Madhavan Peter *v* Public Prosecutor and other appeals
[2012] SGHC 153

Case Number : Magistrate's Appeals Nos 1, 10 and 13 of 2011

Decision Date : 27 July 2012

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : Davinder Singh SC, Wendell Wong, Jaikanth Shankar, Pardeep Singh Khosa, Krishna Elan, Vishal Harnal and Chan Yong Wei (Drew & Napier LLC) for the appellant in MA 1/2011; Subramanian Pillai, Rasanthan Sothynathan and Luo Ling Ling (Colin Ng & Partners LLP) for the appellant in MA 10/2011; Michael Hwang SC (Michael Hwang Chambers) and Thong Chee Kun and Istyana Putri Ibrahim (Rajah & Tann LLP) for the appellant in MA 13/2011; Jeffrey Chan Wah Teck SC, Peter Koy and Navin Thevar (Attorney-General's Chambers) for the respondent in MA 1/2011, MA 10/2011 and MA 13/2011.

Parties : Madhavan Peter — Public Prosecutor

Financial and Securities Markets

Criminal Procedure and Sentencing

27 July 2012 Judgment reserved.

Chan Sek Keong CJ:

Introduction

1 These are appeals by Madhavan Peter ("Madhavan"), Chong Keng Ban @ Johnson Chong ("Chong") and Ong Seow Yong ("Ong") against their convictions by the district judge ("the DJ") for certain offences under the Securities and Futures Act (Cap 289, 2002 Rev Ed) ("the SFA") in connection with the affairs of Airocean Group Limited ("Airocean"), a company which was previously listed on the main board of the Singapore Exchange ("SGX") and of which the appellants (collectively, "the Appellants") were directors at all material times (see *Public Prosecutor v Chong Keng Ban @ Johnson Chong, Peter Madhavan, Ong Seow Yong* [2011] SGDC 97 ("the Judgment")).

2 The Appellants were each convicted of the following charge: [note: 1]

You …

…

are charged that on 25 November 2005, in Singapore, whilst as a director of Airocean …, you consented to Airocean making a statement, namely an announcement entitled "Clarification of Straits Times article on 25 November 2005" released via SGXNET on 25 November 2005, to wit,

> *"We refer to the article entitled "AIROCEAN'S CHIEF EXECUTIVE THOMAS TAY UNDER CPIB PROBE" which appeared in the 25 November 2005 issue of the Straits Times.*

The Company learnt of the CPIB investigations with regard to practices of some other companies in the Aircargo Industry sometime in early September 2005 when the Company's CEO Mr. Thomas Tay was called for an interview by the CPIB.

The Company was advised by Mr. Thomas Tay that he provided Statements to the CPIB and offered his full co-operation.

The Company also immediately appointed Solicitors to ascertain the nature of the investigations and advise the Company of its Corporate obligations and compliance.

The Company was, inter alia, advised by Counsel that the scope of the CPIB investigations was uncertain but on the information presently available, there did not appear to be any impropriety on the part of the Company or its CEO Mr. Thomas Tay.

Further, since then the CPIB has not made any allegations of impropriety against the Company or its CEO Mr. Thomas Tay."

which statement was misleading in a material particular and was likely to have the effect of stabilizing the market price of certain securities, namely, Airocean shares, when at the time Airocean made the statement, it ought reasonably to have known that the statement was misleading in a material particular, and you have thereby committed an offence under Section 331(1) read with Section 199(c)(ii) and punishable under Section 204(1) of the Securities and Futures Act (Chapter 289, 2002 Revised Edition).

[emphasis in original]

3 I shall hereafter refer to the charges against the Appellants under s 199(*c*)(ii) read with s 331(1) of the SFA as "the Misleading Disclosure Charges", and to the announcement mentioned in the Misleading Disclosure Charges as "the 25/11/05 Announcement".

4 Two of the Appellants, Chong and Madhavan, were also each convicted of the following charge: [note: 2]

You …

…

are charged that between 8 September 2005 and 1 December 2005, in Singapore, whilst as a director of Airocean …, you consented to Airocean's reckless failure to notify SGX *that its chief executive officer and director Thomas Tay Nguen Cheong was questioned by the Corrupt Practices Investigation Bureau in relation to 2 transactions involving 2 of Airocean's subsidiaries, that he was released on bail and his passport was impounded* , which information was likely to materially affect the price or value of Airocean shares and was required to be disclosed under Rule 703(l)(b) of the SGX Listing Rules, and you have thereby committed an offence under Section 331(1) read with Section 203(2) and punishable under Section 204(1) of the Securities and Futures Act (Chapter 289, 2002 Revised Edition).

[underlining in original; emphasis added in italics]

5 I shall hereafter refer to the charges against Chong and Madhavan under s 203(2) read with s 331(1) of the SFA as "the Non-disclosure Charges", and to the information described in the italicised words in the quotation above as "the Information".

6 One of the Appellants, Chong, was also convicted of three charges of insider trading of shares in Airocean which he had carried out on three occasions. Save for differences in the dates of the trades and the quantities of shares sold, each charge was as follows: [note: 3]

> You …
>
> …
>
> are charged that you, on 26 September 2005, in Singapore, whilst being the chief operating officer and a director of Airocean …, and by reason of you being connected with Airocean, you were in possession of information that was not generally available but, if it were generally available, a reasonable person would expect it to have a material effect on the price or value of the securities of Airocean, the information being:
>
> a) Thomas Tay Nguen Cheong ("Thomas"), chief executive officer and director of Airocean, was questioned by the Corrupt Practices Investigation Bureau ("CPIB") in relation to 2 proposed transactions between 2 of Airocean's subsidaries with Jetstar Asia Airways Pte Ltd and Lufthansa Technik Logistik Pte Ltd; and
>
> b) Pursuant to this questioning, Thomas was released on bail and surrendered his passport to the CPIB.
>
> and whilst you were thereby precluded from dealing with the securities of Airocean, you sold 1,000,000 Airocean's shares from your mother Foo Jut Wah's ("Foo") bank account number [xxx] with Malayan Banking Berhad, which you were the mandate holder, using Foo's trading account number [xxx] with OCBC Securities Private Limited, and you have thereby committed an offence under Section 218(2)(a) and punishable under Section 221(1) of the Securities and Futures Act (Chapter 289, 2002 Revised Edition).
>
> [underlining in original]

7 I shall hereafter refer to the charges against Chong under s 218(2)(*a*) of the SFA as "the Insider Trading Charges". As the information referred to in these charges is the same as the information referred to in the Non-disclosure Charges (*ie*, the Information as defined at [5] above), I shall likewise use the term "the Information" when discussing the Insider Trading Charges.

Background facts

8 Airocean was the holding company of a group of air cargo logistics companies that provided services in freight forwarding, airline general sales agency as well as air terminal ground cargo handling. The operating subsidiaries involved in these proceedings were Airlines GSA Holdings Pte Ltd ("Airlines GSA") and WICE Logistics Pte Ltd ("WICE Logistics") (collectively, "the Subsidiaries"). The following were Airocean's directors at the material time:

(a) Thomas Tay Nguen Cheong ("Tay"), an executive director and Chief Executive Officer

("CEO") of Airocean;

(b) Madhavan, an independent director, who is the appellant in Magistrate's Appeal No 1 of 2011 ("MA 1/2011");

(c) Chong, an executive director and Chief Operating Officer ("COO") of Airocean, who is the appellant in Magistrate's Appeal No 10 of 2011 ("MA 10/2011");

(d) Ong, an independent director, who is the appellant in Magistrate's Appeal No 13 of 2011 ("MA 13/2011");

(e) Ong Chow Hong ("Ong CH"), an independent director, who was also the non-executive chairman of Airocean's board of directors; and

(f) Dunn Shio Chau Paul ("Dunn"), a director who was based in Hong Kong and the United States.

9 On 6 September 2005, Tay and three officers of the Subsidiaries (namely, Ray Teo, Senior Vice-President of Airlines GSA; Bob Lee, Director of Airfreight and Logistics of WICE Logistics; and Simon Ang Teck Choon ("Simon Ang"), Regional Manager of Airlines GSA) were questioned by the Corrupt Practices Investigation Bureau ("CPIB") in connection with suspected corruption in the air cargo handling industry. Tay was asked:

(a) whether he had given any gratification to one Chooi Yee Cheong ("Chooi") of Jetstar Asia Airways Pte Ltd ("Jetstar") to procure the appointment of Airlines GSA as Jetstar's cargo agent; and

(b) whether he had given any gratification to one Edward Goh of Lufthansa Technik Logistik Pte Ltd ("Lufthansa") in exchange for introducing Lufthansa's business to WICE Logistics.

10 Tay admitted to CPIB that he had previously instructed Simon Ang to inform Chooi that "if he [Chooi] would help us, in the future if he needed help, we would help him". [note: 4] While at the premises of CPIB, Tay instructed Mak Oi Leng Sharelyn ("Sharelyn"), Director of Human Resource and Administration of Airocean, to surface the following documents as requested by CPIB:

(a) Airlines GSA's business proposal to Jetstar;

(b) WICE Logistics' quotations to Lufthansa;

(c) WICE Logistics' cheque payment vouchers; and

(d) Tay's bank statements from January to August 2005.

11 On the same day (*viz*, 6 September 2005), CPIB officers accompanied Tay to Airocean's office, where they conducted a search and seized the aforesaid documents.

12 Also on the same day, Sharelyn informed Chong of the CPIB investigations ("the CPIB Investigations") and Chong thereupon apprised Madhavan of what had happened. Tay was then still at CPIB's premises. Chong telephoned Madhavan and informed him that Tay's wife was concerned and had asked him what she should do. Madhavan suggested that Tay's wife should seek advice from Mr Sant Singh, a lawyer.

13 Chong attempted to convene a meeting of Airocean's board of directors on 7 September 2005, but there was no quorum. Nevertheless, the directors present decided that Airocean should seek legal advice on whether it had to disclose to SGX that its officers were involved in the CPIB Investigations. Madhavan suggested that Airocean seek legal advice from Mr Chelva Rajah SC ("Mr Rajah") of Tan Rajah & Cheah ("TRC"). Later that evening, Chong, Madhavan and Doris Koh Bee Leng ("Doris Koh"), Airocean's Director of Finance, met up with Mr Rajah to seek his advice. Mr Rajah informed them that before he could give his opinion on the issue, he would have to speak to Tay and the officers of the Subsidiaries who had been questioned by CPIB. His partner, Mr Imran Hamid Khwaja ("Imran"), was assigned to do this task. Imran was assisted by another lawyer from TRC, Mr Eusuff Ali s/o N B M Mohamed Kassim ("Eusuff").

14 On 7 September 2005, at around 9.30pm, Tay was placed under arrest pursuant to s 6(*b*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) and released on bail. His passport was impounded. That same night, Chong and Madhavan met Tay at his house. At the trial, Chong and Madhavan disputed the Prosecution's version of what Tay allegedly told them that night. They also claimed that they did not read Tay's bail bond that night. However, the DJ found that Chong and Madhavan were shown the bail bond while they were at Tay's house on 7 September 2005 and did read the contents of the bail bond.

15 On 8 September 2005, Chong chaired a meeting of Airocean's board, which was attended by all the directors except Dunn, to review the events concerning the CPIB Investigations ("the 8/9/05 Board Meeting"). The minutes of the 8/9/05 Board Meeting ("the 8/9/05 Board Minutes") recorded, *inter alia*, that Madhavan informed the directors that he had spoken to Tay's counsel, whose view was that in "the worst-case scenario", [note: 5] Tay might be exposed to a charge of offering a gratification to Chooi. Madhavan, however, expressed the view that the Public Prosecutor could not prefer such a charge against Tay based only on Tay's own statement to CPIB, which, according to Tay, was untrue and had been made under pressure. The 8/9/05 Board Minutes also recorded the fact that CPIB had detained the passports of Tay and Simon Ang, and that Chong had stated that legal counsel should write to CPIB to release the passports. At the end of the meeting, the directors agreed that "technically no action need[ed] to be taken". [note: 6]

16 Imran also met and had a conversation with Madhavan on 8 September 2005. Imran's attendance note dated 8 September 2005 recorded, *inter alia*, a telephone conversation and a meeting with Madhavan, and it included the statement "No need for announcement". [note: 7]

17 On 8, 9 and 16 September 2005, Imran and Eusuff interviewed Tay and the three officers of the Subsidiaries who had been questioned by CPIB. They completed their interviews by mid-September 2005. At the trial, Imran testified that sometime in September 2005, he gave Madhavan the following oral advice ("the Oral Advice"): (a) "the information and evidence available was vague"; [note: 8] (b) "it was difficult to assess whether or not [Airocean] needed to make an announcement"; [note: 9] and (c) "unless and until further information [became] available, no disclosure need[ed] to be made at [that] stage". [note: 10] In the Judgment, the DJ noted that neither Imran nor Madhavan kept a record of the conversation during which the Oral Advice was allegedly conveyed (see the Judgment at [163]).

18 On 26, 27 and 28 September 2005, Chong sold, respectively, 1,000,000, 500,000 and 515,000 Airocean shares which were held in his mother's account.

19 On 25 November 2005, *The Straits Times* published an article with the caption "Airocean's chief

executive [Tay] under CPIB probe" [note: 11] ("the ST Article"). Apart from this caption, the ST Article provided little information about the nature of the CPIB Investigations. But, it reported Tay's role in building up Airocean. It also reported that: (a) Tay "denied that he was being investigated personally", [note: 12] although he admitted that he had been called up by CPIB for an interview "months ago"; [note: 13] and (b) Tay believed that interview concerned "an investigation over some people in [the air cargo] industry and … [had] nothing to do with [him]". [note: 14] In reaction to the ST Article, a representative from SGX contacted Ang Lay Hua ("Ang"), Airocean's company secretary and group financial controller, the same morning to inform her that Airocean was required to issue a clarificatory announcement on the ST Article, in particular, to clarify if Tay was under investigation by CPIB. This request was relayed to Airocean's directors.

20 On the same day, Madhavan prepared a draft clarification ("the First Draft") and e-mailed it to Imran. Imran amended it and sent the amended draft ("the Second Draft") to Madhavan. Madhavan faxed the Second Draft to Ang with instructions to circulate it to Airocean's directors for their approval. According to Madhavan, Ang and Doris Koh later called him and queried the accuracy of the second paragraph of the Second Draft, which stated as follows: [note: 15]

> The Company learnt of the CPIB [I]nvestigations with regard to certain business transactions involving [the Subsidiaries] on 6 September 2005. Full cooperation was rendered to CPIB by the Company, the officers of the [S]ubsidiaries and [Tay] who were interviewed and gave statements to the CPIB.

21 Madhavan then amended the Second Draft and his secretary sent the amended version of that draft ("the Third Draft") to Imran. Madhavan claimed that Imran approved the Third Draft in a telephone conversation after pointing out a typographical error in the draft. After correcting the typographical error, Madhavan sent the corrected version of the Third Draft ("the Corrected Third Draft") to Airocean's office for consideration by the other directors. A dispute arose at the trial as to whether Imran had indeed approved the Third Draft as alleged by Madhavan. On this point, the DJ held that "[t]here [was] … no indication from Imran that he had approved [Madhavan's] re-amended draft [*ie*, the Third Draft]" (see the Judgment at [196]).

22 Ong was informed orally of the contents of the Corrected Third Draft. He objected to two paragraphs in it and suggested that they be redrafted. He was, however, overruled by the other directors, and, thus, the Corrected Third Draft was released as the 25/11/05 Announcement (see [2] above for the full text of the announcement). Even though the First Draft went through several revisions, it will be seen that the 25/11/05 Announcement did make clear, as required by SGX, that Tay was under investigation by CPIB (see also [96] below). However, what was not made clear was the nature of the CPIB Investigations.

23 On 28 November 2005, TRC sent Airocean a written advice dated the same day ("the Written Advice") after Imran and Eusuff discovered that a draft dated 28 September 2005 of that advice in substantially the same terms ("the Draft Advice") had not been sent out. At the trial, Imran, Eusuff and Mr Rajah, all of whom testified as witnesses for the Prosecution, were not able to explain why the Written Advice was not sent to Airocean earlier. In the Written Advice, TRC advised that disclosure of the CPIB Investigations was not necessary at that stage of the investigations. The material paragraphs of the Written Advice read as follows: [note: 16]

> 28. It is not entirely clear at this stage what CPIB are [*sic*] investigating. There have been no formal charges against any officer of Airocean and/or its subsidiaries. The possible transactions being investigated by CPIB also do not deal with significant sums. There is [*sic*]

also no substantive allegations of substantial benefits being offered or changing hands. CPIB has not confronted any of the officers with any real evidence of the possible alleged corruption. The allegations are vague and tentative. On the information available, it is not possible to conclude whether there has been any improper dealings/conduct on the part of the Company or its officers. Consequently, in our view, this situation does not merit disclosure at this stage but would have to be reviewed if more information becomes available.

29. Please note that the above is a preliminary assessment based on limited facts and the company is advised to conduct a full investigation when more facts emerge or become available.

24 As mentioned earlier, the Written Advice, although dated 28 November 2005, was substantially the same as the Draft Advice, which was dated 28 September 2005. The only difference lay in para 28 of the Draft Advice, which was as follows: [note: 17]

28. It is not entirely clear at this stage what CPIB are [*sic*] investigating. There have been no formal charges against any officer of Airocean and/or its subsidiaries. *The transactions being investigated by CPIB also do not deal with significant sums. There is* [*sic*] *also no substantive allegations of substantial benefits being offered or changing hands. CPIB has not confronted any of the officers with any real evidence of the alleged corruption.* Seen in this light, the allegations are vague and tentative which in our view should not merit disclosure at this stage until further information is available. [emphasis added]

25 It is not disputed that after Imran and Eusuff finished interviewing Tay and the three officers of the Subsidiaries who had been questioned by CPIB (see [17] above), TRC was not aware of any further developments in the CPIB Investigations.

26 After the 25/11/05 Announcement was released, Lorraine Chay ("Chay"), Vice-President of SGX's Issuer Regulation Unit, sent an e-mail to Ang on 28 November 2005 (the first trading day after the release of the 25/11/05 Announcement) asking six questions in relation to the announcement. On 30 November 2005, Winston Seow, one of Airocean's company secretaries, sent Chay Airocean's response.

27 On 1 December 2005, Chay and two of her colleagues met Tay and Madhavan at SGX's premises. The minutes of this meeting recorded, *inter alia*, that SGX informed Tay and Madhavan that it "had received information that the [25/11/05] Announcement [might] not be accurate", [note: 18] and that "[a]s such, [Airocean's] Board should decide whether a further clarification was warranted". [note: 19] The minutes further recorded that SGX "advised [Airocean] to conduct independent investigations into the matter rather than to rest only on [Tay's] words". [note: 20] On the same day, Madhavan, Ong CH and Ong met Chay and her colleagues at SGX's premises without the presence of Airocean's management. The minutes of this meeting recorded, *inter alia*, that "SGX expressed concern that [Airocean's] Board [had] relied heavily on the words of [Tay] in their investigations", [note: 21] and that the directors present at the meeting "said that they would go back to consider whether and how a further clarification of the [25/11/05] Announcement should be made". [note: 22]

28 Later that day, Airocean made another announcement ("the 1/12/05 Announcement") as follows: [note: 23]

We refer to the articles in the Straits Times and the Business Times relating to [Airocean] during

the period 25 November 2005 to 29 November 2005 ("Articles").

In the Articles, [Tay], Chief Executive Officer of [Airocean], was quoted to say, "that his interview with the CPIB was "incidental" and due to his position in a company that is a leading player in the transportation logistics industry in Asia."

[Airocean] wishes to clarify that this quote or any similar quotes or quotes of similar meaning or effect in the Articles are inaccurate. [Airocean] had in [the 25/11/05 Announcement] stated that [Tay] has provided statements to [CPIB] and offered his full co-operation in their investigation.

Further, [Airocean] has not received any further communication from the CPIB and is not aware of any conclusion in their investigation.

29 On 2 December 2005, the Commercial Affairs Department ("CAD") started investigations into alleged contraventions of the disclosure provisions in the SFA by Airocean. This led Airocean to make the following announcement on the same day ("the 2/12/05 Announcement"): [note: 24]

The Board of Directors of Airocean … wishes to announce that [CAD] has instituted investigations into alleged disclosure contraventions under the Securities and Futures Act (Cap 289) relating to [the 25/11/05 Announcement and the 1/12/05 Announcement] on the article "Airocean chief executive [Tay] under CPIB probe" published in The Straits Times on 25 November 2005. The Board of Directors today attended an interview at the office of CAD.

The Board of Directors will closely monitor the situation and will keep shareholders informed accordingly.

In respect of [the 1/12/05 Announcement], the Board of Directors, at the request of SGX, wishes to clarify that [Tay] and three (3) officers of [the Subsidiaries] were interviewed by [CPIB] in September 2005. The interview concerned two (2) transactions involving [the Subsidiaries] with other companies in the aircargo industry.

The decision below

The DJ's decision on the Non-disclosure Charges

30 In a reserved judgment issued on 29 March 2011, the DJ convicted Chong and Madhavan of the Non-disclosure Charges on the basis of the following findings:

(a) Airocean had knowledge of the Information as confirmed by, *inter alia*, the 8/9/05 Board Minutes ("finding (a)") (see the Judgment at [116]);

(b) the Information was likely to affect the price or value of Airocean shares, as testified by the Prosecution's expert witness, Chan Heng Toong ("Chan") ("finding (b)") (see the Judgment at [128]–[137]);

(c) Airocean's failure to disclose the Information was reckless as it took a deliberate risk that the legal advice from TRC could be wrong, in that its directors and officers did not bother to ask Imran for the reasons for the opinion expressed in the Oral Advice ("finding (c)") (see the Judgment at [166]); and

(d) Chong and Madhavan had consented to Airocean's reckless failure to disclose the

Information (see the Judgment at [170]).

