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Corruption in Hong Kong



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Outline

- Anti-corruption laws in Hong Kong
- The Stephen Chan case
- Informed consent
- Case Study
- Takeaways

Anti-Corruption laws in Hong Kong

Section 9 of Prevention of Bribery Ordinance,
Cap 201 (“POBO”)

Accepting bribes [Section 9(1) of POBO]

Any agent

- Without the permission of his principal (or without lawful authority or reasonable excuse)
- Soliciting or accepting any advantage
- So as to affect his doing or forbearing to do anything relating to his principal’s affairs or business



Anti-Corruption laws in Hong Kong

Offering bribes [Section 9(2) of the POBO]

Any person

- Without the permission of the agent's principal (or without lawful authority or reasonable excuse)
- Offering an advantage to any agent
- As an inducement to or reward for doing or forbearing to do anything relating to his principal's affairs or business



Anti-Corruption laws in Hong Kong

- Principal or entrusting party
- Generally an employer. Within the private sector, “employer” often means the owner or the board of directors of the company.
- Agent
- Generally an employee (whether part-time or full time). Also includes the individual directors of a company.
- Broad definition – anyone who acts for another



Anti-Corruption laws in Hong Kong

- Offers
- A person offers an advantage if he, or any other persons acting on his behalf, directly or indirectly, affords or hold out, or agrees, undertakes or promises to give afford or hold out, any advantage to or for the benefit of or in that for any other person.
- Similar concepts for “Solicits” and “Accepts”



Anti-Corruption laws in Hong Kong

- Advantage
- Includes money, gifts, loans, rewards, commissions, official position, employment, contracts, service, favours and discharge of liability whether in whole or in part, but excludes entertainment
- Does it matter if what is offered is of a trivial nature?
- POBO does not specify amount or value
- No De minis rule



Anti-Corruption laws in Hong Kong

- Entertainment
- Food or drink for consumption on the occasion when it is provided and any other entertainment, for example, singing and dancing, provided at the same time.
- It is lawful to entertain clients
 - Mooncakes?
 - Rugby Seven tickets to viewing boxes?



Anti-Corruption laws in Hong Kong

- “In relation to his principal’s affairs or business”
- The act of the agent must be aimed at the principal and intended to influence or affect his affairs or business
- Act does not have to relate to exclusively to any particular affairs or business of the principal – “sweetener”

Anti-Corruption laws in Hong Kong

- “Lawful Authority” or “Reasonable Excuse”
- Separate defences to “Principal’s permission”
- Burden on defendant to adduce evidence to prove
- On a balance of probabilities

Anti-Corruption laws in Hong Kong

- Principal's permission
- By employer
- Normally, such permission should be obtained before the agent to whom it is intended to offer the advantage solicits it or accepts it.
- If an agent accepts an advantage without prior permission, he should seek retrospective permission from his principal as soon as reasonably possible.
- Can be oral or implied; general or special
- Policy on acceptance of advantage
 - Code of Conduct or Ethics ["Zero Tolerance"]
 - Employment Contract

Anti-Corruption laws in Hong Kong

- Can one rely on trade custom as a defence to accepting or offering advantage?
- Custom not a defence
- Insurance Broker's commission – lawful authority
- Hobbins v Royal Skandia Life Assurance Ltd HCCL 15/2010 (The “Hobbins” case)

Anti-Corruption laws in Hong Kong

Hobbins case

- H was a successful businessman and an experienced investor
- C, an insurance broker, acted as H's agent to purchase investment-linked assurance scheme products from insurance company S and other insurers
- C made known to H from the outset that it made money from commission and fees paid by insurers whose insurance products were purchased by H
- The client agreement between C and H also stated that C would be earning commission from such business.
- H later sought to say that the contract for purchasing the insurance products was illegal, void and unenforceable as C has accepted illegal commission contrary to s.9 of POBO

Anti-Corruption laws in Hong Kong

Hobbins case

- The Court ruled that s.9 of POBO did not apply to broker commission
- There was “lawful authority” – consisting of a long line of judicial pronouncements stretching from the 19th century to the present) for the long settled common law practice that commission paid to a broker by an insurer does not constitute an illegal secret profit unless it is in excess of what is normally paid in the insurance market.
- Court held that a broker clearly had a duty to disclose to its client it would be paid a commission.
- But no need to specify to the insured the amount of commission received.

