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<p>1 Tuesday, 12 March 2013 2 (10.00 am) 3 Closing submissions by MR MOK (continued) 4 THE CHAIRMAN: Mr Mok. 5 MR MOK: Good morning, Mr Chairman, Commissioner Tang. 6 Yesterday afternoon I was addressing my learned 7 friend's argument that had Mardep spotted that there was 8 no watertight door, it was likely that Cheoy Lee would 9 have installed one instead of simply amending the plan 10 to reflect that there was no watertight door, and if 11 a watertight door was installed, then Lamma IV would 12 have sunk less rapidly. So there is a causal link 13 between Mardep's failure to spot lack of watertight door 14 and the sinking. 15 I was addressing the Commission that on the whole of 16 the evidence, it was much more likely that the plans 17 would simply have been amended to reflect that there was 18 no watertight door. It was much more unlikely that 19 a watertight door would have been installed instead. 20 There is one point, Mr Chairman, Commissioner, I did 21 not deal with, which is that I of course rely on the 22 uncontradicted evidence from both Naval-Consult and 23 Cheoy Lee that the bulkhead at frame 1/2 was not 24 intended to be watertight -- was not intended to be 25 watertight. And my learned --</p>	<p>1 the Preliminary Trim and Damage Stability Booklet, which 2 showed both compartments flooding. 3 But that is only relevant to the point, in my view, 4 of what they would have likely done had the door been 5 discovered. That's simply to address my learned 6 friend's point. 7 THE CHAIRMAN: I follow that. But the real issue is, as 8 I've stated, the fact that nobody corrected the issue. 9 MR MOK: Yes. I also said finally that the cost issue, the 10 relatively minor costs in installing a door, is not 11 really that germane because it's equally or even less 12 costly to do the amendment. 13 THE CHAIRMAN: Well, there's no cost of any significance 14 either way, it would appear. 15 MR MOK: Either way, yes. 16 THE CHAIRMAN: That's what Mr Lo said. Amending the 17 drawing -- "minimal cost" was his phrase. 18 MR MOK: Correct. 19 Mr Chairman, may I just go on to the next matter 20 which my learned friend deals with. First of all my 21 learned friend accepts that had the missing door been 22 spotted and the correct calculation of damage stability 23 carried out in 1996, Mardep would still have issued the 24 certificate of survey because of the 0.1L rule. This 25 much, of course, we respectfully agree. But my learned</p>
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<p>1 THE CHAIRMAN: But this is an ex post facto rationalisation 2 from both the witnesses. 3 MR MOK: It is. In fact that's my learned friend's point. 4 He said those officers or the personnel who were 5 involved contemporaneously were not located to be able 6 to give assistance to the Commission. That's why 7 I showed yesterday to the Commission that in fact Mr Ken 8 Lo made his observation on the basis of objective 9 evidence of the construction of the access opening, 10 showing that it was never intended to have a door in the 11 first place. 12 Also, I rely, of course, on the amendment of the 13 previous plan which was used, the Sections and Bulkheads 14 plan which was previously used for the Eastern District 15 vessel, and the change there. 16 THE CHAIRMAN: Yes. But the issue that really matters is 17 that the ball was dropped by everyone. 18 MR MOK: That's right. 19 THE CHAIRMAN: It was dropped by Naval-Consult, it was 20 dropped by Cheoy Lee, and it was dropped by the Marine 21 Department. 22 MR MOK: That's right. 23 THE CHAIRMAN: Or the officers involved. 24 MR MOK: Correct. And also, Mr Chairman, of course the 25 intention was also reflected or at least consistent with</p>	<p>1 friend goes on to say that the issue of the certificate 2 of survey would not be justified for another reason, and 3 the reason he cites is that there is a separate rule 4 requiring that there be an aft peak bulkhead. So this 5 is the point where he says that the absence of the aft 6 peak bulkhead was also somehow causative of the rapid 7 sinking of the vessel. 8 Now, on that issue, I wish to highlight four short 9 points. 10 We say that the aft peak bulkhead point is in fact 11 a red herring, for four reasons. First of all -- 12 THE CHAIRMAN: Is this reflected in your written submission? 13 MR MOK: Yes. May I give you the reference first? 14 THE CHAIRMAN: Yes, if you would. 15 MR MOK: And then I'll highlight those points. It's on 16 page 7, paragraphs 12 and 13; and page 20, paragraphs 30 17 and 31. Rather than reading through those pages, 18 I simply wish to highlight four of the points. 19 THE CHAIRMAN: I appreciate what you're doing, but for my 20 note and for later reference, this assists me. 21 MR MOK: Of course. Those are the two passages. 22 The first point is that as noted by yourself, 23 Mr Chairman, yesterday, there is no statute or 24 ordinance, or indeed even in the Blue Book, in terms 25 that the aft peak bulkhead should be dealt with by</p>

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<p>1 a formula like the collision bulkhead. 2 Secondly, Dr Armstrong himself eschews the use of 3 any such formula. Here I wish to refer to his evidence, 4 Day 48, 8 March, page 22 at line 21. If I may just read 5 this bit for the record. 6 At line 21, I was asking this question: 7 "You remember in relation to the aft peak bulkhead, 8 you had some observation that its distance should be 9 about or less than 0.1L from the stern, or from the 10 rudder stock? 11 Answer: Yes, sir. 12 Question: But I have noticed that you have made no 13 recommendation in this regard in your part 2 report. 14 Should there be some recommendation in this regard, if 15 it is so important? 16 Answer: I think that's an astute observation, 17 Mr Mok. Yes, perhaps there should be some 18 clarification. 19 Question: What should that recommendation be, if 20 there be a recommendation? 21 Answer: I would need to consider that a little 22 further. I would not be wanting to state numbers. 23 Question: Right. 24 Answer: I think it should be clear that the aft 25 peak bulkhead is in the after part of the vessel, with</p>	<p>1 point at the after end, whereas Lamma IV was a very wide 2 transom. 3 Question: And very many different types of vessels? 4 Answer: Indeed. Many different types of propulsion 5 too. 6 Question: Indeed. So in short, would it be fair to 7 say if indeed there should be some guideline as to the 8 location of the aft peak bulkhead, there should be 9 sufficient flexibility to be given to the authority -- 10 Answer: Always very important in any legislation, 11 yes." 12 So I think this is in line, Mr Chairman, with your 13 observation that there was in fact no statutory or 14 regulatory regulation governing this. 15 The third point is that Dr Armstrong also accepts, 16 and this is what my learned friend fairly pointed out 17 yesterday, that Mardep's view that the aft peak bulkhead 18 can be located further forward is not "unsustainable or 19 plainly wrong", and this is Day 48 at page 46, line 19. 20 A very short reference here. This is Day 47, line 19 of 21 page 46 -- sorry, that may be a wrong reference. 22 THE CHAIRMAN: I remember the evidence because after all, it 23 was not so long ago. 24 MR MOK: Yes. I don't need to refer to that. 25 Finally, Mr Chairman, Dr Armstrong's acceptance of</p>
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<p>1 a volume behind it of moderate capacity or minimum 2 capacity or something like that. 3 Question: So in some general terms? 4 Answer: In some general terms. 5 Question: But you would not, for example, stipulate 6 a distance or location comparable to that which is 7 required for the collision bulkhead? 8 Answer: No, sir, I would not. 9 Question: So you would not use, for example, the 10 0.1L as being the guideline for this purpose? 11 Answer: No, I would not suggest a particular 12 figure. The collision bulkhead location is quite 13 specific, between 5 and 7.5, or whatever classification 14 society or SOLAS you are looking at. But close to those 15 figures. 16 Question: Right. 17 Answer: And that has come from very many years of 18 experience where vessels have been in collisions, and 19 it's been found to be an ideal location for the 20 collision bulkhead. So there is solid evidence behind 21 that location, but I think less so in the terms of aft 22 peak, mainly because there are so many different aft 23 peak designs. 24 Question: Right. 25 Answer: Ocean-going ships tend to come to a narrow</p>	<p>1 Mardep's view was not unsustainable is also appropriate 2 because, precisely, of the first two matters that 3 I referred to. 4 So I don't need to trouble the Commission with the 5 other points that I have listed out in my two passages. 6 Just in conclusion, I would respectfully submit that 7 any suggestion that the lack of watertight door amounted 8 somehow to a breach of regulation 12(iv) of the Blue 9 Book is not made out. That's my submission. 10 THE CHAIRMAN: Thank you. 11 MR MOK: Then the third matter I wish to address by way of 12 my learned friend's submission is a matter with which 13 I respectfully agree, and this is -- if I may ask the 14 Commission to please turn to page 44 of my learned 15 friend's submissions, starting at paragraph 86. I wish 16 to respectfully adopt this line of reasoning. 17 At paragraph 86, my learned friend says: 18 "The consequence of missing the 0.1L rule in the 19 1996 calculation of damage stability for Lamma IV was 20 not material as at that time because the margin line 21 test would still be passed. However, it would be 22 significant in the 1998 and 2005 calculations since the 23 margin line test would have failed had the tank room and 24 steering compartment been treated as one compartment. 25 A question then arises: would or could Mardep have</p>

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<p>1 approved the addition of ballasts in 1998 and the 2 raising of the added ballasts in 2005 had it applied 3 correctly the 0.1L rule? The purpose again is to 4 investigate whether Mardep's mistake in this regard had 5 contributed to the sinking of Lamma IV in its 6 configuration as at 1 October 2012.</p> <p>7 Had the 0.1L rule been applied correctly in 1998, 8 Lamma IV would not be allowed to sail and Cheoy Lee 9 would be obliged to conceive ways to re-jig the 10 ballasts. For instance, they could have lightened the 11 ballasts to be added; added buoyancy in the shape of 12 foam or making alterations to the vessel such as putting 13 buoyancy boxes behind the transom. The same should 14 happen in 2005 in respect of the raising of ballasts, 15 although this issue is academic because had the 0.1L 16 rule been properly applied in 1998, Lamma IV would 17 probably have configured differently which might or 18 might not lead to the raising of ballasts in 2005.</p> <p>19 However, it would appear that the correct 20 application of the 0.1L rule would not result in any 21 suggestion of adding a watertight door at the frame 1/2 22 bulkhead because by virtue of the application of the 23 0.1L rule, the steering gear compartment and tank room 24 would have been merged and treated as one anyway. The 25 calculations were also done on paper and there would be</p>	<p>1 morning. Then the second part, about the aft peak 2 bulkhead, is the second matter that I addressed this 3 morning.</p> <p>4 The same refrain is reflected in paragraph 85. So 5 again, I take issue with it. Paragraph 85 says: 6 "If the Commission accepts the view of Dr Armstrong 7 on aft-peak bulkhead, then Mardep would have no valid 8 justification in approving Lamma IV in 1996 (and 9 reapproving it in 1998 and 2005) despite the departure 10 from the plans. In other words, the failure of Mardep 11 to spot the absence of watertight door at frame 1/2 12 bulkhead did contribute to the sinking ..."</p> <p>13 This bit, of course, is again dealing with the aft 14 peak bulkhead.</p> <p>15 That's all I wish to say, Mr Chairman, save that 16 there is one more point that you yourself raised 17 yesterday, which again I respectfully submit that my 18 learned friend has dealt with fairly, and if I may just 19 remind the Commission. Day 49, page 58, line 18.</p> <p>20 THE CHAIRMAN: The issue being?</p> <p>21 MR MOK: Well, the issue being, Mr Chairman, you remember 22 you said that the significance of the sinking lies in 23 the ballast, and this is the part that my learned friend 24 addressed you on. This is page 58, line 23.</p> <p>25 THE CHAIRMAN: Yes.</p>
<p>Page 10</p> <p>1 nothing to prompt the officers of Mardep to inspect 2 Lamma IV.</p> <p>3 Since the addition of a watertight door at the 4 frame 1/2 bulkhead would not be a response in correctly 5 applying the 0.1L rule and refusing the application for 6 adding and raising ballasts, it is our submission that 7 the failure of Mardep to apply the 0.1L rule in 1998 and 8 2005 did not by itself contribute to the sinking of 9 Lamma IV in its configuration as at 1 October 2012."</p> <p>10 So, up to here, we respectfully agree and adopt the 11 reasoning set out by my learned friend.</p> <p>12 It is the last sentence that I take issue with, 13 because the last sentence actually summarises my learned 14 friend's first two points. This is where he says: 15 "However, Mardep's failure to insist on the 16 frame 1/2 bulkhead being watertight (so as to comply 17 with the plans, and also to serve as a watertight 18 aft-peak bulkhead as required by the Blue Book) did 19 contribute to the loss of the vessel more quickly than 20 would otherwise have been the case, as discussed in the 21 previous section above."</p> <p>22 So those words in brackets, "(so as to comply with 23 the plans ...)" is, as I understand, the reference to 24 the first argument relating to the likelihood that there 25 would be a watertight door, which I addressed first this</p>	<p>Page 12</p> <p>1 MR MOK: Mr Chairman, you said: 2 "The vessel would not have been allowed to sail with 3 that amount of ballast. 4 Mr Shieh: That's right. ... 5 The Chairman: That is significant in the cause of 6 the sinking, is it not? The ballast? 7 Mr Shieh: Not -- yes -- well, I should have put it 8 this way. It would not have had any correlation with 9 whether or not the absence of a door -- 10 The Chairman: No. 11 Mr Shieh: -- had been spotted. 12 The Chairman: No, because you're doing tank room 13 and steering gear compartment together for 0.1L rule. 14 Mr Shieh: Yes. 15 The Chairman: And the margin line is submerged. 16 Alarm bells. 17 Mr Shieh: Yes, yes. But in fairness, one might 18 well say that even if, for example, no ballast 19 whatsoever had been added, let's say upon discovering 20 that the margin line test had failed in 1998, and let's 21 say they say, 'Okay, we'll just do away with the 22 ballast, we don't add any ballast', so the vessel 23 continued in its 1996 situation, but without a door, 24 I think the calculations had shown that in the event 25 that had eventually transpired, the vessel would still</p>

