

**Asia Television Ltd  
and  
Communications Authority (No 2)**

—————  
(Court of Appeal)  
(Civil Appeal No 258 of 2012)  
—————

Kwan, Chu and Lam JJA  
17–18 April, 15 May 2013

*Administrative law — procedural fairness — level of disclosure to enable affected person to make meaningful and focused representations to adverse materials — investigation by Communications Authority against domestic free television programme service licensee — refusal by Authority to disclose identity of persons interviewed in investigation — interviewees' fear of reprisal — duty to maintain confidentiality under Broadcasting Ordinance relevant to level of disclosure — no breach of procedural fairness — Broadcasting Ordinance (Cap.562) ss.26(5), 27*

[Broadcasting Ordinance (Cap.562) ss.26(5), 27, 27(1), 27(2), 27(2)(a)–(d)]

行政法 — 程序的公正 — 披露之水平以確保受影響人士能針對不利的資料作出有意義和有焦點的陳述 — 通訊事務管理局針對本地免費電視節目服務持牌機構的調查 — 管理局拒絕透露在調查中的受訪者身份 — 受訪者恐懼遭到報復 — 《廣播條例》有關維護保密的責任對披露之水平具關鍵性 — 沒有違反程序的公正 — 《廣播條例》(第562章)第26(5), 27條

[《廣播條例》(第562章) 第26(5), 27, 27(1), 27(2), 27(2)(a)–(d)條]

X held a domestic free television programme service licence under the Broadcasting Ordinance (Cap.562) (BO). The Communications Authority (the Authority) was an independent statutory body established under the Communications Authority Ordinance (Cap.616) to regulate broadcasting and telecommunications industries. W was a major investor in X but did not satisfy any of the requirements in the BO of a person who could exercise control over a domestic free television programme service licensee. After receiving an anonymous complaint, the Authority investigated whether W exercised *de facto* control of X in breach of an undertaking given to the Authority, and as such X was in breach

of the service licence. During the investigation, the Authority interviewed various persons (the Interviewees), including former employees of X, and assured them that their identity and information provided would be kept confidential because of their concern about possible adverse consequences. In two draft reports sent to X, the Authority made provisional findings against X and proposed various sanctions, relying in part on the information obtained in the interviews. The Authority refused X's requests to disclose the identities of the Interviewees and only provided a redacted summary of the interviews (the Redacted Summary). X commenced judicial review proceedings against the Authority, challenging its refusal to disclose information obtained during the investigation and the imposition of a deadline for submissions on the draft report. The Judge held in favour of X and granted an order of *certiorari* quashing those decisions. The Authority appealed.

**Held**, allowing the appeal, that:

- (1) The level of disclosure required to meet the standard of fairness was to enable the affected person to make “meaningful and focused representations” to adverse materials. The decision maker should provide sufficient information, subject to the requirement to protect sources and processes, to enable that person to understand the nature of the allegations and to respond. This involved a balance of competing interests between that person's right to know and to respond, and the right to protection of the person providing the information and the public interest in securing relevant information. It was not possible to lay down hard and fast rules if verbatim disclosure and the disclosure of the identity of a witness should be made. Each case must be considered on its own facts and circumstances to see what fairness required (*Re Pergamon Press Ltd* [1971] Ch 388, *Re Darren Hart* 2009 NIQB 57 applied). (See paras.61, 63–64.)
- (2) The Authority was an administrative authority and the investigation was inquisitorial. There was no cross-examination of witnesses and the normal rules of evidence did not apply. In an investigation of this kind, the concept of fairness was flexible and should never force the court to lay down over-rigid rules to be followed. In each case, careful regard must be had to the scope of the proceeding, the source of its jurisdiction, the way in which it normally fell to be conducted and its objective. The level of disclosure required to meet the standard of fairness should not impede or frustrate the purpose of the enabling legislation (*R v Monopolies and Mergers Commission, ex p Matthew Brown Plc* [1987] 1 WLR 1235 applied). (See para.73.)

- (3) While the seriousness of the sanctions proposed by the Authority was a factor to be considered in determining the extent and scope of disclosure which should be made, the statutory duty in ss.26(5) and 27(1) of the BO to maintain confidentiality was another factor to be taken into consideration so that the duty to act fairly would not operate in a way to defeat the purpose of the legislation. Section 27(2) did not oblige the Authority to disclose confidential information whenever the circumstances in s.27(2)(a)–(d) arose. The Authority had the power and discretion to decide if disclosure should be made notwithstanding the objection of the information supplier. (See paras.74, 76.)
- (4) On a proper construction of s.27 of the BO, confidentiality should be maintained unless disclosure was required to facilitate the investigation or was otherwise justified in the public interest. Disclosure should only be made to the extent that was required for procedural fairness, and in this context, to enable X reasonably to make focused and meaningful representations. Support for this construction might be found in the underlying policy that witnesses should be encouraged to come forward and speak frankly. This was of particular importance in the present context as the broadcasting industry was a relatively small and closely related circle where most people would tend to know each other, and hence the confidentiality of the identities of the Interviewees became of utmost importance (*Re Pergamon Press Ltd* [1971] Ch 388, *Yu Chee Yin v Commissioner of Independent Commission Against Corruption (No 2)* [2001] 4 HKC 532 applied). (See paras.78–79.)
- (5) Here, confidentiality amounted to a valid countervailing factor. The Authority had carried out its statutory duty under s.27(2)(c) and decided that disclosure would hinder the investigation as witnesses would be reluctant to take a personal risk in their careers and come forward to provide information without an assurance of confidentiality. It was reasonable for the Authority to take into consideration the interest of the Interviewees and the need to maintain the integrity of the investigation procedure. It was unrealistic to expect the Authority to investigate in detail the Interviewees' claims of fear of reprisal, so long as there were reasonable grounds for the Authority to believe that this was a genuine claim. Given the closely connected nature of the broadcasting industry, it was understandable for employees and former employees of X to have a fear of adverse consequences if their identities were disclosed. (See paras.84, 86–88.)

- (6) The main issue in the investigation was relatively straightforward and that was whether W was in *de facto* control of X. Most of the Interviewees' evidence was about the behaviour of W and X's senior management. These matters were within the personal knowledge of W and the relevant senior managers, the gist of which was set out in the Redacted Summary. It was evident from the allegations and X's response that the identities of the Interviewees or their verbatim statements would not have assisted in the resolution of the dispute. There was no serious dispute of facts by X, but a difference of perception and interpretation of events. It was only in respect of a handful of allegations that the Interviewees' motivation or biased position was mentioned in response. The disclosures made by the Authority were sufficient for X to make focused and meaningful representations to the Interviewees' evidence. (See paras.91–92, 96–106.)
- (7) In light of the above conclusions, the Authority had carried out a proper balancing exercise of the competing interests and there was no breach of procedural fairness. (See para.108.)

### Appeal

This was an appeal by the respondent against the judgment of Thomas Au J granting an application for judicial review by the applicant. The facts are set out in the judgment.

[*Editor's note:* See also [2013] 2 HKLRD 354 for the earlier judgment of the Court of Appeal which dismissed the applicant's application to have this appeal heard in camera.]

[*Editor's note:* Leave to appeal to the Court of Final Appeal against this judgment has been refused by the Appeal Committee of the Court of Final Appeal (see [2013] HKEC 1321).]

Mr Johannes Chan SC and Mr John Hui, instructed by Eversheds, for the appellant/respondent.

Mr Benjamin Yu SC and Ms Sara Tong, instructed by Baker & McKenzie, for the respondent/applicant.

### Legislation mentioned in the judgment

Broadcasting Ordinance (Cap.562) ss.2, 3, 4, 8(4), 10, 21, 23, 24, 25, 25(1), 26, 26(1), 26(3), 26(5), 26(6), 27, 27(1), 27(2), 27(2)(a), 27(2)(b), 27(2)(c), 27(2)(d), 27(3), 28, 28(6), 31, 32, 34

### Cases cited in the judgment

- Bushell v Secretary of State for the Environment [1981] AC 75, [1980] 3 WLR 22, [1980] 2 All ER 608, (1980) 40 P & CR 51
- D (Minors) (Adoption Reports: Confidentiality), Re [1996] AC 593, [1995] 3 WLR 483, [1995] 4 All ER 385, [1995] 2 FLR 687
- Hart (Darren), Re 2009 NIQB 57
- Hearts of Oak Assurance Co Ltd v Attorney-General [1931] 2 Ch 370
- JR 17 (Education), Re 2007 NIQB 107
- Lloyd v McMahon [1987] AC 625, [1987] 2 WLR 821, [1987] 1 All ER 1118
- MH v Secretary of State for the Home Department [2008] EWHC 2525 (Admin)
- Pergamon Press Ltd, Re [1971] Ch 388, [1970] 3 WLR 792, [1970] 3 All ER 535
- R v Chelsea College of Art and Design, ex p Nash [2000] Ed CR 571, [2000] ELR 686
- R v Council of the Borough of Poole, ex p Cooper (1995) 27 HLR 605
- R v Dunraven School Governors, ex p B (A Child) [2000] BLGR 494, [2000] Ed CR 291, [2000] ELR 156
- R v Gaming Board for Great Britain, ex p Benaim and Khaida [1970] 2 QB 417, [1970] 2 WLR 1009, [1970] 2 All ER 528
- R v Monopolies and Mergers Commission, ex p Matthew Brown Plc [1987] 1 WLR 1235, [1987] 1 All ER 463, (1988) 4 BCC 171
- R v Secretary of State for the Home Department, ex p Al-Fayed [1998] 1 WLR 763, [1997] 1 All ER 228, [1997] INLR 137
- R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, [1993] 3 WLR 154, [1993] 3 All ER 92, (1995) 7 Admin LR 1
- R v Secretary of State for the Home Department, ex p Harry [1998] 1 WLR 1737, [1998] 3 All ER 360, (1998) 43 BMLR 155
- R v Secretary of State for the Home Department, ex p Hickey (No 2) [1995] 1 WLR 734, [1995] 1 All ER 490, (1995) 7 Admin LR 549
- Wilson (James), Re 2009 NIQB 60
- Yu Chee Yin v Commissioner of Independent Commission Against Corruption (No 2) [2001] 4 HKC 532

## Kwan JA

1. This is an appeal of the Communications Authority (the Authority, being the successor of the Broadcasting Authority) against the judgment of Thomas Au J on 19 October 2012 in which the Judge granted an application for judicial review brought by Asia Television Limited (ATV) and ordered two decisions of the

Authority be quashed. ATV brought the proceedings for judicial review to challenge the Authority's refusal to disclose to it the identities of the persons the Authority had interviewed (the Interviewees) in an investigation against ATV and the transcripts of the interviews. The Judge concluded there has been a breach of procedural fairness in the investigation justifying the order to quash the decisions under challenge. The hearing before the Judge was held in chambers and was not open to the public. By an order made by this Court (Cheung CJHC and Lam JA) on 28 February 2013, it was ordered that this appeal be heard in open court. (see [2013] 2 HKLRD 354.)