Anti-Corruption laws in Hong Kong

- No prosecution of s.9 offence except with the consent of the Secretary for Justice
- But ICAC can investigate based on complaints or its own volition on prima facie breach of s.9 of POBO

Anti-Corruption laws in Hong Kong

- Maximum penalty
 - On indictment: Imprisonment for 7 years and a fine of HK\$500,000
 - On summary conviction, imprisonment for 3 years and a fine of HK\$100,000. Persons convicted of accepting a bribe may also be ordered by the Court to compensate their employers
- S.33A of POBO – a person may be barred from becoming a director for a maximum period of 7 years if convicted under POBO and the Court considered that it was in the public interest to prohibit the person from becoming a director.
- Stephen Chan case

Anti-Corruption laws in Hong Kong

- Is it a criminal offence for an employee or agent to have a part time job or moonlight in an industry or line of work that is the same or similar to the employer's business area?
- Is it proper to receive a referral fee or rebate after introducing a client or business opportunities to another company or a friend?
- What is "informed consent" of the company or principal for receiving a commission or monetary benefits?
- If the receipt of monetary benefits needs to be disclosed, what is the disclosure requirement?
- Is there any minimum disclosure requirement?

Anti-Corruption laws in Hong Kong

Moonlighting (2nd job) and s.9 of POBO

- Employee (agent) of a company (principal)
- Employee has a side job or part time work and receives compensation for the side job/part time work (receipt of an advantage)
- Employee's employment contract did not allow part time work or company policy requires disclosure or approval for part time work (no principal's permission)
- The nature of the part time work is in the same or similar line of business as the company's business (in relation to the principal's affairs or business)

Referrals and rebates/commission

- Travel agency staff seeking a rebate from his subordinate in relation to referral of bookings of travel products and services to the subordinate.
- Junior staff of company A formed startup company with friends to bid outsource work from company A and obtains compensation from the startup.
- Medical doctors referring patients to laboratories for medical tests and receiving a rebate from the laboratories.
- Private banker introduce customers to a real-estate agent friend for purchase of property and receive a “referral” fee from the real-estate agent.
- A director of company A received a payment from company B that will take over the shares of company A to assist and support the acquisition without disclosure of the payment to company A.

The Stephen Chan case

Secretary for Justice v Chan Chi Wan Stephen and another [2017] HKCFA 33; FACC 11/2016

- Lasted almost 7 years
 - 2 trials (District Court)
 - 2 appeals (Court of Appeal)
 - 1 Final Appeal (Court of Final Appeal)

The Stephen Chan case

Facts

- Chan, TVB celebrity host
- hosted a popular programme “Be My Guest” on TVB
- Hosted 150 episodes for TVB without receiving any remuneration for such work (he did not need to appear in front of cameras but did so voluntarily to host the show)
- New Year eve of 2009



The Stephen Chan case

- Chan hosted a special episode of “Be My Guest” talk show at a countdown event at a shopping mall (the “Additional Be My Guest Show”)
- This Additional Be My Gust Show was arranged by a company that was run by the co-defendant, Tseng Pei Kun
- The shopping mall’s request for the “Additional Be My Guest Show” met with approval from TVB. TVB allowed Chan and another artiste Lai Yiu-cheung to perform together in the Additional Be My Guest show

The Stephen Chan case

- Had Chan refused to perform the Additional Be My Guest Show, it might have been necessary for TVB to arrange another programme as a substitute. This might significantly influence the audience ratings of the live broadcast of the main show (the countdown)
- The shopping mall paid HKD 160,000 to Tseng's company for the Additional Be My Guest Show
- From this, Chan received HKD 112,000 for hosting the show



The Stephen Chan case

- Chan did not report the receipt of money to his employer, TVB nor seek permission to accept such funds from Tseng's company.
- According to the employment contract with TVB (Chan was the GM(Broadcasting)), Chan cannot undertake any work outside of his employment, whether paid or otherwise unless written permission was given.

The Stephen Chan case

- Chan was then investigated by the ICAC, arrested and charged with the offence under s.9 of POBO
 - Chan, being an employee and thus an agent of TVB, without lawful authority or reasonable excuse, accepted from Tseng an advantage consisting of HK\$112,000 fee as an inducement or reward for or otherwise on account of Chan's doing or having done an act in relation to his principal's affairs or business "namely participating and performing in the Additional Be My Guest show which was produced and broadcast by TVB



The Stephen Chan case

- Tseng was also charged with offering an advantage to an agent.
- Both Chan and Tseng were charged with conspiring for an agent to accept an advantage.

The Stephen Chan case

- First trial at the District Court in 2011
- both Chan and Tseng were acquitted as the District Court held that Chan's conduct did not constitute, "in relation to the principal's affairs or business"
- The Court found that Chan's actions did not breach section 9 of the POBO.
 - Chan was not acting in the capacity of TVB's agent when he preformed in the Additional Be My Guest show
 - The Additional Be My Guest show was not related to TVB's affairs or business
 - Could rely on the statutory defence of lawful authority or reasonable excuse to accept the money.