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<p>1 have sunk, without the door. Because I believe that 2 Dr Armstrong and Dr Peter Cheng were I think at one on 3 this, and that is to say even in the configuration of 4 Lamma IV as it was in 1996, without adding ballast, but 5 without that door, it would have sunk. 6 The Chairman: Yes, but that would have been 7 flooding in 2.5 compartments. Is that what you have in 8 mind? What actually happened? No ballast --" 9 Just to give the Commission the reference from 10 Dr Armstrong's second supplemental report. There is 11 a table that I drew to Dr Armstrong's attention at 12 expert bundle, page 929. 13 At page 929, the last table shows very clearly that 14 in 1996, when there was no ballast, and with the engine 15 room and the tank room both flooded, on that 16 presupposition, then the vessel would still sink. So 17 that I think supports my learned friend's submission to 18 the Commission yesterday. 19 Just one very quick point, Mr Chairman. You will 20 recall that Dr Armstrong said that if there was 21 a watertight door, the vessel would not sink 22 immediately. Mr Chairman, you remember you asked him 23 what he meant by that, and he said that because the 24 position of the vessel would have been in such 25 a position that if there were some waves or some vessels</p>	<p>1 it would sink, because it's hard to tell, because of the 2 movement, and the panicky or chaotic situation on board. 3 I now move on to the life jacket matter, which is 4 the last matter I wish to address the Commission on. 5 First of all I would like to refer to my learned 6 friend's paragraph 98, which, Mr Chairman, you also 7 referred to during his submissions. Paragraph 96 on 8 page 50. 9 In the last sentence of paragraph 96, my learned 10 friend said, referring to the life jackets: 11 "Some of them did not know how to put on the life 12 jackets and some had difficulty in putting an adult life 13 jacket on a child." 14 You see that. 15 THE CHAIRMAN: Yes. 16 MR MOK: The reference is footnote 138. Footnote 138 17 contains a number of references. Most of them refer to 18 adults, but there are two references to children. 19 I would like to give the Commission those two references 20 to children. First of all, it is the last reference, to 21 the evidence of Lau Hau-yin. The reference is given 22 there already. Mr Chairman, you remember Mr Lau said, 23 referring to I think trying to put on the life jacket 24 for a child, he said it was all tangled, entangled. 25 THE CHAIRMAN: Yes.</p>
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<p>1 sailing nearby, or even the movement of people on board 2 would have caused the vessel to sink. 3 THE CHAIRMAN: Yes. 4 MR MOK: So that is a matter which Dr Armstrong -- 5 THE CHAIRMAN: That's why you have a margin line. 6 MR MOK: Yes. 7 THE CHAIRMAN: Because when you put the deck at water level, 8 all kinds of things can sink the boat. 9 MR MOK: And particularly where you have a panic situation 10 panning out, and it would simply cause the vessel to 11 sink. There is no calculation or any information from 12 Dr Armstrong that in that scenario -- that is, with 13 a watertight door but all three compartments being 14 flooded -- how fast it would have sunk, because nobody 15 would know because it depends I think on the movement of 16 the passengers on board. 17 THE CHAIRMAN: If there was a watertight door, it wouldn't 18 be a case of three compartments being flooded, would it? 19 MR MOK: Yes, yes. Correct. I stand corrected. 20 MR SHIEH: There was that diagram which we have seen showing 21 it tilted at a particular angle. 22 MR MOK: Yes. 23 MR SHIEH: It may still sink eventually, but -- 24 MR MOK: The point I'm making is there was no calculation or 25 observation by Dr Armstrong as to how fast or how slow</p>	<p>1 MR MOK: Mr Chairman, you asked him what it meant and he 2 said that it was the strings which all became entangled, 3 so it made it difficult to put on. 4 The second reference relating also to a child is the 5 evidence of I think Lee Ming-sun, the second line. The 6 reference again is given there. 7 There, Mr Lee said: 8 "The time was so short that it was impossible to put 9 it on completely. She [that is a daughter, aged 9] was 10 only halfway through, and it was impossible to 11 complete it." 12 He also said he managed to put the life jacket only 13 on the son's head. I think the son was only 2.5 years 14 old. 15 These are, as I understand, the only two references 16 of difficulty of putting life jackets on children, and 17 both of them related to difficulty with not the size of 18 the life jacket, but some other difficulties. 19 Against that -- 20 THE CHAIRMAN: So what are you submitting, that an adult 21 life jacket is suitable for a child? 22 MR MOK: No, not at all. What I'm -- 23 THE CHAIRMAN: Well, what is your submission? 24 MR MOK: My submission is that in this particular incident, 25 there is no evidence that there was any particular</p>

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<p>1 difficulty because of the size of the jacket -- in this 2 instance. Because, Mr Chairman, I perfectly agree with 3 you in your observation during Mr Sam Wong's testimony 4 that there must be a difference between a child and 5 an adult life jacket. Otherwise, the manufacturer would 6 not have created them. 7 Added to that, Mr Chairman, you remember Mr Wong 8 Wing-chuen also explains that there is a new model of 9 adult life jacket with sleeves to make sure that 10 children can go through, and the sleeves -- it would not 11 come off. Do you remember that? May I give you the 12 reference, without referring to it? It's Day 43 -- 13 THE CHAIRMAN: This is the purpose of recommendations? 14 MR MOK: Correct. And also in response, Mr Chairman, to 15 your observation that there must be a difference between 16 child and adult life jacket. 17 THE CHAIRMAN: Yes, I do remember the testimony. But we 18 didn't have any detail as to how those kind of life 19 jackets worked. 20 MR MOK: No, he didn't give -- 21 THE CHAIRMAN: Whereas it's perfectly simple, because we've 22 actually got children's life jackets to see the 23 difference between the one and the other. 24 MR MOK: Correct. Anyway, it's Day 43, Mr Chairman, 25 page 53. Also on that --</p>	<p>1 THE CHAIRMAN: Yes. The son was able to put the life jacket 2 on, whereas Mr Marsden couldn't get the life jacket out 3 of the pouch. 4 MR MOK: He had some difficulty. 5 THE CHAIRMAN: And he went to the upper deck where he 6 located the life jacket and he was still trying to put 7 it on when the vessel reached the pier, as I remember? 8 MR MOK: Yes. That's Day 7, page 54. 9 So these are the three references we have been able 10 to locate so far as children's life jackets are 11 concerned. 12 Finally on this issue, Mr Chairman, you will recall 13 that the IMO resolution sets out a table which now gives 14 a distinction between infant and child. 15 THE CHAIRMAN: Yes. Just remind me what the weight 16 distinctions are? 17 MR MOK: Can I just refer to it first. Expert bundle 3, 18 page 1742-6. Perhaps we can have a quick look at that. 19 There is a paragraph dealing specifically with this 20 at 2.2.1.2, if we can just look at that first. It's the 21 last paragraph on that page: 22 "Life jackets shall be provided in three sizes in 23 accordance with table 2.1." 24 If you move over to table 2.1 which follows that, 25 it's less than 15 kg for infant; and then between</p>
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<p>1 THE CHAIRMAN: Just help me as to the location of the two 2 witnesses who speak to dealing with life jackets on 3 children. 4 Lau Hau-yin, which deck of the vessel? 5 MR MOK: I didn't focus on that particular matter, because 6 I was simply focusing on the life jacket itself. It 7 doesn't seem to matter on which deck, but we can check. 8 THE CHAIRMAN: I'm trying to recall the particular witnesses 9 involved, because there was a mother and father who 10 sadly lost both children, son and daughter, and they 11 were at the stern of the main deck. 12 MR MOK: Yes. It's on the upper deck, on the rear end and 13 on the front section -- sorry, right side, front 14 section. 15 THE CHAIRMAN: So, starboard forward? 16 MR MOK: Correct. Upper deck. 17 THE CHAIRMAN: Yes. And Lee Ming-sun? 18 MR MOK: Day 4. 19 THE CHAIRMAN: I'm interested in the location. I think 20 you're being given the information. 21 MR MOK: Thank you. It's upper deck, port side, front 22 section. 23 Then there is one more reference which is not in my 24 learned friend's footnote. It's Mr Stephen Marsden, 25 with the son, 12-year-old David.</p>	<p>1 15 and 43. 2 THE CHAIRMAN: Yes. Thank you. 3 MR MOK: Mr Chairman, I think that is all I wish to address 4 the Commission on so far as life jackets is concerned. 5 THE CHAIRMAN: Yes. Just give me a moment, if you would. 6 Thank you. 7 MR MOK: On the life jackets, I wish to respond, 8 Mr Chairman, to your observation yesterday in relation 9 to the evidence of Lau Wing-tat and Wong Kam-ching. 10 THE CHAIRMAN: Yes. Those were the two -- 11 MR MOK: If you remember, Mr Chairman, you said the inherent 12 probabilities -- 13 THE CHAIRMAN: These are the two Marine officers who did the 14 2011 and 2012 surveys of Lamma IV? 15 MR MOK: Correct. And your observation of there being no 16 incentive for Hongkong Electric to lie about the absence 17 of life jackets on board. 18 THE CHAIRMAN: Well, it's an unusual circumstance -- 19 MR MOK: Yes. 20 THE CHAIRMAN: -- where somebody makes an out-of-court 21 admission which is adverse to his interests, which is 22 what that is. 23 MR MOK: Yes. And your observation was that the inherent 24 probability probably would be that that is to be 25 preferred to the evidence of Mr Lau and Mr Wong.</p>

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1 THE CHAIRMAN: No, I'm saying that that is what the Court of 2 Final Appeal has recommended is the approach to be taken 3 by those that determine which evidence to accept and 4 which to reject. 5 MR MOK: Yes. 6 THE CHAIRMAN: That is one of the -- 7 MR MOK: One of the approaches. 8 THE CHAIRMAN: -- tools available for a fact-finder. 9 MR MOK: Yes. But the point I would like to make is this. 10 What I would like to say is that the inherent 11 probability equally is that given the so-called policy 12 or instruction at that time, in other words that there 13 was no particular requirement to fully comply with -- 14 THE CHAIRMAN: Well, that's a matter I want you to assist me 15 with in due course. 16 MR MOK: Yes, of course. 17 THE CHAIRMAN: That is to say, what is the Marine 18 Department's position about this informal policy? But 19 come back to that in a moment. 20 MR MOK: Yes, of course. 21 THE CHAIRMAN: So you're dealing with the -- 22 MR MOK: Let me just finish this point first, yes. 23 THE CHAIRMAN: Yes. 24 MR MOK: What I'm saying is, there being no requirement on 25 the inspectors to particularly apply the new regime,	1 THE CHAIRMAN: No, let's just deal with this one. 2 MR MOK: Yes. 3 THE CHAIRMAN: Because if children's life jackets were not 4 on board Lamma IV, this document is false, is it not -- 5 MR MOK: Yes, correct. 6 THE CHAIRMAN: -- because it certifies the vessel is 7 provided with the following life-saving equipment? 8 MR MOK: That's right. 9 THE CHAIRMAN: That's the difference. 10 MR MOK: But what I'm saying -- 11 THE CHAIRMAN: To say "There were no children's life jackets 12 on board but we don't enforce the law because we've 13 reached an arrangement internally" is one thing, but 14 then to assert on a document a falsehood is another 15 matter. 16 MR MOK: Yes. And of course that is a very serious matter. 17 THE CHAIRMAN: Yes. 18 MR MOK: The Commission would not, of course, come to this 19 conclusion unless it is satisfied to a fairly high 20 degree of satisfaction. What I am saying is this -- 21 THE CHAIRMAN: Well, there's well-established law as to 22 that. 23 MR MOK: Yes, Re H and so on. 24 THE CHAIRMAN: Yes, and Others. 25 MR MOK: What I'm saying is there is simply no incentive of
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1 there really was no -- 2 THE CHAIRMAN: Well, ignore the new regime. You call it 3 "regime". Ignore the law. 4 MR MOK: Yes. The regime -- 5 THE CHAIRMAN: "Law". Let's not mince words. 6 MR MOK: Yes. There was no incentive for the Mardep 7 inspector really -- if they did not spot the child life 8 jackets or count them, there was really no need for them 9 to have changed the format of the form. 10 THE CHAIRMAN: Ah, but the form had changed, hadn't it? 11 There was a new form in 2011. 12 MR MOK: True. But, Mr Chairman, you remember that that new 13 format is -- I mean, it just depends on what you input 14 into it. If you look at -- 15 THE CHAIRMAN: Well, let's have a look at it, shall we? 16 MR MOK: Yes, of course. I think it's in marine bundle 4, 17 page 822. 18 THE CHAIRMAN: Yes. That's the one I had in mind. 19 MR MOK: Yes. 20 THE CHAIRMAN: It says at the bottom left-hand corner, 21 "Revision April 2011". 22 MR MOK: Yes. The form was revised, but these figures and 23 the asterisks were input into the form by the officers 24 in question, and you will also remember that, 25 notwithstanding the revision, Lamma II --	1 any kind for any of the inspectors to have inserted 2 a false reference in a form such as this, when 3 particularly in the light of the policy it was not 4 necessary at all, so far as the internal guidelines are 5 concerned. So in that sense, the inherent probabilities 6 are that, in my respectful submission, they would only 7 have done this, since they had no other incentive to do 8 this, if they had indeed spotted the child life jackets 9 on board. And that's the -- I mean, inherent 10 probabilities had it that they would not have done 11 something like this. There's simply no reason to do so. 12 Because previous inspectors, as you will recall, simply 13 followed the previous format. At page 805, for example. 14 Not page 805, that's the same. I'm looking at the 15 previous year. Page 798. 16 THE CHAIRMAN: I follow that. If one goes backwards in 17 time. 18 MR MOK: Yes. 19 THE CHAIRMAN: So you suggest, then, that this form 20 presented no problem? 21 MR MOK: No. 22 THE CHAIRMAN: What were they to do if there were no 23 children life jackets on board, on this form? Just put 24 "no"? 25 MR MOK: Just put "no".

