In the Matter of
Jade Technologies Holdings Limited

Grounds of Decision
of the Hearing Committee
appointed by the Securities Industry Council

Coram:

Mr John Lim
Mr Daniel Ee
Mr Andrew Khoo
Mr Ronald Ong
Mr Hans Tjio

14 October 2008

Contents

Chapter 1 Introduction

1.1 This is a decision by the hearing committee appointed by the Securities Industry Council ("SIC or "the Council") to determine if any party had breached the Singapore Code of Take-overs and Mergers ("the Code") in relation to the withdrawal of the conditional cash offer ("the Offer") by Asia Pacific Links Ltd ("the Offeror") for Jade Technologies Holdings Limited ("Jade" or "the Company").

1.2 The hearing committee issued summonses to the following parties to give evidence: (i) Dr Anthony Soh Guan Cheow ("Dr Soh"); (ii) Ms Tsai Ai Liang, Ms Ang Suat Ching and Mr Tan Wei Ping from Oversea-Chinese Banking Corporation Ltd ("OCBC Bank"); (iii) Mr Steven Lo Pang Foo ("Mr Lo") and Mr Christopher Koh Thong Jer ("Mr Koh") from Messrs Allen & Gledhill LLP ("A&G") and (iv) Merrill Lynch International ("MLI").

1.3 Dr Soh was summoned to determine whether:

(i) Dr Soh had breached General Principle 6 of the Code by announcing, through the Offeror, the Offer on 18 Feb 2008 without being satisfied that he could and would continue to be able to implement the Offer in full;

(ii) the disclosure by Dr Soh that the Offeror and Dr Soh held in aggregate 451,172,504 shares representing 46.54% of the issued shares of Jade in the announcement of the Offer dated 18 Feb 2008 and the Offer document dated 8 Mar 2008 had

breached Rules 3.5(c) and 23.3(c) of the Code, respectively, and/or met the standard of care required under Rule 8.2 of the Code; and

(iii) Dr Soh had breached Rule 11.2(a) by selling shares in Jade during the Offer period.

1.4 Ms Tsai Ai Liang, Ms Ang Suat Ching and Mr Tan Wei Ping from OCBC Bank were summoned to determine whether:

(i) OCBC Bank had acted responsibly and taken all reasonable steps to assure itself that cash would be available to the Offeror to satisfy full acceptance of the Offer when OCBC Bank provided, in the announcement of the Offer dated 18 February 2008 and the Offer document dated 8 March 2008, the confirmation required under Rules 3.5 and 23.8 of the Code, respectively; and

(ii) OCBC Bank's conduct as financial adviser to the Offeror in respect of the disclosure that the Offeror and Dr Soh held in aggregate 451,172,504 shares representing 46.54% of the issued shares of Jade in the announcement of the Offer dated 18 February 2008 and the Offer document dated 8 March 2008 had breached Rules 3.5(c) and 23.3(c) of the Code and/or met the standard of care required under Rule 8.2 of the Code.

1.5 Mr Lo and Mr Koh from A&G were summoned to determine whether the conduct of A&G as legal adviser to the Offeror in respect of

the disclosure that the Offeror and Dr Soh held in aggregate 451,172,504 shares representing 46.54% of the issued shares of Jade in the announcement of the Offer dated 18 February 2008 and the Offer document dated 8 March 2008 had breached Rules 3.5(c) and 23.3(c) of the Code, respectively, and/or met the standard of care required under Rule 8.2 of the Code.

1.6 MLI was summoned to determine whether MLI had breached Rule 12.1 of the Code for failing to publicly disclose in accordance with Notes 4, 5 and 6 on Rule 12 of the Code its dealings in the shares of Jade during the Offer period.

Chapter 2 Procedures

1 The hearings were conducted in accordance with the guidelines stated in the Introduction to the Code. These guidelines sought to ensure that all the parties summoned were given a full opportunity to be heard. The parties were informed of these procedures before the commencement of each hearing.

2 Although the Code states that no legal representation is permitted at the proceedings, the hearing committee nonetheless acceded to the requests of the summoned parties to allow their solicitors to accompany them. The summoned parties were allowed to consult their solicitors, and their solicitors were allowed to make oral submissions at the end of each hearing as well as written submissions following the hearings.

3 After the hearing committee had decided whether the parties were in breach of the Code, it wrote to Dr Soh, OCBC Bank, A&G and MLI on 8 August 2008 to inform them of the findings and invited them to make written and/or oral representations on sanctions and of any mitigating circumstances which they thought the hearing committee should take into consideration in connection with the imposition of such sanctions.

4 The parties asked for an opportunity to make oral submissions on sanctions and further hearings were conducted before the hearing committee.

5 The hearing committee made its final decision after considering all the oral and written representations of the parties. The findings are as contained in these grounds of decision.

Chapter 3 Background Facts

1 The Offeror is wholly-owned by Jade's Group President, Dr Soh. Dr Soh first invested in Jade in June 2007 when he acquired shares representing approximately 76% of Jade's total issued capital. As he had acquired more than 30%, Dr Soh was obliged to make a mandatory offer for the Company. Following the mandatory offer, private placements from his 76% stake and the issuance of new shares by the Company resulted in Dr Soh's holdings in the Company falling to approximately 445,672,504 shares representing approximately 45.97% of the Company's issued capital in September 2007.

2 Securities Lending Agreement

2.1 In September 2007, Dr Soh began negotiations with Mr Raj Maiden, Mr Laurie Emini and Mr Anthony Blumberg from Opes Prime Stock Broking Limited ("Opes") which resulted in the Offeror and Opes entering into the Global Master Securities Lending Agreement ("GMSLA") on or about 26 September 2007. Thereafter, pursuant to the GMSLA, the Offeror began transferring Jade shares to companies under the MLI group, which held the Jade shares in custody for Opes. In total, 300.05 million Jade shares representing approximately 30.95% of Jade's issued capital were transferred between 26 September 2007 and 25 January 2008.

2.2 On 21 January 2008, Opes sold 4.6 million Jade shares, purportedly under the terms of the GMSLA. According to Dr Soh, in response, he announced that he had bought 5.5 million Jade shares on 21 January 2008 in order to maintain the level of his holdings in Jade. Dr Soh demanded an explanation for the sale, and Opes agreed to restore his 4.6 million shares.

On the strength of this assurance, Dr Soh sold 5.5 million Jade shares to pare his holdings to its previous level. However, Opes never restored the shares to Dr Soh.

3 Dealings between Dr Soh, OCBC Bank and A&G

3.1 On 1 February 2008, the Offeror engaged OCBC Bank to act as its financial adviser in relation to the proposed Offer. On the recommendation of OCBC Bank, the Offeror also engaged A&G as its legal adviser.

3.2 On 4 February 2008, at a kick-off meeting attended by Dr Soh, A&G and OCBC Bank, Dr Soh had, amongst others, informed A&G and OCBC Bank that the Offeror's Jade shares were pledged with Opes for financing under the GMSLA. During the kick-off meeting, OCBC Bank requested Dr Soh to provide a letter from a financial institution in a specific format for the purposes of confirmation of financial resources by OCBC Bank. The next day, A&G sent an e-mail to Dr Soh requesting copies of certain documents, including the GMSLA.

3.3 A verification meeting on the draft announcement of the Offer was held on 14 February 2008. During the meeting, Dr Soh confirmed to OCBC Bank and A&G that he beneficially owned 451,172,504 shares representing 46.54% of the issued capital of Jade. The GMSLA was not discussed.

3.4 On 18 February 2008, OCBC Bank received from the Offeror a copy of a letter (the "First Letter") from Standard Chartered Bank Jakarta ("SCBJ") addressed to OCBC Bank. The First Letter, which was signed by Messrs Ng Khok Pheng ("Mr Ng") and Lim Bun Tjaij ("Mr Lim") and in the format specified by OCBC Bank, stated that (i) SCBJ had been instructed

by the Offeror to earmark US$100 million from the current account granted to the Offeror to make payment for the shares tendered in acceptance of the Offer; and (ii) SCBJ confirmed that the Offeror had sufficient financial resources to satisfy full acceptance of the Offer. The copy of the First Letter given to OCBC Bank appeared to be certified as true by Dr Soh.

3.5 According to Dr Soh, the First Letter was arranged by one Dr Abdul Rahman bin Maarip ("Dr Rahman") at the request of Dr Soh. Dr Rahman, Mr Isnin bin Rahim and Dr Soh were equal shareholders in a Bermuda company, First Capital Growth Investment Limited ("FCGIL"). Dr Soh claimed that the US$100 million referred to in the First Letter was part of funds totalling US$625 million in an account in SCBJ in the name of FCGIL. Dr Soh also claimed that Dr Rahman had verbally assured Dr Soh that he would get SCBJ to provide the First Letter as well as a banker's guarantee for US$100 million using the funds in the FCGIL account.

3.6 After receiving the copy of the First Letter, OCBC Bank claimed that it called on the same day the phone number at the footer of the First Letter to verify the authenticity of the First Letter. The phone number turned out to be a direct line to a person purporting to be Mr Ng. This person confirmed that the First Letter was indeed issued by SCBJ and promised to send a written confirmation on the authenticity of the First Letter, which was received by OCBC Bank by fax on 19 February 2008. OCBC Bank never obtained or had sight of the original of the First Letter.

3.7 Thereafter, at around 7:30 pm on 18 February 2008, OCBC Bank released the Offer announcement. In the Offer announcement, it was disclosed, amongst others, that:

(i) the Offeror and Dr Soh held 451,172,504 shares representing 46.54% of Jade's issued capital; and

(ii) OCBC Bank confirmed that sufficient resources were available to the Offeror to satisfy full acceptance of the Offer (collectively, "the two disclosures").

3.8 Following a verification meeting between the parties on the Offer document on 5 March 2008, during which the GMSLA was not discussed, the two disclosures were also made in the Offer document dated 8 March 2008 and despatched on 10 March 2008.

3.9 According to Dr Soh, on or about 19 March 2008, Dr Soh, in response to a request from OCBC Bank for funds to be made available for settlement of acceptances of the Offer, contacted Dr Rahman to arrange for SCBJ to provide the banker's guarantee for US$100 million. The Offeror then informed OCBC Bank that SCBJ would be sending a banker's guarantee to OCBC Bank via SWIFT.

3.10 OCBC Bank, however, did not receive the SWIFT transmission of the banker's guarantee in its SWIFT system. Despite a copy of the SWIFT confirmation in respect of the banker's guarantee being provided by the Offeror to OCBC Bank on 26 March 2008, OCBC Bank was not able to locate the SWIFT transmission in respect of the banker's guarantee on its SWIFT system.

3.11 According to OCBC Bank, it called the main telephone line of SCBJ on 27 March 2008 and asked to speak to Mr Ng. A person purporting to be Mr Ng denied having sent the First Letter and said that the co-signatory

of the First Letter, Mr Lim, had left SCBJ for some time. OCBC Bank was then referred to Mr Kunchayo Bangun of SCBJ's Trade Services Department who handled banker's guarantees. Later, responding to an e-mail from OCBC Bank, Mr Kunchayo Bangun confirmed via e-mail that SCBJ never issued any letters or banker's guarantees to OCBC Bank.

3.12 Dr Soh met OCBC Bank and A&G in the morning on 28 March 2008 to discuss the funds for acceptance of the Offer. During the meeting, calls were placed to the number listed in the footer of the First Letter as well as SCBJ's main line. When speaking to the two persons professing to be Mr Ng, one appeared to have full knowledge of the various letters and banker's guarantee sent to OCBC Bank, whereas the other did not. Dr Soh reassured OCBC Bank and A&G that he had sufficient financial resources and would get SCBJ to send the SWIFT confirmation for the banker's guarantee.

3.13 On 29 March 2008, A&G discharged itself from acting as legal adviser to the Offeror. By 2 April 2008, after not having been able to locate any SWIFT confirmation of a banker's guarantee from SCBJ in its SWIFT system despite Dr Soh's claims that the SWIFT confirmation had been transmitted numerous times, OCBC Bank discharged itself from acting as financial adviser to the Offeror.

