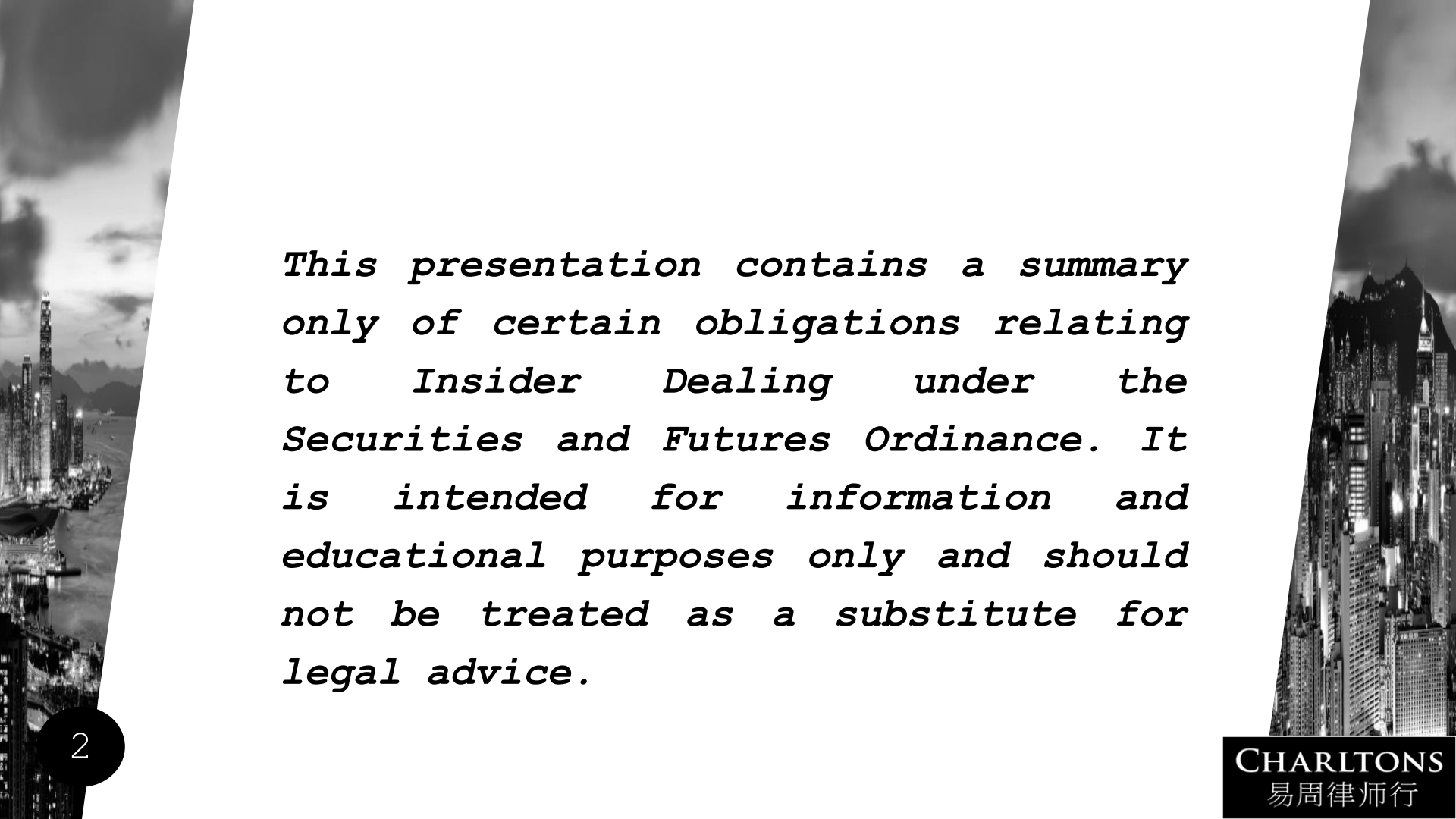




# INSIDER DEALING UNDER THE SECURITIES AND FUTURES ORDINANCE

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*This presentation contains a summary only of certain obligations relating to Insider Dealing under the Securities and Futures Ordinance. It is intended for information and educational purposes only and should not be treated as a substitute for legal advice.*



## 1. INTRODUCTION

Securities and Futures Ordinance (**SFO**) contains:

- i. **civil market misconduct** offences (Part XIII); and
- ii. **criminal market misconduct** offences (Part XIV).

**6 types** of market misconduct:

- i. insider dealing;
- ii. false trading;
- iii. price rigging;
- iv. disclosure of information about prohibited transactions;
- v. disclosure of false and misleading information inducing transactions; and

## What is Insider Dealing?

A person connected with a HKEX-listed company has privileged information, which could impact the company's share price when it becomes publicly known, trades or procures someone else to trade the company's securities or derivatives to make a profit or avoid a loss before the information becomes publicly known; or





A person obtains information from another person they know to be connected with a listed company and trades or procures another person to trade in the company's securities or derivatives so as to make a profit or avoid a loss before the information becomes publicly available.



Seven circumstances of insider dealing under the SFO (sections 270 and 291)

a. Person with inside information deals in shares of a corporation with which he is connected - Sections 270(1)(a) and 291(1)(a)

A person connected with a listed corporation has information he knows is inside information and:

i. deals in the corporation's listed securities or their derivatives or in those of a related corporation; or

ii. counsels or procures another person to deal in such listed securities or derivatives, knowing or having



**b. Take-over offer - bidder deals in shares of target - Sections 270(1)(b) and 291(2)**

A person who is contemplating or has contemplated making a take-over offer for a listed corporation and knows that the information that the offer is contemplated, or is no longer contemplated, is inside information:

i. deals in the corporation's listed securities or their derivatives or in those of a related corporation otherwise than for the purpose of the take-over; or

ii. counsels or procures another person to deal in such listed securities or

c. Person connected with a corporation leaks inside information about that corporation - Sections 270(1)(c) and 291(3)

When a person connected with a listed corporation:

i. has information which he knows is inside information; and

ii. discloses the information, directly or indirectly, to another person

knowing or having reasonable cause to believe that the other person will use the information to deal, or counsel or procure another person to deal, in the corporation's listed securities or their derivatives, or in those of a related corporation



**d. Bidder leaks take-over information - Sections 270(1)(d) and 291(4)**

A person who is contemplating or has contemplated making a take-over offer for a listed corporation and knows that the information that the offer is contemplated or no longer contemplated is inside information discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will:

- i. use the information to deal or to counsel or procure another person to deal in the corporation's listed securities or their derivatives or in those of a related corporation.

e. Recipient of inside information from a person connected with a corporation deals in shares of that corporation - Sections 271(1)(e) and 291(5)

When a person has information which he knows is inside information in relation to a listed corporation which he received, directly or indirectly, from a person whom he knows is connected with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being so connected:

i. deals in the corporation's listed securities or their derivatives or in those of a related corporation; or

. counsels or procures another person to deal in such listed securities or derivatives.

**f. Recipient of inside information about a take-over deals in shares of the target - Sections 270(1)(f) and 291(6)**

When a person has received, directly or indirectly, from a person whom he knows or has reasonable cause to believe is contemplating or no longer contemplating making a take-over offer for the listed corporation, information to that effect which he knows is inside information in relation to the corporation and:

i. deals in the corporation's listed securities or their derivatives or in those of a related corporation; or

ii. counsels or procures another person to

**g. Person with inside information seeks to facilitate a dealing on an overseas market - Sections 270(2) and 291(7)**

when a person who knowingly has inside information in relation to a listed corporation in any of the previous circumstances and:

- i. counsels or procures another person to deal in the corporation's listed securities or their derivatives or in those of a related corporation, knowing or having reasonable cause to believe that the other person will deal in such listed securities or derivatives outside Hong Kong on an overseas stock market; or
- ii. discloses the inside information to another person knowing or having reasonable cause to believe that he or some other person will use the inside information to deal or counsel or procure another person to deal in the corporation's listed securities or their derivatives or in those of a



## Insider dealing in foreign-listed securities

- The court will rely on section 300 of the SFO - using fraudulent or deceptive devices in transactions in securities, futures contracts or leveraged foreign exchange trading.




