

Amended in red pursuant to the Order of
Mr. Justice Hartmann dated 26th October 2005
Dated this the ___ day of _____ 2005
Registrar.

立法會 CB(2) 277/05-06(01)號文件

LC Paper No. CB(2) 277/05-06(01)

HCAL No. 101 of 2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.101 OF 2005

IN THE MATTER of an Application for Leave
to Apply for Judicial Review by the
SECRETARY FOR JUSTICE under Order 53
Rule 3 of the Rules of the High Court

And

IN THE MATTER of the Orders made by
Deputy Judge Livesey sitting at the District
Court commencing from 23 June 2005 in the
trial of the Defendants in DCCC No. 687 of
2004 (Part A)

BETWEEN

SECRETARY FOR JUSTICE (Applicant)

and

SHUM Chiu (1st Respondent)
WONG Hung-ki (2nd Respondent)
YU Chi-wai (3rd Respondent)
WONG Tin-sum, Ann (4th Respondent)

**AMENDED NOTICE OF APPLICATION FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW (O. 53 R. 3)**

This form must be read together with the Notes for Guidance obtainable from the
Registry.

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To the Registrar, High Court, Hong Kong Special Administrative Region

Name, address and description of Applicant	Secretary for Justice, Department of Justice, 5/F, Queensway Government Offices, High Block, 66 Queensway, Hong Kong.
Judgment, Order, Decision or other Proceeding in respect of which Relief is sought	<p>(1) The Order of Deputy Judge Livesey made on 29 June 2005 refusing the prosecution to adduce further evidence or material in relation to the stay application in DCCC No. 687 of 2004(Part A)</p> <p>(2) The Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings and discharging defendant SHUM Chiu in DCCC No. 687 of 2004 (Part A)</p> <p>(3) The Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings and discharging defendant WONG Hung-ki in DCCC No. 687 of 2004 (Part A)</p> <p>(4) The Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings against defendant YU Chi-wai in DCCC No. 687 of 2004 (Part A)</p> <p>(5) The Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings against defendant WONG Tin-sum, Ann in DCCC No. 687 of 2004 (Part A)</p> <p><u>(6) The Order of Deputy Judge Livesey made on 18th October 2005 awarding costs of the proceedings in DCCC No.687 of 2004 (Part A) to defendant YU Chi-wai and defendant WONG Tin-sum, Ann to be taxed if not agreed with certificate for two counsel in respect of both defendants</u></p>

RELIEF SOUGHT

1. An expedited hearing of the application for judicial review;

2. An Order that the Order of Deputy Judge Livesey made on 29 June 2005 refusing the prosecution to adduce further evidence or material in relation to the stay application in DCCC No. 687 of 2004 (Part A) be quashed;
3. An Order of mandamus requiring Deputy Judge Livesey to decide whether she should allow the prosecution to introduce further evidence or material in relation to the stay application in DCCC No. 687 of 2004 (Part A) in accordance with law in the District Court;
4. An Order that the Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings and discharging the 1st Respondent in DCCC No. 687 of 2004 (Part A) be quashed;
5. An Order that the Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings and discharging the 2nd Respondent in DCCC No. 687 of 2004 (Part A) be quashed;
6. An Order that the Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings against the 3rd Respondent in DCCC No. 687 of 2004 (Part A) be quashed;
7. An Order that the Order of Deputy Judge Livesey made on 5 July 2005 staying the proceedings against the 4th Respondent in DCCC No. 687 of 2004 (Part A) be quashed;
- 7A. An Order that the Order of Deputy Judge Livesey made on 18th October 2005 awarding costs of the proceedings in DCCC No.687 of 2004 (Part A) to the 3rd and 4th Respondents to be taxed if not agreed with certificate for two counsel in respect of both Respondents be quashed;
8. An Order of mandamus requiring Deputy Judge Livesey to decide whether she should determine or otherwise deal with the charges against the Respondents in the case DCCC No. 687 of 2004 (Part A) in accordance with law in the District Court;

- 9. An oral hearing of this application is required if leave to move for judicial review is not granted on papers;
- 10. Such further and other relief as the court may provide; and if leave is granted, a direction for the substantive hearing of the Application for Judicial Review to be set down for 1 day with 1 day reserved; and
- 11. An order for costs.


