

SUPREME COURT OF QUEENSLAND

CITATION: *Esther Sau Kuen Fung v Chung Shun Tam & Anor* [2011] QSC 68

PARTIES: **ESTHER SAU KUEN FUNG**
(applicant/cross respondent)
v
CHUNG SHUN TAM (AKA CAMERON TAM)
(first respondent/first cross applicant)
SHARON SAU FONG PUN (AKA SHARON PUN)
(second respondent/second cross applicant)

FILE NO/S: BS6756 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 April 2011

DELIVERED AT: Brisbane

HEARING DATE: 27 August 2010. Final submissions 7 December 2011.

JUDGE: Martin J

ORDER: 1. **That Stephen Kenneth Hartwell be appointed as costs assessor to carry out the costs assessment of the following:**

- a) **Work carried out between 10 November 2007 to 21 November 2007 pursuant to:**
 - i. **Davellin Lawyers Tax Invoice dated 27 November 2007; and**
 - ii. **Cost statement issued pursuant to Rule 705 of the Uniform Civil Procedure Rules 1999 Qld dated 20 May 2010; and**
 - iii. **Supreme Court Order dated 31 October 2007**
- b) **Works carried out between 8 March 2010 to 28 April 2010 pursuant to:**
 - i. **Davellin Lawyers Tax Invoice dated 22 May 2010;**
 - ii. **Costs Statement issued pursuant to Rule 705 of the Uniform Civil Procedure Rules 1999 Qld dated 20 May 2010; and**
 - iii. **Supreme Court Order dated 28**

April 2010

2. **Declare that Esther Sau Kuen Fung is a person who has frequently instituted and conducted vexatious proceedings in Australia within the meaning of those terms in s6 of the Vexatious Proceedings Act 2005 (Qld).**
3. **That Esther Sau Kuen Fung be restrained from instituting any proceedings in any Queensland Court (apart from an appeal in this proceeding) against Chung Hung Shun Tam (also known as Cameron Tam) and Sharon Sau Fong Pun (also known as Sharon Pun), without prior leave of a judge of the Trial Division of the Supreme Court of Queensland.**
4. **That all proceedings already instituted by Esther Sau Kuen Fung in any Queensland Court against Chung Hung Shun Tam (also known as Cameron Tam) and Sharon Sau Fong Pun (also known as Sharon Pun) be stayed unless and until leave to proceed is first obtained from a judge of the Trial Division of the Supreme Court of Queensland.**

CATCHWORDS: COSTS- APPOINTMENT OF A COSTS ASSESSOR - where applicant applied for appointment of costs assessor with respect to two costs statements - where respondent made no objection to appointment of costs assessor – whether rules 705 and 710 of *Uniform Civil Procedure Rules 1999* (Qld) complied with – whether costs assessor should be appointed

PROCEDURE- SUPREME COURT PROCEDURE- QUEENSLAND- JURISDICTION AND GENERALLY- GENERALLY- where applicant filed numerous applications- where applications lack reasonable grounds and repeat allegations already rejected by Court- where applicant does not comply with previous orders of Court- whether applicant is a person who has frequently instituted or conducted vexatious proceedings in Australia

Uniform Civil Procedure Rules 1999 (Qld), r 11, r 705, r 710
Vexatious Proceedings Act 2005 (Qld), s5, s6

Bhamjee v Forsdick [2004] 1 WLR 88

Brisbane City Council v Russell Gordon Haig Mathews [2006] QSC 025

National Australia Bank Ltd v Freeman [2006] QSC 86

Re Cameron [1996] 2 Qd R 218

Hambleton and Anor v Labaj [2010] QSC 124

COUNSEL: Applicant self-represented
J Cremin for the first respondent/first cross applicant and the second respondent/second cross applicant

SOLICITORS: Applicant self-represented
Davellin Lawyers for the first respondent/first cross applicant and the second respondent/second cross applicant

- [1] On 27 August 2010 I dismissed an application brought by the applicant/cross respondent (Ms Fung) in which she sought various orders with respect to:
- (a) The ownership of shares in Shiu Yuk Kwong Tam Pty Ltd, and
 - (b) The will of her late father.
- [2] The first and second respondents (Mr Tam and Ms Pun) brought a cross application seeking:
- (a) Security for costs,
 - (b) The appointment of a costs assessor, and
 - (c) An order under s 6 of the *Vexatious Proceedings Act 2005* (“the Act”).
- [3] I dismissed the application for security for costs. I reserved my decision on the other matters. Since then there have been further steps taken which are reflected in the following reasons.

