cacc 55/2017

[2018] HKCA 425

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 55 of 2017

(on appeal from HCCC NO 484 of 2015)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| Tsang Yam-kuen, Donald (曾蔭權) | | | Applicant |
|  |

Before: Hon Yeung VP, Macrae VP and Pang JA in Court

Dates of Hearing: 25 & 26 April 2018

Date of Judgment: 20 July 2018

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| J U D G M E N T |

Hon Macrae VP:

Introduction

1. The applicant served the Hong Kong Government in various positions between 1967 and 2005. He was appointed Chief Secretary for Administration from 1 May 2001 to 10 March 2005 when, following the resignation of Mr Tung Chee-hwa as Chief Executive of the Hong Kong Special Administrative Region (“the HKSAR”) on 10 March 2005, he assumed the duties of Acting Chief Executive. He was formally appointed Chief Executive for the remainder of Mr Tung’s second term of office from 21 June 2005 to 30 June 2007.
2. On 25 March 2007, the applicant was elected Chief Executive of the HKSAR with effect from 1 July 2007 until 30 June 2012, with the State Council of the People’s Republic of China issuing a notice on 2 April 2007 confirming his appointment. As Chief Executive of the HKSAR, the applicant was also *ex officio* President of the Executive Council.
3. The applicant was tried on an indictment alleging one count of Accepting an advantage as Chief Executive, contrary to section 4(2B)(a) and 12 of the Prevention of Bribery Ordinance, Cap 201 (Count 1), and two counts of Misconduct in public office, contrary to Common Law and punishable under section 101I(1) of the Criminal Procedure Ordinance, Cap 221 (Counts 2 and 3) before Andrew Chan J (“the judge”) and a jury. On 17 ‍February 2017, after a trial lasting 29 days, the applicant was convicted on Count 2 and acquitted on Count 3. The jury were unable to reach a verdict on Count 1 and were, accordingly, discharged from returning a verdict on that count. A re‑trial on Count 1 was ordered. On 22 ‍February 2017, the applicant was sentenced to 20 months’ imprisonment in respect of Count 2.
4. On 9 March 2017, the applicant filed a Notice of application for leave to appeal against both conviction and sentence (in respect of Count 2). On 24 April 2017, he was granted bail pending appeal, and pending the re‑trial of Count 1, by Yeung VP.
5. The re‑trial on Count 1 (lasting 25 days) took place in September 2017 before the same judge, sitting again with a jury. The new jury were similarly unable to reach a verdict on Count ‍1, which was then ordered to be left on the Court file marked not to be proceeded with, without the leave of the Court.
6. On 6 March 2018, the judge made an order for costs against the applicant, ordering him to pay one‑third of the total prosecution costs in respect of the original trial (to be taxed if not agreed) (“the Costs Order”)[[1]](#footnote-1). In so doing, the judge considered the conduct of the defence at the original trial and made comments concerning the applicant’s conduct at the re‑trial.
7. On 27 March 2018, the applicant also filed a Notice of Appeal in respect of the Costs Order made against him. The applications for leave to appeal against conviction and sentence and against the Costs Order were accordingly directed to be heard together at the same hearing. Following the hearing on 25 and 26 April 2018, we reserved judgment on the appeal. This is the Court’s decision in respect of the appeals against conviction and sentence.
8. I have read the reasons for allowing the applicant’s separate appeal against the Costs Order prepared by Yeung VP and agree with those reasons. It will be convenient, however, if we give our decision in respect of the applications for leave to appeal against conviction and sentence first, followed by our decision in respect of the Costs Order.

The background to the offence

1. In late 2009, the HKSAR government decided to introduce a policy framework for the development of digital audio broadcasting (“DAB”) services in Hong Kong, pursuant to which it invited, *via* a Press Release issued on 11 February 2010[[2]](#footnote-2), the submission of applications for sound broadcasting licences.
2. On 29 and 30 April 2010, the Broadcasting Authority (“BA”)[[3]](#footnote-3) received a total of four applications in response, one of which was submitted by Wave Media Limited (“WML”)[[4]](#footnote-4), a company of which a prominent mainland businessman, Mr Wong ‍Cho‑bau (“Wong”), was the director and major shareholder[[5]](#footnote-5). The other shareholders of WML included Mr Ronald Arculli (a member of the Executive Council), Mr ‍Albert Cheng Jinghan, Mr Arthur Li Kwok-cheung (“Mr Arthur Li”) and Mr David Li Kwok-po (“Mr David Li”).
3. In late 2010, WML also applied to the BA to surrender an earlier sound broadcasting licence[[6]](#footnote-6) it had been granted, since it was unable to discharge the licensee’s obligations[[7]](#footnote-7). Between July and November ‍2011, a further application was made for Mr Arthur Li, a disqualified person under the Telecommunications Ordinance, Cap 106 to exercise control of Digital Broadcasting Corporation (“DBC”), which WML had been re‑named on 30 November 2010[[8]](#footnote-8), as its director and Chairman.
4. The applications of WML and DBC were ultimately approved by the applicant. Unknown to the Executive Council, or the public, the applicant was at the relevant times making arrangements to live in an apartment in Shenzhen owned and refurbished by Shenzhen East Pacific (Holdings) Limited, of which Wong was the Chairman and General Manager (“the transaction”).
5. It was against this factual background that Count 2 arose.

The indictment

1. The particulars averred in Count 2 were in the following terms:

“Tsang Yam-kuen, Donald, being the holder of a public office, namely the Chief Executive of the Hong Kong Special Administrative Region and President of the Executive Council (“ExCo”), between the 1st day of January 2010 and the 30th day of June 2012, in the course of or in relation to his public office, without reasonable excuse or justification, wilfully misconducted himself by failing to declare or disclose to, or by concealing from, the ExCo his dealings and negotiations with Wong Cho‑bau, the major shareholder of Wave Media Limited (“WML”) in respect of a three-storey residential property situated at East Pacific Garden, Futian, Shenzhen when he, in his capacity as the Chief Executive and President of ExCo, was involved in decision making in relation to applications made by WML (subsequently renamed Digital Broadcasting Corporation Hong Kong Limited (“DBC”)) for:

(a) A sound broadcasting licence for the provision of digital audio broadcasting services submitted to the Commerce and Economic Development Bureau (“CEDB”) in April ‍2010;

(b) The surrender of a sound broadcasting licence for the provision of Amplitude Modulation radio services submitted to the CEDB in September 2010;

(c) Permission for Li Kwok‑cheung, Arthur to exercise control of DBC as a director and chairman of the board of the company.”

For the sake of convenience, the above property in Shenzhen will hereinafter be referred to as “the property”; while the three applications in respect of (a) the DAB licence, (b) the surrendering of the Amplitude Modulation (“AM”) ‍licence and (c) permitting Mr Arthur Li to exercise control of DBC will be referred to, as in the respective particulars of the count, individually, as “Application (a)”, “Application (b)” or “Application ‍(c)” or, collectively, as “the three ‍applications”.

1. In light of the arguments presented before this Court, it is necessary to say something about the allegation by the prosecution in respect of Count 1, on which the jury failed to agree and were subsequently discharged. It was alleged by this count that the applicant had, without lawful authority or reasonable excuse, accepted an advantage in the form of the refurbishment and re‑decoration of the property (of which he was ultimately to become the tenant), as an inducement to or reward for considering and making decisions in relation to the three applications. It was the prosecution case that the estimated refurbishment and redecoration costs of the property amounted to some HK$3.5 million[[9]](#footnote-9); while the interior design fee was HK$350,000[[10]](#footnote-10). Accordingly, the allegation was that the applicant had received a bribe of some HK$3.85 ‍million.

The facts relevant to Count 2

1. During his tenure as Chief Executive[[11]](#footnote-11), the applicant had made a total of 69 ‍*ad* ‍*hoc* declarations of interest at 46 meetings of the Executive Council[[12]](#footnote-12), 23 of which meetings took place during the period of the offence (the first being 2 March 2010, the last being 5 June 2012)[[13]](#footnote-13). In those 23 ‍meetings, whilst declaring various other interests, the applicant neither declared nor disclosed the transaction, nor did he refer to his relationship with Wong.
2. In early 2010 (the exact date was unknown[[14]](#footnote-14)), the applicant was in discussion with Wong regarding the renting of the property. It was asserted by the applicant for the first time during his appearance as a guest on the Beautiful Sunday radio programme of 26 February 2012 that a rental amount of RMB800,000 *per annum* had been agreed with Wong[[15]](#footnote-15).
3. On 30 April 2010, WML applied to the BA for a DAB licence[[16]](#footnote-16). On 2 November 2010, the HKSAR Government announced that the applicant had given his approval in principle for Application (a)[[17]](#footnote-17).
4. On 9 December 2009, the applicant endorsed an internal minute headed “Declarations of interest – ExCo meeting on 15 December 2009”[[18]](#footnote-18) and thereby agreed that Mr Arculli, another shareholder of WML[[19]](#footnote-19), be excluded from the Executive Council discussions, since Mr ‍Arculli’s “position at Wave Media would likely lead reasonable members of the public to think that there is a real danger that his participation in ExCo’s discussion of the item may be motivated by his significant interest in Wave Media rather than the duty to offer impartial advice”[[20]](#footnote-20). Consequently, Mr Arculli was excluded from the discussion on the relevant applications at the meetings which subsequently took place on 15 December 2009, 2 ‍November 2010, 22 March 2011 and 20 January 2012[[21]](#footnote-21).
5. Between 2008 and 2012, the applicant also endorsed other internal minutes for meetings of the Executive Council, which similarly concerned declarations of interest[[22]](#footnote-22). He did not disclose the transaction or refer to his relationship or dealings with Wong in any of those minutes or meetings.
6. On 17 November 2010, pursuant to an earlier request from the applicant’s wife[[23]](#footnote-23), a sum of RMB800,000 was remitted from her bank account to the bank account of East Pacific (Holdings) Limited[[24]](#footnote-24).
7. On 24 March 2011, the Government announced that the applicant had formally approved Application (a) and Application (b)[[25]](#footnote-25).
8. The refurbishment and re‑decoration of the property began in “late 2011”. Again, this was not revealed to anybody until the Beautiful Sunday broadcast of 26 February 2012[[26]](#footnote-26).
9. On 20 January 2012, the HKSAR Government announced that the applicant had approved Application (c)[[27]](#footnote-27).
10. On 20, 21 and 22 February 2012, certain reports surfaced in the media raising public concerns about the conduct and integrity of the applicant in respect of his association and activities with various wealthy friends and businessmen.
11. On 22 February 2012, a response to those public concerns approved by the applicant was released[[28]](#footnote-28), in which it was disclosed for the first time that the applicant had rented the property, in which he was intending to reside after his retirement, and that he would be paying the market rent for the property.
12. On 26 September 2013, the applicant produced to the ICAC through his solicitors the originals of what were said to be, *inter alia*, a lease agreement and a supplemental lease agreement in respect of the property[[29]](#footnote-29). It should be said, however, that the applicant had initially ignored the ICAC’s request to disclose these documents and it was only after the ICAC made it clear that it had the necessary power to search and seize the documents that they were produced.

The prosecution case on Count 2

1. It was the prosecution case that the applicant had a duty to declare and disclose, and not to conceal, any personal interest which might conflict with his public duty, when discussing and ultimately deciding upon matters during meetings of the Executive Council. The prosecution maintained that the applicant could not conceivably have overlooked his obligations in that regard, since so many related events were taking place at the relevant times, which must have prompted him to realise that he should declare a personal interest[[30]](#footnote-30).
2. The prosecution also alleged that, given the fact that the applicant had made less significant declarations of interest at many other meetings of the Executive Council, his non‑disclosure of the transaction with Wong was clearly a deliberate one.
3. At the outset of his closing speech to the jury, Mr ‍David Perry QC, on behalf of the prosecution, put his case on Count 2 as follows[[31]](#footnote-31):

“The position in relation to Count 2, just summarising the prosecution case at this point, is that the defendant failed to disclose the true nature of his relationship with Wong Cho Bau when he was presiding over the Executive Council and making the decisions to Wave Media, favourable to Wave Media, and also to Wong.

The prosecution case is that that failure, we see in the particulars of count 2 on A3, “failing to declare or disclose to, or by concealing from ... his dealings and negotiations” -- the prosecution case, I’m just going to summarise it, is that that was deliberate. It wasn’t an oversight. It wasn't a mistake. It wasn’t negligent. It was deliberate.

The defendant’s position was hopelessly compromised. The defendant’s position was hopelessly compromised because he was negotiating to occupy a luxury property in Shenzhen, and yet at the same time he was making decisions favourable to the company of which Wong Cho Bau, the other party to those negotiations, was a director and shareholder and who would benefit from the commercial success of the company.

The defendant knew that if he made a disclosure at ExCo, it would lead to the property, which was secret, and it would also lead to his negotiations with Wong, and the reason why it was secret was because it was a corrupt bargain, part of a corrupt bargain. As I said in my opening address, Wave Media and Wong wanted the licences and also for the disqualified person to be able to act in an executive capacity in the company, and the defendant wanted the property.

Whatever the position, whatever you make of count 1 of the indictment, it was still an obligation of disclosure on the defendant when he was presiding before ExCo. And again the period of time is relevant because – I’m going to remind you during the course of my submissions -- of all the matters that were going on during that period of time.

Just ask yourselves this: what would have been on the defendant’s mind throughout this period? His future planning, where he was going to live at the time he stepped down as Chief Executive. That would be a big thing on his mind. It’s not something that would have slipped his mind. So he had all this period of time to think about the negotiations, the redecoration, the redesign, and it was clearly a conscious and deliberate decision not to reveal what the true position was, even though it was a classic conflict of interest situation.”

1. At the conclusion of his speech to the jury on the following day, Mr Perry again summarised the prosecution case on Count 2[[32]](#footnote-32):

“Count 2. The prosecution case is that the defendant wilfully misconducted himself by failing to declare or disclose, as we can see from the particulars at A3, or by concealing from the Executive Council his dealings and negotiations with Wong Cho Bau in respect of the property.

And the position here again, the prosecution say, is quite clear. First, the defendant had placed himself in a position of obligation to Wong Cho Bau and was hopelessly compromised. Who could have any confidence that his decision-making was not tainted by the nature of his relationship with Wong Cho Bau? But being in a classic conflict of interest situation, the defendant kept his negotiations secret while making declarations of interest -- his negotiations secret while at the same time make declarations of interest on matters of much less significance.

Of course we know he was constantly reminded of the importance of declarations in relation to this very matter, when he had to consider Mr Arculli’s position.

This was a serious and persistent breach of his duty to act with integrity. And the information was concealed deliberately and for an obvious reason: it would have led to a declaration of the true nature of his relationship with Wong, it would have undermined confidence in his decision-making, and it would have led to a public outcry about collusion between government and rich business.

Not to declare in these circumstances was a serious matter, not to act openly and in good faith, and it calls into question the integrity of the system of declarations of interest in Hong Kong. To the Chief Executive, it must have been obvious. He abused the system. There was no need for any review of the conflict of interest system. Had it have been operated as it should have been operating, he would have been open, but he was not.”

1. At trial, the prosecution called 37 prosecution witnesses, many of whom were government officials, or former officers, who had worked closely with the applicant. They testified on such matters as the operation of the civil service regulations in respect of conflicts of interest, and the declaration system within the Executive Council[[33]](#footnote-33). The witnesses also referred, amongst other documents, to various codes for principal officials, Civil Service Bureau Circulars and guidance notes for members of the Executive Council.
2. In order to provide the relevant context and background to the offences alleged against the applicant, certain matters were necessarily canvassed in evidence arising out of various radio and television interviews given by the applicant; for example, concerning his private trips to Macau in February 2012, and his use of the private yachts and jets of wealthy friends and businessmen. In respect of these matters, the judge directed the jury that they “must not use these allegations to [the applicant’s] detriment or prejudice”[[34]](#footnote-34).

The defence case

1. The applicant elected not to give evidence at trial, nor did he call any witnesses.
2. Nevertheless, the defence relied upon the applicant’s explanations given in his media interviews, in particular in two ‍radio programmes, namely ‘Talkabout’, on 22 February 2012, and ‘Beautiful Sunday’, on 26 February 2012, in which he made the following assertions, amongst others:

(i) He was never involved in “any corrupt(ion) of any kind”[[35]](#footnote-35);

(ii) It was his (and his wife’s) genuine intention to look for a temporary residence after retirement[[36]](#footnote-36); and

(iii) Whilst accepting that he was familiar with and always concerned about the issue of conflict of interest and the importance of transparency[[37]](#footnote-37), he did not declare the transaction, because he could not see that there was any conflict of interest at all[[38]](#footnote-38).

1. The defence case was summarised by the judge at the beginning of his summing‑up as follows[[39]](#footnote-39):

“There was a genuine lease entered between the defendant's wife and the East Pacific people.

Under the contract, the landlord was obliged to provide redecoration and refurbishment. The redecoration and refurbishment was no more than part of the deal. The rental that they paid included the renovation and the refurbishment.

The defence also say, when the defendant came to consider and approve various applications made by Wave Media or DBC, the fact that Mr Wong Cho‑bau, being the shareholder and director of both Wave Media or DBC and East Pacific Group escaped his attention, and in any event, it was a bit far-fetched for him to declare.

The applications made by Wave Media or DBC and all the negotiations and dealings in connection with the properties, the defence say, are two separate matters.”

1. The defence also laid emphasis on a particular clause in the guidance note for members of the Executive Council, and the interpretation of such clause that the applicant had no obligation to make a declaration of his interest in a property which he was renting, not purchasing[[40]](#footnote-40). The defence contended that the transaction between the applicant and Wong was a *bona fide* lease agreement made at arms’ length and at market rates[[41]](#footnote-41).
2. The defence submitted to the jury that, if no corruption could be proved, then Count 2 should fail because “the heart of the claim about non‑disclosure is that there couldn’t be disclosure because this was corruption”[[42]](#footnote-42). Furthermore, if the non‑disclosure was caused by an error of judgment, it was not serious enough to render the applicant’s conduct a criminal offence[[43]](#footnote-43).
3. The defence further stressed that the consequences of non‑disclosure were not so serious as to affect the people of Hong Kong, since the disclosure would not be known to them anyway, and the disclosure requirements were only of concern to members of the Executive Council. It was submitted to the jury by Ms Clare Montgomery QC, on behalf of the applicant, that[[44]](#footnote-44):

“…the prosecution kept saying to you, “This is non-disclosure, it’s concealing the information from the people of Hong Kong”, but that is an overstatement. It’s not the people of Hong Kong who get told about conflicts of interests or declarations of position; it’s the Executive Council.