31 I do not propose to deal with the submissions of Chong and Madhavan that finding (a) is wrong as, in my view, it is fully supported by the evidence.

32 Apropos finding (b), the DJ said (at [128]–[130] of the Judgment):

> 128 The prosecution's expert witness, [Chan] had confirmed that the information in this case was likely to materially affect the price and value of Airocean shares and had to be disclosed under Rule 703(1)(b) of the SGX Listing Rules. He also gave his opinion that based on the information contained in the minutes of the [8/9/05 Board Meeting], the information was material which would warrant disclosure. The court agrees that [Tay] who was the CEO and director of Airocean was a key figure as he was credited with the success of Airocean by the media and as the CEO, if anything happens to him which would curtail his ability to attend to the affairs of the company, it would be a cause for concern to investors in the company. If this information is not disclosed, the persons in possession of such information would certainly be in a more advantageous position than those who do not know when trading in such shares. …
>
> 129 In regard to whether the information would likely affect the price or value of Airocean shares, [Chan] had given an account of the fall in price after the [2/12/05 Announcement] which was considered to be an accurate announcement by the prosecution and the SGX. This announcement stated that:–
>
> > "[Tay] and 3 officers of [the Subsidiaries] were interviewed by the CPIB in September, 2005. The interview concerned 2 transactions involving [the Subsidiaries] with other companies in the aircargo industry."
>
> 130 Chan had given evidence that the price of Airocean shares fell by 17.4% from 0.115 to 0.095 on 5th December, 2005 which was a material price movement. Chan also stated that to have an accurate guage [*sic*] of an event on the market, one has to look at the prices over a period of time. The defence sought to show that the price of Airocean shares eventually climbed up to a much higher price than the pre-2 December, 2005 announcement [price]. On 1 December, 2005, the price was at 0.115, on … 5th December, it was at 0.095, on 6th December, it was at 0.115 and on 7th December, it was at 0.125. The defence also pointed out that Chan had agreed that there are other factors that one would have to consider in deciding to trade in shares such as the trend of the market and the economic outlook. He added that the list of factors is not exhaustive. The charge in this case states that the information is "likely" to affect the price or value of the shares. As long as there is a likely impact on the price of the shares when one is aware of this information, that would suffice. Whether the price did eventually move up or down can be due to a multiplicity of factors. Chan had, based on his extensive experience in corporate matters confirmed that the information in question would be material as to warrant a disclosure. The court finds that objectively, the information would be likely to affect the price of shares in the company.

33 Apropos finding (c), the DJ said (at [166] and [168] of the Judgment):

> 166 … The court also agree [*sic*] with the prosecution's submission that … Airocean was taking a deliberate risk that the legal advice [from TRC] could be wrong as Airocean, its officers and directors did not bother about the reasons for the Oral Advice and that this was reckless. It would appear from the facts that there was no clarification sought by Airocean in regard to the

alleged Oral Advice.

…

168 The prosecution had submitted that the only record of any deliberation or decision by the Board of Airocean on the issue of disclosure was in the minutes of the [8/9/05 Board Meeting] that "technically no action needs to be taken." The defence argument was that the purpose of the meeting was to appraise [*sic*] the Board of the events which had taken place and that Airocean refrained from making a decision pending legal advice. The defence had also pointed out that the words used "technically no action needs to be taken" was due to [Doris Koh's] poor command of English. The prosecution also submitted that if no decision was taken by the company at the meeting, then this can only mean that the company, through its inaction since 8th September, 2005 until 2 December 2005 (when it finally came clean) failed to disclose what the law required to be disclosed. In either event, the company would have breached its obligations of disclosure and both [Chong] and [Madhavan], who consented to this, are guilty of the offence for which they are charged. Granted that Airocean may not have decided that no announcement was necessary during the [8/9/05] Board Meeting …, the fact remains that given all the information available to them as discussed above, it was incumbent upon the Company to disclose 'the Information' as they [*sic*] were clearly likely to affect the price or value of the shares in Airocean. The court finds that Airocean's failure to notify SGX of 'the Information' was reckless.

The DJ's decision on the Misleading Disclosure Charges

34 The DJ convicted the Appellants of the Misleading Disclosure Charges. He found against the Appellants on the following crucial issues:

(a) the 25/11/05 Announcement was misleading in a material particular ("finding (i)") (see [179] and [183] of the Judgment);

(b) the 25/11/05 Announcement was likely to have the effect of stabilising the market price of Airocean shares at a higher level ("finding (ii)") (see [190] of the Judgment);

(c) at the time when Airocean made the 25/11/05 Announcement, it knew that the announcement was misleading in a material particular ("finding (iii)") (see [195] of the Judgment); and

(d) the Appellants consented to the release of the 25/11/05 Announcement ("finding (iv)") (see the Judgment at [197] and [224]).

I shall consider the correctness of only finding (i) and finding (ii). If these two findings are wrong, there will be no need for me to consider finding (iii) and finding (iv).

35 Apropos finding (i), the DJ said (at [179] and [183] of the Judgment):

179 … In response to the request by SGX, Airocean had provided [the 25/11/05 Announcement] which omitted to mention [the Subsidiaries] and instead stated that the investigations were into "some other companies in the Aircargo industry". *This would cause the public to think that the investigations were into other companies in the Aircargo industry but not into Airocean, [the] [S]ubsidiaries or its officers ([Tay]).* … The crux of the charge was that the Information provided in the [25/11/05 Announcement] was misleading in a material particular as *it*

would impact on investors trading in Airocean shares in deciding whether to buy or sell these shares.

…

183 It can be seen that [the 2/12/05 Announcement] provides a true and accurate version of the events which had taken place in September, 2005 … This … announcement … states that the investigations by the CPIB were into the affairs of … Airocean, its officers including [Tay] and [the] [S]ubsidiaries. The information provided in this announcement is material information *which would certainly impact on the decision of investors trading in Airocean shares as to whether they would sell or buy these shares.* The [25/11/05 Announcement] omits the mention of the CPIB questioning or interviewing the officers of [the Subsidiaries] in relation to the 2 transactions involving [the Subsidiaries] with other companies in the aircargo industry. Instead, [it] stated ["]into some other companies in the Aircargo industry" which is clearly misleading in a material particular as this would, as submitted by the prosecution, distance Airocean and its officers as far away as possible from the allegations made by the [ST Article]. The [25/11/05 Announcement] is clearly misleading in a material particular.

[emphasis added]

36 Apropos finding (ii), the DJ said (at [189]–[190] of the Judgment):

189 … Chan had given evidence on whether the [25/11/05 Announcement] was likely to have the effect of stabilizing the market price of certain securities. In his report P30, he stated that "this was likely to have the effect of stabilizing the market price at a LEVEL HIGHER than what would have taken place, had the facts been truthfully and fully provided. The announcement or parts of it gave the public the impression that [Tay] and [the Subsidiaries] were not the subjects of the CPIB [I]nvestigations. By doing so, [Airocean] shareholders would not be alarmed that CPIB was carrying out investigations on [Tay] and [the Subsidiaries] and [would] not likely be led to sell their [Airocean] shares, which they otherwise would likely have done so if they had the true and complete facts …" As it turned out, the price of Airocean shares fell after the [25/11/05 Announcement]. Likewise, the price of shares also fell after the [2/12/05 Announcement]. The defence had sought to show that notwithstanding the [25/11/05 Announcement] where it states that the [CPIB] [I]nvestigations were into some other companies in the aircargo industry and not Tay or Airocean, the price of shares of the company fell. In the same vein, the defence submitted that the omission of the reference to the transactions involving [the Subsidiaries] in the [25/11/05 Announcement] also resulted in a fall in the price of Airocean shares. The expert witness [Chan] had explained that the market had reacted negatively to the [25/11/05 Announcement] and they did not believe what was stated in the announcement. The prosecution had submitted that the market believed the [ST Article] rather than the denial by the company on what was stated in the report. The prosecution added that this would reinforce the effect that news of the CPIB [I]nvestigations would have and did have an impact on Airocean's share price.

190 The question before the court is whether the [25/11/05 Announcement] was likely to stabilize the market price of Airocean shares. It is clear that if there is information that a company is under investigation by the CPIB, investors trading in Airocean shares would be affected in deciding whether to sell or buy these shares. Consequently, the price of the shares would fall if there is a large volume of shares sold in the market. The subsequent announcement by Airocean on 2 December, 2005 (P13) [*ie*, the 2/12/05 Announcement] showed that prices fell on the next day following the announcement although, as pointed [out] by the defence, the

> prices eventually creeped up. The question is whether it was likely. The defence had submitted that the [25/11/05 Announcement] did not stabilize the market price of Airocean shares as following [that announcement], the price of Airocean shares fell on the next trading day on 28th November, 2005. The expert [Chan] had explained that the market reacted negatively because the public did not believe what the company had said. The court accepts the explanation of [Chan] in the light of the report in the [ST Article] on 25th November, 2005. The fact remains that the [25/11/05 Announcement] did not paint the true picture as it did not state that the CPIB were looking into the affairs of Airocean ie that [Tay] and 3 officers from [the Subsidiaries] were questioned by the CPIB and that it was in relation to transactions involving [the Subsidiaries]. The court was of the view that given this situation, if an announcement by Airocean states that the CPIB were investigating into some other companies in the Aircargo industry and omit[s] to state that it involve [*sic*] its CEO [Tay] and [the Subsidiaries], it is **likely** to stabilize the market price of Airocean shares.
>
> [emphasis in bold in original]

The DJ's decision on the Insider Trading Charges

37 The DJ convicted Chong of the Insider Trading Charges for the following reasons: (a) Chong was "a person … connected to a corporation" for the purposes of s 218 of the SFA (a "connected person") (see [234] of the Judgment); (b) Chong was in possession of the Information (see [233]–[234] of the Judgment); (c) the Information was "price-sensitive" (see [236] of the Judgment); (d) Chong was presumed under s 218(4) of the SFA to know that the Information was not generally available and that if the Information were generally available, it might have a material effect on the price or value of Airocean shares (see [234] of the Judgment); (e) Chong had failed to rebut the presumption in s 218(4) of the SFA (see [234] and [238] of the Judgment); and (f) Chong had sold Airocean shares whilst in possession of the Information (see [239] of the Judgment).

The sentences imposed by the DJ

38 In respect of the Non-disclosure Charges, the DJ, after noting that the sentencing norm for offences under s 203 was a fine and that Tay, who had pleaded guilty, had been fined $80,000 for a similar offence, fined Chong $100,000 and Madhavan, $120,000 (see the Judgment at [250]–[252]). Madhavan was fined a higher amount as he was the principal director whom the other directors looked to for advice. He had also actively liaised with TRC to obtain legal advice. The default sentences were imprisonment terms of ten months in Chong's case and 12 months in Madhavan's case (see the Judgment at [252]).

39 In respect of the Misleading Disclosure Charges, the DJ, having noted that Tay, who had pleaded guilty to a similar offence (for making a false statement to the press), had been fined $160,000, fined Chong $180,000 (in default, 18 months' imprisonment) and Ong, $170,000 (in default, 17 months' imprisonment) (see the Judgment at [254]–[255]). As for Madhavan, the DJ sentenced him to four months' imprisonment on the ground that he had played a dominant role in the commission of the offence, even though he had not profited from his criminal act (see the Judgment at [254]–[255]).

40 In respect of the Insider Trading Charges, the DJ noted the Prosecution's submission that a custodial sentence was warranted by the need for general deterrence (see the Judgment at [257]). The DJ then held that a custodial sentence of two months' imprisonment on each charge (with the sentences for two of the charges to run consecutively) was warranted due to the following "aggravating" factors (see the Judgment at [258]–[259]): (a) Chong had avoided a loss totalling

$191,450; (b) Chong had obtained the Information because of his position as the COO and an executive director of Airocean; (c) the Information was material and "would have an impact on investors trading in Airocean's shares" (see the Judgment at [258]); and (d) "the exploitation of confidential information … would undermine public confidence in the transparency and integrity of the securities market" (see the Judgment at [258]).

The disqualification orders imposed by the DJ

41 In relation to disqualification, the DJ held that s 154(1) of the Companies Act (Cap 50, 1994 Rev Ed) ("the CA") was not applicable because "it [was] concerned with disqualification where an offence [was] committed that involve[d] fraud or dishonesty and no provision [was] made for the pronouncement of disqualification as it appear[ed] to follow immediately upon conviction" (see the Judgment at [264], referring to *Public Prosecutor v Foo Jong Kan and Another* [2005] SGDC 248). However, the DJ held that s 154(2) of the CA was applicable as the offences concerned were committed in connection with the management of Airocean (see the Judgment at [272]–[273]). He therefore disqualified Madhavan from holding office as a director or being involved in the management of any company for a period of five years upon his release from prison after serving the imprisonment term imposed for the Misleading Disclosure Charges. Similarly, Chong was disqualified for five years upon his release from prison after serving the imprisonment term imposed for the Insider Trading Charges. In contrast, Ong was disqualified for only two years because, in the DJ's view, he was less culpable than Madhavan and Chong (see the Judgment at [273]).

The appeals against the convictions on the Non-disclosure Charges, the Misleading Disclosure Charges and the Insider Trading Charges

The element of materiality in the three types of charges

The relevant provisions

42 The common element of materiality runs through the three types of charges in issue in these appeals. The Non-disclosure Charges involve the offence under s 203 of the SFA (referred to hereafter as "s 203" for short where appropriate) of intentionally or recklessly breaching rule 703(1)(b) of the Singapore Exchange Trading Limited Listing Manual ("the Listing Rules"), which requires a company that issues securities traded on SGX (referred to as an "issuer" in the Listing Rules) to disclose information that "would be likely to materially affect the price or value of its securities". The element of materiality for the purposes of the Non-disclosure Charges relates to the likely effect of the Information on the *price or value* of Airocean shares. As for the Misleading Disclosure Charges, they are based on s 199 of the SFA (referred to hereafter as "s 199" for short where appropriate), which prohibits, *inter alia*, the making of any statement that is misleading in "a material particular". The element of materiality for the purposes of the Misleading Disclosure Charges pertains to whether the misleading portions of the 25/11/05 Announcement were likely to have the effect of "stabilizing the market price of … Airocean shares". [note: 25] With regard to the Insider Trading Charges under s 218 of the SFA (referred to hereafter as "s 218" for short where appropriate), the element of materiality relates to whether, if the Information were generally available, a reasonable person would expect it to have a material effect on the price or value of Airocean shares (see s 218(1)(*a*) of the SFA). In this regard, s 216 of the SFA (referred to hereafter as "s 216" for short where appropriate) provides that 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 … securities [concerned]". It can be immediately seen from the terms of these provisions that the concept of materiality in s 218 *read with s 216* is different from that in s 218 *read on its own*, s 199 and

rule 703(1)(b) of the Listing Rules (referred to hereafter as "rule 703(1)(b)" for short where appropriate). This distinction is crucial to the determination of the guilt or otherwise of the Appellants with respect to the offences which they were charged with and convicted of in the court below. As will be seen, both Chan's expert opinion and the DJ's decision appear to have been based on the premise that the concept of materiality is the same for the purposes of the Non-disclosure Charges, the Misleading Disclosure Charges and the Insider Trading Charges. It is necessary that I now consider the meaning of "materiality" of information in the context of the securities market.

43 The ordinary or dictionary meaning of the word "material" connotes something of importance. In a legal context, anything that is material to a particular issue is not simply relevant to that issue, but is also important or significant to the determination or resolution of that issue. For example, evidence may be relevant but not sufficient – *ie*, not "material" – to prove a fact. In relation to information, the central idea of materiality is that the information in question must be relevant *and also significant* to the subject matter concerned. In the context of the securities market generally, for information to be material, it must have some significant effect either on the behaviour of investors in subscribing for, buying or selling securities, or on the price or value of securities. In the specific context of rule 703(1)(b) of the Listing Rules, which imposes an obligation on an issuer to disclose information that would be likely to have a material effect on the price or value of its securities, the word "material" must necessarily refer to information that is likely to effect a significant change in the price or value of an issuer's securities.

44 This interpretation is supported by Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2nd Ed, 2011) ("*Hans Tjio*"), where the author states (at para 8.30) that Chapter 7 of the Listing Rules, which is the chapter in which rule 703(1)(b) is contained, imposes on issuers the obligation to ensure "prompt market disclosure of all material information which would result in a significant change in the market price or value of [their] securities". I agree with this interpretation of rule 703(1)(b) as it strikes a fair balance between the need for continuous disclosure to investors of "material information which would result in a significant change in the market price or value of [an issuer's] securities" (see *Hans Tjio* at para 8.30) and the need to ensure that issuers are not unduly burdened by having to disclose every kind of information, however trivial, that may be likely to have an effect – but not a material effect – on the price of their securities. It calls for a fine, and often difficult, judgment on the part of issuers to decide whether or not information needs to be disclosed under rule 703(1)(b). For clarity and convenience, I shall refer to information falling under rule 703(1)(b) as "materially price-sensitive information".

45 In respect of s 199, the words "material particular" apply to a false or misleading particular that is likely to have the effect of, *inter alia*, "raising, lowering, maintaining or stabilising the market price of securities" (see s 199(*c*)), and not simply any kind of false or misleading particular. The focus of this provision is on the price impact of false or misleading statements. It follows from the nature of the offence under s 199 that the false or misleading particular in question must, just as in the case of the offence under s 203 (read with rule 703(1)(b)), be of sufficient importance to significantly affect the *price or value* of securities. As such, I shall also refer to information falling under s 199 as "materially price-sensitive information".

46 The concept of materiality in s 218 of the SFA, *when read without s 216*, is the same as the concept of materiality in rule 703(1)(b) and s 199 because s 218 read on its own is likewise concerned with the likely effect of information on the price or value of securities. In other words, information which falls under s 218 *read on its own* is likewise materially price-sensitive information. The character or quality of materially price-sensitive information in all three provisions – *viz*, s 199, rule 703(1)(b) and s 218 read on its own – is the same. However, for the purposes of the offence under s 218 (also referred to hereafter as "the offence of insider trading" where appropriate), s 216

makes it unnecessary for the Prosecution to show that the information in question may have a material effect on the price or value of securities in order to satisfy the requirement of materiality set out in s 218. The reason is that s 216 provides that:

> … [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]

The effect of s 216 is to equate the concept of "material effect on the price or value of securities" in s 218 with the likelihood of influencing persons who commonly invest in securities ("common investors") in deciding whether to subscribe for, buy or sell the securities concerned. For clarity and convenience, I shall refer to information falling under s 218 *read with s 216* as "trade-sensitive information". I must at the same time emphasise that s 216 is expressly stated to apply only "[f]or the purposes of this Division", *ie*, Division 3 of Part XII of the SFA, which is the Division in which s 218 is contained. *Section 216 does not apply to any other Division of Part XII of the SFA.* It therefore does not apply to Division 1 of Part XII, which is the Division in which s 199 and s 203 are contained. Accordingly, information which "a reasonable person would expect … to have a material effect on the price or value of securities" under s 218 read with s 216 *cannot* be equated with information which "would be likely to materially affect the price or value of … securities" under rule 703(1)(b) of the Listing Rules. If the position were otherwise, it would entail that whenever a connected person (as defined at [37] above) is found guilty of insider trading under s 218, the company may be held to have committed the offence under s 203 read with rule 703(1)(b) as it may have put itself in a position of having either intentionally or recklessly failed to notify SGX of the inside information in question. Furthermore, all its directors who were aware of that inside information may also be held, pursuant to s 331(1) of the SFA, to have consented to or connived in the company's commission of the s 203 offence, provided that the exception under rule 703(3) of the Listing Rules is inapplicable.

47 In summary, a pure textual reading of the relevant provisions shows that Parliament and SGX have prescribed different concepts of materiality for the purposes of the offence under s 199 and the offence under s 203 on the one hand, and the offence under s 218 on the other, in relation to information concerning securities.

48 This distinction is not found in the Australian legislation and rules from which Singapore's continuous disclosure and insider trading regimes are derived (see the Table of Derivations annexed to the Securities and Futures Bill 2001 (Bill 33 of 2001) ("the SF Bill")). The asymmetry between Singapore's continuous disclosure regime and Australia's continuous disclosure regime has been noted in *Walter Woon on Company Law: Revised Third Edition* (Tan Cheng Han gen ed) (Sweet & Maxwell, 2009) ("*Walter Woon*") at para 15.50 (which Chong has referred to in his written submissions for MA 10/2011) [note: 26] as follows:

> **Relationship with mandatory disclosure**
>
> **15.50** Insider trading is the result of the information asymmetry that exists between those considered 'insiders' in a company and 'outside' investors. Perhaps, a more efficient and pre-emptive way of curing the problem is therefore to have the company disclose the relevant information in a timely fashion before its 'insiders' can take advantage of them. It is therefore quite clear that the mandatory disclosure obligation works in tandem with insider trading laws. *Interestingly, the draft consultation Securities and Futures Bill, which adopted Australia's integrated disclosure regime, utilised the same definition of general availability and materiality of information for both the continuous disclosure obligation as well as insider trading. The relevant*

provisions did not, however, find their way into the [SFA] where the continuing disclosure obligation in s 203 of the SFA was concerned.

