

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

DECISION ON COSTS AND EXPENSES OF
INVESTIGATIONS

Introduction

1. On 8 April 2019, the MMT reached its Determination in these disclosure proceedings. Reasons for its Determination were handed down and uploaded onto MMT's website on 22 May 2019. In this Decision, we adopt the same abbreviations.

2. In relation to investigation costs and expenses, the MMT ordered (the "**Order**") 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) The parties shall follow the directions below:

(i) The Commission shall lodge and serve within 14 days from 8 April 2019 a statement of costs and expenses not exceeding two pages for each of Fujikon, Johnny Yeung and Dorothy Chow;

(ii) Each of Fujikon, Johnny Yeung and Dorothy Chow shall lodge and serve its/ his/ her respective succinct Points of Objection (if any) in bullet-point format of not more than two pages to the Commission's statement of costs and expenses within 14 days after receipt of the Commission's statement of costs and expenses; and

(iii) Unless otherwise directed, the Tribunal's summary assessment of costs and expenses will be by paper disposal;

(c) Liberty to the parties to apply to the Tribunal Chairman for directions on the carrying into effect the orders on costs and expenses ... above.

SFC's Claim

3. By letter dated 16 April 2019, SFC enclosed:

“Statement of costs and expenses incurred by the Commission in relation or incidental to the investigations 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 Claim**’).

The Statement of Costs and Expenses together with the supporting documents run to 5 pages, which exceeded the two page limit.

Chiu & Partner’s response

4. 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 the 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.

SFC’s claim

5. Under the Order, SFC’s investigation costs are to be assessed by summary assessment by the MMT. SFC was to submit a statement of costs and expenses “not exceeding two pages” for each of Fujikon, Johnny Yeung and Dorothy Chow. Although there were 3 Specified

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

Persons, the Claim against them was the same as they were liable “on a joint and several basis”. There was no provision for appending any “supporting documents” in excess of the two page limit. SFC made no application to exceed the two page limit.

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

(1) \$146,568.01 as Costs and Expenses in relation or incidental to investigation carried out before the MMT proceedings were instituted, made up of staff cost of \$118,262 and overhead costs of \$28,306.01 which included 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.

Problems with SFC’s Claim

7. SFC’s claim is problematic for a number of reasons.

(1) To start with, under section 307N(1)(f)(ii) and (iii) of the Ordinance, costs and expenses are restricted to costs and expenses of “investigation of the person’s conduct or affairs”. Costs and expenses of investigation of persons other than the 3 Specified Persons are not included. There are only 3 Specified Persons and the case against each of them seems

rather straight forward. The amounts claimed by SFC seem high.

(2) Secondly, the costs and expenses are “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”. The costs and expenses covered must be incurred “before” the disclosure proceedings were instituted.

(3) As for costs and expenses “for the purposes of these proceeding”, there must be no duplication with “the costs and expenses ... in relation or incidental to these proceedings”. As Cheung JA said in §9 of *Ling Yuk Sing v The Secretary for the Civil Service and another* [2010] 3 HKLRD 722:

“The starting point in a party and party taxation is based on the principle of indemnity: an order for costs between parties allows the receiving party to claim from the paying party only an indemnity in respect of costs recovered by the order. Receiving parties cannot therefore recover a sum in excess of their liability to their own solicitors. Further, such costs are not imposed as a punishment to the party who pays them nor given as a bonus to the party receiving them: paragraph 62/App/2 of the Hong Kong Civil Procedure 2010.”

(4) As for the two items of staff costs, SFC’s Claim states the total amount of staff costs of SFC and the number of hours the named person is said to be engaged on. No distinction is drawn between the costs of persons of different grades, e.g. a former “Senior Director of ENF” appears to attract the same rate in the claim as a “Graduate Trainee of ENF”. There is no information on the emolument rate of any staff. There is no information on the amount of time spent on this

case and the amount of time spent on other matters. There is simply no basis for making any award under staff costs.

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.

(6) None of the 5 persons said to be involved in the investigation is said to be a lawyer and, if he or she is, his or her post-qualification experience is not known.

(7) The item of “Depreciation for the Commission’s fixed assets” can hardly be said to be “costs and expenses reasonably incurred by the Commission ... for the purposes of the proceedings,” emphasis added.

(8) It is claimed that 2 persons spent a total of 48 hours on “Attendance at the MMT and all other related preparation”.

Attendance at the MMT should be included in costs of the disclosure proceedings.

- (9) A total of 48 hours were claimed for “attendance at the MMT and all other related preparation”. There was a short directions hearing and a short substantive hearing. SFC was represented by leading and junior counsel at the hearings. 48 hours hardly seem justifiable.

Conclusion

8. SFC’s claim is unsatisfactory and much on the high side. What presents the greatest difficulty is that there is insufficient information to reach a satisfactory assessment.

Costs Order Nisi

9. Doing the best we can, we assess the investigation costs and expenses at \$100,000. This assessment shall become final and absolute without further order if no application is made to vary it within 14 days from the handing down of this Decision.

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Kenneth Kwok

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