

Part XIVA disclosure obligations: Trading suspensions and post-suspension events cannot be disregarded

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The Hong Kong Court of Appeal (CA) has recently clarified the correct approach when determining whether information is likely to materially affect the price of listed securities for the purpose of Part XIVA disclosure requirements¹, in the context of the listed company having suspended its trading. Any trading suspension and its impact on the price of the securities must be taken into account. As such, the Market Misconduct Tribunal (MMT) was wrong to only consider the impact of the subject information on the pre-suspension price when deciding that the subject information was price-sensitive and that the various former officers of Mayer Holdings Limited (Mayer) were liable for breaching the disclosure requirements.

In light of the error of law, the CA ordered that the determination of liability by the MMT be set aside and the matter be remitted to the MMT for consideration.

Decision of MMT

Mayer has been listed on the Main Board of the Hong Kong Stock Exchange since 2004. In 2011, Mayer's share price fell 75 to 80% due to poor public sentiment in the prospects of the company. Trading was suspended for roughly 6 weeks until 5 January 2012. On 6 January, trading resumed for one day and closed at HK\$0.123, following which trading was suspended again at the company's request. Information arose after 6 January 2012

which the Securities and Futures Commission (SFC) in the subsequent proceedings in the MMT alleged to be price-sensitive. They were the resignation of its auditors in December 2012 and the unresolved accounting issues (including a questionable prepayment made by Mayer) which led to the auditors' indication that they would issue a qualified audit report (Subject Information). Whilst the Subject Information arose at the time when trading of the listed securities was suspended, the SFC's case was that Mayer was obliged to disclose the information pursuant to Part XIVA of the SFO but failed to do so as soon as reasonably practicable after the information came to its knowledge. It is interesting to note that Part XIVA came into effect on 1 January 2013. The SFC's case was that Mayer should have disclosed the information as soon as reasonably practicable after 1 January 2013 (notwithstanding that the information came to the company's knowledge in 2012).

In February 2017, the MMT found that Mayer and the other specified persons were in breach of the disclosure requirements under Part XIVA.

In particular, the Tribunal decided that the Subject Information constituted inside information. In reaching this decision, the Tribunal determined that when assessing whether the information was likely to "materially" affect

¹ Part XIVA of the Securities and Futures Ordinance (SFO) effectively requires listed companies and their management to disclose inside information in a timely manner. Once an officer becomes aware of any inside information concerning

the listed company, the listed company must make an announcement as soon as reasonably practicable, unless otherwise exempted.

the price of the shares, no regard shall be had to the suspension of trading. In other words, the pre-suspension price (in this case, HK\$0.123) should be the reference point in the assessment, regardless of the length of the suspension and the possible effects of any post-suspension events² on the share price. The Tribunal relied on section 307A(3), which provides, “*For the purposes of this Part, securities listed on a recognized stock market are to continue to be regarded as listed during any period of suspension of dealings in those securities on that market*” [emphasis added].

The Tribunal also accepted the expert evidence given by the SFC’s market expert, Mr. Karl Lung (**Expert**) that the Subject Information was likely to have materially affected the share price. It is notable that the Expert was instructed by the SFC to assess the price sensitivity of the information on the premise that trading in Mayer’s shares had not been suspended. That said, during cross-examination, the expert had accepted that the post-suspension events would have significantly reduced the price of Mayer’s shares.

The appellants, who are the financial controller and company secretary, and directors of Mayer, challenged the Tribunal’s decision on the grounds that it had incorrectly interpreted s.307A(3). It was contended that when considering whether information is likely to materially affect the price of listed securities, it is wrong to only have regard to the pre-suspension price. The appellants further argued that the SFC’s market expert’s evidence was therefore fundamentally flawed, as it was conducted on the false premise that the securities had not been suspended from trading.

The Court of Appeal’s ruling

What is the correct interpretation of s.307A(3)?

The Court of Appeal held that the Tribunal’s interpretation of s.307A(3) was incorrect.

s.307A(3) refers only to the *status* of a listed company, as opposed to its *activity*. In other words, s.307A(3) only states that a company’s *status* as a listed company does not change simply because the *activity* (i.e. the trading of shares on the market) had been suspended. What s.307A(3) does *not* say is that a listed company shall be regarded as continuously dealing at the pre-suspension price despite the fact of suspension of dealing. To ignore the fact of suspension is to “*require the issue of materiality [of change to the share price] to be determined on an admittedly false factual premise*”.

In deciding whether or not information will materially impact the price of the listed securities, it is important to have regard to the individual circumstances of each company at the time the information is made available. In this case, the fact that trading in Mayer’s shares had been suspended and the various post-suspension events which would have driven the price even further below the pre-suspension price were important factors. As such, it is possible that the Subject Information may not have had a “material” effect on price.

The CA has therefore set aside the Tribunal’s determination of liability and remitted the matter to the Tribunal to consider the issue of whether

² The post-suspension events included the litigation commenced by Mayer against its counter-parties in a port and property development project in Vietnam seeking to rescind the entire project in January 2012, the resignation of the then auditors in February 2012, the company’s failure to publish audited results for the year ending 31 December

2011 by March 2012, the legal actions commenced against Mayer and its officers in March and April 2012, and the resignation of a non-executive director on the basis that he had a strong disagreement with the board.

the subject information would be likely to materially affect the share price, taking into account the post-suspension events. The parties will have leave to adduce fresh expert evidence, presumably on the impact (if any) of the post-suspension events on the share price.

Key Takeaways

Officers who have an obligation under the SFO to take all reasonable measures to ensure that proper safeguards exist to prevent a breach of disclosure requirement by a listed corporation should be alert to the following:

- (i) disclosure obligations under Part XIVA do not cease just because a listed corporation has suspended trading in its shares, as the listing status remains unchanged according to section 307A(3); and
- (ii) where trading is suspended, whether any information would, if known to the market, materially affect the price of the listed securities, must be judged not only by reference to the last trading price prior to suspension, but also in light of any post-suspension event which may have an impact on the share price. It would not be easy for the listed corporation's officers to come up with a hypothetical price after taking into account the post-suspension events and to assess whether the subject information would still have a material impact on the hypothetical price. It may be safer, in such circumstances, to make an announcement of the subject information especially if the subject information clearly has a material impact on the pre-suspension share price.



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