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廉政公署
INDEPENDENT COMMISSION AGAINST CORRUPTION

By Fax: 2509 0775

Your Ref : CB2/PL/SE
Tel : 2826 3118

28 April 2005

Clerk to Panel
(Attn: Mr Raymond LAM)
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mr LAM,

Panel on Security

I refer to your letter of 23 April 2005.

Our reply to the information sought by the Hon James TO is as follows –

(a) A copy each of the charge sheet of the four defendants in the case and transcript of the rulings on the voir dire applications are attached. As the only summary of facts that was read in open court relates to D2 and D3, not D1 and D4 (referred to in the charge sheet) who are now standing trial, only a copy of the charge sheet is provided.

(b) & (c) The ICAC is seeking legal advice in respect of the rulings and the implications they might have for the work of the ICAC before deciding what action, if any, it should take. Meanwhile, the case is still on trial.

Yours sincerely,

(Mrs Betty CHU)
for Commissioner
Independent Commission Against Corruption

Encl

行政總部 Administration Branch

香港紅棉路八號東昌大廈二十五樓 Fairmont House, 25th Floor, 8 Cotton Tree Drive, Hong Kong
圖文傳真 FAX: (852) 2136 8075
電 話 TEL: (852) 2826 3110

DCCC 689/2004
(Amended)

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. 689 OF 2004

HKSAR

against

(D1) LI Man-tak	(aged 37) (on bail)
(D2) LIN Chak-pui, Louis	(aged 35) (on bail)
(D3) FOO Tiang-hock, Adrian	(aged 34) (on bail)
(D4) TAN Chye-seng, Nicholas	(aged 31) (on bail)

The Court is informed that the following charges are preferred against LI Man-tak, LIN Chak-pui, Louis, FOO Tiang-hock, Adrian and TAN Chye-seng, Nicholas by the Secretary for Justice.

1st Charge (against D1-D3)
Statement of Offence

Conspiracy to offer advantages to an agent, contrary to sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

Particulars of Offence

inclusive

LI Man-tak, LIN Chak-pui, Louis and FOO Tiang-hock, Adrian, between the 1st day of July 2003 and the 25th day of February 2004, in Hong Kong, conspired together and with YUM Vincent to, without lawful authority or reasonable excuse, offer advantages, namely gifts, loans, fees, rewards or commissions consisting of money to an agent the said FOO Tiang-hock, Adrian, an employee of ING Investment Management Asia Pacific (HK) Limited ("ING"), as an inducement to or reward for or otherwise on account of the said FOO Tiang-hock, Adrian doing or having done an act in relation to

his principal's affairs or business, namely causing ING to purchase and to hold the shares of Kwong Hing International Holdings (Bermuda) Limited.

2nd Charge (against D1-D4)
Statement of Offence

Conspiracy to offer advantages to an agent, contrary to sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

Particulars of Offence

inclusive

LI Man-tak, LIN Chak-pui, Louis, FOO Tiang-hock, Adrian and TAN Chye-seng, Nicholas, between the 1st day of July 2003 and the 25th day of February 2004, in Hong Kong, conspired together and with YUM Vincent to, without lawful authority or reasonable excuse, offer advantages, namely gifts, loans, fees, rewards or commissions consisting of money to an agent the said TAN Chye-seng, Nicholas, an employee of UBS AG ("UBS"), as an inducement to or reward for or otherwise on account of the said TAN Chye-seng, Nicholas doing or having done an act in relation to his principal's affairs or business, namely promoting the shares of Kwong Hing International Holdings (Bermuda) Limited and causing UBS to publish a favourable report in relation to the shares of the said Kwong Hing International Holdings (Bermuda) Limited.

Charge 2A (against D1-D4)
(alternative to 2nd Charge)
Statement of Offence

Conspiracy to offer advantages to an agent, contrary to sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

inclusive

Particulars of Offence

LI Man-tak, LIN Chak-pui, Louis, FOO Tiang-hock, Adrian and TAN Chye-seng, Nicholas, between the 1st day of July 2003 and the 25th day of February 2004, in Hong Kong, conspired together and with YUM Vincent to, without lawful authority or reasonable excuse, offer advantages, namely gifts, loans, fees, rewards or commissions consisting of money to an agent the said TAN Chye-seng, Nicholas, an employee of UBS AG ("UBS"), as an inducement to or reward for or otherwise on account of the said TAN Chye-seng, Nicholas doing or having done an act in relation to his principal's affairs or business, namely promoting the shares of Kwong Hing International Holdings (Bermuda) Limited ("Kwong Hing") by introducing Kwong Hing at a UBS promotion conference, by introducing Kwong Hing to UBS clients by inclusion in an UBS publication and by recommending Kwong Hing shares to UBS clients and/or customers.

Charge 2B (against D1-D4)
(alternative to 2nd Charge)

Statement of Offence

Conspiracy to offer advantages to an agent, contrary to sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

inclusive

Particulars of Offence

LI Man-tak, LIN Chak-pui, Louis, FOO Tiang-hock, Adrian and TAN Chye-seng, Nicholas, between the 1st day of July 2003 and the 25th day of February 2004, in Hong Kong, conspired together and with YUM Vincent to, without lawful authority or reasonable excuse, offer advantages, namely gifts, loans, fees, rewards or commissions consisting of money to an agent the said TAN Chye-seng, Nicholas, an employee of UBS AG ("UBS"), as an inducement to or reward for or otherwise on account of the said TAN Chye-seng, Nicholas doing or having done an act in relation to his principal's affairs or business, namely by causing UBS to publish a favourable report

in relation to the shares of the said Kwong Hing International Holdings (Bermuda) Limited.

3rd Charge (against D1-D2)
Statement of Offence

Conspiracy to offer advantages to an agent, contrary to sections 9(2)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201, and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

Particulars of Offence

inclusive.

