FACC Nos. 11 & 18 of 2016

### FACC No. 11 of 2016

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**Final Appeal NO. 11 OF 2016 (CRIMINAL)**

(ON APPEAL FROM CACC NoS. 103 oF 2012 and 183 of 2014)

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BETWEEN

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| SECRETARY FOR JUSTICE | | **Respondent** | |
| **and** | |  | |
| CHAN CHI WAN STEPHEN (陳志雲) (D1) | | **Appellant** | |
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### FACC No. 18 of 2016

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**Final Appeal NO. 18 OF 2016 (CRIMINAL)**

(ON APPEAL FROM CACC NoS. 103 oF 2012 and 183 of 2014)

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BETWEEN

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| **SECRETARY FOR JUSTICE** | **Respondent** |
| **and** |  |
| TSENG PEI KUN (叢培崑) (D2) | **Appellant** |

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| Before : | Mr Justice Ribeiro PJ, Mr Justice Tang PJ,  Mr Justice Fok PJ, Mr Justice Stock NPJ and  Lord Walker of Gestingthorpe NPJ |
| Date of Hearing: | 21 February 2017 |
| Date of Judgment: | 14 March 2017 |

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**J U D G M E N T**

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**Mr Justice Ribeiro PJ:**

1. These appeals, which arise out of the same transaction and which have been heard together, raise questions concerning the elements of the offence created by section 9 of the Prevention of Bribery Ordinance[[1]](#footnote-1) (“POBO”).

A. The relevant events

1. The appellant Stephen Chan Chi Wan (“Chan”) was at the material time employed as General Manager (Broadcasting) by Television Broadcasts Ltd (“TVB”) under a contract designed for administrative personnel. He was not required to appear in front of the cameras but had voluntarily hosted a talk show screened on a TVB pay channel where he interviewed various celebrities, receiving no additional remuneration for so doing.
2. The show has been referred to as the “Be My Guest” show but its Chinese name “志雲飯局” translates literally as “Chi Wan’s Dinner Party”, “Chi Wan” being Chan’s given name. It gained considerable popularity, more than 150 episodes having been aired, so that Chan himself acquired a certain celebrity status. This led to his being engaged by third parties to appear at various external events, the evidence being that between June 2008 and January 2010, this occurred 20 odd times, Chan receiving remuneration on 18 of those occasions.
3. The appellant Tseng Pei Kun (“Tseng”) was the sole director and shareholder of Idea Empire Advertising & Production Company Limited (“IEAP”). He and IEAP acted as Chan’s agent in respect of his outside commercial engagements.
4. Olympian City is a shopping mall operated by Olympian City 2 Management Co Ltd (“OC”). For several years, OC had collaborated with TVB, sponsoring a New Year’s Eve Countdown show produced by TVB and broadcast from Olympian City as a means of promoting the shopping complex. In November 2009, OC and TVB reached agreement for the Countdown show to be presented on 31 December 2009. OC agreed to pay $1.3 million as the sponsorship fee without having discussed any of the programme’s contents.
5. Coincidentally, the parties came up with the idea of adding, as a segment ancillary to the main Countdown presentation, a live, staged edition of the “Be My Guest” show. It was accepted that the $1.3 million fee would not cover the cost of this additional segment and there was no suggestion that TVB would be responsible for arranging for Chan’s participation. The evidence was that OC knew from previous experience that TVB would not provide what were referred to as their “top-tier artistes” for the Countdown event, so OC would independently invite any personalities they wished to have appearing on the show.
6. OC accordingly contacted Tseng, knowing that IEAP acted as Chan’s agent, and entered into an agreement with IEAP for Chan to appear on a live “Be My Guest” segment in the Countdown show, interviewing as his guest Lai Yiu Cheung (“Lai”). It was agreed that they would wear stickers promoting Olympian City, a requirement that did not apply to the artistes supplied by TVB.
7. OC agreed to pay IEAP $160,000 and in turn, IEAP agreed to pay $112,000 to Chan and $20,000 to Lai, keeping $28,000 for itself. Chan did not seek or obtain permission from TVB to appear on or to be paid for hosting the show although he had a contractual obligation to seek approval for outside work. However, since TVB produced the show, it was generally known by persons at TVB that Chan had been engaged to take part in the Countdown event. It was, as its Chinese name indicates, Chan’s show obviously to be aired with his participation. The special edition of “Be My Guest” was duly broadcast and IEAP, Chan and Lai duly received the agreed remuneration.

B. The charges and the course of the proceedings

1. The appellants were charged with conspiring for an agent to accept an advantage contrary to section 9(1)(a) (Charge 1) and, alternatively, with the substantive offences of an agent accepting an advantage (Charge 2, in Chan’s case) and offering an advantage to an agent (Charge 3, in Tseng’s case).
2. The charge against Chan as particularised was that he, being an employee and thus an agent of TVB, without lawful authority or reasonable excuse, accepted from Tseng acting on behalf of IEAP, an advantage consisting of the $112,000 fee as an inducement or reward for or otherwise on account of Chan’s doing or having done an act in relation to his principal’s affairs or business “namely participating and performing in a side-show entitled ‘Be My Guest’ in the ‘New Year Eve Countdown Programme at Olympian City for 2010’ which was produced and broadcast by TVB” on 31 December 2009.
3. Tseng was charged with offering that amount to Chan as an inducement, etc, for Chan so to act in relation to the affairs or business of his principal TVB. The alternative charge that they both faced was that they had conspired for Chan to accept that advantage as such an inducement, etc, in relation to his principal’s affairs or business.
4. On 2 September 2011, His Honour Judge S T Poon, AgCDJ (as he then was) acquitted the appellants.[[2]](#footnote-2) The prosecution appealed by way of case stated[[3]](#footnote-3) and the Court of Appeal[[4]](#footnote-4) allowed the appeal, set aside the not guilty verdicts and remitted the case to the trial judge to consider whether the appellants could rely on the defence of reasonable excuse for Chan’s conduct.
5. On 7 March 2013,[[5]](#footnote-5) S T Poon CDJ ruled that the reasonable excuse defence availed both appellants and dismissed the charges afresh. However, the prosecution once again appealed by way of case stated[[6]](#footnote-6) and, once again, the Court of Appeal[[7]](#footnote-7) allowed the appeal and directed the Judge to convict Chan and Tseng on the conspiracy charge and to sentence them accordingly. Chan was fined $84,000 and Tseng fined $28,000.
6. The Court of Appeal[[8]](#footnote-8) refused a certificate sought by the appellants for the purposes of appeal, but the Appeal Committee granted each appellant leave to appeal,[[9]](#footnote-9) certifying the following questions as being of sufficiently great and general importance, namely:
7. In the context of a section 9 offence under the Prevention of Bribery Ordinance (Cap 201) (“POBO”): (i) what is the *mens rea* required of an agent to constitute him guilty of an offence under that section; and (ii) how should the element “in relation to the principal’s affairs or business” be interpreted having regard to the determination of the Privy Council in *Commissioner of the ICAC v Ch’ng Poh* [1997] HKLRD 652? (“Questions 1(i) and 1(ii)”)

(2) In the context of a section 9 offence under POBO, what is the proper approach the Court should adopt in considering the defence of reasonable excuse? (“Question 2”)

1. Leave was also granted on the ground that it was reasonably arguable that a substantial and grave injustice had been done to the appellants in the present case.

C. Question 1(i): Elements of section 9 and mens rea

1. POBO section 9 is concerned with transactions between third persons and agents in relation to the affairs or business of their principals. Its offence-creating provisions materially state as follows:

Corrupt transactions with agents

(1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or

(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal’s affairs or business,

shall be guilty of an offence.

(2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's –

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or

(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal’s affairs or business,

shall be guilty of an offence.

1. Section 9(4) excludes from liability an agent who obtains the informed permission of his principal before or as soon as reasonably possible after the conduct which would otherwise constitute a section 9 offence. As permission was neither sought nor given in the present case, section 9(4) is of no application.
2. Addressing Question 1(i), there is no doubt that section 9 is an offence which requires proof of *mens rea* in respect of all its essential *actus reus* ingredients. It should be borne in mind that there are several variants of the offence. Thus, section 9(1) covers agents who solicit or accept an advantage while section 9(2) deals with persons who offer an advantage to the agent. The advantage may be an inducement to do or forbear from doing some act in the future. Or it may be a reward for having already done or forborne to do something. The act or forbearance must in each case be in relation to the affairs or business of the agent’s principal, a phrase which is examined in detail below.[[10]](#footnote-10) The *mens rea* requirement of any particular variant is necessarily adapted to the elements of that variant and may differ from the *mens rea* requirement of some other variant of the offence.
3. The importance of the *mens rea* or mental dimension of the offence looms larger in cases involving the offering, soliciting or accepting of an advantage as an inducement for a future act or forbearance. This is because the offence is committed upon the making of the offer, solicitation or acceptance, it being no defence that the contemplated act or forbearance was not or could not be performed by the agent.[[11]](#footnote-11) In such cases, it is the state of mind of the person making the offer to the agent or of the agent soliciting the advantage, or where the agent accepts the advantage, the mental state of the agent in accepting the advantage, that is the major component of the offence. Where the induced or offered act or forbearance has taken place or where the case involves a reward for past conduct, that conduct is available to be examined as part of the *actus reus* with the accused’s accompanying mental state.
4. It has been stressed that the liability of each person involved in the transaction must be independently assessed according to his own *mens rea*. Thus it has been held that an agent accepting an advantage with the requisite corrupt intent may be convicted even though the person furnishing the advantage acted innocently. Stuart-Moore VP put it thus in *HKSAR v Wong Yuk Sim*:[[12]](#footnote-12)

“...where a provider of a reward thinks he is providing something innocently but the receiver believes that the provider is providing it as a corrupt reward and he accepts it as a corrupt reward, believing it to have been provided as a corrupt reward, then the receiver behaves corruptly even if the provider behaves innocently.”

1. It follows that in cases involving the offering or solicitation of an advantage, the prosecution must prove that the accused intended that, if provided, the advantage should be accepted as an inducement or reward for or otherwise on account of the agent’s act or forbearance in relation to his principal's affairs or business (in the sense discussed below[[13]](#footnote-13)).
2. And in cases involving the accused agent’s acceptance of an advantage, the prosecution must prove that he knew or believed it to have been provided as an inducement or reward for or otherwise on account of his act or forbearance in relation to his principal's affairs or business (in the aforesaid sense).

D. The Judge’s reasoning

1. The Judge referred to *Commissioner of ICAC v Ch’ng Poh*,[[14]](#footnote-14) (to which I shall return[[15]](#footnote-15)) and recognized that the prosecution did not have to establish that Chan was acting in his capacity as TVB’s agent either when accepting the money or when appearing on the show. His Honour noted, relying on *Ch’ng Poh*, that:

“What the prosecution needs to prove is only that the relevant act is an act done in relation to his principal’s affairs or business. However, this phrase should not be given a limitlessly wide meaning. Its meaning should be kept within a specific parameter, which is: when the defendant did the act in question, he must have intended the act to ‘influence or affect’ his principal’s affairs or business. In other words, his act was ‘aimed at’ his principal.”[[16]](#footnote-16)

1. He concluded that Chan’s appearance in the “Be My Guest” segment “was purely an act of moonlighting in his capacity as a ‘celebrity’ or an ‘artiste’, and such an act was not intended to influence or affect the affairs or business of TVB, nor was it aimed at TVB”[[17]](#footnote-17) so that it fell outside the ambit of section 9.
2. In his 2nd Case Stated,[[18]](#footnote-18) the Judge elaborated on his views, pointing out that Chan had not used any powers of his office to benefit himself and had acted openly, his participation having been discussed at TVB production meetings, so that there was no question of him making a secret profit. He held that Chan’s participation in the show “would do no harm but good to TVB” and that “[his] performance and acceptance of the reward did not conflict with any interest of TVB.” He commented that Chan’s mistake merely involved his failure to “follow the procedures prescribed in the employment contract” regarding approvals of outside work and remuneration.
3. The Judge therefore concluded that Chan’s act of accepting $112,000 as an inducement or reward for appearing on the show was not an act done “in relation to his principal's affairs or business” within the meaning of section 9 or (in his 2nd Case Stated) was amenable to the defence of reasonable excuse. He therefore acquitted the appellants.