### **The background**

2. The relevant background matters, taken largely from the judgment below, may first be stated as follows.

3. ATV is the holder of a domestic free television programme service licence granted under the Broadcasting Ordinance (Cap.562) (BO). As is well known, it holds one of the two free television licences in Hong Kong.

4. The Authority is an independent statutory body established under the Communications Authority Ordinance (Cap.616) (CAO) to regulate broadcasting and telecommunications industries in Hong Kong in accordance with the BO and the CAO. One of the principal responsibilities of the Authority is to handle the licensing, financial monitoring and regulation of television broadcasting licensees and to deal with complaints about broadcasting. It has the power to impose sanctions on broadcasters for contravening the statutory and licensing requirements imposed upon them.

5. The BO provides the regulatory framework governing the ownership and corporate control of domestic free television programme service licensees and any person exercising control of a licensee. These include the "fit and proper person" requirement (s.21), the residence requirement (s.8(4)), and restrictions on disqualified persons (s.8(4)).

6. Condition 10.1 of ATV's licence provides that unless otherwise approved by the Authority, the licensee shall comply with the licensee's proposal, which includes any statements and representations made regarding the control of the licensee.

7. Wong Ching (Mr Wong) has been a major investor in ATV but he does not meet the residence requirement in s.8(4). He is neither a director nor shareholder of ATV. He does not satisfy any of the requirements in the BO of a person who could exercise control over a domestic free television programme service licensee.

8. In June 2010, ATV sought the Authority's approval of a shareholding change involving the acquisition of 52.4% of ATV's

voting shares by Wong Ben Koon. In support of the application, Mr Wong indicated to the Authority he had a strong commitment to provide financial support to ATV and confirmed that he would not be in a position to exercise any voting control over ATV once the shareholding change had been completed. As one of the approving conditions, the Authority asked Mr Wong to provide a fresh undertaking which was worded as follows:

I undertake to the Broadcasting Authority that following Completion, I will not be entitled to exercise *de facto* control over ATV.

9. On 1 September 2010, the Authority approved the new shareholding structure of ATV and on 19 October 2010 Mr Wong duly submitted an undertaking as per the draft required by the Authority. As this undertaking constituted part of the licensee's proposal of ATV, ATV has an obligation to comply with it at all times and failure to do so would constitute a breach of condition 10.1 of ATV's licence.

10. In June 2011, the Authority received an anonymous letter of complaint requesting it to investigate whether Mr Wong had been exercising control of ATV in contravention of the relevant statutory or licence provisions. It was alleged that Mr Wong had been actively participating in the day-to-day management and operations of ATV and that Wong Ben Koon held the voting shares of ATV as a nominee of Mr Wong.

11. In July 2011, the Authority decided to conduct an investigation under the BO into whether Mr Wong had been and was exercising *de facto* control of ATV, and the relevant regulatory consequences, amidst widespread public concern about the role of Mr Wong in the control and management of ATV. The Authority wrote to ATV on 21 July 2011 to inform the latter that it would critically examine whether Mr Wong had breached his undertaking to the Authority regarding *de facto* control of ATV, and enclosed media reports of a letter issued by a group of ATV staff on 27 June 2011 to major shareholders and directors of ATV, alleging that Mr Wong had interfered with the business in ATV's news department, changed programming schedules and altered marketing and advertising plans. The Authority requested ATV to provide information and documents on a list of matters set out in an annex to its letter by the date specified.

12. It is a matter of public importance that the Authority should reach a decision on its investigation without undue delay whether ATV has been under the *de facto* control of an ineligible person and to make appropriate directions to address the situation as a result of its findings.

## The investigation process

13. As the nature of the investigation process conducted by the Authority and what happened in the process are important for resolving this dispute which is about the fairness of the procedure adopted, it is necessary to give a more detailed description of these matters than in the judgment below.

14. In its initial representations to the Authority, ATV submitted *inter alia* that Mr Wong's participation in the day-to-day business was only in the capacity of a personal consultant to James Shing (Mr Shing), the Executive Director of ATV, under a consulting agreement between Mr Wong and Mr Shing dated 15 April 2010, and that the participation of Mr Wong in the decision-making process was limited to his role as such. It was provided in the consulting agreement that Mr Wong should have no direct right to or responsibility for controlling and directing the management and staff of ATV and that his advice and recommendations might be accepted or rejected at Mr Shing's sole discretion.

15. In response to the Authority's request, ATV submitted documentary information which included the minutes of the weekly management meetings held in 2010 and 2011 (Minutes Supplied by ATV).

16. As part of the investigation, the Authority either requested voluntary provision of information or, where necessary, invoked its powers under s.26 of the BO, to obtain information from those whom it had reasonable grounds to believe would have information relating to the matters being investigated.

17. From October 2011 to May 2012, the Authority approached those whom it believed would have relevant information to invite them to attend for interview. Vincent Ming Kwong Liu (Mr Liu), the Deputy Director General (Broadcasting) of the Authority, gave this account<sup>1</sup> of the approaches to those who were asked to attend for interview and what happened at the interviews:

26. ... Some of the former staff of ATV declined the invitation for fear of retaliation or other adverse consequences. Some others expressed grave concern should their identity and the information to be provided by them be revealed. To encourage the Interviewees<sup>2</sup> to attend interviews, [the Authority] indicated in the invitation letter sent to them that all information and documents submitted to [the Authority] in confidence would be treated as strictly confidential ...
27. The Interviews were conducted by a panel consisting of the Chairman of [the Authority] and between two and three

<sup>1</sup> Affirmation of Mr Liu filed on 18 July 2012.

<sup>2</sup> Being relevant persons from whom information was obtained in interviews between October 2011 to December 2011, as defined in para.4(a) of the Affirmation of Mr Liu.



- other members of [the Authority], accompanied by senior officers and staff of the Television and Entertainment Licensing Authority (TELA) which until the establishment of [the Authority] was the executive arm of [the predecessor of the Authority], who provided secretarial and logistical support to the Interview Panel.
28. Prior to the start of the interview, the Interviewees were invited to agree to recording of their interviews to ensure accuracy. Following the interview, a summary of each interview was prepared by the staff of TELA based on notes that they took during the interview and/or the recording. The summary was then provided to each Interviewee for comment.
29. At the interview, the Interview Panel assured each Interviewee that their identity and the information they provided would be kept confidential. By giving the assurance, the Interview Panel was confirming to the Interviewees that when they gave information in confidence to [the Authority] during the interview it would maintain that confidentiality, which was what [the Authority] was required to do in any event under section 27 of the BO. [The Authority] was keen to secure the full co-operation of Interviewees when it knew that there were concerns about possible adverse consequences and about their identity being revealed. [The Authority] decided that the best approach was therefore to specifically give this assurance to all the Interviewees.
30. ... [The Authority] recognised that in due course it might become necessary to consider whether it should disclose the information obtained in confidence from the Interviewees because it would facilitate the Investigation or otherwise for public interest reasons. In that case, [the Authority] would follow the procedure in section 27 (or, where appropriate, section 26) of the BO which permits disclosure in certain exceptional circumstances.

18. A number of the Interviewees also supplied to the Authority documents relating to ATV, including copies of minutes of ATV's weekly management meetings in 2010 and 2011 retained by them (Minutes Supplied by Interviewees).

19. In November 2011, the Authority invited Mr Shing and Kwong Hoi Ying (Mr Kwong), who held the title of Senior Vice President — Corporate Development and External Affairs of ATV, to an interview. They declined, stating that they did not wish to rely purely on their memory of previous events in answering questions of the Authority and instead invited the Authority to list

“specific questions and/or specific documents” and they would give their replies or provide the necessary information in writing.

20. Thereafter, three rounds of questions were sent by the Authority to Mr Kwong from December 2011 to February 2012 and two rounds of questions were sent to Mr Shing in December 2011 and January 2012. Written replies were provided by Mr Kwong and Mr Shing in each instance. The questions sent to them were very detailed and specific, covering various areas of the investigation and as follow up of the replies previously given by them.

### **The Draft Report and ATV’s request for disclosure**

21. On 9 March 2012, the Authority sent a copy of its draft report (the Draft Report) of the investigation to Baker & McKenzie (B&M), the solicitors acting for ATV in the investigation, setting out its provisional findings and proposed sanctions and stating that if ATV should wish to make representations, it could do so in writing by 22 March, failing which it would be assumed that the Draft Report was accepted by ATV.

22. In the Draft Report, mention was made of the information collected through interviews with relevant parties including former executives of ATV (defined as the Interviewees in the Draft Report).<sup>3</sup> Based on the information collected which included the Minutes Supplied by ATV and the Minutes Supplied by Interviewees,<sup>4</sup> together with the responses to questions and other information given by “the Interviewees”, the Authority identified various incidents and occasions when Mr Wong participated in the day-to-day management and operations of ATV and highlighted notable examples in the Draft Report.<sup>5</sup> It was stated that “statements and submissions given by ‘the Interviewees’ also reinforced the clear evidence that [Mr Wong] had exercised control in the day-to-day management of ATV” and relevant extracts of these statements and submissions relating to specific incidents or occasions when Mr Wong was involved were given in Appendix B to the Draft Report.