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<p>1 THE CHAIRMAN: Then it failed. Because that then drew 2 attention to the fact that the law was not being 3 enforced. That's what the form did. 4 MR MOK: Yes. But, Mr Chairman, the fact is that has been 5 done all along until -- if you look at page 798, you 6 remember, up to 2010, it had been -- 7 THE CHAIRMAN: Well, I have your submission. 8 MR MOK: Yes. And my submission is that certainly, because 9 we spent only relatively little time asking questions, 10 and in fact -- 11 THE CHAIRMAN: I'm sorry? Relatively little time -- 12 MR MOK: Dealing with this particular issue. And I don't 13 think that these officers or inspectors had in fact been 14 confronted with the serious implication. 15 THE CHAIRMAN: They were recalled to afford them 16 an opportunity to resile from what by inference is 17 perjury. 18 MR MOK: Yes. 19 THE CHAIRMAN: That's why they were recalled. 20 MR MOK: Yes. But what I'm saying is that the inherent 21 probabilities approach is not such as to be sufficient, 22 in my respectful submission, for the Commission to draw 23 this serious inference that there was any deliberate 24 attempt on the part of either of these inspectors to 25 make a false statement. That's a very serious</p>	<p>1 THE CHAIRMAN: Well, we've heard evidence from a number of 2 Marine Department officers, but we've heard deafening 3 silence from the top of the Marine Department as to what 4 its position was. 5 MR MOK: Yes. I think -- 6 THE CHAIRMAN: So what are we to make of that? 7 MR MOK: The position is the same as reflected in the 8 evidence; that is, there was a policy or instructions 9 being given by the inspectors at the relevant time. 10 THE CHAIRMAN: The most senior one of the Marine Department 11 officers who has dealt with that is Mr Wong Wing-chuen. 12 MR MOK: Yes. 13 THE CHAIRMAN: But nothing higher than that in the Marine 14 Department? 15 MR MOK: No, because that correctly reflects the position. 16 THE CHAIRMAN: Just let me take a note of this. 17 MR MOK: Of course. 18 THE CHAIRMAN: If that is the case, why have we not been 19 provided with anything in writing that documents this 20 policy? 21 MR MOK: I think from the evidence, it is there was simply 22 no such document. 23 THE CHAIRMAN: So, just to recap, the Marine Department has 24 determined not to enforce the law that the Legislative 25 Council has enacted in respect of life jackets and in</p>
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<p>1 implication and finding to make. 2 Equally, as against that inherent probability which, 3 Mr Chairman, you mentioned, there is also the inherent 4 improbability of them wanting to do anything other than 5 to reflect what they had done. So that equally is 6 something which the Commission should take into account. 7 There's no incentive at all. 8 THE CHAIRMAN: You mentioned Re H, and I'd like counsel for 9 the Commission's assistance on this issue; that is to 10 say, making findings in this area. The Nina Wang will 11 case from Teddy Wang, when it reached the Court of Final 12 Appeal, has passages in the judgments which deal with 13 making findings of this kind and there are other cases, 14 the case from -- 15 MR MOK: Koon Wing-ye. 16 THE CHAIRMAN: Koon Wing-ye may be another one, but I would 17 like assistance in that area. I don't ask for it now. 18 MR SHIEH: It's Lord Nicholls. 19 THE CHAIRMAN: Correct, it's Lord Nicholls. 20 MR MOK: So that's the matter I also wish to draw to the 21 Commission's attention. 22 Coming back to your question, Mr Chairman, about 23 Mardep's position, I think the Commission has heard the 24 evidence that there was an internal policy or guideline 25 or instruction --</p>	<p>1 the way that we've heard in the evidence, and it doesn't 2 document this at all in writing? 3 MR MOK: That's my understanding from the evidence. 4 THE CHAIRMAN: Was anything promulgated publicly so that 5 members of the public could know that this was what was 6 happening? 7 MR MOK: I don't -- 8 THE CHAIRMAN: In writing? 9 MR MOK: I don't think so, Mr Chairman. 10 THE CHAIRMAN: Would you like to say anything to us about 11 the adequacy of that conduct in the Marine Department? 12 MR MOK: Yes. I think to put the matter in context, I think 13 that happened in 2008. What was realised was that it's 14 not just a matter of just putting in additional life 15 jackets. I think you have also heard evidence that -- 16 because the life jacket had to be put somewhere, and the 17 vessels, some of the local vessel operators, being very 18 small, would find it difficult -- 19 THE CHAIRMAN: No, what I'm asking you to address is the 20 adequacy of a large department of Government conducting 21 itself in this way; that is to say, determining not to 22 enforce the law as recently enacted by the Legislative 23 Council, and not documenting it anywhere, or 24 promulgating it publicly. What do you want to say about 25 that?</p>

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<p>1 MR MOK: Well, that I understand was -- the Department was 2 responding to the request of the industry at that time, 3 particularly you will recall that shortly after that was 4 promulgated there was the financial crisis and I think 5 the Department was trying to be sensitive to address the 6 difficulties of the industry at that time. 7 Obviously, in hindsight, that was not the right 8 thing to do because that was the law and -- 9 THE CHAIRMAN: Well, it may or may not, but you're not 10 grappling with the point, if I may say so, with respect, 11 that I'm asking you to deal with, which is to say what 12 is the adequacy of the Marine Department conducting 13 itself in this way, where it reaches a determination not 14 to enforce the law but does not document that in any way 15 and does not promulgate it in writing to the public so 16 the public at large can understand what its position is, 17 and, for that matter, Legco can be told what the Marine 18 Department was doing? 19 MR MOK: Well, Mr Chairman, there obviously was 20 an inadequacy there, in the way that you have described. 21 THE CHAIRMAN: So that was an inadequacy? 22 MR MOK: Yes. 23 THE CHAIRMAN: Thank you. 24 MR MOK: Before I sit down, there is one reference I forgot 25 to give to the Commission that relates to the passenger</p>	<p>1 YK, and this is Day 23, page 168 at line 21 onwards. If 2 I may also read that into the record. 3 THE CHAIRMAN: Yes, please do. 4 MR MOK: Line 21, I asked Dr Cheng: 5 "My last question is this. May I invite you to look 6 at Dr Armstrong's report at page 467, please. Do you 7 see the bottom drawing? 8 Answer: Yes. 9 Question: Just a quick explanation. That is the 10 section of the fibreglass and the foam that was embedded 11 in it. 12 Answer: Yes. 13 Question: The top part, I believe, is what is 14 called the woven roving. It's what you call the 15 fibreglass layer. 16 Answer: Exactly. 17 Question: You measure the fibreglass to be about 18 3 mm in thickness? 19 Answer: Correct. 20 Question: Now, let's assume that this layer is 21 5 mm, instead of 3 mm, which was actually the case. 22 Answer: Yes. 23 Question: On the basis of your experiments, and all 24 the evidence that you have seen, including what is set 25 out in Dr Armstrong's report, would it be possible for</p>
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<p>1 seats which I would like also to give you the reference 2 for. 3 THE CHAIRMAN: Yes. 4 MR MOK: Mr Chairman, you remember in one of your comments 5 yesterday you said that Lamma IV did withstand the 6 collision in the sense that at the point of the 7 collision, the seats did not fail, but they failed when 8 the vessel became tilted and started to sink in that 9 position. 10 THE CHAIRMAN: Yes. 11 MR MOK: The point that I would like to also make is that of 12 course we know that there are loosened screws and 13 re-screwing of some of the seats, and Dr Armstrong had 14 also said that maybe at least the screws should have 15 gone in deeper into the material. You remember the 16 self-tapping screws which -- 17 THE CHAIRMAN: Well, it went in deep enough, but the 18 fibreglass wasn't thick enough for it to take 2.5 turns 19 of the screw. 20 MR MOK: Yes. 21 THE CHAIRMAN: And when it went in deeper, it went into 22 foam, which would be the equivalent of a kitchen 23 cleaning device. 24 MR MOK: Yes. And the reference I would like to make in 25 that regard is from the evidence of Dr Cheng, I think</p>	<p>1 you to exclude the possibility that the seats which were 2 detached in this accident would still have been detached 3 even if the fibreglass layer had been 5 mm thick? Could 4 you exclude that possibility; that the result would 5 still be the same? 6 Answer: First of all, my experiment just focused on 7 the existing fibreboard and, without any further 8 experiment, I cannot exclude the possibility or 9 determine how much force is needed to detach a seat if 10 the woven roving or the fibreboard was increased from 11 3 mm to 5 mm. 12 The Chairman: You'd need to do the experiments with 13 5 mm? 14 Answer: Yes, if I need to answer, but I cannot 15 exclude the seat still coming out. Sure, it depends on 16 how much force is applied. Maybe if the same force, it 17 may be a little bit difficult. It should be much -- 18 I will agree that a higher force may be needed. 19 Mr Mok: Yes. But you don't know how much? 20 Answer: Yes, I don't know how much." 21 Mr Chairman, the point is this: yes, there are 22 loosened screws and re-screwing of the seats, but we 23 don't know whether or not even with a better screwing 24 method or better screwing, that the incident might not 25 have resulted in the same way in terms of the seats</p>

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<p>1 being detached in the extreme situation, position, that 2 the vessel was in at the time of the accident. 3 This leads to my original point, which is that it is 4 perhaps difficult -- and this is a matter, of course, 5 for consideration by the Commission -- to ensure that 6 the seats are so secure that it would withstand all 7 kinds of untoward accidents and events, including this 8 one. The crux of the matter is that we do have 9 fibreglass ships, and the material is used in many of 10 the vessels. Given that this kind of material is being 11 used, it may be extremely difficult or impossible to 12 preclude all sorts of situations where seats may become 13 detached. 14 THE CHAIRMAN: Well, we heard of what are the various 15 preventive measures. One, for example, is to put 16 a wooden base beneath the deck so that you screw into 17 that. 18 MR MOK: Yes. 19 THE CHAIRMAN: Or else you make it through-bolted. There 20 are many ways in which fibreglass may still be used but 21 the seating attachment may be rendered properly secured. 22 MR MOK: Yes. Or more secure. The point I'm making is we 23 don't know whether, in the extreme position, any of 24 those methods would have yielded a different result. 25 That's the only point I wish to make.</p>	<p>1 MR MOK: I think, Mr Chairman, a crew member must mean 2 a proper crew member and not someone in name only, or 3 even worse than that, not even in name. So a crew 4 member is supposed to perform the functions of a crew, 5 and whether or not the functions were given to him 6 generally or specifically, but there must be some 7 function being afforded to that particular member. And 8 it cannot simply have been an incidental matter in the 9 sense of, you know, it depends who comes on board and 10 subjectively the company feels that this person can be 11 a crew member because of his experience, or because he 12 happened to be helping out on something that was 13 incidental to the manning of the ship, for example in 14 leading a group. So I think that's my response. 15 THE CHAIRMAN: Looking forward, so that one could deal with 16 this in a way that would require those that are 17 stipulated to have a certain number of crew on board, 18 that they fulfil what you've just described, that they 19 must be proper members of the crew, what recommendations 20 do you suggest we make as to that? 21 MR MOK: Just thinking aloud, Mr Chairman, there may be 22 a need for some sort of written record of who are the 23 crew members at any period of time. Of course, the 24 members can change because they may change from trip to 25 trip. So there may have to be a panel, a list listing</p>
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<p>1 Unless the Commission has further questions, those 2 are my submissions. 3 THE CHAIRMAN: Yes, I'd like your assistance as to the 4 Marine Department's position on the fourth crew member 5 in the way in which Hongkong Electric contends that it 6 complied with that requirement. 7 MR MOK: Yes. 8 THE CHAIRMAN: Where do you deal with that in your written 9 submission? 10 MR MOK: Yes, I have dealt with that. If I may just have 11 a moment. 12 THE CHAIRMAN: Take your time. I've flagged it, actually. 13 Paragraph 55. 14 MR MOK: Yes. We have set out the issue in paragraph 56. 15 What we say there, in subparagraph (5), is there is 16 serious doubt as to whether there was any fourth crew 17 present. Following the strategy in (3) above -- 18 THE CHAIRMAN: That's where I want your help as to what you 19 really mean by "serious doubt". We have on the evidence 20 a person being treated as the fourth crew member who has 21 not signed the crew register that Hongkong Electric have 22 put in place to support this contention. He is Mr Lai. 23 Mr Lai doesn't know that he is designated as the fourth 24 crew. And so on. Is that a state of affairs that the 25 Marine Department would accept or not?</p>	<p>1 out a panel of these crew members, let's say, Hongkong 2 Electric, "These are my crew members", without 3 specifying what trips they are assigned to, or what 4 particular function they play in any particular trip. 5 But at least there should be maybe some identified 6 person so that it doesn't become a moving target. 7 THE CHAIRMAN: What about the need to have participated in 8 various drills -- emergency drills, fire drills, 9 abandoning ship drills? 10 MR MOK: Yes. That's part and parcel of the function of the 11 crew, that they should take part in, and there can be 12 guidelines regarding those. 13 I'm grateful to my learned friend Mr Zimmern. He 14 refers me to the Merchant Shipping (Local 15 Vessels)(General) Regulation 11 which says: 16 "A local vessel -- 17 (a) shall have on board a sufficient number of crew 18 members who are qualified and capable of carrying out 19 all duties which may reasonably be required; and 20 (b) shall be adequately equipped. 21 to ensure the safety of the vessel ..." 22 I think, Mr Chairman, what you are more interested 23 in is how we can ensure that that is achieved. 24 THE CHAIRMAN: Well, how what you say is the policy of the 25 Marine Department, namely that a crew member should not</p>

