A **CHU PING TAK TIM v COMMISSIONER OF POLICE**

COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 3672 OF 2001
DEPUTY JUDGE ANDREW CHEUNG
26 MARCH, 20 JUNE, 3 JULY 2002

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Administrative Law – Judicial review – Police disciplinary proceedings – Police officer incurred heavy debts and filed for bankruptcy – Whether charge required proof of impairment of efficiency – Propriety of decision making process – Police (Discipline) Regulations (Cap 232A) reg 3(2)(m)

C

Police and Emergency Services – Police – Disciplinary proceedings – Police officer incurred heavy debts and filed for bankruptcy – Debts incurred on borrowings to finance girlfriend's margin trading activities – Whether conduct reprehensible and lowering reputation as a police officer – Whether charge required proof of impairment of efficiency – Police (Discipline)
D **Regulations (Cap 232A) reg 3(2)(m)**

行政法 – 司法覆核 – 警隊紀律程序 – 警務人員欠下龐大債項並申請破產 – 控罪是否需要證實工作效率受損 – 決策過程的恰當性 – 《警察(紀律)規例》(第 232A 章)第 3(2)(m) 條

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警務與緊急服務 – 警察 – 紀律程序 – 警務人員欠下龐大債項並申請破產 – 因借款資助女友進行按金交易活動而欠下債項 – 行為是否損害作為警務人員的聲譽並應受指責 – 控罪是否需要證實工作效率受損 – 《警察(紀律)規例》(第 232A 章)第 3(2)(m) 條

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The applicant joined the police force in January 1998, at a time when he was already in debt in total sum of around $140,000. At that time, he was supporting an unemployed cohabiting girlfriend. A friend of the girlfriend invited her to take part in margin trading of local stocks and the applicant lent his girlfriend $40,000 for the purpose. Further sums were lent as the girlfriend was repeatedly told that
G her trading activities came to a loss. The applicant borrowed from financial institutions a total of $140,000 to help her girlfriend in this manner. By the end of 1999, the applicant had accumulated debts of about $400,000. In early 2000, the applicant realized that he had serious difficulty in managing the monthly repayments of his debts since he had to repay about $30,155 per month in total
H whereas his then monthly salary was only $17,500.10. He informed the Police Welfare Office of his situation but was advised that no workable debt-restructuring plan could be devised and he should petition for bankruptcy. After he filed his bankruptcy petition and informed his commander of the petition, a disciplinary review was conducted. One of the charges laid against him was conduct calculated to bring the public service into disrepute (contrary to Police
I (Discipline) Regulations (Cap 232A) reg 3(2)(m)), referring to his obtaining loans to such an amount that his monthly income became insufficient to service repayment schedules and that he had applied for bankruptcy. The adjudicating

officer, having considered all the evidence available to him, found that the applicant's debts as at March 1999 was still manageable for his monthly repayment, but he made no attempt to settle or reduce his debts. Instead he continued to borrow and his indebtedness in December 1999 was such that it was obviously unmanageable. The adjudicating officer also found that the applicant showed continued interest and had an indirect involvement in the girlfriend's margin trading by his willingness to obtain further loans to help her. Thus the causation of his indebtedness was a reprehensible one. Although there was no evidence of him having been indulging in gambling or overspending, his indebtedness had clearly reflected his being financially imprudent. The adjudicating officer, having considered that it was the applicant's indebtedness and not his petition for bankruptcy that was subject to disciplinary consideration, found that the applicant's conduct had fallen short of public expectations and lowered the reputation of the police force and concluded therefore that the applicant was guilty of the disciplinary charge. A senior police officer confirmed the conviction and imposed an 'order to resign' on the applicant forthwith without salary in lieu of notice. A force discipline officer also agreed to the penalty. The Deputy Commissioner of Police dismissed the applicant's appeal and confirmed the order. As the applicant refused to resign, the Commissioner of Police dismissed him with immediate effect. The applicant applied for judicial review of the adjudicating officer's findings, the awards made by the officers and the dismissal of his appeal.

Held, granting the application for judicial review but quashing only the decision of the Deputy Commissioner of Police to dismiss the applicant's appeal:

Whether a disciplinary offence under the reg 3(2)(m) of the Police (Discipline) Regulations made out

(1) Regulation 3(2)(m) did not require proof of impairment of efficiency before the disciplinary offence thereunder was made out. Financial imprudence resulting in pecuniary embarrassment may, depending on the facts, reflect so badly on the police officer's character in question, that this may amount to conduct bringing the police force into disrepute. The filing of bankruptcy proceedings against the police officer simply served as a convenient piece of evidence of his serious pecuniary embarrassment. *Leung Fuk Wah Oil v Commissioner of Police* [2002] 3 HKC 1 (CA) (at 674G-676G).

Whether the decision to order the applicant to resign and the decision to dismiss the applicant were unreasonable

(2) There was no justification to disturb the adjudicating officer's conclusion of the disciplinary charge on the *Wednesbury* unreasonableness ground. There was material to enable him to come to the conclusion that the financial imprudence displayed by the applicant led one to doubt his general character and suitability as a police officer so that his being a police officer would lower the esteem of the police force as a whole in the eyes of the public. The adjudicating officer was not wrong in saying that the applicant had an indirect involvement in the margin trading activities, all that the adjudicating officer was saying was that the applicant was indirectly involved in his girlfriend's margin trading as a financier. The adjudicating officer was also not wrong in concluding that the

causation of the applicant's indebtedness was therefore a reprehensible one. He was not wrong in describing the cause of the applicant's indebtedness as being a reprehensible one in the sense that it was due to financial imprudence in the circumstances of the case that the applicant was in serious pecuniary embarrassment. Describing the financial imprudence in the applicant's case was just another way of saying that the applicant's conduct called into question his general character and suitability as a police officer. In any event, repeated lending of money to another to an extent that was grossly beyond one's means so as to enable the other to engage in highly risky and speculative margin trading activities when the borrower's only means of repayment was her highly questionable chance of earning money from her trading activities was reprehensible in nature (at 676H-679H).

(3) The phrase 'calculated to' in the disciplinary charge meant 'likely to' (at 679I).

(4) The punishment meted out to the applicant was not so disproportionate to the offence in question as to be perverse, or so unduly oppressive as to be unreasonable. The offence was a serious one almost by definition. Depending on the circumstances, one of the most obvious ways to remedy the situation was to remove the offender from the police force. *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052 considered (at 681B-F).

Whether the decision of the Deputy Commissioner of Police to dismiss the appeal of the applicant was procedurally improper

(5) Where there was a complaint in judicial review proceedings based on non-disclosure of documents or material, the court's task was to first determine whether as a matter of fairness and natural justice, the documents or material ought to have been disclosed to an applicant by the decision-making body so as to afford the applicant an opportunity to respond to the documents or material. At this first stage, it was not necessary for the applicant to establish prejudice as a ground of judicial review. If the court came up with an affirmative answer to the first question, it should proceed to the second stage by considering whether to exercise its discretion to quash the decision of the decision-making body below or grant some other appropriate relief, if any. At this second stage, the fact that there had been (*ex hypothesi*) a breach of procedural fairness was by itself a relevant and weighty consideration to be taken into account. However, at this second stage, the absence of prejudice, if such was the case, was also a relevant factor to take into account. A distinction should be drawn between the total absence of substantive prejudice on the one hand and the presence of a risk of prejudice on the other. If it could be demonstrated to the satisfaction of the court that the non-disclosure did not produce a substantial prejudice to the applicant whatsoever, it would seem that the discretion of the court would most likely, if not inevitably, be exercised against the grant of any relief. If that could not be done so that there was a risk of prejudice having been done to an applicant by the non-disclosure, this would seem to be an important factor in favour of the court exercising its discretion to quash the decision in question, particularly if one bore in mind that *ex hypothesi*, there was a breach of the rules of natural justice which was by itself a weighty consideration to be taken into account in the first place. Given the above analysis, cases where there had been established a breach of the rules of natural justice and yet the court refused as a matter of discretion to grant

any relief must be rare. *Kanda v Government of Malaya* [1962] AC 322, *Chan Tak Shing v Chief Executive of the HKSAR* [1999] 2 HKLRD 389, *Boddington v British Transport Police* [1999] 2 AC 143 and *Leung Fuk Wah Oil v Commissioner of Police* [2002] 3 HKC 1 considered (at 681G-685D).

