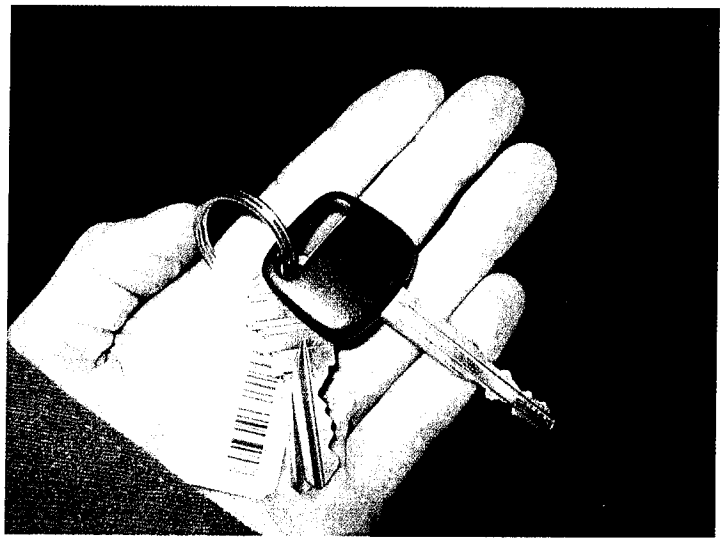
Cargate – An Alternative Legal Opinion

The author casts a different light on the decision not to prosecute



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The Decision not to Prosecute

On 15 December 2003, the Secretary for Justice (Secretary) announced her decision not to bring criminal charges against the former Financial Secretary, Antony Leung, for what has been known as the 'cargate fiasco'. The Secretary considered bringing charges for Mr Leung's purchase of a luxury Lexus vehicle, several weeks before announcing in his budget speech a tax increase on new luxury vehicle registrations, and for his subsequent failure to disclose his conflict of interest in the Executive Council (ExCo) on the day of the budget speech.

In an unprecedented move, the Secretary released a 16 page press release outlining both the decision making process and the various reasons for the decision. The press release disclosed that the Secretary's decision had been delegated to the Director of Public Prosecutions (DPP), who himself had sought separate legal opinions from two leading senior counsel, John Griffiths, SC and Martin Wilson, QC The DPP came to the conclusion that there was no reasonable prospect of conviction if charges of misconduct in public office were brought. He noted, however, that had there been a reasonable prospect, the public interest required that Mr Leung be charged.

The decision not to prosecute received a mixed response in the community. The Chairman of the Bar Association applauded the decision, while others, particularly pro-democracy legislators, were more critical. Legislator Margaret Ng raised doubts about the correctness of the expert opinions and expressed concerns about setting a precedent that would make prosecutions more difficult in the future. Comments by Ms Ng and others have left the public pondering the true state of the law ➤

and its application to Mr Leung. The purpose of this article is to present an alternative legal opinion to the ones expressed by the two legal experts and the DPP. An attempt will be made to clarify the law and to present an alternative theory of liability not mentioned by the experts. While this opinion ultimately agrees with the decision not to prosecute, it places it on an entirely different footing.

A Reasonable Prospect of Conviction

The leading case in Hong Kong on the offence of misconduct in public office is *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 (CFA), a case in which the common law offence was challenged for being unconstitutionally vague. In dismissing the constitutional challenge, the Court of Final Appeal had occasion to spell out the elements of the offence.

In the unanimous judgment of Sir Anthony Mason NPJ, the Court identified two different ways of committing misconduct in public office. The first is if the public official fails to perform his public duty (ie nonfeasance of duty). The second is if the public official improperly performs his public duty, such as using it to benefit himself or to harm others (ie misfeasance of duty).

In cases of nonfeasance, it must be shown that the conduct constituting the non-performance of duty was done with wilful intent, which means that the person must have intended to do the conduct while aware of a risk that he was failing to perform his public duty. This is a lesser standard than having to show his deliberate avoidance of the duty.

In cases of misfeasance, the Court held that on top of wilful intent, it is necessary to show an improper motive, be it dishonest, corrupt or malicious. Given this added element, cases of misfeasance tend to be more difficult to prove.

In the circumstances of Mr Leung, the events surrounding the purchase of the car on 18 January 2003 and the non-disclosure before the ExCo on 5 March 2003 clearly raise questions of nonfeasance of duty. Mr Leung was under a public duty to adhere to the ethical standards in the Code for Principal Officials (Code).

