# FAMC No 34 of 2023

[2024] HKCFA 11

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**MISCELLANEOUS PROCEEDINGS NO 34 OF 2023 (CRIMINAL)**

(ON APPLICATION FOR LEAVE TO APPEAL

FROM HCMA NO 19 OF 2022)

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BETWEEN

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|  | HKSAR | Respondent |
|  | and |  |
|  | SZE CHING LOK (施政樂) | Appellant (Applicant) |

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| Appeal Committee: | Mr Justice Ribeiro PJ, Mr Justice Fok PJ and  Mr Justice Lam PJ |
| Date of Hearing and Determination: | 25 April 2024 |
| Date of Reasons for Determination: | 2 May 2024 |

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|  | REASONS FOR DETERMINATION |  |

Mr Justice Lam PJ:

1. The applicant was charged with two counts of offering an advantage under Section 9(2)(a) of the Prevention of Bribery Ordinance Cap 201. He was convicted as charged in the magistrates court. His appeal was dismissed by Campbell-Moffat J (“the Judge”). He then sought leave to appeal to this Court on the substantial and grave injustice basis. After hearing submissions advanced on his behalf, we dismissed his application for reasons to be given later. Here are our reasons.
2. The case arose from a tenancy in respect of a flat in a building known as Man Ying Building in Yaumatei, Kowloon. The applicant was a tenant and the landlord was a company. In respect of the flat, the applicant dealt with a Mr Ho (“Ho”) who was neither a director nor a shareholder in the company. He was the brother of Christine who had funded the purchase of the flat by the company. Christine and her husband were at the material times its only shareholders and directors. Christine resided in Singapore. One of her sisters signed the tenancy agreement under her instructions. That sister was also appointed as an alternate director of the company.
3. The applicant’s tenancy commenced in April 2013. After a few months, he started to be irregular in paying the rent and Ho had to make much effort in procuring late and partial payments by the applicant. Moreover, those payments were made by different entities making deposits into the bank account of the company. This led to investigations by the Singaporean authorities into the company and Christine. In 2016, Christine wanted to get rid of the applicant as the tenant of the flat. The applicant proposed to have another person replacing him as tenant with himself remaining as a manager, but Christine objected to this suggestion.
4. The offers in question were made by way of WhatsApp messages sent by the applicant to Ho seeking his assistance in persuading Christine to accept his rejected proposal. The first charge was in respect of a message sent by the applicant to Ho on 13 December 2016 in which the applicant offered to pay several thousand dollars for a trip by Ho’s family, including Ho’s father, to Disneyland or Wynn Macau. The second charge was in respect of a message sent by the applicant on 9 June 2017 in which he offered $30,000 as “tea money” to Ho.
5. Mr McGowan submitted that there was a serious procedural irregularity in the conduct of the appeal before the Judge. At the hearing on 9 August 2023, the Judge declined to hear submissions from Mr McGowan on the ground that the applicant should not have two bites of the cherry regarding matters which had already been canvassed by another counsel on behalf of the applicant. Mr McGowan submitted that the applicant was deprived of a fair hearing with the benefit of the transcript since the former counsel had made submissions without considering the transcript of the trial. After Mr McGowan had taken on the case, the Judge granted leave for the transcript to be made available to the applicant. On 28 June 2023, the Judge also directed that Mr McGowan could file further submissions before the hearing on 9 August 2023.
6. We accept that it is reasonably arguable that the Judge’s volte-face was a departure from accepted procedural norms. However, that alone is not sufficient to warrant the grant of leave on the substantial and grave injustice basis. The Appeal Committee must examine whether the intended appeal has any substantive merits.
7. The arguments of Mr McGowan against the applicant’s conviction can be summarized as follows:
8. On the totality of the evidence, the magistrate erred in finding that the applicant communicated with Ho as agent. Counsel submitted that the applicant had reason to believe that Ho was the principal as he had represented that he had a 60% interest in the flat;
9. The magistrate placed undue weight on WhatsApp message #218 when it had not been the subject of cross-examination and it was open to a reading which is consistent with the applicant holding the belief that Ho was the principal. Counsel relied on the rule in *Browne v Dunn* (1893) 6 R 67 at p.70;
10. The magistrate failed to apply the law set out in *Secretary for Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98 (“*Stephen Chan*”) in that the offers were made to the whole family and were beneficial to them and congruent with their interests.
11. The first ground can be disposed of shortly. Having read the relevant parts of the transcript and the WhatsApp messages, including those referred to by Mr McGowan, it is quite plain that the applicant made the offers with a view to seeking Ho’s assistance and, through Ho, to procure assistance from his father in persuading Christine to accept the proposed new tenancy. Such a course of conduct would not be necessary if Christine was not the person having control over the company and the power to reject his proposal.
12. The allegation that Ho had a future interest in the flat (deriving from the mother’s share which was in turn based on the transfer of the sisters’ interests to the mother) after the mother’s death was disputed. The mother was in fact alive at the time of the offers. In any event, such future interest, if any, did not have much bearing on the real situation since Christine was undoubtedly the person in control and Ho had repeatedly told the applicant so. The purpose of the offers was to induce Ho to make greater efforts to persuade Christine to change her mind. Viewed thus, there cannot be any doubt that Ho was acting as an agent and Christine was the decision maker for the company.
13. The second ground is likewise without merit. The magistrate paid due regard to all the evidence in coming to the conclusion that the applicant was aware that Christine was the one who made the relevant decision and Ho was an agent in the management of the flat. Such evidence was not confined to WhatsApp message #218. That message was part of the evidence before the magistrate and he was entitled to pay regard to it in the way he did.
14. Notwithstanding the efforts of Mr McGowan, we have no doubt that the applicant dealt with Ho as agent when he made these offers and the offers were made to induce Ho to persuade Christine and to induce Ho to procure his father to do so.
15. The third ground concerns the application of the law as stated in *Stephen Chan*[[1]](#footnote-1). As held in that case, in the context of a charge of offering an advantage what the offeror intends to induce the agent to do is of primary importance:

“... 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”.

