

REPORT OF THE MARKET MISCONDUCT TRIBUNAL OF HONG KONG

on whether the specified person had dealt with the shares of

China Gas Holdings Limited

on and between 15 November and 6 December 2011

pursuant to the Court of Appeal's Judgment dated 10 September 2018

and on sanctions

The report of the Market Misconduct Tribunal into dealings
in the shares of China Gas Holdings Limited
on and between 15 November and 6 December 2011

**A report pursuant to sections 252(3)(a), (b) and (c) of
the Securities and Futures Ordinance, Cap. 571 and
Court of Appeal’s Judgment dated 10 September 2018**

INDEX

	Paragraphs
Chapter 1	Court of Appeal’s Order for Retrial 1 - 3
	Introduction
	The first MMT Report 1 - 2
	The Court of Appeal’s Order for retrial 3
Chapter 2	Interlocutory Proceedings & Chairman’s Directions 4 - 9
	The Specified Person’s interlocutory applications 4 - 9
Chapter 3	The Determination on Dealing 10 - 24
Chapter 4	Market Misconduct in the Nature of Insider Dealing 25 - 28
Chapter 5	Sanctions Following Finding of Market Misconduct 29
Chapter 6	Michael Li & Co Ceasing to Act 30 - 38
Chapter 7	Sanctions Sought and Ordered 39 - 86
	Section 257(1)(a): Disqualification Order 39 - 46

	Paragraphs
Section 257(1)(b): “Cold shoulder” Order	47 - 48
Section 257(1)(c): “Cease and Desist” Order	49 - 51
Section 257(1)(d): “Disgorgement of Profits Gained” Order	52 - 54
Section 257(1)(e) and 257(1)(f): Costs Order	55 - 60
Heads (1) to (4)	61 - 62
Investigation Costs	63 - 64
Staff Costs approach	65 - 76
Approach on costs and expenses	77 - 81
Section 257(1)(g): Referral Order	82 - 83
Section 259: Compound Interest	84 - 85
Orders under section 264(1) and (2): Giving and registration of notices	86

Attestation to the Report

A

B

C

D

E

F

G

H

I

J

K

L

M

C

D

FG

I
JK
L

and

A

B

C

D

E

F

G

H

I

J

K

L

M

A

B

C

D

E

F

G

H

I

J

K

L

M

CHENG CHAK NGOK 鄭則鏐

Before: Mr Kenneth Kwok SC (Chairman)
Ms Lai Pik Chi Peggy
Ms Lai Tin Yin Fion

Date of Determination on whether Cheng Chak Ngok had
dealt with the Shares: 30 November 2020

Date of SFC’s written submissions on
Sanctions: 5 February 2021

The Specified Person, absent and unrepresented and made no
submission on Sanctions

Date of Determination on
Sanctions: 3 June 2021

DETERMINATION ON SANCTIONS

CHAPTER 1

COURT OF APPEAL'S ORDER FOR RETRIAL

Introduction

The first MMT Report

1. Cheng Chak Ngok 鄭則鏐 is the Specified Person. His English name is “Wilson”.

2. By the Report dated 23 March 2017 (the “**First Report**”), the Market Misconduct Tribunal (“**the Tribunal**” or “**MMT**”), differently constituted¹, concluded that:

“The Tribunal in the final analysis acknowledges the efforts of the SFC to investigate a very suspicious scenario but we were driven to conclude for all the reasons in the report that in all the circumstances we could not be satisfied on a balance of probabilities that the Specified Person, Mr Cheng had committed market misconduct by way of insider dealing. Therefore we so rule.”²

The Court of Appeal's Order for retrial

3. The SFC appealed. The Court of Appeal allowed the SFC's appeal and by its judgment dated 10 September 2018 (“**Judgment**”) in CACV 95/2017³:

“remit[ted] the matter to a differently constituted Tribunal to determine solely the question of whether Mr Cheng had dealt with the shares, as the other elements of market

¹ Comprising Mr Garry Tallentire (as Chairman) and Mr Wong Kai-Tat, Dickson and Mr Kam Chi-Chiu, Anthony (as members).

