FACC 15/2016

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.15 OF 2016 (CRIMINAL)
(ON APPEAL FROM THE COURT OF APPEAL
CACC No. 444 of 2014)

BETWEEN

CHAN KUI YUEN, THOMAS	Appellant (D4)
and	
HKSAR	Respondent

THE CASE FOR THE APPELLANT (D4)

The Conviction And The Basis of The Present Appeal

1. D4 was tried before Macrae J.A. and a Jury and convicted by a majority on, *inter alia*, Count 5 of the Amended Indictment dated 8 May 2014 of conspiring with D1, D2, D3[1], and D5 for D1 to commit Misconduct in Public Office when he became Chief Secretary of the HKSAR.

2. D4 was sentenced to 5 years imprisonment on Count 5 by the learned trial Judge.

3. The Court of Appeal upheld the conviction, but reduced the sentence to 4 years and 3 months.

4. On 12 July 2016, the Appeal Committee granted leave to the Appellant to appeal against the conviction on Count 5 of the Amended Indictment dated 8 May 2014 on the basis that the following question of law of great and general importance has arisen:

   "*Whether in the case of a public officer, being or remaining favourably disposed to another person on account of pre-office payments, is sufficient to constitute the conduct element of the offence of misconduct in public office?*" (**"Question of Law"**)

[1] Acquitted by the Jury.

5. D4 submits that "*being or remaining favourably disposed*" is incapable of amounting to the conduct element of Misconduct in Public Office for the following reasons:

i. The common law jurisprudence of Misconduct in Public Office has established the clear requirement on the prosecution to prove a misfeasance (i.e. an act of misconduct) or non-feasance (i.e. an omission amounting to misconduct) or a breach of duty as the conduct element of the offence and has repeatedly refused to recognise an improper motive or intention *per se as being sufficient for the commission of the offence*;

ii. For the Honourable Court to accept merely "*being or remaining favourably disposed*" as the conduct element of Misconduct in Public Office would be an impermissible extension of the offence, such extension being available only to the Legislature, no such extension having been enacted, and would create a "*thought crime*" contradictory to the established principles prohibiting the creation of such crimes; and

iii. The line of authorities leading to and including *AG v Chung Fat Ming* [1978] HKLR 480 does not provide any support for the proposition that the conduct element of Misconduct in Public Office includes "*being or remaining favourably disposed"*, or "*being kept sweet*". That line of authorities relates only to the interpretation of the Prevention of Bribery Ordinance Cap 201 ("POBO") and not to the Common Law Offence in question.

The Question Of Law In Context

6. The Question of Law was the key legal issue in relation to Count 5 since as early as the close of the prosecution case at trial. The submissions advanced now were advanced by counsel for D4 as part of the submission that there was no case to answer.

7. The issue arose out of the Respondent's attempt to create a new hybrid offence somewhere between s.4(1) of the POBO and the Common Law offence of Misconduct in Public Office. The Respondent took the essential element of the POBO, viz. that receiving an advantage as an inducement or reward for or otherwise on account of the performance of a public duty is a crime; and inserted it into the Common Law offence of Misconduct, thereby removing any requirement on the prosecution to prove an act/omission of misconduct. The result was to create an offence of misconduct that requires neither an act/omission of misconduct nor an intention/agreement to perform such an act. Such an offence is unknown to law.

8. Central to this case were two essential facts:

   i. All the funds (the alleged advantage) in relation to Count 5 were paid to D1 before he took office as the Chief Secretary of the HKSAR on 30 June 2005. This meant that D1 was a private individual when he received them; the POBO was not applicable to their receipt; and their receipt was lawful unless and until it was proved that they were paid/received for the purposes of acquiring

D1's agreement to commit acts/omissions of serious misconduct upon taking up public office; and

ii. There was no/insufficient evidence capable of proving that D1 had actually shown any favour to SHKP whilst he was a public officer. As the Court of Appeal observed: "*Admittedly, the prosecution was unable to establish that Rafael Hui, in his capacity as Chief Secretary, had actually done anything improper and in breach of his official duties to favour SHKP."* [*per* Yeung VP, at paragraph 21]. On the contrary, the evidence established that D1 actually did disfavour to SHKP. A few days after he took office on 30 June 2005 he sabotaged SHKP's effort (jointly with another major property company) to bid for the West Kowloon Cultural District Project.[2] SHKP suffered substantial financial loss as a result, as the financial resources put into the preparation for the bid were totally wasted.

[Part A/ p.452]

9. It was because of those two essential facts that the Respondent opted to create the hybrid offence so as to avoid the necessity of proving that D1 had agreed in return for the pre-office payment to act/omit to act so as to commit the offence of Misconduct in Public Office. Having recognised the evidential failings in its case the Respondent extended the parameters of the Common Law offence so as to obviate the need to prove that which it had recognised it could not.