Appointment of a costs assessor

- [4] Mr Tam and Ms Pun seek the appointment of Stephen Kenneth Hartwell as the costs assessor with respect to two costs statements. Ordinarily, this matter would be dealt with by the Registrar but, in the light of the other proceedings, it was referred to a judge.
- [5] Mr Tam and Ms Pun have satisfied the requirements of rules 705 and 710 of the *Uniform Civil Procedure Rules (Qld) 1999 (UCPR)*. No objection to the costs statements issued was made by Ms Fung. No relevant reason was advanced by her as to why such an order should not be made.
- [6] I will make an order appointing Mr Hartwell as costs assessor.

Order under the *Vexatious Proceedings Act 2005*

- [7] Mr Tam and Ms Pun seek leave under s 5(2) of the Act to bring an application for a vexatious proceedings order against Ms Fung. Mr Tam and Ms Pun each have a sufficient interest in the matter as both of them are respondents to all of Ms Fung’s many applications. I give them leave nunc pro tunc to bring this application.
- [8] Section 5 provides:
- “5 Applications for vexatious proceedings orders**
- (1) Any of the following persons may apply to the Court for a vexatious proceedings order in relation to a person mentioned in section 6(1)(a) or (b)—
 - (a) the Attorney-General;

- (b) the Crown solicitor;
 - (c) the registrar of the Court;
 - (d) a person against whom another person has instituted or conducted a vexatious proceeding;
 - (e) a person who has a sufficient interest in the matter.
- (2) An application may be made by a person mentioned in subsection (1)(d) or (e) only with the leave of the Court.”

[9] Section 6 sets out part of the test to be applied:

“6 Making vexatious proceedings orders

- (1) This section applies if the Court is satisfied that a person is—
 - (a) a person who has frequently instituted or conducted vexatious proceedings in Australia; or
 - (b) a person who, acting in concert with a person who is subject to a vexatious proceedings order or who is mentioned in paragraph (a), has instituted or conducted a vexatious proceeding in Australia.
- (2) The Court may make any or all of the following orders—
 - (a) an order staying all or part of any proceeding in Queensland already instituted by the person;
 - (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in Queensland;
 - (c) any other order the Court considers appropriate in relation to the person.”

[10] The following relevant terms are defined in the Act’s Dictionary.

“*proceeding* includes—

- (a) any cause, matter, action, suit, proceeding, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal; and
- (b) any proceeding, including any interlocutory proceeding, taken in connection with or incidental to a proceeding pending before a court or tribunal; and (c) any calling into question of a decision, whether or not a final decision, of a court or tribunal, and whether by appeal, challenge, review or in another way.

***proceedings of a particular type* includes—**

- (a) proceedings in relation to a particular matter; and
- (b) proceedings against a particular person; and
- (c) proceedings in a particular court or tribunal.

***vexatious proceeding* includes—**

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued without reasonable ground; and
- (d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.”