## SFC v. Young Bik Fung & Others: Facts

- Betty was seconded to a Hong Kong bank to assist with a takeover of a co. listed in Taiwan.
- Discussions took place between the two banks between August to September 2006 and a tender offer was announced on 29 September 2006.
- 20 September 2006 - a new securities account was opened with Tai Fook and the third defendant purchased 1,576,000 shares at an average price of NT\$16.99.
- 29 September - tender offer was announced and the third defendant accepted the offer for all the shares and distributed the profit (around HK\$2.69 million)



## Young Bik Fung (cont'd)

- The Court relied on section 300 of the SFO.
  - Section 300 applied because the offer to buy the securities was made in Hong Kong.
  - The third defendant's acceptance of the tender offer in Hong Kong would also have brought the case within section 300.
  - Betty's conduct amounted to a scheme or act of deception.
- 

## Young Bik Fung (cont'd)

- The CFA - s. 300 could be applied in respect of securities listed outside Hong Kong, provided “substantial activities constituting the crime” occurred within Hong Kong.





## 2. Insider Dealing - Definitions

### 2.1. "Securities"

a. shares, stocks, debentures, loan stocks, funds, bonds or notes of, or issued by, or which it is reasonably foreseeable will be issued by, a body, whether incorporated or unincorporated, or a government or municipal government authority;

b. rights, options or interests (whether described as units or otherwise) in, or in respect of, any of the foregoing;

c. certificates of interest or participation in, temporary or interim certificates for, receipts for, or documents to subscribe for or



## Definition of "Securities" (cont'd)

- d. interests in a collective investment scheme;
- e. any interests, rights or property commonly known as securities, whether in the form of an instrument or not; and
- f. structured products not falling within paragraphs (a) to (e) where a structured product is:
  - 1) an instrument under which some or all of the return or amount due (or both the return and the amount due) or the method of settlement is determined by reference to one or more of:
    - i. changes in the price, value or level (or a range within the price, value or level) of any type or combination of types of securities, commodity, index, property,

## Definition of "Securities" (cont'd)

- ii. changes in the price, value or level (or a range within the price, value or level) of any basket of more than one type, or any combination of types, of securities, commodity, index, property, interest rate, currency exchange rate or futures contract; or
  
- iii. the occurrence or non-occurrence of any specified event or events (excluding an event or events relating only to the issuer or guarantor of the instrument or to both the issuer and the guarantor);



Definition of "Securities" (cont'd)

- 2) a regulated investment agreement; or
  
- 3) any interests, rights or property prescribed, or of a class or description prescribed, by notice under section 392 of SFO as being regarded as structured products.

## 2.2 "Listed securities"

Definition of "listed securities" includes:

- i. issued unlisted securities provided that, at the time of the insider dealing, it is reasonably foreseeable that they will be listed and they are subsequently in fact listed; and
- ii. unissued securities provided that, at the time of the insider dealing, it is reasonably foreseeable that they will be issued and listed and they are subsequently in fact issued and listed.

## 2.3

### “Corporation”

The definition of “corporation” includes the large number of companies which are listed in Hong Kong but incorporated abroad.

## 2.4 Persons connected with a corporation

Sections 247 and 287 -

a. he is a director or employee of that corporation or a related corporation. (including shadow directors, i.e., persons in accordance with whose instructions the corporation's directors are accustomed or obliged to act);

b. he is a substantial shareholder (i.e. has an interest in 5% or more of the issued voting share capital) in the corporation or a related corporation;

c. his position may reasonably be expected to give him access to inside information concerning the corporation by reason of:

Persons connected with a corporation (cont'd)

- i. a professional or business relationship existing between himself (or his employer or a corporation of which he is a director or a firm of which he is a partner) and that corporation, a related corporation or an officer or substantial shareholder in either corporation; or
- ii. his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation; or
- d. he has access to inside information by virtue of being connected (within the meaning of a, b or c above) with another corporation where that information relates to a transaction (actual or contemplated) involving both corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that such transaction is no longer contemplated; or
- e. he was connected with the corporation within the meaning



Persons connected with a corporation  
(cont' d)

- A corporation is connected with another corporation if any of its directors or employees are so connected.
- Under sections 248 and 288, any public officer or member or employee of certain bodies who in his capacity as such obtains inside information about a corporation will be deemed to be connected with that corporation.



## 2.5 “Related corporations”

Two or more corporations will be related corporations of each other if one of them is:

- a. the holding company of the other;
- b. a subsidiary of the other; or
- c. a subsidiary of the holding company of the other.

## "Related corporations" (cont'd)

Corporations are also related where the same individual:

- a. controls the composition of the board of directors of one or more corporations;
- b. controls more than half of the voting power at general meetings of one or more corporations; or
- c. holds more than half of the issued share capital (excluding any part which carries no right to participate beyond a specified amount on a distribution of either profits or capital) of one or more corporations.

## 2.6 Inside Information-Definition

Section 245(1) SFO defines “inside information” in relation to a corporation as specific information about:


- a. the corporation;
- b. a shareholder or officer of the corporation; or
- c. the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would, if it were generally known to them, be likely to materially affect the price of the listed



Inside information must be  
"specific"


Information will be specific if it is capable of being identified, defined and unequivocally expressed.




*Firstone International Holdings Ltd, Chinese Estates Holdings Ltd, Chinney Alliance Group Limited, Gilbert Holdings Ltd*

Information will be sufficiently specific:

“if it carries with it such particulars as to a transaction, event or matter, or proposed transaction, event or matter, so as to allow that transaction, event or matter, to be identified and its nature to be coherently described and understood.”



Inside information must be "specific"  
(cont' d)

- Information does not need to be precise in order to be specific.
  - It is not necessary that all particulars or details of the transaction, event or matter are precisely known.
  - Information may still be specific even if it has a vague quality.
  - Contrasted with mere rumours, vague hopes and worries, and with unsubstantiated conjecture.
- 

Inside information must be information that is not generally known

- Inside information is information that is not generally known to the market.
- Rumours or media speculation relating to a company does not mean the information is “generally known”.



## Information in the media, analyst research reports or electronic subscription databases

- Media, analyst research reports or electronic subscription databases - cannot be assumed to be information that is generally known to the market.
- In determining whether this kind of information is generally known:
  - how widely the information is disseminated
  - accuracy and completeness of the information
  - whether the market can rely on that information

Information in the media, analyst  
research reports or electronic  
subscription databases (cont'd)

- a. the sources contain all the information the corporation would need to disclose as inside information under section 307B(3) of the SFO so that there are no material omissions which may make the disclosure false or misleading;
- b. the market will realise that the information in these sources reflects the information known to the corporation; and

## MMT Case: CMBC Capital

- MMT held that CMBC Capital and six of its former directors failed to disclose inside information as soon as reasonably practicable under the SFO.
- Former CEO and Company Secretary was fined HK\$1.2 million and disqualified for 15 months.

Former Chairman was fined HK\$900,000.

## CMBC Capital: the Facts

- 28 Nov 2013 - CMBC Capital announced its interim results for the 6 months ended 30 September 2013 recording a segment loss of around HK\$14.3 million in securities investment and a loss before tax of around HK\$12 million.
- CMBC announced its annual results for the year ended 31 March 2014 (recording a significant profit increase).
- Company secretary sent unaudited consolidated management accounts (between April - August 2014) to the board of directors via email.

