TAKEOVERS AND MERGERS PANEL

Panel Decision

Disciplinary Proceedings in relation to dealings in the shares of Kong Tai International Holdings Company Limited initiated by the Executive pursuant to paragraph 12.1 of the Introduction to the Takeovers Code

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Introduction

1. The Panel met on 11th, 12th, 13th, 14th and is" January 1999 to consider disciplinary actions in connection with Kong Tai International Holdings Company Limited ("Kong Tai" or the "Company"), a company listed on the Stock Exchange of Hong Kong Limited. The Executive initiated these disciplinary proceedings pursuant to paragraph 12.1 of the Introduction to the Code1. A preliminary hearing was also held by the Panel and the parties on 18th June 1998 to resolve a number of procedural issues. A copy of the Panel decision of the preliminary hearing is set out in **Appendix 1**.

Background

2. On 23rd December 1993 Profit Trade Investment Limited ("Profit Trade"), a company wholly-owned by Mr. David Wong Wai Chi ("Mr. Wong"), entered into a conditional agreement with the Woo family to purchase 210 million shares or 29.19% of Kong Tai (at that time known as Golden Hill Land Development Company Limited) at the price of HK$104 million or HK$0.4973 per share. The consideration represented a 0.46% premium over the market price of Kong Tai shares on 23rd December 1993. The conditions were satisfied in March 1994 and the agreement was completed on 28th March 1994.

3. Between 29th March 1994 and 14th April 1994, Mr. Wong purchased a further 37,850,000 Kong Tai shares (or approximately 5.26% of Kong Tai's entire issued share capital at that time) in the market thereby increasing his declared shareholding (including that held through Profit Trade) to 247,850,000 shares or 34.45% of Kong Tai The purchase prices of these 37,850,000 shares ranged from HK$0.43 to HK$0.495 per share.

4. Ms. A, an employee of David Resources Limited (a private company wholly-owned by Mr. Wong), purchased 29,965,000 shares or 4.2% of Kong Tai between early November 1993 and 3rd December 1993. She gradually disposed of all her Kong Tai shares from 3rd December 1993 to is" March 1994. A broker, Mr. B, was introduced to Ms. A by Mr. C (whose background is explained below) to execute Ms. A's trades. Mr. C is Mr. B's son-in-law.

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[1] The word "Code" used in this Decision means the pre-August 1998 edition of the Takeovers Code; and the words "former Code" mean the pre-April 1992 edition of the Takeovers Code.

5. Ms. D, Mr. B's wife, also dealt in Kong Tai shares from January 1994 to April 1994. She opened an account with Mr. B's brokerage firm in December 1993 to trade Kong Tai shares. Ms D's highest percentage shareholding in Kong Tai was 5.8% (or 41,920,000 shares) as at 18th March 1994 but sharply reduced her holdings by the end of March 1994.

6. The Executive WClS of the view (with supporting evidence) that a significant number of Ms. A's and Ms. D's purchases were funded by Mr. Wong who (through David Resources Limited) deposited at least HK$ 7,000,000 into Ms. A's account and HK$ 10,000,000 into Ms. D's account. Mr. Wong did not dispute these facts. However, the Executive did not initiate disciplinary actions against Ms. A and Ms. 0 as the aggregate shareholdings of Ms. A and Ms. 0 respectively and Mr. Wong never reached or exceeded the 35% threshold at which a mandatory offer would be required under Rule 26.1 of the Code had they been found to have been acting in concert. The disposal of shares by Ms. A and Ms. 0 largely took place before the completion of Mr. Wong's acquisition of 29.19% of Kong Tai on 28th March 1994.

Mr. Wong and Mr. C

7. The Executive submitted that Mr. C was acting in concert with Mr. Wong. Mr. C, the son-in-law of Mr. B and Ms. 0, traded in Kong Tai shares from April 1994 to April 1996 through Mr B as his broker. His highest percentage shareholding in Kong Tai was 6.15% (or 44,735,000 shares) as at 25th January 1995.

8. The Executive identified eight deposits or payments into Mr. C's account at Mr. B's brokerage firm, and evidence was produced to support the Executive's view that a majority of these payments were funded by Mr. Wong. Mr. Wong submitted a statement of account between him and Mr. C, in which Mr. Wong accepted that six payments had been made by him to Mr. C totaling HK$9,500,000. Mr. Wong, however, submitted that he had lent the money to Mr. C as a close friend, the relationship between them was no more than that of lender and debtor, and that Mr. C acquired the Kong Tai shares independently and on his own account. Mr. Wong further submitted that apart from the loans (totaling HK$ 9,500,000), there were additional deposits into Mr. C's account in significant amounts, and that there was no evidence to suggest any of these additional deposits originated from Mr. Wong.

9. The Executive invited the Panel to find that Mr. C and Mr. Wong were acting in concert thus incurring an obligation to make a general offer under Rule 26 of the Takeovers Code on 13th April 1994, when Mr. C acquired more shares in Kong Tai and the aggregate shareholdings of Mr. C and Mr. Wong in Kong Tai increased from lower than 35% to 35.3% (or 254,000,000 shares) [2]. The closing price of Kong Tai shares on 13th April 1994 was HK$0.48 per share. The highest price Mr. C paid on 13th April 1994 was HK$0.50 per share. The highest price paid by Mr. C or Mr. Wong in the preceding six months was also HK$0.50 per

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[2] The figures submitted by the Executive are "35.07% (or 252,290,000 shares)". The Panel noticed that there was a minor arithmetical error and the correct figures should be "35.3% (or 254,000,000 shares)". The Panel is satisfied that this error is immaterial and does not affect any of the Panel's findings and decision.

share. (If Mr. C and Mr. Wong were to have incurred an obligation to make a general offer under Rule 26, under Rule 26.3, the highest price paid by any of them or their concert parties in the preceding six months would become the offer price.)

10. The Executive was unable to locate Mr. C. Consequently, he has not been served with notice of these proceedings and did not appear in any of the Panel hearings mentioned in paragraph 1 above. Accordingly, the Panel did not have the benefit of hearing testimony from Mr. C.

Mr. Wong and Mr. Chan

11. The Executive also submitted that Mr. Steven Chan Sheung Chi ("Mr. Chan"), Managing Director of Peace Town Securities Limited ("Peace Town"), was acting in concert with Mr. Wong. Mr. Chan and Mr. Wong have been very close friends since the 1980's and also business associates. Mr. Chan acted as a broker in a number of property deals in which Mr. Wong participated and Mr. Wong had maintained an account with Peace Town. Mr. Chan acknowledged that he purchased Kong Tai shares through his wife's account maintained at Peace Town Securities. He started to purchase Kong Tai shares in March 1994 and held over 5% (or 38 million shares) of Kong Tai in July 1994. Thereafter, he gradually disposed of his shares on the market throughout the latter half of 1994 and the whole of 1995. By the end of March 1996, he disposed of all his Kong Tai shares.