And so, at most, the disclosure would have been made to them, and at most it would have been noted, and it would have remained confidential after that, because, as you know, all of those papers are watermarked because Executive Council discussions are confidential; the contents are secret. They are never published. But for the fact this case had been brought, you would never know that Mr Arculli had declared an interest and had been excluded. Donald Tsang would have known very well that it would have been perfectly straightforward for him to say, “I am getting the flat redecorated; I feel I should tell you, the members of the Executive Council about it”, and nothing would have happened.

So that undermines, doesn't it, the prosecution theory that all this is being kept secret for a corrupt reason?”

Summing‑up

1. The judge set out (and repeated) what he termed the “elements”[[45]](#footnote-45), or “ingredients”[[46]](#footnote-46), of the offence of Misconduct in public office as follows[[47]](#footnote-47):

“Misconduct in public office is committed where:

(1) a public official

(2) wilfully conducts himself by act or omission

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

(4) without reasonable excuse or justification

(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.”

1. In respect of the alleged “misconduct”, the judge reminded the jury of what leading counsel for the applicant had said in her closing address to the jury[[48]](#footnote-48):

“Now, in relation to Count 2, Ms Montgomery, in her final speech, also told you that it was no more than a *bona fide* commercial transaction reached at arm's length between the defendant and the East Pacific Group. As Mr Tsang said on the radio, he met with Mr Wong Cho‑bau on social occasions and came to know about the property. The defendant and his wife were looking for a temporary residence and it so happened East Pacific Group had to redevelop their clubhouse; the clubhouse was in a dilapidated and unhygienic state. Negotiation took place but it was just the negotiation of a normal lease. The negotiation would not give the Chief Executive any direct or financial interest in any of the Wave Media applications.

Ms Montgomery suggested, if nothing suggested that it was controversial, why should the defendant declare his interest? Renting a property is not a financial interest which required declaration...”

1. As to the element of “wilfulness”, the judge directed the jury that[[49]](#footnote-49):

“‘Wilfully’ in this context means deliberately. Deliberately, rather than by accident and inadvertence or oversight. So members of the jury, you have to be satisfied that the act or omission was deliberately done and it was not merely overlooked by the defendant…if the account put forward by the defendant in Beautiful Sunday is true or may be true, then you should acquit the defendant, because overlooking is not enough for conviction. It has to be deliberately done.”

1. Of the element of “without reasonable excuse or justification”, the judge told the jury that if they found that the applicant had acted wilfully, then there was “little room for having reasonable excuse or justification”; although it was still a matter for them[[50]](#footnote-50).
2. In relation to the element of “seriousness”, the judge directed the jury that[[51]](#footnote-51):

“…what the defendant did, or omitted to do, has to be serious and not trivial, and you judge whether it is serious enough to warrant his conviction for the offence, all other ingredients being proved so that you are sure, by considering the defendant’s responsibilities as well as the responsibilities of his office, the importance of the public objects which he, as the Chief Executive of Hong Kong and the President of the Executive Council, served, and the nature and extent of his departure from those responsibilities.

So it has to be serious, not trivial, and you judge whether it is serious enough to warrant his conviction of the offence by considering the defendant’s responsibilities as well as the responsibilities of the office and the importance of the public objects which he, as the Chief Executive and the President of the Executive Council, serves, and the nature and extent of his departure from those responsibilities.”

1. The judge next reminded the jury that the allegation that the transaction was a corrupt one was the basis on which the prosecution proceeded in respect of Count 1, not Count 2. In respect of the allegation of Misconduct in public office in Count 2, he said[[52]](#footnote-52):

“This is not an allegation involving any suggestion of bribery or corruption, Count 2. So if, at the end of your deliberation in relation to Count 1, you come to the conclusion that there exists no corrupt practice, you still have to … go back to Count 2, go back to the particulars of the offence. You still have to consider the specific allegations, whether they were deliberately made, not by accident, not by inadvertence, not by oversight, without reasonable excuse or justification. And you have to decide whether the defendant, as a public official, was placing himself in a serious conflict of interest where his duties as a public official were hopelessly compromised”.

1. In relation to what the applicant had said in his radio and television interviews (the transcripts and certified translations of which were provided to the jury), the judge directed the jury that[[53]](#footnote-53):

“As far as the radio and television interviews are concerned, they are to be seen and assessed in their entirety, for the simple reason that the defendant was providing an explanation for his conduct.”

Of that explanation, the judge told the jury that “if the account put forward by the defendant is or may be true, then the defendant must be acquitted”[[54]](#footnote-54). Later, he again expressly directed the jury[[55]](#footnote-55):

“So again, if the account put forward by the defendant in Beautiful Sunday is true or may be true, then you should acquit the defendant, because overlooking is not enough for conviction.”

1. The judge also told the jury that, if necessary, they might “listen to the whole of the programme and pay attention to the details given by the defendant”[[56]](#footnote-56). Later, he reminded the jury that they should consider the whole of the programme in deciding where the truth lies[[57]](#footnote-57).
2. The judge also reminded the jury of the defence point, which had emerged from the evidence of Ms Kinnie Wong Kit‑yee (“PW5”), that “there was no obligation to declare property that [the applicant was] renting”[[58]](#footnote-58).

The jury’s questions

1. After the judge had delivered his summing‑up, the jury asked a number of questions, in the fourth of which they indicated that they were unable to reach a majority verdict on Count 1[[59]](#footnote-59). The question went on to request a legal definition of “conflict of interest” and “bribery”. In the final part of the question, the jury asked what their verdict should be if they found that the applicant had accepted an advantage, but nevertheless were not sure that the acceptance of such advantage was connected with the three ‍applications in questions.
2. The judge properly discussed the questions with the parties, before giving further directions to the jury in respect of, *inter alia*, “conflict of interest” in the following terms[[60]](#footnote-60):

“Now, in relation to your request for legal definition for conflict of interest, there is no legal definition for that; there’s no legal definition for conflict of interest. However, you may find what amounts to conflict of interest in paragraphs 3 and 4 of B141[[61]](#footnote-61).

In relation to your request for the legal definition for bribery, there is no legal definition for that; there’s no legal definition for bribery. Section 4(2B), “Chief Executive accepting advantage” is one of the offences mentioned under section 4, “Bribery”. But members of the jury, do not be distracted by the term “bribery”. Focus your attention on the offence of section 4(2B) which is now before you.

In relation to the last item on your request, let me reiterate what I said this morning: but in this case you may not need to consider that, because in this case, the prosecution in this case accepts that they are required to prove the necessary connection, so they accept they have to prove that the defendant accepted the advantage because he was going to consider and make decision in relation to the three applications.

So the question for you is whether you are sure the acceptance of the advantage was made for the considering and making decisions regarding the three applications in his capacity as the Chief Executive of Hong Kong and the President of the Executive Council.”

Grounds of appeal against conviction

1. Ms ‍Montgomery QC (with her Mr Peter Duncan SC and Mr ‍Derek ‍Chan), all of whom appeared for the applicant here and below, has advanced three ‍grounds of appeal against conviction. First, it is argued that the prosecution case on Count 2 was inextricably tied to its case on Count 1. Since there was no verdict on Count 1, there could be no basis for a finding that the transaction and his dealings with Wong were corrupt and that the applicant had deliberately concealed these matters because they were corrupt. The argument is that since the jury should have proceeded on the basis that there was nothing untoward in the applicant’s dealings with Wong over the transaction, there was no duty on the applicant to disclose them, and the applicant’s position could not be said to have been “hopelessly compromised”. Accordingly, the jury should have been directed that they could not convict him, *absent* a verdict of corruption on Count 1, unless they were sure that the applicant’s interest in the transaction was sufficient to influence him in his consideration of the licensing applications; which applications were uncontroversial. As a necessary concomitant to this approach, the jury should have been directed that the prosecution needed to prove deliberate concealment rather than mere non‑disclosure. (Ground 1)
2. Secondly, it is submitted that the judge failed to direct the jury properly as to the *mens rea* of the offence of Misconduct in public office. Although the judge did direct the jury as to the meaning of “wilfully”, namely, “‘wilfully’ in this context means deliberately … rather than by accident and inadvertence or oversight”, he did not go on to explain that deliberate meant, in accordance with *Sin Kam Wah & Another v HKSAR*[[62]](#footnote-62), “in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful”[[63]](#footnote-63). (Ground 2)
3. It is further submitted that the argument on Ground 2 is linked to Ground 1, since *deliberate concealment*, as distinct from non‑disclosure, necessarily depended on a subjective appreciation by the applicant of the unlawfulness of his act.
4. Thirdly, it is contended that the judge did not provide the jury with sufficient guidance as to how to approach the element of “seriousness” in the offence. In particular, the judge failed to direct the jury on the need to consider the seriousness of the applicant’s failure to disclose; the harm that would be caused to the public interest by such failure to disclose, in circumstances where the licences were unanimously approved by those tasked with considering the applications; whether the applicant’s conduct amounted to an abuse of the public’s trust in his office; and the applicant’s motive. (Ground 3)
5. We shall refer to these three grounds as the ‘duty to disclose’ ground, the ‘*mens rea*’ ground and the ‘seriousness’ ground. However, the arguments are to some extent linked and overlapping. For example, it is argued that the direction on seriousness is dependent on the duty that is said to have been breached; whilst deliberate concealment, as distinct from non‑disclosure, is said necessarily to depend on a subjective appreciation by the applicant of the unlawfulness of his act.

The applicant’s arguments

1. A major limb of the applicant’s argument is concerned with the consequences of the jury’s failure to agree on their verdict on Count 1. It is accepted that if the jury had been satisfied that the receipt of the benefit of the property in Shenzhen could be linked with the performance (or non‑performance) of the applicant’s official duty, then there could be no argument that the applicant had seriously misconducted himself by failing to disclose a corrupt transaction. There would be a clear conflict of interest and a deliberate concealment of the circumstances giving rise to that conflict. The facts would, it is argued, be akin to Count 8 of the indictment against the 1st ‍appellant in *HKSAR v Hui Rafael Junior*[[64]](#footnote-64), who had failed to disclose his receipt of HK$11.182 million which, as alleged in Count 7 of the indictment, was a corrupt payment routed to him by the conspirators[[65]](#footnote-65).
2. However, in the present case, the jury were not so satisfied that there was a corrupt transaction, since they failed to agree, and were discharged from giving a verdict, on Count 1. Accordingly, it is argued that the jury needed to be specifically directed as to how they could convict where there was no corruption involved. That necessarily engaged issues of what the applicant failed to disclose which he should have disclosed, what his intention was in not making a disclosure and whether such failure was serious enough to warrant his conviction. For the seriousness of deliberately concealing a corrupt transaction, where there was a clear conflict of interest, is obvious: the seriousness of deliberately concealing (or failing to disclose) a non‑corrupt transaction, where the conflict of interest was not clear, is not so obvious. Moreover, whether the applicant deliberately concealed or merely failed to disclose a non‑corrupt transaction depended on a subjective appreciation of the wrongfulness of his action (or inaction) in those circumstances.
3. Ms Montgomery relied on the principle first established by Abbott CJ in *R v Borron*[[66]](#footnote-66), in a passage specifically recited in full (or in part) and approved in, for example, *R v Llewellyn-Jones*[[67]](#footnote-67), *Attorney-General’s Reference (No 3 of 2003)*[[68]](#footnote-68), *R v Boulanger*[[69]](#footnote-69), *R v W (M)*[[70]](#footnote-70) and *R v Chapman*[[71]](#footnote-71), that in considering the offence of Misconduct in public office[[72]](#footnote-72):

“… the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment. To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom”.

Since the prosecution were unable to prove an *improper* motive, Ms ‍Montgomery submits that it was vital that the judge should instruct the jury to consider the applicant’s motive, since that might be relevant to a decision whether the public trust was in fact abused by the applicant’s conduct: see *Attorney-General’s Reference (No 3 of 2003)*[[73]](#footnote-73). Furthermore, without a direction to consider whether the applicant knew that what he was doing was unlawful, there was a danger that the jury might have thought that simply because the non‑disclosure was deliberate, the applicant was guilty.

1. A proper and sufficient direction on seriousness was therefore necessary. In this respect, Ms Montgomery relied on *R v* *Chapman*, where the Court held, *inter alia*[[74]](#footnote-74):

“It is not in our view sufficient simply to tell the jury that the conduct must be so serious as to amount to an abuse of the public’s trust in the office holder, as such a direction gives them no assistance on how to determine that level of seriousness…

…..

The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis-à-vis his employers or commanding officer, there was no abuse of the public’s trust in the office holder as the misconduct had not had the effect of harming the public interest. No criminal offence would have been committed.”

1. She also referred us to *R v France*[[75]](#footnote-75), where the Court, whilst observing that “the concept of the public interest, and in particular whether the conduct of the public official is so serious as to amount to an abuse of the public trust placed in him … is an unusual, and not always straightforward, one for the jury to determine”[[76]](#footnote-76), accepted that the trial judge had properly identified the elements of the offence of Misconduct in public office and stressed that the level of misconduct had to be shown to be so serious as to be characterised as criminal[[77]](#footnote-77). Nevertheless, in allowing the appeal against conviction, the Court said of the judge’s directions[[78]](#footnote-78):

“However, he did not go further. He did not give the jury any help on how to assess seriousness and harm, for example, by providing them with a list of possible factors that they might wish to consider…

…..

In our judgment, more detailed instruction as to the factors relevant to the question of the public interest were required *on the facts of this case* so that the jury could weigh carefully the seriousness of the breach.” (Emphasis added)

1. Citing the Court’s judgment in *Attorney-General’s Reference (No 3 of 2003)*, Ms Montgomery contended that whether conduct was sufficiently serious enough “will depend on the factors stated by Sir ‍Anthony Mason NPJ (in *Shum Kwok Sher v HKSAR*) along with the seriousness of the consequences which may follow from an act or omission”[[79]](#footnote-79). Of the consequences, the Court said[[80]](#footnote-80):

“The consequences of some conduct, such as corrupt conduct, may be obvious; the likely consequences of other conduct of public officers will be less clear but it is impossible to gauge the seriousness of defaulting conduct without considering the circumstances in which the conduct occurs and its likely consequences. The whole should be considered in the context of the nature of the offence and, as Sir Anthony Mason NPJ stated in *Shum Kwok Sher v HKSAR* …, the responsibilities of the office and officer holder”.

The respondent’s arguments in response

1. Mr Perry QC (with him Mr Eric Kwok SC and Ms ‍Maggie Wong), all of whom also appeared for the prosecution both here and in the court below, took issue with the notion that Count 2 was interlinked with, and dependent upon, Count 1, so that if the jury were unable to agree on Count 1, a conviction on Count 2 would be unsafe and unsatisfactory. We have already referred to those passages in his closing address in which Mr ‍Perry told the jury that whatever their view on Count ‍1, the prosecution case on Count 2 was that the applicant had deliberately concealed his dealings in respect of the transaction, because they would have revealed that he was “hopelessly compromised” when making decisions favourable to Wong. In his opening address, he explained to the jury that Count 2 was “different”[[81]](#footnote-81) from Count 1, in that Count 1 was concerned with accepting an advantage, while Count 2 alleged that the applicant was “concealing his links, even though he was hopelessly conflicted and compromised”[[82]](#footnote-82).
2. Consistent with that approach, the judge instructed the jury that Count 2 was “not an allegation involving any suggestion of bribery or corruption”[[83]](#footnote-83) and that, if they concluded that there was no corruption involved, the jury still had to consider whether the applicant’s conduct in not disclosing his dealings with Wong in respect of the transaction was deliberate and without reasonable excuse or justification[[84]](#footnote-84). Specifically, he directed the jury[[85]](#footnote-85):

“And you have to decide whether the defendant, as a public official, was placing himself in a serious conflict of interest where his duties as a public official were hopelessly compromised”.

1. Accordingly, Mr Perry rejected Ms Montgomery’s analogy between Count 2 in this case and Count 8 in *HKSAR* ‍*v Hui Rafael Junior*. Rather, the allegation in Count 2 in the present case was identical with the complaint of Misconduct in public office in Count 1 of the indictment in of *HKSAR v Hui Rafael Junior* (or, for that matter, Count 6), where the jury had likewise been directed that the allegation did not involve any suggestion of bribery or corruption. Notwithstanding identical issues for the jury in that case, as characterised by the trial judge[[86]](#footnote-86) in his summing‑up that[[87]](#footnote-87):

“The defence answer to that allegation is that the prosecution have failed to prove to the required standard that these matters were disclosable by him as managing director of the MPFA, or that there was any conflict of interest, real or apparent. Furthermore, even if they were disclosable and even if there were a potential conflict of interest, and even if it amounted to wilful misconduct for which there was no reasonable excuse or justification, such misconduct was not serious enough to warrant his conviction and you should find him not guilty”,

this Court had been treated to exactly the same arguments, complaints, authorities and articles in learned legal journals that were run and referred to before the Court of Appeal in *HKSAR v Hui Rafael Junior & Others*[[88]](#footnote-88), and expressly rejected. Moreover, *R v* *Chapman* and *R v* *France* had both been cited to the Court of Final Appeal in argument in the subsequent appeal.

1. Mr Perry accepted that whilst a conviction in respect of corruption on Count 1 would necessarily have resulted in a conviction on Count 2, such conviction was not a necessary *sine qua non* for a determination of Count ‍2, as the judge made clear.
2. It was submitted that the judge’s directions should be viewed in the context of the issues which arose for the jury’s determination. The applicant did not give evidence, nor did he call witnesses. His case was an adoption of what he had told the press in various interviews, in particular the Beautiful Sunday programme on Commercial Radio of 26 February 2012. The importance of the Beautiful Sunday broadcast had been emphasised by Ms Montgomery in her closing address to the jury, where she described it as “a very good way in which you can test Mr Tsang’s honour and his honesty”[[89]](#footnote-89). Having arranged for the whole of the broadcast to be played in sections during her speech, she described the passage dealing with the property in Shenzhen[[90]](#footnote-90) as “a really important passage”[[91]](#footnote-91), and told the jury that this explanation “lies at the heart of Count ‍2”[[92]](#footnote-92). She went on to say[[93]](#footnote-93):

“We suggest that what he’s trying to explain is not that he’s a rubberstamp but that the grant of the Wave Media licence was obviously one that was in the public interest, and so far as he was concerned there was nothing in that that would make him need to disclose what was going on; so it was, as he will tell you, and you will hear him say, far-fetched”.