4 *Opes' receivership and dealings in Jade shares by MLI*

4.1 During the meeting on 28 March 2008, Dr Soh informed the meeting that Opes was in receivership and that the Offeror might not have ownership over the Jade shares transferred under the GMSLA. It was only on that day that A&G first had sight of the GMSLA. Dr Soh had furnished A&G with a copy of the GMSLA. After flipping through the GMSLA and

finding that the odd-numbered pages were missing, A&G returned the copy of the GMSLA to Dr Soh without reading it. A copy of the GMSLA was only sent to OCBC Bank on 29 March 2008.

4.2 As subsequent events were to show, the Jade shares, which Dr Soh thought the Offeror had placed with Opes as collateral for a loan, were in fact loaned[1] to Opes under the GMSLA. The Jade shares under the GMSLA were transferred by the Offeror to a securities account in the name of a company within the MLI group to be held in custody for Opes. According to MLI, this arrangement was pursuant to the International Prime Brokerage Agreement (the "IPBA") between MLI and Opes, which, amongst others, appointed MLI as custodian for securities held by Opes. As Opes' receivership was an event of default under the IPBA, MLI had on 27 March 2008 enforced its rights under the IPBA to seize shares representing approximately 26.5% of the Company's issued capital. On 1 April 2008, MLI sold Jade shares representing approximately 9.82% of the Company's issued capital in the market.

5 *Withdrawal of the Offer*

5.1 On 2 April 2008, the Offeror announced that it no longer held 46.54% of the Company but only 16.06%. The Offeror also cautioned that there was no certainty that it would be able to obtain sufficient financial resources to satisfy full acceptance of the Offer which, at that point, meant acceptances of 83.94%.

[1] As is the case with a loan of cash, title to the shares would normally pass to the borrower in a securities lending transaction, so that the borrower can utilize the shares for its own purposes: *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2008] FCA 594.

5.2 The Offeror subsequently withdrew the Offer on 4 April 2008, with the consent of the SIC, on the following grounds. Under the new circumstances, the Offeror was required to have available additional financial resources of approximately S$67 m (or US$47.5 million[2]) to satisfy full acceptances of the Offer. Given the turn of events, the Offeror was not able to obtain an unconditional confirmation from an appropriate third party that available funds had been earmarked to satisfy full acceptances of the Offer as required by Rule 23.8 of the Code.

5.3 Rule 4 of the Code states that an offeror cannot withdraw his offer without the SIC's consent. This is to prevent an offeror from unilaterally withdrawing his offer without good reason. The SIC consented to the withdrawal of the Offer only after it was clear that the Offeror was unable to provide any acceptable assurance that it was able to secure the requisite third-party confirmation of availability of resources within a reasonable time. To have allowed the Offer to continue in the circumstances would have been untenable given the uncertainty over whether the Offeror could have implemented the Offer in full and the risk of creating a false market in Jade shares.

[2] Based on an exchange rate of US$1 = S$1.4108.

6 Sale of shares by Dr Soh

6.1 During the Offer period[3], Dr Soh had sold shares in Jade, held through the Offeror and Faitheagle Investments Ltd ("Faitheagle"), a company wholly-owned by Dr Soh. In aggregate, the Offeror and Faitheagle sold 50.2 million Jade shares. The following table summarises the sales:

Date	**Offeror No. of Jade shares Acquired / (Sold)**	**Faitheagle No. of Jade shares Acquired / (Sold)**
21 February 2008		(1,000,000)
22 February 2008		(2,000,000)
25 February 2008		(1,500,000)
7 March 2008	(50,000,000)	50,000,000*
8 March 2008		(10,000,000)
10 March 2008		(5,000,000)
11 March 2008		(7,000,000)
12 March 2008		(4,000,000)
17 March 2008		(4,700,000)
31 March 2008		(15,000,000)
Total number of Jade shares sold = 50.2 million		

* Transfer from the Offeror to Faitheagle

[3] Offer period means the period from the date when an announcement is made of a proposed or possible offer (with or without terms) until the date such offer is declared to have closed or lapsed.

Chapter 4 Dr Anthony Soh Guan Cheow

1 The hearing committee will now proceed to consider and determine if Dr Soh had breached the following:

(i) *General Principle 6*

"An offeror should announce an offer only after the most careful consideration. Before taking any action which may lead to an obligation to make a general offer, a person and his financial advisers should be satisfied that he can and will continue to be able to implement the offer in full."

Under General Principle 6, Dr Soh, as the person behind the Offeror, had to be satisfied himself that he had the financial resources to satisfy full acceptance of the Offer. In other words, Dr Soh had to be satisfied that he had S$116 million (or US$ 82.2 million[4]) or could rely upon such amount being available to satisfy acceptances in respect of 518,260,224 Jade shares not already owned, controlled or agreed to be acquired by the Offeror. The issue is whether Dr Soh had met the standard of care required under General Principle 6 when the Offer was announced.

(ii) Rule 3.5(c)

"When a firm intention to make an offer is announced, the announcement must state:-

…

[4] Based on an exchange rate of US$1 = S$1.4108.

(c) details of any existing holding of securities which are being offered for or which carry voting rights or are convertible into those which are being offered for or which carry voting rights, as well as rights to subscribe for or options in respect of securities which are being offered for or which carry voting rights in the offeree company:-

(i) which the offeror owns or over which it has control;

(ii) which is owned or controlled by any person acting in concert with the offeror; or

(iii) in respect of which the offeror or any person acting in concert with it has received an irrevocable commitment to accept the offer;

…."

Rule 8.2

"Any document or advertisement addressed to shareholders in connection with an offer or any announcement issued in connection with an offer must, as is the case with a prospectus, satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. This applies whether the offeror, the offeree company, or any

of their advisors or agents issues the document, advertisement or announcement."

Rule 23.3(c)

"The offer document must state:-

….

(c) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any person acting in concert with the offeror owns or controls (with the names of such persons acting in concert);

…."

Rule 3.5(c) and Rule 23.3(c) requires the Offeror to disclose, in the Offer announcement and the Offer document, respectively, the shares in Jade which the Offeror and its concert parties own or control. Rule 8.2 requires such disclosure of shareholdings to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. Section 3 of the Introduction to the Code holds Dr Soh, being a director[5] of the Offeror, as a party responsible for the contents of the Offer document along with the Offeror's advisers. The issue is whether Dr Soh met the standard of care set out in Rule 8.2 in respect of the disclosures pursuant to Rules 3.5(c) and 23.3(c).

[5] The only other director of the Offeror is Dr Soh's wife.

(iii) *Rule 11.2*

"The offeror and persons acting in concert with it must not sell any securities in the offeree company during the offer period except:- …"

Under Rule 11.2, the Offeror and its concert parties, viz. Dr Soh and companies which Dr Soh controls, are prohibited from selling Jade shares during the Offer period.

2 This chapter summarises the hearing committee's analysis of the evidence and submissions in relation to the above, and then states the hearings committee's findings.

3 General Principle 6 - Resources to implement the offer in full

3.1 *Dr Soh's submissions:* Dr Soh submitted that the requisite standard to be applied in relation to General Principle 6 was whether he had (i) taken reasonable measures, judged on an objective basis, (ii) to be satisfied that he could and would continue to be able to satisfy all acceptances to the Offer, (iii) with reference to the facts and circumstances known to him, (iv) at or just before the announcement of the Offer. Dr Soh contends he met this requisite standard and is, therefore, not in breach of General Principle 6 for the following reasons.

3.2 Dr Soh claimed that he had engaged OCBC Bank as the financial advisers in relation to the Offer as it could play the role of a "one-stop" shop, where it could both advise on the Offer and provide financing for the Offer.

3.3 Dr Soh claimed that prior to the engagement of OCBC Bank as financial adviser, he had engaged in preliminary discussions with OCBC Bank's Enterprise Banking team, and that they had indicated that they would be prepared to extend a credit line to Dr Soh for the purposes of meeting acceptances for an offer on the security of a banker's guarantee.

3.4 Dr Soh claimed that upon OCBC Bank's engagement as financial adviser, OCBC Bank's Corporate Finance team had agreed to assist the Enterprise Banking team to receive the banker's guarantee.

3.5 The banker's guarantee was to be issued on the strength of the US$625 million in the FCGIL account with SCBJ. Dr Soh claimed that he was an authorized signatory of the account and the account had on previous occasions been used to issue bankers' guarantees.

3.6 Dr Soh also claimed that he had sought permission from Dr Rahman to use the money in the FCGIL account with SCBJ for the purpose of issuing the banker's guarantee to secure financing for the Offer. Not only was Dr Rahman apprised of the situation, Dr Rahman also assisted Dr Soh in procuring the necessary letter required by OCBC Bank from SCBJ and the banker's guarantee.

3.7 Finally, Dr Soh claimed that OCBC Bank had only required a letter from SCBJ confirming that a sum of US$100m in the SCBJ account was "earmarked" for the Offer. Dr Soh had obtained the letter from SCBJ in the form required by OCBC Bank, and OCBC Bank had given a confirmation of financial resources.

3.8 *Hearing committee's views:* The hearing committee agrees with Dr Soh on the standard to be used in determining whether or not Dr Soh can be said to be satisfied that he had sufficient financial resources to satisfy full acceptance of the Offer. Accordingly, it is on this basis that the hearing committee will assess whether Dr Soh has breached General Principle 6.

3.9 By Dr Soh's own admission, there had only been one discussion with OCBC Bank's Enterprise Banking team in relation to financing a possible take-over offer. The discussion was on general terms with no mention of the identity of the take-over target. No documents (e.g. term sheets) had been drawn up or signed. There were also no further discussions on the provision of financing by OCBC Bank between Dr Soh and OCBC Bank's Corporate Finance team. Moreover, the agreed mandate of OCBC Bank as financial adviser did not include providing financing for the Offer. In short, there was no indication from OCBC Bank that Dr Soh could have reasonably relied upon to conclude that OCBC Bank, whether through its Enterprise Banking or Corporate Finance departments, would provide him with the necessary financing to satisfy acceptances of the Offer.

3.10 But even assuming that arrangements were in place for a credit line to be available for Dr Soh to draw upon to satisfy acceptances, it was ultimately still dependent on receipt of an acceptable banker's guarantee.

3.11 The question then is whether Dr Soh had taken reasonable steps to ensure that the banker's guarantee would be available for him to draw upon the credit line. In this regard, the hearing committee is of the opinion that Dr Soh has been far too casual in approaching his obligations to

satisfy himself that he had the necessary financial resources to satisfy full acceptance of the Offer for the following reasons.

3.12 Dr Soh had no recourse to SCBJ or the funds in the FCGIL account with SCBJ. Dr Soh admitted that he had never dealt directly with SCBJ. He had never visited SCBJ or even spoken with anyone from SCBJ. Everything in relation to the FCGIL account with SCBJ was done through Dr Rahman. According to Dr Soh, he was a signatory in name only. He could not access the funds in the FCGIL account. In any event, of the US$625 million that Dr Soh claimed to be in the FCGIL account, US$500 million belonged solely to Dr Rahman. As a one-third shareholder of FCGIL, Dr Soh had at most a one-third share in the remaining US$125 million (about US$41.7 million), far short of the US$100m “earmarked” for the Offer. In other words, he was totally dependent on Dr Rahman for the banker’s guarantee.

3.13 Dr Soh admitted that he only had a verbal agreement with Dr Rahman to obtain the banker’s guarantee. There was no written contract. Dr Soh even admitted there was an understanding with Dr Rahman that the banker’s guarantee would not be called upon. By his own admission, Dr Soh did not have direct knowledge as to whether the SWIFT confirmations on banker’s guarantees that were purportedly issued on the strength of the funds in the FCGIL account previously had ever been successfully received by a financial institution. Whatever knowledge Dr Soh had on this was purely hearsay.

3.14 Ultimately, all the reasonable measures that Dr Soh claimed to have taken then to secure the necessary financing for the Offer boiled down to a mere verbal agreement with Dr Rahman for the banker’s guarantee. In

this regard, even if Dr Rahman had assisted Dr Soh in procuring the letter from SCBJ confirming Dr Soh's financial resources, Dr Soh still cannot assume that Dr Rahman would go on to provide the banker's guarantee, as the nature and implications of a banker's guarantee and a confirmation of funds are entirely different. Furthermore, Dr Rahman was not even within jurisdiction. Dr Soh's contact with him was normally through email or the telephone. As events have shown, there was nothing much that Dr Soh could do to compel Dr Rahman to perform what he had verbally undertaken.