² at §121.

³ [2018] HKCA 590.

A

A

misconduct had been established and were not challenged in this appeal.”⁴

B

B

C

C

D

D

E

E

F

F

G

G

H

H

I

I

J

J

K

K

L

L

⁴ §10 of the Judgment.

M

M

CHAPTER 2

INTERLOCUTORY PROCEEDINGS & CHAIRMAN'S DIRECTIONS

The Specified Person's interlocutory applications

4. The Court of Appeal's Judgment was dated 10 September 2018. Cheng Chak Ngok 鄭則鏐 wished to appeal to the Court of Final Appeal. He sought leave from the Court of Appeal and then from the Court of Final Appeal. He also made a number of time applications to the Chairman to defer the retrial by awaiting the outcome of his intended appeal to the Court of Final Appeal. He did not succeed in his applications.

5. The directions hearing for the retrial was held on 7 January 2019. Cheng Chak Ngok 鄭則鏐 was represented by 2 junior counsel⁵ on the instructions of Michael Li & Co. After hearing both parties, the Chairman gave, among others, the following directions:

- "The specified person to file and serve any additional witness statement on the issue of dealing, if so advised, within 12 weeks from 7 January 2019 (i.e. 1 April 2019)."
- "No further witness statement be filed without leave of the Chairman."
- "The re-hearing on the issue of dealing be fixed to commence at 10:00 am on 26 August 2019, with 5 days reserved (i.e. 26 to 30 August 2019). The Tribunal will be sitting normal court hours for the re-hearing."

⁵ Mr Bernard Mak and Mr Ernest CY Ng.

- “Any application for witness(es) giving evidence by way of video-conference be made 4 weeks before the start of the substantive hearing (i.e. 29 July 2019).”
- “There be liberty to apply to the Chairman.”

6. Ultimately, the Court of Final Appeal dismissed his application for leave to appeal and handed down its Reasons for Determination on 30 April 2019. See [2019] HKCFA 17.

7. See the Determination on Dealing⁶ for further information on Cheng Chak Ngok 鄭則鏐’s applications and a citation of the relevant judgments / decisions / determinations of the Chairman / Court of Appeal / Court of Final Appeal.

8. The 12-week time-limit for Cheng Chak Ngok 鄭則鏐 to file and serve additional witness statement, if so advised, expired on 1 April 2019. A Supplemental Witness Statement of Cheng Chak Ngok 鄭則鏐 was filed on the last day of the 12-week time-limit.

9. He did not file any further witness statement.

⁶ https://www.mmt.gov.hk/eng/reports/Report_of_China_Gas_dated_30Nov2020.pdf

CHAPTER 3

THE DETERMINATION ON DEALING⁷

10. The relevant background facts were set out in Chapter 3 of the Determination on Dealing.

11. We rejected the submission of Cheng Chak Ngok 鄭則鏐 on §21(b) of Schedule 9 of the Ordinance.

12. We set out the correct approach for the rehearing.

13. We noted that both Cheng Chak Ngok 鄭則鏐 and Fong gave oral evidence before us, but Li Wei 李威 did not attend the retrial.

14. We noted that despite the close association between Cheng Chak Ngok 鄭則鏐, Fong and Li Wei 李威, Cheng Chak Ngok 鄭則鏐 did not give a coherent, cogent, complete or credible account.

15. Starting from the date immediately following the date of 2 Citigroup emails⁸ which had been copied to Cheng Chak Ngok 鄭則鏐 to the date⁹ when trading in the Shares was suspended, orders were input to the BOC Securities Account in the name of Li Wei 李威 for the Shares of the Company. The orders from 15 November 2011 to 6 December

⁷ https://www.mmt.gov.hk/eng/reports/Report_of_China_Gas_dated_30Nov2020.pdf

⁸ 14 November 2011.

⁹ 6 December 2011.

2011¹⁰ were all buy orders and there was no sell order. The price range for the purchases was from HK\$2.45 to HK\$2.84 per share as set out in §41 of the Determination on Dealing. This price range was lower than the intended take-over offer price range of HK\$3 – HK\$3.75 per share.