1. In discussions with the judge prior to closing addresses as to his proposed legal directions to the jury, Ms Montgomery made her position clear in respect of a lies direction that[[94]](#footnote-94):

“Our primary position is that it is not necessary for there to be any direction on this topic, because the jury’s decision on whether or not the account is untruthful in fact will determine their decision on the questions that are raised in Counts 1 and 2, and therefore it is not a freestanding issue”.

For his part, Mr Perry was minded to agree, if the defence did not want such a direction to be given; but cautioned that the matter should be revisited at the end of closing addresses[[95]](#footnote-95). In the event, the question of giving a lies direction was revisited by the judge at the end of both closing addresses. Having indicated that he did not see the need to give such a direction, both leading counsel agreed with that course, with Mr Perry echoing Ms ‍Montgomery’s earlier view that, if the jury rejected the applicant’s explanation, “it collapses back into the very question at the heart of this case”[[96]](#footnote-96).

1. Accordingly, the explanation given by the applicant in the Beautiful Sunday broadcast on 26 February 2012 was put forward, and described, by Ms Montgomery as “central” to the defence case[[97]](#footnote-97). It was in these circumstances, suggests Mr Perry, that the judge gave the jury an extremely favourable direction concerning the applicant’s radio and television interviews, namely[[98]](#footnote-98):

“The defendant, however, did give an account of what had happened in his radio and television interviews. I have previously told you that if the account put forward by the defendant is or may be true, then the defendant must be acquitted”;

and, specifically, in relation to the Beautiful Sunday broadcast[[99]](#footnote-99):

“So again, if the account put forward by the defendant in Beautiful Sunday is true or may be true, then you should acquit the defendant, because overlooking is not enough for conviction. It has to be deliberately done”.

1. Having given such directions, and assuming that the jury faithfully followed such directions, the Court can safely assume that the jury convicted the applicant because they plainly did not accept his explanation and must have found that there was deliberate concealment on his part of what he knew he should disclose because of his conflict of interest; in circumstances where there was no reasonable excuse or justification.
2. The prosecution case was one of persistent concealment of material facts by the applicant, as Chief Executive of the HKSAR, at a time when he was making important and sensitive decisions in favour of a wealthy businessman, who was involved in the process of arranging to provide the applicant with a luxury property in Shenzhen. Such conduct was extremely serious since it called into question the integrity of the applicant, degraded the office of the Chief Executive and raised serious questions about the reasons for taking important and sensitive decisions in relation to broadcast licences.

Discussion

1. Before addressing the issues which are engaged in this appeal, we wish to make clear our thinking on the ramifications of the jury’s failure to reach a verdict on Count 1. Ms Montgomery, for her part, has argued in essence that since the jury could not agree on their verdict, this Court must proceed on the basis that the transaction in respect of the Shenzhen property was, or might have been, a genuine arm’s length commercial transaction entered into in good faith and unconnected with the performance of any duty by the applicant. The evidence to which she points in making this submission, in the absence of the applicant’s evidence, is his explanation in the Beautiful Sunday broadcast and the lease agreements (by which we mean the lease agreement and the supplemental lease agreement).
2. On the other hand, Mr Perry contended that whatever the jury made of Count 1, the true nature of the transaction remained dubious, suspicious and of questionable propriety, while the lease agreements were hearsay as to their contents and misleading on their face. Whether or not there was a verdict on Count 1, this evidence of impropriety remained as background or contextual evidence and can be taken into account by this Court. He invited us to test the proposition by asking what the position would have been if the applicant had never been charged with accepting a corrupt advantage (as in Count 1). He argued that the evidence would still be relevant and admissible as the context for the applicant’s deliberate concealment of the transaction and his association with Wong.
3. The question of the status of evidence adverse to an accused, where a jury has failed to agree on the substantive offence to which it may be said primarily to relate, is not clear‑cut. We can certainly think of circumstances where background or contextual evidence could retain its cogency (assuming relevance and admissibility), even where there has been an acquittal of a defendant on the substantive offence; for example, where the acquittal was on the basis of lack of knowledge, intent or complicity, although the facts forming the *actus reus* were undisputed.
4. We note that the English courts have evidently been exercised by the question of whether an argument about inconsistent verdicts can be mounted where the jury have convicted on one count but failed to agree on another. In *R v Keeling*[[100]](#footnote-100), the Court held, at paragraph 23:

“Here there were no inconsistent verdicts because there was only one verdict. A jury failure to agree is not the same as a verdict of not guilty. There is, in our judgment, nothing illogical in the situation in this case, where 10 members of the jury were sure of the defendant’s guilt on count 3, returning their verdict on this count before they had concluded their deliberations on the other two counts, but fewer than 10 were sure on counts 1 and 2. The judge had certainly directed the jury that they were likely to reach the same decision on all three counts, but he also directed them to consider each count separately and said that it was a matter for them. The jury plainly did so. A different shade of judgment by one or more members of a jury, in the circumstances of this case, does not persuade us that the conviction on count 3 is unsafe for that reason.”

The Court in *R v Solomons*[[101]](#footnote-101) similarly held that it was not possible to find a conviction inconsistent with a verdict which had never been returned.

1. However, earlier divisions of the Court in *R v Batten*[[102]](#footnote-102), *R v Clifford*[[103]](#footnote-103) and *R v Rooney*[[104]](#footnote-104) had taken a different view.
2. Most recently, in *R v Formhals*[[105]](#footnote-105), in considering its previous decisions, the Court of Appeal of England and Wales decided not to follow *R v Keeling* and *R ‍v ‍Solomons*. It held, at paragraph 27:

“Overall in this context, what the Court of Appeal ultimately has to consider is whether or not a conviction is safe. The failure of a jury to agree on a verdict is, as we have said, self-evidently not a verdict. But in our view, in a context such as the present, linguistics should not be allowed to triumph over justice. It thus may be that where a jury fails to reach a verdict that cannot be said to give rise, strictly, to an inconsistent verdict when set against another verdict. But that is labelling; and in our view, the principles applicable to inconsistent verdicts are capable of applying by analogy where it simply is logically inexplicable as to how a jury could not reach a verdict on one count when set against a verdict of guilty they had reached on another count. We thus think it would be going too far to preclude a defendant in such a situation from even being permitted to argue that the resulting situation gives rise to an unsafe conviction. Accordingly, it is open to the defendant to raise this point in this appeal.”

1. We are not, of course, concerned in this appeal with inconsistent verdicts. We merely cite these authorities in order to show that the courts have found difficulty in deciding how to treat the failure by a jury to agree upon one verdict when it agrees upon another, and also, perhaps, to remind ourselves that we should not be blinded by labels. Of course, a failure to agree upon a verdict is not strictly a verdict at all, but that does not ultimately help resolve the issue of the status of the evidence which goes to the count on which the jury have failed to agree, but which evidence is also relevant to other counts on which the jury have agreed upon their verdict.
2. In our judgment, the answer to the question of how to regard evidence adverse to an accused, where the jury have failed to agree upon their verdict in respect of the substantive offence with which that evidence may be said to be primarily concerned, will depend on the appellate court’s view of what the jury must have found or inferred from the evidence in the case. That may become clear from the jury’s verdicts on other counts on the indictment. It may also depend on the live issues at trial, any admissions by the defendant, the way the defence has put its case in submissions to the jury or the way the issue was crystallised for the jury by the judge in his summing‑up.
3. Here, it was the applicant’s case, albeit unsupported by his evidence, that he had entered into a *bona fide* commercial agreement made at arm’s length and at market rates. Ms Montgomery, in her closing address to the jury, attached considerable importance to the lease agreements, their genuineness and their consequences for the disclosure requirement[[106]](#footnote-106):

“So we suggest there is nothing suspicious in the way the lease is drafted or, in the end, the way in which it is negotiated to settlement by way of repayment of 800,000. This is a perfectly normal transaction. The flat is identified in 2010; a payment is made before the landlord starts to do any work on it; the work has to be done in order for it to be liveable; once it gets to the point where it can be lived in, a formal lease is signed; and then, when it gets to the point when it’s clearly impossible for anyone to live a private life in that flat, the landlord is paid because the lease is being broken.

The prosecution have failed to point to anything in that which is suspicious, still less that proves what they say, that there is no lease at all. That’s what they want you to accept. And if you cannot be sure that this lease is a sham, that is an end of the case, at least as a matter of evidence, if not of law, because Mr Tsang would not have thought the work that was done on it was for his advantage. He would not have thought it was for his reward. He would have been paying the market rent for the flat and he would have been entitled to regard that as a fair and reasonable arrangement where he was, in the language of the law, reasonably to be excused for having entered into the arrangement.”

1. She went on to remind the jury of the evidence of PW5, the Clerk to the Executive Council, that a tenant did not have to disclose that he was renting a property from a landlord. If the lease did not need to be disclosed, then neither did the negotiations leading to the lease[[107]](#footnote-107):

“So if a lease doesn’t have to be declared, if the fact that you’re renting somewhere doesn’t have to be declared, what is the situation in relation to the negotiation?

…..

And of course I’m not saying that negotiating for a lease is exactly the same as negotiating for a credit card. But the principle is the same. If you are just asking for something that is ordinarily open to people at a market rate on a commercial basis, if there is nothing special going on, then there is nothing to disclose.”

1. The prosecution’s position was that the lease agreements were “brought into existence to try to cater for the fact the defendant had been caught out; it was a cover‑up, concealment, disguise”[[108]](#footnote-108). There were several unsatisfactory, questionable and misleading aspects of the documents, which cast doubt on their genuineness and provenance. As for what the documents purported to say, neither of the signatories to the agreements (namely, Wong and the applicant’s wife) had given evidence at the trial and no other witness had been called to speak to their contents. Accordingly, the lease agreements were hearsay so far as the truth of their contents were concerned.
2. On the wider question we have posed as to the status of evidence relating to the charge on which the jury failed to agree (Count 1), we cannot agree with Ms Montgomery that we should assume, from the jury’s failure to agree, that the jury must have found that the transaction was a *bona fide*, arm’s length commercial transaction at market rates. Firstly, the terms of the rental agreements were hearsay if relied upon as to their truth. The most that could properly be said about them is that they were documents sent to the ICAC on 26 September 2013, 19 months after the story concerning the transaction had broken in the press. Their terms and the truth of their contents were never the subject of evidence or agreement. Had a witness been called to explain their terms and contents, no doubt he or she would have attempted to deal with certain odd and unsatisfactory features which bore on the question of their authenticity.
3. Secondly, the lease agreements and their contents were not spoken to in the assertions made in the Beautiful Sunday broadcast 19 ‍months earlier on 26 February 2012. All that was asserted, and repeated, by the applicant was that he “had an intention” to rent the property but “…the tenancy agreement was not yet entered”; and “[m]oreover, at that time, no tenancy agreement was entered yet. I only had an intention to rent it”[[109]](#footnote-109). These were rather surprising assertions to make, if the original tenancy agreement had in fact been entered into, as its terms suggested on their face, on 21 ‍February 2012, five days before the broadcast.
4. In our judgment, there is no room for this Court responsibly to assume that the jury’s failure to agree on Count 1 meant that they must, or even may, have accepted the lease agreements to be evidence of a *bona fide*, arms’ length commercial transaction at market rates. The documents provided no such admissible evidence in support of that assertion at all, and no one was called to speak to their contents.
5. On the other hand, we must also be cautious as to what we make of the evidence surrounding the transaction, in the light of the jury’s failure to agree on Count 1, lest we fall into the trap of assuming that there was something criminal about the applicant’s dealings with Wong. That we might do so may not have been Mr Perry’s intention, but it is the danger of inviting us to examine adverse background or contextual evidence where it was disputed. To make assumptions, other than in the clearest circumstances, would be akin to convicting the applicant of an uncharged act, when the jury were unable to resolve the issue of a criminal (in this case corrupt) transaction. However unwise and imprudent it may have been for the applicant to have entered into private, and apparently secret, negotiations with someone who at the same time had official business with the Government of which the applicant as Chief Executive was the head, and however ambiguous the circumstances of the transaction may or may not seem, there has been no determination that the circumstances of their dealings were corrupt. The question which arises for this Court on appeal, in the wake of the failure of the jury to agree on a verdict in respect of Count 1, is what must the jury have found, *absent* a finding of corruption, as the basis of its conviction on Count 2.
6. Approaching the issue as we have set out at paragraph 78 above, we return to what was asserted in the Beautiful Sunday broadcast, for, as we have said, the applicant’s defence to Count 2 was based upon the explanation he put forward in that interview, in particular at Entry ‍186. In that explanation, the applicant conceded that he had not made any declaration or disclosure of his dealings with Wong. The reason was that the decision-making process resulting in the recommendation that the broadcasting licence be granted to Wong’s ‍company was strictly handled in accordance with Government policy. There was little involvement by the Executive Council and no reason to go against the recommendation. Accordingly, he “did not realise there was any conflict of interest” and “it did not occur to [him] that a declaration was required”. Indeed, he considered that the need for such a declaration “was pretty far‑fetched”.
7. The judge, as we have seen, directed the jury in relation to Count 2 that, “if the account put forward by the defendant in Beautiful Sunday is true or may be true, then you should acquit the defendant, because overlooking is not enough for conviction. It has to be deliberately done”[[110]](#footnote-110). It follows that the jury must have convicted on Count 2, assuming as we must that they followed that direction, on the basis that the applicant did not overlook the fact of his dealings with Wong when he approved the licence, and that he deliberately decided not to disclose such dealings, knowing that he had a conflict of interest. In other words, he deliberately concealed what he knew to be a conflict of interest.
8. Ms Montgomery, in her reply in this Court, rightly conceded that, in convicting on Count 2, the jury must have rejected that part of the applicant’s assertions in the Beautiful Sunday broadcast where he claimed, firstly, that he had overlooked the need for a declaration; and, secondly, that there was, in fact, no need for any such declaration. Nevertheless, she maintained that the jury were misdirected into looking at the breach of duty objectively rather than subjectively, and in their approach to the seriousness of the breach. We shall examine those complaints shortly. However, we simply wish to make clear that our analysis of the conviction on Count 2 is not based on any assumption, finding or suggestion of corruption. Nor is it based on an acceptance of a *bona fide*, arms’ length commercial transaction at market rates. It is based upon an allegation of deliberate concealment by the applicant of his dealings with Wong (whether *bona fide* and arm’s length or not), without reasonable excuse or justification, by virtue of which he, as Chief Executive, was placing himself in a serious conflict of interest and thereby compromising his official duties. That is, indeed, the very case which was put by the judge for the jury to decide when they came to consider Count 2. The judge directed the jury on Count 2 in these terms[[111]](#footnote-111):

“This is not an allegation involving any suggestion of bribery or corruption …

So if, at the end of your deliberation in relation to Count 1, you come to the conclusion that there exists no corrupt practice, you still have to consider the above, the specific allegations that I have just mentioned. You still have to go back to count 2, go back to the particulars of the offence. You still have to consider the specific allegations, whether they were deliberately made, not by accident, not by inadvertence, not by oversight, without reasonable excuse or justification. And you have to decide whether the defendant, as a public official, was placing himself in a serious conflict of interest where his duties as a public official were hopelessly compromised.”

1. We turn, therefore, to the complaints that are made about the judge’s directions in law in respect of Count 2.
2. Ms Montgomery has sought to paint the prosecution’s case on Count 2 as a “shadowy alternative case” to its primary case that the applicant had deliberately concealed his dealings with Wong because those dealings were corrupt. However, once the jury were unable to agree on Count 1, the “shadowy alternative case” required further directions from the judge since, if there was nothing corrupt about the applicant’s dealings with Wong and the applicant was under no duty to disclose a *bona fide* commercial agreement with Wong, the applicant may not have had a conflict of interest and thus been hopelessly compromised in performing his duty. Further, his conduct may in the circumstances have been a mere failure to disclose rather than a deliberate concealment. The judge’s failure to explain how the jury could convict on this alternative basis was, therefore, a misdirection.
3. The difficulty with this argument is that it fails to address the real thrust of the prosecution case on Count 2, which, as the judge explained to the jury, had nothing to do with bribery or corruption. Of course, if the jury had convicted on Count 1, it would have been almost inevitable that they would have found that the applicant’s deliberate concealment of a corrupt arrangement with Wong, in circumstances where he was seriously conflicted in the performance of his duties, made him guilty of Count 2. However, the prosecution case did not depend on a finding that the arrangement was corrupt, as the prosecution and the judge made clear. The defence may well have wished to link the counts for forensic, tactical reasons, as indeed Ms Montgomery expressly tried to do before the jury[[112]](#footnote-112), but that does not mean that the verdict on Count 2 was indeed dependant on the verdict on Count 1. The jury’s verdicts show that they were under no misapprehension about the difference between the two ‍counts.
4. The argument also conveniently sidesteps the fact that the jury must, for the reasons we have given, have clearly rejected the notion that the applicant’s non‑disclosure was anything other than deliberate.

The duty to disclose

1. The judge summed up the evidence of Ms Rita Lau Ng Wai‑lan (“PW21”), the Secretary for Commerce and Economic Development between July 2008 and April 2011, as follows[[113]](#footnote-113):

“… the granting of licences for audio broadcasting was a sensitive issue in Hong Kong in 2008. …

So it was incumbent upon the government to provide a level playing field, to process applications in a fair and open and transparent manner, and that the application was fully justified and had been considered fully, in accordance with the provisions laid down in the law and also administratively, the framework laid down by the Broadcasting Authority.

According to PW21, the community expected the government or officials dealing with those public matters to act in good faith, and also that there was no conflict of interest whatsoever involved in the consideration of the matter, as with everything that the government did”.

PW21 further expressed the view that “if there had been any conflict of interest, she would have expected that to have been disclosed”[[114]](#footnote-114). Since the Government was fair, open and transparent in its decision-making processes, she considered that “fairness, openness and transparency include declaration of interest. That too applied to the Chief Executive, as the ultimate decision-maker”[[115]](#footnote-115).

1. In the memorandum in respect of the meeting of the Executive Council on 9 July 2008, at which WML’s application for a sound broadcasting licence was to be discussed, it was explicitly stated:

“Mis‑management of declarations of interests on these items will undermine public confidence in the integrity of the Council.”

It was further recommended that “the Hon Ron (sic) Arculli should be excluded from discussion of the Wave Media item” and that the respective Council papers “should be withheld” from him. The applicant, as Chief Executive, had signed and written the word “Agreed” against the memorandum on 3 ‍July 2008[[116]](#footnote-116).