12. The Executive identified eight payments into Mrs. Chan's account with Peace Town Securities and evidence was produced to support the Executive's view that a majority of the payments (totaling HK$17 million) were funded by Mr. Wong. Mr. Wong submitted a statement of account between him and Mr. Chan and accepted that he had lent a total sum of HK$8,500,000 on four occasions. An amount of HK$2 million was paid by Mr. Chan to Mr. C at the direction of Mr. Wong on 27th May 1994. Mr. Wong submitted that the loans were just loans between friends, his relationship with Mr. Chan was that of creditor and debtor. Mr. Wong submitted that he had no beneficial interest in any of the Kong Tai shares purchased by Mr. Chan.

13. The Executive invited the Panel to find that Mr. Wong was acting in concert with Mr. Chan thus incurring a general offer obligation under Rule 26 of the Takeovers Code on 14th April 1994, when Mr. Chan acquired more shares in Kong Tai and their aggregate shareholdings in Kong Tai increased to 35% (or 251,815,000 shares). The closing price of Kong Tai shares on 14th April 1994 was HK$0.480 per share. The highest price paid by Mr. Chan (through his wife's account) was $0.485 per share. The highest price paid by Mr. Wong or Mr. Chan in the preceding six months was HK$0.500 per share on 13th April 1994.

Mr. Wong and {X}

14. The Executive further submitted that {X} ("{X}") was acting in concert with Mr. Wong. {X} was the managing director of Transamerica Group and is a very close friend of Mr. Wong. Transamerica Group's business includes trading of cotton

and silk materials, as well as duty free tobacco and liquor. {X} also operated a hotel business in Shenzhen. Mr. Wong introduced {X} to South China Securities Limited ("South China") where {X} could get margin facilities to purchase Kong Tai shares. On ie" August 1994, {X} opened an account at South China and, in the following months, used the account to trade in Kong Tai shares. Tile Executive alleged that from August 1994 onwards, {X} acquired a maximum holding of 40,260,000 shares or 5.6% of Kong Tai in early December 1994. The shares were purchased at prices from HK$0.41 to HK$0.50 per share. {X} said that from August to December 1994 he acquired 40,910,000 Kong Tai shares and sold 100,000 shares. As at the end of December 1994, {X} says that he held 40,810,000 Kong Tai shares. The difference in the number of shares held is not material.

15. The Executive traced eleven payments totaling HK$12.7 million which were credited to {X}'s account at South China by Mr. Wong or companies controlled by Mr. Wong (Profit Trade and David Resources). Mr. Wong accepted that he had made a further payment of HK$ 1 million to {X}'s account with South China. Mr. Wong and {X} both submitted statements of account to explain these payments, and claimed that they were made by Mr. Wong to reduce his indebtedness to {X}. According to the statement of account produced by Mr. Wong, {X} started to lend money to Mr. Wong in December 1991 and in July 1994 Mr. Wong still owed {X} IHK$13.7 million. The twelve payments made by Mr. Wong represented a full repayment of the sum of HK$13.7 million owed to {X}. Mr. Wong also submitted that {X}'s dealings in Kong Tai shares were independently motivated and entirely on his own account and Mr. Wong had no beneficial interest in any of the Kong Tai shares purchased by {X}.

16. The Executive invited the Panel to find that Mr. Wong was acting in concert with {X} thus incurring a general offer obligation under Rule 26 of the Takeovers Code on 2nd December 1994 when {X} acquired more shares in Kong Tai increasing their aggregate shareholdings in Kong Tai to 40.04% (or 288,110,000 shares). The closing price of Kong Tai shares on 2nd December 1994 was HK$0.420 per share. The highest price paid by {X} was $0.42 per share. The highest price paid by Mr. Wong or {X} in the preceding six months was HK$0.500 per share on 22nd August 1994.

17. Details of acquisitions and shareholdings of Mr. Wong, Mr. C, Mr. Chan and {X} in Kong Tai (in tabular and graphic form) are set out in **Appendix 2**.

18. Mr. Wong, Mr. Chan and {X} are represented by Charles Yeung Clement Lam & Co., Haldanes, and Raymond Ho & Co. respectively.

Other Disciplinary Proceedings

19. The Executive also submitted a number of other matters for the consideration of the Panel and initiated disciplinary proceedings against two further parties in connection with these matters.

20. After considering the evidence placed before it and the submissions made to it, the Panel held that the matters complained of did not fall within the ambit of the

Code. There was, therefore, no jurisdictional basis on which to consider the allegations made by the Executive.

21. The Panel excused the two parties and their respective advisers attendance at the continuing proceedings and confirmed that proceedings against the two parties were dismissed for want of jurisdiction.

22. The Panel noted that while a number of issues had been raised that, in the opinion of the Executive, may merit further consideration, it is not within the purview of the Panel to draw these matters to the attention of the Securities and Futures Commission ("the Commission") or other authorities. The Executive has adequate powers to cooperate with other authorities under Section 19.1 of the Introduction to the Code and should, therefore, make such references as it deems appropriate.

23. It is not the role of the Panel either to endorse or to fetter the Executive's judgement as to those matters it wishes to bring before other authorities or to refer to other sections of the Commission. Only in the event that issues arise during the course of Panel proceedings which the Panel considers may of themselves merit further investigation by the Executive or other authorities would the Panel consider making a recommendation for further investigation or initiation of other proceedings.

Jurisdiction

24. Before turning to consider the specifjc allegations made by the Executive against Mr. Wong, Mr. C, Mr. Chan and {X}; the Panel received specific submissions on its jurisdiction in respect of the proceedings against these parties from the parties, their advisers and the Executive. As certain of the arguments adduced turned in part upon matters that were interwoven with the evidence to be considered in the proceedings before the Panel, the Panel deferred a decision upon jurisdiction until it had concluded its examination of the parties and received the closing submissions of all parties. It should be noted that the advisers to Mr. Wong protested this procedure and were joined in this by the advisers to Mr. Chan and {X}. The parties, however, continued to co-operate in the ongoing proceedings their protest having been noted by the Panel.

25. The party who took the jurisdiction point most forcefully was Mr. Wong both in his written submissions and the particular pleadings on his behalf by his advisers. In this regard, Mr. Wong's submissions were also adopted by Mr. Chan and {X}. The case submitted on behalf of Mr. Wong is well summarised in his Final Submission and best dealt with on the basis of that submission (having taken into account the written submissions of all parties and the particular points made by Mr. Chan and {X} or their advisers during the course of the hearing).

26. Mr. Wong's principal contention is that the Panel has no jurisdiction to hear the matter because the Executive has failed to comply with Paragraph 12.1 of the Introduction to the Code. As the first leg of the argument, the provisions of the former Code which, in effect, empower the Chairman to institute disciplinary proceedings if it appears that there may have been a breach of the Code are

contrasted with the current provisions of Paragraph 12.1 of the Introduction, which provides that proceedings may be instituted by the Executive when "it considers there has been a breach of either Code...".

27. Mr. Wong's argument relies, to a large extent, on the language adopted by the Executive in the Panel paper in order to claim that the Executive is following the provisions of the former Code and not the Code and in effect inviting the Panel under the leadership of the Chairman to make enquiries into a possible breach of the Code.

