Monetary Authority of Singapore *v* Lew Chee Fai Kevin
[2010] SGHC 166

Case Number : Suit No 71 of 2009

Decision Date : 27 May 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Cavinder Bull SC, Yarni Loi and Gerui Lim (Drew & Napier LLC) for the plaintiff; Thio Shen Yi SC, Leow Yuan An Clara Vivien and Charmaine Kong (TSMP Law Corporation) for the defendant.

Parties : Monetary Authority of Singapore — Lew Chee Fai Kevin

Financial and Securities Markets – Insider Trading

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 123 of 2010 was dismissed by the Court of Appeal on 1 March 2011. See [2012] SGCA 12.]

27 May 2010 Judgment reserved.

Lai Siu Chiu J:

1 The present suit arose out of a share transaction that was entered into by the defendant, Kevin Lew Chee Fai ("Lew"), who was a senior employee of WBL Corporation Limited ("WBL"). In Suit No 71 of 2009 ("S 71/2009"), the Central Bank of Singapore *viz* the Monetary Authority of Singapore ("MAS") is claiming payment of a civil penalty from Lew under s 232(2), read with s 218, of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (the "SFA"), for insider trading. Lew had brought a claim in a separate suit, Suit 129 of 2008 ("S 129/2008"), for specific performance of the issuance of shares under WBL's Executive Share Option Scheme. S 71/2009 was originally commenced in the Subordinate Courts (as MAS' claim was for less than $250,000) but for expediency, it was transferred to the High Court to be tried together with S 129/2008 before the same judge. The evidence in S 71/2009 was to form part of the evidence in S 129/2008, and *vice versa*. This judgment, however, will only deal with the merits of S 71/2009.

The facts

WBL

2 WBL is a public company listed on the Singapore Exchange Ltd ("SGX"). In 2007, it had about 90 active subsidiaries. WBL's principal activities are in Technology Manufacturing, Automotive Distribution, Technology Solutions and Investments. The Technology Manufacturing division consists of, *inter alia*, a Flexible Printed Circuits business ("FPC") and a Precision Engineering Unit. At the material time, WBL had a number of subsidiaries under its FPC business, including Multi-Fineline Electronix Inc ("M-Flex") and MFS Technology Ltd ("MFS"). M-Flex was listed on the SGX while MFS was a company listed on NASDAQ, an American securities exchange. WBL held approximately 75% of the issued shares in MFS and 55% of the issued shares in M-Flex. While WBL did not manage MFS and M-Flex on a daily basis, it had nominee directors sitting on the Board of Directors of both companies. Another subsidiary of WBL was Wearnes Precision (Thailand) Limited ("WPT"), a company belonging to WBL's Precision Engineering unit with operations in Thailand.

3 At the material time, WBL's senior management comprised of Tan Choon Seng ("CS Tan") its Chief Executive Officer ("CEO"), Wong Hein Jee ("Wong" who is also known as Lester) the Chief Financial Officer ("CFO"), Lew (the Group General Manager for Enteprise Risk Management at the time) and Tan Swee Hong("Swee Hong"), WBL's Company Secretary and Group General Manager for Legal and Compliance. Lew, an accountant by training, joined WBL in 1998 as its Group Financial Controller and became the equivalent of the CFO in 2002. He became WBL's Group General Manager in 2006. Soh Yew Hock ("Soh") was a Non-Independent and Executive Director of WBL between 1994 and July 2007. CS Tan, Wong and Swee Hong testified for MAS and WBL while Soh was Lew's witness.

4 It would be useful, at this juncture, to provide some background on how WBL operated. When CS Tan took over as WBL's CEO in December 2004, he instituted the Group Management Council ("GMC") to support WBL's Board of Directors in strategic, operational and financial matters. The GMC would typically meet every Monday at 8.30am (the "GMC Meeting"). These GMC Meetings were chaired by CS Tan and attended by members of the GMC and WBL's senior management. At the material time, the GMC Meetings alternated, on a weekly basis, between operational meetings (where operational matters and strategy were discussed) and financial meetings (where financial forecasts of WBL's performance were provided). On a number of occasions, CS Tan informed the attendees of GMC Meetings that the information presented and discussed at the meetings was confidential.

5 At the GMC meetings, it was common for financial forecasts to be presented by WBL's finance department through Microsoft Powerpoint presentation slides. Most of WBL subsidiaries (save for the smaller ones) would submit a forecast to their respective division heads, who would in turn submit their forecasts to WBL. Wong's evidence was that most of WBL's subsidiaries had a qualified accountant and that the closer the forecasts were made and submitted towards the end of each quarter, the greater their accuracy in their reflection of the figures for that quarter. These Microsoft Powerpoint presentation slides were not distributed to the attendees of GMC Meetings due to their confidential nature.

6 Lew's position was that these GMC Meetings were not taken seriously by WBL's senior management. He claimed that: (a) GMC Meetings, which he labelled a "Grand Master Circus", were unstructured and not taken seriously; (b) no substantive decisions were made at these meetings; (c) important discussions were taken offline; and (d) decisions made at GMC Meetings were not implemented.

7 I cannot accept Lew's evidence. First, his own witness, Soh, had agreed that during those GMC Meetings: (a) important and/or confidential matters were discussed; (b) substantive decisions were made; (c) updates were given about important matters in the WBL group; (d) it was not true that most matters discussed were trivial; (e) the meetings were not incoherent, a circus or a farce; and (f) the most up-to-date financial information was revealed during the meetings, contradicting Lew's evidence entirely on this point. In addition, Soh had also agreed that financial forecasts that were provided towards the end of every quarter were more reliable. Second, in cross-examination, Lew had retracted his statement that no substantive decisions were made at GMC Meetings. Third, Lew had also agreed that confidential information such as financial data was given during GMC Meetings, thereby contradicting his statement that such meetings were a circus or a farce. I therefore reject Lew's evidence on this point. It was clear on the evidence that important discussions and decisions were made at the GMC Meetings.

8 The claim of MAS against Lew relates to the sale of his WBL shares on 4 July 2007, two days after a GMC Meeting during which (it was alleged) material price-sensitive information was made known to Lew. The price-sensitive information pertained to two matters, namely that:

(a) WBL was going to make a loss; and

(b) it would be taking an impairment charge on WPT.

I will now set out the facts leading to the receipt of what MAS alleged, was material price-sensitive information by Lew and his trade in WBL shares.

Information announced by WBL prior to the 2 July 2007 GMC Meeting

9 On 14 February 2006, WBL announced a net attributable profit (i.e., the profit after tax and minority interest ("PATMI")) of $25.8m for the first quarter of FY 2006 ("Q1 FY06"), up from $7.9m in the first quarter of FY 2005. In Q1 FY 06, M-Flex and MFS contributed $41.9m and $17.8m to WBL's pre-tax profit respectively. As for its prospects for the next quarter, i.e. the second quarter of FY 06 ("Q2 FY06"), WBL opined that:

> [WBL] expects its second quarter results barring unforeseen circumstances, to continue to be positive year-on-year. However, due to the shorter reporting period and the seasonality of sales of electronic products in the second quarter, the Technology Manufacturing Division is likely to report slower sales compared to the first quarter. The Automotive and Technology Solutions Divisions are also likely to see keen competition and increasing pressure on margins. *Hence, the company is cautiously optimistic about its overall performance for Q2 FY2006*.
>
> [emphasis added]

10 On 11 May 2006, WBL announced a net attributable profit of $40m for the first half of FY 2006, which meant that it made a net attributable profit of $14.5m for Q2 FY06. Again, M-Flex and MFS were singled out for achieving "good sales", with the Technology Manufacturing division earning a pre-tax profit of over $92m. As for its prospects for the second half of FY 2006, WBL opined that:

> [WBL] expects its performance for the rest of the year, barring unforeseen circumstances, to improve over last year. The Technology Manufacturing Division is likely to report continued strong sales from existing customers and M-Flex is also expected to roll out several new patented products. The Automotive Division will launch several new models in the later part of the year which should have a positive impact on revenue. However, the Technology Solutions Division is likely to face keen competition and increasing pressure on margins. The company expects to continue to unlock value from its property holdings in the investments portfolio in the second half of FY2006.

In its financial statement for Q2 FY06, WBL noted that:

> The performance of the Group's other technology manufacturing operations were affected by continued streamlining… the performance of the precision operations in Thailand was affected by further provisions made for inventory write offs. Hence the operations recorded a pre-tax loss of $3.1 m for the quarter.
>
> …
>
> Developments in Q3 FY 2006
>
> *The Group is cautiously optimistic on the performance of its core businesses in Q3 2006*.

[emphasis in italics added]

11 On 11 August 2006, WBL announced a net attributable profit of $9m in the third quarter of FY2006 ("Q3 FY06"), down from $32.5m in the third quarter of FY 2005 ("Q3 FY05"). CS Tan observed that the Technology Manufacturing Division had a challenging quarter due to eroded margins, and that while WBL was disappointed in WPT's "larger than expected losses", it was confident of recovery "as we have addressed the issues there". The announcement also stated that:

> The Precision operations recorded losses of $6.6 million; this was mostly from the Thailand operations, which had cost over-runs because it made good contractual and customer obligations for the delayed delivery of several products. The management team has put in place an action plan to reduce costs, improve operational quality and delivery issues and change its product mix to higher margin products.

Looking forward, WBL noted that: (a) the Technology Manufacturing Division and the Technology Solutions Division were likely to face continued pressures on margin; (b) the Automotive Division would only start to deliver new models in Q1 FY07; and (c) WBL would continue to unlock value from its property holdings in the fourth quarter of FY 2006 ("Q4 FY06"). The financial statement for the Q3 FY 06 results indicated that WBL:

> expect[ed] to continue with its efforts to streamline operations and divest non-core property holdings in FY 2006. Hence it [was] cautiously optimistic about its performance for Q4 FY 2006 and for the full year.

12 On 23 November 2006, WBL announced a net attributable profit of $58.9m for all of FY06, up from $7.7m in FY05. This meant that it made a net attributable profit of approximately $9m in Q4 FY06. In its announcement, WBL noted that:

> For FY 2006, the precision manufacturing operations of the Group significantly affected the performance of the Technology Manufacturing Division. It recorded losses of $11.9 m for the whole year, *mainly from the Thailand plant which made good contractual and customer obligations for several low margin products. Going ahead, the Group expects the Thai operations to perform better, and has already started to see the turnaround there*.
>
> …
>
> [CS Tan added]: "We still have work to do to streamline and unlock value in FY 2007. The core FPC businesses are likely to face increased competition. We believe that our efforts to streamline and focus have made us more resilient and better able to tackle the challenges ahead as we continue to unlock value for shareholders in a more challenging global environment."
>
> [emphasis added]

13 On 14 February 2007, WBL announced a net attributable profit of $7.4m for the first quarter of FY 2007 ("Q1 FY07"). CS Tan observed that it was a "challenging quarter with continued margin compression in the Technology Manufacturing Division". The announcement also noted that:

> The precision manufacturing operations of the Group continue to face losses related to contractual obligations to a major customer. It is negotiating with this customer for better prices.