The Stephen Chan case

- The Department of Justice (“DOJ”) then appealed to the Court of Appeal (“CA”) in 2012 against the acquittal of Chan and Tseng.
- The CA allowed the appeal and directed that there be a retrial of the case.
 - Chan was acting in the capacity of TVB’s agent when performing in the Additional Be My Guest show and accepting HK\$112,000
 - The Additional Be My Guest show was related to TVB’s affairs and business
 - There was no permission given to Chan recognized by POBO or any lawful authority for accepting the HK\$112,000 remuneration
- The CA also directed that the District Court to consider if there were any factual elements for Chan to rely on the defence of “reasonable excuse”.

The Stephen Chan case

Retrial

- District Court in 2013
- No fresh evidence was adduced.
- The Court, once again, acquitted Chan and Tseng on the basis that their defence of “reasonable excuse” has been established.
- The DOJ appealed again and it was heard by the CA in 2014.
- The CA held that the District Court Judge erred in the re-trial in finding that there was sufficient primary evidence to support that Chan and Tseng had a reasonable excuse.
- The CA directed the District Court to convict the pair on the charge of conspiracy for an agent to accept an advantage in violation of section 9 of the POBO.

The Stephen Chan case

- Chan was fined HK\$84K and Tseng HK\$28K
- Appealed to the CA for leave to appeal to the CFA but refused
- Appealed to the Appeals Committee of CFA granted leave to appeal to the CFA
- Majority of the CFA disagreed with the CA
- One main issue for the CFA is how the element of: “in relation to the principal’s affairs or business” in section 9 of the POBO be interpreted.

The Stephen Chan case

- The CFA considered the leading authority in this aspect: the *Ch'ng Poh Case*.
 - In that case, Mr A, a partner in a law firm, was acting for Ch'ng Poh who had been convicted of fraud.
 - To bolster his prospects of appeal, Ch'ng Poh caused A to offer a bribe to a corrupt former prosecutor, who was asked to swear an affidavit discrediting a key prosecution witness X, and to try to persuade X not to cooperate with the prosecuting authorities.
 - ICAC went to the law firm of Mr A with a search warrant under a suspected s.9 of POBO offence.
 - The Privy Council held that as A's acts had nothing to do with the affairs or business of his principal (i.e. the law firm), section 9 of the Ordinance was not engaged.
 - Accordingly, a warrant authorizing a search of A's law firm granted under section 9(1)(a) of the Ordinance was quashed for lack of jurisdiction.
 - The Privy Council considered that the phrase "in relation to his principal's affairs or business" has a restricting purpose.
 - Hence, it is not enough to show that the recipient of the bribe is an agent, there has to be linkage of the acceptance of bribe to the principal's affairs or business.

The Stephen Chan case

- The CA considered that Chan's act in the Additional Be My Guest Show and TVB's affairs or business had been established - because Chan was the General Manager of TVB and the Additional Be My Guest Show related to TVB programmes.
- The CA also took the view that there is no requirement that an agent's act has to cause prejudice to the agent's principal's affairs or business
- the Ch'ng Poh Case did not say that the "influence" or "effect" on the principal's affairs or business must be adverse before it can be construed as "in relation to his [agent] principal's affairs or business".

The Stephen Chan case

- The CFA considered that whether Chan's hosting of the show did not qualify as an act "in relation to his principal's affairs or business" required examination of the relationship between that act and the principal's affairs or business. It was not determined simply by saying that Chan was a General Manager of TVB at the time.
- The fact is that TVB wanted Chan's show to be part of the countdown event because its popularity would boost audience ratings. Chan in fact obliged without being asked to do so by TVB and at no cost to TVB as it was paid by the shopping mall. The CFA considered that Chan's conduct was wholly in line with and beneficial to TVB's interests.



The Stephen Chan case

- The majority of the CFA ruled that on a proper construction of section 9 of the POBO, the induced or rewarded conduct “aimed at the principal’s affairs or business” has to be a conduct that “subverts the integrity of the agency relationship to the detriment of the principal’s interests”.
- However, such prejudice to the principal’s interests need not involve any immediate or tangible economic loss to the principal or benefit to the agent at the principal’s expense.

The Stephen Chan case

- The minority view of the CFA considered that, on the facts of this case, Chan's performance at the Additional Be My Guest Show did relate to the affairs or business of TVB and:
 - Once it is established that an advantage was offered or accepted by an agent for a forbidden purpose then absent a reasonable excuse, an offence under section 9 of the POBO would have been committed.
 - Absence of prejudice to the principal or that the act was beneficial to the principal would be a reasonable excuse.
- The minority view of the CFA considered that, on the facts of this case, the defence of reasonable excuse was established as TVB accepted that it knew that Chan would appear in the Additional Be My Guest Show and be paid for it.

