

IN THE MARKET MISCONDUCT TRIBUNAL

IN THE MATTER OF the listed securities of Fujikon Industrial Holdings Limited (“**Fujikon**”) (Stock Code: 927), 1st Specified Person

IN THE MATTER OF Yeung Chi Hung (“**Johnny Yeung**”), 2nd Specified Person

IN THE MATTER OF Chow Lai Fung (“**Dorothy Chow**”), 3rd Specified Person

AND

IN THE MATTER OF section 307I(2) of and Schedule 9 to the Securities and Futures Ordinance, Cap. 571 (“**the Ordinance**”)

Before: Mr Kenneth Kwok SC (Chairman)
Professor Chen Chien-wen, Kevin (Member)
Mr Yu Chun-sing, Sam (Member)

Date of SFC's Statement of Costs and Expenses: 16 April 2019

Date of Chiu & Partners' letter: 30 April 2019

Date of Decision on Costs and Expenses of Investigations: 31 May 2019

Date of SFC's application to vary the Costs Order *Nisi*: 14 June 2019

Date of Chiu & Partners' letter: 26 June 2019

Date of Costs Order Absolute on Costs and Expenses of Investigation:
26 August 2019

COSTS ORDER ABSOLUTE
ON COSTS AND EXPENSES OF
INVESTIGATION

Introduction

1. On 8 April 2019, the MMT reached its Determination in these disclosure proceedings. Reasons for the MMT's Determination ("**Determination**") were handed down and uploaded onto MMT's website on 22 May 2019 (https://www.mmt.gov.hk/eng/reports/Fujikon_Industrial_Holdings_Limited_Report_e_Part%20I.pdf). In this Costs Order Absolute on Costs and Expenses of Investigation ("**Order Absolute**"), we adopt the same abbreviations.

2. In relation to investigation costs and expenses, the MMT ordered that:

(a) Pursuant to section 307N(1)(f)(ii) and (iii) of the Ordinance, an order for each of Fujikon, Johnny Yeung and Dorothy Chow, on a joint and several basis, to pay to the Commission a sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission in relation or incidental to the investigations carried out before these proceedings were instituted or for the purposes of these proceedings;

(b) By letter dated 16 April 2019, SFC enclosed:

A “Statement of costs and expenses incurred by the Commission in relation or incidental to the investigations carried out before the Proceedings were instituted or for the purposes of the Proceedings (the ‘**Statement of Costs and Expenses**’) as against each Specified Person, together with the supporting documents appended to the Statement of Costs and Expenses” (‘**SFC’s Statement of Costs and Expenses**’).

The Statement of Costs and Expenses together with the supporting documents ran to 5 pages. SFC took the liberty of exceeding the two page limit imposed by the MMT.

Chiu & Partner’s response

3. By letter dated 30 April 2019, Chiu & Partners wrote as follows:

“We refer to the agreed proposed orders in the hearing on 8 April 2019 (‘**Order**’) and Statement of Costs and Expenses on investigations enclosed to (*sic*) the letter from the Commission to the Tribunal dated 16 April (‘**Statement**’).

We are instructed that our client¹ (*sic*) would respectfully defer to the Tribunal's assessment and evaluation of the reasonableness of the costs and expenses claimed by the Commission under the Statement in relation or incidental to the Investigations carried out before these proceedings were instituted or for the purposes of these proceedings ...”

Apart from this letter, no other communication has been received from any of the Specified Persons. This letter is unhelpful to the “client” of Chiu & Partners and to the MMT.

SFC's claim

4. SFC claimed a total of \$412,637.13 as investigation costs and expenses.

Costs Order Nisi

5. The MMT's Decision on Costs and Expenses of Investigations was dated 31 May 2019 (“**Costs Order Nisi**”) and uploaded onto the MMT's website (https://www.mmt.gov.hk/eng/reports/Fujikon_Industrial_Holdings_Limited_Report_e_Part%20II.pdf).

6. The MMT made a Costs Order *Nisi* of \$100,000.

SFC's application to vary the Costs Order Nisi

7. By letter dated 14 June 2019, Mr Andre Hui of SFC, assistant presenting officer, applied on behalf of SFC to vary the Costs

¹ Chiu & Partners acted for all 3 Specified Persons, but have not identified the “client” they were referring to.

Order *Nisi* “so that the full sum claimed in the Statement of Costs will be allowed”.

Chiu & Partners’ response

8. By letter dated 26 June 2019, Chiu & Partners submitted that “the Tribunal should uphold its Order *Nisi* under the Decision”.

Jurisdiction to order investigation costs and expenses

9. The MMT is empowered by section 307N(1)(f)(ii) and (iii) of the Securities and Futures Ordinance, Cap 571, to order investigation costs and expenses in favour of SFC. Section 307N(1)(f) provides as follows:

“(f) without prejudice to any power of the Tribunal under section 307P, an order that the person pay to the Commission the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission, whether in relation or incidental to—

- (i) ...
- (ii) any investigation of the person’s conduct or affairs carried out before the proceedings were instituted; or
- (iii) any investigation of the person’s conduct or affairs carried out for the purposes of the proceedings”.

