
IN THE BARRISTERS DISCIPLINARY TRIBUNAL

BETWEEN

THE BAR COUNCIL

THE APPLICANT

And

MS LYNDA MARY ALLISON SHINE

THE RESPONDENT

Coram: Mr. Cheng Huan S.C.
Mr. Samuel, K.Y. Chan
Professor Chan Lai Wan, Cecilia

Dates of Hearing: 26 October 2010; 24 November 2010; 9 -11 February 2011;
14 February 2011; 22 February 2011; 11 April 2011 and 13 May 2011

Date of Delivery: 29th July 2011

STATEMENT OF FINDINGS

Mr Cheng Huan S.C.

Preliminaries

1. In a letter dated 15 September 2010 from Mr. Ronny Tong S.C., the Convenor of the Barristers Disciplinary Tribunal, we were appointed to hear the complaints against Ms. Lynda Mary Allison Shine (the "Respondent") who was called to the Bar in 2002. By a letter dated 6 October 2010 the Tribunal was informed that the Respondent intended to plead not guilty to all the complaints.
2. There are two complaints of professional misconduct laid by the Bar Council against the Respondent and the particulars of the complaints are as follows:

Complaint 1

"The Respondent attempted to knowingly mislead the Court of Appeal, contrary to paragraph 130 of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region ("the Code").

Particulars of Complaint

On 22nd October 2009, the Respondent (as a practising barrister) attempted to knowingly mislead the Court of Appeal at the hearing in CACC 309/2008 (“the Appeal”) by testifying that the Defendants in DCCC 290 of 2008 (“the Trial”) had changed the factual basis of their instructions in the court of the Trial

from

- i. alleging a “frame-up” by Hiteshkumar Patel (“PW1”) who the Defendants had previously met and had an appointment to meet at the time of the Defendant’s arrest,*

to

- ii. alleging that they had never met PW1 and were mere passersby at the time of their arrest,*

When the Defendants had not changed the factual basis of their instructions to her.”

Complaint 2

“The Respondent engaged in conduct which may bring the profession of barrister into disrepute or was prejudicial to the administration of justice, contrary to paragraph 6(b) of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region.

Particulars of Complaint

On 24th July 2008, the Respondent (as a practising barrister) engaged in conduct which may bring the profession of barrister into disrepute or was prejudicial to the administration of justice, by putting (purportedly on behalf of the Defendants) to Senior Inspector Chan Ka Shun at the trial that the Defendants were not the same persons who approached and spoke to PW1 outside Central Park Hotel on 22nd January 2008 when such allegation was contrary to the Defendants’ instructions as to the facts of the case to her.”

3. Mr. Rimsky Yuen S.C. leading Mr. Robert Pang appeared as counsel for the Bar Council and the Respondent was represented by Mr. Gerard McCoy S.C. and Mr. Alexander King S.C. We are very grateful to all counsel for their extensive and helpful submissions both oral and written.

The Background

4. The Respondent was briefed by Messrs. Eric Yu & Co., solicitors, to appear for two Defendants in the District Court. D1 (Daniel K. Kamunoko) and D2, (Karl-Pieter, Kamwanga) were jointly charged with an offence of conspiracy to defraud contrary to Common Law. D1 alone was also charged with a second charge of assaulting two police officers in the execution of their duties. Both defendants pleaded not guilty to these charges.
5. The trial (DCCC 290 of 2008) was before Deputy District Court Judge Woodcock, which commenced on the 22 July 2008 and completed on 2 September 2008. Both defendants were convicted of the charges after trial. D1 was sentenced to a total of 2 years and 6 months.
6. Only D1 applied for leave to appeal against conviction and sentence – D2 having abandoned his appeal. On 22 October 2009, the Court of Appeal in CACC 309/2008 (Hon. Stock VP, Hon. Lunn J and Hon. Wright J) allowed the first applicant's (D1's) application for leave against conviction in respect of charge 1 but dismissed the application in respect of charge 2.
7. In a letter dated 24 November 2009 Hon. Stock VP wrote to the then Chairman of the Bar complaining about the Respondent's conduct.
8. The Court of Appeal had, with respect, extensively and in detail outlined the factual background to the case in its judgement. We shall not repeat all those matters here.
9. We were urged by Mr. McCoy SC and which we adopt as our approach that we are not bound by the findings of fact of the Court of Appeal. The Court of Appeal had the opportunity to hear the testimony of the first applicant and also the evidence given by the Respondent. The Court of Appeal made many findings of facts adverse to the Respondent.
10. Our task is to decide as a tribunal whether the complaints made by the Bar Council can be established to the requisite standard required by law and based on the evidence submitted to us. Mr. McCoy SC has helpfully drawn to our attention the possible pitfalls that we should avoid in coming to any conclusion as there were always inherent dangers that we would rely on hearsay and inadmissible evidence. We are conscious of the difficult task we have.