E. The Court of Appeal’s reasoning

1. The Court of Appeal reversed the Judge’s verdict of acquittal holding that he had been wrong to find that Chan’s act fell outside section 9. In the joint judgment of Yeung VP and Yuen JA, it was held that Chan’s appearance in the show “related to TVB’s affairs or business”; would “influence or affect TVB”; was “aimed at TVB” and would “involve TVB”.[[19]](#footnote-19) The reasoning behind those conclusions is contained in the following paragraphs of that judgment (translated from the original Chinese):

“107. Although Chan’s chief position at TVB was General Manager (Broadcasting) and he was not contractually obliged to perform in front of the camera, the undisputed evidence shows that he had performed in more than 150 episodes of ‘Be My Guest’, which was a well-known and very favourably received talk show on TVB’s pay channel.

108. It must have been because of the popularity of ‘Be My Guest’ that Olympian City would like to have the additional ‘Be My Guest’ show added within the main show.

109. This request made by Olympian City met with approval from TVB. TVB allowed Chan and another artiste Lai Yiu-cheung to perform together in the additional ‘Be My Guest’ show, which was to be produced and broadcast live by TVB.

110. Had Chan refused to perform in the additional ‘Be My Guest’ show, it might have been necessary for TVB to arrange another programme as a substitute. This might affect the contractual relationship between TVB and Olympian City and would significantly influence the audience ratings of the live broadcast of the main show.

111. Judging from the undisputed and/or indisputable background facts of the present case, the propositions that Chan performed in the additional ‘Be My Guest’ show merely in the capacity of a celebrity, that his performing in that show was not related to TVB’s affairs or business, and that it would not influence or affect TVB, would not involve TVB and was not aimed at TVB, are all artificial and contrived. These propositions not only deviate from the crux of the issues in the present case and defy common sense, but also represent an approach which is neither realistic nor reasonable.”

1. These are, with respect, decidedly odd reasons for labelling Chan’s conduct as criminal. What is asserted in those paragraphs is that TVB wanted Chan’s show to be part of its Countdown event because its popularity would boost audience ratings. Chan in fact obliged without being asked to do so by TVB and at no cost to the television station, having been engaged and paid to appear on the show by OC via IEAP. Thus, on the Court of Appeal’s reasoning, Chan’s conduct was wholly in line with and beneficial to TVB’s interests.
2. However, the joint judgment holds that Chan’s conduct constituted the section 9 offence by saying that it “related to”, would “influence or affect”, was “aimed at” or would “involve” TVB’s business or affairs in that TVB’s business would have been prejudicially affected if Chan had *refused* to perform (as he was entitled to under his contract) because audience ratings would have been adversely affected, alternative programming arrangements might have been necessary and TVB’s contractual relationship with OC might have been affected. This is to assert that Chan committed the offence because TVB would have been prejudiced if Chan *did not* act in the beneficial way in which he was induced to act by remuneration from OC. Such reasoning appears to turn the policy of section 9 on its head.
3. The joint judgment did not regard this as a difficulty, taking the view that lack of prejudice to the principal’s affairs or business was irrelevant:

“What section 9(1)(a) requires is that the act of the agent is done in relation to his principal’s affairs or business. There is no requirement that the agent’s act has to cause prejudice to his principal’s affairs or business. *Ch’ng Poh* further explained that the phrase ‘in relation to his principal’s affairs or business’ meant that the agent’s act would influence or affect his principal’s affairs, would involve his principal, and was aimed at his principal. *Ch’ng Poh* did not say that the ‘influence’ or ‘effect’ must be adverse, and the parties agreed that the term ‘aimed at’ does not carry a negative meaning.[[20]](#footnote-20)

In support of this view, reliance was placed on the Court of Appeal’s earlier decision in *HKSAR v Fung Hok Cheung*,[[21]](#footnote-21) to which I shall return.[[22]](#footnote-22)

1. Cheung JA, in a concurring judgment, gave different reasons for holding that Chan’s performance was an act in relation to his principal's affairs within the meaning of section 9. His Lordship stated:

“... Judge Poon overlooked the fact that besides being a celebrity or an artiste, the 1st respondent was also General Manager (Broadcasting) of TVB, and therefore his acts were certainly related to TVB’s business. This is because, on the facts, when TVB and Olympian City Management Ltd were planning the countdown event, they happened to put forward the same idea, to which they then agreed, of adding in a shopping mall version of ‘Be My Guest’ as part of the event. It follows that, if the 1st respondent participated in that show and accepted money therefor, he would be doing an act in relation to TVB’s business.”[[23]](#footnote-23)

1. With respect, the proposition that Chan was General Manager (Broadcasting) and “therefore” his acts “were certainly related to TVB’s business” is hard to follow. Chan’s appearance on the talk show had nothing to do with his being General Manager (Broadcasting). Whether his hosting of the show did or did not qualify as an act “in relation to his principal's affairs or business” required examination of the relationship between that act and the principal’s affairs or business. It was not determined simply by pointing to his managerial position in TVB.
2. Cheung JA added (in the context of his discussion of *mens rea*):

“Judge Poon considered that when the 1st respondent agreed to perform in the ‘Be My Guest’ show, he had no intention to influence or affect TVB’s business and his act was not intended to be aimed at TVB, because the idea of adding in the show was not conceived by either of the two respondents, who merely played a passive role. However, as stated above, *the most important consideration is that the 1st respondent’s act was related to the TVB programmes, and this precisely indicates a causal relationship between his act and his principal’s business*, on which basis the court is entitled to find that the 1st respondent had the *mens rea* for the section 9(1)(a) offence.”[[24]](#footnote-24) (Italics supplied)

1. To regard the required relationship between the agent’s act and the principal’s affairs or business as established simply because Chan’s show “related to TVB programmes”, gives the section an extremely broad interpretation. It was an approach supported by Mr Jonathan Caplan QC[[25]](#footnote-25) who submitted that it was enough that Chan’s show was part of a programme broadcast by TVB.
2. For the reasons developed below, I am respectfully of the view that the Court of Appeal’s judgments are erroneous and based on a misconstruction of section 9.

F. Ch’ng Poh

1. The leading authority in this context is *Commissioner of the ICAC v Ch’ng Poh*[[26]](#footnote-26) in which the Privy Council considered the nature and limits of the offence created by section 9. Mr A, a partner in a solicitors’ firm referred to as X & Co, was acting for Ch’ng Poh who had been convicted of fraud. To bolster his prospects of appeal, Ch’ng Poh caused A to offer a bribe to a corrupt former prosecutor, Warwick Reid, who was asked to swear an affidavit discrediting an accomplice and key prosecution witness, one C H Low, and to try to persuade Low not to cooperate with the prosecuting authorities. A warrant authorizing a search of X & Co’s premises which was purportedly issued by the magistrate under POBO section 9(1)(a) was quashed for want of jurisdiction. The Privy Council held that on the facts, A’s acts had nothing to do with the affairs or business of his principal X & Co, so that section 9 was not engaged.
2. In reaching that conclusion, Lord Lloyd of Berwick held that the words “in relation to his principal's affairs or business” had a restricting purpose and that it was not enough that the recipient of a bribe should merely be shown to be someone’s agent:

“Section 9 is the only section in the Ordinance dealing with persons other than public servants. It is confined to agents. It does not say, like section 4, that the agent must have been acting in his capacity as an agent. Instead the act done (or not done) by the agent must be an act done or not done ‘in relation to his principal's affairs’. But as Keith J pointed out in R v *Ng Man Ho* [1993] 1 HKC 632 at p.638 the alternative words serve much the same purpose. They are clearly intended to be restrictive. It is not enough that the recipient of the bribe should be an agent in fact. Otherwise any partner in a firm of solicitors, accepting an advantage without authority or reasonable excuse, would be caught by the section. This would be much too wide.”[[27]](#footnote-27)

1. Turning to the meaning of the restricting phrase, his Lordship stated:

“So what do the limiting words mean? They mean that, for the section to apply, the person offering the bribe, must have intended the act or forbearance of the agent to influence or affect the principal's affairs. Accordingly s.9 would apply if Ch’ng Poh had bribed Mr A to secure him a benefit at X & Co's expense, for example, to arrange a reduction in X & Co's ordinary professional fees; or if X & Co were induced to act in a way in which they would not otherwise have acted. Thus it is an essential ingredient of the offence under s.9 that the action or forbearance of the agent should be aimed at the principal. If it is sufficient for the purposes of the person offering the bribe that the agent should act on his own without involving his principal, then, whatever other offence may have been committed, it is not a corrupt transaction with an agent for the purposes of s.9.”[[28]](#footnote-28)

1. In giving this meaning to the restrictive words, Lord Lloyd was elaborating upon both the *actus reus* and *mens rea* elements of the offence. In variants of the offence where the agent has already done the act or forborne to act, his Lordship’s *dictum* explains the quality of the relationship between the performed act or forbearance on the one hand and the principal’s affairs or business on the other which must be proved: the act or forbearance must have been aimed at and intended to influence or affect the latter’s affairs or business. In cases where the act or forbearance have yet to occur, Lord Lloyd identifies the mental element required: the advantage offered or solicited must be intended as an inducement or reward for an act or forbearance aimed at the principal’s business, with a view to influencing or affecting the same.
2. Reliance on section 9(1)(a) by the Commissioner in the *Ch’ng Poh* case was plainly misconceived. There was no advantage offered to or solicited or accepted by the only relevant agent, Mr A. And although he was a partner in X & Co and was in general an agent of the firm, his act of conveying a bribe to Reid was not related to X & Co’s affairs or business. The importance of Lord Lloyd’s judgment is in its explication of the required nexus between act and business which was plainly missing in *Ch’ng Poh*. He construed the requirement that the agent’s act or forbearance should be “in relation to his principal's affairs or business” as a requirement that the act or forbearance be “aimed at” and intended to “influence or affect” the principal's affairs.