23. The Authority considered the submissions made by Mr Shing and Mr Wong on Mr Wong’s involvement in ATV’s management<sup>6</sup> and did not find their explanations “credible” for these reasons:<sup>7</sup>

- (1) The Minutes Supplied by Interviewees indicated Mr Shing seldom made decision at weekly management meetings. Mr

<sup>3</sup> Draft Report, para.12.

<sup>4</sup> The Authority identified material discrepancies between the Minutes Supplied by ATV and the Minutes Supplied by Interviewees, almost all of which relate to Mr Wong’s involvement in the day-to-day control and management of ATV. The highlights are set out in Appendix D to the Draft Report.

<sup>5</sup> Draft Report, paras.20, 21, 27 and 28.

<sup>6</sup> Draft Report, paras.25 and 26.

<sup>7</sup> Draft Report, para.27.

Wong's direction during the weekly meetings was clearly recorded in the Minutes Supplied by Interviewees. However, Mr Shing's request for Mr Wong's advice, his endorsement and ultimate decision based on Mr Wong's advice were not recorded in those minutes.

- (2) Mr Shing submitted that where the minutes stated Mr Wong had directed or instructed<sup>8</sup> certain matters to be done, they were simply the choice of words of the notes taker. However, Mr Shing had said in his replies to the Authority that he signed the last versions of the minutes to signify they were the last versions and all the Minutes Supplied by ATV and most of the Minutes Supplied by Interviewees were signed by him.
- (3) The explanation that no principal officers of ATV had ever been instructed to report to Mr Wong on their work was "not consistent" with the evidence collected from "the Interviewees" and a summary of the views of Mr Shing, Mr Kwong and Mr Wong on one side and the views of "the Interviewees" on the other side relating to three specific incidents was given in Appendix C to the Draft Report.
- (4) The statistical analysis submitted by Mr Shing confirmed that Mr Wong had participated in ATV's weekly management meetings. All "the Interviewees" accepted that Mr Wong's involvement in ATV's affairs manifested itself in different ways. For example, Mr Wong had his own office at ATV and he arranged meetings with ATV's senior executives at his own apartment in Kowloon. Thus the frequency of Mr Wong's attendance at the weekly management meetings did not fully reflect the extent of his involvement in ATV's management and control.
- (5) The rights of Mr Wong under the consulting agreement were far beyond those that would normally be expected for a personal consultant.

24. The Authority also noted that:<sup>9</sup>

- (1) The statements and submissions of all former executives of ATV interviewed by the Authority supported the allegation that Mr Wong had exercised control over ATV in a wide range of areas. A number of them confirmed that they regarded Mr Wong, not Mr Shing, as the "boss"<sup>10</sup> and his views were taken as instructions, even in the absence of Mr Shing expressing any view or giving any explicit endorsement

<sup>8</sup> The actual words in Chinese are 指示 and 訓示.

<sup>9</sup> Draft Report, para.28.

<sup>10</sup> In Chinese, 老闆.

on the matters, and the instructions of Mr Wong were decisive in the operation and management of ATV.

- (2) According to the statements of the Interviewees and the minutes of the weekly meetings, Mr Shing did not in fact play a prominent or leading role at ATV. A number of the Interviewees indicated that Mr Shing was only a nominal figurehead. In contrast, Mr Wong was allowed to play a prominent role in various matters concerning ATV, eg in suggesting the “programme project scheme”, in the launch of “ATV Hong Kong Loving Hearts Campaign” and the decision regarding the rating result conducted for ATV by CVSC-Sofres Media (CSM).

25. Based on the available information and assessment above, the Draft Report made a provisional finding on a balance of probabilities that Mr Wong has been exercising *de facto* control over ATV and it followed that he has breached the terms of his undertaking to the Authority and ATV is in breach of condition 10.1 of its licence for failing to comply with its licensee’s proposal.<sup>11</sup> Mr Wong would not meet the criteria for a “fit and proper person” for the purpose of s.21 of the BO if an assessment were to be made and the Authority could take this into account if Mr Wong were to apply to be a voting controller, director or principal officer of ATV in the future.<sup>12</sup>

26. The Draft Report also made a provisional finding that Mr Shing is no longer a “fit and proper person” for the purpose of s.21 of the BO.<sup>13</sup>

27. The Draft Report set out on a provisional basis the decision<sup>14</sup> of the Authority as a result of the findings:

- (1) A financial penalty of \$1 million is to be imposed on ATV.
- (2) A direction is to be issued under s.24 of the BO that ATV shall require Mr Shing to cease acting as a person exercising control of ATV.
- (3) A direction is to be issued under s.24 of the BO requiring ATV to:
  - (i) Cease allowing Mr Wong to take part in its management;<sup>15</sup>
  - (ii) Take immediate rectification action to ensure that the management of ATV shall not be performed by

<sup>11</sup> Draft Report, para.29.

<sup>12</sup> Draft Report, para.59.

<sup>13</sup> Draft Report, paras.44–51.

<sup>14</sup> Draft Report, para.63.

<sup>15</sup> This was changed to “ensure that Mr Wong Ching will refrain from exercising *de facto* control of ATV” in the Revised Draft Report.

- any persons other than the directors and principal officers of ATV and persons duly authorised by ATV; and
- (iii) Submit within three months a proposal for the Authority's approval setting out the steps it will take to improve its corporate governance and thereafter submit annual progress reports until the Authority is satisfied that the proposed improvement measures have been fully and effectively implemented.

28. On 27 March 2012, B&M wrote to the Authority expressing disapproval of the manner in which the Authority had conducted the investigation, in particular in failing to disclose to ATV all relevant information obtained in the investigation. B&M noted that as a result of the withholding of information, ATV had been deprived of an opportunity to make representations on all matters relied on by the Authority in reaching its conclusions, it had been put in a disadvantageous position and was prevented from testing or challenging the veracity of the account of events given by the Interviewees, whose identities were withheld from ATV. B&M requested the Authority to forthwith disclose all documents and information which it had obtained during the investigation, whether relied on by the Authority or not, and the sources of all information relied on in the Draft Report, to agree to an extension of time for ATV to make representations after the provision of the information requested, and to provide an undertaking not to publish any part of the Draft Report before ATV was given a chance to review the requested information and prepare substantive representations.

### **The Authority's response and the Redacted Summary**

29. Mr Liu explained in his affirmation the matters considered by the Authority in response to ATV's request for disclosure and the measures taken by the Authority:

31. ... [The Authority] considered that the assurances which it had given to the Interviewees to maintain confidentiality and to keep secret their identity must be strictly adhered to (which was its statutory obligation in any event under section 27(1)) unless there were compelling public interest reasons for doing otherwise (including, potentially, a compelling public interest reason based on the fact that disclosure would facilitate the investigating or determining of a complaint). Having weighed the request of [ATV] to be provided with more information, in particular the identity of the

Interviewees, [the Authority] decided that the appropriate balance was in favour of preserving the anonymity of the Interviewees and not making disclosure of the recordings or summaries of evidence prepared for [the Authority's] internal use.

32. [The Authority] considers that there is a strong public interest in adopting this approach. Anyone who reports or gives evidence relating to breaches to a regulator may be taking a personal risk in respect of their careers and, unless they are assured that their identity will be kept secret, they may be inhibited in what they are prepared to say. This consideration applied in the present case. There is also a general consideration that, if [the Authority] were to readily reveal the identity of every person who participates in an investigation every time a party under investigation requests this, it would be difficult to obtain co-operation in similar investigations in the future. This is not a groundless fear because ... some former staff of [ATV] verbally declined [the Authority's] invitation to be interviewed for fear of retaliation or other adverse consequences.
33. ... Having taken into account the representations of [ATV] (in its letter of 27 March 2012), [the Authority] prepared a further version of the summary of the interviews [the Redacted Summary] (which was more detailed than the version which appears as Appendix B [to the Draft Report] but with information that may disclose the identity of the Interviewees redacted) and sought the approval of the Interviewees for its disclosure ... The summary of the one Interviewee who declined to give consent was not reflected in [the Redacted Summary].
34. ... each Interviewee has approved both his or her original summary and the relevant part of the [Redacted Summary] which has been given to [ATV] ... [The Authority] has, however, declined to provide [ATV] with the full transcript and recordings of the interviews and information which may disclose the identity of the Interviewees. In adopting this approach [the Authority] has sought to strike an appropriate balance between providing sufficient disclosure to enable [ATV] to make meaningful submissions and preserving confidentiality.

30. On 3 April 2012, the Authority replied to B&M stating that as the parties interviewed had provided information on a strictly confidential basis, and requested that their identity be protected, the Authority was only prepared to provide to ATV the Redacted Summary, which is a redacted version of a summary of the

interviews that the Authority has relied on in the Draft Report. The Authority extended the deadline for ATV to make written representations on the Draft Report to 16 April and oral representations on 21 April.

31. Compared to Appendix B to the Draft Report, which is a four-page document in Chinese, the Redacted Summary is a nine-page document in Chinese, giving a summary of the key points of the relevant persons' statements to the Authority regarding the controlling and management role of Mr Wong in ATV. There are five relevant persons listed as A–E and 14 relevant matters listed under separate headings. In contrast, the number of relevant persons interviewed was not given in Appendix B to the Draft Report and it contained only five headings as to relevant incidents or occasions.

### **The 1st Decision of the Authority and ATV's response**

32. B&M wrote to the Authority on 11 April 2012 reiterating the need to disclose all information obtained in the investigation regardless of whether or not such information supported the complaints against ATV and the identities of the Interviewees.

33. The Authority replied by letter dated 16 April 2012 refusing to provide any further disclosure of information as requested, in particular the identities of the Interviewees, and reiterating its previous stance that it had struck an appropriate balance between confidentiality owed to the Interviewees and ATV's rights to be informed of the main points of the evidence collected. This is the first of two decisions of the Authority (the 1st Decision) that ATV challenged in the judicial review. The Authority only agreed to extend the deadline for ATV's written representations to the Draft Report to 3 May 2012 and oral representations to 5 May.