The Stephen Chan case

Is it safe now?

- Yes, if the moonlighting act does not prejudice the principal's interests or benefit the employee at the principal's expense (but note civil claim or disciplinary proceedings).
- But does not dispel the risk of being suspected of a breach of s.9 (no disclosure of receipt of advantage) or an ICAC investigation
- Risk of thinking that s.9 not triggered and did not have evidence to prove "reasonable excuse" – burden on the defendant to prove.

Informed consent

SFC - Consultation Paper on Proposals to Enhance Asset Management Regulation and Point-of-sale Transparency [2016 Nov]

Enhancing disclosure proposal

- In addition to disclosing the existence and nature of monetary benefits received or receivable that are not quantifiable prior to or at the point of entering into a transaction, an intermediary is required to disclose:
 - (i) the range of such monetary benefits receivable on an annualised basis; and
 - (ii) the maximum dollar amount of such monetary benefits receivable per year.

Is this disclosure sufficient for the purpose of s.9 of POBO?

Informed consent

- Under section 9(4) of the POBO, if an agent solicits or accepts an advantage with the permission of the principal, being permission which complies with s.9(5) of the POB), neither the agent nor the person who offered the advantage shall be guilty of an offence under section 9 of the POBO.
- Section 9(5) provides that the permission shall:
 - be given before the advantage is offered, solicited or accepted; or
 - in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,
- and for such permission to be effective, the principal shall, before giving such permission, have regard to the circumstances in which it is sought.

Informed consent

- There is no provision or definition in the POBO on what amounts to an “informed consent” or minimum disclosure by an agent for the purpose of a principal’s permission.
- Stephen Chan case
 - The CA [in relation to s9 of POBO] considered and approved the Canadian case of *R v Kelly* 73 CCC (3d) 385 that the disclosure “must be adequate and full in the sense that the principal must be specifically advised, or it be otherwise made so crystal clear that he could not deny he ought to have known.”
 - The disclosure must be adequate and timely and a general and vague disclosure that the agent is receiving commissions will not meet the objective. While it may not be possible for the agent to be exact as to the amount of commission which will be received, it will suffice if a reasonable effort is made to alert the principal as to the approximate amount and source of advantage the agent is receiving.

Informed consent

- At the Stephen Chan case CFA hearing, the *R v Kelly* case was not further discussed.
- However, the CFA (minority view and without citing *R v Kelly*) commented that: “what constitutes a fully informed consent is a question of fact and there is no precise formula which will determine all cases.”
- For Chan’s case, even though Chan had not disclosed to TVB that he would be receiving a commission (and therefore, the exact amount of the commission was not disclosed to TVB), the CFA considered that Chan could still avail the defence of reasonable excuse as Chan honestly believed that TVB would not object to his accepting the advantage and the exact amount of the advantage was of no consequence to TVB.
- But *R v Kelly* was not overruled.

Informed consent

Whether a disclosure will satisfy the “informed consent” requirement will depend on whether, in the particular circumstances and under the relevant policies of the principal, the disclosure was adequate and timely.

- If the principal does not care or the exact amount of the advantage was of no consequence to the principal, then a formulation or calculation with the source of advantage disclosed may suffice.
- Otherwise, a detailed disclosure down to “dollars and cents” may need to be disclosed.

Case Study

- Company A provides financial services to its customers.
- Company B is a subsidiary of company A and sells a financial product but company B's business is not doing well
- Company A wants to refer its customers to company B
- Company B will give a rebate to company A for any new business from company A's customers that buy company B's products
- Any issues?

Case Study

- With respect to receiving the rebate from company B, is Company A an agent of its customers? Or is company A a middleman?
- Is the rebate in relation to the customers' affairs or business?
- Is there permission from the customers?
- Has there been informed consent? Is there any disclosure of the receipt of the rebate and is the disclosure sufficient?
- Any lawful authority for receiving the rebate?
- Any reasonable excuse for receiving the rebate?



Takeaways

- Seek legal advice – legal professional privilege
- If in doubt, disclose and seek permission
- Check the company's Code of Conduct/Ethics or policy on acceptance of advantage
- It might not be criminal, but there might still be disciplinary issues or civil claims (e.g. breach of employment contract)

More Power?

Hong Kong graft-buster calls for more power to probe misconduct at highest levels

Anti-corruption watchdog says a change in legislation is necessary as current law makes it tough for officers to gather evidence of alleged wrongdoing by officials

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Q&A

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