Name and address of
Applicant's solicitors

Department of Justice
2/F, Queensway Government Offices
High Block, 66 Queensway, Hong Kong

Signed ~~(sd)~~

Dated ~~5th August 2005~~

~~LEE TIN YAN
Government Counsel
Department of Justice~~


DAVID H.C. WAN
Government Counsel
Department of Justice

22nd October 2005

GROUND ON WHICH RELIEF IS SOUGHT

FACTS AND CHRONOLOGY

Background

1. On 23 June 2005, SHUM Chiu (D1), WONG Hung-ki (D2), YU Chi-wai (D3) and WONG Tin-sum, Ann (D6) stood trial in the District Court before Deputy Judge Livesey in relation to allegations that they variously conspired to offer an advantage to public servants (D1, D2 and D3) and to falsify documents (D1, D2, D3 and D6) in order to obtain lucrative government contracts for the supply of miniature circuit breakers. There were two charges of conspiracy to offer an advantage to public servants, contrary to sections 4(1)(a) and 12(1) of the Prevention of Bribery Ordinance, Cap. 201 and sections 159A and 159C of the Crimes Ordinance, Cap. 200 (CO) (Charges 1 and 3), where it was alleged that D1, D2 and D3 conspired together and with Tang Hop-sing (PW1) in relation to Charge 1 and with PW1 and Lai Sai-sing in relation to Charge 3. There were also two charges of conspiracy to falsify account, contrary to section 19(1)(a) of the Theft Ordinance, Cap. 210 and sections 159A and 159C of the CO (Charges 2 and 4), where it was alleged that D1, D2, D3 and D6 conspired together and with PW1 in relation to Charge 2 and that D1, D2, D3 and D6 conspired together and with PW1 in relation to Charge 4.

The stay application

2. All four defendants made an application for a permanent stay of the proceedings which was granted by the Deputy Judge on 5 July 2005.

3. The application by the defendants concerned a meeting between PW1 and D3 together with two lawyers. The Deputy Judge in her ruling stated that :

"2. All the applications rely upon the fact that ICAC investigating officers arranged for, and carried out, a covert recording of a meeting that took place on Saturday, 16 November 2002, in a restaurant at which PW1, D3 and two solicitors from Haldanes were present. It is the attendance of PW1 at the meeting, and its taping, that form the cornerstone of the whole application."

4. A stay would be granted if, first, notwithstanding the range of remedial measures available, a fair trial for an accused was impossible and continuing the prosecution would amount to an abuse of process. Secondly, a stay might be granted, although the fairness of the trial was not in question, because the circumstances involved an abuse of process which so offended the court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process: see *HKSAR v Lee Ming Tee & another* (2001) 4 HKCFAR 133 at 148F-151J.

5. The basis of the application for D3 was on the second limb of the power to stay proceedings whilst the basis for D1, D2 and D6 was on the first and second limbs. The Deputy Judge explained this in her ruling :

"9. The application on behalf of D3 is not based upon the contention that D3 will not have a fair trial. Indeed, the prosecution have made it quite clear from the outset that the prosecution team have not heard the tape, there is no transcript and that they have no intention of relying upon the taped conversation.

10. The application on behalf of D3 is on the basis that it is submitted that, by recording this conversation, the ICAC have engaged in conduct which was such a breach of the fundamental rights of the accused as to strike at the very integrity of the administration of justice and that there exists a line of cases which recognises the existence of a discretion in the court to stay proceedings where there has been a degradation of the lawful administration of justice. It is further submitted that a failure to have such a discretion would result in the court participating in the consequences of the illegality.

11. It is contended, on behalf of D3, that the court has a discretion to stay these proceedings as the recording of this meeting has resulted in such a degradation of the lawful administration of justice and that such discretion should be exercised in favour of D3.

12. The applications on behalf of D1, D2 and D6 are wider in that they are two-pronged: (1) the conduct of the ICAC in carrying out this covert recording was so unworthy or shameful that it would be an affront to public conscience to allow the prosecution to proceed; and (2) they are unable to have a fair trial as a result and it would be an abuse of the court's process to allow the prosecution to proceed."

