

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF the Decisions made by the Securities and Futures Commission under sections 204, 205 and 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

MS LEUNG YUK KIT

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Mr Ian Charles McWalters, Chairman

Date of Ruling: 27 June 2022

DECISION ON COSTS

A 1. The applicant applied to review a decision of the SFC in which
B the SFC effectively froze the account that the applicant maintained with a
C licensed corporation. The applicant argued, as a preliminary legal point, that
D the SFC had no statutory power to do as it did.

E 2. The legal issues in this preliminary legal point and the questions
F of statutory interpretation which it raised are all set out in my Ruling dated
G 25 April 2022. That Ruling was adverse to the applicant and consequently the
H applicant withdrew her application for review. Thereupon, the SFC applied
I for its costs in relation to the application for review, with a certificate for two
J counsel, to be taxed if not agreed.

K 3. The applicant resists the SFC's application for costs, arguing that
L it is neither fair nor reasonable for her to be ordered to pay the SFC's costs.
M Her reasons for so arguing are:

N (i) the review was not one without any substance or merits;

O (ii) the preliminary legal point had a public interest litigation element
P to it and was reasonably arguable with a realistic prospect of
Q success;

R (iii) there is an enormous disparity of resources between the SFC and
S the applicant;

T (iv) members of the public will be deterred from applying for a
U review;

V (v) the need for a review could have been avoided by the SFC had it

A alerted the public in 2016 that it was, henceforth going to make
B use of sections 204 and 205 in the way it did in this case; and

C (vi) the applicant pursued the review in an entirely reasonable manner.
D

E 4. The position of the SFC is quite a straightforward one; namely
F costs follow the event when a party withdraws or discontinues an action and
G good reason must be shown for departing from this principle. None of the
H reasons advanced by the applicant constitute a proper basis for departing from
I this general principle. In this respect the SFC relies on the summary of legal
J principles contained in *Brookes v HSBC plc* [2011] EWCA Civ 354.

K 5. I accept that the presumption is that the SFC should recover its
L costs and that the applicant bears the burden of showing good reason for
M departing from that position. The only issue is whether it has done so in the
N different reasons on which it relies or whether, cumulatively, it can be said
O that those reasons provide a basis for me to form the view that the justice
P of the case warrants a departure from the norm as it would not be fair or
Q reasonable to order the applicant to pay the SFC's costs.

R 6. The starting point is to recognize that the Tribunal did not embark
S upon a consideration of the factual merits of the review. That did not happen
T because the applicant withdrew her application after receiving an adverse
U ruling on a legal point which, had it succeeded, would have resulted in the
V review succeeding as the SFC's actions would have been deprived of any legal
basis.

7. I accept that the legal point, and the arguments on which it was
based, had merit and was reasonably arguable. I also accept that it is an


A important point to both the SFC and the public and that my ruling in so far as
B it remains unchallenged, clarifies the operation of certain statutory provisions
C in the SFO and the powers of the SFC.

D 8. But, does that provide a basis for departing from the presumption
E that costs follow the event? I am not persuaded it does. Parties to litigation
F frequently take legal points to benefit their interests and frequently those legal
G points will be founded on a reasonable legal basis with reasonable arguments
H underlying them and frequently the consequence of taking those points may
I be to clarify an important area of the law, thus providing a benefit to others
J outside of the litigation. As the SFC points out, this is not a judicial review
K and the legal principles applicable to public interest litigation in the public law
L field do not apply to the applicant's case which is solely based on private law
M commercial interests.

N 9. That being so, I am not persuaded that any of the matters
O advanced by the applicant, either singly or cumulatively, provide good reasons
P for me departing from the presumption. Nor do they constitute a reason for
Q me finding that it would be unfair or unreasonable to order the applicant to
R pay the SFC's costs, so that the justice of the case would require a departure
S from the presumption.

T 10. I order that the applicant pays the respondent's costs of the
U application with a certificate for two counsel, to be taxed if not agreed.
V




Ian Charles McWalters
(Chairman)