History of proceedings

- [11] The parties are siblings. The applications made by Ms Fung arise out of, or are said to relate in some way, to the estate of the parties' late father (Kwong Tam) who died in 1992. His estate has been completely administered. His executors were Ms Fung and Mr Tam.
- [12] In 2002 the parties' mother died and Ms Fung brought an application for further provision in relation to her mother's estate. This was settled following mediation and an amount was paid to Ms Fung in accordance with the terms of the settlement.
- [13] In 2007 Ms Fung filed an originating application seeking orders:
- (a) Permitting her to inspect and take copies of all documents in the possession or power of Cameron Tam and herself as trustees of the estate of Kwong Tam and their solicitor,
 - (b) Permitting her to obtain a similar right of inspection with respect to Sharon Pun and any documents she held.
- Consent orders were made with respect to that application by Atkinson J on 31 October 2007.
- [14] A further application was made in February 2010 seeking further inspection and copying.
- [15] At or about this time Ms Fung somehow managed to change the records held by the Australian Securities and Investments Commission relating to the directors and shareholders of Shiu Yuk Kwong Tam Pty Ltd by inserting her name as a director and shareholder when she was neither. The manner in which she did that was raised before me. It is not entirely clear how it occurred, but it and other matters were the subject of orders made by Applegarth J on 28 April 2010.
- [16] On 28 April 2010 Applegarth J gave leave to Ms Fung to file an application for further provision out of the estate of "the above named deceased". The application did not contain the name of any deceased, but the matter proceeded on the basis that the application concerned the estate of her late father.
- [17] Further, on the 28 April 2010, Walker Lawyers were granted leave to withdraw from acting as Ms Fung's lawyers. Ms Fung had notified the court previously, on 4 February 2010, of a change of solicitors from Tobin King Lateef to Walker Lawyers.
- [18] Justice Applegarth heard the matter on 28 April 2010 and dismissed both applications filed by Ms Fung. He made the following orders:
- (a) That she be restrained until further or other order from representing herself as a director and/or shareholder of Shiu Yuk Kwong Tam Pty Ltd.
 - (b) That her name be removed as a director and shareholder of the company.
 - (c) That she pay the costs of Mr Tam and Ms Pun on an indemnity basis.
- [19] On 4 May 2010 Ms Fung filed an application seeking the following orders:
- "(a) An order pursuant to r 990 of the *UCPR* for leave to withdraw from the record in these proceedings.
 - (a) Direction.

- (b) That the order of 28 April 2010 lodged by Davellin Lawyers was inappropriate and be dismissed.
- (c) That there be no order as to costs.”

[20] On 2 June 2010 Ms Fung filed an application seeking the following orders:

- “1. That the order 28 April 2010 lodged by Davellin Lawyers did not meet the compliance of Civil Uniform Rules and be dismissed.
- 2. That both parties be agree to share the ‘Residues’ one sixth each and be accept that 11th September 1998 the late Shiu Yuk Tam True Will.
- 3. That the respondent pay the applicant’s costs of the application;
- 4. Such further or other order as the court may consider appropriate.
- 5. Dismiss Sharon Pun.
- 6. That liberty to apply on seven days notice by any party.”

[21] On 8 June 2010 Ms Fung filed an affidavit apparently in support of the application filed on 2 June 2010. Part of it consists of documents which had been tendered before Applegarth J. It also contains a further list of orders sought by Ms Fung:

- “1. Bank Accounts in name of Esther Sau Kuen Fung to be returned to the accountholder Esther Sau Kuen Fung inclusive those jointly with her mother.
- 2. The Probate in held by George Hatzis to be return to Esther Sau Kuen Fung subject that there is no objection from Cameron Tam.
- 3. Trust deed of Esther Fung in the matter of ‘Shiu Yuk Kwong Tam Pty Ltd’ to be returned to Esther Fung subject to that there is no objection from Cameron Tam.
- 4. The Company Folios in held by George Hatzis and or Sharon Pun as third party to be returned to beneficiary owner Esther Fung subject that there is no objection from Cameron Tam.
- 5. A life tenancy granted to Esther Sau Kuen Fung on Property 40 Redland Bay Road Capalaba subject to her need base and her age and no objection from her siblings.
- 6. Dismiss Cameron.
- 7. Dismiss Sharon Pun as secretary and director in the company affairs and executor.
- 8. The cost of the applicant Esther Sau Kuen Fung to be pay out of respondent Sharon Pun to be assessed on an indemnity basis.
- 9. ‘Davellin Lawyers’ role as a third party representing Sharon Pun that at no time a shareholder undue influence Sharon Pun amended ASIC forms – substituted market shares replaced capital shares was illegal and found to be negligence.
- 10. ‘Davellin Lawyers’ dismiss as executors and estates files to be return to Esther Sau Kuen Fung.

11. Both parties to be agree to set aside the agreement dated 01/12/03 and agree to cooperate with each other to sort out Tasmania properties one-sixth each.
12. That the judge thinks fit.”

[22] Ms Fung filed an affidavit on 28 July 2010 in which she alleged that her father promised her a share in the company, Shiu Yuk Kwong Tam Pty Ltd, upon his death. Ms Fung also made other assertions as to promises her father made.