The factual basis for the stay application

6. During the course of the application the only oral evidence given was from one of the partners of Haldanes, Mr. Louis Fung. He testified that he attended a meeting together with another partner from Haldanes, Mr. Geoffrey Booth with PW1 and D3. His evidence was :

Q. During the course of that meeting, did you give legal advice?

A. Yes.

Q. To whom?

A. To both Tang and Lawrence Yu.

Q. Tang, PW1 in these proceedings?

A. Yes, PW1, Tang.

Q. Lawrence Yu?

A. Between the solicitors. D3 in this proceedings

Q. And what was the legal advice pertaining to?

A. In respect of the raid by the ICAC in respect of the premises of ABB Hong Kong.

Q. And was that the operation which had taken place on 7 November 2002?

A. That's correct, yes.

Q. And is that the operation which is described in the skeleton in the following terms: "Search warrants were executed by the ICAC at ABB, and several persons were arrested, including two employees of ABB. One of those was D6.

A. Yes. The other one was Victor Law."

7. There were also a set of premised facts which came from facts variously asserted by the defendants in their written submissions and were marked for identification as MFI 1 to 4. The Deputy Judge set out the premised facts in her ruling :

"8. Briefly, those premised facts are that

(a) On 3 May 2002, PW1, an employee of ABB, was arrested by the ICAC. It was clear, even at that stage, that PW1, D1, D2, D3, D4, PW2 and others were suspected of conspiracy to offer advantages to a public officer.

(b) From 3 May 2002 until June 2003, PW1 acted as an undercover agent on behalf of the ICAC; inter alia, he

removed various documents from his employer's premises without their knowledge and gave them to the ICAC. He also agreed occasionally to wearing covert recording devices during this period in an attempt to collect evidence. During this period, PW1 made a number of non-prejudicial statements to the ICAC.

- (c) On 7 November 2002, the ICAC, having obtained search warrants, executed an operation at the premises of ABB. They seized various exhibits, including those documents set out in paragraph 4 of Exhibit MFI-4, and arrested a number of persons.*
- (d) PW2 had been informed that it was the intention of the ICAC to arrest D3 during that raid but D3 and Keith Leung, another suspect, were not arrested as they were not in Hong Kong. D3 was only arrested on 16 August 2003. The seized documents are to be part of the prosecution case and had been referred to by PW1 when making some of his non-prejudicial statements.*
- (e) On 7 November, Messrs Haldanes were retained by ABB to protect the interests of the company and its employees. Thereafter, Keith Leung frequently contacted PW1 during the ensuing days and told PW1 not to say anything if arrested but to contact Mr Fung of Haldanes.*
- (f) On 14 November, PW1 informed the ICAC that he was to attend a lunch with D3 and a lawyer on 16 November. D3 is the second most senior executive in the company; PW1 is a subordinate. It was further admitted, during admissions, that PW1 always used the Chinese word meaning "solicitor" in his non-prejudicial statements.*
- (g) Having received this information, the ICAC arranged for PW1 to be equipped with a covert recording device so that the meetings could be recorded. On 16 November, PW1 attended the meeting at which D3 and two solicitors, including Mr Louis Fung from Haldanes, were present.*
- (h) Mr Fung gave evidence in court that he was present at the meeting and that he gave legal advice to PW1 and D3. Mr Fung stated that he had retained conduct of these proceedings on behalf of Haldanes.*
- (i) The meeting lasted about an hour, and it was recorded by the ICAC using covert taping being carried by PW1. This tape is not to form part of the prosecution case and has not been heard by prosecuting counsel nor his court ICAC assistants, nor the Department of Justice, and also not by counsel acting on behalf of any of the defendants.*

- (j) *The ICAC, prior to the meeting, informed PW1 of his own right to privileged communication with the lawyer should he be offered advice. Again, it was agreed, during submissions, that PW1 waived his right to privilege prior to the meeting taking place.*
- (k) *The same covert device was used to tape a conversation between D3 and PW1 after the meeting. It is the prosecution's intention to seek to use this section of the tape as part of their case.*
- (l) *Since the meeting, the tape has been listened to by at least PW1 and two ICAC officers when PW1 was asked to confirm that the contents of the tape were correct."*

The refusal to accept additional evidence

8. The prosecution prior to making its reply to the stay application sought to put before the Deputy Judge additional relevant material being the evidence of two ICAC officers, NG Ping-kwok, Principal Investigator (PI NG), who would deal with the events leading up to and including the decision to tape the meeting and another ICAC officer who would produce a transcript of the taped meeting between PW1 and Keith Leung in which it would be revealed that attempts were being made for PW1 to make a false and misleading statement to the ICAC about the case. A copy of PI NG's statement and a copy of the English translation of the transcript of the said taped meeting between PW1 and Keith Leung are respectively marked as "PWS-10" and "PW-6" and exhibited to the Affidavit of PANG Wai-sum dated 2 August 2005 filed herein. The prosecution also sought that the Deputy Judge listen to the tape in order to determine whether the communication was covered by legal professional privilege. The Deputy Judge refused both requests.