[emphasis added]

4 9 *Walter Woon* points out that *at the consultation stage*, the draft of the SF Bill imported the Australian deeming provision (*viz*, the deeming provision in s 1001D of the Corporations Act 2001 (Cth) ("the Australian Corporations Act 2001"), which has since been repealed (see [55] below)) into the continuous disclosure regime (*ie*, the disclosure regime under s 203 of the SFA), but it was omitted in the final version of the SF Bill when it was passed by Parliament. Even though the parliamentary materials are silent on the reasons for this omission, it is reasonable to infer that the omission was deliberate. The result is that the SFA provides two separate regimes in relation to the concept of materiality, *viz*, the continuous disclosure regime under s 203 (when read with provisions in the Listing Rules such as rule 703(1)(b)), which regulates the disclosure of material information, and the insider trading regime under s 218, which prohibits the use of inside information for the purposes of trading in securities. Even though the two regimes are intended to work in tandem, the relevant provisions provide different legal tests for determining the materiality of the information concerned.

50 As will be seen, the DJ made no distinction between the different concepts of materiality in convicting the Appellants of the different types of offences with which they were charged as he relied uncritically on Chan's expert opinion in answer to three questions posed to him by the Prosecution (set out in the quotation at [69] below), which questions also did not make such a distinction.

The decision in Jubilee Mines NL v Riley (2009) 69 ACSR 659

51 Before I leave this subject, it is relevant to consider how the Western Australian courts have dealt with the related problem of an inconsistency between the statutory and the regulatory regimes governing the obligation to disclose material information under the corresponding securities legislation. In *Jubilee Mines NL v Riley* (2009) 69 ACSR 659 ("*Jubilee Mines NL*"), the Court of Appeal of the Supreme Court of Western Australia ("the WACA") was required to interpret the meaning of the word "material" in the context of the phrase "material effect on the price or value of securities" in rule 3A of the Australian Securities Exchange Listing Rules at the material time ("the ASX Listing Rules") (from which rule 703(1)(b) of the Listing Rules appears to be derived) and s 1001A of the Australian Corporations Act 2001 (on which s 203 of the SFA is modelled (see the Table of Derivations annexed to the SF Bill)). Although s 1001A of the Australian Corporations Act 2001 has since been repealed, the reasoning of the WACA in *Jubilee Mines NL* is nonetheless instructive.

52 The headnote of *Jubilee Mines NL* sets out succinctly the facts of the case and the decision of the WACA as follows (see *Jubilee Mines NL* at 659–660):

> Jubilee Mines NL (Jubilee) was a listed gold exploration company. In 1993, Jubilee acquired a tenement known as McFarlanes Find. In August and September 1994, Jubilee received notification from a neighboring tenement holder, Western Mining Corporation Ltd (WMC), concerning the results of drilling that WMC had mistakenly carried out on McFarlanes Find. These results showed nickel sulphide dissemination at substantial depths. Jubilee did not disclose these matters to the market until June 1996.
>
> At first instance, Riley (being a holder of both partly and fully paid shares in Jubilee) succeeded in a claim brought under s 1005 of the [Australian Corporations Act 2001] for loss and damage suffered by reason of a failure to immediately disclose the information in contravention of s 1001A

of the [Australian Corporations Act 2001]. Jubilee appealed from that decision.

Held, allowing the appeal and setting aside the judgment at first instance:

…

(ix) As Jubilee had, as a matter of fact, no intention of undertaking exploratory drilling on the McFarlanes Find tenement in 1994 it had no obligation to disclose the information provided by WMC in 1994: at [106]–[114].

(x) Standing in the shoes of the hypothetical investor … and taking into account the relevant evidence, an announcement by Jubilee of all relevant information pertaining to the WMC drill hole data with respect to McFarlanes Find would not, or would not have been likely to, influence persons who commonly invest in securities in deciding whether or not to buy or sell its shares. Accordingly, s 1001D [of the Australian Corporations Act 2001] did not operate to require Jubilee to disclose any information relating to the data provided by WMC until June 2006: at [123].

…

[emphasis in bold in original]

53 Rule 3A(1) of the ASX Listing Rules (which corresponds, but is not identical to rule 703(1)(b) of the Listing Rules) provided as follows at the material time (see *Jubilee Mines NL* at [42]):

A listed company shall immediately notify the [ASX] of —

(1) any information concerning the company of which it is or becomes aware and which a reasonable person would expect to have a material effect on the price or value of securities of the company. …

…

54 Section 1001A of the Australian Corporations Act 2001 (which corresponds, but is not identical to s 203 of the SFA) provided as follows at the material time (see *Jubilee Mines NL* at [44]):

(1) This section applies to a listed disclosing entity if the provisions of the listing rules of a securities exchange:

(a) apply to the entity; and

(b) require the entity to notify the securities exchange of information about specified events or matters as they arise for the purpose of the securities exchange making that information available to a stock market conducted by the securities exchange.

(2) The disclosing entity must not contravene those provisions by intentionally, recklessly or negligently failing to notify the securities exchange of information:

(a) that is not generally available; and

(b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities [*ie*, "enhanced disclosure securities", which refer, *inter alia*, to securities quoted on a stock market of a securities exchange (see

s 111AE(1) of the Australian Corporations Act 2001, which has since been repealed)] of the entity.

(3) A contravention of subsection (2) is only an offence if the failure concerned is intentional or reckless.

…

55 Section 1001D of the Australian Corporations Act 2001 (which has since been repealed and which corresponds, but is not identical to s 216 of the SFA) provided as follows at the material time:

For the purposes of [section] 1001A …, 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, or buy or sell, the first-mentioned securities.

56 Because s 1001D of the Australian Corporations Act 2001 applied to s 1001A but not rule 3A of the ASX Listing Rules, the appellant in *Jubilee Mines NL* argued that the master at first instance erred in applying s 1001D to "the antecedent question of whether [rule 3A(1) of the ASX Listing Rules] had been breached" (see *Jubilee Mines NL* at [56]). In other words, the appellant argued that rule 3A(1) of the ASX Listing Rules would only be triggered if it was shown that a reasonable person would expect the information in question to have a material effect on the price or value of the securities concerned. The WACA rejected the appellant's argument for the reasons set out at [57]–[62] as follows (*per* Martin CJ):

57 As I have already observed, s 1001D is somewhat analogous to a deeming provision. It provides that the question of whether a reasonable person would be taken to expect information to have a material effect on the price or value of securities, is to be taken to be affirmatively answered if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities. So, if the information has the characteristic referred to in s 1001D, it is to be taken to be information which falls within the scope of s 1001A(2)(b).

58 However, s 1001D does not provide that it is only information which has the defined characteristic that can fall within the scope of s 1001A(2)(b). If the legislature had intended that result, the word "if" in s 1001D would no doubt have been followed by the words "and only if". It follows that information can fall within the scope of the legislative regime either if it has the characteristic referred to in s 1001D or alternatively, if it is *for some other reason* information which a reasonable person would be taken to expect to have a material effect on the price or value of securities.

59 However, in practical terms, it is very difficult to envisage a circumstance in which a reasonable person would expect information to have a material effect on the price or value of securities if the information would not be likely to influence persons who commonly invest in those securities in deciding whether or not to subscribe for, or buy or sell them. The price of securities quoted on a stock exchange is essentially a function of the interplay of the forces of supply and demand. It is therefore difficult to see how a reasonable person could expect information to have a material effect on price, if it was not likely to influence either supply or demand. Rather, on the face of it, the scope of information which would, or would be likely, to influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities is potentially wider than information which a reasonable person would expect to have a

material effect on price or value, because there is no specific requirement of materiality in the former requirement.

60 The question posed by ground 7 is whether s 1001D applies to the ascertainment of a contravention of listing rule 3A [*ie*, rule 3A of the ASX Listing Rules], or whether, as Jubilee [the appellant] asserts, … listing rule 3A can only be contravened if a reasonable person would expect the information to have a material effect on the price or value of Jubilee's securities quite independently of the question posed by s 1001D. Jubilee advances that proposition on the unstated hypothesis that the effect of its acceptance would be that listing rule 3A(1) would have a narrower scope of operation than s 1001A(2) read with s 1001D. Based on the analysis in the preceding paragraph, that hypothesis would appear to be valid, if Jubilee's argument is accepted.

61 However, acceptance of Jubilee's proposition would create a significant inconsistency in the regime which was quite deliberately created in 1993 and 1994, and which was based upon the interplay of the [ASX] Listing Rules and the statutory provisions. That is because the scope of the statutory regime, if this argument were accepted, would be potentially wider than the scope of the [ASX] Listing Rules. But invocation of the statutory regime is dependent upon a contravention of the [ASX] Listing Rules. Thus, the use of potentially broadening language in the statutory regime would be pointless.

62 As I have observed, the [ASX] Listing Rules expressly provide that "expressions given a particular meaning in … the [Australian Corporations Act 2001]" are to have the same meaning when used in the [ASX] Listing Rules. Further, as seen above, on strict analysis, s 1001D did not give the expression used in s 1001A a particular meaning. Rather, s 1001D provided that the requirement embodied in the expression is to be taken to be satisfied in particular circumstances. However, the clear sentiment more generally embodied in the definitions section of the [ASX] Listing Rules, and quite specifically embodied in the structural relationship between the [ASX] Listing Rules and ss 1001A–1001D, is that of consistency between the two regimes. An unduly constrained and technical approach to the terminology used in the definition section in the [ASX] Listing Rules would defeat that obvious purpose and create the evident inconsistency to which I have referred. For those reasons, such an approach should be rejected. The better view is that s 1001D applied to listing rule 3A with the consequence that if information had the characteristic defined in that section, it should be taken to be information falling within the scope of the listing rule. Accordingly, ground 7 should be dismissed.

[emphasis added]

57 In *Jubilee Mines NL*, the WACA construed the requirement of materiality in rule 3A of the ASX Listing Rules as being the same as the requirement of materiality in s 1001A(2)(b) read with s 1001D of the Australian Corporations Act 2001 because the contrary construction would have created "a significant inconsistency in the regime which was quite deliberately created in 1993 and 1994" (see *Jubilee Mines NL* at [61]), and "the use of potentially broadening language in the statutory regime would be pointless" if one had to satisfy the requirement of a narrower concept of materiality in rule 3A of the ASX Listing Rules (see likewise *Jubilee Mines NL* at [61]).

The different concepts of materiality in s 218 read with s 216 and s 203 read with rule 703(1)(b)

58 The apparent inconsistency between the statutory and the regulatory regimes which was resolved by the WACA in *Jubilee Mines NL* does not arise under the Listing Rules and the SFA because our continuous disclosure regime does not provide for an equivalent of s 1001D of the Australian Corporations Act 2001 to apply to our equivalent of s 1001A of the Australian Corporations Act 2001,

viz, s 203 of the SFA (see [46] and [49] above). In other words, there is no provision in s 203 or any other section of Division I of Part XII of the SFA (*viz*, the Division in which s 203 is found) to deem the phrase "materially affect" in rule 703(1)(b) of the Listing Rules to have the characteristic referred to in s 1001D of the Australian Corporations Act 2001 (which, as mentioned earlier, corresponds, but is not identical to s 216 of the SFA). As pointed out earlier, s 216 of the SFA is enacted in substantially the same terms as s 1001D of the Australian Corporations Act 2001, but s 216 applies only to insider trading under s 218. It should be noted that the DJ's attention was, in fact, drawn to these differences between the two legislative frameworks. In his closing submissions to the DJ, Chong referred to the passage in *Walter Woon* reproduced at [48] above and pointed out that the definition of "material effect on the price or value of securities" in s 216 was applicable only to the offence of insider trading in Division 3 of Part XII of the SFA, and not to any other Division of Part XII (and, in particular, not to s 203, which, as just mentioned, is found in Division 1 of Part XII). On that basis, Chong submitted that the Prosecution had erroneously charged him on the basis that the information needed to prove the Insider Trading Charges against him was the same as the information needed to prove all the other charges against him.

59 I agree with Chong's submission for the reasons given above. Rule 703(1)(b) of the Listing Rules read with s 203 of the SFA has a narrower scope of operation than s 218 *read with s 216* of the SFA (the precise scope of rule 703(1)(b) has already been noted above at [44]). The former set of provisions applies only to information that would be likely to have a significant impact on the price or value of securities, but not to any other kind of information nor to trade-sensitive information (*ie*, information deemed by s 216 to satisfy the requirement of materiality set out in s 218 (see [46] above)) which may not have a material effect on the price or value of securities. The two tests of materiality are distinct as a matter of law, and the court should not apply the broader test under s 218 read with s 216 to determine whether the information in question crosses the threshold of materiality for the purposes of rule 703(1)(b) of the Listing Rules.

60 I should make three further observations. First, the information that has to be disclosed under rule 703(1)(b) is information which "would be likely to *materially* affect the price or value of … securities" [emphasis added]. Such information is *not* the same as information which would merely be likely to affect the price or value of securities. I have earlier stated that I agree with the statement in *Hans Tjio* (at para 8.30) that Chapter 7 of the Listing Rules imposes on an issuer the obligation to disclose all material information which is likely to have the effect of making a *significant* change in the *price or value* of its securities (see [44] above). The concept of materiality in rule 703(1)(b) is different from the concept of materiality in s 216, which assesses the materiality of information based on whether the information is likely to influence a common investor in deciding whether to subscribe for, buy or sell the securities concerned. That said, and this is my second observation, all information that is required to be disclosed under rule 703(1)(b) (*ie*, materially price-sensitive information) will, for practical purposes, be information which also falls under s 218 read with s 216. In other words, materially price-sensitive information will also be trade-sensitive information. As the WACA in *Jubilee Mines NL* observed at [59] (reproduced at [56] above) apropos the relationship between s 1001D of the Australian Corporations Act 2001 and rule 3A(1) of the ASX Listing Rules:

> … [I]n practical terms, it is very difficult to envisage a circumstance in which a reasonable person would expect information to have a material effect on the price or value of securities if the information would not be likely to influence persons who commonly invest in those securities in deciding whether or not to subscribe for, or buy or sell them.

My third observation relates to the WACA's comment in *Jubilee Mines NL* at [58] (reproduced at [56] above) that s 1001D of the Australian Corporations Act 2001 (which, as mentioned earlier, corresponds, but is not identical to s 216 of the SFA) is not exhaustive of what is material information

for the purposes of rule 3A(1) of the ASX Listing Rule (which, although not an insider trading provision, uses the same test of materiality as that set out in s 218 of the SFA *read on its own*, *viz*, the test of whether or not "a reasonable person would expect [the information in question] to have a material effect on the price or value of securities"). This entails, in the context of our insider trading regime, that information which is material for the purposes of the offence of insider trading is *not* limited to information which satisfies the test of materiality in s 216. Instead, the element of materiality for the purposes of this offence can be proved in two different ways, *viz*, *with* the aid of s 216 (*ie*, by establishing that the information in question is *trade-sensitive* information), or, alternatively, *without* the aid of s 216 (*ie*, by establishing that the information in question is *materially price-sensitive* information). As s 216 provides a different and (from the Prosecution's perspective) less rigorous test of materiality than the test in s 218, most prosecutions for the offence of insider trading are likely to be based on s 218 read with s 216, rather than on s 218 read on its own.

61 My analysis of the relevant provisions may seem surprising to some market participants. But, in my view, this differentiation between the continuous disclosure regime and the insider trading regime is not indefensible from the perspective of commercial morality and market integrity. If trade-sensitive information is not disclosed to the market, no investor can be said to be worse off, *provided* investors in possession of trade-sensitive information ("'inside' investors") do not trade in securities using such information. There is no question of an uneven playing field being created to the disadvantage of common investors who do not possess the same trade-sensitive information. Criminalising insider trading on trade-sensitive information would serve the interest of maintaining a level playing field between common investors and "inside" investors because the level playing field would only be made uneven if "inside" investors in possession of trade-sensitive information trade in securities using such information. If "inside" investors do so, there would be good commercial reason to punish them for taking advantage of trade-sensitive information. In any event, whether or not this distinction between our continuous disclosure regime and our insider trading regime is defensible is not the point here. It is a distinction that flows from the legislative and the regulatory structures that Parliament and SGX have put in place.

The concept of materiality in s 199

62 Let me now discuss the scope of s 199 of the SFA. This section is derived from s 999 of the Australian Corporations Act 2001 (see the Table of Derivations annexed to the SF Bill), with one major difference (see [63] below). Section 199 provides as follows:

> **False or misleading statements, etc.**
>
> **199**. No person shall make a statement, or disseminate information, that is false or misleading in a material particular and is likely —
>
> (*a*) to induce other persons to subscribe for securities;
>
> (*b*) to induce the sale or purchase of securities by other persons; or
>
> (*c*) to have the effect of raising, lowering, maintaining or stabilising the market price of securities,
>
> if, when he makes the statement or disseminates the information —
>
> (i) he does not care whether the statement or information is true or false; or

(ii) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

63 Apart from differences in the drafting style, the only substantial difference between s 199 of the SFA and s 999 of the Australian Corporations Act 2001 is that s 199 of the SFA does not contain the words "or materially misleading" immediately after the words "in a material particular". In my view, the word "material" in the phrase "a material particular" has the same meaning as the word "materially" in the phrase "materially misleading". However, the first phrase (*viz*, "a material particular") applies to a particular in a statement, whereas the second phrase (*viz*, "materially misleading") applies to the whole of the statement. This suggests that the scope of s 199 of the SFA is narrower than the scope of s 999 of the Australian Corporations Act 2001 in this respect. In other words, if, hypothetically, the 25/11/05 Announcement is misleading only when it is read as a whole, it may, arguably, not be caught by s 199 of the SFA because the whole of the announcement is not a particular. However, this is not an issue in these appeals.

64 The word "material" in s 199 is not defined, but, read in its proper context, it must mean sufficiently important to be likely to, *inter alia*, "have the effect of raising, lowering, maintaining or stabilising the market price of securities" (see s 199(*c*) and also [45] above). As s 216 of the SFA is not applicable to s 199, it is reasonable to infer that Parliament intended s 199 to have a narrower scope than s 218 read with s 216. In other words, the expression "a material particular" in s 199 refers to a particular that is likely to materially affect the price or value of securities as per the concept of materiality in rule 703(1)(b), and *not* as per the concept of materiality set out in s 216.

65 With this legal framework in mind, I shall now examine the evidence of materiality relied upon by the DJ in convicting the Appellants of the offences which they were charged with.

The evidence of materiality relied on by the DJ

66 The DJ held that the Prosecution had made out its case on the Misleading Disclosure Charges and the Non-disclosure Charges based solely on Chan's expert evidence that the misleading parts of the 25/11/05 Announcement (in the case of the Misleading Disclosure Charges) and the Information (in the case of the Non-disclosure Charges) were likely to have a material effect on the price or value of Airocean shares. Before me, Chong and Madhavan (and also Ong in so far as the Misleading Disclosure Charges are concerned) have reiterated their argument (which was rejected by the DJ) that this requirement was not made out. Before considering the rival arguments, I shall first consider the threshold argument that Chan was not qualified or competent to give expert evidence on the issue of the materiality (or otherwise) of the aforesaid information *vis-à-vis* Airocean's share price.

Whether Chan was qualified to give expert evidence

67 In substance, it is argued that Chan's expertise was of limited value as it was derived not from any practical experience in share trading, but from advising clients on initial public offering ("IPO") issues and tracking the price performance of shares subsequent to an IPO with a view to identifying the reasons or causes of their price performance. Chan's expertise, in other words, lay in explaining the movements in share prices after an event and not in predicting the likely movements in share prices before an event – the latter being, so it is argued, a very different kind of exercise which requires greater skills and knowledge of how investors behave.

68 There is some merit in this argument. However, if investors are assumed to act rationally in making investment decisions, then past experience of investors' behaviour can be a good guide as to their future behaviour as well. Thus, for example, if Chan had studied a previous case where investors

had reacted in a certain way to information that a company's CEO was under investigation by CPIB or CAD, such a study would be useful in his prediction as to how Airocean shareholders might likely have reacted to the news that Tay, Airocean's CEO, was being investigated by CPIB. Although there is no evidence that Chan had such a specific level of experience, I am prepared to accept him as an expert on the basis of his general experience in monitoring the price performance of securities after their issue. I must, however, also emphasise that, ultimately, the question of whether the information in issue apropos the Misleading Disclosure Charges and the Non-disclosure Charges was likely to materially affect the price or value of Airocean shares is a question of mixed law and fact for the court, and not the expert, to decide after considering the evidence before it. The expert cannot usurp the court's function in this respect (see *The H156* [1999] 2 SLR(R) 419 at [27] and *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85]).

Chan's report on the three questions posed by the Prosecution

69 Chan's report dated 12 August 2009 ("the Report") was specially prepared for the trial below at the request of the Prosecution. Paragraph 2(b) of the Report sets out the Information as defined at [5] above (*ie*, the information which is the subject matter of the Non-disclosure Charges and which also constitutes the relevant inside information in relation to the Insider Trading Charges). Paragraph 3 sets out the three questions on which Chan's expert opinion was sought, which opinion he provided from para 5 onwards. Paragraph 3 reads as follows: [note: 27]

> 3 I have been asked to provide an expert opinion on the following:
>
> a) whether for the orderly operation of a securities exchange, [Airocean] ought to have made an announcement under Rule 703 of the [Listing Rules] based on the information contained in the [8/9/05 Board Minutes];
>
> b) whether the statements or information in [the 25/11/05 Announcement] were likely to have the effect of raising, lowering, maintaining or stabilising the market price of [Airocean] shares; and
>
> c) [w]hether any information contained in the [8/9/05 Board Minutes] was price sensitive and if so, to discuss the reasons for [such] opinion, and the degree of price sensitivity.