1. The Minutes of the meeting of the Executive Council for 9 ‍July 2008, at which the applicant presided, duly recorded that Mr Arculli declared his interest as a principal shareholder of WML, “did not receive the paper and withdrew from the Chamber prior to the discussion of the item”[[117]](#footnote-117).
2. A similar memorandum, with a similar note and recommendation concerning Mr Arculli, was prepared for the meeting of the Executive Council on 11 November 2008, at which the grant of a sound broadcasting licence to WML was to be discussed. Again, the applicant signed and wrote “Agreed” against the memorandum on what must have been 4 November 2008 (although he wrote “4/8”)[[118]](#footnote-118). The Minutes of the meeting of the Executive Council for 11 November 2008 contained a similar record concerning the declaration of Mr Arculli’s interest as a principal shareholder of WML, his non‑receipt of the paper concerned and his withdrawal from the Chamber prior to discussion of the item[[119]](#footnote-119). The applicant, as Chief Executive, presided over the meeting and the licence was duly approved and granted.
3. At a further meeting of the Executive Council on 15 ‍December 2009, although presided over by the Chief Secretary, Mr ‍Arculli again declared his interest as one of the principal shareholders of WML, did not receive the relevant paper and withdrew from the Chamber when WML’s application was discussed.
4. The memorandum preceding the meeting of the Executive Council on 2 November 2010, at which WML’s applications for a sound broadcasting licence and surrender of its existing AM licence were to be discussed, contained a similar note that:

“Mis‑management of declarations of interest on the item will undermine public confidence in the integrity of ExCo”,

with the same recommendation that Mr Arculli be excluded from discussion of the item “and that the ExCo memorandum be withheld from him”[[120]](#footnote-120).

1. On this occasion, the Chief Secretary, in his capacity as Acting Chief Executive, signed and wrote the word “approved” on the memorandum on 25 October 2010.
2. The Minutes for the meeting of the Executive Council on 2 ‍November 2010, at which the applicant, as Chief Executive presided, again duly recorded that Mr Arculli declared his interest as principal shareholder of WML, “did not receive the paper and withdrew from the Chamber prior to the discussion of the item”[[121]](#footnote-121).
3. A similar memorandum preceded the meeting of the Executive Council on 22 March 2011, at which the grant of sound broadcasting licences to three companies, among them WML, was to be discussed. Again, a similar note concerning declarations of interest, with a recommendation that Mr Arculli be excluded from the discussion and the relevant memorandum withheld from him, was made, with the applicant signing the memorandum and writing the word “Agreed”, on 17 March 2011.
4. The Minutes for the meeting of the Executive Council on 22 ‍March 2011, at which the applicant, as Chief Executive presided, again duly recorded that Mr Arculli had declared his interest, did not receive the relevant paper and withdrew from Chamber prior to discussion of the item[[122]](#footnote-122).
5. A similar memorandum preceded the meeting of the Executive Council on 10 January 2012, at which there was to be discussion of an application by DBC for approval of a “disqualified person” to exercise control of DBC. Again, a similar note concerning declarations of interest, with a recommendation that Mr Arculli be excluded from the discussion and the relevant memorandum withheld from him, was made, with the applicant signing the memorandum and writing the word “Content”, on 9 January 2011.
6. At the meeting of the Executive Council on 20 January 2011, at which the applicant as Chief Executive presided, Mr Arculli was absent. A decision was made to allow Mr Arthur Li to exercise control of DBC, notwithstanding his status as a “disqualified person”, subject to his executing an undertaking.
7. The respondent has argued, with some considerable force, that given (i) these constant reminders about the importance of making appropriate declarations of interest at meetings of the Executive Council, so as not to undermine public confidence in the integrity of the decision-making process of that body; (ii) the repeated recommendations that Mr ‍Arculli be excluded from the discussions at those meetings concerning WML and DBC, which the applicant approved; and (iii) Mr Arculli’s ensuing withdrawals from those discussions, the obvious importance of making his own declaration of interest in relation to WML could not have been lost on the applicant.
8. Ms Montgomery’s answer to the applicant’s failure to declare his interest is that, unlike Mr Arculli, the applicant had no interest in the financial health or well‑being of the commercial radio station. In mounting this response, she was driven to saying that had the public known the true circumstances of the applicant’s relationship with Wong, they would have known there was nothing untoward about it and, consequently, there would have been no public disquiet over his failure to declare an interest before participating in the decision to grant licences to Wong’s company.
9. We cannot accept this argument. Quite apart from the fact that it places ‘the cart before the horse’, inasmuch as the public can know nothing of the Chief Executive’s private dealings unless and until he chooses to disclose them, it cuts against the whole ethos of the Government administration and civil service, which inculcates in its officers the need to avoid conflicts of interest where the officer’s private interests compete or conflict, or potentially might do so, with the interests of the Government or the officer’s official duties[[123]](#footnote-123). The applicant himself would have been schooled in, and instinctively understood, that ethos over several decades in public service: indeed, PW21 testified that the applicant “was someone who would have been aware of the importance of declaring conflict of interest”[[124]](#footnote-124). If it were not instinctively obvious, the applicant had himself made clear, in the same Beautiful Sunday broadcast of 26 February 2012, that the separation of official and personal matters was not merely a matter of procedure but “a very important core index, a standard of the SAR government”[[125]](#footnote-125). In any event, it was the applicant’s case, as expressed through the Beautiful Sunday broadcast, that it never occurred to him to make a declaration of interest. Clearly, by their verdict, the jury must have rejected this claim.
10. As for members of the Executive Council, the applicant would have known of the responsibility of members to declare an interest so as to ensure that the advice tendered to the Chief Executive was as objective as possible. He would have appreciated the types of exclusionary interest “which should normally demand that a Member withdraw from a meeting of the Executive Council”[[126]](#footnote-126): indeed, Mr Arculli’s consistent withdrawal arose out of such an interest. And he would have understood that “[i]nterests other than those described above (ie exclusionary interests), whether direct or indirect, even when remote and non‑pecuniary, should be declared where they might be thought likely to incline a Member towards a particular stance on the item under discussion”[[127]](#footnote-127). This also puts paid to Ms Montgomery’s argument that the applicant had no duty to disclose his interest.
11. We further note that, in an unrelated event on 30 September 2010, the applicant, as Chief Executive, issued a statement by way of press release, which commenced[[128]](#footnote-128):

“To ensure that advice given to the Chief Executive by Members of ExCo is as unbiased and objective as possible, Members have a duty to declare any interest that they may have in matters considered by ExCo”.

The statement went on to state that, after examining the controversy concerning a particular member’s interest:

“…the Chief Executive, Mr Donald Tsang, considers that the declaration requirements should be interpreted in a strict manner”.

Mr Perry has pointed out that this press statement was released just over a month before the meeting of the Executive Council of 2 November 2010, at which WML’s applications for a sound broadcasting licence and the surrender of its AM licence were placed on the agenda for discussion.

1. There is a further significance to the meeting of 2 November 2010. The applicant did make a declaration of interest in respect of another unrelated matter on the agenda at this particular meeting at which WML’s application was also being discussed. He made another declaration in relation to a different matter at the meeting of 20 January 2012, when DBC’s application was also under discussion. Mr Perry submits that clearly the applicant understood his obligations and was perfectly capable of making declarations of interest in respect of less significant matters on the agenda at these, as well as other, meetings of the Executive Council.
2. In our judgment, the evidence was as formidable as it was compelling that the applicant, as Chief Executive, could not have overlooked the need to disclose his dealings with Wong when he approved the various applications from WML (and DBC), and that he must have deliberately decided not to make such disclosure, knowing that he had a conflict of interest. As we have said, those are the clear findings to be extracted from the jury’s evident rejection of the applicant’s explanation in the Beautiful Sunday broadcast, and their findings of guilt on Count 2. This was no mere non‑disclosure: it was, on the directions to the jury, and by their verdict, deliberate concealment.

‘Mens rea’

1. It is argued by Ms Montgomery that to define “wilfully” for the jury as something done deliberately, and not by accident, inadvertence or oversight, was not enough in this particular case: the jury should also have been told that deliberate meant “in the sense that the official knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful”: see *Sin Kam Wah v HKSAR*, at paragraph 46.
2. However, a judge’s directions should be viewed in the context of the issues which arise for the jury’s determination in any particular case. As Gleeson CJ explained in the High Court of Australia decision of *Doggett v R*[[129]](#footnote-129):

“The manner in which a trial is conducted, and in which the issues are shaped, especially where (as in the present case) an accused is represented by experienced and competent counsel, has a major influence upon the way in which the case is ultimately left to the jury, and upon the directions, comments and warnings, from the trial judge to the jury, that may be appropriate or necessary. Directions are not ritualistic formularies. Their purpose is to assist the jury in the practical task of resolving fairly the issues which have been presented to them by the parties.”

1. It is also worth reminding ourselves of Lord Alverston CJ’s statement on behalf of a five‑member Court of Criminal Appeal of England and Wales in *R v Stoddart*[[130]](#footnote-130):

“Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument.”

1. The prosecution had never put their case against this applicant on the basis that he was reckless in failing to disclose his dealings with Wong: nor would the defence have wanted such a direction. We can, therefore, quite understand why the judge (as well as counsel for both parties) did not wish to complicate the jury’s task by introducing the notion of recklessness, whereby the applicant disregarded the risk that his conduct was unlawful.
2. The case for the prosecution was at all times that the applicant, in making decisions concerning Wong’s companies had deliberately concealed his private dealings with Wong when it would have been obvious to him that he should declare them. “Wilful” may not have been a word familiar to all members of a jury. However, they would have well understood what “deliberate” meant. The Shorter Oxford dictionary defines the primary meaning of the word as “carefully thought out, studied; intentional, done on purpose”. If something is done “not by accident”, then it is done on purpose; if it is done “not by inadvertence”, then it is considered; if it is done “not by oversight”, then it is knowingly done. The word “deliberate” in common parlance conveys all of these nuances of meaning. It is fanciful to suppose that the jury could have convicted the applicant of failing to disclose his dealings with Wong, in the context of this case, unless they were sure that he had deliberately intended not to disclose them.
3. As an adjunct to the argument, Ms Montgomery complains that the jury were not told that they must be sure that, as well as finding his actions deliberate, the applicant “knew that his conduct was unlawful”. It is to be noted, however, *pace* Lord Alverstone and Gleeson CJ, that Ms ‍Montgomery did not ask the judge to give such a direction either before, during or after the summing‑up. That is somewhat surprising in light of the mild rebuke issued by the Court of Appeal in *HKSAR v Hui Rafael Junior & Others*, at paragraph 230. However, we think that it was recognised by both parties and the judge himself that, in reality, it added nothing in the context of this case. A high‑ranking Government official who deliberately conceals a conflict of interest must know, with respect, what he is doing and that what he is doing is wrong.
4. A similar argument was mounted in the recent Australian case of *Obeid v R*[[131]](#footnote-131). There it was argued on behalf of the appellant[[132]](#footnote-132):

“166. … that the direction of the trial judge was erroneous in that, contrary to what was said in *Sin Kam Wah* supra, there was no reference to Mr Obeid knowing that his conduct was unlawful or acting in wilful disregard of the risk that the conduct was unlawful”.

Of that argument, Bathurst CJ, giving the lead judgment of the New South Wales Court of Criminal Appeal, said[[133]](#footnote-133):

“172. As I stated in dealing with the first ground of appeal, it is important to consider the directions given by the judge as a whole and consider the matter complained of in context … The first complaint was that the jury was not directed that to convict it was necessary to determine that Mr Obeid was aware that the conduct was unlawful, or Mr Obeid acted in wilful disregard of the risk the conduct was unlawful.

173. It is correct that the trial judge did not state in terms that it was necessary for the jury to find that Mr Obeid knew the conduct was unlawful or wilfully disregarded that risk. However, the jury had already been directed on the matters in pars 3(a) and 3(b)[[134]](#footnote-134) of the written directions, which identified the conduct and made it clear that the jury was required to be satisfied that the conduct was a breach of the duties and obligations of a Member of Parliament.

…..

175. Paragraph 3(c) of the written directions assumes the jury was satisfied that the conduct was committed and that it was in breach of the duties and obligations of Mr Obeid’s office. Paragraph 3(c) addresses whether in those circumstances Mr ‍Obeid was aware the conduct as found was in breach of that obligation. There was no need in my view to state the conduct was unlawful as distinct from a breach of the obligation which had been explained to the jury and which the jury had found was in fact breached.

176. It follows that the trial judge did not err in directing the jury in this fashion. The direction in my view would only be understood in the circumstances as being directed to a legal obligation.”

1. In the case before us, the judge told the jury that they “should have not much difficulty”[[135]](#footnote-135) in finding that the three applications by Wong’s companies were discussed at meetings of the Executive Council, over which the applicant presided. He recited extensively the evidence, in particular of PW5 and PW21, in respect of the duties of members of the Executive Council, including the Chief Executive, to make declarations where possible conflicts of interest were concerned. He instructed them in terms that they had to be sure that his conduct in not making such a declaration was deliberate and not by accident, inadvertence or oversight. He told them “to decide whether the defendant, as a public official, was placing himself in a serious conflict of interest where his duties as a public official were hopelessly compromised”[[136]](#footnote-136). And he reminded the jury that it was the prosecution case that the applicant “cannot possibly overlook the obligation to declare his interest by reason of the fact that so many events had taken place at the relevant times”; events which he invited them to examine closely by reference to various chronologies provided[[137]](#footnote-137).
2. In our judgment, the jury could have been in no doubt as to the mental element required for this offence and, as we have already said, it is fanciful to suggest, in the context of this case and the directions they received, that the jury could have convicted the applicant unless they were sure that his dealings with Wong placed him in a conflict of interest, which he deliberately intended to conceal.
3. We observe in passing that the Crown in *Obeid* had “submitted that the formulation of the elements of the offence by Sir ‍Anthony Mason NPJ (in *Sin Kam Wah*) should not be treated as if it was a statute”[[138]](#footnote-138). Whether that is so or not, the fact is that the judge in the present case, as with the trial judge in *HKSAR v Hui Rafael* ‍*Junior*, identified the five elements of the offence, set out by Sir ‍Anthony Mason NPJ in *Sin Kam Wah v HKSAR*, at paragraph 45. And he explained, in simple, uncomplicated terms, which would be readily understood by any jury, that the applicant’s concealment of his dealings with Wong must be deliberate. Given the focus of this trial and the directions of the judge, which were rightly and necessarily aimed at the issues presented by the parties before the jury, we say again that it is fanciful that the jury could have convicted the applicant unless they were sure that he had deliberately intended to conceal his dealings with Wong from the Executive Council, when he must have realised he had a conflict of interest between his private interests and his public duty which he should have disclosed.
4. In *R v Chapman*, it was argued by the applicants that the directions given by the trial judge to the jury were deficient “in that they did not require the jury to find that each (applicant) knew or intended that the misconduct of the holder of the public office should be so serious as to amount to an abuse of the public’s trust in the office holder”[[139]](#footnote-139). In response, the prosecution submitted that[[140]](#footnote-140):

“… for the holder of a public office to be convicted of misconduct in public office, he must know of the facts and circumstances which would lead the right-thinking member of the public to conclude that the misconduct was such as is required by the third element set out in *Attorney General’s Reference (No 3 of 2003)*. However, it is not necessary for the prosecution to prove that the holder of the public office himself reached that conclusion. It was sufficient to prove that he had the means of knowledge available to him to make the necessary assessment of the seriousness of his misconduct; the assessment was for the jury”.

The Court expressly agreed with the prosecution’s submission[[141]](#footnote-141). The Court in *R v France* adopted the same reasoning[[142]](#footnote-142).

1. We think this is the correct way of looking at the matter, given that it is for the jury to determine the seriousness and culpability of the misconduct. Be that as it may, we are quite satisfied, from the judge’s directions and the jury’s consequent verdict in this case, that the applicant not only must have known, but did know, that he was, as a public official “placing himself in a serious conflict of interest where his duties as a public official were hopelessly compromised”[[143]](#footnote-143). His concealment was plainly deliberate.

Seriousness

1. The judge directed the jury in relation to the element of seriousness in the offence of Misconduct in public office as follows[[144]](#footnote-144):

“The fifth ingredient of the offence is this, that what the defendant did, or omitted to do, has to be serious and not trivial, and you judge whether it is serious enough to warrant his conviction for the offence, all other ingredients being proved so that you are sure, by considering the defendant’s responsibilities as well as the responsibilities of his office, the importance of the public objects which he, as the Chief Executive of Hong Kong and the President of the Executive Council, served, and the nature and extent of his departure from those responsibilities.”

The judge then repeated the direction[[145]](#footnote-145).

1. There is no issue that this direction followed closely the words of Sir Anthony Mason NPJ in *Sin Kam Wah v HKSAR*, at para 45. Furthermore, it was in all material respects identical to the directions given by the trial judge in *HKSAR v Hui Rafael Junior* on both Count 1[[146]](#footnote-146) and Count 6[[147]](#footnote-147), neither of which involved an allegation of corruption. Factually, Count 2 in the case before us was perhaps closer to Count 6 in *HKSAR v Hui Rafael* ‍*Junior*, where it was alleged that the 1st appellant, when Chief Secretary, had misconducted himself by failing to declare or disclose, or by concealing from the Government the provision to him of, the annual extensions of a HK$3 ‍million unsecured loan from Honour Finance Co Ltd. The said finance company was effectively owned by the company with which he had official dealings. Again, the defence was that the loan and its extensions were perfectly legitimate commercial transactions; they were not disclosable by the 1st appellant as Chief Secretary; there was no conflict of interest, real or apparent; and, in any event, even if it amounted to misconduct, it was not serious enough to warrant his conviction. The jury convicted on Count 6 (as well as Count ‍1), and the convictions were upheld by the Court of Appeal.
2. As Mr Perry has pointed out, Ms Montgomery had similarly argued before the Court of Appeal in *HKSAR v Hui Rafael Junior* *& Others* that the judge should have given the jury assistance on how to determine the level of seriousness of the misconduct, citing *R v* *Chapman* in support of her argument[[148]](#footnote-148). Whilst we recognise that her submissions concerned Count ‍5 of that indictment in respect of the 2nd ‍appellant, it was also argued by the 1st appellant that mere non‑disclosure of the matters alleged in the particulars of Count 1 and Count 6 did not amount to the offence of Misconduct in public office.
3. The Court of Appeal in *HKSAR v Hui Rafael Junior & Others*[[149]](#footnote-149) dealt with the argument as follows, *per* Lunn VP:

“*Seriousness of misconduct/reasonable excuse or justification*

250. As noted earlier the judge had given the jury repeated directions as to the five ingredients in the offence of misconduct in public office. Of the requirement that misconduct “is serious, not trivial” he said repeatedly, and in the context of Count 5, that was to be determined:

“ …having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve, and the nature and extent of the departure from those responsibilities.”