9. The Deputy Judge said it was not a situation where she should exercise her discretion to permit the prosecution to resile from a fact which was agreed and call rebuttal evidence.

10. The Deputy Judge also refused to listen to the tape. She said that as D3 did not know that PW1 was "an ICAC mole" there was no implied waiver of the

privilege by D3 in having PW1 present at the meeting. She also said she did not see any benefit in her listening to the tape.

LEGAL CONTEXT

11. The jurisdiction to stay criminal proceedings has been laid down by the Hong Kong Court of Final Appeal in HKSAR v Lee Ming Tee & Another (2001) 4 HKCFAR 133 at 148F-151J [Section C of the judgment of the Court of Final Appeal]:

- a. The decision whether or not to bring a prosecution falls entirely within the province of the Secretary for Justice.
- b. If a prosecution is brought, the court's duty is to try the case.
- c. The court, unquestionably, has jurisdiction to stay criminal proceedings in exceptional cases where such a course is justified.
- d. The jurisdiction rests on the court's inherent power to prevent abuse of its own process.
- e. It is an abuse of process, excepting cases where the entire prosecution was tainted by abuse of power, only when a fair trial is impossible.
- f. The fairness achievable is judged in practical and not absolute terms.
- g. The court's primary endeavour is to ensure that a fair trial takes place, employing the law's available resources, and not to abort it on the ground of fairness cannot be attained, save as a last resort.

12. The Court of Final Appeal in Lee Ming Tee cited with approval the following passages from the judgment of Brennan J (as he then was) in Jago v District Court of New South Wales (1989) 168 CLR 23 at 46-47:

A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedure of the trial to avoid or minimize prejudice to either party.

Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes, adverse revelations in a public enquiry, absence of competent

representation, or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.

SUBMISSIONS

13. In the present case, the following salient points should be noted:
- (1) The ICAC had reasonable grounds to suspect that at the meeting of 16 November 2002 D3 would attempt to pervert the course of public justice by getting PW1 to make a false or misleading statement. Also, the ICAC at that stage did not know whether a lawyer or a solicitor's clerk would attend the meeting.
 - (2) The ICAC explained to PW1 that the proposed meeting with a lawyer would be covered by legal professional privilege and sought and received his acquiescence to monitor the meeting and his waiver of any legal professional privilege.
 - (3) The recording device was to record any conversation in which PW1 was involved.
 - (4) The ICAC disclosed as unused material the fact that the meeting had been recorded by audio-tape together with all relevant particulars.
 - (5) The prosecution had no intention to rely on the taped conversation. There was no transcript of the audio-recording. The prosecution team had not heard the tape.
 - (6) At the end of the meeting, there was a conversation between D3 and PW1 which was not part of the discussion with the two lawyers and which the prosecution was to rely on as part of its case.

14. The Deputy Judge has based her decision on the notion that any form of violation of legal professional privilege will warrant a stay under the second limb. However, no attempt was made by the Deputy Judge to assess or evaluate the nature of the communication and the alleged violation in question. It appears that the meeting with the two lawyers had been arranged by D3 for PW1 to be given some advice. In fact, it seems that D3 and Keith Leung were wanting PW1 to make a statement to the ICAC that was false or misleading. At that stage of the investigation, no one had been charged, except several people including PW1 had been arrested some time before but there was renewed interest in the investigation because of recent inquiries into ABB Industrial and Building Systems Ltd. (ABB).

15. The nature of the legal advice may be such that it was not sensitive because of its purpose and content, the circumstances in which it was given, the stage at which it was given, that is, during the investigative stage after the execution of search warrants and the person to whom it was given, that is, PW1. The sensitivity of the advice in this case did not appear to be great. The nature of the violation was that legal advice that was given had been revealed to others. Firstly, it is arguable that the legal advice was directed only to PW1. Secondly, PW1 had waived legal professional privilege. Thirdly, if legal advice was also given to D3 it appears to be the same legal advice given to PW1. Fourthly, if D3 was given different legal advice he waived the privilege by allowing PW1 to be present to hear it. The only persons who heard the legal advice were PW1 (with D3's approval) and two ICAC officers by listening to the taped conversation, neither of whom were involved in the prosecution case. The communication was not revealed or used beyond that.