16. From 15 November 2011 to 6 December 2011, a period of 22 calendar days, 4,930,000 Shares had been purchased at an aggregate consideration of HK\$13,763,605.60. ENN and Sinopec jointly announced on 12 December 2011 their takeover offer at HK\$3.50 per share. Trading in the Shares resumed on 13 December 2011.

17. For the period from 13 December 2011 to 15 December 2011¹¹, the orders (all sell orders, there being no buy order) listed in §44 of the Determination on Dealing were carried out. Thus, all the 4,930,000 Shares were unloaded in 3 trading days.

18. All the Shares were purchased through the BOC Securities Account¹² and were sold for an aggregate consideration, less charges, of HK\$16,752,442.26. The gain is \$2,988,836.66 as shown in Annex 1 of the Determination on Dealing.

19. There were numerous fund transfers between Fong and i) Li Wei 李威; ii) Fong's father; iii) Fong's mother; iv) Polaris Securities (HK) Limited¹³; v) Cheng Chak Ngok 鄭則鏐's RMB account and vi)

¹⁰ A total of 22 calendar days.

¹¹ A period of 3 trading days.

¹² As listed in §41 of the Determination on Dealing.

¹³ Cheng Chak Ngok 鄭則鏐's securities broker.

Xinao¹⁴. The fund transfers / settlement of dealings, as summarised by the SFC, were reproduced in the Table called “Funds to and from Fong” annexed to the Determination on Dealing as Annex 2.

20. We were unimpressed by the evidence given by Cheng Chak Ngok 鄭則鏢.

21. We considered and evaluated the relevant evidence on the issue of dealing that was before us and came to the conclusion that it was more probable than not that Cheng Chak Ngok 鄭則鏢 dealt with the Shares.

22. We were unable to agree with the submission of Mr Nigel Kat SC, Leading Counsel for Cheng Chak Ngok 鄭則鏢, on “remote” access.

23. We concluded that on the basis of the evidence before us, neither Li Wei 李威 nor some other unidentified individual would have been in a position to place the orders on the Shares.

24. The Determination on Dealing was handed down on 30 November 2020.

¹⁴ See Annex 2, Company owned by Cheng Chak Ngok 鄭則鏢.

CHAPTER 4

MARKET MISCONDUCT IN THE NATURE OF INSIDER DEALING

25. The Market Misconduct Tribunal was required by the Notice from the SFC to conduct proceedings and determine, among others, whether any market misconduct in the nature of insider dealing or otherwise had taken place. The Person suspected to have engaged in market misconduct activities was Cheng Chak Ngok 鄭則鏐.

26. Apart from the element whether Cheng Chak Ngok 鄭則鏐 had dealt with the Shares, the other elements of market misconduct had been established and were not challenged in his appeal to the Court of Appeal. The Court of Appeal allowed the SFC's appeal and remitted the matter to a differently constituted Tribunal to determine solely the question of whether Cheng Chak Ngok 鄭則鏐 had dealt with the Shares.

27. In the re-trial, we considered and evaluated the relevant evidence on the issue of dealing that was before us and came to the conclusion that it was more probable than not that Cheng Chak Ngok 鄭則鏐 dealt with the Shares. We also concluded that on the basis of the evidence before us, neither Li Wei 李威 nor some other unidentified individual would have been in a position to place the orders on the Shares.

28. This led to the inevitable conclusion that market misconduct in the nature of insider dealing had taken place and that the Person found

A

to have engaged in market misconduct activities was Cheng Chak Ngok
鄭則鏐.

A

B

B

C

C

D

D

E

E

F

F

G

G

H

H

I

I

J

J

K

K

L

L

M

M

CHAPTER 5

SANCTIONS FOLLOWING FINDING OF MARKET MISCONDUCT

29. Section 257(1) of the Ordinance as it stood at the time of market misconduct provided that:

“Subject to subsection (3), the Tribunal may at the conclusion of any proceedings instituted under section 252 make one or more of the following orders in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b) ...”