34. On 3 May 2012, B&M wrote to the Authority making representations to the Draft Report for the purpose of meeting the deadline, without prejudice to ATV's rights to seek judicial review of the 1st Decision. In paragraphs numbered 6–15 of the letter, a response was made to the information from interviewees. Although the identities of the Interviewees remained undisclosed, B&M stated that the Redacted Summary provided some hints as to their identities and responded accordingly. B&M explained why, if those particular individuals they identified had indeed been interviewed, they considered the account of events given by those persons was biased and not reliable. They set out in Appendix A to their letter the responses of ATV to the Redacted Summary, and reserved the right to supplement or revise the representations when the withheld information was made available.

35. Appendix A to B&M's letter ran into 17 pages. Part A of this document was in the nature of general observations and made

the point that the Authority's refusal to disclose the identities of the Interviewees inhibited ATV from making submissions as to the credibility and motives of the Interviewees. Part B dealt with the specific allegations of the Interviewees in the Redacted Summary and sought to answer the allegations of each interviewee under each of the 14 relevant matters as listed in the Redacted Summary. I will come back to this document in due course.

36. Further information was supplied by ATV to the Authority in the interview of Stephen Luan Zhenguo, a director of ATV, on 21 May 2012, and his written answers to the Authority's questions on 1 June 2012.

### **The 2nd Decision of the Authority and the Revised Draft Report**

37. On 21 June 2012, the Authority wrote to B&M enclosing a revised draft report of the investigation (the Revised Draft Report). It requested ATV to submit written representation by 28 June 2012, and oral representations, if any, on 30 June, failing which the Authority would assume that ATV accepted the Revised Draft Report and would publish its findings and decision in the final report after a final decision is made. This is the second decision of the Authority (the 2nd Decision) challenged by ATV in the judicial review.

38. The Revised Draft Report took into account the further representations and information the Authority had received since the Draft Report. Regarding Mr Wong's involvement in the day-to-day management and operations of ATV, there was no change to the views of the Authority why it did not consider the explanation of Mr Wong and Mr Shing credible.<sup>16</sup> As to the representations of ATV on 3 May 2012 challenging the truthfulness of the statements and information provided by the Interviewees and alleging that they were biased, the Authority affirmed it is appropriate to have regard to and rely upon the evidence of the Interviewees in reaching its findings for these reasons:<sup>17</sup>

- (a) the evidence offered by the Interviewees is consistent, credible and objective. The Authority is fully aware of the relationship between the Interviewees and ATV, and the Authority has relied to the extent possible on objective facts rather than subjective judgments adduced by the Interviewees. The evidence offered by the Interviewees is reasonable and not biased against ATV or any individual member of the ATV management or otherwise. The Authority finds their evidence credible;<sup>18</sup> and

<sup>16</sup> Revised Draft Report, paras.26 and 27.

<sup>17</sup> Revised Draft Report, para.28.

<sup>18</sup> See also the affirmation of Mr Liu filed on 18 July 2012, para.38.



- (b) the Authority has accorded ample opportunities for ATV, Messrs James Shing, Kwong Hoi Ying and Wong Ching to present their views, including an invitation for direct interview with the Authority before reaching its findings on a balance of probabilities. Messrs James Shing, Kwong Hoi Ying and Wong Ching have declined Authority's invitation for separate interviews, and have opted to submit views in writing.

39. The provisional findings relating to Mr Wong exercising *de facto* control over ATV and Mr Wong and Mr Shing not meeting the criteria of a "fit and proper person" for the purpose of s.21 of the BO were maintained in the Revised Draft Report.<sup>19</sup> The provisional decision of the Authority as a result of such findings remained substantially the same in the Revised Draft Report.<sup>20</sup>

### The application for judicial review

40. On 26 June 2012, ATV issued a notice of application for leave to apply for judicial review against the 1st and 2nd Decisions, seeking an order of *certiorari* that they be quashed and for interim relief. Leave was granted on the following day. An interim injunction was made on 4 July 2012 to restrain the Authority from issuing a direction under s.24 of the BO in respect of the proposed sanctions in the Revised Draft Report, without restraining the Authority from proceeding to reach a final decision in the investigation if it so wishes. The substantive hearing of the application for judicial review took place before Thomas Au J on 30 and 31 August 2012, and judgment was given on 19 October 2012 in favour of ATV. An order of *certiorari* was made quashing the 1st and 2nd Decisions.

### The judgment below

41. The ground in support of the judicial review was procedural unfairness, based on the Authority's refusal to disclose to ATV the identities of the Interviewees and the transcripts of the interviews. The court was not concerned with the merits or otherwise of the evidence considered by the Authority, its provisional findings and its proposed sanctions.

42. The issues in the judicial review, as stated in para.80 of the notice of application to apply for judicial review, were as follows:

- (1) Whether as a matter of procedural fairness in respect of the investigation, ATV ought to be entitled to disclosure of all information, documents and evidence obtained in the

<sup>19</sup> Revised Draft Report, paras.32, 48–56, 64.

<sup>20</sup> Revised Draft Report, para.70.

investigation, as well as the source from which, and identities of the persons from which, such information, documents and evidence were obtained.

- (2) Whether the Authority acted unlawfully, irrationally and/or unreasonably (in the *Wednesbury* sense) in making the Decisions. In particular:
- (a) Whether the Authority acted unlawfully or irrationally in failing to consider or properly consider whether disclosure of the requested information ought to have been made pursuant to:
    - (i) Sections 26(5) and 27(2)(d) of the BO by reason that it is in the public interest to do so; and/or
    - (ii) Section 27(2)(c) of the BO by reason that such disclosure is necessary to facilitate the investigation;
  - (b) Whether the Authority acted irrationally and/or unreasonably in deciding not to make disclosure without taking into account relevant considerations; and
  - (c) Whether the Authority acted unlawfully and/or irrationally in failing to give reasons or adequate reasons for refusing the disclosure of the requested information.

43. The attack on procedural unfairness was targeted at the 1st Decision. The 2nd Decision was effectively a complaint that the timeframe given by the Authority to ATV to respond and make representations to the Revised Draft Report was so short that it rendered ATV unable to make any meaningful representations. The Judge held that the application for judicial review against the 2nd Decision cannot succeed on its own and would stand or fall with the challenge against the 1st Decision.<sup>21</sup> The ground based on *Wednesbury* unreasonableness in issue (2) set out above would also stand and fall with the merits and success of the ground of procedural unfairness and issue (1).<sup>22</sup>

44. Applying the principles at common law,<sup>23</sup> the Judge is satisfied that the non-disclosure of the requested information by the Authority is in breach of procedural fairness. He accepted that the provisional findings and proposed sanctions in the Revised Draft

<sup>21</sup> The judgment, [79]–[82].

<sup>22</sup> The judgment, [43].

<sup>23</sup> As summarised in the judgment, [50].

Report are serious and important for ATV.<sup>24</sup> He held that the evidence provided by the Interviewees is relevant to the provisional findings and that the Authority has found this evidence to be relevant and credible and that it has added weight to support the other evidence on which it relied to make the provisional findings.<sup>25</sup> The identities of the Interviewees, their roles and positions in ATV, are relevant factors to assessing the credibility and reliability of their evidence.<sup>26</sup> As such relevant information is only known to the Authority but not ATV, this is *prima facie* unfair to ATV, and this is underlined by the fact that the Authority has acted both as judge and prosecutor in the investigation.<sup>27</sup>

45. The Judge held that without knowing the exact content of the transcript of statements of the Interviewees and their identities, ATV would not be in a position to properly assess whether the summaries of their evidence provided in the annexes to the Draft Report and Revised Draft Report and the Redacted Summary represent a full and balanced interpretation of their evidence. And without knowing the identities of the Interviewees, the ATV is disadvantaged in making submission on the credibility and reliability of their evidence. He rejected the Authority's proposition that the Redacted Summary would be sufficient disclosure to ATV to achieve the necessary procedural fairness. For the above reasons, he concluded that ATV is thereby deprived of a fair and proper opportunity to make meaningful and focused representations to the Interviewees' evidence.<sup>28</sup>

46. The Judge held that ss.26 and 27 of the BO *per se* would not have rendered the non-disclosure of the requested information a fair one, when and if in applying the principles at common law it would not have been.<sup>29</sup> He ruled that confidentiality in the present case does not amount to a valid countervailing factor against disclosure in view of the "general and unparticularised allegation of fear" of the Interviewees, especially when some of them are only former employees of ATV, when viewed against the seriousness of the provisional findings and proposed sanctions to be made against ATV and an "implied condition" attached to witnesses giving evidence in an investigation that their evidence may have to be disclosed to persons adversely affected by such evidence.<sup>30</sup> For this purpose, the Interviewees' position as witnesses must be distinguished from that of informants.<sup>31</sup>

<sup>24</sup> The judgment, [52]–[55].

<sup>25</sup> The judgment, [53].

<sup>26</sup> The judgment, [57]–[71](4).

<sup>27</sup> The judgment, [56].

<sup>28</sup> The judgment, [57]–[71].

<sup>29</sup> The judgment, [61]–[65].

<sup>30</sup> The judgment, [67].

<sup>31</sup> The judgment, [70].

47. Having been satisfied that the information sought ought to have been disclosed as a matter of procedural fairness, the Judge proceeded to the next stage to consider whether to exercise his discretion to quash the Decisions. He took the view that there is at least a risk that ATV is prejudiced by the non-disclosure.<sup>32</sup> He rejected the Authority's contentions that substantive relief should not be granted as there exists an alternative remedy under s.34 of the BO<sup>33</sup> and that the Decisions are only procedural and the application for judicial review is premature as a final substantive decision has not been made.<sup>34</sup> He therefore found in favour of ATV and quashed the 1st and 2nd Decisions.

### **This appeal**

48. The Authority accepts that as a regulator, it has a duty to act fairly in conducting the investigation process. There is a spectrum of fairness and the main issue in this appeal is the appropriate standard of fairness to be applied in the particular context of this case.