251. Having said that he had already explained the five elements earlier, the judge said, “They are the same legal ingredients or elements, whether the offence is a single substantive offence…or...an allegation of conspiracy.” In explaining the element of seriousness, in the context of Count 6, the judge had identified the issue as being whether Rafael Hui, as Chief Secretary, had:

“ placed himself in a serious conflict of interest where his duties and responsibilities as a public officer were hopelessly compromised”.

252. Ms Montgomery submitted that the judge had failed to give the jury assistance “in determining how seriousness was to be assessed and that the threshold of seriousness was a high one.” Further, she complained that the judge had failed to give the jury adequate directions in respect of the issue of whether or not Rafael Hui had a reasonable excuse for his conduct, even as alleged by the prosecution.

253. I am satisfied that there is considerable force in Mr Perry’s reply to the argument in respect of the issue of the seriousness of the misconduct. The context of the allegation was of importance. First, in having regard to the specific matters to which their attention was directed the jury was dealing with the Chief Secretary and the provenance of the very substantial impugned payments was a director of a substantial publicly listed property developer. The responsibilities of the office, his responsibilities and the importance of the public objectives were obvious. Secondly, the matter put at issue in the defence case was the legitimacy or illegitimacy of the payments, not the degree of harm to the public interest.”

We agree with the Court’s observation that context, particularly when addressing the seriousness of the misconduct, is vital.

1. The point was reiterated in the judgment of the Court of Final Appeal in *HKSAR v Hui Rafael Junior*[[150]](#footnote-150):

“That … the essence of the offence is the abuse of public trust by the officer is also amply supported by the authorities cited by Ribeiro PJ in his judgment in *HKSAR v Wong Lin Kay*[[151]](#footnote-151) at [26]‑[33]. And as Chan ACJ put it, in *HKSAR v Ho Hung Kwan Michael*, “this offence is aimed at punishing an abuse by a public officer of the power and duty entrusted to him for the public benefit or of his official position”[[152]](#footnote-152).

*In this area of the law, as elsewhere, context is all important. Because the essence of the conduct is the abuse of office it is necessary that the misconduct be “serious, not trivial” and, therefore, when asking whether a public officer had misconducted himself in office, it is essential to put that enquiry into its proper context by identifying “the responsibilities of the office and the officeholder”*[[153]](#footnote-153)*.*” (Emphasis added)

Having traversed the duties and responsibilities of the office of Chief Secretary, with particular reference to conflicts of interest, the Court concluded[[154]](#footnote-154):

“And it is plain that, as Chief Secretary, Rafael Hui was “appointed to be a sentinel of the public welfare”[[155]](#footnote-155).”

1. We, of course, accept that not all misconduct by a public official is necessarily “an abuse … of the power and duty entrusted to him for the public benefit or of his official position”: the Canadian case of *R v Boulanger* is an example of conduct which did not amount to an abuse of public trust and thereby of his office. In *R v Boulanger*, McLachlin CJ, on behalf of the Supreme Court of Canada held, *inter alia*[[156]](#footnote-156):

“… the course of action chosen by the accused cannot be said to represent a marked departure from the course of action he should have taken. Rather, as the trial judge put it, Mr Boulanger’s conduct was simply an error of judgment … Considering all the circumstances of this case, I conclude that Mr Boulanger’s actions do not rise to the level of seriousness required to establish the *actus reus* of the offence of breach of trust by a public officer”.

1. Boulanger was the director of security of a municipality in Quebec, who had asked the constable in charge of the case of a traffic accident, in which Boulanger’s daughter was involved, to prepare a second more complete accident report, as he was entitled to do. The second report, for which the constable was solely responsible, exonerated Boulanger’s daughter from blame for the accident. The applicant before us was the Chief Executive of the HKSAR, who was required by statute[[157]](#footnote-157) to make important (and sensitive) decisions in Council concerning, *inter ‍alia*, the grant of public broadcasting licences. In doing so, he deliberately concealed from that Council the transaction and his private dealings with the wealthy businessman who was the beneficiary of his decisions. If we say he occupied the highest office in the land, we are not falling into the trap cautioned against by Millett NPJ in *HKSAR v Wong Lin Kay*[[158]](#footnote-158), of focussing on the status of the applicant rather than his functions: we are simply pointing out that he was required to exercise, in the present context, important powers, duties and responsibilities specifically entrusted to, or invested in, him *and no other* by statute in the public interest.
2. Before leaving *R v Boulanger*, it is worth noting that, although the appellant’s conduct in that case was not thought serious enough to warrant his conviction, McLachlin CJ considered the test to determine seriousness set out in *Shum Kwok Sher v HKSAR* (later re‑affirmed in *Sin Kam Wah v HKSAR*) to be correct[[159]](#footnote-159):

“The questions posed by Sir Anthony Mason of the Court of Final Appeal of Hong Kong in *Shum Kwok Sher* provide a sound definition of the parameters of the inquiry into whether the conduct constitutes a marked departure from accepted standards. The inquiry must take place against the background of the responsibilities of the office and the importance of the public objects they serve:

Whether it is serious misconduct in this context is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.” (Original emphasis)

1. Whether one is dealing with the Chief Secretary or the Chief Executive of the HKSAR, the responsibilities of those high offices, which are at the very pinnacle of the Government of the HKSAR and its administration, and the importance of the public objectives which each office serves, are obvious. PW1, as Permanent Secretary to the Chief Executive’s Office and the most senior civil servant within the Chief Executive’s Office[[160]](#footnote-160), was asked what the rules concerning declarations of interest were designed to achieve. She responded in terms with which nobody could seriously take issue[[161]](#footnote-161):

“I think they require officials, especially those in high positions, to conduct themselves up to the highest standard of personal conduct and integrity, and ultimately the purpose is to ensure the integrity of the system, as well as to ensure public confidence in the system”.

She went on to say that the primary obligation on senior public officials lay[[162]](#footnote-162):

“… not in the procedural step of making declarations but rather how one conducts himself or herself, and that is to make our best endeavours to avoid giving rise to any potential or real conflict of interest”.

1. Of the process of the granting of broadcasting licences, PW21 said[[163]](#footnote-163):

“… it is incumbent upon the government to provide a level playing field, to process applications in a fair and open, transparent manner, and that the application is fully justified and has been considered fully, in accordance with the provisions laid down in the law and also administratively, the frameworks laid down by the Broadcasting Authority, which is the statutory authority to process applications for a sound broadcasting licence.

…

… as with everything the government does, which I think the community expect(s) the government or officials dealing with those public matters to act in good faith and also ensure that there is no conflict of interest whatsoever involved in the consideration of the matter”.

1. Although the judge referred to these very pieces of evidence in his summing‑up[[164]](#footnote-164), Ms Montgomery argues that he did not spell out the importance of the consequences of the misconduct in determining whether it was serious enough to warrant conviction for the offence; particularly where there was no accompanying conviction for corruption. However, with respect, those consequences would be obvious in the context of the present case.
2. In *HKSAR v Wong Kwong Shun Paul*[[165]](#footnote-165), the applicant, a senior landscape architect in the Housing Department, had recommended the use of certain building products in four Housing Department projects to be supplied by a company, one of whose directors was a close personal friend of his. He did not disclose his relationship with the director. It was never the prosecution’s case that the applicant had been influenced by his own self‑interest, nor was it suggested that the products were unsuitable for their purpose[[166]](#footnote-166). The Court nevertheless held[[167]](#footnote-167):

“As a high-ranking civil servant, the important public objects which the applicant had to serve were not confined to utilizing his professional knowledge to recommend certain products. It was the applicant’s duty to uphold the integrity of a civil service in which the public had confidence. The decisions he made in the course of his public office should not have been influenced by his own interests or the interests of his relatives and friends.

…..

What the applicant did was not only misconduct in the form of a serious breach of his duties, but it also deviated from the public objects which he was required to serve. By wilfully recommending the products which his good friends dealt in without making the requisite disclosure, the applicant had failed to perform the duties imposed on him by his office and had misused the discretion conferred upon him by his office.”

1. This authority serves to underscore the point that however explicable, justified or even deserved the decision may have been, the failure by the officer to disclose a personal relationship with the beneficiary of his decision undermined public confidence in the decision-making process, the integrity of the office holder and the purity of the decision itself. These are frankly obvious consequences which the applicant, of all people at the very top of the Government administration, after decades in public service, would have readily and instinctively understood. So would a Hong Kong jury.
2. We should here say something about Ms Montgomery’s complaint that the jury were not invited to examine the applicant’s possible motive. The problem with this argument is that the applicant elected not to give evidence and, his assertions in the Beautiful Sunday interview having been plainly rejected, there was no other reasonable or sensible evidential basis for attributing a benign motive to the applicant for the deliberate concealment of his dealings with Wong from the Executive Council. In any event, in respect of the question of motive, it was held by Bokhary PJ in *Chan Tak Ming v HKSAR*[[168]](#footnote-168), with whose judgment all other judges, including Sir Anthony Mason NPJ, agreed[[169]](#footnote-169):

“Misconduct in public office may be committed for personal benefit to the defendant or for motives other than that one. It may be committed, for example, to benefit others or to harm others. Indeed, it may be committed for no discernible or provable motive.”

1. In reality, the consequences of the applicant’s misconduct in this case were inevitably and inextricably bound up with the importance of the responsibility reposed in him as Chief Executive to make a declaration of interest when a possible conflict of interest presented itself. As Chan ‍ACJ put it in *HKSAR v Ho Hung Kwan Michael*[[170]](#footnote-170):

“… in most cases, the consequences of the misconduct will usually have been considered when one is examining the nature and extent of the departure from those responsibilities”.

1. We are entirely satisfied that the judge’s directions in respect of the seriousness of the offence and the evidence relevant to that issue were correct, sufficient and in accordance with authority. In our judgment, *R v* *Chapman* and *R v* *France* were very different cases and have no bearing on the one before us. The problem with which the Court was concerned in *R v Chapman* was the tension between competing public interests, where the official in question had provided information to the media in breach of his duty, but in circumstances “where the provider of that information may benefit the public interest rather than harm it”[[171]](#footnote-171). The Court in *R v* *Chapman* held[[172]](#footnote-172):

“The provision of the information may well in such a case be an abuse of trust by the office holder to his employer or commanding officer, even if the disclosure of the information may be in the public interest. It may therefore result in disciplinary action and dismissal of the office holder. That is because the abuse of trust reposed in the office holder by the employer/commanding officer in such a case is viewed through the prism of the relationship between the office holder and his employer or commanding officer. That is not the prism through which a jury should approach the issue of the public’s trust in an office holder.”

1. Like the Court of Appeal in *HKSAR v Hui Rafael Junior & Others* and the Court of Final Appeal in *HKSAR v Hui Rafael Junior*, the Court in *R v Chapman* on no less than three occasions in its judgment emphasised that “context” is all important in this consideration. It concluded[[173]](#footnote-173):

“In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public’s trust and thus a criminal offence”.

1. In *R v* *France*, the appellant, a journalist was convicted of encouraging a police officer to commit the offence of misconduct in public office by providing information relating to Heathrow airport, where the officer worked. Although the officer worked airside in the highly sensitive commands of aviation security and anti‑terrorism, with access to a confidential database to retrieve information, for which it might be thought a high degree of trust was reposed in him, it was not suggested that the information he supplied to, and was paid for by, the appellant was “secret”. Rather, it was effectively trivial “tittle tattle”, for which the prosecution suggested there could be no public interest in its publication.
2. The Court in *R v* *France* similarly emphasised the importance of putting the appellant’s conduct “into its proper factual context”[[174]](#footnote-174), and determined that “more detailed instruction as to the factors relevant to the question of public interest were required on the facts of this case so that the jury could weigh carefully the seriousness of the breach”[[175]](#footnote-175).
3. Looking at the present case in its factual context, namely the head of the Government and administration of the HKSAR deliberately concealing his dealings and relationship with a wealthy businessman over a luxury apartment he was to occupy on leaving office, whilst at the same time approving a broadcasting licence which would benefit that businessman’s company, we do not see the sort of tension between competing public interests which might be relevant to the question of seriousness. The public interest engaged in the present case lay in the integrity of the Chief Executive (and thereby in the Executive Council itself) in providing a level playing field, in which the community could trust that the decision to grant licences had been made and processed in a fair, open and transparent manner by officials acting in good faith. We cannot conceive of any public interest that might have been enhanced by the concealment of the applicant’s relationship with Wong: certainly, none was put forward in evidence by the applicant.
4. In our judgment, the judge’s directions on seriousness were in conformity with the law as it is applied in this jurisdiction. There is no merit in this ground of appeal.
5. The law relating to Misconduct in public office is well‑settled in Hong Kong, although different permutations of the offence will no doubt continue to excite the scrutiny of lawyers and the attention of the appeal courts. While the common law “varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the judges”[[176]](#footnote-176), it has always been grounded in common sense and experience. In *Smith ‍v Harris*[[177]](#footnote-177), du Parcq LJ described it in these terms[[178]](#footnote-178):

“The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings‑up of judges of experience to juries consisting of plain men, not usually students of logic, nor accustomed to subtle reasoning, but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a school‑man could understand, then I am always very doubtful whether it can possibly be expressing the common law”.

1. If, in this case, one stands back from the legal quagmire of over‑analysis and simply asks oneself whether it is Misconduct in public office for the highest official in the HKSAR, who is statutorily required to exercise a judgment and make a decision in the public interest as Chief Executive in Council, to deliberately conceal from that Council, without reasonable excuse or justification, that he has a private arrangement and dealings with the person who will benefit from his decision, we think the answer is a resounding one. And it will be the same answer as that given by the jury in respect of Count 2.
2. The application for leave to appeal against conviction is refused and the appeal is dismissed. We turn now to the question of sentence.

Appeal against sentence

1. The applicant was sentenced to 20 months’ imprisonment, which was reached by the judge adopting a starting point of 2½ years’ (or 30 months’) imprisonment and giving him a ten‑month reduction for his good character and past contribution to Hong Kong. The judge considered that the applicant had[[179]](#footnote-179):

“…deliberately concealed his dealings and negotiations with Mr ‍Wong Cho‑bau, a major shareholder of Wave Media Limited, in respect of a property situated at East Pacific Garden, Shenzhen, when the defendant was involved in considering and making decisions in relation to three applications made by Wave Media”.

He went on to say[[180]](#footnote-180):

“It is clear from the verdict that the jury rejected any suggestion that it was simply an oversight on the part of the defendant”.

1. The judge accepted that there were no sentencing guidelines for the offence of which the applicant had been convicted, but considered that the offence could broadly be divided into two types. One category, the more serious of the two, involved an element of corruption: the other did not. Although the maximum sentence for the offence was 7 ‍years’ imprisonment, sentences in the latter category were at large and could, depending on the circumstances, include various non‑custodial penalties. He accepted that the applicant’s conduct came within the latter category[[181]](#footnote-181).
2. However, that did not mean that the offence was trivial: on the directions to the jury, it was clear that they must have been satisfied that such was the departure from the applicant’s responsibilities that his conduct was culpable and a conviction was warranted[[182]](#footnote-182).
3. The judge reasoned that[[183]](#footnote-183):

“…the seriousness (of the offence) lies in the position the defendant occupied, the office of the Chief Executive. As the Chief Executive, the defendant was the head of the region and was accountable to not only the people of Hong Kong but also to the Central People’s Government. It is a trust placed on him by the people of Hong Kong and the people of China. Furthermore, the Chief Executive must be a person of integrity, the only person in the Basic Law where such a requirement is specifically stipulated. The breach of trust is an important and significant aspect of the defendant’s criminality in this case”.

1. The decisions made by the applicant at the meetings of the Executive Council were, he said, “important ones … affecting all walks of life in Hong Kong”[[184]](#footnote-184). The judge considered that the offence of Misconduct in public office “was aimed at punishing an abuse by the public officer of the power and duty entrusted to him for the public benefit or of his official position. In other words, punishment and deterrence form the core components in sentencing”[[185]](#footnote-185).
2. The judge acknowledged the applicant’s previous good character and past contribution to Hong Kong, particularly during the financial crisis of 1998. To give effect to these factors, he found that he could reduce the appropriate starting point of 2½ years’ (or 30 months’) imprisonment after trial to 1 ‍year and 8 months’ (or 20 months’) imprisonment. He did not consider that a suspension of that term was warranted.

The applicant’s submissions on sentence

1. It is argued that the judge misinterpreted the starting point adopted by the trial judge in the case of the 1st appellant in *R v Hui Rafael Junior*, which was said to be 27 months’ imprisonment, and thereby came to a mistaken starting point in the present case, which was no more serious on the facts. An updated medical report on the applicant’s health was also placed before us. Ms ‍Montgomery concluded by saying that, in all the circumstances, the starting point for sentence should not have been more than 18 months’ imprisonment.

The respondent’s submissions on sentence

1. Mr Perry did not wish to engage in a sentencing quantum argument that was for this Court to determine in the absence of relevant guidelines on sentence. However, he made clear that he did not accept there had been a misunderstanding by the judge of the sentencing process adopted in the case of the 1st appellant in *HKSAR v* *Hui Rafael Junior*, which was an altogether more complex exercise involving multiple offences, some with a corrupt element, some without, in which that judge would have had to bear in mind the overall question of totality.