70 The question in para 3(a) of the Report, which relates to the Non-disclosure Charges, seeks Chan's opinion, in an oblique way, as to whether "the *information* contained in the [8/9/05 Board Minutes]" [note: 28] [emphasis added] was likely to "*materially* affect the price or value of [Airocean] shares" [emphasis added] for the purposes of rule 703(1)(b) of the Listing Rules. If so, Airocean ought to have disclosed it. Two preliminary issues arise from the way in which this question was framed. First, what part of the information contained in the 8/9/05 Board Minutes ought to have been disclosed? Second, was Chan provided with any guidance on the meaning of the phrase "materially affect" in rule 703(1)(b) in relation to the price or value of securities? As the question in para 3(a) of the Report is a mixed question of law and fact, how would Chan have been able to give his opinion on it if he did not know what the phrase "materially affect" in rule 703(1)(b) meant? As to the first preliminary issue, it was left to Chan to select what he considered to be the material information contained in the 8/9/05 Board Minutes which might come within the purview of rule 703(1)(b) and which, therefore, ought to have been disclosed. At para 6 of the Report, Chan concluded as follows: [note: 29]

> 6 From the above record [*ie*, Chan's summary of the 8/9/05 Board Minutes], and on the

assumption that the Board of Airocean, and every member of the Board present at [the 8/9/05 Board Meeting], knew that [Tay] was questioned by the CPIB in relation to two transactions involving [the Subsidiaries], it is my opinion that for the orderly operation of a securities exchange such information known by the Board was material and warranted disclosure in a timely manner.

71 It is clear from this conclusion that Chan selected from the 8/9/05 Board Minutes the information concerning Tay being questioned by CPIB in relation to two transactions involving the Subsidiaries as the crucial information that ought to have been disclosed. In this judgment, I shall refer to this composite information as "the Tay/Subsidiaries Information". At para 7 of the Report, Chan explained the likely impact of the Tay/Subsidiaries Information on the price of Airocean shares as follows: [note: 30]

> 7 [Tay] was then the CEO of [Airocean], and the fact that he was questioned by the CPIB with regard to [the Subsidiaries] was material information likely to materially affect the price of [*sic*] value of [Airocean] shares. [Tay] was not only the Chief Executive but also one of the two founder-shareholders in the Company. He has been credited for the success of the Company by the Media (ST article dated 25 November 2005 [*ie*, the ST Article as defined at [19] above]). His questioning by the CPIB in relation to [the Subsidiaries] would thus be likely to cause a reasonable investor to conclude that his ability to continue to effectively attend to the affairs of the company would be impaired. This in turn can affect the future performance of the company. Given this, a reasonable investor with knowledge of this information will be likely to sell [Airocean] shares. The value of [Airocean] share[s] as listed in [SGX] would accordingly fall. I would add that the securities market of Singapore, like all securities markets, is very sensitive to negative information concerning the companies whose shares are listed in that market.

72 At para 8 of the Report, Chan referred to the fact that Tay had been released on bail and that his passport had been impounded ("the Bail Information") as additional reasons why Airocean shareholders would be concerned by the CPIB Investigations: [note: 31]

> 8 The additional information that [Tay] was released on bail and his passport impounded would cause further concerns to reasonable investors as this could mean that he was severely handicapped in his ability to attend to the affairs of the company of which he was the key person. They would be even more likely to sell down the shares of [Airocean] if they came to know of this.

73 In summary, Chan's opinion was that the Tay/Subsidiaries Information, together with the Bail Information (which collectively form the Information as defined at [5] above), was likely to materially affect the price or value of Airocean shares because reasonable investors would conclude that Tay would not be able to attend to the affairs of Airocean, and this was likely to lead to their selling down their Airocean shares; that would, in turn, cause Airocean's share price to fall. Chan's conclusions at paras 7 and 8 of the Report provided the Prosecution with the basis of the Non-disclosure Charges against Chong and Madhavan (see [4] above).

74 Chan's opinion was hypothetical in relation to what reasonable investors would have perceived to be the likely state of affairs at Airocean if the Information (*ie*, the Tay/Subsidiaries Information and the Bail Information) had been disclosed. In short, his opinion seemed to be that any investigation by CPIB into the CEO of any listed holding company in connection with the transactions of its operating subsidiaries was likely to materially affect the holding company's share price, irrespective of whether CPIB's investigations concerned serious or minor corruption. In the present case, as will be seen, if the Tay/Subsidiaries Information had been disclosed together with other relevant information,

investors would have known that the CPIB Investigations were not concerned with serious corruption involving Tay (see [105]–[106] below). Indeed, Tay's corrupt act eventually turned out to be minor, and, furthermore, the undisputed evidence is that his attempted bribe to Chooi was unsuccessful in securing any business from Jetstar for Airocean via its subsidiary, Airlines GSA.

75 As to the second preliminary issue mentioned at [70] above, because Chan did not know what the expression "materially affect the price or value of … securities" in rule 703(1)(b) of the Listing Rules meant in law, he gave his expert opinion on the basis of: (a) the likelihood of investors selling their Airocean shares as they would be alarmed by the Information if it were disclosed; and (b) the market impact evidence of investors' reaction to the 25/11/05 Announcement and the 2/12/05 Announcement on, specifically, the first trading day after each of these announcements.

76 In respect of the question in para 3(b) of the Report, which relates to the Misleading Disclosure Charges, Chan explained (at para 11 of the Report) that he was specifically asked to consider the following question: [note: 32]

> 11 I am asked specifically as follows:: [*sic*]
>
> On the basis that parts or the whole of [the 25/11/05 Announcement] were false or misleading in a material particular in not disclosing that [Tay] was questioned by the CPIB with regard to two transactions involving [the Subsidiaries], I was asked to opine if such false or misleading parts or the whole of the said announcement were likely to:–
>
> (i) … induce other persons to subscribe for [Airocean] shares; or
>
> (ii) … induce the sale or purchase of [Airocean] shares by other persons; or
>
> (iii) … have the effect of raising, lowering, maintaining or stabilizing the market prices of [Airocean] shares.
>
> I was also asked whether there would be a difference to my opinion on the above with the additional assumption that:
>
> (a) [Tay] possessed the Bond and Bail Bond which stated that he was arrested by the CPIB under Section 6(b) of the Prevention of Corruption Act (Chapter 241).

77 Chan's opinion on this question is set out at para 13 of the Report as follows: [note: 33]

> 13 … The [25/11/05] Announcement or parts of it gave the public the impression that [Tay] and [the Subsidiaries] were not the subjects of the CPIB [I]nvestigations. By doing so, [Airocean] shareholders would not be alarmed that CPIB was carrying out investigations on [Tay] and [the Subsidiaries] and would not likely be led to sell their [Airocean] shares, which they otherwise would likely have done so if they had the true and complete facts. Before [Airocean's] release of the [25/11/05] Announcement, [Airocean] shareholders would likely have been concerned about the [ST Article] which carried the title 'Airocean's chief executive [Tay] under CPIB probe'. In this article, [Tay] had denied that he was personally being investigated by the CPIB. [Airocean] shareholders would have been expecting an announcement from [Airocean] as to the truth of the contents of the [ST Article]. Had [Airocean's] announcement stated that [Tay] was questioned by CPIB over transactions of [the Subsidiaries], [Airocean] shareholders would likely have inferred that [Tay] and [the Subsidiaries] were being investigated by CPIB, and be concerned about [Tay's] ability to effectively attend to the affairs of [Airocean] and the future performance of

[Airocean]. [Airocean] shareholders would likely have sold their [Airocean] shares and likely [have] caused [Airocean's] share price to drop.

78 In summary, Chan's opinion in relation to the Misleading Disclosure Charges was that because Airocean's investors did not know of the Tay/Subsidiaries Information, they were not alarmed and therefore were not likely to sell their Airocean shares, which they would otherwise likely have done if that information had been disclosed (and which would, in turn, have caused Airocean's share price to fall). This sequence of events would result in the 25/11/05 Announcement being likely to stabilise the market price of Airocean shares at a *higher level* than what their market price would likely have been had the Tay/Subsidiaries Information been disclosed.

79 The question in para 3(c) of the Report is concerned with whether any information in the 8/9/05 Board Minutes was "price sensitive". [note: 34] It is unclear, on the face of this question, whether it was directed at the Non-disclosure Charges or the Insider Trading Charges. Chan was not informed of what the words "price sensitive" [note: 35] meant in this context. He assumed, and on that basis opined (at para 15 of the Report), that "the information as recorded in the [8/9/05 Board Minutes] that [Tay] and [the Subsidiaries] were being investigated [*ie*, the Tay/Subsidiaries Information] … and the seriousness of the investigation which resulted in [Tay's] passport being surrendered to the CPIB [*ie*, the Bail Information]" [note: 36] was "price sensitive" [note: 37] as it "*would, or would be likely to*,*influence persons who commonly invest in securities in deciding whether to subscribe for, buy or sell* [Airocean shares]" [note: 38] [emphasis added]. Although Chan did not refer to s 216 of the SFA, he obviously took the italicised words from that provision. This meant that to Chan, the question in para 3(c) of the Report was concerned with the offence of insider trading, with the words "price sensitive" [note: 39] meaning trade-sensitive as per the concept of materiality set out in s 216 (see [46] above). At paras 17–26 of the Report, Chan set out his opinion on this question as follows: [note: 40]

Degree of Price Sensitivity

17 It is only ***hypothetical*** to assess the degree of price sensitivity if such information were released soon after [Airocean's] Board had met on 8th September 2005. However we can infer the degree of price sensitivity by looking at the trading volume and price soon after the Straits Times ("ST") and Business Times ("BT") articles and [Airocean's] announcements were released in November and December 2005 which dealt with similar information.

25th–28th November 2005

18 On 25 November 2005, at 0900 hours, a trading halt was imposed on [Airocean] shares pending an announcement by the Company to clarify the [ST Article] with the headline caption "Airocean's chief executive [Tay] under CPIB probe". Subsequent to the trading halt, [Tay] was interviewed by reporters from ST and BT and their articles appeared in the respective newspapers on 26 November 2005. On 25 November 2005 at 2013 hours, the Company issued a SGXNET announcement "Clarification of Straits Times article on 25th November 2005" [*ie*, the 25/11/05 Announcement].

19 Trading was lifted on the following Monday 28th November 2005.

20 The trading volume for 28th November 2005 was 17.585 million shares which was the highest volume dealt with in a single day since 23rd September 2005 (19.7 million shares). The

share price fell by 12% (1.5 cents) from S$0.125 to S$0.110 on this day. A 12% fall in the price of the share is considered material price movement.

1st–5th December 2005

21 On Thursday, 1st December 2005 at 1400 hours, a trading halt was again imposed on [Airocean] shares pending [an] announcement. At 1901 hours, [Airocean] announced its clarifications on the various ST and BT articles relating to [Tay's] involvement in the CPIB [I]nvestigation[s]. On Friday 2 December 2005, at 0011 hours, [Airocean] announced that SGX ha[d] informed the Company that the above mentioned clarification was inadequate and hence the trading halt would not be lifted. At 2206 hours, the Company announced the investigation by the CAD and further clarified the ST and the BT articles relating to [Tay's] involvement in the CPIB [I]nvestigations.

22 When trading was lifted on Monday 5th December 2005 the trading volume for this day was 15.597 million shares, the 2nd highest volume per day since 28th November 2005. The share price fell that day by 17.4% (2 cents) from S$0.115 to S$0.095. A 17% fall in price of the share is considered material price movement.

23 Based on the analysis above, it is my opinion that information relating to [Tay's] and the [Subsidiaries'] involvement in the investigation was price sensitive as such information was likely to influence the investment decision of a reasonable person trading in [Airocean] shares.

24 The degree of sensitivity could be seen in the changes in Price and Volume of transacted shares soon after the resumption of trading following the ST and BT articles and the [25/11/05 Announcement]. In particular, when the Company clarified that " … *[Tay] and 3 officers of [the Subsidiaries] were interviewed by the Corrupt Practices Investigation Bureau ("CPIB") in September 2005. The interview concerned 2 transactions involving [the Subsidiaries] with other companies in the aircargo industry*." in the [2/12/05 Announcement], the price of shares suffered a 17.4% fall in price and … 15.597 million shares changed hands the next trading day, which was 5 December 2005.

25 Based on the price performance of the [Airocean] Shares as detailed above, it is my opinion that if the price sensitive information was released soon after [Airocean's] Board had met on … 8th September 2005, the price of the [Airocean] shares would experience a similar fall in price, if the announcement factually and fully reported the price sensitive information.

26 My opinion on the above analysis would not change if it was also made known that [Tay] was released on bail subsequent to his CPIB interview. In fact this would have strengthened the notion that [Tay] and the [Subsidiaries] were subjects of the CPIB [I]nvestigation[s]. The fact that [Tay] was released on bail would indicate the seriousness of the CPIB [I]nvestigation[s] and increase the level of concern over his continued ability to attend to the affairs of the Company. This in turn will affect even more the price of the Company's share[s]. It is thus information that would enhance the price-sensitivity of information that [the Subsidiaries] and [Tay] were being investigated by the CPIB.

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

80 As mentioned earlier, the DJ, in convicting the Appellants of the offences which are the subject matter of these appeals, accepted *in toto* Chan's opinion on the three questions set out in para 3 of the Report. It is now necessary for me to examine whether Chan's failure to distinguish between the

different concepts of materiality applicable to the three types of charges which the Appellants were convicted of is an error that is fatal to their convictions. I shall at the same time also consider whether the DJ was right in finding that the other essential elements of the three types of charges had been proved by the Prosecution. I start with the Non-disclosure Charges.

Analysis of the DJ's findings on the Non-disclosure Charges

81 As mentioned earlier, Chong and Madhavan were charged under s 203(2) read with s 331(1) of the SFA for consenting to Airocean's reckless failure to notify SGX of the Information. Rule 703(1)(b) of the Listing Rules provides as follows:

> An issuer must announce any information known to the issuer concerning it or any of its subsidiaries or associated companies which:—
>
> …
>
> (b) would be likely to *materially affect* the price or value of its securities.
>
> [emphasis added]

82 Sections 203(2) and 203(3) of the SFA provide as follows:

> (2) The [issuer] shall not intentionally, recklessly or negligently fail to notify the securities exchange of such information as is required to be disclosed by the securities exchange under the listing rules or any other requirement of the securities exchange.
>
> (3) … [A] contravention of subsection (2) shall not be an offence unless the failure to notify is intentional or reckless.

83 Section 331(1) of the SFA provides as follows:

> **Corporate offenders and unincorporated associations**
>
> **331.**—(1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of an officer of the body corporate, the officer as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> …

84 For the purposes of the present proceedings, s 331(1) is predicated on Airocean having committed the offence under s 203. Reading these provisions together, the Non-disclosure Charges against Chong and Madhavan require the following elements to be proved: (a) Airocean had knowledge of the Information (as noted at [31] above, I agree with the DJ that this element was satisfied on the evidence); (b) the Information was likely to materially affect the price or value of Airocean shares; (c) Airocean was reckless in not disclosing the Information to SGX under the Listing Rules; and (d) Chong and Madhavan consented to Airocean's reckless failure to make disclosure.

The DJ's findings on the requirement of materiality

85 Having considered the arguments of Chong and Madhavan on the findings of the DJ, I am of the view that the DJ's decision that the requirement of materiality had been satisfied *vis-à-vis* the Non-

disclosure Charges was wrong in law on three main grounds, namely:

(a) the DJ misdirected himself on the law in relation to the concept of materiality applicable to the Non-disclosure Charges;

(b) the DJ erred in accepting Chan's opinion that the CPIB Investigations could impair the future performance of Airocean; and

(c) the DJ erred in accepting Chan's analysis of the movements in Airocean's share price after the 25/11/05 Announcement and after the 2/12/05 Announcement.

(1) The DJ's misdirection on the law

86 Madhavan argues that the DJ misdirected himself on the law in holding that the Information was likely to affect the price of Airocean shares. The misdirection, Madhavan contends, lay in the DJ's omission of the vital ingredient of "*materially* affect" in his consideration of the Non-disclosure Charges. As a result, the DJ's interpretation contradicted the plain words of rule 703(1)(b) of the Listing Rules and also the policy reasons underlying the continuous disclosure regime.

87 Madhavan has referred to two passages in the Judgment where such omission occurred. In the heading immediately above [119] of the Judgment, the DJ framed the price sensitivity element of the Non-disclosure Charges as follows, *contrary* to the terms of rule 703(1)(b):

> Was the Information *likely to affect* the price and value of Airocean shares and was [it] [i]nformation which was required to be disclosed under Rule 703(1)(b) of the SGX Listing Rules. [emphasis in original omitted; emphasis added in italics]

88 At [130] of the Judgment, the DJ again omitted the word "materially" twice in considering the likely effect of the Information on the price of Airocean shares:

> Chan had given evidence that the price of Airocean shares fell by 17.4% from 0.115 to 0.095 on 5th December, 2005 which was a material price movement. Chan also stated that to have an accurate guage [*sic*] of an event on the market, one has to look at the prices over a period of time. The defence sought to show that the price of Airocean shares eventually climbed up to a much higher price than the pre-2 December, 2005 announcement [price]. On 1 December, 2005, the price was at 0.115, on … 5th December, it was at 0.095, on 6th December, it was at 0.115 and on 7th December, it was at 0.125. The defence also pointed out that Chan had agreed that there are other factors that one would have to consider in deciding to trade in shares such as the trend of the market and the economic outlook. He added that the list of factors is not exhaustive. The charge in this case states that the information is "*likely" to affect* the price or value of the shares. As long as there is a likely impact on the price of the shares when one is aware of this information, that would suffice. Whether the price did eventually move up or down can be due to a multiplicity of factors. Chan had, based on his extensive experience in corporate matters confirmed that the information in question would be material as to warrant a disclosure. The court finds that objectively, the information would be *likely to affect* the price of shares in the company. [emphasis added]

89 I accept Madhavan's argument on this issue. The element of a likely *material* effect on the price or value of Airocean shares is an essential ingredient of the Non-disclosure Charges under s 203 of the SFA read with rule 703(1)(b) of the Listing Rules. That requirement is expressly set out in the

plain words of rule 703(1)(b). The phrase "likely to *materially* affect the price or value of … securities" [emphasis added] in that rule does not have the same meaning as "likely to affect" the price or value of securities. In this connection, I note that there are two other passages in the Judgment where the DJ repeated the same omission of the word "materially", namely:

> 134 … The observation by the court is that this view [*viz*, SGX's view that the 2/12/05 Announcement was acceptable even though it did not include the Bail Information] is tied up with the SGX's concern that any information which would be *likely to affect* the price of shares in a company should be disclosed. This is to ensure a level playing field in the trading of shares by investors.
>
> …
>
> 168 … Granted that Airocean may not have decided that no announcement was necessary during the [8/9/05 Board Meeting], the fact remains that given all the information available to them as discussed above, it was incumbent upon the Company to disclose 'the Information' as they [*sic*] were clearly *likely to affect* the price or value of the shares in Airocean. …
>
> [emphasis added]

90 The consequence of this misdirection in law is that the DJ made no finding on an essential element of the Non-disclosure Charges. It follows that the convictions of Chong and Madhavan on the Non-disclosure Charges for the reasons given by the DJ cannot stand. In this connection, it is necessary that I consider the Prosecution's response to the argument that the DJ misdirected himself in law. The Prosecution's case is that: (a) the DJ did not err because Chan's opinion was that the Information was likely to materially affect Airocean's share price; [note: 41] and (b) the DJ did use the word "material" in some parts of the Judgment, and his omission to do so in other parts of the Judgment was inadvertent. [note: 42] I disagree with the Prosecution on this point. In my view, there are just too many passages in the Judgment which have omitted the crucial word "materially" to support the Prosecution's submission that the omission was inadvertent. The passages in the Judgment quoted earlier clearly show that the references therein to "material" were merely *pro forma* for the reason that the meaning of "materially affect" in rule 703(1)(b) of the Listing Rules was never articulated. The pith and substance of the DJ's decision was that the Information fell within rule 703(1)(b) because it was "*likely to affect* the price or value of the shares in Airocean" [emphasis added] (see [168] of the Judgment (reproduced at [89] above); see also the other passages from the Judgment reproduced at [87]–[88] above). The Prosecution has made no submission that the DJ's decision can still be supported on other grounds on the basis of other evidence before the DJ.

(2) The DJ's erroneous acceptance of Chan's opinion that the CPIB Investigations could impair Airocean's future performance

91 Madhavan's second main argument is that in any event, Chan's opinion – *viz*, that the CPIB Investigations would impair Tay's ability to continue to effectively attend to the affairs of Airocean and this could affect Airocean's future performance (see the Report at para 7 (reproduced at [71] above)) – was inconsistent with the actual state of affairs at the time Chan gave his opinion. Similarly, Madhavan submits that Chan's further opinion – *viz*, that the information about Tay's release on bail with his passport impounded (*ie*, the Bail Information) would affect the price of Airocean shares even more because investors would be even more concerned about Tay's continued ability to attend to the affairs of Airocean (see the Report at para 8 (reproduced at [72] above)) – was also flawed for the same reasons.

92 I agree with this submission. Tay's ability to manage the affairs of Airocean was not, in actual fact, impaired at any time during the period from September to December 2005. After being questioned by CPIB, Tay was released on bail without being formally charged with any offence. He was able to travel to Shanghai between 8 September 2005 and 2 December 2005. It was also Tay's evidence that Airocean had an increased turnover of over $700m in 2005.