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<p>1 simply be one in name, "You can be crew today", but he 2 must be somebody who is -- 3 MR MOK: Can properly carry out the function. 4 THE CHAIRMAN: -- given a proper function and can discharge 5 it. So I'm inviting your help in that area. 6 MR MOK: That's right. Those are the suggestions that I can 7 think of. 8 THE CHAIRMAN: Well, thank you for that. Thank you very 9 much. 10 MR MOK: Thank you, Mr Chairman. 11 THE CHAIRMAN: Mr Pao. 12 Closing submissions by MR PAO 13 MR PAO: May it please the Commission. I shall be brief. 14 Having heard the submissions of my learned friend 15 Mr Mok, I do not believe I need to go into great detail 16 on the issue of the side plating of the vessel and the 17 seats on the upper deck. I do not intend to read 18 through my written submissions, but there will be 19 paragraphs in the submissions that I would at a later 20 stage invite the Commission's attention to. 21 THE CHAIRMAN: Yes. 22 MR PAO: Of the three criticisms levelled against the 23 construction of the Lamma IV, I do not believe I need to 24 deal with that because, having heard the submissions of 25 my learned friends Mr Mok and Mr Yeung, the points</p>	<p>1 30 degrees or more at its stern. 2 But having said that, it is of course a matter for 3 the Commission to consider whether to recommend a more 4 secure method of fastening seats onto GRP material. For 5 instance, they should be fastened on rails, much like 6 high-speed ferries, or on aircraft. In fact I'm told by 7 my lay client that that's been done for many of the 8 crafts they have built in recent years. 9 Coming to the now notorious missing door on the 10 bulkhead at frame 1/2, the evidence is that on that 11 equally notorious Sections and Bulkheads drawing, there 12 were contradictory notations as to the nature of the 13 bulkhead at frame 1/2; that is to say, whether it should 14 be watertight. This contradiction had not been spotted 15 or queried for some 16 years, until after the accident, 16 when everything relating to the Lamma IV was being put 17 under the microscope. 18 In our view, this Sections and Bulkheads drawing is 19 a stand-alone document. It should not require the 20 reader to refer to section 12(v) of the Blue Book to 21 find out that there should be an efficient closing 22 appliance attached to the access opening, unless it is 23 specifically referred to in the drawing. 24 Now, the reader of this Sections and Bulkheads 25 drawing may not know section 12(v) of the Blue Book, or</p>
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<p>1 I make are very similar indeed. They are set out in 2 paragraphs 28 to 35 of my submissions. The page 3 references set out under those paragraphs may be useful 4 if the Commission wishes to be reminded of the evidence. 5 So far as the attachment of the seats to the upper 6 deck is concerned submissions are set out in 7 paragraphs 36 to 39 of my submission, which are more or 8 less in line with those made by my learned friend 9 Mr Mok. The page references of the evidence relied on 10 are set out under each of those paragraphs. 11 The Commission has accepted the expert evidence of 12 both Dr Cheng and Dr Armstrong, that the seats would not 13 be dislodged by the immense impact force of the 14 collision, and such collision -- 15 THE CHAIRMAN: We haven't accepted or rejected anything as 16 yet. We're listening to evidence, and now to your 17 submissions. But that was their evidence, and 18 uncontradicted. 19 MR PAO: Yes. And we say that a collision of this nature 20 was not the usual recurring event in the operating life 21 of the Lamma IV. And in our submission, which is also 22 the same as that of my learned friend Mr Mok, the seats 23 on the upper deck were securely fastened for the purpose 24 of ferry service undertaken by Hongkong Electric. Such 25 service would not normally include the vessel tilting at</p>	<p>1 even the existence of something called the Blue Book. 2 THE CHAIRMAN: That's by the by, is it not? The real issue 3 is that the drawings provided to Cheoy Lee by 4 Naval-Consult had, for example on the General 5 Arrangement, the Profile and Decks drawings, this 6 bulkhead described as "watertight" -- 7 MR PAO: Yes. 8 THE CHAIRMAN: -- and yet, the Sections and Bulkheads 9 drawing, having described an access opening, made no 10 reference as to its status; that is to say, "watertight 11 door" or not. That's the issue. And the question that 12 arises is, why didn't Cheoy Lee do something about that? 13 Particularly if it then proceeded to build a vessel 14 without a watertight door, which rendered incorrect the 15 approved drawings. 16 MR PAO: The evidence was that they were not spotted by 17 Cheoy Lee. 18 THE CHAIRMAN: So that's simply the position? 19 MR PAO: That's simply the position. 20 THE CHAIRMAN: Failed to spot it? 21 MR PAO: Failed to spot it. I've just -- 22 THE CHAIRMAN: Just a moment. Thank you. 23 MR PAO: That was indeed the position. Mr Chairman will 24 remember that it was through Mr Chairman's questioning 25 that both Mr Lo and Mr Lim acknowledged that they hadn't</p>

<p style="text-align: right;">Page 41</p> <p>1 realised there was such a mistake on the drawings. It 2 was afterwards, after the accident, when they trawled 3 through the documents available -- 4 THE CHAIRMAN: I appreciate that. But to put that into 5 context, neither of them were dealing with the issue at 6 the time, were they? 7 MR PAO: No. 8 THE CHAIRMAN: They were trying to help the Commission 9 retrospectively. 10 MR PAO: Indeed. 11 THE CHAIRMAN: Because Mr Lim was not the draftsman, he'd 12 gone elsewhere, and Mr Lo was not the person dealing 13 with this vessel in Cheoy Lee. 14 MR PAO: Mr Leizaola had gone back somewhere, to Spain, 15 I think. 16 THE CHAIRMAN: Yes. But we do have the various people from 17 Cheoy Lee who did deal with the vessel, in particular 18 the stability booklet calculations, and it's apparent 19 that they were misled by the material that Cheoy Lee had 20 in its audit trail. 21 MR PAO: Yes, indeed. That's the evidence, Mr Chairman. 22 THE CHAIRMAN: And that is why the damage stability 23 calculation was done on the basis of the steering gear 24 compartment being watertight. 25 MR PAO: Indeed. So it's unfortunate, but that was the</p>	<p style="text-align: right;">Page 43</p> <p>1 the opening. 2 THE CHAIRMAN: Yes. 3 MR PAO: So that would alert the reader of that drawing that 4 there should be something there, apart from the hole. 5 THE CHAIRMAN: But if the vessel had been built in that 6 way -- that is to say, leaving the access opening as 7 simply a hole -- then you accept, I take it, that Cheoy 8 Lee should have done something about the approved 9 drawings which showed the bulkhead as being watertight? 10 MR PAO: Indeed -- 11 THE CHAIRMAN: Should have gone back to the Marine 12 Department. The drawings you've approved are incorrect 13 in that respect. 14 MR PAO: Had it been noticed at the time that it was built 15 that way, and the drawing showing that it was 16 a watertight bulkhead, then it would have gone back and 17 tried to amend the drawings to show that bulkhead at 18 frame 1/2 as non-watertight. That's the point. 19 THE CHAIRMAN: Yes. 20 MR PAO: Or at an earlier stage, had it been spotted, then 21 it would have been clarified with Naval-Consult as to 22 what they actually meant. But the -- 23 THE CHAIRMAN: Because all Mr Lim and Mr Lo were doing was 24 ex post facto rationalisation? 25 MR PAO: Indeed. Now, Mr Lo believes that the access</p>
<p style="text-align: right;">Page 42</p> <p>1 position. 2 THE CHAIRMAN: So the failure to spot the difference, as you 3 put it, between the Sections and Bulkheads drawing -- 4 "access opening", no other description of anything -- 5 and the other main structural drawings, the General 6 Arrangement and the Profile and Deck has led to a false 7 documentary trail being kept in existence and relied 8 upon? 9 MR PAO: Yes, and relied upon, Mr Chairman. 10 THE CHAIRMAN: Year after year? 11 MR PAO: Year after year, Mr Chairman, yes. That's the 12 position. If it's of any interest to the Commission 13 I have done a rough calculation as to that "WT BHD" 14 notation appearing on the various drawings. 15 THE CHAIRMAN: Yes. 16 MR PAO: The percentage of the size of it in relation to the 17 entire area of the drawing is less than 0.015 per cent. 18 THE CHAIRMAN: I don't think that really helps. One's 19 attention is focused on a bulkhead, and if it has 20 "WT BHD" next to it, that's what carries the 21 significance. 22 MR PAO: Yes, indeed. 23 THE CHAIRMAN: You very helpfully on behalf of Cheoy Lee 24 provided us with the drawings that we can read readily. 25 MR PAO: Or a wedge shape showing there's a swinging door at</p>	<p style="text-align: right;">Page 44</p> <p>1 opening was not intended to be watertight, and Mr Lim of 2 Naval-Consult also believes that it was his draftsman 3 who made the mistake. 4 THE CHAIRMAN: Well, that was his final position. 5 MR PAO: Yes, his final position. 6 THE CHAIRMAN: When he started out, he said it was to have 7 a watertight door. 8 MR PAO: Yes, indeed. After he discovered the preliminary 9 trim calculations, he changed his position. 10 THE CHAIRMAN: Yes. 11 MR PAO: As Mr Chairman has pointed out, that was ex post 12 facto reconstruction of the position. 13 Mr Lo also based his conclusion on the fact that the 14 access opening was not constructed in a way to receive 15 a door, and he also pointed out the fact that it would 16 only cost a few thousand dollars for a door to be fitted 17 into that opening, so it could not have been a question 18 of cost. 19 I should add that my learned friend Mr Shieh made 20 a perfectly valid observation yesterday in this regard, 21 in that having no door over that access opening would 22 not be something that Naval-Consult or Cheoy Lee would 23 have insisted on. For any shipbuilder faced with 24 a delivery deadline and finding itself in a situation of 25 either fitting a door, or not having the vessel</p>