## CMBC Capital: the Facts (cont.)

- 17 October 2014 - the board issued an announcement stating that it was not aware of any reason for those movements or any information that must be announced to avoid a false market in its shares or any inside information that needed to be disclosed under the SFO.
- 7 November 2014 - CMBC issued a profit alert after trading hours. The closing share price on the next trading day then increased by 24.84%

## CMBC Capital (cont.)

The 2014 April - August financials constituted inside information as it was:

- specific information about the company
- was not generally known to the persons accustomed to or likely to deal in the listed securities of CMBC Capital

would be likely to materially affect the price of the securities it was generally known to them.



## CMBC Capital (cont.)

- The information did or ought reasonably to have come to the knowledge of the board on or around 13 October 2014 and CMBC was obliged to disclose the information to the public as soon as reasonably practicable under s.307B(1),



## CMBC Capital (cont.)

- The former directors breached s.307G(2)(a) for their intentional, reckless or negligent conduct that had resulted in the breach of the disclosure requirements by CMBC and/or s.307G(2)(b) for failing to take all reasonable measures to ensure that proper safeguards exist to prevent a breach of the disclosure requirements.
- The former CEO and former chairman admitted that their negligent conduct led to CMBC Capital's breach of the disclosure requirements.



Information that is likely to have a material effect on the price of the listed securities

- The information must be price sensitive.
- The effect must be material.

Information that is likely to have  
a material effect on the price of  
the listed securities-cont'd

- Materiality standard - whether the information on the particular share would influence persons who would be likely to deal in the share, in deciding whether or not to buy or sell it.
- The test is a hypothetical one.
- There are no fixed thresholds of price movements or quantitative criteria



## 2.7 Dealing in securities

- Under section 249 of the SFO a person deals, whether he acts as principal or agent.
- Agreeing to deal and buying or selling the right to deal will also be dealings under the SFO.



## WHAT IS NOT INSIDER DEALING?

### 3. Defences

3.1 The dealing, counselling or procuring was made:

- a. for the sole purpose of acquiring qualifying shares **as a director** or **intending director** of a corporation;
- b. in good faith in performance of an **underwriting agreement** for the listed securities or derivatives in question; or
- c. in good faith **as a liquidator, receiver or trustee in bankruptcy.**

### 3.2 Chinese Wall Defence

A corporation (e.g. an investment bank or sponsor firm) will have a defence if it can demonstrate that:

- a. there were effective arrangements in place (i.e. a “Chinese wall”) to ring-fence any inside information in the possession of any of its directors and employees; and
- b. each person who took the decision for the corporation to deal, counsel or procure a dealing in the listed securities or derivatives in question did not have the inside information at that time and had not received advice from those in possession of such information.



### 3.3 Innocent Purpose Defence

- It is a defence if the purpose for which a person dealt in or counselled or procured another to deal in the listed securities or their derivatives or disclosed information did not include the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using the inside information.

### 3.4 Innocent Purpose Defence (cont'd)

It is a defence if a person dealt or counselled or procured another to deal in a corporation's listed securities or their derivatives:

- a. as agent;
- b. he did not select or advise on the selection of such listed securities or derivatives; and
- c. he did not know that the person for whom he acted was connected with that corporation or had the inside



### 3.5 Off-market dealings

It will be a defence if the dealing occurred off-market in Hong Kong and:

- a. the person dealing in listed securities or their derivatives and the other party:
  - i. entered into the dealing directly with each other; and
  - ii. at the time of the dealing, the other party knew, or ought reasonably to have known, of the inside information; or
- b. where a person counselled or procured another person to deal in listed securities or their derivatives, he counselled or procured the other party to enter into the dealing directly with him and at that time the other party knew, or ought reasonably to have known, of the inside information.



### 3.6 Off-market dealings (cont'd)

- It is a defence where a person dealt in listed securities or their derivatives but did not counsel or procure the other party to deal and at the time of the dealing the other party knew, or ought reasonably to have known, that he was a person connected with the corporation.

### 3.7 Off-market dealings (cont'd)

A person will have a defence if they counselled or procured another to deal in listed securities or their derivatives and establishes that:

- a. the other person did not counsel or procure the other party to the dealing to deal in the listed securities or derivatives; and
- b. at the time he counselled or procured the other person to deal, the other party to the dealing knew, or ought reasonably to have known, that



### 3.8 Off-market dealings (cont'd)

A defence is available to a person who dealt or counselled or procured another to deal in a corporation's listed securities or their derivatives where:

a. the person acted in connection with any dealing which was under consideration or was the subject of negotiation, or in the course of series of such dealings and with a view to facilitating the accomplishment of the dealing or the series of dealings; and

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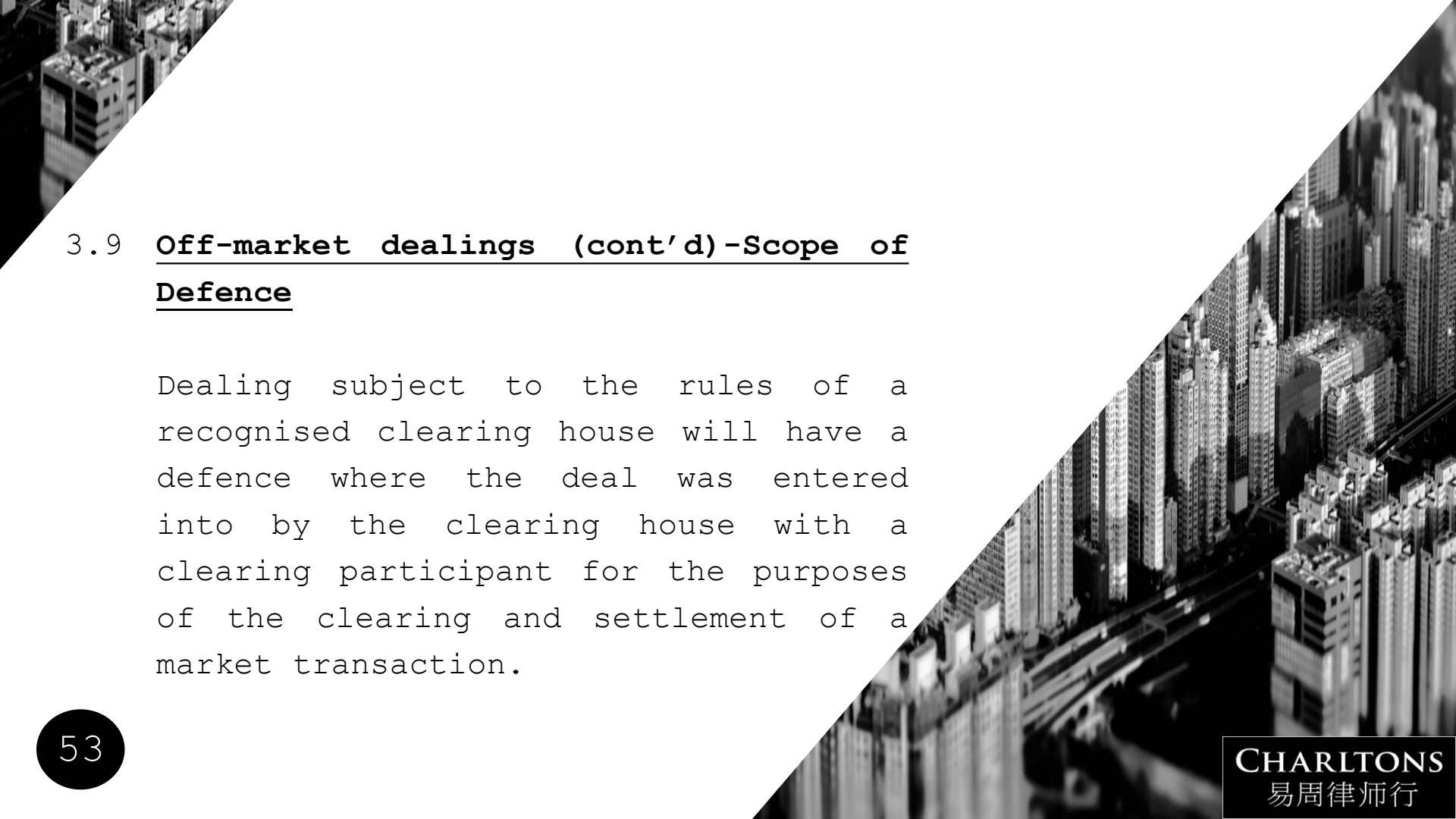
b. the inside information was market information arising directly out of his involvement in the dealing or





## Market Information-Definition

- that there has or is to be (or that there has not been or is not to be) a dealing in listed securities or their derivatives or that any such dealing is under consideration or negotiation;
- the quantity and price (or price range) of the listed securities or their derivatives; and
- the identity of the persons involved.