93 Instead of considering the *actual* factual position that Tay's role in running Airocean was not impaired (and indeed, if Airocean had disclosed the Information, common investors would have known from such disclosure that Tay was not being held in custody and would thus still be in charge of the affairs of Airocean), Chan *hypothesised* that if the Information had been disclosed, common investors would have perceived that Tay's ability to attend to the affairs of Airocean would be impaired. As I have just pointed out, this hypothesis was contrary to the actual facts. This may possibly explain the curious way in which the DJ formulated his acceptance of Chan's opinion. At [128] of the Judgment, the DJ said:

> … The court agrees that [Tay] who was the CEO and director of Airocean was a key figure as he was credited with the success of Airocean by the media and as the CEO, *if anything happens to him which would curtail his ability to attend to the affairs of the company*, it would be a cause for concern to investors in the company. … [emphasis added]

94 The DJ's ruling in the above passage is a self-evident proposition. Naturally, Airocean shareholders would be concerned *if* anything were to happen to Tay that would curtail his ability to manage Airocean. The DJ's finding was premised on the following assumptions: (a) the CPIB Investigations would lead to something happening to Tay; (b) that something would impair Tay's ability to attend to the affairs of Airocean; (c) that impairment would in turn cause alarm to Airocean shareholders; (d) alarmed Airocean shareholders would sell their Airocean shares; and (e) consequently, the price of Airocean shares would fall. Hence, the DJ concluded, the CPIB Investigations would likely affect the price of Airocean shares. The DJ's ruling was a self-evidently syllogistic holding based on a premise which was factually untrue, *ie*, that Tay would not be able to attend to the affairs of Airocean.

95 The same comment applies to the fact of Tay being investigated in connection with two transactions of the Subsidiaries. In the Judgment, the DJ did not explain how and why this particular fact was so significant that it would be likely to *materially* affect the price of Airocean shares. He appeared to have overlooked the consideration that Tay was investigated in connection with two transactions whose total value was financially negligible and insignificant compared to Airocean's turnover of over $700m in 2005 (see [105(d)] below).

(3) The DJ's erroneous acceptance of Chan's analysis of the movements in Airocean's share price

96 Madhavan has argued that the DJ erred in accepting Chan's analysis of the movements in Airocean's share price after the 25/11/05 Announcement and after the 2/12/05 Announcement. Before I consider this argument, it is pertinent to note that the DJ made a serious factual error in his understanding of the 25/11/05 Announcement. At [190] of the Judgment, the DJ said:

> 190 … The fact remains that the [25/11/05 Announcement] did not paint the true picture as *it did not state that the CPIB were looking into the affairs of Airocean* ie that [Tay] and 3 officers from [the Subsidiaries] were questioned by the CPIB and that it was in relation to transactions involving [the Subsidiaries]. … [emphasis added]

The above statement gives a specific meaning to "the affairs of Airocean". It is incorrect in a

significant aspect. As a matter of fact, the 25/11/05 Announcement *did* disclose that CPIB was looking into the affairs of Airocean. What it did not disclose were the details or particulars identified at [190] of the Judgment. The 25/11/05 Announcement was issued in order to clarify the statement in the ST Article that Tay was under a CPIB probe. That announcement disclosed, *inter alia*, that Tay had been called in by CPIB for an interview, that he had given statements to CPIB and that he had co-operated in full with CPIB. In making these clarifications, Airocean confirmed that Tay was being investigated by CPIB, but, at the same time, tried to downplay the significance of this news on Tay's ability to continue to attend to Airocean's affairs and, in turn, on Airocean's business. Any reasonable reader of the 25/11/05 Announcement would immediately have reached the same conclusion, *viz*, that CPIB was investigating Tay in relation to the affairs of Airocean. The 25/11/05 Announcement painted a true picture of what was really significant to Airocean shareholders, *viz*, Tay, as the CEO of Airocean, was being investigated by CPIB in connection with the affairs of Airocean. That the affairs of Airocean concerned, specifically, two transactions of the Subsidiaries was a mere detail. Airocean shareholders would know that Airocean was a holding company whose operations were carried out by (*inter alia*) the Subsidiaries. In my view, the 25/11/05 Announcement, when read as a clarification of the ST Article, would have communicated to any reasonable reader that Tay was being investigated by CPIB in connection with the affairs of Airocean.

97 Since the 25/11/05 Announcement disclosed that Tay was under investigation by CPIB, it is important to consider carefully the market impact evidence after that announcement was released. It is also necessary to determine what information disclosed in the 25/11/05 Announcement caused the movements in the price of Airocean shares. Similarly, it is important to consider the market impact evidence after the 2/12/05 Announcement disclosed the additional information that the CPIB Investigations concerned, specifically, two transactions involving the Subsidiaries.

98 On the first day of trading after the 25/11/05 Announcement, the volume of trade in Airocean shares went up to 17,585,000 from 2,328,000 at the close of the previous trading day, and the price went down from $0.125 to $0.11, a drop of 12%. But, the price recovered the following day, dropped again for a few days to as low as $0.095 (this was after the 2/12/05 Announcement was released) and then climbed back to the region of $0.115 to $0.12, where it remained stable for a few days. Equally important is the fact that the highest price done on many of these trading days was $0.12 to $0.125, with the exception of 28 November 2005 (highest price done was $0.11), 1 December 2005 (highest price done was $0.115) and 5 December 2005 (highest price done was $0.10). Thus, over a period of some two weeks, Airocean's share price fluctuated within a relatively small band of prices and at times reached the same price as that around 23–24 November 2005.

99 The market impact evidence therefore gives rise to a reasonable doubt as to whether both the 25/11/05 Announcement and the 2/12/05 Announcement had a *material* effect on Airocean's share price if the share price movements are viewed over a reasonable period of time, and not just on the first trading day after each of these announcements was released. In this connection, it is not disputed by Chan that there is no fixed timeframe for assessing the impact of information on the price of shares for the purposes of determining the materiality of the information. The Court of Appeal in *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 ("*Kevin Lew*") took a similar view towards market impact evidence in the context of insider trading. The expert witness in *Kevin Lew* had testified that "a general timeframe for assessing the impact of a piece of news on the market was three days" (see *Kevin Lew* at [135]). The court took the view that there was no fixed timeframe for assessing the market impact of information, and that "[m]uch would depend on the nature of the shares" (see *Kevin Lew* at [135]). In that case, as the shares in question were not actively traded, the court looked at the market impact evidence for a period longer than the three days recommended by the expert witness. In the present case, the DJ noted at [130] of the Judgment that according to Chan, "to have an accurate guage [*sic*] of an event on the market, one ha[d] to look at the prices

over a period of time" [emphasis added]. I agree with Chan's view as expressed. However, Chan did not appear to have adopted that approach in his actual analysis of the market impact evidence (see paras 18–23 of the Report (reproduced at [79] above)) as he focused solely on the changes in Airocean's share price on the first trading day after the 25/11/05 Announcement and the 2/12/05 Announcement respectively were released. Similarly, the DJ did not take into account the need to consider the market impact evidence over a reasonable period of time when he reached the conclusion (at [130] of the Judgment) that "[t]he court finds that objectively, the [I]nformation would be likely to affect the price of shares in the company".

100 In the present case, the market impact evidence was the best available evidence for determining whether the Information was likely to have a material effect on the price of Airocean shares. Although market impact evidence is by no means conclusive of the issue of materiality, in my view, the market impact evidence after the 25/11/05 Announcement and after the 2/12/05 Announcement, as analysed at [98] above, must, at the very least, throw a reasonable doubt on Chan's conclusion that the Information was likely to materially affect the price of Airocean shares, in the absence of any other material contributory factor. In this regard, Chan did not provide any explanation for the absence of a substantial change in Airocean's share price after the release of the 25/11/05 Announcement and after the release of the 2/12/05 Announcement, apart from making the obvious observation that share prices are affected by a multiplicity of factors (see the Judgment at [130]).

101 In this regard, it is worth reiterating that the court ought not to blindly accept expert testimony without critically evaluating "the factual or other premises on which the expert based his opinion" (see *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [23]). In a similar vein, experts are expected to clearly explain the basis for their conclusions by referring to the facts. They should also refer to any relevant material (for example, literature and market behaviour studies in similar circumstances) which might support or detract from their views. In the context of an expert opinion on the materiality of information in relation to a company's share price, for example, it would be useful for the expert to refer to reports by financial analysts. A careful study of the actual market impact of the relevant information would also be helpful. Further, in considering the actual market impact, it would be prudent for the expert to also consider and draw the court's attention specifically to the possibility of other macroeconomic or sector-specific factors which might have contributed to the change in share price.

102 Before leaving this subject, it should be noted that the *immediate* change in Airocean's share price on the first trading day after the 2/12/05 Announcement might also have been affected by another fact that was disclosed in the 2/12/05 Announcement, *viz*, that CAD had started investigating Airocean and its officers for possible breaches of their disclosure obligations under the SFA. This additional piece of negative information must have been a material factor, possibly of equal gravity as the CPIB Investigations, from the viewpoint of Airocean shareholders. It could have contributed to the fall in Airocean's share price by 17.4% on the first trading day after the 2/12/05 Announcement. Indeed, Chan's testimony at the trial is consistent with this view. When cross-examined by Chong's counsel, Chan agreed that the more important part of the 2/12/05 Announcement was the information about CAD's investigations into Airocean and its officers ("the CAD Investigations"), rather than the Tay/Subsidiaries Information. He also agreed that the news of the CAD Investigations was additional information which would have been treated negatively by the market. He further told Ong's counsel that he had taken the CAD Investigations, which he considered as consequential to the CPIB Investigations, into account in his opinion. During re-examination, Chan initially said that the 2/12/05 Announcement disclosed two pieces of important information, *viz*, the Tay/Subsidiaries Information and the CAD Investigations. However, on further questioning, he reverted to his earlier answer that the more important portion of the 2/12/05 Announcement was the

information about the CAD Investigations because it suggested an escalation of the matter from a CPIB probe to a CAD probe. Chan's final position as just stated reinforces the view that the market impact evidence after the 2/12/05 Announcement, which disclosed both the Tay/Subsidiaries Information and the CAD Investigations, raises at least a reasonable doubt as to whether the Tay/Subsidiaries Information alone was likely to materially affect Airocean's share price. The DJ completely disregarded this factor in the Judgment in spite of Chan's concession that the information about the CAD Investigations was the more important aspect of the 2/12/05 Announcement, and that the disclosure of this information might have had an impact on Airocean's share price and/or on investors' decision to sell their Airocean shares over and above the impact caused by the disclosure of the Tay/Subsidiaries Information.

103 For the reasons given above, I find that the DJ's total reliance on Chan's opinion was not justified. I further find that there was insufficient reliable evidence to show beyond reasonable doubt that the Information, which does not make any mention of the CAD Investigations (see [4] above), was likely to materially affect the price of Airocean shares.

104 There is, in my view, one other important factor that would have weakened the Prosecution's case on the Non-disclosure Charges even more if Chong and Madhavan had raised it. It is this: if Airocean had disclosed the CPIB Investigations pursuant to rule 703(1)(b), it would likely have disclosed not only the Information, but also any additional relevant information contained in the 8/9/05 Board Minutes which might mitigate or neutralise any potential adverse effect of the Information on its business (and, indirectly, its share price). The reason is that it would have been in Airocean's commercial interest to do so. In this regard, I note that in *Jubilee Mines NL*, the appellant, a mining company listed on the Australian Securities Exchange, succeeded in satisfying the WACA that if it had disclosed certain information about the discovery of nickel sulphide deposits on its tenement, it would also have disclosed, *inter alia*, that it had no current intention to exploit the deposits, which would have affected investors' evaluation of the materiality of the information on the company's share price. The WACA also pointed out that if the appellant had disclosed the information about the discovery of nickel sulphide deposits on its tenement without also disclosing that it had no current intention to exploit the deposits, that would have resulted in the disclosed information being misleading (see *Jubilee Mines NL* at [113]).

105 In the present case, the Prosecution selected the bare essentials of the most damaging aspects of the CPIB Investigations to prefer the Non-disclosure Charges against Chong and Madhavan. All attenuating circumstances were omitted from these charges. As a result, Chan's opinion was focused only on the Information and its effect on Airocean's share price. There was in fact other information that could have had the effect of diluting or neutralising the negative impact of the Information. For example:

(a) As noted in the 8/9/05 Board Minutes, the initial advice from TRC, Airocean's counsel, was that there were insufficient particulars to formulate a view as to the nature of the CPIB Investigations.

(b) Although Tay had told CPIB during his interview that he had asked Simon Ang (Regional Manager of Airlines GSA) to tell Chooi of Jetstar that if he (Chooi) assisted Airocean by helping Airlines GSA in a Jetstar procurement tender, then should Chooi need help from "us" [note: 43] in future, "we" [note: 44] would help him, Tay subsequently denied having given this instruction to Simon Ang. The 8/9/05 Board Minutes recorded Tay as having explained to Airocean's board of directors that he had made the aforesaid statement to CPIB while under severe strain due to having been kept without sleep for 36 hours by CPIB.

(c) Tay had been released on bail without having been charged with any specific offence, and had not been told what offence, if any, he would be charged with.

(d) In respect of the Subsidiaries, Airlines GSA had no dealings with Jetstar, while WICE Logistics had only negligible dealings with Lufthansa which involved only "a nominal profit of $750 from a turnover of approximately $5400 … amount[ing] to a mere 0.0025% of Airocean's annual turnover". [note: 45]

106 These additional particulars would have informed Airocean shareholders and assured them, contrary to Chan's hypothesis, that Tay was still in charge of Airocean, and that the CPIB Investigations were not concerned with any serious corrupt acts on the part of Tay in connection with the affairs of Airocean.

The DJ's findings on the element of recklessness

(1) The DJ's reasons for finding that the element of recklessness was made out

107 In respect of the Non-disclosure Charges, the DJ also found that Chong and Madhavan had consented to Airocean's reckless failure to disclose the Information. This finding was predicated on the threshold finding that Airocean was reckless in failing to disclose the Information. The DJ explained his reasons for so finding at [166] and [168] of the Judgment (reproduced at [33] above).

108 The DJ appears to have given two different reasons for finding recklessness on the part of Airocean. The first (see [166] of the Judgment) is that Airocean acted on the Oral Advice given by Imran without bothering to ask him for his reasons for giving such advice. Airocean's failure to ask for reasons was, in the DJ's view, a reckless act. In my view, this finding was a *non sequitur*. Airocean's failure to ask Imran about the reasons underlying the Oral Advice did not entail that Airocean was therefore reckless in relying on that advice. Where a client relies on legal advice from his lawyer without asking the latter for the reasons for his advice, if the legal advice turns out to be wrong in law, it may, of course, cause the client considerable problems or even financial ruin, but that would be a consequence of the legal advice being bad advice, and not of the client having deliberately taken the risk of the legal advice being incorrect. Indeed, clients have no duty to question their lawyer's advice and it would not be reasonable to expect or require them to do so, unless the advice is manifestly absurd, irrational or wrong. Airocean was far from being reckless in any sense of the word. That was why it sought legal advice immediately after it was confronted with the information of Tay being investigated by CPIB. Airocean acted properly and prudently in seeking legal advice on whether or not to disclose what it knew.

109 The second reason underlying the Judge's finding of recklessness on Airocean's part (see [168] of the Judgment) is the premise that Airocean knew full well that the Information was "clearly likely to affect the price or value of the shares in Airocean", and yet, did not disclose the Information. In my view, there was no basis for the DJ to conclude that Airocean had such knowledge. The more reasonable conclusion, consistent with Airocean's decision to seek legal advice from TRC, is that Airocean did not know whether the Information had to be disclosed pursuant to rule 703(1)(b) of the Listing Rules (read with s 203 of the SFA) and thus sought legal advice as it did not wish to take the risk of failing to make disclosure where disclosure was required.

(2) The meaning of "recklessly" for the purposes of s 203(2)

110 Since I have rejected the DJ's reasons for finding that Airocean was reckless in failing to disclose the Information, I now turn to consider whether this finding can nevertheless be supported

by factors other than those relied on by the DJ. I begin by considering the meaning of "recklessly" for the purposes of s 203(2).

111 The word "reckless" was examined by the House of Lords in *R v G and another* [2003] 4 All ER 765 ("*R v G*") in the context of s 1 of the Criminal Damage Act 1971 (c 48) (UK), which provides as follows:

> **1.—(1)** A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
>
> (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another —
>
> (*a*) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
>
> (*b*) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;
>
> shall be guilty of an offence.
>
> (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

112 The House of Lords interpreted the word "reckless" as bearing its pre-existing common law meaning (see *R v G* at [46] and [50]), which comprises two elements: (a) subjective awareness of a risk; and (b) unreasonableness on the part of the offender in taking that risk. I see no reason why the common law meaning should not apply to the word "recklessly" in s 203(2) of the SFA, and I proceed with my examination of the facts before me on that basis.

(3) Was Airocean reckless in not disclosing the Information?

113 With respect to the first element of subjective awareness of a risk that disclosure was required, the evidence clearly shows that Airocean was fully aware that if it did not disclose any materially price-sensitive information known to it, it could be in breach of rule 703(1)(b) of the Listing Rules. That was the reason why Airocean's directors decided to seek legal advice as to whether disclosure of the Information was necessary.

114 In this connection, it is necessary to distinguish between having knowledge of information and having knowledge of whether the information is likely to have a material effect on the price or value of a company's securities. The first kind of knowledge involves knowing a fact, past or present. The second kind of knowledge involves predicting a future fact. The likelihood of information materially affecting the price or value of a company's securities requires a prediction of how investors would react to the information if they were to know of it. Of course, some kinds of information are so damaging to the financial condition of a company or its future prospects that, as a matter of common sense, it is bound to materially affect the price of the company's securities (*eg*, information that a company has lost its only valuable franchise or has lost the bulk of its capital). The likely market impact of other kinds of information may, however, be less clear (*eg*, the impact of information that a company's CEO or COO is under criminal investigation, as the business of the company may not be totally reliant on its CEO or COO). Experience and the actual market impact of similar information in

the past may be of assistance in evaluating the probable outcome of disclosing the information in question. Securities analysts and other experts in studying the reaction of investors to certain kinds of favourable or unfavourable news about a company's securities or the stock market as a whole may also be of assistance. The correctness of the forecast or prediction is often validated or disproved, as the case may be, by actual market impact evidence, which is highly relevant. If such evidence shows no or little movement in the share price of the company concerned, it would be difficult for the court to disregard such evidence and accept an expert's evidence that the information should have impacted the company's share price, but did not for some reason or reasons which the expert is unable to pinpoint. It might even be irrational for the court to prefer expert evidence, and not the actual market impact evidence to the contrary, in these circumstances.

115 In the present case, the 8/9/05 Board Minutes confirm that Airocean's directors knew of the Information. But, they also show that Airocean's directors did not know or were not sure whether they had to disclose the Information, and such other explanatory information as might be relevant, under rule 703(1)(b). Madhavan has argued that Airocean had to act cautiously as any misjudged disclosure could be detrimental to Airocean and its investors. In my view, this was not an unreasonable position for Airocean to take in the circumstances of this case. It should be remembered that Airocean knew that its business with Jetstar and Lufthansa through the Subsidiaries was of negligible value, and that its only concern was that Tay could be charged for having offered a bribe of an unspecified nature to Chooi for a contract which its subsidiary, Airlines GSA, never got. Thus, to Airocean, the only negative information was Tay's admission to CPIB of having offered such a bribe. Airocean did not know the likely effect of this information on its share price. In this regard, it is worth noting that on the night before the 8/9/05 Board Meeting, Mr Rajah told Madhavan and Chong that the available information on the CPIB Investigations was too vague for him to formulate a view as to the nature of the investigations. In the light of the aforesaid factors and the pressing circumstances in which Airocean's directors had to make a quick decision as to whether or not to disclose the Information, it was not unreasonable for Airocean's directors to have reached the provisional view on 8 September 2005, as recorded in the 8/9/05 Board Minutes, that "technically no action need[ed] to be taken". [note: 46]

116 It is also my view that given the circumstances prevailing at the material time, it was not unreasonable for Airocean to have continued taking the risk of non-disclosure after the 8/9/05 Board Meeting and after receiving legal advice. Far from deliberately taking the risk of non-disclosure, Airocean considered it prudent to hedge that risk by seeking legal advice from a competent law firm, *viz*, TRC. This is not a case where TRC had advised Airocean that disclosure was required and Airocean had deliberately ignored such advice.

117 The substance of the Oral Advice given by Imran should also be noted. Imran's advice was that: (a) "the information and evidence available was vague"; [note: 47] (b) "it was difficult to assess whether or not [Airocean] needed to make an announcement"; [note: 48] and (c) "unless and until further information [became] available, *no disclosure need[ed] to be made at [that] stage*" [note: 49] [emphasis added] (see [17] above). Imran did not give specific advice on whether or not the Information was likely to materially affect the price or value of Airocean shares. But, this omission cannot be attributed to Airocean because its brief to TRC was wide-ranging and included the specific issue of whether disclosure of the Information was necessary. Imran did not testify that his advice went beyond the Oral Advice. Hence, there was no evidence to show what the scope of Imran's general advice was. In the circumstances, there was no reason for the DJ to hold that Airocean was reckless in acting on the Oral Advice without asking Imran for his reasons for giving such advice. To hold that Airocean acted recklessly in not questioning Imran about the basis of the Oral Advice is, in my view, wrong in law. It would imply that there was a duty on the part of Airocean to question the

Oral Advice, which would impose too onerous an obligation on any person seeking legal advice on whether or not to take a certain course of action.