[2] See (i) email dated 11.7.2005 in relation to informal meeting with the Chief Secretary on West Kowloon Cultural District on 12.7.2005 (exhibit D4-14) and (ii) 3rd draft Steering Committee paper of "Establishment of a new body to take forward the development of the West Kowloon Cultural District" for discussion on 21/7.205 (exhibit D4-15) (To be included into Part B of the Records)

10. The Respondent achieved this by taking Leonard J.'s phrase *"being or remaining favourably disposed"* to the payer of the bribe [see Chung Fat Ming (above)], itself a paraphrase of *"otherwise on account of"* [s.4(1) of the POBO] and inserted it as a legal ingredient of the Common Law offence of Misconduct in Public Office.

11. This meant that it was unnecessary to prove that the advantage had been paid to or received by a serving public officer (necessary under the POBO); and unnecessary to prove an act/omission of serious misconduct (necessary at Common Law). It created the new offence of receiving a pre-office advantage whilst agreeing to do no more than would have been done anyway even had the payment not been made (i.e. merely remaining warm or friendly to the payer of the advantage). Such an offence is unknown to law.

12. At the close of the prosecution case D4 submitted that:

i. "*Being or remaining favourably disposed"* is not an 'act' because it is a state of mind. It is thus incapable of amounting to the conduct element of the offence. For the offence to be made out it had to be proved that D1 had agreed to show favour or to commit an act/omission of serious misconduct (as required by Sin Kam Wah v HKSAR (2005) 8 HKCFAR 192) in return for the pre-office payment; and

ii. The problem could be cured by amending Count 5 to allege that D1 had agreed that he would commit an act of misconduct should such

an act become necessary or appropriate. D4 made it clear that in such proposal, it was **not** necessary to give any further particulars of the misconduct contemplated. The learned trial Judge rejected D4's argument without giving any reasons.[3]

13. The learned trial Judge directed the jury in accordance with the Respondent's suggestion that the mere receipt of the payment in connection with D1's public capacity was sufficient to amount to guilt:

i. "*The evil or vice of these kinds of payments is that no-one could have confidence in the acts of a public official who, through the offer and acceptance of money, has been kept sweet by private interests. And the confidence which the public are entitled to have in the fair and impartial performance of a public official's duties and obligations is thereby eroded or destroyed"* (see transcripts of the summing up, 1st day, p.89H-O) [Part A/ p.69]

ii. The fact that the payment had been received before D1 became a public official thus became irrelevant: the learned Judge ignored the fact that the payment was made pre-appointment "*the acceptance of money by a public official…*"; "*payments made to sweeten a public official"* (see transcripts of the summing up, 1st day, p.89A & I) [Part A/ p.69]

iii. Likewise the fact that D1 did not commit a wilful act of serious misconduct (or agree to do so) also became irrelevant: the learned

[3] D4 had specifically invited the learned Judge to give reasons for his ruling. The learned Judge refused to do so.

Judge directed the jury it was irrelevant that the "*public official may have acted in exactly the same way, or objectively made the correct decision, or done the right thing, whether he was sweetened or not".* (see transcript of the summing up, 1st day, p. 89F) [Part A/ p.69]

14. The Court of Appeal upheld the conviction and accepted the validity of the Respondent's position as well as the learned trial Judge's direction:

"226. …The offence of conspiracy to commit misconduct in public office is made out on proof that the conspirators intended and agreed that in return for the payment the recipient would be and remain favourably disposed to the payer. That is that he had been sweetened; his goodwill had been bought. That is the abuse of the office. ***Thereby, he was vulnerable to corrupt demands.*** *It was not necessary in proof of the offence that it be averred or proved that it was agreed and intended by the conspirators that Rafael Hui, if necessary, would act/not act in favour of SHKP.* [Part A/ pp.542-543]

The timing of the payments

227. Given that Count 5 averred a conspiracy to commit misconduct in public office, the fact that the payments to Rafael Hui were made prior to his appointment to the office of Chief Secretary is irrelevant. The crux of the offence was an agreement between the conspirators, which they intended to carry out, for Rafael Hui to wilfully misconduct himself in public office by being or remaining favourably disposed to SHKP in return for payment of $8.5 million." (emphasis added).

15. It is submitted that by adopting the Respondent's approach to the law the learned Judge's summing up amounted to a serious misdirection. It was not open to the Respondent to create a hybrid offence by replacing the requirement to prove serious misconduct at Common Law with Leonard J.'s paraphrase of the wording of s.4(1) of the POBO.

i. Whilst the law of conspiracy dispenses with the need to prove the actual performance of an illegal act (because the agreement is itself the criminal act); it does not dispense with the need for the object of the conspiratorial agreement to be an act that amounts to a crime;

ii. "*Being or remaining favourably disposed*" to a private party, whether on account of pre-office payment or otherwise, cannot amount to the conduct element of the common law offence of Misconduct in Public Office because it is not an act. Even under the POBO it is part of the mens rea of the offence not its actus reus.

Conspiracy

16. Section 159A of the Crimes Ordinance, Cap. 200, provides that:

"(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offence impossible,

he is guilty of conspiracy to commit the offence or offences in question."

17. A conspiracy to commit Misconduct in Public Office thus requires proof of an agreement to commit an act/omission of serious misconduct in public office. This means that the parties to the agreement must have agreed that the soon to be public officer will commit acts/omissions of misconduct, should they become necessary, upon taking office, for the agreement to contravene section 159A of the Crimes Ordinance, Cap. 200.

