

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL Nos. 12-15 of 2016 (CRIMINAL)
(ON APPEAL FROM CACC No. 444/2014)

HKSAR

Respondent

v

HUI Rafael Junior, also known as HUI Si-yan Rafael	1 st Appellant ("D1")
KWOK Ping-kwong, Thomas	2 nd Appellant ("D2")
CHAN Kui-yuen, also known as Thomas CHAN	3 rd Appellant ("D4")
KWAN Francis Hung-sang, also known as KWAN Francis	4 th Appellant ("D5")

THE RESPONDENT'S CASE

INDEX

(1)	Introduction	2
(2)	The Conviction of the Appellants	3
(3)	The Decision under Challenge	5
(4)	The Ground of Challenge	6
(5)	The Ingredients of MIPO.....	7
(6)	Favourable Disposition.....	17
(7)	Chung Fat-ming.....	21
(8)	Policy	30
(9)	The Directions of the Judge.....	33
(10)	Conclusion	35

(1) Introduction

RECORD
(Part/Vol/page)

1. The point of law raised in the appeal is whether in the case of a public officer, being or remaining favourably disposed to another person on account of pre-office payments, is sufficient to constitute the conduct element of the offence of misconduct in public office (“**MIPO**”). A/3/623
2. The Respondent submits that a public officer who is or remains favourably disposed to another person on account of pre-office payments commits a continuing act of disloyalty in breach of his duty to serve the people of Hong Kong. In the present case, the 1st Appellant sold his loyalty as Chief Secretary to property developers, for \$8.5 million. This completely destroyed his public duty. His favourable disposition towards his private paymasters tainted his entire office and all his official acts. As the Court of Appeal observed, it is “difficult to think of a more serious misconduct in public office when Rafael Hui was Chief Secretary”.¹ A/2/459-460
3. The conclusion that favourable disposition in return for pre-office payments constitutes the conduct element of the offence of MIPO is consistent with the established ingredients of the offence, the underlying rationale of the offence, the case law in this area and policy considerations. The conclusion does not involve any novelty or expansion of the scope of the offence. To the contrary, it is the Appellants’ argument – namely that the offence does not prohibit bribes provided that payment is made before the official takes office – which is both novel and contrary to principle.

¹ Court of Appeal judgment (“Judgment”), per Yeung VP, at § 35

4. The Respondent submits that the reasoning and conclusion of the Court of Appeal were correct, and accordingly the Respondent invites the Court to answer the certified question in the affirmative, and to dismiss the appeal. The Respondent's submissions are set out below.

(2) The Conviction of the Appellants

5. The Appellants were convicted of conspiracy to commit MIPO, following a trial before Macrae JA and a jury: Count 5 of the Indictment. The conspiracy particularised was an agreement that the 1st Appellant, whilst Chief Secretary, would wilfully misconduct himself in the course of or in relation to his public office (without reasonable excuse or justification), by being or remaining favourably disposed towards Sun Hung Kai Properties Limited (“**SHKP**”) and others in return for the payments totalling \$ 8.5 million.
6. The payments to the 1st Appellant were made in the days and hours leading up to his appointment as Chief Secretary. The payments were disguised: they were made by the 2nd Appellant, through an indirect and complicated route (described by the Court of Appeal as “circuitous and devious”²), involving the 3rd and 4th Appellants. A/2/447P-Q
The Prosecution case was that the payment was a general sweetener, made to secure the favourable disposition of the 1st Applicant as Chief Secretary, towards SHKP.
7. The convictions also included the conviction of the 1st, 3rd and 4th Appellants of conspiracy to offer an advantage to a public servant, contrary to section 4(1)(a) of the Prevention of Bribery Ordinance,

² Judgment, per Yeung VP, at § 3

Cap. 201 (“**POBO**”): Count 7. The conspiracy involved payments to the 1st Appellant totalling \$11.182 million whilst he was a Non-Official Member of the Executive Council. As in the case of Count 5, the payments were disguised, and made through an indirect and complicated route involving the 3rd and 4th Appellants. The Prosecution case was that this payment was also a general sweetener, paid to the 1st Appellant in return for his favourable disposition.

8. Counts 5 and 7 did not allege a specific act of favour that was to be given, or was in fact given, as a *quid pro quo* for the payments. Instead, the Prosecution allegation was that the payments were intended to be, and were in fact, general sweeteners: they were general goodwill payments made to the 1st Appellant to secure, and accepted by him in return for, his favourable disposition as a public servant. The payments were made at a time when SHKP and the Government were engaged in official dealings, in which SHKP had a significant financial interest. At the time the 1st Appellant took office, the Government was considering SHKP’s tender to be the developer of the West Kowloon Cultural District Project, and the Government and SHKP were counterparties in negotiations concerning the development of Ma Wan Island.
A/1/5, 7
A/2/459-460
9. The issue at trial was whether the payments made to the 1st Appellant in the days and hours prior to his appointment were bribes in connection with the performance of his public office, as alleged by the Prosecution, or were legitimate payments for consultancy work, as the 1st, 2nd and 3rd Appellants contended during their evidence.

10. The jury concluded beyond reasonable doubt that the payments were bribes for the 1st Appellant to be or remain favourably disposed towards SHKP in the course of or in relation to his public office as Chief Secretary, and that the accounts given on oath by the Appellants were false.
11. The starting point for any analysis, therefore, is that the payment in Count 5 was a bribe paid to the 1st Appellant in connection with the performance of his public office.

(3) The Decision under Challenge

12. On appeal to the Court of Appeal, the Appellants argued that favourable disposition on the part of a public officer in return for pre-office payment does not constitute the conduct element of the offence of MIPO, because such favourable disposition is merely a state of mind, and not an “act” of misconduct. The Appellants contended that it was necessary for the Prosecution to go further, and identify an additional or specific “act” pursuant to that disposition in breach of duty.

