

Criminal Litigation

Is Donald Tsang Guilty of the Offence of Misconduct in Public Office?

There has been wide news coverage lately over the heated controversy surrounding the Chief Executive accepting favours from tycoons. This article discusses the elements of this important offence of misconduct in public office which governs the conduct of public officials in relation to their public office.

Introduction

Misconduct in public office is a common law offence punishable under section 101I(1) of the Criminal Procedure Ordinance (Cap. 221), which, if convicted, can be liable to seven years' imprisonment and a fine. Leading authorities in this area are the two Court of Final Appeal judgements: Shum Kwok Sher v HKSAR and Sin Kam Wah & Lam Chuen Ip v HKSAR, in which Sir Anthony Mason NPJ considered the elements of this offence.

Shum Kwok Sher v HKSAR

In Shum Kwok Sher, a former chief property manager with the Government Property Agency ("GPA") was convicted of misconduct in public office and sentenced to 30 months' imprisonment as he wrongfully caused a private company and its associated companies, controlled by the brothers of his sister-in-law, to be awarded management contracts for various government services and acted dishonestly by not disclosing the family connection to his employer.

Sir Anthony Mason NPJ considered the elements of the offence of misconduct in public office as: (1) a public official; (2) who in the course of or in relation to his public office; (3) wilfully and intentionally; (4) culpably misconducted himself. In other words, a public official culpably misconducted himself if he, without reasonable excuse or justification, wilfully **and** intentionally *neglected or failed to perform a duty*, or with improper motive, wilfully **and** intentionally *exercised a power or discretion*, he was subject to because of his office or employment.

Further, the misconduct must be both "wilful" and "intentional". "Wilful" means knowledge or advertence to the consequences, as well as intent to do an act or refrain from doing an act, in cases of non-feasance, misfeasance and other forms of misconduct in public office. The misconduct in question must also be serious misconduct, having regard to (a) the responsibilities of the office and the officeholder, (b) the importance of the public objects which they served and (c) the nature and extent of the departure from those responsibilities.

Sin Kam Wah & Lam Chuen Ip v HKSAR

In *Sin Kam Wah*, a former Senior Superintendent of the Hong Kong Police Force, was convicted of misconduct in public office and sentenced to 2 years' imprisonment because he accepted free sexual services provided by prostitutes over whom the co-Defendant exercised control, direction or influence. Considering the English Court of Appeal case in *Attorney-General's Reference (No. 3 of 2003)*, Sir Anthony Mason NPJ reformulated the elements of the offence of misconduct in public office as:

1. a public official;
2. in the course of or in relation to his public office;
3. wilfully misconducted himself; by act or omission, e.g. by wilfully neglecting or failing to perform his duty;
4. without reasonable excuse or justification; and
5. where such misconduct was serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they served and the nature and extent of the departure from those responsibilities.

It was held that the misconduct must be deliberate rather than accidental in that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable. It is important to note that the trial judge concluded that the favours provided by the co-accused went well beyond normal hospitality and were accepted by Sin in relation to his office, and he drew the inference that they were supplied as some form of "sweetener" to Sin. In the Court of Final Appeal, Sir Anthony Mason NPJ stated clearly that acceptance of a "general sweetener" by a public officer can, in appropriate circumstances, amount to misconduct in public office.

Donald Tsang's Controversy

Towards the last week of February 2012, it has been widely reported in the media that Chief Executive Donald Tsang has accepted tycoons' favours in various ways, ranging from accepting at least four trips on private planes and yachts offered by his tycoon friends and renting a luxury penthouse in Shenzhen at bargain price from a businessman to storing vintage wines and staying in a luxury Macau casino resort suite in 2007. Tsang has set up a committee headed by the former Chief Justice Andrew Li Kwok-nang to review the existing code of conduct for handling potential conflicts of interests for the Chief Executive and officials alike. On 28 February, the ICAC initiated an investigation into Tsang. Despite these moves, there have been calls from the lawmakers to seek a Legco inquiry into Tsang's conduct. Some even called for a motion of impeachment.

Is Tsang likely to be liable to the offence of misconduct in public office? Assuming what was reported in the media to be true and applying the above principles laid down by Sir Anthony Mason NPJ, here are some observations:

1. He is no doubt a public official.
2. He might not be subject to the Civil Service Code or the Code for Officials Under the Political Appointment System, but no matter what kind of internal code he had developed for himself to govern his acceptance of hospitality from friends, it would be quite strange that he would be subject to a lower standard than an ordinary civil servant, namely, not to act in conflict of interest and not to confer benefits on friends.
3. He misconducted himself, by failing to disclose his dealings with tycoon friends, perform his duty to avoid conflict of interest and refrain from putting himself in a position where his personal interest conflicts with his duty as a Chief Executive.
4. Whether he omitted to do all these things knowing that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful would depend on the evidence.
5. All these omissions took place in the course of his public office as the Chief Executive.
6. Tsang said that he paid the cost of standard ticket and economy class ticket prices for luxury travels. It is doubtful whether this would amount to reasonable excuse or justification.
7. Having regard to his responsibilities as a Chief Executive, the importance of the public objects the post of Chief Executive served and the nature and extent of the departure from those responsibilities, such misconduct was indeed serious, not trivial.

It may be premature and inappropriate for us to arrive at a concrete conclusion at this time when the ICAC investigation has not finished and all the evidence is not out yet. However, to adopt the languages of the trial judge and Sir Anthony Mason NPJ in *Sin Kam Wah*, the favours provided by the tycoons, as reported by the media, if proven to be true, went well beyond normal hospitality and were likely to be accepted by Tsang in relation to his office and that they were supplied as some form of “sweetener” to Tsang. This may well be the appropriate circumstances where the acceptance of more than a “general sweetener” by Tsang amounts to misconduct in public office. As the Chief Executive, he must be seen to be above suspicion and act impartially. The consequence of Tsang’s accepting these advantages from tycoons would be exposure to risk of future corrupt demands from them, even though no such equivalent advantage was asked for at the time the favours were given.

Conclusion

In general, misconduct in public office can occur without bribery, and an officer may commit this offence when he misuses his official position for pecuniary gains, when he dishonestly shows partiality to a contractor, or when he negligently performs his duties. In addition, corruption normally starts with the officer being offered small favours to keep him sweet i.e. the “sweetening process”.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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