

**IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL**

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IN THE MATTER OF a Decision made by the  
Securities and Futures Commission under  
section 194 of the Securities and Futures  
Ordinance, Cap. 571

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

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BETWEEN

ADAMAS ASSET MANAGEMENT (HK) LIMITED

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

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Tribunal: Mr. Michael Lunn, Chairman

Date of Determination: 20 December 2019

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DECISION ON COSTS

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1. By a Notice of Application for Review, dated 11 September 2019, the Applicant commenced these proceedings. Following a directions hearing on 9 October 2019, the Applicant filed an Amended Notice of Application for Review, dated 30 October 2019. By an order, dated 5 November 2019, the Tribunal fixed the hearing of the application on 24 to 28 February 2020 inclusive and gave related procedural directions.

2. By a letter dated 2 December 2019, to which was attached a Notice of Discontinuance, solicitors representing the Applicant informed the Tribunal that the Applicant wished to discontinue the application and invited the Tribunal to make an order that the application be dismissed with “no order as to costs.”

3. In submissions dated 10 December 2019, counsel for the Securities and Futures Commission (“SFC”) invited the Tribunal to dismiss the application, but order that the Applicant “pay the costs of the Application to the Commission.”

4. In submissions filed with the Tribunal on 18 December 2019, the solicitors for the Applicant reiterated their request that the application be dismissed with no order as to costs.

*The Applicant’s submissions*

5. In the Applicant’s solicitors letter, dated 2 December 2019, complaint was made of the “manner in which this investigation has been conducted and the long period of time taken to conclude it”, in consequence of which it was asserted that “the investigation has materially affected every aspect of our client’s business, from fundraising to portfolio management to securing investment deals.”

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6. Of the length of the investigation and delay, having noted that the investigation into the Applicant began in October 2014, complaint was made that:

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“...the SFC issued 57 section 183 notices to produce information and documents. It conducted 11 interviews. Three individuals were interviewed twice. Between March 2018, when Adamas submitted its representations in response to the SFC’s Notice of Proposed Disciplinary Action, and June 2019, when the SFC issued its response to Adamas’ representations, the matter was left in abeyance by the SFC for some 17 months.”

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*The SFC’s submissions*

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7. For the SFC, Ms. Bonnie YK Cheng submitted that where a party withdraws or discontinues an action the general rule is that he has to pay the costs of the other party.<sup>1</sup> She said that the applicable principles were those articulated in the judgment of the Court of Appeal of England and Wales in *Brookes v HSBC plc*, cited with approval in judgments of the Court of First Instance.<sup>2</sup> She contended that no good reasons had been advanced to depart from those principles: the scope and duration of the investigation was necessitated by the circumstances of the case; the Applicant had failed to file 339 disclosure of interests forms accurately and/or to timeously over an overall period of three years; the Amended Notice of Application for Review did not challenge determinations of liability, rather they are addressed the appropriateness of the pecuniary penalty; no legal costs would have been incurred by the Applicant in the period of 17 months from the submission of representations to the service of the SFC’s Decision Notice, dated 31 July 2019; there had been no change of circumstances caused by the respondent.

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<sup>1</sup> *Re China Solar Energy Holdings Limited* (HCCW 108/2015; unreported, 1 March 2016.)

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<sup>2</sup> *Re China Solar Energy Holdings Limited*, paragraph 17; *Re Smart Land Investment Limited* (HCCW 96/2016; unreported, 30 April 2018) paragraph 11.