A/2/501-502,
§§ 146,147(iii)

A/2/506-507,
519
§§ 153-154,
172
13. In a judgment dated 16 February 2016, the Court of Appeal (Yeung, Lunn VPP and Pang JA) rejected this argument, and held that on a charge of conspiracy, it was sufficient to prove that the agreement was for a public official, in connection with his public office, to be or remain favourably disposed in return for a general sweetener payment; it was not necessary to prove the conspirators agreed that the public official would commit an additional, identifiable specific act of misconduct in return for his money.³

A/2/454-455,
458, 460-461

§§ 21-22, 30,
38

AB/2/542,
§ 226

³ Judgment, per Yeung VP, at §§ 21-22, 30, 38; per Lunn VP, at § 226

The public official's favourable disposition, purchased by private interests, was a continuous and serious act of misconduct.⁴

A/2/463

14. The Court of Appeal concluded that the Chief Secretary being or remaining favourably disposed to SHKP in return for SHKP having paid him very large sums of money was “*a gross departure*” from the Chief Secretary's responsibilities as a public officer and “*was itself a serious [act of] misconduct in public office*”.⁵ The agreement particularised in Count 5 was for the 1st Appellant, after being paid millions of dollars by SHKP, to commit a continuous act of favouritism towards SHKP whilst he was Chief Secretary. That act of favouritism was an abuse of the trust reposed in the 1st Appellant's public office and a betrayal of his duty of loyalty.⁶ As the Court of Appeal held: in the case of the Chief Secretary, “*it is difficult to think of a more serious [act of] misconduct in public office...*”⁷

A/2/462, § 41

A/2/462-463

A/2/459-460

15. The Court of Appeal held that, on a charge of conspiracy, if it is proved that the conspirators agreed the public official was to be or remain favourably disposed towards his private “paymaster”, it is not necessary for the prosecution to prove that the public official would (if necessary or otherwise) carry out any further, particular and identifiable “act” of misconduct.

A/2/542

(4) The Ground of Challenge

16. The Court granted leave to appeal on 12 July 2016 in relation to the point of law set out in paragraph 1 above. The Appellants are

A/3/623

⁴ *Ibid.*, per Yeung VP, at § 44

⁵ *Ibid.*, per Yeung VP, at § 41

⁶ *Ibid.*, at §§ 43-44

⁷ *Ibid.*, at § 35

advancing the same argument that was advanced before the Court of Appeal.

17. The Appellants are contending, therefore, that the Court should decide that the criminal law does not prohibit the bribing of Hong Kong public officials to secure their general goodwill, provided that the bribe is paid before the official assumes office.

(5) The Ingredients of MIPO

18. The offence of MIPO is committed where: (a) a public official; (b) in the course of or in relation to his public office; (c) *wilfully misconducts himself, by act or omission*; (d) without reasonable excuse or justification; and (e) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.⁸
19. In the particulars of Count 5, the act of misconduct in the course of or in relation to the 1st Appellant's public office was his favourable disposition towards SHKP and/or others named in return for payment.
20. As is apparent from the case law both in Hong Kong and elsewhere, the offence of MIPO is directed at the abuse by a public officer of his or her official position. This was expressed by Auld

⁸ *Sin Kam-wah v HKSAR* (2005) 8 HKCFAR 192, at § 45; *HKSAR v Wong Lin-kay* (2012) 15 HKCFAR 185, at §§ 24, 44-46

LJ in *Three Rivers District Council v Bank of England (No 3)*⁹ at 137F-G:

““the essence of the tort is the abuse of public office.” Abuse ... connotes dishonesty or bad faith by a public officer either in the performance of his office or in an absence of an honest attempt at it...”

Lord Millett also said at p. 235F-G:

“Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power...”

21. The authorities in Hong Kong have made clear (and it is in this jurisdiction that the offence has perhaps seen its most detailed development), the essence of the offence lies in the abuse by a public official of his official position.¹⁰ The Court of Final Appeal decided in *HKSAR v Shum Kwok Sher*¹¹ that the elements of the offence of misconduct in public office are difficult to describe with precision and the difficulty stems, as Sir Anthony Mason NPJ pointed out at § 69:

“... not so much from the various ways in which they have been expressed as from the range of misconduct by officials which may fall within the reach of the offence. This is

⁹ [2003] 2 AC 1

¹⁰ *HKSAR v Wong Lin Kay* (2012) 15 HKCFAR 185, at §§ 19-21, 23, 29, 31

¹¹ (2002) 5 HKCFAR 381

because, to quote the words of PD Finn, ‘Public Officers: Some Personal Liabilities’ (1977) 51 ALJ 313 at p.315:

‘The kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position.’¹²

And in the same case, at § 80:

“Official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.”¹³

22. Sir Anthony Mason NPJ further commented: “what constitutes misconduct in a particular case will depend upon the nature of the relevant power or duty of the officer or of the office which is held and the nature of the conduct said to constitute the commission of the offence.”¹⁴

23. This was further explained by Sir Anthony Mason in *Sin Kam Wah* (2005) 8 HKCFAR 192, at 211 D-G:

“To constitute the offence of misconduct in public office, wilful misconduct which has a relevant relationship with the defendant’s public office is enough. Thus, misconduct

¹² This was quoted with approval in *HKSAR v Wong Lin Kay*, *supra*, at p.192 § 19

¹³ See also § 81

¹⁴ At p.405E, § 69

otherwise than in the performance of the defendant's public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute, in circumstances where the misconduct is both culpable and serious and not trivial. In the present case, if the charges as particularized are made out, there can be no doubt that the misconduct had the necessary relationship with the first appellant's public office and that it was culpable and serious because it involved his participation in the acceptance of free sexual services with the knowledge that they were provided by prostitutes over whom the second appellant exercised control, direction or influence, that being a serious criminal offence."

