

HCMP 697/2022
[2022] HKCFI 2596

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 697 OF 2022**

IN THE MATTER of
Sections 87(1)(a), 87(9) & 88 of
Electoral Procedure (Chief
Executive Election) Regulation
(Cap 541J)

and

IN THE MATTER of the Chief
Executive Election held on 8 May
2022

and

IN THE MATTER of an
application made by LEE KA
CHIU JOHN (李家超) for relief
for election advertisements

BETWEEN

LEE KA CHIU JOHN (李家超) Applicant

and

SECRETARY FOR JUSTICE Respondent

Before: Hon Au-Yeung J in Court

Date of Hearing: 18 August 2022

Date of Judgment: 18 August 2022

J U D G M E N T

INTRODUCTION

1. The Applicant (“**Mr Lee**”) was a candidate and subsequently elected as the Chief Executive at the Election held on 8 May 2022 (“**the Election**”). He has failed to comply with section 87(1)(a) of the Regulation, in making late submission of 3 Consent of Support Forms (the “**Non-compliance**”), in breach of the Guidelines on Election-related Activities in respect of the Chief Executive Election (the “**Guidelines**”). Those Forms concerned 3 persons whose names and photos were featured in three election advertisements (“**EAs**”) published on 13, 17 and 18 April 2022 respectively. The 3 Consent of Support Forms were submitted on 21 April 2022, ie 2 or 3 working days (after deducting interim public holidays) after the deadline prescribed by the Electoral Affairs Commission (“**the Commission**”).

2. By an Originating summons filed on 7 June 2022, Mr Lee seeks relief under section 88 of the Electoral Procedure (Chief Executive Election) Regulation, Cap 541J (the “**Regulation**”), on the grounds of “inadvertence” and “absence of bad faith”.

3. The Respondent (“**SJ**”) does not contest the Application but makes submission to draw to the Court’s attention relevant facts and matters pertinent to the determination of the application.

4. The burden remains on Mr Lee to satisfy the Court that he has met the statutory requirements for the Court to grant relief under section 88 of the Regulation.

BREACH OF REQUIREMENTS FOR SUBMISSION OF EAs IN THE REGULATION AND GUIDELINES

5. Section 87(1)(a) and (2) of the Regulation require a candidate who publishes an (EA) to submit the advertisement and any information related to the advertisement required by the Commission to the Registration and Electoral Office (“**REO**”) by way of uploading onto REO’s Central Platform or Candidate’s Platform, or by hard copy to the Returning Officer, in the manner and within the time specified by the Commission.

6. Paragraph 18.16 of the Guidelines requires candidates to post the written consent for EAs onto the Candidate’s Platform or Central Platform, or by hard copy to the Returning Officer, in the manner as set out in paragraph 8.53 of the Guidelines and §1 of Appendix 4 of the Guidelines.

7. In conjunction with the Election, Mr Lee obtained the 3 Consent of Support Forms from Li Ching, Lam Chi-yuen and Fong Lik-sun.

8. There is no requirement in the Guidelines that consent of support forms should generally be submitted to the REO for public inspection within any timeframe. It is only when the consent of support is related to an EA that such consent of support form should be obtained before the publication of the EA and needs to be made available for public inspection within a prescribed timeframe after publication of the EA.

9. On the above bases, pursuant to section 87(1) of the Regulation, Mr Lee shall, in relation to the 3 Consent of Support Forms, comply with either section 87(2) or 87(3) by uploading, within 1 working day (ie any day other than a general holiday and Saturday) after the publication of the EAs, onto REO's Central Platform or Candidate's Platform; or by providing a hard copy to the Returning Officer.

10. On 21 April 2022, the Election Campaign Office of Mr Lee (the "**Campaign Office**") received a media enquiry regarding the absence of the 3 Consent of Support Forms for public inspection.

11. Upon receiving the enquiry, the Campaign Office retrieved the 3 Consent of Support Forms from amongst an approximately 800 forms. The 3 Consent of Support Forms were processed and immediately uploaded onto the Central Platform on the same day.

12. Upon discovery of the Non-compliance, Mr Lee promptly explained to the public through media that there was room for improvement in the working mechanism and that instructed that the matter be looked at urgently and immediate actions be taken to rectify the

situation so as to prevent any reoccurrence of similar incidents from then onwards.

13. A new mechanism was immediately put in place on the following day to ensure no recurrence of similar incidents and there was no recurrence.

14. Mr Lee had nevertheless failed to comply with the deadline in the 3 Consent of Support Forms were only uploaded onto the Central Platform on 21 April 2022, ie 2 to 3 working days after the deadline prescribed by the Commission.