10. To qualify for a costs order under section 307N(1)(f)(ii) and (iii):

- (1) SFC must have “incurred” “*costs and expenses*”;

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

- (2) The costs and expenses must be “*investigation*” costs and expenses;
- (3) In case of section 307N(1)(f)(ii), the costs and expenses must be in “any *investigation* of the person’s conduct or affairs carried out before the proceedings were instituted”;
- (4) In case of section 307N(1)(f)(iii), the costs and expenses must be in “any *investigation* of the person’s conduct or affairs carried out for the purposes of the proceedings”;
- (5) The costs and expenses must be “reasonably incurred by the Commission”, and the decision maker on this issue is the MMT.

11. Staff costs are not “investigation” costs or expenses. Staff costs were incurred to meet SFC’s staffing requirements and staff costs were incurred irrespective of the investigation in this case. Correlation between staff costs and the investigation in this case is not established and no attempt has been made to show correlation.

12. The same is true of overhead costs. Overhead costs were incurred irrespective of the investigation in this case. Overhead costs are not “investigation” costs or expenses.

13. SFC also claims “depreciation for the Commission’s fixed assets”. §30 of Mr Andre Hui’s letter reads as follows:

“ ‘Depreciation for the Commission’s fixed assets’ is an accounting term, which in short, represents the Commission’s overhead expenses on various items such as furniture and fixtures, office equipment, computers. Its calculation is based on the accounting policies adopted by the Commission in preparing its financial statements. Therefore, we submit that

A
B this category of expenses should fall within the ‘costs and
C expenses reasonably incurred by the Commission for the
D purpose of the proceedings.’

E
F 14. Mr Andre Hui’s submission demonstrates a lack of
G understanding of the concept of depreciation. Depreciation is a concept
H used for tax and accounting purposes that describes the method a
I company uses to account for the declining value of its assets. There is
J no associated outgoing cash flow. The reason is that cash was expended
K during the acquisition of the underlying fixed asset. There is no
L correlation between depreciation and investigation. Depreciation is
M charged irrespective of any investigation in this case.

N
O 15. SFC claimed a total of \$412,637.13 as investigation costs
P and expenses, comprising:

Q
R (1) \$146,568.01 as Costs and Expenses in relation or incidental
S to investigation carried out before the MMT proceedings
T were instituted, made up of staff cost of \$118,262
U and overhead costs of \$28,306.01 which included
V depreciation for fixed assets;

(2) \$170,069.12 as Costs and Expenses in relation or incidental
to investigation carried out for the purposes of the MMT
proceedings, made up of staff cost of \$142,345 and overhead
costs of \$27,724.12; and

(3) Disbursement in respect of external expert of \$96,000.

16. For reasons given above, neither staff costs nor overhead
costs are investigation costs and expenses. This is dispositive of SFC’s
application for variation.

A
B *SFC's submissions*

C 17. Further and in any event, we turn now to look at Mr Andre
D Hui's letter. Instead of contending that SFC has incurred "investigation"
E "costs and expenses" and that such costs and expenses were appropriate
F and reasonably incurred, Mr Andre Hui commented on certain passages
G in the Costs Order *Nisi*. There is no assumption of reasonableness and
H appropriateness on the part of SFC and its claim.

I
J *Practice Direction 14.3 (Costs)*

K 18. Mr Andre Hui Submitted in §6 as follows:

L "We submit that the fact that the Specified Persons have not
M lodged any objections to our claim of investigation costs
N indicates that the amount claimed is proportionate and
O reasonable. A similar approach is adopted in paragraph 14 of
P the Practice Direction 14.3 (Costs) Tab 1] regarding summary
Q assessment of costs in civil proceedings under Order 62 of the
R Rules of the High Court:

M '14. Although the Court may allow the full amount
N claimed by the receiving party, it will, so far as possible,
O ensure that the final figure is not disproportionate and /
P or unreasonable having regard to the nature and
Q circumstances of the application or matter and the
R underlying objectives stated in Order 1A. The Court
S will retain this responsibility notwithstanding the
T absence of challenge to individual items in the make-up
U of the figure sought. The fact that the paying party is not
V disputing the amount of costs can however be taken as
some indication that the amount is proportionate and
reasonable. The Court will therefore intervene only if
satisfied the costs are so disproportionate that it is right
to do so. (emphasis added) ' ”²

S 19. As the MMT pointed out in §33(5) of the Determination,
T Order 62 does not cover taxation of costs and expenses of any

U
V

² Highlighting as by Mr Andre Hui.

investigation. Mr Andre Hui does not demur, but he cited a Practice Direction on Order 62, an Order which did not apply in this case.

