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Application No. 1 of 2009

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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IN THE MATTER of a Decision
made by the Securities and Futures
Commission pursuant to s 194 of
the Securities and Futures
Ordinance, Cap 571,

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IN THE MATTER of s 217 of the
Securities and Futures Ordinance

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BETWEEN

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CHU KWOK SHING, GODWIN

Applicant

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and

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SECURITIES AND FUTURES COMMISSION

Respondent

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Before: Chairman, Hon Saunders J,
Members, Mr Kwan Pak Chung, Edward, and Mr Chan Kam
Wing, Clement.

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Written Submissions: 16 & 23 July 2010

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Date of Decision: 6 August 2010

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DECISION

Introduction:

1. On 30 June 2010, we handed down our decision dismissing an application for review by Mr. Chu of the decision of the SFC dated 30 January 2009, in which the SFC found that Mr. Chu had failed to act honestly, fairly and in the best interests of the integrity of the market by having created a false or misleading appearance of active trading in, or with respect to the market for, three stocks, in breach of General Principle 1 of the Code of Conduct.

2. At the same time we upheld Mr. Chu's application for review of the penalty imposed, namely suspension for a period of three years. We reduced that period of suspension to a period of 18 months.

3. We made an order nisi that Mr. Chu should pay two thirds of the cost of the application for review on a party and party basis. We invited the parties to make submissions in writing on the question of costs. Those submissions have now been considered by us.

4. The basis upon which we took the preliminary view that Mr. Chu should pay two thirds of the cost of the application was that the great bulk of the preparation for, and the hearing of, the application for review related to the finding of misconduct. In that respect Mr. Chu had failed in the application.

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The Tribunal's usual practice as to costs:

5. Counsel for Mr. Chu contended that the usual practice of the Tribunal was to make no order for costs. That is not a correct reflection of the usual practice.

6. The four decisions relied on by Ms Lam, in which the Tribunal referred to its “usual practice” of not awarding costs, are all decisions that relate to bankruptcy cases. In such cases the applicant normally appears in person, and the SFC is represented by a member of its staff. Recognising that there is little point in seeking an order for costs in such cases, it has been the practice of the SFC not to seek costs, and the Tribunal not to award costs in such cases.

7. The Tribunal may have to reconsider that position, in the event of a bankruptcy case becoming sufficiently complex that it would be necessary for the SFC to instruct counsel.

8. We accept Mr. Beresford's submission that, apart from the bankruptcy cases, the Tribunal's decisions fall broadly into three categories:

- (i) cases in which the challenge fails entirely;
- (ii) cases in which a challenge to the finding of misconduct fails, but the challenge to penalty succeeds, resulting in a variation of penalty; and

- (iii) cases in which the finding of misconduct is not challenged, but the challenge to penalty succeeds, resulting in a variation of penalty.

9. Where an application for review is entirely dismissed, it is usually dismissed with costs. Mr. Beresford put before us a schedule of 23 decisions of the Tribunal, handed down between October 2003 and July 2010, in which the application for review of the finding of misconduct was dismissed. In each case costs were awarded, in two, on a common fund basis.

10. Where a substantial challenge to the finding of misconduct has failed, but the applicant for review has succeeded in having the penalty reviewed, to his benefit, a number of cases show that Tribunal has awarded to the SFC a substantial portion of its costs. Mr. Beresford gave three examples:

- (i) In *Choy Ye King Andy, Cheng Kai Ming Charles, & Li Kwok Cheung George*, SFAT 3, 4, & 5/2006, the SFC's findings of misconduct were upheld. The applicant's suspensions were varied, (i) from 9 months to 6 months, (ii) from 6 months to 4 months, (iii) from 4 months to 3 months. The SFC was awarded 80% of its costs.
- (ii) In *Lee On Ming Paul* SFAT 4/2009, findings of misconduct were upheld and prohibition for life was varied to 18 month suspension. The SFC was awarded 50% of its costs.

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(iii) In *Ng Chiu Mui, Law Kai Yee, Tang Yuen Ting*, SFAT 7, 8, & 9/2007, findings of misconduct were upheld. The first applicant’s penalty was varied from life to 10 years, and the second applicant’s penalty was reduced by 25% to reflect the reduction in the first applicant’s penalty. The SFC was awarded 85% of its costs of the first and second applications. The third application was dismissed with costs.

11. Rather than Tribunal’s practice being not to award costs, on an unsuccessful challenge to findings of misconduct, the usual practice is to award costs.

Mr. Chu’s present financial situation:

12. The submission was made that the Tribunal should consider Mr. Chu’s present financial situation. The evidence established that he had worked in the securities industry since 1994. His counsel says, but without any evidence to support the submission, that this work has been his only means of livelihood for over 16 years. We accept, without evidence, that he has a family to support and that his parents, wife and child rely upon him as the primary breadwinner.

13. The evidence established Mr. Chu was a day trader who has no clients, but simply traded in securities on his own account. His income accordingly does not depend upon commissions from a licensed business. He puts no evidence before us to demonstrate that his ability to trade on his own account is in any way affected by the suspension of his licence, because he is perfectly capable of trading through licensed persons. It is

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right that he would have to pay a commission on his trading, but that sum will be negligible compared to the amount a day trader, supporting himself and his family for 16 years, would be expected to make.

14. He elected, both in the substantive hearing, and on the issue as to costs, to put no other evidence at all before us in support of his financial position.

15. We are asked to have regard to the fact that the SFC's costs, involving as it did both leading and junior counsel will be substantial. That is not a basis upon which to refuse an order for costs where, in all other respects, it would be proper to make an order. Mr. Chu set the parameters of the appeal, making a significant challenge to the whole basis on which the finding of misconduct was reached by SFC. He instructed leading counsel himself, and commissioned an expert to give evidence. The SFC was entirely justified in its response to the scope of the application for review.

Conclusion:

16. Having regard to all the foregoing factors we are satisfied that the order nisi, that Mr. Chu should pay two thirds of the costs of the SFC, with a certificate for two counsel, is a proper order. Indeed, in the light of the authorities cited by Mr. Beresford, an order that he should pay only two thirds of costs was generous.

17. The order nisi will be made absolute.

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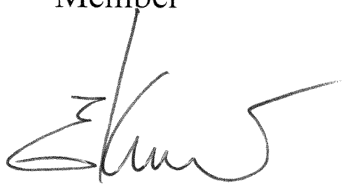
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John Saunders
Judge of the Court of First Instance
High Court
Chairman



Mr Chan Kam Wing, Clement
Member



Mr Kwan Pak Chung, Edward
Member

Ms. Rachel Lam, Counsel, instructed by Messrs Hastings & Co for the Applicant

Mr. Roger Beresford, instructed by the Securities and Futures Commission for the Respondent