Application No. 5 of 2022

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF the Decision made by the Securities and Futures Commission under section 208 of the Securities and Futures Ordinance, Cap. 571

AND IN THE MATTER OF section 217 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

LAI KWOK KWONG	Applicant
and	
SECURITIES AND FUTURES COMMISSION	Respondent

Tribunal: Mr Michael Hartmann, Chairman

Date of Ruling: 13 March 2023

RULING ON COSTS

The history of the proceedings

1. At all material times, the Applicant in this matter, Lai Kwok Kwong, held substantial cash and securities with a corporation licensed under the Securities and Futures Ordinance ('the Ordinance'). The name of that licensed corporation was Get Nice Securities Ltd ('Get Nice').

2. On 1 November 2021, the Securities and Futures Commission ('the SFC') served a notice on Get Nice pursuant to the provisions of sections 204 and 205 of the Ordinance prohibiting it from dealing with the assets of certain clients including the Applicant. The result was that, while the notice remained in force, the Applicant was prevented from withdrawing his assets from Get Nice.

3. Section 207 of the Ordinance sets out the circumstances in which the SFC may impose prohibitions pursuant to the provisions of sections 204 and 205; for example, when it appears to the SFC that it is desirable in the interests of the investing public or indeed in the public interest generally: in this regard see section 207(e).

4. In the present case, in the statement of reasons set out by the SFC in its notice of prohibition, it was said that evidence obtained by the SFC suggested that a group of traders, including the Applicant, may have acted in concert in a pre-arranged manner to conduct manipulative trading and/or to participate in a deceptive scheme in respect of certain shares and in the result, so it was stated, the SFC had reason to suspect that false trading, price rigging and or stock market manipulation within the meaning of sections 274, 275 and 278 of the Ordinance, may have taken place.

5. By letter dated 22 November 2021 addressed to the SFC, the Applicant's legal representatives sought a setting aside of the prohibition in so far as it affected the Applicant.

6. The application to set aside the prohibition was founded on the assertion that the SFC had misinterpreted the nature and extent of its powers under section 207 of the Ordinance. It was asserted that, on a proper reading of section 207, powers of prohibition were only to be exercised against licensed corporations themselves and not against the clients of those corporations, that is, persons such as the Applicant who chose to invest with them. That being the case, as Get Nice itself was not suspected of culpability under section 207, there was no basis in law for the service of the prohibition order.

7. As it was said on behalf of the Applicant in the letter of 22 November 2021, section 207 did not provide the SFC -

> "... with the unrestricted power and authority to impose prohibitions and/or requirements when there is no suspicion of misfeasance and/or misconduct on the part of licensed corporations ."

8. In short, the assertion made by the Applicant's legal representatives was that, in the circumstances, the issue of the prohibition notice by the SFC had been *ultra vires* and therefore of no force or effect.

9. It took the SFC the better part of a year to consider the challenge. Thereafter, in terms of a notice dated 22 August 2022 ('the refusal notice'), the SFC informed the Applicant that the request made to set aside the original notice of prohibition was refused and in the circumstances the prohibition on the release of the funds would remain in force.

10. In its reasons attached to its notice of 22 August 2022, the SFC rejected any suggestion that it had acted *ultra vires*, that is, above its powers, the following being said –

> Having considered the legislative purpose of sections 204 and 205 of the SFO [the Ordinance], the Commission is of the view that its power of intervention under Part X, Division 1 of the SFO was to enable it to take immediate action to protect the interests of the investing public generally as well as those of a licensed person's clients and creditors. The Commission is further of the view that sections 204, 205 and 207 (e) of the SFO, are

> clearly intended to encompass the situation where it is the client of a licensed corporation (as opposed to the licensed corporation itself) that is suspected of having committed market misconduct or regulatory offences under the SFO.