18. It is submitted that the English Court of Appeal's formulation of a conspiracy to commit Misconduct in Public Office in R v Chapman [2015] 2 Cr. App. R. 10, in which reporters were charged with conspiring with public officers to commit misconduct in public office by making payments to public officers in return for information acquired by the latter in public office, is pertinent and is directly applicable in the present case:

"68. ...the jury had to be sure that there was an agreement between [the public officer] and [the reporter] which, if it were carried out in accordance with their intentions, would necessarily

involve [the public officer], acting as a public official, wilfully breaching his duties. …" (*per* Thomas L.C.J., at p.180).

19. In the instant case, the pre-office payment of HK$8.5 million, to D1 was incapable of amounting itself to misconduct because D1 was not a public official when he received it. It was thus incapable of being the intended object of any conspiracy to commit misconduct. This is because D1 was a private citizen at the time of receiving the payment and was entitled to receive it unless it was paid to him in order to acquire his criminal agreement to commit misconduct upon becoming a public officer.

20. It is thus correct that the receipt of a pre-office payment can amount to a crime but only where it is accompanied by a criminal agreement to commit Misconduct in Public Office in return for the payment. The in terrorum suggestions of the Respondent before the Court of Appeal, viz. that if the Applicant is right such payments would be incapable of being the subject of prosecution, are thus wholly wrong.

21. What does not amount to a crime is the pre-office payment in return only for the soon to be public official agreeing to be or remain favourably disposed to the payer. This is because an agreement to be or remain favourably disposed, warm, or friendly to the payer is not an agreement to **<u>do</u>** anything at all. It is certainly not an agreement to commit an act/omission of serious misconduct.

22. The Respondent's position is unsupported by authority and is wrong in law. Notwithstanding that the Respondent has been repeatedly challenged to provide a single authority in support of the proposition that "being or remaining favourably disposed" amounts to part of the actus reus of the offence of Misconduct in Public Office no such authority has been forthcoming. Chung Fat Ming (above) is no such authority since it has no application to the Common Law offence, being a case on the meaning of s.4 of the POBO.

23. If a public official is or remains favourably disposed to a person who pays him a bribe he commits the POBO offence because it is an offence to receive an advantage on account of the performance of public duties. In determining whether the payment was on account of the performance of such duties (as opposed to being for unconnected private reasons) Leonard J. determined that the payment would be on account of the performance of such duties where the payment acquired the favourable disposition of the public officer in the performance of the duties. The moral obloquy thus caught by the POBO is the receipt of the extra advantage (above that paid ordinarily for the rendering of public duties) paid by someone who acquires favourable disposition from the public official, even though he might go on to do only what his public duties required of him.

24. The receipt of monies by a private individual however contains no moral obloquy at all (since such payments are entirely lawful) unless and until it is proved that the payment was made in order to induce the commission of a crime.

25. It is not a crime under the POBO to conspire to make a payment to a person who is not a public official because the POBO offences require the payment (or intended payment) to be made to a public official. This is why a charge of conspiracy to contravene the POBO could not be brought in this case.

26. Whilst it is a crime to commit acts/omissions of serious misconduct in public office, it is not a crime for a public officer to do what his duties require him to do (however favourably disposed he might be to those affected by the discharge of those duties). A public official commits no offence by properly discharging his public duty even though he may be exceptionally favourably minded towards those benefiting from it.

27. It is therefore not a crime for a private individual to receive a pre-office payment if he intends notwithstanding the payment to discharge his future duties properly, however favourably disposed he might be to the payer. This is because the POBO does not apply to such a payment and the offence of Misconduct in Public Office only applies to acts/omissions of serious misconduct (or agreements to commit such acts/omissions).

28. There is no lacuna in the law because there is no moral obloquy in the pre-office payment unless and until it is accompanied by an agreement to commit acts/omissions of serious misconduct upon taking up office. Indeed it is of fundamental importance, given the policy in Hong Kong of seeking to attract experienced businessmen into public office, that pre-office payments be

recognised as being completely lawful unless and until such clear criminal intent is established.

29. Further there is no evidential difficulty. It was open to the prosecution at trial (at least in the alternative) to recognise that D1 might not have actually assisted SHKP albeit that he had agreed criminally that he would do so. It does not matter in the proof of a criminal conspiracy that it was not in fact possible for the contemplated acts in fact to be carried out. The prosecution could have presented the highly suspicious nature of the pre-office payments and their proximity to D1 taking up office, the lack of ostensible legitimate reason etc. and invited the inference that such sums paid in such circumstances could only have been to secure D1's agreement to commit Misconduct in Public Office.

30. Instead the prosecution sought to prove that D1 had in fact shown favour to SHKP (in relation to Ma Wan and the West Kowloon Cultural Development project) and when it failed to prove that D1 had actually shown favour then persuaded the learned trial judge that it was not necessary for him even to have agreed to show favour in return for the pre-office payment; only that he should have agreed to remain favourably disposed to SHKP.

