ACCESS TO JUSTICE

Review of Recent Court of Final Appeal Judgments Affecting Professional Advisers and Others

The Law Society has reviewed recent Court of Final Appeal judgments quashing the criminal convictions of professional advisers namely:

1. *Vivien Fan and Others and HKSAR* FACC No 6, 7, 10, 11 and 12 of 2010 (Criminal) ("Shanghai Land case")

2. *Andrew Lam and HKSAR* FACC 5 of 2009 (Criminal) ("Semtech case")

3. *Winnie Lo and HKSAR* FACC 2 of 2011 (Criminal) ("Winnie Lo case")

The Law Society notes the following areas of concern in relation to the criminal prosecution of solicitors involved:

I. Judiciary

The Court of Final Appeal (CFA) criticised judgments of the District Court and the Court of Appeal in all three cases.

1. Shanghai Land case

- All appellants granted leave to appeal under the "substantial and grave injustice" limb, to pursue various arguments against the convictions.

- Court must provide a fair trial to the accused

- Wrong application of the co-conspirators rule by HHJ Mackintosh (as he was then)

- The "proviso" should not have been applied by the CA

- Charge of conspiring to make false representations

    - Citation of Mr. Justice Ribeiro PJ's comments in ***HKSAR v Kevin Egan***

      "*In the absence of actual knowledge, a solicitor (or barrister) is bound to adopt an agnostic approach towards the client's instructions in carrying out his professional duties since it is not his business to judge their truth or falsity. The solicitor or barrister may privately harbour distinct feelings of scepticism about his client's story but that is wholly besides the point. Professionally, he is required to abstain from forming any belief one way or the other on the topic. For a court to attribute guilty knowledge or belief and criminal liability to the legal adviser in such circumstances would gravely endanger the fundamental right to legal advice and representation."*[1]

    - *The duty of lawyers and other professional persons is to serve their clients' legitimate interests and do so within the bounds of law and professional ethnics. Sometimes a court is invited to find it proved beyond reasonable doubt that a lawyer or other professional person has strayed from that duty and into criminal conduct in league with his or her client. If such a finding is to be made, the evidence in proof of it must be very plain indeed. Such evidence must be seen after strict scrutiny to admit of no other reasonable conclusion. The evidence in the present case is nothing of that kind. Indeed, it points more to Ms Fan and Mr. Lai being deceived than to either of them being the deceiver*"[2]

- The defendants were deprived of a fair trial on the charge of conspiracy.

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[1] FACC No 6,7,8,10,11 &12 of 2010 para. 101

[2] Supra para 102

- The CFA noted in the final paragraph of its decision that "… *justice demands that this be said. There were raised on behalf of each defendant/appellant points other than those on which it has been necessary for the Court to act. It is not to be assumed that those points were without substance …*" [3]

The District Court Judge was the late HHJ Mackintosh (as he was then)
Court of Appeal: Stock VP, Hartmann JA and Wright J.

2. Semtech case

The CFA was very critical of the standards of the lower courts in the *SemTech* case.

- District Court Judgment
  - Criticised the "soundness of the Judge's treatment of the 'evidence'"
  - His approach to assessing credibility
  - Unorthodox incorporation of the defence submissions of no case to answer into his ultimate findings of fact
  - Shifted the burden from the prosecution to prove guilt to the defendant to prove his innocence

- Majority decision in the Court of Appeal
  - Unsound analysis

The District Court Judge was HHJ Fung CDJ (as he was then)
Court of Appeal: Hon. Ma CJHC (as he was then), Tang VP, and Wright J.

3. Winnie Lo case

The CFA criticised the lower courts and the prosecution.

Ribeiro PJ made the following observations:

  - The finding that Lo knew of and connived with Cheung was unsustainable

[3] Supra para 113

- The inferences drawn by the Judge and upheld by the Court of Appeal were founded in part on irrelevant materials and in part on matters that ought to have been regarded as exculpatory but were unjustifiably treated as incriminating
- The prosecution's reliance on the 4 May 2005 meeting failed properly to take account of the context of what was said
- The inference that Lo knew and wished to assist Cheung's champertous scheme was against the inherent probabilities
- The suggestion that the means of assisting Cheung involved a contrived legal opinion is irreconcilable with acceptance that there was nothing improper about counsel's involvement
- Counsel's reasoning showing how the $871,531.54 figure was arrived at is transparently accessible and belies the suggestion that it was improperly manipulated
- Inferences consistent with Lo's innocence can cogently be postulated
- The prosecution fell far short of demonstrating that the inference that Lo knowingly abetted Cheung's champerty is the only reasonable inference to be drawn. [4]

The District Court Judge was Deputy District Court Judge Albert Wong
Court of Appeal: Yeung and Yuen JJAs and Barnes J.

