

<p style="text-align: right;">Page 1</p> <p>1 Friday, 7 December 2012 2 (10.00 am) 3 Ruling 4 THE CHAIRMAN: I am going to ask that our ruling is 5 interpreted, and I will pause from time to time to allow 6 interpretation. 7 At the preliminary hearing, held on 5 December 2012, 8 Mr Zervos SC, the Director of Public Prosecutions, 9 applied to the Commission to adjourn the calling of 10 evidence in relation to the first of the terms of 11 reference, stipulated by the Chief Executive in Council 12 until the end of January 2013. That requires the 13 Commission to enquire into the facts and circumstances 14 leading to and surrounding the collision of the two 15 vessels, and: 16 "(a) ascertain the causes of the incident and make 17 appropriate findings thereof". 18 In the course of his submissions, he reduced the 19 period of adjournment that he sought to the "second week 20 of January 2013". 21 The twin bases advanced by Mr Zervos in support of 22 his application were that the first of the terms of 23 reference went to the heart of an ongoing investigation 24 by the police into criminal offences arising from that 25 conduct, which might be prejudiced by the calling of</p>	<p style="text-align: right;">Page 3</p> <p>1 leading to the collision by the end of December 2012. 2 As a result, Mr Zervos said that he anticipated that the 3 decision whether or not to bring criminal charges would 4 be made by the end of January 2013, or earlier if other 5 matters did not arise which needed to be addressed. 6 One of the concerns that Mr Zervos expressed as to 7 prejudice to any subsequent criminal trial was the 8 effect on witnesses who had given evidence before the 9 Commission where the rules of evidence do not apply (see 10 section 4(1) of the Commissions of Inquiry Ordinance, 11 Cap 86) on their subsequent evidence where such rules do 12 apply. 13 Of his concern of prejudice, arising from publicity 14 given to the proceedings before the Commission, to any 15 resulting trial on criminal charges of any one of the 16 seven crewmen of the two vessels, Mr Zervos acknowledged 17 that no such concern arose in respect of a prospective 18 trial in the District Court by judge alone. He was 19 right to do so. There is no dispute that in such 20 a trial, a District Court judge would be able to put out 21 of his mind any prejudicial material arising from the 22 Inquiry. Accordingly, the nub of the concerns expressed 23 by Mr Zervos was as to a trial before a judge and jury 24 in the High Court, in particular on an indictment 25 containing a count of manslaughter.</p>
<p style="text-align: right;">Page 2</p> <p>1 evidence in the Commission relevant to that issue, and 2 to prejudice resulting to any criminal trial that might 3 result from the investigation. 4 On 2 October 2012, the three crew of the vessel 5 Lamma IV and the four crew of the vessel Sea Smooth were 6 arrested by police officers on suspicion of having 7 committed criminal offences by their conduct on their 8 respective vessels in the period of time leading up to 9 the collision of the two vessels. Three of them were 10 arrested in respect of the offence of manslaughter, and 11 four of them in respect of the offence of endangering 12 safety of a person on a vessel. 13 Mr Zervos said that his concern as to the integrity 14 of the police investigation was one that echoed that 15 which was given voice before Lord Justice Leveson in his 16 Inquiry in the United Kingdom, namely that the premature 17 release of information or material into the public 18 domain might have an impact on the course of the police 19 investigation or related operational decisions. 20 However, he acknowledged that the circumstances 21 obtaining in this case in Hong Kong were quite different 22 in that, as he put it, the police were "not far off 23 completing their investigation". Further, he informed 24 the Commission that he anticipated being provided with 25 a report of an expert in respect of the circumstances</p>	<p style="text-align: right;">Page 4</p> <p>1 Mr Zervos answered in the negative when pressed by 2 the Chairman to address the rhetorical question posed by 3 Mr Paul Shieh, senior counsel: if one or more of the 4 involved persons was charged with manslaughter during 5 the period of adjournment, if one was granted, would the 6 Director of Public Prosecutions apply for a stay of 7 these proceedings? 8 Mr Zervos acknowledged that section 7 of the 9 Commissions of Inquiry Ordinance, Cap 86, provided in 10 terms that evidence given in person before the 11 Commission was not admissible against him in any civil 12 or criminal proceedings other than, for example, for 13 a charge of perjury. 14 We are satisfied that there is simply no force at 15 all in the concerns expressed by Mr Zervos as to the 16 integrity of any ongoing police investigation into this 17 matter. As he conceded, the investigation is all but 18 finished. As Mr Shieh pointed out, the best Mr Zervos 19 could do was to point to some possibility of further 20 enquiries by the police that might be affected by the 21 evidence taken in the Inquiry. 22 The manner in which witnesses who have testified in 23 the Commission give evidence subsequently in a criminal 24 trial is, of course, subject to the control of the trial 25 judge applying the rules of evidence. There is no</p>

<p style="text-align: right;">Page 5</p> <p>1 reason to think that those rules would not be imposed 2 and observed appropriately. Furthermore, whilst 3 evidence led in the hearings before the Commission is 4 not subject to the rules of evidence, the Commission has 5 no intention of presiding over a free-for-all, in which 6 witnesses are invited to speculate or guess in their 7 testimony. In any event, such evidence would have no 8 weight to any fact-finding body.</p> <p>9 As the Chairman reminded those present at the outset 10 of the Preliminary Hearing, the Chief Executive in 11 Council has directed that:</p> <p>12 "The determination of any criminal or civil 13 liability of any person shall be outside the terms of 14 reference of the Commission."</p> <p>15 Needless to say, the Commission will abide by that 16 direction.