FACC 14/2016

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.14 OF 2016 (CRIMINAL)
(ON APPEAL FROM THE COURT OF APPEAL CACC NO. 444 of 2014)

BETWEEN

	KWOK PING KWONG, THOMAS	Appellant (D2)
	and	
	HKSAR	Respondent

THE CASE FOR THE APPELLANT

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1. Introduction

1.1 The Appellant was D2 at trial and was convicted by a bare majority on Count 5 of a conspiracy to commit misconduct in public office by Rafael Hui (D1), whilst Chief Secretary of Hong Kong (CS), "being or remaining favourably disposed to Sun Hung Kai Properties Limited (SHK) and/or [D2 or others] in return for the sum of HK$8.5 million."

1.2 The Defence case was that the payments under Counts 2 (on which D2 was unanimously acquitted) and 5 were consultancy fees owed to D1 when he worked for SHK. They were paid whilst D1 was still a private citizen.

1.3 There was no evidence that D1 agreed to or actually did anything improper and in breach of his official duty to favour SHK when he became CS [CA§21]. Indeed there was positive evidence of disfavour. D1 acted against SHK's interests when he was CS.

1.4 The Prosecution case was that the payment was made in return for an agreement that D1 would misconduct himself by "being or remaining favourably disposed" to SHK.[1] The Prosecution argued that Count 5 need not allege any agreement or intention that D1 would act in any way to favour SHK while in office, whether in a specifically identified way or in a generic way (where he would act if necessary or requested, even if the act itself was not identified).[2]

1.5 The Prosecution submitted that "being or remaining favourably disposed" in return for payment was on its own an "act" of misconduct. The

[1] CA§§3-9

[2] CA§§219-220

Prosecution declined to amend their case to allege any intention to act corruptly or favourably.[3] The trial Judge accepted this and, relying on *Chung Fat Ming*[4], directed the Jury on Count 5 as if dealing with a section 4 statutory bribery offence under the *Prevention of Bribery Ordinance* (POBO) Cap.201.[5]

The Question for Determination

1.6 "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?"

The Issues

1.7 D2 submits that "being or remaining favourably disposed" to someone (without an agreement or intention of act in breach of duty) is not an "act" of misconduct. Being or remaining of a particular disposition (for whatever reason) is a state of mind.[6]

1.8 The Judge's direction that "being or remaining favourably disposed" (in return for pre-office payment) was itself an act of misconduct and

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[3] The Prosecution nevertheless claimed that there was evidence from which the Jury could conclude that favour was shown by D1.
[4] [1978] HKLR 480
[5] Without two of its constituent elements.
[6] *Oxford English Dictionary* 2nd Ed p822 "Disposition": "The state or quality of being disposed, inclined or 'in the mind'…; inclination (sometimes = desire, intention, purpose); state of mind or feeling in respect to a thing or person; the condition of being (favourably or unfavourably) disposed towards."

sufficient for conviction was literally without precedent in the common law applied over 800 years in five continents.

1.9 Count 5 did not constitute an offence known to the law and gives rise to three fundamental issues: (i) the *actus reus*/conduct element of the offence; (ii) conspiracy; and (iii) the connected misdirections on legal and factual issues.

(i) The *actus reus* of misconduct involves external conduct in the form of a breach of duty

1.10 The criminal law has always distinguished between the external conduct elements of an offence (*actus reus*) and its mental or internal components (*mens rea*). The *actus reus* defines the external ingredients of the crime.[7] A crime requires some external state of affairs that can be categorised as criminal. A state of mind is not an external element.

1.11 The courts below wrongly held that "being or remaining favourably disposed"[8] (for pre-office payment) is itself an "act" of misconduct. However, misconduct involves an act (or omission[9]) in abuse of power in breach of public duty. The presence of a mental disposition (whether voluntary or involuntary) is not an "act", still less an act of misconduct.[10]

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[7] *Glanville Williams: Criminal Law - The General Part* Ch1 p19 "*actus reus* means all the external ingredients of the crime". It denotes "the external situation forbidden by law - the external elements of the offence" namely "those parts of the offence that were 'not in the defendant's mind'." See *Director of Public Prosecutions (NT) v WJI* [2004] 219 CLR 43.

[8] The phrase was taken from Leonard J's judgment in *Chung Fat Ming*. It has never been used to describe misconduct before this case.

[9] The Prosecution did not allege misconduct by omission. Accordingly the Case concentrates on the active form of the offence.

[10] It is not enough to create criminal responsibility that there are *mens rea* and an act: the *actus* must be *reus*; that is an act proscribed by the law*: Glanville Williams*: *supra* p17.

Misconduct is not and has never been a thought crime.[11] The central conduct element in misconduct is what the public officer does and how it breaches his duty; not what he thinks.

1.12 Section 4 of POBO created a new statutory bribery offence. Section 4 not only criminalised the payment of an advantage to a public servant in return for a breach of duty, but also expanded criminalisation to encompass mere payment of an advantage "on account of" a public servant doing nothing more than performing his normal duties (so-called general sweetening). The expression "being or remaining favourably disposed" was coined to describe that specific expanded criminalisation under s4, nothing more.

1.13 The expression "being or remaining favourably disposed" should not have been transposed from s4 to replace the *actus reus* element of misconduct. The Prosecution's claim that a pre-office payment producing a "warm glow" in the mind of the payer that he had "a friend in office" was all that was required was unprincipled. The Judge's direction that "being or remaining favourably disposed" (in return for pre-office payment) was itself an act of bribery and misconduct and sufficient for conviction was unprecedented.

1.14 As a result the offence of misconduct was unlawfully expanded to cover cases where there was no external element and no (mis)conduct. This expanded offence required even less by way of proof (both in terms of evidence and the constituent elements) than the supposed wider statutory provisions of POBO. The bar was lowered for both bribery and misconduct.

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[11] *Glanville Williams: ibid* p1 "That crime requires an act is invariably true … a private thought is not sufficient to found [criminal] responsibility"

(ii) Conspiracy was not established

1.15 In the case of a conspiracy it is necessary to prove that it was intended and agreed that a course of conduct amounting to a crime would be pursued. Conduct in this sense must mean, at least, an agreement that there will be an act in the future in legally relevant circumstances in the form of an external element (or *actus reus*).

