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

6. The Executive WCIS of the view (with supporting evidence) that a significant number

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

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

Mr. Wong and Mr. Chan

11. The Executive also submitted that Mr. Steven Chan Sheung Chi ("Mr. Chan"), Managing Director of Peace Town Securities Limited ("Peace Town"), was acting in concert with Mr. Wong. Mr. Chan and Mr. Wong have been very close friends since the 1980's and also business associates. Mr. Chan acted as a broker in a number of property deals in which Mr. Wong participated and Mr. Wong had maintained an

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

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

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

(ii) in the alternative (although the point is not made as forcibly in the submission

(i)

Letter itself forms part of what may be described as "collateral" evidence rather than determining evidence in

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

2.65 It is open to the Panel to find that on 13 April 1994, David Wong and [Mr. C] incurred an obligation to make a general offer under Rule 26 of the Takeovers Code in that their aggregate shareholding in Kong Tai amounted to 35.07%.

2.85 ... [I]t remains open to the Panel to infer from the available evidence that Steven Chan, through [his wife], was acting in concert with David Wong. It is therefore open to the Panel to conclude that on 14 April 1994, Steven Chan .and David Wong breached Rule 26 of the Takeovers Code in failing to make a general offer when their aggregate shareholding in Kong Tai amounted to 35%.

2.96 It is open to the Panel to find that on 18 August 1994 David Wong and {X} incurred an obli

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

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

52. Acting in concert of itself is not a breach of the Code. If the existence of a concert

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

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

Standard of proof

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

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

57.

5

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

60. The Executive maintains that the pattern of acquisitions; the funding of these acquisitions by funds either lent or in the case of {X} repaid by Mr. Wong into a specific account at South China Securities where they were used exclusively to purchase Kong Tai shares; the use in each case of a segregated account with

of action in the matter and their lack of consultation with Mr. Wong in respect of

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

71. {X}

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

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

The price at which the offer ought to have been made

83. Unde hBT1 0 .e33(o)13(n)13(g)b 0 1 316.49 716.02 Tm[(t)-4((ered)12( )-4(i)5(nto.)] TJ262(h)13(iB

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

Conduct of the Executive

89. The Panel wishes to record its concern with the procedure adopted by the Executive in respect of {X}. The fact that {X} was not interviewed or indeed contacted by the Executive prior to the service of notice of disciplinary proceedings together with the voluminous evidence associated with these proceedings is unacceptable. The reason given by the Executive for their failure to interview {X} - namely that it was late in the day and that the other parties to the proceedings had not been co-operative - is not a sufficient reason for failing to attempt to interview or inform {X} of the proceedings prior to service and