

TAKEOVERS AND MERGERS PANEL

Panel Decision

Disciplinary Proceedings in relation to dealings in the shares of Tack Hsin Holdings Limited pursuant to section 12.1 of the Introduction to the Hong Kongin the6u2

(“**Mr. Lo**”). Mr. Lo is registered with the SFC as an investment adviser director, commodity dealer and securities dealing director.

5. From August 2000 to 31 January 2001, the aggregate number of shares held in Tack Hsin by the Investment Companies increased from 57,016,000 (representing 19.0% of the total issued share capital of Tack Hsin) to 105,200,000 (representing **35.06%** of the total issued share capital of Tack Hsin). AFAM went on to make further acquisitions of Tack Hsin Shares on behalf of the Investment Companies so that by 31 March 2001, the total aggregate shareholding of the Investment Companies in Tack Hsin amounted to **41.94%** of the total issued share capital of Tack Hsin. The shares were acquired at prices between HK\$1.04 and HK\$1.87 per share.
6. AFAM is no longer the investment manager of or investment adviser to any of the Investment Companies, such arrangements having been terminated between 5 April 2001 and 1 October 2001. During the course of the meeting, the Panel was informed by Mr. Lo that Controlled-Risk had disposed of all its shares in Tack Hsin. Other than this disposal, the Panel is not aware of any disposals of Tack Hsin Shares by the Investment Companies since the Executive commenced enquiries.
7. On 30 January 2002, the Executive commenced disciplinary proceedings against AFAM and Mr. Wong pursuant to section 12 of the Introduction to the Code. On the same date, the Executive circulated a paper setting out its case (“**Panel Paper**”) to AFAM and Mr. Wong inviting them to make submissions.

The Executive’s case

8. The Executive takes the view that the Investment Companies under the management of AFAM are presumed to be acting in concert with AFAM under class (4) of the definition of “*Acting in concert*” in the Code.

The definition provides that :

“Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:-

(4) “fund manager (including an exempt fund manager) with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;”

9. On that basis, the total shareholding in Tack Hsin held by the concert party exceeded 35% in January 2001 thereby triggering a mandatory general offer obligation under Rule 26 of the Code. At that time the trigger threshold was 35% under the pre-19 October 2001 version of the Code.
10. The Executive considers that AFAM is the principal member of the concert group. Further, the Executive takes the view that Mr. Wong is also a principal member of the concert group. Mr. Wong advised the Executive that he took all of the decisions in

17. After considering the written and oral representations of the Executive, AFAM and Mr. Wong and the answers to questions posed by Panel members during the course of the meeting, the Panel found that AFAM has breached the mandatory offer provisions of Rule 26.1 of the Code. The Panel also found that Mr. Wong was the party principally responsible for causing that breach to occur.
18. The Panel did not reach a decision as to sanctions as it believed that as a result of information that came to light during the course of the meeting, it needed further

time of the meeting on 5 March 2002 prominently referred to on the Glanville web site).

- (viii) Full clarification of Mr. Wong's relationship with AFAM International Inc.

The Executive was required to provide:

- (ix) The results of a company search on the Glanville Pacific Management Limited.

19. The Panel required this information to be provided by 12 March 2002 with a view to reconvening on 14 March 2002 to consider this information together with submissions, written and oral, in respect of sanctions before reaching a decision on sanctions.
20. The Panel advised the Parties and the Executive that it was minded, but had not yet reached a decision, to consider the question of a compensation order, and in that regard, advised the P

(b) two or more persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35% or more of the voting rights of the company;”

25. By 31 January 2001 the Investment Companies held 105,200,000 shares of Tack Hsin representing 35.06% of the issued share capital and voting rights of Tack Hsin, thereby giving rise to a mandatory offer requirement under the provisions of Rule 26(1)(b) of the Code. AFAM on behalf of various of the Investment Companies acquired further shares in Tack Hsin increasing the total shareholding of the Investment Companies in Tack Hsin to 125,852,000 shares at 31 March 2001, equivalent to 41.94% of Tack Hsin’s issued share capital and voting rights.
26. In light of the above and in the absence of a general offer, the Panel found, having considered the submissions written and oral of the Parties and the Executive, that AFAM had breached the provisions of Rule 26.1(b) of the Code.
27. The composition of the concert party has been questioned in AFAM’s submission which contends that AFAM should be presumed to be acting in concert with only six rather than seven of the Investment Companies: a contention not accepted by the Executive. However, even if the company in question, Diamond Diversified, were to be excluded from the concert party presumption the Tack Hsin Shares and voting rights held by the remaining six Investment Companies would still have exceeded in aggregate 35% of the voting rights of Tack Hsin, with the relevant date on which the mandatory offer obligation was triggered being no later than 28 February 2001 rather than 31 January 2001.
28. The Panel has asked to hear argument on the exact date on which the breach occurred and the price at which a general offer should have been made before reaching a decision on sanctions.
29. The Panel accepts on the evidence placed before it that Mr. Wong was the author of AFAM’s investment decisions. Mr. Wong has offered no evidence to rebut the Executive’s submissions or AFAM’s submissions which concur in identifying him as the party upon whose instructions and under whose supervision the acquisitions in question were made. Mr. Wong in his submission has confined himself to making no admission. He has not attempted to rebut the allegations or dispute or deny the evidence. He has also chosen not to attend the Panel meeting.
30. The Panel believes that on the basis of the evidence presented that Mr. Wong was the party who as the Chief Executive undertook the day-to-day management of AFAM and made the investment decisions regarding the acquisitions of shares in Tack Hsin, and in the absence of any rebuttal or refutation of that evidence, Mr. Wong cannot escape responsibility for the breach because the actions that caused it were effected through a company, AFAM, when he in reality determined all the relevant actions of that company.
31. The Panel has, therefore, concluded that Mr. Wong was the party principally responsible for causing AFAM to breach Rule 26.1(b) of the Code.