</p> <p>17 Insofar as the Commission receives evidence to 18 establish "the facts and circumstances leading to and 19 surrounding the collision of two vessels" so as to 20 enable it to, "ascertain the causes of the incident and 21 make appropriate findings thereof", such publicity as is 22 given to the evidence led in the Commission relevant to 23 that issue will be subject to the usual direction to be 24 given at any trial by the judge to the jury. That 25 standard direction enjoins the jury to reach a verdict</p>	<p style="text-align: right;">Page 7</p> <p>1 candidly that, even if one or more of the involved 2 persons was charged with the offence of manslaughter 3 during the period of the adjournment that he seeks, he 4 would not then seek a stay of these proceedings, there 5 is no point in delaying the receipt of evidence. It 6 would merely create unnecessary delay. In the result, 7 having regard to all the matters that we have addressed, 8 we refuse his application.</p> <p>9 Mr Grossman SC, who appears on behalf of the 10 Hongkong Electric Company Ltd and the three crew members 11 of the Lamma IV, and Mr Sussex SC, who appears on behalf 12 of Islands Ferry Company Ltd, Hong Kong & Kowloon Ferry 13 Holdings Ltd and the crew of the Sea Smooth, each seek 14 an adjournment of the hearings of the Commission until 15 early January 2013. They do so on the basis that, at 16 the time of their application, they had received none or 17 very little material relevant to the anticipated 18 evidence to be led by counsel for the Commission. In 19 particular, they had not received the electronic radar 20 records and the anticipated expert report of Captain 21 Pryke. Furthermore, they wish to inspect the vessels 22 with their own expert witnesses and to consider their 23 own positions.</p> <p>24 Sensibly, Mr Shieh acknowledged those concerns of 25 counsel and their need to digest the material to be</p>
<p style="text-align: right;">Page 6</p> <p>1 according to the evidence presented to them in court, 2 and directs them to ignore information that they have 3 received in any other way.</p> <p>4 As Ribeiro PJ noted in his judgment in the Court of 5 Final Appeal in the HKSAR v Lee Ming-tee (2001) 6 4 HKCFAR 133, at page 190G:</p> <p>7 "Reliance on the integrity of the jury and its 8 ability to try the case fairly on the evidence, to put 9 aside extraneous prejudice and to follow the directions 10 of the judge is fundamental to the jury system itself."</p> <p>11 He went on to note the importance of the trial 12 process itself in that regard (page 191, I-J):</p> <p>13 "Secondly, the jury may sensibly be credited with 14 the ability to overcome any pre-trial prejudice because 15 of the nature and atmosphere of the trial process 16 itself. Whatever impression of the case members of the 17 jury may have gained beforehand, at the trial, they are 18 given direct, first-hand access to the actual evidence 19 in the case, presented systematically and in detail, 20 with live witnesses tested by cross-examination and 21 exhibits tendered for inspection. They are addressed as 22 to the significance of such evidence by counsel on both 23 sides and guided by the impartial summing-up of the 24 judge."</p> <p>25 Given that Mr Zervos has informed the Commission</p>	<p style="text-align: right;">Page 8</p> <p>1 provided to them, but he went on to outline the way in 2 which they might be addressed. He indicated that he 3 proposed to lead evidence as to the collection of the 4 raw data of the radar images that depict the vessels 5 colliding. That evidence will be supplied by three 6 witnesses, two from the Marine Department and one from 7 the Hong Kong Police. Then, Captain Pryke would be 8 called. His report had been signed off on 4 December 9 2012, and was available in the hearing room for 10 distribution to the parties. Captain Pryke had been 11 asked to address matters in two reports. First, in the 12 report then available, he reported as to the 13 circumstances of the collision of the two vessels. 14 Later he would be asked to report on issues of ship 15 management, harbour management and safety measures. In 16 the third category of witnesses were some of those who 17 were passengers aboard the vessels Lamma IV, Sea Smooth 18 and Lamma II. He anticipated that some of those 19 witnesses would be called only after the anticipated end 20 of the first period of proceedings, namely proceedings 21 ending on 21 December 2012.</p> <p>22 Mr Shieh said that thought was being given to 23 identifying which of the witnesses involved in the 24 "rescue" ought to be called. Also, he informed the 25 hearing that the Commission had engaged a naval</p>

<p style="text-align: right;">Page 9</p> <p>1 architect to give the Commission expert assistance as to 2 ship construction, in particular the reason why Lamma IV 3 sank so quickly. 4 Noting that evidence of electronic radar records had 5 been accepted previously in the courts of Hong Kong, 6 Mr Shieh suggested that the evidence of the three 7 witnesses who spoke to that issue was unlikely to be 8 controversial. Even if it was, it did not involve 9 a great deal of reading of the material about to be 10 supplied. Recognising that the involved parties had not 11 yet received Captain Pryke's report, he suggested that 12 Captain Pryke might be called and questioned by counsel 13 for the Commission but, if other counsel wished to apply 14 to question him, such questioning might be deferred 15 until the New Year when it was envisaged that he would 16 be recalled to deal with his second report. 17 Mr Shieh suggested that in all the circumstances, it 18 was to be anticipated that, if counsel for the involved 19 parties wished to question the witnesses who were 20 passengers on the three vessels, and they were permitted 21 to do so, such questioning would likely not be 22 over-elaborate. Their statements were relatively short, 23 the relevant nub of which was contained in several 24 paragraphs only. 25 Mr Shieh said that Captain Pryke's report would be</p>	<p style="text-align: right;">Page 11</p> <p>1 those representing the involved parties have time to 2 digest the material served upon them. 3 We are satisfied that there is considerable merit in 4 Mr Shieh's suggestion that evidence in respect of the 5 system of storage and recovery of the radar track from 6 the vessels be led first and that Captain Pryke be 7 questioned by counsel for the Commission as to his 8 report. It is to be noted that the most relevant part 9 of the radar track occupies about five minutes. The nub 10 of Captain Pryke's report is contained in nine pages of 11 text in that report. There is no reason why that 12 evidence should not be led on 12 December 2012 onwards. 13 If the involved parties wish to apply to question those 14 witnesses, no doubt they will do so. If they are 15 permitted to question them, but contend that they need 16 further time to digest the material provided to them or 17 to obtain other material, no doubt they will make the 18 appropriate application, which the Commission will then 19 consider. Similarly, on the same basis there is no 20 reason why evidence should not then be led from the 21 witnesses who were passengers on the three vessels. 22 Accordingly, the applications by Mr Grossman and 23 Mr Sussex for an adjournment of the proceedings are 24 refused. 25 Mr Shieh, are there matters that can be usefully</p>