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<p>1 certified, that choice, if you can call it that, would 2 really be one of Mr Hobson's: a door would be fitted. 3 It's just as simple as that. 4 THE CHAIRMAN: This is all hypothetical, because nobody 5 managed to notice that the vessel as built was at odds 6 with the description of the frame 1/2 bulkhead being 7 described as watertight in those main structural 8 drawings. 9 MR PAO: As you have rightly pointed out, Mr Chairman, there 10 is no evidence on that. But I do suggest in reality 11 that had been the situation, as suggested by my learned 12 friend Mr Shieh. 13 Then the debate over the so-called missing door 14 became largely academic after 1998 and 2005, after 15 8.25 tonnes of lead ballast was added and subsequently 16 shifted by 10 inches upwards in the hull of the 17 Lamma IV. I have set out briefly the history of the 18 design of the hull of the Lamma IV and the mistake of 19 the draftsman of Naval-Consult that led to the 20 calculation errors down the line at Cheoy Lee in 21 paragraphs 5 to 23, with page references to the 22 evidence. 23 May I now invite the Commission's attention to 24 paragraph 24 of the written submission. 25 THE CHAIRMAN: Yes. What issue are you dealing with there?</p>	<p>1 vessel? It's sufficient to just do it on the drawings? 2 MR PAO: Well, Mr Chairman -- 3 THE CHAIRMAN: That's what I'm inviting you to address me 4 on. 5 MR PAO: It is not satisfactory in the sense that the person 6 doing the calculations was not given clear instructions. 7 You will remember Mr Cheung Fook-chor saying that he was 8 given certain drawings which only told him that the 9 bulkhead was supposed to be watertight, and he would 10 simply do the calculations and leave it to his superior, 11 who was at the time Mr Leizaola, to confirm that his 12 work was correct. 13 THE CHAIRMAN: But the issue, really, is this. Should 14 somebody, perhaps not the draftsman who is doing the -- 15 MR PAO: Not the draftsman, but the person in charge of -- 16 THE CHAIRMAN: Shouldn't somebody check that this vessel has 17 been built as the drawings suggest, the primary 18 structural drawings -- 19 MR PAO: There should have been. 20 THE CHAIRMAN: So you accept that? 21 MR PAO: I accept that. 22 THE CHAIRMAN: Who should have done that? 23 MR PAO: The person in charge of the vessel construction at 24 the time, which is Mr Leizaola. And it is based on his 25 instructions that the stability booklets were prepared.</p>
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<p>1 MR PAO: It's the issue I just mentioned. By 1998 and 2005, 2 after the lead ballast was added and subsequently raised 3 by 10 inches, the question was largely academic because, 4 had the proper floodable length calculation been 5 conducted by ignoring the existence of the bulkhead at 6 frame 1/2, it would have shown that the margin line 7 would be submerged at the stern of Lamma IV and other 8 solutions would have to be found. 9 But unfortunately, as Mr Chairman has observed, 10 everyone dropped the ball and it was never noticed. 11 THE CHAIRMAN: What do you say about a system where -- and 12 this appears to be the effect of the evidence of the two 13 draftsmen in Cheoy Lee who did the stability booklet 14 calculations for damaged compartments -- that there is 15 no inspection of the vessel and it is simply done on 16 drawings? 17 MR PAO: I believe that it was unsatisfactory in a way, but 18 by looking at the drawing, when it says that the 19 bulkhead at frame 1/2 was watertight, or the drawings 20 they have looked at for the preparation of the stability 21 booklet, they are perfectly correct to assume that the 22 vessel would be built with the frame 1/2 -- 23 THE CHAIRMAN: So are you suggesting that there's no 24 inadequacy in not having the vessel inspected when 25 you're adding a major amount of weight, ballast, to the</p>	<p>1 Well, the first one anyway. 2 THE CHAIRMAN: So when something as significant as adding 3 8.25 tonnes of lead ballast, which as we know is only 4 about half or just more than half of the total weight 5 increase of the vessel, the vessel itself should have 6 been checked by Mr Leizaola, or at least on his 7 instructions, to move safely forward on the basis of the 8 assumed -- or rather on the assumptions that the 9 draftsman would make from making calculations from the 10 drawings alone? 11 MR PAO: Yes. 12 THE CHAIRMAN: That should have been his back-up? 13 MR PAO: Yes. I think -- 14 THE CHAIRMAN: "I'll do the figures; somebody else checks 15 the vessel"? 16 MR PAO: Yes. The blame should not be put on the persons 17 who prepared the paperwork, so to speak. It's the 18 person who gave the instructions for that draftsman to 19 prepare the stability booklet who should be responsible 20 for seeing to it that clear instructions had been given 21 to the draftsman. 22 THE CHAIRMAN: Thank you. 23 MR PAO: Going on, so far as it concerns the question as to 24 whether in 1995 there was a practice or requirement -- 25 that's paragraph 25 of the submissions, Mr Chairman.</p>

<p style="text-align: right;">Page 49</p> <p>1 THE CHAIRMAN: Yes.</p> <p>2 MR PAO: Whether in 1995 there was a practice or requirement</p> <p>3 that there should be an aft peak bulkhead at the after</p> <p>4 end of the vessel at about 10 per cent or less of its</p> <p>5 waterline length or overall length and that it was</p> <p>6 required to be watertight, that is to say to consider</p> <p>7 the bulkhead at frame 1/2 as such an aft peak bulkhead,</p> <p>8 it is apparent that the Marine Department holds a view</p> <p>9 very different to that of the expert.</p> <p>10 THE CHAIRMAN: Yes.</p> <p>11 MR PAO: There's something really puzzling me still. In the</p> <p>12 latest clarification by Dr Armstrong of the definition</p> <p>13 of the capital "L", he said that it's the length of the</p> <p>14 forward perpendicular to the aft perpendicular of the</p> <p>15 length of a vessel.</p> <p>16 THE CHAIRMAN: Yes.</p> <p>17 MR PAO: Now, if that was the basis of L, calculated by</p> <p>18 multiplying with a depth of something, I found that the</p> <p>19 fore peak, the forward perpendicular, the distance</p> <p>20 between the forward perpendicular and the fore peak</p> <p>21 bulkhead to be less than 0.1L. And I have seen no</p> <p>22 calculations -- the correct ones, not the wrong ones --</p> <p>23 that show that the void space adjacent to the fore peak</p> <p>24 bulkhead should be considered as one in the calculation</p> <p>25 of the floodable length.</p>	<p style="text-align: right;">Page 51</p> <p>1 circulated by the Marine Department.</p> <p>2 Perhaps, if I may suggest, it's a matter for the</p> <p>3 Commission, that it may wish to consider for making</p> <p>4 recommendations as regards the requirements of an aft</p> <p>5 peak bulkhead for local vessels, rather than leaving it</p> <p>6 to the lawyers every time to debate as to what amounts</p> <p>7 to an aft peak bulkhead and where should it be located.</p> <p>8 THE CHAIRMAN: Well, the difficulty for the Commission to do</p> <p>9 that is that its naval architect expert was trepidatious</p> <p>10 about formulating anything for an aft peak bulkhead.</p> <p>11 What he said is, one, it should be at the aft end of the</p> <p>12 vessel; and two, it should be of a moderate size.</p> <p>13 That's all he was prepared to say.</p> <p>14 MR PAO: I can see the difficulty for the Commission in this</p> <p>15 regard. It's just something that may be for the</p> <p>16 Commission to consider.</p> <p>17 If I may move on to paragraph 40 of my written</p> <p>18 submissions.</p> <p>19 THE CHAIRMAN: Dealing with which issue?</p> <p>20 MR PAO: Dealing with the issue whether the existence of</p> <p>21 a watertight door at that opening at frame 1/2 would</p> <p>22 have saved the Lamma IV from sinking as it did.</p> <p>23 The evidence of Dr Armstrong is that by his</p> <p>24 calculation, the vessel would not have sunk immediately.</p> <p>25 That's paragraph 42 of my submission. His evidence</p>
<p style="text-align: right;">Page 50</p> <p>1 THE CHAIRMAN: But we haven't received any evidence about</p> <p>2 this.</p> <p>3 MR PAO: We haven't, but --</p> <p>4 THE CHAIRMAN: We can't receive evidence from you at this</p> <p>5 stage.</p> <p>6 MR PAO: No, no. It's just something that's still puzzling</p> <p>7 me.</p> <p>8 THE CHAIRMAN: Yes.</p> <p>9 MR PAO: Because all along we were working on the basis that</p> <p>10 10 per cent of the length of the vessel was considered</p> <p>11 in relation to the overall length of the vessel.</p> <p>12 THE CHAIRMAN: Yes.</p> <p>13 MR PAO: But this latest evidence from Dr Armstrong has sort</p> <p>14 of made it unclear for me. For me, at least. I may be</p> <p>15 missing something. But I digress.</p> <p>16 We say that the proposition that it was or has been</p> <p>17 a practice or requirement that there should be a</p> <p>18 watertight aft peak bulkhead at the after end of the</p> <p>19 vessel at about 10 per cent or less of its waterline</p> <p>20 lengths or overall length and that the existence of this</p> <p>21 bulkhead should be ignored for the purpose of certain</p> <p>22 calculations in respect of certain aspect of the</p> <p>23 stability of the vessel, it's a bit difficult for</p> <p>24 shipbuilders to follow unless clearly expressed and set</p> <p>25 forth in instructions or directives issued and</p>	<p style="text-align: right;">Page 52</p> <p>1 should be still very fresh in the minds of the</p> <p>2 Commission.</p> <p>3 THE CHAIRMAN: Yes.</p> <p>4 MR PAO: We would like to point out that the calculation</p> <p>5 done by Dr Armstrong was based on various assumptions</p> <p>6 which in turn were based on data extracted from</p> <p>7 stability booklets which Dr Armstrong had criticised as</p> <p>8 containing "some error in calculations somewhere" and</p> <p>9 "something fundamentally wrong with the calculation".</p> <p>10 More importantly, the calculation of this</p> <p>11 hypothetical flooding of the engine room and the tank</p> <p>12 room is required to assume that "the ship has no list".</p> <p>13 Now, Dr Armstrong knew that you only need 2 or</p> <p>14 3 degrees of heel for there to be a difference.</p> <p>15 The evidence is that Lamma IV was leaning starboard</p> <p>16 shortly after the collision.</p> <p>17 THE CHAIRMAN: Well, it was knocked sideways by the impact.</p> <p>18 MR PAO: Yes.</p> <p>19 THE CHAIRMAN: That's really what it came to, was it not?</p> <p>20 MR PAO: Yes. And the Lamma IV leaning starboard, as I said</p> <p>21 in this submission, could well be the result of the</p> <p>22 immense impact force of the collision and the subsequent</p> <p>23 impact of that powerful single wave, which is</p> <p>24 characteristic of a catamaran travelling at a certain</p> <p>25 speed, at a certain depth of water created by it, or it</p>

Page 53	1 might be caused by uneven weight distribution of the 2 passengers on board. 3 None of the above facts has been factored into the 4 calculation of the hypothetical flooding of the engine 5 room -- 6 THE CHAIRMAN: Was this suggested to Dr Armstrong in 7 questioning? 8 MR PAO: This is based on Dr Armstrong's own evidence. 9 THE CHAIRMAN: I follow that. But the purpose of 10 questioning of witnesses is to put scenarios to them. 11 Was this done for Dr Armstrong? 12 MR PAO: No, it wasn't. 13 THE CHAIRMAN: So this is just being done for submissions? 14 MR PAO: Yes, it is. 15 THE CHAIRMAN: It's not the way we do things, is it, Mr Pao? 16 MR PAO: I'm afraid not. But it is upon reviewing 17 Dr Armstrong's evidence that these points came up. 18 We say that another fact of this hypothetical 19 flooding has assumed that had there been a door on the 20 bulkhead at frame 1/2, that door would have been 21 securely fastened at the time of the collision. 22 We have heard evidence that on the Sea Smooth, the 23 watertight manhole on the port bow of the main deck 24 burst open after the collision -- 25 THE CHAIRMAN: Well, the evidence I think we've had is that,	Page 55	1 basis of a conclusion that such a door at frame 1/2 2 would have saved the Lamma IV from sinking as it did. 3 In conclusion, I would just like to say that it is 4 very unfair now, 16 years afterwards, to criticise 5 Lamma IV for not having a watertight door on the 6 bulkhead at frame 1/2 when the evidence suggests that it 7 was not intended to have such a door when it was 8 designed. 9 Lastly, we do say that although there were mistakes 10 on the part of a number of Cheoy Lee's staff members, it 11 is submitted that, throughout the life of Lamma IV, 12 Cheoy Lee has in good faith fulfilled its obligations as 13 its shipbuilder. 14 Unless I can be of further assistance. 15 THE CHAIRMAN: No. Thank you very much, Mr Pao. 16 MR PAO: May I, before I sit down, thank everyone in this 17 room for their impeccable assistance in making my life 18 in this rather strange environment much easier. 19 THE CHAIRMAN: Thank you for that. 20 Mr Shieh? 21 MR SHIEH: Mr Chairman, we have been looking up the points 22 that Mr Chairman requires assistance on, namely the 23 point on -- we have dug up a few authorities. Perhaps 24 it might be -- 25 THE CHAIRMAN: Yes, very well. You're suggesting we take
Page 54	1 when one looks at it as a whole, the engineer opened up 2 the inspection manholes, which is what they are, and it 3 was his specific evidence that he hadn't secured them 4 when he left them. 5 MR PAO: Yes. 6 THE CHAIRMAN: So that they were not locked back in as 7 watertight. 8 MR PAO: Yes. 9 THE CHAIRMAN: And it was in those circumstances -- and 10 I think the inference is that it was also before the 11 vessel started to motor again that water came into the 12 vessel. But that may be either way. But they were not 13 secured or resecured by the engineer. That's the 14 position post-accident. Correct me if I'm wrong on the 15 evidence. 16 MR PAO: The point I wish to make is simply that. With that 17 access opening at frame 1/2 being designed for the 18 convenience of the crew to get in and out of, a door 19 over that access opening, over the years, force of habit 20 may not have been closed at the time or may not have 21 been securely fastened at the time of the accident. 22 For these reasons we would respectfully urge the 23 Commission to receive this part of the expert evidence 24 with some caution. And we do say that it would not be 25 safe for the Commission to rely on this evidence as the	Page 56	1 a break now? 2 MR SHIEH: Yes. 3 THE CHAIRMAN: The authority that I asked to be circulated 4 to counsel I notice is -- 5 MR SHIEH: In Hongkong Electric's list. 6 THE CHAIRMAN: Your list of authorities? 7 MR McGOWAN: Yes, that's correct. 8 THE CHAIRMAN: It's because it was there sideways that 9 I hadn't spotted that. 10 Was it referred to in the text? 11 MR McGOWAN: It was. It's the definition. Page 245 is the 12 particular section you're -- 13 THE CHAIRMAN: Mr Justice Karminski. 14 MR McGOWAN: Yes. Page 245. 15 THE CHAIRMAN: Thank you. I have it. We'll take 16 a mid-morning break for 20 minutes. 17 (11.23 am) 18 (A short break) 19 (11.45 am) 20 THE CHAIRMAN: Mr Shieh. 21 Further closing submissions by MR SHIEH 22 MR SHIEH: Mr Chairman, you asked for assistance on the 23 question on standard of proof. 24 THE CHAIRMAN: Yes. 25 MR SHIEH: First of all, I would like to put the matter in