G. Question 1(ii): The Court of Appeal and Ch’ng Poh

1. Although the Court of Appeal referred extensively to *Ch’ng Poh*, I do not, with respect, think that that authority was correctly analysed and applied. To take Cheung JA’s judgment first, his Lordship, as we have seen, adopted an extremely wide interpretation of the relevant phrase, holding that it was enough simply to prove that Chan’s show “related to TVB programmes” in some undefined way. This is inconsistent with *Ch’ng Poh* in that it fails to assign to that phrase the restrictive function referred to above.
2. It appears that Cheung JA may have adopted his wide interpretation because he was not persuaded that Lord Lloyd had meant the words to operate restrictively. Cheung JA stated:

“The words ‘influence’, ‘affect’ and ‘aimed at’ do not appear in section 9. The Privy Council used these words merely because this would facilitate explanation of the causal relationship between the act of the offending agent and his principal’s business. The Court used these words for the purpose of emphasizing the need for the prosecution to prove such a causal relationship in a given case, but this does not mean that, apart from being related to the principal’s business, the agent’s act must also have been deliberately intended to influence, affect or be aimed at the principal’s business. Put another way, these words do not connote a positive or negative impact of the agent’s act on the principal’s business or any good or bad consequences of such act upon the principal’s business. I think that this is the principle which the courts should apply when considering the agent’s intention.”[[29]](#footnote-29)

1. Two main points are made in that paragraph, the important proposition being that the words “influence”, “affect” and “aimed at” do not appear in section 9. That is certainly true and it is correct that in the relevant phrase, words with a general, non-specific meaning – “in relation to his principal's affairs or business” – are used. However, I am unable to agree with Cheung JA’s statement that “this does not mean that, apart from being related to the principal’s business, the agent’s act must also have been deliberately intended to influence, affect or be aimed at the principal’s business” in so far as his Lordship may have intended to question the correctness of Lord Lloyd’s construction.
2. Lord Lloyd elaborated upon the meaning of those words by reference to the mischief of the legislation (which is further discussed below[[30]](#footnote-30)) as indicated by the examples he gave. In so doing, he was reflecting the Court’s duty to give effect to the legislative intention when construing general words, as explained by Lord Millett NPJ in *Ho* *Choi Wan v Hong Kong Housing Authority*:[[31]](#footnote-31)

“In construing the language of a statute, it is the task of the court to ascertain and give effect to the intention of the legislature. But that does not mean that the Court must give a literal construction to every word or phrase in the statute. As Lord Bingham of Cornhill said in *R (Quintavalle) v. Secretary of State for Health*[2003] 2 AC 687 at p.695:

‘The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose.’

Whenever the legislature enacts or amends an Ordinance, its purpose is to remedy a perceived mischief or defect in the pre-existing legislation. It is to be presumed that it did not intend the statute to go wider in its operation than is necessary to remedy the mischief or defect in question. If it has inadvertently employed general words which, if given their fullest effect, are wider than necessary, the court not only may but must restrict them by construing them in a narrower sense which, while still falling within the ordinary meaning of the words, gives effect to the legislative intent but does not go beyond it, still less frustrate it.”

1. I am less clear about the meaning of Cheung JA’s second point regarding a “causal relationship.” The suggestion that Lord Lloyd was “emphasizing the need for the prosecution to prove [some] causal relationship” is puzzling especially since it is juxtaposed with the statement that the words in question “do not connote a positive or negative impact of the agent’s act on the principal’s business”. If this is a reference to the rule laid down by POBO section 11 that inability or failure to carry out the corrupt purpose is not a defence, then it is uncontroversial. Otherwise, its relevance is not evident.
2. Turning to the joint judgment, it held, as we have seen, that the appellants’ conduct was caught by the relevant phrase because TVB’s enthusiasm for having Chan’s segment as part of the Countdown show to achieve higher audience ratings meant that his participation was an act “in relation to his principal's affairs or business”. That is not an approach consistent with *Ch’ng Poh*. It appears that in arriving at its decision, the joint judgment sought to distinguish the Privy Council’s decision. First, it treats *Ch’ng Poh* as authority merely for the proposition that where an “agent’s act has nothing to do with his principal’s affairs or goes beyond the agent’s official powers and duties and is not authorized by his principal” no section 9 offence is committed.[[32]](#footnote-32) This was certainly the position on the facts of *Ch’ng Poh*[[33]](#footnote-33) and may be said to be its *ratio decidendi*. However,as noted above,[[34]](#footnote-34) the importance of Lord Lloyd’s judgment lies in its elaboration of the phrase currently under discussion.
3. The joint judgment seeks next to distinguish Lord Lloyd’s explication by asserting that:

“The intention with which *Ch’ng Poh* was concerned is the intention in relation to the offering of the bribe, not the intention of the agent who accepts the advantage. This point is not difficult to understand. The person offering the bribe will not give an advantage to the agent for no reason. He certainly wants the agent who has accepted the advantage to do certain acts which will influence or affect his principal and which will benefit him. It is possible that an agent accepts an advantage solely out of greed, with no intention to actually influence or affect his principal’s affairs by doing his act, but it does not follow that he has not committed the offence under section 9(1)(a) of the Prevention of Bribery Ordinance.”[[35]](#footnote-35)

1. In *Ch’ng Poh*, Lord Lloyd was analysing the position from the point of view of the offeror, giving hypothetical examples involving Ch’ng Poh offering a bribe to Mr A. But his Lordship was not suggesting that the need to establish the relationship in question only arises in the variant of the offence involving the offering of a bribe. Lord Lloyd stated generally that “the act done (or not done) by the agent must be an act done or not done ‘in relation to his principal's affairs’” and that it was “an essential ingredient of the offence under s.9 that the action or forbearance of the agent should be aimed at the principal”.[[36]](#footnote-36) The section itself employs the same restrictive phrase in both subsections, dealing first with the variant involving an agent who solicits or accepts the advantage and secondly with the variant involving a person who offers the advantage.
2. But even on the narrow view of *Ch’ng Poh* taken by the joint judgment, the question which had to be – but was not – posed was whether Tseng, acting on behalf of IEAP and OC, in offering remuneration of $112,000 to Chan as an appearance fee, intended his performance in the “Be My Guest” segment to be an act aimed at and intended to influence or affect TVB’s business. I find it impossible to see how the answer could be in the affirmative. Tseng’s position was in principle no different from that of OC which had provided the fee to secure Chan’s performance as OC’s guest in a show promoting its shopping mall. It cannot plausibly be suggested that OC committed a section 9 offence involving TVB’s affairs or business.
3. Properly applying *Ch’ng Poh*,the joint judgment should also have asked whether, in accepting the fee and doing the show, Chan knew or believed that his fee had been provided by Tseng as an inducement or reward for appearing on the show as an act aimed at TVB’s affairs or business and intended to influence or affect the same. As discussed above[[37]](#footnote-37), this represents the agent’s *mens rea* requirement in a section 9 offence involving solicitation or acceptance. Again, I can see no basis for an affirmative answer.
4. It follows, in my view, that the Court of Appeal misconstrued section 9 and applied the wrong test for determining whether the necessary relationship between the agent’s act or forbearance and the principal’s affairs or business was proved. On this basis alone, the Court of Appeal’s decision to reverse the trial Judge’s acquittals cannot stand. However, one other aspect of the Court of Appeal’s decision, also bearing on that relationship, is of general importance and ought to be addressed. This involves the question whether, on the true construction of the section, the contemplated act or forbearance by the agent has to be adverse to the principal’s interests.

H. The need for conduct adverse to the principal’s interests

1. As noted above,[[38]](#footnote-38) the joint judgment was not troubled by the fact that Chan’s appearance on the show would only have beneficial consequences for TVB and involved no conflict of interest or other detriment to the principal’s interests. It took the view that “[There] is no requirement that the agent’s act has to cause prejudice to his principal’s affairs or business” and that “*Ch’ng Poh* did not say that the ‘influence’ or ‘effect’ must be adverse”, the term ‘aimed at’ not carrying a negative meaning.[[39]](#footnote-39)
2. I respectfully disagree. In my view, on a proper construction of section 9 in the light of its mischief, the induced or rewarded conduct “aimed at the principal’s business” has to be conduct which subverts the integrity of the agency relationship to the detriment of the principal’s interests. It is not the legislative intent to stigmatize as criminal, conduct of an agent which is beneficial to and congruent with the interests of the principal (as in the present case).
3. I hasten to add that the prejudice to the principal’s interests to which I refer does not need to involve immediate or tangible economic loss to the principal or benefit to the agent at the principal’s expense. Of course, it will frequently (or indeed, usually) do so, but that is not essential on the true construction of the section. The agent may, for instance, be induced to act prejudicially to the reputation of the principal’s business or to divulge confidential information without any immediately palpable loss to the principal. Where the offering, solicitation or acceptance of an advantage is of such a nature as to undermine the integrity of the agency relationship, that is, of such a nature as to injure the relationship of trust and loyalty that a principal is entitled to expect from his agent, this in itself is capable of constituting the necessary detriment. This reflects increasing recognition in the field of employment law, of the importance of the reciprocal duties of trust and confidence in the relationship of employer and employee – perhaps the most common agency relationship – with the evolution of remedies for damage to that relationship.[[40]](#footnote-40)
4. Corrupt transactions with agents which undermine that relationship of trust and loyalty may well give rise to serious reputational damage to the principal even if no direct economic detriment is suffered. This may be illustrated by some hypothetical examples:
   1. An employee, A, is a manager with authority to select subordinate employees in his department for promotion. He accepts gifts from a subordinate’s parents who make it plain that they expect their daughter to get promotion, as she does. The employer suffers no detriment (if she is up to the job) but the corrupt transaction, if revealed, will damage its reputation with its other employees.
   2. An employee, B, is in charge of a confidential tendering process. Shortly before the closing date B accepts a bribe from X to reveal the lowest tender price so far submitted (say $900,000), thus enabling X to submit a successful tender of $850,000. B has apparently saved his employer $50,000 (if X does the job properly) but the breach of confidence has impaired the relationship of trust and loyalty and the corrupt transaction, if revealed, will damage the employer’s reputation with its regular suppliers.
   3. An employee, C, runs the department selling electronic toys in a large store. At Christmas there is intense demand, exceeding supply for a particular toy. C takes a bribe of $500 from a customer to jump the queue on the waiting list. The store suffers no financial loss but the corrupt transaction, if revealed, would damage the store’s reputation with its regular customers.

***H.1 The mischief of the Ordinance and of section 9***

1. At the risk of stating the obvious, the object of the POBO is the suppression of bribery and corruption. The long title makes this clear[[41]](#footnote-41) and the purpose of the legislation has been acknowledged in many reported cases.[[42]](#footnote-42) In *Ch’ng Poh*, Lord Lloyd noted that “section 9(1)(a) criminalises corrupt transactions with agents ...”[[43]](#footnote-43) In the example he gave of a case which would fall within the section, he spoke of Ch’ng Poh hypothetically bribing Mr A “to secure him a benefit *at X & Co’s expense*”.[[44]](#footnote-44)
2. The respondent sought to make something of the fact that the word “corruptly”, used in the equivalent provision previously in force,[[45]](#footnote-45) has been removed from the current Ordinance. However, its removal obviously does not change the mischief at which the Ordinance is aimed. In a debate on the Bribery Bill 1970, Mr Oswald Cheung, a Legislative Councillor, expressed doubts as to removal of the word and suggested an amendment to restore it.[[46]](#footnote-46) The Attorney-General responded that it was removed lest inclusion of a reference to corruption “would oblige the Crown, before an accused had a case to answer, to establish that the soliciting or acceptance of a bribe was attributable to a corrupt motive”, experience showing that this had caused difficulties.[[47]](#footnote-47) He went on to explain that, as drafted, “the Crown will need to prove only a payment to the public servant, or agent, or other person. It will then be for the accused to show that he received it for reasons which are unconnected with bribery...”
3. With respect, it was an over-simplification for the Attorney-General to suggest that the Crown would need “to prove only a payment”. As is evident from the structure and elements of the section 9 offence discussed in Section H.2 below, while the need to prove a corrupt motive was avoided by removing a reference to corruption in the wording, the approach adopted involves creating offences requiring proof of actual or proposed transactions involving particular classes of defendants (including agents in the private sector) which are of such a nature as to savour implicitly of corruption. Thus proof of a payment (or an offer or solicitation) meeting the conditions defined by section 9 implicitly establishes a corrupt transaction, subject to the defences of lawful authority and reasonable excuse.