3.15 Dr Soh has also argued that he had relied on OCBC Bank's confirmation of financial resources. The hearing committee accepts that Dr Soh was entitled to draw some comfort from OCBC Bank's confirmation. But Dr Soh has a separate and distinct obligation from his advisers to satisfy himself that he could implement the Offer in full and he was not relieved of this obligation by OCBC Bank's confirmation. After all, the letter from SCBJ that OCBC was relying on only stated that US$100m in the FCGIL account was "earmarked' to satisfy acceptances. As Dr Soh well knew, he did not have direct access to this account and, in any event, he was entitled to only about US$41.7 million. Ultimately, he was still solely dependent on the verbal agreement with Dr Rahman for the banker's guarantee, and, by his own admission, Dr Soh had consulted neither OCBC Bank nor A&G on whether this was sufficient to satisfy his obligations under the Code.

3.16 The hearing committee also noted Dr Soh's casual approach to satisfying himself that he retained beneficial interest in the Jade shares lent to Opes under the GMSLA. Dr Soh should have been concerned given the sheer number of Jade shares transferred under the GMSLA and

the significant impact such transfer would have on the cash confirmation if he did not retain beneficial interest. (Please see para 4.10 below for further discussion.)

3.17 Therefore, taking into account the facts and circumstances known to Dr Soh at or just before the announcement of the Offer, the hearing committee is of the opinion that Dr Soh is in breach of General Principle 6 by failing to take reasonable steps to be satisfied that he could and would continue to be able to implement the Offer in full.

4 Rules 3.5(c), 23.3(c) and 8.2 – Disclosure of shareholdings

4.1 There are two sets of facts to be considered in determining whether the Offeror's disclosure of shareholdings in Jade in the Offer announcement and the Offer document is in breach of Rules 3.5(c) and 23.3(c), and/or meet the standard of care required under Rule 8.2 of the Code. The first set of facts relates to the GMSLA while the second relates to the sale of Jade shares by Faitheagle.

GMSLA

4.2 *Dr Soh's submissions:* Dr Soh submitted that where statements in the Offer announcement or Offer document involved statements of fact, the position is very clear; the person making the statement must ensure that the statement is factually correct and does not contain any omissions that would make the statement inaccurate or misleading. However where the person is of an opinion or belief, the standard applicable should be a subjective one. Therefore the hearing committee should accept that Dr Soh had complied with Rule 8.2 if Dr Soh honestly held the view that his opinion or belief was in compliance with Code standards. Dr Soh cited the

decision of the UK Takeover Panel in Enterprise Oil plc's offer for LAMSO plc (Takeover Panel Statement 1994/4) in support of his contention.

4.3 Dr Soh next submitted that he had complied with Rule 8.2 in relation to his disclosure of his shareholdings as he had disclosed to his advisers, in particular, A&G, that he had entered into a share lending agreement with Opes. Dr Soh had also sought repeated assurances from Opes that he retained beneficial ownership.

4.4 Finally, Dr Soh submitted that he had entered into the GMSLA on the basis of Opes' representations that he continued to retain a beneficial ownership in the shares. Therefore, the level of shareholdings disclosed by Dr Soh was technically correct because:

(i) Dr Soh had executed the GMSLA under a mistake and the resulting right of Dr Soh was to rescind the GMSLA and require the return of the shares;

(ii) Opes had committed a fraudulent misrepresentation inducing Dr Soh to enter into the GMSLA and the resulting right of Dr Soh was to rescind the GMSLA and require return of the shares;

(iii) Opes' misconduct might amount to a breach of section 52 of the Australian Trade Practices Act 1974 that prohibits misleading or deceptive conduct and a possible remedy might be rescission of the GMSLA and a return of the shares; and/or

(iv) Dr Soh and Opes had entered into a collateral contract where beneficial title remained with Dr Soh, the result of which was that beneficial title did not pass under the GMSLA.

4.5 Therefore, as he had an honest belief, and reasonable basis for such belief, that he retained beneficial interest in the Jade shares under the GMSLA, Dr Soh submitted that he was in compliance with Rule 8.2 in relation to his disclosure of interests in the Jade shares lent to Opes under the GMSLA.

4.6 *Hearing committee's views:* The hearing committee will address the arguments put forth by Dr Soh above in turn. First, the hearing committee observes that the statements that Dr Soh was making as to the level of shareholdings were statements of fact and not opinions. He may have taken a certain view of the position under the GMSLA and held a belief that he remained the beneficial owner under the GMSLA, but that does not change the statements as to his level of shareholdings from statements of fact into opinions or beliefs.

4.7 Second, the hearing committee notes that the GMSLA was at all times in Dr Soh's possession and if Dr Soh had read the GMSLA carefully, in particular clause 2.3[6], it should have been apparent to him that according to the terms of the GMSLA he had lost legal and beneficial ownership of the shares. Even though Dr Soh had received reassurances from Opes, the process was hardly straightforward. By his own admission, Dr Soh had questioned Opes repeatedly on ownership and received some unsatisfactory answers and required no less than four meetings and

[6] Clause 2.3 of the GMSLA states that "….title to securities "borrowed" or "lent"... shall pass from one Party to another as provided for in this Agreement, the Party obtaining such title being obliged to redeliver Equivalent Securities or Equivalent Collateral as the case may be."

conference calls to obtain such reassurances. In a conversation with Mr Laurie Emini, the CEO of Opes, Dr Soh himself had noted the oddness of the terminology under GMSLA that he was the "lender" and the "money" from Opes was the collateral, since, in Dr Soh's own words, he should have been pledging his shares as collateral for borrowing money.

4.8 The hearing committee also notes that on 21 January 2008, Dr Soh was first informed by Opes that it was going to sell Jade shares as Dr Soh had failed to meet margin calls in the morning. This was followed by an email from Opes on the same day informing Dr Soh that the Jade shares had been sold. Subsequent emails revealed that 4.6 million Jade shares had been sold. Dr Soh contends that such sales or margin calls were not inconsistent with a pledge. The hearing committee would have expected that under a pledge, Dr Soh would have been given more notice and opportunity to meet any margin calls. The hearing committee also notes that Dr Soh himself had demanded an explanation from Opes, and that even though Dr Soh claimed that Opes had agreed to restore the 4.6 million shares, the shares were never in fact restored. Further, after being notified of Opes' sale, Dr Soh announced that he had purchased 5.5 million shares on 21 January 2008 to "balance out the number". After being told that Opes would restore the 4.6 million shares, Dr Soh then sold down his shares from 12 to 25 February 2008 to restore his holdings to its previous level, as if there had been no selling of the Jade shares by Opes for failure to meet margin calls. By the end of the sell down, the Offer was well under way and as Dr Soh has conceded, none of these sales were disclosed.

4.9 Rather than reinforcing his belief, all these incidents should have sown doubt in Dr Soh's mind as to whether or not he indeed retained beneficial interest in the Jade shares under the GMSLA.

4.10 The hearing committee observes that the ownership of the shares under the GMSLA impacts not just the accuracy of Dr Soh's shareholding disclosure in the Offer announcement and Offer document, but also the securing of financial resources to implement the Offer in full, since Dr Soh had to be certain of his own level of shareholdings in order to determine the amount of cash required to settle acceptances. Given the importance of the issue and the large number of shares affected by the GMSLA, the hearing committee is of the opinion that Dr Soh had again been far too casual in approaching his responsibilities under the Code in relation to the GMSLA. It may be that Dr Soh had mentioned the GMSLA to his advisers, but, by his own admission, he did not ask them to look at specific areas. Nor is it clear, to the hearing committee, why Dr Soh did not disclose to his advisers the history behind the GMSLA or the sale of shares by Opes, instead of trying to balance the numbers by himself, when the Offer was underway and such sale of Jade shares were in breach of the Code. In light of what had transpired, it was incumbent on Dr Soh to take more steps to clarify the ownership status of the shares under the GMSLA.

4.11 Third, the hearing committee notes that as of the date of this decision, Dr Soh has, like many former clients of Opes, commenced legal proceedings in Australia on the bases set out in para 4.4 above. But Dr Soh's argument in this regard misses the point. The GMSLA certainly raises the possibility that beneficial ownership had passed and this uncertainty was not reflected in the Offer announcement and the Offer

document, which state Dr Soh's shareholdings without qualification and without reference to the GMSLA.

4.12 In any event, the hearing committee is of the view that the arguments put forth by Dr Soh are not in keeping with the spirit of the Code. When a conditional offer is made, trading and investment decisions are based on the likelihood of the offer becoming unconditional. Information in the offer announcement and document that has a bearing on the offer becoming unconditional, such as the level of shareholdings, must be accurate to enable the market to assess this likelihood. Even if the numbers as disclosed by Dr Soh in relation to the GMSLA are ultimately found to be technically correct (assuming the legal issues with respect to Opes are resolved in Dr Soh's favour), they are certainly not reflective of the position under the GMSLA at the time of the Offer and the impact this could potentially have on the level of acceptances and/or the likelihood of the Offer becoming unconditional.

4.13 Rule 8.2 requires the Offer announcement and the Offer document to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. For the foregoing reasons, the hearing committee is of the opinion that Dr Soh has failed to meet this standard and is in breach of Rule 8.2 in relation to his shareholding disclosures under Rules 3.5(c) and 23.3(c).

4.14 Similarly, for the foregoing reasons, the hearing committee is also of the opinion that Dr Soh had failed to act responsibly and take all reasonable steps, to be satisfied that he could implement the Offer in full as required by General Principle 6.

4.15 For completeness, the hearing committee notes that Dr Soh had suggested that Opes might have failed in its obligations to disclose the acquisition of its interest in Jade shares under the Companies Act and the Securities and Futures Act. While the hearing committee observes that section 7(9)(b) of the Companies Act states that an interest in a share that arises by way of security where a person lends money in the ordinary course of business is to be disregarded for the purposes of disclosure, the hearing committee understands that such matters are under the purview of the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") and the Monetary Authority of Singapore ("MAS") and have been referred to the Commercial Affairs Department ("CAD"). It is therefore inappropriate for the hearing committee to evaluate this as a matter of law or anticipate their findings. The hearing committee will forward the evidence before it to the CAD to aid in its investigations.

Sale of shares by Faitheagle

4.16 Dr Soh acknowledged that there were lapses on his part in failing to take into account the following transactions when disclosing his interests in Jade shares in the Offer announcement and Offer document:

(i) the sale of 4.6 million Jade shares on 21 January 2008 by Opes; and

(ii) the sale of shares by Faitheagle on 12 February 2008.

4.17 Dr Soh also acknowledged that the following transactions were not taken into account when he disclosed his interests in Jade shares in the Offer announcement and Offer document:

(i) sale of 1 million Jade shares by Faitheagle on 21 February 2008;

(ii) sale of 2 million Jade shares by Faitheagle on 22 February 2008; and

(iii) sale of 1.5 million Jade shares by Faitheagle on 25 February 2008.

4.18 *Hearing committee's views:* Given the evidence and Dr Soh's admission that the shareholdings in the Offer announcement and the Offer document did not take into account the above sales of Jade shares, the hearing committee finds Dr Soh to be in breach of Rules 3.5(c) and 23.3(c) as well as Rule 8.2.

5 Rule 11.2 – Sale of Jade shares during the Offer period

5.1 *Dr Soh's submissions:* Dr Soh acknowledged that the sale of an aggregate of 50.2 million Jade shares by Faitheagle during the Offer period between 21 February 2008 and 31 March 2008 is in contravention of Rule 11.2. (Details of the sale of Jade shares are at para 6.1 of Chapter 3.)

5.2 Dr Soh submitted that he did not at the relevant times receive any specific advice or warning from A&G or OCBC Bank on the provisions of the Code restricting an offeror's ability to undertake any sale of Jade shares during the offer period. In fact, Dr Soh claimed that A&G had advised that under Rule 12 of the Code, the offeror is "free to deal in the relevant securities during the Offer period", but these dealings must be disclosed on the SGXNET no later than 12 noon on the dealing day following the relevant transaction.