<p style="text-align: right;">Page 10</p> <p>1 served on the parties as soon as the Commission 2 adjourned and that lists of witness statements and 3 witness statements themselves would be served during 4 5 December 2012. 5 Turning then to a consideration of those 6 submissions. Given that the involved parties were not 7 stipulated as such by the Commission until during the 8 course of the hearing on 5 December 2012 it was not 9 appropriate that prior to that date they were provided 10 with material received by the Commission from the 11 Hong Kong Police, Marine Department and Fire Services 12 Department, pursuant to the Commission's compulsory 13 orders. To expedite that process the Commission had 14 invited those representing them to make written 15 applications in advance of the hearing. 16 At the request of the involved parties the 17 Commission ordered that arrangements be made for them 18 and their expert witnesses to inspect the vessels. 19 Although arrangements were made for an inspection to 20 take place on 6 December 2012, perhaps understandably 21 given the short notice, none of the involved parties 22 felt able to take up the offer. 23 The Commission is mindful, on the one hand, of the 24 limited time period in which it is required to report 25 but also, on the other hand, of the need to ensure that</p>	<p style="text-align: right;">Page 12</p> <p>1 addressed at this stage? 2 MR SHIEH: There are a number of matters which I will simply 3 flag and perhaps we can ask the Commission to take 4 a view as to whether or not the parties can usefully 5 discuss it during a short break before we come back. 6 THE CHAIRMAN: Thank you. 7 MR SHIEH: One point is the question about inspection. As 8 I understand it, as the Commissioner said, for 9 understandable reasons the offer for an inspection 10 yesterday was not taken up. 11 I understand that steps have been taken to enable 12 the parties to liaise directly with the police to 13 arrange, except that there has been a request by 14 Messrs Holman Fenwick Willan, instructing my learned 15 friend Mr Sussex, that they wish the Lamma IV to be 16 cleared of water and mud before any inspection were to 17 take place. Now, that is a matter which perhaps may 18 require some direction from the Commission. But again, 19 we can either deal with it now or we can deal with it 20 after I've had a chance of discussing it with Mr Sussex. 21 THE CHAIRMAN: We can deal with it now, I think. 22 At the Commission's direction, Captain Pryke was 23 contacted as to this matter, was he not? 24 MR SHIEH: Yes. Captain Pryke had indicated that he did not 25 regard it as necessary for water and mud to be cleared.</p>

<p style="text-align: right;">Page 13</p> <p>1 On this, can I just make a few remarks. 2 THE CHAIRMAN: Perhaps I could just interrupt you. But he 3 said that a short remedial measure would enable the 4 water and mud to be removed within an hour or two, did 5 he not, and that involves drilling a hole in the bottom 6 of the vessel? 7 MR SHIEH: I believe so, yes. But I think, more 8 importantly -- yes, it is not entirely clear what water 9 the request referred to. It couldn't have been the 10 water that was on the vessel immediately after 1 October 11 because that would have been dried up a long time ago. 12 It would well be more helpful if Messrs Holman Fenwick 13 Willan could indicate -- because I'm not sure if the 14 expert has even been to the vessel. It's a general 15 open-ended request. 16 THE CHAIRMAN: Let me change the Commission's mind, if 17 I may. Counsel ought to discuss this. If there remains 18 a problem, come back to us. 19 MR SHIEH: Yes. 20 THE CHAIRMAN: Thank you for flagging that point. That's 21 the first point. 22 MR SHIEH: The second point is requests have been made for 23 the supply of materials which are not just attached to 24 Captain Pryke's report, because Captain Pryke referred 25 explicitly to a number of documents in his report and</p>	<p style="text-align: right;">Page 15</p> <p>1 THE CHAIRMAN: Is there any reason why they shouldn't be? 2 MR SHIEH: They may contain matters which are not strictly 3 necessary or relevant, and they may contain matters 4 which perhaps could be regarded as sensitive, for 5 example pictures of dead bodies and those sort of 6 matters. 7 THE CHAIRMAN: I see. I see. 8 MR SHIEH: Because that is actually a scanned set of all the 9 materials that had been acquired by the Commission 10 during that period of time. 11 THE CHAIRMAN: Yes. 12 MR SHIEH: It was in a way supplied to Captain Pryke in 13 an abundance of caution in case he felt it necessary to 14 have regard to them, but in the event he had not. 15 THE CHAIRMAN: Certainly no necessity, subject to any 16 requests by counsel -- and I'd be very surprised if one 17 is forthcoming -- that photographs of the deceased would 18 need to be disseminated. 19 MR SHIEH: But certainly there would be an index, as one can 20 see in item 1. So the involved parties would get the 21 index and they would get everything else except 3. So 22 if, upon perusing the index, they felt it necessary to 23 actually identify particular documents which are 24 actually not supplied under any other rubric, they could 25 perhaps then ask.</p>
<p style="text-align: right;">Page 14</p> <p>1 those have all been attached as part of the attachments. 2 Requests have been made by Richards Butler and also by 3 Holman Fenwick not just for those documents but also for 4 documents attached to appendix 2, which are documents 5 supplied to Captain Pryke for the purpose of his 6 consideration. 7 We have since made enquiries with Pryke Captain 8 Pryke. Of those documents listed in appendix 2, he had 9 actually not felt it necessary to actually look at the 10 content of one of the items, namely item 3, that is to 11 say a DVD containing soft copies of a whole host of 12 materials. He has had an index to the documents, but he 13 has not regarded it as necessary to actually open the 14 DVD. 15 To cut a long story short, of the documents listed 16 in appendix 2, he has actually looked at all the items 17 except item 3. In my submission, it would be fair if 18 the request is made for those documents to be supplied 19 to the involved parties. 20 THE CHAIRMAN: Are the items identified in 3 not provided in 21 any event to the parties? 22 MR SHIEH: The DVD? 23 THE CHAIRMAN: Yes. Aren't they provided under some other 24 rubric? 