1.16 Proof of a conspiracy to commit misconduct thus required proof of an agreement that the public officer would misconduct himself by an act in office that was identifiable and of a sufficiently serious nature to give rise to the offence. Count 5 contained no such allegation. Without an agreement and intention that D1 would act in breach of public duty, no offence of conspiracy could be established.

1.17 Count 5 did not even allege an agreement to pursue a course of conduct in the future. D1 "remaining favourably disposed" did not require any change from the status quo from D1.

(iii) There were connected misdirections

1.18 The directions given to the Jury, framed as directions of law, were defective. The verdict is unsafe for this reason. But, even if favourable disposition can be misconduct on its own, the Judge failed to understand that D1's conduct during his tenure as CS was still critical to the Jury's assessment of the purpose of the payment and whether D1's actions were governed by a criminal conspiracy with D2.

1.19 Evidence of disfavour ignored. The Judge assumed that if an act of favour was legally irrelevant, it was also factually irrelevant. This was wrong. No irresistible inference of guilt against D2 could be drawn if D1 could be shown to have acted to harm SHK and had declined to show favour when he had the opportunity to do so.

1.20 The Judge accepted the Prosecution's submission that any positive evidence of favour by D1 would prove the existence of his "favourable disposition"[12], but that as a matter of law, lack of evidence of favour or even positive evidence of disfavour did not disprove it.

1.21 Even if the Judge (contrary to basic principles of summing up) was permitted to direct the Jury on issues of fact and say that acts of favour "may be very difficult to show", he should still have told the Jury that actions by D1 that harmed SHK or did not further SHK's interests, were factually relevant.

1.22 The Judge's one sided direction undermined the fairness of the trial. Years of investigation and 56 days of Prosecution evidence had been spent in an effort to prove acts of favour. The Jury were directed to consider whether there was any evidence in favour of the Prosecution. They were not told that the evidence to the contrary was equally relevant. In any fair trial the evidence of disfavour shown by D1 to the Kwoks was just as relevant to the Jury's task as whether there was any evidence of positive favour.

1.23 Inexcusable bribery? The Jury were also told, wrongly, that a pre-office payment merely to retain favourable disposition was bribery and was not

[12] [Part-B/Transcript-Day105/Leave-Hearing-Bundle-p.1109/56/lines16-22]

excusable in any circumstances. The direction[13] went further to undermine the fairness of the trial. It was born from the Judge's adoption of *Chung*, yet it went well beyond that. It expanded the reach of s4 POBO beyond the provisions of the Ordinance and also shut off any consideration by the Jury of any reasonable excuse for which favourable disposition might be sought.

2. The Actus Reus

Common law misconduct requires a "breach of duty"

2.1 The CFA has considered the offence of misconduct in public office repeatedly over the last 15 years.[14] In essence, the offence is a conduct crime. The central external conduct element (the *actus reus*) of the offence has always been identified as an abuse or breach of one of the powers, discretions or duties conferred on a public officer for the public benefit exercisable by virtue of his official position.

2.2 The Prosecution have sought to avoid this element of the offence by constantly resorting to inaccurate and out of context precis of the offence (such as "abuse of office" or "abuse of official position"). Whilst this type of shorthand description appears alluringly simple, it should not be used to obscure the need to identify an external conduct element committed in office in breach of duty.

[13] The direction was given despite Defence objections [Part-B/Transcript-Day75/Leave-Hearing-Bundle-p.1053/31]
[14] *Shum Kwok Sher* (2002) 5 HKCFAR 381, *Sin Kam Wah* (2005) 8 HKCFAR 192, *Chan Tak Ming* (2010) 13 HKCFAR 745, *Wong Lin Kay* (2012) 15 HKCFAR 185, *Ho Hung Kwan* (2013) 16 HKCFAR 525.

2.3 The CFA has held proof of this external conduct element requires examination of the powers and duties exercisable by virtue of office and the manner in which the alleged misconduct is said to have been in breach of those powers and duties.[15]

2.4 The centrality of the abuse of powers, discretions or duties in public office and the need for an external conduct element is reflected in Mason NPJ's description of the offence in *Shum Kwok Sher* §81: "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" The need for an act in breach of duty to be identified and analysed has been accepted throughout the common law world, since the first trace of the offence in the 13th century and in the cognate misfeasance cases.[16] It is an essential external element (and an element of the tort) that "there must be a breach of duty by the officer. It may consist of an act of commission or one of omission."[17]

2.5 The reformulation in *Sin Kam Wah* did not alter this key ingredient. Mason NPJ continued to emphasize that: "The offence is committed

[15] "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." per Mason NPJ in *Shum Kwok Sher* §84.
[16] See *Three Rivers* [2003] 2 AC 1
[17] *AG's Reference (No.3 of 2003)* [2004] 2 CrAppR 23§55

where: a public official … wilfully misconducts himself; by act or omission”.[18]

2.6 In *Wong Lin Kay*,[19] Ribeiro PJ emphasised the need for an analysis of the particular act since the “essential feature of the offence is an abuse by the defendant of the powers, discretions or duties exercisable by virtue of his official position”.

2.7 As the CFA repeated in *Ho* “abuse of power” is “the essence of the offence”[20], not some generalised abuse of official position. The shorthand phrase “abuse of position” or “abuse of office” is only used in summary form to introduce the need to establish an external act that is an abuse of a particular power or duty.

2.8 It is clear that in every case of misconduct ever prosecuted in the HKSAR (other than the instant case) an external or physical act committed by the public officer, be it non-disclosure, acting in conflict of interest, divulging confidential information etc, has been charged.[21]

Misconduct is not an offence defined by lack of loyalty in the abstract

2.9 Misconduct is not a broad integrity offence, tested by reference to the public’s expectations of loyalty in public officers. Statements that merely say an officer has brought his office into disrepute or has “sold” his office are not useful in defining the scope of the crime. The Prosecution argue that an officer who can be said to have abused the trust of the public

[18] §45
[19] §§19, 22
[20] §42
[21] See the analysis of HKSAR cases provided to the CFA on the leave application

commits the offence, without recognising that this is but a single element in the detailed definition of the offence.