118 In this connection, the DJ also accepted the Prosecution's submission that "it was no defence for Airocean to rely on legal advice as a justification for its breach of the law" (see the Judgment at [166]). The Prosecution submitted that: (a) an accused could not rely on wrong or bad legal advice as a defence to a criminal charge, unless the reliance was such that he did not have the requisite *mens rea* for the offence ("submission (a)"); and (b) an accused could not rely on legal advice to justify his position that "because the legal advice was that [he] need not do anything, therefore [he] need not do anything notwithstanding that not doing anything [was] a crime" ("submission (b)") (see the Judgment at [166]). The Prosecution cited the decision in *Sillitoe and Others v McGraw-Hill Book Company (UK) Ltd* [1983] FSR 545 ("*Sillitoe*") as authority for its submissions. In relation to submission (a), the DJ failed to appreciate that Chong and Madhavan were relying on the legal advice from TRC precisely to establish that Airocean did not have the *mens rea* of recklessness required by s 203 (as mentioned at [84] above, the Non-disclosure Charges against Chong and Madhavan were predicated on Airocean having committed the offence under s 203). In relation to submission (b), the DJ failed to appreciate that *Sillitoe* is not relevant in the present case. *Sillitoe* concerned an action for copyright infringement by importing an infringing article. The basis for the action was s 5(2) of the Copyright Act 1956 (c 74) (UK), which required proof that the defendant had knowledge that the making of the infringing article in question constituted a copyright infringement or would have constituted an infringement if the article had been made in the place into which it was imported. One of the defendant's arguments was that it had acted in reliance on legal advice that its actions did not constitute copyright infringement, even though it did not dispute that it had knowledge of the relevant facts (see *Sillitoe* at 556). The court rejected this argument on the ground that knowledge for this purpose referred to knowledge of the *facts* underlying the infringement (see *Sillitoe* at 557). It was in this context that the court held that the defendant, having known of the plaintiffs' complaints and the factual basis for the complaints, could not rely on legal advice that there was, as a matter of law, no copyright infringement. *Sillitoe* is not relevant for the simple reason that Chong and Madhavan were not relying on TRC's legal advice simply to justify Airocean's failure to disclose the Information. Instead, they were relying on that legal advice to show that Airocean had not acted recklessly in failing to disclose the Information because it was not unreasonable for Airocean to have relied on TRC's advice that "no disclosure need[ed] to be made at [that] stage". [note: 50]

119 I shall conclude this section of my judgment with the observation that the DJ did not make an express finding as to whether or not Imran did indeed give the Oral Advice to Madhavan. This is not a tenable position for a trial judge to take in relation to a question of fact upon which the conviction or acquittal of the accused depends. In my view, unless the DJ had cogent reasons to doubt the veracity of Imran's evidence that he gave the Oral Advice to Madhavan sometime in September 2005 (see [17] above), he should have accepted Imran's evidence as true because Imran was a prosecution witness. If the Prosecution did not accept Imran's evidence that he gave the Oral Advice to Madhavan, it should have impeached his credit. That the Prosecution did not do so means that not only was there nothing to contradict Imran's evidence, his evidence also corroborated Madhavan's testimony that he (Madhavan) received the Oral Advice.

My decision on the Non-disclosure Charges

120 For the above reasons, I conclude that: (a) there is insufficient reliable evidence to show beyond a reasonable doubt that the Information was likely to materially affect the price or value of Airocean shares; and (b) the DJ erred in holding that Airocean was reckless in not disclosing the Information. Accordingly, two essential elements of the Non-disclosure Charges have not been established. In the circumstances, I do not propose to consider whether Chong and Madhavan

consented to Airocean's failure to notify SGX of the Information.

Analysis of the DJ's findings on the Misleading Disclosure Charges

121 I turn now to the Misleading Disclosure Charges. The DJ convicted the Appellants of these charges under s 199(*c*)(ii) read with s 331(1) of the SFA (see [62] and [83] above, where s 199 and s 331(1) respectively are reproduced).

122 To make good these charges, the Prosecution had to prove that:

(a) Airocean made the 25/11/05 Announcement;

(b) the 25/11/05 Announcement was misleading in a material particular;

(c) the 25/11/05 Announcement was likely to have the effect of stabilising the market price of Airocean shares (which was the specific allegation set out in the charges);

(d) Airocean knew or ought reasonably to have known that the 25/11/05 Announcement was misleading in a material particular; and

(e) the Appellants consented to the s 199(*c*)(ii) offence committed by Airocean.

123 As the first requirement in [122] above is not disputed in the present case, I shall begin by examining the second requirement, *viz*, whether the 25/11/05 Announcement was misleading in a material particular.

Whether the 25/11/05 Announcement was misleading in a material particular

124 The DJ held that the 25/11/05 Announcement was misleading in a material particular for the reasons set out at [179] and [183] of the Judgment (reproduced at [35] above).

125 Those paragraphs of the Judgment show that the DJ considered that two material particulars had been omitted from the 25/11/05 Announcement. The first particular was that Tay was being investigated by CPIB. I have already held at [96] above that this particular was in fact disclosed in the 25/11/05 Announcement. The second particular was that the CPIB Investigations concerned two transactions involving the Subsidiaries. At [183] of the Judgment (reproduced at [35] above), the DJ held that the 25/11/05 Announcement was misleading because it tried to "distance Airocean and its officers as far away as possible from the allegations made by the [ST Article]". I pause here to note that the DJ appears to have misread the ST Article. All that the ST Article alleged was that Tay was under a CPIB probe. It made no mention whatever of Tay being investigated in connection with transactions involving the Subsidiaries.

126 In the Report, Chan treated the above two particulars as a single composite particular, *ie*, Tay was being investigated by CPIB in connection with two transactions involving the Subsidiaries (see paras 2(b), 6, 11, 15, 23, 24 and 25 of the Report). It is evident from [179] of the Judgment that the DJ accepted Chan's approach (see [35] above). At no time did the DJ consider whether the particular that the CPIB Investigations concerned two transactions involving the Subsidiaries, *without reference to the particular that those investigations also concerned Tay*, constituted a material particular *in itself*. In other words, the DJ did not consider whether the particular that the CPIB Investigations concerned two transactions involving the Subsidiaries, *taking this particular on its own*, was likely to have any impact on Airocean's share price in addition to the impact already caused by the particular

that the CPIB Investigations concerned Tay (which particular was, as just mentioned, disclosed in the 25/11/05 Announcement).

127 The DJ held that the particular that the CPIB Investigations concerned two transactions involving the Subsidiaries was a material particular because its omission from the 25/11/05 Announcement (together with the "omission" of the particular that the CPIB Investigations concerned Tay) "would cause the public to think that the investigations were into other companies in the Aircargo industry but not into Airocean … [or the] [S]ubsidiaries" (see [179] of the Judgment), and that in turn "would certainly impact on the decision of investors trading in Airocean shares as to whether they would sell or buy these shares" (see [183] of the Judgment).

128 In my view, the above finding by the DJ was wrong in law for two reasons. The first reason is that the DJ applied the wrong test of materiality (which he took from s 216) to s 199(*c*). Section 199(*c*) is not concerned with whether the information in question would influence common investors in deciding whether to subscribe for, buy or sell securities, but is instead concerned with whether the misleading *material* particular in question is likely to have the effect of (*inter alia*) stabilising the market price of the securities concerned. In other words, s 199(*c*) is not concerned with whether the particular that the CPIB Investigations concerned two transactions involving the Subsidiaries "would … impact on the decision of investors trading in Airocean shares as to *whether they would buy or sell* these shares" [emphasis added] (see [183] of the Judgment), which is a s 216 test. The decision of one investor to sell Airocean shares may be matched by the decision of another investor to buy Airocean shares, with the result that over a period of time, the misleading particular might not have a material effect on Airocean's share price.

129 The second reason why I find that the DJ erred in law is that, as I alluded to at [126] above, given that Tay's involvement in the CPIB Investigations was disclosed in the 25/11/05 Announcement (see [96] above), the DJ should have considered, but did not, whether the additional particular that the CPIB Investigations concerned two transactions involving the Subsidiaries would, taken on its own, be likely to have any impact on Airocean's share price in addition to the impact already caused by the particular that those investigations concerned Tay. Chan likewise did not consider this issue because he was asked to answer only the composite question (*viz*, the question of whether the information about Tay being investigated by CPIB in connection with two transactions involving the Subsidiaries was, taken collectively, a material particular), and this resulted in the DJ failing to make a finding on an important issue relevant to the Misleading Disclosure Charges.

130 On the available evidence, I find that there is, at the very least, a reasonable doubt as to whether the particular that the CPIB Investigations concerned, specifically, two transactions involving the Subsidiaries was sufficiently material to be likely to affect the price of Airocean shares in a significant way. The suggestion in the 25/11/05 Announcement that the CPIB Investigations concerned other companies in the air cargo industry was misleading, but it was not *materially* misleading. In my view, this conclusion is validated by the evidence of the market impact of the 2/12/05 Announcement, which, as accepted by the DJ, disclosed the fact that the CPIB Investigations concerned two transactions involving the Subsidiaries. I have already explained in some detail that the market impact evidence of the trades in Airocean shares during the short period after the 2/12/05 Announcement showed that the disclosure of the information set out in that announcement did not have a material effect on the price of Airocean shares (see [98] above).

131 Accordingly, I find that the DJ erred in law in finding that the 25/11/05 Announcement was misleading in a material particular. Of the two particulars which, in the DJ's view, should have been disclosed in that announcement (see [125] above), the particular that Tay was being investigated by CPIB was in fact disclosed in the announcement, whilst the particular that the CPIB Investigations

concerned, specifically, two transactions involving the Subsidiaries was not a material particular.

Whether the 25/11/05 Announcement was likely to have the effect of stabilising the market price of Airocean shares

132 In view of my conclusion that the 25/11/05 Announcement was not misleading in a material particular, it is not necessary for me to consider whether that announcement was likely to have the effect of stabilising the market price of Airocean shares as alleged in the Misleading Disclosure Charges. I shall nevertheless briefly consider this issue for completeness.

133 The DJ accepted Chan's opinion that the 25/11/05 Announcement was likely to have the effect of stabilising the market price of Airocean shares at a higher level than what their market price would likely have been "had the facts been truthfully and fully provided" (see the Judgment at [189] (reproduced above at [36])). The DJ rejected the Appellants' argument that the 25/11/05 Announcement did not have such a stabilising effect as Airocean's share price actually fell on the first trading day after the announcement was made. The DJ dismissed this argument on the ground, as explained by Chan, that Airocean's share price fell on that day "because the public did not believe what [Airocean] had said [in the 25/11/05 Announcement]" (see the Judgment at [190] (reproduced above at [36])), but instead believed the ST Article, which stated (*inter alia*) that Tay was "under [a] CPIB probe". [note: 51]

134 In my view, Chan's explanation was based on the incorrect premise that the 25/11/05 Announcement failed to disclose that Tay was being investigated by CPIB. This premise was incorrect because, as I stated earlier, the 25/11/05 Announcement, in clarifying the ST Article, did disclose that Tay was under investigation by CPIB. In my view, it would be reasonable to infer that investors were influenced by the 25/11/05 Announcement because it confirmed the information in the ST Article that Tay was under a CPIB probe. That would explain why the price of Airocean shares fell drastically on the first day of trading after the 25/11/05 Announcement. For these reasons, I am constrained to find that there is a reasonable doubt as to the correctness of Chan's explanation that Airocean's share price fell drastically that day because the public did not believe the 25/11/05 Announcement. This explanation had no factual basis and was inconsistent with the market impact evidence. No Airocean investor was called to give evidence on what he understood the 25/11/05 Announcement to have disclosed or not disclosed, nor was any Airocean investor called to give evidence that he did not believe what Airocean had said in the 25/11/05 Announcement. It bears reiteration that the 25/11/05 Announcement clarified, and thereby disclosed, that Tay was under investigation by CPIB, even though Tay had denied it in his earlier interview with *The Straits Times* (as reported in the ST Article). The sharp fall in Airocean's share price on the first trading day after the 25/11/05 Announcement must have been a direct reaction to that announcement, which confirmed that Tay was "under [a] CPIB probe" [note: 52] as reported in the ST Article, and not a result of investors believing the ST Article but not the 25/11/05 Announcement.

My decision on the Misleading Disclosure Charges

135 For these reasons, there is a reasonable doubt as to the correctness of Chan's opinion that the 25/11/05 Announcement was likely to stabilise Airocean's share price at a level higher than what it would otherwise likely have been if the two particulars mentioned at [125] above had been disclosed. Accordingly, I find that the DJ erred in convicting the Appellants of the Misleading Disclosure Charges. It has not been proved beyond a reasonable doubt that the 25/11/05 Announcement was misleading in a material particular and that it was likely to stabilise Airocean's share price.

136 In the circumstances, it will not be necessary for me to address the remaining issues as to:

(a) whether Airocean knew or ought reasonably to have known that the 25/11/05 Announcement was misleading in a material particular; and (b) whether the Appellants consented to the release of the 25/11/05 Announcement.

Analysis of the DJ's findings on the Insider Trading Charges

137 I turn now to the Insider Trading Charges against Chong. Chong was convicted of these charges under s 218 of the SFA for the reasons summarised at [37] above.

138 The elements of the offence of insider trading under s 218 of the SFA are as follows (see *Kevin Lew* at [23]):

(a) the defendant is a connected person ("element (a)");

(b) the defendant possessed information concerning the corporation ("element (b)");

(c) the information was not generally available ("element (c)");

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

(e) the defendant knew or ought reasonably to have known that the information was not generally available ("element (e)"); and

(f) the defendant knew or ought reasonably to have known that if the information were generally available, it might have a material effect on the price or value of the corporation's securities ("element (f)").

139 Section 218(4) of the SFA provides that once the Prosecution has proved element (a), element (b) and element (c), element (e) and element (f) are presumed to be satisfied until the contrary is proved. As for element (d), it is defined in s 216 of the SFA, which is set out at [142] below.

140 Chong concedes that he was a connected person (which is element (a)) and that the Information was not generally available (which is element (c)). He has appealed against his conviction on the Insider Trading Charges on the following grounds:

(a) He was not in possession of the Information because: (i) he was led to believe that neither Tay nor the Subsidiaries were the subject of the CPIB investigations; (ii) he did not understand what being released on bail meant or entailed; and (iii) he was not aware of the nature of the Information (*viz*, that it fell within s 216 of the SFA) because he had relied on legal advice that disclosure of the Information was not necessary.

(b) It was not shown that a reasonable person would expect the Information, if it were generally available, to have a material effect on the price or value of Airocean shares.

(c) The presumption under s 218(4) of the SFA that Chong knew that the Information was not generally available and that the Information, if it were generally available, might have a material effect on the price or value of Airocean shares did not arise because Chong was not in possession of the Information and it was not proved that the Information was materially price-sensitive.

(d) It was not proved that Chong either knew or ought reasonably to have known that the Information, if it were generally available, would be materially price-sensitive.

(e) There was no causal connection between the Information and Chong's trades in Airocean shares.

Whether Chong was in possession of the Information

141 In respect of element (b), I agree with the DJ's finding that Chong was in possession of the Information. The minutes of the 8/9/05 Board Meeting, which Chong attended, recorded that: (a) Tay had been questioned by CPIB in relation to two transactions between the Subsidiaries and Jetstar and Lufthansa; (b) Tay had been released on bail; and (c) Tay's passport had been retained by CPIB. The DJ also found that Chong had seen Tay's bail bond on 7 September 2005 (see the Judgment at [160]). I see no basis to overturn this factual finding.

Whether a reasonable person would expect the Information, if it were generally available, to have a material effect on the price or value of Airocean shares

142 *Vis-à-vis* element (d), I mentioned earlier that for the purposes of proving that a reasonable person would expect the inside information in question, if it were generally available, to have a "material effect on the price or value of securities" within the meaning of s 218, the Prosecution may rely on the deeming provision in s 216, which provides as follows:

Material effect on price or value of securities

216. For the purposes of this Division [*ie*, Division 3 of Part XII of the SFA], 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.

143 Section 216 *deems* information having the characteristic stated therein to satisfy the requirement of materiality set out in s 218. The s 216 test of materiality is based on trade sensitivity – *ie*, it is based on the likely influence of the information in question on *common investors* in deciding whether to subscribe for, buy or sell the securities concerned upon receiving the information. Economic theory posits that investors in securities markets generally act rationally when making decisions on whether to buy, sell or hold on to securities. It should also be noted that, as I stated at [60] above, the s 216 test is neither an exhaustive nor an exclusive test for determining whether the information in question satisfies the requirement of materiality set out in s 218. This follows from the observations of the WACA in *Jubilee Mines NL* at [58] in relation to s 1001D of the Australian Corporations Act 2001 (see [56] above).

144 The question that I have to consider where element (d) is concerned is whether the Information fell under either s 218 *read with s 216* (which looks at the *trade sensitivity* of information), or s 218 *read on its own* (which looks at the *price sensitivity* of information). The DJ held that the Information fell under s 218 read with s 216 (see the Judgment at [236]).

145 In his oral submissions before me, Chong's counsel contended that there was a reasonable doubt as to whether the Information was materially price-sensitive (*ie*, whether it fell under s 218 read on its own) as the Insider Trading Charges did not state that the Information would impair Tay's functions as the CEO of Airocean. He contended that Airocean's share price would only have been affected if there was such impairment. It was submitted that in the absence of such impairment, the

Prosecution's case rested simply on the premise that the information about CPIB investigating Tay in connection with two transactions of the Subsidiaries was *per se* materially price-sensitive information, and this was not the law. In support of his argument, Chong's counsel referred to the decision in *Kevin Lew*, where the Court of Appeal held (at [96] and [146(c)]) that in order to satisfy the requirement in s 218 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA (2006 Rev Ed)") that "a reasonable person would expect [the information in question] to have a material effect on the price or value of securities", it must be shown that there was "a *substantial* likelihood" [emphasis added] that the information would influence the common investor's decision on whether to subscribe for, buy or sell the securities concerned (s 218 of the SFA (2006 Rev Ed) is *in pari materia* with s 218 of the SFA).

146 In *Kevin Lew*, the Court of Appeal applied the meaning of "material" laid down by the United States Supreme Court ("the US Supreme Court") in *TSC Industries, Inc, et al, Petitioners, v Northway, Inc* (1976) 426 US 438 ("*TSC*"). In that case, the US Supreme Court was concerned with the meaning of the word "material" in rule 14a-9(a) of the General Rules and Regulations promulgated under the Securities Exchange Act 1934 15 USC (US) ("rule 14a-9(a)"), which reads as follows:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing *any statement which*, at the time and in the light of the circumstances under which it is made, *is false or misleading with respect to any material fact*, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading. [emphasis added]

147 At 449–450 of *TSC*, the US Supreme Court formulated the following test of materiality ("the *TSC* test"):

> … An omitted fact is material if there is a *substantial likelihood* that a reasonable shareholder would consider it important in deciding how to vote. … It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.
>
> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. … The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment. …
>
> [emphasis added]

148 It may be noted that the language of rule 14a-9(a) is broadly similar to the language of s 199 of the SFA in so far as the former uses the phrase "any statement which … is *false or misleading with respect to any material fact*" [emphasis added]. However, in *Kevin Lew*, the court did not apply the *TSC* test to s 199 of the SFA (2006 Rev Ed), which was not relevant in that case, but instead applied

it to s 218 read with s 216 of that Act (ss 199 and 216 of the SFA (2006 Rev Ed) are likewise *in pari materia* with the corresponding sections of the SFA). The court said at [96] of *Kevin Lew*:

> 96 We note that s 216 of the SFA [(2006 Rev Ed)] does not expressly state the degree of likelihood that the information must have of influencing the Common Investor before that information can be regarded as having a material effect on the price or value of the shares in question. *We are of the view that, in accordance with the* TSC *test, there must be "a substantial likelihood" that the information will influence the Common Investor in order for a reasonable person to consider that information as having a material effect on the price or value of the shares.* It goes without saying that, in applying the *TSC* test, the influence cannot be *de minimis*. [emphasis in original omitted; emphasis added in italics]

149 At [146(c)] of *Kevin Lew*, the Court of Appeal made it clear that it was reading a requirement of substantiality into s 216 of the SFA (2006 Rev Ed):

> In so far as *Issue 3* was concerned (*ie*, whether, if the Information [*ie*, the information in issue in *Kevin Lew*, as opposed to the Information as defined at [5] above] *were* generally available, a reasonable person would expect the Information to have a "material effect" on the price or value of WBL shares under s 216 of the SFA [(2006 Rev Ed)]), we agreed with the Judge that the correct legal test was the *TSC* test as defined at [95] above. Indeed, parties did not dispute that the *TSC* test is the correct test to apply under Issue 3. Rather, parties disputed how much weight should be accorded to Market Impact Evidence (as defined in [97] above), with Lew [the offender], in particular, arguing that Market Impact Evidence should be treated as *conclusive* in demonstrating whether the Information was material or not. For the reasons given at [102]–[106] above, we rejected this approach and held that, whilst Market Impact Evidence may be a *relevant* factor in determining whether the Information was material, it is clearly not conclusive in and of itself given s 216 of the SFA [(2006 Rev Ed)] and the *TSC* test. The proper role of expert evidence, in the context of s 216 of the SFA [(2006 Rev Ed)], should be to assist the court in establishing how *a reasonable person, at the time of the alleged insider trade*, would have expected the information to influence a Common Investor, and *not* to analyse in minute detail what, on hindsight, had actually happened to the market upon the release of the information.
>
> Further, we held that the Information here was material within the meaning of s 216 of the SFA [(2006 Rev Ed)] (*ie*, a reasonable person would have expected the Information to have a "material effect" on the price or value of WBL shares) because ***there was a substantial likelihood that the Information would have influenced the Common Investor to buy or sell WBL shares*** . While we had some reservations with regard to the materiality of the Loss Forecast *in and of itself*, this was not crucial since we agreed that the Significant Impairment Prospective and therefore the Significant Overall Loss Forecast were material. The Market Impact Evidence in this case supported the conclusion that there was a ***substantial*** likelihood that the Information would have influenced the Common Investor to buy or sell WBL shares, although, as we held earlier, Market Impact Evidence is *not conclusive proof* of materiality under s 216. Therefore, the Information satisfied the requirement under s 218 of materiality …
>
> [emphasis in original in italics; emphasis added in bold italics]

150 Even though I was a member of the court that decided *Kevin Lew*, I am now of the view that the *TSC* test is not relevant, and should not have been applied to s 216 of the SFA (2006 Rev Ed) to make the test of materiality more rigorous than the test set out by the express words of that provision. The ruling on the applicability of the *TSC* test to s 216 merits reconsideration when a case involving this section comes before the Court of Appeal again. Section 216 enacts a statutory test of

"likely" and not "substantially likely" to determine whether the information concerned is trade-sensitive such that it satisfies the requirement of materiality set out in s 218. It would be contrary to the legislative purpose to add the element of substantiality to the test. I should add that the *TSC* test is also not relevant in the context of s 199 of the SFA and rule 703(1)(b) of the Listing Rules for a different reason. As I have noted above, s 199 and rule 703(1)(b) are premised on the likely material effect of information on the *price or value* of securities. They are not premised on the likely behaviour of common investors in deciding whether to subscribe for, buy or sell securities, which is the statutory test that s 216 provides.