H.2 The structure of section 9

1. As Li CJ stated in *HKSAR v Cheung Kwun Yin*,[[48]](#footnote-48)the purpose of a statutory provision may be evident from the provision itself. The structure and elements of the section 9 offence give a strong indication of the legislative intent. Thus, the section concerns transactions between third persons and agents who have been entrusted with power to act on their principals’ behalf. It focuses on an advantage solicited or accepted by, or offered to, the agent as an inducementfor him to act or forbear to act in some way in relation to his principal’s affairs or business. If the agent were duly acting in the ordinary course of his principal’s business, one would expect no such inducement to enter the picture. The situation targeted by section 9 is thus evidently one where the agent is being offered or solicits without permission, lawful authority or reasonable excuse, an inducement to do (or forbear from doing) something “in relation to his principal's affairs or business”. It is a situation which is implicitly likely to involve some deviation from his normal duties and is likely to undermine the integrity of the agency relationship. This is reflected in paragraph (b) of each of sections 9(1) and 9(2)[[49]](#footnote-49) which, by focussing on an agent’s “showing or forbearing to show ... favour or disfavour to any person in relation to his principal’s affairs or business” as the basis of guilt, indicate that section 9 targets transactions tending to undermine the integrity of the agency relationship.
2. As Blair-Kerr J, in *R v R E Low*,[[50]](#footnote-50) put it in relation to an earlier version of section 9:[[51]](#footnote-51)

“It is the inducing influence of the gift in relation to the recipient's performance or non-performance of his duty which is the essence of the offence.”

H.3 Fung Hok Cheung

1. In rejecting the argument that the “influence” or “effect” must be adverse, the Court of Appeal relied on *HKSAR v Fung Hok Cheung*.[[52]](#footnote-52) The facts were described as follows:

“... the applicant had access to a corrupt jockey, one Munce, who was prepared to provide tips as to the prospects of success of horses in respect of which he had peculiar information as a result of having ridden them at the request of various trainers; the applicant would pass this information on to PW1 [an ICAC undercover agent] who would place bets in his own name but on Munce's behalf; if a bet was successful a proportion of the winnings would be paid over to Munce, via the applicant who would retain a share, whereas if it was unsuccessful the loss would be borne by, ostensibly, PW1.”[[53]](#footnote-53)

1. The jockey was held to be the agent of the trainers for whom he was riding and Wright J, giving judgment for the Court of Appeal, described the case as one in which the agent “surreptitiously provides confidential information concerning his employer's business to a third party in return for payment”.[[54]](#footnote-54) The applicant was convicted of conspiracy to offer an advantage to an agent, contrary to POBO section 9(2)(a), read together with sections 159A and 159C of the Crimes Ordinance (“CO”).[[55]](#footnote-55) In the passage relied on below, Wright J stated:

“The section does not require, nor should the phrase ‘aimed at’ in *Commissioner of the Independent Commission Against Corruption v Ch’ng Poh* be read as importing, any direct adverse proprietary consequence to the principal's affairs or business. What it requires is that the person offering the inducement intended that the act to be carried out by the agent itself in some way would influence or affect the affairs or business of the principal.”[[56]](#footnote-56)

1. His Lordship added:

“The Deputy Judge was fully justified in finding on the evidence before her that the use by the applicant, for financial gain, of the confidential information obtained by Munce as jockey for and agent of the trainer, potentially would affect the trainer's reputation. It requires nothing more than commonsense to appreciate that such a situation would affect the trainer's affairs or business, from which it is self-evident that Munce's conduct was an act in relation to his principal's affairs or business and that the applicant intended that consequence.”[[57]](#footnote-57)

1. It is clear from these two paragraphs that *Fung Hok Cheung* is not authority for the proposition that a person can be guilty of a section 9 offence even where the contemplated act or forbearance has no potentially adverse impact on the principal’s interests. Wright J was stating that there was no need to show any “any direct adverse proprietary consequence to the principal's affairs or business”. In the next paragraph he endorsed the trial judge’s finding that Munce’s acts potentially damaged the trainer’s reputation and thus would affect his affairs or business. Such reputational damage is not a direct “proprietary” or “economic” consequence, but it is plainly a consequence inimical to the integrity of the agency relationship between Munce and the trainer. It might moreover lead to indirect economic harm to the trainer’s business.
2. I pause to note that in the leading textbook in this jurisdiction on the subject,[[58]](#footnote-58) the learned author asserts the need for prejudice to the principal’s interests:

“Section 9 is the only offence in the POBO dedicated solely to corruption in the private sector but it is limited in its scope by the requirement that there exists a principal/agent relationship and that the principal’s interests are prejudiced or at risk of being prejudiced by the secret actions either of his corrupt agent or by a person with whom he is having dealings who seeks to corrupt his agent. This is the traditional narrow view of corruption which is typically found in anti-corruption legislation and is even reflected in Article 21 of the United Nations Convention Against Corruption (UNCAC) which proscribes the offering solicitation or acceptance of undue advantages to or by the employees of private sector entitles “in order that he or she, in breach of his or her duties, act or refrain from acting”. Thus the focus of the UNCAC and other similar offences is on conduct which undermines the integrity of the agent in his relationship with his principal ...”

I. Conclusions on section 9 summarised

1. There are variants of section 9 offences differing according to whether they are committed by the agent soliciting or accepting the advantage or by the person offering the same; and whether the act or forbearance is contemplated or already performed.
2. The *mens rea* requirements of knowledge, belief and intention adhere in their appropriately adapted forms to the essential *actus reus* ingredients of each of these variants, applied independently to each person allegedly involved in the transaction.
3. The reference in section 9 to the agent’s act or forbearance being “in relation to his principal's affairs or business” is properly construed to mean that the agent’s act or forbearance must be aimed at and intended to influence or affect the principal’s affairs or business in a manner that undermines the integrity of the agency relationship by injuring the bond of trust and loyalty between principal and agent.
4. In offering cases, the prosecution must prove that the offeror intended that the advantage would be accepted as an inducement or reward for or otherwise on account of the agent’s act or forbearance which is aimed at and intended to influence or affect the principal’s affairs or business.
5. In soliciting or accepting cases, the prosecution must prove that the accused agent knew or believed that the advantage was provided as an inducement or reward or otherwise on account of his actual or contemplated act or forbearance as conduct aimed at or intended to influence or affect the principal’s affairs or business.

J. Question 2: reasonable excuse

1. Section 9 creates an offence based on conduct performed without lawful authority or reasonable excuse and section 24 lays it down that these are matters of defence which the accused bears the onus of proving:

“In any proceedings against a person for an offence under this Ordinance, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused.”

1. In *HKSAR v Ho Loy*,[[59]](#footnote-59) Fok PJ pointed out that a defence of reasonable excuse involves (i) identifying the matters relied on as constituting the excuse; (ii) determining the genuineness of the excuse; and (iii) assessing “... whether that excuse is reasonable, which the court will do on an objective standard depending on the particular facts of the case”.
2. An issue as to reasonable excuse only arises if there is proof of conduct which prima facie constitutes the section 9 offence so that an assessment of the facts relied on as an excuse is required. Since I have concluded that the appellants do not fall within section 9, there is no realistic basis for assessing the defence in the present case. The prosecution has not proved that they respectively offered and accepted an advantage to induce or reward conduct by Chan aimed at TVB which prima facie undermined the integrity of the agency relationship to TVB’s detriment. It is thus not a meaningful exercise to search for and assess the reasonableness of matters relied on to excuse a state of affairs that never came into existence. This applies, for instance, to Chan’s reliance on his belief that he effectively had TVB’s permission to perform versus the prosecution’s assertion that permission would have been refused. What divided the parties on that issue was whether Chan’s act could be regarded as aimed at and intended to influence or affect TVB’s business – questions bearing on prima facie guilt rather than on reasonable excuse. I shall accordingly confine myself to a discussion of one question of principle relating to reasonable excuse that was canvassed at the hearing.

K. Conspiracy, section 24 and the burden of proof

1. As noted above, section 24 provides that the “burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused”. If that section is engaged and a constitutional challenge mounted on the basis that it infringes the presumption of innocence, a proportionality analysis may be required. I do not, however, intend to enter into that discussion.
2. The point of principle which I wish to address arises out of the Court of Appeal’s direction requiring the Judge to find the appellants guilty solely on the charge of conspiracy for an agent to accept an advantage.[[60]](#footnote-60) The question is whether, in cases of conspiracy, section 24 is engaged so that a reverse onus to prove lawful authority or reasonable excuse is placed on the accused.
3. In *HKSAR v Ng Po On*,[[61]](#footnote-61) the effect of section 24 was considered in relation to POBO section 14 which made it an offence to fail “without reasonable excuse” to comply with a notice requiring the person served to furnish information relevant to an ICAC investigation. The prosecution argued that section 24 made it clear that reasonable excuse was a matter of defence to be proved by the respondent on the balance of probabilities. This Court held that on a proportionality analysis, the validity of the section 14 offence could be upheld as consistent with the presumption of innocence provided that section 24 was read down to impose merely an evidential burden on the person failing to comply with the notice to raise the issue of reasonable excuse while the prosecution bore throughout the persuasive burden of proving non-compliance and of negating reasonable excuse.
4. In connection with inchoate offences including the offence of conspiracy, I stated:[[62]](#footnote-62)

“The precise offence charged has to be borne in mind. Thus, if a defendant is charged with an inchoate offence of conspiracy, attempt or incitement relating to a statutory offence, it does not matter that the substantive statutory offence may, on construction, be found to contain a reverse onus provision. The inchoate offence exists at common law and, in accordance with the general common law rule, does not involve any reverse onus. This is unaffected by s.94A.[[63]](#footnote-63) Thus, in *HKSAR v Lam Yuk Fai* (2006) 9 HKCFAR 281, §33, a count alleging a conspiracy to commit the statutory offence of transferring a passport to another person without reasonable excuse was held not to involve the imposition of any persuasive burden on the accused and the presumption of innocence was not engaged. Lord Woolf NPJ stated: As Count 3 alleges a conspiracy, the task of the prosecution was to prove in the normal way the nature of the conspiracy; namely that (a) there was an agreement alleged between the appellant and Philip Chu and; (b) the purpose of the agreement, which on the case for the prosecution, was that the passport should be used for an unlawful purpose and so without reasonable excuse (see for example *Yip Chiu Cheung v R* [1995] 1 AC 111). This conspiracy could not either under S.94A or at common law give rise to any reverse burden. In view of the ingredients of the offence of conspiracy it is unlikely that any charge of conspiracy should give rise to any burden being placed on a defendant.”

1. It may also be noted that CO section 159A(2),[[64]](#footnote-64) which places the offence of conspiracy on a statutory footing, retains the common law approach by providing that even where the substantive offence is one of strict liability in relation to any factual ingredient, a conspiracy to commit that offence nevertheless requires proof of intention or knowledge in relation to that fact or circumstance.
2. It was however made clear in *Ng Po On*,[[65]](#footnote-65) that the Court was concerned with section 24 exclusively as read in conjunction with, and affecting the meaning of, section 14(4). It was observed that section 24 is also relevant to other provisions of the POBO which involve “reasonable excuse”, including section 9, and noted that “[its] interaction with such other provisions raises separate considerations which fall outside the scope of this judgment”.
3. Mr Caplan QC submitted that, by virtue of POBO section 12A(1), the present case is indeed one where section 24 operates differently. Section 12A(1) provides:

“Any person convicted of conspiracy to commit an offence under this Part shall be dealt with and punished in like manner as if convicted of such offence and any rules of evidence which apply with respect to the proof of any such offence shall apply in like manner to the proof of conspiracy to commit such offence.”