2.10 There is no precedent for the suggestion that the offence can be committed by a generalised "abuse" of official position or trust without a relevant act or omission. The CFA in *Wong Lin Kay* rejected the argument that misconduct was simply an "integrity offence" committed whenever a civil servant broke "the public trust placed in [them] that they will properly discharge their duties." The CFA held that the offence can only be established where there is proof of "misconduct by a public officer in relation to powers and duties exercisable by him for the public benefit."[22]

2.11 The Prosecution have repeatedly cited an observation in *HKSAR v Wong Kwong-shun Paul* [2009] 4 HKLRD 840 §40 about the general duty of a public officer to be impartial without acknowledging that this attempted definition of the offence was <u>expressly</u> rejected by the CFA.[23]

Misconduct by thought is contrary to basic principles of criminal law

2.12 Misconduct cannot be committed by thoughts alone. This is consistent with Glanville Williams' explanation for Lord Mansfield's dictum, "so long as an act rests in bare intention it is not punishable by our laws". The reasons for the rule were "(1) the difficulty of distinguishing between day-dream and fixed intention in the absence of behaviour tending towards the crime intended, and (2) the undesirability of spreading the criminal law so wide as to cover a mental state that the accused might be too irresolute even to begin to translate into action."[24]

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[22] §§15-17

[23] *Chan Tak Ming* §3 (see also Editor's note p747)

[24] *Glanville Williams*, *supra* p2

The adverse consequences of expanding the law

2.13 It is an important protection for private citizens entering public life that the law of misconduct is confined to cases where acts in breach of duty are committed. Private citizens must be free to enter public life with their existing prejudices and predilections, whether or not they come from prior payments or years of cordial friendship in their private life. A private citizen turned public officer (be it judge, legislator or executive officer) commits no offence if he harbours a predisposition to favour a person from any source provided he does not act (or omit to act) or favour that person in breach of duty. If he breaches his duty he commits an offence.

2.14 Thus a barrister who is excused chambers liabilities (e.g. rent) because of his years of service to chambers before his official appointment to the bench commits no offence if he thinks warmly of his chamber-mates and their generosity. Similarly, a company executive receiving an ex-gratia bonus because of his contribution to his employer and thinks well of his employer's generosity before his official appointment to become Secretary of Commerce commits no offence. It is only if he breaches his duties of disclosure or impartiality that an offence is committed.[25]

2.15 It is vital for the future of public life in the HKSAR that prospective candidates for public office understand that they are not liable for their dispositions <u>but only for what they do in office</u>. The area is one in which there is no room for judicial dynamism/creativity.

[25] There was no evidence against D2 that he was party to any agreement with D1 not to disclose the payments to the Chief Executive or Executive Council. D1 was charged alone with substantive non-disclosure offences (Counts 1, 6 and 8).

2.16 The law should not criminalise the general gratitude a political candidate may feel towards those who support him or his party financially, like in the US.[26] It is for the executive and the legislature to consider whether pre-office payments and predilections (whether political, familial or commercial) should be the subject of prohibition or more disclosure and whether any infraction should be criminal or administrative.

2.17 The practical reality may be that in the HKSAR, where there will always be family and business connections, the area is best covered by rules on disclosure[27] and conflict of interest. It would be much harder to recruit a Financial Secretary from the private sector if mere goodwill, inspired by the payment of an ex gratia leaving bonus, without any external act is enough to constitute criminal misconduct.

2.18 This does not mean that a public official who is predisposed to favour another is immune from the criminal law: if he acts in favour of others or he omits to act pursuant to that predisposition; if he fails to disclose the predisposition in breach of a relevant disclosure duty even if no act of favour is rendered he will still be guilty of misconduct.

The resultant uncertainty

2.19 The warning in *Shum Kwok Sher* about the need to avoid expanding the boundaries of criminal liability[28] should be heeded. The boundaries of an offence committed by disposition alone would be uncertain. The fact that this case involved a pre-office payment does not alter the essential element of misconduct or provide any limit to the extension of the offence. It is

[26] See *McDonnell v United States* 579 US 1 (2016).
[27] See s 19 *Elections (Corrupt and Illegal Conduct) Ordinance* Cap.554
[28] §98

only the act to be done in breach of duty that is essential to proof. The prosecution formulation would open the possibility of public servants, judges and politicians being prosecuted merely for harbouring friendly or unfriendly feelings towards someone else.

POBO and Chung Fat Ming did not extend the common law

2.20 The common law of bribery was supplemented in the HKSAR by the *Misdemeanors Punishment Ordinance* and the *Prevention of Corruption Ordinance* 1948. The law was further supplemented in POBO.

2.21 Bribery at common law required proof of a payment to someone in a public official position[29] with the intention of influencing his behaviour as a public official.[30]

2.22 Section 4 POBO effectively abolished the requirement of proof that any advantage was given corruptly and with intent to influence the performance of duty.

2.23 Section 4(2) merely required proof that the relevant advantage was "an inducement to or reward for <u>or otherwise on account of</u>" a public servant acting or failing to act as specified in s4(2)(a)(b)(c).

2.24 Given the obvious legislative intention, it is not surprising that the Court of Appeal in *Chung* interpreted the language underlined above to ensure that

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[29] It did not cover pre-office payments. See *HM Advocate v Dick* 1901 3F(CtofSession)59.

[30] Most commentators cite the definition in *Russell on Crime* (12th ed 1964) p381: "Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity."

relatively tenuous circumstances of corruption could be prosecuted under POBO.

2.25 It was under this regime that the concept of "being or remaining favourably disposed" emerged. It was Leonard J who coined the phrase. He was alone in considering this sufficient to amount to the relevant "act" but *only* "within the meaning of the section" and only because of his application of "<u>or otherwise on account of</u>" in s4. The expression "being or remaining favourably disposed" emphasised the fact s4 did not require proof of any specific act of favour by reason of the words "or otherwise on account of."