### 3.9 Off-market dealings (cont'd) - Scope of Defence

Dealing subject to the rules of a recognised clearing house will have a defence where the deal was entered into by the clearing house with a clearing participant for the purposes of the clearing and settlement of a market transaction.

## Off-market dealings (cont'd)

- Sections 272 and 293 - a defence where a trustee or personal representative dealt in or counselled or procured a dealing in listed securities or their derivatives on advice obtained in good faith from an appropriate person who did not appear to him to be a person who would have been involved in insider dealing if he himself had dealt in the listed securities or their derivatives.
- Sections 273 and 294 - a defence where a person dealt in listed securities or their derivatives in the exercise of a right to subscribe for or otherwise acquire such securities or their derivatives which was granted to him or was derived from securities held by him at a time



## Innocent purpose defence

### SFC v. Yiu Hoi Ying Charles and Others

- The respondents, Mr. Yiu Hoi Ying Charles (**Mr. Yiu**) and Ms. Wong Nam Marian (**Ms. Wong**) held 6 million shares and 10 million shares in Asia Telemedia Limited (**ATML**), respectively.
- ATML owed a debt of HK\$58.08 million to Goodpine Limited.
- In April 2007, Goodpine Limited served a statutory demand on ATML and stated that it would issue a winding-up petition against ATML if the debt was not repaid within 21 days.

## Innocent purpose defence (cont'd)

- Mr. Yiu and Ms. Wong sold their shareholdings and made profits of HK\$5.305m and HK\$5.1m respectively .
- The SFC alleged - the respondents' knowledge of Goodpine Limited's statutory demand to ATML constituted inside information and that they engaged in insider dealing when they relied on that information to dispose of their ATML shares at a profit.







## Innocent purpose defence (cont'd)

- Mr. Yiu and Ms. Wong relied on the innocent purpose defence.
- The MMT (and later the Court of Appeal) accepted that defence.
- The defence was rejected in the CFA's four-to-one decision for the SFC.

## Innocent purpose defence (cont'd)

- The CFA stated that using inside information means turning the possession of inside information into action.
- Mere withholding or non-disclosure of inside information is insufficient to show use of the inside information.
- The inside information had to be exploited for financial advantage.
- The rulings suggests that officers of a listed corporation are considered to be using inside information and cannot rely on the innocent purpose defence if they possess inside information which is not publicly known when they deal in the corporation's securities.

#### 4. Consequences of Insider Dealing

- The MMT conducts civil proceedings and imposes civil sanctions.
- It is an independent body chaired by a judge / former judge who sits with two members and a presenting officer
- It is inquisitorial and is entitled to direct that the SFC carry out further investigations and report
- The presenting officer of the MMT is a lawyer whose role is to present evidence to the MMT.

## MMT Proceedings


- If it appears to the SFC that market misconduct has, or may have, taken place, it can institute proceedings before the MMT under Section 252 of the SFO.



## MMT Proceedings (cont'd)

The purpose of MMT proceedings is to determine:

- a. whether any market misconduct has taken place;
- b. the identity of persons who have engaged in market misconduct; and
- c. the amount of any profit gained or loss avoided as a result of the market misconduct.



## MMT Proceedings (cont'd)


The MMT may identify a person as having engaged in market misconduct if:

- a. he has perpetrated any market misconduct;
- b. the market misconduct was perpetrated by a corporation of which he is an officer with his consent or connivance; or
- c. another person engaged in market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constituted or might constitute market misconduct.

## MMT Proceedings (cont'd)

- Civil standard of proof
- Must be satisfied that a person has engaged in market misconduct on the balance of probabilities.





## MMT Proceedings (cont'd)

- The MMT has powers to receive any evidence, whether or not the evidence would be admissible in civil or criminal proceedings; and
- Has wide powers to compel the giving of evidence and to prevent the publication of information about the evidence it receives.



## MMT Proceedings (cont'd)

- A person is not excused from complying with a requirement of the MMT to give evidence on the ground that to do so might incriminate him (section 253(4)) and compelled self-incriminatory evidence may be considered by the MMT.



## SFC v. Cheng Chak Ngok: Facts

He obtained information regarding:

- (i) the consortium formed to finance the acquisition;
- (ii) the timing of the announcement of the general offer (the **Announcement**); and
- (iii) the offer price.

The SFC - insider dealing had been committed by Mr. Cheng when he used a third party's securities account to purchase China Gas shares immediately prior to its suspension of share trading before the Announcement

## Facts (cont'd)

- Profit of approximately HK\$3 million made when shares were later sold.
- MMT was not satisfied on a balance of probabilities that Mr. Cheng had dealt in China Gas shares at the material times.
- The SFC appealed against that decision.

## Principles set out by the Court of Appeal

### *Nature of MMT Inquiry*

- The nature of the MMT's inquiry on market misconduct is civil and inquisitorial.

### *Standard of Proof*

- The standard of proof is on a balance of probabilities.
- Case law - the standard of proof will be proportional to the seriousness of the allegations.

Principles set out by the  
Court of Appeal (cont'd)

*Burden of Proof*

- Only relevant in adversarial proceedings.
- In inquisitorial proceedings, no party has the burden of proof.





## SFC's Grounds for Appeal

The SFC specified 4 grounds of appeal:

- i. the MMT had erred in law in
  - a. misdirecting itself that the inquiry was adversarial in nature;
  - b. misdirecting itself that burden of proof applied and rested with the SFC; and
  - c. failing to exercise its investigative powers under



## SFC's Grounds for Appeal (cont'd)

- ii. the MMT had applied a criminal standard of proof;
  
- ii. the MMT erred in concluding that it could not be satisfied that Mr. Cheng had engaged in insider dealing on a balance of probabilities; and
  
- iii. the MMT failed to exercise its investigative powers under the SFO before concluding the inquiry.

## Decision of the Court of Appeal

### *Standard of proof*

- The MMT had not properly evaluated the available evidence and was wrong in applying the criminal standard.
- Mr Cheng's evidence was confusing and suspicious, but the SFC needed to provide more compelling evidence to prove the case.
- The MMT erred in requiring the SFC to prove the case on the basis of the criminal standard of



## Burden of proof

- The MMT had incorrectly imposed the burden of proof on the SFC.
- No burden of proof need be imposed in an inquisitional inquiry.
- The SFO requires the SFC to present evidence to the MMT to enable the MMT to come to a decision.

A black and white photograph of a city skyline, likely Hong Kong, with numerous skyscrapers and a body of water in the foreground. The image is split into two triangular sections by a white diagonal line.

## Burden of proof (cont'd)

The SFC is only required to present evidence and information to the MMT, which should investigate the facts to reach a decision on a balance of probabilities.