CHAPTER 6

MICHAEL LI & CO CEASING TO ACT

30. By letter dated 16 December 2020, the SFC enclosed its proposed directions on the further conduct of the proceedings and suggested that the question of sanctions be dealt with on paper. It informed the MMT that “the Specified Person’s solicitors ... confirmed that they have no comments on the proposed directions”.

31. On 17 December 2020, the Chairman gave directions as proposed by SFC. Under these directions, Cheng Chak Ngok 鄭則鏐 had up to 26 February 2021 to file and serve his written submissions.

32. By letter dated 5 February 2021, Ms Jasmine Chan, Assistant Presenting Officer, enclosed SFC’s written “Submissions on Orders to be made by the Tribunal dated 5 February 2021” and “the Commission’s List of Authorities together with the authorities”. Ms Jasmine Chan’s letter was copied to Mr Selwyn Yu, SC and Michael Li & Co.

33. As the insider dealing took place in November and December 2011, the 1 April 2003 version of the Securities and Futures Ordinance should be the governing version. However, the copy authority which Ms Jasmine Chan included in her bundle of authorities has “Last updated date of 3.3.2014” printed on it. We are puzzled by her citation and inclusion of a statute a few years *after* the period of the market misconduct in this case, but not the 2003 version.

34. By letter dated 25 February 2021, Michael Li & Co referred to the Chairman's directions dated 17 December 2020. They alleged certain matters between client (Cheng Chak Ngok 鄭則鏐) and themselves as solicitors. They concluded the letter by asserting that:

"Hence, we write to inform the Tribunal that our firm cease to act for Mr Cheng in the captioned matter¹⁵ with immediate effect.

Kindly place this letter before the Chairman for his attention. If the Chairman has any question and concern, we are happy to assist."

35. The letter purported to have been copied to the SFC, but did not purport to have been copied to Cheng Chak Ngok 鄭則鏐.

36. Michael Li & Co said "they cease[d] to act for Mr Cheng ... with immediate effect". By the date of their letter, they had already received notice and had knowledge of further proceedings on sanctions. Their knowledge is imputed to Cheng Chak Ngok 鄭則鏐.

37. Thus, notice of the further conduct of the MMT proceedings on sanctions had been given to both Cheng Chak Ngok 鄭則鏐 and Michael Li & Co. Neither made any submissions on the question of sanctions.

38. On about 19 April 2021, Michael Li & Co served a sealed copy Order dated 14 April 2021 made by Master Tse in CACV 95/2017¹⁶ ordering that:

¹⁵ The caption of the letter is "Re: The Market Misconduct Tribunal Proceedings in relation to dealings of the listed securities of China Gas Holdings Limited".

A

B

C

D

E

F

G

H

I

J

K

L

M

A

B

C

D

E

F

G

H

I

J

K

L

M

- “1. Upon compliance with the requirements of Order 67, rule 6(1) of the Rules of High Court, the said Messrs. Michael Li & Co. ceases to be the Solicitors acting for the 1st Respondent¹⁷ in this Action; and
2. Costs of this application summarily assessed at HK\$3,000 be payable by the 1st Respondent to Messrs. Michael Li & Co. forthwith”.

¹⁶ In CACV 95/2017, the SFC was the appellant, with Cheng Chak Ngok as the 1st Respondent and the MMT as the 2nd Respondent. Michael Li & Co was not a party in this appeal.

¹⁷ “Cheng Chak Ngok”.

CHAPTER 7

SANCTIONS SOUGHT AND ORDERED

Section 257(1)(a): Disqualification Order

39. We turn now to each of the sanctions sought by the SFC.

40. Section 257(1)(a) as it stood at the time of the market misconduct provided:

“(a) an order that the person shall not, without the leave of the Court of First Instance, be or continue to be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation for the period (not exceeding 5 years) specified in the order”.