LI Man-tak and LIN Chak-pui, Louis, between the 1st day of November 2003 and the 25th day of February 2004, in Hong Kong, conspired together and with YUM Vincent to, without lawful authority or reasonable excuse, offer advantages, namely gifts, loans, fees, rewards or commissions consisting of money to an agent the said FOO Tiang-hock, Adrian, an employee of ING Investment Management Asia Pacific (HK) Limited ("ING"), as an inducement to or reward for or otherwise on account of the said FOO Tiang-hock, Adrian doing or having done an act in relation to his principal's affairs or business, namely causing ING to continue to hold the shares of Kwong Hing International Holdings (Bermuda) Limited.

4th Charge (against D3 only)
Statement of Offence

Accepting an advantage as an agent, contrary to sections 9(1)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201.

Particulars of Offence

FOO Tiang-hock, Adrian, being an agent, namely an employee of ING Investment Management Asia Pacific (HK) Limited ("ING"), on a date unknown between the 1st day of September 2003 and the 31st day of December 2003, in Hong Kong, without lawful authority or reasonable excuse, accepted an advantage, namely a

gift, loan, fee, reward or commission consisting of $1,000,000.00 cash in Hong Kong currency from YUM Vincent, as an inducement to or reward for or otherwise on account of the said FOO Tiang-hock, Adrian doing or having done an act in relation to his principal's affairs or business, namely causing ING to purchase the shares of LeRoi Holdings Limited.

5th Charge (against D3 only)
Statement of Offence

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

Particulars of Offence

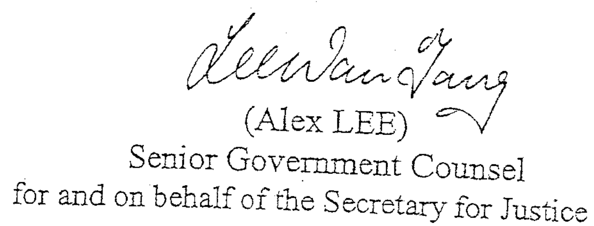
FOO Tiang-hock, Adrian, between the 1st day of December 2003 and the 17th day of December 2003, in Hong Kong, conspired with YUM Vincent to defraud SBI E2-Capital Securities Limited ("SBI E2"), by dishonestly :

(a) falsely representing that HO Ting-yuk, Joanne, was a genuine investor who would purchase the shares of HC International Incorporation ("HC');

(b) concealing and/or failing to disclose that the said FOO Tiang-hock, Adrian and the said YUM Vincent were the actual subscribers of two million shares of HC; and

(c) causing two million shares of HC to be allotted to the account in the name of the said HO Ting-yuk, Joanne.

Dated this 23rd day of March, 2005.



(Alex LEE)
Senior Government Counsel
for and on behalf of the Secretary for Justice

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. 689 OF 2004

Transcript of the audio recording of the Ruling on Voir Dire Applications at the trial of Li Man-tak (D1) and 3 Others, charged with Conspiracy to offer advantages to an agent, before H H Judge Sweeney

Date: 22 April 2005

Present: Mr Cheng Huan, SC, leading Ms C Draycott and Mr Tse, instructed by Messrs Tai, Mak & Partners, for D1
Mr G Plowman, SC, leading Mr King and Ms Po, instructed by Messrs Haldanes, for D4
Mr David Fitzpatrick, Counsel on fiat, for HKSAR

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RULINGS ON ADMISSIBILITY OF EVIDENCE

1. I will give these four rulings in the same chronological order in which I heard the applications.

Application No. 1

2. The prosecution have sought to adduce two videotaped records of interview under caution made by the 1st defendant, Li Man-tak, Michael, at Murray Road ICAC Headquarters on the evening of 25 February 2004 and in the early hours of 26 February respectively. In these two interviews given without the benefit of legal advice the defendant makes relevant and incriminating admissions. The prosecution does not seek to rely on a third videotaped record of interview made in the company of a lawyer on the afternoon of 27 February, in which D1 makes detailed complaints of his earlier treatment in ICAC custody.

3. Having listened to the evidence of both sides and the lengthy submissions thereon by counsel, I find I cannot be certain that the first two cautioned statements made by D1 were voluntary, in the sense that they were not the fruit either of inducement or threat held out by some persons in authority and, further, that they are not the fruit of conduct so oppressive that there is a danger that it resulted from the will of the person being interrogated having been overborne.

4. Without descending into detail at this stage and speaking in general terms only, I will make several observations on the manner in which the ICAC informs a suspect of their rights.

5. In this, as in other voir dires, the prosecution has laid great store by the service of a "Notice to Persons in Custody" (the pink form) and the suspect's signature thereon. It is, however, notable that the suspect's rights to telephone friends, relatives, or engage a lawyer is qualified by the words "provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation", etc. This is a very woolly phrase that can mean anything and everything. In practical terms, it means that if one divides the number of arrestees up into "phase 1" and then a second set into "phase 2", all the arrestees in phase 1 can be refused access to friends, relatives, or lawyers on grounds of possible hindrance with the arrest of those in phase 2. In short, what is given with one hand is taken away with the other.

6. A second general point that I would wish to make at this stage about the pink form is this: whether by accident or design, there is a glaring omission in the notice. The suspect is not informed of his most important right of all, i.e., that he has a right to refuse any requests for interviews, or that such interviews may be used in court against him, or that he has a right to have a lawyer present at all such interviews. In my

view, telling the suspect of his right to silence once the camera has already started running in the Interview Room is not appraising him of this most important right in a timely manner so as to enable him to carefully consider his position with or without legal advice and to make an informed decision on whether or not to give evidence against himself.

7. As already stated, as I am not satisfied beyond a reasonable doubt that the two cautioned statements in question by D1 were given voluntarily, I must exclude them from evidence.