## MMT Orders

1. a disqualification order
2. cold-shoulder order
3. cease and desist order
4. disgorgement order
5. cost orders
6. a disciplinary referral

## Appeals

- May appeal to the Court of Appeal on a point of law.
- Need to obtain leave of the Court of Appeal for an appeal based on a question of fact (section 266).
- In the case of SFC disciplinary actions, may appeal to the SFAT.
- SFC and SFAT proceedings are civil in nature and use the civil standard of proof.

## MMT Case- China Huiyuan Juice Group Ltd

- Ms. Sun Min was prosecuted for buying around 8.6 million shares of China Huiyuan Juice Group Ltd.
- Ms. Sun made a profit of HK\$55.1million + when she sold all her shares in the company within 48 hours after the public announcement of the Coca-Cola takeover.
- Ms. Sun had close connections with the management of the company, but no direct evidence that she received insider information.
- She denied having any inside information



MMT Case- China Huiyuan Juice Group Ltd  
(cont'd)

- The SFC's case centered around the circumstantial evidence and inferences from handwritten notes from a meeting on the Coca-Cola takeover found in Ms. Sun's secretary's diary.
- The SFC was unable to identify from which connected person the inside information came or how the information was collected / passed to her employer.



MMT Case- China Huiyuan Juice Group  
Ltd (cont'd)

MMT held - if the identity of the connected person who passed on the insider information could not be ascertained, the MMT would decide, based on all available evidence, whether a compelling inference could be drawn that the insider information must have been from an unidentified connected person and that Ms. Sun must have known of that fact.

MMT Case- China Huiyuan Juice Group Ltd (cont'd)

- The information was fact specific.
- Some of the notes concerned PRC antitrust law.
- The MMT inferred that the information came from an insider even though the insider's identity could not be ascertained.





MMT Case- China Huiyuan Juice Group Ltd  
(cont' d)

- The MMT also considered that the inside information in the diary must have come from Ms. Sun or she must have known of the information.
- The information would have been passed on in the normal course of events.
- The MMT rejected the secretary's evidence that she was unsure whether she had passed on the information to Ms. Sun

## MMT Case - Warderly International Holdings Limited

- Former company secretary (**Lo**) (held around 1.6 million shares)
- Lender and potential investor (**Luu**) (held around 50 million shares through three nominees).
- Mid-2006 - Warderly encountered cash flow problems and both Lo and Luu sold their share holdings in late March / April 2007.
- The SFC alleged that Lo and Luu engaged in insider dealing as at the time they sold their shares, they were in possession of price sensitive information concerning Warderly's



MMT Case - Warderly International Holdings Limited (cont.)

- a. tightening of banking facilities since July 2006, and subsequent events e.g. overdue loans, rescheduled payments, demand letters and writs issued by banks and lenders;
- b. the HK\$2 million loan from Luu on 17 November 2006 at an interest rate of 5% per month;
- c. further loans from Luu totaling HK\$7.2 million at an interest rate of 5% on 11 and 28 December 2006;
- d. Warderly's failure to repay the loan and interest due to Luu when they became due on 28 January 2007; and/or
- d. the HK\$10 million loan from Mr. Luu in February 2007 that carried an interest rate

## MMT Case - Warderly International Holdings Limited (cont.)

- MMT held - the information regarding Warderly's poor financials was already known to the public and there was no adverse impact on the stock price.
- The information was therefore not relevant information and Lo and Luu were held not to have engaged in insider dealing.



## 4.2 Criminal Liability

- All forms of market misconduct are liable to prosecution as a criminal offence under Part XIV of the SFO (maximum penalty of 10 years' imprisonment and a fine up to HK\$10 million.)
- The court may also make disqualification, cold shoulder and disciplinary referral orders and non-compliance.
- Non-compliance is an offence liable to a maximum fine of HK\$1 million and

An aerial, black and white photograph of a dense city skyline, showing numerous skyscrapers and buildings. The image is positioned on the left side of the slide, partially overlapping the text area.

## No double jeopardy

- A person who has been subject to criminal proceedings under Part XIV may not be subject to MMT proceedings if those proceedings are still pending or if no further criminal prosecution could be brought against that person again under Part XIV in respect of the same conduct and vice versa (sections 283 and 307).

## No double jeopardy (cont'd)

- The decision as to whether to take civil or criminal proceedings in relation to suspected market misconduct is made by the Secretary for Justice based on two criteria.
- The SFC may also institute summary criminal proceedings before a magistrate for less serious market misconduct offences.



### 4.3 Civil Liability - Private right of action

The SFO provides a private right of civil action against any person who has committed market misconduct or any offence under Part XIV in favour of anyone who has suffered a pecuniary loss as a result, unless it is fair, just and reasonable that the perpetrator should not be liable (sections 281 and 305).



### 4.3 Civil Liability - Private right of action (cont'd)

A person will be taken to have committed market misconduct if:

- a. he has perpetrated any market misconduct;
- b. any corporation of which he is an officer perpetrated the market misconduct with his consent or connivance; or
- c. any other person committed market misconduct and he assisted or connived with that person in the perpetration of the market misconduct, knowing that such conduct constitutes or might constitute market misconduct.

### 4.3 Civil Liability - Private right of action (cont' d)

- Not necessary to have a finding of market misconduct by the MMT or a criminal conviction under Part XIV before bringing civil proceedings.
- Findings of the MMT are admissible as prima facie evidence that the market misconduct took place or that a person engaged in market misconduct.
- A criminal conviction constitutes conclusive evidence that the person committed the offence.
- The courts are able to impose injunctions in addition to or in substitution for damages.

**Transactions not void or  
voidable**

Sections 280 and 304 SFO - a  
transaction is not void or  
voidable by reason only that  
it constitutes market  
misconduct.



## 5. Liability of Officers of a Corporation

### 5.1 Duty of Officers

Section 279 of the SFO - duty on all officers of a corporation to take reasonable measures to ensure that proper safeguards exist to prevent the corporation from acting in a way which would result in the corporation perpetrating any market misconduct.

## 5. Liability of Officers of a Corporation (cont'd)

- The definition of an “officer of a corporation” includes a director, manager or secretary of, or any other person involved in the management of, the corporation.



## 5. Liability of Officers of a Corporation (cont' d)

Section 258 - where a corporation has been identified as having been engaged in market misconduct and the market misconduct is directly or indirectly attributable to a breach by any person as an officer of the corporation of the duty imposed on him under section 279, the MMT may make one or more of the orders even if that person has not been identified as having engaged in market misconduct himself.

## Civil Liability

- Anyone who suffers pecuniary loss as a result of market misconduct has a right of civil action to seek compensation.

## *Criminal Liability*

Section 390 SFO - where it is proved that an offence committed under Part XIV was aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to the recklessness of, any officer of the corporation, or any person purporting to act in any such capacity, that person, as well as the corporation, is guilty of the offence and liable to be punished accordingly.





## Disciplinary Proceedings

- Under Part IX SFO - any regulated person who is guilty of misconduct or who, in the opinion of the SFC, is not a fit and proper person to be or to remain the same type of regulated person, is subject to a widened range of disciplinary procedures.
- “Misconduct” - any contravention of the SFO or of the terms of any licence issued or registration made under it.



## *Disciplinary Proceedings (cont'd)*

- The SFC may revoke or suspend a person's licence in respect of all or any part of the regulated activities for which he is licensed; or
- May impose a fine not exceeding the greater of HK\$10 million or 3 times the amount of the profit gained or loss avoided by the regulated person as a result of his misconduct, or such other conduct which led to the SFC's opinion that he is not fit and

A black and white photograph of a city skyline, likely Hong Kong, with numerous skyscrapers and a body of water in the foreground. The image is split into two triangular sections by a white diagonal line.

## *Disciplinary Proceedings (cont'd)*

- The SFC may also impose prohibition orders.
- Approvals granted to responsible officers may also be suspended or revoked.