11. Of central relevance is the fact that the reasons continued with the following statement –

> The Commission's views are supported by the recent decision of the Securities and Futures Appeals Tribunal dated 25 April 2022 (*Leung Yuk Kit v Securities and Futures Commission*).

12. In response to the rejection notice ('the rejection notice of August 2022'), an application for review was lodged by the Applicant with this Tribunal on 9 September 2022. The essential basis of the application for review remained the assertion that the SFC, in issuing its notice of prohibition, and later refusing to withdraw that notice, had acted *ultra vires*.

13. On 26 September 2022, a directions hearing was held before this Tribunal. At the hearing, counsel for the Applicant, Mr Andrew Lam, accepted of course that he was aware of the earlier judgment of the Tribunal in *Leung Yuk Kit v Securities and Futures Commission*[1]. It was accepted by Mr Lam that this judgment, which had not been appealed, did not support the Applicant's case. It was submitted on behalf of the Applicant, however, that this judgment, although persuasive, was not binding and, in addition, further arguments were to be advanced which would show that this earlier determination had been incorrect in law or was distinguishable.

14. Following this disclosure, at the same directions hearing, leading counsel for the SFC, Mr Norman Nip, informed the Tribunal that earlier that same day – that is, on 26 September 2022 - a judgment had been handed down in the Court of First Instance which, on its face, was also of direct relevance and in which, so it appeared, *Leung Yuk Kit* had been cited with approval.

---

[1] Application No. 4 of 2021.

15. This new judgment - the judge being Coleman J - was *Tam Sze Leung (and two others) v Secretary for Justice and the Securities and Futures Commission (HCAL* 177/2022[2]). The SFC had been a party to these proceedings.

16. Obviously, with the judgment of the Court of First Instance in *Tam Sze Leung* handed down just that morning, there was no opportunity at the directions hearing to consider its ramifications.

17. However, by letter dated 16 November 2022, the legal representatives of the Applicant informed the Tribunal that, having considered Coleman J's judgment in *Tam Sze Leung*, the decision had been made to withdraw the application for review.

18. The Tribunal was at the same time informed that attempts had been made – but without success - to agree the issue of costs. In respect of that issue, it was the Applicant's contention that, in the particular circumstances of the case, an equitable order would be one in which both parties met their own costs: an order, therefore, that there be no order as to costs.

19. Contrary to this, it was the contention of the Respondent, that is, the SFC, that, in light of the fact that the Applicant had discontinued the proceedings, the order should be one in terms of which the Applicant was ordered to pay costs.

20. Accordingly, with the parties unable to agree costs, a direction was made that the issue of costs would be determined by the Tribunal on the basis of written submissions.

---

[2] The other citation is [2022] HKCFI 2330.

Relevant legal principles

21. Concerning the applicable legal principles, there does not appear to be any dispute. It is more a question of how those principles are to be applied in the present instance.

22. Section 223 of the Ordinance gives to this Tribunal the power to make an award for costs in respect of an application for review and, in exercising that power, to award such sum as it considers appropriate in the circumstances.

23. The starting point in relation to costs arising out of a discontinuance is to the following effect; namely, that, where a party withdraws or discontinues an action, there is a presumption that the defendant should be entitled to recover his costs, the burden being on the plaintiff in the action (the party who has discontinued the proceedings) to show good cause for departing from that position.

24. The governing principles have been summarised in the judgment of Moore-Bick LJ in the English Court of Appeal in *Brookes v HSBC Bank Plc*[3], those principles being adopted by Le Pichon DJ (as she then was) in the Hong Kong Court of First Instance in *Re China Solar Energy Holdings Ltd*[4].

25. The governing principles which are of most direct relevance in the present matter are contained in paragraph 17 of the judgment of Le Pichon DJ and are cited as follows…

> (4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
>
> (5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

---

[3] [2011] EWCA Civ 354.
[4] [2016] HKEC 487.

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.