The Second Application - Ruling on admissibility of surveillance evidence against D1, Li Man-tak, Michael, and D4, Tan Chye Seng, Nicholas

8. In this trial the prosecution also seek to adduce into evidence visual and oral surveillance tapes made covertly of two meetings:

(1) At the Langham Hotel, Tsim Sha Tsui, on 4 November 2003 in its "Tang Court Restaurant" made between 2000 hours and 2230 hours. Here the prosecution seek to produce a filmed recording of the outside of the VIP Room at the said restaurant, presumably to show those persons entering and leaving the said room. They also wish to produce a recording of conversations inside that room made by way of listening or "bugging" devices; and

(2) At the Hunan Garden Restaurant, Exchange Square, Hong Kong Island, on 20 February 2004, where video film and sound recordings were made of another meeting held between 2030 hours and 2230 hours, apparently by way of a video camera placed at a nearby table.

9. No person participating in either conversation was aware that they were being recorded.

10. For the purposes of this voir dire the defence have agreed the chain of evidence, i.e., the mechanical installation of the said recording equipment, the subsequent labelling of the respective tape recordings and/or DV discs, and their safe retention until their production in court as provisional exhibits. Further, the defence have also agreed, for the purposes of this voir dire, that the said recordings had been listened to by Vincent Yum, a prosecution witness who has not yet given evidence (at the time of this voir dire) to confirm the identities of the various speakers thereon and that the speakers are the persons identified in the certified transcripts. (See Agreed Facts, Exhibits Nos. P131 and P133)

11. For the purposes of this ruling I further accept the assurances of Mr Fitzpatrick of prosecuting counsel that the said recordings are of good sound and visual quality and contain cogent and relevant evidence insofar as they purport to show, (a) admissions by the 1st defendant to the conspiracy charges he faces and, (b) statements made by this defendant and other defendants which, the prosecution submits, are statements made in furtherance of those conspiracies.

12. Finally, I accept that the offences then under investigation by the ICAC were serious offences by any standards.

OBJECTIONS

13. Mr Cheng Huan of leading counsel for the 1st defendant objects to the admissibility of these recordings and to their transcripts on innovative grounds. He says that these are recordings of private conversations that are protected by virtue

of Article 30 of the Basic Law of the Hong Kong Special Administrative Region.

14. Article 30:

> "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

15. The 2005 edition of Archbold - "Archbold Hong Kong" - confirms the originality of this application at paragraph 19/33:

> "The power to exclude evidence for breach of a Basic Law right or freedom has yet to be determined. When the issue arises, it will likely be determined according to a proper interpretation of the right to judicial remedies under Article 35 of the Basic Law and principles to be derived from international jurisprudence."

16. To clear a preliminary point out of the way, Mr Fitzpatrick of prosecuting counsel has submitted that the two restaurants in question were public places and therefore not protected by Article 30. This point was not however pursued with the vigour of the rest of Mr Fitzpatrick's arguments. I must reject that submission here and now. This law was clearly designed to protect privacy of communication rather than privacy of venue.

17. Mr Fitzpatrick then falls back upon the limitations to privacy of communication expressed in Article 30 itself, i.e., that right to privacy is qualified by the two stated exceptions which give "the relevant authorities" power to inspect such communications "<u>in accordance with legal procedures</u>".

18. Indeed, this whole application revolves around the meaning of those five underlined words. Mr Cheng submits that no legal procedures have been devised in Hong Kong, whether legislative or otherwise, to safeguard the individual's rights under this article, and/or in the alternative, that his client's privacy of communication has been violated by the making of a recording of private conversations other than in accordance with legal procedures. Mr Cheng argues that the "legal procedures" envisaged by Article 30 must have anticipated the legislature enacting detailed guidelines and a code of conduct to regulate those authorities who might wish to eavesdrop on private conversations in order to meet the needs of public security or to investigate criminal offences. There is, it is now apparent, no such legislative framework in Hong Kong.

THE CURRENT PROCEDURE

19. The prosecution have led evidence that the ICAC have "Standing Orders" by which every investigator must apply to an officer of at least Principal Investigator rank stating the available intelligence information and his grounds for seeking to covertly install bugging devices. The senior officer then considers such intelligence information and submitted grounds before deciding whether or not to authorise the installation of bugging devices. An application form/authorisation form is supposed to be filled in in each instance so that a written record can be preserved.

20. In the present case, the investigator was Mr Patrick Ho and the principal investigator was Mr Tony Lui. Mr Lui testified in this voir dire along the lines of his written statement dated 6 April 2005 (i.e., made two days before his testimony) as follows:

> "After carefully analysing the intelligence information received, I was of the view that covertly tape recording the meeting was the only means by which the

A B C D E F G H I J K L M N O P Q R S T U

> ICAC could obtain important evidence of this very serious corruption offence. I was conscious of the provision of Article 14 of the Hong Kong Bill of Rights Ordinance that no one shall be subjected to arbitrary or unlawful interference with his privacy and understood that by making covert tape recordings, individuals privacy, particularly of those other persons who were not connected with the case, could well be affected. Nonetheless, I was convinced that there was a genuine need to obtain such important evidence in enforcing the law. Carefully and thoroughly considering the matter, I considered that it was a proper and lawful means to obtain evidence of corruption and gave verbal approval to covertly tape record the meeting at Langham Hotel on the evening of 4 November 2003 and asked Mr Patrick Ho to make the necessary arrangements to follow up."

(Mr Lui made a similar statement in relation to the "bugging" of the Hunan Garden Restaurant on 20 February 2004.)

21. Whatever protection the ICAC Standing Orders might afford the citizen against arbitrary or oppressive covert surveillance (and bear in mind that these Standing Orders are confidential and not available for inspection by the public) was totally undermined by the facts of the present case. Mr Ho communicated his intelligence information and grounds of application verbally. Mr Lui then granted verbal approval for same. Neither party kept any record of this transaction or filled in any forms so there is now no way of knowing if the Standing Orders have been complied with by reference to contemporary records.