The Standard of Proof

11. The Court of Final Appeal in *A Solicitor v the Law Society of Hong Kong (2008) 11 HKCFAR 117* declared that the standard of proof for disciplinary

proceedings in Hong Kong should be a civil standard. Mr. Justice Bokhary PJ in paragraph 116 of the judgment stated:

*“In my view, the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the **Re H** approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide an appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation.”*

12. We are aware of s.8 of the Barristers Disciplinary Tribunal Proceedings Rules (Cap. 159) which states that this tribunal “may determine its own procedure and rules of evidence”. Even though we are not bound by the strict rules of evidence, our approach is to ensure that in such a serious case we should try to adhere as much as possible to the rules of evidence in criminal cases. Our ultimate task is to ensure a fair trial for the Respondent.
13. We have also taken into account the good character of the Respondent. We have taken into account that the Respondent is held in high esteem by some members of the legal profession.
14. The Respondent elected not to give evidence and obviously no adverse inference can be drawn from this exercise of her constitutional rights.

The Permanent Stay Application

15. A number of sessions were devoted to the Respondent’s application for a permanent stay of the proceedings. We were assisted by the extensive oral and written submissions of both sides. On 22 February 2011 we made our ruling and refused a permanent stay of the proceedings. We handed down our ruling, which is Annexure 1 of this judgment. For the purpose of our Statement of Findings we adopt our reasons in Annexure 1 for refusing the stay application.

Jurisdiction

16. On 11 April 2011 Mr. McCoy SC informed the Tribunal that he wished to address us as to whether the tribunal had any jurisdiction over the Respondent who was no longer a barrister. We heard submissions from both parties on the 11 April and 13 May 2011. There were both oral and written submissions made on this important issue. On 13 May 2011 we indicated that we would

reserve our statement of findings and also that we would decide the jurisdictional point when we deliver our statement of findings.

Findings on Jurisdiction

17. There is no dispute between the parties that:

- a. The Respondent (Ms. Lynda Shine) was a barrister within the meaning as defined in the Legal Practitioners Ordinance (“LPO”) at the time when the conduct complained of took place.
- b. The Respondent was a barrister when the Barrister Disciplinary Tribunal (“BDT”) Convenor gave notice to this Tribunal.
- c. The Respondent is not currently on the roll of barristers.

18. A chronology was also provided by the Respondent, which the Applicant has accepted:

- a. 15 September 2010: The BDT’s convenor gave notice of the setting up of this Tribunal;
- b. 21 September 2010: solicitors for the Bar Council wrote to the Respondent enclosing, inter alia, a copy of the complaints and particulars of misconduct dated 14 September 2010;
- c. 24 September 2010: the Hon. Secretary of the Bar Association wrote to the Court of First Instance (re HCMP 1648/2010) that the Bar Council had no objection to the voluntary removal from the roll of the Respondent;
- d. 27 September 2010: the Hon. Chung J made an order of voluntary removal, granting the motion dated 31 August 2010;
- e. 7 October 2010: the Chairman of this BDT wrote to the Respondent and the Applicant directing that the first hearing of the Tribunal would be on the 26 October 2010.

The Respondent’s Submission

19. Among the Respondent’s submissions was that once a person was removed from the roll of barristers (as defined in s2 LPO, Cap 159) which is kept by the Registrar in accordance with s29 LPO, then this BDT simply has no further

jurisdiction over that person. It was submitted that this tribunal lacked the statutory *ratione personae* over the Respondent.

20. Another of Mr. McCoy SC's submissions was in relation to section 2 of the LPO. In short, his submissions were that sanctions can only be imposed on current barristers and not ex-barristers.

21. We were further asked to consider the legislative history of the LPO. It was the Respondent's submission that prior to 1994 the provisions creating the jurisdiction of the Solicitors Disciplinary Tribunal ("SDT") were virtually identical to the provisions in relation to the BDT. We were then directed to the 1994 amendments which made provisions in relation to the jurisdiction of the SDT only (namely s9A and s9B). However, no such amendments were made to the provisions concerning the jurisdiction of the BDT.

22. It was suggested that there was only one possible inference that could be drawn from the 1994 amendments which is that without those amendments the SDT does not have jurisdiction over a person who was not a solicitor at the relevant time. The 1994 amendments widened the jurisdiction of the SDT to include, inter alia, solicitors who were not current solicitors and trainee solicitors.