1. Applying *Commissioner of the ICAC v Ch’ng Poh*,[[2]](#footnote-2) it was accepted in *Stephen Chan*,[[3]](#footnote-3)that the phrase “in relation to his principal’s affairs or business” has a restrictive purpose so that “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. In particular:

“... 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.”[[4]](#footnote-4)

1. Further:

“... the prejudice to the principal’s interests … does not need to involve immediate or tangible economic loss to the principal or benefit to the agent at the principal’s expense ... Where the offering … 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.”[[5]](#footnote-5)

1. In the present case, the offer of 13 December 2016 was made against the following background:
2. Christine had made it very clear that she strongly objected to the applicant remaining as a tenant or playing the role of manager on behalf of a substituted tenant;
3. Her objection was so strong that she only agreed to meet with Wong, the proposed new tenant, in the absence of the applicant;
4. At the meeting on 11 December 2016, she firmly rejected the proposal of Wong taking over the tenancy with the applicant acting as his manager. According to her evidence, she saw no point in discussing further with Wong once it was mentioned that the applicant would manage the flat on his behalf;
5. Contrary to the submission of Mr McGowan, the proposal was not a win-win solution. Though the applicant would have ceased to be a tenant, he would remain as the manager of the flat. As far as Christine was concerned, she did not wish to have any involvement of the applicant in the management of the flat;
6. She felt strongly against the proposal and she blamed Ho for it. In the next few days, she was not on speaking terms with Ho. She flew back to Singapore on 12 December 2016;
7. The applicant was aware of the adverse response of Christine and her firm stance against having him involved in relation to the flat, whether as a tenant or a manager on behalf of Wong;
8. The WhatsApp messages of 13 December 2016 clearly indicate that Ho was reluctant to talk to Christine in the near future about the proposal and he simply asked the applicant to pay rent punctually in the meantime. The applicant made the offer of a trip to Disneyland in order to encourage Ho to make further efforts, including the procurement of support from his father;
9. Since Ho had told the applicant that Christine had left Hong Kong, the applicant could not have intended to include her as a party to the suggested trip. Bearing in mind the circumstances in which she left, it is fanciful to suggest that she would be willing to fly back to Hong Kong for such a trip. Instead the offer included family members because the applicant was urging Ho to muster the support of his father;
10. It was not an open offer. There was nothing to suggest that the applicant intended Ho to inform Christine and obtain her consent before accepting his offer. In light of Christine’s negative view of the applicant, it would be most unlikely that she would have consented to it. She actually testified at the trial that she would not consent to it;
11. The applicant was anxious that the proposal should be reconsidered by Christine because he had an interest in Wong taking over as tenant since Wong had paid him a takeover fee which he would have to refund if the proposal was not accepted;
12. In substance, the offer was an inducement to Ho to work on persuading Christine and to enlist his father’s help in doing so. Ho himself had never suggested that his father could help.
13. Undoubtedly, such an offer, made behind the back of Christine, at a time when Christine had categorically and firmly rejected the proposal, was prejudicial to Christine’s interest in that it undermined the relationship of trust and loyalty that Christine was entitled to expect from Ho. Since Christine was the decision maker for the company, her interest aligned with that of the company in the matter.
14. The offer of “tea money” on 9 June 2017 was even more egregious. By that stage, Ho had repeatedly complained about the applicant’s late and irregular payment of rent. Ho did not see any potential for substituting Wong as tenant. The applicant made the offer to induce Ho to urge Christine to reconsider the proposal.
15. It was only after Ho’s rejection of the offer that the applicant added that the tea money was for all the family members. As the magistrate observed, the idea of offering tea money to the family members is nonsensical when the applicant’s rental payment was in arrears.
16. Applying the law as stated in *Stephen Chan*, it is clear that the offers were made with a view to inducing Ho to make greater efforts (including enlisting the support of his father) in persuading Christine and that such acts would undermine the trust and confidence placed by Christine upon Ho. The intended acts of persuasion are acts in relation to the affairs or business of Christine and the company.
17. There is no reasonably arguable appeal and leave is refused accordingly.

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| (R A V Ribeiro) | (Joseph Fok) | (M H Lam) |
| Permanent Judge | Permanent Judge | Permanent Judge |

Mr James H M McGowan, instructed by Choy Yung & Co, for the Applicant

Ms Noelle A Chit SPP, of the Department of Justice, for the Respondent

1. *Stephen Chan* at §§18-21. [↑](#footnote-ref-1)
2. [1997] HKLRD 652 (PC). [↑](#footnote-ref-2)
3. *Stephen Chan* at §§37-39. [↑](#footnote-ref-3)
4. *Stephen Chan* at §53. [↑](#footnote-ref-4)
5. *Stephen Chan* at §54. [↑](#footnote-ref-5)