22. Clearly, the whole process is carried out without reference to any outside body and allows of no right of inspection or appeal. Indeed, it can fairly be said that the only protection the citizen has against such unfettered and unsupervised power is the goodwill of the principal investigator. However, in fairness to Mr Tony Lui, it should be stressed that his bona fides have not been called into question in this application. What is under question by the defence is

the process by which such surveillance was authorised. Was it "in accordance with legal procedures"?

23. For his part, Mr Fitzpatrick urges the court to ignore the manner in which authorisation was granted to carry out this surveillance. He stresses that at common law the fact that evidence has been obtained illegally does not effect its admissibility.

24. Insofar as the Basic Law needs to be considered in this context, Mr Fitzpatrick says that the term "legal procedures" refers to the traditional balancing exercise applied under the residual discretion that judges have to exclude otherwise admissible evidence to ensure a fair trial. He says the term covers the common law and statute law, the laws of evidence and the laws of procedure, and is wide enough to include the very procedure in which we are currently engaged, by which I take him to mean that the conduct of this voir dire necessarily involves judicial scrutiny of the reasons for, and the operation of, this particular surveillance operation. In particular, he says that Article 30 of the Basic Law is counterbalanced by Article 87, which mandates the right to a fair trial.

THE ISSUES

25. So, if I may be permitted to summarise both sides of this argument in their natural chronological order:

(1) the defence says that before the ICAC installs bugging devices they must have complied with legal procedures in order that any resulting information is admissible in evidence. By contrast,

(2) the prosecution says that once such information has been obtained, legal procedures can rectify

any perceived imperfections in the process of getting that information.

THE 4TH DEFENDANT's SUBMISSIONS ON ADMISSIBILITY

26. Leading counsel for D4, Mr Gary Plowman, has adopted the submissions of Mr Cheng and adds an alternative way of looking at Article 30. Mr Plowman says that production of these tapes as evidence in the trial by itself constitutes a breach of Article 30. He shows why the Basic Law affords extra and specific protection to Hong Kong SAR residents over and above those previously enjoyed under the Bill of Rights and that Article 30 confers unique rights on Hong Kong citizens, the interpretation of which must be generous and any restrictions thereof must be strictly and narrowly construed. (See Gurung Kesh Bahadur v Director of Immigration [2002] 5 HKCFAR at paragraphs 24 and 29)

27. Mr Plowman goes on to argue that the court should confine itself to the literal meaning of the words on the page, i.e., any interference with our Article 30 rights can only be "for the purpose of meeting the needs of public security or the investigation into criminal offences", full stop. Article 30, this argument says, does not allow for interference with privacy rights for any other purpose. Accordingly, he submits, the gathering of trial evidence for production in a criminal trial is manifestly outside the exceptions to prohibition laid down in Article 30. Their production in a criminal trial is not covered by Article 30, therefore the court in regulating its proceedings must not and cannot allow such a constitutional breach to occur.

28. Finally, he submits that there is no discretion to admit the tapes in a balancing exercise where a constitutional breach has already occurred. This literalist approach to the Basic Law, breathtaking in its audacity, omits two vital ingredients, the first being the long-accepted principle that in

the interpretation of a constitution such as the Basic Law a purposive approach is to be applied.

29. "This is necessary because a constitution states general principles and expresses purposes without descending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic material." (See Ng Ka Ling and Others v Director of Immigration [1999] 1 HKLRD 315)

30. The second ingredient missing from this submission is, with the greatest respect for an argument brilliantly constructed on an unstable platform, common sense. This is the layman's version of "the purposive approach". In short, what is the point of investigating criminal offences if you cannot prosecute the offender?

31. I now return to the main argument.

THE CURRENT HONG KONG LAW ON THE RIGHT TO PRIVACY

32. In order to succeed in his objections, Mr Cheng has to show that the protection afforded by Article 30 of the Basic Law is greater than that afforded by Article 14 of the Hong Kong Bill of Rights. Why do I say that?

33. In R v Cheung Ka Fai [1995] 3 HKC 214, the very issues raised by the defence in this voir dire were canvassed before the Court of Appeal. In that case, counsel for one of the defendants argued that covertly taped telephone conversations ought to be excluded as they were recorded in breach of his client's Article 14 rights to privacy. In dismissing such an argument, Litton VP stated that, "The question of admissibility

is governed by the common law as expressed in R v Sang [1980] AC 402", before going on to comment at the end of his judgment:

> "As can be seen, the argument in effect boils down to this. Assuming that the interceptions amounted to some violation of A1's 'privacy' in terms of Article 14(1), should the trial judge have made an order pursuant to section 6(1) excluding the evidence?
>
> This is in effect the same argument which is conclusively dealt with by applying the common law rule in R v Sang. The Bill of Rights is part of the fabric of the Law of Hong Kong. It is not a self-contained code. It would be an extraordinary thing if, by applying the normal rules of evidence and procedure a piece of evidence is admissible and yet, by the operation of section 6(1) of the Bill of Rights Ordinance it should be inadmissible. This would in effect be to operate a dual system of justice. In our judgment, section 6(1) has no such effect. This removes the necessity of having to consider whether "wire taps"' constitute "arbitrary or unlawful interference with privacy" and the consideration of cases in the international sphere, such as Malone v United Kingdom [1984] 7 EHR 14, which deal with article 8(1) of the European Convention, becomes unnecessary."