49. Mr Johannes Chan SC, who appeared for the Authority in this appeal,<sup>35</sup> argued that the context here includes: (1) the inquisitorial and administrative nature of the investigation; (2) the nature and purpose of the enabling legislation, the BO in this instance; (3) the closely connected relationships within a relatively small industry; and (4) the substance of the investigation. In contrast, the relevant factors that should be considered, according to Mr Benjamin Yu SC, who appeared for ATV throughout,<sup>36</sup> include: (1) the statutory framework under the BO; (2) the potential seriousness of the proposed sanctions and significance to ATV; (3) the relevance and necessity of the disclosure sought; (4) the risk of prejudice or unfairness to ATV without the disclosure being made; and (5) the existence of valid countervailing factors against disclosure.

50. The ultimate question here is whether the level of disclosure made by the Authority, specifically the summaries in Appendices B and C of the Draft Report and the Redacted Summary provided on 3 April 2012, are sufficient to enable ATV to have a reasonably clear picture of what it is meant to answer in respect of the Interviewees' evidence, such that ATV can make focused and meaningful representations. Mr Chan contended that the standard of procedural fairness has been met in this case, without disclosing the verbatim evidence and every detail, in particular the identities of the Interviewees.

<sup>32</sup> The judgment, [73]–[77].

<sup>33</sup> The judgment, [83]–[95].

<sup>34</sup> The judgment, [96]–[100].

<sup>35</sup> With Mr John Hui.

<sup>36</sup> With Ms Sara Tong.

51. Mr Chan further submitted that the Judge had failed to appreciate the true effect of s.27(2)(c) and (d) of the BO and was wrong in holding that the preservation of confidentiality under s.27(1) is not a valid countervailing factor against disclosure. The Authority had balanced the factors for and against the disclosure of confidential information and made a decision to preserve confidentiality. Short of demonstrating that the Authority had acted irrationally in the *Wednesbury* sense, the assessment and decision of the Authority cannot be judicially challenged.

52. Mr Chan also argued that even if in the first stage of analysis the Authority has acted in breach of procedural fairness, the Court should nevertheless, in the second stage, exercise its residual discretion to refuse to grant substantive relief on the ground that the procedural unfairness poses no risk of prejudice to ATV and would not have changed the outcome of the investigation.

### The duty to act fairly

53. Both sides have cited to us quite a number of authorities in support of their different contentions on the scope and content of the duty to act fairly in this investigation. As I see it, there is no substantial dispute about the law. The differences between Mr Chan and Mr Yu are more a matter of differences in emphasis.

54. It would be convenient to start with the legal principles so comprehensively formulated by the Judge in [50] of his judgment, derived from the authorities in applications for judicial review based on a complaint of procedural unfairness for non-disclosure of information, documents or material adverse to the applicant:

- (1) Procedural fairness is not rationed at its source on whether a decision being administrative or judicial.<sup>37</sup> It is about the duty to act fairly, which is a key element of procedural propriety: *De Smith's Judicial Review*, 6th ed., paragraph 7-003.
- (2) Although it is for the decision-maker to determine what procedure is to be adopted, whether that procedure meets the necessary standard of fairness as required by the law is to be decided by the court: *R v Secretary of State for the Home Department, ex parte Hickey (No 2)* [1995] 1 WLR 734 at 742B to C, per Simon Brown LJ, adopting *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 per Lord Mustill.
- (3) In considering whether fairness has been so met, two principles are relevant:

<sup>37</sup> The author also stated "the breadth of the flow will depend upon the circumstances surrounding the decision ... some decisions require full adjudicative-type hearings, others only narrowly permit the mere right to make representations."

- (a) A right to be heard, which right would be worthless unless the person involved knows in *adequate form* what is being said against him.
- (b) It is generally unfair for the decision-maker to have access to damaging or adverse material to which the person at risk has no access.

See *Kanda v Government of the Federation of Malaya* [1962] AC 322 (PC), at 337–8 per Lord Denning; *R v The Governing Body of Dunraven School, ex parte B* [2000] ELR 156 at paragraphs 18–27 per Sedley LJ.

- (4) The heart of a fair procedure and hearing is that there should be a reasonable opportunity for a person to know about and respond to adverse materials received by and relied on by the decision-maker. As a starting point, there is thus a strong presumption in favour of disclosing to a party any materials relating to him or her: *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 609A–B, per Lord Mustill.
- (5) Thus, generally if prejudicial allegations are to be made against a person, he must normally be given particulars of them so that he can prepare his answers, and the details required of the disclosure must be such so as to enable him to make “meaningful and focused representations” to the adverse materials and allegations contained therein. The person must be enabled to controvert, correct or comment on such evidence and materials that *may* be relevant to the decision and influential materials on which the decision-maker intends to rely: *De Smith’s, supra*, paragraph 7-057; *R v Secretary of State for the Home Department, ex parte Harry* [1998] 1 WLR 1737 at 1748 per Lightman J; *Administrative Law by Wade and Forsyth*, 10th ed., p.426.
- (6) However, the extent of what fairness demands is dependent on the context of each case. In this regard, the scope of disclosure to the affected person of any adverse evidence and materials received by the decision-maker required by the law to meet the minimum procedural fairness would depend, *inter alia*, on:
  - (a) The statute that creates the discretion: *ex parte Hickey (No 2)*, *supra*, 742D per Simon Brown LJ.
  - (b) The *prima facie* relevance, credibility and significance of the evidence or materials *vis-à-vis* the decision which is to be made. See *Kioa v West* (1985) 159 CLR 550 at 628–9 per Brennan J.
  - (c) The nature of the relevant decision and its objective significance to the affected person. The more serious

the significance and nature of the decision, the higher the standard or extent of procedural fairness for disclosure is generally required: *R v The Governing Body of Dunraven School, ex parte B, supra*, at paragraphs 18–27 per Sedley LJ.

- (d) Whether there are any countervailing factors against disclosure, such as: confidentiality for the protection of the witness from *genuine* fear of, say reprisal or harm, or national security. If there are such factors, the decision-maker would have to make a balancing exercise (in the circumstances of each case, including the nature and seriousness of the decision to be made) to see whether (a) notwithstanding the factors, disclosure is still needed to be made to ensure fairness, (b) he would no longer rely on this material and continue the investigation or hearing without it, or (c) he would abandon the hearing or investigation entirely: *R v The Governing Body of Dunraven School, ex parte B, supra*, at paragraphs 18–27 per Sedley LJ.
- (7) On the other hand, confidentiality *per se* does not invariably or necessarily restrict disclosure in light of procedural fairness. At times, circumstances may at least imply into the confidentiality a condition that the information requested would need to be disclosed to the affected person as a matter of fairness: *R v The Council of the Borough of Poole, ex parte Cooper* (1995) 27 HLR 605 (Lexis transcript, 3 October 1994) per Sir Louis Blom-Cooper QC, pp.6–7.
- (8) Even if it is shown in a judicial review that as a matter of fairness and natural justice, the documents or material ought to have been disclosed by the decision-maker to the applicant so as to afford him an opportunity to respond to them, the court should still proceed to the next stage to consider whether to exercise its discretion to quash the decision. At this stage, one of the factors that the court should consider is whether there is absence of prejudice caused by the procedural unfairness. In assessing this factor, the test here is not whether the person is in fact prejudiced in not having the disclosure, but rather whether there is a *risk* of prejudice: *Kanda, supra*, 338 per Lord Denning. It is only in rare cases where, when procedural unfairness is demonstrated, the court would refuse to grant substantive relief under judicial review. One of such rare occasions is where it can be shown that the outcome (in the form of the original substantive decision) is inevitable even with the disclosure: *Chelsea College of Art & Design, ex parte Nash* (unreported, Lexis transcript, 10 May

2000, Elias J), at paragraphs 46–48; *Chu Ping Tak v Commissioner of Police* [2002] 3 HKLRD 679 at paragraphs 59–66 per Deputy Judge A Cheung (as the learned CJHC then was).

55. Mr Chan criticised the above formulation by the Judge of the relevant principles in two respects.

56. The first relates to [50(4)]. Mr Chan submitted that there is no general presumption, let alone a “strong” presumption, in favour of disclosing “any materials relating to [the affected party]”. He pointed out that *Re D (Minors) (Adoption Reports: Confidentiality)* concerned an adoption hearing in court, and that the touchstone of what is fair in the particular circumstances of that case, and what is appropriate in judicial proceedings, may not be appropriate in an administrative inquiry. The correct starting point should be the statutory framework under which the investigation is conducted (*Lloyd v McMahon* [1987] AC 625, 702H–703B). The Court should be cautious before imposing additional requirements upon an administrative procedure for which express statutory provision has been made.

57. The second criticism is regarding [50(6)]. Having mentioned at the outset that the extent of what fairness demands depends on the context of each case, the Judge went on to set out four matters relevant to the scope of disclosure to meet minimum procedural fairness. Mr Chan argued that these matters should not be regarded as absolute principles. They would only help to determine the ultimate question whether the party affected is afforded a reasonable opportunity to make focused and meaningful representations. And one must bear in mind the different decision-making process, the nature of the decisions made, the particular factual circumstances and the legal framework in those cases.

58. Mr Chan further submitted that in formulating the legal test in that way, the Judge has lost focus of the underlying principles of procedural fairness by adopting a formulaic approach in applying the principles without considering adequately the practical context of the investigation in this case.

59. As to Mr Chan’s first criticism, it is correct to say that the content and extent of the duty to act fairly is fact-sensitive and this depends on the nature and purpose of the enabling legislation and the nature and substance of the investigation. As for the distinction between judicial and administrative proceedings, I do not understand Mr Chan to submit that this distinction is relevant to the entitlement to fair procedure. Mr Chan only contended that this distinction should have a bearing on the level of disclosure required to meet the standard of fairness in a given situation. I would have no quarrel with that. It seems to me that the statements of Lord Mustill in *Re*



*D (Minors) (Adoption Reports: Confidentiality)* are statements of principle going to the entitlement to fair procedure rather than the level of disclosure required.

60. Mr Chan's second criticism appears to me to be more of a caveat that one should not apply a dogmatic and formulaic approach in this situation. I do not think there was any error in the way the Judge formulated the principles in [50(6)] of the judgment.

