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Cargate – An Alternative
Legal Opinion

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

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 Reelck Sher v HK SAR (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 N PJ, 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).

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,

... 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.

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.

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
... it is another question as to whether it would be in the public interest to bring the prosecution.

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 incendences 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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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，是基於兩位專家的評估，及考慮到有關人士的意見，最终決定不作出檢控。但其他人士，特別是民主派立法會議員，則有較多批評意見。其中吳霭儀議員質疑專家意見的準確性，並關注到此事會設下先例，令將來衆多涉及高級官員的事件，會更加困難。

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遵循的理據。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（John Griffiths, SC）和韋爾森御用大律師（Martin Wilson, QC）的法律意見。專家的結論認為，如要作出檢控，不僅需要在公開場合作出，同時需要在公開場合作出，才能確保確實與眾人利益的。

理性的定罪機會
本港有關「在公職中行為不當」的判決，多數涉及未有不當行為，但涉及公眾利益的。在某些情況下，公眾利益是重要的。在某些情況下，公眾利益是重要的。在某些情況下，公眾利益是重要的。在某些情況下，公眾利益是重要的。在某些情況下，公眾利益是重要的。
不足以確定不履行職責任的罪行，但亦
涉到不當行為的嚴重性。

至於梁先生的犯罪意圖，有強而
有力的證據證明，他在行政會議
上不披露此情，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，樑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。

軍裝買車事件，而有關軍事委員會的
報告和事實，證明針對梁先生的個
案較屬合理。作為財政司司長，別人
對其資金狀況和處理事宜亦屬有
所了解。在披露事件中，梁先生
確實行為已盡力，這是指在
披露事件中，他已盡力完成其任
務。

但檢視符合公眾利益呢？

上述事件後，梁先生的行為
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，要有責任向行政會
議作出披露的資料。如果他沒有這樣做，
便構成行為不當。其次，他應保留
不當財務利益，進一步延續不履行職
任的行為。我們或會懷疑，當他在
2003年3月沒有披露他買車一事，
其財政利益會否被人所知。持續保留
個人得利，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，
乃是梁先生在公職中不履行職任的
行為。然而，大家亦可質疑，買車作
家居用是否符合公職有關。本人認
為，如此狹義的公私分開可免則免。

這就正如醫學上不論在值班或休班時
間，都不應與已知罪犯有任何牽涉；
財政司長在獲取資產時亦需同樣慎
慎。身居要職的人士，在進行非公務
事宜時，有時亦可能會涉及其公職。

香港大學法学院副院长
助理教授 杨晨文先生

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