Decision on sanctions

32. The Panel met again on 14 March 2002 to consider the information that had been provided by the Parties and the Executive in response to enquiries raised b

47. The Panel has, accordingly, found that Mr. Wong, certainly insofar as regards the management of the assets of Controlled-Risk, would seem to have quite deliberately sought to conceal his acquisitions of shares in Tack Hsin. The Panel requested AFAM to contact the other six Investment Companies to determine if there are any other examples of misreporting. At the meeting on 14 March 2002, AFAM informed the Panel that no additional information had been received in this regard by AFAM.

54. In this regard, Mr. Wong reportedly sought to appoint a financial adviser to act on behalf of AFAM in a general offer and sought underwriters for that proposed offer. Letters were sent by Mr. Wong's legal advisers to the SFC reporting these efforts (copies of which were attached to the Panel Paper). On the face of it, these efforts would seem to substantiate Mr. Wong's claim to have explored seriously the possibility of making a general offer.
55. However, when the Panel questioned Mr. Lo as to whether he or any other member of the board of directors of AFAM had been approached by Mr. Wong in respect of either the appointment of AFAM's financial adviser or in respect of any conversations with underwriters in regard to a possible general offer by AFAM, Mr. Lo explicitly denied any knowledge of these matters whatsoever. He confirmed that no approach had been made to the board of directors of AFAM in respect of the appointment of a financial adviser or for the provision of funding for a general offer. He also confirmed that Mr. Wong acting alone was not authorised to make financial commitments on behalf of AFAM of the order required to fund a possible general offer.
56. The Panel is not persuaded that Mr. Wong's efforts represented a serious exploration of the possibility of making a general offer. He neglected to undertake even the most basic form of consultation with his fellow directors in respect of a commitment that would have been substantial at the AFAM level and substantial even at the level of AFAM's ultimate holding company, AFH.
57. The Panel has been unable to address any questions to Mr. Wong on this point as he has chosen not to appear at the Panel meetings and his adviser who attended the meetings had no instructions in this regard.
58. The finding of the Panel is, therefore, that Mr. Wong's efforts in respect of any attempt to remedy the breach were reflective of form rather than substance and in no way serve to mitigate his actions.
- *Presumption of concertedness*
59. In Mr. Wong's submission of mitigation two other substantive arguments were advanced namely he had "*only been presumed to have acted in concert with the seven investment companies as a result of his then position as their fund manager and not in his personal capacity*" and he had "*... acknowledged and accepted that he and the seven investment companies were presumed to be acting in concert under the Takeovers code and that a mandatory general offer obligation had been triggered in January 2001.*" Moreover he had "*made no attempt to rebut the aforesaid presumption*".
60. As regards the first argument, that Mr. Wong was not acting in his personal capacity but only as a fund manager, the Panel completely rejects this argument. Mr. Wong was wholly responsible for his own actions. He has not contested the evidence contained in AFAM's and the Executive's submissions that he was personally responsible for the relevant investment decisions and exerted a dominant influence over the affairs of AFAM at the relevant time. The Panel has no hesitation in these circumstances in lifting the corporate veil and placing responsibility directly on the

principal author of the breach by AFAM (a presumed concert party with the seven Investment Companies under paragraph (4) of the definition of “Acting in concert” under the Code) of Rule 26 of the Code, namely, Mr. Wong.

- *Co-operation with the Panel*

61. Mr. Wong has absented himself from both meetings of the Panel, notwithstanding the specific invitation for him to attend the meeting of 14 March referred to in paragraph 21 above. The instructions of Mr. Wong’s legal adviser who attended the Panel meeting were limited to a simple non-admission of the case against Mr. Wong and the delivery of the plea of mitigation contained in Mr. Wong’s original submission. Mr. Wong, through his advisers has provided as an explanation for his non-attendance only the statement that “*he is overseas*”. His adviser was unable to provide the Panel with any further explanation on this point.