61. I am in agreement with the Judge regarding his formulation of principles in [50(5)], namely, that the level of disclosure required to meet the standard of fairness is to enable the affected person to make "meaningful and focused representations" to the adverse materials. Mr Yu submitted that where a person is at risk of penalty, *prima facie*, all relevant evidence should be disclosed to him unless there is good reason for not doing so. I think his proposition is far too wide.

62. Mr Chan cited to us a number of cases where it was said that the provision of a gist and summary of the issues would usually suffice to enable the party affected to make focused and meaningful representations, without the need to provide verbatim transcripts, among them: *Re Pergamon Press Ltd* [1971] Ch 388, 400A–F; *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, 431F–G; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 560F–G; *R v Secretary of State for the Home Department, ex p Harry* [1998] 1 WLR 1737, 1748B–D; *R v Secretary of State for the Home Department, ex p Al-Fayed* [1997] 1 All ER 228, 241A–E; *MH v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin), [42]; *Re James Wilson* 2009 NIQB 60, [20]–[24].

63. In this regard, Mr Yu added among other cases two decisions of Weatherup J in *Re JR 17 (Education)* 2007 NIQB 107, [37]–[43] and *Re Darren Hart* 2009 NIQB 57.<sup>38</sup> In the latter case, which was in the context of prison discipline, Weatherup J summed up the position neatly in this way at [12]:

What is required in order to comply with the obligation to provide the gist of the reasons for removal? The decision maker should provide sufficient information, subject to the requirement to protect sources and processes, to enable the applicant to understand the nature of the allegations and to respond. This exercise involves a balance of competing interests between the applicant's right to know and to respond, and the right to protection of the person providing the information and the public interest in securing relevant information and the maintenance of good order and discipline in the prison. The starting point is the provision of sufficient information to enable the prisoner to understand the reasons for removal, if so required. Where such disclosure is subject

<sup>38</sup> The extract quoted below was cited in *Re James Wilson* 2009 NIQB 60, [23].

to constraint by reason of other interests the decision maker is required to make a judgment as to the extent to which the provision of information should be limited in order to protect the rights of others. The decision maker must be accorded a discretionary area of judgment in relation to the extent to which the release of information should be limited ...

64. I do not think both counsel have any quarrel with the approach encapsulated in the above statements. It is not possible or appropriate to lay down hard and fast rules if verbatim disclosure and the disclosure of the identity of a witness should be made. Each case must be considered on its own facts and circumstances to see what fairness requires. As Sachs LJ had observed in *Re Pergamon Press Ltd*, 404H, “so many are the permutations and combinations which may arise in an investigation that it seems ... quite plain that it is impracticable and, indeed, ill-advised to attempt to lay down a set of rules applicable to all witnesses at all times.”

65. With this, I turn to the statutory framework. It is common ground that this is a relevant factor to be taken into consideration as to the standard of fairness required in this situation.

### The statutory framework

66. As stated in its long title, the BO is an ordinance to license companies to provide broadcasting services, to regulate the provision of broadcasting service by licensees, and to provide for matters incidental thereto or connected therewith. The licensees are required to comply with the provisions in the BO, the terms of their licence and any code of practice and directions issued by the BO, and the Authority may carry out an investigation of the business of the licensees to ensure compliance with those requirements.<sup>39</sup>

67. Section 25 in Part 6 relates to investigation of a licensee’s business. Subsection (1) provides that where the Authority is satisfied it is necessary for the proper performance of its functions under a prescribed Ordinance<sup>40</sup> to ensure a licensee’s compliance with a licence condition, direction, order, determination or provision in a code of practice applicable to it, the Authority may authorise in writing any person to do all or any of the following at such times as are specified by it in the authorisation:

- (a) require a licensee or a person whom such authorized person reasonably believes to be employed or engaged in connection with the relevant business of a person to whom this section applies to produce for examination any data, book, document or record which relates to such business and which is in the

<sup>39</sup> BO ss.3, 4, 10, 23, 24 and Part 6.

<sup>40</sup> This is defined in s.2 of the BO to mean the ordinances specified, which include the BO.

- possession or under the control of the licensee or person, as the case may be;
- (b) examine and, if he thinks fit, to take copies of any data, book, document or record produced under paragraph (a) or any entry therein;
  - (c) remove the data, book, document or record referred to in paragraph (a) or the copies referred to in paragraph (b) for examination by him and the Authority; and
  - (d) require a licensee or a person whom such authorized person reasonably believes to be employed or engaged in connection with the relevant business of a person to which this section applies to give the authorized person and the Authority any explanation or further particulars as specified by the authorized person in respect of any data, book, document or record produced under paragraph (a).

68. If the Authority is satisfied there are reasonable grounds for believing that a person, other than a licensee, is or is likely to be in possession of information or a document relevant to its investigation, it may obtain information by the procedure in s.26(1), serving a notice requesting that person to give information or produce the document and if that person cannot or does not wish to comply he may make representations to the Authority of his reasons. The Authority may then withdraw its notice or seek an order from a magistrate under s.26(3) requiring that person to give the information or document. Section 26(5) provides that the Authority shall not disclose any information or document given or produced under this provision except subject to the requirement in sub-s.(6) and if the Authority considers that it is in the public interest to disclose. Section 26(6) provides that the Authority shall give a person giving or producing information or document under this provision a reasonable opportunity to make representations on a proposed disclosure before it makes a final decision to disclose.

69. Section 27 is headed “Confidential matter to be safeguarded” and the relevant provisions read as follows:

- (1) Subject to subsections (1A) and (2):
  - (a) any information which is furnished, and any data, book, document or record which is produced, by a person in confidence to the Authority or any person authorized by it or any committee appointed by it or by that committee for any purpose connected with the performance of any function under this Ordinance, shall be treated as confidential; and

- (b) unless the person otherwise permits in writing and except in accordance with such permission, no such information, data, book, document or record or any copy thereof shall be divulged or shown to any person other than in confidence to members of the Authority or any committee appointed thereby, or to a public officer acting in the performance of his duties or for the purposes of this Ordinance or the Broadcasting (Miscellaneous Provisions) Ordinance (Cap.391).

...

- (2) Subsection (1) shall not be construed as prohibiting the disclosure of information:

- (a) with a view to the institution of or otherwise for the purposes of any criminal proceedings or any investigation in connection therewith, whether under this Ordinance or otherwise, in Hong Kong;
- (b) in connection with civil proceedings to which the Authority is a party;
- (c) which facilitates the Authority investigating or determining a complaint that a licensee is engaging in conduct that contravenes a provision of a prescribed Ordinance; or
- (d) subject to subsection (3), which the Authority considers it is in the public interest to disclose.

- (3) The Authority shall give the person supplying the information in confidence a reasonable opportunity to make representations on a proposed disclosure of the information under subsection (2)(c) or (d) and shall consider all representations made before the Authority makes a final decision to disclose the information.

- (4) A person may permit, subject to such conditions as the person may specify, the Authority or any person authorized by the Authority:

- (a) to divulge specified information which the person has given thereto; or
- (b) to show any specified document or any copy thereof which the person has produced thereto,

to any person or to any specified person.

70. Section 28 deals with the imposition of financial penalty on the licensee by the Authority if it is satisfied that the licensee contravened a licence condition, requirement, direction, order, determination or provision in a code of practice applicable to it. Subsection (6) provides that the Authority shall not impose a financial penalty unless it has given the licensee a reasonable opportunity to make representations to it.

71. It should be noted that the outcome of an investigation may not lead to the imposition of financial penalty. From the regulatory point of view, it may be more effective for the Authority to exercise its power under s.24 to issue directions for specific actions to be taken by the licensee.

72. Where the conduct of the licensee is sufficiently grave to warrant the suspension or revocation of its licence, there is provision for a public hearing to be conducted in accordance with procedures determined by the Authority.<sup>41</sup> This is not the present situation.

73. Thus, by the BO, the Authority is charged with the obligation to investigate a licensee's business to ensure compliance with relevant conditions and requirements. The Authority is empowered to obtain information relevant to its investigation. It is to make findings based on the information obtained, to issue directions and impose sanctions as appropriate, and to report the findings to the public. The investigation is inquisitorial and is conducted by an administrative authority. It is not a trial or an adversarial hearing. There is no cross-examination of witnesses and the normal rules of evidence do not apply. As stated by Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75, 97B–C, “To ‘over-judicialise’ the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair”. In an investigation of this kind, the concept of fairness is flexible and should never force the court to lay down over-rigid rules or steps which have to be followed (*R v Monopolies and Mergers Commission, ex p Matthew Brown Plc* [1987] 1 WLR 1235, 1240A–H). In each case, careful regard must be had to the scope of the proceeding, the source of its jurisdiction, the way in which it normally falls to be conducted and its objective (*Re Pergamon Press Ltd*, 403E–G). The court must be careful to see to it that the level of disclosure required to meet the standard of fairness would not impede or frustrate the purpose of the enabling legislation.

74. Mr Yu also submitted that the seriousness of the sanctions proposed by the Authority is a factor to be considered in determining the extent and scope of disclosure which should be made to ATV to ensure procedural fairness. I do not understand Mr Chan to have

<sup>41</sup> BO ss.31 and 32.

contended otherwise. But that is just one of the factors in a balancing exercise. Another factor to be considered is the need for confidentiality.

### **Confidentiality and s.27**

75. The Interviewees agreed to be interviewed by the Authority and to supply information relevant to the investigation on the assurances of the Authority that their identities and the information provided would be kept confidential. The Authority has adhered to this understanding with the Interviewees and sought their consent before it disclosed a more detailed summary of the interviews to ATV in the Redacted Summary and the summary of interview of one of the Interviewees who declined to give consent was not reflected in the Redacted Summary. It was not disputed that confidentiality arises in respect of the identities of the Interviewees and the information they provided.

76. The statutory duty in ss.26(5) and 27(1) to maintain confidentiality is a factor to be taken into consideration in determining the standard of fairness, so that the duty to act fairly would not operate in a way to defeat the purpose of the legislation. Section 27(2) does not oblige the Authority to disclose confidential information whenever the circumstances in sub-s.(2)(a)–(d) arise. Subject to the requirement of fairness as explained in [78] below. The Authority has the power and discretion to decide if disclosure should be made notwithstanding the objection of the information supplier.