1. The argument is that section 24 is a rule of evidence which applies with respect to the proof of a section 9 offence so that section 12A(1) causes it to operate in conspiracy cases just as it does to proof of substantive section 9 offences.
2. In response, Mr David Perry QC[[66]](#footnote-66) relies on CO section 159A(1) which materially provides:

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

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

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

1. Mr Perry QC’s argument runs as follows:
   1. The words “without ... reasonable excuse” appear in the body of the offence-creating provisions of section 9 and form an element of the offence which the prosecution has the burden of proving in the usual way, negating reasonable excuse.
   2. To prove a conspiracy to commit a section 9 offence, section 159A(1)(a) makes it necessary as a matter of substantive criminal law for the prosecution to prove that pursuit of the course of conduct agreed to by the alleged conspirators would necessarily amount to or involve the commission of a section 9 offence by at least one of them.
   3. If, contrary to Tseng’s submission, POBO section 24, read with POBO section 12A(1), has the effect of reversing the onus for the purposes of conspiracy, it would mean, inconsistently with CO section 159A(1)(a), that the prosecution would not have to prove that pursuit of the alleged conspiratorial agreement would necessarily result in commission of the section 9 offence since it would be relieved from having to prove that pursuit of the agreement would not involve conduct exonerated by a reasonable excuse.
   4. Mr Perry QC argued that this could not be the intended effect of section 24 since that section is concerned with rules of evidence and is not intended to modify the substantive law defining the elements of criminal conspiracy as laid down by CO section 159A(1)(a). Accordingly, he submitted that section 24 does not apply to the conspiracy charge and the prosecution’s failure to negate reasonable excuse presents another reason for allowing the appeal.
2. I have difficulty accepting Mr Perry QC’s argument. Its premise is that the words “without reasonable excuse” constitute an element of the offence to be proved by the prosecution. But if section 24 is engaged, it clearly stipulates that “reasonable excuse” is a matter of defence and expressly reverses the onus. Thus an argument founded on the premise that reasonable excuse is not a matter of defence but an ingredient of the offence as the basis for contending that section 24 is not engaged appears to beg the question.
3. However, I arrive at the same conclusion, but by a different route. Section 24 on its face only relates to “any proceedings against a person for an offence under this Ordinance”. A conspiracy to commit a section 9 offence is not an offence under the POBO. It is either a common law offence or, having been put on a statutory footing, an offence contrary to CO section 159A, so that on its face, section 24 does not apply to such conspiracies.
4. To make section 24 apply, the prosecution has to rely on section 12A(1), arguing that it makes section 24’s reverse onus, treated as a “rule of evidence” applicable to the proof of conspiracies to commit section 9 offences in like manner as it applies to proving the substantive offence.
5. But in my view, on its true construction, section 12A(1) is inapplicable to section 24. Section 12A(1) extends “rules of evidence which apply with respect to the *proof* *of* any ... offence” [[67]](#footnote-67) under Part II of POBO (including section 9) to conspiracies to commit such offences. It does not cover rules of evidence (assuming a reverse onus provision to be such a rule) regarding available *defences*. Section 24 stipulates how the defences of lawful authority and reasonable excuse are to be established. It is not concerned with the proof of any offence.
6. The position is therefore as stated in *Ng Po On* set out above. To prove conspiracy, the prosecution cannot rely on section 12A or section 24 but must, in accordance with the usual common law rule and section 159A(2), discharge the burden of proving that pursuit by the alleged conspirators of their agreement would necessarily result in the commission of a section 9 offence without any (lawful authority or) reasonable excuse availing the accused.
7. Mr Caplan QC acknowledged that if the reverse onus provision did not avail the prosecution, the conspiracy conviction directed to be entered by the Court of Appeal could not stand since reasonable excuse had not been negated by the prosecution. However, he invited the Court in such event to exercise its discretion[[68]](#footnote-68) to order that there be substituted in respect of each appellant, a conviction on the respective alternative charges of offering and accepting an advantage which, he submitted, are clearly within the ambit of section 24.
8. Since I have in any event held that liability cannot be established on the substantive charges because the appellants’ conduct was not caught by section 9, there is no question of any such substitution.

L. Disposal of the appeals

1. For the foregoing reasons, I would allow both appeals and quash the appellants’ convictions. I would direct that any submissions as to costs should be lodged within 21 days of the date of the handing down of this judgment with any submissions in reply to be lodged within 14 days thereafter.

**Mr Justice Tang PJ:**

***Introduction***

1. I have had the advantage of reading Ribeiro PJ’s judgment in draft and agree that the appeals should be allowed. The background and facts have been stated by Ribeiro PJ and I gratefully adopt them. However, I am of the view that Chan’s participation in the 2010 countdown edition of “Be My Guest” was an act “in relation to his principal’s affairs or business” but that he had a reasonable excuse to accept OC’s payment within the meaning of s 9(1)(a) of the Prevention of Bribery Ordinance Cap 201 (“Cap 201”).
2. I will state the essential facts which, in my view, support my view that he had a reasonable excuse.
3. It is not disputed that OC and TVB agreed that, a live, staged edition of “Be My Guest” should form part of the countdown programme. Mr Caplan QC accepted that TVB knew that Chan would appear as a guest of OC. The learned trial judge said it would be naive to think that Chan would have done so gratuitously. With respect, I agree. Not only is this plain common sense, the evidence was that OC had to procure Chan’s attendance through Tseng because as the learned trial judge said “everybody knew that to invite (Chan) to take up a job had to proceed through (Tseng)”. Tseng, and his company, IEAP “acted as Chan’s agent in respect of his outside commercial engagements”.[[69]](#footnote-69) The Court of Appeal said:

“14. … For this reason they approached Tseng, and later Olympian City concluded a contract with him (on behalf of IEAP), under which he was to procure Chan and Lai Yiu-cheung [Lai][[70]](#footnote-70) to perform in the additional ‘Be My Guest’ show, and Olympian City was to pay IEAP $160,000 as consideration.”[[71]](#footnote-71)

“It was agreed that they would wear stickers promoting Olympian City, a requirement that did not apply to the artistes supplied by TVB.”[[72]](#footnote-72)

1. On these facts, I am satisfied that whether Chan had the evidential burden or persuasive burden to prove reasonable excuse,[[73]](#footnote-73) the burden has been discharged.[[74]](#footnote-74)
2. What is a reasonable excuse “depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of ‘reasonable excuse’ is an exception.”[[75]](#footnote-75) In order to determine the ambit of the defence of reasonable excuse one needs to take a view on the offence created by s 9.[[76]](#footnote-76) Section 9(1) provides:

“Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his -

1. doing or forbearing to do, or having done or forborne to do, any act in relation to his principal’s affairs or business; or
2. showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal’s affairs or business.

Shall be guilty of an offence.”[[77]](#footnote-77)

1. I would just note[[78]](#footnote-78) that s 9(4) and (5) provide that if the advantage was solicited or accepted with the permission of the principal which complied with s 9(5), neither the agent nor the person who offered the advantage would be guilty of an offence under s 9(1) or (2).
2. To constitute an offence under s 9, there must be a payment (without lawful authority or reasonable excuse) as an inducement to or reward for or otherwise on account of the agent doing or forbearing to do any act in relation to his principal’s affairs or business (the forbidden purpose). In the present case it was not disputed that the payment to Chan was made as an inducement to or reward for him to take part in the countdown edition of “Be My Guest” (Chan’s performance). What was disputed was whether the performance was in relation to TVB’s affairs or business and if so, whether he had a reasonable excuse.
3. Agent is defined to include “a public servant and any person employed by or acting for another”. It was not disputed that Chan was TVB’s agent since he was employed by TVB. TVB was a public body and Chan as its General Manager (Broadcasting) was a public servant.[[79]](#footnote-79) As the learned trial judge pointed out, Chan could have been prosecuted under s 4. However, the prosecution relied on s 9 which covered dealings with agents as well as public servants. Section 4(2) makes it an offence by a public servant to solicit or accept any advantage as an inducement to or reward for or otherwise on account of his “performing … or abstained from performing, any act in his capacity as a public servant”.[[80]](#footnote-80) However, s 9(1)(a) does not require that the agent acted or forborne from acting in his capacity as agent. It is engaged if the act or forbearance was “in relation to his principal’s affairs or business”.[[81]](#footnote-81) The prosecution case was that Chan’s performance was an act in relation to TVB’s affairs or business.

***Ch’ng Poh***

1. Lord Lloyd of Berwick said in *Commissioner of ICAC v Ch’ng Poh* [1997] HKLRD 652 at 657, a decision of the Privy Council on appeal from Hong Kong:

“… the alternative words serve much the same purpose. They are clearly intended to be restrictive. It is not enough that the recipient of the bribe should be an agent in fact.”

1. *Ch’ng Poh* arose out of an application to quash a search warrant under s 10B of the ICAC Ordinance Cap 204 which was issued based on the commission of an offence under s 9. Briefly, a witness, Reid, had been bribed by Mr A, a solicitor, to made a false affidavit favouring Ch’ng Poh who was appealing his conviction. Mr A was a partner in the firm which acted in Ch’ng Poh’s appeal. Ch’ng Poh provided the money for the bribe.
2. Lord Lloyd who delivered the advice of the Privy Council was of the view that since the case being made by ICAC was that Reid had been bribed by Mr A:

“… s.9(1)(a) of the Bribery Ordinance was simply not engaged. As Litton V-P put it:

Section 9(1)(a) criminalises corrupt transactions *with* agents: not dishonest acts by agents.”[[82]](#footnote-82)

1. However, it was argued on behalf of the ICAC in the Privy Council that the argument had been misunderstood and that its case was that Mr A must have received a bribe to do an act in relation to X & Co’s business. Their lordships did not accept that was the case relied on in the courts below but in light of it Lord Lloyd said of the words “in relation to his principal’s affairs” at 657:

“ … mean that, for the section to apply, the person offering the bribe, must have intended the act or forbearance of the agent to influence or affect the principal’s affairs. Accordingly s.9 would apply if Ch’ng Poh had bribed Mr A to secure him a benefit at X & Co’s expense, for example, to arrange a reduction in X & Co’s ordinary professional fees; or if X & Co were induced to act in a way in which they would not otherwise have acted. Thus it is an essential ingredient of the offence under s.9 that the action or forbearance of the agent should be aimed at the principal. If it is sufficient for the purposes of the person offering the bribe that the agent should act on his own without involving his principal, then, whatever other offence may have been committed, it is not a corrupt transaction with an agent for the purposes of s.9.

If the facts put before the magistrate had been that Ch’ng Poh offered Mr A a bribe in order to secure the filing by X & Co of an affidavit which they both knew to be false, then a case might just have been made out. But as already mentioned, that is not a fair reading, or indeed a possible reading, of the information sworn by Mr Osborn.”