[23] On 6 August 2010, the applicant filed another application in this matter seeking the following orders:

- “1. That the name of Esther Sau Kuen Fung DOB 18 February 1956 be reinstated as Recipient Owner with Shareholdings Identity Number:4230393 and OFFICE HOLDER of the captioned Company located at 40 Redland Bay Road Capalaba Q4157 namely **SHIU YUK KWONG TAM PTY LTD ACN 010 357 178 Granted by the Late Kwong Tam deceased on or about 17th August 1992; Reference is made to Notification of Change to Officeholders in Australia, Form 304 Corporations Law 242 (7), 361(1)(c)and that it is patented on or about 5 February 1993 ASIC File: 00317777.**
2. That the name of Sharon Sau Fong Pun be removed as secretary and Director until further or any other order.
3. That the Respondent pays the Applicant's cost of the Application.
4. Such further or other order as the Court may consider appropriate.
5. Dismiss Sharon Pun and Davellin Lawyers as executors in the matter of **Shiu Yuk Tam.**
6. That **Probate ECC. No. 1151 of 1995** dated First August 1995 ESTATE KWONG TAM and **Trust deed** in name of **SAU KUEN FUNG (aka ESTHER FUNG)** DOB 18.02.1956 Granted by the LATE KWONG TAM in held at Hatzis Lawyers be returned to ESTHER SAU KUEN FUNG.
7. That both parties be agree to share the ‘Residues properties’ in Hobart Tasmania and the ‘Principal houses’ of the deceased one-sixth each and be accept that 11th September 1998 was the Late Shiu Yuk Tam True Will.
8. Liberty to apply on a 7 days notice by any party.”

[24] On 16 August 2010 Ms Fung filed an affidavit in which she stated that she is the “trustee and owner of Shiu Yuk Kwong Tam Pty Ltd”.

[25] On 19 August 2010 Ms Fung filed a further affidavit in which she reiterated that her father had intended to hand the company over to her and that she legitimately held ownership of the company.

[26] On 24 August 2010 Ms Fung filed an affidavit in which she alleged:

- (a) That both her parents had already divested their interest in the company to her prior to the death of her father;

- (b) That a trust deed was executed prior to his death dealing with that transfer of ownership; and
- (c) A number of other allegations relating to the residue of her mother's estate which are not capable of being understood.

[27] The case for Ms Fung so far as it concerns any part of her mother's estate is subject to the mediated agreement based upon her application for further provision with respect to that estate. The case apparently mounted by her with respect to her father's estate is that he promised her, among other things, that he would leave his share in the company to her. His will did not have that effect. I note that Ms Fung was an executor of the estate and that these applications are brought some 12 years after probate was granted.

[28] Apart from the difficulty in understanding large parts of what is said by Ms Fung in her affidavits and how she claims to be entitled to the relief she seeks, she also makes assertions in her affidavit filed on 19 August 2010 relating to the provenance of the will of Kwong Tam. It appears that Ms Fung is attempting to demonstrate that a document has been altered but, as the document is one which was provided by her to the document examiner, and is not the document for which probate was granted, nothing more can be said about it.

[29] Since this matter was heard in August Ms Fung has filed further applications in the same matters, seeking the same orders.

[30] On 31 August 2010, Ms Fung filed an application seeking the following orders:

1. "That, pursuant to **s41(1) of the Succession Act 1981 Interstate**, adequate provision be made for the proper maintenance and support of the said **Esther Sau Kuen Fung** out of the estate of the above-named deceased¹;
2. That the name of **Esther Sau Kuen Fung DOB 18 February 1956 be hold her privacy as owner** and she hold her own beneficiary Right as Trustee and be reinstated as Recipient beneficiary with **Shareholder Identity Number: 4230393** and that she is a True and correct OFFICE HOLDER of the captioned Company located at 40 Redland Bay Road Capalaba Q4157 namely **SHIU YUK KWONG TAM PTY LTD ACN 010 357 178 Granted by the Late Kwong Tam deceased on or about 17th August 1992; Reference is made to Notification of Change to Officeholders in Australia, Form 304 Corporations Law 242(7), 361(1)(c) and that it is patented on or about 5 February 1993 ASIC File: 00317777 through a solicitor George Hatzis.**
3. **The applicant's costs of an incidental to this application be paid out of the estate of the above-named deceased on an indemnity basis;**
4. That there be no order as to costs;
5. That the order of 28 April 2010 lodged by Davellin lawyers be dismissed.
6. That both parties be cooperate and agree to share the "**residual properties**" in Hobart Tasmania and the "three Principal houses" of the deceased one-sixth each.