Consideration

1. We are not persuaded that the judge misunderstood the sentencing approach to the 1st appellant in *HKSAR v Hui Rafael Junior*. In any event, that case and this were very different. Ultimately, while the 1st appellant in that case may have been Chief Secretary, the applicant before us was Chief Executive and head of the Government and administration of the HKSAR, accountable both to the people of Hong Kong and to the Central People’s Government. The applicant’s persistent concealment of the fact of his relationship and dealings with Wong, at a time when he was making sensitive decisions in WML and DBC’s favour, was a very serious matter indeed for the head of the Government and administration of the HKSAR. It defies belief that someone with the applicant’s long experience and background in Government service could have overlooked the need to make a declaration of interest in these circumstances. The jury evidently did not accept that he had overlooked that need when the issue was placed squarely before them by the judge, and must have rightly determined that his misconduct in concealing this matter was serious enough to warrant his conviction.
2. To this day, there has never been a proper explanation as to why the applicant did what he did, and the question‑marks over his actions and integrity will inevitably and regrettably remain as a judgment of his time as Chief Executive of the HKSAR. Those question‑marks will not have dissipated as a result of the applicant’s explanations to the press, in particular during the Beautiful Sunday broadcast of 26 February 2012, which were not repeated or tested on oath in evidence, and which the jury clearly rejected as untrue.
3. The applicant’s misconduct was in our view particularly serious, given his pre‑eminent position in the community and the harm his actions will have engendered among the people of Hong Kong in their confidence in the way the Government does its business, in the officials who are trusted to oversee the integrity of the system and, ultimately, in the decisions themselves. In our judgment, for the applicant’s persistent misconduct over a sustained period of time, a term of immediate imprisonment was inevitable.
4. However, whilst we agree with the judge’s reasoning in respect of sentence, we think that, in all the circumstances, he pitched the starting point for sentence too high. In our judgment, the sentence after trial should have been 18 months’ imprisonment. From that starting point, we would give the applicant a 6 months’ reduction for his good character and past contribution to Hong Kong. That corresponds to the same percentage reduction afforded to the applicant by the judge from the starting point he adopted. We do not consider that there is anything in the medical report furnished to us which takes the applicant’s position outside the normal health considerations to be expected of someone of the applicant’s age in facing the prospect of imprisonment for the first time in his life.
5. Accordingly, we shall reduce the applicant’s sentence of imprisonment from 1 ‍year and 8 months (or 20 months) to 1 year (or 12 ‍months).

Yeung VP:

1. I have read the draft judgment of Macrae VP and I agree with it. I will just deal with the application for leave to appeal against the Costs Order.

The Costs Order

1. As pointed out by Macrae VP, the applicant pleaded not guilty to all three charges and stood trial before A Chan J (the judge) sitting with a jury (the 1st trial). The 1st trial lasted 29 days and on 17 February 2017, the jury acquitted the applicant on Count 3 and convicted him on Count 2. The jury was unable to reach a verdict on Count 1 and a re-trial on that charge was ordered.
2. The re-trial on an amended version of Count ‍1 lasted 25 days and concluded on 3 November 2017. Again, the jury was unable to reach a verdict.
3. On 6 March 2018, following a full hearing, the judge made the Costs Order in question against the applicant. The applicant appeals against the Costs Order on the ground that it was unjust and unreasonable.
4. The judge, in making the Costs Order, emphasised the following:
5. Despite the many statements and assurance made to the public that he would render full co-operation to the ICAC, the applicant exercised his right of silence and gave no assistance to the ICAC whatsoever; he offered no explanation concerning the property or his relationship with Wong, Mr Albert Cheng or Mr David Li, each of whom had a part to play in the transaction.
6. The applicant claimed to have leased the property and paid a sum of RMB800,000 to the landlord, yet he did not voluntarily produce the lease, or the related documents, all dated, on their face, 21 February 2012. The applicant only produced those documents on 26 September 2013 after the ICAC had threatened to use all necessary powers to search and seize the purported lease; and he provided no explanation as to when those documents were created.
7. The documents produced by the applicant were misleading and replete with contradictions and discrepancies.
8. The applicant’s wife, Madam Tsang refused to sign and confirm her witness statement to the ICAC, when she was one of the signatories to the purported lease of the property; as a result the ICAC had to conduct further investigation into the alleged payment of rent and such investigation revealed that no rental payment had been made in 2012, the payment of RMB800,000 having in fact been made in 2010.
9. The absence of explanation caused the ICAC to probe further into the financial situation of the applicant and Madam Tsang, leading to the uncovering of their financial dealings with Mr David Li and Mr Wong, both shareholders of WML and such fund flow investigation took the ICAC over two and half years to complete.
10. The applicant only admitted the financial transactions that Madam Tsang had had with Mr David Li and Wong after the formal bankers’ affirmations were served when they should not and could not be challenged.
11. Despite the public statements that he had made and his close relationship with Wong, the applicant refused to admit the corporate structure of Shenzhen East Pacific (Group) Ltd or that Wong was its Managing Director.
12. The applicant refused to admit the fact that Shenzhen East Pacific (Group) Ltd had issued certain announcements in connection with the transaction in various newspapers resulting in the need for the ICAC to obtain search warrants, which were executed against newspapers and certain advertising companies. It was only then that the applicant agreed to admit those “insignificant matters” that the prosecution were required to prove.
13. The applicant had made unnecessary and unmeritorious pre-trial applications (Section 16 application and objection to the admissibility of evidence), which were first withdrawn, but later resurfaced in another form.
14. The judge accepted that an enormous amount of time and manpower had been put into the investigation of undeniable facts due to the improper way in which the applicant had defended the case, causing the prosecution to incur unnecessary costs. The judge emphasised that despite the way he chose to defend the case, the applicant had stated in public to the media on 5 October 2015 that he had rendered full co-operation in the ICAC investigation in the 3½ years, which statement was very far from the truth.
15. In his decision on the costs application, the judge also explained his reasons for discharging a juror in the re-trial and criticized the way in which the applicant had defended his case. The judge suggested that the applicant, knowing that he could not introduce good-character evidence, chose to introduce such evidence through the back door by engaging a public relations firm to bring in prominent and influential personnel to sit in court, particularly towards the end of the trial when counsel were making their final addresses, at seats exclusively reserved for his family and friends. The judge suggested that the applicant’s objective was “undoubtedly to inform and impress upon the jury that the defendant was a good person and had support from people across the whole spectrum of the society.”

The applicant’s position on the Costs Order

1. Ms Montgomery argued that the making of a Costs Order against a defendant is highly exceptional and should only be made “where the way in which the defendant approached the investigation and/or the prosecution of the cases constitutes an abuse”. She suggested that there was no special circumstance to justify the Costs Order when the applicant could not have rendered any “assistance” to the prosecution or the ICAC, since he was not formally approached by the ICAC during the remainder of his term as Chief Executive and he should not be involved in an ICAC investigation into his own conduct. In any event, so Ms Montgomery argued, the applicant’s exercise of the right to silence and/or failure to positively assist the investigation could not be an exceptional circumstance justifying the Costs Order.
2. Ms Montgomery emphasised that since the applicant had no duty to assist the ICAC investigation, his failure to co-operate, despite the public announcement he made that he would fully co-operate with the ICAC, could not have resulted in the ICAC incurring extra costs. She pointed out that when the applicant was first approached by the ICAC for an interview in October 2013 (1½ years after his public statement), he was cautioned and reminded that he had the right to remain silent and he also then had the benefit of legal advice. Ms Montgomery argued that the applicant was just exercising his right to silence as he was entitled to do and it should not have led to the adverse Costs Order.
3. In so far as the judge criticized the applicant for his failure to admit (a) the relevant financial transactions, (b) the corporate structure of Shenzhen East Pacific (Group) Ltd, and (c) the announcement that it had issued in various newspapers, Ms Montgomery suggested that the applicant could not have made admissions earlier than he did when (b) and (c) were not within the applicant’s knowledge and he could only be in an informed position to make admissions on (a) after receiving and reading the formal bankers’ affirmations. Ms Montgomery argued that the prosecution had the obligation to investigate and collect evidence, including the obtaining of bankers’ affirmations and the execution of search warrants and therefore the costs of doing so should not be borne by the applicant.
4. In any event, Ms Montgomery suggested that those matters did not cause any significant lengthening of the trial as the re‑trial (involving only the 1st count) lasted 25 days and was shorter than the 1st trial (involving all three counts) by a mere 4 days.
5. Ms Montgomery suggested that the Section 16 application and the admissibility objection were reasonably made and were timeously withdrawn, so as not to cause any significant wastage of the court’s time. She further suggested that the Costs Order was not just or reasonable when the prosecution case at the 1st trial was that all 3 counts were inextricably linked and the full thrust was focused on the alleged underlying corrupt transaction which was not established.
6. Ms Montgomery submitted that the judge had wrongly allowed his observation on the way the applicant had conducted his defence (introducing good-character evidence through the back door) to influence his decision to make the Costs Order.

Observation

1. The judge, on the prosecution’s application, discharged a juror towards the end of the re-trial. It was right that he should give his reasons for doing, so as he had earlier indicated. The judge was also entitled to voice what he considered to be an improper way of conducting the applicant’s defence. The use of a public relations firm to bring prominent and respectable citizens to sit in court at reserved seats during counsel’s final addresses, could, if established, reasonably be perceived as an improper way of attempting to influence the jury that the applicant was a person of exemplary character, who had the support of prominent and respectable members of the community. The judge would then have been entitled to take it as an attempt to bring in evidence of good character through the back door, although it is perhaps debatable whether the judge should have first made the necessary enquiries and allowed the relevant parties to be heard before he made those comments.
2. One can perhaps appreciate why the judge chose to include his explanation for discharging the juror and his comments on the applicant’s conduct of the case in, but separate from, the decision on the Costs Order. It was by that stage of proceedings more convenient to have one written decision covering both matters. In any event, the judge’s reasons for discharging the juror and his comments only appeared after he made the Costs Order. As Ms Montgomery was the first to admit, those reasons and comments bore no relevance to the costs decision at all.
3. We do not think it is fair to accuse a professional judge of allowing irrelevant matters to influence his exercise of discretion just because he found it convenient to include his reasons for discharging the juror and his comments on the defence conduct in his decision on costs. We do not think that the judge’s observation concerning the defence conduct resulting in the discharge of a juror had any part to play in the Costs Order he made. The complaint that the judge had allowed irrelevant matters to influence his exercise of discretion should not, with respect, have been made.
4. Whether a convicted defendant should be ordered to pay the costs of the prosecution is fairly well settled in Hong Kong. In *Chan ‍Chor ‍v The Queen* [1968] HKLR 540, it was held that it is not usual to award costs against a convicted person unless there are special circumstances which have led to extraordinary expenses.
5. The Costs in Criminal Cases Ordinance, Cap 492 (“the Ordinance”) was enacted in 1997 and sections 11 and 12 of the Ordinance empower the court to order a convicted defendant to pay prosecution costs, but do not specify the circumstances in which the order should be made. Section 17 of the Ordinance allows the courts to make a Costs Order against a defendant, irrespective of whether he has been convicted, if the judge is satisfied that costs have been incurred as a result of an unnecessary or improper act or omission of the defendant, provided that “the costs…shall not be punitive but shall be reasonably sufficient …” (Section ‍15 (a)) and “just and reasonable” (Section 15(c)).
6. The court’s discretion to award costs against a convicted defendant under section 15 of the Ordinanceis a broader one and is not restricted by the factors set out in section 17 as long as it is “not punitive”, “reasonable sufficient” and “just and reasonable”.
7. In Hong Kong, a Costs Order against an acquitted defendant is rare, if not unheard of, and a Costs Order against a convicted defendant will normally only be made if the defendant’s conduct has led to unnecessary and extraordinary expenses for the prosecution.
8. In *HKSAR v Chan Kwok Wah* [1999] 1 HKC 697, Chan CJHC (as he then was) took the view that it should not be the case that each and every convicted defendant had to pay the prosecution costs, and that such order should only be made in special circumstances when the prosecution had had to incur additional costs. Chan CJHC elaborated, at paragraph 14 of the judgment:

“… it has not been the court’s intention to require each and every convicted defendant to pay costs of the prosecution. A defendant is presumed innocent until he is proved guilty, and the prosecution bears the burden of proving the defendant’s guilt beyond reasonable doubt. This is a fundamental constitutional right enjoyed by a defendant. Accordingly, it is an indirect deprivation of a defendant’s fundamental constitutional right to penalize him in costs merely because his plea of not guilty has rendered it necessary for the prosecution to adduce evidence against him or because his defence has not been accepted by the court. Furthermore, if, as the magistrate in the present case said, each and every convicted defendant had to pay costs of the prosecution, does it mean that in each and every case an adjournment would be required pending a bill of costs from the prosecution and the court would have to calculate and even rule upon the amount of costs payable by the defendant? This cannot be the objective of the Ordinance. In my view, in applying the Costs in Criminal Cases Ordinance, the magistrate must consider whether there have been special circumstances as a result of which the prosecution incurred additional costs. These circumstances may include the defendant’s conduct throughout the trial, for example, by deliberately making difficulties about the prosecution witnesses, intentionally lengthening the trial, or putting the prosecution to proof of insignificant matters or undeniable facts. The magistrate also has to consider the defendant’s financial condition before deciding whether to order the defendant to pay costs of the prosecution.”

1. A similar approach was adopted in *HKSAR v Cheng Tak Wai* [2002] 4 HKC 458 where the Court of Appeal set aside a Costs Order against a convicted defendant when the judge did not point to any “misconduct” in the way in which the defence was conducted and therefore the Costs Order was in effect punitive in nature.
2. In *HKSAR v Chan Kwok Hung* [2000] 3 HKLRD 389, Yeung ‍J (as he then was) further elaborated, at p 393:

“… in my view, an order for costs against the Defendant when he pleaded guilty to the charge should not normally be made. An order for costs should not and could not be made as a means to impose additional penalty on a Defendant or on any other person. An award for costs should normally only be made when in the opinion of the Court, the way in which the Defendant approaches the investigation and/or the prosecution of the case constitutes an abuse resulting in the prosecution having to incur extra costs which, in the normal course of event, would not or need not be incurred.

…this observation is not meant to be a straitjacket approach and an element of discretion or perhaps common sense are called for depending on the facts of each individual case.”

1. In *HKSAR v Man Chai Wah* [2004] 2 HKC, the Court of Appeal reiterated at paragraph 13 of the judgment that “an accused in a criminal case is entitled to put the prosecution to proof of the case against him and a Costs Order should not normally be made against an accused who exercises such right. It is only in exceptional circumstances that an accused should be ordered to pay the costs of the prosecution”.
2. Mr Perry QC, for the respondent, suggested that the court’s current approach in ordering a convicted defendant to pay the prosecution costs is too restrictive, and that the factors required to be established were not provided for in the Ordinance. He pointed out that in England and Wales, where the legislation is expressed in similar terms, the criminal courts enjoy a broad discretion to award costs, including the costs of any investigation, in favour of the prosecution. Mr Perry pointed to the decision in *R v Yoxall* (1973) 57 Cr App R 263, where Mackenna J said at 265:

“In exercising its discretion under these provisions, a court is entitled to take all the circumstances into account, including the strength of the case against the accused, and his knowledge of its strength at the time he pleaded not guilty. He has, of course, a right to plead not guilty however strong the prosecution’s case is, and however conscious he may be of his guilt and to take his chance with a jury. But if he fights and loses a case in which the evidence against him was very strong, he cannot reasonably complain that he is ordered to pay a part of the costs within his means.”

1. The approach in England and Wales to awarding costs against a convicted defendant may well be more liberal, but the core principles from which that approach is derived are not fundamentally different from those adopted in Hong Kong. Like all discretions, statutory discretion that gives a court power to award prosecutions costs must be exercised judicially, and not at the whim of an individual judge. There must be objective criteria governing the exercise of the discretion.
2. In *Yoxall* (supra), the defendant drove a car under the influence of drink. The car crossed the offside verge of the road, ploughed through a fence and went down an embankment without leaving any skid marks and when there was no other vehicle involved. By the time the police arrived, the defendant had disappeared and when the police eventually found him at home, he pretended to have had a drink so that he might avoid a breath test. Eventually, he admitted that he had not taken any drink since the accident and the breath test proved positive. His blood sample contained no less than 236 milligrammes of alcohol when the prescribed maximum was 80. The defendant said to the police that he had “been driving round…pissed for the last five years, I had to get caught sometime”.
3. The defendant deliberately misled the police in the course of their investigation and must have put them to avoidable time and expense. Further, despite the overwhelming and indisputable evidence, he chose to contest the charge. It was in such circumstances that the Costs Order in favour of the prosecution was upheld.
4. The other case referred to by Mr Perry is *Northallerton Magistrates’ Court, Ex p. Dove* [2000] 1 Crim App R (S) 136. However, this case did not establish any novel or alien principle when Lord ‍Bingham ‍CJ gave the following guidance at p 142:

“(1) …

(2) …

(3) The purpose of such an order is to compensate the prosecutor and not to punish the defendant. Where the defendant has by his conduct put the prosecutor to avoidable expense he may, subject to his means, be ordered to pay some or all of that sum to the prosecutor. But he is not to be punished for exercising a constitutional right to defend himself… .”

(Emphasis added).

1. In *Hayden* (1975) 60 Cr App R 304, the defendant was charged with possession of a small quantity of cannabis and the case ought ordinarily to have been tried in the magistrate’s court. However, the defendant exercised his right and was tried before a jury in the Crown Court. In upholding a Costs Order against the defendant, the Court of Appeal commented:

“When one comes to the question of costs again the award of costs should not be used as a means of punishing the defendant for having elected to go to trial. It would be quite foreign to the true practice of awarding costs to use them as an additional form of penalty. But, on the other hand, it is perfectly right to say of a man who has elected to go for trial that if the case is one in which the costs of the prosecution should fall on the defendant in the events which happen, then, by going to the Crown Court, he must inevitably suffer a higher financial penalty, if that is the right word, because he has chosen to go to the Court where the costs, for reasons which we all understand, are bound to be higher.”