24. It may be noteworthy that the Court of Appeal commented that while the misconduct in public office offence laboured under a lack of a precise definition in certain authorities, what has been consistent is a reference to "*corrupt conduct as being a classic situation in which the offence operates.*"¹⁵ The central theme of the offence is "the concept of the intentional abuse of an official position."¹⁶
25. The above decisions are also consonant with the observation made in *HKSAR v Wong Kwong-shun Paul*,¹⁷ at § 40, concerning the cultural conditions in Hong Kong and the public interest in eradicating corruption:

"In order that Hong Kong can continue to be a corruption-free, fair and just community, any public officer in the

¹⁵ *HKSAR v Sin Kam Wah and anor* (unreported, CACC 520/2003. 11 June 2004), at p. 14, § 15(3)

¹⁶ *Ibid.*, p. 18, § 18

¹⁷ [2009] 4 HKLRD 840, at 848

execution of his public duties must not only be impartial and avoid doing anything in conflict with his personal interest, but must also ensure that his conduct will not lead to any reasonable criticism, cause any suspicion or bring his office into disrepute. Otherwise, the public will lose confidence in public administration and social stability and harmony will be perturbed. In performing his public duties, a public officer must never harbour any selfish motive and must not intentionally benefit himself or his friends or relatives in any way, for instance, by providing any assistance to them so that they would enjoy an unfair advantage. Any conduct of a public officer which contravenes the above principles is serious misconduct.”

26. The principle underpinning the offence was also explained by Chan Acting CJ in the Court of Final Appeal decision in *HKSAR v Ho Hung Kwan, Michael*¹⁸:

“26. In considering this important question, one must not lose sight of the object of this offence. It is clear from a review of the authorities that this offence is aimed at punishing an abuse by a public officer of the power and duty entrusted to him for public benefit or of his official position ...

29. In cases where corruption, dishonesty or other illegal practices are involved, it is not necessary to specifically consider the consequences of the misconduct in deciding

¹⁸ (2013) 16 HKCFAR 525 at 533-534

whether it is serious enough as to constitute the offence of misconduct ...

39. The integrity of the system and the public confidence in such a system are clearly relevant matters for consideration in deciding whether the conduct of a public officer is so serious as to amount to the offence of misconduct in public office.”

27. The above principles appear to have been accepted in Australia, for example in *R v Clarke*¹⁹, the public officer secretly received money and furniture from merchants, which he claimed were rewards for personal work he performed in assisting them to prepare their costs and did not affect the content of his official “reports”. He was charged with misconduct in public office for making a secret profit out of his office. The learned Judge ruled (at 313, 318) that he could be found guilty even if his claims were true, directing the jury that:

“When a man accepts a position of trust and confidence under the Crown he undertakes duties the pure administration of which is of the utmost importance to the community in which he lives, and the law requires from such a person a very great care in the exercise of his office and he should never put himself in a position in which his own interests may point one way, and the duties which he has undertaken for the Crown point in the opposite direction ...

¹⁹ [1954] Arg LR 312 (a decision of O’Byrne J)

If you find that he took the secret payment even for nothing more than preparing the costs but that in so doing he deliberately did that which he knew would necessarily and inevitably impede him in the discharge of the public duties which he was by law bound to discharge then you may find him guilty.

Or put it another way – if you find that by agreeing to take money or furniture, as the case may be, he consciously and deliberately put himself into a position in which his duty to investigate impartially the costs of an article and make an unbiased report thereon conflicted with his [interests], he is guilty and it does not matter for this purpose that his report might have been the same if he received no secret profit.”

28. In *R v Boston*²⁰, the High Court of Australia analysed a case of criminal conspiracy in the context of payments made to a member of the legislative assembly. Two issues arose for consideration. First, was the member of the Legislative Assembly a public official? And secondly, if he was a public official, was what he did within the terms of his public office? It appears to have been the prosecution allegation that the pressure alleged in the Indictment would be pressure applied in an extra-parliamentary manner. At 394, the Chief Justice said:

“...the question whether the transaction is in fact, or in the opinion of either or both of the parties to the agreement, beneficial to the public is wholly immaterial – the only question being whether payment of money to a member of

²⁰ [1923] 33 CLR 386

Parliament for the purpose alleged in the information is an act which tends to the public mischief; **the tendency of such payment must be judged irrespective of the merits of the transaction intended to be promoted** I can see no such difference between an agreement to buy a member's vote and an agreement to buy his influence with a Minister as would justify the conclusion that the line be drawn between them. Admittedly the one amounts to a criminal offence, and, in my opinion, so also does the other."

And at 396, Isaacs and Rich JJ said:

"It is wholly independent of the merits of the matter in respect of which it takes place. A Judge who agrees for personal advantage to decide a cause in one prescribed way commits a crime, notwithstanding that as between the parties that decision might be just. A public ministerial officer who for private gain prefers one applicant to another is guilty of a crime, even though such preference would be otherwise fully justifiable."

And they continued at 401-403:

"It is thus clear to demonstration that every member of the Assembly elected fills a position created in which he is to 'serve' as member in the sense in which that expression has always been understood and to which the duties of service are inseparably attached. Those duties are of a transcendent nature and involve the greatest responsibility **That is the whole essence of responsible government, which is**

the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but **the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration...**

But if intervention by a public representative be impelled by motives of personal gain, **if it be the outcome of an agreement based on some pecuniary, or what is equivalent to a pecuniary, consideration** and constituting the member of a special agent of some individual whose interests he has agreed to secure – **interests that are necessarily opposed pro tanto to those of the community – the whole situation is changed...**"

29. The rationale that underpins the decision is not that Boston agreed to do an act but that he sold his loyalty. The mischief is not that an act is done. It is the abuse of the office. And so applying the law of Hong Kong, as it has been explained by the Court of Final Appeal, the case of *Boston* may give some insight into the duties and obligations of those who hold high office in government. If one were to transpose the language of *Boston* and the analysis that has been conducted by the Court of Final Appeal, in particular by Sir Anthony Mason in *Sin Kam Wah, supra*, there is no difficulty whatsoever in the allegations contained in this Indictment. They

satisfy the ingredients of the offence and are directed at the very mischief that the offence is intended to deter.