(6) Relief should be granted to the applicant in respect of the decision of the Deputy Commissioner of Police, which must be quashed. The court was not convinced that had the documents comprised in the defaulter's report of the applicant been disclosed properly to the applicant at the material time, the outcome of his appeal, in particular his appeal against sentence, would certainly have been the same. There was actual prejudice to the applicant by the non-disclosure of documents, consisting of memoranda written by members of the discipline section and the force discipline officer (at 685E-688B).

Cases referred to

Boddington v British Transport Police [1999] 2 AC 143, [1998] 2 All ER 203, [1998] 2 WLR 639 (HL)

Chan Tak Shing v Chief Executive of the HKSAR [1999] 2 HKLRD 389 (CA)

Kanda v Government of Malaya [1962] AC 322, [1962] WLR 1153, 106 Sol Jo 305 (PC)

Leung Fuk Wah Oil v Commissioner of Police [2002] 3 HKC 1 (CA)

Ng Kam Chuen v Secretary for Justice [1999] 2 HKC 291 (CFI)

R v Admiralty Board of the Defence Council, ex p Coupland [1996] COD 147 (DC)

R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 3 All ER 452, [1976] 1 WLR 1052 (CA)

R (on the application of Alconbury Development Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 All ER 929, [2001] 2 WLR 1389 (HL)

Legislation referred to

Police Force Ordinance (Cap 232) ss 30, 45(1)

Police (Discipline) Regulations (Cap 232A) reg 3(1), (2)(m)

Other sources referred to

Bingham (Sir Thomas) *'Should Public Law Remedies be Discretionary?'* [1991] PL 64, 72-73

De Smith, Woolf & Jowell *Principles of Judicial Review* (1999 Ed) pp 386-391, 459-462, 488

Civil Service Regulations paras 455, 458

Police General Orders para 6-01(8)

Wade *Administrative Law* (8th Ed) pp 501-504

[*Editorial note*: for further reading on the subject areas, see *Halsbury's Laws of Hong Kong* Vol 1, Administrative Law; Vol 20, Police and Emergency Services.]

Application for judicial review

This was an application by a police constable, Chu Ping Tak Tim, for judicial review of the decision of an adjudicating officer finding him guilty of a disciplinary offence and ordering him to resign from the police force and of the decision of the Deputy Commissioner of Police dismissing his appeal. The facts appear sufficiently in the following judgment.

Hectar Pun (Fung, Wong, Ng & Lam) for the applicant.
SH Kwok (Law Officer (Civil Law)) for the respondent.

Deputy Judge Andrew Cheung: 1. The applicant was at all material times a police constable in the Hong Kong Police Force. In late 2000 disciplinary proceedings were commenced against him on the ground that he was guilty of conduct calculated to bring the public service into disrepute. The proceedings, which included an appeal, lasted until mid 2001, and eventually resulted in the applicant being ordered to resign immediately without salary in lieu of notification. The applicant refused to resign and on 26 July 2001, the Commissioner of Police dismissed the applicant with immediate effect. He now seeks by way of judicial review to quash the various decisions made in the course of those proceedings.

2. The applicant was born in Hong Kong on 26 August 1974. He completed his form 5 studies in Hong Kong in 1990. He then worked for one year as a stylist assistant in a hair saloon. In 1992, he went to Australia to read a graduate diploma in a college. After his graduation in 1994, he returned to Hong Kong and worked as a salesman in a garment outlet where he met his present girlfriend and cohabitee, a Miss Lau, who was also a salesperson in the same company. In about mid 1994, he started co-habiting with Miss Lau. At the end of the same year, he changed to work as a site technician and his salary was about $16,000. In 1998 his monthly income was about $25,000 inclusive of overtime and travelling allowances. Unfortunately, his monthly income dropped to about $10,000 due to the drastic drop in the business of his employer. In 1998, he left his employer and went to the Police Training School for training.

3. It is not in dispute that before the applicant joined the Police on 12 January 1998, he was already in debt in the total sum of around $140,000. According to him, his girlfriend/cohabitee was unemployed and he had to support their living. Anyway, after the applicant passed out from the Police Training School in July 1998, his debt was reduced to around $120,000 as he had made some repayments.

4. In March 1998, whilst the applicant's girlfriend was still unemployed, her friend, a Miss Wong, invited her to take part in margin trading of local stocks. Although in the papers, the activities were described as 'investment' activities, it is quite clear from the applicant's own statement dated 6 March 2000 which formed an agreed exhibit in the

disciplinary proceedings, that the activities were more in the nature of speculation than investment. Anyway, initially Miss Lau and Miss Wong only contributed $5,000 each to 'invest' in the margin trading. Miss Wong was responsible for handling the actual trading activities. Initially, Miss Wong told Miss Lau that they had made some profits from the activities. In September 1998, Miss Wong asked Miss Lau to contribute another $40,000 for the activities. The applicant therefore lent $40,000 to his girlfriend for that purpose. Miss Wong also from to time told Miss Lau about the profits they had made or the loss they had suffered from the activities.

5. In January 1999, Miss Wong told Miss Lau that all their money in the margin trading account including the previous $40,000 had been lost and each of them had to contribute another $50,000 for the margin trading activities. Miss Lau therefore asked the applicant to lend her another $50,000, to which the applicant agreed. Like the previous sum of $40,000, the applicant had to borrow from financial institutions in order to lend the sum of $50,000 to his girlfriend. According to the applicant, when he lent the money to his girlfriend, he made it clear to her that she would need to return the money when she made a profit. In fact, according to the applicant, his girlfriend had previously made some partial repayments of several thousands on each occasion to him.

6. In June 1999 Miss Wong again told Miss Lau that all their money had been lost and asked her to contribute another $50,000 to continue with their trading activities. Miss Lau therefore asked the applicant for help again. According to the applicant, he reluctantly borrowed yet another sum of $50,000 from a financial institution and lent it over to his girlfriend. He told her that that was the last time he would lend money to her. But about 10 days later, Miss Wong told Miss Lau that the market had dropped; the last sum of $50,000 had been lost. Moreover, each of them had to contribute a sum of $75,000 to make up for the loss. The applicant said that he then felt suspicious and spoke to Miss Wong over the phone. He asked Miss Wong to show him all the statements of the previous margin trading transactions. Miss Wong promised to do so over the telephone. Thereafter the applicant and his girlfriend made six to seven appointments with Miss Wong for that purpose, but she never turned up for the appointments. In August 1999, the applicant and his girlfriend discovered that Miss Wong had disconnected her mobile phone. And they were never able to locate Miss Wong again.