26. In the present case, therefore, following the established principles, if the Applicant is to avoid an order for costs being made against him, he must demonstrate some form of unreasonable conduct on the part of the SFC of sufficient gravity to justify the Tribunal in departing from the rule.

The Applicant's case

27. As to this unreasonable conduct, it is the Applicant's case that it is to be found in the fact that, in its notice of rejection of August 2022, while the SFC did make mention of the judgment of the Tribunal in *Leung Yeung Kit*, it failed to make mention of the fact that, in addition, it was an involved party in judicial review proceedings in the matter of *Tam Sze Leung* which, although not yet determined, had been heard before the Court of Instance (on 28 and 29 July 2022) with a judgment pending.

28. It was submitted that no mention at all had been made by the SFC concerning the outstanding judgment in the *Tam Sze Leung* judicial review proceedings even though those proceedings were directly relevant to the SFC's interpretation of its powers under sections 204, 205 and 207 of the Ordinance. As it was put in the Applicant's written submissions:

> There was no mention at all about the fact that the SFC's broad interpretation of the 'restriction notice' regime was subjected to judicial review with a judgment pending when the SFC's decision [its rejection notice] was issued.

29. It was the Applicant's submission that, if the SFC had informed him of the pending judgment, he would have applied to the Tribunal for an extension of time within which to file his application for review, allowing him time to consider that judgment before deciding whether to proceed further or withdraw his application.

30. As it was further put on behalf of the Applicant:

> The *Tam Sze Leung* judgment [when it was handed down by the Court of First Instance] radically narrowed down the scope of the arguments available to the Applicant in advancing his application.

31. In light of this, so it was submitted, once the legal ramifications of the judgment in the *Tam Sze Leung* judicial review had been considered, the Applicant's legal representatives sought to discontinue the action, doing so not on the basis that it was in any way entitled to costs itself but on the basis simply that there be no order as to the costs of and incidental to its application.

32. In support of the Applicant's case, reference was made to *Re Peaktop Technologies (USA) Hong Kong Ltd.*[5] In which Barma J (as he then was) said:

> Further, it seems to me that where an Applicant's application is doomed to failure by reason not of anything which he has done or not done, but because of an act of the Respondent which is within its control and out of the hands of the Applicant and is, further, a step which could have been taken either prior to the application being made or at an earlier stage in the application so as either to obviate the possibility of the application being made, or to minimise the costs associated with it, it may well be appropriate to recognise this by an appropriate costs order.

- *Examining the nature of the SFC's asserted unreasonable conduct*

33. In *Leung Yuk Kit*, this Tribunal was required to consider whether restrictions could be placed on funds lodged by a client with a licensed corporation if the licensed corporation itself was not suspected of market misconduct but only the client. This Tribunal determined the matter in the affirmative: yes, the funds could be restricted even though there was no allegation of wrongdoing made against the licensed corporation itself.

34. The Applicant's challenge, before it was withdrawn, was made in full knowledge of the findings in *Leung Yuk Kit* and was effectively to the same effect.

---

[5] [2007] 4 HKLRD 207 (para 8).

As mentioned earlier, it was the Applicant's case that *Leung Yuk Kit* was either wrong in law or distinguishable.

35. In *Tam Sze Leung*, however, Coleman J, in the Court of First Instance, was asked to determine a more fundamental issue, namely, whether the 'restriction notice' regime under sections under 204 and 205 of the Ordinance was constitutionally valid.

36. As it was, Coleman J held that the 'restriction notice' regime was constitutionally valid.

37. In written submissions as to the question of costs, counsel for the SFC emphasised that the key issues in *Leung Yuk Kit* and *Tam Sze Leung* had been "wholly different" and that, of course, is correct. But equally, the decision in *Tam Sze Leung*, going to the fundamental constitutional validity of all the relevant provisions, encompassed also, if not the nature of the challenge made by the Applicant, certainly the result sought by him, namely, a finding that his funds were being unlawfully held and should be returned. On that basis, the possible outcome of the court's judgment in *Tam Sze Leung* was of relevance to the Applicant when he filed his application for review.

