

**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,

And

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

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BETWEEN

YAN KWOK TING SUNNY

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

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Before: Chairman, Hon Saunders J,

Date of Applicant's Written Submissions: 3 November 2011

Date of Respondent's Written Submissions: 18 November 2011

Date of Decision: 1 December 2011

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DECISION ON COSTS

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1. On 7 October 2011, I handed down a decision on the merits of Mr Yan's application for review in these proceedings. The application was heard at the same time as that of Mr Wan Ten Lok, an applicant for review in Application 8/2009. Both applications were dismissed and an order nisi made that the Applicants should jointly and severally pay the costs of the applications for review on an indemnity basis.

2. Mr Yan now seeks to vary the order nisi on the following grounds:

- (i) there was no special or unusual feature, and a costs order should be on the usual party and party basis; and
- (ii) relatively less time had been taken dealing with Mr Yan's case and it would be therefore fair to apportion costs relative to the time taken by the respective applications.

3. Two issues therefore arise. First the question of whether or not this was a case for indemnity costs, and second an examination of the time issue.

4. Counsel for the SFC accepts that the successful party should show that the case has some special or unusual feature in order to obtain an

order for costs on an indemnity basis: see *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 114. In that decision, the CFA confirmed that the discretion to award indemnity costs is “unfettered and uncircumscribed”.

5. Counsel for Mr Yan refers me to the following passage from a decision of Kirby P in *Walton v McBride* [1995] 36 NSWLR 440:

“Where indemnity costs are available by law, it is usual to confine their provision to cases where the body so empowered to order costs ultimately comes to the conclusion that it must mark its disapproval for wrongful conduct by departing from the ordinary principle of costs and relieving the ‘innocent’ party of the burden of costs inflicted by the wrongful action of the losing party: see *Colgate-Palmolive Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225 at 227, citing *Fountain Selected Meats (Sales) Pty Ltd* (at 400f). Indemnity costs may be ordered where a hearing is prolonged by deliberately false allegations of fact. Mere prolongation without more will not ordinarily justify an award of indemnity costs: cf *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534 at 542; *Degmam Pty Ltd (In Liq) v Wright [No 2]* [1983] 2 NSWLR 354.”

6. However, counsel for the SFC correctly draws my attention particularly to the following passage from that citation:

“Indemnity costs may be ordered where a hearing is prolonged by deliberately false allegations of fact. Mere prolongation without more will not ordinarily justify an award of indemnity costs:”

7. The application for review was a case of forged documents.

8. The Court of Appeal, in affirming the decision of Lam J to order that the plaintiff was entitled to indemnity costs in *Chinachem Charitable*

*Foundation Ltd v Chan Chun Chuen* (unreported), 14 February 2011, CACV 62 & 101 of 2010, said:

“By far the most important point in relation to the costs in this case is that it would be scarcely imaginable that a court could do otherwise than order costs on an indemnity basis given the findings by the judge. It was proved that the first defendant knowingly put forward a forged will in the hope of securing for himself an immense fortune. In doing so he told lies. That must on any footing be an egregious abuse of process of and an affront to the court. Any other order than costs on an indemnity basis would be inconceivable.”

9. In these proceedings I found that Mr Wan assisted by Mr Yan deliberately fabricated documents designed to mislead the SFC and Tribunal. It may well be that Mr Yan was not himself engaged in the act of forgery. But in the whole of the circumstances, he must have known that the documents were forged. Plainly, Mr Yan, as well as Mr Wan, lied in the face of contemporaneous documents. Their conduct was compounded by the fact that they were blaming an innocent person.

10. My finding was that Mr Wan and Mr Yan had acted together. They both commenced and insisted on pursuing an unmeritorious application for review knowing they had produced forged documents and a false declaration. Their case was thoroughly dishonest.

11. I remain firmly of the view that this was a clear case for indemnity costs.

12. This is not a case in which the allocation of time in respect of the conduct of the cases of the two separate applicants is the basis on which costs should be ordered.

13. Mr Yan's conduct of his defence went well beyond a mere challenge to the validity of signatures. Mr Yan himself gave evidence that he had been present when Ms Carol Tsang Sze Man (Ms Tsang) gave the challenged documents to Mr Wan and assured Mr Wan of the integrity of the due diligence work. That was false evidence.

14. I accept the submission of counsel for the SFC that through his false declaration, Mr Yan assisted and relied upon Mr Wan's attempt to cast Ms Tsang as a scapegoat for Mr Wan's misconduct. They both commenced, and jointly insisted on pursuing, a completely unmeritorious application for review, based upon forged documents and a false declaration. It is right that the running of this case was left principally to Mr Wan's counsel, but the case advanced by Mr Wan was precisely the same as the case advanced by Mr Yan; they both said Ms Tsang was responsible for post listing and consequently responsible for the false documents.

15. Mr Yan called an expert witness to cast doubt on the signatures of Ms Tsang knowing full well that she had not signed the documents. That was egregious conduct. At the time Mr Yan made his false declaration that he was the source of the documents, he was fully aware that they did not come from the location as asserted by him.

16. I reject the proposition that there should be any division of the costs based on the time involved by each of the two Applicants.

17. The costs order is hereby made absolute.

A handwritten signature in black ink, appearing to read 'John Saunders', with a long horizontal flourish extending to the right.

(John Saunders)  
Chairman,  
Securities and Futures Appeals Tribunal  
Judge of the Court of First Instance  
High Court

Mr Adrian Bell SC and Mr Derek Chan, instructed by the Securities and Futures Commission

Mr Kevin Wong instructed by Messrs Lee & So, for Mr Sunny Yan Kwok Ting