7. So in total, the applicant lent $140,000 to help his girlfriend in relation to her margin trading activities. By the end of 1999, the applicant had accumulated a debt of about $400,000. According to the applicant, the main reasons for his indebtedness were that he needed to support his own family, he needed to support his own living, he needed to support the living of his girlfriend who was unemployed throughout as well as her

family, and he had to pay a substantial amount of interest to the various financial institutions from which he had borrowed money at fairly high interest rates, quite apart from the total sum of $140,000 he had lent to his girlfriend in the above circumstances.

8. In early 2000, the applicant realised that he had serious difficulty in managing the monthly repayments of his debts. In short he had to repay about $30,155 per month in total whereas his then monthly salary was only $17,500.10. In February 2000, he went to the Police Welfare Office to seek advice on his financial difficulties. He was told that not much could be done in relation to his situation, and there was no workable debt-restructuring plan that could be realistically devised. It was suggested to him that he might want to apply for bankruptcy. He was given to understand that the Police Force took bankruptcy proceedings against a police officer as neutral in nature and no disciplinary proceedings would be instituted against him unless his efficiency as a police officer had been impaired.

9. The applicant filed a bankruptcy petition on 1 March 2000. As at the time of his petition, his total accumulated indebtedness was in the sum of $512,795. He informed his commander immediately after the filing of his bankruptcy petition. A disciplinary review against the applicant was then conducted. Upon the conclusion of the review, a disciplinary charge was formally laid against the applicant as follows:

> Charge (B): Conduct calculated to bring the public service into disrepute
>
> Contrary to Regulation 3(2)(m) of the Police (Discipline) Regulations, Cap. 232.
>
> Particulars: PC 58614, CHU Ping-tak, of the Hong Kong Police Force, you are charged that between 1998-1999, being imprudent with your finance affair, you put yourself in pecuniary embarrassment through obtaining loans to such an amount that your monthly official emolument becomes insufficient to service repayment schedules, and that you applied for a bankruptcy petition, such act being conduct calculated to bring the public service into disrepute.

10. At the disciplinary hearing, the applicant gave evidence in relation to the charge in question. Apart from his oral testimony, a previous statement made by him dated 6 March 2000 was also placed before the Tribunal as agreed exhibit. As mentioned above, the applicant described in the statement the margin trading activities of his girlfriend as speculation activities. Further in his statement, when describing the second time he was asked by his girlfriend to lend a sum of $50,000 in May or June 1999, as the first sum of $50,000 had been lost, he said:

> We [i.e. the applicant and his girlfriend] calculated that inclusive of money earned and expenses, in fact we only lost about $10,000 to $20,000. I then borrowed again from a finance company and made overdraft from credit card to have the $50,000 for Ah Ching [i.e. the girlfriend]. At that time, I told Ah

> Ching that it was the last time, if (she) lost money again, (I) could not help her any more.

11. At the beginning of the disciplinary proceedings, it was commented on behalf of the applicant that the particulars of the charge were not clear and a request was made for further and better particulars of the charge. After consideration, the adjudicating officer expressed the view that the particulars appeared to have been properly worded and he did not see the need for any amendment.

12. As I said, the applicant gave evidence before the adjudicating officer. Amongst other things, he said this:

> I had no idea of my girlfriend's margin investment. She did win and pay me back a little bit. I only met my girlfriend's friend one-two times and it was until May 1999 when I suspected that my girlfriend had been deceived $70,000-HK on top of the loss of $50,000-HK in margin investment. There was no receipt regarding my girlfriend's investment in margin.

13. The applicant's girlfriend did not give evidence before the adjudicating officer. No other witness was called by either side in relation to the charge in question. The adjudicating officer gave his judgment on 28 November 2000. He said his judgment was based on the agreed facts, agreed documentary exhibits (ie including the statement I mentioned above), evidence of the witness (relating to a separate charge which is irrelevant to these proceedings) and evidence of the applicant. He had also given due consideration to the defence submission. Of the evidence which he said he had taken into account, the adjudicating officer specifically pointed out that according to the evidence of the applicant, 'he had no idea of his girlfriend's margin investment despite she did pay him back a little bit when she won.' And in relation to the defence submission, the adjudicating officer noted specifically that the applicant obtained loans to save his cohabitee from financial trouble and it was the latter, ie Miss Lau who actually participated in the investment of margin trade.

14. The adjudicating officer concluded as follows:

> (iii) It can be seen that the defaulter's [i.e. the applicant] debts as at March 1999 was still manageable for his monthly repayment was $9,250-HK.
>
> (iv) However defaulter made no attempt to settle or reduce his debts; on the contrary, he continued to borrow loans which subsequently amounted to $512,795-HK towards the end of December 1999.
>
> (v) As at 31 December 1999, defaulter had to effect a monthly repayment of $30,155-HK for his outstanding debts with a monthly salary of $17,510-HK. That was obviously unmanageable by defaulter.
>
> (vi) Defaulter claimed part of his debts i.e. $140,000-HK was given to his girlfriend for her investment in margin trade.
>
> (vii) Defaulter showed continued interest in assisting his girlfriend's investment in margin trade by his willingness to obtain further loans to

help her and his having been repaid of about $10,000-HK in the interim. This indirect involvement is obvious.

(viii) The investment in margin trade is a form of recognised high risk business.

(ix) The causation of defaulter's indebtedness was therefore a reprehensible one.

(x) Despite there is no evidence showing defaulter had been indulged in gambling or overspending, his indebtedness has clearly reflected his being financially imprudent.

(xi) I agree that bankruptcy proceedings are neutral and designed to help debtors resolve their civil liability.

(xii) It is also an indisputable fact that through defaulter's act of excessive borrowing of loans which had subsequently resulted to his application for bankruptcy petition that the relevant creditors i.e. the financial companies and banks suffered certain losses.

(xiii) Although CSR [Civil Service Regulations] 458 stated that except those who handle public fund, civil servants need not necessary be suspended or disciplinary charged for insolvency or bankruptcy, CSR 455 stated serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer and, if occasioned by imprudence or other reprehensible cause, may form the basis of a discipline charge.

(xiv) It is the causation of the defaulter's indebtedness which is subject to disciplinary consideration and the application for bankruptcy petition will not automatically render defaulter liable for the present charge. …

(xv) Despite there is no evidence showing any preferences had been given by the creditors to defaulter's status of being a police officer when he applied for various loans, it is relevant to note that when defaulter applied for bankruptcy petition, members of the public who have high expectations to a professional and reputable Hong Kong Police certainly will not feel comfortable to realize its members had applied for bankruptcy through being financially imprudent.

(xvi) In view of the above evidence adduced before me during this disciplinary hearing, I am satisfied that defaulter, being financially imprudent between the year 1998 and 1999, had put himself in pecuniary embarrassment through obtaining loans to such an amount that his monthly official emolument became insufficient to service the repayment schedules, and that he applied for a bankruptcy petition; such conduct had fallen short of public expectations and lowered the reputation of Hong Kong Police.

15. On 11 December 2000, a Senior Police Officer confirmed the conviction against the applicant and awarded an 'Order to resign forthwith, without salary in lieu of notice' to the applicant. In a memo dated 7 March 2001 the Force Discipline Officer imposed an award of 'Order to resign immediately without salary in lieu of notification'. By a memo dated 20 July 2001, the Deputy Commissioner of Police dismissed the applicant's appeal. By another memo to the applicant dated 26 July 2001, the Commissioner of Police imposed an award of 'Order to resign

immediately without salary in lieu of notification'. On the same date, the applicant confirmed that he would not submit his resignation. So by another memo dated 26 July 2001, the Commissioner of Police dismissed the applicant with immediate effect.