25 MR SHIEH: They have not yet been provided.</p>	<p style="text-align: right;">Page 16</p> <p>1 THE CHAIRMAN: Yes. Is this a matter the Commission can 2 leave with counsel to discuss? It seems agreement could 3 be reached. 4 MR SHIEH: Yes. Mr Sussex is nodding his head, I think 5 Mr McGowan also. 6 MR MCGOWAN: I agree as well. 7 MR SHIEH: There is a third matter, and that is to say 8 yesterday late in the afternoon, the Commission received 9 certain new disclosures from the Department of Justice. 10 Effectively, to cut a long story short, the VTC of 11 the Marine Department captured certain radar images or 12 data. That data had gone to the system in the Marine 13 Police which generated certain track records which were 14 considered by Captain Pryke. Yesterday the Department 15 of Justice disclosed certain track records which were 16 compiled by the system within the Marine Department 17 based on the same radar signals, the figures of which 18 were slightly different from the figures generated by 19 the system in the Marine Police based on the -- 20 THE CHAIRMAN: Is that because they're based on AIS? 21 MR SHIEH: Yes, I believe so. Perhaps it's something Mr Mok 22 can explain. Basically yesterday, additional 23 information was provided based on the system in the 24 Marine Police. 25 THE CHAIRMAN: The position is this, is it not? Sea Smooth</p>

<p style="text-align: right;">Page 17</p> <p>1 was equipped with AIS and VHF. 2 MR SHIEH: Yes, that's right. 3 THE CHAIRMAN: AIS signals are broadcast through VHF, and 4 they give coordinates, course, bearing, speed and the 5 closest point of approach, CPA. 6 MR SHIEH: That is my understanding. 7 THE CHAIRMAN: Is that the data that's now been disclosed? 8 MR SHIEH: Yes, it is. And that data was supplied to 9 Captain Pryke overnight. 10 THE CHAIRMAN: Just pause there. 11 Let me ask Mr Mok why this was not supplied earlier. 12 MR MOK: Yes. 13 Mr Chairman, I understand that originally there was 14 a set of data being provided by the Marine Police, the 15 raw data of which came from the radar system managed in 16 the VTC. However, it was not discovered until 17 yesterday, when they went through the expert reports 18 with those instructing me and counsel, that it was 19 discovered that there was some discrepancy between the 20 data which was generated by the software in the 21 possession of the VTC, and possibly the data generated 22 by the software used by the Marine Police. That being 23 discovered yesterday, immediate disclosure was made to 24 the Commission. So that was not realised before. 25 THE CHAIRMAN: So it was simply overlooked?</p>	<p style="text-align: right;">Page 19</p> <p>1 THE CHAIRMAN: I take it there is no substantial difference 2 between the two? 3 MR SHIEH: Our current understanding is that there is no 4 substantial difference. 5 We take it also that the DoJ has already supplied 6 the additional materials to the involved parties, or 7 have they not? 8 MR MOK: They have not. 9 MR SHIEH: The materials have not yet been supplied to the 10 involved parties, so the Commission would, I would 11 suggest, be supplying the materials to the involved 12 parties immediately. 13 THE CHAIRMAN: Yes, I think that should be done immediately. 14 MR SHIEH: So Captain Pryke's supplemental report would be 15 available on Monday. 16 The same point would apply, namely that any request 17 to question Captain Pryke on that report would be dealt 18 with as and when the applications are made. 19 THE CHAIRMAN: Yes. 20 MR SHIEH: The fourth item is that following the hearing on 21 Wednesday, a witness list has been given to the involved 22 parties. I understand that because of the need to 23 actually burn the actual soft copies of witness 24 statements into DVDs or CD-ROMs, the actual service 25 might have been done the day after -- it was the day</p>
<p style="text-align: right;">Page 18</p> <p>1 MR MOK: It was simply overlooked. 2 THE CHAIRMAN: The Commission recognises that the volume of 3 material involved is enormous, and it's a difficult job 4 being dealt with expeditiously, and we accept your 5 explanation. 6 MR MOK: Thank you. 7 THE CHAIRMAN: Mr Shieh, does anything flow from this? 8 MR SHIEH: Captain Pryke has been supplied with the 9 materials overnight. He has been asked to provide 10 a supplemental report essentially considering the other 11 set of figures generated by the system in Marpo, Marine 12 Police, with a view to doing another plot, because the 13 Commission would know in the original report he did 14 a plot based on the figures contained in Marine 15 Police -- 16 THE CHAIRMAN: That's the one in appendix 24? 17 MR SHIEH: Yes, but now he's going to do another plot based 18 on the figures generated by the system in the Marine 19 Department. That will be the subject of an additional 20 report. 21 THE CHAIRMAN: When it is anticipated that that will be 22 available? 23 MR SHIEH: It is now the middle of the night in England. We 24 hope that he will be able to revert over the weekend and 25 we hope that the report will be available on Monday.</p>	<p style="text-align: right;">Page 20</p> <p>1 after, yes. It was actually done the day after, 2 although the witness list was actually given on the very 3 day. But I suppose it could be said that seeing the 4 name list is not much use without actually seeing the 5 statement. So time began to run on the 6th. 6 Can I simply report what has taken place since then. 7 The solicitors for the Commission have been liaising 8 with witnesses whose names appear on the list. For 9 understandable reasons, some of them were unavailable, 10 some of them, for reasons which would be obvious, did 11 not feel disposed to attend the hearing at this stage, 12 and therefore arrangements were made to revise the list. 13 So there is now going to be a revised list of witnesses 14 who have already indicated that they would be available 15 and are prepared to attend the hearing. It is in the 16 course of being drawn up, because it was literally being 17 finalised overnight and this morning. 18 Those on the revised list, obviously some of them 19 would not be on the original list because some of them 20 were approached after the original list was prepared. 21 THE CHAIRMAN: When will the final version of this revised 22 list be available for dissemination? 23 MR SHIEH: This morning. And obviously, if any witness 24 statements are necessitated -- obviously there will 25 be -- they would also be scanned and supplied in the</p>