28. In support of this argument, reference is made to the Executive's Panel Paper. Particular emphasis is placed on the Executive's repeated use of the expression "possible breaches" and the particular form in which the Executive has invited the Panel to consider the paper before it.

29. The point is taken further by reference to specific testimony given by the Executive where the line of argument that it is sought to establish is that the Executive merely believes there may have been breaches of the Code as opposed to affirming that there were breaches of the Code and did not therefore reach a concluded view that there had been breaches of the Code (defined as a "concluded breach" in the submissions) prior to instituting proceedings.

30. Mr. Wong's submissions on jurisdiction also involve an examination of the evidence (or as Mr. Wong would have it the lack of evidence) as to whether there was any exercise of voting rights or the presence or otherwise of hostile takeover bids. The point of this argument being that the lack of such evidence militates against the proposition that there was "an intention to obtain or consolidate control". The argument then proceeds on the basis that if no such intention to obtain or consolidate control was demonstrated by the evidence, the Executive had not properly considered the issue, in particular whether each of the elements embodied in the definition of acting in concert was present prior to instituting proceedings. The alleged failure of the Executive to have properly "considered the matter" prior to the institution of disciplinary proceedings constitutes in essence the second leg of the argument that the proceedings were improperly instituted and, consequently, fall outside the jurisdiction of the Panel. These propositions are also reflected in various forms in the submission of Mr. Wong dated 20th August 1998.

31. A further point that is taken is a discrepancy in the annexures to a letter from a firm of lawyers to the Executive dated 26u, June 1995 (the "Letter"). Much is made of the discrepancy between the single annexure provided by the Executive to the Panel and the number of annexures that were produced by the law firm with the Letter and allegedly sent to the Executive namely four. Here the argument again seems to have two legs to it namely:

    (i) that if the Executive only had one annexure (as the Executive maintains), then the Executive had failed to consider properly the issue by virtue of the fact that it had not followed up the incongruity between the four annexures referred to in the letter and the single annexure in its possession; or

(ii) in the alternative (although the point is not made as forcibly in the submission as it was made by Mr. Wong's legal adviser at the hearing), the Executive had falsified the evidence. This is a wholly separate point to the question of jurisdiction and, if it is intended to be pursued by Mr. Wong, needs to be considered separately.

32. Mr. Wong's submission endeavours to draw further support for his argument as to the lack of a "concluded breach" from the Executive's statements when questioned by the Panel in relation to {X} and in particular the Executive's failure to interview him which it is alleged demonstrate the generality of the concert party allegations against {X} and Mr. Wong.

33. While not part of the principal thrust of the submission's arguments, reference is also made to the attempt by the Executive to invite the Panel to extend its remit beyond the consideration of breaches of the Code particularly as to whether conduct in respect of various other matters should be referred for further investigation.

34. In sum, Mr. Wong's submission argues that Paragraph 12.1 of the Introduction to the Code "envisages" that prior to institution of disciplinary proceedings:

(i) the Executive must have considered the matter;
(ii) the Executive must have reached a concluded view that there is a breach prior to the institution of the proceedings; and
(iii) (implicitly) the Executive must state in the Panel Paper that it considers there to have been a breach.

Mr. Wong argues that these requirements were not satisfied in that:

(a) the Executive did not properly consider whether each of the elements embodied in the definition of "acting in concert" was present;

(b) the discrepancy in annexures to the Letter and the failure to interview {X} support this proposition;

(c) the Executive had not reached a concluded view that there was a breach because of the use of terms such as "possible" breaches, and the large number of references to "potential" findings, in the Panel Paper.

35. Mr. Wong's second main argument is that the alleged breach must be precisely identified so that Mr. Wong and equally the other parties know the case they have to meet. The complaint is that the allegations were insufficiently precise and particular reference is made to the Panel Paper where it was stated that there are a "large number of combinations of potential findings by the Panel of breaches of Rule 26 of the Takeovers Code".

36. In his Conclusions to the Closing Submissions, Mr. Wong reinforces this argument further saying :

(i) "...it has still not been possible to determine precisely what breaches Mr. David Wong is supposed to have committed"

(ii) "...until the Panel decides on jurisdiction and on what breaches Mr. David Wong is alleged to have committed, Mr. David Wong will not have known what the breaches are that [he] has been accused of committing."

Panel's decision on jurisdiction

37. The Panel considered carefully the arguments put to it and having done so, has decided that it does have jurisdiction in respect of the allegations against Mr. Wong, Mr. C, Mr. Chan and {X} set out in Section 2 of the Panel Paper, the background to which is given above. Cutting to the quick on the arguments put to it, the Panel is satisfied that:

(i) proceedings were instituted by the Executive. The Executive did not ask the Chairman of the Panel to determine whether proceedings should be instituted. It instituted proceedings under the powers conferred upon it by Paragraph 12.1 of the Introduction to the Code. This was clearly stated in the letters dated 24th February 1998 which initiated proceedings by serving the Panel Paper dated 24th February 1998 on each of the parties namely "the Executive hereby institutes disciplinary proceedings against you, pursuant to Section 12.1... on the basis that it considers that there have been breaches of the Code ..." (emphasis added); and

(ii) the language that the Executive has chosen to present its allegations is certainly permissive rather than declaratory but, in the overall context of the institution by the Executive of the proceedings and the role of the Panel to determine the outcome of the case before it, it seems to the Panel that there has been no breach of the fundamental tenets of natural justice. The Executive has instituted a case; it has identified alleged breaches; it has presented evidence; and it has invited the parties against whom allegations have been made to be heard in their own defence after having had adequate notice of the allegations and the evidence to be presented against them.

38. The Panel finds that the attempt to unseat the Executive's position on the basis that particular language has evidenced that it has followed the former Code rather than the Code fails when one applies the test of what actually happened, i.e. the Executive instituted disciplinary proceedings and invited the Panel to make a finding upon the allegations set out before the Panel. The Panel has limited itself to the matters set out in the Panel Paper and has not cast itself in the role of an inquisitor seeking out evidence upon which it could then lay charges, form a judgement and impose sanctions. It was asked to consider specific allegations couched in language that reflected the fundamental natural justice presumption of innocence rather than guilt. This it has done and has confined itself to considering only those allegations set out in the Panel Paper.

39. Turning to the question of whether the Executive had properly considered the matter prior to instituting proceedings, Mr. Wong's submission focuses to a large extent on whether there were sufficient grounds for the Executive to conclude

that Mr. Wong was acting in concert with Mr. C, Mr. Chan or {X} as there was no evident need to consolidate control or any evidence of the use of voting rights by any of Mr. C, Mr. Chan or, {X} in conjunction with Mr. Wong. In particular:

(i) there was no threat of any takeover at all at the relevant time;

(ii) there was no threat to replace the board of directors of Kong Tai with persons who could not work with Mr. Wong; and

(iii) at no time did Mr. C, Mr. Chan and {X} exercise their voting rights in Kong Tai for the purpose of sanctioning any transaction between Kong Tai and Mr. Wong.