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<p>1 context. We are now dealing with the evidence of the 2 Marine Department inspectors who inspected the Lamma IV 3 in 2011 and 2012. 4 Could I just remind the Commission of the respective 5 transcript references. Lau Wing-tat was the 2011 6 inspector. His evidence is Day 34, transcript page 55 7 onwards. Wong Kam-ching is the inspector for Lamma IV 8 for 2012. His transcript is Day 34, page 30 onwards. 9 When he was recalled, it's Day 45, page 26 onwards. 10 Now, I'm not going to turn up the actual transcript 11 because -- 12 THE CHAIRMAN: And the reference for Mr Wong when he was 13 recalled? 14 MR SHIEH: Mr Wong recalled was Day 45. I'm sorry, I should 15 start again. 16 THE CHAIRMAN: They were both recalled. 17 MR SHIEH: Mr Lau Wing-tat, Day 34, page 55. That was the 18 first time. I don't think I have given you the recall 19 for Mr Lau because I don't think he significantly added 20 much to his evidence given the first time around. But 21 his recall is Day 45, page 28. That's Mr Lau's recall. 22 THE CHAIRMAN: They were recalled in this context, that in 23 the interim, since they'd first given evidence, Mr Wong 24 Wing-chuen had given evidence -- 25 MR SHIEH: About the policy, yes.</p>	<p>1 context when Mr Mok addressed this Commission on what 2 might be said to be serious allegations or serious 3 findings of fact against the inspectors, because it 4 might be said that it is serious misconduct or a serious 5 allegation of fact to be made against these two 6 inspectors that they had made a false statement of fact 7 in the respective certificates of survey for those two 8 years when they put an asterisk next to the children's 9 life jacket entry, saying one life jacket per passenger 10 on board when in fact there were no children's life 11 jackets. So it was in context that the question about 12 the serious allegation of fact is made, and the 13 discussion on Re H is necessitated. 14 We have scanned three copies of cases for the 15 Commission and we have given copies to all counsel. The 16 first is Re H, the other one is Nina Wang. Nina Wang is 17 too long, so although the whole case has been scanned, 18 we have only hard copy extracts of three pages 19 pertaining to the relevant part. The third case is 20 a case called Re B, also a case in the House of Lords, 21 where they reviewed or revisited the judgment in Re H. 22 Perhaps I shall start with Re H. It's childcare 23 proceedings, so inquisitorial in nature, so not the 24 typical adversarial case in the courts. 25 The relevant part on standard of proof is at</p>
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<p>1 THE CHAIRMAN: -- about a short-term measure or policy that 2 had been implemented by certain Marine Department 3 officers about not enforcing the law. 4 MR SHIEH: Yes. And they were recalled in that context, for 5 them to regive their evidence or reconsider their 6 evidence given in respect of what happened in respect of 7 children's life jackets when they did their respective 8 inspection, and also in respect of the entry of 9 asterisks in the respective certificates. 10 I have given the Commission the respective 11 references. It is fair to say, without actually turning 12 up the pages, Mr Lau actually said he has no 13 recollection about it; he could only go by what was 14 written in the certificates, and he just went by what he 15 thought to have been his normal practice. Mr Wong 16 Kam-ching in his witness statement said that he went by 17 his usual practice and there's no reason to believe that 18 he had departed from his usual practice, but when he was 19 in the witness box he volunteered that he had 20 recollection of seeing children's life jackets, although 21 when questioned by Mr Beresford, he was unable to say 22 where and how, et cetera; only that he remembered seeing 23 children's life jackets. 24 Now, the significance of engaging the principles 25 discussed in Re H about standard of proof arose in the</p>	<p>1 page 586. 2 THE CHAIRMAN: This is Lord Nicholls, is it not? 3 MR SHIEH: Yes, the well-known passage of Lord Nicholls, 4 since applied, I believe, in Lee Ming-tee in 2003 in 5 Hong Kong. Lee Ming-tee is actually cited by Lord Scott 6 of Foscote in Nina Wang. 7 THE CHAIRMAN: Yes, I've copied Lee Ming-tee myself in the 8 coffee break. That's HKCFA [2003] 34. 9 MR SHIEH: 334 at paragraph 136, that was actually the part 10 cited by Sir Anthony Mason in Nina Wang, but of course 11 Mr Chairman would have the fuller judgment in mind. 12 But the standard test remains that of Lord Nicholls, 13 although in the interim it might have been misread by 14 others. But it was put back on the right track in the 15 case of Re B. 16 Lord Nicholls, "The Standard of Proof" at C: 17 "Where the matters in issue are facts the standard 18 of proof required in non-criminal proceedings is the 19 preponderance of probability, usually referred to as the 20 balance of probability. This is the established general 21 principle. There are exceptions such as contempt of 22 court applications, but I can see no reason for thinking 23 that family proceedings are, or should be, an exception. 24 By family proceedings I mean proceedings so 25 described ..."</p>

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<p>1 I don't think I need to read through the details of 2 that. 3 "The balance of probability standard means that 4 a court is satisfied an event occurred if the court 5 considers that, on the evidence, the occurrence of the 6 event was more likely than not. When assessing the 7 probabilities the court will have in mind as a factor, 8 to whatever extent is appropriate in the particular 9 case, that the more serious the allegation the less 10 likely it is that the event occurred and, hence, the 11 stronger should be the evidence before the court 12 concludes that the allegation is established on the 13 balance of probability. Fraud is usually less likely 14 than negligence. Deliberate physical injury is usually 15 less likely than accidental physical injury. 16 A stepfather is usually less likely to have repeatedly 17 raped and had non-consensual oral sex with his underage 18 stepdaughter than on some occasion to have lost his 19 temper and slapped her. Built into the preponderance of 20 the probability standard is a generous degree of 21 flexibility in respect of the seriousness of the 22 allegation. 23 Although the result is much the same, this does not 24 mean that where a serious allegation is in issue the 25 standard of proof required is higher. It means only</p>	<p>1 standard of on a balance of probability. 2 The next judgment is that in <i>Nina Kung v Wang</i> 3 <i>Din Shin</i> in the Court of Final Appeal, and the relevant 4 page is page 559, paragraph 625. 5 THE CHAIRMAN: Is this Lord Scott? 6 MR SHIEH: Yes. The relevant allegation in that context is 7 of course that of forgery. 8 Paragraph 625: 9 "Where allegations of this character are made, the 10 courts rightly demand a standard of proof commensurate 11 with the seriousness of the allegations. The remarks of 12 Lord Nicholls of Birkenhead in <i>Re H ...</i> are often cited 13 and are very pertinent for present purposes. They repay 14 repeating ..." 15 I won't repeat the citation. 16 Then a reference is made to <i>Lee Ming-tee</i>. 17 "The same thought was expressed by Sir Anthony Mason 18 in <i>HKSAR v Lee Ming-tee ...</i> at paragraph 136 when he 19 referred to matters that 'on their own raise a case of 20 suspicion against the SFC and are capable of generating 21 an adverse inference of ulterior intention or 22 purpose ...' and went on: 23 'But when due weight is given to the seriousness of 24 the conduct alleged against the SFC, the explanations 25 offered on behalf of the SFC and the strong possibility</p>
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<p>1 that the inherent probability or improbability of 2 an event is itself a matter to be taken into account 3 when weighing the probabilities and deciding whether, on 4 balance, the event occurred. The more improbable the 5 event, the stronger must be the evidence that it did 6 occur before, on the balance of probability, its 7 occurrence will be established. <i>Ungoed-Thomas J</i> 8 expressed this neatly in <i>In re Dellow's Wills Trust ...</i> 9 "The more serious the allegation the more cogent is the 10 evidence required to overcome the unlikelihood of what 11 is alleged and thus to prove it.' 12 This substantially accords with the approach adopted 13 in authorities such as the well-known judgment of 14 <i>Morris LJ in Hornal v Neuberger ...</i> This approach also 15 provides a means by which the balance of probability 16 standard can accommodate one's instinctive feeling that 17 even in civil proceedings a court should be more sure 18 before finding serious allegations proved than when 19 deciding less serious or trivial matters." 20 That is <i>Re H</i>, Lord Nicholls. In fact in <i>Re H</i> 21 itself, Lord Nicholls had already alluded to the 22 possibility that the law might be misconstrued as 23 meaning that the gravity of the matter actually calls 24 for proof to a higher standard, and he actually made it 25 quite clear that there is only one standard, namely the</p>	<p>1 that any errors of judgment on the part of the SFC were 2 innocent, one cannot be satisfied that the ulterior 3 intention or purpose is made out or that the inference 4 sought to be drawn by the respondent is compelling." 5 So that is an example of applying the principle in 6 <i>Re H</i>. 7 At paragraph 626: 8 "The passage from Lord Nicholls's opinion in <i>Re H</i> 9 ... that I have cited stresses the need to concentrate 10 on the inherent probability or improbability of the 11 serious allegation being true." 12 Then he went on to describe the allegations on the 13 facts of that case, which I don't believe that I need to 14 go into because those are fact-sensitive matters. 15 THE CHAIRMAN: Yes. 16 MR SHIEH: Then I go to <i>Re B --</i> 17 THE CHAIRMAN: Although Lord Scott was here quoting from 18 paragraph 136 of Sir Anthony Mason's judgment in <i>Lee</i> 19 <i>Ming-tee</i>, the matter had been addressed earlier in the 20 judgment, had it not, at paragraphs 70 and following, 21 where Sir Anthony Mason, amongst other things, cites 22 from the <i>Neuberger</i> case and <i>Re H</i>, also citing from <i>ADS v</i> 23 <i>Brothers</i>, where Lord Hoffmann -- if you remember, that's 24 the -- 25 MR SHIEH: <i>ADS v Wheelock Marden</i>.</p>

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<p>1 THE CHAIRMAN: Yes, that's the one. Where Lord Hoffmann had 2 made some observations about making findings of this 3 nature and the -- 4 MR SHIEH: Yes, serious allegations. 5 THE CHAIRMAN: -- degree of proof that's required. 6 MR SHIEH: Yes. The point has always remained that the test 7 remains the same, the standard remains the same. It's 8 on a balance of probability. It is really the cogency 9 of the evidence that is needed that might be said to be 10 dependent upon the inherent likelihood or unlikelihood 11 of somebody committing a serious act of misconduct. And 12 it was that which had led to some degree of confusion in 13 some minds that there may be some kind of a sliding 14 scale in terms of the standard of proof, which was 15 eventually put right in the case of Re B that I'm going 16 to deal with. 17 THE CHAIRMAN: Yes. Please do. 18 MR SHIEH: It's Re B, the last case, 2009. 19 The matter was addressed by both Lord Hoffmann and 20 Baroness Hale, but Lord Hoffmann in his typical 21 colourful language is perhaps the first one to look at. 22 That is at page 19. Paragraph 10 actually cites 23 Hornal v Neuberger which Mr Chairman has just referred 24 to: 25 "The leading case in the second category was, until</p>	<p>1 mean that 'where a serious allegation is in issue the 2 standard of proof required is higher', Lord Steyn ... 3 cited this very passage as authority for the existence 4 of a 'heightened civil standard'. This appears to have 5 resulted in submissions that the Family Division should 6 also apply a 'heightened civil standard', equivalent to 7 the criminal standard ('in serious cases such as the 8 present case the difference between the two standards 9 is, in truth, largely illusory', per Lord Bingham ...), 10 in local authority applications for care orders. Dame 11 Elizabeth Butler-Sloss P restored clarity and certainty 12 in In re U ... 13 'We understand that in many applications for care 14 orders counsel are now submitting that the correct 15 approach to the standard of proof is to treat the 16 distinction between criminal and civil standards as 17 "largely illusory". In our judgment this approach is 18 mistaken. The standard of proof to be applied in 19 Children Act ... cases is the balance of probabilities 20 and the approach to these difficult cases was laid down 21 by Lord Nicholls in In re H ... That test has not been 22 varied not adjusted by the dicta of Lord Bingham ... or 23 Lord Steyn who were considering applications made under 24 a different statute. There would appear to be no good 25 reason to leap across a division, on the one hand,</p>
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<p>1 In Re H ... the decision of the Court of Appeal in 2 Hornal v Neuberger ... The question there was the 3 appropriate standard of proof of an allegation of fraud 4 in civil proceedings. In a frequently cited passage, 5 Morris LJ said ... that it was the normal standard for 6 civil proceedings; proof on a balance of probability. 7 But the gravity of an allegation of fraud was something 8 which should be taken into account in deciding whether 9 the burden had been discharged: 10 "Though no court and no jury would give less careful 11 attention to issues lacking gravity than to those marked 12 by it, the very elements of gravity become a part of the 13 whole range of circumstances which have to be weighed in 14 the scale when deciding as to the balance of 15 probabilities.' 16 It was this notion of having regard to inherent 17 probabilities which Lord Nicholls ... attempted to 18 capture in In Re H ..." 19 I don't need to refer to the next citation. 20 THE CHAIRMAN: No. You've cited that. 21 MR SHIEH: Paragraph 12: 22 "The degree of confusion which is possible on this 23 issue is exemplified by the fact that despite the 24 painstaking clarity with which Lord Nicholls explained 25 that having regard to inherent probabilities did not</p>	<p>1 between crime and preventative measures taken to 2 restrain defendants for the benefit of the community 3 and, on the other hand, wholly different considerations 4 of child protection and child welfare nor to apply the 5 reasoning in McCann's case ... to public, or indeed to 6 private, law cases concerning children. The strict 7 rules of evidence applicable in a criminal trial which 8 is adversarial in nature is to be contrasted with the 9 partly inquisitorial approach of the court dealing with 10 children cases in which the rules of evidence are 11 considerably relaxed. In our judgment therefore ... the 12 principles set out by Lord Nicholls should continue to 13 be followed by the judiciary trying family cases and by 14 magistrates sitting in the family proceedings courts.' 15 My Lords, I would invite your Lordships fully to 16 approve these observations. I think that the time has 17 come to say, once and for all, that there is only one 18 civil standard of proof and that is proof that the fact 19 in issue more probably occurred than not. I do not 20 intend to disapprove any of the cases in what I have 21 called the first category, but I agree with the 22 observation of Lord Steyn in McCann's case ... that 23 clarity would be greatly enhanced if the courts said 24 simply that although the proceedings were civil, the 25 nature of the particular case involved made it</p>