31. This, it is submitted was because the Respondent was nervous that the defence to the making of the payment, viz. that it was the final instalment of D1's consultancy salary in a total amount consistent with the amount that Walter Kwok had agreed was an appropriate

amount for him to be paid[4]; the timing of which being consistent with D1 having worked his three month notice period from his giving of notice in late March 2005, might succeed.

32. The Respondent therefore having tried to prove that D1 had shown actual favour to SHKP but being concerned that the evidence had fallen short; and in recognition of the potential force of the defence evidence as to the actual reason for the payment and for its need to be hidden, persuaded the judge to extend considerably the ambit of the offence so as to render irrelevant the pre-office timing of the payment and to render irrelevant the fact that D1 had not shown favour to SHKP (and indeed had shown positive disfavour). This, it is submitted, was to give rise to a significant error of law and a material misdirection to the jury.

33. Instead of being directed that the jury had to be sure that D1 had agreed with the other defendants to show favour to SHKP in return for the pre-office payment, the jury were directed that all they had to find was that D1 had agreed to be or remain favourably disposed to SHKP following the payment. This was on the specific basis that it does not matter as a matter of law whether the recipient of such a payment actually shows favour to the payer or not. On the contrary, it was of central importance in this case since if D1 had not shown actual favour to SHKP (when indeed he had had the opportunity), the jury might have doubted that he had agreed to accept the payment for that purpose.

[4] The evidence showed that Walter Kwok had thought prior to D1's employment as a consultant that sums equivalent to what D1 was in fact paid (including the final payment in June 2005) were in line with market rates for such services.

34. A conspiracy to commit Misconduct in Public Office is established by proof that the conspirators agreed to enter into a course of conduct, which if carried out would necessarily involve the commission of an act/omission of serious misconduct. It follows that a case could be brought without there being any evidence of a payment having been made at all. Because a pre-office payment is not itself an act of misconduct such evidence, if present, would merely be part of the evidential framework from which the agreement to commit misconduct might be inferred.

35. In a case involving no payment at all that element would be missing evidentially but it would still be possible to prove the offence, for example from the evidence of one of the persons party to it that the soon to be public officer had agreed to show unlawful favour upon taking office.

36. The suggestion in such a case, i.e. one involving no payment, that the offence could still be committed even though the conspiracy involved no agreement to show actual favour but only because the soon to be public officer had agreed to remain favourably disposed, warm or friendly to his co-conspirators is absurd. This exposes the confusion in the Respondent's thinking. It is not the fact, amount, circumstances or timing of the pre-office payment that is the misconduct itself it is merely evidence from which the nature of the agreement can be inferred. The nature of the agreement still has to be an agreement that the public official will commit an act/omission of serious misconduct before the agreement becomes an indictable conspiracy.

The Conduct Element of Misconduct in Public Office

37. The Common Law offence of Misconduct in Public Office is not an exception to the paradigm structure of criminal offences, i.e. conduct in which guilty *actus reus* and *mens rea* must combine.[5] All leading authorities defining the Common Law offence (i) draw a clear distinction between the conduct of the public officer and his mental state and (ii) stipulate that both elements are required to constitute a valid offence. There are also clear warnings from leading authorities not to confuse or conflate the two elements.

38. R v Llewellyn-Jones (1966) 51 Cr App R 4 was the first authority, which laid emphasis on the need for both an *actus reus* and a *mens rea* to co-exist in order to constitute a valid offence of misconduct. A county court registrar was originally charged with making an order with knowledge that he would make a personal gain from having done so. Widgery J. (as he then was) concluded that the allegation was not one known to law as it lacked any allegation relating to the requisite intent for committing misconduct:

> *"I have formed a clear view, but stated in hypothetical terms, that if the registrar of a county court* ***when exercising his power*** *to order payment out of court of money held on behalf of a beneficiary were to make an order* ***in expectation of some personal benefit*** *which he hoped to obtain and in circumstances where,* ***had***

[5] cf. R v Boulanger [2006] 2 R.C.S. 49 in which the Supreme Court of Canada drew reference from the Hong Kong and English jurisprudence to define the *actus reus* and *mens rea* of the codified equivalent of Misconduct in Public Office in Canada.

<u>it not been for the personal benefit, he would not have made the order</u>, *that would be an example of misconduct in a public duty sufficient to come within this rule. The reason why I feel that would come within the rule is because in that hypothetical case a public officer would be distorting the course of justice to meet his own personal ends and, in my opinion, it would be sufficient to justify a conviction if it could be shown that he had made such an order with intent to obtain personal benefit for himself and in circumstances in which there were no grounds for supposing that he would not have made the order but for his personal interest and expectation. On the other hand, I have reached an equally clear view that it is not enough to bring a county court registrar within the principle mere to show that, when making an order which was within his powers and which he could make for perfectly proper motives, he knew that by a side wind, as it were, he was going to gain some personal benefit. ...* ***I would not be prepared to say that it would be misconduct for this purpose for a registrar to make a decision which did affect his personal interests were so involved, if the decision was made honestly and in a genuine belief that it was a proper exercise of his jurisdiction so far as the beneficiaries and other persons concerned came into it****.*