23. The gist of Mr. McCoy SC's submission was that there was no such amendments in relation to barristers and therefore an analogy could be drawn to suggest that in the absence of such amendment this tribunal has no jurisdiction over the Respondent.

24. In short, it was submitted that when the Court of First Instance made an order of voluntary removal of the Respondent on 27 September 2010 we ceased to have any further jurisdiction over the Respondent.

25. The case of *Maurice v Priel (1989) 58 DLR (4th) 736 (SCC)* was cited to support the Respondent's contention that we do not have any jurisdiction over the Respondent

The Applicant's Submission

26. Mr. Yuen SC disagreed with Mr. McCoy SC's submission. Among the many points raised by Mr. Yuen SC was that Mr. McCoy SC's interpretation of the relevant LPO provisions were too simplistic and literal.

27. The Applicant further submits that on the Respondent's literal interpretation of s2 of the LPO, s38(1) which provides that;

‘Any barrister who has been suspending from practicing or whose name has been struck of the roll...’

can never operate because a person who is suspended from practice or whose name has been struck off the roll cannot by definition be a barrister.

28. It was submitted by Mr. Yuen SC that once a Tribunal is properly constituted, the fact that the name of the barrister concerned was removed from the roll of barristers has no bearing on the jurisdiction of the Tribunal.

29. Mr. Yuen SC also referred us to s35, s35A and s36 of the LPO. He specially referred us to ss 1A and 5 of s36 which provides the following:

s36(1A):

‘A Barristers Disciplinary Tribunal may inquire into the conduct of any person in respect of which it was constituted.’

and

s36(5):

‘A Barristers Disciplinary Tribunal constituted to inquire into the conduct of a person may inquire into other conduct of the person, but only if:

(a) the person has been given reasonable notice and adequate particulars of that other conduct...’

30. It was Mr. Yuen SC's contention that there could be no other persons in respect of whom a BDT could be constituted except a barrister. He submitted that the legislative intent must be that, despite any subsequent change of status of the barrister concerned, the Tribunal would still be required to conduct its inquiry.

31. It was also Mr. Yuen SC's submission that s 37(g) of LPO provides the Tribunal with wide powers and that the Tribunal may ‘make any other order it thinks fit’. Such powers, according to him, were sufficient to encompass similar orders made in respect of a barrister who subsequently (whether by his

own act or otherwise) ceased to become a barrister at the time of the decision by the Tribunal.

32. In response to Mr. McCoy SC's submission on *Maurice v. Priel*, Mr. Yuen SC cited the case of *Re Canada (Commissioner of the Royal Canadian Mounted Police* [1993] 2 FC 351 (affirmed on appeal in [1994] 3 FC 562) and *Knutson v. Saskatchewan Registered Nurses' Association* (1990) 87 Sask. R. 86.

33. Mr. Yuen SC further raised an issue of "contractual jurisdiction" suggesting that a contract giving rise to disciplinary jurisdiction could be implied by the conduct of the parties. We were referred to the case of *Modahl v. British Athletic Federation Ltd.* [2002] 1 WLR 1192.

34. For completeness we should also state that Mr. McCoy SC disagreed with Mr. Yuen SC's contractual jurisdiction point.

35. There was a further suggestion by Mr. Yuen SC that the Respondent voluntarily submitted to the jurisdiction of this tribunal at least to the extent that the Respondent actively took part in these proceedings and actively pursued her application for stay.

36. With respect, we disagree with Mr. Yuen SC on this point in as much as on 26 October 2010 Mr. McCoy had submitted "I leave for later consideration how that (i.e. the fact that the Respondent is no longer a barrister) affects the jurisdiction of this tribunal and what can be done. That is a separate matter."

Conclusions on Jurisdiction

37. As stated earlier in paragraph 7, the Hon. Stock VP made a complaint to the Bar Council about the Respondent on 24 November 2009 and on 23 April 2010 the Respondent was made aware of the allegations. Therefore, when the Respondent applied to be voluntarily removed from the roll on 31 August 2010, she was fully aware of the allegations against her. The Convenor gave notice of the convening of this Tribunal on 15 September 2010.

38. It seems clear to us that when the Convenor gave notice on 15 September 2010 the Respondent was still a member of the Bar. The learned judge did not grant the order of voluntary removal until 27 September 2010, i.e. after this tribunal had been convened.

39. As stated under section 35A of the LPO (Cap. 159):

“(1) On receiving a submission under section 35, the Tribunal Convenor of the Barristers Disciplinary Tribunal Panel is required to appoint from the Panel-

(a) a Senior Counsel; and

(b) a barrister who is not a Senior Counsel; and

(c) a lay person.