30. The offence contrary to section 4(1)(a) of the POBO is similarly directed at the abuse of office.²¹ So far as material, section 4(1) provides:

“Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant’s –

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant ...

shall be guilty of an offence.”

31. The ingredients of offering an advantage to a public servant are as follows. It is necessary to prove: (a) the offer of an advantage to a public servant; (b) that the offer was made without lawful authority or reasonable excuse; (c) that the offer was an inducement to or reward for or otherwise on account of *the performing or abstaining from performing, or having performed or abstained from performing, any act*; (d) that the *act* was to be performed (etc.) in his capacity as a public servant; (e) that the *act*, whilst not necessarily particularised, was discernible within his

²¹ It is noteworthy that in the Hansard 21st October 1970, at 144 § 8: “*Clause 4 deals with the person who, without any lawful authority or reasonable excuse, offers (...) any advantage to a public servant to induce him to abuse his official position, or as a reward for his having abused his official position, in any of the ways indicated in the clause...*”

capacity as a public servant; and (f) that the public servant knew of these factors.²²

32. In Count 7, the act in the 1st Appellant's capacity as a public servant was his favourable disposition towards SHKP.

(6) Favourable Disposition

33. The Respondent submits that favourable disposition in return for payment is itself capable of constituting an act in public office, and capable of tainting each and every act performed in office. This is well-established in the law of Hong Kong and the good sense of this position is obvious.²³

34. The outcome sought by the Applicants would be novel and, to say the least, legally curious. They argue that in Hong Kong it is perfectly lawful for a public official to be favourably disposed in a general way towards private interests in return for money, as long as it cannot be shown that the payment was connected to a specific official act; or, alternatively, that it is lawful for a public official to be generally sweetened by private interests, so long as the sweetener itself is banked an hour (or even minutes) before the official has formally been appointed. The Respondent submits that in regulating the conduct of those entrusted with public office, the law of Hong Kong is not so unprincipled or feeble.

35. The Respondent's argument is consistent with the core of the common law offence and the mischief which it is designed to address. As was stated above, the essence of the offence lies in the

²² *Attorney General v Chung Fat-ming* [1978] HKLR 480, at 496-97

²³ *Chung Fat-ming*, per McMullin J, at 485-86; and per Leonard J, at 497

abuse by a public official of his official position. The acceptance of bribes in return for being or remaining favourably disposed to the payer is a fundamental breach of duty because it involves a betrayal of the obligation to serve the public conscientiously, dutifully, honestly and with integrity. It involved in this case a sale of the 1st Appellant's loyalty with the result that he pursued his own selfish interests at the expense of the public good. And his office was degraded and undermined.

36. It is submitted that there can be no greater abuse than to receive secret payments in return for being favourably disposed to a private interest. It is an abuse that destroys public confidence in the public official and that is why being favourably disposed is an "act" for the purposes of the POBO and the common law offence of MIPO. Being favourably disposed towards private interests in return for payment taints and compromises the office and undermines public confidence in the officeholder. It is fundamentally inconsistent with public duty, and a gross breach. An official so disposed cannot properly and loyally discharge his public functions: so much is obvious and explains why the Appellants went to such lengths to conceal the payments.
37. Consistent with case law, in considering if it was improper or wrong for the 1st Appellant to accept large sums of money from businessmen and in return to be favourably disposed towards them whilst he was a public official, it would be significant to bear in mind the 1st Appellant's position in HKSAR, his duties, responsibilities, discretions and powers as well as public trust and confidence invested in him. As Chief Secretary, the number two in the HKSAR Government, the 1st Appellant held an office of trust

and confidence concerning the public. He had taken an oath as a principal official to serve HKSAR “conscientiously, dutifully, in full accordance with the law, honestly and with integrity”. As Chief Secretary and an ExCo member, he would have unlimited information on government policies and could have widespread influence on every major government decision affecting individuals or business entities. At the time of the payments, the 1st Appellant, SHKP and HKSAR were engaged in commercial dealings on large scale and important projects in which SHKP had a very significant financial interest.

A/2/456,
§§ 25-26

38. The Respondent submits that a public officer being favourably disposed towards private interests having been paid to be so constitutes a gross and obvious act of misconduct. Being so disposed in connection with public office is itself an act of misconduct, and, further, it taints each and every official act: a public officer who has sold his impartiality to private interests is abusing his power. To put this in another way, general sweetener payments corrupt the core characteristics of public service, and taint each and every official act of the office holder.
39. The Appellants are contending that, on the basis of the Judge’s directions on favourable disposition, they have been convicted of an “Orwellian thought crime”, established “merely by proof of socially unacceptable thoughts”²⁴. They were convicted, so the argument goes, on the basis of the 1st Appellant’s “mere” favourable disposition: mere favourable disposition is a state of mind and part of the *mens rea* of the offence, and does not amount

²⁴ An identical argument was raised before the Court of Final Appeal in relation to the offence of money laundering in *HKSAR v Yeung Ka Sing Carson* [2016] HKEC 1506 (FACC 5,6 and 1/2015). It was rejected at § 57 of the judgment essentially for the reasons set out in the Respondent’s argument below.

to the conduct element. In support of this argument, the Appellants have cited the famous observation of Sir Edward Coke, that no man shall be examined upon the “secret thoughts of his heart”.²⁵

40. The Respondent submits that in devoting time to developing this argument, the Appellants have entirely missed the point. Favourable disposition in return for payment constitutes a continuing abuse of power and thus a continuing act of misconduct. Such disposition is not just breach of duty: it is entirely destructive of the duty and trust owed by the public officer to the people of Hong Kong, and irreparably taints the officer’s performance of his functions. The following two points are of significance.
41. First, the Appellants were not prosecuted for harbouring private thoughts, and the contention to the contrary ignores the terms of the Indictment and is divorced from reality. The prosecution did not allege “mere” favourable disposition, but favourable disposition in return for payment. The particulars of Count 5 did not allege that the Appellants sat in a room and privately fantasised about corruption; the particulars alleged that the Appellants actually entered into a corrupt bargain, and that the corrupt bargain related to performance of the 1st Appellant’s public duty. Furthermore, the resulting payments of \$8.5 million were not secrets in the 1st Appellant’s heart, but credits in his bank account available to him all the time while he was Chief Secretary, until they were spent on fine living.