## Disciplinary Proceedings (cont'd)

- Corporations licensed under the SFO;
- Responsible officers and persons involved in the management of licensed corporations;
- Authorised financial institutions and their executive officers, persons involved in the management of their regulated business and individuals named in their register as carrying out a





## 6. Proceedings under Section 213 of the SFO


Section 213 - CFI may, on the application of the SFC, grant orders to prevent or remedy breaches of the SFO and other relevant ordinances.



## 6. Proceedings under Section 213 of the SFO (cont' d)

Section 213 of the SFO also covers:

- a. aided, abetted or assisted, counselled or procured another person to commit a breach of the SFO;
- b. induced, by threats, promises or otherwise, another person to commit a breach of the SFO;
- c. directly or indirectly being knowingly involved in, or a party to, a breach of the SFO; or
- d. attempted or conspired with others to commit a breach of the SFO.



## 6. Proceedings under Section 213 SFO - remedies

- Injunctions and orders requiring the person to take steps to restore the parties to a transaction to the position they were in before the transaction; or
- Restraining or prohibiting a person from acquiring, disposing of or dealing in any property

The CFI has to satisfy itself that it is desirable to make one or more of the order(s) and that the order(s) will not unfairly prejudice any person.



## 7. Other Insider Dealing Cases

### SFC v. Tiger Asia

- Tiger Asia received confidential and price sensitive information regarding placements of the shares of two banks
- It then took short positions in the shares of the two companies (before the placings were announced to the public) and made a substantial profit.
- Tiger Asia also manipulated the CCB share price during the closing auction session.
- The court ordered Tiger Asia and the two senior officers to pay around HK\$45.3 million to investors affected their insider dealing.



## HKSAR v. Du Jun

- Du Jun was convicted of insider dealing in the shares of China Resources Holdings and sentenced to six years' imprisonment and fined HK\$1.7m.
- In s.213 proceedings, the court granted a restoration order against Du Jun, ordering him to pay HK\$23.9m to 237 affected investors.

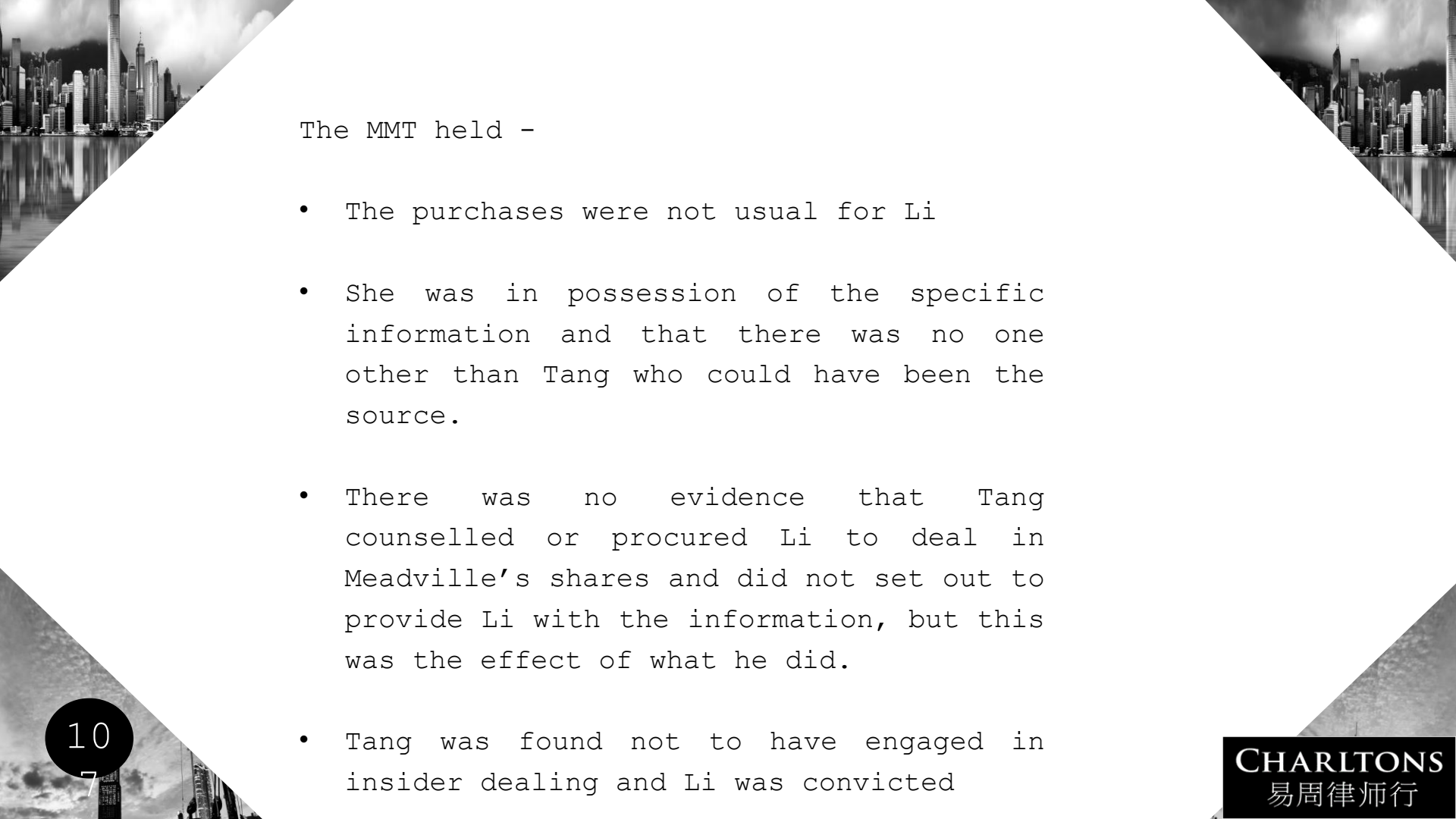




## 7. Other Insider Dealing Cases

### Meadville Holdings

- The SFC alleged that Tang tipped off Li about a potential acquisition.
- Li then purchased around 2.1m shares in Meadville and made a profit of around HK\$6.5m upon selling them.
- Both Tang and Li refuted this.

The background of the slide features a black and white photograph of a city skyline, likely Hong Kong, with numerous skyscrapers and a body of water in the foreground. The image is framed by a white diamond shape that points towards the center of the slide.

The MMT held -

- The purchases were not usual for Li
- She was in possession of the specific information and that there was no one other than Tang who could have been the source.
- There was no evidence that Tang counselled or procured Li to deal in Meadville's shares and did not set out to provide Li with the information, but this was the effect of what he did.
- Tang was found not to have engaged in insider dealing and Li was convicted

Leung Pak Keung - Cash Financial  
Services Group (CFSG)

- April 2021 - Leung Pak Keung was acquitted of charges of alleged insider dealing in the shares of CFSG.
- The Court concluded that it was not demonstrated beyond reasonable doubt that Leung knew the subject information was inside information.
- The SFC is reviewing the decision.



## Leung Pak Keung – Cash Financial Services Group (CFSG) (cont.)

- Leung acted as a legal adviser to the buyer (Oceanwide Holdings) in a proposed acquisition of a 44% stake in CFSG.
- The SFC alleged that Leung purchased CFSG shares (around 2.1m) whilst in possession of CFSG-specific, non-public and price sensitive information.
- Following the announcement of the proposed acquisition on 12 January 2015, Leung disposed of his CFSG shares and made a profit of UK\$45,300.

## Chow Chiu Chi – China Automation

- 17 Dec 2020 – Eastern Magistrates' Court convicted Mr. Chow Chiu Chi, company secretary of China Automation Group Ltd (China Automation) of insider dealing in the shares of China Automation and Chow was subsequently sentenced in January 2021 to 45 days of imprisonment and fined HK\$45,000.