Legal framework

16. Under s 30 of the Police Force Ordinance (Cap 232), every police officer shall obey all lawful orders of his superior officers whether given verbally or in writing and shall obey and conform to police regulations and orders made under the Ordinance. Under s 45(1) of the Ordinance, the Chief Executive in Council may make such regulations to prescribe or provide for, amongst other things, resignations, dismissals, discipline and punishments of police officers.

17. The Police (Discipline) Regulations, made pursuant to s 45(1) of the Ordinance, provides in reg 3 as follows:

(1) Any inspector or junior police officer who commits any disciplinary offence specified in paragraph (2), and —

(a) pleads guilty before an appropriate tribunal; or
(b) is found guilty by an appropriate tribunal,

may be punished by such tribunal in accordance with these regulations.

(2) The offences against discipline are —

(a) absence from duty without leave or good cause;
(b) sleeping on duty;
(c) conduct to the prejudice of good order and discipline;
(d) cowardice in the performance of duty;
(e) contravention of police regulations, or any police orders, whether written or verbal;
(f) insubordination;
(g) being unfit for duty through intoxication;
(h) neglect of duty or orders;
(i) malingering;
(j) making a statement which is false in a material particular in the course of his duty or in connection with the discharge by the police force of any of its duties or functions;
(k) unlawful or unnecessary exercise of authority resulting in loss or injury to any other person or to the Government;
(l) wilful destruction or negligent loss of or injury to Government property;
(m) conduct calculated to bring the public service into disrepute.

18. It is also relevant to note that Police General Order (PGO) 6-01(8) provides as follows:

A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer.

19. Furthermore Civil Service Regulations (CSR) 455 and 458 (at the material times) stated that:

455. Serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer and, if occasioned by imprudent or other reprehensible cause, may form the basis of a discipline charge

…

458. An officer who becomes insolvent or bankrupt, even though no proceedings have been taken against him is required at the earliest possible moment to submit a complete statement of the facts of his case to his Department, for transmission to the Civil Service Bureau. Even though the circumstances may not warrant the interdiction of the officer from duty, in no case may an officer who is bankrupt or insolvent continue to be employed on duties involving the handling of public money. Shroffs and other officers entrusted with the handling of public money are liable to disciplinary proceedings on disclosure of bankruptcy or insolvency.

Grounds for judicial review

20. On behalf of the applicant, three grounds are advanced in support of the present judicial review application. First, it is argued that the adjudicating officer's decision, finding the applicant guilty, was unreasonable, in that there was no or insufficient evidence for the adjudicating officer to conclude that the applicant's conduct was calculated to bring the public service into disrepute. Second, it is contended that the decision of the Senior Police Officer, the Force Discipline Officer and the Commissioner of Police to order the applicant to 'resign forthwith without salary in lieu of notice' and the decision of the Commissioner of Police to dismiss the applicant were unreasonable, because they were unduly oppressive, or were otherwise so disproportionate to the disciplinary offence as to be perverse. Third, it is also argued on behalf of the applicant that the decision of the Deputy Commissioner of Police dismissing the appeal of the applicant was procedurally improper in that it failed to meet his duty to provide adequate disclosure of material submitted to the Deputy Commissioner in connection with the appeal of the applicant.

21. I shall deal with these three arguments in turn.

Unreasonableness

22. Mr Pun, counsel for the applicant, argues that it is trite law that when the decision-maker has taken into account as a fact something that is

wrong or where he has misunderstood the facts upon which the decision depends, the decision may be impugned on the ground of *Wednesbury* unreasonableness. He also contends that it is trite law that if there is no evidence for a finding upon which a decision depends, or where the evidence taken as a whole, is not reasonably capable of supporting a finding of fact, the decision may be impugned on the ground of *Wednesbury* unreasonableness. Amongst other authorities, he relies on *de Smith, Woolf & Jowell's Principles of Judicial Review* (1999 Ed) pp 459-462 in support of his propositions of law.

23. Mr Pun argues that at the disciplinary hearing the applicant's unchallenged evidence was that he made clear to his girlfriend that she needed to repay the money to him when she had money; in fact, she did make some repayments when she made profits in margin trading. Further, Mr Pun argues that there was no evidence or insufficient evidence for the adjudicating officer to conclude that the applicant had an 'indirect involvement' in margin trading. Moreover, there was no evidence at all for the adjudicating officer to conclude that the public 'will not feel comfortable' to realize a member of the Police Force 'had applied for bankruptcy through being financially imprudent'. Furthermore, Mr Pun argues that there was no evidence for the adjudicating officer to conclude that the fact that the applicant had applied for a bankruptcy order 'had fallen short of public expectations and lowered the reputation of the Hong Kong Police.' Mr Pun contends that the conclusion of the adjudicating officer clearly contradicted his earlier finding that 'bankruptcy proceedings are neutral and designed to help debtors resolve their civil liability' and the provisions of CSR 458 referred to above. Mr Pun therefore concludes that there was insufficient evidence, if any at all, for the adjudicating officer to come to the conclusion that the applicant's conduct was calculated to bring the public service into disrepute.

24. This ground of attack mounted by the applicant involves the proper construction of this particular disciplinary offence under reg 3(2)(m) in the Police (Discipline) Regulations as well as its proper application, if any, in the present case.

25. In relation to the proper construction of the disciplinary offence, Mr Pun argues by reference to PGO 6-01(8) referred to above that according to the construction of the order placed by Stone J in *Ng Kam Chuen v Secretary for Justice* [1999] 2 HKC 291, in a charge based on the general order, the Police Force bears the ultimate legal burden of establishing both serious pecuniary embarrassment stemming from financial imprudence and consequential impairment of efficiency of the officer concerned, but that upon the demonstration of serious pecuniary embarrassment, the evidential burden shifts to the accused officer to establish that his efficiency as an officer has not been impaired.

A 26. In the present case it is common ground that there was no specific evidence that the applicant's efficiency as a police officer has been impaired by his financial predicament. Mr Pun therefore argues that had a disciplinary charge been laid against the applicant under PGO 6-01(8), the charge would have been bound to fail for want of impairment of
B efficiency of the applicant. Mr Pun therefore argues that the present charge against the applicant under reg 3(2)(m) was really an attempt by the Police to get round PGO 6-01(8) through the backdoor. Mr Pun argues that so far as financial imprudence or pecuniary or serious pecuniary embarrassment is concerned, in the absence of any impairment of the
C affected officer's efficiency as a police officer, the imprudence or the embarrassment cannot, as a matter of construction and common sense, amount to 'conduct calculated to bring the public service into disrepute' under reg 3(2)(m) of the Regulations.

27. Mr Pun also draws analogy with the two Civil Service Regulations referred to by me above, the combined effect of which is also said to be
D that in the absence of impairment of the officer's efficiency, there is no basis of a disciplinary charge. In fact, CSR 455 goes further and requires, apart from impairment of efficiency, that the serious pecuniary embarrassment faced by the officer to have been occasioned by 'imprudence or other reprehensible cause' in order to form the basis of a
E disciplinary charge.