²⁵ For example: 1st Appellant’s Case, at §§ 20-24, 55; 2nd Appellant’s Case, at §§ 2.64-2.67; 3rd Appellant’s Case, at §§ 66, 78; 4th Appellant’s Case, at § 37

42. Secondly, the contention that the favourable disposition alleged in Count 5 was merely a state of mind constituting no more than the *mens rea* of the offence is legally incoherent, and fails to recognise the true nature of a general sweetener situation. It is well-established that the *mens rea* of the offence of MIPO is *wilful* misconduct. The favourable disposition alleged in the Indictment is not concerned with whether the misconduct was performed with the requisite state of mind, but is in fact a description of the misconduct itself. In a general sweetener situation, it is implicit that the public officer acts in breach of his duty: the fact that the public officer is labouring under a general sweetener, and is thereby favourably disposed to his private paymasters, is itself an obvious act of misconduct, and is a matter that taints all his official acts.
43. The all-encompassing and generic nature of the act of misconduct in a general sweetener situation means that it is not necessary for the Prosecution to identify a further, specific act. This outcome is consistent with the underlying rationale of the MIPO offence. It is also consistent with authority, and in particular the decision of the Court of Appeal in *Attorney General v Chung Fat-ming*,²⁶ in which the Court explained why a public servant being or remaining favourably disposed in return for payment involved an “act” in the public servant’s capacity as such.

(7) Chung Fat-ming

44. The decision in *Chung Fat-ming* provides a valuable insight into the policy of the law when addressing abuse of office by

²⁶ [1978] HKLR 480

corruption. There is no reason to distinguish the position under the POBO or the common law.

45. In *Chung Fat-ming*, the Court identified the insidious nature of general sweeteners, and the fact that a public servant who has been generally sweetened can no longer claim to be impartial or loyal to the public interest. The Court determined that favourable disposition in return for payment did, in itself, amount to an “act” in public office. McMullin J, at 488 stated:

“It is corrupt to accept a gift for carrying out one’s public duty even if one intends to carry it out properly; even if one has carried it out properly. The evil of doing so is that the other party, and any other person who may be aware of the transaction, will not know or will not believe in the purity of one’s intention to perform one’s duty properly whether gratified or not. By any such act the confidence which private citizens ought to be able to repose in the impartial performance of their duty by public officials is eroded.”

46. The question which arose in *Chung Fat-ming* was whether a public servant being favourably disposed in return for a payment was an “act” for the purposes of (as it was in that case) subsection 4(2)(a) of the POBO.
47. Unsurprisingly, the Court held that if a public servant accepts an advantage in return for him being favourably disposed towards another, that favourable disposition is itself an “act” in his capacity as a public servant.²⁷ It is not necessary to identify any other

²⁷ *Chung Fat-ming* was approved by *R v Paul Kiang* (unreported, CACC 243/1989) at 8-10; *R v Tsou Shing Hing* [1989] 1 HKC 93 at 96F-H; *Liu Cheung-hon v R* [1994] 2 HKCLR 150 at 159 lines 13-17

specific act of favour. (Nor is the acceptance of the advantage the relevant “act” for the purposes of subsection (2)(a): the acceptance is a separate ingredient of the offence, distinct from the requirement in subsection (2)(a) for proof of the performance of an act in the accused’s capacity as a public servant.)

48. In the course of his judgment, McMullin J stated that in the context of a public servant who has been generally sweetened, the act is no more than the performance by the public servant of his normal duty: that is, any and all acts falling within the scope of such duty.²⁸ Leonard J stated: “*I would regard **being or remaining favourably disposed to the person solicited as sufficient to amount to an ‘act’** within the meaning of the section and it is for that reason that I say **the act does not have to be particularised.***”²⁹ Contrary to the assertions of the Appellants, there is no difference between these formulations. In the context of a general sweetener, favourable disposition is a disposition held by *a public servant in his capacity as a public servant*. This by its nature taints all acts performed in that capacity, and it is unnecessary for the misconduct to be particularised further.
49. The Appellants have sought to contend that *Chung Fat-ming* is not authority for the proposition that favourable disposition in return for payment constitutes an “act” by a public servant in his capacity as such. In advancing this contention, the Appellants have variously described the judgments of the Court as contradictory, “wrong” and “slightly haphazard”. The Appellants have even

and *HKSAR v Chow Kai-shun, Alexander* (unreported, CACC 147/2002) at § 20. The formula of “favourably disposed towards” another is used in case law in Hong Kong, most recently in a Chinese Judgment *HKSAR v Cheung Koon-chee* (unreported, CACC 356/2010) at § 40. See also *HKSAR v Tang Hoi-on Barry & Another* [2003] 3 HKC 123 at § 4.

²⁸ *Chung Fat-ming*, at 485-86

²⁹ *Ibid.*, at 497

sought to contend that the reference to an “act” in section 4 of the POBO, and in the Court’s judgment, is a reference to the *mens rea* of the offence, not the conduct element.³⁰ However, the terms of the judgment are clear, and determine that a public officer who is favourably disposed on account of having been generally sweetened commits an act in his capacity as such.