The financial statement for Q1 FY07 observed that:

The precision manufacturing operations of the Group continued to drag on the performance of the Division. It had losses of $6.0million for the quarter. The operations will continue to focus on reducing costs and to negotiate with a major customer to improve the margins on several products.

…

Developments in Q2 FY 2007

In line with the announcement by the Group's subsidiaries, [M-Flex] and [MFS], the FPC sector is expected to continue to face stiff competition and lower gross margins.

The Automotive Division expects continued keen competition in the Singapore market.

The Technology Solutions Division is also likely to face increasing pressure on margins due to more aggressive competition.

The Group will continue with its efforts to streamline operations.

14 On 12 May 2007, WBL announced a net attributable profit of $1.7m for the second quarter of FY 2007 ("Q2 FY07"). CS Tan observed that it was a "challenging half year". The announcement noted that:

The precision manufacturing operations in Thailand continued to perform poorly and incurred retrenchment costs as it scaled back production due to a drop in sales volume. It recorded a loss of $11.2 million for the half year, compared with a loss of $2.5 million in the first half of FY 2006. The Group will continue to restructure the operations in Thailand.

CS Tan also observed, in the announcement, that:

As we continue to navigate a challenging year, we expect our Technology Manufacturing Division to face continued pressure on margins. The Group is accelerating its plans to divest some non-core assets and believes that together with the Automotive Division, this could help counter some of the cyclical uncertainties related to the technology business.

In the financial statement for Q2 FY07, it was noted that:

The Group's precision operations in Thailand had retrenchment costs and lower revenue related to the fall in demand from its largest customer. These contributed to attributable losses of $5.3 million.

…

Developments for the rest of the year

In line with continued margin compression in the Group's core Technology Manufacturing Division, and in line with the announcement by its subsidiaries, M-Flex and MFS, the Group is cautious about its performance for the rest of the year.

Internal Discussions on WPT

15 While WPT was not a major component of WBL's revenue, it was regarded as a problematic entity, having consistently recorded losses over a number of quarters, as follows:

	Q4 FY 05	**Q1 FY 06**	**Q2 FY 06**	**Q3 FY 06**	**Q4 FY 06**
Net loss (pre-tax)	$6.1m	$0.7m	$2.2m	$5.9m	$4.4m

The 20 November 2006 Audit Committee Meeting

16 WPT's losses did not go unnoticed by WBL's management and board of directors. On 20 November 2006, an Audit Committee ("AC") meeting was held. CS Tan, Wong and Lew attended the meeting. At this meeting, WPT's performance was discussed. The minutes indicated that WBL's management took the view that the taking of an impairment was unnecessary, and that WPT would be able to break even by the third quarter of financial year 2007 ("Q3 FY07") and even make a profit in the following quarter by making operational changes, including effecting cost-cutting measures of approximately $6m. At this meeting, CS Tan had said that Dr Lim, another member of WBL's Board of Directors, would present an update on WPT's performance for WBL's Board of Directors and that an implementation plan would be prepared.

The 9 February 2007 Audit Committee Meeting

17 On 9 February 2007, another AC meeting was held (the "9 February 2007 AC Meeting"). CS Tan, Wong and Lew attended the meeting. By then, WPT had already recorded losses in Q1 FY07 that were greater than projected. There were discussions as to whether it was necessary to take an impairment on 31 December 2007. WBL's management took the view that it was unnecessary to do so. Tan Bee Nah, WBL's external auditor, briefed the AC on the impairment issue, noting that:

> [T]he issue of impairment is highly judgmental as it is highly dependent on the following key assumptions, including:
>
> (a) Finalisation and acceptance of the revised terms (as set out in Appendix 1) with Nidec;
>
> (b) Securing contracts from new customers (such as SC Wado) and new businesses [such as the Molex business from Wearnes Precision (Shenyang)]; and
>
> (c) Cost reduction initiatives (including headcount reduction, improvement of yield and quality).

18 Both CS Tan and Dr Lim explained to the AC that:

> [A] number of the loss-making contracts had been terminated and a review of the sub-contractors had been performed to eliminate those which were not competitive. WPT also threatened to terminate their business relationship with Nidec due to the loss making business, and successfully negotiated better terms with Nidec, including an increase of selling prices… Dr Lim shared that the increase in selling prices with Nidec will take effect from… February and Nidec will review the selling prices with WPT on a month to month basis, depending on the production yield.
>
> Chairman enquired whether there will be an upward trend in the next quarter. Mr Lai Teck Poh also enquired whether the projections were based on realistic or optimistic assumptions. Dr Lim Huat Seng replied that based on the actual results to date, the loss was about $1.3m in January

but was expected to reduce significantly in February and March. The projection of the $3.1 m loss included a $1 m retrenchment cost for reducing the headcount by 566.

After some deliberations on the assumptions, 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)*.

[emphasis added]

19 Lew gave evidence that the AC had, at this meeting, decided that WPT would without further discussion take an impairment in Q2 FY07 if it incurred more than $3.1m in losses. During cross-examination, Lew accepted that his position was not reflected in the minutes. When asked why he did not amend the minutes, he gave a number of different excuses claiming that: (a) the minutes were not received for verification; (b) it was not for him to amend the minutes since it was only for the AC members; (c) he had talked to Dr Lim and the minute-taker about this discrepancy; and, (d) it was not for the attendees of the AC meetings to challenge the minutes, and that he had never been asked whether he agreed with the minutes in all the years he had attended meetings. However, WBL produced three emails (dated 23 January 2007, 5 April 2007 (in relation to the 9 February 2007 AC Meeting) and 9 July 2007 (in relation to the 8 May 2007 AC Meeting)), where Lew responded to requests to review the minutes of the AC meetings. In two of those instances, Lew proposed changes to the minutes. Questioned, Lew claimed he was "mistaken", conceded that there was a practice of sending minutes internally for verification, but insisted that he did not have authority to make any substantive amendments to the minutes. I reject Lew's evidence on this point as his testimony was not corroborated by any other witness. It beggars belief that such a high-ranking employee of the company could not make any substantive changes to the minutes if necessary or, that the "mistake" had not been spotted by any of the other seven addressees of the e-mails seeking verification of the same. In my view, it was more likely than not that no firm decision to take an impairment in Q2 FY07 was taken at the 9 February 2007 AC Meeting, if the results were unfavourable.

The 8 May 2007 Audit Committee Meeting

20 At the next AC meeting held on 8 May 2007 attended by CS Tan, Wong and Lew (the "8 May 2007 AC Meeting"), it was reported that WPT's losses for Q2 FY07 were higher than expected. The minutes indicated that a number of explanations were given for those losses. There were also discussions on whether WPT had to take an impairment charge. The minutes stated:

[Wong] briefed the AC on the updated impairment analysis prepared in Q207, which showed no impairment in value of WPT assets. [Wong] stated that 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 [from PricewaterhouseCoopers] 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*.

[CS Tan] updated the AC that management is in the process of negotiating with two parties…

Dr Cham Tao Soon [the AC Chairperson] 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. *Mr Tan Choon Seng proposed a cut-off date of Q307, and an impairment charge should be recognised if there is no progress by then. The AC 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]

21 Further, in Microsoft Powerpoint presentation slides that were prepared for this meeting, it was observed that WBL could adopt either of the following options in respect of WPT:

1. **Re-build**
    - Only if JVC and/or [Panasonic] HDD business firmed up within the next 30 days
        - Analysis clearly shows viable & profitable business under any normal situation
        - WPT operations not viable without HDD business
    - Little confidence that current WPT team able to deliver
        - …
    - Very high risk option since still require 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
        - Continuing operational losses in meantime
    - No asset impairment in current quarter.

[emphasis original]

The 2 July 2007 GMC Meeting

22 On 2 July 2007, a financial GMC Meeting was chaired by CS Tan ("2 July 2007 GMC Meeting"). This meeting was held 2 days after the end of the Q3 FY07 on 30 June 2007. Wong, Swee Hong and Lew were also attendees. The evidence suggested that the meeting was not pleasant with voices being (at the least) raised thereat. A Microsoft Powerpoint presentation of WBL's financial forecasts for Q3 FY07 and Q4 FY07 was provided at the meeting, as follows:

	Pre-tax Profit	Profit after Tax and Minority Interests
Technology Manufacturing	(4.6 m)	(4.8 m)
Technology Solutions	0.9 m	1.2 m
Automotive	5.1 m	4.4 m
Investments	4.0 m	2.7 m
Corporate HQ	(4.4 m)	(4.8 m)
Stock Option Expenses & SARS	(1.1 m)	(1.0 m)
WBL Total (w/o MFS/[M-Flex])	**(0.0 m)**	**(2.3 m)**
MFS/MFI	4.2 m	1.8 m
WBL Total	**4.2 m**	**(0.4 m)**

[emphasis original]

23 The forecasts were based on actual results in April and May 2007 and best estimates for June 2007, but did not take into account any impairment charge to be taken on WPT. The minutes of this meeting stated as follow:

> **Subject 1 Tech Manufacturing ... 1.1 Wearnes Precision Thailand** — **Action Items**
>
> Continued losses, more than forecast due to exchange rate loss. Q3 forecast -$4.7m. Operational loss is $3.5m. $1.1m exchange rate loss.
>
> 1.1.1 Decision point on divesting the plant must be made by next week. [CS 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 Lester 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. — **Lester to follow up**
>
> ...
>
> **3 Overall Group Forecast**
>
> *3.1 Performance will be loss of $2.3million without MFS n MFLEX*.
>
> *WBL total: with MFLEX n MFS, will be loss of $0.4m*.
>
> ...

5 Action Items

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

…

5.3 Need a solid decision on WPT.

[emphasis in italics added]

24 CS Tan testified that he had told the attendees that a full impairment had to be taken on WPT's assets in Q3 FY07, unless the deal to sell WPT as a going concern was concluded within a week. CS Tan and Wong also stated that Wong had indicated that the chances of a sale were "very slim". However, even if a sale materialised, WBL would still have to recognise an impairment charge because WPT would have been sold at distressed prices below its carrying value on WBL's accounts.

25 Interestingly, an email was sent by one Debra Soon (who was WBL's Group General Manager for Corporate Communications and Investor Relations) ("Debra") to Swee Hong, stating that "like that we will need a profit warning". This email was sent at 8.48am, i.e., during the 2 July 2007 GMC Meeting. Swee Hong asked Debra what was stated in WBL's last announcement. Debra replied by stating "That not good la, but we never said going into loss".

Events subsequent to the 2 July 2007 GMC Meeting

26 On 11 July 2007, M-Flex announced that it had suffered an unanticipated decline in revenue for Q3 FY07 and was expected to record a net loss in that quarter. This announcement was made available by WBL on the SGX website. On 17 July 2007, MFS also issued an announcement on the SGX website to warn that it was expecting a net loss of between $2.5m and $3m in Q3 FY07. After trading hours on 17 July 2007, WBL issued a profit warning. It referred to the announcements released by MFS and M-Flex and stated that "further to the said announcements and the continual loss suffered by [WPT]", the Group would be reporting a loss for Q3 FY07.

