

BETWEEN

Registrar of the HKICPA

COMPLAINANT

And

The 1st Respondent

1st Respondent

The 2nd Respondent

2nd Respondent

The 3rd Respondent

3rd Respondent

DECISION ON COSTS

Background

1. The Complaints were heard on 16th April 2015. The Disciplinary Committee handed down its Reasons for Decision on 10th June 2015 (“the Decision”).
2. The Disciplinary Committee found the Respondents to be in breach of their Director’s undertaking for failing to use their best endeavours to procure the Company to comply with the Listing Rules and thus were in breach of the relevant Code as charged.
3. The present decision and orders concern only the sanctions and costs to be imposed against the Respondents.
4. As set out in §83 of the Decision:
“83. The Disciplinary Committee makes the following directions for parties to make written submissions concerning appropriate sanctions and on costs:

- i. The Respondents shall lodge with the Disciplinary Committee and serve on the Complainant a written submission on the appropriate sanction(s) to be imposed within 14 days of this Decision.
 - ii. The Complainant shall lodge with the Disciplinary Committee and serve on the Respondents a written submission on sanctions (if the Complainant so desires) and on the appropriate order of costs together with a statement of costs relied on by the Complainant within 14 days of receipt of the Respondents' submission stated in direction (1) above.
 - iii. The Respondents shall lodge with the Disciplinary Committee and serve on the Complainant a reply submission within 14 days of receipt of the Complainant's written submission stated in direction (2) above. "
5. The Respondents lodged their written submissions on sanctions and costs on 25th June 2015.
6. The Complainant lodged its written submissions on sanctions and costs as well as a statement of costs on 7th July 2015.
7. The Respondents did not file any reply in response to the Complainant's written submissions.
8. The Disciplinary Committee has considered all the above written submissions of the parties.

The Respondents' submissions

9. The Respondents proposed that in deciding the most appropriate sanctions, the Disciplinary Committee must look at the misconduct and the mitigation. Furthermore, the Disciplinary Committee should start with a sanction that is the least severe, and

then ask whether a heavier sanction in its mind is right for the misconduct in question: Giele v General Medical Council [2006] 1 WLR 942 at §26.

10. The Respondents proposed to the Disciplinary Committee that the appropriateness of the sanction must be case-specific and fact-sensitive: Registrar of HKICPA v Chan Kin Hang Danvil [2014] 2 HKLRD 723 at §46.
11. The Respondents echoed the Disciplinary Committee's opinion in that the charge against each of the Respondents was not serious since it did not allege any fraudulent intent or personal gain: see Decision at §38.
12. The Respondents had sought legal advice from Mr. Warren Ko of Messrs. Robertsons to on compliance with the relevant provisions of the Listing Rules. While they could have taken more active steps to ensure they had used their "best endeavours" to procure the Company's compliance, there was no evidence to indicate that the Respondents were dishonest or refrained from using the best endeavours deliberately.
13. Although the shareholders of the Company had not given prior approval to the payment of the deposit by the Company, they did subsequently approve the subject transaction and ratify the deposit on 29th August 2009. This demonstrates that the breach was technical as the shareholders approved the payment of the deposit. There was no evidence of either any complaint filed by any of the shareholders or indication of they being the "victims" to the breach.

Mitigating Factors

14. The 1st Respondent is now aged 47 and is the husband of the 3rd Respondent. The couple have two sons – a four and a two-year-old respectively. It is submitted that the 1st Respondent has a father and mother who are 79 and 66-years-old respectively. Both are retired and are financially dependent on the 1st and/or the 3rd Respondents. The Disciplinary Committee was informed that the 1st Respondent is currently serving a term in prison, but for reasons which were not provided. It was requested that the

sanctions be lenient as a result of the prison term, especially in light of the fact that the 1st Respondent would likely face another round of disciplinary proceeding.

15. The 3rd Respondent is now 37 years-old and has become the sole breadwinner and homemaker of the family. She works as a company secretary for another company earning a monthly income of approximately \$19,000.00. In addition to the dependents mentioned previously, she also supports her own mother who is 67-years-old.
16. The 2nd Respondent is currently a Director of Fuji Finance Company Ltd, earning a monthly income of about \$50,000.00. He is the sole breadwinner of his family, comprising of his wife and two sons (ages 8 and 12).
17. All the Respondents have maintained a clean disciplinary record with the HKICPA since their acquisition of their relevant licenses but for this case.
18. It is submitted on the Respondents' behalves that they have fully cooperated and assisted the investigation since the discovery of the complaints made to the HKICPA.
19. Finally, the Respondents have already received a degree of sanctions. The Listing Committee of the Stock Exchange imposed a public censure on the Company and the Respondents for their breaches. The Respondents also attended a mandatory 24 hour training provided by an approved course provider.
20. On costs, the Respondents argued that the Disciplinary Committee should exercise its discretion not to award costs against them because (i) the charges were minor in nature, (ii) the Respondents' cooperation and (iii) the Respondents' inability to pay due to heavy financial pressure.

21. In the alternative, the Respondents argue that if the Disciplinary Committee was minded to order costs against the Respondents, they should only be held liable to pay only a small part of HKICPA's costs.