Recommendation 1

1. **These three cases raise issues of concern as to the provision of a level playing field for defendants in complex cases and the quality of justice in the criminal courts.**

2. **The Law Society should continue to recommend widening the current pool of applicants for appointment as a Judicial Officer and the taking of measures to improve resources and assistance to judges by increasing funding and expanding the available training for Judicial Officers.**

[4] FACC 2 of 2011 Section F – see pages 48-72

II. Department of Justice (DOJ)

The Law Society reviewed the following issues of concern arising from the Shanghai Land case

1. Choice of charges and accused

It is noted that certain officials at BOCHK in 2002 were aware Chau Ching Ngai ("Chau") intended to by-pass the connected transaction rules in the Listing Rules of The Stock Exchange of Hong Kong Limited by transferring properties to "men of straw"; there was clear evidence such BOCHK officials had such knowledge and were involved in the arrangements. This went to the heart of a scheme potentially to facilitate application of Shanghai Land's funds to repayment of the bank, through the acquisition of particular properties, by-passing the connected transaction rules in the Listing Rules of The Stock Exchange of Hong Kong Limited and funnelling payments to repayment of the bank loan. This appears to have been a fundamental part of certain bank officials' dealings with the borrower for the takeover, and while relevant to charges laid, constituted a separate, clear conspiracy in respect of which a charge was not laid. Documents in the unused evidence showed that Simon Lai had been excluded from these arrangements.

Why the DOJ failed to bring fraud and conspiracy charges against relevant individuals, including certain officials of BOCHK at the time, in respect of these particular arrangements, as the documents held by the prosecution clearly indicate they participated in the arrangements described above, is unclear.

2. Delay in bringing charges?

The DOJ completed its initial interview of witnesses in the Shanghai Land case by 2003 but did not proceed with the prosecution until 2006.

Whilst it might be argued that the delay was not excessive in light of the following factors:

- the volume of documents

- The defendants have a right to apply for a stay of proceeding because of delay but no application was made

there seems no justification for the delay and for the resulting prejudices to the defendants.

It is noted the trial judge acknowledged there had been a "long delay ….. before coming to trial" and reduced the sentences of both Vivien Fan and Simon Lai by 3 months.

Recommendation 2

The matters of choice of charges and delay should be raised with the Secretary for Justice (SJ) and DOJ by raising the following:

(a) Why were certain BOCHK officials involved in the arrangements referred to above allowed to return to the Mainland?

(b) Why did the DOJ wait 3 years, until late 2006, to prosecute given that investigations had been substantially completed in 2003?

(c) Why were charges not laid over the arrangements for holdings of properties by *men of straw* and funneling of the proceeds of any sale to repayment of the bank, with a view to circumventing the connected transaction rules and thereby defrauding regulators and shareholders, in which certain BOCHK officials in 2002 were involved (such charges naming such BOCHK personnel as co-conspirators if they were no longer in the jurisdiction)?

3. Use of 'immunised witnesses': implementation of the DOJ's prosecution policy

The DOJ's decision to use Angela Gong, who was charged as a co-conspirator , is questionable given her previous criminal record and Kevin Egan's letter to the Director of Public Prosecutions indicating Angela Gong would "……..*plead to the Holocaust in her present state of mind*".[5]

[5] Letter from Angela Gong's counsel to the DPP dated 18 May 2007

In addition, paragraph 19.4 of the DOJ's Prosecution Policy clearly states that in general a prospective immunised witness will only be given immunity from prosecution if the evidence the accomplice can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources, and the accomplice can be regarded "*as significantly less culpable than the accused*". In reality, Angela Gong could not be said to be less culpable than the other defendants to relevant charges were alleged to be (and indeed, such was the judge's conclusion).

The DOJ's actual practice lacks transparency and is contrary to the stated prosecution policy.

Issues regarding actual implementation of the DOJ's prosecution policy (which includes policies such as that on immunised witnesses designed to enhance the prospect of a fair trial) raise the question of how committed the DOJ is to fairness, as opposed to maximising chances of conviction.

The former SJ was aware of the Law Society's concerns but noted all three cases had proceeded up to the CFA. He noted the DOJ often seeks outside counsel's opinion on sensitive cases.

However, while each of the Shanghai Land, Semtech and Winnie Lo cases did proceed all the way to the CFA, in each case the trial at first instance in the District Court was unfair and all convictions were quashed. Those cases have been examined closely because each concerned lawyers but the issues raised are important with respect to the quality of justice applied to all defendants.

Recommendation 3

Representatives from the Working Party should meet with the SJ and DPP to raise issues of concern on implementation of the DOJ's prosecution policy.

4. Policy in relation to "unused evidence"

The DOJ's practice in relation to unused materials was reviewed.

In practice, when the prosecution decides not to put forward evidence which is material to the defence the onus is on defendants to try to find such material before the trial starts.

The prosecution has no duty to highlight information which is favourable to defendants, nor does it have to highlight anything in the unused materials.

Even when there is exculpatory material, the prosecution can always indicate it does not believe the contents of the documents and does not rely on it to prove its case.

The prosecution must highlight all points of law in a defendant's favour but not all points of fact. It can elect not to believe, or can contest the relevance of, the contents of documents.

In the Shanghai Land case the prosecution documents were voluminous. Yet amongst the very extensive amount of unused material (i.e. not included in those volumes) was evidence, previously not seen by Simon Lai, showing certain alleged co-conspirators and others had excluded Simon Lai from activity facilitating injection of specific properties into Shanghai Land, with a view to by-passing connected transaction rules (thereby reducing any risk of failing to inject such specific properties, i.e. seemingly a key execution point of any scheme) with documentation designed to funnel proceeds towards repayment of the bank loan.

It is acknowledged that it would be difficult to dissect the prosecution's case. Even if the defence team had reviewed all unused documents and the defence maintained its position that Simon Lai had been excluded from this "side agreement" and that this was relevant to the charges laid against him, the prosecution could still assert a view that the contents of the documents were untrue or irrelevant; therefore it is the defendant's responsibility to make use of the documents which have been provided.