15. Section 87(9) of the Regulation provides that any person who fails to comply with section 87(1) commits an offence and is liable to a fine at level 2 and to imprisonment for 6 months.

16. In this Application, Mr Lee seeks an order that he be excepted from the requirement under section 87(1)(a) of the Regulation and be relieved from the penalties under section 87(9) of the Regulation.

LEGAL PRINCIPLES

17. Section 88 of the Regulation provides that:

“(1) A person who publishes an election advertisement without complying with section 87(1)(a) or (4) may apply to the Court for an order under subsection (2).

(2) On the hearing of an application made under subsection (1), the Court may make an order excepting the act which would, but for the order, constitute an offence under subsection (9) of section 87, from the relevant requirement under that section, but only if the Court—

(a) is satisfied that—

(i) the non-compliance was due to inadvertence, an accidental miscalculation or any reasonable cause and was not due to bad faith; and

(ii) if the Court requires notice of the application to be given in Hong Kong, the notice has been given; and

(b) believes it to be just that the act be so excepted.”

18. The terms “inadvertence”, “any reasonable cause” and “not due to bad faith” appear in comparable legislation whereunder the Court is empowered to grant relief to:

(1) An applicant which publishes an EA without compliance with statute: section 106 of Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation, Cap 541D (“**EACR**”); and

(2) A candidate who fails to lodge an election return before the end of the permitted period under section 40 of Elections (Corrupt and Illegal Conduct) Ordinance, Cap 554 (“**ECICO**”).

19. As section 88 of the Regulation, section 106(1) and (2) of EACR and section 40(1) and (2) of ECICO all deal with a similar subject matter, namely, election-related matters, it is appropriate to consider the statutes *in pari materia*: see *Tang Ho Hei v Chan Po Mei* [2022] HKCA 799, at §§67-68 citing *HKSAR v Kwan Ka Hei* (2020) 23 HKCFAR 229, at §§47-49, which in turn cited *Bennion on Statutory Interpretation*:

“Two or more Acts may be described as in *pari materia* if:... they otherwise deal with the same subject matter on similar lines ... Acts that are in *pari materia* are sometimes described as forming a single code on a particular matter in the sense that they deal with the same or a similar subject matter and are to be

construed as one. They ‘are to be taken together as forming one system, and as interpreting and enforcing each other’. The principle underlying the treatment of Acts which are in *pari materia* is based on the idea that there is continuity of legislative approach and uniformity in the use of language.

...

‘Where there are different statutes in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other’.”

20. The principles for grant of relief as distilled from the authorities on the EACR and ECICO can be summarized as follows:

(1) Ignorance of the law is no defence. It is incumbent upon a candidate to familiarize himself with the election rules, and to ascertain the deadline for compliance. Compliance with the election rules is important. The solemnity and integrity of the election system and regime depends on it. *Man Fu Wan v Secretary for Justice* [2020] 4 HKLRD 153, §15, Keith Yeung J.

(2) Inadvertence suggests a lack of deliberateness. It means negligence or carelessness where the circumstances show an absence of bad faith. The evidence should show some reasonable excuse for the inadvertence and the negligence must not be of so gross a nature or so culpable as of itself to raise doubts concerning the good faith of the applicant. Negligence in this context does not have the precise meaning given to the word in the context of the tort of negligence: *Re Ho David*, [2022] 2 HKLRD 76, §§65 and 66, Coleman J; *Re Fan Gary Kwok Wai* (unrep., HCMP 1080/2013, 20 January 2014), §§7 to 8, Au-Yeung J.

(3) Identifying the inadvertence and lack of bad faith are two separate elements. The mere exclusion of one (bad faith) cannot automatically mean the satisfaction of the other (inadvertence). If an applicant has to show both inadvertence and the absence of bad faith, there must be room on the facts of any particular case for an applicant to demonstrate the absence of bad faith yet fail to show inadvertence. See *Re Ho David*, §§59(6) and 66.

(4) Where a deliberate decision has been made to exclude an item from an election return, the applicant may not avail himself of the “inadvertence” exception. It would be a conscious decision, albeit erroneous. However, the applicant may rely on the “any reasonable cause” exception. See *Re Fan Gary Kwok Wai*, §§7 to 8.

(5) “Any reasonable cause” must be other than (that is, in addition to) those causes identified in the other limbs of the section (such as inadvertence, accidental miscalculation). An act may be performed either reasonably or unreasonably, even if performed in good faith: *Re Ho David*, §67.

(6) The burden is on the applicant to prove that the pre-conditions for grant of relief are established on the evidence and that there was no bad faith on his part: *Re Fan Gary Kwok Wai*, §9.

21. For the present Application under section 88 of the Regulation (and section 106 of EACR), the Court has to believe that it is “just” that the act be excepted.