<p style="text-align: right;">Page 21</p> <p>1 same way as the original witness statements have been. 2 THE CHAIRMAN: Yes. 3 MR SHIEH: There is a question of translation that has just 4 been raised, and which I believe would be helpfully 5 sorted out by a short discussion between counsel, 6 because the witness statements are taken in Chinese and 7 there were discussions as to who should be responsible 8 for doing the translation and prioritising the matter. 9 THE CHAIRMAN: Well, this is something that the Commission 10 has asked be done by those assisting the Commission, and 11 it asked some time ago that this was addressed. I'm 12 aware that there are many things to do, but it is 13 important that we assist everyone the best we can. 14 MR SHIEH: Yes. But now that the list has been sorted out 15 and the priority of witnesses has also been sorted out, 16 it may well be some kind of priority can be arranged. 17 THE CHAIRMAN: That, I thought, was already in place. It's 18 not a question of translating the statements of those 19 who are not going to come to give evidence, although 20 it's helpful for the parties to have an overall view of 21 what people said and why it is that the counsel for the 22 Commission have chosen certain witnesses to give 23 evidence. Because, as I understand it, you will be 24 calling people who will speak to certain issues, for 25 example those that saw the --</p>	<p style="text-align: right;">Page 23</p> <p>1 THE CHAIRMAN: But not inspected? 2 MR McGOWAN: I'm not talking about inspecting -- they're 3 obviously available because they were supplied to him. 4 We'd like copies of those. 5 THE CHAIRMAN: We were told by Mr Shieh that he didn't look 6 at item 3. 7 MR McGOWAN: Well, maybe not. But if it's got all the 8 material that essentially has been delivered to the 9 Commission from the various sources, we would like to 10 have a look at that. 11 THE CHAIRMAN: Including the photographs of the deceased? 12 MR McGOWAN: It might be something that may become relevant 13 later. 14 THE CHAIRMAN: I've got your application. 15 MR McGOWAN: Yes. And obviously if the Commission is 16 looking later on into matters of the stability of the 17 vessels and so on -- 18 THE CHAIRMAN: I've got your application, Mr McGowan. 19 MR McGOWAN: Right. Thank you very much. 20 The translation point has already been dealt with. 21 THE CHAIRMAN: I don't need you to address the items that 22 Mr Shieh has identified because I'm going to give you 23 an opportunity to discuss them. 24 MR McGOWAN: We don't have anything else. Thank you. 25 THE CHAIRMAN: Thank you.</p>
<p style="text-align: right;">Page 22</p> <p>1 MR SHIEH: Experienced certain features or not experienced 2 certain features, saw certain things or did not view 3 certain things. 4 THE CHAIRMAN: Very well. So that's another issue to be 5 addressed with counsel. What I have in mind is 6 adjourning for whatever time you suggest is necessary, 7 and then I'll hear from counsel for the involved parties 8 as to how these issues are being resolved. 9 MR SHIEH: Perhaps I should -- 10 THE CHAIRMAN: Is there anything else on your list? 11 MR SHIEH: Not from the Commission's representatives. If 12 the other involved parties have any other matters that 13 they think usefully can be dealt with, perhaps they can 14 be brought out and we can also address that. 15 THE CHAIRMAN: Are there any matters, other than those that 16 have been identified, that counsel wish to put on their 17 shopping list? 18 MR SHIEH: There is one question, as I understand it, 19 arising out of supply of LiveNote transcripts. But 20 again, these matters perhaps I can liaise with counsel. 21 THE CHAIRMAN: I hope counsel can sort that out. 22 Mr McGowan? 23 MR McGOWAN: Yes, Mr Chairman. I, speaking at least from 24 our point of view, would prefer to have the DVDs that 25 were supplied to Captain Pryke because --</p>	<p style="text-align: right;">Page 24</p> <p>1 Mr Sussex? 2 MR SUSSEX: My Lord, I don't make that application at the 3 moment, so that it may be something that we'll have to 4 make later, but I'd like to see the list first of all of 5 what was contained in the document. 6 My Lord, the only point I correct Mr Shieh on is 7 it's suggested that the point of translation has just 8 been raised. As your Lordship heard, the witness 9 statements were not supplied to us until yesterday 10 and -- 11 THE CHAIRMAN: I don't need to trouble you on that. That's 12 something that I've been asking to be addressed. 13 MR SUSSEX: So be it. 14 My Lord, the other point that we need clarification 15 of is the ambit of the evidence of a naval architect, 16 because we apprehend that that could be relevant to the 17 cause of the collision, but obviously we won't know that 18 until we ourselves have obtained the evidence of a naval 19 architect and we know precisely what's coming from the 20 Commission's expert in that regard. But I'm not sure 21 that -- 22 THE CHAIRMAN: I'm not anticipating that it would be 23 relevant to the cause of the collision. It might be 24 relevant to the consequences of the collision. 25 MR SUSSEX: It certainly can be relevant to the question of</p>

<p style="text-align: right;">Page 25</p> <p>1 whether or not the -- why it was that the Lamma IV sank 2 so quickly, I do accept that. 3 THE CHAIRMAN: That has specifically been addressed by 4 Mr Shieh. 5 MR SUSSEX: That's right. My Lord, again, perhaps that's 6 something I can discuss with Mr Shieh, but there is 7 concern in relation to that particular area of evidence 8 at the moment. 9 My Lord, that's all I'd wish to raise at this stage. 10 THE CHAIRMAN: As far as cause is concerned, perhaps what 11 you might have in mind, for example, would be that 12 something went wrong with the steering or something like 13 that. 14 MR SUSSEX: That is a possibility. We just don't know. 15 THE CHAIRMAN: Well, I'm not anticipating that. That's 16 certainly not why the Commission has asked that a naval 17 architect be engaged. 18 MR SUSSEX: So be it. The difficulty we have, of course, is 19 we've only had a look at the vessel once, that goes back 20 to 14 November 2012. Our request in relation to water 21 and mud obviously goes back to that date, because that's 22 when we last saw the vessel. We don't know what her 23 state is at the moment. 24 But, my Lord, I will try and discuss these matters 25 with Mr Shieh and insofar as matters can't be resolved,</p>	<p style="text-align: right;">Page 27</p> <p>1 nothing? 2 THE CHAIRMAN: I understood you were given witness 3 statements. 4 MR SUSSEX: We have been given witness statements in 5 Chinese. 6 THE CHAIRMAN: I would have thought they were paginated. 7 Are they not paginated? 8 MR SUSSEX: They have numbers on them, but we didn't realise 9 the pagination was in any particular -- 10 MR SHIEH: We will see to it that if documents are supplied 11 to the involved parties, they will be in a paginated 12 form so they will be able to compile -- 13 THE CHAIRMAN: That's fundamental, I would have thought. 14 Mr Mok, anything else? 15 MR MOK: Not from me. 16 THE CHAIRMAN: Mr Zervos? 17 MR ZERVOS: Chairman, Commissioner, thank you for hearing 18 from me and dealing with the application. That's all 19 I have to say. 20 THE CHAIRMAN: Thank you. 21 Gentlemen, how long do you need to put your heads 22 together? 23 MR SHIEH: I think an hour, to take stock of everything. 24 THE CHAIRMAN: Mr McGowan? 25 MR MCGOWAN: That seems sensible to us.</p>