5.3 *Hearing committee's views:* The hearing committee noted that Dr Soh did not disclose the sale of the Jade shares on the SGXNET notwithstanding A&G's advice to do so. If the disclosure had been made, A&G or OCBC Bank might have noticed the breach of the Code after the first sale and prevented further sales of Jade shares. The hearing committee also could not comprehend why Dr Soh did not consult A&G or OCBC Bank on the sale of Jade shares, and simply assumed that he could do so, when by his own admission, he knew it would affect the level of acceptances and therefore the chances of the Offer being unconditional.

5.4 Given the evidence and Dr Soh's admission, the hearing committee finds Dr Soh in breach of Rule 11.2 in respect of the sale of an aggregate of 50.2 million Jade shares by Faitheagle during the Offer period between 21 February 2008 and 31 March 2008.

6 For the avoidance of doubt, the hearing committee did not rely on any statements made by OCBC Bank, A&G or MLI in making any of its findings on the breaches of the Code by Dr Soh.

Chapter 5 Oversea-Chinese Banking Corporation Ltd

1 The hearing committee will now proceed to consider and determine if OCBC Bank had breached the following:

(i) *Rule 3.5*

"…

Where the offer is for cash or involves an element of cash, the announcement of an offer should include an unconditional confirmation by the financial adviser or by another appropriate third party that the offeror has sufficient resources available to satisfy full acceptance of the offer."

Rule 23.8

"Where the offer is for cash or includes an element of cash, the offer document must include an unconditional confirmation by an appropriate third party (e.g. the offeror's banker or financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer. The party confirming that resources are available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash would be available to satisfy full acceptance of the offer. The Council reserves the right to require evidence to support such confirmation."

OCBC Bank as the financial adviser provided an unconditional confirmation in the Offer announcement and Offer document,

as required under Rules 3.5 and 23.8 respectively, that sufficient financial resources were available to the Offeror to satisfy full acceptance of the Offer by the holders of Jade shares not already owned, controlled or agreed to be acquired by the Offeror on the basis of the Offer price. The issue is whether OCBC Bank, in giving the confirmation, acted responsibly and took all reasonable steps to assure itself that the cash would be available to satisfy full acceptance of the Offer.

(ii) *Rule 3.5(c)*

"When a firm intention to make an offer is announced, the announcement must state:-

…

(c) details of any existing holding of securities which are being offered for or which carry voting rights or are convertible into those which are being offered for or which carry voting rights, as well as rights to subscribe for or options in respect of securities which are being offered for or which carry voting rights in the offeree company:-

(ii) which the offeror owns or over which it has control;

(ii) which is owned or controlled by any person acting in concert with the offeror; or

(iii) in respect of which the offeror or any person acting in concert with it has received an irrevocable commitment to accept the offer;

…."

Rule 8.2

"Any document or advertisement addressed to shareholders in connection with an offer or any announcement issued in connection with an offer must, as is the case with a prospectus, satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. This applies whether the offeror, the offeree company, or any of their advisors or agents issues the document, advertisement or announcement."

Rule 23.3(c)

"The offer document must state:-

….

(c) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any person acting in concert with the offeror owns or controls (with the names of such persons acting in concert);

…."

Rule 3.5(c) and Rule 23.3(c) requires the Offeror to disclose, in the Offer announcement and the Offer document,

respectively, the shares in Jade which the Offeror and its concert parties owns or controls. Rule 8.2 requires such disclosure of shareholdings to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. Section 3 of the Introduction to the Code holds OCBC Bank, as the financial adviser, responsible for the contents of the Offer document along with the Offeror's directors and other advisers. The issue is whether OCBC Bank had met the standard of care set out in Rule 8.2 in respect of the disclosures pursuant to Rules 3.5(c) and 23.3(c).

2 This chapter summarises the hearing committee's analysis of the evidence and submissions in relation to the above, and then states the hearings committee's findings.

3 Rules 3.5 and 23.8 - Confirmation of financial resources

3.1 *OCBC Bank's submissions:* OCBC Bank submitted that, in giving the confirmation pursuant to Rules 3.5 and 23.8, it acted responsibly and took all reasonable steps to assure itself that the cash would be available to satisfy full acceptance of the Offer for the following reasons.

3.2 OCBC Bank's Corporate Finance team had conducted research on Dr Soh beforehand and reasonably concluded from publicly available information that Dr Soh was a credible and reputable investor with a good track record and experience with take-overs. Other departments of OCBC Bank as well as other members of the OCBC Group had also dealt with Dr Soh and/or his companies before, and had no adverse comments.

3.3 OCBC Bank had relied on what it believed to be a letter of confirmation (the First Letter) from a reputable international bank, SCBJ, that it had been instructed by the Offeror to "earmark" US$100m for the Offer and the Offeror had sufficient financial resources to satisfy full acceptance of the Offer. In this connection, OCBC Bank submitted that it was not uncommon for financial advisers, in issuing financial resources confirmations, to rely upon such confirmations from one reputable bank to another.

3.4 OCBC Bank had also made calls to SCBJ to verify that SCBJ had indeed issued the First Letter.

3.5 As it turned out, it appeared to OCBC Bank that Dr Soh had orchestrated with the collusion of third parties in Indonesia, an elaborate scheme to induce OCBC Bank to confirm the Offeror's financial resources. However, there was no reason for OCBC Bank to suspect foul play at the time of the Offer announcement and the Offer document.

3.6 *Hearing committee's views:* The hearing committee accepts that there might have been a deception on OCBC Bank in respect of the confirmation letters purportedly issued by SCBJ. However, based on the available evidence, the hearing committee is unable to express an opinion as to whether Dr Soh was complicit in this deception. In this regard, the hearing committee understands that OCBC Bank has made a complaint to the CAD alleging such complicity. The hearing committee will forward the evidence before it to the CAD to aid in their investigations.

3.7 The hearing committee also accepts that OCBC Bank had taken the steps enumerated above and that they had no reason to suspect foul play.

The hearing committee notes, however, that OCBC Bank never had sight of the original First Letter from SCBJ. All that OCBC had was a copy of the First Letter that was certified as a true copy by Dr Soh. OCBC Bank was an addressee in the First Letter, yet it never received the original. By their own admission, one would have reasonably expected the communication of such a letter to be from bank to bank, rather than through Dr Soh. At the very least, one would have expected OCBC Bank to have sight of the original purportedly in Dr Soh's possession or obtain an original for itself soon after. This was never done.

3.8 OCBC Bank admitted that it did have cause for concern, which was why it had called SCBJ to verify the letter of confirmation. However, in order to be meaningful, any verification of the letter of confirmation must be independent, not just of Dr Soh, but of the letter itself. Yet the steps taken by OCBC Bank were patently not independent of the letter. OCBC Bank called the phone number listed in fine print at the footer of the letter next to the address, which one would normally have assumed to be the main line of the bank. However, OCBC Bank apparently did not find it odd that that number turned out to be a direct line to the purported signatory of the letter. Nor did OCBC Bank consider it odd that that was the only number listed and the number of the main line did not appear elsewhere in the letterhead. OCBC Bank only spoke to and was given confirmation by the purported signatory of the First Letter through this direct line. As events have proven, even the simplest form of independent verification, namely calling the main line of the bank, would probably have alerted OCBC Bank to the deception.

3.9 While OCBC Bank did place some reliance on its background research conducted on Dr Soh (though such research did not provide any indication as to Dr Soh's ability to mount an S$116 million offer), OCBC

Bank, by its own admission, was still ultimately confirming Dr Soh's financial resources to satisfy acceptances of the Offer on the strength of the First Letter provided by SCBJ. The hearing committee is of the opinion that there were sufficient indicators to alert OCBC Bank that there was a need to verify the First Letter with SCBJ, and that OCBC Bank had failed to meet the requisite standard of care by failing to conduct an independent verification. The hearing committee is therefore of the opinion that OCBC Bank had not acted responsibly nor had it taken all reasonable steps to assure itself that sufficient cash was available to Dr Soh to satisfy full acceptance of the Offer and hence is in breach of the standard of care required under Rules 3.5 and 23.8.

4 Rules 3.5(c), 23.3(c) and 8.2 – Disclosure of shareholdings

4.1 The set of facts relevant to the issue of whether OCBC Bank met the standard of care set out in Rule 8.2 in respect of the disclosures pursuant to Rules 3.5(c) and 23.3(c) is limited to that in relation to the GMSLA.

4.2 *OCBC Bank's submissions:* OCBC Bank submitted that it has complied with Rule 8.2 in relation to the disclosure of the Offeror's interests in the Jade shares that were lent to Opes under the GMSLA pursuant to Rules 3.5(c) and 23.3 (c).

4.3 OCBC Bank argued that there was division of responsibilities between OCBC Bank and A&G. The ownership status of the Jade shares under the GMSLA was a legal issue for A&G.

Reliance on A&G and Dr Soh

4.4 At the kick-off meeting on 4 February 2008, Dr Soh had informed OCBC Bank and A&G that he had pledged Jade shares under the GMSLA.

According to OCBC Bank, A&G was to look into the terms of the GMSLA. Subsequently, on 5 February 2008, A&G had sent an email to Dr Soh asking for, amongst other documents, a copy of the GMSLA.

4.5 On 14 February 2008, A&G informed OCBC Bank that there were further documents outstanding from Dr Soh regarding an issue on convertible notes and OCBC Bank assisted A&G to obtain these documents from Dr Soh. A&G subsequently reviewed and advised on these documents.

4.6 According to OCBC Bank, also on 14 February 2008, at a verification meeting in relation to the Offer announcement, A&G stated it would look into the GMSLA when the GMSLA was mentioned.

4.7 On 18 February 2008, A&G and Dr Soh signed off on the draft announcement by confirming they had “no more comments”. A&G did not raise any issue about the level of shareholdings. OCBC Bank submitted that it was entitled to assume, with reasonable basis, that A&G must have reviewed the GMSLA prior to its sign off, as it had done with the documents relating to the convertible notes.

4.8 From 26 February 2008 to 5 March 2008, there were exchanges over email and at a verification meeting in relation to the Offer document between Dr Soh and A&G as to the proportions of Dr Soh’s shareholdings that should be direct and deemed interests.

4.9 On 6 March 2008, Dr Soh and A&G signed off on the Offer document by confirming that they had “no further comments”. A&G did not state that it had not reviewed the GMSLA. On the contrary, A&G had

advised on how Dr Soh's direct and deemed interests should be reflected in the Offer document.

4.10 OCBC Bank submitted that it was reasonable for OCBC Bank, on what was a legal issue, to rely on A&G as the legal adviser, in the same way that section 157C of the Companies Act allowed a director to rely on expert advice on a particular subject matter in the performance of duties as a director. A&G had only informed OCBC Bank that it had never had sight of the GMSLA on 28 March 2008.

4.11 Dr Soh had all along assured OCBC Bank as to his level of shareholdings and signed off on the shareholdings disclosed in both the Offer announcement and Offer document.

Public record

4.12 OCBC Bank had also conducted independent checks against public records such as filings of changes of shareholding interests on SGXNET and Jade's Annual Report, to verify the level of shareholdings. The figures disclosed by Dr Soh tallied with those in the public records.

Dependent on specific terms

4.13 OCBC Bank contended that beneficial ownership does not pass under all share lending agreements and they cited, as an example, the Companies (Exemption from Notification of Substantial Shareholding) Order 2004.[7]

[7] Under the Order, a substantial shareholder who lends his securities is exempted from the requirements to report substantial shareholding interests and changes to such interests if there is in force between the shareholder and the borrower an agreement that the shareholder retains all beneficial interest in the shares and is in a position to exercise all shareholder rights.

Uncertain ownership status

4.14 OCBC Bank pointed out that to date, the ownership status of the Jade shares under the GMSLA remains uncertain and that legal proceedings are underway in Australia to determine this very issue.

Disclosure under the Companies Act and the Code

4.15 OCBC Bank also contended that even if beneficial ownership had passed under the GMSLA, the shareholdings disclosed in the Offer announcement and the Offer document remained accurate because (i) under section 7(6)(b) of the Companies Act, Dr Soh would continue to have an interest in the shares lent to Opes Prime because Dr Soh had the right to call for redelivery of the shares within 7 days under clause 8.2 of the GMSLA and (ii) Note 14 on Rule 14.1 on mandatory offers states that the lender of shares will not be deemed for purposes of the Rule 14, to have disposed of the voting rights attached to the lent shares, if he has the right to recall them by giving notice of not more than 7 days.