1. In Hong Kong, just as in England and Wales, anyone charged with an offence has the fundamental constitutional right to put the prosecution to proof of the case against him and any award of costs should not be made with a view to punishing him for having elected to go for trial, but he does not have the right to deliberately hinder or in any way positively obstruct the course of investigation or the trial process, thus putting the investigator and/or prosecutor to avoidable expense.
2. When the court used the expression “special/exceptional circumstances” to justify a Costs Order against a convicted defendant, and when Deputy Judge Li (as he then was) commented in *Au Chi Wai v HKSAR* [2000] 2 HKLRD 278 that “the constitution should not be taken as a guarantee for an accused to try his luck”, they meant nothing more than that an accused has no right to engage in unnecessary or improper conduct in the course of the investigation of the crime against him or at trial, and if he does, then the court can, in the exercise of the discretion under the Ordinance, order costs against him.
3. Against that background of authorities, there are a number of propositions which may be stated. They are:
4. An award of costs should not be made with a view to punishing a defendant for having elected to go for trial. The discretion to award costs against a convicted defendant must be exercised judicially and be guided by established principles, having regard to the circumstances of the case.
5. The discretion to order a convicted defendant to pay the prosecution costs (including the costs of investigation) can be exercised if the defendant’s conduct in the course of the investigation and/or at trial is unreasonable or improper, resulting in the authority having to incur extra or additional expenses which, in the normal course of events, would not or need not be incurred.
6. An award of costs should not be punitive, but only compensatory and should never exceed the sum which the authority had actually and reasonably incurred.
7. An award of costs against a convicted defendant, together with any other financial penalty, should be within his financial capability and should not have a crippling effect on his financial status. It should be just and reasonable.
8. Before an award of costs against a convicted defendant is made, he should be given the opportunity to make representations and disclose to the judge such data relevant to his financial position so as to enable the judge to assess what he can reasonably afford. If he fails to do so, the judge is not obliged to make the enquiries on his own initiative, but may draw inferences from evidence he has heard and from all the circumstances of the case.
9. Examples of unreasonable or improper conduct which may attract a Costs Order against a convicted defendant include, but are not limited to;
   1. The defendant, by words or conduct, has misled the authority in the course of the investigation;
   2. The defendant has deliberately delayed or hindered the investigation process, including, for example, by absconding, by destroying evidence or by interfering with the witnesses;
   3. The defendant has unreasonably raised, pursued or contested issues in pre-trial applications or at trial which are completely unmeritorious;
   4. The defendant has pleaded not guilty when the undisputed or indisputable evidence was overwhelming and ultimately unchallenged;
   5. There was a last minute change of legal representation without proper reason, resulting in an adjournment;
   6. The defendant, on the pretext of putting the prosecution to strict proof, has deliberately and unreasonably refused to admit unchallenged or unchallengeable evidence, for example, medical evidence, bankers’ evidence, evidence in the public domain or evidence relating to the handling of exhibits;
   7. The defendant has unreasonably, through unjustifiable allegation or lengthy cross-examination or, in other ways, harassed the prosecution witnesses.
10. The judge had the conduct of the 1st trial which lasted 29 days. He would no doubt have had a “feel” of the case and would have been in the best position to decide if the applicant had overstepped what constituted his proper defence. Irrespective of whether the applicant should adhere to his misleading public statement that he would render full co‑operation to the ICAC, the applicant had clearly placed obstacles in the path of the ICAC investigation.
11. Mr Perry was right to suggest that the applicant chose to make misleading statements, and delayed in the production of documents that were misleading on their face, to support his assertion that he had agreed to rent the property from Wong, resulting in the ICAC not only having to make repeated requests for the production of the documents, but to undertake a detailed investigation into the veracity of his assertion and the documents he produced.
12. The corporate structure of Shenzhen East Pacific (Group) Ltd and the announcements it made in newspapers are matters of public record and/or in the public domain. They were not significant matters, were clearly undeniable and should not have been contentious, yet the applicant refused to admit Wong’s position in the company and its corporate structure until after the formal production of the relevant evidence. The contents of its announcement was objected to and the prosecution had to obtain evidence to link the announcement with Shenzhen East Pacific (Group) Ltd, including the issue and the execution of search warrants against various newspapers and advertising companies.
13. Madam Tsang was of course privy to the financial dealings she had with Mr David Li and Wong, and there was no reason for the applicant not to admit those financial transactions. The suggestion that the applicant was only in an informed position to make admissions after receiving and reading the formal banker’s affirmations was transparently unconvincing.
14. The Section 16 Discharge Application and the application to exclude the Codes of Conduct were without merit. The defence could have allowed the admission of the Codes of Conduct, but argued that they did not apply to the applicant.
15. What the applicant did was much more than a proper exercise of his right to silence; it was intended to hinder the ICAC investigation and the prosecution, resulting in the incurring of unnecessary costs. The judge was entitled to conclude that there were special circumstances, in the sense that the applicant’s conduct in the course of the ICAC investigation and at trial was unreasonable and improper, thus putting the ICAC and the prosecution to avoidable expense. The judge was entitled to order the applicant to bear part of the prosecution costs.
16. We wish to add that in appropriate cases, the prosecution may well consider that an application for costs against a convicted defendant is an effective tool to compensate the public purse for the unnecessary wastage of time, both of the prosecution and the court and to that extent, the observations of Stock VP in *HKSAR v Hon Ming Kong (re: case management)* [2014] 2 HKLRD 710 at paragraph 12 are pertinent:

“I started by saying that the waste of public funds in this case was extraordinary; and indeed it was. Many, though not all, of the long and numerous delays were symptomatic of a culture in which the convenience of counsel rules the day. Satellite proceedings were launched which should never have seen the light of day. Teams of counsel were changed time and again. The first applicant has to date enjoyed the benefit of no fewer than eight different leading counsel and, despite the ability which seems apparent therefrom to afford that kind of representation (which is of course his right), no application was made upon conviction of the applicants for the costs of the prosecution, costs which must have been enormous; a lack of action which we were told accords with the standard policy – if that be so, it is a policy about which taxpayers should be concerned.”

The quantum

1. The prosecution claimed one‑third of its total costs of HK$14 ‍– 15 million, but took the view that the amount was likely to be reduced on taxation. The prosecution was satisfied with a sum of HK$3 to 3.5 million.
2. In making the Costs Order, the judge said:

“The total prosecution costs for the 1st trial was estimated to be in the region of HK$15 million. The defendant has a substantial amount of cash in his bank accounts and has been receiving pension payments after his retirement as the Chief Secretary. In summary, the Defendant is in a position to pay the costs. As such, it is ordered that the Defendant pays one third of the total prosecution costs in respect of his first trial, to be taxed if not agreed, with certificate for three counsel.”

1. We are concerned with the following relevant matters:

(i) An order of one-third of the total prosecution costs to be taxed if not agreed, with a certificate for three counsel, may lead to an amount exceeding the figure of HK$3 to 3.5 million sought by the prosecution;

(ii) The applicant is not a wealthy businessman, but a retired civil servant, having served the Government for almost 50 years;

(iii) The applicant and his wife did have a substantial amount of cash in their bank accounts (about HK$50 million) but he had gone through two lengthy trials and one appeal, with other ancillary proceedings, having been represented throughout by a team of lawyers consisting of three or four counsel, two of whom were leading counsel. Legal costs must have significantly reduced the cash still available to the applicant;

(iv) The applicant is 73 years of age, and his chances of starting another career are remote. The applicant can only resort to what is left of his savings and pension. Financially, the Costs Order may have a crippling effect on the applicant;

(v) The 1st trial involved three charges. The applicant was convicted of Count 2, but acquitted of Count 3 and the jury was unable to reach a verdict on Count 1. A lot of the evidence might well be common to all three charges, but the main thrust of the 1st trial was on Count ‍1, as demonstrated by the fact that the 1st trial took 29 days involving all three charges, whereas the re‑trial took 25 days but was only concerned with Count 1;

(vi) The applicant’s conduct in the course of the investigation and trial, may have been reasonable, but was not outrageously so.

1. We are satisfied that in the entire circumstances of the case, the Costs Order against the applicant is excessive and that a fixed sum of HK$1 million is more just and reasonable.
2. We therefore grant leave to the applicant to appeal against the Costs Order. We allow that appeal and reduce the amount of the costs to be paid by the applicant to the prosecution to HK$1 million.

Pang JA:

1. I have read the judgments of the two Vice Presidents and I agree with them both.

Yeung VP:

Conclusion

1. This Court unanimously refuses the application for leave to appeal against conviction and dismisses the appeal but grants leave to the applicant to appeal against his sentence and the Costs Order. We accordingly allow the appeals against both sentence and the Costs Order to the extents indicated.

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| --- | --- | --- |
| (Wally Yeung)  Vice President | (Andrew Macrae)  Vice President | (Derek Pang)  Justice of Appeal |

Mr David Perry QC, Mr Eric Kwok SC and Ms Maggie Wong, Counsel on fiat, Ms ‍Alice Chan SADPP and Ms Irene Fan SPP, of the Department of Justice, for the Respondent

Ms Clare Montgomery QC, Mr Peter Duncan SC and Mr Derek C L Chan, instructed by King & Wood Mallesons, for the Applicant

1. *HKSAR v Tsang Yam-kuen, Donald*, HCCC 484/2015, 6 March 2018: Appeal Bundle, pp 2017-2033. [↑](#footnote-ref-1)
2. Appeal Bundle, Tab 62, pp 1255-1256: Press release - Implementation plans for digital audio broadcasting and mobile TV services. [↑](#footnote-ref-2)
3. The BA was managed by the Commerce and Economic Development Bureau (“CEDB”). Since April 2012, the BA was merged with two other authorities to form the Communications Authority. [↑](#footnote-ref-3)
4. Admitted Facts, para 34, Appeal Bundle, p 25: The other applicants were Phoenix U Radio Limited (“Phoenix U”), Metro Broadcast Corporation Limited (“Metro”) and Hong Kong Commercial Broadcasting Company Limited (“Commercial Radio”). [↑](#footnote-ref-4)
5. Admitted Facts, para 20(a), Appeal Bundle, p 21: Wong held 150 shares (20% shareholding) until 1 ‍February 2013 when it was increased to 60%. He became a director of WML on 28 December 2007 and resigned as a director on 20 ‍August 2013. [↑](#footnote-ref-5)
6. Appeal Bundle, Tab 52, p 1210: Internal minute dated 25.10.2010, para 5. That licence had been granted on 11.11.2008 for the provision of Amplitude Modulation (“AM”) radio services. [↑](#footnote-ref-6)
7. Appeal Bundle, Tab 61, p 1254: Press release – Wave Media granted sound broadcasting licence. The licensee’s obligations included commencing AM broadcast not later than 10.11.2010, as well as providing a $2 ‍million performance bond. [↑](#footnote-ref-7)
8. Admitted Facts, para 18, Appeal Bundle, p 21. [↑](#footnote-ref-8)
9. Summing-up: Appeal Bundle, p 136S. This was an estimate given by Mr Barrie Ho (“PW6”), the interior designer of the property. [↑](#footnote-ref-9)
10. Summing-up: Appeal Bundle, p 129F. The sum of $350,000 was paid by East Pacific Holdings directly to PW6 in two separate cheques of $175,000 (see Summing-up: Appeal Bundle, p 130P-Q; and pp 134T-135A). [↑](#footnote-ref-10)
11. As Acting Chief Executive between 11.3.2005 and 25.5.2005 (Admitted Facts, para 2, Appeal Bundle, pp 17-18), and as Chief Executive from 21.6.2005 to 30.6.2012 (Admitted Facts, paras 6 and 9, Appeal Bundle, pp 18-19). [↑](#footnote-ref-11)
12. Details of the 69 *ad hoc* declarations of interest at the 46 meetings of the Executive Council were set out in Admitted Facts, para 54, Appeal Bundle, pp 29-43. [↑](#footnote-ref-12)
13. The dates of the meetings were 2.3.2010, 16.3.2010, 11.5.2010, 25.5.2010, 6.7.2010, 2.11.2010, 30.11.2010, 25.1.2011, 29.3.2011, 3.5.2011, 7.6.2011, 28.6.2011, 5.7.2011, 4.10.2011, 18.10.2011, 20.1.2012, 7.2.2012, 21.2.2012, 13.3.2012, 27.3.2012, 24.4.2012, 8.5.2012 and 5.6.2012. [↑](#footnote-ref-13)
14. That was presumably the reason why 1.1.2010 was identified as the commencement date of Count ‍2. [↑](#footnote-ref-14)
15. Appeal Bundle, pp 425-474, Entries 134 and 144. [↑](#footnote-ref-15)
16. Admitted Facts, para 34, Appeal Bundle, p 25. [↑](#footnote-ref-16)
17. Appeal Bundle, Tab 63, pp 1257-1258: Press release – Digital audio broadcasting takes new step forward. [↑](#footnote-ref-17)
18. This minute (dated 7.12.2009) can be found in the Jury Bundle at C148-150, but not in the Appeal Bundle. [↑](#footnote-ref-18)
19. Admitted Facts, para 20(c), Appeal Bundle, p 22: Mr Arculli held a 10% shareholding until he transferred all his shares to Wong on 1 February 2013. [↑](#footnote-ref-19)
20. Clause 6 of the minute. [↑](#footnote-ref-20)
21. In all other internal minutes prepared for those subsequent meetings, the applicant agreed that Mr ‍Arculli should be excluded for similar reasons. Those minutes may be found in Appeal Bundle, Tab ‍52, pp 1209-1211; Tab 55, pp 1230-1232; and Tab 57, pp 1240-1243. [↑](#footnote-ref-21)
22. Admitted Facts, paras 25, 26, 32, 37, 41 and 51, Appeal Bundle pp 23, 25, 26, 29. [↑](#footnote-ref-22)
23. Admitted Facts, para 69, Appeal Bundle, p 46. [↑](#footnote-ref-23)
24. Admitted Facts, para 71, Appeal Bundle, p 47. [↑](#footnote-ref-24)
25. Appeal Bundle, Tab 64, p 1263: Press release – DBC, Metro and Phoenix U granted sound broadcasting licences; Admitted Facts, para 43, Appeal Bundle, p 27. [↑](#footnote-ref-25)
26. Appeal Bundle, pp 455-457, Entry 134. The exact date was not spelt out. It may be noted that the prosecution alleged that the applicant’s wife had begun discussions relating to the property with the interior designer (PW6) as early as February 2011. See, for example, the note in relation to the meeting of 18.2.2011: Appeal Bundle, Tab 30, p 828. [↑](#footnote-ref-26)
27. Appeal Bundle, Tab 65, p 1268: Press release – Disqualified person application by DBC approved. [↑](#footnote-ref-27)
28. Appeal Bundle, Tabs 69-70, pp 1877-1884. [↑](#footnote-ref-28)
29. Appeal Bundle, Tab 88, pp 1937-2003. The lease agreements purported to show that the lease was entered into between Shenzhen East Pacific Group Limited (“SEPGL”) and the applicant’s wife, Madam Tsang Pou Siu-mei, on 21.2.2012, for the period 1.7.2012 to 31.8.2015. The annual rent was said to be “eight hundred thousand (捌拾万) Yuan”, payable before 1.7.2012; it is noted that the amount was wrongly written in Arabic numerals in the main agreement as “8000,000”. [↑](#footnote-ref-29)
30. Summing-up: Appeal Bundle, p 103A-C. [↑](#footnote-ref-30)
31. Prosecution closing speech: Appeal Bundle, Tab 26, p 709 (page 15 line 1 - page 16 line 22). [↑](#footnote-ref-31)
32. Prosecution closing speech: Appeal Bundle, Tab 26, p 753 (page 74 line 6 - page 75 line 17). [↑](#footnote-ref-32)
33. In particular, it may be noted that:

    (a) Ms Alice Lau Yim (“PW1”), Permanent Secretary of the Chief Executive’s Office, testified that the primary obligation on public officials and senior public officials lay not in the procedural step of making declarations, but rather how one conducted himself or herself, and that was to make their best endeavours to avoid giving rise to any potential or real conflict of interest (Summing‑up: Appeal Bundle, p 109J-K).

    (b) Ms Rita Lau Ng Wai-lan (“PW21”), the Secretary for CEDB (from July 2008 – April 2011), who had known the applicant for almost 30 years, said that he was someone who would have been aware of the importance of declaring conflict of interest. He had not related to her the transaction with, or his dealings or relationship with, Wong at meetings of the Executive Council or on any other occasions (Summing‑up: Appeal Bundle, p 165N-R). [↑](#footnote-ref-33)
34. Summing-up: Appeal Bundle, p 75E-G. [↑](#footnote-ref-34)
35. Appeal Bundle, p 430, Entry 25. [↑](#footnote-ref-35)
36. Appeal Bundle, p 310, Entry 4. [↑](#footnote-ref-36)
37. Appeal Bundle, p 309, Entry 4; p 312, Entry 8. [↑](#footnote-ref-37)
38. Appeal Bundle, p 464, Entry 186. In particular, during the Beautiful Sunday broadcast, the applicant asserted: “Indeed and truly, I didn’t give any thought at all that I, in Shenzhen, not in Hong Kong, had an intention, at that time, it was not yet rented, the tenancy agreement was not yet entered, there was the intention (to do it), wanting to rent a place, which was in his, being a property of a shareholder of the company. In addition, the tenancy was to rent for a, a short period of time. At that time, indeed and truly, it did not occur to me that a declaration was required. If a declaration had to be made, it was pretty far‑fetched. Well, the decision would not be influenced. However, I felt, let me tell you this, at that time, I did not declare it. There was a good, a good reason, a good reasoning, for not making declaration. Indeed and truly, I personally did not realise there was any conflict of interest re‑re‑re‑re‑regarding commercial conflicts. Most important of all, (I was) aware that, at that time, we were, were handling the matter at the market rate. Moreover, at that time, no tenancy agreement was entered yet. I only had an intention to rent it.”. [↑](#footnote-ref-38)
39. Summing-up: Appeal Bundle, pp 68N-69B. [↑](#footnote-ref-39)
40. In “Annex I – Annual Declaration of Registrable Interests of Members of the Executive Council”, attached to a document headed “Guidance Note for Members of the Executive Council on Declaration of Interest” (Appeal Bundle, Tab 45, pp 1153-1166), it was stated under Clause 4 - Registrable Interests that:

    “Land and property owned in Hong Kong or outside Hong Kong, including those for self-occupation. Land or property which are held in the name of Members’ spouses, children or other persons or companies, but are actually owned by Members; or land or property which are not owned by Members, but in which Members have a beneficial interest (e.g. ‍rental income), are all registrable. It is not necessary to provide detailed addresses of the land or property.” (Appeal Bundle, p 1160)

    Insofar as the interpretation of the above clause was concerned, at trial it was put to Ms Kinnie Wong Kit Yee (“PW5”), clerk to Executive Council, to which she agreed, that members “do not have to put the register property that they are renting, either from the Government or from a private owner” (PW5’s evidence: Appeal Bundle, Tab 21, p 626 (page 58 lines 5-8)). [↑](#footnote-ref-40)
41. Summing-up: Appeal Bundle, p 92J. [↑](#footnote-ref-41)
42. Defence closing speech: Appeal Bundle, Tab 27, p 807 (page 34 lines 17-20). [↑](#footnote-ref-42)
43. Defence closing speech: Appeal Bundle, Tab 27, p 807 (page 35 lines 15-20). [↑](#footnote-ref-43)
44. Defence closing speech: Appeal Bundle, Tab 27, p 792 (page 87 line 16-page 88 line 12). [↑](#footnote-ref-44)
45. Summing-up: Appeal Bundle, p 98R. [↑](#footnote-ref-45)
46. Summing-up: Appeal Bundle, p 98T-U. [↑](#footnote-ref-46)
47. Summing-up: Appeal Bundle, p 99A-N. [↑](#footnote-ref-47)
48. Summing-up: Appeal Bundle, p 194E-O. [↑](#footnote-ref-48)
49. Summing-up: Appeal Bundle, p 100L-Q. [↑](#footnote-ref-49)
50. Summing-up: Appeal Bundle, p 101R-T. [↑](#footnote-ref-50)
51. Summing-up: Appeal Bundle, pp 101U-102I. [↑](#footnote-ref-51)
52. Summing-up: Appeal Bundle, p 102M-T. [↑](#footnote-ref-52)
53. Summing-up: Appeal Bundle, p 82D-F. [↑](#footnote-ref-53)
54. Summing-up: Appeal Bundle, p 82M-N. [↑](#footnote-ref-54)
55. Summing-up: Appeal Bundle, p 100O-P. [↑](#footnote-ref-55)
56. Summing-up: Appeal Bundle, p 85F-G. [↑](#footnote-ref-56)
57. Summing-up: Appeal Bundle, p 178T-U. [↑](#footnote-ref-57)
58. Summing-up: Appeal Bundle, p 126P-Q. [↑](#footnote-ref-58)
59. See the jury note (written in Chinese): Appeal Bundle, Tab 28, p 811. [↑](#footnote-ref-59)
60. Summing-up: Appeal Bundle, p 243B-L. [↑](#footnote-ref-60)
61. Namely CSB Circular No 2/2004 entitled “Conflict of interest” (Appeal Bundle, Tab 39, pp 1076-1086), which states that:

    “3. A conflict of interest situation arises where the “private interests” of an officer compete or conflict with the interests of the Government or the officer’s official duties. For the purposes of this Circular, “private interests” include the financial and other interests of the officer himself; his family or other relations; his personal friends; the clubs and associations to which he belongs; any other groups of people with whom he has personal or social ties; or any person to whom he owes a favour or is obliged in any way. There are circumstances in which a tie of kinship or friendship, or some other association or loyalty which does not give rise to a financial interest, can influence the judgment of a civil servant in discharging his official duties, or may reasonably be perceived as having such an influence. An officer’s duty to declare a conflict of interest therefore goes beyond the disclosure of interests that are definable in pecuniary terms.