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The purchase of the car and the non-disclosure in ExCo were two incidences where Mr Leung failed to adhere to the ethical standards of the Code and in doing so, he non-performed his duty. The fact that Mr Leung himself realised a benefit in tax savings, although not necessary in establishing the non-performance of duty, is relevant to the seriousness of the misconduct.

As to Mr Leung's mens rea, there is a strong circumstantial case that his non-disclosure in ExCo was both wilful and intentional. According to the facts in the press release,

> [t]owards the end of that ExCo meeting, Dr EK Yeoh formally declared that he had ordered a new car for delivery in about two months. Mr James Tien and Mr Stephen Lam said they had recently purchased cars. A ruling was made that Dr Yeoh's declaration was appropriate as his car was yet to be registered, but that those of Mr Tien and Mr. Lam were not necessary as their vehicles had already been registered and they had not been involved in preparing the Budget. Mr Leung did not participate in this discussion.

In the face of discussions over car purchase disclosures by three other ExCo members, it defies common sense to believe that Mr Leung was not at least reckless as to the need to make a disclosure as required by the Code.

The case against Mr Leung on the basis of the car purchase incident alone is less strong having regard to his anticipated defence. Being in the position of Financial Secretary with the knowledge and intelligence one would expect a person in that position to have, the close temporal nexus between the purchase of the car and the budget deliberations/announcement could certainly ground a reasonable inference of Mr Leung's wilful intent, ie that at the time of the purchase, he intended to buy the car while aware of a risk that he would be in breach of the Code. But Mr Leung's denial of such wilful

intent reduces this issue to one not of inference but of credibility. To gauge the likely outcome of this credibility issue, the Secretary and DPP had the rare opportunity of seeing both Mr Leung's defence and how well he will stand up as a witness in court. In respect of the former, a team of lawyers made extensive submissions to the DPP in July 2003 essentially asserting that Mr Leung was absent-minded at the time because of his preoccupation with his new wife and forthcoming baby. In respect of the latter, Mr Leung faced questioning before the Legislative Council Constitutional Affairs Panel in March and April 2003. Having had this unusual opportunity to see the fullness of the defence, there is good reason to believe that Mr Leung would raise a reasonable doubt as to his mens rea due to his personal circumstances at the time.

But this is not the end of the matter because even if the car purchase incident is not in itself culpable, the misconduct in failing to make a disclosure before ExCo can form the basis of a reasonable prospect of conviction. It is misguided to view this incident in isolation and to consider it trivial as was suggested in the opinion of Mr Griffiths, SC. The two incidences are inseparable and joined by a common conflict of interest. On this point, the House of Lord's decision in *Regina v Miller* [1983] 2 AC 161 is analogous and instructive. Miller was a squatter who fell asleep with a lit cigarette in his mouth. He was not criminally responsible at this point because in falling asleep he lacked the necessary mental element. When Miller awoke to see the fire he had started, rather than putting it out, he moved to another room to continue sleeping. In confirming Miller's guilt for criminal damage to property, the House of Lords said it was necessary to view his entire conduct as one continuous act. When Miller awoke to discover the fire he had caused, he had a duty to try to extinguish it. In failing to meet his duty, he was criminally responsible for the damage to the house caused by the fire.

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In accordance with these principles, when Mr Leung realised his conflict of interest, he had a duty to make the necessary disclosure to ExCo. In failing to do so, he culpably misconducted himself because his non-performance of duty furthered his continued retention of an improper financial benefit. One has to wonder if this financial benefit would ever have come to light had the media not revealed the matter in March 2003. The continued retention of this personal benefit underlies the seriousness of the misconduct.

One might wonder whether the two incidences were 'in the course of or in relation to his public office', which is another requirement of the offence. Clearly, the non-disclosure, taking place in the context of an ExCo meeting, was nonfeasance in the course of Mr Leung's public office. However, one might think the purchase of a car for domestic purposes is of questionable relation to his public office. But such a narrow approach to the public-private distinction should be eschewed. Just as police officers, whether on or off duty, should not associate with known criminals, finance ministers must exercise the same degree of circumspection when acquiring assets. It is because of the individual's senior position that his engagement in unofficial business can at times implicate his public office.