<p style="text-align: right;">Page 26</p> <p>1 we will obviously raise them with you after whatever 2 adjournment you now allow. 3 THE CHAIRMAN: Thank you. 4 Mr Mok. 5 MR MOK: Just a housekeeping matter. I'm wondering whether 6 the Commission is thinking of using some sort of common 7 paginated bundle or are we simply using the witness 8 statements individually? 9 THE CHAIRMAN: There is an overall paginated system which 10 was implemented from the very start. 11 MR MOK: Thank you. 12 THE CHAIRMAN: But it may be -- as I understand it, 13 everything has been paginated. So it may follow that 14 the material that's relevant will -- 15 MR MOK: Will come later. 16 THE CHAIRMAN: -- be in different bits. So it may be pages 17 1-50, 500-600, with gaps. 18 Am I right, Mr Shieh? 19 MR SHIEH: Yes, that would be a sensible way of dealing with 20 it, rather than repaginating everything once they have 21 been taken out. 22 THE CHAIRMAN: We have enough repaginating of in the Court 23 of Appeal. 24 MR SUSSEX: May I ask whether we're going to be privy to 25 these paginated pages, because at the moment we have</p>	<p style="text-align: right;">Page 28</p> <p>1 MR SUSSEX: That seems sensible. 2 THE CHAIRMAN: Very well. We'll give you until 12.10 then. 3 (11.07 am) 4 (A short break) 5 (12.10 pm) 6 MR SHIEH: Mr Chairman, we've had a very useful discussion 7 over the past hour. Can I just report where we are. 8 In respect of inspection, the involved parties will 9 be given the relevant contact details for the relevant 10 persons within the Marine Police and they will be making 11 their own arrangements. 12 In respect of the request to clear Lamma IV of mud 13 and water, a suggestion has been made, and I think it's 14 been accepted, that rather than discuss this requirement 15 to clear the mud and water in the abstract, the best 16 thing is for the expert retained by Sea Smooth to 17 actually attend first and then see whether or not there 18 are particular areas or particular aspects where the 19 expert requires some further help by way of clearing 20 things up. 21 That is something which I don't think we need any 22 direction from the Commission. I think that can be 23 something that is left to the good sense of the legal 24 advisers. 25 THE CHAIRMAN: Thank you.</p>

<p style="text-align: right;">Page 29</p> <p>1 MR SHIEH: In relation to materials in appendix 2 of Captain 2 Pryke's report, it has now been resolved and agreed that 3 all except item 3, the DVDs, would be supplied in soft 4 format. But because of the time that is needed for 5 burning, the Commission's solicitors would be burning 6 the midnight oil to make sure that they be delivered 7 ASAP. But there has been a request that there are some 8 materials within the schedule 2 materials that they 9 would wish to see earlier, for example the DVD video 10 depicting the radar track. 11 THE CHAIRMAN: Yes. 12 MR SHIEH: That would be dealt with perhaps as a matter of 13 priority. So before burning anything else, that would 14 be burned as a matter of priority. 15 THE CHAIRMAN: That seems very sensible. 16 MR SHIEH: In relation to the revised witness list, that has 17 been handed out, and in relation to witnesses' 18 statements which were not in the original witness list 19 but which are now in the revised witness list, they will 20 be supplied. 21 In relation to translations, again, we would be 22 looking for the Department of Justice to provide the 23 relevant translations of the relevant police statements 24 of those who are in the revised witness list. But of 25 course priority being given to those listed in the</p>	<p style="text-align: right;">Page 31</p> <p>1 THE CHAIRMAN: Seek to call? 2 MR SHIEH: Yes, seek to call. 3 So the witness statements of those which the 4 Commission would not seek to call will also be supplied, 5 but in that event, without translation. 6 THE CHAIRMAN: Yes. 7 MR SHIEH: Because things must be prioritised. So 8 translation priority is given to those which are 9 contemplated would be called. Because once the Chinese 10 statements of those who are not sought to be called are 11 given, the advisers can no doubt take a view as to which 12 bits they actually really want and take it from there. 13 THE CHAIRMAN: Yes. 14 MR SHIEH: That really is about it, except there's one 15 further point that has just occurred to me and my 16 learned juniors and that is when the materials have been 17 given, they have actually not been subject to any 18 express stipulation as to use and confidentiality. We 19 think it might be useful for the Commission to consider 20 imposing orders, extracting undertakings as to the 21 permissible use of materials supplied. 22 THE CHAIRMAN: That they be used only for these proceedings? 23 MR SHIEH: For the purpose of these proceedings. Of course, 24 there may be materials they have anyway, but those would 25 not be captured because those are matters they have</p>
<p style="text-align: right;">Page 30</p> <p>1 earlier part of the witness list, because it is 2 contemplated those would be called first. 3 THE CHAIRMAN: Yes. 4 MR SHIEH: It may not be strictly in the same order, because 5 very often it still depends on whether or not they can 6 take a day's leave on Tuesday rather than Wednesday. 7 THE CHAIRMAN: Yes, of course. 8 MR SHIEH: But those in the earlier part would be the ones 9 who would be called earlier than those in the later 10 part. Again, that would be sorted out with the good 11 sense of the legal advisers. 12 A point has been raised, the force of which is 13 acknowledged, and that is, apart from the statements of 14 the witnesses whom the Commission has decided to call, 15 the involved persons have a legitimate interest in 16 seeing the statements of those which the Commission has 17 not decided to call but which they may wish to see, for 18 two purposes: first of all, to see whether or not there 19 are materials in those -- it's almost like unused 20 materials. The witness list of other witnesses which 21 they may wish to put to the witnesses who have been 22 called, who are going to be called, and also for the 23 second purpose of enabling them to see whether or not 24 they wish to call any of those which the Commission 25 has --</p>	<p style="text-align: right;">Page 32</p> <p>1 not -- pursuant to any disclosure in these proceedings. 