***Section 9(1)(a)***

1. I will consider s 9(1)(a) first and return to *Ch’ng Poh* later. Section 9(1) and (2) was first enacted as s 4 of the Prevention of Corruption Ordinance Cap 215 (“Cap 215”) in 1948.[[83]](#footnote-83) Section 4 of Cap 201 was s 3 in Cap 215. When enacted, those sections required that the advantage be offered or accepted corruptly. As *Bribery and Corruption Law in Hong Kong* 3rd edition by Ian McWalters SC (as McWalters JA then was), explained the word “corruptly” was understood to require “purposely doing an act which the law forbids as tending to corrupt”.[[84]](#footnote-84)
2. When Cap 201 was enacted in 1970 and ss 3 and 4 of Cap 215 were replaced by s 9 and s 4 of Cap 201 the word “corruptly” was removed and substituted by “without lawful authority and reasonable excuse”.
3. The reason for the change was explained by the Attorney General[[85]](#footnote-85) in response to the remarks by Hon Mr Oswald Cheung that he was “staggered” that “the word corruption” was not used in the proposed   
   Cap 201. The Attorney said the word was not used:

“… since it would oblige the Crown, before an accused had a case to answer, to establish that the soliciting or acceptance of a bribe was attributable to a corrupt motive. Unfortunately, past experience has been that this is difficult, and many accused persons have not been charged, and some have been charged but acquitted, because the prosecution was not able to establish that a payment of money in suspicious circumstances was corrupt but had to leave it to the court to draw an inference of corruption, which it was sometimes reluctant to do.”[[86]](#footnote-86)

1. The mischief against which the amendments were made is clear, namely, that corrupt motive was not to be an essential element of the offences under s 4 or s 9 of Cap 201. The Attorney General went on to say:

“As the bill is now drafted, the Crown will need to prove only a payment to the public servant, or agent, or other person.”

1. Section 9 is straightforward. It makes it an offence for an agent to solicit or accept any advantage as an inducement to or reward for or otherwise on account of his doing or forbearing to do “any act in relation to his principal’s affairs or business” in the absence of lawful authority or reasonable excuse.[[87]](#footnote-87) In other words, if an advantage was solicited or accepted in respect of an act or forbearance which related to the principal’s affairs or business, absent lawful authority or reasonable excuse or permission under s 9(4) and (5), an offence is committed. The deliberate removal of the word “corruptly” is significant and I do not believe s 9 requires that any payment for a forbidden purpose must be made with a corrupt motive. With respect, the Attorney General was exactly right when he said:

“As the bill is now drafted, the Crown will need to prove only a payment to the public servant, or agent, or other person.”

***Influence or Affect***

1. *Ch’ng Poh* is authority that for an act or forbearance to relate to the principal’s affairs or business it must have been intended to “influence or affect the principal’s affairs.” And it would not so relate if the agent “should act on his own without involving his principal”. With respect, I agree. Thus, a moonlighting employee would not fall foul of s 9 even if moonlighting was strictly forbidden by his contract of employment.[[88]](#footnote-88) But Lord Lloyd went on to say:

“Thus it is an essential ingredient of the offence under s.9 that the action or forbearance of the agent should be aimed at the principal.”[[89]](#footnote-89)

***Aimed At***

1. It is not clear what if anything “aimed at the principal” additionally requires. The expression has been considered by the English Court of Appeal in *R v Majeed and Another* [2013] 1 WLR 1041 when they considered s 1 of the 1906 Act on which s 9 of Cap 201 was based. The only material difference between s 1 of the 1906 Act and s 9 is that section 1 had not replaced “corruptly” with “without lawful authority or reasonable excuse.”
2. *Majeed* was concerned with cricketers who were bribed to play in a certain way to facilitate betting on cricket matches where one could bet not only on the outcome but also, for example, “on individual events during the course of an over or passage of play”.[[90]](#footnote-90) One of the arguments relied on was that the actions of the cricketers on the field were not aimed at their principals, the Pakistan Cricket Board or the Essex Cricket Club (“the boards”). Relying on the passage in *Ch’ng Poh* quoted above,[[91]](#footnote-91) counsel submitted:

“The boards did nothing, and nothing was expected of them. The bribes were not intended to and did not influence them in any way. … He suggested that, like the dishonest solicitor, ‘A’, in the *Ch’ng Poh* case, the way in which [the cricketers performed in their matches], was personal to them. Like the firm in which ‘A’ was a partner, the boards did not and were not expected to do anything at all by way of response or as a reaction to the giving and the acceptance of the bribes.”

1. Lord Judge CJ who delivered the judgment of the Court[[92]](#footnote-92) said:

“21. … The problem for [counsel] is that [the passage] was addressing the stark reality that ‘A’s’ firm was remote from the bribes paid by Ch’ng Poh, and wholly unaffected by them. They were not paid to ‘A’ for any purposes associated, directly or indirectly, with the business or affairs of his firm. In fact they were not paid to ‘A’ at all. He simply organised their onward transmission to the intended recipients. It is however clear from the judgment that the transaction would have fallen within the ambit of the legislation if the bribes had been accepted by ‘A’ with the intention or for the purpose of influencing or affecting the affairs of the firm. This is why Lord Lloyd went on to acknowledge that if the bribe had been offered to ‘A’ by Ch’ng Poh in a way which would have led the firm to file an affidavit which both ‘A’ and Ch’ng Poh knew to be false, the warrant, as issued, might have been appropriate. This would have been because, although Lord Lloyd did not need to spell it out, the bribe would then have involved the firm, albeit wholly innocently on the part of the firm, in the corrupt activity.

22. We cannot find anything in the judgment in the *Ch’ng Poh* case … which lends support to [counsel]’s argument, and if it did, the submission would be wholly inconsistent with the clear statutory language.

23. … looking at the realities of the situation, there could on the evidence have been nothing closer to the heart of the affairs or business of a cricket board than the performance of the players selected by them to represent their and his country, or their and his county.”

1. With respect, like the English Court of Appeal, I believe the language of s 9 does not require that the act or forbearance should, apart from influencing or affecting the principal’s affairs or business thus involving them be also intentionally directly or indirectly aimed at the principal though one would expect that in many cases they would do so. Nor do I understand Lord Lloyd to have said otherwise.
2. So the question here is whether Chan’s performance related to TVB’s affairs or business. With respect, I agree with Ribeiro PJ’s statement of the elements and *mens rea* at paras 20 and 21 of his judgment. However, it was TVB’s countdown which was televised by TVB and the “Be My Guest” portion was part of the programme. So TVB was very much involved. Suppose TVB had requested Chan to take part in this edition of “Be My Guest” and Chan had agreed. Undoubtedly his participation would have related to TVB’s affairs or business. I am not sure the fact that he had appeared as OC’s guest and paid by them to do so would necessarily result in his not being involved in the business or affairs of TVB.

***Morgan***

1. *DPP v Morgan* [1970] 3 All ER 1053 was also concerned with the interpretation of s 1 of the 1906 Act, Lord Parker CJ in the Divisional Court[[93]](#footnote-93) was quite satisfied that these words “fall to be widely construed”.[[94]](#footnote-94) *Morgan* was an employee of Rover’s as well as the convenor of shop stewards. He solicited a bribe from H who worked as a subcontractor for Rover’s who had been blacked by the union, telling H that he could possibly make it easier for H at the management/union meeting by suggesting that there was no objection to H doing the work. *Morgan* is often cited for the proposition that an agent can have more than one principal.
2. But it decided more than that. It was submitted on behalf of *Morgan* that:

“… if the £25 was obtained as an inducement for doing an act, ie for procuring that there would be no objection by the union to Mr Hurford doing the work, the act was not in relation to Rover’s affairs but in relation to those of the union; that, if the £25 was so obtained, it was not obtained by the appellant as agent of Rover’s but as agent of the union.”[[95]](#footnote-95)

1. Of course, the fact that *Morgan* was the agent of Rover’s was not to the point unless the act “related to the affairs” of Rover’s as well. Hence, Lord Parker CJ said at page 1057:

“The *real point* is whether, there being an obtaining of money as an inducement for the doing of some other act, that act was to be in relation to his principal’s affairs, namely Rover’s affairs.” (*my emphasis*)

1. Lord Parker went on to say at pages 1057 to 1058:

“ … It is counsel for the appellant’s argument that the words “any act in relation to his principal’s affairs” in s 1(1) must mean in direct relation to his principal’s affairs or, put another way, in relation to matters concerning his principal where he owes a duty as an agent. Read in that way, it can be said that, while the appellant was an agent of Rover’s, nevertheless the act in question was in relation to union affairs albeit against the background of the business that Rover’s carried on. For my part, I am quite satisfied that those words “in relation to his principal’s affairs” fall to be widely construed, as indeed they were in the only case to which the court has been referred, *R v Dickinson*, *R v De Rable*,[[96]](#footnote-96) where Pritchard J, in giving the judgment of the Court of Criminal Appeal, said:

“In the judgment of the court the words of s 1 of the Act of 1906 are designedly very wide, and it would be undesirable in the extreme to narrow their meaning in the way which would be necessary if the argument on this first point were held to be valid.”

It seems to me that the conditions precedent to an offence being proved are present here; the appellant was an agent, and what was done here, albeit it was in relation to the union affairs, was also in relation to his principal’s affairs, namely Rover’s affairs.”

1. So here, the fact that Chan performed as the guest of and was paid exclusively by OC is not a sufficient answer to a charge under s 9 unless Chan’s performance did not also relate to TVB’s affairs or business. I am also of the view that it would be undesirable in the extreme to narrow down the meaning of those words. It is of course a question of fact whether the agent’s act or forbearance relates to the affairs or business of his principal. On the facts of this case, I am of the view that Chan’s performance related to the affairs or business of TVB.

***Prejudice to the Principal***

1. Ribeiro PJ is of the view that the agent’s act or forbearance must be adverse to the principal’s interest,[[97]](#footnote-97) in the sense, I think, that it must “prima facie undermined the integrity of the agency relationship to [the principal’s] detriment.”[[98]](#footnote-98) I regard any advantage solicited or accepted without the knowledge of the principal to have such effect. Naturally, in most cases under s 9, the act or forbearance would be adverse to the principal’s interest which was the reason for the advantage. But as Lawton LJ said in connection with s 1 of the 1906 Act:

“The mischief aimed at by the modern statutes dealing with corruption is to prevent agents and public servants being put in positions of temptation.”[[99]](#footnote-99)

1. I do not accept that s 9 requires any other detriment. The acceptance of a payment to favour one of two equal competitors is no less an offence under s 9. Nor would it have made any difference in *Morgan*, if *Morgan’s* promised effort would havestopped a crippling strike.
2. Ribeiro PJ said[[100]](#footnote-100) that on the Court of Appeal’s reasoning, namely that Chan’s performance would boost audience rating at no cost to TVB, “Chan’s conduct was wholly in line with and beneficial to TVB’s interest”. In my view such benefits have no bearing on the offence.

***Fiduciary obligation of agents***

1. Cap 201 was enacted to make “further and better provision for the prevention of bribery” and in construing s 9 one naturally has such purpose in mind. Lord Thomas of Cwmgiedd CJ, in *R v J(P) and others* [2014] 1 WLR 1857[[101]](#footnote-101) said of the 1906 Act that:

“14. … It is clear from the materials before us that the mischief at which the provision was principally aimed was criminalising the bribery of agents in commercial transactions, particularly commissions paid to the agent without the knowledge and informed consent of his principal. These were and are commonly referred to as secret commissions.”[[102]](#footnote-102)

1. And that the aim and purpose of the 1906 Act:

“17. … was entirely in accordance with the underlying law relating to the fiduciary obligations of agents established in the cases to which we have referred.”

1. One of those cases was *Parker v McKenna* (1874-75) LR 10 Ch App 96 where James LJ at 124-125 said:

“ … I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.”