28. But much of the force of Mr Pun's argument is now gone by reason of the latest judgment of the Court of Appeal in *Leung Fuk Wah Oil v Commissioner of Police* [2002] 3 HKC 1, which has this to say about PGO 6-01(8):

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> 84. Serious pecuniary embarrassment is proved, for example, by the police officer having unmanageable debts. Imprudence is proved by the circumstances in which these debts occurred. However, as serious pecuniary embarrassment is regarded as a circumstance impairing efficiency, it is not necessary to adduce further evidence on the
G impairment of efficiency.
>
> 85. No useful purpose is served by the arguments that notwithstanding the financial problems of the police officer, he still may be discharging his duties efficiently. There are other provisions in Regulation 3(2) which deal with the efficiency of a police officer eg absence from duty without leave or good cause; conduct to the prejudice of good order and
H discipline; and neglect of duty or orders. These are also disciplinary offences.
>
> 86. However, the Regulations have specifically provided for the contravention of PGO 6-01(8) to be a disciplinary offence, and one must turn to PGO 6-01(8) to ascertain its true meaning. In terms of the language used, this clearly is not a provision dealing with the general efficiency of a police
I officer. Rather it is concerned with a specific offence that arises by reason of the acute financial problems of the police officer.
>
> …

89. In *Ng Kam Chuen v Secretary for Justice* [1999] 2 HKC 291, the court construed PGO 6-01(8) as meaning a 'two-pillar' charge sounding both to financial prudence and the consequent impairment of efficiency. In so far as this means or is interpreted as meaning the prosecution is required to adduce evidence on both financial imprudence and impairment of efficiency, then we are unable to accede to this construction for the reasons we have indicated.

29. But in any event, in my judgment, the correct construction of reg 3(2)(m) ultimately turns on its own wording. It is a regulation made by the Chief Executive in Council. It is not made by the Commissioner of Police who is also responsible for the Police General Orders referred to above, nor is it made by the author of the Civil Service Regulations which apply generally to all civil servants. I accept, however, that to some extent and in a fairly general sense, the Police General Orders as well as the Civil Service Regulations may be regarded as part of the general background against which one must construe reg 3(2)(m) according to its ordinary and natural meaning.

30. In my judgment, there is nothing in the regulation which warrants the addition of a mandatory requirement of impairment of efficiency for the commission of the disciplinary offence. Efficiency is just one of the many things the public is entitled to expect from police officers. Besides efficiency, the public is entitled to expect police officers to possess the right qualities in terms of judgement, common sense, intelligence, self discipline, self restraint, sense of responsibility, sense of reasonableness and proportion, and so forth, or in short, the right general character or suitability to be a police officer. All this may be reflected by how a police officer manages or handles his own financial affairs. Financial imprudence displayed by a police officer that resulted in pecuniary embarrassment on his part may, depending on the facts, reflect badly on his general character or suitability as a police officer, and may lower his reputation as a police officer in the eyes of the public. The filing of bankruptcy proceedings against the police officer simply serves as a convenient piece of evidence of his serious pecuniary embarrassment.

31. Since the Police Force consists of its members, it is unrealistic to divorce the conduct of its individual members from the Force itself, or for that matter, the reputation of the members from that of the Force as a whole. In other words, any lowering of reputation of a police officer in the above-described situation may also lower the reputation of the Force as a whole in the eyes of the public. Furthermore, the public may think that the Force is composed of officers of such questionable character.

32. Thus analysed, I reject the applicant's argument that in the absence of impairment of efficiency, a disciplinary offence under the regulation can never be made out.

33. As I said, everything really depends on the facts. I am *not* laying down any general rule that financial imprudence resulting in pecuniary embarrassment like bankruptcy *must* in every case amount to conduct bringing the Police Force into disrepute. All I am trying to say is that such financial imprudence *may*, depending on the facts, and in some cases, reflect so badly on the police officer's character in question, that this may amount to conduct bringing the Police Force into disrepute. So for instance, if a police officer borrows heavily beyond his means to meet a family emergency or tragedy, such as a close relative falling ill and requiring huge medical expenses for his or her treatment, one would have thought that the borrowing is nonetheless imprudent in the sense that the loan borrowed is far beyond the means or repayment ability of the officer; yet arguably the financial imprudence may not in any real sense reflect badly on the general character and suitability of the officer as a police officer. In those circumstances, I would have thought that arguably (and I put it no higher than that) the heavy borrowing does not amount to conduct bringing disrepute to the Police Force.

34. I think I have laboured sufficiently on the proper construction of reg 3(2)(m). All I wish to add is that this is by no means meant to be an exhaustive construction of the regulation, which quite obviously applies to a variety of situations. But in so far as Mr Pun argues that in the absence of impairment of efficiency by the pecuniary embarrassment faced by an officer, there can never be an offence under reg 3(2)(m), I disagree with such a sweeping statement.

35. This being my conclusion, I have to move on to consider the facts of the present case. I do not think it can be seriously disputed that the applicant in the present case was financially imprudent. He borrowed money far beyond his means. Part of the money was used to support his own living, as well as the living of his unemployed girlfriend, and the respective families. Part of the borrowed money was undisputedly used to finance the girlfriend's margin trading activities.

36. Further, one must bear in mind that although the money was lent to the girlfriend, given that the girlfriend had been (and still was) unemployed for a long period of time and had no independent means of her own, any hope or requirement of repayment by the girlfriend of the loans could only materialise if the girlfriend earned money from her speculation activities. But then, almost by definition, the activities were highly speculative and risky in nature, with or without the intervention of the suspected deception practised by Miss Wong on the girlfriend. In those circumstances, I am quite clearly of the view that the applicant was financially imprudent in lending repeatedly to his girlfriend to finance her margin trading speculation activities, the chance of repayment of which was directly dependent on the success or otherwise of such activities. Given the pre-existing financial condition of the applicant, the lending of

money to the girlfriend in those circumstances exposed the applicant to grave financial risks and resulted in his eventual serious pecuniary embarrassment as evidenced by his bankruptcy proceedings.

37. This being the case, can it be said that the adjudicating officer went wrong in convicting the applicant of the charge under reg 3(2)(m) by concluding that his financial imprudence and resulting pecuniary embarrassment as evidenced by his bankruptcy amounted to conduct calculated to bring the Police Force into disrepute?

38. In other words, did the financial imprudence displayed by the applicant in the present case lead one to doubt his general character and suitability as a police officer, so that, if the answer is yes, his being a member of the Police Force would lower the esteem of the Police Force as a whole in the eyes of the public?

39. Given the circumstances of this case, I am of the view that there was indeed material to enable the adjudicating officer to come to an affirmative conclusion, as he no doubt did. It must be remembered that in these proceedings, the court only plays a supervisory rather than an appellate role over the decision of the tribunal below. The fact that on the material the court may have preferred to reach another conclusion if it had been sitting as the fact-finding tribunal instead of the one reached by the tribunal below, is insufficient to ground an order interfering with the decision below. It is only when the decision reached by the tribunal below is one which no reasonable tribunal based on the material in question would have reached, that the court should consider exercising its discretion to interfere with the decision reached below.

40. In the present case, given the circumstances leading to the financial predicament of the applicant, I am of the view that they did constitute material based on which the adjudicating officer could reach the conclusion that he had reached, ie that the applicant's financial imprudence resulting in his pecuniary embarrassment amounted to 'conduct falling short of public expectations and lowering the reputation of the Hong Kong Police Force', or in other words, conduct calculated to bring the Police Force into disrepute.