20. Mr Andre Hui's highlighting in §18 above is out of context. §14 of the Practice Direction makes it abundantly clear that the MMT must "ensure that the final figure is not disproportionate and / or unreasonable having regard to the nature and circumstances of the application or matter and the underlying objectives stated in Order 1A. The [Court/MMT] will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought".

21. The Practice Direction cannot and does not change the law that the MMT, not the specified persons, is the decision maker on the issue of whether the costs and expenses were reasonably incurred by the Commission.

22. Mr Andre Hui cited Practice Direction 14.3 but omitted reference to §7 of the Practice Direction which provides that:

"A party who wishes to seek summary assessment of costs should prepare a statement of costs which should, as far as possible, be in the format in Appendix A. This statement should be signed by the party acting in person or his solicitor."

Appendix A was not included in the bundle of authorities provided by Mr Andre Hui. Appendix A is material for two reasons (https://legalref.judiciary.hk/doc/pd/eng/PD14.3_files/PD14.3_App_A.doc). The first is that it clearly contemplates legal costs. The second is

A that the SFC did not follow the Appendix A format in SFC's Statement of
B Costs and Expenses.

C
D 23. SFC is claiming costs as a litigant in person. If Order 62
E were applicable, Order 62 rule 28A (1) – (3) provide that:

F “(1) On a taxation of the costs of a litigant in person there
G may, subject to the provisions of this rule, be allowed
H such costs as would have been allowed if the work and
I disbursements to which the costs relate had been done
J or made by a solicitor on the litigant's behalf.

K (2) The amount allowed in respect of any item shall be such
L sum as the taxing master thinks fit not exceeding,
M except in the case of a disbursement, two-thirds of the
N sum which in the opinion of the taxing master would
O have been allowed in respect of that item if the litigant
P had been represented by a solicitor.

Q (3) Where in the opinion of the taxing master the litigant
R has not suffered any pecuniary loss in doing any work
S to which the costs relate, he shall not be allowed in
T respect of the time reasonably spent by him on the work
U more than \$200 an hour.”
V

Staff costs and overhead costs

N 24. The difficulty about the staff costs and overhead costs
O approach is that while the amounts of total staff costs and the time staff
P spent on investigation in this case can be ascertained, one must also
Q ascertain the time spent by staff on other matters to work out staff costs
R by using the formula:

R Time spent on investigation in this case ÷ Time spent on
S investigation and other matters x Total staff costs
T
U
V

A
B SFC does not appear to be forthcoming on time spent on other matters.
C This is the unsatisfactory nature of the staff costs approach which has
D been quoted in §25 of the Court of Appeal judgment in *Ling Yuk Sing* and
referred to in §7(4) of the Costs Order *Nisi*.

E 25. For completeness, we note that Mr Andre Hui mentions
F “hourly emolument rates” in §§22 – 24 of his letter, without alleging that
G the ENF employees were hourly rated employees. In the absence of an
H express assertion that all relevant ENF employees were hourly rated
I employees and in the absence of information on how the “hourly
emolument rates” were arrived at, we attach no weight to the allegations
of “hourly emolument rates”.

J 26. *Ling Yuk Sing* is a case where the Court of Appeal appointed
K a friend of the Court to assist the Court and the Court of Appeal had the
L benefit of detailed submissions by leading and junior counsel for the
M Department of Justice. It had also had the benefit of first instance
N judgments. In a considered judgment, the Court rejected the staff costs
approach.

O 27. The Court of Appeal is the appellate court from the MMT.
P Any decision of the MMT adopting the staff costs approach cannot stand
Q in view of *Ling Yuk Sing*.

R *Cases cited by SFC*

S 28. *China Overseas Land and Investment Limited* is a case
T which the MMT held in §1249 that the claim in that case was “justified
U and reasonable in principle”. That was a fact sensitive decision in that
V

case. Moreover, there was no discussion of the “investigation”, “costs and expenses” requirements. We also repeat §27 above.

29. There was no discussion of the staff costs approach in any of the 3 other cases cited. We also repeat §27 above.

Summary Assessment

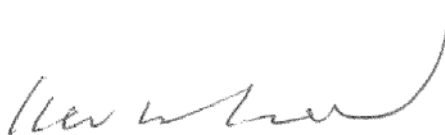
30. We said in §§7 and 8 of the Costs Order *Nisi* that we were not satisfied that the amount claimed was reasonably incurred. We are not persuaded to change our minds.

Conclusion

31. For reasons given above and given in the Costs Order *Nisi*, we see no reason to vary the Costs Order *Nisi*. We make the Costs Order Absolute.



(Mr Kenneth Kwok SC)
Chairman, Market Misconduct Tribunal



(Professor Chen Chien-wen, Kevin)
Member, Market Misconduct Tribunal



(Mr Yu Chun-sing, Sam)
Member, Market Misconduct Tribunal

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Written submissions by Mr Andre Hui of SFC, assistant presenting officer,
for the Securities and Futures Commission
Written submissions by Chiu & Partners, solicitors, for all 3 Specified
Persons

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V