2.26 As explained in *Bribery and Corruption Law in HK*: "[Leonard J] focuses on the drafting of the offence provision and identifies the word "act" as the key to unlocking the offence from the narrow confines of bribery".[31] It is for that reason he considered the "act" as it appears in s4 does not have to be further particularised in a s4 charge.[32]

2.27 McMullin J disagreed with Leonard J. He did not adopt the formulation "being or remaining favourably disposed". He held that the conduct element of the s4(2) offence was the request by Chung for the payment of laisee on account of the performance of his normal duties as a postman even though this involved no "malfeasance or nonfeasance" and no "breach of duty". He held that "any act" within the meaning of s4(2) was a generic denotation of any and all acts which may fall within the normal scope of a public servant's duties.[33]

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[31] McWalters, §6.63
[32] *Chung* pp496-497
[33] p486

2.28 This wide interpretation allowed s4 to be established without proof of any *quid pro quo*, so that advantages given to a public servant, without any intention that they would do anything, would still be a prohibited "general sweetener" bribe even if it was given for no more than "a warm glow in the mind of the giver, or solicitee, occasioned by the feeling, justified or not, that he has won a friend in office"[34].

2.29 McMullin J did not accept that a favourable disposition was itself sufficient to constitute an act under s4(2). He was right not to. An act involves something more than mere mental disposition. In ordinary language an act will involve a state of affairs external to the public officer.

2.30 The concept of "being or remaining favourably disposed" was thus the creation of Leonard J alone. It was an attempt to provide a shorthand description of the reach of s4. Leonard J did not appear to be advocating a metaphysical transformation of thought into deed.

2.31 Even if Leonard J was correct that s4 created a new form of "thought crime", that would reveal nothing about the common law of misconduct (or bribery). The "act" within s4 is different from the "act" required under misconduct. Statements made in the context of a particular statutory regime should not be transposed to another context.[35] The enactment of POBO and the interpretation of s4 cannot alter the correct approach to the essential external conduct element of misconduct.

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[34] p489

[35] *Pang Hung Fai* [2014] 17 HKCFAR 778

Importing s4 into misconduct undermines legislative choice

2.32 The Legislature refrained from extending POBO to cover pre-appointment payments made to prospective agents or public officers.[36] This legislative choice, made in 1970, suggests that no expansion of the common law was intended nor considered to be warranted on policy grounds.

2.33 The language in the POBO cannot justify the suggestion that the common law of misconduct or bribery also expanded by necessary implication.

2.34 In *Three Rivers* the House of Lords rejected a similar argument that the common law approach to the ingredients of the tort of misfeasance in public office should change in light of European Community law. The fact that the correct common law approach to the tort's mental element would render it ineffective to deal with breaches of Community law could not justify altering its ingredients and "if there is a gap it must be for Community law to fill it".[37]

***Sin Kam Wah* did not change the constituent elements of misconduct**

2.35 The acceptance of a s4 advantage may also give rise to the common law offence of misconduct. It may not. The postman's acceptance of $10 in *Chung Fat Ming* did not. The courts below read too much into the *obiter* statement in *Sin* at §54 to the effect that "acceptance of a "general sweetener" by a public officer can, in appropriate circumstances, amount to misconduct in public office" in guiding them to conclude that "being or

[36] Contrast section 7 of the *Indian Prevention of Corruption Act 1988* and USC18§201(a)(1) for example. It is common ground that POBO did not apply to the agreements between D1 and D2 charged in Counts 2 and 5 for this reason.
[37] p196D

remaining favourably disposed" in return for payment is an "act" of misconduct.

2.36 The CFA did not uphold *Sin*'s conviction on the basis of general sweetener. It refused in terms to do so. The CFA held that Sin's position and his knowledge of the underlying sexual offending meant that it was misconduct for him to accept the gifted sexual services in office.

2.37 The CFA did not apply the analysis in *Chung*, nor was *Chung ever* referred to in the judgment. The CFA never used the term "being or remaining favourably disposed", nor did it conclude that disposition could amount to an "act" of misconduct.

2.38 In *Sin* the CFA was dealing with the case of "general sweetener" identified by the trial judge, namely that the unlawful sexual favours were accepted by the police officer with knowledge of their illegality as "goodwill payments" on account of his duties as a policeman. The qualified *obiter* comment was made in that context [CA§215].

2.39 The CFA did not endorse the suggestion made by the lower courts in *Sin* that a public officer would necessarily commit misconduct merely by placing himself in a "vulnerable" position to receive corrupt demands. This is for good reason, because misconduct is based on a breach of public duty, not on the possibility of a future breach. A public official does not commit misconduct merely by placing himself in a vulnerable position[38]; a breach of duty is required to constitute the offence.

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[38] There are many areas, including a public official's sexual preferences, where the public servant may be "vulnerable"' without committing any offence.

2.40 Even in that context the CFA did not make an unqualified statement of principle (as the Judge did in D2's case) that acceptance of general sweeteners by a public officer <u>would</u> in all circumstances amount to misconduct.

2.41 The reference to "appropriate circumstances" by the CFA recognised that context is always relevant in determining when general sweetener situations may give rise to misconduct. The relevant contextual factors must include the nature of the public office, the relationship of the giver to the public officer or office, the circumstances of the gift (was it disclosed, was it legal etc), and any *quid pro quo* for the gift.[39] The receipt of a gift by a public officer will not always amount to misconduct and does not always mean he will act corruptly or breach his duty (even if he may be liable under s4). Still less does favourable disposition or the holding of a good opinion of another mean that corruption will follow.

2.42 In any event, nothing in *Sin* or *Chung* supports the Prosecution assertion that "being or remaining favourably disposed" is an "act" of misconduct because it is an "act" of betrayal of office. A state of mind without any physical manifestation is not an "act" and cannot be an external element of a crime. In *Sin* both the acceptance of the services by the police officer and (if proved) the agreement to yield to future corrupt demands were, literally, acts of misconduct.

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[39] It appears to be implicit that had the sexual services been legal or had Sin been in the traffic division it might not have been misconduct to accept the gifted service.

