA, vol III Part Q, pp 3650–3652 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder Bull SC).

[note: 27] JROA, vol III Part S, p 3974 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder Bull SC).

[note: 28] JROA, vol III Part R, p 3946 (Cross-Examination of Kevin Lew Chee Fai by Mr Cavinder

Bull SC).