77. Mr Chan submitted that on a proper construction of the statute, disclosure of confidential information is an exception rather than the rule and there is in effect a presumption of confidentiality which is to be displaced only in exceptional circumstances.

78. I think that is putting it too high. But I would agree with Mr Chan to the extent that a restrictive approach to disclosure of confidential information should be adopted, and confidentiality should be maintained unless disclosure is required to facilitate the investigation or is otherwise justified in the public interest. Section 27(2) is drafted in terms that the confidentiality provided for in sub-s.(1) “shall not be construed as prohibiting the disclosure of information” in the circumstances stated in sub-s.(2)(a)–(d). Disclosure should only be made to the extent this is required for procedural fairness, and, in this context, to the extent it is necessary to enable ATV reasonably to make focused and meaningful representations.

79. Support for this construction, as submitted by Mr Chan, may be found in the underlying policy that witnesses in investigations such as the present one should be encouraged to come forward and

speak frankly, see *Yu Chee Yin v Commissioner of Independent Commission Against Corruption (No 2)* [2001] 4 HKC 532, 547G–548F, citing *R v Gaming Board for Great Britain, ex p Benaim and Khaida*, 431; and *Re Pergamon Press Ltd*, 399H–400F. This is of particular importance in the present context, as the broadcasting industry is a relatively small and closely related circle with only two free television broadcasting service providers, where most people would tend to know each other, and hence the confidentiality of the identities of the Interviewees becomes of the utmost importance.

80. The Authority has taken great pains to explain to the Interviewees that it will maintain confidentiality. If the assurances to preserve confidentiality given to the Interviewees were to be lightly withdrawn, witnesses would be reluctant to come forward to provide information and the statutory purpose of conducting an investigation in such a closely connected industry would be thwarted. In offering assurances to the Interviewees in this way, I do not think the Authority has fettered its own discretion under s.27, as was demonstrated by the matters considered by the Authority as mentioned in the relevant parts of Mr Liu's affirmation set out earlier.

81. In his judgment,<sup>42</sup> the Judge drew a distinction between informants and witnesses, putting the Interviewees' position in the latter category. In the situation of informants (such as the person who sent the complaint letter to the Authority in June 2011), the Judge took the view that their identities may be considered protected as a matter of conventional public immunity, as without informants there may be an issue of drying up the sources, and he cited in this connection *R v Secretary of State for the Home Department, ex p Hickey (No 2)*, 746B, per Simon Brown LJ. The Judge was inclined to think that witnesses generally occupy a different position, stating that when witnesses are approached to give statements for an investigation, as a matter of fairness, there is "generally an implied condition" that such statements cannot be withheld from disclosure to the person adversely affected, citing in support *R v Council of the Borough of Poole, ex p Cooper* (1995) 27 HLR 605, 613.

82. It does not appear to me one should draw a hard and fast distinction between informants and witnesses. Particular circumstances may call for a different approach regarding disclosure of the information supplied even though the supplier of information is a witness. Thus, in the passage in *R v Secretary of State for the Home Department, ex p Hickey (No 2)* cited by the Judge at 746B (which was in the context of a very closed procedure operated by the Home Secretary for the referral of convictions to the Court of Appeal where there has been miscarriage of justice), having mentioned the position of informers, Simon Brown LJ went on to

<sup>42</sup> [70(4)].

say that similarly, if the Secretary perceives a real risk of intimidation, such as when occasions occur in an effort to persuade witnesses to change their evidence, “such a risk should properly be reflected in the level of disclosure decided upon”, as witnesses should be kept safe.

83. I should think that the proposition the Judge drew from *R v Council of the Borough of Poole, ex p Cooper* regarding a generally implied condition that statements given by witnesses cannot be withheld from disclosure should also be looked at in a similar light. One comes back to the question if the particular circumstances call for a different approach, then the requirements of procedural fairness must be addressed in the context of the particular circumstances in order to decide on the specific level of disclosure that should be made. The guiding principle should always be that sufficient disclosure should be given to the party adversely affected to enable him to deal with such evidence given by the witness concerned.

84. The Judge rejected the Authority’s concern about the Interviewees’ fear of reprisal,<sup>43</sup> taking the view that such fear was general and not particularised and some had left the employment of ATV. I think it is unrealistic to expect the Authority to investigate in detail the facts behind the claim of fear of reprisal put forward by each person, so long as there are reasonable grounds for the Authority to believe that this is a genuine claim. Given the closely connected nature of the broadcasting industry, that senior members in the industry tend to move around with the few broadcasting service providers, I agree with Mr Chan that it is readily understandable and reasonable for employees and former employees of ATV to have fear of adverse consequences if their identities were disclosed. In this connection, one must also take into account the possibility of reprisal in the form of legal proceedings taken by the subject of an investigation against the witness.

85. The investigation is not a judicial proceeding, and the Interviewees are not protected by absolute privilege but only by qualified privilege. It is pertinent to have regard to these words of Lord Denning MR and Sachs LJ in *Re Pergamon Press Ltd*, in the context of an investigation conducted by inspectors appointed under the Companies Act:

This investigation is ordered in the public interest ... Witnesses should be encouraged to come forward and not hold back ... It is easy to imagine a situation in which, if the name of a witness were disclosed, he might have an action brought against him, and this might deter him from telling all he knew. No one likes to have an action brought against him, however unfounded. Every witness must, therefore, be protected. He must be encouraged to be frank.

<sup>43</sup> The judgment, [67].



This is done by giving every witness an assurance that his evidence will be regarded as confidential and will not be used except for the purpose of the report. This assurance must be honoured. It does not mean that his name and his evidence will *never* be disclosed to anyone. It will often *have* to be used for the purpose of the report, not only in the report itself, but also by putting it in general terms to other witnesses for their comments. But it *does* mean that the inspectors will exercise a wise discretion in the use of it so as to safeguard the witness himself and any others affected by it. His evidence may sometimes, though rarely, be so confidential that it cannot be put to those affected by it, even in general terms. If so, it should be ignored so far as they are concerned. For I take it to be axiomatic that the inspectors must not use the evidence of a witness so as to make it the basis of an adverse finding unless they give the party affected sufficient information to enable him to deal with it. (400B–D (Lord Denning))

In the course of that investigation confidential information may have to be sought and may have to be examined. In such a case the inspectors are entitled to take into account that many men have deep-seated fears of becoming involved as defendants in defamation actions, for which there is no legal aid, at the suit of somebody with a long purse who may wish to stifle criticism. That is a general observation ... it is simply something which has to be taken into account in view of the fact that statements made by witnesses to these inspectors are not the subject of absolute privilege. It is often difficult enough to persuade a citizen to give evidence in road accident cases. How much more reluctant may they well be to risk becoming themselves involved in litigation as the result of their public duty at an investigation unless they can be given protection. It can be in the public interest that such account be taken of the fears of potential witnesses. If authority is needed for so self-evident a proposition, it can be found in the judgment of Lord Hanworth MR in the *Hearts of Oak Assurance Co Ltd v Attorney-General* case [1931] 2 Ch 370, 389. (404C–F (Sachs LJ))

86. As Mr Liu has explained in those parts of his affirmation set out earlier, the Authority has assessed the circumstances to see whether they fall within the scope of s.27(2)(c)<sup>44</sup> in that disclosure would facilitate the investigation and it has determined that this would not but instead would hinder the investigation, as witnesses would be reluctant to take a personal risk in their careers and come forward to provide information without an assurance of confidentiality. It is reasonable for the Authority to take into

<sup>44</sup> Mr Liu did not mention expressly s.27(2)(c), but it is reasonably clear, on a fair reading of para.31 of his affirmation, the Authority had considered whether “disclosure would facilitate the investigating”. Paragraph 32 is to the same effect, although s.27(2)(c) was not expressly mentioned.

consideration the interest of the Interviewees and the need to maintain the integrity of the investigation procedure.

87. On a fair and proper reading of Mr Liu's affirmation, the Authority has come to the view that s.27(2)(c) is not engaged. It is not necessary for it then to go through the procedure in s.27(3) and give the Interviewees an opportunity to make representations on a proposed disclosure before it makes a final decision regarding disclosure. I do not agree with Mr Yu that the Authority has failed in carrying out its statutory duty under s.27 to properly consider if disclosure should be made to facilitate a fair investigation.

88. The Judge is in error in holding that confidentiality in the present case does not amount to a valid countervailing factor.

89. Public interest immunity is irrelevant here and has not been relied on by the Authority in this administrative inquiry. It is not necessary to deal with Mr Yu's arguments on this matter.

### A matter of fact

90. We are here concerned with, whether, as a matter of fact, the materials disclosed by the Authority to ATV afford the latter a reasonable opportunity to make meaningful and focused representations in respect of the Interviewees' evidence. Does fairness demand disclosure of the Interviewees' identities and their verbatim statements in the interviews, or would the summaries of their evidence as provided suffice? One would need to look at the issues and matters in contention and what the summaries consist of, before one can form a view whether sufficient disclosure has been made to enable ATV properly to present its best case.

91. The main issue in the investigation is relatively straightforward, and that is whether Mr Wong is in *de facto* control of ATV. In making the provisional finding that Mr Wong is in *de facto* control, the Authority has relied, first and foremost, on the documentary evidence — Minutes Supplied by ATV, Minutes Supplied by Interviewees, the consultancy agreement between Mr Wong and Mr Shing. The Authority has also relied on the statements of the Interviewees given in the interviews, taking the view that they are "consistent with and reinforce the evidence from the minutes of the weekly management meetings".<sup>45</sup> As appeared from the provisional findings of the Authority, the Interviewees' evidence is *prima facie* relevant, significant and credible.

92. Most of the Interviewees' evidence, as appeared from the various summaries prepared and provided by the Authority, is about the behaviour of Mr Wong, Mr Kwong and Mr Shing in the management meetings, and Mr Wong's conduct in relation to ATV's daily operation, such as the production of television programmes. These matters are within the personal knowledge of Mr Wong, Mr

<sup>45</sup> Revised Draft Report, para.23.