When one looks at the terms of count 1 as it now stands, it seems to me that it alleges no more than knowledge on the part of the defendant that his personal interest was involved. For reasons I have given, it is not enough to disclose an offence known to the law and, if the matter rested there, that count…would have to be quashed." (emphasis added, pp. 6-7)

39. The Court in HKSAR v Shum Kwok Sher (2002) 5 HKCFAR 381 went through an extensive survey of the case law relating to Misconduct in Public Office in order to define the constituent elements of the offence. The Court unequivocally separated conduct from motive and warned against conflating the two:

"81. ...the essence of the offence is that an officer who has been entrusted with powers and duties for the public benefit has abused them or his official position. Abuse of such powers and duties may take various forms, ranging from ***fraudulent conduct****, through* ***nonfeasance*** *of a duty,* ***misfeasance in the performance*** *of a duty or exercise of a power with a* ***dishonest, corrupt or malicious motive****,* ***acting in excess of power or authority*** ***with a similar motive****, to* ***oppression****. In all these instances* ***the conduct complained of by the public officer takes place in or in relation to, or under colour of exercising, the office****.*

82. The critical question is: what is the ***mental element*** *required to constitute commission of the offence? In the case of nonfeasance, non-performance of a duty arising by virtue of the office or the employment, all that is required is wilful intent, accompanied by absence of reasonable excuse or justification. Mere inadvertence is not enough. ...*

83. In other cases, the question is more complex. That is because outside the area of non-performance of a duty, an additional element is generally, if not always required, to establish misconduct which is culpable for the purposes of the offence. ***In such cases, in the absence of breach of duty, the element of wilful***

intent will not be enough in itself to stamp the conduct as culpable misconduct. *A dishonest or corrupt motive will be necessary as in situations where the officer is exercising a power or discretion with a view to conferring a benefit or advantage on himself, a relative or friend. A malicious motive will be necessary where the officer exercises a power or discretion with a view to harming another. And a corrupt, dishonest or malicious motive will be required where an officer acts in excess of power. The point about these cases is that,* ***absent the relevant improper motive, be it dishonest, corrupt or malicious, the exercise of the power or discretion would not, or might not, amount to culpable misconduct****. …*

84. In my view, the elements of the offence of misconduct in public officer are:

(1) A public official;
(2) Who in the course of or in relation to his public office;
(3) Wilfully and intentionally;
(4) Culpably misconducts himself.

A public official culpably misconducts himself if he wilfully and intentionally neglects or fails to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification. A public official also culpably misconducts himself if, with an improper motive, he wilfully and intentionally ***exercises a power or discretion which he has by virtue of his office or employment*** *without reasonable excuse or justification.* …" (all emphases added)

40. AG's Reference (No. 3 of 2003) [2004] 2 Cr App R 23 further developed the definition of Misconduct in Public Office. The English Court of Appeal drew the same distinction between the conduct element and the mental state of the accused in a manner consistent with the Court in Shum Kwok Sher (above):

*"55. **There must be a breach of duty by the officer**. It may consist of an act of commission or one of omission. The conduct must be wilful, in the sense already considered.*

*56. ...there must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice. **The motive** with which a public officer acts may be relevant to the decision whether the public's trust is abused by **the conduct**."* (emphasis added)

41. In Sin Kam Wah v HKSAR (2005) 8 HKCFAR 192, the Court refined the definition of the offence in light of the judgment in AG's Reference (No. 3 of 2003) above:

"45. ...The offence is committed where:

(1) a public official;

(2) in the course of or in relation to his public office;

*(3) Wilfully **misconducts** himself; **by act or omission**, for example, by wilfully neglecting or failing to perform his duty;*

(4) Without reasonable excuse or justification; and

(5) Where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the office holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

46. The misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregard the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable." (emphasis added)

42. In Chan Tak Ming v HKSAR (2010) 13 HKCFAR 745, after referring to Shum Kwok Sher and Sin Kam Wah for the definition of Misconduct in Public Office, this Court made the following strong remarks against the confusion between conduct and motive:

"3. …That is the law, and nothing should be introduced to confuse it. Thus I would expressly reject, for example, the notion, which appears to have found some support in the courts below, that what would not otherwise be a departure from official responsibilities would be rendered such a departure simply by personal motives."

43. The Court in Shum Kwok Sher, and Chan Tak Ming clearly warned against blurring the line between the conduct element and the improper motive, and made it clear that the mental element could not substitute the conduct element of the offence. Both AG's Reference (No. 3 of 2003) and Sin Kam Wah adopted and drew the same distinction between the conduct and mental elements of the office.

44. It follows therefore that the favourable disposition of the public officer is part of the mental element of the offence, which must be accompanied by an act/omission of serious misconduct before the offence is committed. Becoming ***vulnerable*** to future corrupt demands (as the Court of Appeal articulated it), does not establish this duality since the state of being 'vulnerable' is purely mental. Until the vulnerability produces an actus reus no offence is committed. Being 'vulnerable to future corrupt demands' is a pre-offence state of mind and is not indictable.