34. I am, of course, bound by decisions of the Hong Kong Court of Appeal, so if the protections afforded by Article 30 are to be read as similar to, or the legal equivalent of Article 14 of the Bill of Rights, I cannot revisit that territory. Indeed, in their text book "Criminal Evidence in Hong Kong", Messrs Bruce & McCoy state that when it comes to interpreting the basic law, "It is likely that the same approach will be adopted in that regard as occurred under the Bill of Rights." (Chapter 1 at paragraph 901).

35. It is also notable that the authors of "Archbold Hong Kong" in their 2005 edition at paragraph 19/147, entitled "General Principles", treat Article 14 of the Bill of Rights and Articles 28 to 30 of the Basic Law interchangeably, as if one was merely a rewording of the other.

36. Both Article 8 and Article 87 of the Basic Law support this approach in their determination to preserve the common law "except for any that contravene this law". In HKSAR v David Ma [1997] HKLRD 774 it was said, "The Basic Law provides for the continued application of the common law in Hong Kong."

37. Also, in Director of Immigration v Chung Fung Yuen [2002] 2 HKLRD 533 the judge commented, "Accordingly, the courts are bound to apply the common law in exercising their power of interpretation in relation to Hong Kong law, including the Basic Law."

WHAT DOES "IN ACCORDANCE WITH LEGAL PROCEDURES" MEAN?

38. This expression is not encountered in equivalent provisions of the Hong Kong Bill of Rights, the European Convention, or the International Covenant on Civil and Political Rights, nor does one encounter it in the international jurisprudence thereon. Article 14 of the Bill of Rights is identical to Article 17 of the International Covenant. Both refer to "arbitrary or unlawful attacks" on, inter alia, the right to privacy. Article 8 of the European Convention prohibits such interference "save in accordance with the law".

39. I find that Article 30 of the Basic Law mirrors the objectives sought to be achieved by the above-mentioned Articles and that the proviso "in accordance with legal procedures" bears an equivalent meaning to the proviso "in accordance with the law."

40. Some support for the mutuality of aims of these various Articles can be found at page 819 of the Privy Counsel's decision in Fuk Lau Ying v Governor in Council and Others HKLRD [1997].

THE COMMON LAW APPROACH

41. The question then has to be asked: what is the common law position on this topic? Is it in fact set in stone in R v Sang, or has it developed to take account of human rights conventions such as the European Convention or the International Covenant?

42. Whatever misgivings the Court of Appeal had in 1995 about the relevance of the Bill of Rights or the European Convention to admissibility of evidence in Hong Kong have long since been swept aside by the Courts of England, as we shall see in a moment. Closer to home, I also bear in mind that the Basic Law "can provide for rights additional to those minimum standards set out in the International Covenant on Civil and Political Rights." (Paragraph 25 of Gurung Bahadur, (supra))

43. Although the courts of all common law jurisdictions have evolved very similar exclusionary rules to govern the admissibility at trial of confessions not proven to have been freely given, they have adopted a wide variety of approaches when faced with the problem of other kinds of evidence obtained from accused persons by wrongful means.

THE HISTORICAL COMMON LAW APPROACH

44. The approach of the English courts had always been robustly in favour of admitting relevant evidence. As far back as 1861, Crompton J said "It matters not how you get it, if you steal it even it would be admissible in evidence. (8 Cox Reports 498). In Kurama v R [1955] AC 197, Lord Goddard, CJ., stated the law thus:

> "The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained."

45. In the case of R v Sang, (supra) the House of Lords reviewed the history of admissibility in England and declared (at page 437).

> "Save with regard to admissions and confessions, and generally with regard to evidence obtained from the accused after the commission of the offence, a trial judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained."

46. Indeed, so great was the reliance by the English courts on common law that the Privy Council in the case of King v R [1969] 1 AC 304, looked at constitutional rights through common law spectacles. Lord Hudson observed at page 319:

> "The appellant relied, in support of his submission that the evidence illegally obtained against him should be excluded on the argument that it was obtained in violation of his constitutional rights .... this constitutional right may or may not be enshrined in a written constitution but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law, as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form."

47. By 1999 however, the impact of the European Convention on Human Rights resulted in constitutional provisions being looked at in a new light. The Privy Council looked again at the Constitution of Trinidad and Tobago in the case of Allie Mohammad v The State 2 AC at page 111. And Lord Steyn declared, (at page 123):

> "Their Lordships are satisfied that in King v R, which was decided in 1968, the Board took too narrow a view on this point. It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their constitution. The stamp of constitutionality on its citizens rights is not meaningless. It is clear testimony that an added value is attached to the protection of the right. The narrow view expressed in King v R is no longer good law. On the other hand, it

is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. ... In such a case not every breach will result in a confession being excluded. But their Lordships made clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless the judge must perform a balancing exercise in the context of all the circumstances of the case."

48. In his submissions before this court, Mr Fitzpatrick has urged this judgment as relevant recent authority for the continued existence of "the balancing exercise".

THE RIGHT TO PRIVACY AT COMMON LAW

49. In Malone v Commissioner of Police for the Metropolis (No. 2) [1979] 2 All ER 620 The Vice-Chancellor, Sir Robert McGarry, declared, in relation to telephone tapping of a suspect's conversations that "there was, in English law, neither a general right of privacy nor, as the applicant had contended, a particular right of privacy to hold a telephone conversation in the privacy of one's home without molestation. Moreover no duty of confidentiality existed between the post office and the telephone subscriber, nor was there any other obligation of confidence on a person who overheard a telephone conversation, whether by means of tapping or otherwise." Turning to the arguments based on the European Convention, the Vice-Chancellor noted that the Convention was not part of the law of England and as such did not confer on the applicant direct rights that would be enforced in the English courts." Accordingly, the Vice-Chancellor decided that no declaration could be granted. However, he did express serious concern about the state of the law relating to telephone tapping.