151 Nevertheless, since I am bound by *Kevin Lew*, I shall now consider whether, applying the *TSC* test to element (d), a reasonable person would expect the Information, if it were generally available, to have a material effect on the price or value of Airocean shares – *ie*, whether, on the evidence adduced by the Prosecution, there is a *substantial* likelihood that the Information would influence common investors in deciding whether or not to subscribe for, buy or sell Airocean shares.

152 For this purpose, I put aside Chan's expert opinion, which made no distinction, in substance, between the meaning of the word "material" as used in rule 703(1)(b) (in the context of the phrase "materially affect") on the one hand, and as used in s 216 and s 218 on the other.

153 There is, in my view, sufficient objective evidence in the form of actual market impact evidence to enable me to decide whether the Information fell under either s 218 read on its own, or s 218 read with s 216. In the Report, Chan relied on the volume and the price of Airocean shares transacted on the first day of trading after the 25/11/05 Announcement (which disclosed the fact that Tay was being investigated by CPIB (see [96] above)) as well as on the first day of trading after the 2/12/05 Announcement (which disclosed, *inter alia*, the additional information that the CPIB Investigations concerned two transactions involving the Subsidiaries) to support his conclusion that the Information "was price sensitive as [it] was likely to influence the investment decision of a reasonable person trading in [Airocean] shares" [note: 53] (see para 23 of the Report (reproduced at [79] above)). I should point out here that the cumulative effect of the 25/11/05 Announcement and the 2/12/05 Announcement was to disclose only that part of the Information which comprised the Tay/Subsidiaries Information (*ie*, the information that Tay was being investigated by CPIB in relation to two transactions involving the Subsidiaries); the Bail Information (as defined at [72] above) was never disclosed in any of the announcements made by Airocean in connection with the CPIB Investigations. With regard to the 25/11/05 Announcement, the trading volume for Airocean shares on 28 November 2005 (the first trading day after the release of that announcement) was 17,585,000 shares, which was the highest volume transacted in a single day since 23 September 2005 (trading volume of 19,700,000 shares). Airocean's share price fell by 12% (1.5 cents) from $0.125 to $0.11 on 28 November 2005. According to Chan, a 12% fall in share price is considered a material price movement (see the Report at para 20 (reproduced at [79] above)). With regard to the 2/12/05 Announcement, the volume of Airocean shares transacted on 5 December 2005 (the first trading day after the release of that announcement) was 15,597,000 shares, the second highest volume transacted in a single day since 28 November 2005. Airocean's share price fell by 17.4% (2 cents) from $0.115 to $0.095. According to Chan, a 17.4% fall in the share price is considered a material price movement (see the Report at para 22 (likewise reproduced at [79] above)). However, what is interesting about these two sets of figures is that Airocean shares closed at $0.115 on the last trading day before the 2/12/05 Announcement (*viz*, 1 December 2005), which was about 4.6% *higher* than the lowest price of $0.11 on 28 November 2005.

154 It bears emphasis that the market impact evidence mentioned above is only for the first day of trading after each of the aforesaid announcements was made. What Chan failed to take into account was the following evidence:

(a) With regard to the 25/11/05 Announcement, Airocean's share price recovered and closed at $0.125 on 29 November 2005 and at $0.12 on 30 November 2005 on a trading volume of 9,773,000 shares and 3,974,000 shares respectively.

(b) With regard to the 2/12/05 Announcement, the traded price of Airocean shares fluctuated in the following manner:

(i) the share price recovered and closed at $0.115 on 6 December 2005;

(ii) the share price reached a high of $0.125 on 7 December 2005, and closed at $0.12 on that day;

(iii) the share price reached a high of $0.12 on 8 December 2005, and closed at $0.115 on that day; and

(iv) the share price reached a high of $0.12 from 12 to 14 December 2005, and closed at $0.115 (on 12 and 13 December 2005) and at $0.11 (on 14 December 2005).

155 It can be seen from the foregoing market impact evidence that the Tay/Subsidiaries Information (which, as mentioned earlier, was the only part of the Information that was ultimately disclosed) did *not* have a material effect on the price of Airocean shares over a short period of time (as shown by the traded prices from 28 November to 1 December 2005, and from 5 to 14 December 2005). Although the market impact evidence is not conclusive of whether the Tay/Subsidiaries Information was *likely* to have a material effect on Airocean's share price, the fact that the market impact evidence showed no material change in Airocean's share price is an important consideration. In the absence of any explanation as to why there was no material change in Airocean's share price, it would be reasonable to infer that there was no likelihood of the Tay/Subsidiaries Information having a material effect on Airocean's share price, unless the market impact evidence can be explained away by other factors. In the circumstances, I find that the Tay/Subsidiaries Information did not fall under s 218 read *without* s 216 – *ie*, it was not materially price-sensitive information.

156 However, I find that the market impact evidence shows that the Tay/Subsidiaries Information did fall under s 218 read *with* s 216 (as interpreted in *Kevin Lew*) – *ie*, it was trade-sensitive information. The sharp increase in the volume of Airocean shares transacted on the first trading day after the 25/11/05 Announcement and on the first trading day after the 2/12/05 Announcement indicate that the Tay/Subsidiaries Information had a substantial likelihood of influencing common investors in deciding whether to buy or sell Airocean shares. I note that the changes in trading volume after the 2/12/05 Announcement might also have been caused or contributed to by the disclosure in that announcement of the CAD Investigations (see [102] above). This factor does not, however, explain the sharp changes in trading volume immediately after the 25/11/05 Announcement.

157 Accordingly, I agree with the DJ that the Tay/Subsidiaries Information was information which a reasonable person would expect, if it were generally available, to have a "material effect on the price or value of securities" under s 218 read with s 216.

Whether Chong knew or ought reasonably to have known that if the Information were generally available, it might have a material effect on the price or value of Airocean shares

158 I turn now to consider element (f) in relation to the Insider Trading Charges. As noted above, s 218(4) of the SFA provides that a defendant would be rebuttably presumed to know that the

information in question, if it were generally available, might have a material effect on the price or value of the securities of the company concerned once it has been shown that: (a) the defendant is a connected person *vis-à-vis* that company; (b) the defendant possessed information concerning that company; and (c) the information was not generally available (see [139] above).

159 I have earlier expressed my agreement with the DJ's finding that Chong was in possession of the Information (see [141] above). On that basis, and given that Chong concedes that he was connected with Airocean and that the Information was not generally available (see [140] above), it follows that Chong is presumed to have known that if the Information were generally available, it might have a material effect on the price or value of Airocean shares. I agree with the DJ's finding that Chong has not rebutted this presumption (see the Judgment at [237]–[238]). I thus uphold Chong's conviction on the Insider Trading Charges.

Summary of my decision on the appeals against conviction

160 For the reasons given above, I set aside the convictions of Madhavan and Chong on the Non-disclosure Charges. I also set aside the convictions of all the Appellants on the Misleading Disclosure Charges. The related sentences imposed by the DJ for the Non-disclosure Charges and the Misleading Disclosure Charges are set aside. Where Madhavan and Ong are concerned, I also set aside the disqualification orders imposed on them in the court below.

161 However, I affirm the conviction of Chong on the Insider Trading Charges. I shall now consider Chong's appeal against his sentence and his disqualification *vis-à-vis* these charges.

Chong's appeal against sentence and disqualification *vis-à-vis* the Insider Trading Charges

The sentence imposed by the DJ

162 Chong was convicted of insider trading in Airocean shares for having sold 1,000,000 Airocean shares on 26 September 2005, 500,000 Airocean shares on 27 September 2005 and 515,000 Airocean shares on 28 September 2005 at $0.205 per share for a net total sum of $411,804.79. The DJ accepted the Prosecution's submission that Chong had avoided a total loss of $191,450 (see the Judgment at [258]). Chong was sentenced to two months' imprisonment on each of the Insider Trading Charges, with two of the sentences to run consecutively, thus making a total of four months' imprisonment in effect.

The usual sentence for insider trading offences

163 The DJ sentenced Chong to imprisonment even though he accepted that, hitherto, the District Courts had generally imposed fines for insider trading offences which were not of an egregious nature (see the Judgment at [256]). There was an exception in the egregious case of *Public Prosecutor v Chen Jiulin* District Arrest Case No 23240 of 2005 ("*Chen Jiulin*"). The accused in that case ("Chen"), who was at the material time the CEO and managing director of China Aviation Oil (S) Corporation ("CAO") as well as a vice-president of CAO's parent company, China Aviation Oil Holding Corporation ("CAOHC"), procured CAOHC to sell its 15% stake in CAO while he was in possession of information that CAO was facing market losses of at least US$180m. Chen was sentenced to four months' imprisonment after entering a guilty plea. In contrast, a fine was imposed in the related case of *Public Prosecutor v Jia Changbin* District Arrest Cases Nos 23256 and 23527 of 2005. The accused in that case ("Jia"), who was a director and non-executive chairman of CAO as well as the president of CAOHC at the material time, had consented to the transaction procured by Chen while in possession of the same information. Jia pleaded guilty to a charge of insider trading and was fined the statutory

maximum amount of $250,000.

164 Other insider trading cases where the District Courts have imposed fines are:

(a) *Public Prosecutor v Joanna Yeo* District Arrest Case No 5259 of 2005, where the accused pleaded guilty to one charge of insider trading and consented to two similar charges being taken into consideration. The accused was the executive director, chief financial officer and company secretary of Asiatravel.com Holdings Ltd ("AHL"). Together with other AHL officers, she attended a meeting with Valuair Limited ("Valuair"), at which Valuair agreed to a US$3.5m investment by AHL. The following day, she sold 100,000 AHL shares in her trading account at $0.355 per share. AHL announced its deal with Valuair five days later. The statement of facts does not state the amount of profit that the accused made or the amount of loss that she avoided. However, the statement of facts explains that AHL's share price rose by 5.6% after the deal was announced. The share price subsequently fell and closed at $0.435, which was 3.3% lower than the previous day's closing price. AHL's share price continued to fall over the next three days. The accused was sentenced to a fine of $60,000 (in default, six months' imprisonment) for her insider trading offence.

(b) *Public Prosecutor v Ang Luck Seh* District Arrest Case No 6008 of 2009, where the accused pleaded guilty to one charge of insider trading and consented to another similar charge being taken into consideration. The accused was the executive director of AP Oil International Limited ("AP Oil"). He purchased 85,000 AP Oil shares while in possession of information that AP Oil had signed two sale and purchase agreements worth US$355.5m, which information had yet to be disclosed to the public. He was sentenced to a fine of $80,000 (in default, five months' imprisonment). The statement of facts does not reveal the amount of profit that the accused made or the amount of loss that he avoided.

(c) *Public Prosecutor v Koh Soe Khoon* [2006] SGDC 84, where the accused pleaded guilty to three charges of insider trading and agreed to three other similar charges being taken into consideration. The accused was the managing director and executive chairman of Brilliant Manufacturing Limited ("BML"). Between 18 November 2003 and 2 December 2003, the accused knew that BML's full year net profit had increased by 203% and that BML intended to declare a higher dividend than that declared in the previous year. It was not disputed that this information was material and was not generally available. While the accused was in possession of such information, he bought 150,000, 100,000 and 100,000 BML shares for his son's account at an average price of $0.60333, $0.575 and $0.58 respectively. Upon the release of the information, BML's share price rose to $0.725. Based on these prices, the accused made a paper gain of $47,800, but only $37,950 was taken into consideration for sentencing. He was fined $160,000 (in default, 16 months' imprisonment) for each of the three insider trading offences.

165 The DJ explained his decision on Chong's sentence for the Insider Trading Offences at [258] of the Judgment as follows:

258 … The defence had submitted that between the period when [Chong] sold these shares up to the announcement on 25th November 2005, there was a lapse of 2 months and that during these 2 months, the price of Airocean shares had fluctuated due to extraneous circumstances such as market sentiment. There was also a substantial downloading of shares by another director [Dunn] (23.83 million shares) over a short period of time and the share prices of Airocean had dropped significantly during the period from 8 to 17 November 2005 i.e. the share price of Airocean shares had fallen from $0.16 on 8 November to $0.115 on 17 November 2005. The defence submitted that the quantum of the losses avoided should not be an important

consideration for the assessment of fines to be imposed by the court. However, profits made and losses avoided are important factors which the court would take into consideration in assessing sentence for insider trading offences. This stems from the motive for the buying and selling of shares arising from … access [to] the confidential material information in the company especially … where access is due to the connection of the offender with the company. The court considered that in this case, [Chong] had obtained the information of the CPIB investigations into Airocean's officers and the transactions involving [the Subsidiaries] by virtue of his position as the Chief Operating Officer and as a director in Airocean. He has, by having access to this information and selling [a] substantial amount of shares (about 2 million shares) abuse[d] his position and fiduciary relationship with the company. Moreover, the court had found the information in this case to be material information which would have an impact on investors trading in Airocean shares. Further, the exploitation of confidential information in this case would undermine the public confidence in the transparency and integrity of the securities market. As submitted by the prosecution, there is an avoidance of losses amounting to $191,450 arising out of [Chong's] sale of the shares. In view of these aggravating factors, the court agrees with the prosecution's submission that it would be appropriate in the present case to impose a custodial sentence.

166 Chong has argued that the cases involving other provisions of the SFA as well as the cases from other jurisdictions in which custodial sentences were imposed for insider trading are not applicable to his circumstances. He cites as an example *Ng Geok Eng v Public Prosecutor* [2007] 1 SLR(R) 913 (one of the cases relied on by the Prosecution), a market rigging case where the market misconduct involved more culpable conduct. Similarly, Chong submits, apart from the different sentencing norms and statutory provisions applicable in England and Australia, the culpability of the offenders in English and Australian cases where custodial sentences were imposed was also much higher. Chong further argues that the loss which he avoided was not $191,450, and that it is difficult to compute accurately exactly how much loss he avoided since there was a lapse of approximately two months between his sale of Airocean shares in September 2005 and the release of the 25/11/05 Announcement and the 2/12/05 Announcement. Chong further points out that other factors were also responsible during this intervening period ("the Intervening Period") for lowering the price of Airocean shares. For example, Dunn had reduced his investment in Airocean from 24,330,000 shares to 500,000 shares between 8 and 17 November 2005. In view of all these circumstances, Chong submits, a fine of between $40,000 and $60,000 for each of the Insider Trading Charges would be appropriate.

My decision on Chong's sentence

167 It is well established that an appellate court will not disturb the sentence of a lower court unless: (a) the lower court erred with respect to the proper factual basis for sentencing; (b) the lower court failed to appreciate the materials placed before it; (c) the sentence is wrong in principle; or (d) the sentence is manifestly excessive or manifestly inadequate (see, *inter alia*, *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [12]).

168 In my view, the DJ erred in sentencing Chong to two months' imprisonment on each of the Insider Trading Charges for the following reasons.

169 First, he misdirected himself on the gravity of Chong's conduct and also the quantum of losses avoided by Chong.

(a) At [258] of the Judgment (reproduced at [165] above), the DJ characterised all the factors mentioned therein as *aggravating* factors. Those factors were, however, not aggravating factors. They were merely factors which satisfied the ingredients of the offence of insider

trading. The DJ also did not consider other aspects of Chong's conduct which showed that the gravity of his conduct was not as serious as is suggested by [258] of the Judgment. For example, Chong did not sell the Airocean shares in question immediately or shortly after he came into possession of the Information. He delayed for almost three weeks, which supports his argument that his sale of those shares was not planned to avoid a loss which he had anticipated would occur and that he had instead sold those shares because he thought that things had settled down. Moreover, Imran's advice that no disclosure of the CPIB Investigations was necessary as at September 2005 would still have been in his mind when he sold those shares.

(b) The DJ was also wrong in accepting the Prosecution's submission that Chong had avoided a loss of $191,450 (see the Judgment at [258]), which amount was derived by using the traded price of Airocean shares after the 2/12/05 Announcement was released. This was an overly simplistic way of computing the loss avoided by Chong and failed to take into account the general decline in Airocean's share price during the Intervening Period. Airocean's share price declined from approximately $0.20 to $0.21 during the period from 25 to 27 September 2005 to a low of $0.125 on 24 November 2005. The general decline in Airocean's share price was, in fact, highlighted in the ST Article. Although it is impossible to say what exactly caused the decline in Airocean's share price, there is some indication from what was said in the ST Article that Airocean's share price had also declined for other reasons which had nothing to do with the CPIB Investigations (for example, the ST Article noted that Airocean's efforts to enter into a joint venture to start a budget airline in China had failed). Furthermore, the 2/12/05 Announcement also contained another piece of price-sensitive information in addition to the Tay/Subsidiaries Information, *viz*, the information about the CAD Investigations. Hence, the Prosecution's computation of the loss avoided by Chong is unlikely to be correct as it would not be possible to determine the extent to which the fall in Airocean's share price during the Intervening Period was due to the disclosure of the Tay/Subsidiaries Information (which, as stated earlier, was the only part of the Information that was ultimately disclosed).

170 Secondly, in departing from the existing sentencing norm of a fine for non-egregious insider trading offences, the DJ preferred the sentencing approach of the courts in jurisdictions such as Australia and England. While I agree that insider trading can damage a securities market's reputation for integrity as well as affect its growth and development, not all insider trading offences call for custodial sentences. Such offences may be committed in many ways, for different ends, and with different consequences to investors and the securities market.

171 For instance, in *Regina v Rivkin* [2003] NSWSC 447 ("*Rivkin*"), where a custodial sentence was imposed for insider trading, the unlawful conduct of the offender ("Rivkin") was found by the court to have been egregious. Furthermore, a simple reference to the sentence imposed in that case is inappropriate because of the different sentencing regime that the court utilised. Rivkin was described as "a most experienced stockbroker" (see *Rivkin* at [48]), having been a member of the Sydney Stock Exchange for over 30 years. He had "deliberately decided to arrange the purchase of the shares, notwithstanding that he had received an express caution from Gerard McGowan [the chief executive officer of Impulse Airlines, the person from whom Rivkin had obtained the inside information] that he should not trade in [those] shares" (see *Rivkin* at [50]). Even then, the court held that the aim of general deterrence would be served if Rivkin was sentenced to merely *periodic detention* in the form of either mid-week or weekend detention at a detention centre (see *Rivkin* at [65]). Rivkin was also fined A$30,000 (see *Rivkin* at [69]). In my view, *Rivkin* is not an appropriate sentencing precedent for the present case.

172 In the English cases where custodial sentences were imposed for insider trading, the culpability of the offenders was likewise much higher than that of Chong. In *R v Spearman* [2003] EWCA Crim

2893, there was a conspiracy among the three co-defendants. They were sentenced to between 18 to 21 months' imprisonment on appeal for having made profits of £36,000, £100,000 and £200,000 respectively. In *R v McQuoid* [2009] 4 All ER 388, the offender ("McQuoid") was a solicitor and general counsel of a public limited company listed on the London Stock Exchange. He acquired inside information about a proposed takeover and passed the information to his father-in-law, who traded on it and made a profit of £48,919.20, half of which was later paid to McQuoid. The facts of this case are not fully reported in the published judgment, but it appears from a press release from the United Kingdom Serious Fraud Office that McQuoid and three other offenders had conspired together as well as with other persons for almost four years, between 1 June 1997 and 28 April 2001, to deal in securities on the London Stock Exchange using inside information given to them by an insider of a listed company. McQuoid was sentenced to eight months' imprisonment.