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*The Applicant’s submissions in reply*

8. In the Applicant’s Submissions in Reply, it was contended that “the discontinuance of the Application was necessitated by a change in circumstances since the commencement of the Application which was unforeseen, and which the Applicant did not contribute to.” That was a reference to the abandonment of a proposed investment with a fund managed by the Applicant by a Korean investor. It was contended that in consequence “the Applicant was left with insufficient additional revenue to fund unbudgeted business expenses, such as the Application.” Secondly, it was submitted that the Respondent had cited no reasons for the order it sought, other than relying on the general principle that a party who discontinued proceedings that he had begun ought to bear the costs. Thirdly, it was contended that it was not plain that the application would have failed. Fourthly, reiterating complaints as to the manner and length of the investigation and the delay in making the determination in the Decision Notice, it was contended that the Respondent’s alleged conduct was relevant to a consideration of the exercise of the Tribunal’s discretion in costs, albeit that the Applicant acknowledged no legal costs had been incurred by the Applicant in the period of 17 months from the submission of representations by the Applicant to the service of the SFC’s Decision Notice.

*Discussion*

9. Section 223 of the Securities and Futures Ordinance, Cap. 571 (see “Ordinance”) provides that:

- (1) the Tribunal may, in relation to a review, by order award to-
  - (a)...
    - (b) any party to the review,
      - such sum as it considers appropriate in respect of the costs reasonably incurred by the person or the party (as the case may be) in relation to the review of the application for review in question.

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10. The principles relevant to the award of costs on the discontinuance of action begun by a party approved of by the Court of Appeal in *Brookes v HSBC plc*, cited with approval in Hong Kong, are:

- (1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
- (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
- (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
- (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;
- (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.

11. In his judgment in *Re Smart Land Investment Limited*, Lam J said:<sup>3</sup>

“The court has a very broad discretion on the matter of costs. The general rule or starting point is that an applicant who has given up as application by withdrawing it has to pay the costs of the respondent unless there is a good reason for a different order to be made.”

12. The unanticipated financial circumstances that the Applicant apparently now finds itself in due to the conduct of a third party is no such good reason.

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<sup>3</sup> *Re Smart Land Investment Limited*, paragraph 7.

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13. It is readily apparent from the very detailed description of the SFC's investigation contained in the Notice of Proposed Disciplinary Action (17 pages) that the material obtained and considered was voluminous and of some complexity. In response, the Applicant's solicitors filed very lengthy written submissions (over 19,000 words in 35 pages), in which, *inter alia*, it was asserted that:

- the Commission had "misstated" the Applicant's systems and controls for monitoring and reporting notifiable interests in Hong Kong and the Applicant had in place such systems;
- the proposed disciplinary action was disproportionate and unreasonably punitive, in that it was not appropriate to find the Applicant culpable of "misconduct", contrary to section 193 of the Ordinance; the proposed disciplinary action was inconsistent with the action taken in previous similar cases and would significantly affect the Applicant's business and future fund-raising activities;
- the Commission had failed to consider as mitigating circumstances that the application of Part XV of the Ordinance to the Applicant's dealings was complex and unclear and provided a reasonable excuse for why other disclosures will not be made as required and/or timeously and the remedial measures taken by the Applicant;

14. It is clear that the very considerable length of the Decision Notice (43 pages) is, in very large part, due to the fact that the SFC considered it necessary to identify, analyse and ultimately refute *seriatim* the multiple submissions made on behalf of the Applicant in their written submissions.

15. Although ultimately the limited ambit of the review, as identified in the Amended Notice of Application for Review, was to invite this Tribunal to reduce the pecuniary penalty from HK\$2.5 million to HK\$1.8 million, nevertheless the Amended Notice extended to no less than 14 pages.

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16. The simple and central issue relevant to an order of costs is the fact that the Applicant now seeks to discontinue the Application for Review, two and a half months after having commenced those proceedings. No good reason has been advanced as to why the Applicant should not bear the costs of the Respondent for these proceedings.

*Conclusion*

17. In the result, I grant the Applicant leave to discontinue the Application for Review, but order that the Applicant pay the costs of the Respondent for these proceedings, to be taxed if not agreed.



(Mr. Michael Lunn)

Chairman, Securities and Futures Appeals Tribunal

Proskauer Rose, Solicitors for the Applicant

Ms. Bonnie YK Cheng, instructed by SFC  
for the Respondent