4.16 *Hearing committee's views:* The hearing committee accepts that OCBC Bank had indeed taken the steps enumerated and that Dr Soh had indeed given certain confirmations. The hearing committee notes however that OCBC Bank never had sight of the GMSLA after they became aware of it at the kick-off meeting on 4 February 2008 until it was too late. While the hearing committee accepts that OCBC Bank was entitled to believe that A&G would be advising Dr Soh on the Offer in accordance with its obligations under the Code, the hearing committee also notes that OCBC Bank never followed up with A&G on the GMSLA or sought confirmation from A&G that they had indeed reviewed the GMSLA. This was despite OCBC Bank's own admission that they were aware that the GMSLA was a share lending agreement. As corporate finance professionals, they should

have been aware that it is common for legal and beneficial ownership to pass under a share lending agreement. OCBC Bank's own notes of the kick-off meeting reveal that in the course of describing the terms of the GMSLA, Dr Soh had referred to the collateral under the GMSLA as being cash. Dr Soh's use of the term was inconsistent with the GMSLA being a simple pledge, because under a pledge the collateral should have been the Jade shares and not cash.

4.17 The hearing committee notes that quite apart from OCBC Bank's responsibility as an adviser to ensure the accuracy of the information in the Offer announcement and the Offer document, OCBC Bank as financial adviser would also have to be satisfied as to the level of shareholdings in order to confirm that Dr Soh had the financial resources to satisfy all acceptances.

4.18 Given the significance of the level of shareholdings to OCBC Bank's responsibility as financial adviser to both ensure the accuracy of information and confirm financial resources, and that there were sufficient indicators to alert OCBC Bank that the GMSLA might be more than a simple pledge, the hearing committee is of the opinion that it is not sufficient for OCBC Bank to passively rely on the silence from A&G to assume that the GMSLA had no effect on the level of shareholdings. Rather, OCBC Bank must actively follow up with A&G and seek clarification on the ownership status of the Jade shares under the GMSLA.

4.19 It might be the case that not all share lending agreements result in a transfer of beneficial ownership from the lender to the borrower, but it would be fair to say beneficial ownership normally passes under a share lending agreement. OCBC Bank, as corporate finance professionals,

should have known this. It is difficult to see how OCBC Bank could have been certain as to the ownership status of the Jade shares without sight of the GMSLA or express confirmation from A&G.

4.20 It might also be the case that the ownership of the Jade shares is the subject of legal debate in Australia. To reprise the hearing committee's earlier comments in relation to its findings on Dr Soh, he has, indeed, like many former clients of Opes, commenced legal proceedings in Australia. But the GMSLA certainly raises the possibility that beneficial ownership had passed [8] and this uncertainty is not reflected in the Offer announcement and the Offer document, which state Dr Soh's shareholdings without qualification and without reference to the GMSLA.

4.21 With respect to a lender retaining an interest in lent shares under the Companies Act, the hearing committee notes that this is for the purpose of determining substantial shareholder notification. The fact that disclosure may not be required under the provisions under the Companies Act does not mean that disclosure is not necessary in an offer document. The hearing committee does not disagree that professionals are entitled to look to disclosure obligations elsewhere for guidance. However, the circumstances must be comparable and it is difficult to see how an ongoing reporting obligation is comparable to a disclosure requirement for a specific corporate action such as a take-over.

4.22 As for Note 14 on Rule 14.1, the hearing committee notes the exception was introduced to facilitate securities borrowing and lending so that a lender who might cross the mandatory offer thresholds as a result of

[8] Indeed, the claimants in proceedings which have been commenced in Australia in respect of similar agreements do not appear to dispute that beneficial ownership would have passed under the lending agreement, only that the agreement may have been vitiated.

recalling borrowed shares need not make a mandatory offer. It is a specific and limited dispensation, in relation to whether or not a person will trigger a mandatory offer and is not intended to apply across the Code.

4.23 In any event, the hearing committee is of the view that these arguments are not in keeping with the spirit of the Code. The hearing committee had expressed the same view earlier in response to arguments made by Dr Soh. When a conditional offer is made, trading and investment decisions are based on the likelihood of the offer becoming unconditional. Information in the offer announcement and document that has a bearing on the offer becoming unconditional, such as the level of shareholdings, must be accurate to enable the market to assess this likelihood. Even if the numbers are technically correct because of the Companies Act and Code provisions alluded to by OCBC Bank, they are certainly not reflective of the position under the GMSLA and the impact this could potentially have on the level of acceptances and/or the likelihood of the Offer becoming unconditional.

4.24 The hearing committee is therefore of the opinion that OCBC Bank, in failing to follow up with A&G on the effect of the GMSLA on the level of shareholdings, had not: (i) met the standard of care required under Rule 8.2 in relation to the Offeror's disclosure of its interest in Jade shares under the GMSLA in the Offer announcement and the Offer document pursuant to Rules 3.5(c) and 23.3(c) and (ii) acted responsibly and taken all reasonable steps to assure itself that sufficient cash was available to Dr Soh to satisfy full acceptance of the Offer in breach of the standard of care required under Rules 3.5 and 23.8.

5 For the avoidance of doubt, the hearing committee did not rely on any statements made by Dr Soh, A&G or MLI in making any of its findings on the breaches of the Code by OCBC Bank.

Chapter 6 Allen & Gledhill LLP

1 The hearing committee will now proceed to consider and determine if A&G had breached the following:

Rule 3.5(c)

"When a firm intention to make an offer is announced, the announcement must state:-

…

(c) details of any existing holding of securities which are being offered for or which carry voting rights or are convertible into those which are being offered for or which carry voting rights, as well as rights to subscribe for or options in respect of securities which are being offered for or which carry voting rights in the offeree company:-

(i) which the offeror owns or over which it has control;

(ii) which is owned or controlled by any person acting in concert with the offeror; or

(iii) in respect of which the offeror or any person acting in concert with it has received an irrevocable commitment to accept the offer;

…."

Rule 8.2

"Any document or advertisement addressed to shareholders in connection with an offer or any announcement issued in connection with an offer must, as is the case with a prospectus, satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. This applies whether the offeror, the offeree company, or any of their advisors or agents issues the document, advertisement or announcement."

Rule 23.3(c)

"The offer document must state:-

….

(c) the shareholdings in the offeror (in the case of a securities exchange offer only) and in the offeree company which any person acting in concert with the offeror owns or controls (with the names of such persons acting in concert);

…."

Rule 3.5(c) and Rule 23.3(c) requires the Offeror to disclose, in the Offer announcement and the Offer document, respectively, the shares in Jade which the Offeror and its concert parties owns or controls. Rule 8.2 requires such disclosure of shareholdings to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly. Section 3 of the Introduction to the

Code holds A&G, as the legal adviser, responsible for the contents of the Offer document along with the Offeror's directors and other advisers. The issue is whether A&G had met the standard of care set out in Rule 8.2 in respect of the disclosures pursuant to Rules 3.5(c) and 23.3(c).

2 This chapter summarises the hearing committee's analysis of the evidence and submissions in relation to the above, and then states the hearings committee's findings.

3 Whether A&G had met the standard of care required under Rule 8.2

3.1 *A&G's submissions:* A&G submitted that it had met the standard of care required under Rule 8.2 in relation to the disclosure of the shareholdings of the Offeror and Dr Soh in Jade in the Offer announcement and the Offer document pursuant to Rules 3.5(c) and 23.3(c), respectively, for the following reasons:

(i) A&G claimed that at the kick-off meeting on 4 February 2008, the advice that Dr Soh had sought regarding the GMSLA was whether MLI as a custodian was thereby a concert party for purposes of the Offer. Dr Soh had not sought advice on the nature of his interests in the pledged shares. Although A&G had asked for a copy of the GMSLA, Dr Soh never provided a copy. Nor did he seek any further advice on the GMSLA. A&G claimed that Dr Soh had, in response to questions by A&G, confidently confirmed that the Offeror (i) was the beneficial owner of the "pledged" Jade shares, (ii) held the voting rights

of the "pledged" Jade shares and (iii) was entitled to dividends in the "pledged" Jade shares.

(ii) A&G had conducted independent checks against public records such as filings of changes of shareholding interests on SGXNET and Jade's annual report, to verify the level of shareholdings. The figures disclosed by Dr Soh tallied with those in the public records.

(iii) A&G had confirmed these figures repeatedly with Dr Soh and OCBC Bank in the course of preparing the Offer announcement and Offer document.

(iv) A&G had drawn Dr Soh's attention to his responsibilities and obligations under the Code, particularly the need for accuracy of the facts, and the consequences of non-compliance.

(v) A&G submitted that a lawyer's obligation under the Code is the same as his duties vis-à-vis his client at law. In particular, a lawyer is obliged to advise only where the client asks for legal advice or where the client needs or wants that advice, or where the lawyer identifies a hidden risk that the client has not seen.

(vi) In this regard, Dr Soh had not sought A&G's advice on the status of the Jade shares under the GMSLA. Dr Soh was known to A&G as a highly sophisticated investor with experience in at least one other general offer. It was not A&G's duty to insist on advising him or to force him to divulge

information, but rather to advise him of his duties under the Code.

(vii) A&G submitted that the risk of the GMSLA was not hidden to Dr Soh and his actions showed that he did not need advice on the GMSLA because he had confirmed that notwithstanding the GMSLA, he retained beneficial interest in the Jade shares.

(viii) A&G alleged that Dr Soh deliberately did not want to ask questions in relation to the disclosure issue or share his instructions and facts. Dr Soh could have been out to deceive A&G and the market. The higher the level of deception, the lower the obligation on the lawyer ought to be.

(ix) A&G submitted that as the GMSLA is governed by foreign law, A&G would not have been permitted to advise on it even if it had been produced and A&G had reviewed it.

3.2 *Hearing committee's view:* The hearing committee accepts that A&G had indeed taken certain steps to verify the shareholding and that Dr Soh had indeed made certain representations[9]. The hearing committee notes however that A&G never had sight of the GMSLA even though they became aware of it at the kick-off meeting on 4 February 2008. The hearing committee is of the view that for A&G to be able to dismiss, unseen, a document that they knew involved Jade shares, they had to be

[9] Though from the evidence before the hearing committee, it does not appear that Dr Soh had gone so far as to use the exact words "notwithstanding the GMSLA" he was the beneficial owner of the shares or words to the effect that A&G was to disregard the operation of the GMSLA in advising him.

satisfied to a very high degree that the agreement was indeed nothing more than a pledge and/or did not involve a change in beneficial ownership.

3.3 By A&G's own admission however, they were aware that the GMSLA was some kind of share lending agreement. As corporate finance lawyers, they should have been aware that it was common for beneficial ownership to pass under a share lending agreement. A&G's own attendance notes reveal that in the course of describing the terms of the GMSLA to A&G, Dr Soh had referred to the collateral under the GMSLA as being cash. Dr Soh's use of the term was inconsistent with the GMSLA being a simple pledge, because under a pledge the collateral should have been the Jade shares and not cash.

3.4 A&G argued that their responsibility was limited to ensuring that APLL and Dr Soh were aware of the requirements of and their responsibilities under the Code, which A&G had done. In support of this proposition, A&G cited the UK Takeover Panel case of *Kvaerner/AMEC plc* (1995/9). The facts in *Kvaerner/AMEC plc* are however different from the present case. It involved a situation where the offeree's public relations advisor had failed to exercise sufficient care in his discussions with an analyst unconnected with the offeror or offeree. In such a case, it would have been unreasonable to hold the offeree's financial adviser responsible for what the public relations adviser had said in discussions with a third party. The most the financial adviser could have done was to take all reasonable steps to ensure that the offeree and its advisers were aware of their obligations under the Code and therefore the only issue in that case with regard to the financial adviser, was whether it had taken such steps.