50. The applicant appealed to the European court in any event. And in Malone v United Kingdom [1984] 7 EHRR at page 14

they considered Mr Malone's case in light of Article 8 of the European Convention (which is, I suggest, a direct ancestor of Article 30 of the Basic Law). This appeal, which was not opened before me, is very relevant to the present case as it deals with the meaning of "in accordance with the law" (which, contrary to the submissions of Mr Cheng, I have found to be an equivalent expression to "in accordance with legal procedures", as submitted by Mr Fitzpatrick). In the "holding" section of Malone v United Kingdom it was held at (c):

> "(c) The court referred to its jurisprudence on the meaning of the expression "in accordance with the law". The phrase implied that there had to be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights in Article 8......The law had to be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which, and the conditions on which, public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.
>
> Moreover, since the implementation in practice of measures of secret surveillance of communications was not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. The law had to indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.
>
> (d) The court found that English law did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities in the field of interception of communications. To that extent the minimum degree of legal protection to which citizens were entitled under the rule of law in a democratic society was lacking, and,
>
> (e) In view of its conclusion that the system of intercepting communications was not in accordance

A with the law, the court did not have to examine whether the system was 'necessary in a democratic society.'" A

B B

C 51. This decision has been followed in all of the subsequent European Court of Human Rights' cases that dealt with the legality of wire-tapping and/or covert bugging devices. The case of Huvig v France [1990] 12 EHRR 528 sets out these requirements in a more succinct fashion. The House of Lords in R v Khan [1997] AC 558 held that a breach of Article 8 of the European Convention was outweighed by the public interest in the detection of serious crime and that R v Sang still applied. On appeal to the European court Khan v United Kingdom [2001] 31 EHRR 45 at page 1017, it was held that: "At the time of the events in the present case there existed no statutory system to regulate the use of covert listening devices, so it followed that the interference could not be in accordance with the law and so Article 8 had been breached."

K 52. As previously noted, decisions of the European court are now taken into account in England in assessing the modern common law approach to particular areas of criminal law. The House of Lords considered the effect of Article 8 of the European Convention (which had by then been enacted into English law) in the case of Regina v P. [2002] 1 AC 146. Lord Hobhouse of Woodborough, having quoted with approval the above passage from Malone v United Kingdom in the European court, stated at page 157:

> "This decision made it clear that the enactment of a statutory provision, which was sufficiently accessible and precise, was essential if the United Kingdom government was to comply with its obligations under the Convention. Telephone interception was justifiable but must be based on legal provisions of the requisite quality which would preclude abuse. The 1985 Act was the government's response.
>
> A similar decision was arrived at by the European Court of Human Rights in relation to covert surveillance devices planted by the police on private property in

Khan v United Kingdom The Times 23 May 2000. English law failed the qualitative test."

53. No doubt as a result of decisions of the European court and the coming into law in England of the Human Rights Act in October 2000, incorporating the European Convention on Human Rights, the English parliament passed RIPA "The Regulation of Investigatory Powers Act" in 2000, together with statutory guidelines. These provide detailed rules for the authorisation of covert surveillance as well as its documentation in writing and the retention of such material for subsequent inspection.

54. It is accepted by Mr Fitzpatrick that there is no such legislative framework in Hong Kong to regulate covert surveillance. Accordingly, and to that extent, the minimum degree of legal protection to which citizens of Hong Kong are entitled under Article 30 of the Basic Law is lacking, i.e. there is a legislative lacuna.

55. I therefore conclude that the system of covertly intercepting private communications, as practised by the ICAC in the two instances under review, in November 2003 and in February 2004, was not "in accordance with legal procedures". Accordingly, both sets of recordings were made in breach of Article 30 of the Basic Law and so were unlawfully made.

56. Just as the relevant authorities must apply for a search warrant before they can invade the privacy of one's home, I can see no valid reason why they should not also be obliged to apply for some form of warrant before they can invade the privacy of personal communications.

57. That is not the end of the matter, however. I now have to consider whether or not the prosecution are entitled to use this unlawfully obtained evidence in this trial.

ADMISSIBILITY OF UNLAWFULLY OBTAINED EVIDENCE

58. Mr Fitzpatrick has drawn the court's attention to the fact that the "success" of Mr Khan before the European court was a Pyrrhic victory insofar as his original conviction was not overturned. The European court held that the use of interception evidence, although in breach of his Article 8 rights to privacy, did not breach his Article 6 rights to a fair trial in view of the fact that the recording of his conversation had not been unlawful in the sense of being contrary to domestic criminal law. Moreover the applicant did not contend that the evidence was unreliable or inauthentic, and he had had the opportunity to challenge it at First Instance, and during subsequent appeal proceedings, under section 78 of the Police and Criminal Evidence Act 1984. (In the present case the defendant has challenged admissibility under common law voir dire proceedings).

59. As Lord Hobhouse said (at page 161 of Regina v P., (supra)

> "It should be noted that the (European) court again emphasised that the defendant is not entitled to have the unlawfully obtained evidence excluded simply because it has been so obtained. What he is entitled to is an opportunity to challenge its use and admission in evidence, and a judicial assessment of the effect of its admission upon the fairness of the trial, as is provided for by section 78."

60. Similar outcomes were achieved by the "successful" applicant in each of Malone's case and Huvig's case referred to above as well as the applicant in Schenk v Switzerland [1988] 13 EHRR 232 and, more recently, in Perry v United Kingdom [2003] CLR 282.

61. Regarding the apparent failure to fully protect constitutional/Convention rights to privacy by taking the extra step of excluding evidence thus obtained, some of the judges in the European court have issued dissenting judgments, and I note

A B C D E F G H I J K L M N O P Q R S T U

in particular the strong commentary thereon by Professor Ashworth in his report on the Case of K G and J H v United Kingdom Criminal Law Review [2002] at page 308.

62. Further, the reference made at page 122 by Lord Steyne in Allie Mohammad, (supra) is also indicative of an arguable contrary approach.