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<p>1 appropriate to apply the criminal standard." 2 But that is not in the context of the present case, 3 because that is in the context of a separate category of 4 cases, what Lord Hoffmann had called the first category, 5 which is not what we are dealing with. 6 "Finally, I should say something about the notion of 7 inherent probabilities. Lord Nicholls said, in the 8 passage I have already quoted, that -- 9 'the court will have in mind as a factor, to 10 whatever extent is appropriate in the particular case, 11 that the more serious the allegation the less likely it 12 is that the event occurred and, hence, the stronger 13 should be the evidence before the court concludes that 14 the allegation is established on the balance of 15 probability.' 16 I wish to lay some stress upon the words I have 17 italicised. Lord Nicholls was not laying down any rule 18 of law. There is only one rule of law, namely that the 19 occurrence of the fact in issue must be proved to have 20 been more probable than not. Commonsense, not law, 21 requires that in deciding this question, regard should 22 be had, to whatever extent appropriate, to inherent 23 probabilities. If a child alleges sexual abuse by 24 a parent, it is commonsense to start with the assumption 25 that most parents do not abuse their children. But this</p>	<p>1 the nostrum, 'the more serious the allegation, the more 2 cogent the evidence needed to prove it', to take hold 3 and be repeated time and time again in fact-finding 4 hearings in care proceedings ... It is time for us to 5 loosen its grip and give it its quietus." 6 Then I move on to paragraph 68 where a reference was 7 made to the judgment of Lady Butler-Sloss in the case of 8 U, which I won't repeat. 9 At paragraph 69, Baroness Hale likewise said: 10 "My Lords, I entirely agree." 11 Effectively, both Lord Hoffmann and Baroness Hale 12 restored the pre-existing view that there is only one 13 standard but perhaps depending on the inherent 14 probabilities and the gravity of the conduct, perhaps 15 different requirements as to cogency of evidence. Both 16 of them cited the case of U. 17 Perhaps before I leave Re B, can I draw 18 Mr Chairman's attention to paragraph 70: 19 "My Lords, for that reason I would go further and 20 announce loud and clear that the standard of proof in 21 finding the facts necessary to establish the 22 threshold ... is the simple balance of probabilities, 23 neither more nor less. Neither the seriousness of the 24 allegation nor the seriousness of the consequences 25 should make any difference to the standard of proof to</p>
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<p>1 assumption may be swiftly dispelled by other compelling 2 evidence of the relationship between parent and child or 3 parent and other children. It would be absurd to 4 suggest that the tribunal must in all cases assume that 5 serious conduct is unlikely to have occurred. In many 6 cases, the other evidence will show that it was all too 7 likely. If, for example, it is clear that a child was 8 assaulted by one or other of two people, it would make 9 no sense to start one's reasoning by saying that 10 assaulting children is a serious matter and therefore 11 neither of them is likely to have done so. The fact is 12 that one of them did and the question for the tribunal 13 is simply whether it is more probable that one rather 14 than the other was the perpetrator." 15 Similar remarks were made by Baroness Hale, and 16 I don't think I need to go through the entirety of 17 Baroness Hale, except to look at page 35. 18 THE CHAIRMAN: Yes. 19 MR SHIEH: I'm sorry. Can I just have one minute. 20 Paragraph 64 first, page 34: 21 "My Lords, Lord Lloyd's prediction proved only too 22 correct." 23 That is a prediction that the words used by Lord 24 Nicholls would harden into a formula. 25 "Lord Nicholls's nuanced explanation left room for</p>	<p>1 be applied in determining the facts. The inherent 2 probabilities are simply something to be taken into 3 account, where relevant, in deciding where the truth 4 lies." 5 Mr Chairman, perhaps one word of reminder. We are 6 not dealing with a charge of perjury. I think I have 7 made that clear. I should make it clear. We are not 8 dealing with a question of perjury. It might be said, 9 "Ah, by necessary implication, the witnesses, if their 10 evidence is not accepted, might be committing perjury." 11 In the case of Mr Lau, he actually said that he couldn't 12 remember but he referred to what he said to be his 13 general practice. He wasn't positively asserting 14 a version of fact. 15 Mr Wong might have gone a bit further and asserted 16 possibly that he had a recollection, but one obviously 17 has to look at the entirety of his evidence. Of course, 18 the fact that the court may reject his evidence doesn't 19 necessarily mean that he's perjuring himself. 20 But the serious allegation of fact that we are 21 concerned with, that triggers the Re H analysis, is the 22 perpetration of a false statement in a document. 23 Now, how serious is that and how inherently unlikely 24 is that obviously depends on the Commission's 25 instinctive feeling as to how likely or unlikely these</p>

<p style="text-align: right;">Page 73</p> <p>1 matters are to likely to occur in real life. Therefore 2 we can't straitjacket the matter into different grades 3 of serious misconduct. We can't say this is a grade A 4 type of misconduct, or this is a grade B type of 5 misconduct. 6 In the context of this particular case, the 7 Commission obviously will have regard to the totality of 8 the evidence. No doubt good administration requires 9 that correct statements are made and not incorrect 10 statements are made, but we actually have evidence that 11 on Mardep's own case, incorrect statements are made in 12 their survey documents. 13 Mr Chairman, you remember when Mr Wong Chi-kin 14 actually described, on their own evidence, their 15 practice -- I alluded to this yesterday -- that when 16 they inspect vessels, if the vessel is an old vessel and 17 if the old vessel actually complied with the 18 pre-existing regime, that is 40 per cent -- let's say 19 Lamma IV. When they inspect Lamma IV, under the old 20 regime Lamma IV has got 92 life jackets. And time and 21 time again they have used the same template: "92". 22 After the new law has been passed, if they inspect 23 Lamma IV and if Lamma IV passed the old law but not the 24 new law, they would still pass Lamma IV and they would 25 simply roll over the old template, "92", irrespective of</p>	<p style="text-align: right;">Page 75</p> <p>1 MR SHIEH: It's different in nature, because in the case of 2 the 92 life jackets, as you said, Mr Chairman, it is 3 simply a matter of numbers. Whereas in the case of 4 children's life jackets, it's a case where there is none 5 and they state there is. But in a way, if one were to 6 test the matter further, you can say even on Mardep's 7 own interpretation of the asterisk they are still making 8 an incorrect statement, because what they say is that 9 the asterisk doesn't mean there is a life jacket for all 10 child passengers because that would be a complete 11 variable. You never know when more children might go 12 onto a vessel. 13 What that asterisk really meant, in Mardep's 14 meaning, is 5 per cent of 200-odd. 15 THE CHAIRMAN: Yes. Which is why I made reference to the 16 Ordinance. You've got to go and look at the Ordinance 17 to find out what it means, which is an extraordinary way 18 in which to deal with a form dealing with -- 19 MR SHIEH: Yes, but 12 life jackets doesn't actually mean 20 one life jacket per child passenger on board. 21 THE CHAIRMAN: Agreed. So in that sense, the statement is 22 misleading. 23 MR SHIEH: It's misleading -- 24 THE CHAIRMAN: But it can be reconciled by reference to the 25 Ordinance.</p>
<p style="text-align: right;">Page 74</p> <p>1 whether or not there was 100, 120, 130 life jackets. 2 Because Wong Chi-kin says, "It doesn't matter. They 3 simply roll over." Wong Kam-ching, sorry. It's Wong 4 Kam-ching, not Wong Chi-kin, the inspector for 2012. 5 So in a way, one can say that is already 6 an admission that in a rather mechanical manner of 7 filling in the certificates, when it's all a matter of 8 perhaps administrative bureaucracy which we sometimes -- 9 THE CHAIRMAN: There's a different nature in the false 10 statement, is there not, if it is false? What he was 11 saying is "there may have been 132 life jackets on 12 board, but we were satisfied there was at least 92, and 13 that's what we put down." 14 MR SHIEH: Yes, the nature's different. 15 THE CHAIRMAN: Whereas in the other situation, the issue 16 is -- 17 MR SHIEH: Have or have not. 18 THE CHAIRMAN: -- was the asterisk placed in the "children's 19 life jackets" box indicating what the formula at the 20 bottom says as to the number on board, although you have 21 to go to the legislation to find out what the form means 22 by the asterisk -- 23 MR SHIEH: In a way -- yes, when -- 24 THE CHAIRMAN: -- when in fact there were none on board. 25 That's different in nature.</p>	<p style="text-align: right;">Page 76</p> <p>1 MR SHIEH: I'm not sure it can be reconciled because the 2 Ordinance doesn't actually deem there to be a particular 3 number of children on board, because the certificate, 4 the asterisk, purports to state a statement of fact. 5 THE CHAIRMAN: Well, if it's not reconciled, at least you 6 can perhaps work out what it tries to say. 7 MR SHIEH: Yes. Mr Chairman, what I'm -- 8 THE CHAIRMAN: But your point is that it's still incorrect? 9 MR SHIEH: Yes. But what I'm trying to say is that it is 10 all a matter of commonsense, really, and for the 11 Commission to form a view as to, "Well, look, this kind 12 of conduct -- call it making a false statement, call it 13 making a misleading statement", whether or not this kind 14 of conduct in the context of what we are now dealing 15 with, and we have seen evidence as to what one may call 16 the culture and the environment in which Mardep 17 operates, whether or not it is of such severity that it 18 might actually require maybe evidence of greater cogency 19 to enable the Commission to make findings one way or the 20 other. The Commission is faced with the evidence that 21 we have seen, and eventually it is really a matter of 22 applying that one single standard: the standard of 23 balance of probabilities. 24 THE CHAIRMAN: Yes. 25 MR SHIEH: Mr Chairman, I'm not sure whether there is</p>

