CORRUPTION IN HONG KONG: LESSONS FROM A RECENT CASE

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CORRUPTION IN HONG KONG BECAME a serious political issue after the riots of 1967. Discontent and frustration by the local Chinese residents had built up over time because the colonial administration ignored systemic corruption in the police force, as well as the civil service (Carroll, 2007). The case of Peter Godber, a Chief Superintendent who fled from Hong Kong to evade prosecution in 1973, created considerable public outrage (McWalters *et. al.*, 2015). A new organisation created to combat corruption, known as the Independent Commission against Corruption (ICAC), was established in 1974. This marked an important milestone for Hong Kong's anti-corruption campaign in the public as well as the private sectors, and more importantly, it gave the locals something to be proud of (Tsang, 2004). By the 1980s, the collective rejection of corruption had been embedded into the territory's identity. This anti-corruption culture has been widely recognized. For example, the Corruption Perceptions Index 2016, which compares jurisdictions world-wide, ranked Hong Kong 15th out of 176 jurisdictions, with a score of 77. This is an improvement from the previous year's score of 75, and the year before that of 74. Therefore, any chatter about corruption or even allegations now captures the public's attention.

A recent, high-profile case involved a celebrity and lasted almost seven years, with two trials, two appeals and one final appeal. It embroiled the former General Manager of Television Broadcasts Limited (TVB), Stephen Chan Chi-Wan (Chan). TVB is the largest television station in Hong Kong, with satellite TV services in Australia, USA, Europe and other countries. Apart from being an executive, Chan also hosted the popular programme, *Be My Guest*. Whilst this case focussed on corruption in the private sector, its seriousness lies, at its heart, in the betrayal of trust—or at least, the debasement a principal is entitled to expect of an agent or employees (McWalters *et. al.*, 2015). However, Chan's successful appeal should prompt companies to rethink their policies about employees' moonlighting activities, as well as the dangers faced by having slack procedures and controls to avoid corrupt practices in Hong Kong. Ignoring this problem could send the wrong signals to employees and corporate executives that it is 'okay to make a little money on the side', in turn tarnishing corporate reputation and even threatening Hong Kong's hard-earned status as one of the world's least corrupt cities.

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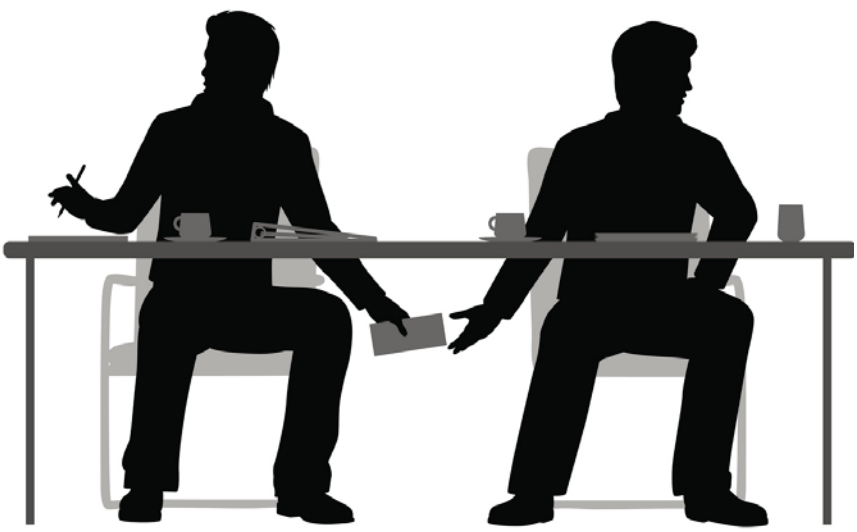
The incident occurred on New Year's Eve, 2009. Chan hosted a special episode of the *Be My Guest* talk show at a countdown event at a shopping mall (the *Additional Be My Guest Show*). Before hosting this show, Chan hosted 150 episodes of *Be My Guest* for TVB without receiving any remuneration for such work.

This *Additional Be My Guest Show* was arranged by a company run by the co-defendant, Tseng Pei Kun. The shopping mall paid HKD 160,000 to Tseng's company for the *Additional Be My Guest Show*, and Chan received HKD 112,000 for hosting the show. More importantly, Chan did not report the receipt of money to his employer, TVB, nor seek permission to accept such funds from Tseng's company. However, according to the employment contract with TVB, Chan cannot undertake any work outside of his employment, whether paid or otherwise unless written permission was given.

Chan was subsequently charged with accepting an advantage as an agent, contrary to section 9 of the Prevention of Bribery Ordinance (POBO). Tseng was also charged with offering an advantage to an agent. In addition, both Chan and Tseng were charged with conspiring for an agent to accept an advantage.

Section 9(1) of the POBO states that it is an offence for an agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for doing or forbearing to do any act in relation to the agent's principal's affairs or business. Section 9(2) of the POBO provides that it is an offence for any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement or a reward for the agent doing or forbearing to do any act in relation to the agent's principal's affairs or business.



At the 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. 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. 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 retrial at the District Court was held in 2013. No fresh evidence was adduced. The Court, once again, acquitted Chan and Tseng on the basis that their defence of "reasonable excuse" had 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.

Then, in 2016, Chan and Tseng appealed to the CA for leave to appeal to the Court of Final Appeal (the CFA), but were not granted. Then they appealed to the Appeals Committee of the CFA and were granted leave to appeal to the CFA. The majority of the CFA disagreed with the CA and found that the CA misconstrued section 9 of the POBO when determining whether the necessary relationship between the agent's act or forbearance and the principal's affairs and business was proved.