1. In my opinion, once it is established that an advantage was offered or accepted by an agent for a forbidden purpose then absent a reasonable excuse[[103]](#footnote-103) an offence under s 9 would have been committed. Furthermore, I would not regard absence of prejudice to the principal, or that the act was beneficial to the principal to be a reasonable excuse. I see no reason why criminal law should differ from civil law in this respect. Just as in civil law the principal should not be put to the danger of such an inquiry, to permit such inquiries in criminal prosecution would set back the fight against corruption. It is well to remember what the Attorney General said in moving the second reading of the Bill:

“Sir, it is impossible to assess with any accuracy the extent to which society in Hong Kong is affected by corruption … But … corruption does exist here to an extent which not only justifies, but demands, that the utmost efforts be made to eradicate it from our public and business affairs.”[[104]](#footnote-104)

Since 1970, corruption has become less of a problem in Hong Kong but it has not been defeated.

1. Section 4 which covers public servants may provide a useful comparison. There, I do not believe it is suggested that prejudice to public service is required or that its absence might provide a defence. Under s 4(2)

“any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

…

shall be guilty of an offence.”

1. As I understand s 4(2)(a), a public servant, say a postman, who accepted any advantage from a householder would be guilty of an offence under s 4 even if the householder had offered it in appreciation of the fact that he had gone out of his way to deliver a letter or parcel. It is important, given the scourge of corruption under which Hong Kong had suffered for so long,[[105]](#footnote-105) that it should be clearly understood that under no circumstances should any public servant accept any advantage for acting or forbearing to act in his capacity as a public servant. The corrupting tendency of any offer or acceptance of advantage is too obvious to require elaboration. Nor would I leave it to be determined on a case by case basis whether the tip was deserved and whether there was any prejudice.
2. If prejudice to public service is not required under   
   s 4, I see no reason for requiring it for an offence under s 9.

***Reasonable excuse***

1. I turn now to consider reasonable excuse.
2. *R v J (P)* was also concerned with s 1 of the 1906 Act and involved the allegation that the defendants had conspired corruptly to give agents of the tax authorities of a state in the Commonwealth a substantial sum of money as an inducement to show favours to a company in relation to the calculation of tax owed by that company to the tax authorities. The issue before the court was whether the word “corruptly” implied that the payment for the prohibited purpose had to have been paid or received secretly and without the knowledge and informed consent of the principal.
3. The defendant’s contention was:

“8(ii) … that the term ‘corruptly’ connoted secrecy. As the 1906 Act had been formulated in terms of principal and agent, it must follow that a payment could not be secret if it was made with the knowledge and consent of the principal. Thus it must be for the prosecution to prove, as part of its case, the specific ingredient of lack of knowledge or informed consent by the principal; in essence the element of corruption was the doing of the act prohibited without having first made full disclosure to the principal and obtaining his informed consent.”

1. Given that the 1906 Act required that the giving be made corruptly, Lord Thomas said:

“28. There might well be cases where the defendant who is a commercial agent avers that his principal knew of the payment as he had made full disclosure and gave his informed consent; or the defendant might aver that he honestly believed that the agent’s principal knew and gave his informed consent to the receipt of the payment by his agent. It would in such a case be necessary when deciding whether the payment was or was not made or received corruptly for the jury to consider that evidence. However, there is no requirement that the prosecution specifically prove the lack of knowledge and informed consent of the principal separately.”

1. Had the word corruptly been retained in Hong Kong, I would have concluded that on the facts of this case the payment did not fall within   
   s 9. However, the word “corruptly” having been replaced, the payment being for a forbidden purpose, it fell within s 9, and it is necessary to consider whether there was any reasonable excuse. The Court of Appeal was of the view that there was no reasonable excuse.
2. In the second judgment of the Court of Appeal[[106]](#footnote-106) it said at   
   para 88:

“We agree that permission[[107]](#footnote-107) and reasonable excuse are two separate defences provided for by the Ordinance. We also agree that reasonable excuse is wider in scope than permission.”

With respect, I agree.

1. The Court of Appeal went on to say:

“88. … Under some circumstances, it is possible that an agent who does not have his principal’s permission but accepts an advantage which is related to his principal’s business can use reasonable excuse as his defence. Take for example, an agent who has from time to time applied to his principal for permission to accept an advantage on account of his doing an act in relation to his principal’s business, and to whom the principal has always granted permission, will reasonably believe that under the same circumstances he can obtain his principal’s permission. However, on one occasion, when the agent applied for permission from his principal pursuant to section 9(5)(b) of the Ordinance after he accepted an advantage, his principal, without informing him of any change, suddenly, for no reason, refuses to give him permission. The agent cannot legitimize his acceptance of the advantage by the permission provided in the Ordinance, but it is highly likely that he can successfully convince the court that he has a reasonable excuse and thereby legitimizing his acceptance of the advantage.”

1. With respect, on these facts I feel sure that the defence of reasonable excuse has been established because they showed that the agent honestly believed that his principal would not object to his accepting the advantage. In other words, he had the consent of his principal to accept the payment, the paradigm of a reasonable excuse. In my view, that is precisely Chan’s position. TVB accepted it knew that Chan would appear in the programme as a guest of OC. On the evidence the inescapable conclusion was that Chan would be paid by OC through IEAP.[[108]](#footnote-108) It is true that there was no evidence that TVB knew how much Chan would be paid by OC. It was suggested that absent such knowledge there was no informed consent. What constitutes a fully informed consent is a question of fact and “there is no precise formula which will determine all cases”.[[109]](#footnote-109) In this case I do not believe it mattered. On the facts TVB must be taken to have consented to Chan performing in the programme as OC’s guest and be paid for it. The exact amount was of no consequence to TVB.
2. For the above reasons, I am of the view that no offence was committed under s 9 because Chan had a reasonable excuse in appearing as OC’s guest and be paid for it. It follows that both he and Tseng should be acquitted of all the charges relating to this incident. I would allow their appeals.

**Mr Justice Fok PJ:**

1. I have had the benefit of reading in draft the judgments of Ribeiro PJ and Tang PJ. I agree with them in their respective conclusions that these appeals should be allowed. As will be apparent, however, Ribeiro PJ arrives at his conclusion by a very different route to that of Tang PJ and, for that reason, I add this short judgment to indicate my agreement with the reasoning of Ribeiro PJ and to explain my preference for his reasoning in arriving at the conclusion that the two appellants were not guilty of an offence under section 9 of the POBO.
2. Ribeiro PJ’s analysis of the need, if guilt under section 9 is to be established, for there to be conduct adverse to the principal’s interests (Section H of his judgment) is, in my opinion, sound and consistent with the language of section 9 properly construed in accordance with its context and purpose.
3. I do not, with respect, share the view of Tang PJ that the omission of the word “corruptly” in section 9 (which had previously been found in section 4 of the Prevention of Bribery Ordinance (Cap.201)) means that, for an offence under section 9 to be made out, the prosecution need prove only a payment to an agent of which his principal does not know and to which he does not consent.
4. The section does not, in my view, criminalise any and all payments of money by a third party to an agent made without the principal’s knowledge and consent. If it had been intended to cast the offence in such wide terms (and they would be very wide indeed), section 9 would have been very differently and much more simply worded.
5. Instead, the Legislature required that the advantage solicited, accepted or offered must have been as “an inducement to or reward for” the agent’s doing (or forbearing to do) an act “in relation to his principal’s affairs or business” (in sub-sections 9(1)(a) and 9(2)(a)) or showing or forbearing to show “favour or disfavour” to someone “in relation to his principal’s affairs or business” (in sub-sections 9(1)(b) and 9(2)(b)). The words “inducement” and “reward” require the advantage solicited, accepted or offered be invested with some quality of purpose. This is reinforced by the use of the words “favour” and “disfavour” in sub-sections 9(1)(b) and 9(2)(b).
6. Likewise, the Legislature required that the advantage be “in relation to his principal’s affairs or business”. Section 9 is not the private sector mirror image of the section 4 offence. The offence in the latter section is established on proof of an advantage solicited or accepted by a public servant for an act “in his capacity as a public servant”. It is the nature of the act performed (or not) as a public servant in return for the advantage that invests the advantage with its criminality. In contrast, for section 9, it is not enough that the advantage is solicited or accepted by the agent in his capacity as such. It must additionally be “in relation to his principal’s affairs or business”.
7. Those words in section 9 are critical. They were construed by Lord Lloyd of Berwick in *Commissioner of the ICAC v Ch’ng Poh* [1997] HKLRD 652 at pp.656-657 as meaning that the action or forbearance of the agent must have been intended to “influence or affect the principal’s affairs” and be “aimed at the principal”. It would be surprising, to say the least, for Lord Lloyd to have expressed himself as he did if he thought that those words simply meant that the payment must be “related to” the principal’s affairs or business in the broad sense urged by the prosecution in these appeals.
8. I do not therefore agree that the Attorney General’s statement that “the Crown will need to prove only a payment to the … agent” is a correct or complete statement of the elements of the offence under section 9. It is unlikely that this was his intention given the language of section 9 as a whole. Rather that statement, seen in context, was commenting on the wording of the then proposed section 9 “[a]s … now drafted” and addressing the concern he expressed as to what the Crown would have to establish “before an accused had a case to answer”. Removing the word “corruptly” from section 9 did not mean that there was no need for a qualitative assessment of the payment and, on its wording, the section clearly requires an examination of the nature, purpose and context of the payment. This is referred to, in Tang PJ’s judgment, as “a forbidden purpose”. I respectfully agree with the need for there to be such a “forbidden purpose” and the real debate in these appeals has been directed to the search for a proper definition of that prohibited purpose.
9. In my view, that definition is to be found in Sections H and I of the judgment of Ribeiro PJ. I also agree in all other respects with that judgment.

**Mr Justice Stock NPJ:**

1. I agree with the judgments of Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

**Lord Walker NPJ:**

1. I agree with the judgments of Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

**Mr Justice Ribeiro PJ:**

1. The appeals are unanimously allowed and the appellants’ convictions are quashed.  Any submissions as to costs should be lodged within 21 days of the date of the handing down of this judgment with any submissions in reply to be lodged within 14 days thereafter.