27 On 2 August 2007, M-Flex announced a net loss of US$6.7m. On 14 August 2007, WBL announced that it suffered an attributable loss of $27.3m for Q3 FY07, which included an impairment charge on WPT costing $26.6m.

The sale of WBL shares by Lew

28 The records from SGX showed that Lew had, on 2 July 2007 at 2.24 pm, made a bid to sell 17,000 WBL shares at $5.05 per share. However, his bid was not matched. Subsequently, at about 8.34am on 4 July 2007, Lew submitted three bids to sell a total of 27,000 WBL shares at $5.05 to $5.10 per share. The records suggested that the three bids were made at 8.34am within a span of two seconds, but none were matched with buyers. Lau Kin Hin Leslie, the Assistant Information Technology Manager for AmFraser, gave evidence that Lew had placed those bids through his Internet trading account with AmFraser and testified that the users' brokers did not know the password and username for trading on the AmFraser's Internet trading platform on their clients' behalf. Lew did not dispute the veracity of AmFraser's records. However, he claimed that he had given the order to sell those 27,000 shares only after lunchtime on 4 July 2007, and that the order was made through his broker. During cross-examination, Lew said that he could not recall making those three bids and suggested that it was not possible for him to trade at 8.34am on 4 July 2007 as he was then on the move in China. I do not accept Lew's evidence. MAS provided documentary evidence (which Lew accepted) to show that Lew had put in bids to sell *personally* on the morning of

4 July 2007. His excuse, that he was on the move in China, was uncorroborated. In my view, the fact that the three bids (from the SGX's records) appeared to be made within a span of two or three seconds was inconclusive as to the veracity of Lew's account. Given that the information was downloaded from SGX, the time captured on SGX's record would reflect the time that the bids were *received* by SGX and not the time that the bids were *sent* by Lew from China. In my view, on the totality of the evidence, it was more likely than not that Lew had made those bids through his internet trading account on the morning of 4 July 2007.

29 At 2.36pm, Lew put in a bid to sell 30,000 WBL shares at $4.98 (which was the last transacted price) and his bids were matched. At 3.52 pm, he put in another bid to sell 30,000 shares at $4.98 (also the last transacted price) and his bids were matched within three minutes. At 3.56pm, Lew put in a third bid to sell 30,000 shares at $4.98 (the last transacted price), and his bid was matched almost instantly. All the bids were made through Lew's broker with AmFraser. In total, Lew sold 90,000 shares at $4.98, raising $448,200.

Lew's resignation from WBL

30 On 5 July 2007, Lew wrote to, *inter alios*, Swee Hong to inform her about the sale of his WBL shares on the previous day. Swee Hong responded on 9 July 2007 stating that, in her view, he possessed price-sensitive information made known at the 2 July 2007 GMC Meeting and that his actions might be construed as insider trading. Lew's response was:

> I sold my shares to raise cash to exercise my WBL options, which forms you would have received today.
>
> I did not think that the matters discussed at the GMC on 2 July were price-sensitive information, which is why I sold the shares. Had I thought otherwise, I definitely would not have done anything because I am fully aware of insider trading rules.
>
> The GMC Meeting on 2 July was an update of the 3Q forecast which can and do change, as you have seen in previous GMC meetings when such forecasts were presented, sometimes quite substantially, when the actual results are submitted or at the next update. Moreover, the forecast of the two FPC subsidiaries, which forms the bulk of the Group results, were not updated at the meeting. Additionally, there may be non-operational events which may or may not have been discussed at the meeting. Besides, as explained above, I sold the shares so that I can exercise my options for more shares.
>
> However, it is interesting that you view what was discussed at the GMC as sufficiently price-sensitive to send me this caution note, which I greatly appreciate. You know that the last thing I want to do is to be in breach of the regulations.
>
> If you consider my explanations as not sufficient justification of the sale and advise that I should not have carried out that trade, I will promptly buy back those shares at no less than the price that I sold them for.
>
> Your advise is greatly appreciated.

31 Swee Hong's response the following day (on 10 July 2007) was that Lew had sought her advice on the afternoon of 2 July 2007 (i.e., after the 2 July 2007 GMC Meeting), and that her advice was that:

it would be prudent not to deal in WBL shares in view of the information (which was and is still not generally available to the public) shared at the GMC meeting that morning.

Nevertheless, it would definitely not be in order to purchase the same number of shares (which you have sold) back from the market presently.

32 In Lew's response, he acknowledged having "a casual conversation after the [GMC Meeting] on whether the matters discussed at the meeting [were] price-sensitive information". However, Lew denied that he had sought Swee Hong's advice on whether he could sell the WBL shares. He claimed that at that point of time, it did not occur to him that he would be doing so. He ended by observing that they had a different view on whether the information was price-sensitive. Swee Hong subsequently reiterated that she had advised Lew on 2 July 2007 that it would not be "prudent" to deal with his WBL shares in the light of the information shared at the GMC Meeting that morning.

33 CS Tan's evidence was that on 10 July 2007, Swee Hong told him about Lew's trade in WBL shares, and, that she (Swee Hong) had previously told Lew that the information discussed at the 2 July 2007 GMC Meeting was price-sensitive. WBL's solicitors were called to conduct an inquiry, the outcome of which is privileged. On 17 July 2007, WBL filed a Suspicious Transaction Report in respect of Lew's trade. On 19 July 2007, Lew resigned from WBL with immediate effect.

Issues before the Court

34 The claim of MAS against Lew is based on s 218 of the SFA, the relevant provisions of which are 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.

(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 …

(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.

(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; …

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

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

35 As such, under s 218(1) of the SFA, a person must not sell any shares of the company if:

(a) he is a "person 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 of the securities of that corporation;

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

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

Conditions (e) and (f) are presumed, until the contrary is proven, if MAS can prove conditions (a), (b) and (c) to the satisfaction of this court (see s 218(4) of the SFA).

36 It cannot be disputed that Lew is a "connected person" within the meaning of s 218(5) of the SFA. Neither is it in doubt that Lew possessed information at the material time. The issues for this court's determination are as follows:

(a) what was the "information" Lew possessed at the material time?

(b) was the information generally available?

(c) did the information have a material effect on the price of WBL shares?

(d) did Lew know or ought reasonably to know, that the information was not generally available?

(e) did Lew know, or ought reasonably to know, that the information might have a material effect on the price of WBL shares?

37 The key witnesses for MAS were CS Tan, Wong and Swee Hong. In addition, Christopher Chong ("Chong") was its expert witness. Apart from himself, Lew called two other witnesses namely Soh and R, who was his expert witness.

38 At this juncture, it would be useful for me to make some observations about the evidence that was given. From my observation, I found the key witnesses of MAS to be truthful and honest – there was no reason for me to reject their evidence, especially since they were corroborative on many points. On the other hand, I was not impressed with Lew's testimony. Lew had, on a number of occasions, been untruthful (see, for instance, [19] above). I should also point out that while R was Lew's expert witness, Lew did not rely on R's testimony at all in his closing submissions.

What was the Information Lew possessed at the material time?

39 Under s 214 of the SFA, "information" is defined as *including*:

(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.

40 MAS asserted that Lew possessed the following information on 4 July 2007:

(a) As of 2 July 2007, WBL had forecasted a loss for Q3, FY 2007 at $2.3m (excluding MFS and M-Flex's performance) or $0.4m (including MFS and M-Flex's performance), which were based on WBL's most updated internal forecasts and discussions held during the 2 July 2007 GMC Meeting;

(b) WBL needed to take a *full* impairment for WPT in Q3, FY 2007 from the 2 July 2007 GMC Meeting, and that the quantum of the impairment would be a significant one; and

(c) As a result of the first two pieces of information, Lew knew that WBL would incur a substantial loss for Q3, FY 2007.

41 A reading of Lew's closing submissions revealed that he implicitly disagreed with the assertion of MAS that he possessed the information, especially in relation to the quality of the information. Lew argued that the information he received at the 2 July 2007 GMC Meeting was indefinite and unreliable. While these arguments were raised in respect of subsequent issues (*viz*, materiality and his subjective knowledge), it would be more convenient to deal with them here. Making clear the type of information possessed by Lew with regards to, *inter alia*, its quality and nature, will avoid the risk of conflating separate issues in the subsequent analysis.

42 As mentioned earlier, the case against Lew was that he possessed information in the form of a *forecast* made known at the 2 July 2007 GMC Meeting, that WBL would make a loss of $2.3m (excluding the performance of MFS and M-Flex) or a loss of $0.4m (including the two companies' forecasted performance). Lew did not dispute that such a forecast was provided at the meeting. Therefore, Lew possessed the information that WBL had *forecasted* the loss as described above (at [40(a)]).

43 Lew also did not deny that discussions on impairment were held during the 2 July 2007 GMC Meeting. However, he did not accept that it was decided, at the 2 July 2007 GMC Meeting, that a full impairment would be *recognised*, and that the quantum of impairment was *significant*. Lew's arguments and evidence were that:

(a) If WBL had decided to take a full impairment on WPT at the 2 July 2007 GMC Meeting, it would have discussed issuing a profit warning at that meeting and would not have waited until 17 July 2007 to do so.

(b) The minutes for the 2 July 2007 GMC Meeting suggested that the deadline for taking the impairment had been extended to 31 July 2007 (see above at [23]).

(c) No mention of any impairment was made in the profit warning issued or the suspicious transaction report made by Swee Hong. Similarly, in an e-mail sent by CS Tan to WBL's Board of Directors on 12 July 2007, CS Tan said that "WBL may have to issue our own warning together with the impairment that *may* happen in [WPT]" [emphasis added], suggesting that no such actual decision had been made.

(d) WBL's management kept pushing back the deadline to recognise the impairment as it was reluctant to do so. There was no indication that the deadline given at the 8 May 2007 AC Meeting was a fixed deadline. For example, following from the 9 February 2007 AC Meeting, an impairment should have been taken but was not recognised even when WPT's losses for Q2 FY07 of $5.3m exceeded the limit of $3.1m decided at that meeting (see above at [18]). New assumptions were constantly introduced. At the 8 May 2007 AC Meeting, it was discussed that WPT could get JVC as a new key customer, and that they were negotiating with other buyers for WPT. As a result, as of 2 July 2007, Lew could not conclude that all these alternatives were dead as there were no updates, and decisions might have been made offline.

(e) There was no requisite quorum for the 2 July 2007 GMC Meeting as Dr Lim and Jane Lim,

who were both involved with WPT, were absent. Lew also knew that Wong, Dr Lim and Jane Lim would be visiting Thailand after the 2 July 2007 GMC Meeting for further discussions with potential buyers, and therefore, no decision to impair could have been made at that meeting.

44 The common testimony of CS Tan, Wong and Swee Hong was that at the 2 July 2007 GMC Meeting, it was clear that the impairment had to be recognised. From CS Tan' perspective, it was because WPT had failed to satisfy the condition imposed by the AC during the 8 May 2007 AC Meeting (*viz*, to secure a contract with JVC) (see above at [20]-[21]). From Wong's and Swee Hong's perspective, the fact that no mention of any JVC deal was made at the 2 July 2007 GMC Meeting meant that no such deal had been reached. As a result, the impairment had to be recognised as the condition imposed at the 8 May 2007 AC Meeting was not satisfied. This would be so even if a sale of WPT (or its assets) materialised as it was unlikely that the selling price would be above WPT's carrying value on WBL's accounts. In any case, Wong's evidence was that the chances of a sale were slim. However, Wong admitted that the AC subsequently had to agree to the impairment and that there was a possibility that the update to the AC would be different if a sale or new deal with a customer had materialised.