In practice, is the defence obligated to go through all the unused material?

Yes, it appears the defence has a duty to do so. In a recent appeal, where a defendant's legal team failed to review the unused materials, the court found the defence lawyers had a duty to do so and found in favour of the defendant because of 'incompetent representation'.

However it is notable that while most of the defendants in the Shanghai Land case were relatively well resourced, a less well resourced defendant might be seriously prejudiced by effective "burial" of evidence potentially relevant to the defence which would only come to light if sufficient, quality resources were addressed to unused material.

***Guinness* judgment**

Should there be an independent review of unused materials?

The judgement in I.J.L. and Others v The United Kingdom before the European Court of Human Rights (ECHR) was considered.

This case involved an appeal by 3 defendants who were charged with criminal offences involving an unlawful share support operation by Guinness in its take-over of Distillers. One of the issues in the appeal was the existence of some material held by the prosecution prior to the trial which had not been previously disclosed to the defendants. The averment was the prosecution had deliberately withheld material of relevance to the defendants' defence and thus denied them a fair procedure.

The prosecution had withheld some material on the grounds of public interest immunity and legal professional privilege. The ECHR held there had been no violation of the defendant's rights under Article 6 of the Convention.

Recommendation 4

Notwithstanding that the jurisprudence in the ECHR on the issue may not yet support the point, the DOJ should consider whether its prosecution policy should be amended so that evidence which a reasonable person would consider might be relevant to a defence should be brought to the attention of the defence.

5. Prosecution's charge of "conspiracy" in Charges 1 and 2 and use of the co-conspirators rule; misapplication of the "proviso"

After the Court of Appeal quashed / upheld convictions, amongst other appeals, Simon Lai appealed both convictions under Charges 1 and 2 and Vivien Fan, her conviction under Charge 2.

Charges 1 and 2 in the Shanghai Land case, in essence, alleged a conspiracy to conceal a plan by Chau to inject specific assets. At the trial, the prosecution relied on the co-conspirators' rule. The CFA considered at length misapplication of that rule, and also misapplication of the proviso under s.83(1) Criminal Procedure Ordinance by the Court of Appeal, the Court of Appeal having identified errors in the application of the co-conspirators rule[6].

The CFA reviewed the Court of Appeal's reasons for upholding/quashing the convictions of Ms. Fan and Mr Lai. Bokhary PJ noted the following:

> *"[i]n conspiracy cases a clear distinction is to be made between the existence of a conspiracy and the participation of each of the alleged conspirators in it."*[7]
>
> The following was noted by the CFA on the misapplication of the co-conspirators rule in the trial at first instance:
>
> *"Essentials of the co-conspirators rule*
>
> *81: ...* the *co-conspirators rule operates as a rule whereby evidence of the acts and declarations of one or more conspirators in furtherance of a conspiracy may be adduced to prove the extent and degree of participation of another or others in the conspiracy and the nature and extent of the conspiracy. The foundation for the reception of such evidence must be independent evidence linking the defendant concerned to the conspiracy charged. This "foundation" evidence must of course be independent in the sense of being evidence other than the evidence which would be admissible only pursuant to the co-conspirators rule itself. It must be admissible against the defendant concerned. And it must amount to at least reasonable evidence.*

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[6] Donald Koo's remaining conviction on charge 5 was quashed on grounds that such conviction should not have stood after the quashing of his conviction on charge 2; the CFA additionally noting that "*.... it is neither necessary or appropriate to discuss ... other arguments in any detail. But it is only fair to Mr. Koo to indicate they appear to have force."*

[7] FACC No. 6,7,8,10,11 & 12 of 2010 para 47 citing Ahern v R (1988) 165 CLR 87

84: ... Evidence may be excluded even where it does come within the rule….A court's overriding duty to ensure a fair trial invests the court with a judicial discretion to exclude even admissible evidence if doing so is necessary in order to secure a fair trial. The discretion is a judicial one, and its proper exercise depends on a fair and coherent presentation of the basis on which the rule is being invoked.

87: Prosecution's arguments on the co-conspirators rule

i. *There was no denial of opportunity at the trial or before the Court of Appeal to challenge the admissibility of the exhibits used by the trial judge under the co-conspirators rule.*
ii. *At the early stages of the trial there had been detailed discussions between prosecuting and defence counsel of the co-conspirators rule…..*
iii. *All counsel were aware of the rule and its possible applicability to the exhibits.*
iv. *No defence counsel had sought clarification as to which documents the prosecution was seeking to rely upon under the rule….*
v. *The failure was of defence counsel's own making. Accordingly there was no error on the trial judge's part in failing to identify the documents to which the rule applied.*
vi. *There was therefore no material misdirection."*

CFA's criticism of the prosecution and the trial judge:

"89: ...justice was not served by the way in which the prosecution went about deploying the co-conspirators rule at the trial. It has become clear that what really happened was:

i. *The co-conspirators rule was mentioned by the prosecution in its opening at the trial.*

ii. *And the question of documents being admitted under the rule was discussed at various points in time during the evidence-taking stage of the trial.*

iii. *But the prosecution never pressed for, let alone obtained, a ruling in that regard during that stage.*

iv. *Then in its closing speech the prosecution pointed to many bundles containing hundreds of documents which had been, in the interests of efficiency, placed before the trial judge without dispute as to authenticity but expressly subject to the rule against hearsay and expressly without any admission as to whether or when they had been read by any defendant.*

v. Pointing to those bundles, the prosecution in effect invited the trial judge to proceed thus. Go through those bundles while considering his verdict. Rule quietly to himself on what in those bundles could be used under the co-conspirators rule….