41. The disqualification period sought is “not less than 4 years”. The SFC has not named any “specified corporation”.

42. The dual objectives of the disqualification are protection of the public and deterrence.

43. Cheng Chak Ngok 鄭則鏐 is a professionally qualified accountant, executive director, chief financial officer and company secretary of ENN. His dealings with the Shares were aggressive and deliberate. His bringing in of his relatives, friends and associates showed his intention to cover up his misconduct and that it was preconceived. He bought a total of 4,930,000 Shares in 22 calendar days at an aggregate consideration of HK\$13,763,605.60 before the proposed takeover of the

Company became public knowledge and he sold all the 4,930,000 Shares in 3 trading days. His gain was nearly \$3 million. His insider dealing was calculated and motivated by greed. He sought to make as quick and as much a profit as possible in as short a period as possible. He had shown no remorse for his misconduct. He had not demonstrated any wish to mitigate. Instead he adopted delaying tactics. The version which he put forward was almost moonshine. Our finding was that he was not a credible witness.

44. In our opinion, this is one of the worst cases, if not the worst. He is unfit to be a director of any corporation, whether listed or not. He abused his expertise and breached the trust and confidence which he enjoyed. His misconduct brought Hong Kong into disrepute as a financial centre. The disqualification period should be near the maximum. We allow a 10% discount which we consider generous.

45. We order a disqualification period of 54 months.

46. As the SFC has not sought a disqualification in respect of any specified corporation, we make no such order.

Section 257(1)(b): "Cold shoulder" Order

47. Section 257(1)(b) as it stood at the time of the market misconduct provided:

“(b) an order that the person shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign

exchange contract or collective investment scheme for the period (not exceeding 5 years) specified in the order”.

48. The misconduct was deliberate and serious. For reasons given on disqualification, a “cold shoulder” order for the same period of 54 months is appropriate and we so order.

Section 257(1)(c): “Cease and Desist” Order

49. Section 257(1)(c) as it stood at the time of the market misconduct provided:

“(c) an order that the person shall not again perpetrate any conduct which constitutes such market misconduct as is specified in the order (whether the same as the market misconduct in question or not).”

50. This order is preventive and is similar to a permanent injunction.

51. We repeat what we said on Disqualification. We consider a “Cease and Desist” Order appropriate in this case and we so order.

Section 257(1)(d): “Disgorgement of Profits Gained” Order

52. Section 257(1)(d) as it stood at the time of the market misconduct provided:

“(d) an order that the person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question”.

53. The market expert instructed by the SFC opined in his second report dated 2 February 2021 that the total gain made amounted to

HK\$2,948,030.54 [HK\$305,405.80 (realised profit) + HK\$2,642,624.74 (notional profit)]. His opinion is not challenged by Cheng Chak Ngok 鄭則鏢.

54. Cheng Chak Ngok 鄭則鏢 should not be allowed to gain from his market misconduct. Accordingly, the amount which we order him to pay to the Government is HK\$2,948,030.54.

Section 257(1)(e) and 257(1)(f): Costs Order

55. Section 257(1)(e) as it stood at the time of the market misconduct provided:

“(e) without prejudice to any power of the Tribunal under section 260, an order that the person pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings”.

56. Section 257(1)(f) as it stood at the time of the market misconduct provided:

“(f) without prejudice to any power of the Tribunal under section 260, 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) the proceedings;
- (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’.

57. Section 257(6) as it stood at the time of the market misconduct provided:

“(6) Where the Tribunal makes an order under subsection (1)(e) or (f) requiring the payment of costs as costs reasonably incurred in relation or incidental to any proceedings instituted under section 252, subject to any rules made by the Chief Justice under section 269, Order 62 of the Rules of the High Court applies to the taxation of the costs.”

58. Sub-section (6) does not apply to taxation of investigation costs. See §179 of Part II of the Report on Mayer Holdings Limited.