> "Counsel'S alternative submission was backed by formidable principled argument and by an impressive body of comparative material.
>
> Counsel submitted that unless there is at least a prima facie rule against admitting a confession obtained in breach of constitutional rights no, or virtually no value would be accorded to the incorporation of those rights in a written constitution. It is a short but important point. For further support of this view counsel cited decisions from a number of jurisdictions. The three most useful sources of authority proved to be Ireland, Canada and New Zealand."

63. Having looked at the cited authorities from those three common law jurisdictions, I would have to say that each of them would generally exclude unlawfully obtained evidence on the basis that only a prima facie exclusionary rule gives proper effect to the constitutionality of the particular provision.

THE HONG KONG APPROACH

64. Be that as it may, for historical reasons Hong Kong follows the English tradition of interpreting the common law, where the balancing exercise always finds favour over the exclusionary rule. In the case of Chalkey [1998] QB 848 Auld LJ commented that a breach of a duty laid down by code will be relevant to a section 78 discretion exercise before stating:

> "The critical test under section 78 is whether any impropriety affects the fairness of the proceedings. The court cannot exclude evidence under the section simply as a mark of disapproval of the way in which it was obtained".

RULING

65. In adopting a strict exclusionary approach to this evidence the defence have been unable to show how unfairness would follow if the evidence is admitted, so, in all the circumstances of this case, I cannot find any unfairness in admitting these two recordings into evidence despite the fact that they were unlawfully obtained. I therefore admit them into evidence.

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66. Finally, I should point out that in his extensive and detailed written submissions, Mr Cheng has conceded in a very fair manner that "the ICAC officers did not knowingly and wilfully breach the defendant's rights. What they did was at best a deliberate act done in ignorance of those rights." The recent English authorities and commentary thereon show that the discretion to exclude evidence obtained unlawfully will generally not be exercised if those who obtained the evidence made a bona fide mistake as to their powers. By contrast, the discretion is generally exercised against the prosecution if the police acted mala fide, i.e. knowingly exceeding their powers.

67. Now that a Hong Kong court has made a ruling that the installation of covert surveillance devices is in breach of the Basic Law without proper legal procedures in place, and unless and until this ruling is overturned, it may well be held in future criminal trials that the ICAC are acting mala fide if they continue this practice without some legislative basis.

(Proceedings not required)

Court adjourns - 12.42 pm

Court resumes - 2.30 pm
All defendants present. Appearances as before.

(Proceedings to 2.32 pm not required)

COURT:

APPLICATION NO. 3:-

68. One of the Phase 1 suspects arrested in Operation "Moby Dick" in the early evening of 25 February at the Star Ferry Pier in Central was Vincent Yum, an employee of SB1 E2 which is an investment company that, inter alia, advises clients on share placements in the stock market. Within minutes of his arrest Vincent Yum was "exploring my options to be spared from prosecution, asking if I could assist in any way." This desire to assist was passed up the ICAC chain of command and a few hours later Vincent Yum was asked to telephone, inter alia, D4, that is, Nicholas Tan (who was then at work at UBS offices in Exchange Square) which conversation was recorded without D4's knowledge.

69. It was Vincent Yum's understanding that his role was to obtain as much evidence as he could over the telephone, and the more useful evidence he could obtain the better so far as the question of his own prosecution was concerned. As to what discussions he had had with his ICAC "handlers" before the phone call, Mr Yum testified as follows:

> "I did not discuss the contents with them except that I should try to ask, try to lead the conversation towards the ING and UBS reports."

(I.e. the alleged offences the ICAC were then investigating). It was also arranged that the ICAC officers would, if necessary, hold up a piece of paper on which questions or topics were written in order to keep the conversation focused on what they wanted to hear. The witness agreed that there had been extensive discussions with his ICAC handlers before he telephoned D4 and "I believe I knew what I should do so I did not ask for instructions on what I should say". Mr Plowman asked him in cross-examination,

> "Q. What did you understand to be the purpose of your call to Nicholas Tan?

> A. Perhaps to collect information, or whatever, of wrongdoings that we have done so it could be recorded down.
> Q. I.e. to collect evidence?
> A. Yes."

Further into the cross-examination the witness agreed "My mission was to get him to talk" (on the matters he himself had been arrested for and the ICAC were then investigating). The witness further agreed with defence counsel that he had deliberately set out to get Nicholas Tan off his guard "by praising his recent work." The witness was shown a piece of paper on which the ICAC officer had made notes during this conversation, and he agreed that he had tried to follow the suggestion on that piece of paper by getting D4 to admit on the telephone that it was his idea to come out with the report in question. He also agreed that he did keep steering D4 back towards making the admissions he knew would please the ICAC.

70. Finally, Vincent Yum frankly admitted in cross-examination that he had told deliberate lies on some eight occasions to D4 during this telephone conversation in order to draw some further admissions out of him. These were lies that went right to the central elements of the conspiracy under investigation.

71. The defence say that the form and manner of this monitored phone call amounted to an interrogation which effectively deprived D4 of his right to silence. In particular, that Vincent Yum did not take a passive role and merely provided an opportunity for D4 to speak. He went further than that, he actively sought to elicit specific responses (admissions) from him.

72. The defence says that at the time of this monitored call D4 was not only a suspect but on the "Moby Dick" Phase 1 arrestees' list. Mr Fitzpatrick of prosecuting counsel, game to the last, submitted that D4 was then "only a suspect in an

ongoing investigation" and so different considerations apply. However, that submission has been undermined by the evidence as it emerged. In particular, the surveillance team that lay in wait for D4 that night at Exchange Square were under no illusions that their task was to arrest D4 as soon as he left the building, as confirmed by the principal investigator, Mr Tony Lui, when he testified.

