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 his budget speech that 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 *Shun Keok Shek v HKJAR (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).

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,

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... 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.

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 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抒己見

不作檢控的決定
2003年12月15日，律政司司長、市政局最終委員、司長樑錦松的「買車風波」，決定不作刑事檢控。司長的考慮，是針對梁先生在發表財政預算案議員前的數星期，購買了一輛名貴凌志房車。他透露在該購入後，增加了名貴車的首次稅額。發言人指，當日，他亦未有向政府部門提出有關利
益衝突。司長批評梁針對一筆數達

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 Kwek Shek v HKSAR (2002) 3 HKCFAR 381，終審法院的一案，案中被告違反規定受
到質疑，被指為不符合憲法法的觀
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點時，特恩格特當這罪行的元素。
不足以确定不履行职责的罪行，但亦
涉及到不正当行为的严重性。

至於梁先生的犯罪意图，有强有力的证据支持，他在行政会议
上不披露此事，既是蓄意亦是故意。
以下为有关新闻稿内所述事件：

……在该日行政会议开庭前，何永胜.trim在会场上正式申
报他被盗了一辆新车，将於兩
个月後出車。田北俊先生和林振
先生亦声明近期购买了新车。会
议上裁定何先生的申報恰當，因
为他的车尚未登记，但田先生和
林先生的车则有登记，因为他们
有车辆登记，而且他们没有参与制定财政预算案。梁先生
没有参与会议。

梁先生当时就其余三位行政会议成
员的请愿书表示有异议，正对梁
先生作出的决定，令他确需要按《守則》作出披露，而是
有自會常理。

单就「买車事件」而言，在考慮
透過程後，証明针对梁先生的个
案有欠理據。因为财政司司长，別人
對其知識和智慧水平虽然有一定期
望。买車及预算案審議／公布之間存
在密的資料聯繫，大概令人有理由
懷疑。梁先生有著蓄意的意图，这即
使在买車之前，他已明确著買車的
意图，同时事情到違反《守則》的風
險。然而，梁先生对這蓄意意图作出
否認，此舉將事件的性质由推論變為
为逻辑性的問題。要衡量此可性事
宜可能出現的结果，司長和官員有
必要参与梁先生的答辩，及探討他应出席
答辩的可取性。就前一件事件，一组
律师在 2003 年 7 月向專員提交廣泛
意见書。基本主張为梁先生當時心不
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
接受帶著。藉著目睹整個答辩的特殊機
會，我們有充分理由相信，有鉴于
梁先生當時的個人情況，他能就其意
图提出合理的疑點。

然而，這並不代表事情已经完
結。即使买車本身不构成罪行，不向
行政会议作出披露的不當行为，足以
作为定罪的合理根据。倘若如祁理士
早深律师的意见認為，此事應予以
獨立處理及其性質微不足道，則僅稱
誤導之舉。實際上，這兩件事不可分
割，並由不同的利益衝突所聯系。就
这一点而言，英國上議院对 Regina v
Miller [1983] 2 AC 161 案的裁决，可
作为了鋸及指引。Miller 乃一名非

……另一個
要考懲的問題，
是检権否
符合公眾利益

根據此等原則，當梁先生意認到
自己有利益衝突時，有責任對行政會
議作出披露的揭露。他未有這樣做，
便构成行为不當。其後，他持續保留
不当財務利益，進一步延續不履行責
任的行为。我們或會懷疑，若信媒在
2003 年 3 月沒有揭發他購車一事，
其財政利益會否為人所知。持續保留
財政利益，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，大家亦可質疑，買車作
家居非等同與公職有關。本人認
為，如此義正的公私分間可周則免。
這就正如警員不分在值班或休班時
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。

但檢樁符合公眾利益嗎？

闡述上述各點後，另一個要考慮的問
題，是檢樁是否符合公眾利益。儘管
存在合理的定罪理由，但定罪的機會
不大，原因は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，更為事件除去公職，最
終蒙受名譽上的损失。以上各點均傾
向支持不作出检樁的決定。

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