16. The Deputy Judge has erred in a number of respects.

- (1) Firstly, the Deputy Judge erred in law to refuse an application by the prosecution to put relevant additional material before her in relation to the application. As stated by Hartmann J in *Secretary for Justice v Cheung Chung Chit* [2003] 3 HKLRD, at 454A-C :

"15. During the course of submissions much was said of the dangers of a judge assuming an inquisitorial role if compelled to

make an inquiry. I find nothing of substance in that concern. Our courts have an obligation to control their own procedures so that, as far as possible and in accordance with law, a fair trial is assured. From time to time that places upon presiding judges the obligation to seek answers, implicitly thereby to make some form of inquiry. In guarding the integrity of the judicial process in their courts common law judges cannot be entirely passive."

- (2) Secondly, the Deputy Judge by refusing the application by the prosecution to put before her relevant additional material, wrongly decided the application in relation to the defendants and further, had she not deprived herself of the evidence the prosecution wished to adduce she would not have decided as she did.
- (3) Thirdly, the Deputy Judge erred in law in applying the relevant legal principles in relation to legal professional privilege and a stay of proceedings, in that, she did not correctly decide whether the communication with the lawyers was covered by legal professional privilege because (i) of the waiver by PW1; (ii) the legal advice was given to both PW1 and D3 at the same time (it should be noted that D3 had already consulted the lawyer and the purpose of this meeting was to give advice to PW1); (iii) D3 waived his privilege by allowing PW1 to be present; and (iv) the evidence of Mr Louis Fung as far as it goes was that the same legal advice was given to PW1 and D3 and together; and she did not correctly address the principles applicable to the two limbs of the power to stay proceedings and did not correctly evaluate and determine the relevant facts and circumstances thereto. See Hartmann J's remarks in *Secretary for Justice v Cheung Chung Chit* [2003] 3 HKLRD at 452A-454C; *HKSAR v Lee Ming Tee and Anor* (2001) 4 HKCFAR 133.
- (4) Fourthly, the Deputy Judge erred in finding that the conduct of the ICAC offended the second limb of the power to stay the proceedings in relation to D3.
- (5) Fifthly, the Deputy Judge erred in finding that she would have exercised her discretion to stay the proceedings on the same ground as D3 and for the same reasons in relation to D1, D2 and D6 in circumstances where D1,

D2 and D6 had no involvement in the meeting of 16 November 2002 and no issue of legal professional privilege concerned them.

- (6) Sixthly, the Deputy Judge erred in finding that D1, D2 and D6 could not have a fair trial because the taped conversation could not be disclosed to them, in that, no prejudice had been shown and, in any event, PWI had waived his privilege and the taped conversation could be disclosed to D1, D2 and D6 which was the same advice to D3. Otherwise, the communication was privileged and not disclosable.

17. Accordingly, the Deputy Judge has erred when she (a) refused the prosecution to adduce further evidence or material in relation to the stay application, and (b) ordered the stay of proceedings against the defendants.

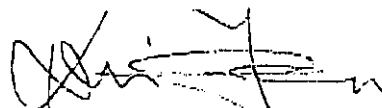
18. The hearing of the application for judicial review should be expedited because the issue will determine whether the criminal trial in relation to the Respondents should proceed and this case will be relevant to the trial in DCCC No. 687 of 2004 (Part B) against the 3rd Respondent, the 4th Respondent and two others, namely HO Shek-on, Simon and YAN Kin-ming which is outstanding and due to commence on 1 September 2005

19. Should this Judicial Review application be decided in favour of the applicant then as a consequence thereof the Order of Deputy Judge Livesey made on 18th October 2005 awarding costs of the proceedings in DCCC No.687 of 2004 (Part A) to the 3rd and 4th Respondents to be taxed if not agreed with certificate for two counsel in respect of both Respondents should accordingly be quashed.

~~(sd)~~

~~(Kevin P. Zervos, SC)~~

~~Senior Assistant Director of Public Prosecutions~~



(Kevin P. Zervos, SC)

Senior Assistant Director of Public Prosecutions