… Which documents the trial judge used under the co-conspirators rule and how he used them are unknown…. the trial judge said… "*When I rely on evidence on this basis I shall on occasions so indicate but it may not be so recorded every time.*"

The CFA noted that "*Every one of the defendants stood trial on at least one conspiracy charge. And the course followed by the trial judge in regard to the co-conspirators rule deprived each and every one of them of a fair trial on conspiracy*."[8]

The CFA commented on the misapplication of the proviso in the Court of Appeal that:

"80: At this stage it is convenient to state the correct test when deciding whether to apply the proviso to affirm a conviction notwithstanding what had gone wrong at the trial. Quite simply, that test is this:

"*Would a reasonable and properly instructed or self-instructed tribunal of fact, acting on the evidence properly to be placed before or received by it, with nothing wrongly excluded or wrongly admitted, inevitably convict?**...The proviso applies where it is clear that the error was harmless because the conviction was inevitable***.** (Emphasis added)"

"*91: …. Since no one should be tried at all unless he or she can be tried fairly, it is to be doubted that the proviso can ever be used to affirm a conviction obtained at an unfair trial. If that can ever be done, it would require special circumstances of which there are none in the present case."*

and having commented on aspects of Angela Gong's evidence:

(108) "… That is not evidence upon which a person can be found to have entered into a conspiracy. It is for the trial judge and not a witness to draw the relevant inferences and they have to be the only reasonable inferences to draw … The existence of such fundamental doubts about the soundness of the prosecution's case provides another reason for concluding that this was not a case for the application of the proviso."

[8] Supra

Appendix 1: Shanghai Land Case Charges 1 and 2 - full text

Recommendation 5

In view of the CFA's criticism of the lower courts, we repeat our observations in Recommendation 1 above.

6. Expert Witness Statements

(a) Preparation of Statements by Expert Witnesses

It was noted the ICAC had prepared the first draft witness statements for the prosecution's expert witnesses.

Archbold Hong Kong states the following in relation to Expert Evidence:

> *Section 10-37*
> "Evidence from an expert is admissible even if he was not asked to make a witness statement as an expert and that *the first draft of its witness statement was prepared by an ICAC officer* (emphasis added), so long as his opinion was given in an independent and objective manner. It is for the trial judge to determine whether a witness should be permitted to give evidence as an expert and, if so, if that witness has not at the outset been informed of his duties as an expert witness to determine what weight is to attach to his testimony."

Concern was expressed over ICAC's practice of preparing the first draft of an expert witness' statement. In its judgment in the Shanghai Land case, the Court of Appeal stated:

> *"151. During the course of the trial, defence counsel made an application to exclude the evidence of all three witnesses in so far as the prosecution intended to rely on them as experts. This was not an application going to weight, it was an application going to admissibility.*
>
> *152. The first basis of the application was that, at the time their statements were made, none of the witnesses had been informed that they were being asked to make those statements as experts. They were not therefore alerted to the duty*

imposed upon them as expert witnesses to give objective and balanced opinions, opinions that were uninfluenced by the exigencies of the litigation.

153. This omission, it was argued, was compounded by the fact that the first drafts of the witness statements had been prepared by an ICAC officer and not by the witnesses themselves so that, in a number of significant respects, the statements of both Richard Williams and Larry Chan contained expressions of opinion that clearly came from the pen of an ICAC officer. The statements, therefore, were not seen to be the independent product of the two expert witnesses uninfluenced by the opinions of those who had instructed them.

154. In respect of this latter challenge, the judge accepted the evidence of the witnesses as to the manner in which they had come to make their statements. That evidence was to the effect that, while the first draft of the statements may have been drafted by an ICAC officer after detailed instructions had been obtained, those drafts were then "reworked and developed" by the witnesses themselves so that, prior to their signing, the witnesses were satisfied as to the truth of their contents. This meant that, even though not every word of their expert opinions may have been penned by the witnesses themselves, they were nevertheless their own independent opinions.

155. As with any witness, the test is the one stated in Monodu (supra): does the statement constitute the witness's own uncontaminated evidence? In other words does it represent the evidence of the witness uninfluenced, directly or indirectly, by any person who may have a purpose in seeking to influence the contents of the statement? In respect of the three expert witnesses, the judge was satisfied that their statements – re-worked and re-drafted by them to the degree that each believed necessary – reflected their own uncontaminated evidence. I fail to see how it can be said that he was wrong to come to this conclusion.

156. The judge did accept that each of the witnesses should have been informed that they were being asked to give evidence as experts and, as such, that they were subject to the higher responsibilities imposed on expert witnesses. But, as he observed, it was not a case of a witnesses (sic) being taken by surprise

or having his expert evidence teased from him in a context which suggested bias of one kind or another. The witnesses had understood from the beginning that they were being asked to give opinion evidence based on their particular qualifications, knowledge and experience. It was their evidence, which the judge accepted, that they had sought to give their opinions in an independent and objective manner, in short, that they had in fact attempted to compile their statements and give their evidence in accordance with the duties imposed on experts.