41. During submission, much time was spent on whether the adjudicating officer was wrong in saying that the applicant had an 'indirect' involvement in the margin trading activities, which was said by the adjudicating officer to be 'obvious'. I have already extracted above the relevant paragraphs in the conclusion of the adjudicating officer, in particular paras (vi) to (ix). In my judgment, on a fair reading of those paragraphs both by themselves and in conjunction with the other paragraphs extracted above, all that the adjudicating officer was saying was that the applicant was indirectly involved in his girlfriend's margin trading activities as a financier. He was not saying that he took a personal interest in the trading activities beyond the extent that repayment of the

money he had lent to the girlfriend would obviously depend on the result of those trading activities. In other words, he was not finding that the applicant had any personal share in the margin trading activities. The applicant was just a creditor or financier of the girlfriend and her trading activities. I find nothing wrong with this finding when properly understood in this light.

42. Furthermore, I find nothing wrong with the adjudicating officer's consequential conclusion that 'the causation of defaulter's indebtedness was therefore a reprehensible one'. In using the word 'reprehensible', the adjudicating officer was obviously affected by the wording of CSR 455. In my judgment, first, on a proper construction of CSR 455 which refers to serious pecuniary embarrassment being 'occasioned by imprudence or other reprehensible cause', financial imprudence is quite obviously treated as a reprehensible cause but not *the only* possible reprehensible cause. In other words, the adjudicating officer was not wrong in describing the cause of the applicant's indebtedness as being a reprehensible one in the sense that it was due to financial imprudence in the circumstances of this case that the applicant was in serious pecuniary difficulty as he no doubt was.

43. Secondly, and in any event, even without regard to CSR 455, I am of the view that it was not a misnomer for the adjudicating officer to describe the financial imprudence on the facts of this case as proved before him as being reprehensible in nature. Repeated lending of money to another, even a closely related person or family member, to an extent that was grossly beyond one's means, so as to enable the other to engage in highly risky and speculative margin trading activities when the borrower's only means of repayment was her highly questionable chance of earning money from her trading activities, is in my judgment reprehensible in nature. Put at the lowest, I am not prepared to disturb the adjudicating officer's finding in this regard, bearing in mind the nature of judicial review proceedings.

44. In my judgment, describing the financial imprudence on the part of the applicant which resulted in his pecuniary embarrassment as reprehensible is just another way of saying that the applicant's conduct calls into question his general character and suitability as a police officer. As he is a member of the Police Force, the Police Force as a whole is affected adversely by his conduct. In other words, the reputation of the Police Force is affected and a charge under reg 3(2)(m) may be established.

45. Finally, it must be emphasised that the charge relates to conduct 'calculated to' bring the Police Force into disrepute. The phrase only means 'likely to'. On the material before the adjudicating officer, he was entitled to come to his conclusion. I see no justification for disturbing his conclusion on the *Wednesbury* reasonableness ground.

Proportionality

46. Mr Pun argues that it is a cardinal principle that official decisions may be held unreasonable when they are unduly oppressive because they subject the offender to an excessive hardship or an unnecessarily onerous infringement of his interest. The complaint under the present head is essentially an abuse of power in the sense of an excessive use of power. Mr Pun contends that an excessive administrative penalty can be attacked on the ground that it was so disproportionate to the offence as to be perverse. He relies on *de Smith* at p 488, which says:

> The focus of attention in these cases will be principally the impact of the decision upon the affected person. The outcome or end-product of the decision-making process will thus be assessed, rather than the way the decision was reached.

47. Mr Pun also relies on *R v Barnsley Metropolitan Council, ex p Hook* [1976] 1 WLR 1052; *R v Admiralty Board of the Defence Council, ex p Coupland* [1996] COD 147; and *R (on the application of Alconbury Development Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929, in support of his legal contention.

48. Mr Pun argues that the decision to order the applicant to resign is oppressive and out of proportion because the applicant had a clear disciplinary record, the money borrowed by him was just intended to help his cohabitee out of her financial difficulties and was not incurred as a result of any gambling activities, the applicant did not participate one way or another in the margin trading, all the money was borrowed from lawful recognised banks or financial institutions, the assessment of the applicant by his superior in the Police Force were 'good' and 'very good', the applicant's debt did not impair his efficiency as a police officer, the applicant voluntarily disclosed his indebtedness to the Force, the applicant was in fact advised to file bankruptcy proceedings and that those proceedings are regarded by the Force as neutral in nature, the dismissal affected the reputation of the applicant and affected his chance of finding jobs in the future, only $140,000 of debt was referable to the girlfriend's margin trading activities, and generally the punishment was too severe. On this last point, Mr Pun points out that one of the police officers involved in the sentencing process actually recommended a suspension of the award of 'Order to Resign' for 12 months because he believed that the applicant's predicament was chiefly due to his stupidity, immaturity and poor judgement, and that the applicant had learned a lesson in a bitter way (see below).

49. In my judgment, it is not really essential to determine whether the doctrine of proportionality exists as an independent ground under English and Hong Kong law on judicial review or should be subsumed under the traditional headings.

A 50. In either case, the same judicial restraint must be exercised. As I said, the court essentially plays a supervisory role over the decision of the tribunal below. It does not exercise an appellate role as such. This is true in relation to a decision on liability as well as a decision on punishment or sentencing. Unless the sentence or punishment is so out of proportion to
B the offence in question, as to be perverse or unduly oppressive, I see no ground for intervention.

51. In the present case, almost by definition, the offence is a serious one, ie commission of conduct likely to bring the Police Force into disrepute. Depending on the circumstances, one of the most obvious ways
C to remedy the situation is to remove the offender from the Police Force.

52. In the circumstances of the present case, although it could be reasonably argued that the punishment meted out to the applicant, ie immediate resignation without compensation or payment, was extremely severe and even on the high side, bearing in mind the various levels and
D forms of punishment open to the Commissioner to impose as set out in the Schedule to the Police (Discipline) Regulations, I do not take the view that the eventual award made was one so disproportionate to the offence in question as to be perverse, or put another way, was so unduly oppressive as to be unreasonable. I do not consider the award as 'altogether excessive and out of proportion to the occasion' (per Lord
E Denning MR in *R v Barnsley Metropolitan Council, ex p Hook* at 1057H). I have borne in mind the various factors urged upon me by Mr Pun during submission which have been summarised by me above. As I said, if I were sitting as the first instance tribunal, I might have inclined to come to a less severe or more lenient sentence. But that is neither here nor there. I do not
F consider that the sentence reached below can be interfered with. I therefore reject this ground of judicial review as well.

Procedural impropriety

G 53. I now turn to deal with the third and last ground of challenge. The applicant argues that the decision of the Deputy Commissioner of Police dismissing the appeal of the applicant was procedurally improper in that the Deputy Commissioner failed to meet his duty to provide adequate disclosure.

54. It is not in dispute that the Deputy Commissioner of Police has
H seen 21 pages of documents, which were not disclosed to the applicant at the material times. It is said that those documents were intended to influence the Deputy Commissioner and they, with one exception, advocated for a particular result, namely, the dismissal of the appeal of the applicant.

I 55. It is, therefore, argued that the Deputy Commissioner has failed to perform his duty to afford adequate disclosure to the applicant and the applicant was not given a reasonable opportunity to be heard.