45 I accept that there were apparent inconsistencies between the evidence of Wong and Swee Hong on the one hand and CS Tan's evidence on the other. The former two suggested that the decision to impair was made *during* the meeting, while the latter suggested that the decision was made *before* the meeting as the condition had not been satisfied. In my view, this apparent inconsistency arose due to the different perspectives taken by them, and it was not indicative of any confusion or uncertainty as Lew contended. CS Tan, as CEO, had personally promised the AC that an impairment would be recognised if WPT did not secure a new customer by 30 June 2007. From his perspective, since WPT did not secure a new customer, the decision to impair was set in stone. However, from the perspective of the other two, they might not have the same information as CS Tan. Until the GMC Meeting took place, they were unable to assume that the impairment would take place.

46 In my view, the important feature of the evidence of CS Tan, Wong and Swee Hong was that any attendee of the 2 July 2007 GMC Meeting would know that the decision to impair was almost a certainty. I accept that the decision to impair was subject to the AC's subsequent approval, but given the known implausibility that there would be any buyers for WPT and that an impairment would have to be recognised regardless, I cannot accept Lew's evidence that he did not know that an impairment was very likely to materialise. On the contrary, Lew accepted during cross-examination, that he had heard CS Tan say words to the effect that WBL would take a full impairment in Q3 FY07, corroborating the evidence of CS Tan, Wong and Swee Hong. I therefore find that Lew possessed information that WBL was very likely to recognise an impairment in Q3 FY07.

47 In my view, the other points raised by Lew do not detract from the fact that he possessed information relating to the impairment. The fact that no profit warning was issued until a much later date is not determinative of the issue, *viz*, whether an impairment was very likely to materialise, and does not aid his case. The SGX Listing Manual ("SGX-LM") does not impose on listed companies an *absolute* duty of immediate disclosure (see Rule 703(3) of the SGX-LM for exceptions relating to confidential, insufficiently definite or internal information). In addition, I accept the explanation of CS Tan that the issuance of a profit warning by WBL was a sensitive matter which required internal discussions and advice from counsel, all of which would take time. His evidence was corroborated by Swee Hong. In any case, Wong and Swee Hong testified that they had (separately) given consideration on the issue of providing a profit warning on 2 July 2007, and that Swee Hong had discussed this issue with CS Tan immediately after he returned from his holiday. While there is no documentation to show that discussions on the profit warning had taken place before 12 July 2007,

the e-mails exchanged between Debra and Swee Hong during the 2 July GMC Meeting (see above at [25]) strongly suggests that the issue of the profit warning would have been raised soon after the meeting. Debra and Swee Hong, being in charge of WBL's communications and legal matters respectively, would have been key personnel involved in the preparation of a profit warning. The facts therefore lend support to the strong inference that a profit warning had been discussed soon after the 2 July 2007 GMC Meeting. As such, I do not think the failure to issue a profit warning immediately after the 2 July 2007 GMC Meeting was indicative of any uncertainty in the forecasted loss or the taking of the impairment, *per se*.

48 CS Tan's statement (as recorded in the minutes) that he would "like to see an end by 31st July and greater sense of urgency" (see above at [23]), when read on its own, suggests that the deadline for recognising an impairment had been pushed back. However, when read in context, that was not the intended meaning. Instead, that deadline referred to any plans to divest WPT's plant. Both CS Tan and Wong testified that those observations referred to the decision on the *size* of the impairment (e.g., whether a sale of WPT or its assets would materialise), and not the decision to impair itself. Their explanation was consistent with such an interpretation, *viz*, that the deadline referred to plans to divest WPT's plant and not the impairment. Hence, I do not find that the 31 July deadline was referable to the decision to recognise an impairment.

49 Lew relied on the 20 November 2006 and the 9 February 2007 AC Meetings to argue that the 30 June 2007 deadline fixed at the 8 May 2007 AC Meeting was not definite as the management kept pushing back those deadlines. I have already (at [19] above) rejected Lew's claims that a definite deadline had been imposed at the 9 February 2007 AC Meeting. Nothing said at the 20 November 2006 AC Meeting suggested that a definite deadline was imposed. Therefore, Lew had no basis for asserting that the deadline fixed at the 9 May 2007 AC Meeting was not definite. Lew's argument, that he did not know that the JVC deal or deals with other buyers were dead, cannot stand, particularly since Lew had admitted that CS Tan had said words to the effect that an impairment had to be taken.

50 The fact that there was no quorum at the 2 July 2007 GMC meeting does not assist Lew's case. I accept that the decision to impair was not made at that meeting itself, but in the circumstances, it was clear to all attendees that it was *very likely* that the impairment would be recognised, for the reasons explained above (at [44]-[49]).

51 As for the suspicious transaction report, Swee Hong's explanation was that the impairment had been implicitly referred to in the suspicious transaction report as "other financial information" that was involved. In any case, given the strong evidence that any attendee at the meeting would know that an impairment was almost certain to be taken, and that Lew had admitted hearing CS Tan mention that an impairment would be taken, I do not think what was written in the suspicious transaction report or in CS Tan's e-mail to WBL's Board of Directors can make a difference to the conclusion. I therefore find that Lew possessed information that WBL was very likely to recognise an impairment on WPT at the material time.

52 I turn now to consider the information that Lew possessed on the quantum of the impairment. At the 8 May 2007 AC Meeting, WBL's external auditors had informed those present (including Lew) that WBL's value-at-risk was at $22.5m and $30.5m (excluding and including freehold property respectively), and it was suggested that a $30m write-off was the most predictable outcome (see above at [20]-[21]). Lew contended that the maximum value at risk could not be $30m, because no assessment was made as to WPT's valuation or its value in use. In my view, it is difficult to appreciate how Lew could contend that the impairment would not be significant. Even 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.

53 As such, I find that Lew was in possession of the following information at the material time:

(a) That WBL had forecasted a loss of loss of $2.3m (excluding MFS and M-Flex's performance) or a loss of $0.4m (including MFS and M-Flex's forecasted performance) for Q3 FY07.

(b) That it was *very likely* for WBL to recognise a *significant* impairment on WPT in Q3 FY07.

(c) As a result of (a) and (b) above, that it was very likely that WBL would incur a significant overall loss for Q3 FY07.

Whether the Information was generally available

What is "generally available" information?

54 Under s 215 of the SFA, 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).

55 I will refer to s 215(a) as the "readily observable test", s 215(b) as the "publishable information test" and s 215(c) as the "market analysis test". At this juncture, I should observe that these definitions are not without difficulty, for reasons which will be explained in greater detail below. Ironically, the Australian equivalent to s 215 of the SFA was introduced to provide more certainty on the type of information that was intended to be caught by the provisions (see Kendall and Walker, *Insider Trading in Australia and New Zealand: Information that is "generally available"* (2006) 24 C&SLJ 343 at 345). The prior Australian position (found in the Australian Securities Industries Act 1980) did not define what information was "not generally available", and this made the previous regime uncertain and difficult to police (see Lyon and du Plessis, *The Law of Insider Trading in Australia* (Annandale, N.S.W.: The Federation Press, 2005) at p 30).

56 The Australia draftsmen of this legislation meant to provide a fair market for trading securities, vis-à-vis the information that is available to the investing public. As was noted in its report, Griffith, *Fair Shares for All, Insider Trading in Australia* (Australian Government Publishing Service, 1989) ("Griffith Report") (at para 3.3.6):

> [I]t must be emphasised that the basis for regulating insider trading is the need to *guarantee investor confidence in the integrity of the securities market*. Accordingly, the Committee confirms the principles adopted in 1981 by the Committee of Inquiry into the Australian Financial System (the Campbell Committee) as a basis for the prohibition of insider trading:
>
> > The object of restrictions on insider trading is to *ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information*. Investor confidence, and thus the ability of the market to mobilise savings, depends importantly on the *prevention of the improper use of confidential information*.
>
> [emphasis added]

57 It should, however, be noted that the Griffith Report only touched on the requirements of the publishable information test. With regard to the readily observable test, it was explained in the Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (the "Explanatory Memorandum") that that test was subsequently included because (at para 327):

> Concern was expressed that in consequence of the adoption of this definition in the exposure draft [i.e., the publishable information test], 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.

58 There is, however, considerable uncertainty regarding the applicability of the readily observable test in Australia. These difficulties were raised in the decision of the New South Wales Criminal Court of Appeal in *R v Firns* [2001] NSWCCA 191 ("*Firns*"). There, the accused acted on information obtained from the Papua New Guinea ("PNG") Supreme Court which was favourable to a certain company. The information was made known to him through that company's solicitors (who had attended the hearing before the PNG Supreme Court) and he went on to purchase shares in that company. The issue was whether a judgment issued by the PNG Supreme Court could be considered "generally available information". On appeal, it was held, by a majority, that such information was generally available. Mason P, delivering the majority's judgment, recognised that there was a tension between the Australian equivalent to s 215(b) of the SFA, which reflected the policy of equality of access to relevant information to ensure fair markets (the "fairness policy"), and the Australian equivalent to s 215(a) and s 215(c) of the SFA, which recognised that "cleverness, swiftness and efficiency" were to be encouraged for some types of information (the "efficiency policy") (see *Firns* at [51] and [57]). Given the conflation of competing policies within the same section, Mason P took the view that the Australian equivalent of s 215(a) of the SFA had to be read literally to reflect the efficiency policy. As such, the class of persons by whom the matter in question was to be regarded as readily observable was not confined to existing shareholders or persons who traded on the Australian Stock Exchange (see *Firns* at [70]). On the facts of the case, Mason P found that the PNG judgment was readily observable as it was available, understandable and accessible to a significant group of the public, *viz*, those present and capable of being present in court in the ordinary course (see *Firns* at [76]).

59 Carruthers AJ, however, dissented from the majority's judgment on this point, taking the view that (see *Firns* at [112]-[113]):

> [T]he words readily observable matter cannot be allowed to operate in a vacuum. In most cases

> the question must be asked: to what class of persons must the information consist of "readily observable matter"? ...
>
> Mr Game SC for the Crown on this appeal submitted (correctly in my view) 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*. 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 added]

60 On the one hand, the insider trading rules were promulgated with the intent of correcting any unfair informational asymmetry that may arise in the securities market. On the other hand, the test of what is "generally available information", if construed strictly, would mean that the diligent would be unduly penalised by the wide scope of insider trading laws. As was recognised by the US Supreme Court in *Dirks v Securities Exchange Commission* 463 US 646 (1983) (at p 658-659):

> Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have *an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market*. It is commonplace for analysts to "ferret out and analyze information," … and this often is done by meeting with and questioning corporate officers and others who are insiders. And information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities. The analyst's judgment in this respect is made available in market letters or otherwise to clients of the firm. It is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally. [emphasis added]

61 Locally, s 9A of the Interpretation Act (Cap 1, 1999 Rev Ed) states that:

> an interpretation that would promote the purpose or object underlying the written law…shall be preferred to an interpretation that would not promote that purpose or object.