45. Sir Anthony Mason's remarks in Sin Kam Wah that "*acceptance of a "general sweetener" by a public officer can, in appropriate circumstances, amount to misconduct in public office"* does not have the effect of transforming mere "*favourable disposition*" into the conduct element of the offence. The conduct in question in the case was the acceptance of the general sweetener by a serving police officer. It is not a pre-office payment case. The acceptance of that sweetener with the mens rea of favourable disposition meant that the monies related to the performance of the officer's public duties such that the acceptance of them amounted to misconduct. The case is not an authority for the proposition that

mere favourable disposition is sufficient to establish the conduct element of the offence.

46. It is a cardinal principle of the criminal law that no crime requiring proof of guilty mens rea is committed unless and until the guilty conduct coincides with the guilty mind[6]. It is not anticipated that the Respondent will contest such a proposition. The Respondent's case before the Court of Appeal was that 'being or remaining favourably disposed' was the conduct element of the offence. It is understood that this was in reliance upon the single sentence of Leonard J. to that superficially apparent effect in Chung Fat Ming[7].

47. It is submitted that Leonard J. did not intend the sentence to be read out of context so as to elevate a state of mind into an act. What he intended by the sentence, *"I would regard being or remaining favourably disposed to the person solicited as sufficient to amount to an "act" within the meaning of [s.4(2) POBO] and it is for that reason that I say the act does not have to be particularised"* is that all of the acts of a public servant are the acts caught by s.4 of the POBO when performed by a public officer who has accepted an advantage in return for being favourably disposed to the payer. That is why those acts do not need to be particularised - it is all of them.

48. If the contrary is the case Leonard J. could not have gone on to say *'…it is for that reason that I say that* ***the act*** *does not have to be particularised'* if he actually meant that 'favourable disposition'

[6] See DPP for Northern Ireland v Lynch [1975] AC 653 at 690.
[7] At p.497.

was itself the act. In such a case it would be necessary to particularise that the act was the act of being 'favourably disposed' (as indeed the instant indictment was so particularised) as opposed to it not being necessary to particularise the 'act'.

49. At page 493 of Chung Fat Ming Leonard J. said the following,

"As a postman [the accused] was accustomed to performing essentially three acts…They were (a) to deliver letters…(b) to go personally to individual apartments with registered letters, and (c) to post pre-stamped letters which had been left for posting…He performed acts (a), (b) and (c) as a postman. They were the ***only*** *acts, which he could reasonably be expected to perform vis-à-vis the person from whom advantage was solicited. Each of them was an act in his capacity as a public servant"* (emphasis added).

50. Leonard J. made no mention of the existence of a fourth 'act', viz. of being favourable disposed to the user of the postal service. He made it clear that there were only three acts that fell within the postman's public duty.

51. Further, Leonard J. at page 494 rephrased the question he had identified in Kong Kam-Piu v The Queen (1973) HKLR 120, viz. *"Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?"* so as to include the requirement that the public servant should be one who *"could have performed some* ***act*** *as a public servant to the benefit of the person solicited"* (original emphasis).

52. This, with respect, is an obvious and necessary consequence of the wording of s.4 of the POBO. The advantage must be offered to a public servant as an inducement to or reward for or otherwise on account of *"performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant"*.

53. If the word *"act"* could mean 'being favourably disposed to someone' it would make a nonsense of s.4(1)(a) of the POBO. How does one perform or abstain from performing being favourably disposed? How is being favourably disposed something within the capacity of a public servant?

54. Being favourably disposed is part of the mens rea of the offence not its actus reus. If a postman solicits or accepts an advantage so that he will remain favourably disposed to a person whilst he performs the acts of his public service, namely posting and collecting letters, then the advantage will have been solicited or received as an inducement to or reward for or otherwise on account of his public service and he will commit the offence.

55. What Leonard J. meant was that if the advantage is received on account of the performance of public acts such that the public officer is favourably disposed to the payer in the performance of those acts then it is sufficient to prove such favourable disposition without having to particularise which public duty was intended to be performed favourably.

56. ‘Being or remaining favourably disposed’ is simply a paraphrase for the words in s.4 of the POBO, *“otherwise on account of”*. An advantage is otherwise on account of the performance of the public servant’s public duties when it is received by the public officer so that he will be or remain favourably disposed to the payer when he performs those public duties.

57. In the alternative that the Respondent is right in establishing that Leonard J. actually intended in that single sentence to elevate ‘favourable disposition’ from a mere state of mind into an ‘act’ then it is submitted that Leonard J. was wrong as a matter of fact, law and common sense and he is unsupported by any authority either previously or since.

58. Further it would mean that Leonard J. was contradicted in the same case by McMullin J. but did not say so. At p.486 of Chung Fat-Ming (above) McMullin J. said the following,

> *“…there will be cases in which nothing more can be shown than an unexplained and prima facie inexplicable gratification linked with the incumbency of a particular office although no malfeasance or non-feasance can be proved. In that case the solicitation or gratification may reasonably be said to be ‘on account of’ the performance of the official of ‘an act’ within the capacity as a public servant* ***even where that act is nothing more than the performance by him of his normal duty****. I understand the phrase: ‘an act’ to be a generic denotation of any and all acts which may fall within the scope of such duties and not to be limited to the showing of some specific act with that range.”* (emphasis added).