59. Mr Selwyn Yu SC submits in §38 of his written submissions that:

“It is submitted that Mr. Cheng should pay (i) the sum the Tribunal considers appropriate for the costs and expenses incurred by the Government in relation or incidental to the First Proceedings and these proceedings, (ii) the costs and expenses of the investigation incurred by the Commission in the sum of [redacted¹⁸] (The Commission’s Statement of Investigation Costs and Expenses is enclosed at Annexure 2), and (iii) the costs and expenses incurred by the Commission in relation or incidental to the First Proceedings and these proceedings, such costs to be taxed if not agreed, with Certificate for two Counsel.”

60. The costs and expenses asked for can be grouped under 8 heads:

- (1) The Government’s costs and expenses in relation or incidental to the First Proceedings;
- (2) The SFC’s costs and expenses whether in relation or incidental to the First Proceedings;

¹⁸ A mid 6 digit figure.

- | | | | |
|---|-----|---|---|
| A | | | A |
| | (3) | The SFC's investigation costs and expenses carried out before the First Proceedings were instituted; | |
| B | (4) | The SFC's investigation costs and expenses carried out for the purposes of the First Proceedings; | B |
| C | (5) | The Government's costs and expenses in relation or incidental to the Retrial (" Second Proceedings "); | C |
| D | (6) | The SFC's costs and expenses whether in relation or incidental to the [Second Proceedings]; | D |
| E | (7) | The SFC's investigation costs and expenses carried out before the [Second Proceedings] were instituted; | E |
| F | (8) | The SFC's investigation costs and expenses carried out for the purposes of the [Second Proceedings]. | F |

Heads (1) to (4)

- | | | | |
|---|-----|---|---|
| G | 61. | The Court of Appeal ordered in §11 of the Judgment: | G |
| H | | "11. There will be a costs order nisi that SFC is to have the costs of the appeal with a certificate for two counsel. <i>As to the costs below, it will be SFC's costs in the cause of the rehearing with a certificate for two counsel.</i> " (emphasis added) | H |
| I | 62. | Heads (1) to (4) are in respect of the First Proceedings. Such costs have already been dealt with by the Court of Appeal in §11 of the Judgment. Apart from determining "the cause of the rehearing" in favour of the SFC, we have no role in respect of the costs and expenses of the First Proceedings. We have <u>no</u> jurisdiction to make any order on costs and expenses under Heads (1) to (4) and we make no order under these Heads. | I |
| J | | | J |
| K | | | K |

L			L
M			M

Investigation Costs

63. Heads (3) and (4) are the SFC's investigation costs and expenses in relation to the First Proceedings. Heads (7) and (8) are the SFC's investigation costs and expenses in relation to the Second Proceedings.

64. As the *Mayer* Tribunal pointed out in §179 of Part II of the *Mayer* Report:

“Section 307N(5)¹⁹ does not cover taxation of costs and expenses of any investigation.”

Staff Costs approach

65. In her letter dated 5 February 2021, Ms Jasmine Chan made 2 points. The first is on the staff costs approach:

“The Statement [of Investigation Costs and Expenses] sets out the Commission's staff costs as calculated based on the formula suggested by the Tribunal in the matter of Fujikon Industrial Holdings Limited (see paragraph 24 of the Costs Order Absolute on Costs and Expenses of Investigation dated 26 August 2019), being: Time spent on investigation in this case ÷ Time spent on investigation and other matters x Total staff costs (being the fixed emoluments of the relevant staff in the relevant year).”

The second point is that:

“As the fixed emolument of the Commission's staff is sensitive and confidential information, we would kindly request the Tribunal and the Specified Person (whose solicitors are copied to this letter) to refrain from disclosing the Statement [of Investigation Costs and Expenses] in any manner.”

¹⁹ Section 257(6) was the then equivalent of section 307N(5).

66. Taking the second point first, the SFC is a *public* regulator. No reason is given why the fixed emolument of its staff is sensitive and confidential. In taxation of costs, the rate(s) and amount(s) of costs of solicitors and counsel are disclosed because such information is necessary for assessing the reasonable amount to be allowed. We see no reason for not disclosing the fixed emoluments where such disclosure is necessary for assessing the reasonable amount to be allowed.