40. The Panel does not agree with the argument that these circumstances and the absence of evidence regarding the exercise of voting rights can be taken as positively establishing as a fact that there was no intention to obtain or consolidate control. The Code does not require that the obtaining or consolidation of control be the only motive of the agreement or understanding between concert party members. There may be other motives or objectives of the arrangement, which may be as important or more important than obtaining or consolidating control. The mere absence of a threat or the act of refraining from exercising a right do not of themselves disallow the possibility either of an intention to obtain or consolidate control (as defined in the Code) or deny the possibility of the future exercise of voting rights or the grant of proxies should the need arise. The Panel does not agree that it can be demonstrated that an essential element embodied in the definition of acting in concert, namely an intention to obtain or consolidate control, can be patently shown to be lacking and thus evidencing a lack of proper consideration on the part of the Executive prior to instituting proceedings.

41. The Panel, moreover, feels it appropriate to emphasise the point that where the expression "obtain or consolidate control" as used in the definition of acting in concert, control is a specifically defined term which is set out in Paragraph 6 of the definitions section of the Code which reads "unless the context otherwise requires control shall be deemed to mean a holding, or aggregate holdings, of 35% or more of the voting rights of a company, irrespective of whether that holding or holdings gives de facto control".

42. In the matter of the Letter, it is clearly a matter of concern that this particular piece of evidence, to which specific reference was made in various Sections of the Panel Paper contained an internal contradiction that was not followed up by the Executive. Had this letter as presented formed a material part of the Executive's case and indeed had it been one of the planks upon which the specific allegations with regard to Rule 26 breaches by Mr. Wong, Mr. C, Mr. Chan and {X} were based, then clearly this may have had a major impact on the decision of the Panel from the standpoint of evidential considerations. As it is, while the contradictions do not reflect well on the Executive, the fact of the matter is that the substance of the allegations against Mr. Wong and the other parties remains unaffected by the actual content of the annexures to the Letter and the

Letter itself forms part of what may be described as "collateral" evidence rather than determining evidence in respect of any alleged breach. The Panel is not, therefore, minded to regard the discrepancy in annexures as being of such moment as to accede to the proposition that this discrepancy of itself is sufficient to indicate a lack of proper consideration of the case.

43. As to the alternative proposition that evidence was deliberately suppressed by the Executive, the Panel does not consider this is an argument that attaches itself to the question of proper consideration and jurisdiction, but rather is a separate issue which Mr. Wong may pursue separately if he so wishes. However, the Closing Submissions made on behalf of Mr. Wong would appear to argue this point as a logical alternative as opposed to a direct accusation and as a proposition it is strongly rebutted by the Executive in their Closing Submission.

44. Finally, as regards the references to {X} the fact that in respect of one of the parties the Executive pursued a "different mode of investigation" does not, in the Panel's view, sustain the proposition that there was such want of consideration as to undermine the Executive's case from the outset. The matter of the Executive's actions in respect of {X} is, however, an issue that is returned to later in this Decision.

45. Attention is drawn to the fact that Mr. Wong's Closing Submission has incorporated within it references to evidence that became available to the Panel during the course of the proceedings underlines the appropriateness of continuing proceedings prior to reaching any conclusion upon jurisdiction as, clearly, in assessing Mr. Wong's own points on the question of adequate consideration by the Executive, these matters were germane to the consideration of the Panel in reaching a decision on jurisdiction.

46. In regard to the arguments that the allegations as to breaches were insufficiently precise and consequently Mr. Wong and the other parties did not know the case they had to meet, the Panel has found that there was sufficient precision in the allegations set out in Section 2 of the Panel Paper for Mr. Wong, Mr. Chan and {X} to know what breaches they had been accused of committing.

47. While it is fair to say that the language used by the Executive is permissive (i.e. it is open for the Panel to decide) rather than declaratory (i.e. the following breaches took place), the Panel considers that it is quite evident that particular breaches were being alleged in regard to Rule 26 in respect of Mr. C, Mr. Chan (using an account in his wife's name) and {X} acting in concert with Mr. David Wong. Far from the Executive ignoring the provisions of the Code or natural justice, it appears that the Executive intended to demonstrate clearly that it was presenting its case to the Panel for its consideration and formulating the allegations in words that reflected the fundamental principle of the presumption of innocence.

48. Within Section 2 of the Panel Paper, a number of alleged breaches of Rule 26 are clearly identified and evidence adduced in support of the Executive's case. Section 2.54 which is headed "Breaches of 35% threshold by alleged concert parties" introduces a series of paragraphs that set out the breaches complained

of. In particular, in Sections 2.65 (Mr. C), 2.85 (Mr. Chan) and 2.96 ({X}), there are clear allegations of breaches of Rule 26 by the parties named as acting in concert with Mr. Wong. Namely:-

> 2.65 It is open to the Panel to find that on 13 April 1994, David Wong and [Mr. C] incurred an obligation to make a general offer under Rule 26 of the Takeovers Code in that their aggregate shareholding in Kong Tai amounted to 35.07%.
>
> 2.85 ... [I]t remains open to the Panel to infer from the available evidence that Steven Chan, through [his wife], was acting in concert with David Wong. It is therefore open to the Panel to conclude that on 14 April 1994, Steven Chan .and David Wong breached Rule 26 of the Takeovers Code in failing to make a general offer when their aggregate shareholding in Kong Tai amounted to 35%.
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> 2.96 It is open to the Panel to find that on 18 August 1994 David Wong and {X} incurred an obligation to make a general offer under Rule 26 of the Takeovers Code in that their aggregate shareholding in Kong Tai amounted to 35.02%."

49. It should also perhaps be remarked that a further summary of the allegations against Mr. Wong, Mr. C, Mr. Chan and {X} is given in Paragraphs 1.16 to 1.18 of the Panel Paper and also set out in the Supplemental Panel Paper.

Panel's Decision and Findings

50. Having satisfied itself that it has jurisdiction in the matter and, in particular, that breaches of Rule 26 have been alleged in sufficient detail for the parties to be fully aware of the allegations made against them, the Panel considered the substance of those allegations and what sanctions, if any, are appropriate.

Relevant provisions of the Code

51. The Executive has submitted that Mr. Wong and Mr. C, Mr. Wong and Mr. Chan and Mr. Wong and {X} were acting in concert. "Acting in concert" is defined in paragraph 2 of the definitions in the Code. So far as is relevant the definition reads:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding, actively co-operate to obtain or consolidate "control"(as defined below) of a company through the acquisition of voting rights of the company".

The Panel must therefore decide whether the elements of the definition in the Code of "acting in concert" are satisfied. There must be:

1. an agreement or understanding
2. active co-operation to obtain or consolidate "control" (as defined)
3. through the acquisition of voting rights.

"Control" is defined in paragraph 6 of the definitions as follows:

". . . control shall be deemed to mean a holding, or aggregate holdings, of 35% or more of the voting rights of a company, irrespective of whether that holding or holdings gives de facto control".