The case was not left on the basis of corrupt demands as formulated at trial in *Sin*

2.43 Even under the *Sin* trial Judge's formulation of "general sweetener", the offence of misconduct requires proof of more than "disposition". In *Sin* the general sweetener was said to provide a basis for future corrupt demands. Therefore the offence, even under this formulation, would require proof of the acceptance of a benefit where it was understood that there may be corrupt demands in the future, and if such demand is made it will be acted upon by the public official. This formulation would still require proof that the intention of the conspirators was that the public official would act corruptly.

2.44 It is an integral part of such formulation that the Jury will have to examine the intention of the defendants and whether they intended that future corrupt demands would be acted upon by the public official. The Court's conclusion that, under the *Sin* formulation, it is not necessary to prove that the conspirators intended that the public officer would act if necessary [CA§226] was erroneous.

2.45 Properly understood, the CFA statement in *Sin* §54 supports the defence case that there has to be an external voluntary physical act by a public officer pleaded and proved in order to establish misconduct. At its lowest, the formulation in *Sin* requires proof that the public official would act in breach of duty if and when a corrupt demand is made.

2.46 The Court of Appeal was therefore wrong to uphold the conviction on the basis of *Sin*. But even if this was a possible way of putting the case against D2, that formulation was never put to the Jury.

2.47 It was never explained to the Jury that:

(1) the *Sin* formulation of "vulnerable to future corrupt demands" would require proof of an intention and agreement that the public official would act in breach of duty if and when a corrupt demand was made;

(2) they would have to consider the acts and conduct of D1 after he received the payment in order to determine whether the payment was a "general sweetener" made with corrupt contemplation or for some other purpose or no purpose other than friendship;

(3) proof of a favourable disposition did not prove vulnerability to corruption. Proof of this element would require consideration of whether there was any evidence of corrupt demands or responses; a decision precluded by the Judge's direction that evidence of disfavour was effectively irrelevant.

2.48 The Court of Appeal was wrong to uphold the conviction on the basis that the payment was a general sweetener made to a public official which was a "goodwill payment" for the purpose of providing a basis for future corrupt demands being made of the public official [CA§223].

***Sin Kam Wah* was very different from this case**

2.49 *Sin* was very different from the present case. No future agreed acts or vulnerability to corruption were pleaded or proved in D2's case. The payments were made to D1 when he was a private citizen before his appointment against a background of long standing friendship and

employment by SHK/D2 in circumstances where D2 enjoyed considerable legitimate wealth and a reputation for unconditional generosity.

2.50 Even on D2's case, it was possible D1 would continue to think well of D2 following his payment ("remaining favourably disposed"). That surely was not sufficient to render any continuing goodwill criminal. Yet that was the case left to the Jury.

2.51 The Prosecution and the Judge never dealt with the reality of the case as left to the Jury. If the agreement was merely for favourable disposition ("a warm glow", a "friend in office") without any corrupt demand, it was an improbably vague and valueless agreement that would not warrant the size of the payment involved.

2.52 The Prosecution invited the Jury to treat D2's account explaining these exceptionally generous payments as improbable; however it was no more improbable than the Prosecution case that millions would be paid to D1 without any agreement that he would do anything in return for the money.

General principles of criminal law require proof of an actus reus

2.53 There has never been any suggestion at common law that having a particular mental disposition can constitute an "act" of misconduct on its own. Such a suggestion would be contrary to the ordinary meaning of the words "favourably disposed"; the general principles of criminal law on the need for *actus reus* as well as *mens rea*; and the case law on misconduct

2.54 The state of "being or remaining favourably disposed" cannot constitute the "abuse of power" required in misconduct. As to "remaining"

favourably disposed, this would not even require any change on the part of the public officer to his pre-office mind-set.

Count 5 did not identify any actus reus

2.55 The only misconduct identified in Count 5 was D1 "being or remaining favourably disposed" to SHK in return for payment. The Prosecution expressly declined to amend the count to identify any act of favour or misconduct[40] and rejected any suggestion it had to prove an agreement that the favourable disposition would affect D1's conduct as CS (even if only contingently).[41] It argued that D1's decisions and conduct while he was CS were irrelevant unless they supported the Prosecution case.

2.56 No act of abuse by D1 of his powers, discretions or duties was therefore ever identified for the Jury, still less was it possible for the Jury to analyse that act to ensure the seriousness and connection thresholds were met.

Being or remaining favourably disposed is not an "act"

2.57 When confronted with the Court of Appeal's question: "Can favourable disposition be just a frame of mind?" the Prosecution suggested that "being or remaining favourably disposed" is an "act" of betrayal, therefore misconduct.

2.58 This was a misuse of language. Betrayal (until manifest in external physical action) is a state of mind. Despite this, the Prosecution argued

[40] [Part-B/Transcript-Day73/Leave-Hearing-Bundle-p.1000/65/line24 and p.1005/87/line16]
[41] [Part-B/Transcript-Day104/Leave-Hearing-Bundle-p.1108/42/line11 and Day105/Leave-Hearing-Bundle-p.1109]

that "impurity of thought" is enough of an act to establish misconduct. Indeed Yeung VP considers that D1 was guilty of misconduct because his "heart and his soul were with SHKP" [CA§35].

2.59 This is contrary to the approach of the CFA, which has *rejected* the suggestion that misconduct is an "integrity offence" that criminalises breaches of "duty of loyalty" or "breach of the public trust placed in civil servants that they will properly discharge their duties." (*Wong Lin Kay*§15).

2.60 The Prosecutor's changing description of the Prosecution case from (i) no more than "a warm glow" is required (at trial), to (ii) the act of misconduct is the "act of betrayal" (in the Court of Appeal), to (iii) the "act" is the "continuous act of favouritism" (in the CFA leave hearing) exposes the problem with attempting to mischaracterise "favourable disposition" as an "act" of misconduct.

2.61 The Prosecution's anxiety to establish that favourable disposition is not just in the mind betrays the fact that it understands that misconduct required proof of an external act in the form of a breach of duties/powers.