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<p>1 a general right of reply, because we have actually 2 written rather full submissions on all the other 3 matters. 4 THE CHAIRMAN: I would invite you to reply on matters you 5 think might help the Commission. 6 MR SHIEH: There is perhaps one matter I wish to address the 7 Commission on. 8 THE CHAIRMAN: I will give Mr Mok an opportunity to respond 9 on the issue of law. 10 MR MOK: Yes. 11 MR SHIEH: I would respectfully address the Commission on 12 the question of seats. Because Mr Mok in his written 13 closing at paragraph 45 addressed the question of seats. 14 The Marine Department's position is that the requirement 15 of properly securing seats was premised upon the 16 day-to-day operation, normal day-to-day operation of 17 vessels. For reasons that we had developed and for 18 reasons Mr Beresford had developed, that actually does 19 not take into account a pertinent consideration; that is 20 to say, a collision scenario. A collision scenario, the 21 risk of collision and the risk entailed in the event of 22 a collision. We have not just talking about the force 23 generated horizontally during a collision, because after 24 a collision there could be numerous configurations of 25 a vessel.</p>	<p>1 That is the 2006 code of practice, and this 2 particular part is in respect of high-speed craft. 3 Paragraph 4.3. In the context of high-speed craft, 4 Mardep's 2006 code actually says: 5 "Seats and their attachments, and the structure in 6 the proximity of the seats, should be of a form and 7 design, and so arranged, such as to minimise the 8 possibility of injury and to avoid trapping of the 9 passengers after the assumed damage in the collision 10 design condition." 11 So it focuses on the possibility of injury and to 12 avoid trapping in the collision design condition. 13 Mr Chairman, one may pause to think that if risks 14 can be created as a result of a collision, such 15 consideration should not be confined to seats on 16 a high-speed craft. Because not only high-speed crafts 17 can be involved in a collision. A non-high-speed craft 18 could be rammed into by a high-speed craft, such as what 19 happened in the present case. 20 If one were to look at the IMO High-Speed Craft Code 21 that Mr Wallaston referred to, which was actually put to 22 Dr Armstrong, as Mr Beresford had shown to the 23 Commission -- if we can have expert bundle 2, page 1014. 24 This is an extract of the exhibit from Mr Wallaston's 25 report. Mr Wallaston was not called, but this part was</p>
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<p>1 Mardep's position seems to be not that when they 2 considered the adequacy of seats, they actually took 3 into account the risk entailed in collision, and somehow 4 they formed the view that even in the case of collision, 5 this should suffice. That is not the evidence of the 6 approach Mardep had taken. Mardep's stance, even as of 7 now, is that they took the view that the adequacy of 8 attachment of seating is to be judged by reference only 9 to what one may call the normal day-to-day incidents of 10 travelling. 11 THE CHAIRMAN: Wear and tear on seats in operations in these 12 waters. 13 MR SHIEH: Yes. So they draw a sharp dichotomy. They say 14 the risk of collision, the risk entailed in the event of 15 a collision is not something that is relevant to their 16 consideration as to whether or not seats are properly 17 attached. That is something which the Commission may 18 wish to comment on, because that is not a matter whereby 19 Mardep exercised some kind of a judgment in deciding, 20 "Oh, in a collision, maybe there would be 30 per cent 21 tilting but not 90", and they somehow formed a view. 22 They stand by the irrelevancy of the collision. 23 In this context, perhaps I can just make a few 24 comments on the 2006 code of practice which Mardep had 25 introduced, and that is marine bundle 11, page 3527.</p>	<p>1 put to Dr Armstrong, as Mr Beresford had indicated. 2 Page 1014 at expert bundle 2 at 4.5.4: 3 "Seats and their attachments, and the structure in 4 the proximity of the seats, shall should be of a form 5 and design, and so arranged, such as to minimise the 6 possibility of injury and to avoid trapping of the 7 passengers after the assumed damage in the collision 8 design condition ..." 9 So that mirrors -- 10 THE CHAIRMAN: What is he quoting there? 11 MR SHIEH: This is the IMO High-Speed Craft Code, chapter 4. 12 THE CHAIRMAN: Thank you. 13 MR SHIEH: We can actually move up to the top of the screen. 14 It sets out extracts from IMO High-Speed Craft. So 15 paragraph 4.5.4 that I've just read is from chapter 4 of 16 the code. 17 THE CHAIRMAN: Can we have that again, please. 18 MR SHIEH: Yes. 19 THE CHAIRMAN: "... assumed damage in the collision design 20 condition" -- that's the same phrase as used in the code 21 of practice? 22 MR SHIEH: But if we turn over the page, there is actually 23 a purpose set out, page 1015. That's from annex 10 of 24 the same code, IMO Code: 25 "The purpose of these criteria is to provide</p>

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<p>1 requirements for revenue and crew seats, seat anchorage 2 and seat accessories and their installation to minimise 3 occupant injury and/or disruption of egress/ingress if 4 the craft suffers a collision." 5 The point we make is simply that the Commission may 6 wish to consider whether or not as a matter of logic 7 it's not just high-speed craft that could suffer 8 a collision. The consequences of a non-high-speed craft 9 such as Lamma IV being in collision with a high-speed 10 craft is nevertheless, and this perhaps harks back to 11 the question that collision risk surely has to be 12 something that must be factored in in considering the 13 adequacy or propriety of securing of seats. 14 In terms of collision -- I mean, it's commonsense 15 that collisions are not something lightly ignored. They 16 may not occur every minute of the day, but in terms of 17 maritime safety, one could always say one is too many. 18 We have the statistics given by the Mardep witness, 19 Mr Chung Siu-man, the table that was produced. It's 20 marine bundle 13, page 4636-23. That sets out the 21 frequency and the time of marine incidents over the 22 years. 23 THE CHAIRMAN: So what you're suggesting is the risk that 24 has to be addressed in a way is the same kind of risk 25 that is addressed when airbags are required in</p>	<p>1 not been mentioned would be the members of the press to 2 my starboard stern and also on the upper deck. 3 It is not a frivolous remark, because they have 4 played a significant part in ensuring that an Inquiry of 5 this nature, when openness and frankness is of utmost 6 importance, as the Commission has been at pains to point 7 out -- of course there might be the odd imperfections 8 here and there, but in my respectful submission the way 9 in which the members of the press have tirelessly, 10 conscientiously and continuously covered the Inquiry is 11 something for which we should be thankful about. In 12 particular the whole point of establishing a Commission 13 of Inquiry of this nature is to ensure that matters are 14 dealt with in an entirely open and frank manner. In 15 particular where many interested members of the public 16 may not be able to attend these hearings, and in 17 particular also many members of bereaved families are 18 strongly interested in following these proceedings. 19 Perhaps one adage, which hopefully is not a cliché, 20 and that is to say a free and open press is something, 21 a virtue which we in Hong Kong at least can feel 22 justifiably proud of and is something which we treasure 23 and respect, perhaps more so now than ever. 24 With these words, unless I can assist any further, 25 these are my submissions.</p>
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<p>1 motorcars? 2 MR SHIEH: Yes. 3 THE CHAIRMAN: That's the risk of collision, not its normal 4 use. 5 MR SHIEH: That's right. 6 THE CHAIRMAN: Just as, for example, the nature of the glass 7 is such that it will shatter and won't injure you. 8 MR SHIEH: Or seatbelts. 9 THE CHAIRMAN: Or seatbelts. So the same approach ought to 10 be applied to marine craft? 11 MR SHIEH: Yes. Yes. 12 THE CHAIRMAN: Not simply normal use but -- 13 MR SHIEH: Not just normal wear and tear. Not just 14 something you can do by way of what Mr Chairman called a 15 secondhand car salesman's testing by kicking of the 16 tyre. 17 Unless there are other matters I can usefully assist 18 the Commission on, if I may associate myself with 19 everything else that everyone else has said about 20 thanking everyone that had anything to do with the 21 Inquiry: the secretariat, the security staff, the 22 support staff, and the camaraderie of all legal 23 representatives involved, and for the Commission in 24 patiently listening to all our attempts to assist the 25 Commission. And perhaps one category which has so far</p>	<p>1 THE CHAIRMAN: Thank you, Mr Shieh. This part of the 2 Commission's proceedings have now come to an end. 3 MR MOK: Sorry, Mr Chairman. 4 THE CHAIRMAN: But not quite. Mr Mok, the law. 5 MR MOK: I will be short. 6 Further closing submissions by MR MOK 7 THE CHAIRMAN: Thank you for reminding me. 8 MR MOK: Mr Chairman, Commissioner Tang, there are in fact 9 two different kinds of inherent probabilities and 10 improbabilities involved in the evidence of the two 11 Marine inspectors. One type of inherent probabilities 12 or improbabilities is derived from the surrounding 13 circumstances. The ones that are particularly relevant 14 are, first of all, that the COS, the certificate of 15 survey, in 2011, was a clear change in format, because 16 the form is more or less the same but the input was 17 different from the previous one. So it took some sort 18 of deliberate decision to change that format. That's 19 one factor. 20 The second factor is that the previous format had 21 been followed over a number of years, even after 2008. 22 So, 2008, 2009, 2010 -- the same old format was 23 followed. 24 The third relevant circumstance is that there was no 25 need, so far as the internal guidelines were concerned,</p>

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<p>1 for any such change to be made. In other words, because 2 there was the non-enforcement which, Mr Chairman, you 3 referred to, there was really no need, unless there is 4 a good reason to do so, to change the inputting of those 5 particulars. 6 Then fourthly, there was also evidence that in 7 relation to other vessels, for example Lamma IV, no such 8 change had occurred in 2011. Maybe I can just give you 9 a reference, without turning to it. It's marine 10 bundle 11, page 3745. 11 So it's not a case where there was some sort of 12 sudden change at that juncture for the new input to be 13 put in place, and the inherent probabilities in that 14 situation, given all those circumstances, is that the 15 inspector in question had a good reason to do what he 16 did. 17 THE CHAIRMAN: Yes. 18 MR MOK: And that reason had nothing to do with any personal 19 incentive. He had no incentive, whether by reference to 20 his own promotion or some other advantage, that he 21 should feel the need to do that. And he was doing 22 that -- the inherent probability is, based on how he in 23 fact conducted himself on the day of the inspection. 24 That is one set of inherent probabilities. 25 The other set of inherent probabilities or</p>	<p>1 The other one is relating to the inspection -- 2 THE CHAIRMAN: It's consistent, is it not, with the earlier 3 position? 4 MR MOK: I would say -- yes, that's circumstantial evidence. 5 But the other one, more direct, is what happened on the 6 day of the inspections themselves. 7 THE CHAIRMAN: Yes. 8 MR MOK: You may recall that I had asked some questions, for 9 example of Tang Wan-on, to ask him whether or not he in 10 fact noticed specifically what was done by the 11 inspector, and I think he was not all that clear what 12 was in fact done or counted by the inspector in 13 question. 14 In other words, what happened on the day of the 15 inspection, so far as the crew and Mr Tang Wan-on were 16 concerned, is not all that clear, as to whether or not 17 the inspector did or did not see those life jackets. 18 Mr Chairman, you fairly and correctly observed that 19 one view of the matter is that there may be inherent 20 improbabilities in the sense that why should Hongkong 21 Electric or their crew -- although they may have had 22 child jackets on board that day -- should say that they 23 did not have, because that may be something that is 24 inherently improbable for them to do so. But then the 25 fact that there is this inherent improbability only</p>
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<p>1 improbabilities is the converse of that: should he, for 2 whatever reason, decide to make a statement on that form 3 when he did not see any child jacket or count them, that 4 he should somehow deliberately put in a notation that 5 there was some child jacket, that would involve, as we 6 have discussed, some sort of false statement in 7 a publicly available form. And therefore using Re H, 8 that is not a circumstance that is considered to be 9 likely, and because the seriousness involved in that 10 sort of conduct is such that the court should require 11 more cogent evidence before coming to such a conclusion. 12 So these are the two sets of probabilities or 13 improbabilities which the Commission will take into 14 account. 15 Now, as against that, Mr Chairman -- 16 THE CHAIRMAN: What do you say is lacking in cogency as 17 being the evidence of Lamma IV's crew, and the company, 18 and the Cheoy Lee observer, that there were no 19 children's life jackets on board? What's lacking in 20 cogency about that? 21 MR MOK: Well, I think there are two types of evidence. One 22 is the lack of child jackets on the day of the 23 collision, incident. 24 THE CHAIRMAN: Yes. 25 MR MOK: That's not relevant to this.</p>	<p>1 means that if you need to go against that evidence, you 2 need more cogent evidence to dislodge the inherent 3 improbabilities. But that doesn't mean the fact that 4 there is such inherent improbability is not sufficient, 5 in my respectful submission, to override the two sets of 6 inherent improbabilities which I have just mentioned in 7 relation to the two inspectors. 8 So this may not be ultimately a satisfactory 9 situation, but I think we are left with all these 10 matters, all of which are relevant, and I do urge that 11 the Commission consider these to be relevant and cogent 12 in its determination as to how any findings should be 13 made, if at all, on this matter. 14 Those are my submissions. 15 THE CHAIRMAN: Thank you very much. 16 These proceedings, then, have reached their end in 17 the public nature of the proceedings. It remains for 18 the Commission, as required under our terms of 19 appointment, to report to the Chief Executive. That we 20 will do in due course. 21 Finally, we too would like to echo our thanks to the 22 various parties who have ensured the smooth running of 23 these proceedings, and we include everyone involved in 24 making that possible, in particular counsel and 25 solicitors. Of them, of course, and everyone else no</p>

<p style="text-align: right;">Page 89</p> <p>1 doubt will understand why I make this observation, it is 2 counsel and solicitors for the Commission who have had 3 the great burden of dealing with this matter. 4 The orders that we made at the outset for the 5 provision of material obtained by the various emergency 6 services was such that a huge volume of material was 7 forthcoming. And we, of course, are grateful for having 8 had that material available, because it has been huge in 9 volume. 10 The task of counsel and solicitors for the 11 Commission has been to identify that which was relevant 12 so that the Commission itself was not overburdened with 13 material. So we pay particular thanks to them, counsel 14 and solicitors for the Commission, for the heavy burden 15 that they have had and, from the thanks that have been 16 expressed by counsel representing the involved parties, 17 it's clear that they have also been able to discharge 18 their duties of disclosure and expeditious disclosure to 19 the involved parties. 20 On that note, these proceedings are now concluded. 21 (12.32 pm) 22 (The hearing concluded) 23 24 25</p>	
<p style="text-align: right;">Page 90</p> <p>1 I N D E X 2 Closing submissions by MR MOK (continued)1 3 Closing submissions by MR PAO37 4 Further closing submissions by MR SHIEH56 5 Further closing submissions by MR MOK84 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	