It is however not apparent, whether the legislative purpose of s 215(a) is such that the policy of fairness should trump the policy of efficiency. At the second reading of the Securities and Futures Bill (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2136-2137) ("the Parliamentary Debates") by BG Lee Hsien Loong, Deputy Prime Minister ("BG Lee") it was suggested that the underlying rationale for implementing the current insider trading rules was to ensure fairness within the securities market. BG Lee explained (*id* 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.

62 However, it has been pointed out that the policy of efficiency was not far away from the regulator's minds in promulgating the current rules (see Lee, *"Americanisation" of the Civil Liability Regime for Insider Trading in Singapore* (2005) 23 C&SLJ 396 at p 397-398). According to MAS'

Insider Trading Consultation Paper, 2001 (the "MAS Consultation Paper"), the current provisions on insider trading were created to "further enhance the effectiveness of our insider trading laws" and were part of MAS' "continuing efforts to ensure that our markets operate *fairly and efficiently*" [emphasis added] (at para 21). It would therefore appear that both policies of fairness and efficiency were considered pertinent in passing the relevant provisions in the SFA. In construing the insider trading provisions, I am mindful of Mason P's observation (in *Firns* at [40]) that:

> There is lengthy philosophical debate about the object of prohibiting insider trading. Because of this, care needs to be taken to ensure that a judge does not unconsciously read his or her own philosophy into the enactment and then use it as the basis for construing the enactment consonant with that philosophy.

63 It is not strictly necessary for me to decide whether the majority or minority decision of *Firns*, or even a different formulation therefrom, should be adopted in Singapore. 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 USA) satisfies the readily observable test or publishable information test. However, I take the view that the efficacy of the insider trading regime would be best maintained by imposing a narrow view of what is "generally available information". Lew's counter-argument was that it would place an onerous burden on company insiders as they would not be able to trade on their option shares, which, I recognise, may comprise a not insubstantial portion of their income (see generally the observations of the US District Court for Eastern District of Pennsylvania in *United States of America v Kevin Heron* 525 F Supp 2d 72). However, that is not a good reason for construing "generally available information" expansively. As was observed by BG Lee (Parliamentary Debates at col 2157-2158):

> First, may I explain that whether or not a trade violates the insider trading rules does not depend on the restriction period. It *depends on whether or not you have sensitive inside information at the time of trading*. It can be outside the restricted period. But if you have some information, you know something is going to happen, you trade on it, you have violated the rule. And when we say it is information-connected rather than person-connected, we mean that it goes down the chain - I told you, he told the next person, and so on. It is information-connected.
>
> [Emphasis added]

Clearly, therefore, if a company executive is in possession of sensitive information that is not known to the market, he should not be allowed to trade in those securities.

64 With regard to the market analysis test, Lew argued that the words "deduction, conclusion and inference" in s 215(c) should be given their respective dictionary meanings, with an "inference" being less certain than a conclusion. As such, under the market analysis test, the "deductions, conclusions or inferences" need not be correct, so long as it is not fanciful and was arrived at with some basis. It would be possible to arrive at different conclusions, deductions or inferences from the same data, and therefore, the threshold for such "deductions, conclusions or inferences" was rationality, not certainty.

65 In *R v Hannes* [2000] NSWCCA 503 ("*Hannes*"), a person who called himself "M Booth" had instructed his brokers to purchase call options in TNT Limited ("TNT"). The call options were due to expire in two months, had a strike price of $2, and were purchased at 2 cents a piece. Two weeks later, a take-over bid for TNT was announced at $2.45 per share, and TNT's share price rose to $2.25 as a consequence. "M Booth" made a $2m profit from his call options. The jury, after considering the evidence, took the view that H had purchased the options using the false name "M Booth". H was an

executive director of MCF, a division of a major bank that had advised TNT at the material time.

66 The prosecution in *Hannes* relied on the cumulative effects of four separate elements of the information possessed by H, namely, that (*Hannes* at [28]):

(a) there was a prospect that TNT would be the subject of a take-over;

(b) there was a prospect that the offer would be at a price in excess of $2 per share;

(c) MCF was advising TNT in relation to the possible take-over; and

(d) TNT securities had been placed on MCF's embargo list.

67 On appeal, H raised a number of grounds to challenge his conviction, including the ground that the trial judge had erred in directing the jury on the type of information which was considered to be "not generally available" (see *Hannes* at [103]). On this point, the appellant sought to rely on, *inter alia*, contemporaneous brokers' reports and newspapers articles, which referred to TNT as a take-over target and valued TNT shares in excess of $2 each. Spigelman CJ first observed that the reports and articles only related to the first two of the four elements of information that the Prosecution relied on. He observed, in respect of the third and fourth elements, that (see *Hannes* at [256]):

> The fact that the company was seeking advice with respect to these matters and the further fact that that advice was of sufficient significance to warrant an embargo of this character, *was an important part of the insider information contained in the particulars*. At whatever level of probability the prospect of a take-over at a price could be seen to exist at any relevant time, *these further factors increase the quality of that information in a manner which is plainly of significance*. [emphasis added]

68 In addition, Spigelman CJ also observed that the articles and reports relied on by the accused were not of the same quality as the information in his possession, as follow (see *Hannes* at [258]):

> The "information" which the jury had to consider was whether or not there was a "prospect" that shares in TNT "would be the subject of a takeover" and whether or not there was a "prospect" that an offer "would be at a price in excess of $2 per share". References in the brokers' research were of the following character: "TNT as a take-over candidate" and "We currently value TNT at $2.20/share" (AB4546); "Takeover Value Estimated At $2.21" and "Takeover Value $2.21" (AB4689). *Such references are of little, if any, assistance on the issue whether or not the information in the particulars was "generally available"*. [emphasis added]

69 Despite the vagaries in those articles and reports, H argued that the information in his possession could have been deduced or inferred from information generally available (i.e., the reports and articles). Spigelman CJ gave short shrift to this argument, explaining that:

> 275 No doubt the analyses were "deductions, conclusions, and inferences" from matter that was "generally available". *However, none of it is of the character of the "information" particularised. It is not about the "prospect" that there "would be" a take-over at a price above $2. Nor, obviously, is it about the fact that TNT had appointed MCF as advisers and MCF had placed TNT shares on an embargo list*.
>
> 276 In my opinion, the information specified in the particulars *was not of the same character* as that contained in the brokers' reports. *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*. Both of the first sentences as to the prospect of a take-over and of the price use the word "*would*". The reference to "prospect" indicates an element of indefiniteness. However, an element of "probability" rather than mere "possibility" is contained in the word "would". This element is emphasised by the third sentence of the particulars, referring to the involvement of MCF as an adviser and the embargo list. 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 added]

70 Spigelman CJ further explained that (see *Hannes* at [382]):

[T]he stockbroker reports and newspaper articles relied upon were, as I have said above, *of a qualitatively different character to the matter particularised in the first two sentences of the particularised "Information"* which referred to a prospect that TNT "would be the subject of a take-over" and that the offer "would be at a price in excess of $2 per share". *This went well beyond informed analysis of the vulnerability of TNT to a take-over. The brokers' valuations in excess of $2 per share were of a different quality to the information particularised which concerned the likely price of a prospective take-over, rather than a valuation based, as such valuations must be based, on information of varying and often unknown reliability, employing a diversity of valuation techniques*. [emphasis added]

71 In short, *Hannes* supports the proposition that the deduction, conclusion or inference drawn must be of the *same quality and character* as the information possessed by the defendant. Otherwise, a person who possesses information that a merger is about to take place will be able to trade, so long as there are rumours in the market that the merger may take place. I accept the submission of MAS that *Hannes* applies with equal force in Singapore. It would make no sense to allow a corporate insider to trade with impunity simply because (whether fortuitously or otherwise) the same outcome had been predicted by outsiders with less certainty. The insider possesses information of an entirely different quality from that relied upon by an outsider, in the sense that the information available to the insider is more reliable, and the predictions by the insider are therefore more certain than that by an outsider. To allow the corporate insider to trade on the basis of more reliable insider information simply because the same outcome could be predicted by outsiders with less certainty would be to promote an unequal playing field. I therefore reject Lew's contention that rationality to the exclusion of certainty is the threshold for the market analysis test.

The parties' arguments

72 On the facts, Lew relied on various press releases from WBL, announcements posted on SGX's or WBL's websites and public announcements by MFS, M-Flex or WBL's major customers (e.g. Motorola). As I had highlighted earlier (at [63] above), there is no real dispute that such information satisfies the readily observable test or publishable information test.

73 Lew's argument was that the forecasted loss and impairment could have been deduced, concluded or inferred using the market analysis test, because:

(a) The Q1 FY07 Announcement (see above at [13]) and Q2 FY07 Announcement (see above at [14]) showed a declining trend, suggesting that there was a "real possibility of a continuing decline in performance". Since there was no good news during this period, the generally available information on WBL as on 2 July 2007 was "pessimistic and cautious".

(b) WBL's profit in Q2 FY07, being only 0.32% of its revenue, was marginal and insignificant in comparison. As such, any deterioration in performance would easily bring WBL into a loss. Based on Q2 FY07's results, it was "certainly a real possibility" that it could be deduced, concluded or inferred that Q3 FY07 would be a loss. This was especially since those profit and revenue figures were readily available figures which WBL expressly brought to the public's attention.

(c) In WBL's forward looking statements in their results announcements for the past six quarters, the company suggested that its performance could deteriorate. Despite subsequent drops in profits, WBL maintained that its results were "in line" with its previous guidance. Considering WBL's declining profits and those pessimistic statements, a loss was therefore more logically probable for Q3 FY07. This was especially since "companies trumpet good news and are euphemistic about bad news". It was reasonable to use the preceding six quarters of financial information as it was not affected by any impairments and therefore reflected a fair view of WBL's operational performance.

In the light of the above, Lew argued that while the market did not know of the forecast made by WBL's management, it was possible to conclude, deduce or infer that WBL would make a loss. It did not matter if it was the right or only conclusion, so long as it was a reasonable conclusion.

74 Lew had further argued that the impairment could have been deduced, concluded or inferred from the generally available information. In particular, while WPT was not a major part of WBL, its poor performance had been consistently singled out by WBL's management. Despite the management's assurance given in Q3 FY06 and Q4 FY06 that it would improve margins, WPT's results did not show any improvement. WBL's press release for Q2 FY07 would have been viewed with even more pessimism as it was retrenching staff and scaling down on operations without explaining why they failed to turn WPT around. As such, Lew contended that it was objectively possible to conclude, deduce or infer that WBL would "have to contemplate the closing down of the WPT business, sale of WPT or the downsizing and continuation of WPT and the consequent impairment which may be taken". Therefore, the news of the impairment taken by WPT would have been in the market, in the sense that under the market analysis test such information could be deduced, concluded or inferred, on 4 July 2007.