¹ The estate of Shiu Yuk Tam.

7. That both parties be accept that **11th September 1998 was the Late Shiu Yuk Tam True Will.**
8. Dismiss Sharon Pun (aka Sharon Su Fung appears as a **wrong Name** shown on **the Incorrect order drafted by David Lin - 28/04/10).**
9. Dismiss Chun-Hong David Lin (appears as an unidentified name on the Will of Shiu Yuk Tam.
10. Dismiss Nancy Mei-Hesung Lin (appears as an unidentified name)
11. Liberty to apply on a 7 days notice by any party.
12. Adjourn to a date to be fixed.”

[31] On 20 September 2010, Ms Fung filed another application seeking the following orders:

1. “That the application of interim order filed on the 18th, April 2010 by ‘Davellin Lawyers’ for respondent parties that were rejected several times by the registry be dismissed.
2. That the **unjust order** filed on the 28th April 2010 by the respondent ‘Davellin Lawyers’ be dismissed for the ground that the hearing was adjourned at 1pm.
3. That the Plaintiff Esther Sau Kuen Fung be hold her Shareholder Right and be reinstated as beneficiary Owner and Director of the captioned Company namely Shiu Yuk Kwong Tam Pty Ltd ACN 010 357 178 at ASIC; reference to S 157 (1) 1994 Land Act.
4. That the respondent Sharon Sau Fong Pun be restrained until further or other order from representing herself as a Director, secretary and or shareholder of the company until further or other order.
5. Liberty to apply on 7 days notice by any party.
6. The application of costs assessment by the respondents dismissed by Court on 18/06/10 at 3pm already at Court.
7. That the Respondent Sharon Sau Fong Pun comtempt of the Courts order and therefore be responsible to pay the Plaintiff costs on an indemnity basis to be assessed.
8. That both parties be accept that [**11th September 1998 Will Shiu Yuk Tam**] was the deceased Will”.

[32] In the applications filed 31 August 2010 and 20 September 2010, Ms Fung has added a third and fourth respondent, David Chun-Hong Lin, (‘Chun-Hong David Lin’) the solicitor and Principal of Davellin Lawyers and Mei Hesung Lin (‘Nancy Mei-Hesung Lin’), another solicitor who was formerly employed by Davellin Lawyers. I can discern no basis for their addition as third and fourth respondents.

[33] On 11 October 2010, Ms Fung filed a further affidavit alleging, through an annexure, the same claim of ownership over her father’s company.

[34] On 26 October 2010, Ms Fung filed another application seeking the following orders:

1. “That the name of ESTHER SAU KUEN FUNG (aka Esther Fung DOB 18 February 1956) be reinstated as Recipient Owner with Shareholdings Identity Number: **4230393** and OFFICE HOLDER of the Company located at 40 Redland Bay Road Capalaba QLD 4157 [**SHIU YUK KWONG TAM PTY LTD ACN 010 357 178**] **Granted by the Later Kwong Tam deceased 17th August 1992; Reference is made to Notification of Change of Officeholders in Australia, Form 304 Corporations Law 242(7), 361(1)(c) and that it is patented 3 February 1993 ASIC File: 00317777.**

2. That the name of Sharon Sau Fong Pun be removed as secretary and Director until further or any other order.
3. That the Respondent pays the Applicant's cost of the Application.
4. That there be no order as to costs.
5. Such further or other order as the Court may consider appropriate.
6. Dismiss Sharon Pun.
7. Liberty to apply on a 7 day notice by any party".

[35] On 27 October 2010, Ms Fung filed a supporting affidavit, reiterating her claim as director and shareholder of her father's company.

[36] I now turn to the issue of whether Ms Fung should be declared a person who has "frequently instituted or conducted vexatious proceedings" within the meaning of s 6 of the Act, such that the Court should make a "vexatious proceedings order" under s6(1)(a). The definition of "vexatious proceedings" is set out above.