173 Before me, the Prosecution has submitted that I should follow the sentencing approach of V K Rajah JA (sitting as a High Court judge) in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 ("*Able Wang (Sentence)*"). In that case, Rajah JA departed from the sentencing norm of a fine for the offence of false or misleading disclosure under s 199 of the SFA (2006 Rev Ed) (see the Judgment at [253]).

174 The accused in *Able Wang (Sentence)* was convicted of the offence under s 199(*b*)(i) of the SFA (2006 Rev Ed) for posting on an Internet forum a false statement that CAD had raided the office of Datacraft Asia Limited. The case concerned a particularly egregious instance of dissemination of false information for the purpose of self-gain. The accused committed the offence in a brazen manner and in circumstances where the potential harm to the public could have been "enormous and devastating" (see *Able Wang (Sentence)* at [24]). This led Rajah JA, after noting that the Subordinate Courts had established "a *de facto* benchmark sentence of a fine … for most offences under Division 1 of Pt XII of the SFA [(2006 Rev Ed)]" (see *Able Wang (Sentence)* at [17]), to decide that a fine was inappropriate in the circumstances. It was in this context that Rajah JA said (see *Able Wang (Sentence)* at [29]):

> … White-collar crimes, especially financial market-related crimes, often have wider ramifications and repercussions on many more persons and financial institutions as well as a far more significant impact on market confidence than offences against the person which by and large entail more limited consequences. Sentencing judges should painstakingly seek to ensure that the punishment adequately addresses the harm caused by the offence in these circumstances. ...

I find nothing in this passage to suggest that Rajah JA was saying that the then sentencing norm for securities market-related offences was no longer appropriate for *every* such offence.

175 In my view, Chong's insider trading offences were not sufficiently serious to justify a sudden and unexpected departure from the existing sentencing norm. If *Able Wang (Sentence)* did indeed signal a change in the sentencing norm with effect from 11 March 2008 (the date on which that judgment was released) for all securities market-related offences, including the offence of insider trading, a justification must be found before the altered approach can be applied *retrospectively* to Chong's insider trading offences, which were committed in different circumstances in 2005. I am not able to find such a justification in the present case. Moreover, there is a serious objection, in terms of fairness and the principle of just deserts, to the retrospective application of sentencing norms to offences committed before those norms are established. The principle of deterrence has no application in such a situation as the offence in question has already been committed. Such a situation raises, instead, the issue of whether an offender should be sentenced based on the sentencing guidelines in force at the time of the commission of the offence, or based on the sentencing guidelines in force at the time of sentencing. This issue can have significant impact on an

offender where the sentencing guidelines have been altered to his detriment between the time he committed his offence and the time of sentencing.

176 In England, the English Court of Appeal held (*per* Lord Judge CJ) in *R v H* [2011] EWCA Crim 2753 that the relevant date for determining the sentence was "*the date of the sentencing hearing*, on the basis of the legislative provisions *then current*, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts" [emphasis added] (see *R v H* at [47(a)]). The court's reason for taking this approach was that "it [was] wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 [*viz*, the time of sentencing in *R v H*] what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed" (see *R v H* at [47(b)]). *R v H* concerned a series of eight "historic" or "cold" sexual crimes which, for various reasons such as a delay in reporting the crimes, came to light only several years after they were committed. For example, one of the offences took place from 1966 to 1979, but a complaint was made to the police only in 2010 (see *R v H* at [49]–[50]). It should be noted that the statements from *R v H* quoted earlier in this paragraph assume that there are definitive sentencing guidelines in force as at the date of sentencing.

177 In Australia, a different approach was taken by a specially-constituted five-member New South Wales Court of Criminal Appeal ("NSWCCA") in *R v MJR* (2002) 54 NSWLR 368 ("*MJR*"). The question before the NSWCCA in that case was whether the offender should be sentenced according to the sentencing practice in force at the time of the commission of the offence, or according to the more severe sentencing regime that had since been adopted by the time of sentencing (see *MJR* at [1]). The court concluded (by a majority of 4:1) that the sentencing practice as at the date of the commission of the offence should be applied (see *MJR* at [31] (*per* Spigelman CJ), [71] (*per* Grove J) and [105] (*per* Sully J, who concurred only because a prior NSWCCA precedent had "stood unreversed since 1993" and had been consistently followed in subsequent decisions of the NSWCCA)). The Northern Territory courts take a similar view as the majority of the NSWCCA in *R v H*, but with some qualifications as set out in the following passage from *Green v The Queen* (2006] 205 FLR 388 ("*Green*"):

> 45 As is not unusual in the criminal law, the considerations founded in public policy do not all point in the same direction. There is a tension between those considerations which requires resolution through the application of fundamental principles of "justice and equity" while retaining sufficient discretion in a sentencing court to resolve practical issues which necessarily arise when sentencing many years after the commission of an offence. *Balancing the competing interests, and applying those fundamental principles, in my opinion, speaking generally, when changing sentencing standards have resulted in penalties increasing between the commission of the crime and the imposition of sentence, and in circumstances* ***where the delay is not reasonably attributable to the conduct of the offender*** *, a sentencing court should, as far as is reasonably practicable, apply the sentencing standards applicable* ***at the time of the commission of the offence*** *.* As Mason CJ and McHugh J said, the offender has "an entitlement" to be sentenced "in conformity with the requirements of the law as it then stood".
>
> 46 The view I have expressed is ***subject to important qualifications*** . First, the general principle is not an "inflexible rule". If good grounds exist, it may be appropriate to apply current sentencing standards. Second, the general principle can be applied only if it is reasonably practicable to do so. If the available evidence fails to establish a change in sentencing standards between the commission of the offence and the time of sentencing, the court will be left with no alternative but to apply current standards.

> 47 There is a third qualification. Statutory changes in sentencing regimes can complicate the application of the general principle as a matter of practicality and they might dictate that the general principle has been qualified or is inapplicable. …
>
> [emphasis added in italics and bold italics]

178 In the Hong Kong case of *HKSAR v Mok Yiu Kau* [2007] HKCA 341 ("*Mok Yiu Kau*"), the sentencing judge departed from the prevailing sentencing guidelines for the offence of trafficking in ketamine (see *Mok Yiu Kau* at [2]). On appeal, the Court of Appeal of the Hong Kong Special Administrative Region had to consider whether the sentencing judge was correct to have taken the view that the more severe sentencing guidelines in force at the time of sentencing should be applied against the applicant even though the sentencing guidelines prevailing at the time of the offence would have warranted a lower sentence (see *Mok Yiu Kau* at [3]). The applicant argued that the sentencing judge's approach was a breach of Art 12(1) of the Hong Kong Bill of Rights Ordinance (Cap 383) ("the HK Bill of Rights"), which provides as follows:

> … Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. …

The court held that the sentence imposed by the sentencing judge should be adjusted to reflect the guidelines that prevailed at the time of the commission of the offence (see *Mok Yiu Kau* at [8]):

> 8. The fact of the matter is that the courts have in practice adopted a guideline tariff. Furthermore, we are informed that in relation to the review to be heard later this year, to which we have referred, the respondent defendant in that particular case has expressly been assured that any resulting upward adjustment in the tariff for ketamine offences will not affect the sentence imposed in his case. In the circumstances, we take the view that the sentence imposed upon this applicant should be adjusted to reflect the guideline-influenced practice that prevailed at the time that he committed this offence. …

It may be that the Hong Kong position is not analogous to that at common law by reason of Art 12(1) of the HK Bill of Rights.

179 In the United States, the US Supreme Court unanimously held in *Miller v Florida* (1987) 482 US 423 ("*Miller*") that it was contrary to the *ex post facto* clause in Art 1 of the United States Constitution to apply sentencing guidelines to offences committed *before* the guidelines became effective (see *Miller* at 435). Again, the analogy is not appropriate as *Miller* was a case concerning statutory guidelines.

180 As far as local sentencing practices are concerned, the cases discussed in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at paras 13.088–13.090 show that there is no consistency in the approach of the local courts *vis-à-vis* the retrospective application of sentencing norms or guidelines to "old" offences (*ie*, offences committed before the implementation of the sentencing norms or guidelines in force at the time of sentencing).

181 In my view, there is no inflexible rule that current sentencing guidelines or principles cannot be applied to "old" offences in any circumstances. Nevertheless, the general principle ought to be that an offender should not be punished more severely than other offenders who committed the same offence (or an offence falling within the same category of offences) before the implementation of new guidelines providing for heavier sentences for that offence (or that category of offences). This principle is fair and just, and gives equal protection of the law to offenders of equal or similar

culpability. If the sentencing norm for an offence is to be departed from to the detriment of the offender (*eg*, from a fine to imprisonment and/or caning), it should only be done in circumstances where specific or general deterrence is needed to check the rise of particular types of offences. Even then, there is no reason why the courts should not, whenever possible, forewarn would-be offenders of the new sentencing guidelines or even benchmarks. Although it is not common, our courts have done this from time to time, *eg*, in *Panneerselvam s/o Arunasalam v Public Prosecutor* Magistrate's Appeal No 21 of 2008 (see Selina Lum, "Risk $3k fine for feeding monkeys" *The Straits Times* (7 May 2008)).

182 The practice of not applying new sentencing guidelines to "old" offences without any kind of forewarning is also consistent with the well-established practice of our courts in not taking into account heavier punishments prescribed by legislation for the same offence (or an offence of the same category) committed prior to such legislative changes. For instance, in *Seow Wei Sin v Public Prosecutor and another appeal* [2011] 1 SLR 1199, a case involving a National Service defaulter, Chao Hick Tin JA (sitting as a High Court judge) agreed with counsel's submission that "sentencing precedents relating to offences committed *after* the 2006 amendments [to the Enlistment Act (Cap 93, 2001 Rev Ed)] were not relevant and should not be relied upon … to determine the appropriate sentence because the [a]ccused should only be punished in the circumstances and in accordance with the law which existed at the time of his offence" [emphasis in original] (at [26]). Chao JA also referred to an earlier High Court decision in which L P Thean J accepted counsel's argument that the accused in that case ought to have been "punished in the circumstances which then existed and in accordance with the legislation then in force, and it [was] not correct to take into account subsequent legislation" (see *Chota bin Abdul Razak v Public Prosecutor* [1991] 1 SLR(R) 501 at [19]). Exceptionally, as the court said in *Green* at [46], "[i]f good grounds exist, it may be appropriate to apply current sentencing standards". This would be appropriate for egregious cases. In such cases, the court may, for example, impose a symbolic custodial sentence of one day for an offence which has hitherto been punished solely by way of a fine.

183 Where insider trading offences are concerned, the sentencing norm as at 2005 did not preclude the court from imposing a custodial sentence for egregious cases, as can be seen from the four-month imprisonment term imposed in *Chen Jiulin* (see [163] above). There was thus no need for the DJ to rely on *Able Wang (Sentence)*, which was not concerned with insider trading but instead concerned a s 199 offence of a serious nature that had been committed egregiously, to justify the imposition of custodial sentences on Chong for the Insider Trading Charges. More importantly, given the circumstances in which Chong committed his insider trading offences (see [169] above), I am of the view that Chong's conduct was not of sufficient gravity to justify the imposition of custodial sentences. There is no reason why Chong should not be punished in accordance with the sentencing norm prevailing in 2005, rather than that applicable in 2011, for insider trading offences which are not of an egregious nature. For Chong, a heavy fine would be a sufficient punishment.

184 For all the reasons above, I set aside the custodial sentences imposed on Chong in the court below for the Insider Trading Charges. In their place, I impose the following sentences on Chong:

(a) District Arrest Case No 34240 of 2008 (sale of 1,000,000 Airocean shares) – fine of $100,000 (in default, ten months' imprisonment);

(b) District Arrest Case No 34241 of 2008 (sale of 500,000 Airocean shares) – fine of $50,000 (in default, five months' imprisonment); and

(c) District Arrest Case No 34242 of 2008 (sale of 515,000 Airocean shares) – fine of $50,000 (in default, five months' imprisonment).

185 Before I turn to consider the disqualification order imposed by the DJ against Chong, I should briefly address an argument raised by Ong in MA 13/2011 in respect of sentencing, even though sentencing is no longer a live issue where Ong is concerned given my decision to set aside his conviction. Ong's argument is that the retrospective application of current sentencing guidelines to "old" offences could infringe Art 11(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), which provides that "[n]o person shall be punished for an act or omission which was not punishable by law when it was done or made, and *no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed*" [emphasis added]. The word "law" is defined in Art 2(1) of the Constitution as including "the common law in so far as it is in operation in Singapore", and has also been interpreted in the context of Art 11(1) as including "judicial pronouncements" (see *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [66]).

186 Although the aforesaid constitutional argument was not raised by Chong in challenging the DJ's reliance on *Able Wang (Sentence)* to justify the imposition of custodial sentences, as opposed to the normal sentence of a fine, for the Insider Trading Charges, if Chong had raised that argument, it would have been given short shrift. This is because the custodial sentences imposed on Chong for his insider trading offences were validly imposed under two laws, *viz*, the SFA and the Criminal Procedure Code (Cap 68, 1985 Rev Ed). Furthermore, the aggregate custodial term of four months' imprisonment was within the type and range of punishments prescribed by s 221(1) of the SFA. It follows that the custodial sentences imposed on Chong cannot be challenged based on Art 11(1) of the Constitution (nor, for that matter, based on Art 9(1), which provides that "[n]o person shall be deprived of his life or liberty save in accordance with law").

The disqualification order against Chong

187 Turning now to the disqualification order imposed on Chong in the court below, the DJ disqualified Chong from acting as a director or being involved in the management of a company for a period of five years upon his release from prison after serving the custodial sentences imposed for the Insider Trading Charges (see the Judgment at [272]). He held (at [272] of the Judgment) that Chong's offences were committed in connection with the management of Airocean on the basis of the test formulated by Staughton LJ in *R v Goodman* [1993] 2 All ER 789 ("*Goodman*") at 792, which was as follows:

> There are three possible ways of looking at the test to be applied. The first might be to say that the indictable offence referred to in the [Company Directors Disqualification Act 1986 (c 46) (UK)] must be an offence of breaking some rule of law as to what must be done in the management of a company or must not be done. Examples might be keeping accounts or filing returns and such matters. It is clear from the authorities that the section [*viz*, s 2(1) of the aforesaid Act] is not limited in that way, although even if there were such a limit it would be arguable that the offence of insider trading, because it requires some connection between the defendant and the company, is an offence of that nature. Another view might be that the indictable offence must be committed in the course of managing the company. That would cover cases such as *R v Georgiou* [(1988) 87 Cr App R 207], *R v Corbin* [(1984) 6 Cr App R (S) 17] and *R v Austen* [(1985) 7 Cr App R (S) 214]. What the defendants in all those cases were doing was managing the company so that it carried out unlawful transactions.
>
> The third view would be that the indictable offence must have some relevant factual connection with the management of the company. That, in our judgment, is the correct answer. It is perhaps wider than the test applied in the three cases we have mentioned, because in those cases there was no need for the court to go wider than in fact it did. But we can see no ground for supposing

that Parliament wished to apply any stricter test. Accordingly, we consider that the conduct of Mr Goodman in this case did amount to an indictable offence in connection with the management of the company. Even on a stricter view that might well be the case, because as chairman it was unquestionably his duty not to use confidential information for his own private benefit. It was arguably conduct in the management of the company when he did that.

188 The test preferred by Staughton LJ has since been applied in a subsequent decision of the English Court of Appeal (Criminal Division) (see *R v Creggy* [2008] 3 All ER 91 at [13]–[14]). In my view, the facts of the present case fall within the ambit of Staughton LJ's preferred test. As Chong was the COO as well as an executive director of Airocean at the material time, his offences would fall within the third test formulated in *Goodman*.

189 As to whether disqualification for five years is manifestly excessive, reference may be made to the related appeal of *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor and another appeal* [2011] 3 SLR 1093 ("*Ong Chow Hong*"), where the High Court increased the period of disqualification imposed on Ong CH, the non-executive chairman of Airocean's board of directors at the material time, from 12 months to 24 months. Ong CH had pleaded guilty to a charge under s 157(1) of the Companies Act (Cap 50, 2006 Rev Ed) of failing to use reasonable diligence in the discharge of his official duties as a director (see *Ong Chow Hong* at [10]). The charge arose out of Ong CH's conduct on 25 November 2005 after Ang contacted him to update him on developments in connection with SGX's request that Airocean issue a clarificatory announcement on the ST Article (see *Ong Chow Hong* at [9]; see also [19] above). Apparently, Ong CH told Ang that "he would agree to any announcement issued by [Airocean] if [Madhavan] approved it … because he was going to play golf that day" [emphasis in original omitted] (see *Ong Chow Hong* at [9], referring to the agreed statement of facts in that case). The High Court held that Ong CH's conduct was "nothing short of a serious lapse in entirely abdicating his corporate responsibilities" (see *Ong Chow Hong* at [28]). *Ong Chow Hong* is also helpful for its clarification that the disqualification regime in Singapore is "*protective* in nature" [emphasis added] (see *Ong Chow Hong* at [21]). The disqualification regime is meant to protect the public from both the individual director in question as *well as* errant directors in general (see *Ong Chow Hong* at [22]–[23]).

190 In comparison to Ong CH, who (as just mentioned) was disqualified for 24 months for serious dereliction of his duties as a director, Chong's conduct can be said to be far more serious as he abused his office as a director to trade in Airocean shares using inside information which he had acquired *qua* director. For these reasons, I do not propose to disturb the DJ's order to disqualify Chong from acting as a director or being involved in the management of any company for a period of five years. The five-year disqualification period will begin today.

Conclusion

191 In summary, my decision in these appeals is as follows:

(a) The appeals in MA 1/2011 (Madhavan's appeal against his conviction and sentence) and MA 13/2011 (Ong's appeal against his conviction and sentence) are allowed. The convictions, sentences and disqualification orders of Madhavan and Ong are set aside.

(b) The appeal in MA 10/2011 (Chong's appeal against his conviction and sentence) is allowed to the extent that Chong's conviction and sentence for the Non-disclosure Charges and the Misleading Disclosure Charges are set aside. Chong's appeal is, however, dismissed where his conviction on the Insider Trading Charges is concerned. As for the sentence to be imposed on Chong for his insider trading offences, I set aside the custodial sentences imposed by the DJ and

order that Chong be sentenced as follows instead:

(i) District Arrest Case No 34240 of 2008 (sale of 1,000,000 Airocean shares) – fine of $100,000 (in default, ten months' imprisonment);

(ii) District Arrest Case No 34241 of 2008 (sale of 500,000 Airocean shares) – fine of $50,000 (in default, five months' imprisonment); and

(iii) District Arrest Case No 34242 of 2008 (sale of 515,000 Airocean shares) – fine of $50,000 (in default, five months' imprisonment).

(a) However, I uphold the disqualification order imposed on Chong by the DJ. The five-year disqualification period will begin today.

[note: 1] See, for example, Record of Proceedings ("ROP") Vol 1 at pp 3–4.

[note: 2] See, for example, ROP Vol 1 at p 2.

[note: 3] See, for example, ROP Vol 1 at pp 8–9.

[note: 4] See ROP Vol 10 at p 6722.

[note: 5] See ROP Vol 8 at p 5524.

[note: 6] See ROP Vol 8 at p 5525.

[note: 7] See ROP Vol 8 at p 5555.

[note: 8] See ROP Vol 9 at p 6433.

[note: 9] *Ibid*.

[note: 10] *Ibid*.

[note: 11] See ROP Vol 8 at p 5373.

[note: 12] *Ibid*.

[note: 13] *Ibid*.

[note: 14] *Ibid*.

[note: 15] See ROP Vol 8 at p 5570.

[note: 16] See ROP Vol 9 at pp 6491–6492.

[note: 17] See ROP Vol 9 at pp 6556–6557.

[note: 18] See ROP Vol 8 at p 5382.

[note: 19] *Ibid*.

[note: 20] See ROP Vol 8 at p 5383.

[note: 21] See ROP Vol 8 at p 5384.

[note: 22] *Ibid*.

[note: 23] See ROP Vol 8 at p 5386.

[note: 24] See ROP Vol 8 at p 5389.

[note: 25] See, *inter alia*, ROP Vol 1 at p 3.

[note: 26] See Chong's written submissions for MA 10/2011 at pp 106–107.

[note: 27] See ROP Vol 8 at pp 5456–5457.

[note: 28] See ROP Vol 8 at p 5456.

[note: 29] See ROP Vol 8 at p 5458.

[note: 30] *Ibid*.

[note: 31] *Ibid*.

[note: 32] See ROP Vol 8 at p 5459.

[note: 33] See ROP Vol 8 at p 5460.

[note: 34] See ROP Vol 8 at p 5457.

[note: 35] *Ibid*.

[note: 36] See ROP Vol 8 at p 5461.

[note: 37] See ROP Vol 8 at p 5457.

[note: 38] See ROP Vol 8 at p 5461.

[note: 39] See ROP Vol 8 at p 5457.

[note: 40] See ROP Vol 8 at pp 5462–5464.

[note: 41] See the Prosecution's skeletal arguments at paras 82–86.

[note: 42] See the Prosecution's reply submissions at paras 13–17.

[note: 43] See ROP Vol 8 at p 5524.

[note: 44] *Ibid*.

[note: 45] See Madhavan's Skeletal Arguments at para 737(b).

[note: 46] See ROP Vol 8 at p 5525.

[note: 47] See ROP Vol 9 at p 6433.

[note: 48] *Ibid*.

[note: 49] *Ibid*.

[note: 50] *Ibid*.

[note: 51] See ROP Vol 8 at p 5373.

[note: 52] *Ibid*.

[note: 53] See ROP Vol 8 at p 5463.