(2) The persons so appointed constitute a Barristers Disciplinary Tribunal to inquire into the conduct of the barrister concerned...”

40. In our opinion, the BDT to inquire into the conduct of the Respondent was constituted on 15 September 2010 i.e. when the Respondent was still a barrister.

41. We reject the submission from McCoy SC that once the Respondent was removed from the roll of barristers, the BDT had no jurisdiction over her.

42. In relation to the Respondent's submissions relating to the 1994 Amendments to s.9 and s.10 of the LPO, while we accept that amendments were made to the LPO in relation to solicitors we still have to interpret the relevant sections of the LPO in relation to barristers. However, given our finding that the Respondent was still a barrister on the 15 September 2010, we find the analogy to the position of solicitors not very helpful.

43. The case of *Maurice v Priel* can also be easily distinguished as was submitted by Mr. Yuen SC. The complaint, investigation and appointment of the tribunal hearing against Mr. Maurice took place many years after he ceased to be a lawyer.

44. In all the circumstances, this tribunal is of the view that we have the jurisdiction to determine the complaints against the Respondent.

Findings on the Two Complaints

45. We now come to the ultimate issues that we have to decide i.e. whether the Respondent is guilty of any of the two complaints.

46. We have obviously considered the two complaints separately. Mr. Yuen SC and Mr. Pang have given us very helpful closing submissions. Mr. McCoy SC and Mr. King SC made no further written submission, but Mr. McCoy SC (p21, 13 May 2011 Transcript) relied on his submissions made during his stay application. In short, he complained of not having any live witnesses before the tribunal and urged us that there was sufficient doubt for us to acquit the Respondent.

1st Complaint

47. The gist of the complaint was that the Respondent knowingly misled the Court of Appeal by testifying that the Defendants had changed the factual basis of their instructions during the trial. The details are as stated in the particulars of the complaint.
48. Mr. Kamunoko (D1) gave evidence in the Court of Appeal to the effect that he had not changed the factual basis of his instructions (p.37-50 of the bundle). The Respondent also gave evidence in the Court of Appeal that there was such a change (p.51-65 of the bundle).
49. An important issue for us to decide is whether the defendants had changed the factual basis of their instructions at the trial.
50. One of the complaints made by Mr. McCoy SC was that D1 was not called as a witness and therefore no weight should be placed on his evidence or any of his affirmations. Further, another complaint was that the Respondent was not a party in the Court of Appeal but merely went there as a witness.
51. We have taken all these arguments by Mr. McCoy SC into account, as we have the submissions of Mr. Yuen SC.
52. However we are satisfied that we can rely on the accuracy and evidential value of the evidence given by D1 and the Respondent in the Court of Appeal. We have also taken into account the various affirmations given by D1 and the Respondent.
53. We also bear in mind that no live witnesses were called by the Applicant before the Tribunal. Ultimately our paramount duty has been to ensure that the Respondent has a fair trial before us.

District Court Trial

54. The Respondent was assigned by the Director of Legal Aid to represent the two defendants at their criminal trials.
55. Both defendants' defences were set out in detailed handwritten instructions which were exhibited in D1's 1st Affirmation to the Court of Appeal (p.462-488 of the bundle). At paragraph 6, it states, "We both denied the charge. Our defence briefly was that we did have meetings with PW1 with a view to doing business but subsequently found that he was trying to cheat us. We threatened to call the Police but he subsequently framed us up by making a false report to the Police." Further at paragraph 9, D1 stated, inter alia, "The issue of

identification was never raised by me in my instructions referred to in paragraph 6 above”.

56. According to D1, his detailed handwritten instructions (a copy of which was exhibited as “KDK1” to his 1st Affirmation dated 23 March 2009) were given by him to the instructing solicitors at a pre-trial conference in Lai Chi Kok Reception Centre and confirmed at a later conference with the Respondent and the instructing solicitors. Neither the existence of D1’s written instructions nor the aforesaid circumstances in which they were given were disputed by the Respondent, whether in her two Affidavits dated 28 April 2009 and 24 September 2009 respectively filed in CACC 309/2008 or at the hearing before the Court of Appeal on 22 October 2009.

57. In the course of PW1’s evidence in chief in the District Court Trial, the following exchange took place (p.151 of the bundle, C-L):

Q: Now in relation to the other three packets, B, C and D, do you have a chance to see them again?

A: No. Sorry. In the police station.

Q: In the police station.

A: Also I just – I would like to add, they also brought me photographs after they were captured to confirm it was them.

Court: Of the stones or of the men?

A: Of the men.

Court: Yes. You were shown photographs?

