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<td><strong>Author(s)</strong></td>
<td>Young, SNM</td>
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<tr>
<td><strong>Citation</strong></td>
<td>Hong Kong Lawyer, 2004, Feb, p. 37-41; 香港律師, 2004, Feb, p. 37-41</td>
</tr>
<tr>
<td><strong>Issued Date</strong></td>
<td>2004</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/48394">http://hdl.handle.net/10722/48394</a></td>
</tr>
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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 Reesk Siew v HKSAR (2002) 5 HKCFA 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 PJJ, 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).

... 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 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
（以下簡稱「司長」）宣佈，就前財
政司司長梁錦松的「買車風波」，決
定不作刑事檢控。司長的考慮，是
針對梁先生在發表財政預算案演講前
的數星期，購買了一輛名貴凌志房
車。後來他在該演講內宣佈，增加名
貴車首年登記稅。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
程及所遵循的原則。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 — 祁律士資深大律
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感歡
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
德儀議員質疑專家意見的準確性，並
關注到此事有其合法性問題，並
指出司長對此事會設下先例，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及行規狀況及
將其應用到梁先生的其他情況及問題作出
深思。本文旨在提出有別於兩位法律
專家及專員的法律意見，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，但所基於的理論卻截然不同。

合理的定罪機會
本港有關「在職中行為不當」罪行
的首要案例，乃 Shum Kweck Shek vs
HKSAR (2002) 5 HKCFAR 381（終
審法院）一案，案中被告因違反公
法法行受到質疑，被指為不符合憲法及期
望，終審法院在反覆有關不符合憲法的觀
點時，特別闡述違行此罪的元素。

在非常任法官梅師賢爵士
（Sir Anthony Mason NPJ）的判
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執行其公職，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，並同時明知其承受
未能履行職責的風險，其準則較要證明
故意逃避職責任微。

就行為失當的個案而言，法庭指
稱，除非個案中行為，必須證明當事
人擁有不當動機，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。

以梁先生的個案而言，一連串風
波後他在 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。梁先生需遵守《資眾判官主要官員守則》
（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，從而未有履行職責任。梁先
生本身知悉截減稅款的獲益，雖然此
不足以確定不履行職責的罪行，但亦
事涉不當行為的嚴重性。

至於梁先生的犯罪意圖，有強而
有利的證據證明，他在行政會議
上披露此事，既非蓄意亦是故意。
以下為有關新聞稿內的事實：

… 在該日行政會議開會接近結
束時，楊永強醫生在會上正式申
報他訂了一輛新車，將於兩個
月後出車。田北俊先生和林瑞麟
先生亦聲稱這輛車是梁先生在會
議上確定楊醫生的申報時，因
為他的汽車尚未登記。楊永強
先生和林先生均未申報，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。

梁先生當時面對其他三位行政會議成
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
和審議結果後，證明針對梁先生的個
案基礎理據。作為政府司局長，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
在緊密的資質聯繫，大概令人有理由
懷疑，梁先生具有蓄意的意圖。要
是說，在買車之時，他已具備買車的
意圖，同時意圖違反《守則》的規
定。然而，梁先生對此蓄意意圖作出
否決，此舉將事件的性質由推論轉變
為可信性的質。要衡量此可信性事
宜可能出現的結果，司長和官員實
在須對梁先生的答辯，並探討他提出
答辯的可取性。及前一件事宜，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於新婚
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
出席立法會財政事務小組委員會會議
接受質問。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
圖提出合理的質點。

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。倘若如祁博士
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，則嫌稱
誤導之舉。實際上，這兩件事不可分
割，並由相同的利益衝突所聯繫。就
這點而言，英國上院對 Regina v Miller [1983] 2 AC 161 案的裁決，
可作為借鑑及指引。Miller 乃一名非

… 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，有責任向行政會
議作出披露。他未有這樣做，
便構成行為不當。其後，他持續保留
不當財政利益，進一步延續不履行責
任的行為。我們或會懷疑，當商媒在
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：「在行使公職
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
家庭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。
這就正如警員在值班或休班時
間，與異性發生關係的行為，財
務部長在獲取資產時亦須同樣審
慎。身居要職的人士，在行使非公務
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
犯罪意圖存在合理質點。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，更為事件解決，最終
許多名譽上的損失。以上各點均傾
向支持不作出檢控的決定。

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助理教授楊艾文先生