## Chow Chiu Chi - China Automation (cont.)

- Chow purchased a total of 534,000 shares through his wife's securities account upon becoming aware of a possible general offer and being instructed to arrange suspension of trading on 11 April 2016.
- The suspension commenced in the afternoon of 11 April.
- China Automation published an announcement on 12 April 2016 in relation to the possible general offer.
- Upon resumption of trading on 13 April, the

## Chow Chiu Chi – China Automation (cont.)

- Between 14 – 21 April 2016, Chow sold some of the China Automation shares and made a profit of HK\$7,417.
- The notional profit of the remaining unsold shares was HK\$36,865.
- The SFC stated that Chow, by virtue of his position, had access to inside information and used it to profit from trading the company's shares and thereby gained an unfair advantage in the market and abused the trust of the company.



## Securities and Futures Commission v. Chan Pak Hoe Pablo

- Chan was found guilty of insider dealing and initially sentenced to 240 hours of community service and ordered to pay the SFC's investigation costs.
- On review, the Eastern Magistrates Court sentenced Chan to 4 months' imprisonment and a fine of HK\$120,000.
- On appeal, the CFI restored the original sentence - the Magistrate lacked jurisdiction to grant the application for review of a sentence once notice of appeal had been lodged.
- The CFA reversed that decision - a pending appeal against one part of a Magistrate's decision does not preclude review of another part. The 4 months' imprisonment and fine were restored.
- The Hon. Justice Riberio clarified that the appropriate sentencing for insider dealing cases is a custodial sentence and a fine to disgorge all the profits made

## Hong Kong Aircraft Engineering Company

- Mr. Lam obtained price sensitive information regarding a potential acquisition and purchased shares in the target minutes later, making a profit of HK\$79,000.
- The Court rejected his argument he was intoxicated when making the trades .

Lam was sentenced to 5 months' imprisonment (suspended for 2 years), fined HK\$500,000 and ordered to pay half of the SFC investigation costs



## China CBM Group Company Limited

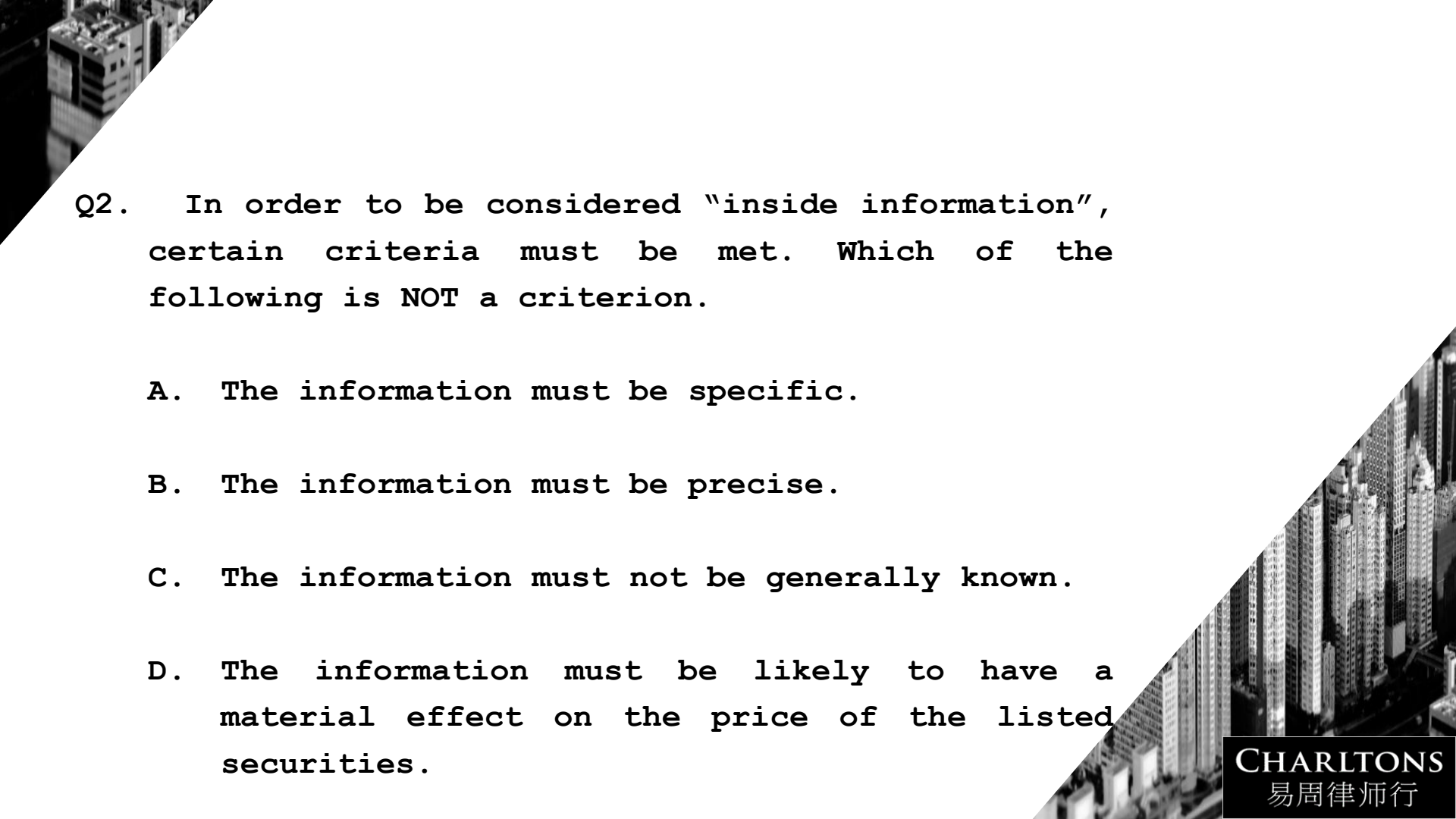
- Mr. Au-Yeung (former group finance manager of China CBM) learned while auditing the company's financials that CBM had suffered a loss and was at risk of trading in its shares being suspended.
- Mr Au-Yeung counselled or procured his father to sell 500,000 CBM shares beneficially owned by Mr. Au-Yeung and sold 600,000 CBM shares himself. Trading in CBM shares was suspended and the share price dropped 20% when trading resumed. Mr. Au-Yeung avoided a notional loss of HK\$174,000.
- Mr. Au Yeung was sentenced to 4 months' imprisonment and fined HK\$120,000. On appeal, the sentenced was upheld, however Mr Au-Yeung was allowed to serve the custodial term of his two convictions concurrently.

MCQs



Q1. Which of the following is an example of an individual "connected" with a company?

- A. A shadow director of the company.
- B. A substantial shareholder.
- C. An executive director of a related company.
- D. All of the above.