157. In circumstances such as this, I am satisfied that it is for the trial judge to determine whether a witness should be permitted to give evidence as an expert and, if so, if that witness has not at the outset been informed of his duties as an expert witness, to determine what weight, if any, to give to his testimony.

158. In the present case, the judge exercised his discretion to allow the witnesses to give evidence as experts. He then proceeded to consider what weight should be given to their evidence. He was of the view that there was nothing in the complaints which affected the weight to be accorded to the evidence of the witnesses in so far as it purported to constitute expert evidence." [9]

(b) DOJ's Code of Practice

We note that the DOJ published a *Code of Practice for Expert Witnesses Engaged by the Prosecuting Authority* in 2004.[10] A note in *Archbold* indicates the Code had been drawn from the common law, as derived from case law, and a large body of referenced material was considered including 'learned articles, legal publications and commentaries'.

The best practice particularly in criminal trials should be for experts to write their own reports. Any implication that it is acceptable for the ICAC to prepare the first draft for

[9] *HKSAR v Habibullah Abdul Rahman & Ors CACC 302/2008* judgment paras. 151 to 158.

[10] *Archbold Hong Kong 2011* 2004 edition, Appendix Three

an expert's testimony is a matter of great concern. The prosecution should follow civil practice whereby experts prepare their own reports.

Appendix 2: DOJ's letter dated 18 July 2012

Recommendation 6

The issue of expert witnesses and their duties in criminal proceedings should be raised with the DOJ as it is not considered to be good practice for the ICAC to assist with the preparation of an expert's report, let alone preparing the first draft.

7. Jury trials in the District Court / venue of trials

(a) Jury Trials

Why were such high profile cases prosecuted in the District Court where there is no right to a trial by jury?

Should the Law Society lobby for jury trials in the District Court on the basis this will help to raise the quality of justice as none of the cases involving solicitors were heard before a judge and jury?

There are counter arguments against juries hearing complex cases:

- Debate has taken place in England and Wales on whether complex commercial cases should be heard before a single judge because of the complexity of the material.

- Defendants can apply under the *Complex Commercial Crimes Ordinance* (Cap.394) to be tried by a judge plus two lay assessors. This procedure has never been used.

Representatives of the legal profession, namely members of the Law Society's Criminal Law and Procedure Committee and the Bar, had met with Kevin Zervos the DPP in November 2011 to discuss the feasibility of introducing jury trials in the District Court. The DPP responded and indicated the Government would not

relinquish its right to select the venue of trials but would increase transparency to clarify the decision on the selection of venue. DOJ has stated the matter is *non negotiable*[11] but it will issue guidelines to highlight the basis of its decision-making process in relation to venue.

The document "*Mode of Trial*" received by the Law Society in February 2012 indicates that one of the matters to be considered would include the length of sentence which the relevant court is permitted to impose[12] as well as various other factors.

(b) Comments in the *BOMA AMASO* judgment.

In a Court of Appeal decision dated 1 February 2012 *HKSAR and A male known as BOMA AMASO* CACC 335/2010, Stock VP noted the following in his judgment:

> *28. "Part of the problem may well stem from the perception of the Department of Justice that by reason of the judgment of this Court, differently constituted but of which I was a member, in HKSAR v Kam Susanto CACC 542 of 2003, 3 May 2005, unreported, that most cases should be tried in the District Court."*
>
> 37. "*Next, we would suggest that* ***the Director of Public Prosecutions should not feel constrained by prior judgments of this Court from bringing cases in the High Court where huge sums of money are involved or where the predicate offence is particularly serious.*** *True it is that this involves a burden on juries in such cases, but the alternative, in other words, the exclusion of the High Court as a possible forum, brings distortions to justice*." (Emphasis added)

The Law Society notes that the Shanghai Land case involved the takeover of an over HK$2 billion listed cash shell.

Lily Chiang recently failed in her quest for a jury trial as of right. The CFA stated "*Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference*."[13]

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[11] Basic Law: Article 63 which states "The Department of Justice of the HKSAR shall control criminal prosecutions, free from interference."

[12] In the District Court the maximum sentence upon conviction is 7 years' imprisonment

[13] Chiang Lily v Secretary for Justice FAMC 64 and 65 of 2009 CFA judgment dated 20 March 2010

Appendix 3: DOJ's Guidelines "*Mode of Trials"*

Recommendation 7

The Law Society notes the provisions of Article 63 of the Basic Law. Such provisions very clearly give complete discretion to the DOJ. Without prejudice to that, however, the DOJ should be invited to consider Stock VP's observations noted above.

8. Recovery of Criminal Defence costs

The existing system is unfair. Civil party and party rates are not the correct basis to review the defendant's legal costs. This should be challenged as the liberty of the individual is at risk in criminal proceedings and the recovery of costs by defendants under the existing system is too low and unjust.

Recommendation 8

The Law Society questions the appropriateness of using the civil party and party rates as the correct basis for recovery with the DOJ. Defendants who overturn their convictions should be entitled to recovery of fees on an indemnity basis.

9. Compensation

There is no general entitlement to recompense for wrongful conviction or charge[14] but there are two schemes in place, one statutory and the other an administrative one.