INADVERTENCE

22. Mr Lee himself was not aware of the Non-compliance. Ms Pauline Ng, one of his Election Expense Agents and Deputy Directors of his Campaign Office explained the circumstances giving rise to the Non-compliance. I give leave to file her latest 3rd affidavit dated 17 August 2022.

23. Staff members of the Campaign Office responsible for uploading EAs and the two PR contractors, namely Gagy Creative & Tech Ltd (“GC&T”) and TA Communications Ltd (“TA”), responsible for creating and publishing EAs, were aware of the 1-working-day requirement in respect of EAs in paragraph 9 above. The explanations for the Non-compliance can be summarized into (i) lack of direct and timely communication between GC&T and the EAs submission team of the Campaign Office, (ii) tight timeframes, (iii) limited manpower and (iv) workload.

24. With regard to communication problem: GC&T made conscious efforts to ensure that written consent of support had been obtained and believed the written consent would be uploaded once they were with the Campaign Office. On the other hand, the staff members of the Campaign Office had to rely on those who published the EAs (TA this case) to tell them who were involved in the EAs to be able to upload the consent of support forms onto the Central Platform. As the GC&T web publishing team and the Campaign Office’s EAs submission team were operating at 2 different locations, they had a lack of direct and timely communication between them. It thus gave rise to the failure to

upload the 3 Consent of Support Forms within the time limit.

25. With regard to tight timeframes: the electioneering work was carried on within a highly compressed timeframe due to the deferment of the Chief Executive Election and the absence of a complete list of Election Committee members before Mr Lee's candidacy was confirmed on 18 April 2022. Since there was no requirement that consent of support forms generally need to be submitted for public inspection within any certain timeframe, it was not unreasonable for staff (who was not aware of the need to process the consent forms earlier) to attend to other more urgent tasks before processing the consent of support forms.

26. With regard to limited manpower: the Administration Office of the Campaign Office was staffed by four full-time staff members. The processing, checking, data-entry and uploading of the returns on EAs, including the maintaining of a master list of the consent of support forms received, was carried out by a small team comprising one volunteer and an intern. These staff members had been working round the clock and over Sundays and public holidays to process documents, and priority was given to work which was subject to deadlines.

27. With regard to heavy workload: the Campaign Office had enormous workload over nominations, consent of support forms, EAs, arranging meetings and supporting electioneering work. In respect of the uploading of EAs and related information, within the 12-day period from 10 April 2022 to 21 April 2022, 963 consent forms and 237 returns on EAs were handled and uploaded onto the Central Platform. The 3 Consent of Support Forms came into being in the first week of

operation of the campaign team when team members came together for the first time.

28. I am satisfied from the above explanation that this is not a case where someone turned a blind eye to legal requirements. Before the Non-compliance was discovered, about 800 Consent of Support Forms have already been processed without breach of the law. There was no reason to suggest that the Campaign Office singled out the 3 Consent of Support Forms for special treatment. After the Non-compliance was discovered, there were no other non-compliances. The whole course of conduct suggests that the Non-compliance was purely out of inadvertence in the midst of heavy workload, tight timeframes, limited manpower and lack of communication.

LACK OF BAD FAITH

29. After the Non-compliance was discovered, investigation for the cause was promptly made. The Non-compliance was remedied immediately on the same day that the media made the enquiry.

30. Mr Lee immediately explained to the media on the following day after the Non-compliance was discovered. He openly admitted that there was room for improvement and prompted action to rectify the Non-compliance.

31. A new checking mechanism concerning the uploading of consent of support forms was put in place on the following day, which precisely tackled the cause of the Non-compliance by improving the communication among staff members responsible for the Central

Platform and those responsible for the issue of EA posts. There was no similar non-compliance after that.

32. It was plain that no one had intended the Non-compliance to occur or re-occur. There was no bad faith involved.

WHETHER IT IS JUST TO GRANT RELIEF

33. The Non-compliance was caused by inadvertence. The inadvertence was not gross as to call in doubt the good faith of Mr Lee or the Campaign Office. Remedy of the Non-compliance was prompt. The delay in uploading was a relatively short one. There was no bad faith shown. No special advantage was gained by Mr Lee. In fact, his and Ms Pauline Ng's attitude was candid. I consider it just to grant the relief sought.

COSTS

34. Mr Lee is seeking indulgence. The established law is that an applicant should bear the costs of the SJ whose stance is neutral: *Lau Chak Fung v Secretary for Justice* [2022] 2 HKLRD 768, at §48, Coleman J. Mr Lee does not object. Such costs are summarily assessed at \$64,289.00.

35. I thank counsel for their assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

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