2.62 The offence of misconduct is not defined by reference to loyalty in office in isolation, it is about preventing serious misuse of a power conferred on a public officer for the public good

2.63 The reality is that the Prosecution case was based on the private thoughts of D1 and not on any external manifestation of those thoughts. As the

Prosecution submitted to the Judge the real complaint concerned D1's "impurity of thought"[42] and "impurity of his mind"[43] while in office.

No thought crimes

2.64 It is dangerous to allow the Prosecution to mischaracterise "being or remaining favourably disposed" without agreement or intention to commit any act in breach of duty as the *actus reus* element of misconduct, particularly when "thoughts", or "feelings" or, even more ephemeral, "a warm glow" can be caused by a number of factors. Committing a crime by "disposition" or "thought" is contrary to fundamental principles of criminal law.

2.65 Such approach would result in an unparalleled extension of the boundaries of criminal liability in the form of an Orwellian thought crime. The *actus reus* element of a crime cannot be established merely by proof of socially unacceptable thoughts.

2.66 As Glanville Williams writes:[44] "a crime requires some external state of affairs that can be categorised as criminal. What goes on inside a man's head is never enough in itself to constitute a crime, even though it be proved by a confession that is fully believed to be genuine. English law has no instance of Orwell's 'thoughtcrime', no equivalent of the adultery 'in his heart' of the New Testament. Sir Edward Coke: 'No man…shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought to be objected against him what he hath spoken or done'."

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[42] [Part-B/Transcript-14.April.2014/p.21/Leave-Hearing-Bundle/p.774/line15]
[43] [Part-B/Transcript-14.April.2014/p.17/Leave-Hearing-Bundle/p.773/line7]
[44] *supra* p31

2.67 It is thus important to distinguish between external elements and internal mental attributes[45]: "*Mens rea* is … the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence".[46] The external element of an offence is "distinct from whatever inward, that is mental, attributes [that] must be added to make the actor guilty"[47] because "an act or omission done or made by a person is the essential foundation of his criminal responsibility".[48]

The Prosecution case was unprecedented

2.68 The Prosecution's mischaracterisation of "favourable disposition" as the "act" of misconduct blurred the distinction between the internal mental elements of an offence and the external circumstances that are the conduct element or *actus reus*.

2.69 It is only where a wrongful state of mind is coupled with an improper act in breach of duty, or where a discretion is exercised on the basis of an improper motive[49] or powers conferred are improperly abused[50] that the substantive offence of misconduct may be committed. Even in these cases the act in question has to be assessed to determine the connection (if any)

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[45] *R v Safety-Kleen Canada Inc.* 114 CCC (3d) 214
[46] *Majewski* [1977] AC 443 p478
[47] *Kolian v R* (1968) 119 CLR 47
[48] *He Kaw Teh v The Queen* (1985) 157 CLR 523 per Brennan J §2; *Kao, Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830§41
[49] See *Shum Kwok Sher* (preferential treatment to pre-qualify for government tenders)
[50] See *Chan Tak Ming* (doctor misusing confidential data)

to duties or powers conferred for the public benefit[51] and judged according to its seriousness[52], before it can be held to be misconduct.

2.70 The Prosecution has provided no explanation for the fact that all cases of misconduct or misfeasance throughout the common law world have involved an act in breach of duty. There has never been a case in over 800 years and on the five continents in which the common law has been applied of "favourable disposition" being sufficient to found a claim in crime or tort. The caselaw in HK and the rest of the world speaks with a single voice, yet, the Prosecution claims this is a "paradigm" case based on "well-established" principles.

2.71 There is no justification for the suggestion that the most attenuated statutory form of corruption created in POBO mandated an extension of the common law offences of bribery or misconduct. A statute that abolishes a requirement to prove corrupt intent or to identify a particular act does not justify the removal of those juristic elements from the common law.

Threat to the separation of powers

2.72 It is not for the Prosecution (or the court) to attempt to circumvent the statute by selectively transposing concepts from statutory offences into the common law (whilst altering the latter's juristic elements) in order to seek a conviction on a basis outside the clear limits of the statute. The courts guard against such an approach to the criminal law: *Chan Wai Yip*.[53]

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[51] See *Wong Lin Kay*
[52] *Chan Tak Ming* §27 and *Ho Hung Kwan* §32
[53] HCMA 449/2008 (26 May 2010) Tang VP held "the legislature had seen fit to legislate in a very limited way…if it is thought that section 7 [POBO] does not go far enough, it is for the

2.73 The doctrine of the separation of powers and the relationship between the legislature and the courts is embedded in the common law.[54] The Prosecution must respect the choice of the legislature and the limits on the powers of the courts. Even if he regards the law as feeble, a Prosecutor cannot choose to prosecute conduct that falls outside the limits of any statute by claiming that the common law has expanded to contain one of the statutory elements whilst ignoring the other limitations in the legislation.

2.74 The proper performance of regular duties, that is the essence of POBO general sweetening, is the opposite of misconduct. To apply the "being or remaining favourably disposed" concept explained in *Chung* to common law misconduct would be to turn the offence of misconduct on its head and say that it is committed even where there is no breach or even intended breach of duty. It would not just expand the law on misconduct; it would alter its juristic elements.

3. Conspiracy

3.1 Count 5 is a conspiracy charge so it was essential to prove that a course of conduct had been agreed that would in the future amount to a criminal offence. This required proof of an agreement to perform some external activity in the form of the *actus reus* of an offence. An agreement that has as its object only a state of mind is unknown to law.

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legislature to expand it and not for the court to do so" (§17) (upheld (2010) 13 HKCFAR 842). See also *Mo Yuk Ping* (2007) 10 HKCFAR 386 and *Shum Kwok Sher v HKSAR supra* §98.

[54] *Leung Kwok Hung v President of the Legislative Council (No 2)* (2014) 17 HKCFAR 841.

3.2 As no breach of duty was identified, it was not possible to show that any course of conduct, agreed upon by the defendants, would necessarily amount to misconduct. It was not possible to assess whether D2 agreed, intended and knew[55] that D1 <u>would</u> wilfully abuse his powers or duties (i) by an act in breach of his official duty imposed for the public benefit (ii) that the circumstances surrounding the misconduct were such that, on assessment by the Jury, it reaches the requisite degree of seriousness (iii) without reasonable excuse or justification, see *Chapman*[56]. No intended act was identified that could satisfy elements (i) to (iii).