(a) Schemes for Compensation

(i) Statutory Compensation under the Hong Kong Bill of Rights Ordinance

Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap. 383) (HKBORO) incorporates Article 14(6) (right to compensation for imprisonment based on a miscarriage of justice) of the International Covenant on Civil and Political Rights in Hong Kong law and compensation is payable under HKBORO:

[14] DOJ Paper dated June 2004 to the Panel on Administration of Justice and Legal Services

> "(5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

The DOJ has indicated compensation is only payable after the emergence of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice, and provided the non-disclosure of this fact was not wholly or partially attributable to the applicant.[15]

We note that poor investigation/prosecution standards or unfair conduct of the trial are insufficient grounds to seek compensation under the statute.

(ii) *Ex gratia*

The Government may make an ex gratia payment in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. Compensation may also be payable where the wrongful act was that of a judge or magistrate, but payment in such cases should only be made on the recommendation of the judiciary.

(b) Comments on the two Schemes

We believe that the existence of the *ex-gratia* scheme may not be widely known within the community.

The Legal Policy Division provided a brief overview of the administrative guidelines in relation to the payment of the statutory and *ex gratia* payments in its Paper to the Legislative Council's panel on Administration of Justice and Legal Services in June 2003 noting that if a claim under Article 11(5) HKBORO could not be settled administratively it would have to be adjudicated by the court.

[15] DOJ's paper dated June 2004 at para 4

The guidelines state that compensation may be payable, inter alia, to a person convicted of a criminal offence:

> "(a) Compensation may be payable to a person convicted of a criminal offence who has spent time in custody and has received a free pardon because his innocence has been established or his conviction has been quashed following a reference to the Court of Appeal by the Chief Executive or an appeal out of time.
>
> (b) Compensation may be payable where a person has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. For example, refusal of bail because of incorrect information given to the court by the prosecutor or the police, or police suppression of material evidence which would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate but, to preserve the perceived independence of the judiciary, payment in such cases should only be made on the recommendation of the judiciary itself.
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> (c) Aside from guidelines (a) and (b), compensation may be payable in outstandingly deserving cases even where the loss was not caused by a wrongful act or omission by a public authority.
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> (d) Compensation would not be paid simply because the prosecution was unable to prove its case beyond reasonable doubt in relation to a particular charge.
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> (e) Compensation may be refused where there is serious doubt about the claimant's innocence, based on the argument that it would be repugnant to pay compensation out of public funds to a person who is probably guilty but, for example, whose conviction was quashed on a mere technicality.
>
> (f) Compensation may be refused or reduced proportionately where the claimant is wholly or partly to blame for his misfortune; for example, he deliberately withheld evidence which would have demonstrated his innocence.
>
> (g) From the perspective of public policy or administration, extending compensation beyond guidelines (a), (b) and (c) to persons who have suffered loss in the ordinary course of the criminal process (for example, to those to whom guideline (d) applies) would have substantial cost and other resource

implications. There would be a much larger number of potential claimants and a tribunal or some other special machinery would be required to investigate each case and distinguish the claimants who are very probably innocent from these who were lucky to escape conviction."[16]

There are serious ramifications for persons who have been wrongly charged and convicted and those who have suffered should be entitled to receive just compensation as well as payment of their legal costs by the Government. Notwithstanding other comparable jurisdictions have limited rights to compensation, it is time to review the matter of compensation for defendants who have served time in prison because of a wrongful conviction, or otherwise have been significantly prejudiced.

In the Shanghai Land case for example the CFA stated that "the appellants …. have left this Court innocent and, let it be understood, without any cloud over his or her innocence" [17] and even stated in the Judgement on Costs that the prosecution had not made out its assertion that the defendants / appellants had brought suspicion upon themselves. [18] The defendants / appellants nevertheless suffered severely financially and in career terms as a result of their convictions, in addition to the extreme stress suffered by them and their families as a result of their wrongful incarceration.

(c) Should the DOJ advise on compensation?

The DOJ offers legal advice in respect of all claims under the administrative scheme, including claims for *ex gratia* payments. The final decision whether an applicant qualifies for payment, after considering the circumstances of the individual case and the views of the Secretary for Justice and any other department or bureau concerned will be made by the Financial Services and Treasury Bureau.

There is no independent assessment of claim for compensation, unlike the United Kingdom, where the amount of statutory and *ex gratia* compensation is made by an independent assessor.

The DOJ stated: "Independent assessment of whether a claimant qualifies for compensation may be appropriate where in the circumstances some blame attaches to

[16] Legal Policy Division Paper dated June 2003, para 7

[17] FACC Nos. 6, 7, 8, 10, 11 & 12 of 2010 para 113, CFA judgment dated 15 July 2011

[18] FACC Nos. 6, 7, 8, 10, 11 & 12 of 2010, para 7, CFA Judgment dated 6 January 2012

the public authorities, or in particularly large or complicated cases. In other cases the assessment could adequately (and more efficiently and economically) be made by a member of the Department of Justice who is experienced in the relevant matters." [19]

The DOJ has a clear conflict of interest.

It is questionable whether defendants who sought justice up to the CFA will have the stamina to launch yet another set of proceedings such as a judicial review and face the possibility of an adverse costs order in order to seek compensation.

