

The report of the Market Misconduct Tribunal into dealings
in the shares of Warderly International Holdings Limited
on and between the 28th of March and 2nd of May 2007

**Part II : The Order of the Tribunal in respect of an application for costs
by Mr. LO Hang Fong, Hank (“Lo”) being the First Specified
Person**

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Attestation to Part II of the Report

CHAPTER 9

APPLICATION FOR COSTS BY LO

Background

259. On the 5th of August 2016 the Market Misconduct Tribunal (“Tribunal”) handed down its Report¹ into allegations of market misconduct against the two Specified Persons connected to Warderly International Holdings Limited (“Warderly”). The applicant in the present matter was the First Specified Person, Mr LO Hang Fong, Hank (“Lo”). For reasons given at length in the first report which is now Part I, the Tribunal found no identifiable market misconduct.

260. On the 24th of August 2016 Lo, Wong and Tsui, Solicitors, wrote to the Securities and Futures Commission (“SFC”) asking for them to agree costs for Lo. On the 31st of August 2016 the SFC wrote indicating agreement on the basis that costs should follow the event and asked for a breakdown of Lo’s costs for consideration. This was provided on the 14th of October 2016. On the 1st of November 2016 the SFC resiled from the initial agreement and indicated they would oppose costs. This was explained further on the 2nd of November 2016, the SFC indicating it would oppose such an application on the basis that sections 260(4)(b) and (c) of the Securities and Futures Ordinance,

¹ Date of the report is the 4th of August 2016.

Cap. 571 (“Ordinance”) applied. Therefore on the 22nd of November 2016 application was made to the Tribunal for costs on behalf of Lo.

261. The hearing before the full Tribunal took place on the 1st of December 2016.

The Application

262. Mr. Peter Duncan S.C. on behalf of Lo, having previously provided short written submissions made further representations to the Tribunal. He addressed us first on the correct approach to the award of costs in a matter such as this and then as to why we should not find this matter to fall within the exceptions provided by sections 260(4)(b) and (c) of the Ordinance. The application for costs is brought under section 260(1)(b) of the Ordinance.

263. Mr. Duncan submitted the correct approach was that costs should normally follow the event. He cited the authority of the Report of the Market Misconduct Tribunal in Yue Da Mining Holdings Limited (Part II) Hartmann NPJ (Chairman) at paragraph 428.

“In the judgement of the Tribunal, the provisions of section 260 ... should also, on a proper construction, be read to mean that if a specified person is found not to be culpable of market misconduct then a costs order should normally be made in favour of that specified person.”

Mr. Grossman S.C. on behalf of the SFC, fairly as always, agreed that this was the proper approach. The Tribunal also agreed and proceeded on that basis.

264. Mr. Duncan then proceeded to submit to the Tribunal that this application was not within the exceptions provided by sections 260(4)(b) and (c) of the Ordinance. With reference to the SFC's submissions, he made the point that some reliance was placed on three cases against five directors and Lo was not a party to any of those proceedings. Further those proceedings involved the duties of directors under the listing rules and Lo was merely a solicitor giving advice from time to time with no such obligations. His position throughout was that he was unaware of the matters said to constitute relevant information in these proceedings before the Tribunal. Therefore those other cases should be ignored. The Tribunal should in effect look only at its own findings that relevant information had not been established. Thus his simple submission was that the SFC had not shown that either sections 260(4)(b) nor 260(4)(c) of the Ordinance had been established and Lo should have costs awarded as in the normal course of events.

265. Mr. Grossman made an equally concise oral submission to supplement his written submissions. Mr. Grossman pointed out that section 260(1)(b) of the Ordinance gave the Tribunal an unfettered discretion to award costs. That the facts were such that the case required investigation by the Tribunal. That Lo as a solicitor was in a different position from other people and he should have been aware of at least some of the five matters relied upon. Mr. Grossman accepted that Lo was not a director nor was he involved in the other cases involving five directors. However as a solicitor he should have

been aware of the matters, that the SFC relied upon. His conduct caused the Tribunal to investigate his conduct therefore he should not be granted his costs.

The Tribunal's Findings


266. The Tribunal carefully considered all submissions and the Report of the Inquiry prepared into this case. We fully agreed with Mr. Duncan that the three cases involving five directors had no bearing on this case which should be considered purely on its own facts. By way of comment and taking the matter no further, we do place on record our surprise and dismay that a public body like the SFC should accept liability for the costs then go on to change its position and oppose such an award. We noted that Mr. Duncan did not wish to make anything of this matter and the communications were “without prejudice”.

267. In all the circumstances we were of the opinion that Lo as Company Secretary and a solicitor should have perhaps been more diligent in his duties and that his action certainly raised suspicions such as to justify being investigated. However we were firmly of the opinion that the facts showed he had not used price sensitive information to avoid a loss on his shares. That in fact no potential loss had been shown to the satisfaction of the Tribunal. There was no suggestion that during the investigation that Lo had lied or misled the SFC in any way. The conclusion we came to was that his acts did require investigation by the SFC but we did not and could not conclude they fell within the exceptions of section 260(4)(b) or 260(4)(c) of the Ordinance so as to say his conduct was such to warrant even in part, this investigation by the Tribunal nor

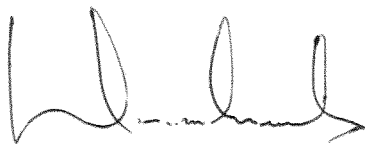
the institution of proceedings. Therefore we concluded and so ruled that costs, as is the normal case, should follow the event.

The Order

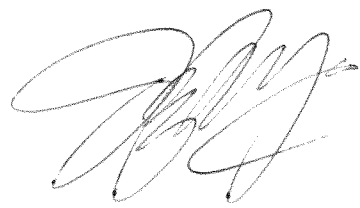
268. The Tribunal therefore makes an Order Nisi to become absolute in 14 days that Lo should have his costs, to be taxed, if not agreed, against the SFC. Whilst noting the provisions of section 260(2) of the Ordinance, we accepted Mr. Grossman's assurance that the SFC would arrange payment from the general revenue, that is the Government.



Mr. Garry Tallentire
(Chairman)



Dr. Wai Chi Kin, Victor
(Member)



Mr. Yau Yin Kwun, Joseph
(Member)

Dated 5 December 2016