75 To summarise, Lew's argument was that a person who considered WBL's results and forward-looking statements for the past six quarters, would or could reach the deduction, conclusion or inference that WBL would suffer a loss in the next quarter, and that WBL would take a sizeable impairment on WPT.

76 MAS' case was that such information was not publicly available. Nothing in the results announcements or forward-looking statements suggested that WBL would make a loss, and no profit warning was given either. MAS highlighted that the trend analysis could not be relied on as it was not reliable. MAS also argued that an investor could not possibly know that the impairment would be taken since it was a one-off event, especially since WBL announced that WPT had incurred retrenchments costs in Q2 FY07 which suggested that its operating losses would decrease with time. The circumstantial evidence also suggested that the deductions, conclusions or inferences relied on by Lew could not arise.

Was the forecasted loss "generally available information"?

77 I will now consider Lew's argument that the forward-looking statements and results announcements suggested that WBL would suffer a loss in Q3 FY07, and that it was a real possibility that WBL would incur a loss then because its profits were already hovering just above breakeven. Chong's evidence on this point was that there was no indication that WBL would suffer a loss in Q3 FY07. While the forward-looking statements and results announcements were cautious, it did not state that WBL would suffer a loss. In addition, WBL did not incur a loss in previous quarters even though the results announcements and forward-looking statements released prior to those quarters were similarly cautious. No profit warning had been issued by WBL as of 4 July 2007, and investors would therefore not deduce, conclude or infer that it would be announcing a loss the next quarter.

78 I accept Chong's evidence on this point. None of the forward-looking statements or results announcements alluded to the possibility that WBL was going to suffer a loss in the next quarter, although I accept that they were fairly described as being pessimistic. In this regard, I find it significant that no profit warning was issued. Chong, who is also a director of several companies, gave unchallenged evidence that it would have been bad practice from a corporate governance perspective for any company not to issue a profit warning before announcing a loss. Lew's expert, R, also agreed that a reasonable investor could not reasonably have expected a loss at the end of Q2 FY07, based on the forward-looking statements and results announcements. That would militate against any conclusion, deduction or inference that WBL was likely to suffer a loss.

79 Another argument of Lew was that if one considered WBL's consistently declining but positive PATMI for the past six quarters, it would be "rational" to conclude, deduce or infer that a loss would materialise in Q3 FY07. I do not accept this argument. Insofar as the regression analysis is used to show that it was *possible* for a person to deduce a loss in Q3 FY07, it does not assist Lew's case. This is so because the conclusions drawn by Lew based on the information he possessed would have been of far greater certainty than the conclusions drawn from a regression analysis based merely on six data points. In other words, because of the difference in the quality of information (the information Lew had as compared with the six data points available to the public) Lew could be more certain of his conclusions than an investor who relied on the regression analysis (see in this regard [71] above). Insofar as this regression analysis is used to show that there was the *same* degree of probability that a loss would be incurred by WBL in Q3 FY07, I reject the argument. In addition to the point made earlier that Lew could be more certain of his conclusions than an investor who relied on the regression analysis to draw his conclusions because of the difference in the quality of information on which the conclusions were drawn, the regression analysis was also deficient as an analytical tool. As Chong had pointed out, taken to its logical extreme, the invocation of the regression analysis would lead one to the conclusion that WBL would never make a profit from Q2 FY07 onwards. Furthermore, the accuracy of Lew's simple regression analysis is also questionable. There were only six data points and such an analysis assumed, very questionably, in my view, that the variables were homoscedastic, i.e. that there was a constant variance. Lew conceded that it was "anybody's guess" what the results for Q3 FY07 would be based on the regression analysis. R, during cross-examination, found it "naïve" to think that an investor would apply a linear regression to predict the future, in the first place.

80 I conclude that a forecast based on the regression analysis could not be of the same quality as a forecast made by Lew based on the information he possessed, which rested, *inter alia*, on figures for two months of actual results. This argument did not support Lew's position that the information he possessed was generally available. For the foregoing reasons, I hold that the forecasted loss was not generally available information.

Whether the taking of an impairment was "generally available information"

81 WPT was consistently singled out by WBL in its announcements despite its relative small size. WBL's management gave repeated assurances that things would improve at WPT but it never did. WBL also announced that it was retrenching staff and scaling back on operations in WPT. In addition, WPT's losses for the first half of FY07 were as bad as its loss for the whole of FY06. Based on these bits of information, Lew argued that it could be deduced, concluded or inferred that the impairment would be taken, as WPT was doing very badly despite the management's attempts to turn it around. Again, the deduction, conclusion and inference he sought to draw is clearly of a different quality. This form of inference is, at best, *speculative*. This is in contrast to the information Lew possessed, that it was *very likely* that a *significant* impairment would be recognised. On this ground alone, Lew's contention that information on the impairment was generally available would fail, since it is clearly of disparate quality. As MAS rightly pointed out, the public would also not possess various particularised aspects of the information Lew possessed, for example, that the decision to impair came from the CEO or that WPT had recorded losses that were worse than expected. Lew and R both agreed that the quantum of the impairment could not be deduced by the investing public, again, lending support to the finding that the information possessed by Lew and the inference he sought to draw were of disparate quality.

82 It is difficult to see how it can be argued that the information which Lew possessed, that WBL would very likely incur a *significant* loss in Q3 FY07, was generally available. As MAS pointed out, there was no evidence of any report by any investor or analyst that deduced, inferred or concluded the information that Lew possessed. I therefore hold that MAS has established that the information Lew possessed was not generally available.

Did the information have a material effect on the price of WBL shares?

83 Section 218(1)(a) of the SFA, additionally, requires the information to be of such a character that:

> … a reasonable person would expect it to have a material effect on the price or value of securities of that corporation…

84 As to what is considered of "material effect", s 216 of the SFA sets out that:

> **Material effect on price or value of securities**
>
> **216**. For the purposes of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of securities *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 first-mentioned securities*. [emphasis added]

85 In other words, the relevant test here is whether a reasonable person would expect that the information in question *would*, or *would be likely* to, influence the common investor in deciding whether or not to buy or sell WBL shares. The following principles can be distilled from these provisions and the cases:

(a) From the language of the provision, it is clear that the test is to be objectively applied (see also *Hannes* at [287]).

(b) From the language of the provision, it is also clear that there is no need for there to be an actual impact on company's share price in order to establish the element of materiality (see *The Law of Insider Trading in Australia* at p 25).

(c) Be that as it may, the court is entitled, in deciding the materiality of the information, to consider the actual effect on the price of the securities when the announcement is released. However, the court, in so assessing the materiality of the information, should remain alive to the possibility that the quality of the information announced (which may be couched in absolute terms) may not be the same as that possessed by the defendant (which may be couched in terms of a high degree of probability) (see *Hannes* at [295] and [298] and *R v Rivkin* [2004] NSWCCA 7 ("*Rivkin*") at [195]). As was observed in *Hannes v DPP (Cth) (No 2)* [2006] NSWCCA 373 at [351]:

> Further, the probative value of such evidence will undoubtedly vary from case to case and will depend in part on which element or elements of the charge the evidence may support. In particular, where the evidence goes to questions of general availability or materiality, it must be borne in mind that the jury is invited to speculate as to whether information has been made known in a manner likely to bring it to the attention of persons who commonly invest in securities of a particular kind and whether a reasonable person would be taken to expect such information to have a material effect on the price or value of the security. *The actual effect of the release of the information to the marketplace is not necessarily without probative value in answering those questions. The possibility that other factors may have affected the market for a particular security at a particular time must always be borne in mind, but to reject information as to price movements out of hand on that basis is at least to risk inviting the jury to speculate, without the assistance of the only concrete evidence which might be thought to provide some assistance in undertaking that evaluation*.
>
> [emphasis added]

(d) The source of the information is relevant towards the test of materiality and can have a significant impact on price-sensitivity (see *Rivkin* at [132], [134] and [232]).

86 It has been suggested that the decisions of the US courts on the materiality threshold are persuasive in the Australian context and, by parity of reasoning, in Singapore (see Baxt, Black and Hanrahan, *Securities and Financial Services Law* (Chatswood, N.S.W.: LexisNexis Butterworths, 7th Ed, 2008) at para 18-17). The leading case in the US on the materiality threshold is *TSC Industries Inc v Northway Inc* (1976) 426 US 438 ("TSC"), wherein the US Supreme Court held that information would be considered material if (at p 448-449):

> [T]here 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]

87 However, this approach appears to have been criticised by the Court of Appeal of Western Australia in *Jubilee Mines NL v Riley* [2009] WASCA 62, on the ground that (at [34], per Martin CJ):

> Section 1001D [in pari materia with s 216 of the SFA] did not require that the information should have a "material" effect on the share price. Rather, the effect of the section was to obviate the need to address the question of whether a reasonable person would be taken to expect a "material" effect on price to be produced by deeming that question to be answered in the

affirmative if the information would, or would be likely to, influence persons who commonly invest in the relevant securities in deciding whether or not to subscribe for, or buy or sell those securities. *Further, the "material effect" referred to in ss 1001A and 1001D is the effect on price, whereas the materiality referred to in the case cited by the master is the materiality of information: TSC Industries Inc v Northway Inc 426 US 438 (1976)*. [emphasis added]

88 The italicised portion of the judgment, read in isolation, suggests that the Court of Appeal of Western Australia treated the US and Australian approach on materiality as being conceptually different, as the former approach is concerned with the materiality of the *information* itself, while the latter approach is concerned with materiality in the sense of the effect of the information on the share price. However, reading the judgment as a whole, it was clear that the Court of Appeal of Western Australia was criticising the trial judge's holding that s 1001D of the Australian Corporations Act required that the "information should have a "material" effect on the share price", conflating the two principles (on the materiality of information and on materiality in terms of effect on share price) together (at [33]). The Australian Corporations Act and the SFA both require proof that a reasonable person would *expect* the information in question to have a material effect on the share price. It does not require proof that the information *would* have a "material" effect on the share price. An expectation that certain information would have a material effect on the share price and the actual materialisation of that effect are different things. In addition, a reasonable person is *deemed* to *expect* that the information would have a material effect on the share price, if it is shown that the information *would, or would be likely to, influence* a common investor in deciding whether or not to buy or sell the shares of that company. In other words, there is no basis for rejecting the US approach simply because the test of materiality there is referable to information, and not share price. In my view, the approach in *TSC* is persuasive, insofar as it serves as a reminder to the court that the materiality of the "inside" information is to be considered in the context of the information that is available in the market, and how the "inside" information affects or alters the information that is available in the market when made public. It is noteworthy that the ruling in *TSC* was adopted by the US Supreme Court in *Basic Inc v Levison* (1988) 485 US 224 in relation to Rule 10b-5 in the context of insider trading.