52. Acting in concert of itself is not a breach of the Code. If the existence of a concert party is established by the Panel, it will then look to establish if purchases by one or more members of the concert party triggered as alleged a mandatory offer under Rule 26.1 of the Code and if the concert party breached the Code by failing to make the mandatory offer required by the Code to be made by the purchaser or the principal members of the concert party.

53. The relevant provisions of Rule 26.1 are as follows:

26.1 When mandatory offer required

Subject to the granting of a waiver by the Executive, when

(a) any person acquires, whether by a series of transactions over a period of time or not, 35% or more of the voting rights of a company;

(b) two or more persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and anyone or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35% or more of the voting rights of the company;

(c) any person holds not less than 35%, but not more than 50%, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than 5% from the lowest percentage holding of that person in the 12 month period ending on and inclusive of the date of the relevant acquisition; or

(d) two or more persons are acting in concert, and they collectively hold not less than 35%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 5% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date of the relevant acquisition;

that person, or the principal members of the concert group, as the case may be, shall extend offers, on the basis set out in this Rule, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares.

54. It is convenient at this point to mention General Principle 10 of the Code. This provides:

> *"All parties concerned with takeovers and mergers are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information."*

Standard of proof

55. Evidence of persons acting in concert is usually circumstantial, rather than direct, and no one circumstance will necessarily be determinative. Thus the Panel must examine all of the circumstantial factors to decide whether an inference can reasonably be drawn that any two or more of the parties had an agreement or understanding actively to co-operate to obtain or consolidate control of Kong Tai.

56. Reference has been made in the Executive's Submissions to the Guinness case and to the possibility of the sufficiency of "a nod or a wink" to evidence the existence of a concert party. The Panel believes that while useful guidance may be had from the decision in that case, care must also be taken in applying the Guinness case outside the particular circumstances of that transaction. The Panel considers that the reference to "a nod or a wink" should not be taken to mean that the establishment of the existence of a concert party requires only evidence or inferences which are as fleeting or possibly as inconsequential as a nod or a wink. The statement, however, aptly illustrates the fact that the agreement or understanding does not have to be written or formal, but may be tacit or informal.

57. As in previous hearings, the Panel has adopted a standard of proof to a high degree of probability, given the serious consequences that could follow an adverse finding by the Panel. It is a high standard of proof but it is not the highest reserved for criminal allegations.

Analysis of the evidence

58. In this matter, the Panel does not consider the evidence in question is evidence that might be described as being in the order of "a nod or a wink". The evidence that has been placed before the Panel is tangible evidence (which is not materially disputed) of substantial fund flows, of the existence of segregated accounts and of a remarkable coincidence in the utilisation of funds emanating from Mr. Wong to purchase shares in a single, relatively illiquid counter of which he was the chairman and most substantial shareholder.

59. The Executive has laid out a case which identifies a considerable number of payments between Mr. Wong, Mr. C, Mr. Chan and {X}. Where funds flowed from Mr. Wong to these parties, the monies were used almost exclusively to purchase substantial numbers of shares in the company now known as Kong Tai Payments were made utilising primarily cashier orders as well as cheques. In some instances, repayments, in amounts up to HK$1.6 million, were made in cash. All the parties were aware that Mr. Wong was chairman of Kong Tai and he was regarded as controlling the company. Where monies were advanced by

Mr. Wong, they were advanced interest free, unsecured and with no fixed term of repayment. There was no evidence from Mr. Wong that he required these loans to be documented in any way. The Executive has ascertained details of certain fund flows after a considerable period of investigation. The fund flows detailed in the Panel Paper are not to any material extent disputed by Mr. Wong, Mr. Chan or {X}.

60. The Executive maintains that the pattern of acquisitions; the funding of these acquisitions by funds either lent or in the case of {X} repaid by Mr. Wong into a specific account at South China Securities where they were used exclusively to purchase Kong Tai shares; the use in each case of a segregated account with the broker concerned; that each of Mr. C, Mr. Chan and {X} were "very close friends" of Mr. Wong; and that there were long standing business relationships between Mr. Wong and, respectively, Mr. Chan and {X}; allows the inference to be drawn that an agreement or understanding existed between each of these parties and Mr. Wong in respect of the acquisition of control (as defined in the Code) of Kong Tai.

61. Mr. Wong and the parties who have been served with the Panel Paper each deny that this is the case. In the case of Mr. Wong, he maintains that he acted largely in ignorance of what the funds in question were to be used for and, in the case of Mr. Chan and {X}, they maintain that they acted quite independently of Mr. Wong in making their investment decisions and bearing the financial risk of those investments. No written agreement between the parties has been produced to the Panel either in respect of the loan arrangements or in respect of shareholdings of Kong Tai.

62. Taken in the broadest sense, the Panel has to consider whether it accepts the evidence of Mr. Wong and the parties that no agreement or understanding existed and that these share purchases were effected quite independently of Mr. Wong by each of the parties or whether it is persuaded, relying upon the evidence of the funding identified by the Executive, the use of segregated accounts and the admitted relationships that existed among the parties, that it is reasonable and sustainable to conclude that agreements or understandings did exist. Inevitably great reliance must be placed on circumstantial evidence and the inferences that may be drawn from it.

63. Mr. Chan and {X} both maintain that, notwithstanding the agreed fund flows and their admitted very close friendship with Mr. Wong as well as their knowledge of his position as chairman and in effect controller of Kong Tai, they acted quite independently and indeed neither sought advice from him on the timing or extent of their investments. It should be noted that in the case of {X}, {X} states that Mr. Wong recommended Kong Tai to him as a counter from which he might profit. Mr. Chan said that he did not inform Mr. Wong of the nature and extent of the investments that he had made with the money borrowed from him until well after they had been purchased nor, according to his evidence, did {X} inform Mr. Wong of the precise nature or extent of the investments purchased with the monies repaid directly to the account at South China Securities. Mr. Chan and {X} when questioned on this point by the Panel were quite clear as to their independence

of action in the matter and their lack of consultation with Mr. Wong in respect of the amount and timing of the purchases in Kong Tai and, in Mr. Chan's case, the choice of counter. For his part, Mr. Wong, in the case of Mr. C and Mr. Chan, advanced considerable sums of money with no interest, no security, no fixed date of repayment and no form of written contractual agreement to be employed in any such manner as the borrowers chose. Mr. Chan told the Panel that the loans to him were supported by undated cheques. Mr. Wong could not recall this. Mr. Chan also produced a photocopy of a page of a note book purportedly evidencing a running tally of the amount he owed to Mr. Wong.

64. In considering these issues, the Panel has had to form a view as to the credibility of the parties' explanations for the financial arrangements that they admitted existed between them, that is to say, the loans or repayments of loans and their assertions that there were no agreements or understandings between any or each of them and Mr. Wong with regard to the acquisition of shares in Kong Tai Having heard and considered the explanations and evidence proffered by Mr. Wong, Mr. Chan and {X}, the Panel does not find the explanations credible.