[37] The Court must ensure that its processes are not abused and, apart from the Act, it has an inherent jurisdiction to restrain vexatious proceedings. In considering the court's inherent jurisdiction, Muir J (as he was then) in *National Australia Bank Ltd v Freeman*² adopted what Lord Phillips MR (as he then was) said in *Bhamjee v Forsdick*³:

"The Court, therefore, has power to take appropriate action whenever it sees that its functions as a court of justice are being abused. The advent of the Civil Procedure Rules makes the nature of those functions more transparent. A court's overriding objective is to deal with cases justly. This means, among other things, dealing with case expeditiously and allotting to them an appropriate share of its resources (while taking into account the need to allot resources to other cases). This objective is thwarted and the process of the court abused if litigants bombard the court with hopeless applications. They thereby divert the court's resources from dealing with meritorious disputes, delay the handling of those disputes, and waste skilled and scarce resources on matters totally devoid of any merit"

[38] As to what constitutes vexatious legal proceedings, this Court has adopted a "broad test" as expressed by Fitzgerald P in *Re Cameron*⁴, which was decided in relation to the *Vexatious Litigants Act 1981* (Qld). In that decision, Fitzgerald P identified the following as factors which are relevant to the determination of whether proceedings are vexatious:

- (a) the legitimacy or otherwise of the motives of the person against whom the order is sought,
- (b) the existence or lack of reasonable grounds for the claims sought to be made,
- (c) repetition of similar allegations or arguments to those which have already been rejected,

² [2006] QSC 86 at [26]

³ [2004] 1 WLR 88 at 93

⁴ [1996] 2 Qd R 218 at 220

- (d) compliance with or disregard of the Court's practices, procedures and rulings,
- (e) persistent attempts to use the Court's process to circumvent its decisions or other abuse of process,
- (f) the wastage of public resources and funds, and
- (g) the harassment of those who are the subject of the litigation which lacks reasonable basis.

[39] It will be convenient to use those factors to assist in the assessment of Ms Fung's conduct.

Legitimacy of motives

[40] It is not entirely clear what Ms Fung's motives are. It is obvious, from both her written material and her appearances before me, that she struggles to express herself in English. But, she has been the subject of orders which have been clear and which she understood. In her appearance before me she made it obvious that she understood Applegarth J's orders and that she disagreed with them.

[41] She has not explained why she waited so long to bring these applications concerning her late father's estate and why, having been an executor of that estate, she did nothing at the relevant time to vindicate the claims she currently makes.

[42] I am not willing to find that she has pursued these claims for illegitimate motives because I am not confident that I understand what her motives are.

Existence or lack of reasonable grounds

[43] Apart from Ms Fung's repeated assertions that her father promised her a share in the company there is nothing to support her allegation. Of course, a promise of that kind, if expressed privately, will be difficult to establish other than by way assertion. There is, though, evidence which is contrary to the position advanced by Ms Fung. The lengthy delay in making this claim is unexplained. While Ms Fung has been unrepresented for most of the applications she has filed, she has had representation at various stages and at no time has a satisfactory explanation for the delay been advanced. Further, Ms Fung has not explained why she, as an executor, sat by and allowed her father's estate to be administered according to his will without raising this alleged gift of the share.

[44] On the material filed by Ms Fung I am of the view that she does not have reasonable grounds for the applications she has made.

Repetition of similar allegations or arguments

[45] Ms Fung's arguments have been rejected by Applegarth J and by me. She has not appealed either decision. She has repeated the same or similar allegations and arguments on at least a dozen occasions.

Compliance with or disregard of the Court's practices, procedures and rulings

[46] Apart from repeatedly filing applications and affidavits seeking relief which has already been refused there is evidence that Ms Fung has not observed the orders made

by Applegarth J. It appears from the affidavit material that she has, contrary to those orders, represented herself as the owner of the company:

- (a) Ms Fung's telephone correspondence with Ray White Commercial Bayside Managing Agent on 30 April 2010.
- (b) Ms Fung's letter to Davellin Lawyers dated 30 April 2010, which she signed as "Esther Fung (Owner)"
- (c) Ms Fung's letter to Davellin Lawyers dated 1 May 2010, headed "SHIU YUK KWONG TAM PTY LTD" "Patented Shareholdings: Fung Esther", signed "OWNER ESTHER FUNG" and stamped "OWNER CAPITAL: FUNG. ESTHER". In this letter Ms Fung purports to terminate Davellin Lawyers' role as solicitors for Tams Estates, for which Ms Fung has no authority.
- (d) Ms Fung's letter to Davellin Lawyers dated 3 May 2010 headed "SHIU YUK KWONG TAM PTY LTD" "Patented Shareholdings: Fung Esther" and signed "Fung, Esther (ID Code 4230393) Shareholding registered 09th December 1992". In the letter, Ms Fung makes threats to Davellin lawyers, alleges that the Court's orders are void, and represents herself as owner of the company, with authority to terminate the services of Davellin Lawyers.
- (e) Ms Fung's letter to Davellin Lawyers dated 30 April 2010 signed "Esther Fung Owner 40 Redland Bay Road Capalaba Capital Shareholdings ID: 4230393". In this letter, Ms Fung again misrepresents her ownership of the company.
- (f) The Public Notice which Ms Fung caused to be published in the Courier Mail Newspaper dated 29 March 2010 in which she alleges ownership of the company.

Persistent attempts to use the Court's process to circumvent its decisions or other abuse of process

- [47] Notwithstanding the dismissal of her earlier applications, Ms Fung continues to seek orders to similar affect without having sought to appeal those decisions.

The wastage of public resources and funds

- [48] While the court's time has been taken up, this is not a matter of great importance compared to the other factors

The harassment of those who are the subject of the litigation which lacks reasonable basis

- [49] Ms Fung's brother and sister have been subjected to numerous applications and allegations. They have retained lawyers and have incurred fees which are solely due to Ms Fun's actions. The repeated claims of this type amount, in my view to harassment.

Other considerations

- [50] Following directions I made on 18 November 2010, that Mr Somers of Counsel provided written submissions on Ms Fung's behalf in relation to the First and Second Respondents' application for orders under the *Act*.

- [51] Mr Somers submits that, in light of the relief sought by Ms Fung, (that is declaratory relief as to the ownership of the shares of the company, which will necessarily involve not just an issue of law but also substantial disputes of facts) the proceedings should have been commenced by Claim and Statement of Claim under r 11 *Uniform Civil Procedure Rules 1999* (Qld). Mr Somers submits that Ms Fung's pursuit of her claim in an improper form was an innocent error falling short of vexatious proceedings. Mr Somers appears to attribute this error to the fact that, for most of the period of the litigation, Ms Fung was self-acting.
- [52] On the evidence, it appears that Ms Fung disposed of legal representation at her own will. In the period from 1992 to 2010 Ms Fung employed six different legal representatives. Ms Fung had the assistance of counsel when she filed the originating application in August 2007 and the applications on 4 February 2010 and 27/28 April 2010. Ms Fung subsequently terminated the services of Walker Lawyers and represented herself from 23 April 2010. In filing her third application, Ms Fung was again legally represented by AMH Lawyers and counsel on 18 May 2010. The court adjourned at the request of Ms Fung's solicitors to give AMH Lawyers time to obtain instructions for the amendment of Ms Fung's material. But Ms Fung terminated the services of AMH Lawyers one week after the court appearance, and subsequently represented herself at proceedings and filed her fourth application. On the next appearance, 18 June 2010, Ms Fung confirmed to the court that she had obtained the services of Smithson Solicitors and directions were made for the parties to file and serve additional materials by 9 July 2010. One day before the due date for the delivery of further materials, Ms Fung terminated her retainer with Smithson Solicitors. Ms Fung subsequently filed a sixth application on 6 August 2010. In the light of that history, the fact that Ms Fung was self-acting at various times appears to be a consequence of her own decisions. I do not accept that Ms Fung suffered from a lack of legal advice.
- [53] With respect to the content of Ms Fung's claim, Mr Somers submitted that there is an arguable claim, supported by Ms Fung's various affidavits, of a legally binding agreement to an entitlement to the shareholding of the company on the basis of an equitable estoppel - the "equity of expectation" that Ms Fung's parents encouraged her to return to Australia from Hong Kong and work in the family business, in the expectation that ownership of the company would be transferred to her. In connection with this claim, Mr Somers proposed that the Court further reserve its orders with respect to the *Vexatious Proceedings Act* and costs, pending the filing of a fresh claim for declaratory relief by way of Claim and Statement of Claim. No such claim has been filed.