50. It is also noteworthy that the 3rd Appellant has made a concession which, on analysis, would be determinative of the appeal. At §§ 58-63 of the 3rd Appellant’s case, it appears to be conceding that, as explained by McMullin J in *Chung Fat-ming*, in a general sweetener situation, the act on account of which the sweetener was paid need be no more than the performance of the public servant’s normal duties. What the 3rd Appellant appears not to have appreciated is that there is no distinction between this analysis and the analysis of Leonard J, that the concept of favourable disposition in return for payment involves the tainting of the performance of the public servant’s normal duties, and that the Indictment in the present case covered this position in pleading that the favourable disposition (ie the misconduct) was “*in the course of or in relation to [the 1st Appellant’s] public office*”. The short point is that if the 3rd Appellant accepts the analysis of McMullin J, it is no longer possible to contend that there was no act of misconduct in the present case.

51. The decision in *Chung Fat-ming* also acknowledges the practical reality involved in addressing corruption in its most insidious form. When a public servant receives a gratification from private interests, it may often be difficult, and sometimes impossible, to

³⁰ 1st Appellant’s Case, at §§ 28-30, 33; 2nd Appellant’s Case, at §§ 2.25-2.30; 3rd Appellant’s Case, at §§ 54, 57; 4th Appellant’s Case, at § 32

link the payment to a specific act performed by him in his public capacity. In this area of the criminal law, where one party is in a position of power or influence in relation to another, it may be difficult, if not impossible to show that the former has done anything unusual or out of the ordinary in relation to the latter notwithstanding the obvious bestowing of an advantage or gratification. Indeed, on the face of it, he may be able to give an objectively justifiable reason within the duties and responsibilities of his office as to why he acted as he did. This was the difficulty to which Lord Hoffmann NPJ adverted when giving the principal judgment of the Hong Kong Court of Final Appeal in *Li Defan & Another v HKSAR*,³¹ at 335A-E. The simple point is that the law recognises the practical reality that bribes are most typically paid in circumstances of subtlety and ambiguity, to secure general goodwill and favourable disposition: *Chung Fat-ming*, at 485-86, 487. In *HKSAR v Cheung Koon-chee*³², the Court found that “favourably disposed” does not necessarily mean giving someone an advantage to which he is not entitled. It can be favourable treatments of a general nature, such as performing their duties in a realistic and practical manner with no fault-picking or obstruction and adopting a down-to-earth approach.

52. The Appellants’ submission that the Prosecution must prove a further act of favour pursuant to the general sweetener ignores this practical consideration. The Appellants argue that it is necessary to focus on the performance of the official’s functions, and determine whether his decisions are proper and reasonable, or acts of favouritism towards the paying party. It follows that if the

³¹ (2002) 5 HKCFAR 320

³² *HKSAR v Cheung Koon-chee* (unreported, CACC 356/2010), § 40

prosecution cannot prove beyond reasonable doubt that any decision relating to a third party was improper, the fact that the official has been bribed by the third party to be favourably disposed towards them does not matter.³³ The Respondent submits that this approach is unprincipled, and would permit and encourage corruption in its most subtle and sophisticated form.

53. As a matter of principle, a general sweetener situation requires a focus on the nature of the payment, not the merits of decisions. This is because, as the Court has recognised, the polycentric nature of decision-making means it will often be possible to provide an objectively justifiable reason for an official decision, whatever the true motive of the official, and an act of favour may be subtle, difficult to discern and, sometimes, outwardly imperceptible. In the present case, for example, the 3rd Appellant has stated that the evidence at trial demonstrated that the 1st Appellant “sabotaged” SHKP’s tender for the West Kowloon Cultural Development Project, and that he showed positive disfavour towards SHKP.³⁴ The Respondent observes that that contention is, to say the least, highly contestable, and that, unsurprisingly, the matter is multifaceted and complex. But the important point is that at the time the 1st Appellant was participating in Executive Council and other meetings concerning SHKP’s interests, he was (as the jury found) in receipt of millions of dollars from SHKP, having secretly agreed to be favourably disposed towards the company as Chief Secretary. It is that fact which means that the confidence which the people of Hong Kong ought to be able to repose in the impartial performance of the Chief Secretary’s duties is eroded, rather than

³³ 1st Appellant’s Case, at §§ 45, 66, 68; 2nd Appellant’s Case, at §§ 2.13, 2.14, 2.18; 3rd Appellant’s Case, at §§ 8ii, 26, 27; 4th Appellant’s Case, at § 41

³⁴ 3rd Appellant’s Case, at § 8ii. The defence contention was put forth in the Judge’s Summing Up (A/1/314, 316, 319)

the contestable merits of any particular decision. And this is what the case law recognises.

54. As noted above, *Chung Fat-ming* authoritatively determined that for the purposes of subsections (1)(a) and (2)(a) of section 4 of the POBO, being a public servant favourably disposed in return for a payment constitutes or involves the performance of an “act in his capacity as a public servant”. Accordingly, for good reason, where a general sweetener payment has been offered or accepted, it is not necessary to identify any specific act of favour.
55. Although the Appellants have sought to cast doubt on the decision, and in any event confine general sweetener corruption within the ambit of the POBO, the Respondent submits that the analysis in *Chung Fat-ming* is of general application, and there is no basis in logic or justification in terms of policy or legal principle for making a distinction between the POBO and the common law offence of MIPO in relation to general sweeteners.
56. The offences contrary to section 4 of the POBO and the offence of MIPO both require the identification of an “act” in the official’s capacity as a public officer. There is no logical or principled reason why a general sweetener situation should amount to or implicitly involve such an act for the purposes of the POBO, but not for the purposes of the common law.
57. Both offences are underpinned by the same rationale, namely the prohibition of the abuse of office by public officials. There can be no more paradigm case of an abuse of office than to sell one’s public office secretly to a third party, and the conclusion that a general sweetener situation amounts to an act of misconduct is

consistent with the rationale of the common law offence, just as it amounts to an official act prohibited by the POBO.