But is it in the Public Interest?

Now having said all of this, it is another question as to whether it would be in the public interest to bring the prosecution. While there is a reasonable prospect of conviction, that prospect is not great since a reasonable doubt as to Mr Leung's mens rea at the time of both incidences is conceivable. On the whole, the circumstances, including the absence of harm or undue favour to others, Mr Leung's immediate and full cooperation, his expression of remorse, his self-disgorgement of the gain and donation of an equivalent amount to charity, his resignation from public office, and finally the consequential loss of face and reputation, tend to weigh on the side of not bringing the prosecution.

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從另一法律角度探討「買車事件」

筆者就律政司不作檢控的決定另持己見

不作檢控的決定

2003 年 12 月 15 日，律政司司長（以下簡稱「司長」）宣佈，就前財政司司長梁錦松的「買車風波」，決定不作出刑事檢控。司長的考慮，是針對梁先生在發表財政預算案演詞前的數星期，購買了一輛名貴凌志房車。後來他在該演詞內宣布，增加名貴汽車首次登記稅。發表預算案當日，他亦未有向行政會議披露有關利益衝突。

司長史無前例地發表了一份長達十六頁的新聞稿，概述作出決定的過程及所依循的理據。新聞稿透露，司長將決定權授予刑事檢控專員（以下簡稱「專員」），由其分別徵詢兩位首席資深大律師 — 祁理士資深大律師（John Griffiths, SC）和韋爾森御用大律師（Martin Wilson, QC）的法律意見。專員的結論認為，如要就「在公職中行為不當」對梁錦松作出檢控，不可能有達致定罪的機會。不過，他亦指出，如果整體證據能達致合理的定罪機會，檢控梁錦松是符合公眾利益的。

對於不作出檢控的決定，坊間反應不一。大律師公會主席對此深表歡迎，但其他人士，特別是民主派立法會議員，則有較多批評意見。其中吳靄儀議員質疑專家意見的準確性，並關注到此事會設下先例，令將來更難提出檢控。吳議員及其他人士的意見，引發公眾人士對法律真正狀況及將其適用到梁先生的情況等問題作出深思。本文旨在提出有別於兩位法律專家及專員提出的法律意見，並嘗試剖析有關法律，以及提出上述專家未有提及的另一個法律責任理論。即使本人的意見最終亦支持不作出檢控的決定，但所基於的理據卻截然不同。

合理的定罪機會

本港有關「在公職中行為不當」罪行的首要案例，乃 *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381（終審法院）一案，案中此普通法罪行受到質疑，被指為不符合憲法及含糊。終審法院在反駁有關不符合憲法的觀點時，特意闡述這項罪行的元素。

在非常任法官梅師賢爵士（Sir Anthony Mason NPJ）的一致判決中，法院指出執行公職期間行為不當的兩種模式。其一是公務人員未有履行其公職（即不履行職責）；其二是公務人員不當地履行其公職，例如藉此為自己獲利或傷害他人（即在公職中行為失當）。

就不履行職責的個案而言，有必要證明構成不履行職責的行為是蓄意作出，意思是說有關人士必須有作出某種行為的意圖，並同時知悉其承受未能履行公職的風險，其準則較要證明故意逃避職責輕微。

就行為失當的個案而言，法庭指稱，除蓄意的意圖外，必須證明當事人懷有不當動機，諸如不誠實、舞弊或惡意。由於加上了這個元素，要證明行為失當的案件，一般都較為困難。

以梁先生的情況而言，一連串圍繞他在 2003 年 1 月 18 日買車及同年 3 月 5 日行政會議上不作披露的事件，引起的顯然是針對他未有履行職責的質疑，而非在公職中行為失當。此等事件發生時，梁先生正擔任公職，需遵守《問責制主要官員守則》（以下簡稱《守則》）的道德標準。買車及在行政會議上不作披露這兩件事，反映梁先生未有遵照《守則》的道德標準，從而未有履行職責。梁先生本身知悉節省稅款的獲益，雖然此