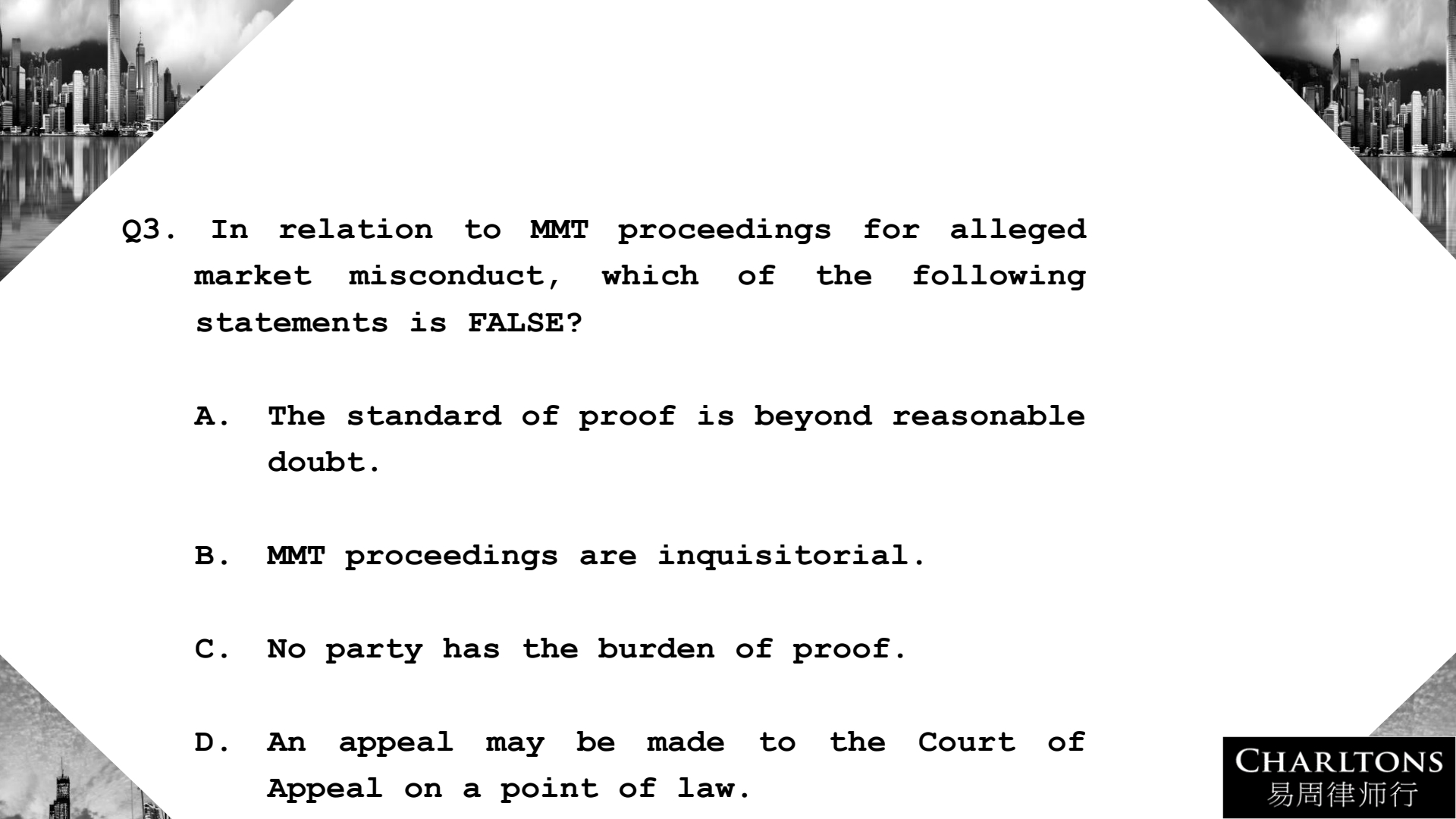
Q2. In order to be considered "inside information", certain criteria must be met. Which of the following is NOT a criterion.

A. The information must be specific.

B. The information must be precise.

C. The information must not be generally known.

D. The information must be likely to have a material effect on the price of the listed securities.

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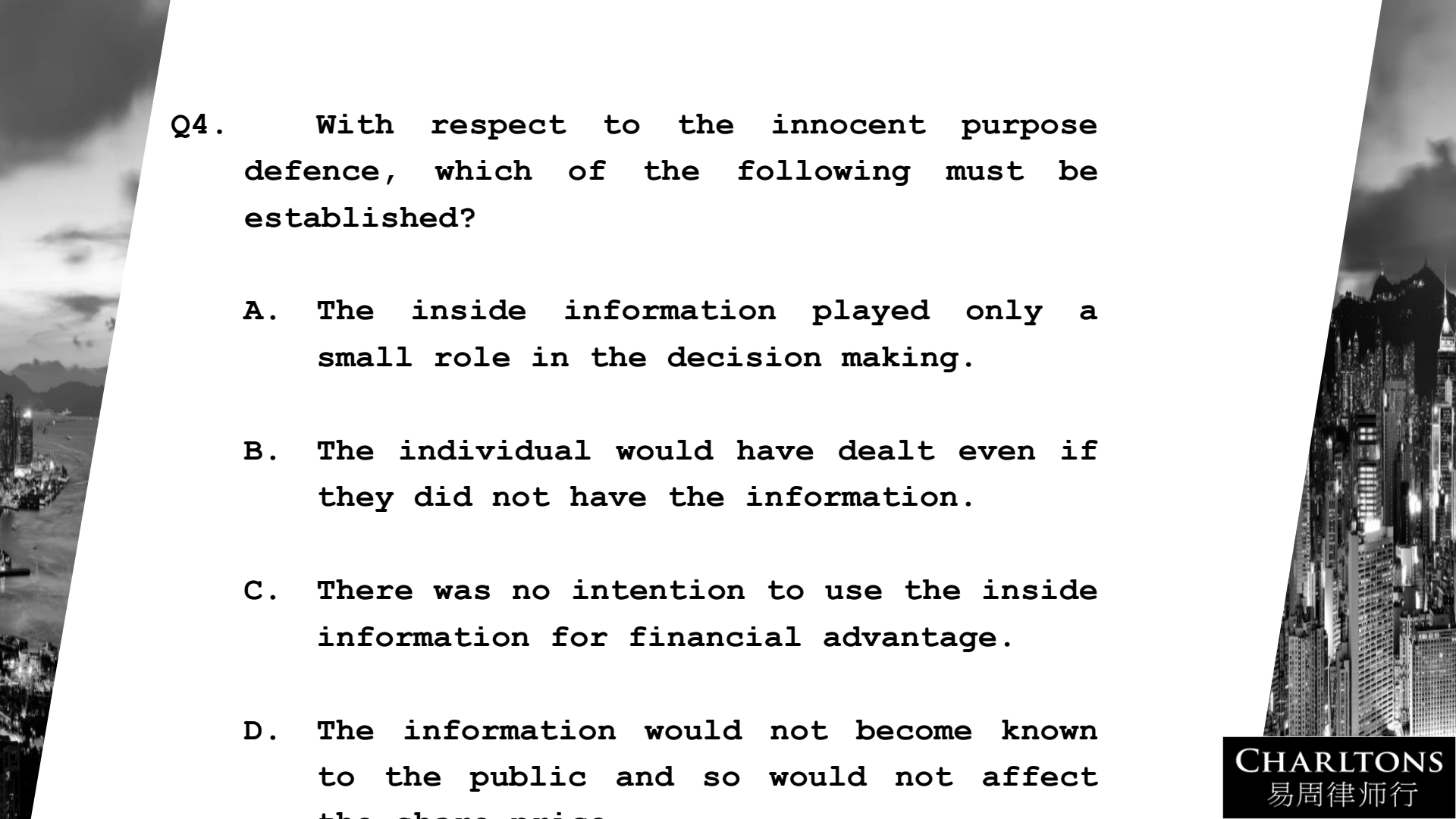
Q3. In relation to MMT proceedings for alleged market misconduct, which of the following statements is FALSE?

A. The standard of proof is beyond reasonable doubt.

B. MMT proceedings are inquisitorial.

C. No party has the burden of proof.

D. An appeal may be made to the Court of Appeal on a point of law.



Q4. With respect to the innocent purpose defence, which of the following must be established?

- A. The inside information played only a small role in the decision making.
- B. The individual would have dealt even if they did not have the information.
- C. There was no intention to use the inside information for financial advantage.
- D. The information would not become known to the public and so would not affect the share price.



Q5. Insider dealing involves certain elements. Which of the following is NOT one of those elements?

A. The person concerned is a connected person.

B. The company is publicly listed in Hong Kong or on an overseas exchange.

C. The person has information which constitutes inside information under the SFO.