67. Returning to the first point, Ms Jasmine Chan cited the *Fujikon* case but that case does not seem to be on SFC's List of Authorities nor was a copy of that case included in the SFC's bundle of authorities. Ms Jasmine Chan helpfully supplied a copy of that case at the MMT's request. She submitted that the staff costs approach was suggested by the Tribunal in §24 of the Order Absolute in the *Fujikon* case. We are unable to agree.

68. §24 of the Report on Order Absolute in the *Fujikon* case reads as follows:

"Staff costs and overhead costs

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

$$\frac{\text{Time spent on investigation in this case}}{\text{Time spent on investigation and other matters}} \times \text{Total staff costs}$$

SFC does not appear to be forthcoming on time spent on other matters. This is the unsatisfactory nature of the staff costs approach which has 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*".

69. The *Fujikon* Tribunal commented on the unsatisfactory nature of the SFC's approach in that case by pointing out that it contained no information on time spent on other matters. It also made express reference to §25 of the Court of Appeal judgment in *Ling Yuk Sing*. It did not endorse the staff costs approach. On the contrary, it went on to repeat that the staff costs approach was unsatisfactory and made express reference to §25 of the Court of Appeal judgment in the *Ling Yuk Sing* case which read as follows:

“25. I agree with the approach of *In re Eastwood*. The principle of indemnity must be applied flexibly and reasonably. Starting from the basis that the costs of government lawyer are to be taxed on the same basis of private lawyer, the uniform approach is one that commends simplicity. It has not been shown that this approach has caused any significant injustice in taxation of costs which is generally based on reasonable approximations only. Any contrary approach in terms of trying to calculate the actual costs by reference not only to a proportion of the government lawyer's salary but also to the overhead costs of his office and the supporting staff is unworkable in practice and may not necessarily produce a more accurate result. In my view Hong Kong has correctly adopted the uniform approach.”

70. Significantly, the *Fujikon* Tribunal went on to say in §§26 and 27 of the *Fujikon* Report on Order Absolute that:

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

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

71. One must also bear in mind what the *Fujikon* Tribunal had said earlier in §7(4) and (5) of the *Fujikon* Report on Order *Nisi*²⁰ that:

“(4) ... The claim of staff costs has been criticised and rejected by the Court of Appeal in *Ling Yuk Sing* where the Court of Appeal considered the question of taxation of costs of Government lawyers. At §25, Cheung JA said: “I agree with the approach of *In re Eastwood*. The principle of indemnity must be applied flexibly and reasonably. Starting from the basis that the costs of government lawyer are to be taxed on the same basis of private lawyer, the uniform approach is one that commends simplicity. It has not been shown that this approach has caused any significant injustice in taxation of costs which is generally based on reasonable approximations only. Any contrary approach in terms of trying to calculate the actual costs by reference not only to a proportion of the government lawyer’s salary but also to the overhead costs of his office and the supporting staff is unworkable in practice and may not necessarily produce a more accurate result. In my view Hong Kong has correctly adopted the uniform approach.”

(5) Our attention has not been drawn to any authority on assessment of costs and expenses of SFC. There is no apparent reason why costs and expenses of SFC should be assessed differently from the costs of government lawyer”.

72. *Fujikon* was a case where the SFC included overhead cost in its calculation of staff costs. The SFC left out overhead costs in this case, so it cannot claim to be at all four with the *Fujikon*.

73. Heads (7) and (8) on investigation costs in respect of the Second Proceedings should not duplicate Heads (3) and (4) on investigation costs in respect of the First Proceedings. The Second Proceedings were *not* conceived and did *not* come into existence before the Court of Appeal ordered a retrial on 10 September 2018. Costs incurred before that date cannot be said to be investigation costs in respect of the Second Proceedings. The Second Proceedings had not been conceived.