65. According to Mr. Wong's evidence, normally when his friends borrowed money from him, they would give Mr. Wong post-dated cheques evidencing the loans. From Mr. Wong's own evidence, the form of advances to Mr. C and Mr. Chan did not follow these normal procedures of accepting post-dated cheques as evidence of the advance. Where Mr. Wong advanced money without knowing the precise application of those funds, it was by his own evidence in small sums and to close friends. The sums involved in the case of Mr. C and Mr. Chan were not small by Mr. Wong's own definition and, clearly, in each instance, there were repeated advances.

66. The Panel did not have the benefit of questioning Mr. C, a matter which the Panel will comment on later. On Mr. Wong's evidence, Mr. C was a very close friend. Mr. C requested the loans and specified the form of payment which was by cashier order, but did not tell Mr. Wong until a later date the purpose of the loans, which were used exclusively to purchase shares in Kong Tai In making these advances which amounted in aggregate to HK$9.5 million, Mr. Wong made no assessment of Mr. C's ability to repay the loans and the loans were not documented or recorded in any way by Mr. Wong. The Panel does not accept that Mr. Wong would lend to even "a very close friend who he had known for many years" a sizeable sum of money on these terms without knowing the specific purpose for which the loan was being requested. It is also difficult to believe that the reason for the use of cashier orders was not motivated, at least in part, by a desire to veil the source of funding for these share purchases.

67. The Panel is of the view that Mr. Wong knew the purpose for which his advances would be used by Mr. C and, given the amount of the loans and their singular purpose, he would have had a reasonable knowledge of the scale of the purchases and would have known that his shareholding when aggregated with that of Mr. C would have exceeded 35%. The Panel considers that all the essential elements of acting in concert are present as far as Mr. Wong is concerned. In particular, the advance of the loans and the purpose to which they were put shows both an understanding between the parties and active

cooperation between them in the acquisition of voting rights in Kong Tai. A consequence that would follow from this cooperation is that their combined shareholding would exceed 35% and Mr. Wong would have known this.

68. In the case of Mr. Chan, we are asked to believe that an experienced dealer in securities was prepared to commit himself to a substantial holding (by his own evidence ultimately his largest ever single stock market investment) in a speculative counter (by his own definition) the liquidity of which seems questionable and without securing in advance funding for those purchases. Payments to Mr. Chan were made by cashier order, apparently at his request, which both Mr. Chan and Mr. Wong must have appreciated would have veiled the identity of the source of funds. Moreover, Mr. Chan's own evidence is that he did not want to disclose the extent of his purchases to Mr. Wong lest he be squeezed by him; but yet was still prepared to borrow from Mr. Wong the sums necessary to finance these purchases: sums that were of such moment in Mr. Chan's financial affairs that he states he was obliged to mortgage his flat in order subsequently to repay them. All of these took place, without consulting his very close friend Mr. Wong, the chairman of the company, on the merits of these acquisitions or indeed informing him of the purpose to which the borrowed funds were to be put. In passing it may also be remarked that Mr. Chan served as a conduit for at least one payment to Mr. C (HK$2 million on 27 May 1994). In repaying Mr. Wong, Mr. Chan made at least one repayment in cash in the amount of HK$1.6 million. The form of repayment apparently was the choice of Mr. Chan.

69. The Panel does not accept the explanations of either Mr. Wong or Mr. Chan in this regard. It does not believe that Mr. Wong did not know the purpose for which the advances to Mr. Chan would be used or that a very close friend of long standing would conceal such information from him. The Panel also draws the inference that the method of payment between them was motivated by a wish to veil Mr. Wong's involvement in the financing. Both knew that the purchases of shares when added to Mr. Wong's existing shareholding would exceed 35% of the voting rights of Kong Tai As, respectively, the chairman of a listed company and a registered dealer and dealing director, Mr. Wong and Mr. Chan should have been alive to the Code implications of these arrangements. The Panel considers that all the essential elements of acting in concert are present and finds that Mr. Wong and Mr. Chan were acting in concert.

70. Turning to the position of Mr. Wong and {X}, the tangible evidence before the Panel is of sums paid by way of cashier orders to an account at South China Securities opened by {X} through the introduction of Mr. Wong. {X} told the Panel that the form of payment was suggested to him by South China Securities. No evidence has been produced as to the specific transactions that gave rise to this indebtedness but both Mr. Wong and {X} have identified the amounts in question as, essentially, the repayment of advances made on trading account by {X} to Mr. Wong. These advances were said to be unsecured, interest free and had no fixed terms of repayment. The first advance to Mr. Wong from {X} was made in December 1991 and by March 1993, these advances, less repayments, totalled HK$16.5 million. The loans were fully repaid by January 1995. Mr. Wong, in response to questioning, confirmed that his method of monitoring such positions

was to rely on his memory although the evidence of particular fund flows was reflected in bank statements and vouchers. The Panel did not see the ledger entries for these payments, although this information had been requested of Mr. Wong. In his evidence, {X} confirmed the informality of these arrangements.

71. {X} confirmed that he purchased shares in Kong Tai after Mr. Wong told him he "will be able to buy Kong Tai shares at 50 cents and that if I can dispose of those shares at 80 cents then I will be able to make a profit". In addition, Mr. Wong facilitated {X}'s acquisition of Kong Tai shares by introducing him to a broker, South China Securities, which was willing to provide facilities to {X} to purchase these shares on margin. Thereafter, Mr. Wong directed, at {X}'s request, the repayment of monies owed by him to {X} directly to the account at South China Securities which, at the relevant time, was used exclusively for the purchase of shares in Kong Tai. The payments into this account were made by cashier orders. The Panel does not deny that {X} had both the experience and apparent financial substance to act as an independent investor. What the Panel cannot accept is that {X}'s investment in Kong Tai was indeed entirely independent when it appears to have been funded almost exclusively by the receipt of monies by way of the repayment of sums purportedly due from Mr. Wong in to the account at South China Securities and the utilisation of the margin facilities on that account. While it is credible that {X}'s principal motive was to profit in the manner he described in evidence, the Panel does not believe that, having regard to the singularity of these transactions, there was no special agreement or understanding between Mr. Wong and {X} relating to the acquisition of these shares in Kong Tai.

72. This is particularly so when one considers that by his own evidence, {X} was unable to secure margin facilities against this counter from his existing stockbroker who had told him that it was a "rubbish stock". Yet he was prepared to commit substantial sums to purchase up to 40.2 million shares (circa 5.6% of this counter) on the mere assertion of the chairman that he would be able to buy at 50 cents and, if he can dispose of those shares at 80 cents, he would be able to make a profit. {X} gave evidence that he did not enquire of Mr. Wong in detail as to the business of the company nor indeed did he know even approximately the scale of Mr. Wong's shareholding in the company.

73. Viewed as a whole, the evidence of Mr. Wong and {X} does not ring true and, accordingly, as in the case of Mr. C and Mr. Chan, the Panel believes that it is reasonable for it to conclude that there was an agreement or understanding between {X} and Mr. Wong and active co-operation between them with regard to the consolidation of control (as defined in the Code) of Kong Tai.