3.3 "Remaining" favourably disposed would never be sufficient to meet the requirements of s159A(1) of the Crimes Ordinance Cap. 200. An agreement not to alter an existing state of mind does not meet the statutory requirement that a future crime must be agreed. The future conditional tense is used deliberately in s159A(1) "a course of conduct … *if* the agreement is *carried out* in accordance with their intentions … (a) *will* necessarily amount to or involve the commission of any offence …"

<u>4. Misdirections</u>

4.1 The directions given were defective in law for the reasons set out above. These errors had other consequences.

Warm glow enough?

4.2 The Judge directed the Jury that they only need be satisfied that the payment was made in return for D1 "being or remaining favourably

[55] s159A(2) of the Crimes Ordinance
[56] [2015] 2 Cr App R 10§§68-69

disposed". The direction allowed the Jury to convict on the basis that a payment for a "warm glow" was sufficient to constitute misconduct.

4.3 Given the background of friendship and employment, this was insufficient. It became a trap for D2 as, even on his case, his financial generosity to D1 might have been regarded by the Jury as being likely to produce or reinforce feelings of gratitude and friendship on the part of D1, even if money was due as remuneration. The Jury may have considered it had to convict if this was an intended or agreed outcome of making the payment, even if they accepted the remuneration explanation.

The inaccurate summary of *Sin Kam Wah*

4.4 The Judge inaccurately paraphrased the *obiter* statement in *Sin*.[57] He did not qualify the statement (as the CFA did in *Sin*) that only in certain circumstances would the acceptance of general sweetener amount to misconduct. He did not tell the Jury what circumstances might be relevant. He did not give the Jury any direction on how they should determine the context in order to satisfy themselves that D1 had committed the offence of misconduct.

4.5 The Judge did not use the *Sin* trial judge's formulation that acceptance of a general sweetener may amount to misconduct if the payment is made for the purpose of "providing a basis for future corrupt demands."

[57] "The acceptance of money by a public official in return for him in a general way, rather than in a specific way, being favourably disposed to the person or persons giving him the money, is itself capable of amounting to misconduct by virtue of the breach of the duties and obligations he owes to the public as a public official." [Part-A/p.69H-K]

4.6 Critically the Judge failed to point out that the Jury could not find the relevant misconduct to be acceptance of the payment since this was <u>not</u> a case involving "acceptance of money by a public official" (he wrongly suggested that it was). He ought to have directed them it was only what was agreed to be done in return for the payment that could form the relevant breach of duty.

4.7 If the Prosecution case was that all D1's acts were tainted, the question of reasonable excuse would have to be considered, act by act, because D1 may reasonably have considered he was not in breach of duty in carrying out his general duties in relation to matters that were unrelated to SHK and the Kwok family.[58] Not all his duties had the necessary 'public' qualities. The Jury would also have had to be told to consider whether the absence of rules requiring D1 to declare the Count 5 payments might have been relevant.[59]

The direction on bribery

4.8 The Judge was wrong to allow the Prosecution to equate misconduct with the s4 POBO offence.[60] He was also wrong to allow the Prosecution to characterise the payments in Counts 2 and 5 as bribes.[61] The defence objected to this approach.[62]

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[58] Any defence that involves a value judgment, such as reasonable excuse or seriousness, must be left to a jury. See *Yager v The Queen* (1977) 139 CLR 28, §38 and *R v Y (A)* [2010] 1 WLR 2644

[59] Evidence of Kinnie Wong Kit-yee as summarised [Part-A/p.91]

[60] Prosecution Opening [Part-B/Transcript-Day18/Leave-Hearing-Bundle-pp.892-893]. This was developed in relation to the 'warm glow' basis for conviction. Both the Judge at [Part-B/Transcript-Day73/Leave-Hearing-Bundle-p.1000/67] and the Prosecution at [Part-B-Transcript-Day113/Leave-Hearing-Bundle-p.1209/107] suggested misconduct required no more than that, following a pre office payment, there was in the payer a "warm glow" or a sense of goodwill without any need to prove that any act of favour was agreed or intended.

[61] [Part-B/Transcript-Day18/Leave-Hearing-Bundle-p.892/56/line22] The Prosecution told the Jury it was merely "for technical reasons … the Bribery Ordinance wouldn't apply" to the

4.9 Because the Judge misunderstood the law, he allowed the case to be presented on the basis that any pre-office payment that resulted in favourable disposition in office was an act of "bribery" even if there was no corruption, no act of favour and the provisions of s4 were not breached.

4.10 The Judge directed the Jury that the "central issue" in relation to Count 5 was whether the payments were "bribes"[63].

4.11 Yet Count 5 did not charge a breach of common law or statutory bribery[64]; and the Jury was not directed on the constituent elements of either form of bribery offence. The former required (at least) directions on an intention to influence the acts of a serving public official[65] and the latter required directions on the other elements appearing in s4.

4.12 The Judge effectively created his own definition of what might amount to bribery and then told the Jury that this so-called bribery was serious and not excusable in any circumstances.[66] The effect of this direction was confirmed by the direction that there could be no lawful authority or reasonable excuse for public servant to accept a "bribe" when explaining Count 7.[67]

Count 5 payment because D1 was not yet a public official but "it doesn't make any difference to the issues that arise in the case. It's more of a lawyers' technical distinction that you needn't be concerned about."

[62] Contrary to the conclusion of the CA [CA§243] the issue was raised at trial [Part-B/Transcript-Day75/Leave-Hearing-Bundle-p.1053/31]

[63] [Part-A/p.24B-F]

[64] Essential elements in common law bribery include (i) a payment in office with the intention of (ii) corruptly (iii) influencing the acts of the public officer.