58. Quite apart from the authority of *Chung Fat-ming*, the charge against the Appellants did not involve any novelty or extension of the offence of MIPO. The Appellants contend that there is no precedent for a charge of misconduct being brought on the basis of a general sweetener. The Respondent does not need to rely on a precedent and show that on another particular occasion, on particular facts, a charge was framed in a particular way. What the Respondent does rely on is the principle that a public official who has been bought, and is generally sweetened, is committing an obvious and serious act of misconduct. The charge against the Appellants involved no more than a conventional application of the well-established ingredients of the common law offence.

59. Moreover, the application of the *Chung Fat-ming* analysis of favourable disposition was expressly approved in the context of the offence of MIPO by the Court in *Sin Kam-wah*. Sir Anthony Mason stated, at § 54:

“I should make clear ... that the acceptance of a ‘general sweetener’ by a public officer can, in appropriate circumstances, amount to misconduct in public office.”

60. The Appellants have argued that this observation does not apply to the facts of the present case, because the act of misconduct postulated by Sir Anthony Mason – the “acceptance” of a general sweetener – was not an act which took place whilst the 1st

Appellant was a public officer.³⁵ This argument, however, overlooks three points.

61. First, it is not the mere acceptance of a payment – that is, a financial transaction – that constitutes an act of misconduct. The misconduct arises from the connection between the payment and the performance of the official’s public acts. In other words, the reason why the acceptance of a general sweetener is an act of misconduct is because the official, through his favourable disposition, is irreparably compromised in the performance of his public act. (Indeed, it appears that the 3rd Appellant has conceded this point at § 20 and § 45 of his Case.) There is no need to prove a further act of misconduct: the favourable disposition, secured by way of a bribe, is itself sufficient.
62. Secondly, it is illogical to make a distinction between general sweetener cases based on the timing of the payment. Whether the payment is made before the official takes office, or after, the key point is that official’s favourable disposition has been bought, and the performance of his public duties compromised. This is the essence of general sweetener corruption, and the timing of the payment is legally irrelevant.
63. There is no distinction either as a matter of principle or logic between a case where bribes are paid to a public official in return for his favourable disposition, and a case where bribes are paid to a person who is about to become a public official in return for his favourable disposition in office. The culpability and the conduct are identical.

A/2/543,
Judgment, § 227

³⁵ 1st Appellant’s Case, at §§ 35, 39; 3rd Appellant’s Case, at § 45; 4th Appellant’s Case, at §§ 16, 29

64. In summary, the Respondent submits that the authorities speak with a single voice: a public official who has been bought and is generally sweetened has betrayed his office and commits an obvious and serious act of misconduct. It is, in fact, the Appellants' submission that is unsupported by any case law.

(8) Policy

65. The policy of the law is to prohibit corruption, including corruption in its most subtle and tacit form. The availability of the MIPO offence in circumstances where a public official's favourable disposition has been bought by means of a pre-office payment safeguards the public interest. It cannot be the case that the public of Hong Kong would consider the law an adequate protection of their interests if it could be said that the law does not provide any remedy for a case where a bribe is paid to an official before he assumes office.

66. Not only does the Appellants' submission fail to advance this important policy interest, it also appears to be the Appellants' case that the policy is misplaced, and that the prosecution in the present case was an impermissible intrusion into the private affairs of businessmen.

67. The 1st Appellant contends that the prosecution breached the "public-private divide", concentrating on matters that took place when the 1st Appellant was a private citizen and under no public duty. It is natural that a person might be favourably disposed towards others as a result of past dealings, and businessmen should

not be barred from office as a result of such disposition, or be expected to cleanse themselves of it.³⁶

68. The 2nd Appellant contends that private citizens should be free to enter public life with their existing prejudices and predilections, whether or not they come from prior payments: the practical reality in Hong Kong is that there may always be “business connections”.³⁷

69. The 3rd Appellant contends that the payments in the present case were perfectly permissible: they were private payments and carried no “moral obloquy” at all. Given the policy in Hong Kong of attracting experienced businessmen into public office, it is of “fundamental importance” that pre-office payments of the kind under consideration should be recognised as “completely lawful”.³⁸

70. The 4th Appellant contends that the criminalisation of favourable disposition in return for pre-office payments risks public officials being prosecuted for criticising third parties, or on the basis that their official conduct is based on friendship or revenge.³⁹

71. The Appellants’ argument is contrary to the policy of the common law and its abhorrence of corruption.

(i) It would encourage secret payments.

(ii) It would encourage secret payments made to public officials both before and after their service as public officials.

³⁶ 1st Appellant’s Case, at §§ 45-46, 53, 60-68

³⁷ 2nd Appellant’s Case, at §§ 2.13-2.18

³⁸ 3rd Appellant’s Case, at §§ 21, 24, 28

³⁹ 4th Appellant’s Case, at § 41

- (iii) It would encourage ambiguous and tacit conduct.
 - (iv) It shifts the focus from the bribe to the conduct of the public official and in particular what he/she did by way of a *quid pro quo*.
 - (v) In cases where payments are made to public officials before or shortly after their tenure in office, and where it is established that the payments are bribes, no offence is committed in the absence of any *quid pro quo*.
72. The justification for the payments advanced by the Appellants fails to recognise the insidious and tacit nature of corruption, and its destructive effect on public confidence in Hong Kong. And the legal outcome for which the Appellants contend would advance and encourage corruption in its most subtle form. The payments in the present case were not private payments, where only private interests were at stake. As the jury found, the payments were bribes made in connection with the 1st Appellant's public duty as Chief Secretary: the payments corrupted the 1st Appellant's duty of impartiality, and irreparably compromised the exercise of his public office. The Court of Appeal was correct to conclude that it is difficult to conceive of a more serious case of misconduct in public office in relation to the second most senior public servant in Hong Kong.
73. The Respondent submits that the availability of the MIPO offence in circumstances such as the present accords with legal principle, common sense, practicality and the longstanding policy of the law,

which reflects the overwhelming public interest in fighting corruption in Hong Kong.