38. The core issue, of course, is whether, in the circumstances, that possible outcome placed some form of burden on the SFC, presumably founded on the requirements of professional conduct, to inform the Applicant in its notice of rejection of the proceedings before the Court of First Instance in *Tam Sze Leung* and the issues that were awaiting determination in that matter.

39. In considering the issue, a number of contextual matters need to be taken into account.

40. Fundamentally, it was not argued on behalf of the Applicant that the SFC was under a duty in law to make disclosure; no such duty was ever identified.

The Applicant's case was founded on the allegation that in the circumstances of this particular matter the SFC had acted unreasonably.

41. Concerning the particular circumstances of this matter, it is to be noted that when the SFC spoke of the *Leung Yuk Kit* matter in its rejection notice, it was speaking of a judgment already handed down, a judgment which had not been appealed and which the SFC contended supported its position. In short, it was speaking of recent but established jurisprudence.

42. By contrast, in respect of the *Tam Sze Leung* matter, when the rejection notice was issued, although a court hearing had taken place, there was as yet no judgment. Nor were the issues still under consideration a mirror of the issues raised by the Applicant. How the issues in contention would be dealt with by the court in its judgment (when it was handed down) was uncertain and the result itself was uncertain.

43. At best, therefore, if any disclosure was made, the Applicant could have expected nothing more than a statement from the SFC that there were proceedings underway before the Court of First Instance challenging the constitutional validity of the relevant provisions in the Ordinance.

44. Second, nothing was put before the Tribunal to suggest that in the circumstances of this particular matter the SFC had been placed under some form of obligation to divulge ongoing, and therefore uncertain, litigation proceedings. For example, nothing was put before the Tribunal to suggest that the Applicant had made particular enquiries of the SFC. .

The Tribunal's decision

45. In all the circumstances, the Tribunal fails to see how it can be said that the SFC was culpable of unreasonable conduct by failing to inform the Applicant - at a time when the SFC could not know that the Applicant would himself even institute proceedings - that, in addition to the established jurisprudence

mentioned in the rejection notice, there were proceedings in process, proceedings as yet undecided, which may be relevant.

46. The Tribunal is unable to accept that, outside of any particular set of circumstances creating a specific obligation, any form of blanket obligation of the kind suggested by the Applicant rests on the shoulders of an administrative body.

47. Accordingly, the Tribunal is satisfied that no good reason has been shown to depart from the general rule that the Applicant should bear the costs of his discontinuance of these proceedings. The Applicant is ordered to pay those costs in full.

Miscellaneous matters

48. On behalf of the SFC, it has been submitted that, as these proceedings have not been substantial nature, it would be in the general interest to conduct a gross sum assessment of the costs. In the view of the Tribunal, this is clearly the best way forward, saving costs for both parties. Accordingly, it is directed that the SFC will submit a skeletal bill within 14 days of the date of this ruling, the Applicant being granted a further 14 days within which to reply. There will be no need for an oral hearing. Thereafter, this Tribunal will make its determination on paper.

49. On behalf of the Applicant, it has been proposed that the costs payable by him should be paid out of his funds frozen by the SFC. This proposal has been opposed by the SFC.

50. As it was put on behalf of the SFC, the monies that have been frozen are suspected to relate to an illicit scheme which is still under investigation. The funds should remain frozen until that investigation is completed. Should proceedings be instituted by the SFC upon completion of its investigation, it will likely seek an order that the funds be utilised to compensate investors who have suffered as a result of the illicit activity (a form of activity commonly described as a 'ramp and dump' scheme).

51. The Tribunal is satisfied that at this moment in time all of the funds should remain frozen, this being in the public interest. An order is made to that effect.

Mr Michael Hartmann
(Chairman)

Lam & Co.
for the Applicant

Securities and Futures Commission - Respondent