89 It is common ground between the parties that the date for assessing the materiality of the information possessed by Lew is 4 July 2007, the date of Lew's trade. It would be useful at this juncture to refer to two Australian cases, where a finding of materiality was made out in one but not in the other. In *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963, the Federal Court of Australia found that even if information that Citigroup was acting for a particular client was generally available, it would *not* have had a material effect at the time of the alleged insider trade by the defendant, because the price had, at that point of time, already reflected a substantial likelihood of a takeover (at [569] and [571]). In *Rivkin*, the appellant heard from M, the Executive Chairman of Impulse Airlines ("Impulse"), that there was a deal for merging Impulse with Qantas, that he could only buy the accused's property after ACCC had approved the merger, and that he believed the ACCC approval would be forthcoming (see *Rivkin* at [4]-[5]). The appellant then instructed his broker to purchase shares in Qantas for his company and was charged for insider trading. The court observed that the appellant's expert had conceded that "the fact of the price rise, after the announcement, meant that the market had not factored in the disappearance of one of the players" (see *Rivkin* at [196]) and agreed that the information was, therefore, material.

90 Lew raised a whole host of arguments to assert that the information he possessed was not material. I will deal with each argument in turn.

91 In respect of the forecasted loss, Lew argued that the information was not material on two

broad grounds. First, generally, such forecasts were inherently flawed because:

(a) a number of WBL's subsidiaries did not have qualified accountants preparing the figures;

(b) there was a great deal of subjectivity involved in preparing the forecasts, for example, in determining any consolidation adjustment; and

(c) Lew's past experience was that the forecasts were not a reliable predictor of whether WBL would record a profit or a loss.

92 Second, Lew claimed that the specific forecasted information was not definite because it did not incorporate the forecast figures of M-Flex and MFS even though both were key subsidiaries. The figures for June 2007 were simply forecasts. The overall forecast was also so close to break-even point that any such small errors or accounting adjustments could result in WBL breaking even or recording a profit. This uncertainty was, in Lew's view, reflected in the fact that WBL did not announce a profit warning immediately after the 2 July 2007 GMC Meeting.

93 I reject Lew's arguments. First, Lew's submissions assumed that the common investor would know that the forecasts provided were generally unreliable (assuming that the common investor was privy to the forecasts). It would not be possible to attribute such knowledge to the common investor. In *Rivkin*, for example, the trial judge directed that the jury could take into account (at [227]):

> … the fact that persons who commonly invest in securities would be taken to have the ability to assess the reliability of information, and information of the kind under consideration here. *This ability would include a knowledge of matters that are generally available. Such persons would be able to draw inferences from the Information itself in assessing its reliability.* [emphasis added]

One of the appellant's arguments on appeal was that the directions did not go far enough to eliminate the precise circumstances in which the information had been received in considering the materiality of the information. However, the New South Wales Court of Criminal Appeal took the view that the directions given were correct and appropriate (see *Rivkin* at [232]). It is therefore supported, by both logic and authority, that the common investor cannot possess information that was not generally available or not inferable from generally available information. In the present case, the common investor cannot be expected to know about the unreliability (if true) of the forecasts (assuming the forecasts had been made public).

94 Second, as of 4 July 2007, the latest publicly available information that a common investor possessed on WBL's financial matters would be its Q2 FY07 results. It is inconceivable that a forecast by WBL itself that was based, in part, on two months of actual results, could not influence the common investor's decision to buy or sell shares. I agree with Chong's commonsensical approach that, *ceteris paribus*, the more recent the information, the greater weight a common investor would attach to it.

95 In my view, it would be too myopic to say, as Lew did, that the information was not material because the forecasted loss was marginal and the $2m drop in profits was small compared to WBL's size and performance. WBL was about to record its first loss after six consecutive quarters of profits. Nothing in the forward-looking statements or results announcements suggested that a loss was imminent. The fact that no profit warning had been issued as of 4 July 2007 meant that the common investor would not likely expect WBL to report a loss for Q3 FY07. Taking all these factors into consideration, the common investor would not expect a loss to be forthcoming. Seen in this light, the forecasted loss would, at the least, be likely to influence the common investor's decision to buy or sell

WBL shares. One would certainly take a step back to consider if this would be the start of many more quarters of losses, or was simply an aberration. As such, I am of the view that the common investor would regard the information possessed by Lew on the forecasted loss as being material.

96 I turn now to consider the impairment charge. I have already dealt with Lew's contention that the impairment was not certain or definite as of 2 July 2007, and that the value of the impairment was not known as of 2 July 2007 (see above at [43]-[48]). One other argument raised by Lew was that the common investor would not react to the impairment because it was simply an accounting adjustment and/or because of WBL's previous impairment in Q4 FY05. I reject this argument. Insofar as he suggested that there was no informational value to the fact of an impairment, his assertion is unsubstantiated and may be rejected outright. As for the reference to WBL's previous impairment, Lew argued that there was no real effect on WBL's performance, and therefore, the common investor would not be affected by the impairment in July 2007. However, as Chong had pointed out, there were numerous differences between the circumstances in which the previous impairment was taken in FY05, and the circumstances in which the impairment was to be taken in Q3 FY07. In particular, after the previous impairment in FY05 was announced, WBL's share price fell by 2.5% in a rising market, suggesting that news of the impairment was material. Chong's evidence was that the common investor would tend to look at an impairment as "something big", suggesting that it would have a material effect on the share price. I agree. Much would depend on the common investor's expectations at that point in time – if, for example, the impairment was smaller than expected by the common investor, the news of such an impairment would certainly affect the common investor's decision to invest or not. Here, considering the quantum of the impairment, I cannot accept that the information was not material. There was no evidence that the common investor would have, in deciding whether to buy or sell WBL shares, already factored in a significant impairment at the material time.

The expert evidence on materiality

97 I will now turn to consider how WBL's share price reacted when the information possessed by Lew was subsequently released. On this point, the parties were diametrically opposed. MAS contended that the subsequent price changes in WBL's share price reflected that the information possessed was material; Lew disagreed.

98 Given the numbers involved, it would be useful for me to briefly set out the price changes that took place. It is not disputed that the three most relevant points of time are 12 July 2007 (the day M-Flex issued its profit warning), 17 July 2007 (the day MFS and WBL issued their profit warnings) and 14 August 2007 (the day WBL announced its actual loss figures and the impairment).

12 July 2007

99 The M-Flex profit warning was released by WBL at 12.40 pm on 12 July 2007. Coincidentally, WBL went ex-dividend (at 8.5 cents per share) on the same day. The relevant information is as follows:

Date	Close	Volume
11 July 07	$5.00	107,000
12 July 07	$4.92	38,000
13 July 07	$4.92	48,000

16 July 07	$4.98	75,000

100 Lew attributed the fall in price on 12 July 2007 to the share going ex-dividend on that date. After that information had been made known to the public and had affected the share price accordingly, Lew submitted that it was apparent that there was no significant change in share price over the next three trading days, suggesting that the M-Flex announcement had little impact.

101 MAS argued that Lew had taken a flawed interpretation of the data. First, the fall in share price on 12 July 2007 took place in a rising market. Also, WBL shares started to under perform the Straits Times Index ("STI") from 12 July 2007 onwards. In addition, the opening price on 12 July 2007 was $4.98. The announcement of the profit warning by M-Flex therefore resulted in the additional losses for that day.

17 July 2007

102 MFS issued its profit warning before trading began on 17 July 2007. WBL's profit warning was issued after trading closed for the day. The relevant information is as follows:

Date	Close	Volume
17 July 07	$5.00	67,000
18 July 07	$4.90	389,000
19 July 07	$5.00	204,000
20 July 07	$5.00	106,000

103 Lew's argument was that the changes in WBL's share price (or the lack thereof) reflected that the market was not surprised by the information that WBL would record a loss in Q3 FY07. The lack of reaction over WBL's profit warning could not be attributed to M-Flex's earlier announcement as the results of MFS, the other major component, were still unknown. Investors would therefore be slow to conclude that WBL would make a loss just because of M-Flex's results.

104 MAS argued that the MFS and WBL profit warnings did not cause any significant impact on WBL's share price. The common investor would have, based on the M-Flex profit warning, viewed WBL's profit warning as unsurprising.

14 August 2007

105 WBL's Q3 FY07 results were announced on 14 August 2007 after the close of trading. The relevant information is as follows:

Date	Close	Volume	% change	% change STI
14 August 07	$4.78	16,000	NA	
15 August 07	NA		NA	(3.4)

16 August 07	$4.68	17,000	(2.1)	(3.7)
17 August 07	NA		NA	(0.69)
20August 07	NA		NA	6.1
21 August 07	$4.68	6,000	0	2.8
22 August 07	$4.46	45,000	(3.8)	2.9
23 August 07	$4.46	69,000	0	1.5

106 Lew argued that the fall in the share price on 16 August 2007 was insignificant. The volume traded was minimal and was not a fair representation of how the common investor reacted. There were no trades, and therefore, no interest or reaction over the next two days (i.e., 17 and 20 August 2007). This suggested that the information on the impairment had no influence on the common investor.

107 MAS submitted that the news of the impairment had a significant impact on the common investor's decision-making process. It highlighted that while there was a positive correlation between WBL's share price and the STI before 15 August 2007, the positive correlation became a negative correlation after that date. This was because investors "sharply revised downwards their assessment of WBL". MAS also relied on the bid-ask spread for WBL shares over the next four trading days to establish that there was a significant impact on the share price.

Whether the trades reflected that the information was material

108 I will deal with the M-Flex profit announcement made on 12 July 2007 first. I accept that there was no perfect correlation between the size of the dividend given and the drop in WBL's share price. I should observe that it may not always be safe to simply rely on the opening price on the ex-dividend date as the benchmark for the ex-dividend share price, as evidence on how the share price reacted after the first trade may be material towards ascertaining the ex-dividend price, especially since it is accepted that markets do not operate with perfect efficiency. I should, however, observe that the STI rose by nearly 1% at the opening bell, which would go a long way towards explaining the first traded ex-dividend price of $4.98.

109 If that was the case, a six cent (or 1.2%) drop would be attributable to M-Flex's profit warning. The STI rose by 0.8% on the same day, suggesting that the news had, approximately, a 2% impact on WBL's share price. On 13 July 2007, WBL's share price remained unchanged, but the STI rose by 0.8% again. On 16 July 2007, WBL's share price rose by 1.2%, with the STI remaining flat. Chong suggested that WBL's share underperformed the STI between 12 July 2007 and 16 July 2007. While that may be true in absolute terms, in my view, it must also be considered that the percentages involved were relatively small. As such, I take the view that the changes in WBL's share price after the M-Flex announcement suggested that the news had some, but not a major or significant impact, on investors.

110 Both MAS and Lew agreed that the MFS and WBL profit warnings had no significant impact on the market. Lew attributed this to the fact that the market was not surprised by WBL's loss; MAS attributed this to the fact that the market had already expected WBL to record a loss after M-Flex's profit warning. Given my conclusion that the M-Flex profit warning did not have a significant impact on WBL's share price, it must necessarily follow that the profit warnings of MFS and WBL also did not

have any significant impact on WBL's share price. As such, the market did not appear to regard the information on the loss to be a significant factor towards their evaluation of WBL.

111 What was the effect that the news of the impairment and the actual losses had on the market? In my view, such news was clearly considered by the market to be material for a number of reasons. I agree that the information on the bid-ask spread is relevant towards ascertaining the effect the news had on the market. Lew had suggested that the prevalence of deleted entries and the small number of bidders involved meant that those bidders were not serious. I cannot accept that this was the case. Many of the deleted bids were instantaneously followed by a higher bid, which suggests that the bidders were slowly trying to close the bid-ask spread.