(9) The Directions of the Judge

74. The 2nd Appellant has made various complaints about the directions given by the Judge during the summing-up.⁴⁰ The Respondent submits that the Judge gave conventional directions to the jury, all of which accorded with the law. The complaints raised by the 2nd Appellant are not free-standing, and ultimately collapse into the certified point of law. Nor do the points have any substance when analysed on their own terms.

75. The 2nd Appellant contends that the Judge's direction on favourable disposition may have led to his conviction even if the jury had accepted that the payments under consideration may have been legitimate consultancy payments. This contention is obviously untenable. The issue at trial was whether the payments were, and were intended to be, corrupt, or whether they were legitimate consultancy payments. The Judge directed the jury in clear terms that they must be satisfied as to the nature of the payments, ie whether they were bribes or legitimate payments. In convicting the Appellants, the jury must have satisfied the nature of the payments was corrupt.

76. The 2nd Appellant also argues that the Judge erred in directing the jury that the central issue in the case was whether the payments under consideration were bribes, because the Appellants were not charged under the POBO. This argument is wholly semantic and is

Summing-Up,
A/1/24D-F,
25D-I, 31A-J,
32J-N, 64K-R,
65G-I, 68J-M,
70J-O, 75A-F,
77N-78B,
79C-R, 80B-F,
83C-M,
255-256,
258,
271, 275,
285-286,
303-304, 305,
310-311, 313,
315, 316

⁴⁰ The 2nd Appellant (D2)'s complaints of misdirections were originally in his substantial and grave injustice limb submissions at the leave stage. The Appeal Committee did not grant leave to any of the Appellants to argue there was any substantial and grave injustice.

without any substance whatsoever. The prosecution allegation was that the payments bought the 1st Appellant's favourable disposition: they amounted to bribes, and were corrupt. In terms of the ingredients of the offence of MIPO, the Judge gave the jury a full and accurate direction, including an explanation of how favourable disposition could amount to misconduct. The direction simply reflected the applicable legal principles, and the Judge's identification of the central factual issue in the case – ie the nature of the payments – was both accurate and appropriate.

77. Contrary to the 2nd Appellant's contention, the Judge did not direct the jury to ignore what the defence characterised as evidence of disfavour. Indeed, the Judge summarised the evidence, and the defence case on this point. The point the Judge made when directing the jury on the ingredients of the offence was that it was not necessary for the prosecution to prove a specific act of favour beyond favourable disposition. The Judge then went on to explain the reason for this, namely that in general sweetener cases, it may be impossible to identify any such act. This was an accurate statement of the law, and did not involve any instruction to the jury to disregard any particular strand of evidence, or submission from the parties.

A/2/549-551,
Judgment,
§§ 246-249

78. The 2nd Appellant has raised the possibility that, on the Respondent's case on favourable disposition, it would have been necessary for the jury to consider the question of reasonable excuse in relation to the performance of the 1st Appellant's duties, "act by act". This submission is legally incoherent. The misconduct in question arose from the bribe/general sweetener, and involved the fatal compromise of the 1st Appellant's public

duty. Any question of reasonable excuse would have had to address this fact, rather than each and every act performed by the 1st Appellant during his term as Chief Secretary. Needless to say, no question of reasonable excuse was raised at trial, and any contention on this point would have been inconsistent with the defence actually advanced by the Appellants.

79. The directions given by the Judge fully addressed the question of the seriousness of the alleged misconduct. The short point is that the Judge gave the jury a specific direction in relation to this ingredient of the offence. Moreover, in the present case, the seriousness of the alleged misconduct was both obvious and overwhelming.
80. In summary, the Respondent submits that the Court of Appeal was correct to decide that the particulars of Count 5, the ruling of the Judge at the close of the Prosecution case and the directions he gave to the jury during the summing-up, reflected the settled law of Hong Kong.

(10) Conclusion

81. For the reasons set out above, the Respondent submits that the conviction of the Appellants was fair in all respects, and was based on an accurate application of the law of Hong Kong. The Appellants were convicted by a jury comprised of Hong Kong citizens. The jury heard all the evidence, including evidence given on oath by the first three Appellants. After receiving directions from the trial Judge which properly accorded with the law, the jury concluded beyond reasonable doubt that the conduct of the Appellants was corrupt, and constituted the conspiracy charged on

the Indictment. The proceedings were a model of trial by jury in Hong Kong, and the charges against the Appellants were properly determined on their merits. In all the circumstances, the Respondent invites the Court to dismiss the appeal.

Dated 29th November 2016

David Perry QC

Joseph Tse SC

Maggie Wong

FACC 12-15/2016

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL Nos. 12-15 of 2016 (CRIMINAL)
(ON APPEAL FROM CACC No. 444/2014)**

HKSAR

Respondent

v

**HUI Rafael Junior,
also known as HUI Si-yan Rafael**

**1st Appellant
("D1")**

KWOK Ping-kwong, Thomas

**2nd Appellant
("D2")**

**CHAN Kui-yuen,
also known as Thomas CHAN**

**3rd Appellant
("D4")**

**KWAN Francis Hung-sang,
also known as KWAN Francis**

**4th Appellant
("D5")**

THE RESPONDENT'S CASE

Dated this 29th day of November, 2016.

DEPARTMENT OF JUSTICE

**7TH FLOOR, HIGH BLOCK
QUEENSWAY GOVERNMENT OFFICES
66 QUEENSWAY
HONG KONG**

TEL NO.: 2867 2288

FAX NO.: 3105 1387