Acting in concert

74. There is undisputed evidence of the acquisition of voting rights in Kong Tai by each of Mr. C, Mr. Chan and {X}, Details of these acquisitions and Mr. Wong's shareholding are set out in **Appendix 2**. The Panel has carefully considered the explanations of the parties as to the partial funding of these acquisitions by Mr. Wong or companies under his control. The Panel finds the explanations for these various arrangements wholly lacking in credibility and is of the view that, on the

body of evidence before it, it may reasonably draw the inference that these purchases were made pursuant to agreements or understandings between Mr. Wong and each of Mr. C, Mr. Chan and {X}. The Panel has therefore found that Mr. Wong was acting in concert with each of Mr. C, Mr. Chan and {X} to obtain or consolidate control of Kong Tai. For the avoidance of doubt, it was not alleged, nor is it the Panel's finding, that these three parties acted together in concert with Mr. Wong.

75. The Panel has also had to address the question of when Mr. Wong first started to act in concert with each of Mr. C, Mr. Chan and {X}. In the case of Mr. C, Mr. Wong's submission makes the point that the first loan to Mr. C identified in these proceedings was on 4 May 1994 and that of itself this precludes the Panel from finding that Mr. Wong and Mr. C were acting in concert in respect of the acquisition of shares in Kong Tai prior to this date: Mr. C's acquisitions of Kong Tai shares in April purportedly having been made with his own funds.

76. The Panel does not accept this argument. A concert party unless admitted is likely to be carefully concealed. The Panel believes that the body of evidence most certainly allows the inference to be drawn that this was indeed the case in respect of the agreements or understandings between Mr. Wong and each of Mr. C, Mr. Chan and {X} in respect of the acquisition of shares in Kong Tai In reaching its conclusion in this matter, the Panel has had regard to the evidence presented of, inter alia, longstanding relationships, the singular usage of funds provided by Mr. Wong, the absence of documentation and the relative scale of the purchases by the three parties, particularly of Mr. C and Mr. Chan. In drawing together these various threads of essentially circumstantial evidence, the Panel has felt able to make the inferences that led it to its conclusion that Mr. Wong was acting in concert with each of Mr. C, Mr. Chan and {X}. The Panel's conclusion in this regard is based on its assessment of the import of the entire body of evidence. The Panel considers that it is therefore entitled to infer that agreements or understandings in respect of the acquisition of shares in Kong Tai may have preceded the exact dates on which funds were first provided to any of Mr. C, Mr. Chan or {X} and that, in the absence of specific evidence as to the dates of agreements or understanding, the Panel is entitled to infer that such agreements or understanding preceded the time when the first purchases of Kong Tai shares were made by Mr. C, Mr. Chan or {X}. Accordingly, the Panel finds that the dates on which concert party arrangements came into existence between Mr. Wong and each of Mr. C, Mr. Chan and {X} were dates that cannot be precisely ascertained by the Panel but are dates which were not later than the dates on which the first acquisitions of shares in Kong Tai detailed in the Panel Paper and its exhibits were made by each of Mr. C, Mr. Chan and {X}. These dates were, respectively 8th April 1994 (Mr. C), 18th March 1994 (Mr. Chan) and 18th August 1994 ({X}).

Breaches of the Code

77. The first breach in time of the Code alleged by the Executive is that of Mr. C acting in concert with Mr. Wong. The Panel was informed by the Executive that it had been unable to serve papers on Mr. C. This is regrettable: the Panel considers that greater effort should have been made to locate Mr. C to serve the

papers on him. As the Executive has been unable to serve papers on Mr. C no finding can be made against him in the current proceedings as he is unaware of the actions proposed to be taken against him, the timing (now past) and place of the hearing and the case that he would be called upon to answer, and therefore to do so would be to fail to accord with the most basic principles of natural justice. This, it must be emphasized is in no way a vindication of Mr. C, who remains open to subsequent service by the Executive, should it so be determined, of papers in respect of the breach alleged.

78. As regards Mr. Wong, the Panel believes that it may properly and fairly consider the allegation against Mr. Wong of a breach of Rule 26.1 (b) by Mr. Wong acting in concert with Mr. C, notwithstanding the absence of Mr. C. It is well established in criminal proceedings that the absence of a co-conspirator does not prevent the prosecution from proceeding against the party before the court. The proceedings before the Panel are not criminal proceedings but, if a person can be tried in the absence of co-conspirators in the criminal courts, the same principle must hold good in the case of a person alleged to be acting in concert with others who are absent, in disciplinary proceedings before the Panel.

79. On 13 April 1994, purchases by Mr. C resulted in Mr. Wong and Mr. C's aggregate shareholding exceeding 35%. On that day a mandatory offer was triggered at a price of HK$0.50 per share (being the highest price paid by either of the concert parties for shares in Kong Tai in the six months preceding 13 April 1994). Failure to make such an offer is a breach of Rule 26.1 (b) and the Panel finds that Mr. Wong so breached the Code. Purchasing continued and at its highest point the aggregate holding of Mr. Wong and Mr. C was 40.6%.

80. The Panel finds that purchases by Mr. Chan which commenced on 14 April 1999 did not trigger a mandatory offer solely because the offer obligation had already arisen as a result of the previous purchase by Mr. C acting in concert with Mr. Wong. The purchases of Mr. Chan acting in concert with Mr. Wong further consolidated the control of Kong Tai by Mr. Wong and parties acting in concert with him. For Mr. Chan's part, these purchases were made with complete disregard to the requirements of the Code: of which he admits he was aware and understood its relevant provisions. Mr. Wong also knew or ought to have known that Mr. Chan's purchases were being made with scant regard to the requirements of the Code. But for the Panel's finding of an earlier triggering of a mandatory offer by Mr. C acting in concert with Mr. Wong (unbeknown to Mr. Chan), Mr. Chan's purchases would have of themselves triggered a mandatory offer. These purchases did not trigger a mandatory offer solely because of the Panel's finding that on 13 April 1994, the aggregate shareholding of Mr. Wong and Mr. C had already reached 35% of the voting rights of Kong Tai Accordingly, the first leg of Rule 26.1(b) was not satisfied in that immediately prior to the relevant time the concert parties must hold less than 35% of the voting rights. The highest point of the aggregate shareholding of Mr. Wong and Mr. Chan was 39.84%.

81. The Panel believes that Mr. Chan failed to act in accordance with the standards of conduct that might reasonably be expected of a registered person and that he

gave less than frank disclosure to the Panel of the agreements or understandings that existed between him and Mr. Wong. The Panel believes that he and Mr. Wong have knowingly and deliberately not complied with General Principle 10, which states "All parties concerned with takeovers and mergers are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information" but for the Panel's finding of a prior breach he, acting in concert with Mr. Wong, would have breached Rule 26.1(b) of the Code.

82. Purchases by {X} which commenced on 18 August 1994 further consolidated the control of Kong Tai by Mr. Wong and parties acting in concert with him. The highest point of the aggregate shareholdings of {X} and Mr. Wong was 40.04%. While {X} should have been aware of the efforts to conceal the involvement of Mr. Wong from the funding of his purchases, it does not appear that he was aware of the Code implications of the arrangements or understandings he had entered into.