Conclusions

- [54] Ms Fung's claim disregards my dismissal of her application on 27 August 2010 with respect to the ownership of shares in Shiu Yuk Kwong Tam Pty Ltd and the will of her father.
- [55] Despite the dismissal of her applications filed on 4 February 2010 and 28 April 2010, Ms Fung's continued to file applications concerning the same subject matter as those previous applications. Ms Fung's insistence that she be reinstated as "beneficial Owner and Director of Shiu Yuk Kuen Fung", as expressed in her applications filed 6 August 2010, 31 August 2010, 20 September 2010 and 26 October 2010, demonstrates a

disregard of the orders made by Applegarth J that she “be removed as a director and beneficial shareholder of the company Shiu Yuk Kwong Tam Pty Ltd”.

- [56] Section 6(1)(a) of the Act requires consideration be given to whether a person is a person who has frequently instituted or conducted vexatious proceedings. In *National Australia Bank Ltd v Freeman*⁵, Muir J addressed the meaning of “frequently” in the context of the Act:

“Frequently” is defined in the Shorter Oxford English Dictionary as: “At frequent or short intervals, often repeatedly; numerously”. Whether proceedings have been instituted or conducted “frequently” must be looked at in the context of litigation. In that sense “frequently is a relative term”.

- [57] In the context of the current litigation, I regard Ms Fung’s applications as being sufficiently frequent so as to demand the Court’s sanction. Since Justice Applegarth dismissed two of Ms Fung’s applications on 28 April 2010, she has filed a further six applications. Ms Fung has also filed a further application to be heard on 29 April 2011.

- [58] Ms Fung’s conduct has led me to conclude that she is a person who has “frequently instituted or conducted vexatious proceedings” within the meaning of s 6 of the Act. I am satisfied that an order pursuant to the *Vexatious Proceedings Act 2005* (Qld) should be made but that it should be confined to proceedings against Mr Tam and Ms Pun. I would further confine it to matters relating to the estates of their parents and Shiu Yuk Kwong Tam Pty Ltd but Ms Fung’s many applications have strayed beyond those issues and I am satisfied that to so limit the order would not necessarily terminate the vexatious proceedings.

Orders

- [59] The orders are as follows:
1. That Stephen Kenneth Hartwell be appointed as costs assessor to carry out the costs assessment of the following:
 - c) Work carried out between 10 November 2007 to 21 November 2007 pursuant to:
 - iv. Davellin Lawyers Tax Invoice dated 27 November 2007; and
 - v. Cost statement issued pursuant to Rule 705 of the *Uniform Civil Procedure Rules 1999* Qld dated 20 May 2010; and
 - vi. Supreme Court Order dated 31 October 2007
 - d) Works carried out between 8 March 2010 to 28 April 2010 pursuant to:
 - iv. Davellin Lawyers Tax Invoice dated 22 May 2010;
 - v. Costs Statement issued pursuant to Rule 705 of the *Uniform Civil Procedure Rules 1999* Qld dated 20 May 2010; and
 - vi. Supreme Court Order dated 28 April 2010
 2. Declare that Esther Sau Kuen Fung is a person who has frequently instituted and conducted vexatious proceedings in Australia within the meaning of those terms in s6 of the *Vexatious Proceedings Act 2005* (Qld).
 3. That Esther Sau Kuen Fung be restrained from instituting any proceedings in any Queensland Court (apart from an appeal in this proceeding) against

⁵ [2006] QSC 86 at [30]

Chung Hung Shun Tam (also known as Cameron Tam) and Sharon Sau Fong Pun (also known as Sharon Pun), without prior leave of a judge of the Trial Division of the Supreme Court of Queensland.

4. That all proceedings already instituted by Esther Sau Kuen Fung in any Queensland Court against Chung Hung Shun Tam (also known as Cameron Tam) and Sharon Sau Fong Pun (also known as Sharon Pun) be stayed unless and until leave to proceed is first obtained from a judge of the Trial Division of the Supreme Court of Queensland.

[60] I will hear the parties on costs.