The DOJ's letter to the Law Society dated 20 December 2011 indicates that no compensation had been paid under Article 11(5) of the HKBORO. In its letter dated 28 March 2012, the DOJ stated:

"*Please be informed that we have received 12 applications involving claims for compensation for wrongful imprisonment under Article 11(5) of the Hong Kong Bill of Rights or the ex gratia arrangements since the year 2000. Of the 12 applications, nine were rejected on grounds that the claim did not meet the requirements of Article 11(5) of the Hong Kong Bill of Rights and/or the ex gratia scheme. The remaining three applications are still being processed by this Department.*"

Appendix 4: Legal Policy Division Paper dated June 2003 to the Panel on Administration of Justice and Legal Services (Panel), DOJ's Paper to the Legco Panel dated June 2004, DOJ's letters to the Law Society dated 20 December 2011 and 28 March 2012.

Recommendation 9

1. There should be an independent review of the policy on compensation for wrongful conviction and we invite adoption of the following recommendations:

(a) An independent body should be established to process such applications.

(b) The DOJ should relinquish its role to review applications for compensation as it has a clear and substantial conflict of interest.

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[19] Legal Policy Division Paper dated June 2003 to the Panel on Administration of Justice and Legal Services para 11

2. Information on the existing policy for compensation for wrongful imprisonment should be circulated to members via the weekly circulars.

III. Phone Tapping

10. Concerns of defence lawyers

During the investigation phase and up to commencement of trial defendants in both the Shanghai Land and Semtech cases suspected their calls may have been monitored by law enforcement agencies (LEAs). There appears to be some concerns, whether well-founded or not, amongst some defence lawyers that LEAs intercept communication to ascertain the tactics of defendants. However, no evidence has been identified.

It was noted the Interception of Communication and Surveillance Ordinance (Cap. 589) ("ICSO") came into effect on 9 August 2006.

The Security Bureau consulted with the Law Society on proposed amendments to the ICSO in 2 consultations in 2011 and in 2012. Council approved the draft submissions on the second round of consultation which were sent to the Security Bureau on 28 February 2012. The Law Society commented inter alia on:

- **Oversight by the Commissioner**

  We note the Commissioner on Interception and Communications has proposed a checking system whereby he and his designated officers can listen to and check any intercept products in order to ensure the contents of the reports by the law enforcement agencies ("LEAs**"**) truly represent the intercept products as heard by the listeners. The Commissioner is seeking express authority to have access to and the right to listen to any intercept products and proposes the same power to be extended to those staff designated by him.

  The Law Society supports the Commissioner's recommendation as there should always be appropriate checks and balances, particularly in respect of any communication which may involve Legal Professional Privilege **(**"LPP**"**). The Commissioner noted in his *Annual Report 2010* that he and his staff are subject to the Official Secret Ordinance and that the rank of his staff is not below those of the LEAs listeners.

The LEAs must understand the Commissioner has authority to fully audit their reports namely, 'does the printed word actually correspond with the tapes.'

- **LPP**

Where there is *any* likelihood of interception of LPP or journalistic material ("JM"), all applications must be classified as Type 1 surveillance (i.e. such applications are subject to greater scrutiny by the LEAs). The legislative intent must be clarified to ensure LEAs do not have any discretion to seek a Type 2 authorisation: if there is any possibility of interception of LPP or JM the legislation must make it clear that LEAs must make a Type 1 application to the Commission.

The Law Society commented on the review of the ICSO in September 2011 and February 2012 but the timing of proposed amendments remains unknown.

Recommendation 10

Council should closely monitor the proposed amendments to the ICSO in light of the concerns which have been expressed.

IV. Access to Justice Issues

The cases reviewed by the Law Society related to quashed criminal convictions of professional advisers. However the issues arising are of broader concern than justice for defendants in that category. It is evident from these cases that it took considerable resources to proceed to the CFA. It took those resources to obtain justice. The Law Society has grave doubts as to whether defendants relying on criminal legal aid, which is severely deficient, would have the same stamina or resources to protect themselves in an equivalent manner.

It has long been argued that inadequate resources give rise to great concerns whether all defendants are being given the opportunity for proper representation and hence access to justice.

Recommendation 11

The Law Society should continue to lobby the Government for proper levels of criminal legal aid and for the establishment of an Independent Legal Aid Authority.

January 2013

ACCESS TO JUSTICE

Review of Recent Court of Final Appeal Judgments Affecting Professional Advisers and Others

Executive Summary of Recommendations

I. Judiciary

Recommendation 1

1. **These three cases raise issues of concern as to the provision of a level playing field for defendants in complex cases and the quality of justice in the criminal courts.**

2. **The Law Society should continue to recommend widening the current pool of applicants for appointment as a Judicial Officer and the taking of measures to improve resources and assistance to judges by increasing funding and expanding the available training for Judicial Officers.**

II. Department of Justice (DOJ)

Recommendation 2

The matters of choice of charges and delay should be raised with the Secretary for Justice (SJ) and DOJ by raising the following:

(a) Why were certain BOCHK officials involved in the arrangements referred to above allowed to return to the Mainland?

(b) Why did the DOJ wait 3 years, until late 2006, to prosecute given that investigations had been substantially completed in 2003?

(c) Why were charges not laid over the arrangements for holdings of properties by *men of straw* and funneling of the proceeds of any sale to repayment of the bank, with a view to circumventing the connected transaction rules and

thereby defrauding regulators and shareholders, in which certain BOCHK officials in 2002 were involved (such charges naming such BOCHK personnel as co-conspirators if they were no longer in the jurisdiction)?