73. The defence says that the ICAC, in setting up this monitored call in this manner, were deliberately circumventing the Secretary for Security's rules and directions for the questioning of suspects insofar as D4 ought to have been cautioned before any questions about these offences were put to him. They place heavy reliance on the case of <u>HKSAR v Lam Tat Ming</u> [2000] 2 HKLRD in which our Court of Final Appeal conducted a wide-ranging examination of the principles governing the admissibility of confession evidence. The relevant passages, so far as this application is concerned, are all in the "holding" section at the start.

> (4) A judge had the overriding duty to ensure a fair trial for the accused. Unfairness was to be judged against what was required to secure a fair trial for the accused. In exercising the residual discretion to exclude a voluntary confession the judge had to consider whether it would be unfair to the accused to use the confession against him at trial.
>
> (5) The protection of the accused's right of silence was the principle of a fair trial. Where a confession was obtained in breach of the Secretary for Security's "rules and directions for the questioning of suspects in the taking of statements", this was relevant to the discretion. These rules protected an accused's right of silence by requiring a suspect to be cautioned.
>
> (7) Where the alleged offence was complete and then there was an undercover operation, the suspect would not have the benefit of safeguards of the caution and the voluntariness rule. Where such an operation resulted in a confession that was voluntary, the court might exclude it in the

exercise of its residual discretion where the accused's right of silence was infringed.

(8) In answering whether the right of silence was infringed, the law had to apply practical common sense. Where the undercover officer played a passive role and heard or overheard the confession or recorded it, there was no basis for rejecting it. The confession was offered freely without interrogation. Where the officer played an active role in procuring the confession by asking questions of the suspect, the exercise of the residual discretion may be engaged. If the officer did no more than draw attention to the incident, there was no persuasive reason in the absence of any other relevant circumstances for excluding the confession as the officer was doing no more than providing an opportunity for the suspect to speak. However, if what the officer did amounted to an interrogation, the discretion would normally be exercised to exclude the confession as it would constitute a derogation of the accused's right of silence and thus prejudice his fair trial. Whether the conversation amounted to an interrogation would have to be determined having regard to all the circumstances."

74. The defence submits that the ICAC in this instance were using Vincent Yum in the role of an undercover agent as if he was an undercover officer. I find that this must have been the case. I also find that if this had not been an undercover operation D4 would have had to be cautioned to remind him of his right to silence and thus enabling him to make a choice whether or not to speak. In the English Court of Appeal case Laurence Jellan and Anthony Katz [1990] 90 Cr.App.R., Auld J held that,

> "Even where there is an element of entrapment in a tape recorded conversation between a defendant and a witness made by the witness at the instigation of the police without the defendant's knowledge, the tape recording may be admitted in evidence unless the conversation is unfairly conducted by the witness."

And, further into the judgment,

"The Code of Practice is designed to protect those who are vulnerable because they are in police custody, not to hamper the investigation of crime. They are not intended to confine police investigation of crime to conduct which might be regarded as sporting to those under investigation."

75. Here the court laid great emphasis on the fact that the lower court had found that Jellan would have said what he was recorded as saying anyway, "as nobody had advanced misleading information to Mr Jellan to make him speak in terms which he otherwise would not have spoken in." Of course, in the present case Vincent Yum frankly admits to having told lies to D4 in a monitored call in order to draw further admissions from him.

76. In the case of R v Christou and Wright [1992] 1 QB 979, having cited the first passage above from Jellan and Katz, the Court of Appeal (Lord Taylor) said at page 990:

"That passage is not quite accurate. It is true that the provisions of the Code are largely concerned with those who are in custody, but not exclusively so, thus the first nine paragraphs are concerned with those in detention. However, paragraph 10.1 and other paragraphs dealing with interviews are not confined to those in custody. The judge recognised that the quoted passage required some qualification. His amendment was that the Code was intended to apply to people under detention 'or people for whom detention is becoming, as it were, imminent.' Even that amendment may be too restrictive."

77. In the present case I find that D4, Nicholas Tan, whilst he was in Exchange Square that evening was someone "for whom detention was becoming imminent". Lord Taylor went on to say on the following page, page 991:

"We should ourselves administer a caution. It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the Code and with the effect of circumventing it."

78. In Lam Tat Ming's case our own Chief Justice (at page 445 and 446), having analysed the English authorities, makes it clear that there is a thin line between acceptable undercover police operations which passively provide an opportunity for the suspect to speak and those which actively seek admissions by addressing questions that go to the vital issues of the offences under inquiry. In seeking to hold on to this evidence Mr Fitzpatrick has stressed that Vincent Yum did not "interrogate" D4 in the sense of shouting at him or bullying him and cajoling him. I agree. However, as we all know, a good cross-examiner does not ask questions crossly. A gentle cross-examination that eases admissions out of the witness will still be regarded as an effective interrogation.

79. Having carefully considered the gravity of the offence, the form and content of this monitored phone call and, in particular, the context in which it was made, I have decided to exercise my residual discretion to exclude the monitored phone call between Vincent Yum and Nicholas Tan in order to ensure a fair trial for the accused.

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80. Finally, the fourth ruling concerns the admissibility of two video recorded records of interview under caution conducted with D4, Tan Chye-seng, Nicholas at, (a) 0317 hours on 26 February 2004 (PP66); and (b) at 0945 hours on the same morning (PP67). I find I am satisfied so as to be certain that the first interview was given by this defendant freely and voluntarily and without any form of inducement or oppression. I therefore admit PP66 into evidence.

81. Regarding the second interview, I find that I cannot be certain that this statement is voluntary in the sense that it

is not the fruit either of inducement or threat held out by some person in authority and, further, that it is not the fruit of conduct so oppressive that there is a danger that it resulted from the will of the person being interrogated having been overborne. I therefore exclude PP67 from evidence.

H H Judge Sweeney
District Court Judge