The Complainant's submissions

22. The Complainant reminded the Disciplinary Committee that it has a wide discretion under section 35 of the Professional Accountants Ordinance (Cap. 50) ("PAO") regarding sanctions. In addition to powers to issue a reprimand and financial penalty, the Committee has the power to order removal (temporary or permanent) of a respondent's name from the register, and the power to order cancellation of a respondent's practicing certificate with or without a condition as to when the respondent may reapply for a new practicing certificate.
23. The Complainant acknowledged that the Listing Committee had already imposed penalties of a public reprimand and an order for the Respondents to undergo training concerning their continuing obligations as directors of listed companies for their breach of the Listing Rules.
24. The Complainant therefore submits that the Disciplinary Committee should, at a minimum, reprimand the Respondents for their breach of professional standards. The Disciplinary Committee is also invited to impose a financial penalty if it is deemed appropriate.
25. The Complainant asks that the Respondents should pay the Complainant's costs because it is their conduct which resulted in the disciplinary proceeding under the PAO.
26. The Complainant argued that the nature of the charges being minor is not a reason for not ordering costs against the Respondents.

27. Furthermore, the Complainant argued that the Respondents' alleged co-operation were simply answering letters and essentially negligible.
28. Finally, the Complainant submitted that costs were awarded to the Institute for all complaints that were successful between 2009 to 2015.

Decision

Sanction

29. The Disciplinary Committee maintains its position that the charge each of the Respondents faces is not serious because it did not allege any fraudulent intent or personal gain.
30. On the facts found the Respondents did seek and rely on the legal advice of Mr. Ko. However, as analysed in the Decision, it was the Respondents' lack of critical thinking and positive step to follow up with the said legal advice that ultimately led to their failure to use their best endeavours as charged and hence the breach of the Code.
31. The Disciplinary Committee takes into account particularly the following relevant factors, namely, (i) the Respondents having maintained a clean disciplinary record with the HKICPA since the acquisitions of their relevant license, (ii) the Listing Committee has already imposed a public censure on the Company and the Respondents for their breaches, (iii) the Respondents had already attended a mandatory 24 hour training provided by an approved course provider and (iv) the shareholders of the Company approved retrospectively at an extraordinary general meeting the acquisition of BCFC including the Escrow Agreement.
32. In the circumstances, the Disciplinary Committee considers that the most appropriate and lenient sanction is to reprimand each of the Respondents and to impose a fine of \$1,000.00 against each of the Respondents.

Costs

33. On the matter of costs, the Disciplinary Committee had at the end of the Decision indicated provisionally that it was considering imposing an order of costs against the Respondents: see §82 of Decision.
34. The Disciplinary Committee is not persuaded by the Respondents' submissions that costs should not be ordered against the Respondents or that the same should be reduced once the reasonable amount is assessed. The personal circumstances of the Respondents are not so exceptional as to require a departure from the general principle of costs to follow the event. In this case the Respondents denied the charge and produced positive defences to the same at the hearing which failed. All the costs incurred by the Complainant in this case were necessitated by the position taken by the Respondents and there is simply no reason why costs should not follow the event or that the reasonable costs incurred should be reduced.
35. The Disciplinary Committee therefore orders the Respondents do pay the costs of the HKICPA as assessed below.

Statement of Costs

Item A – Hourly Rates

36. The Complainant claimed the hourly rates for the following people:

Donald Leo	General Counsel	HK\$ 2,000.00 per hour
Kenneth Ng	Legal Counsel	HK\$ 2,000.00 per hour
Winnie Leung	Associate Director, Compliance	HK\$ 1,200.00 per hour
Elaine Chung	Deputy Director, Compliance	HK\$ 1,600.00 per hour (for 1 st May 2015 to present)

HK\$ 1,200.00 per hour
(for period up to 30th
April 2015)

Brenda Leung Associate Director, Compliance¹ HK\$ 1,200.00 per hour

37. The Disciplinary Committee finds that the above rates are reasonable.

Item B – Complainant

38. The Complainant claimed the preparation of complaint documents and correspondence with the Respondent, Disciplinary Committee Convenor and Clerk to the Disciplinary Committee from 24 April 2014 to 7 July 2015 as follows:

30.0 hours @ \$2,000 per hour	HK\$ 60,000.00
9.5 hours @ \$1,200 per hour	HK\$ 11,400 .00

39. The Disciplinary Committee find that 30 hours in preparation for this case is excessive. We would consider 20 hours to be sufficient. .

40. The combined total costs would be adjusted to HK\$ 40,000.00 + HK\$ 7,200.00 = HK\$ 47,200.00.

Item C – Clerk to the Disciplinary Committee

41. The Complainant claimed the following under this head:

Actual costs incurred from 8 May 2014 to 15 April 2015: 9.0 hrs @ \$1,200.00 per hour	HK\$10,800.00
Hearing on 16 April 2015: 3.0 hrs @ \$1,200.00 per hour	HK\$ 3,600.00
Estimated further costs to completion of	HK \$3,000.00

¹ In all correspondences received by the Disciplinary Committee, Ms. Leung has always been referred to “Clerk to the Disciplinary Committee”

proceedings: 2.5 hrs @ 1,200.00 per hour

42. The Disciplinary Committee finds that the costs under this item are reasonable.

Item D – Other disbursements

43. The Complainant claimed the following under this head:

Photocopying, fax, postage and others	HK\$ 9,039.00
Cost of interpreter for 1-day hearing	HK\$ 6,000.00

44. The Disciplinary Committee finds that the costs under this item are reasonable.

45. The total reasonable costs of the Complainant is therefore assessed at \$79,639.00.
The same will be rounded down to \$79,000.00.

Conclusion

46. By reason of the above, the Disciplinary Committee makes the following orders:
- i. Each Respondent be reprimanded;
 - ii. Each Respondent to be fined HK\$1,000.00; and
 - iii. The Respondents do jointly and severally pay the assessed costs of HKICPA assessed at HK\$ 79,000.00.

Dated the 10th day of September 2015.