3.5 A more relevant case was the UK Takeover Panel's decision in *Corporate Resolve Plc* (2001/2) which concerned a failure to make certain disclosures in the offer documents. The UK Takeover Panel stated the following with respect to the responsibility of the adviser, Mr Christopher Jones, the solicitor to the offeror:

> "It is a particular responsibility of the advisers to an offeror to ensure that the disclosure requirements of the Code are satisfied. In this case, Corporate Resolve did not appoint a financial adviser. Mr Christopher Jones however had a wide role as adviser to Corporate Resolve including responsibility for drafting of offer documents and liaison with the Executive. Mr Jones' role included advice on the Code and general transaction management … An adviser undertaking the role assumed by Mr Jones is expected to ensure that such enquiries are undertaken as are necessary to meet the disclosure requirements of the Code and to ensure that the offer document is verified to the prospectus standard which the Code requires. Mr Jones failed to exercise due care in ensuring that these disclosure requirements were met and/or to ensure that the offer document was properly verified."

3.6 The hearing committee notes that the roles and responsibilities of Mr Jones as highlighted by the UK Takeover Panel are also the roles and responsibilities described within the scope of work of A&G's engagement letter dated 1 February 2008.

3.7 It is unnecessary for the hearing committee to decide whether a legal adviser's duty under the Code is the same as under law. Suffice to say that under the Code, in order to properly advise on the disclosure of

shareholdings, the hearing committee would expect A&G to have sight of the GMSLA when A&G learnt, in the course of advising on a concert party issue, that it involved 30% of Jade's total issued shares and the form of the agreement and the terms used by Dr Soh in describing the agreement appeared inconsistent with his instructions that he retained beneficial ownership because the agreement was only a pledge.

3.8 While Dr Soh may have been involved in corporate finance deals before, it did not mean that he would have been conscious of all the possible legal issues and pitfalls in the take-over process, such that A&G could have afforded to be any less proactive. Dr Soh was not legally trained and there were at least two instances which indicated that he was less than totally familiar with the rules under the Code. The first was when he had sent a letter to Jade, five days before the Offer announcement informing them that he wanted to make a take-over offer. The second was when he had made inappropriate comments to the press after the offer announcement. As a result, A&G had to send Dr Soh a note on 18 February 2008, to warn him not to do anything else without first consulting A&G and OCBC.

3.9 A&G also submitted that a lawyer cannot compel a client to divulge information when he refuses to do so. However, there is no indication that Dr Soh had refused to provide the GMSLA. Indeed, it was Dr Soh who had raised the GMSLA at the kick-off meeting. At the end of the meeting, A&G had requested for copies of all the documents mentioned at the meeting, including the GMSLA. The next day, A&G followed up with an email to Dr Soh to reiterate the request. Although Dr Soh did not provide the GMSLA in reply to that email, A&G also did not follow up with Dr Soh.

3.10 In conclusion, the hearing committee is of the view that there were sufficient indicators to alert A&G that the GMSLA might involve more than a simple pledge. In order for them to properly advise on the disclosure of shareholdings, it was incumbent on A&G to have sight of the GMSLA, a document which they knew involved a significant number of Jade shares and should have known might have a bearing on the legal and beneficial ownership of such shares. Even if the document had not been provided by Dr Soh in the first instance, and Dr Soh had not sought further advice, it was incumbent on A&G to follow up on its own accord and obtain the document for review as part of its own due diligence as a legal advisor to meet the standard of care required under Rule 8.2 of the Code. If A&G took the view that the GMSLA was governed by foreign law which A&G was not qualified to advise on, the hearing committee would have expected A&G to at least alert Dr Soh to the nature and language of the GMSLA and advise Dr Soh whether it was necessary to consider seeking foreign counsel on these matters.

3.11 The hearing committee is therefore of the opinion that A&G had not met the standard of care required under Rule 8.2 in relation to the Offeror and Dr Soh's disclosure of their interest in Jade shares under the GMSLA in the Offer announcement and the Offer document pursuant to Rules 3.5(c) and 23.3(c), respectively.

3.12 For the avoidance of doubt, the hearing committee did not rely on any statements made by Dr Soh, OCBC Bank or MLI in making any of its findings on the breaches of the Code by A&G.

4 Postponement of decision in respect of A&G

4.1 *A&G's submissions*: A&G had submitted, in the alternative, that the hearing committee should postpone making a finding as to whether A&G met the standard of care in Rule 8.2 until the courts in possible criminal proceedings against Dr Soh surrounding the Offer and Australian proceedings filed by Dr Soh against Opes had decided whether the Offeror and Dr Soh did in fact own 46.54% of Jade's total issued shares at the time the Offer announcement and Offer document were issued. If the number of shares stated in those documents was factually correct, the requisite standard of accuracy would have been met. This would also obviate the risk that the hearing committee's finding would be inconsistent with that arrived at by the courts to the prejudice of A&G.

4.2 *Hearing committee's views:* Regardless of the outcome of the proceedings in Australia and whether the disclosures turn out to be factually accurate, the standard of care in Rule 8.2 of the Code calls for "the highest standard of accuracy" and the presentation of information "adequately" and "fairly". As the hearing committee has already stated, at the time the Offer was made, the GMSLA certainly raised the possibility that beneficial ownership in the Jade shares lent under the GMSLA had passed to Opes, and this uncertainty was not reflected in the Offer announcement and Offer document, which state Dr Soh's shareholdings without qualification and without reference to the GMSLA. The GMSLA was a share lending agreement signed by Dr Soh with Opes that by its nature and language suggested that beneficial ownership of the lent shares passed to Opes. Whether such ownership would remain with Dr Soh would depend on the effect of supervening representations by Opes.

In the circumstances, the hearing committee would certainly expect more than a bare statement that the Offeror had a direct interest in the lent shares, in order to satisfy the highest standard of accuracy and present the information adequately and fairly as required by Rule 8.2.

4.3 As regards A&G's submission that the findings of the hearing committee in relation to any breach by A&G of the Code should be deferred until after the courts' decision as they may overlap with or have a bearing on issues arising from criminal proceedings in Singapore against Dr Soh, the hearing committee notes that section 139(8) of the Securities and Futures Act states, "*A failure of any party concerned in a take-over offer or a matter connected therewith to observe any of the provisions of the Take-over Code shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in the proceedings*". Section 139(9) then goes on to state that, "*Nothing in subsection (8) shall be construed as preventing the Securities Industry Council from invoking such sanctions as it may decide in relation to breaches of the Take-over Code by any party concerned in a take-over offer of matter connected therewith*". These provisions recognize that findings of the SIC as to breaches of the Code may potentially overlap with the findings of the courts but that this should not deter the SIC from making findings and imposing sanctions when it sees fit. In this regard, the hearing committee would also highlight section 139(5) of the Securities and Futures Act, which appoints the SIC as the statutory administrator and enforcer of the Code.

4.4 The hearing committee had not relied on the statements of any party, other than A&G, in coming to its findings on the breaches of the Code by A&G. In other words, all facts were as recounted by A&G and resolved in favor of A&G. This should allay A&G's concerns as, to the extent that there are inconsistencies in any factual findings by the courts and the hearing committee, it will not be to the prejudice of A&G.

4.5 Finally, the hearing committee notes that it is unclear when the proceedings alluded to by A&G will be resolved. The postponement sought by A&G would therefore protract the hearing committee's decision indefinitely. In the circumstances, the hearing committee considers that it would be preferable in the interests of the parties to the Offer and the public interest to explain the nature of its investigations and the significance of any conclusions reached, without postponing its findings in respect of A&G.

Chapter 7 Merrill Lynch International

1 The hearing committee will now proceed to consider and determine if MLI had breached the following:

Rule 12.1

“Dealings in relevant securities by the offeror, the offeree company or any of their associates for their own accounts or for the accounts of discretionary investment clients during the offer period must be publicly disclosed in accordance with Notes 4, 5 and 6 on Rule 12 below.”

MLI, as an associate, is required to disclose publicly its dealings in Jade shares during the Offer period by 12 noon on the dealing day following the date of the relevant transaction. An associate is defined (Definition no. 2) as follows:

“It is not practicable to define "associate" in precise terms which would cover all the different relationships which may exist in a take - over or merger transaction. The term "associate" is intended to cover all persons (whether or not acting in concert with the offeror, offeree company or with one another) who directly or indirectly own, or deal in, the shares of the offeror or offeree company in a take-over or merger transaction and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer. Without prejudice to the generality of the foregoing, the term "associate" will normally include the following:-

…

(f) a holder of 10% or more of the equity share capital of the offeror or offeree company. This includes a holder who acquires shares which takes him through 10%. Where two or more persons act as a syndicate or other group, pursuant to an agreement or understanding (whether formal or informal) to acquire or hold such capital, they will be deemed to be a single holder for the purpose of this paragraph; and …"

The issue is whether MLI had breached Rule 12.1 by failing to publicly disclose, in accordance with Notes 4, 5 and 6 on Rule 12: (i) its seizure of Jade shares representing approximately 26.5% of Jade's issued capital when it enforced its rights under the IPBA to do so on 27 March 2008; and (ii) its sale of Jade shares representing approximately 9.82% of Jade's issued capital in the market on 1 April 2008.

2 This chapter summarises the hearing committee's analysis of the evidence and submissions in relation to the above, and then states the hearings committee's findings.

3 Rule 12.1 – Disclosure of dealings by an associate

3.1 *MLI's submissions:* ML submitted that Rule 12.1 of the Code does not apply to MLI for the following reasons.

(a) Sections 2 and 3 of the Introduction to the Code indicate that the Code only applies to parties in, or to, a take-over or

merger transaction, and their advisers. Also, General Principle 1 of the Code specifies that only "persons engaged in … [take-over or merger] transactions" are bound by the Code. MLI was not a party to the Offer or advising any such party.

(b) Even if the Code, and in particular Rule 12.1, would govern dealings of "associates" of Jade, MLI was not an "associate" under sub-paragraph (f) of Definition no. 2 of the Code by virtue of its shareholding as a result of having come into possession of more than 10% of Jade shares in exercising its security rights over collateral provided by Opes. The opening lines of Definition no. 2 excluded a shareholder from the definition of "associate" if his interest is only by virtue of his shareholding. This exclusion was carried over into sub-paragraph (f) of Definition no. 2. In other words, to be an "associate" under sub-paragraph (f), a shareholder who acquires more than 10% shareholding must <u>also</u> have an additional interest in the outcome of the offer over and beyond a normal interest as a shareholder. Since MLI had no such interest, MLI was not an "associate".

(c) It was overly-inclusive to impose disclosure obligations on secured lenders like MLI who were "incidental shareholders" in their exercise of contractual rights in the ordinary course of business against third parties independent of the take-over offer. Policing such obligations would be difficult and may result in inconsistent market regulation.

3.2 Three cases were cited in support of MLI's proposition that to be an "associate" under sub-paragraph (f), a shareholder who acquires more than 10% shareholding must also have an additional interest in the outcome of the offer over and beyond a normal interest as a shareholder, namely, ***Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd*** [1994] 3 SLR 320, ***PP v Viran*** [1947] 13 MLJ 62 and ***Fincar SRL v 109/113 Mount Street Management Co Ltd*** *[1999] L. & T.R. 161*

3.3 *Hearing committee's views:* Rule 12 of the Code states that "all parties to a take-over and merger transaction (other than a partial offer) **and associates** [*emphasis added*] are free to deal subject to this Rule". Therefore, it is clear that "associates" are subject to obligations under the Code, in particular Rule 12. The question then is whether, to be regarded as an "associate", a holder of 10% or more of the equity share capital of the offeror or offeree company (and a holder who acquires shares which take him through 10%) described in sub-paragraph (f) of Definition No. 2 must also have an additional interest or potential interest in the outcome of the offer as discussed in the opening words of Definition no. 2.

3.4 The hearing committee drew MLI's attention to the phrase "[w]ithout prejudice to generality of the foregoing, the term "associate" will normally include…" preceding sub-paragraph (f) to Definition no. 2. It also highlighted the English House of Lords' decision in *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation*) [2002] 1 Lloyd's Rep 553 which was contrary to MLI's argument that the exclusion of shareholders who do not have an additional interest in the outcome of the offer in the opening lines of Definition no. 2 should be carried over into sub-paragraph (f). In *Caledonia* it was decided that usage of a similar phrase, i.e. "without prejudice to the foregoing generality" (i) was indicative of an intention that

the specific provisions that followed were to be read independently and not restricted by anything said earlier and (ii) any exclusions in the opening provision were therefore not carried forward into the specific provisions that followed.