2 And also not be disclosed until they've been adduced as 3 evidence in these proceedings. Because we don't want 4 witness statements to then start being bandied about, 5 not that it's likely that they would do so. Because 6 sensitivities of witnesses obviously have to be 7 considered. 8 THE CHAIRMAN: Not disclosed publicly, you mean? 9 MR SHIEH: Publicly, yes. So the condition that materials 10 disclosed not be used except for the purpose of these 11 proceedings, and they not be disclosed publicly until 12 they have been adduced as evidence publicly in these 13 proceedings. 14 I'm sorry I have not been able to discuss this with 15 my learned friends, but I had thought it to be 16 relatively uncontroversial, so I raise it now. 17 THE CHAIRMAN: Yes. Let me hear the parties on the latter 18 matter, that is an order that the material provided to 19 them by counsel for the Commission should be used only 20 for the purposes of these proceedings and that material 21 is not to be disclosed publicly before it is adduced in 22 evidence in the proceedings. 23 Mr McGowan? 24 MR MCGOWAN: Yes, I think we'd certainly agree with that, 25 Mr Chairman.</p>

<p style="text-align: right;">Page 33</p> <p>1 THE CHAIRMAN: Mr Sussex? 2 MR SUSSEX: Mr Chairman, we'd have no problem with an order 3 along those lines or a requirement along those lines. 4 THE CHAIRMAN: Thank you. 5 Mr Mok? 6 MR MOK: We support that. 7 THE CHAIRMAN: Very well. We'll make an order in those 8 terms, and I'd ask you, Mr Shieh, to draft it and we'll 9 promulgate it in that way. But that order is in effect 10 now. 11 MR SHIEH: There's one further point, perhaps not 12 necessitating an express order. There's a question as 13 to provision of transcripts. There was a small point as 14 to whether or not it should be the Commission who would 15 be making the copying and supplying to the parties. 16 I have suggested to the parties that they approach the 17 service-provider directly, and the Commission would give 18 the necessary consent for them to enter into 19 an arrangement directly with the service provider. 20 THE CHAIRMAN: And the parties are agreeable to that? I see 21 you're nodding. Thank you. 22 Are there any other matters, then? 23 MR SHIEH: There's nothing from our part, Mr Chairman. 24 THE CHAIRMAN: Well, there is the outstanding matter of 25 Mr Lee Kwok-keung, who I see sitting at the back of the</p>	<p style="text-align: right;">Page 35</p> <p>1 have concerns about the time we have available. There's 2 no guarantee we're going to get material today. There 3 may be no guarantee we're going to get material 4 tomorrow. We may only get it on Monday. I know great 5 efforts are being made to do the duplication and so on. 6 That leaves us obviously very little time to look at it. 7 I would therefore, Mr Chairman, like to reserve the 8 matter of our applications for questioning which might 9 well require the recalling of witnesses who have given 10 evidence. 11 THE CHAIRMAN: Yes. I know counsel will be particularly 12 sensitive to the need to recall passenger witnesses. 13 MR MCGOWAN: Yes. 14 THE CHAIRMAN: I would ask you to -- if indeed you wish to 15 question them, because the role of the counsel for the 16 Commission is to put before the tribunal all relevant 17 matters. 18 MR MCGOWAN: Yes. 19 THE CHAIRMAN: I would ask you to be particularly anxious 20 about that. Because it's traumatic enough, no doubt, 21 for them to come here once. I'd like to try and avoid 22 them having to come here twice. 23 MR MCGOWAN: I entirely accept and indeed agree with that, 24 Mr Chairman. But, of course, we do also have roles to 25 play in this and what may be apparent or appear</p>
<p style="text-align: right;">Page 34</p> <p>1 hearing room. Has Mr Lee been spoken to? 2 MR SHIEH: Mr Lee has been approached by Messrs Lo & Lo, the 3 Commission's solicitors, and steps are being taken to 4 obtain a fuller statement from him with supporting 5 documentation, and then a view will then have to be 6 taken as to whether or not Mr Lee's role is going to be 7 somebody who provides information for us to make 8 enquiries, or whether or not he is going to be somebody 9 called as a witness, or whether or not he would be 10 somebody we regard as having the necessary standing or 11 is sufficiently affected. But it is too early to form 12 a view on that until the solicitors have met him 13 properly and taken a statement. But a meeting has taken 14 place with him already, and matters have been explained 15 to him. 16 THE CHAIRMAN: Mr Lee, were you able to follow that? I know 17 Mr Shieh speaks fast. 18 MR LEE KWOK-KEUNG: Yes, I can follow. 19 THE CHAIRMAN: So we're still considering your position and 20 what role you might play. 21 MR LEE KWOK-KEUNG: Yes, sir. I can follow. I understand. 22 THE CHAIRMAN: Thank you. 23 Mr McGowan, any matters you wish to raise? 24 MR MCGOWAN: Yes. Thank you, Mr Chairman. I think I speak 25 for both my learned friend Mr Sussex and myself. We do</p>	<p style="text-align: right;">Page 36</p> <p>1 important perhaps to my learned friends may not be the 2 same for us, and vice versa. 3 THE CHAIRMAN: Yes. I hear what you say. 4 MR MCGOWAN: That leads me really on to deal with 5 appendix 2. We've spoken at some length this morning 6 about item 3. Item 3 is the three DVDs which contain 7 all the documents, as I reminded you this morning. That 8 effectively is -- 9 THE CHAIRMAN: You didn't remind me; you informed me, in 10 fact. 11 MR MCGOWAN: Well, I'm reading from what is written in the 12 papers, really, Mr Chairman. That seems to us a very 13 quick and easy way of providing us with all the unused 14 material in a manner we can access quickly. 15 THE CHAIRMAN: I think the way to deal with this is for you 16 to be given whatever index there is as to item 3, and 17 then you can formulate your proposal, rather than making 18 an omnibus request. I can tell you quite frankly, 19 I will need some persuasion that it's appropriate that 20 photographs of the deceased be provided to you. 21 MR MCGOWAN: It would be under the same undertaking as other 22 matters. 23 THE CHAIRMAN: You heard what I said, Mr McGowan. 24 MR MCGOWAN: Yes. I did, my Lord. It just seems -- well, 25 I heard what you said, my Lord. I won't say anything</p>

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1 further on that.