不足以確定不履行職責的罪行，但亦牽涉到不當行為的嚴重性。

至於梁先生的犯罪意圖，有強而有力的環境證據證明，他在行政會議上不披露此事，既是蓄意亦是故意。以下為有關新聞稿內的事實：

> … 在該日行政會議開會接近結束前，楊永強醫生在會上正式申報他訂了一輛新汽車，將於兩個月後出車。田北俊先生和林瑞麟先生亦聲稱近期購買了汽車。會議上裁定楊醫生的申報恰當，因為他的汽車尚未登記，但田先生和林先生的則不須申報，因為他們的車輛已經登記，而且他們沒有參與制定財政預算案。梁先生沒有參與討論。

梁先生當時面對其餘三位行政會議成員就披露買車的討論。要相信他連需要按《守則》作出披露也忽略，實在有違常理。

單就「買車事件」而言，在考慮過預期答辯後，證明針對梁先生的個案較欠理據。作為財政司司長，別人對其知識和智慧水平固然有一定期望。買車及預算案審議／公布之間存在緊密的實質聯繫，大概令人有理由推論，梁先生具有蓄意的意圖，這即是說，在買車之時，他已具備買車的意圖，同時意識到違反《守則》的風險。然而，梁先生對此蓄意意圖作出否認，此舉將事件的性質由推論轉而為可信性的問題。要衡量此可信性事宜可能出現的結果，司長和官員罕有地參閱梁先生的答辯，並探討他出庭答辯的可取性。就前一件事宜，一組律師在 2003 年 7 月向專員提交廣泛意見書，基本主張為梁先生當時心不在焉，因為他將注意力集中在新婚妻子及即將誕生的嬰兒身上。就後一件事宜，梁先生在 2003 年 3 月及 4 月出席立法會政制事務小組委員會會議接受提問。藉著目睹整個答辯的特殊機會，我們有充分理由相信，有鑑於梁先生當時的個人情況，他能就其意圖提出合理的疑點。

然而，這並不代表事情已經完結。即使買車本身不構成罪行，不向行政會議作出披露的不當行為，足以作為定罪的合理理據。倘若如祁理士資深大律師的意見認為，此事應予以獨立處理及其性質微不足道，則堪稱誤導之舉。實際上，這兩件事不可分割，並由共同的利益衝突所聯繫。就這一點而言，英國上議院對 *Regina v Miller* [1983] 2 AC 161 一案的裁決，可作為借鑑及指引。Miller 乃一名非法佔住者，有一天，他口含香煙入睡了。在這個階段，他並不負上刑責，因為入睡意味他缺乏犯罪所需的精神元素。當 Miller 醒來時，發現自己惹起火種，他不但沒有即時撲滅，反而走到另一間房間繼續睡覺。上議院在裁定 Miller 負上損壞財產的刑事責任時指出，必須將他整個行為視為一個連續的作為。當 Miller 醒來時發現自己惹起火種，他有責任盡力撲滅。既然未能履行責任，他便需為失火對房屋的破壞負上刑事責任。

… 另一個要考慮的問題，是檢控是否符合公眾利益

根據此等原則，當梁先生意識到自己有利益衝突時，有責任對行政會議作出所需的披露。他未有這樣做，便構成行為不當。其後，他持續保留不當財務利益，進一步延續不履行責任的行為。我們或會懷疑，若傳媒在 2003 年 3 月沒有揭發他買車一事，其財政利益會否為人所知。持續保留個人得益，加重了不當行為的嚴重性。

大家或許會問，兩件事件是否符合罪行的另一個要素：「在執行公職的過程中進行或與公職有關」。顯然，在行政會議上不披露買車一事，乃梁先生在公職中不履行職責的行為。然而，大家亦可能質疑，買車作家居用途是否與公職有關。本人認為，如此狹義的公私分開可免則免。這就正如警員不論在值班或休班時間，都不應與已知罪犯有任何牽連；財務部長在獲取資產時亦需同樣審慎。身居要職的人士，在進行非公務事宜時，有時亦可能會牽涉其公職。

但檢控符合公眾利益嗎？

闡述上述各點後，另一個要考慮的問題，是檢控是否符合公眾利益。儘管存在合理的定罪理由，但定罪的機會不大，原因是梁先生在這兩件事中的犯罪意圖存在合理疑點，這一點是可以理解的。整體而言，梁先生的行為未有為他人帶來傷害或不當得益，加上他即時採取全面合作的態度，並且表現悔意，自願交出得益並將等額捐贈慈善機構，更為事件辭去公職，最終蒙受名譽上的損失。以上各點均傾向支持不作出檢控的決定。

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