59. It follows therefore that the single sentence of Leonard J. in Chung Fat-Ming, is incapable of justifying the approach taken by the Respondent. That conclusion is underlined by an examination of the other decisions in relation to bribery and corruption.

60. In Chung Fat-Ming at page 482 reference was made to Chu Chi-Kin v The Queen No. 449 of 1977 unreported. The Indictment alleged that favour had been shown to the provider of the advantage in relation to the submission of reports by a health inspector of the Urban Services Department concerning the sanitary condition of a restaurant. The allegation was thus an allegation that the defendant accepted the advantage in return for his agreement to act should the need arise in relation to the sanitary condition of the restaurant. The case thus supports the requirement that the advantage must be linked to the performance or abstaining from the performance of an act within the defendant's capacity as a public servant.

61. Likewise in Chung Yuk-shu v The Queen No.63 of 1978 unreported, referred to in Chung Fat-Ming at page 483. The advantage was given to the fireman on account of them having performed their duties at a Kaifong association opera. So too in Chan Wing-yuen v The Queen (1977) HKLR 186, referred to in Chung Fat-Ming at page 484. The tea money was paid to the official of the Urban Services Department in respect of the performance of his official duties. McMullin J. stated that *"the charge should no doubt properly speaking be one of offering of accepting the advantage 'on account of' some prospect of favour*

not particularised but discernable among a variety of possible ***acts*** *within the public capacity of the accused"* (emphasis added).

62. The same applies in the Scottish case referred to in Chung Fat-Ming at page 488, Gardener v Robertson (1921) S.C. 132[8], stressing the fact that bribery in its legal sense implies corruption, *"What a public servant is entitled to in return for the performance of his duty is his official wage…and nothing more. It is corrupt to accept a gift for carrying out ones public duty even if one intends to carry it out properly; even if one has carried it out properly"*. The point being that the advantage must have been paid to the public servant as an inducement to, reward for or otherwise on account of the performing or abstaining from performing an act in his capacity as a public servant. The act in question therefore is the act the public servant is employed to perform.

63. The act that rendered Chancellor Bacon guilty of having accepted bribes was not therefore any favourable disposition held on his part towards the litigant (indeed such disposition was demonstrably absent in his case) but his judicial and administrative acts as Lord High Chancellor (see page 488 of Chung Fat-Ming).

64. In Kong Kam-piu v The Queen (1973) HKLR 120, referred to in Chung Fat-Ming at page 494 the constables were alleged to have taken an advantage in return for having not effected arrests in relation to public order offences they had witnessed. The act was thus the act of abstaining from carrying out their public duty to effect the arrests. So too in Woo Main-wai v The Queen No. 655

[8] Which in any event was a case in relation to defamation.

of 1975 unreported, referred to in Chung Fat-Ming at page 494, the act concerned the supply of information as part of the defendant's public duty in relation to an ICAC investigation.

65. It follows therefore that Leonard J. did not identify any occasion upon which a defendant had been charged let alone convicted where the allegation was merely that he was or had remained favourably disposed to someone as opposed to where he was alleged to have acted or agreed to act in relation to the discharge of his public duties.

66. It has not been possible to find a single case anywhere in the Common Law world either before or since the decision in 1978 in Chung Fat-Ming, where a defendant has been charged let alone convicted upon an allegation merely that he was or remained favourably disposed towards someone.

67. In the leading case in relation to Bribery at Common Law, The King v Charles Whitaker [1914] 3 K.B. 1283, Lawrence J. reviewed the case law. At page 1,297 – 1,298 he listed myriad cases involving bribery, not one of which involves an allegation merely of being or remaining favourably disposed. All the cases involve an allegation that the advantage was given or received for the performance or abstaining from performing of an act in the defendant's capacity as a public servant. The Indictment in Whitaker, made clear that the conduct alleged to amount to bribery was to act in *"in violation of his official duty to do and omit to do divers acts, to wit, to shew favour and to forbear to shew disfavour to [certain persons in relation to contracts for catering]…knowing*

the said acts and omissions to be in violation of the official duty of the appellant".

68. The use of the words 'to show' favour as opposed to 'be or remain favourable' is instructive. It is undoubtedly an offence to show favour, it is not an offence to be or remain favourable in the absence of any act in one's capacity as a public servant.

69. Other than Gardner v Robertson (1921) SC 132, which was a Scottish case on slander, the judgment in Chung Fat Ming referred to no case authorities other than cases on s.4 of the POBO. More importantly, the Court in Chung Fat Ming never professed to apply any Common Law principles: the case related only to the POBO.

70. Also, any suggestion that Chung Fat Ming was intended to be of "*general application*" (a submission repeatedly made by the Respondent) fails given that the judgment has never been referred to in any judgment not concerning the POBO.[9]

71. Therefore, it is submitted that Chung Fat Ming is specific to the statutory interpretation of the POBO and has no value in ascertaining the Common Law position.