3.5 MLI argued that *Caledonia* should not be applied in construing the Code as the subject matter in *Caledonia* was unique and the facts were such that the House of Lords had to strain the interpretation of the phrase in order to reach a right result.

3.6 The hearing committee notes however that this is purely speculative and unsupported by the judgment in *Caledonia* or any judgment of the House of Lords since *Caledonia*. Rather, the hearing committee is of the opinion that the House of Lords had based their decision on a plain reading of a phrase, similar to that found in the Code, that accords with the hearing committee's own interpretation of the phrase.

3.7 With regard to the cases cited by MLI, *Swee Hong Investment Pte Ltd* states that "without prejudice to the generality thereof" should be interpreted in such a way that words preceding the phrase (such as the opening words of the Definition No. 2) are considered the "core part" of the provision in which the phrase appeared. MLI then relied on *Viran* to argue that the words "without prejudice" mean "not to override or repeal". MLI argued that the combined effect of the two cases must be that particular examples following the phrase (such as subparagraph (f) of Definition No. 2) should not "override or repeal" the "core part" of the provision.

3.8 *Viran* must be viewed in context. That case considered a scenario where a pre-existing law prescribed a low penalty for arms offences,

before a second law came into effect which prescribed a high penalty for arms offence that was “without prejudice to” any written law in force for arms offences. The question was whether the second law repealed and completely replaced the first law. The court held that the words “without prejudice” meant that the first law was not repealed by the second law and the two laws could exist side by side. This is completely consistent with the hearing committee’s interpretation that sub-paragraph (f) of Definition No. 2 does not “repeal” the “core part” of the provision (in the same way that the second law did not repeal the first law in *Viran*) and the two can exist independently side by side. Therefore, contrary to MLI’s arguments, it does not follow from these two cases that sub-paragraph (f) should be read subject to the “core part”.

3.9 Turning to *Fincar SRL v 109/113 Mount Street Management Co Ltd*, MLI relied on a remark by Lord Justice Thorpe in the English Court of Appeal. Lord Justice Thorpe said that a specific obligation following the phrase “without prejudice to the generality of the foregoing” did not extend the general obligation which preceded the phrase. This view was not expressed by the other two judges in *Fincar* and did not impact on the eventual decision in that case, as Lord Justice Thorpe found that there was nothing in the specific obligation that was not found within the general obligation.

3.10 The hearing committee is inclined to prefer the interpretation arrived at by the English House of Lords in *Caledonia*, being that of a superior court whose interpretation accords more with a plain reading, and the hearing committee’s own understanding of the phrase.

3.11 The hearing committee is therefore of the view that there is no additional requirement that a holder of more than 10% of shares in the offeror or offeree envisioned in sub-paragraph (f) to Definition no. 2 must also have an additional interest or potential interest in the outcome of the offer in order to fall within the definition of "associate" under the Code.

3.12 MLI also argued that the presence of the word "normally" in the phrase "*the term 'associate' will normally include the following"* preceding sub-paragraph (f) of Definition no. 2 created a rebuttable presumption that a holder of 10% or more of the equity share capital of the offeror or offeree must also have an additional interest in the outcome of the offer. Where such a shareholder can show that it does not in fact have an interest in the outcome of the offer over and above that of a normal shareholder's interest, that shareholder would not be regarded as an "associate". The hearing committee is of the opinion however that, on a plain and natural reading of the entire phrase preceding the sub-paragraphs as a whole, the use of the word "normally" is merely to highlight that the various categories enumerated in sub-paragraphs (a) to (g) whereby one could be an "associate" are not exhaustive, rather than to introduce such a rebuttable presumption.

3.13 In reaching its decision, the hearing committee took into account the fact that it serves the spirit and objective of the Code to ensure fair and equal treatment of all shareholders in a take-over or merger transaction if the market is informed of the dealings by and identity of persons with significant holdings in the offeror or offeree companies so that the market may correctly assess the chances of success or failure of a bid, regardless of whether such persons have an additional interest in the outcome of the offer over and beyond a normal interest as a shareholder.

3.14 The hearing committee therefore finds that MLI was an “associate” within the sub-paragraph (f) of Definition no. 2 of the Code. MLI breached Rule 12.1 by failing to disclose (i) on 28 March 2008 that it had come into possession of approximately 26.49% of Jade’s issued capital and (ii) on 2 April 2008 that it had sold approximately 9.82% of Jade’s issued capital in the market.

4 For the avoidance of doubt, the hearing committee did not rely on any statements made by Dr Soh, OCBC Bank or A&G in making any of its findings on the breach of the Code by MLI.

Chapter 8 Sanctions against Dr Anthony Soh Guan Cheow

1 Having found that Dr Soh breached *General Principle 6, Rule 3.5(c), Rule 8.2, Rule 23.3(c) and Rule 11.2*, the hearing committee proceeded to consider and determine the appropriate sanctions.

2 General Principle 6

2.1 *Dr Soh's submissions:* Dr Soh submitted that:

(a) The hearing committee should take into account the fact that Dr Soh's own experience and dealings with Dr Rahman had not caused him to doubt that his verbal agreement with Dr Rahman for the latter to procure a banker's guarantee would be honoured.

(b) His breach would not have occurred but for the failure of OCBC Bank to discharge its duties. The primary responsibility for confirming the sufficiency of financial resources lay with OCBC Bank. At all times, Dr Soh relied on the advice of OCBC Bank as financial adviser to guide him on what was needed to issue the confirmation of financial resources.

2.2 *Hearing committee's view:* The hearing committee remarks that regardless of the degree of trust between Dr Soh and Dr Rahman, the

imprudence of not insisting on a formal and enforceable agreement for US$100m to finance a take-over must be obvious.

2.3 The hearing committee had stated earlier in response to arguments made by Dr Soh that he was not in breach of the Code, that regardless of OCBC Bank's confirmation, Dr Soh owed a separate and distinct obligation to be satisfied of his own ability to implement the offer in full. This is clear from the language of General Principle 6[10] which states that both the offeror and his financial adviser must be satisfied that the offeror can and will continue to be able to implement the Offer in full. The hearing committee also notes that at all times Dr Soh's finances and the financing arrangements to be made were well within his knowledge and control.

2.4 Dr Soh has cited a number of decisions by the UK Takeover Panel to support his submission that the sanction for his breach of General Principle 6 (as well as for each of his other breaches) should not go beyond public censure. While the decisions provide some insight into the approach of the UK Panel towards different types of breaches, the hearing committee was also mindful that sanctions need to considered based on the facts and circumstances of each case. The decisions can also be distinguished in that Dr Soh had committed other and more numerous breaches of the Code as compared to the offender in each of those decisions. In any event, given Dr Soh's multiple breaches of the Code, the hearing committee considers that it will be more appropriate to assess the breaches globally and impose one set of sanctions for all the breaches rather than imposing one sanction for each breach.

[10] An offeror should announce an offer only after the most careful consideration. Before taking any action which may lead to an obligation to make a general offer, a person and his financial advisers should be satisfied that he can and will continue to be able to implement the offer in full.

3 Rules 3.5(c), 23.3(c) and 8.2 of the Code

3.1 *Dr Soh's submissions:* As regards his breaches of these provisions of the Code arising from the lending of Jade shares to Opes under the GMSLA, Dr Soh submitted that:

(a) The hearing committee should consider the culpability of the following third parties, who had contributed to his breaches.

(i) Opes, which had deliberately hidden the true ownership status of the shares lent under the GMLSA from Dr Soh.

(ii) Opes and MLI, which had failed to discharge their disclosure obligations under sections 82 and 83 of the Companies Act and section 137 of the Securities and Futures Act.

(iii) OCBC Bank and A&G, which had failed to properly advise Dr Soh of the potential complications posed by the GMSLA.

(b) Dr Soh should not be judged on the basis that his disclosure of ownership of Jade shares under the GMSLA was entirely erroneous because he was entitled to describe his interest in the lent shares as a deemed interest. The inaccuracy was limited to his failure to disclose a risk, namely that he could potentially lose beneficial ownership of the shares under the GMSLA.

3.2 As regards the breaches arising from Faitheagle's undisclosed sale of 5.5 million Jade shares between 12 to 25 February 2008 and transfer of 50 million Jade shares from the Offeror to Faitheagle, Dr Soh submitted that it was relevant, in light of the principle of proportionality, to note that these were *de minimis* errors in respect of only a small proportion of Jade's issued share capital. The errors also played little or no part in the withdrawal of the Offer.

3.3 *Hearing Committee's view:* Some of the submissions reprise the arguments made by Dr Soh that he was not in breach of the Code. The hearing committee will not repeat its earlier responses, except to acknowledge that arguments insufficient to exonerate Dr Soh from a breach of the Code may be accorded more merit when it comes to mitigation.

3.4 In respect of Dr Soh's suggestion that MLI may have failed to discharge its disclosure obligations under the Companies Act and the Securities and Futures Act, this is premised on MLI having acquired beneficial ownership of the Jade shares under a share lending agreement with Opes. Dr Soh described this agreement as an "AMSLA", that is, an Australian version of the GMSLA. While the hearing committee observes that based on the documents produced, MLI appears to have acquired a security interest under the IPBA rather than beneficial ownership under an AMLSA, the hearing committee understands that such matters are under the purview of ACRA and MAS and have been referred to CAD. It is therefore inappropriate for the hearing committee to evaluate this as a matter of law or anticipate their findings. The hearing committee will forward the evidence before it to the CAD to aid in its investigations.

3.5 For the sake of clarity, the hearing committee reiterates that Dr Soh could not have satisfied the highest standards of accuracy and presented the information on his shareholdings accurately and fairly as required by Rule 8.2 by a bare statement that he had a deemed interest in the shares affected by the GMSLA. Given that the GMSLA suggested by its nature and language that beneficial ownership passed from Dr Soh to Opes and ownership would be retained only by operation of superseding representations by Opes, Dr Soh's disclosures would have to go into substantially more detail.

3.6 Finally, it bears repeating that Dr Soh's failings in respect of the level of his shareholdings also resulted in him breaching General Principle 6.

3.7 As regards the undisclosed sale of Jade shares by Faitheagle, the hearing committee notes that this was not just a one-off transaction. Rather, there were a series of non-disclosures by Dr Soh in respect of sales conducted over several days from 12 to 25 February 2008 and extending into the Offer period.

4 Rule 11.2(a)

4.1 *Dr Soh's submissions:* Dr Soh submitted that any sanction in respect of his breach of Rule 11.2(a) arising from his sales of a total of 50.2 million Jade shares during the Offer period should take into account the following:

(a) A&G had advised him that he was free to deal with the relevant securities during the Offer period.

(b) The number of Jade shares sold during the Offer was limited.

4.2 *Hearing committee's views*: The hearing committee notes that Dr Soh admitted that A&G had advised him of the need to disclose any dealings during the Offer period. This he failed to do. Even in the absence of advice, it is hard to see how Dr Soh could assume that he could sell the shares when by his own admission he knew his sales would affect the level of acceptances.

5 Mitigation arising from Personal Circumstances

5.1 Finally, Dr Soh raised several matters relating to his personal circumstances in mitigation, such as his personal suffering and financial loss, his prior clean record and contributions to Jade and to society.

6 Conclusion

6.1 The hearing committee has taken into consideration all the mitigating factors cited by Dr Soh. But Dr Soh has committed multiple and serious breaches of the Code. The provisions that were breached are important to promote an efficient, competitive and informed market for control of voting shares in a target company. A breach of General Principle 6 can lead to a false market in offeree shares. A breach of Rules 3.5(c), 23.3(c) and 8.2 may result in the market trading on an ill-informed basis.

6.2 Dr Soh is hereby censured and:

(a) prohibited from making any take-over offer in Singapore for a period of 5 years from 14 October 2008 and

(b) denied the facilities to buy and sell shares through Singapore Exchange Securities Trading Limited without Council's prior consent for a period of 3 years from 14 October 2008.

6.3 In view of the breaches of the Code, the hearing committee considers Dr Soh unsuited to be a director of any listed company in Singapore for a period of 5 years from 14 October 2008.