56. A similar ground of appeal was relied on by the applicant in *Leung Fuk Wah Oil, supra*. The Court of Appeal held that given the nature of the documents involved in that case, they should be disclosed to the applicant there so that he could make a meaningful presentation in the appeal petition. It was argued on behalf of the Commissioner that the documents did not contain new material. However, the Court of Appeal observed that until the material was disclosed, the applicant would not know if it contained new or adverse matters. In the view of the Court of Appeal, the disclosure should not depend on the views of an individual on the nature and contents of the documents, but rather as a matter of procedural requirement. The applicant, as the appellant in the appeal, should have the last word. In those circumstances, the Court of Appeal concluded that the material in question had to be disclosed as a matter of fairness.

57. Up to that point, the latest Court of Appeal decision did not, so far as local jurisprudence is concerned, break any new ground. In a not dissimilar situation, another division of the Court of Appeal in *Chan Tak Shing v Chief Executive of the HKSAR* [1999] 2 HKLRD 389, a case concerning a decision by the Chief Executive requiring a police officer to retire from the public service pursuant to s 12 of Executive Order No 1 of 1997, quashed the decision of the Chief Executive on the ground that certain material placed before the Chief Executive for his consideration in relation to his decision was not disclosed to the police officer, thereby depriving him of an opportunity to reply to the material, and therefore his last word in the matter. In that case, the Court of Appeal observed that the fact that the material contained no new ground of complaint against the officer and no new facts made no difference, nor did the fact that the officer knew perfectly well what was the case made against him. The Court of Appeal followed what Lord Denning had said in the Privy Council case of *Kanda v Government of Malaya* [1962] AC 322, 337, which was as follows:

> The Court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough.

See pp 392H-393G (per Godfrey JA) and p 395F-G (per Mortimer VP).

58. But the Court of Appeal in *Leung Fuk Wah Oil* did not stop at its conclusion that the material presented before the Deputy Commissioner ought to have been disclosed to the applicant as a matter of fairness. The Court of Appeal went on to consider whether the non-disclosure vitiated the decision of the Commissioner and required it to be quashed. In that regard the Court of Appeal emphasized that the applicant was seeking a discretionary remedy by way of judicial review and in considering whether to exercise the discretion of the court, the court could and should take into account whether the breach of the principle of fairness did not produce a substantial prejudice to the applicant. Adopting that approach,

the Court of Appeal proceeded to examine the material that was not disclosed in that case and concluded that whatever new matters that might have been contained in the undisclosed documents, they 'would not have made the slightest difference to [the applicant's] petition to the Commissioner' (at p 27 para 75) [see [2002] 3 HKC 1 at 16F]. In those circumstances, notwithstanding the breach of the rules of natural justice, the Court of Appeal, in the exercise of its discretion, refused to grant the relief sought by the applicant in that case, and allowed the decision of the Deputy Commissioner of Police in that case to stand.

59. In my judgment, the position is as follows. Faced with a complaint based on non-disclosure of documents or material, the court's task in a judicial review is, first, to determine whether as a matter of fairness and natural justice, the documents or material ought to have been disclosed to the applicant by the decision-making body so as to afford the applicant an opportunity to respond to the documents or material. At this first stage, it is not necessary for the applicant to establish prejudice as a ground of judicial review: *Boddington v British Transport Police* [1999] 2 AC 143, 174D-E (cited with approval in *Leung Fuk Wah Oil* at p 16 para 40) [*supra* at p 11F].

60. Secondly, if the court comes up with an affirmative answer to the first question, it should proceed to the second stage of the matter by considering whether to exercise its discretion to quash the decision of the decision-making body below or grant some other appropriate relief, if any. At this second stage, the fact that there has been (*ex hypothesi*) a breach of procedural fairness is, of course, by itself a relevant and indeed a weighty consideration to be taken into account. However, at this second stage, the absence of prejudice, if such is the case, is also a relevant factor to be taken into account: *Boddington (supra)*; and *Leung Fuk Wah Oil*. In fact, as is demonstrated by the actual decision in *Leung Fuk Wah Oil*, if the non-disclosure did not produce a substantial prejudice to the applicant whatsoever, it would seem that the discretion of the court would most likely, if not inevitably, be exercised against the grant of any relief: See p 27 para 76 of the judgment [p 16G of the report], where the Court of Appeal observed that:

> Judicial review being a discretionary remedy, if Mr Leung does not, as a matter of substance, suffer prejudice, then the failure to observe the principle of fairness should not be a ground for quashing the decision.

61. I am not sure in a case where there was demonstrably no substantive prejudice caused to the applicant by the non-disclosure, whether the court *must* always exercise the discretion against the grant of any remedy, regardless of the seriousness of the breach of the rules of natural justice or any other circumstances that may have existed in the case. Of course, in *Leung Fuk Wah Oil* itself, there were no such other circumstances and the breach of the rules of natural justice in that case by itself was not

sufficiently weighty to counteract the fact that there was no substantive prejudice caused to the applicant. A

62. However and in any event, a distinction should be drawn between the *total absence* of substantive prejudice on the one hand and the presence of a *risk* of prejudice on the other. As mentioned above, in the earlier Court of Appeal decision in *Chan Tak Shing*, the Court of Appeal adopting what the Privy Council had said in *Kanda* held that the court would not inquire whether the material not disclosed did work to the applicant's prejudice; it was sufficient that it 'might do so'; the court would not go into the likelihood of prejudice; and the 'risk' of it was enough. *Leung Fuk Wah Oil* is a case where it can be demonstrated to the satisfaction of the court that no prejudice whatsoever was done to the applicant by the non-disclosure. In my judgment, if that can be done, then most likely (if not as a matter of certainty), the court would refuse to grant the discretionary remedy. However, if that cannot be done so that there is a 'risk' of prejudice having been done to an applicant by the non-disclosure, this would seem to be an important factor in favour of the court's exercising its discretion to quash the decision in question, particularly if one bears in mind that *ex hypothesi*, there was a breach of the rules of natural justice which, as I said above, is by itself a weighty consideration to be taken into account in the first place. B C D

63. What perhaps is new in the latest Court of Appeal decision is that despite what was said in *Chan Tak Shing* and *Kanda*, it demonstrates the court's willingness, at least in an appropriate case, to 'inquire whether the evidence or representations [not disclosed] did work to [an applicant's] prejudice.' *Leung Fuk Wah Oil* was such a case in which the Court of Appeal undertook the task of inquiring whether the non-disclosure did actually work to the applicant's prejudice or not. E F

64. One final observation is this: Given the above analysis, cases where there has been established a breach of the rules of natural justice, and yet the court refuses as a matter of discretion to grant any relief must be 'rare'. In this regard, I cannot improve on what has been written by Bingham LJ (as he then was) in an article entitled '*Should Public Law Remedies be Discretionary?*' published in [1991] Public Law 64, 72-73 as follows: G

> (6) *Inevitability of outcome* H
>
> Judges of the highest distinction have held that an applicant who has been unlawfully and unfairly denied a right to be heard may be denied relief if the outcome would have been no different if he had been heard. Sir William Wade has referred to 'the dubious doctrine that a hearing would make no difference,' and in a recent case [*R v Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990] IRLR 344] I gave six reasons for expecting (by which I really meant hoping) that such cases would be of great rarity. Since the case has not been widely reported, perhaps I may repeat them here: I

A (i) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could or would have put if he had had the chance.

(ii) As memorably pointed out by Megarry J. in *John v. Rees*, experience shows that that which is confidently expected is by no means always that which happens.

B (iii) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.

(iv) In considering whether the complainant's representations would have
C made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

(v) This is a field in which appearances are generally thought to matter.