Recommendation 3

Representatives from the Working Party should meet with the SJ and DPP to raise issues of concern on implementation of the DOJ's prosecution policy.

Recommendation 4

Notwithstanding that the jurisprudence in the ECHR on the issue may not yet support the point, the DOJ should consider whether its prosecution policy should be amended so that evidence which a reasonable person would consider might be relevant to a defence should be brought to the attention of the defence.

Recommendation 5

In view of the CFA's criticism of the lower courts, we repeat our observations in Recommendation 1 above.

Recommendation 6

The issue of expert witnesses and their duties in criminal proceedings should be raised with the DOJ as it is not considered to be good practice for the ICAC to assist with the preparation of an expert's report, let alone preparing the first draft.

Recommendation 7

The Law Society notes the provisions of Article 63 of the Basic Law. Such provisions very clearly give complete discretion to the DOJ. Without prejudice to that, however, the DOJ should be invited to consider Stock VP's observations noted above

Recommendation 8

The Law Society questions the appropriateness of using the civil party and party rates as the correct basis for recovery with the DOJ. Defendants who overturn their convictions should be entitled to recovery of fees on an indemnity basis.

Recommendation 9

1. There should be an independent review of the policy on compensation for wrongful conviction and we invite adoption of the following recommendations:

(a) An independent body should be established to process such applications.

(b) The DOJ should relinquish its role to review applications for compensation as it has a clear and substantial conflict of interest.

2. Information on the existing policy for compensation for wrongful imprisonment should be circulated to members via the weekly circulars.

III. Phone Tapping

Recommendation 10

Council should closely monitor the proposed amendments to the ICSO in light of the concerns which have been expressed.

IV. Access to Justice Issues

Recommendation 11

The Law Society should continue to lobby the Government for proper levels of criminal legal aid and for the establishment of an Independent Legal Aid Authority.

Appendix 1

Shanghai Land Case

Conspiracy Charges

Charge 1

Conspiracy to defraud, contrary to common law and punishable under section 159C(6) of the Crimes Ordinance, Cap. 200

Particulars of offence

Gong Beiying, Habibullah Rahman, Ng See-wai, Rowena, Lam Lai-chu, Fiona, Fan Cho-man and Lai Sau-cheong, between the 17th day of March 2002 and the 22nd day of June 2002 in Hong Kong conspired together and with Chau Ching-ngai, Yau Shuk-ching and Fu Kwan-wai, Grace, to defraud the Stock Exchange of Hong Kong Ltd, the Securities and Futures Commission, and the existing and potential shareholders of imGO Limited by dishonestly:

(i) falsely representing, in a joint announcement of Global Town Ltd and imGO Limited, for the acquisition of shares in imGO Limited by Global Town Ltd, and dated the 3rd day of May 2002, that the purchaser had no specific plans with respect to the Put Option or in respect of any injection of assets;

(ii) falsely representing in the composite offer and response document dated the 20th day of June 2002, relating to an unconditional cash offer by BOCI Asia Ltd on behalf of Global Town Ltd to acquire all the issued shares of, and to cancel all outstanding options to subscribe for shares in, imGO Ltd that-

(a) the Offeror intended to finance the Offer for the Shares and Options from its own resources and by credit facilities extended to it by the Bank of China (Hong Kong) Ltd and that the Offeror intended that the payment of interest on, and repayment of such credit facilities would not depend to any significant extent on the business of imGO; and

(b) at that time, the Offeror had no specific plans with respect to the Put Option or in respect to any injection of assets.

Charge 2

Conspiracy to defraud, contrary to common law and punishable under section 159C(6) of the Crimes Ordinance, Cap. 200

Particulars of offence

Gong Beiying, Lai Sau-cheong, Simon, Fan Cho-man and Koo Hoi-yan, Donald, between the first day of April 2002 and the 13th day of August 2002 in Hong Kong, conspired together and with Chau Ching-ngai and Fu Kwan-wai, Grace, to defraud the Stock Exchange of Hong Kong Ltd, the Securities and Futures Commission, and the existing and potential shareholders of imGO Limited (the company), later known as Shanghai Land Holdings Ltd, by dishonestly:

(i) falsely representing, in an announcement published on the 16th day of July 2002 concerning a proposed change of company name and amendment to the Articles of Association of the company, that to facilitate the management of the assets of the company and to make speedy decisions, particularly concerning any disposal or acquisitions, including any joint-venture arrangements, and any borrowings or encumbrances of the company, it was in the interest of the company to establish an Executive Committee to manage and regulate such activities;

(ii) falsely representing in a letter from the board of directors dated the 22nd day of July 2002 contained in a circular published and sent to shareholders on 22nd day of July 2002 relating to the proposals involving a change of company name and amendments to the Articles of Association of the company, that to facilitate the management of the assets of the company and to expedite the decision-making process, that it would be in the interest of the company to establish an Executive Committee to manage and regulate the five activities which were set out in the letter;

(iii) causing the shareholders of the company to vote, at an extraordinary general meeting of the company held on the 13th day of August 2002, on a special resolution to amend the Articles of Association of the company by adding a new Article 121A to Article 121 that the board may establish an Executive Committee which was to have responsibility for the management and administration of the business of the company and any matters which were within the ordinary course of the company's business under the control and supervision of the Board and in accordance with the provisions of the Articles of Association of the company, knowing that the reasons given to the shareholders for the said amendment were false.