[65] See *Russell on Crime*, *supra* fn30

[66] "The evil or the 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." [Part-A/p.69L-O]

[67] [Part-A/p.77P]

4.13 The combined effect of the Judge's directions was that the Jury would have assumed that mere acceptance by D1 of the pre-office payment was *itself* misconduct whereas it was clear that the pre-office payment could not be misconduct. The Judge also left little or no room for the other requirements of misconduct to be considered.

Direction to ignore disfavor

4.14 As a consequence of the decision that the Prosecution did not have to prove any act of favour, the Judge concluded he did not need to direct the Jury on the relevance of the evidence of lack of favour shown by D1 as CS.

4.15 However, even if the Judge may have been right in law, he should have directed the Jury on the importance of the lack of evidence of corruption or favour and the positive evidence of disfavour by D1 towards SHK when he was CS. This remained relevant evidence as to whether the payment was known and intended to be a general sweetener or a bribe.

4.16 Instead, the Judge directed the Jury in conclusory terms, that the lack of evidence of favour was typical and expected:[68]

"*Indeed*, in the context of paying any public official a sweetener, which you might think *would necessarily involve subtlety and secrecy*, it may be *very difficult to show that any favour was in fact performed*. A 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." (emphasis added)

[68] [Part-A/p.69D-G]

4.17 The Judge's direction, framed as a direction of law, was effectively an instruction to ignore the defence reliance on the absence of any evidence of favour as well as the evidence of disfavour.

4.18 The Judge's direction was inconsistent with *Chung*, even assuming the principles in *Chung* were to be transposed to misconduct. *Chung* expressly stated that when assessing a s4 situation: "The value of the advantage, the nature of the occasion, the identity and status of offeror and offeree *and their behaviour generally* will be the materials on which the prosecutor will deliberate, … before preferring a charge." (p487). Therefore under s4, evidence of lack of favour or positive disfavour would never be *irrelevant* even if proof of a specific act of favour or *quid pro quo* is not legally required.

4.19 The direction also undermined the subsequent summing up on D2's case on this point [see CA§§246-249]. The Judge's reference to D2's counsel speech on this issue did not correct the defective direction.

4.20 The misdirection undermined and devalued the defence case. D2 argued that D1 would not have acted against SHK's interests if he had been paid to favour D2 or SHK. D1 would have taken one of many opportunities to favour SHK if that was what he had been paid for. The fact he did not do so was relevant, as was the evidence that he acted against the interests of SHK. At the very minimum, if 56 days of Prosecution evidence[69] was relevant to the claim that favour had been shown,[70] then the positive

[69] From an investigation that commenced in 2008 and with evidence from 76 prosecution witnesses.
[70] [Part-B/Transcript-Day105/Leave-Hearing-Bundle-p.1109/56/lines16-22]

evidence of disfavour that emerged at the same time must have been relevant to disprove any alleged favourable disposition.

4.21 The Judge was wrong to suggest that the merits of D1's conduct were irrelevant unless it proved his guilt. This one sided direction undermined the fairness of the trial.

4.22 Yeung VP suggested that "being or remaining favourably disposed" had an "obvious meaning" that D1 could act in favour of SHKP [CA§40]. If that was the meaning intended, the Jury needed to be told. They were told the opposite.

4.23 Even if the Prosecution case only involved general (non-specific) allegations of favour or continuous favouritism, then the Jury should still have been directed that the evidence of disfavour or lack of favour was directly relevant to this issue. Given the weight of the evidence of disfavour, the verdict might have been different. The Prosecution's claim that "the jury must have been satisfied that the payments were corrupt" is made on a flawed basis since the Jury were not directed to consider all the relevant evidence or the law of bribery. The Jury were not given the opportunity to consider fairly whether the only irresistible inference was corruption[71].

5. Concluding Submissions

5.1 The Prosecution approach undermines the fundamental requirement in criminal law for an *actus reus*.

[71] *HKSAR v Mak Chai Kwong* (2016) 19 HKCFAR 1

5.2 The Court should not countenance an extension of the common law of misconduct to alter the established elements of the offence.

5.3 The extension necessary to sustain the Appellant's conviction would be unprecedented.

5.4 The proposed extension would provide no clear boundaries to the law.

5.5 Any extension of the law would harm HK society, the rule of law and the doctrine of separation of powers. It would involve unjustified judicial dynamism and allow an undesirable degree of control to rest on prosecutorial discretion.

5.6 It would be contrary to the legislative intentions evident in POBO. The Legislature chose, when POBO was enacted, not to extend the Ordinance to cover prospective public officers or payments received by them before they assumed office.

5.7 If there is thought to be a gap in the protection of the criminal law that is a matter for the Legislature.

5.8 Favourable disposition is a state of mind that may arise from payments, or from years of pre-existing friendship and will likely exist in any public officer towards his former employers when he takes office. It is lawful to carry those thoughts into office as long as that disposition does not result in actual acts of misconduct and breaches of duty.

5.9 The common law is not feeble as the Prosecution suggests. The moment the officer acts on his disposition, he is caught by misconduct. That is the

common position that has been taken over the many centuries and in the many countries applying the common law.

5.10 The Prosecution was able to charge misconduct conventionally. If the case concerned an agreement to act continuously in SHK's favour (e.g. to conceal conflicts of interest, to act favourably when conflicted, to provide secret information or, as asserted, to be SHK's "eyes and ears"; or as Stock NPJ suggested "keeping an eye out" for SHK to protect and to safeguard its interests) which all encompass the required external element, then a conventional misconduct conspiracy charge could have been brought. But the Prosecution chose not to do this; no doubt because of a concern that the evidence did not establish any of those acts.

5.11 It was to avoid the need to prove the *actus reus* element of misconduct in public office that the Prosecution sought to transpose a concept from POBO into the common law.

5.12 If, as the Court of Appeal suggested, there was a proper basis for inferring that there must have an agreement to favour SHK or the Kwoks that could and should have been charged. It was not. That was a choice made by the Prosecution because of the paucity of the evidence of favour and the powerful evidence of disfavour. The Prosecution should not be permitted to use the weakness of their case as an excuse to expand the law. The conviction of D2 is unjust and should not stand.

Dated: October 2016

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TO: The Registrar of the Court of Final Appeal (x6)

AND TO: The Department of Justice