Kwong and Mr Shing, the gist of which is set out in some detail in the Authority's summaries, in particular the Redacted Summary.

93. Mr Yu pointed to the conflict of evidence between Mr Wong and Mr Shing on the one hand and the Interviewees on the other hand in relation to the extent of involvement of Mr Wong in the management and operations of ATV. The Authority has preferred the Interviewees' evidence. It also rejected ATV's contention that the Interviewees' evidence may be tainted by bias. Given that the credibility of the Interviewees' evidence is seriously disputed by ATV, he submitted that the disclosure of their identities is plainly necessary to enable ATV to make representations why their evidence is not credible or otherwise tainted by bias, and the proper weight the Authority should give to their evidence. As for the summaries prepared by the Authority, he contended that they may distort the Interviewees' evidence, and the possibility of differing interpretations or emphasis of what they said cannot be excluded.

94. As I understand the Authority's position, it would have no objection to disclosing the verbatim transcripts but for the fact that this would have revealed the identities of the Interviewees. And it is not feasible to redact the transcripts so as not to reveal the identities of the Interviewees but leave the contents intelligible.

95. Mr Chan submitted that the situation here is far removed from cases where the outcome is dependent upon the tribunal's belief of one person's word against another, as in *R v Dunraven School Governors, ex p B (A Child)* or in *R v Chelsea College of Art and Design, ex p Nash*. Given the Authority's primary reliance on the documentary evidence, of which there is a considerable amount, and most of what the Interviewees said was supported by the documents, this rendered their identities less crucial. He submitted that the relevance or probative value of the Interviewees' identities and the full transcripts is very much limited in the context of this investigation.

96. On the conflict of evidence between Mr Wong, Mr Kwong, Mr Shing and the Interviewees, I think it is necessary to examine ATV's detailed response in the letter of B&M dated 3 May 2012 and the 17-page appendix to that letter which sought to answer the allegations in the Redacted Summary point by point, in order to form a view whether disclosure of the Interviewees' identities and verbatim statements should be made for ATV to make meaningful and focused representations to the allegations for the resolution of the conflict of evidence.

97. I take as an example the conflict of evidence relating to the production of a programme called "Hong Kong Loving Hearts". The discrepancies of the versions supplied by the two sides were set out in Appendix C to the Draft Revised Report and the gist of

the Interviewees' allegations was given in the Redacted Summary under the heading of "Hong Kong Loving Hearts Campaign". According to the Interviewees, Mr Wong was responsible for suggesting the production of this programme and for directing the News Department to take up responsibility for its production. ATV's response was that Mr Wong raised the idea for this programme in a meeting of the management of ATV, it was agreed at the meeting to produce the programme and it was then decided that the programme was to be produced jointly by the News and Public Affairs Department and the Production Department.

98. It was further alleged by the Interviewees that during the production, Mr Wong would attend interviews personally with the film crew and on several occasions he directed the staff of the News Department to film certain candidates; he was also responsible for nominating several candidates to be shortlisted and removing the names of candidates whom he believed would not attend the awards ceremony. ATV denied the last allegation, stating that nominations of candidates were received from a working group and the public, and that the working group decided on the short listing of candidates, although Mr Wong attended some of the discussions of the working group. Mr Wong was present during only one interview with a shortlisted candidate, whom he knew personally. He was present during the filming of that candidate and offered assistance to the film crew to perform its duty. The final award winners were decided by public poll and a panel of judges comprising 50 reputable people selected by the working group. So it is not true to say that the shortlist consisted of only those candidates who would attend the award ceremony, and Mr Wong could not have had any decision-making power to pick and choose the candidates on the shortlist.

99. Lastly, it was alleged by an Interviewee that Mr Wong requested the programme be broadcast during the best period of the prime time. ATV responded that the decision of what time slot to broadcast a particular programme is ultimately for the Programme Department after considering a variety of factors and it is not determined by one person alone.

100. I have set out the allegations and ATV's response in some detail as this shows the kind of conflict in evidence that was raised. It is evident that the identities of the Interviewees or their verbatim statements are not germane to the making of a proper response to the allegations in this investigation.

101. I take another example of the allegations regarding the weekly management meetings. It was alleged that Mr Wong was the one who made decisions at these meetings, that he criticised the performance of the former management at these meetings and later three key executives resigned and were replaced with PRC

nationals. ATV's response was that the weekly management meetings is a forum for exchange of information between different departments and the purpose of the meetings is not to make decisions. Strategic decisions are made by Mr Shing, with the endorsement of the board if the situation requires, together with the relevant principal officers, outside the weekly management meetings. The comments and opinions made by Mr Wong at these meetings only showed that he was active in expressing his opinions, in either his role as an investor or as a personal consultant to Mr Shing. It is unfair to associate the appointments of three PRC nationals with Mr Wong's comments at these meetings.

102. Thus, ATV's response is essentially that the Interviewees had misunderstood the function of the weekly management meetings in the operation of ATV, and that was why Mr Shing did not need to make decisions at such meetings and was not seen doing so. I am unable to see how the disclosure of the Interviewees' identities or their verbatim statements would have assisted in the resolution of this dispute.

103. Similar instances abound. I do not propose to set out all of them but just give two further examples. In respect of the allegation concerning rating research of CSM, it was alleged that Mr Wong dictated what Mr Kwong had to say in a press conference as the primary spokesman. ATV's response was that Mr Wong only made suggestions as to what Mr Kwong could say. In respect of the allegation under the heading of Mr Wong's role, it was alleged that he received guests in the capacity of the host and boss of ATV and talked about the proposed development of ATV during the guest visits. ATV's response was that Mr Wong participated in the guest receptions in his capacity of the major financial investor in ATV and as such he was free to express his aspired development of ATV and seize every chance to boost the business in which he has invested.

104. In most instances, it is fair to say there is no serious dispute of facts but more a difference of perception and interpretation, with ATV attributing this to the Interviewees' mistaken views and misunderstanding and being partial and biased. In essence, ATV was saying that many of the acts of Mr Wong, and many of them were recorded in documents, are entirely explicable in that he was just giving advice or making suggestions as the major investor of ATV and the personal consultant of Mr Shing.

105. In the letter of B&M dated 3 May 2012, ATV made representations to the Authority naming three of the Interviewees based on what it deduced to be hints of their identities in the Redacted Summary and explaining why their statements must be considered biased based on their past conflicts and altercations with Mr Wong. However, in the specific responses in the 17-page

appendix of B&M's letter to the allegations in the Redacted Summary, the identities of who had made the allegations did not appear to be of much significance to the dispute. It was only in respect of a handful of allegations that the Interviewee's motivation or biased position was mentioned in response, such as the allegation that Mr Wong supported Josephine Yan for whom ATV had arranged a press conference and changed the prime time schedule to broadcast it (ATV's response was that the Authority should consider the motivation of the Interviewee who alleged this and whether there was any previous friction between this Interviewee and Ms Yan); and the allegation that Mr Shing was merely a nominal figurehead (ATV's response was that this demonstrated the biased position of the Interviewee against Mr Shing, Mr Kwong and Mr Wong).

106. As for the complaint that without disclosure of the Interviewees' identities and the full transcripts, ATV would not be able to properly assess whether the summaries prepared by the Authority amounted to a full and balanced interpretation of their evidence, I am inclined to think this is an over-exaggeration. The important thing is whether ATV adequately appreciates the nature, extent and basis of the allegations elicited by the Authority from the Interviewees. I am satisfied that it does, from the summaries provided by the Authority. The consideration here is not whether ATV would be better off with the disclosure of the further information it seeks, but whether the procedure adopted by the Authority was actually unfair (*R v Secretary of State for the Home Department, ex p Doody*, 560H–561A).

107. The Judge is in error in holding that the disclosures made by the Authority to ATV are not sufficient to achieve the necessary procedural fairness for ATV to make focused and meaningful representations to the Interviewees' evidence.

## Conclusion

108. For the reasons given above, the Judge has erred in holding that confidentiality is not a valid countervailing factor that should be taken into account in this case and he has erred in his factual assessment that the disclosures made by the Authority are insufficient to enable ATV to make focused and meaningful representations and hence meet the requirements of procedural fairness. In my view, the Authority has carried out a proper balancing exercise of the competing interests between ATV's right to know and to respond, the right to protection of the Interviewees, the public interest in securing information from the Interviewees and the need to conduct the investigation efficiently. I hold that there is no breach of

procedural fairness in this case and the application for judicial review must fail.

109. Mr Yu has urged upon us that we should adopt a “heightened” sense of what procedural fairness would require in this situation, given that the investigation is inquisitorial in nature and that the Authority acts both as a prosecutor and a judge. I am not saying this is immaterial but this is only part of the picture. Witnesses in the investigation would require protection they would not otherwise require had they been giving evidence in court proceedings, as they do not enjoy absolute privilege in giving statements to the Authority, only qualified privilege. The Authority would need to exercise its discretion wisely on disclosure of confidential information to safeguard the witnesses and any others who may be affected by the disclosure. The entire process must be looked at in context to determine what procedural fairness requires for the level of disclosure in a specific situation. As mentioned above, this is a balancing exercise.

110. Given the above conclusion, there is no need to consider the question of residual discretion if procedural unfairness were established. Nor is it necessary to consider the question raised in the respondent’s notice of ATV that the judgment be affirmed on additional grounds in that the Decisions should be quashed on the basis that the Authority had failed to disclose all relevant materials, irrespective of whether the Authority relied on them, not just the identities of the Interviewees and their verbatim statements.

111. I would allow the appeal of the Authority and set aside the order of *certiorari* made by the Judge quashing the Decisions and the order he made as to costs. I would award the costs below to the Authority, with a certificate for two counsel, and make a similar costs order *nisi* in respect of the costs of this appeal.

### Chu JA

112. I agree with the judgment and orders proposed by Kwan JA.

### Lam JA

113. I agree with the judgment and orders proposed by Kwan JA.

Reported by Ken TC Lee