D (vi) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.

See also *Wade, Administrative Law* (8th Ed) pp 501-504; *de Smith, op cit*, at pp 386-391.

E 65. Turning to the facts in the present case, the material not disclosed to the applicant was very similar in nature to that not disclosed to the applicant in *Leung Fuk Wah Oil*. It consisted of documents comprising the so-called 'defaulter report' of the applicant. I have no difficulty in concluding that as a matter of fairness, the material ought to have been disclosed to the applicant.

F 66. I, therefore, reach the second stage of the matter as was described by me above, namely, whether as a matter of exercise of discretion, I should grant any relief in favour of the applicant on the ground of non-disclosure. As I said, the breach of the rules of natural justice by itself is a relevant consideration which I do take into account and attach due weight
G to.

67. Did the non-disclosure produce any substantive prejudice to the applicant? Mr Kwok submits that no prejudice was produced and Mr Pun submits otherwise. The arguments centre on three undisclosed memos, one of which was entitled 'Written Appeal Against Conviction and
H Award'. This memo which was undated and unsigned, and was apparently generated by the Discipline Section of the Police Force, was a detailed and apparently convincing refutation point by point of the matters raised in the applicant's written petition for appeal to the Deputy Commissioner. It is not suggested that the memo referred to new evidence or raised new
I matter. However, Mr Pun argues that had this memo been disclosed to the applicant at the material time, the applicant would have replied to the points raised in the memo against him. In particular, Mr Pun takes issue

with the argument raised in the memo relating to the 'reckless participation in margin trading' of the applicant and that it 'resulted in appellant's bankruptcy'. Mr Pun argues that on the facts only a sum of $140,000 out of the total indebtedness was attributable to the applicant's loans to his cohabitee in relation to the latter's margin trading activities. Mr Pun also repeats his earlier point that by doing so, the applicant was not participating recklessly or otherwise in any margin trading activities himself. Mr Pun also draws my attention to the reference in the memo to 'the normal tariff for cases of similar offences' when its author commented on the sentence imposed on the applicant which was being appealed against. Mr Pun points out that this was the first time the existence of any tariff was mentioned in the disciplinary proceedings which was not known to the applicant at all. By failing to disclose this memo to the applicant, the applicant was deprived of the opportunity of finding out what the tariff was, challenging the reasonableness and appropriateness of the tariff in general, fitting his case into the established tariff, if any, or making an exception of his case to the established tariff, as the case may be.

68. As to the second memo, it was prepared by a senior inspector in the Discipline Section of the Police Force. Interestingly, this memo contained a paragraph in which the author actually set out mitigating factors for the Deputy Commissioner's consideration in favour of the applicant as follows:

> As to the level of awards, … I agree that an 'Order to Resign' for Charge (B) is the appropriate starting reference in light of all the circumstances of the charge. However, I believe some leniency might be given to the defaulter. Whilst there is no dispute that the defaulter was imprudent in financial affairs, I tend to believe his predicament was chiefly led by his stupidity, immaturity and poor judgement when he chose to please his girlfriend by offering financial support to the speculative investment and raising excessive loans. I believe the defaulter has learnt a lesson in a bitter way. I also note that the defaulter had no movement record of visits to Macau within one year prior to his bankruptcy. The management may consider giving such a young officer one last chance to make amends, given his generally satisfactory service record and the absence of evidence to prove other reprehensible causes of the indebtedness. I recommend the FDO to suspend the award of 'Order to Resign' for 12 months.

69. Mr Pun argues that had this memo been disclosed to the applicant at the material time, the applicant could rely on the sympathetic stance taken by the author of the memo to advance or buttress up his case on sentence. He could, for instance, provide further material and evidence to back up the author's view that his action or predicament was 'chiefly led by his stupidity, immaturity and poor judgement', which if not substantiated by further material and evidence from the applicant would remain as it did the mere subjective conjecture or speculation of the author of the memo

in question. At the very least, so Mr Pun argues, his client could have placed emphasis on this sympathetic view expressed by a senior inspector working in the Discipline Section of the Police Force and experienced in this sort of matter. This could also provide ammunition for challenging the so-called normal tariff in this type of cases. And after all, as observed in *Wade* at p 503:

> But in the case of a discretionary administrative decision, such as the dismissal of a teacher or the expulsion of a student, hearing his case will often soften the heart of the authority and alter their decision, even though it is clear from the outset that punitive action would be justified. This is the essence of good and considerate administration, and the law should take care to preserve it.

70. If the sympathetic stance taken by the author of this second memo towards the applicant's case were made known to him, it would have provided him with extra ammunition before the Commissioner in presenting his case on mitigation and his chance of softening the heart of the authority and altering their decision might, albeit marginally, be improved.

71. Finally, Mr Pun also refers to a third memo written by the Force Discipline Officer in which he alleged that 'the majority of the loans were allegedly made to support his girlfriend in margin trading' which as Mr Pun correctly points out was factually incorrect, because as I said, only a sum of $140,000 out of the total indebtedness was in relation to the cohabitee's margin trading activities.

72. Bearing all this in mind and looking at the contents of all the undisclosed documents, I am not convinced that had the material been disclosed properly to the applicant at the material time, the outcome of his appeal, in particular his appeal against sentence, would certainly have been the same. Unlike the Court of Appeal in *Leung Fuk Wah Oil*, I am unable to conclude that the disclosure of the documents in question to the applicant 'would not have made the slightest difference to his petition to the Commissioner'. In other words, I am of the view that there was a 'risk' of the undisclosed documents having worked to the applicant's prejudice. That, according to the earlier Court of Appeal decision in *Chan Tak Shing* following the Privy Council decision in *Kanda*, is by itself sufficient; but in any event, I would go one step further and express my agreement with Mr Pun's argument that has been summarised above and conclude that there was indeed actual prejudice to the applicant by the non-disclosure of the relevant memos.

73. Bearing in mind all these relevant considerations, in the exercise of my discretion, I am of the view that relief should be granted to the applicant in respect of the decision of the Deputy Commissioner. In other words, I order that the decision of the Deputy Commissioner contained in a memo dated 20 July 2001 dismissing the applicant's appeal in which

decision-making process the non-disclosure occurred be quashed. It must follow that the subsequent decision of the Commissioner of Police imposing an order of 'Order to Resign immediately without salary in lieu of notification' and his other decision dated 26 July 2001 dismissing the applicant with immediate effect upon the applicant's failure to obey his earlier order must also be quashed. The net effect of my decision is that the applicant's appeal against his conviction and sentence is still outstanding, and the matter should be proceeded with accordingly.

Costs

74. The upshot of all this is that the applicant is successful in this application for judicial review to a limited extent.

75. So far as costs are concerned, the applicant succeeds on one ground but fails on two other grounds. The hearing took two days with a long adjournment in between due to the fact that the third challenge of the applicant could not be heard until after the decision of the Court of Appeal in *Leung Fuk Wah Oil* was known. Approximately the same amounts of time were expended on arguments relating to the first and second grounds of challenge and the third ground of challenge respectively. In my judgment, roughly speaking, the same should also be true in terms of the time and effort that must have been expended by the parties in preparation for the first two grounds of challenge and the last ground of challenge respectively in these proceedings for judicial review.

76. Given the result, in my judgment, the fairest order is that each side should bear its own costs of this judicial review, and I so order. I also make an order that the applicant's own costs be taxed in accordance with the Legal Aid Regulations.

Reported by PY Lo