72. Also, as explained by Stephenson LJ in Malone v Metroplitan Police Commissioner [1980] 1 QB 49, the development of the common law cannot draw assistance from statute (for frankly obvious reasons):

[9] It was cited in the arguments before the Court in Sin Kam Wah, but it was not mentioned in the judgment.

"*Until I listened to this argument, I never heard that the statue book was a source of the common law*." (at p.63H)

73. As this Court has repeatedly stated on various occasions, the development of common law must be done within an allowable and constitutional boundary:

i. In Shum Kwok Sher, Sir Anthony Mason stated that:"…*it is well established that, by employing accepted and traditional judicial techniques, a court is entitled, indeed bound, to clarify the existing law where clarification is needed so long as, in doing so, the court does not extend the boundaries of criminal liability. To do so would create retrospective criminal liability and offend the provision of art. 12(1) of the Bill.*" (at para. 98)

ii. In HKSAR v Chan Yau Hei (2014) 17 HKCFAR 110, this Court repeated the warning Shum Kwok Sher not judicially to extend criminal liability and adopted the House of Lords' observation in Knuller (Publishing, Printing and Promotions) Ltd. v Director of Public Prosecutions [1973] AC 435 that "*the fact that authorities show no example of the application of the rule of law in circumstances such as the instant does not mean that it is not applicable,* ***provided that there are circumstances, however novel, which fall fairly within the rule.***"[10]

74. It is submitted that, for reasons already stated above, simply relying on one sentence of Leonard J's judgment in Chung Fat

[10] See paragraphs 29 to 34 of the judgment.

Ming to conclude that "*being or remaining favourably disposed"* is capable of being the conduct element of Misconduct in Public Office is so far removed from the allowable boundary for the development of the Common Law.

The Definition of Mens Rea in Misconduct In Public Office

75. Once it is established that the 'acts' that must be performed are any or all of those performed by the public officer in discharging his public duty it is necessary to consider the mens rea necessary before such acts could be performed criminally. As the above authorities make abundantly clear those acts must be performed with the necessary guilty mens rea before the offence of misconduct is committed.

76. Under the POBO it is sufficient mens rea for a public official to perform his public duties knowing that he has received a payment on account of the performance of those duties so that he is or remains favourably disposed to the payer in the performance of those duties. He does not either have to or intend to perform those duties in any way differently to the manner in which he would have performed them had no payment been made. That is because of the clear wording of s.4 of the POBO.

77. At Common Law it is necessary that the public officer commit an act/omission of serious misconduct wilfully and without reasonable excuse or justification[11], or with an improper motive[12]. It is plain

[11] See Sin Kam Wah (*supra*) at para. 45
[12] See R v W (M) [2010] QB 787, at para. 9 to 13.

therefore that there must be misconduct and it must be wilful and inexcusable. The mens rea therefore is the commission of a deliberate act/omission amounting to serious misconduct and knowingly lacking reasonable excuse or with an improper motive. A conspiracy to commit Misconduct in Public Office therefore must involve an agreement to commit a wilful act/omission of serious misconduct lacking reasonable excuse.

78. The Respondent's case is that the acceptance, albeit pre-office, of a payment taints all of the acts of the public official thereafter such that he commits misconduct even though he does not perform any of his public duties otherwise than in accordance with what his public duty requires of him. He is guilty merely because he accepted the payment and then took public office. This transfers the mens rea from the wilful commission of an act/omission of serious misconduct into the receipt of a payment that causes him to be or remain favourably disposed to the payer.

79. This would criminalise any person who had received a payment at any time prior to him becoming a public officer, which payment engendered in him favourable feelings towards the payer. It would radically extend the ambit of the Common Law offence so as technically to catch any person who had ever received such a payment.

80. It is submitted that it is trite law that the mens rea must be attached to the actus reus of the offence before the crime is committed. The actus reus of the offence of Misconduct in Public Office is the commission of an act/omission of serious misconduct. It is that

act/omission to which the mens rea of wilful and without reasonable excuse must be attached.

81. The Respondent's error is to consider that the actus reus of the offence of Misconduct in Public Office is the same as that under s.4 of the POBO: it is not. The actus reus under s.4 is that of the offer and receipt of an advantage as an inducement or reward for or otherwise on account of the performance of those duties. The mens rea in that regard is the simple knowledge that the payment is unlawful because it is made in that regard.

82. It is not unlawful to receive a payment as a private individual. It is not unlawful for that payment to induce warm and friendly feelings and favourable disposition. It is not unlawful to take up public office having received such a payment. Illegality only occurs when as a result of that payment or as a result of such favourable disposition serious misconduct is wilfully committed or a person conspires to bring about the commission of such misconduct.

Conclusion

83. For all reasons stated above, there was a serious misdirection in the learned trial Judge's summing up to the jury, which renders the conviction on Count 5 fundamentally unsafe and unsatisfactory, and should be quashed accordingly.

Dated 18 October 2016

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