62. The Panel has been unable to address questions to Mr. Wong. It considers that this is a situation far removed from the level of co-operation contemplated under General Principle 10 which states “*All parties concerned with transactions subject to the Codes are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information*”.

- *Past precedent*

63. In reaching a decision on sanctions, the Panel has had regard to the level and nature of sanctions imposed in previous decisions involving a breach of Rule 26 of the Code. While such decisions are of persuasive effect they are not binding precedents. Each case has its own distinguishing features.

64. Ultimately, therefore, the Panel’s decision on sanctions is determined by the particular circumstances of each case having had regard to such past decisions on sanctions as are germane.

65. Viewed as a whole the Panel considers that the actions of Mr. Wong are wholly inconsistent with the standards expected of the chief executive of a registered investment management company and a registered person. Mr. Wong’s actions directly led to the breach of Rule 26 of the Code by AFAM.

- *Conclusion*

66. The Panel concluded that a severe sanction is merited having regard to the facts and the reasoning set out above.

Sanctions against AFAM

67. As regards AFAM, the Panel publicly censures AFAM pursuant to section 12.1(c) of the Introduction to the Code. The Panel also intends, pursuant to section 12.2(d) of the Introduction to the Code to report AFAM to the SFC and any other appropriate regulatory authorities.

Reasons

68. The Panel has found that Mr. Wong was the principal party responsible for causing AFAM to breach Rule 26 of the Code. In determining the sanctions appropriate to AFAM's breach, the Panel has considered in particular the submissions of mitigation made on AFAM's behalf by its legal advisers.
69. AFAM has accepted that it breached the provisions of Rule 26 of the Code and has based its arguments in mitigation largely upon the role played by Mr. Wong. A role that is generally consistent with the Panel's findings of fact with regard to Mr. Wong.
70. The Panel is of the view, however, that in assessing the level of sanctions appropriate to AFAM's breach, regard must be taken of the circumstances which allowed Mr. Wong to operate as he did and to the measures that AFAM itself took in response to the discovery of the breach.

- *Inadequacy and internal controls*

71. AFAM is an investment management company registered as an investment adviser and commodity trading adviser with the SFC. Directors actively engaged in its management are required to be registered as investment advisers with the SFC. Mr. Wong and Mr. Lo were so registered.
72. AFAM is a member of the AFH group. The ultimate holding company, AFH, owns some 70.31% of AFAM's issued share capital. AFH is the holding company for a financial services group that includes within it a bank and an insurance company. AFAM is through its name and its directors publicly associated with the AFH group.
73. The Panel believes that, as a registered investment management company and a member of a substantial financial services group, AFAM cannot simply hide behind the actions of Mr. Wong.
74. AFAM failed to put in place the most basic of internal controls regarding the activities of Mr. Wong. It relied on Mr. Wong both as the principal manager of AFAM's affairs and as its compliance officer. AFAM was equally aware of the internal audit reports referred to in paragraph 41 above and did nothing to establish an independent compliance function. As a member of a substantial financial services group, the reputational and regulatory risks of a compliance failure must have been clear to AFAM and its board, yet no action was taken to establish an independent compliance function.
75. AFAM was apparently a successful business, manag (gr95n Tc 0.ustwithin it a b) Tj 3 0 TD -0.0292

Wong was allowed a largely unfettered remit devoid of an independent internal or group compliance function.

77. The Panel finds that AFAM has a heavy responsibility to bear for this management failure and its consequences.

- *Financial gain*

78. AFAM was a beneficiary of the acquisition by AFAM of Tack Hsin Shares on behalf of the Investment Compa

concentrated position that AFAM had accumulated in Tack Hsin and which led to the breach of Rule 26 of the Code.

- *Conclusion*

83. The Panel has taken all of the above into account in reaching its decision on sanctions. It considers that AFAM contributed in no small measure to its own predicament. Its management and conduct fell far short of that which the Panel would expect of a registered investment management company and member of a substantial financial services group.

84. The Panel considers these to be serious matters that fully merit the sanctions imposed.

General observations

85. The work of the Panel is generally greatly facilitated by the efforts of the financial and other professional advisers appearing before it. Due heed is paid to their obligations to the Panel as set out in General Principle 10 of the Takeovers Code.

86. In this instance, however, the Panel would observe (and this is in no way a sanction), that it is disappointed in the manner in which Holman Fenwick & Willan, solicitors, chose to represent its client, Mr. Wong, before the Panel. This is not in any sense a reflection on the individual performance of the solicitor who attended the meeting as an observer on behalf of Mr. Wong, or on the arguments put forward on Mr. Wong's behalf, but rather on the manner in which the firm appears to have approached its duties towards the Panel.

87. The solicitor who attended the meetings was not conversant with the Code nor had he had any direct contact with Mr. Wong himself. The partner who had had such contact and presumably was conversant with the Code and who may have been able to assist the Panel in its work, chose not to attend either of the two meetings. No reason was given for his non-attendance. Whilst Holman Fenwick & Willan's attendance was characterised as being an observer only, the Panel would have expected the person