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| --- | --- | --- |
| (R A V Ribeiro)  Permanent Judge | (Robert Tang)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (Frank Stock)  Non-Permanent Judge | (Lord Walker of Gestingthorpe)  Non-Permanent Judge |

Mr Joseph Tse SC, Mr Charles J. Chan and Mr Byron C.Y. Tsang, instructed by Ivan Tang & Co., for the Appellant in FACC 11/2016

Mr David Perry QC, Ms Maggie Wong, Mr Derek C.L. Chan and Mr Samuel Sung, instructed by Angela Lau Law Office, for the Appellant in FACC 18/2016

Mr Jonathan Caplan QC and Mr Eric Kwok SC, on fiat, and Mr Felix Tam SPP, of the Department of Justice, for the Respondent in FACC 11/2016 and FACC 18/2016

1. Cap 201. [↑](#footnote-ref-1)
2. DCCC 1214/2010. [↑](#footnote-ref-2)
3. The Case Stated by the Judge is dated 5 March 2012, CACC 103/2012 (“1st Case Stated”). [↑](#footnote-ref-3)
4. Yeung VP, Cheung and Yuen JJA, CACC 355/2011 and CACC 103/2012 (21 November 2012) (“1st CA Judgment”). [↑](#footnote-ref-4)
5. DCCC 1214/2010. [↑](#footnote-ref-5)
6. The second Case Stated by the Judge is dated 17 September 2014, CACC 183/2014 (“2nd Case Stated”). [↑](#footnote-ref-6)
7. Yeung VP, Yuen and Pang JJA, CACC 92/2013 and CACC 183/2014 (26 October 2015) (“2nd CA Judgment”). [↑](#footnote-ref-7)
8. Yeung VP, Yuen and Pang JJA, CACC 103/2012 and CACC 183/2014 (26 January 2016). [↑](#footnote-ref-8)
9. Tang and Fok PJJ and Stock NPJ, FAMC 4/2016 (29 June 2016) in Chan’s case; and Ribeiro, Tang and Fok PJJ, FAMC 40 of 2016 (4 October 2016) in Tseng’s case. [↑](#footnote-ref-9)
10. In Sections F, G and H of this judgment. [↑](#footnote-ref-10)
11. POBO section 11. See *HKSAR v So Kam Tim* [1997] HKLRD 1123 at 1126. [↑](#footnote-ref-11)
12. (CACC 497/2002, 24 August 2004, unreported) at §44. Citing *R v Li Fook Siu Ronald* [1991] 2 HKLR 288, see per Fuad VP at 298. [↑](#footnote-ref-12)
13. That is, an act “aimed at” and “intended to influence or affect” the principal’s affairs or business. See Section F of this judgment. [↑](#footnote-ref-13)
14. [1997] HKLRD 652. [↑](#footnote-ref-14)
15. In Section F of this judgment. [↑](#footnote-ref-15)
16. 1st Case Stated §11. [↑](#footnote-ref-16)
17. *Ibid* §12(6). [↑](#footnote-ref-17)
18. At §§32-35. [↑](#footnote-ref-18)
19. 1st CA Judgment §§105-106. [↑](#footnote-ref-19)
20. 1st CA Judgment, §128. [↑](#footnote-ref-20)
21. [2008] 5 HKLRD 846. [↑](#footnote-ref-21)
22. In Section H.3 of this judgment. [↑](#footnote-ref-22)
23. 1st CA Judgment, §153. [↑](#footnote-ref-23)
24. 1st CA Judgment §154. [↑](#footnote-ref-24)
25. Acting for the respondent with Mr Eric Kwok SC and Mr Felix Tam SPP. [↑](#footnote-ref-25)
26. [1997] HKLRD 652. [↑](#footnote-ref-26)
27. At 656-657. [↑](#footnote-ref-27)
28. At 657. [↑](#footnote-ref-28)
29. 1st CA Judgment, §150. [↑](#footnote-ref-29)
30. In Section H.1 of this judgment. [↑](#footnote-ref-30)
31. (2005) 8 HKCFAR 628 at §109. This duty was reiterated by Lord Woolf NPJ in *HKSAR v Lam Yuk Fai* (2006) 9 HKCFAR 281. [↑](#footnote-ref-31)
32. 1st CA Judgment, §101-104. [↑](#footnote-ref-32)
33. As noted in *R v Majeed, R v Westfield* [2013] 1 WLR 1041 at §§19 and 21. [↑](#footnote-ref-33)
34. Section F of this judgment. [↑](#footnote-ref-34)
35. 1st CA Judgment, §122. [↑](#footnote-ref-35)
36. *Ch’ng Poh* at 657. [↑](#footnote-ref-36)
37. Section C of this judgment. [↑](#footnote-ref-37)
38. Section D of this judgment. [↑](#footnote-ref-38)
39. 1st CA Judgment, §128. [↑](#footnote-ref-39)
40. See for example *Mahmud v Bank of Credit and Commerce International* *SA* [1998] AC 20, per Lord Nicholls of Birkenhead at 35 and Lord Steyn at 45-46. [↑](#footnote-ref-40)
41. “To make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith”. [↑](#footnote-ref-41)
42. Including in this Court in *HKSAR v Ng Po On* (2008) 11 HKCFAR 91 at §§51 and 69. [↑](#footnote-ref-42)
43. *Commissioner of ICAC v Ch’ng Poh* [1997] HKLRD 652 at 656. [↑](#footnote-ref-43)
44. *Ibid* at 657. Italics supplied. [↑](#footnote-ref-44)
45. Prevention of Corruption Ordinance, Cap 215, section 4(a) (enacted in 1948), referring to any agent who “*corruptly* accepts or obtains [etc] ... any gift or consideration as an inducement or reward [etc]”. [↑](#footnote-ref-45)
46. 18th November 1970, Resumption of debate on second reading (21.10.70), Hansard p 196-197. [↑](#footnote-ref-46)
47. Mr Denys Roberts, *ibid*, p 201. [↑](#footnote-ref-47)
48. (2009) 12 HKCFAR 568 at §14. [↑](#footnote-ref-48)
49. Set out in Section C above. [↑](#footnote-ref-49)
50. [1961] HKLR 13 at 94 (Full Court). [↑](#footnote-ref-50)
51. Section 4(a) of the Prevention of Corruption Ordinance (Cap 215) which provided that if any agent corruptly accepts any gift as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs, he shall be guilty of an offence. [↑](#footnote-ref-51)
52. [2008] 5 HKLRD 846. [↑](#footnote-ref-52)
53. *Ibid* at §3. [↑](#footnote-ref-53)
54. *Ibid* at §37. [↑](#footnote-ref-54)
55. Cap 200. [↑](#footnote-ref-55)
56. [2008] 5 HKLRD 846 at §39. [↑](#footnote-ref-56)
57. *Ibid* at §40. [↑](#footnote-ref-57)
58. Ian McWalters SC, *Bribery and Corruption Law in Hong Kong* (Lexis Nexis 3rd Ed), §9.5. [↑](#footnote-ref-58)
59. (2016) 19 HKCFAR 110 at §36. [↑](#footnote-ref-59)
60. 2nd CA Judgment, §93. [↑](#footnote-ref-60)
61. (2008) 11 HKCFAR 91. [↑](#footnote-ref-61)
62. At §37. [↑](#footnote-ref-62)
63. Section 94A of the Criminal Procedure Ordinance (Cap 221) which relieves the prosecution of negativing exceptions or exemptions or qualifications to the operation of a law creating an offence. [↑](#footnote-ref-63)
64. Cap 200. Section 159A(2): “Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.” [↑](#footnote-ref-64)
65. (2008) 11 HKCFAR 91 at §11. [↑](#footnote-ref-65)
66. Appearing with Ms Maggie Wong, Mr Derek C L Chan and Mr Samuel Sung for Tseng. [↑](#footnote-ref-66)
67. Such as the rules of evidence contained in POBO sections 10, 20, 21 and 21A. [↑](#footnote-ref-67)
68. Pursuant to section 83A of the Criminal Procedure Ordinance (Cap 221) in conjunction with section 17(2) of the Hong Kong Court of Final Appeal Ordinance (Cap 484). [↑](#footnote-ref-68)
69. Para 4 above. [↑](#footnote-ref-69)
70. A popular artiste in the employ of TVB. [↑](#footnote-ref-70)
71. Yeung VP, Cheung and Yuen JJA, CACC 355/2011 and CACC 103/2012 (21 November 2012). [↑](#footnote-ref-71)
72. Para 7 above. [↑](#footnote-ref-72)
73. The issue is complicated by the fact that we are concerned with the charge of conspiracy. See section K of Ribeiro PJ’s judgment. [↑](#footnote-ref-73)
74. Like Ribeiro PJ, I will not consider whether s 24 infringes the presumption of innocence. [↑](#footnote-ref-74)
75. *Taikato v R* (1996) 186 CLR 454 at 464. [↑](#footnote-ref-75)
76. All references are to Cap 201 unless otherwise stated. [↑](#footnote-ref-76)
77. Section 9(2) provides a corresponding offence for the offeror. It is not necessary to deal separately with him. [↑](#footnote-ref-77)
78. No reliance on such permission. [↑](#footnote-ref-78)
79. DCCC 1214/2010, para 29. [↑](#footnote-ref-79)
80. Section 4(2)(a). Section 4(1) contains the corresponding offence for the offeror, with which we are not concerned. [↑](#footnote-ref-80)
81. It was not the prosecution case that Chan was acting in his capacity as a public servant. [↑](#footnote-ref-81)
82. At p 656. [↑](#footnote-ref-82)
83. Section 9(4) and (5) were introduced by amendment in 1980. Section 4 of Cap 215 was based on s 1 of the Prevention of Corruption Act 1906 (“the 1906 Act”). [↑](#footnote-ref-83)
84. Para 1.31, following *Cooper v Slade* (1858) 6 HLC 746, Willes J and *R v Smith* [1960] 2 QB 423. [↑](#footnote-ref-84)
85. During the second reading. [↑](#footnote-ref-85)
86. Hansard 18 November 1970 at 201. [↑](#footnote-ref-86)
87. However, if the soliciting or acceptance was made with permission by the principal in compliance with s 9(4) and (5), then neither the agent nor the offeror would be guilty of an offence under s 9(1)(a) or (b). [↑](#footnote-ref-87)
88. There was a discussion at the hearing over whether if a junior clerk employed by TVB were to return to work after office hours for a contracted cleaner to clean TVB’s premises whether he could come within s 9. I feel sure the defence of reasonable excuse would be available. It would no more affect his employer if he was engaged after work to make sandwiches for the caterer who supplied them to his employer. But, the matter is fact sensitive. The situation of a manager who owns an outside catering service and sells sandwiches to his employer without any disclosure may be more problematical. Here Chan’s contract of employment with TVB did not permit outside work without the written consent of TVB. Mr Caplan QC rightly accepted that this has no bearing on whether Chan’s performance in “Be My Guest” related to TVB’s affairs or business. But, whether his appearance in the “Be My Guest” related to the affairs or business of TVB is not easily resolved. [↑](#footnote-ref-88)
89. P 657. [↑](#footnote-ref-89)
90. 1043G. [↑](#footnote-ref-90)
91. Para 103 above. [↑](#footnote-ref-91)
92. Lord Judge CJ, Openshaw, Irwin JJ. [↑](#footnote-ref-92)
93. Together with Ashworth and Browne JJ. [↑](#footnote-ref-93)
94. With the agreement of Ashworth and Browne JJ. [↑](#footnote-ref-94)
95. P 1056e. [↑](#footnote-ref-95)
96. (1948) 33 Cr App Rep 5 at 9. [↑](#footnote-ref-96)
97. Paras 61-65 above. [↑](#footnote-ref-97)
98. Para 73 above. [↑](#footnote-ref-98)
99. *R v Wellburn and Others* (1979) 69 Cr App Rep 254 at 265, CA, Lawton LJ, Cantley and Willis JJ. [↑](#footnote-ref-99)
100. Para 28 above. [↑](#footnote-ref-100)
101. Rafferty LJ, Henriques J. [↑](#footnote-ref-101)
102. Lord Thomas also pointed out that s 1 also covered public servant which has a bearing on its construction. [↑](#footnote-ref-102)
103. I ignore lawful authority or permission under subsections (4) and (5) which are irrelevant for the present purpose. [↑](#footnote-ref-103)
104. Second reading, Attorney General, Hansard 21 Oct 1970, p 131. [↑](#footnote-ref-104)
105. For a long time, tipping was expected for many public service, including service in public hospitals. [↑](#footnote-ref-105)
106. Yeung VP, Yuen and Pang JJA. [↑](#footnote-ref-106)
107. Complying with ss (4) and (5). [↑](#footnote-ref-107)
108. Para 94 above. [↑](#footnote-ref-108)
109. *Bowstead and Reynolds on Agency* 20th edition 6 – 039. [↑](#footnote-ref-109)