

SFAT awards costs against the SFC

Case summary

In a recent decision by the Securities and Futures Appeal Tribunal (**SFAT**) in respect of an application for costs, SFAT No. 2 of 2010, the SFAT has determined that the applicant should be compensated by an award of costs in his favour against the Securities and Futures Commission (**SFC**), where the SFAT found, on an application for a review of the penalty (not findings of misconduct) that the SFC's proposed penalty was manifestly excessive, and the application was therefore successful.

The SFAT ordered that the SFC must pay the applicant's costs of the application for review, to be taxed on a party and party basis.

Background

On 8 July 2009, the Market Misconduct Tribunal (**MMT**) found the applicant guilty of insider dealing contrary to section 270(1)(c) of the Securities and Futures Ordinance, Cap. 571 (**SFO**). The MMT suspended his trading licence for nine months. On 27 January 2010, the SFC determined that the applicant was no longer a fit and proper person to be licensed. As a result of that finding, the SFC sought to impose a life ban on the applicant pursuant to section 194(1)(iv) of the SFO prohibiting the applicant from carrying out regulated activities.

The applicant appealed to the SFAT against the penalty imposed by the SFC. In his submissions in support of the application for review, the applicant emphasised that he did not seek in any way to challenge the findings of the MMT, but merely sought to give "*appropriate characterisation*" to his conduct as established by the findings of the MMT.

The applicant successfully argued that, the absence of personal gain in monetary terms on his part and the fact that his conduct was a one-off event, warranted a lesser penalty. The SFAT also accepted that "*within the concept of dishonesty, there is a range of activity which will attract different sentences*". The SFAT concluded that in terms of severity, this case fell towards the lower end of the range of cases of insider dealing.

Finally, the SFAT took into account the applicant's age and recognised that, when considering whether a person is likely to seek re-entry into the financial workforce, having regard to the fact that disciplinary proceedings are, in part, to protect the investing public, a modest period of prohibition will have a more significant impact on a middle-aged person than it will have on a young person. As the applicant was in his early 50s, any prohibition would be a substantial penalty and was likely to make it very difficult for the applicant to re-enter the workforce in the financial field.

The SFAT held that a life ban was "*manifestly excessive*" and it was set aside in place of a ten-year prohibition from carrying on regulated activities.

Key Issues

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Background

Application for a costs order against the SFC

If you would like to know more about the subjects covered in this publication or our services, please contact:

Martin Rogers +852 2826 2437

Cassandra Ng +852 2825 8987

Heather Ong +852 2826 3430

Clifford Chance, 28th Floor, Jardine House,
One Connaught Place, Hong Kong SAR

www.cliffordchance.com

Application for a costs order against the SFC

Upon the applicant's successful application for review, the applicant sought costs against the SFC. The SFAT agreed with the applicant's submission that a very substantial penalty, that of a life prohibition, was reduced to 10 years, making the application for review a successful one entitling the applicant to seek costs.

The SFAT held that where there is no challenge to a finding of misconduct, and a challenge to penalty succeeds, it is open for the SFAT to award costs against the SFC. It further pointed out that an award of costs to a successful party is not designed to punish the unsuccessful party for taking the stand that it did in the proceedings, but it is intended to compensate a successful party in respect of the costs he has incurred in his successful proceedings.

Clifford Chance represented the applicant in this case.

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