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Application No. 2 of 2010

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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 &  
198 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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TSIEN PAK CHEONG, DAVID

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, Ms Chan Yuen Fan, Florence, and Mr Tsang Sui  
Cheong, Frederick,

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Date of Hearing: 17 December 2010

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Date of Decision: 18 February 2011

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## DECISION ON COSTS

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1. On 23 September 2010, we heard an application for review by the Applicant in which he challenged a penalty imposed by the SFC, subsequent to a finding by the Market Misconduct Tribunal that he had engaged in insider dealing.

2. In its Notice of Proposed Disciplinary Action (NPDA), issued to the Applicant on 21 October 2009, the SFC proposed prohibiting him for life from undertaking certain regulated activities. Following submissions made by the Applicant, on 27 January 2010, by a Notice of Final Decision (NFD), the SFC confirmed that penalty.

3. Having heard from counsel for the SFC and the Applicant's solicitor, the tribunal upheld the application for review and set aside the order prohibiting the Applicant for life. In its place an order was made that the Applicant be prohibited from undertaking the certain regulated activities for a period of 10 years.

4. The Applicant now seeks costs consequent upon what Mr Rogers describes, correctly in our view, as a successful application for review.

5. Mr. Beresford submitted that there should be no order as to costs because the Applicant sought at the hearing a reduction of the penalty to two years, a submission that failed. While being obliged to accept that

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the penalty had been reduced, Mr. Beresford said that in reality there was no winner.

6. In its decision in Application 1/2009, *Chu Kwok Shing, Goodwin v SFC*, the Tribunal dealt with issues of costs in cases where the challenge failed entirely, and in cases in which a challenge to a finding of misconduct failed. Although recognising a third category, cases in which the finding of misconduct was not challenged, but the challenge to penalty succeeded, resulting in a variation on penalty, the Tribunal did not deal with that category of cases.

7. We have reached the conclusion that where there is no challenge to a finding of misconduct, and a challenge to penalty succeeds, it is open to the Tribunal to award costs against the SFC, and that save in exceptional circumstances, a costs order would normally be made.

8. A review of previous decisions of this Tribunal, in circumstances where an application for review of penalty succeeds, demonstrates that there are occasions where an applicant for review, who was represented in the application, may be awarded his costs against the SFC. In Application 5/2004, *Korner v SFC*, 23 July 2004, the successful applicant, having had a penalty substantially reduced, was awarded his costs. In application 4/2007, *Lee Ming On Paul v SFC*, 9 November 2007, a prohibition for life was reduced to 18 months, but an application for review of findings rejected. The applicant was awarded 50% of his costs.

9. It is important to remember when considering questions of costs, an award of costs to a successful party is not designed to punish the

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unsuccessful party for taking the stand that it did in the proceedings. An award of costs is intended to compensate a successful party in respect of the cost that he has occurred in his successful proceedings.

10. The Applicant succeeded in a significant reduction in the penalty. It is right that the submission by his counsel that the penalty should be reduced to 2 years was rejected, but that does not diminish the fact of success of the application. A very substantial penalty, that of a life prohibition, was reduced to 10 years.

11. In the whole of those circumstances we are satisfied that the Applicant should be compensated by an award of costs in his favour. We accordingly order that the SFC must pay the Applicant's costs of the application for review, to be taxed on a party and party basis.

John Saunders J  
Chairman

Ms Florence Y F Chan  
Member

Mr Frederick S C Tsang  
Member

Mr. Martin Rodgers of Clifford Chance for the Applicant

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