²⁰ https://www.mmt.gov.hk/eng/reports/Fujikon_Industrial_Holdings_Limited_Report_e_Part%20II.pdf

74. For reasons given above, we make no order in respect of Heads (7) and (8).

75. On costs and expenses, we make an order under heads (5) and (6) as follows:

(1) Cheng Chak Ngok 鄭則鏐 do pay the Government's costs and expenses in relation or incidental to the Second Proceedings, to be taxed, if not agreed;

(2) Cheng Chak Ngok 鄭則鏐 do pay the SFC's costs and expenses whether in relation or incidental to the Second Proceedings, to be taxed, if not agreed;

76. We make no order on the other heads, i.e. heads 1, 2, 3, 4, 7 and 8.

Approach on costs and expenses

77. The SFC's claim for costs and expenses in the *Fujikon* case and this case suggest that thoughts should be given to a careful and considered approach. Thoughts should be given to who and how costs are to be assessed if there is no agreement between the SFC and a specified person on investigation costs and expenses. Taxation of investigation costs and expenses seems to be ruled out by sub-section (6). Taxation by the Chairman may not be an ideal solution since the Chairman may not be experienced in taxation.

78. Consideration should be given to adopting the Law Society's approach. From time to time, the Law Society, after consultation with the Registrar, High Court, circulates to solicitors with different seniority and

unqualified staff that may be allowed on taxation. These hourly rates are not binding on the taxing master²¹, but serve as a helpful guide.

79. The current approach of the SFC is cumbersome since working out the total time spent on other matters in a year may be time consuming and may not be a better approximation.

80. While questions may not have arisen on the items under heads 2, 3 and 4, a considered approach would help in deciding the dividing line between them.

81. After the SFC has worked out a considered approach, it might help if the matter is fully argued before the MMT or better still, before the Court of Appeal.

Section 257(1)(g): Referral Order

82. Section 257(1)(g) as it stood at the time of the market misconduct provided:

“an order that anybody which may take disciplinary action against the person as one of its members be recommended to take disciplinary action against him”

83. Cheng Chak Ngok 鄭則鏐 is a professionally qualified accountant and a member of the Hong Kong Institute of Certified Public Accountants (“**HKICPA**”). The HKICPA is a self-regulated professional body of the misconduct of its members. In order that it can discharge its duties properly, it is important that they receive adequate relevant

²¹ §62/App/22 The White Book 2021.

information in respect of the misconduct of its members. We consider it necessary that we make a recommendation to the HKICPA that it takes such disciplinary action as it deems appropriate in respect of Cheng Chak Ngok 鄭則鏐.

Section 259: Compound Interest

84. Section 259 as it stood at the time of the market misconduct provided:

“Where the Tribunal makes an order referred to in section 257(1)(d), whether under section 257(1) or 258(1), requiring the payment of money by a person, the Tribunal may also order that the payment shall carry compound interest calculated—

- (a) from the date of occurrence of the market misconduct in question; and
- (b) at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance (Cap. 4) and with such rests and in such manner as the Tribunal considers appropriate.”

85. The SFC does not ask for compound interest. In the circumstances of this case, we so not disagree and make no such order.

Orders under section 264(1) and (2): Giving and registration of notices

86. Section 264(1) & (2) as they stood at the time of the market misconduct provided:

- (1) “The Court of First Instance may, on notice in writing given by the Tribunal in the manner prescribed by rules made by the Chief Justice under section 269, register an order of the Tribunal in the Court of First Instance and the order shall, on registration, become for all purposes an order of the Court of First Instance made within the jurisdiction of the Court of First Instance.

(2) Where an order is made under section 257(1)(a), or an order referred to in section 257(1)(a) is made under section 258(1), the order shall be filed by the Tribunal with the Registrar of Companies, as soon as reasonably practicable after it is made.”

The SFC is asked to draft an Order for registration under section 264(1) and an Order for filing under section 264(2) for registration and filing, as the case may be.



(Mr Kenneth Kwok SC)
Chairman, Market Misconduct Tribunal



(Ms Lai Pik Chi Peggy)
Member, Market Misconduct Tribunal



(Ms Lai Tin Yin Fion)
Member, Market Misconduct Tribunal

Mr Selwyn Yu, SC, Presenting Officer, for the SFC

The Specified Person, Cheng Chak Ngok 鄭則鏐, absent and unrepresented