The price at which the offer ought to have been made

83. Under Rule 26.3 of the Code, the price at which a mandatory offer is to be made is "the highest price paid by the offeror or any person acting in concert with it for voting rights of the offeree during the offer period or within 6 months prior to its announcement". Properly the offer period should have started when the purchase by Mr. C triggered an offer. Since no offer was announced or made, the Panel is of the view that the mandatory offer obligation should be at the highest price paid at any time during the six months prior to 13 April 1994. The highest price paid during this period by Mr. Wong or any of the parties acting in concert with him was HK$0.50 per share.

84. In determining the price at which the offer ought to have been made, the Panel has also had regard to the prices at which subsequent purchases were made by Mr. Wong and parties acting in concert with him. For the avoidance of doubt, the Panel wishes to make it clear that it does not consider this determination to be a binding precedent in future disciplinary proceedings as to the reference period to be adopted in settling upon the price at which a mandatory offer ought to have been made. In particular, the Panel reserves the right to fix upon a price set by purchases subsequent to the date upon which a mandatory offer should have been made if it considers that the particular facts of a case suggest that General Principle 1 would be better served by the adoption of such a reference point, particularly having regard to the provisions of Rule 24.1 which provides that if purchases are made during the offer period at prices higher than the offer price, the offer must be increased to the highest price paid. This would be particularly the case if control was consolidated by purchases at a materially higher price made subsequent to the date upon which a mandatory offer should have been made.

Sanctions

85. The Panel has found that Mr. Wong acting in concert with Mr. C breached Rule 26.1(b) of the Code and did so with the clear intent of concealing the breach and

avoiding his obligations under the Code. Mr. Wong also acted in concert with Mr. Chan and {X} in evident disregard of the provisions of the Code. This is unacceptable conduct, particularly in the chairman of a listed company and Mr. Wong is, accordingly, publicly censured. Moreover, the Panel, pursuant to Paragraph 12.1(e) of the Introduction to the Code, hereby requires all registered and exempt dealers, investment advisers, dealers representatives and investment representatives within the meaning of the Securities Ordinance (Cap. 333) not, without the prior consent of the Executive in writing, to act or continue to act directly or indirectly in their capacity as registered and exempt dealers, investment advisers, dealers representatives and investment representatives for Mr. Wong Wai Chi, David and any private companies controlled by him during the period commencing on 25 June 1999 and ending on 24 June 2000 (the "cold-shoulder order"). A copy of the cold-shoulder order is set out in **Appendix 3**. However, if Mr. Wong pays compensation in the amount of HK$0.019 per share (together with interest thereon from 13 April 1994 to the date of payment calculated in accordance with **Appendix 5**) to all persons who were the beneficial owners of shares in Kong Tai on 13 April 1994, being persons who were deprived of the benefit of receiving a mandatory offer, in accordance with the compensation procedure set out in **Appendix 4** then, with effect from the date of the last such payment, the cold-shoulder order shall cease to operate. The Executive may also, on the application of Mr. Wong, uplift the cold-shoulder order if it is satisfied that Mr. Wong has completed such of the procedures set out in **Appendix 4** as will ensure that compensation in the amount of HK$0.019 per share (together with interest as aforesaid) will be paid, within a reasonable period of time, to all persons who were the beneficial owners of shares in Kong Tai on 13 April 1994.

86. Mr. Chan is publicly censured for failing to comply with General Principle 10. In this regard, the Panel has taken particular cognisance of its finding that but for a prior breach of which he was unaware, Mr. Chan acting in concert with Mr. Wong would have breached Rule 26.1 on 14 April 1994. The Panel is particularly critical of Mr. Chan's conduct having regard to his status as a registered person and the dealing director and managing director of Peace Town Securities Limited.

87. The Panel has stated above that it believes it is entitled to find that Mr. Wong was acting in concert with Mr. C, notwithstanding Mr. C's absence from the proceedings. In the event that the Panel is held to be wrong in its finding of a prior breach of Rule 26.1 by Mr. Wong acting in concert with Mr. C, the Panel would have found for the reasons stated above, that Mr. Wong acting in concert with Mr. Chan, breached Rule 26.1 (b) of the Code on 14 April 1994 and that Mr. Wong and Mr. Chan should be publicly censured accordingly. In such circumstances the Panel considers that the cold-shoulder order in the form set out in **Appendix 3** would still have been made against Mr. Wong and private companies controlled by him but would have directed that such order would cease to have effect and be uplifted in the same circumstances as are set out in paragraph 85 with the substitution of 14 April 1994 for 13 April 1994 wherever such date appears in paragraph 85 and **Appendix 4**.

88. While {X} may not have known of the provisions of the Code, he entered into arrangements or understandings with the chairman of a listed company concerning the purchase of shares in that company. {X} made absolutely no effort to establish whether there were requlatory consequences resulting from his actions. The Panel believes that {X} has not been as forthright with the Panel as he should have been having regard to the provisions of General Principle 10 which his advisors have had adequate opportunity to explain to him in full. The Panel is critical of the conduct of {X}. For the avoidance of doubt, the Panel does not intend to pursue the question of a breach of Rule 26.1 (d) by virtue of the fact that {X}'sshareholdinq when aggregated with that of Mr. Wong and parties acting in concert with him would have resulted in a breach of the provisions of Rule 26.1 (d) as it feels that in practical terms there would be little to gain from such an exercise.

Conduct of the Executive

89. The Panel wishes to record its concern with the procedure adopted by the Executive in respect of {X}. The fact that {X} was not interviewed or indeed contacted by the Executive prior to the service of notice of disciplinary proceedings together with the voluminous evidence associated with these proceedings is unacceptable. The reason given by the Executive for their failure to interview {X} - namely that it was late in the day and that the other parties to the proceedings had not been co-operative - is not a sufficient reason for failing to attempt to interview or inform {X} of the proceedings prior to service and could have led to unfairness to {X} and criticism of the Executive and the Panel in this case. The assertion that other parties have been uncooperative does not allow the Executive the right to presume, in the absence of any particular evidence to the contrary, that {X} would be uncooperative. However, in the present case, the Panel is satisfied that no unfairness has been caused to {X} resulting from the Executive's failure to interview {X}.

90. The institution of disciplinary proceedings, particularly against private individuals, is not a matter to be taken lightly given the substantial legal and professional costs that may well be incurred by the individual and indeed the costs to the SFC of these proceedings. This is not to say that proceedings should not be brought where parties have been contacted but have refused to co-operate - quite the reverse. Where no effort has been made to contact the party, it is open for the Panel to take this into account in its deliberations.

91. The Panel also wishes to point out that it does not subscribe to the Executive's proposition in its Closing Submissions that "the commencement of proceedings before the Panel does not mark the conclusion of the Executive's enquiry but simply a continuation of it". While the Panel has powers of enquiry during the proceedings and may make such enquiries as members of the Panel deem appropriate, the hearing is not a forum for the Executive to continue its enquiry. The Executive may, as may the parties, question witnesses or evidence produced to the Panel, it may not, however, use the proceedings as a means to further its enquiries into the case before the Panel.