2 We don't need an inspection. We have actually
3 inspected Lamma IV already. We will reserve our
4 position on the Sea Smooth, but that can be done later.
5 Sea Smooth was not in the Government dockyard when we
6 went there earlier in the week.
7 THE CHAIRMAN: No, but it can be inspected in the sea.
8 That's the inspection that my fellow commissioner and
9 I did.
10 MR MCGOWAN: Yes. I think it's now at anchor in the Yau Ma
11 Tei typhoon shelter.
12 THE CHAIRMAN: Yes.
13 MR MCGOWAN: That is all I have to say at the moment,
14 my Lord.
15 THE CHAIRMAN: Thank you.
16 Mr Sussex?
17 MR SUSSEX: Mr Chairman, I don't have very much to say.
18 Obviously we will be very sensitive to the position of
19 the survivors, and I apprehend it won't be necessary for
20 anybody to be recalled, but obviously we haven't seen
21 what they have to say as yet.
22 THE CHAIRMAN: Of course, I understand that.
23 MR SUSSEX: But I do envisage that it will be necessary to
24 recall the three witnesses who give evidence of raw data
25 in relation to the Marine Department, VTC, VTS systems,

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1 and the marine policemen, largely because their evidence
2 will obviously be the subject of consideration by my
3 experts.
4 THE CHAIRMAN: Yes.
5 MR SUSSEX: It's going to take time for me to evaluate all
6 of that. So for the first few days, I apprehend that
7 the Commission will be receiving evidence and then
8 receiving applications for us to question but to defer
9 our questioning because of the embarrassment in which we
10 currently find ourselves.
11 THE CHAIRMAN: Yes, very well. We'll entertain those
12 applications when they're made.
13 THE CHAIRMAN: Mr Mok?
14 MR MOK: Nothing from me.
15 THE CHAIRMAN: Mr Shieh, any matters arising?
16 MR SHIEH: Just to give a degree of assurance to the
17 Commission and my learned friends. Insofar as the
18 passenger witnesses are concerned, it is unlikely that
19 they would be called within next week. Chances are they
20 will be called the week after next.
21 THE CHAIRMAN: Yes.
22 MR SHIEH: So there will be hopefully enough cushion or
23 buffer for my learned friends to consider not only their
24 statements, but also the statements of the other
25 uncalled witnesses so they could actually take a view.

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1 So there won't be the need, for example, to say, "Ah, we
2 haven't considered the materials maturely enough and
3 we've omitted to ask four questions, and here they are."
4 THE CHAIRMAN: Very well. We'll see where we are when we
5 come to it.
6 Perhaps I can say this, that the Commission is
7 asking those assisting it to take steps to provide, if
8 we're able to, a facility for simultaneous translation,
9 and that will be by, we think, the use of headphones on
10 a wireless basis, so that although much of the evidence
11 is likely to be led in Cantonese, enabling particularly
12 the relatives of the deceased and those that were
13 injured, or passengers on the vessels, to follow it.
14 Where evidence is in English no doubt it would be
15 informative to them if we can provide that service, and
16 that's something we are hoping to have in place by
17 Wednesday. But we'll see if we're able to achieve that.
18 So I'd ask you, Mr Shieh, to bear that in mind when
19 we come to the evidence in particular of Captain Pryke.
20 It may be that we have to do it at a slower speed than
21 we would otherwise if it was not being translated.
22 MR SHIEH: Yes, most certainly, Mr Chairman. There is
23 perhaps one extra point that I wish to bring up, now
24 that the question of language is being raised.
25 In relation to the passenger witnesses who are going

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1 to be called, many of whom are likely to have given
2 witness statements in Chinese, as I understand it, the
3 contemplated procedure would be not for them to give
4 viva voce evidence and basically recall what they have
5 said in the witness statements. The suggested mode of
6 giving evidence would be for counsel leading their
7 evidence to read the relevant part of their evidence in
8 Chinese into the transcript. But since the official
9 language of the Inquiry is English, the official
10 translation would obviously be read at the same time by
11 Mr Chairman and also by counsel. So there probably may
12 not be a need to simultaneously translate that bit into
13 English, because it will be read in Chinese.
14 THE CHAIRMAN: That's a matter for you to think about,
15 Mr Shieh. What we can do, of course, since we've got
16 scanned documentation, is we can put up on the screen
17 one version, perhaps the English version or the Chinese
18 version, and then the other language could be used for
19 reading it out, so that people can follow it in
20 whichever language they wish to follow it in.
21 MR SHIEH: Yes.
22 THE CHAIRMAN: And then questioning, which will be
23 necessary, if it arises, will be done -- questioning in
24 English with the interpretation into Cantonese.
25 MR SHIEH: Yes. We will give some thought as to how the

<p style="text-align: right;">Page 41</p> <p>1 matter can be dealt with expeditiously, efficiently and 2 also in the most comprehensible manner to the public. 3 THE CHAIRMAN: I'd ask that you put your head together with 4 counsel for the involved parties to consider that. But 5 certainly the starting point will be the witness 6 statements, and we'd invite you to invite the witnesses 7 to confirm that at the time they gave the statement, 8 that was the account to the best of their memory, and 9 then proceed to oral questioning. 10 MR SHIEH: Yes. 11 THE CHAIRMAN: Thank you. Are there any matters arising 12 from that? If not, then these proceedings will be 13 adjourned until 10 o'clock on Wednesday, 12 December 14 when we will first of all hear an opening speech from 15 Mr Shieh, counsel for the Commission, and then we will 16 hear whether or not applications are made by those 17 representing the involved parties to make their opening 18 speeches, after which we will proceed to receive the 19 evidence, as I understand it, in relation to the radar 20 and AIS systems and the track that was obtained as 21 a result. 22 So, 10 o'clock on 12 December. 23 (12.28 pm) 24 (The hearing was adjourned until 10 am on Wednesday, 25 12 December 2012)</p>	
<p style="text-align: right;">Page 42</p> <p>1 I N D E X 2 3 Ruling1 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	