    4. The Administration has no wish to impinge upon legitimate loyalties owed by an officer to his family, relations, personal friends, etc. However, it is essential that all civil servants are honest, impartial and objective in carrying out their duties and in their dealings with members of the public and with their staff. Officers must avoid situations which might compromise (or be seen to compromise) their personal judgment or integrity at work or lead to conflict of interest. A civil servant must not subordinate his official duty to his private interests, nor put himself in a position where his official duty and private interests conflict. He must not use his official position (or any privileged information made available to him in his capacity as a civil servant) to further his private interests or those of his family, friends or associates nor put himself in a position which gives rise to suspicion that he has done so. He must not allow the pursuit of his private interests to interfere with the proper discharge of his official duties, such as engaging in an occupation or undertaking which might conflict with the interests of the department he works in.” [↑](#footnote-ref-61)
62. *Sin Kam Wah & Another v HKSAR* (2005) 8 HKCFAR 192. [↑](#footnote-ref-62)
63. *Ibid.*, at para 46. [↑](#footnote-ref-63)
64. *HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264, at para 30. [↑](#footnote-ref-64)
65. To avoid confusion, we shall refer to the decision of the Court of Final Appeal as *HKSAR v Hui Rafael Junior*, as it is styled in (2017) 20 HKCFAR 264; and to the decision of the Court of Appeal, from which it emanated, as *HKSAR v Hui Rafael Junior & Others* (unrep., CACC 444/2014, 16 ‍February 2016), as it is styled in the unreported judgment of that Court. There were, of course, originally five defendants before the court of trial and four appellants on appeal. [↑](#footnote-ref-65)
66. *R v Borron* (1820) 3 B & Ald 432. [↑](#footnote-ref-66)
67. *R v Llewellyn-Jones* [1968] 1 QB 429, at 436E-G. [↑](#footnote-ref-67)
68. *Attorney-General’s Reference (No 3 of 2003)* [2005] QB 73, at 85A-C. [↑](#footnote-ref-68)
69. *R v Boulanger* [2006] 2 RCS 49, at 58. [↑](#footnote-ref-69)
70. *R v W (M)* [2010] QB 787, at 792C-D. [↑](#footnote-ref-70)
71. *R v Chapman* [2015] QB 883, at 894E-F. [↑](#footnote-ref-71)
72. *R v Borron* (1820) 3 B & Ald 432, at 434. [↑](#footnote-ref-72)
73. *Attorney-General’s Reference (No 3 of 2003)* [2005] QB 73, at 90F-G. [↑](#footnote-ref-73)
74. *R v Chapman* [2015] QB 883, at 895B-H. [↑](#footnote-ref-74)
75. *R v France (Anthony)* [2016] 4 WLR 175. [↑](#footnote-ref-75)
76. *Ibid*., at para 27. [↑](#footnote-ref-76)
77. *Ibid*., at para 28. [↑](#footnote-ref-77)
78. *Ibid*., at paras 28-29. [↑](#footnote-ref-78)
79. *Attorney-General’s Reference (No 3 of 2003)* [2005] QB 73, at 88D-E. [↑](#footnote-ref-79)
80. *Ibid*., at 91D-E. [↑](#footnote-ref-80)
81. Prosecution opening speech: Appeal Bundle, Tab 19, p 529 (page 73, line 16). [↑](#footnote-ref-81)
82. Prosecution opening speech: Appeal Bundle, Tab 19, p 529 (page 74, lines 1-4). [↑](#footnote-ref-82)
83. Summing-up: Appeal Bundle, p 102M-N. [↑](#footnote-ref-83)
84. Summing-up: Appeal Bundle, p 102N-R. [↑](#footnote-ref-84)
85. Summing-up: Appeal Bundle, p 102S-U. [↑](#footnote-ref-85)
86. Macrae JA. [↑](#footnote-ref-86)
87. Summing-up in *HKSAR v Hui Rafael Junior & Others*, at Appeal Bundle, p 82P-U of that appeal. [↑](#footnote-ref-87)
88. *HKSAR v Hui Rafael Junior & Others* (unrep., CACC 444/2014, 16 February 2016). [↑](#footnote-ref-88)
89. Defence closing speech: Appeal Bundle, Tab 27, p 799 (page 1, lines 10-11). [↑](#footnote-ref-89)
90. Appeal Bundle, p 464, Entry 186. [↑](#footnote-ref-90)
91. Defence closing speech: Appeal Bundle, Tab 27, p 799 (page 4, lines 20-21). [↑](#footnote-ref-91)
92. Defence closing speech: Appeal Bundle, Tab 27, p 800 (page 5, line 11). [↑](#footnote-ref-92)
93. Defence closing speech: Appeal Bundle, Tab 27, p 800 (page 5, lines 12-19). [↑](#footnote-ref-93)
94. Appeal Bundle, Tab 25, p 702 (page 23, lines 9-14). [↑](#footnote-ref-94)
95. Appeal Bundle, Tab 25, p 704 (page 31, lines 16-20). [↑](#footnote-ref-95)
96. Appeal Bundle, Tab 27, p 808 (page 37, line 20 - page 38, line 24). [↑](#footnote-ref-96)
97. Defence closing speech: Appeal Bundle, Tab 27, p 800 (page 6, line 20). [↑](#footnote-ref-97)
98. Summing-up: Appeal Bundle, p 82L-N. [↑](#footnote-ref-98)
99. Summing-up: Appeal Bundle, p 100P-Q. [↑](#footnote-ref-99)
100. *R v Keeling* [2008] EWCA Crim 3017. [↑](#footnote-ref-100)
101. *R v Solomons* [2011] EWCA Crim 1. [↑](#footnote-ref-101)
102. *R v Batten* (1990) The Times 16 March 1990. [↑](#footnote-ref-102)
103. *R v Clifford* (unrep., 8 May 1998, CA). [↑](#footnote-ref-103)
104. *R v Rooney* [2006] EWCA Crim 1841. [↑](#footnote-ref-104)
105. *R v Formhals* [2014] 1 Cr App R 35. [↑](#footnote-ref-105)
106. Defence closing speech: Appeal Bundle, Tab 27, p 788 (page 71, line 9 - page 72, line 8). [↑](#footnote-ref-106)
107. Defence closing speech: Appeal Bundle, Tab 27, p 790 (page 77, lines 2-19). [↑](#footnote-ref-107)
108. Prosecution closing speech: Appeal Bundle, Tab 26, p 713 (page 30, line 25 - page 31, line 2). [↑](#footnote-ref-108)
109. Appeal Bundle, p 464, Entry 186; see also footnote 38 *supra*. [↑](#footnote-ref-109)
110. Summing-up: Appeal Bundle, p 100O-Q. [↑](#footnote-ref-110)
111. Summing-up: Appeal Bundle, p 102M-U. [↑](#footnote-ref-111)
112. Defence closing speech: Appeal Bundle, Tab 27, p 807 (p 34, lines 17-20). [↑](#footnote-ref-112)
113. Summing-up: Appeal Bundle, p 156J-P. [↑](#footnote-ref-113)
114. Summing-up: Appeal Bundle, p 159S-T. [↑](#footnote-ref-114)
115. Summing-up: Appeal Bundle, p 165S-U. [↑](#footnote-ref-115)
116. Appeal Bundle, Tab 47, p 1180. [↑](#footnote-ref-116)
117. Appeal Bundle, Tab 48, p 1187. [↑](#footnote-ref-117)
118. Appeal Bundle, Tab 49, p 1188. [↑](#footnote-ref-118)
119. Appeal Bundle, Tab 50, p 1196. [↑](#footnote-ref-119)
120. Appeal Bundle, Tab 52, p 1209. [↑](#footnote-ref-120)
121. Appeal Bundle, Tab 53, p 1225. [↑](#footnote-ref-121)
122. Appeal Bundle, Tab 56, p 1239. [↑](#footnote-ref-122)
123. See, for example, Civil Service Bureau Circular No 2/2004, entitled ‘Conflict of Interest’. [↑](#footnote-ref-123)
124. Summing-up: Appeal Bundle, p 165N. [↑](#footnote-ref-124)
125. Appeal Bundle, pp 465-466, Entry 192. [↑](#footnote-ref-125)
126. Appeal Bundle, Tab 45, pp 1153-1157 ‘Guidance Note for Members of the Executive Council on Declaration of Interest’, at para 6. [↑](#footnote-ref-126)
127. *Ibid.,* at para 8. [↑](#footnote-ref-127)
128. Appeal Bundle, Tab 67, p 1872. [↑](#footnote-ref-128)
129. *Doggett v R* (2001) 182 ALR 1, at para 2. [↑](#footnote-ref-129)
130. *R v Stoddart* (1909) 2 Cr App R 217, at 246. [↑](#footnote-ref-130)
131. *Obeid v R* (2017) 350 ALR 103. [↑](#footnote-ref-131)
132. *Ibid.*, at 140, para 166. [↑](#footnote-ref-132)
133. *Ibid.*, at 141, paras 172-176. [↑](#footnote-ref-133)
134. The judge’s written directions were as follows, at [28]: “To prove that the accused, Edward Moses Obeid, is guilty of the charge on the indictment the Crown must prove beyond reasonable doubt that, between 1 ‍August 2007 and 30 November 2007:

     The accused was a public official …;

     The accused acted in the course of or connected to his public office;

     In so acting the accused wilfully misconducted himself;

     To prove this element [t]he Crown must prove beyond reasonable doubt that:

     The accused engaged in the conduct identified in the indictment that is he made representations to Stephen Paul Dunn with the intention of securing an outcome from the Maritime Authority favourable to Circular Quay Restaurants Pty Ltd in respect of its tenancies of properties at Circular Quay knowing at the time he made the representations that he had a commercial and/or beneficial and/or family and/or personal interest in the tenancies which he did not disclose to Stephen Paul Dunn;

     Such conduct as you are satisfied the accused engaged in was misconduct, that is a breach of the duties and obligations of his office as a member of the Legislative Council; and

     That such misconduct you find the accused engaged in was ‘wilful’ that is the accused knew he was obliged not to use his position in that way or he knew that it was possible that he was obliged not to use his position in that way but chose to do so anyway; and

     The accused’s conduct was misconduct that was serious and merits criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.” [↑](#footnote-ref-134)
135. Summing-up: Appeal Bundle, p 101B-D. [↑](#footnote-ref-135)
136. Summing-up: Appeal Bundle, p 102S-U. [↑](#footnote-ref-136)
137. Summing-up: Appeal Bundle, p 103A-E. [↑](#footnote-ref-137)
138. *Obeid v R* (2017) 350 ALR 103, at 141, para 169. [↑](#footnote-ref-138)
139. *R v Chapman* [2015] QB 883, at 898, para 46. [↑](#footnote-ref-139)
140. *Ibid.*, at para 48. [↑](#footnote-ref-140)
141. *Ibid.*, at para 49. [↑](#footnote-ref-141)
142. *R v France* [2016] 4 WLR 175, at para 9. [↑](#footnote-ref-142)
143. Summing-up: Appeal Bundle, p 102S-T. [↑](#footnote-ref-143)
144. Summing-up: Appeal Bundle, pp 101T-102E. [↑](#footnote-ref-144)
145. Summing-up: Appeal Bundle, p 102F-I. [↑](#footnote-ref-145)
146. The direction on Count 1 in *HKSAR v Hui Rafael Junior & Others* in relation to seriousness was as follows:

     “The fifth element of the offence is this, that what he did or omitted to do has to be serious and not trivial, and you judge whether it is serious enough to warrant his conviction for the offence, all other elements being proved so that you are sure, by considering Rafael Hui’s responsibilities as well as the responsibilities of his office as managing director of the MPFA at that time, the importance of the public objects which he, as managing director of the MPFA, served, and the nature and extent of his departure from those responsibilities.” [↑](#footnote-ref-146)
147. The direction on Count 6 was similar:

     “Again, the fifth element, which is not particularised but which is implicit in the degree of misconduct required before you may find the defendant guilty, assuming you find all other elements proved, is that the misconduct should be serious, not trivial, having regard to D1’s responsibilities, as well as the responsibilities of his office, the importance of the public objects which he as Chief Secretary served, and the nature and extent of his departure from those responsibilities.” [↑](#footnote-ref-147)
148. The 2nd appellant’s outline submissions, at paras 116-120. [↑](#footnote-ref-148)
149. *HKSAR v Hui Rafael Junior & Others* (unrep., CACC 444/2014, 16 February 2016), at paras 250-253. [↑](#footnote-ref-149)
150. *HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264, at paras 86-87. [↑](#footnote-ref-150)
151. *HKSAR v Wong Lin Kay* (2012) 15 HKCFAR 185: *viz R v Bembridge* (1783) 3 Doug KB 327, 99 ‍ER 679; *R v Dytham* [1979] QB 722; *R v Whitaker* [1914] 3 KB 1283; *Re A-G’s Reference (No 3 of 2003)* [2005] QB 73; *Russell on Crime* (12th ed., 1964) p 361 para 32; *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, 235*; Henley v Lyme* (1828) 5 Bing NC 91, 107, 130 ER 995, 1001; *Northern Territory of Australia v Mengel* (1995) 185 CLR 307. [↑](#footnote-ref-151)
152. *HKSAR v Ho Hung Kwan Michael* (2013) 16 HKCFAR 525, [26]. [↑](#footnote-ref-152)
153. Element (5) of Sir Anthony Mason NPJ’s reformulation of the offence. [↑](#footnote-ref-153)
154. *HKSAR v Hui Rafael Junior*, at paras 91-92. [↑](#footnote-ref-154)
155. *The Queen v Boston* (1923) 33 CLR 386, 403 (Isaacs and Rich JJ). [↑](#footnote-ref-155)
156. *R v Boulanger* [2006] 2 RCS 49, at para 67. [↑](#footnote-ref-156)
157. Section 13C and 13H of the Telecommunications Ordinance, Cap 106. [↑](#footnote-ref-157)
158. *HKSAR v Wong Lin Kay* (2012) 15 HKCFAR 185, at para 46. [↑](#footnote-ref-158)
159. *R v Boulanger* [2006] 2 RCS 49, at para 53. [↑](#footnote-ref-159)
160. Appeal Bundle, Tab 20(i), p 583 (page 70, lines 15-16). [↑](#footnote-ref-160)
161. Appeal Bundle, Tab 20(iii), p 604 (page 22, lines 14-19). [↑](#footnote-ref-161)
162. Appeal Bundle, Tab 20(iii), p 604 (page 24, lines 12-16). [↑](#footnote-ref-162)
163. Transcript of evidence of PW21, Day 14, page 45 line 25 - page 46 line16 (not in the Appeal Bundle). [↑](#footnote-ref-163)
164. Summing-up: Appeal Bundle, p 107F-H; p 109J-L; p 156J-O. [↑](#footnote-ref-164)
165. *HKSAR v Wong Kwong Shun Paul* [2009] 4 HKLRD 840. [↑](#footnote-ref-165)
166. *Ibid.*, at para 37. [↑](#footnote-ref-166)
167. *Ibid.*, at paras 45-47. [↑](#footnote-ref-167)
168. *Chan Tak Ming v HKSAR* (2010) 13 HKCFAR 745. [↑](#footnote-ref-168)
169. *Ibid.*, at 758, para 26; 760, para 35. [↑](#footnote-ref-169)
170. *HKSAR v Ho Hung Kwan Michael* (2013) 16 HKCFAR 525, at para 30. [↑](#footnote-ref-170)
171. *R v Chapman* [2015] QB 883, at 894H-895A. [↑](#footnote-ref-171)
172. *Ibid.*, at 895A-B. [↑](#footnote-ref-172)
173. *Ibid.*, at 895H-896A. [↑](#footnote-ref-173)
174. *R v France* [2016] 4 WLR 175, at para 27. [↑](#footnote-ref-174)
175. *Ibid.*, at para 29. [↑](#footnote-ref-175)
176. Preface to *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824) by Peter du Ponceau, referred to in *A & others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, at 300, *per* Lord Carswell. [↑](#footnote-ref-176)
177. *Smith v Harris* [1939] 3 All ER 960. [↑](#footnote-ref-177)
178. *Ibid.*, at 967. [↑](#footnote-ref-178)
179. Appeal Bundle, p 249P-R. [↑](#footnote-ref-179)
180. Appeal Bundle, p 249S-T. [↑](#footnote-ref-180)
181. Appeal Bundle, p 250A-F. [↑](#footnote-ref-181)
182. Appeal Bundle, p 250F-H. [↑](#footnote-ref-182)
183. Appeal Bundle, p 250H-L. [↑](#footnote-ref-183)
184. Appeal Bundle, p 250M-N. [↑](#footnote-ref-184)
185. Appeal Bundle, p 250P-Q. [↑](#footnote-ref-185)