112 I turn my attention now to look at how the WBL share price fluctuated after the loss and impairment was announced. For 15 August 2007, there were no takers for the lowest asking price of $4.60 (which represented a 3.8% decline in share price from the previous day); this is compared with a 3.4% drop in the STI on the same day. The data for 15 August 2007 is inconclusive as no trades were carried out. On 16 August 2007, WBL's share price outperformed the STI, but I would observe that the volume traded was low. On 17 August 2007, there were no takers for WBL shares at $4.68. On 20 August 2007, there were no takers for WBL shares even at the lowest asking price of $4.70, although the STI saw a gain of more than six percent that day. The divergence became more stark between 21 and 23 August 2007, when WBL shares changed hands at a falling price despite a rising market. Chong's evidence was that no more than three market days should be used to analyse the impact of the results announcements. I accept that this should usually be the case, but in this case where the volume thinned out and there were no trades on two days, I see no reason why the court cannot take into consideration the trades that took place subsequently, particularly if they were significant. Here, I find it especially significant that the STI rose by more than 10% between 20 August 2007 and 22 August 2007 but the price of WBL shares dropped by nearly 4% during the same period. It is also noteworthy that the significant volumes were registered only at $4.46, suggesting that that was the price at which the market valued WBL shares, taking into account the impairment and losses.

113 In my view, given that the investors were given advance warning of the losses and the quantum of the operating losses for that quarter was relatively small (at $0.7m), the drop in WBL's share price was largely attributable to the news on the taking of the impairment and its quantum.

Conclusion on whether the information was material.

114 There is little doubt that the news of the impairment was material. The market clearly did not expect WBL to recognise the impairment at that point of time and at that quantum, resulting in a drop in WBL's share price after news of the impairment was announced. The empirical evidence therefore supported the predictive evidence that the fact of the taking of the impairment and its quantum was material information.

115 As for the loss, the issue is quite finely balanced. On the one hand, there is strong evidence that the common investor would not have expected a loss given the absence of statements to that effect in previous results announcements and forward-looking statements, and the absence of any profit warning. As for the empirical evidence, I accept that a two percent drop in WBL's share price (after factoring in the rise in the STI) would ordinarily be material. However, I am mindful that this two percent estimate comes with a large standard deviation. If, for example, there was a one-bid increase or decrease in "true" ex-dividend price and WBL had a record of rising and falling less than the STI (i.e., a beta not equivalent to one), the two percent figure would be affected. In this regard, the empirical evidence was not as strong as that for the impairment. Be that as it may, the empirical

evidence still shows that the news of the loss had some effect on the price of WBL's share. Further, it must be remembered that the SFA does not require actual proof that there was a material effect on the price of the share – it simply requires a reasonable person to *expect* it to have such effect. As such, taking into account the predictive effect of the forecasted loss, I take the view that the information that WBL would record a loss in Q3 FY07 was material.

Did Lew know or ought reasonably to know that the information was not generally available and that if it was generally available, it might have a material effect on the price of WBL shares?

116 Given that MAS has successfully proven that Lew was in possession of information concerning WBL that was not generally available, under s 218(4) of the SFA, it is assumed that Lew knew, at the material time, that the information was not generally available, and that if generally available, it *might* have a material effect on the price or value of WBL shares.

117 Lew's position was that he did not know or ought reasonably to have known that the information was not generally available and that it would have a material effect on the price of WBL shares, if available, for the following reasons.

118 First, Lew claimed that his past experience with the forecasts was that they were not a "reliable predictor" of whether WBL would make a loss or profit. Any small errors, one-off items or consolidation adjustments could have caused WBL to turn in a profit instead. As such, Lew did not attach much significance to the forecast given at the 2 July 2007 GMC Meeting, and could only recall that it was a small loss. Additionally, Lew claimed that it was significant that no profit warning had been discussed at the 2 July 2007 GMC Meeting, which in his view, meant that the forecast provided was just "another volatile forecast".

119 With respect to the impairment charge, Lew's case was that he did not think it would be detrimental to WBL. WPT was a small company which had a big impact on WBL's profits. An impairment was simply an accounting adjustment and it was not necessarily detrimental as it did not involve the company's cash-flow. In the present case, the impairment would be beneficial to WBL as it would enable WBL to improve its bottom-line. This was, in fact, the case when post-Q3 FY07 results were released, with WBL recognising that its increased profits were due (in part) to the closure of WPT.

120 In addition, Lew highlighted that WBL's AC and management had discussed the impairment for the past nine months. However, no decision was made; instead, the deadline was constantly pushed back. In addition, it was highlighted to the AC that there were other potential deals, and Lew (who was not involved in WPT) could not have known that those options were dead. From Lew's perspective and experience, those matters could have been taken "offline" for discussion. Dr Lim, the person in charge of WPT, was also not present at the meeting, and Lew knew that Dr Lim and Wong would be going to Thailand for discussions with potential buyers after the meeting. Further, there was no requisite quorum for the 2 July 2007 GMC Meeting. Additionally, the impairment charge would not have been $30m, given the value of WPT's assets and the need for a valuation report to ascertain the relevant valuations. There was also no discussion on a profit warning at the 2 July 2007 GMC Meeting, suggesting that no decision to take the impairment charge had taken place.

121 As for Swee Hong's opinion that the information was price-sensitive, Lew argued that it was for him to make the relevant judgment call, and that he had acted reasonably in disagreeing with her view. Lew had, on a number of earlier occasions, sold WBL shares and duly reported them, expecting WBL to point out to him if there were any problems. In any case, Lew was more experienced than

Swee Hong in areas of finance. Lew's open conduct was therefore not indicative of an insider trader.

122 The response of MAS was straightforward. In its view, the evidence adduced show that there was no doubt that Lew had traded with the requisite knowledge, given the sequence of events at the material time, as well as the answers he (Lew) gave in subsequent interviews with WBL's external lawyers and the MAS.

Did Lew know or ought reasonably to know that the information was not generally available?

123 Lew, in his submissions, did not deny that he knew that the information he possessed was not generally available. Indeed, in his interviews with WBL's counsel (on 12 July 2007) and with the MAS (on 11 September 2007), Lew agreed that that was the case. I therefore find that Lew knew that the information was not generally available.

Did Lew know or ought reasonably to know that the information, if generally available, might have a material effect on the price of WBL shares?

124 In respect of the forecasted losses, Lew's submission was (in essence) that such forecasts were unreliable, and that as a consequence, he did not know (or ought reasonably to have known) that it might have a material impact on WBL's share price. Lew also submitted that an impairment was not necessarily bad news for WBL and that there was no certainty that a decision to impair had been taken at the 2 July 2007 GMC Meeting.

125 It is difficult to see how Lew could argue that he did not know, or ought reasonably to know, that the forecasted loss *might* have a material impact on WBL's share price. The threshold for materiality here is pitched at a lower standard than that in s 218(a), as reflected in the use of the word "might" here instead of the word "would" in s 218(a). In my view, it was disingenuous of Lew to contend that he did not know that the forecasted loss might have a material effect on the price of WBL shares, for the same reasons as explained above (at [95]). Even if Lew did not know this as a matter of fact, I find that he ought reasonably to have known that the information *might* have a material effect on the price of WBL shares. Quite plainly, the fact that a large company that had turned in six consecutive quarters of profits was going to suffer an operational loss *might* have a material impact on that company's share price.

126 As for the impairment, similarly, I find it difficult to believe that Lew did not know that it might have a material effect on the share price of WBL. Lew knew that the impairment would be a significant one. Given the quantum, it is difficult to see how it would not have had a material effect on the price of WBL shares. While it may be fairly said that WPT's troubles were publicly well-documented, the common investor would not have known that a conditional deadline to impair had been imposed by the AC, 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 common investor 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. Even if, taking Lew's case at its highest and recognising that such an impairment was beneficial to WBL by enabling it to record profits without being dragged down by WPT, one would then expect WBL's share price to rise.

127 I have, for reasons explained earlier, rejected Lew's arguments that decisions to impair had previously been made but not followed through. Lew's second argument in respect of the information on the impairment was, therefore unsustainable. Again, for the reasons stated above (at [44]-[46]), I do not accept Lew's evidence that he did not know that no deal had materialised that could save

WPT from being impaired. Significantly, Wong and Swee Hong came out of that meeting with the clear impression that no such deal had been reached. In my view, Lew ought reasonably to have reached the same conclusion. Lew was no babe in the woods, having served in WBL for many years and being a trained accountant.

128 In addition, I would also observe that Swee Hong's evidence was that she had told Lew that the information was price-sensitive after the 2 July 2007 GMC Meeting, but before he executed the trade (see above at [30]-[33]). Lew countered that Swee Hong's opinion was immaterial and that he was entitled to exercise his own judgment call, especially since he was more qualified in areas of finance. MAS pointed out that the test in s 218(a) includes constructive knowledge, and therefore, the issue is whether Lew's opinion that the information was immaterial was reasonable in the circumstances. I am of the view that it was not. 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. In any case, the burden of proof was on Lew to disprove his knowledge – he has, quite plainly, failed to discharge his burden.

129 Therefore, I find that Lew knew that the impairment would materialise, and for the same reasons as given above, that it might have a material effect on WBL's share price.

Conclusion

130 I find that MAS has satisfied, on a balance of probabilities, the requisite elements to make out the claim for insider trading under s 218 of the SFA against Lew. MAS is claiming a civil penalty from Lew under s 232(2) of the SFA, which states:

> (2) If the court is satisfied on a balance of probabilities that the person has contravened a provision in this Part which resulted in his gaining a profit or avoiding a loss, the court may make an order against him for the payment of a civil penalty of a sum —
>
> (a) not exceeding 3 times —
>
> (i) the amount of the profit that the person gained; or
>
> (ii) the amount of the loss that he avoided,
>
> as a result of the contravention; or
>
> (b) equal to $50,000 if the person is not a corporation, or $100,000 if the person is a corporation,
>
> whichever is the greater.

131 The position taken by MAS is that the loss avoided by Lew was the difference in the price at which he sold his shares (i.e., $4.98) and the price at which he could have sold his shares if he had complied with the insider trading provisions. This, MAS submitted, would be 16 August 2007 (i.e., the first day after 14 August 2007 with trades), where the average price of WBL shares was $4.68. As such, MAS contended that Lew avoided a loss of $27,000 (30¢ x 90,000). The penalty would therefore range from $50,000 (see s 232(2)(b)) to $81,000 (three times the loss avoided by Lew). According to MAS, the highest possible civil penalty (of $81,000) ought to be imposed in the present

case as Lew had deliberately used the information he obtained while he was a very senior officer in WBL to benefit himself, despite having received advice to the contrary. MAS also sought costs of the present action.

132 Lew's closing submissions did not address the issue of the civil penalty at all. I will therefore hear the parties on this issue and also on costs on another date. In that regard, the parties are to write in to the Registrar to fix a hearing date.

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