Chapter 9 Sanctions against Oversea-Chinese Banking Corporation Ltd

1 Having found that OCBC Bank had breached Rules 3.5 and 23.8 of the Code in respect of the financial resources confirmation; and Rules 3.5(c), 23.3(c) and 8.2 in respect of the disclosure of shareholdings, the hearing committee proceeded to determine the appropriate sanction against OCBC Bank.

2 *OCBC Bank's submissions:* OCBC Bank submitted that the following factors should be taken into account:

(a) OCBC Bank was a victim of fraud, perpetrated by the primary wrongdoer, Dr Soh. He had lied to OCBC Bank that he had sufficient financial resources, made incomplete disclosures of his dealings in Jade shares to the market, and concealed the true nature of and key facts regarding the GMSLA transaction with Opes from OCBC Bank.

(b) OCBC Bank's breaches were not intentional and were lapses which occurred in the course of OCBC Bank performing its professional duties as financial advisers. OCBC Bank had acted in good faith throughout. Indeed OCBC Bank had carried out a number of proper steps to discharge its duties. OCBC Bank had simply failed to take additional steps which, on hindsight, could have been taken.

(c) OCBC Bank had issued its financial resources confirmation on the basis that Dr Soh held approximately 46% of Jade's total

issued shares ("of Jade shares") and that he required financing for the remaining 54% of Jade shares. However, when Opes went into receivership, Dr Soh found that he had lost the 30% of Jade shares that he had lent to Opes. Dr Soh now needed financing for 84% of Jade shares instead of just 54% of Jade shares. OCBC would have been willing to stand behind its financial resources confirmation for 54% of Jade shares and extend financing to Dr Soh. But Dr Soh withdrew the Offer because he had been unable to raise the additional S$67m required to finance the remaining 30% of Jade shares.

(d) OCBC Bank's breach in relation to the disclosure of shareholdings was contributed to by A&G, the other professional adviser that had the expertise to review the GMSLA.

(e) Opes and MLI had failed to disclose their interest in Jade shares as required by the Companies Act and the Securities and Futures Act. As a result, OCBC Bank was led to believe that the Offeror and Dr Soh owned 46% and not 16% of Jade when OCBC Bank had checked their shareholdings against public records.

(f) OCBC Bank gained no benefits, financial or otherwise from its breaches. In contrast, Dr Soh and perhaps Opes and MLI had reaped gains to serve their private interests.

3 *Hearing committee's views:* The hearing committee accepts that Dr Soh's reticence and breaches of the Code certainly deprived OCBC Bank

of the opportunity to detect his failings and to advise him properly. Further, OCBC Bank's breaches were relatively less culpable than Dr Soh's overall conduct. The hearing committee has already dealt with the alleged failures by Opes and MLI to discharge their statutory disclosure obligations in the course of Dr Soh's submissions.

4 Nonetheless, there were serious lapses on the part of OCBC Bank which led to multiple breaches of the Code that are important to promoting an efficient, competitive and informed market. As the financial adviser and indeed, the issuer of the Offer announcement and Offer document, OCBC Bank had a key responsibility for ensuring compliance with the Code.

5 As acts of contrition for its breaches of the Code, OCBC Bank has volunteered (without any legal admission of liability) to:

(a) abstain from undertaking financial advisory work on take-overs for a period of 6 months from 1 September 2008; and

(b) donate a sum of S$1 million towards the cause of educating and promoting awareness among members of the public on lessons which may be learnt from this episode.

6 The hearing committee notes that OCBC Bank had, on its own accord, not accepted any Code-related work since the SIC commenced investigations into Jade, that is, since 11 April 08. The total period of abstention from Code work will therefore be approximately 11 months.

7 The hearing committee accepts OCBC Bank's offer of the self-imposed abstention and acknowledges OCBC Bank's donation. OCBC Bank is hereby censured for its conduct in this matter.

Chapter 10 Sanctions against Allen & Gledhill LLP

1 Having found that A&G had breached Rule 8.2 in relation to the Offeror and Dr Soh's disclosures of their interest in Jade shares in the Offer announcement and Offer document pursuant to Rules 3.5(c) and 23.3(c) respectively, the hearing committee proceeded to determine the appropriate sanctions.

2 *A&G's submissions:* A&G had submitted that the following factors should be taken into account in considering the issue of sanctions:

(a) A&G was not primarily responsible for ensuring the accuracy of the Offeror and Dr Soh's Jade shareholdings.

(b) A&G had taken steps to advise Dr Soh of his Code obligations and independently verify the Offeror and Dr Soh's Jade shareholdings.

(c) A&G had acted in good faith and had not deliberately breached the Code. In fact, A&G had been misled by Dr Soh.

(d) The direct and proximate cause of the withdrawal of the Offer was due to the inadequacy of Dr Soh's financial resources to satisfy outstanding acceptances, for which the Offeror, its directors and financial advisers were wholly responsible. Other parties were therefore more culpable for the inaccurate disclosures and reasons leading to the withdrawal of the Offer.

(e) Even if A&G had reviewed the GMSLA, the Offeror would still have disclosed an aggregate interest in 46.54% of Jade shares. The only difference would have been that the GMSLA shares would have been characterised as deemed interests rather than direct interests. A&G relied on Note 2 to Rule 23.3 of the Code which states that "references to directors being 'interested' in shareholdings should be interpreted according to section 164 of the Companies Act". Since the Offeror had a right of redelivery under the GMLSA, the Offeror would continue to have a deemed interest in the GMSLA shares under section 164, Companies Act, which states that a person has a deemed interest in a share if he had the right to have the share transferred to himself.

(f) Legal advisers acting in take-overs have only been censured in very exceptional circumstances.

(g) A&G has learnt from this episode and will not repeat its mistake again.

(h) Mr Lo, the partner in charge of advising Dr Soh and the Offeror on the Offer, was only one of 60 lawyers in A&G's mergers and acquisition team. It would be totally disproportionate and unreasonable to restrict the entire team from participating in mergers and acquisition activity. In this regard, A&G and Mr Lo were willing to undertake (without any legal admission of liability) to the hearing committee that Mr Lo would not be involved in any matters related to the Code for a period of 6 months.

3 *Hearing committee's views:* The hearing committee cannot accept A&G's contention that had they reviewed the GMSLA, according to Note 2 of Rule 23.3 of the Code, the Offeror would simply have been able to disclose an aggregate deemed interest in 46.54% of Jade's total issued shares. Note 2 on Rule 23.3 itself makes it clear that only references to directors being "interested" should be interpreted according to section 164 of the Companies Act. Reference to directors being "interested" are found only in Rule 23.3(b), which requires the offer document to state the shareholdings in the offeror and offeree company in which the directors of the offeror are interested. Hence even if the operation of Note 2 on Rule 23.3 is to allow shareholdings under the GMSLA to be stated solely as a deemed interest, this applies only to the statement of the directors' interest required by rule 23.3(b) but not to the other statements required by the rest of Rule 23.3, including the statement of shareholdings of the Offeror and its concert parties.

4 While A&G was not directly involved in providing or verifying the financial resources confirmation, the hearing committee notes that A&G must have known that the Offeror and Dr Soh's shareholding disclosures in Jade would have a direct bearing on two key issues relevant to the Offer, namely, the amount of financial resources needed to satisfy the outstanding acceptances and the likelihood of the offer becoming unconditional.

5 The hearing committee accepts however that primary responsibility for accurate disclosure of the level of shareholdings did rest with Dr Soh. The hearing committee also notes that as between the advisers, OCBC Bank had the leading role as the financial adviser compared to A&G.

6 The hearing committee notes that Mr Lo had, on his own accord, ceased accepting new Code-related work since the SIC commenced investigations into Jade, that is, 11 April 2008. Together with Mr Lo's undertaking not to undertake Code related work for a further six months from 1 September 2008, the total period of abstention is therefore approximately 11 months.

7 Having considered all these circumstances, the hearing committee accepts Mr Lo's self-imposed abstention from Code related work and hereby takes no further action against A&G.

Chapter 11 Sanctions against Merrill Lynch International

1 Having found that MLI had breached Rule 12.1, the hearing committee proceeded to consider and determine the appropriate sanctions.

2 *MLI's submissions*: MLI submitted that:

(a) As a secured creditor of Opes, MLI had acted reasonably and in good faith in expeditiously disposing of and realising the proceeds of the Jade shares towards discharging Opes' debts owed to MLI. In this respect, MLI had also enforced its rights over various other securities around the same time, with the same purpose of applying the proceeds towards the discharge of Opes' liabilities to MLI. The sale of the Jade shares was not an opportunistic maneuver.

(b) In good faith, MLI made the necessary disclosures to the SGX and Jade of the fact of MLI becoming a substantial shareholder and its disposal of Jade shares. This indicated that MLI had no intention to withhold information from the market and corroborates MLI's honest view that the Code was not applicable to them.

(c) As stated in the Code, the primary responsibility for ensuring compliance with the Code did not rest with MLI who was not a party to the Offer or an adviser.

(d) To impose on secured lender/prime brokers operating in multi-jurisdictions such as MLI the same Code obligations as those imposed on the parties to a take-over would be onerous and unnecessary and may stultify financing to Singapore's securities industry.

(e) This is the first instance in which a secured creditor has found itself subject to the obligations of the Code.

(f) The definition of "associate" in the Code is not free from ambiguity and there was no precedent to shed light on its interpretation.

(g) There are no aggravating factors.

3 *Hearing committee's view:* While it is not disputed that the primary obligations under the Code are for the parties to the take-over and their advisers, the Code clearly also imposes obligations on associates. In particular, the hearing committee reiterates the importance of informing the market of dealings by, and the identities of, persons with significant holdings (i.e. of at least or exceeding 10% of the company's equity share capital) in the offeror or offeree companies, regardless of whether such persons have an additional interest in the outcome of the offer over and beyond a normal interest as a shareholder. This is to enable the market to correctly assess the chances of success or failure of a bid.

4 Nevertheless, the hearing committee accepts that MLI's breaches were neither opportunistic nor intentional and that MLI was acting in good faith in realising in its security interests. This is borne out by the fact that

MLI had taken steps to notify Jade and SGX of MLI's acquisition of interests in, and disposal of, the Jade shares as secured creditors, in the discharge of MLI's disclosure obligations under the Companies Act and the Securities and Futures Act. In particular, MLI had taken steps to notify Jade and SGX before it commenced selling Jade shares on 1 April 2008. While the hearing committee notes that the changes to MLI's shareholdings in Jade were only announced on 8 April 2008, the hearing committee understands that such delays in announcements are under the purview of ACRA and MAS and have been referred to CAD. The hearing committee will forward the evidence before it to the CAD to aid in its investigations. The hearing committee also accepts that it was not unreasonable for MLI to have been genuinely mistaken as to the definition of "associate" in the Code as there is no precedent interpreting this term.

5 Having considered all these circumstances, the hearing committee hereby takes no further action against MLI.

Chapter 12 Order of Compensation

1 In deciding whether to make an order of compensation, the hearing committee must consider, amongst others, the nature of the breaches of the Code. Generally, compensation is appropriate where there is a breach of an obligation to make an offer on the terms prescribed by the Code. An example of such an obligation is Rule 14, which requires a mandatory offer to be made when an offeror acquires more than 30% of the shares in the offeree company or in the case of an offeror already holding between 30% to 50% of such shares, when he acquires more than 1% of such shares within any six-month period. Rule 14 also requires a mandatory offer to be at the highest price paid by the offeror of such shares within six months of the offer. Another example is Rule 21, which requires an offeror who purchases shares during the offer period at above the offer price to increase his offer to not less than this higher price. Where the breach is of such an obligation, found only under the Code, it is unlikely that shareholders will be able to rely on civil remedies to seek compensation in the courts.

2 This is in line with the approach taken by Takeover Panels in other jurisdictions. For example, the UK Panel's power to order compensation is in respect of a breach of a rule "the effect of which is to require the payment of money" (section 954, UK Companies Act 2006) and which "relate[s] to the level of consideration that must be paid by an offeror to shareholders in the offeree company" (UK Panel's Consultation Paper PCP 2005/5).

3 In this case, the breaches of the Code relate to the availability of financial resources to satisfy the offer in full and accuracy of information in the offer announcement/document, and not obligations to make offers on the terms prescribed by the Code. Taking this into account as well as the specific circumstances of the breaches, the hearing committee is therefore of the view that it is not appropriate to make an order of compensation.