More importantly, 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"—in particular, not in his capacity when he was General Manager of TVB at that time. 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.

This case raises the question of what amounts to an "informed consent" of the principal for an agent to accept an advantage. Unfortunately, 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. Even though Chan had not disclosed to TVB that he would be receiving a commission for doing the work, the CFA considered that it could still avail the defence of reasonable excuse, as he 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.

Whilst the CFA decision is closure for the parties involved, there are several lessons companies in Hong Kong can learn. First, whether a disclosure will satisfy the "informed consent" requirement under the law will depend on whether, in the particular circumstances and under the relevant policies of the principal, the disclosure was adequate and timely. Disclosure might need to be detailed down to "dollars and cents". Second, it would be good practice to have in place a mechanism for all employees, including the directors, to declare any 'outside' work, whether it may be as a volunteer or remunerated on an annual basis. Third, draft or update the company's code of conduct about procedures on obtaining permission for work performed outside the organisation as a volunteer or remunerated in any capacity. Fourth, recalibrate the company's risk matrix and associated liabilities arising from corrupt practices from remote to highly possible. The risks of ignoring such matters could range from damages to a company's reputation, to scandals that snowballs into corporate collapses. Fifth, introduce or update company policies on whistleblowing because the company has zero tolerance when it comes to corrupt practices. Such policies encourage people to speak out as 'it is the right thing to do'. •••

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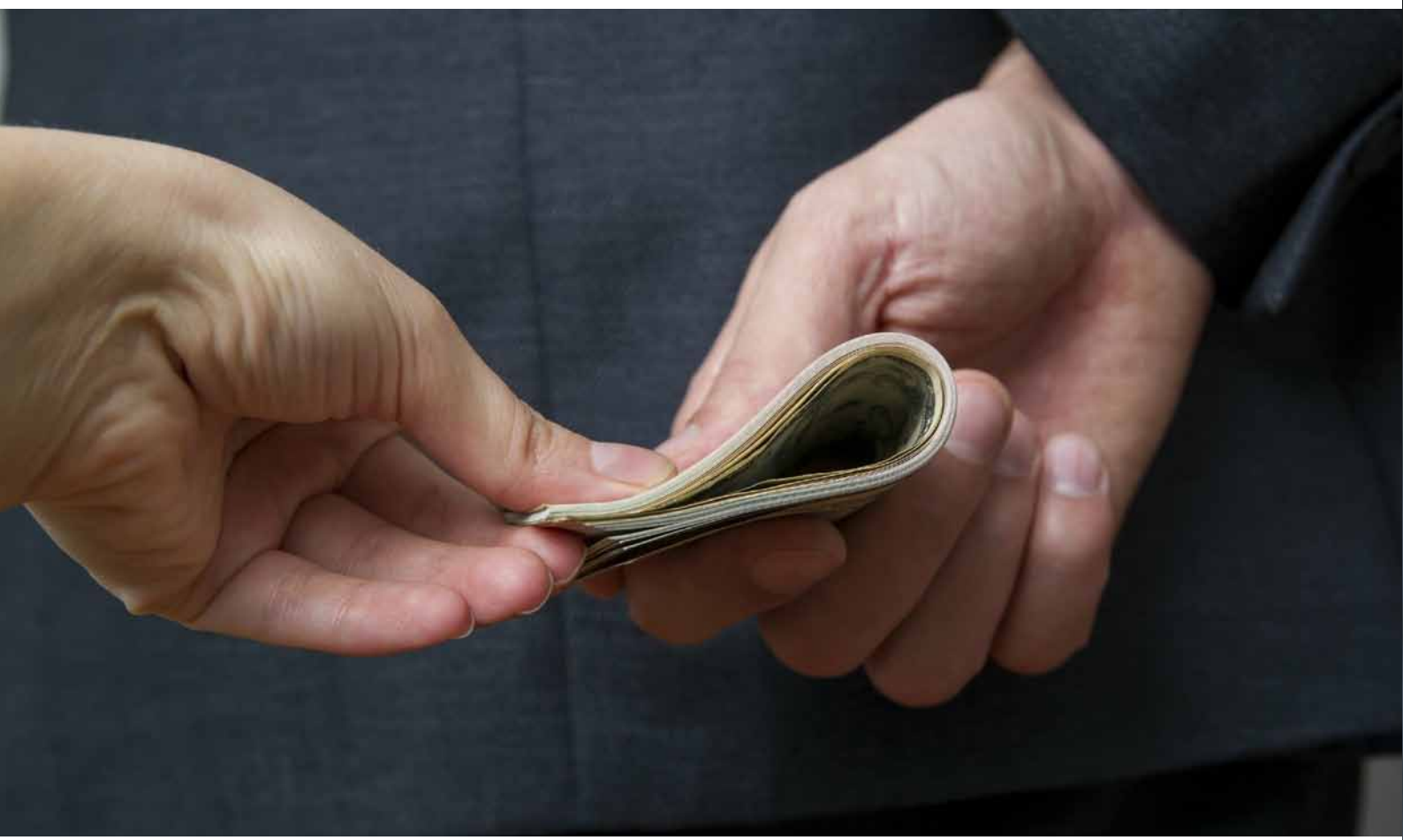

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Biography

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Dominic's practice focuses on advising clients on matters relating to business email scams and online frauds, cybersecurity, data security and privacy law issues, online defamation, competition law matters, e-Discovery and forensic investigation issues. He also advises clients on anti-corruption (dealing with the ICAC), white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering.

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