Q: When were you shown the photographs?

A: In the police station.

Q: ...of the men?

A: In the police station.

Q: When?

A: In the police station after they were caught, when I was in the police station giving my statement

Court: Same Day?

A: Same Day.

58. As a result of these exchanges, the trial was adjourned and the Respondent had a conference with the Defendants. After this adjournment the following critical matters were put to the PW3 Senior Inspector Chan Ka Shun by the Respondent :

"I also put to you that the two men only walked past the hotel entrance and did not stop outside nor speak with PW1 at any stage" (p.221 of the bundle, K-M).

and

"I further suggest to you that the two men who were arrested in that vicinity of the Central Park Hotel on 22 January 2008 were person who were just in the area, and were not the same persons whom you have testified as having approached and spoken with PW1" (p.222 of the bundle, M-O)

59. The gist of the complaint is that in the District Court D1's and D2's instructions to the Respondent were that the issue of identification was not raised by them but was unilaterally suggested by the Respondent. The Applicant's case was that the Respondent thought that an issue of identification was raised in the light of the evidence of PW1 that he was shown photographs of the Defendants in the police station.

60. D1 and D2 were convicted after trial.

Court of Appeal

61. Mr. Kamunoko gave evidence in the Court of Appeal to the effect that there was no change of instructions at any time. The Respondent gave evidence in the Court of Appeal that there was such a change of instructions. We bear in mind that when Mr Kamunoko gave evidence in the District Court and in the Court of Appeal he had vested interests in those proceedings.

62. However, what is very important was that Mr. Kamunoko elected to give evidence in the District Court and he gave evidence in accordance with his written instructions *i.e.* that he had met PW1 before, that they had arranged to meet at about the time of the arrest, and they had spoken to each other prior to the arrest but that he had not represented the stones to be diamonds.

63. We also accept the Applicant's submission that the Respondent's assertion that D1 and D2 had changed the factual basis of their defence is inherently improbable because:

- a. the Respondent's reason for not cross-examining PW1, namely to avoid strengthening PW1's identification of D1 and D2 (see paragraph 3 of the Respondent's 1st Affidavit dated 28 April 2009) would only be explicable if the factual instructions had not changed;
- b. there was no reference or mention of the alleged change of factual instructions at all in the two Affidavits of the Respondent;
- c. such drastic change of instructions as to the *factual basis* would have been reduced into writing as the Respondent stressed in her 1st Affidavit that in light of her experience she took the 'precautionary measure' of having D1 and D2 signed a document to confirm their change of instructions as to the *conduct* of the defence in running the defence on identification.

64. In our opinion, there was a consistency in the evidence given by Mr. Kamunoko both in the District Court and Court of Appeal. Further his evidence was supported by the written instructions he gave as exhibited in his 1st affirmation as stated above in paragraph 55.

65. In all the circumstances, we are satisfied that when the Respondent testified in the Court of Appeal that there had been changed in the factual basis of her instructions in the trial the Respondent attempted to "knowingly mislead" the Court of Appeal. We are satisfied that the Defendants had not changed the factual basis of their instructions to her.

66. Accordingly we find the Respondent guilty of Complaint 1.

2nd Complaint

67. The particulars of the complaint are as particularised.

68. As stated above the Respondent put to Senior Inspector Chan Ka Shun in the District Court trial that the Defendants were not the same persons who approached and spoke to PW1 outside Central Park Hotel on 22 January 2008 when such allegations were contrary to the Defendant's instructions.

69. The important question of course was whether there was a change of instructions regarding the issue of identification. If there was no such change of instructions it was wrong and contrary to instructions for the Respondent to have put such matters to Senior Inspector Chan Ka Shun.

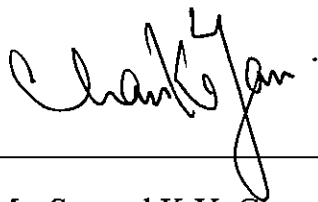
70. For reasons aforesaid we are satisfied that in all the circumstances, there was no such change of instructions. Therefore by putting those matters to the police officer, the Respondent had acted against her instructions and was “engaged” in conduct which may bring the profession of barrister into disrepute or was prejudicial to the administration of justice.

71. We find the Respondent guilty of Complaint 2.

72. Accordingly we unanimously find the Respondent guilty of Complaint 1 and Complaint 2.



Mr. Cheng Huan S.C.
Chairman



Mr. Samuel K.Y. Chan
Member



Prof. Chan Lai Wan
Member

Barristers Disciplinary Tribunal

The Bar Council v. Ms. Lynda Mary Allison Shine (“Respondent”)

RULING ON PERMANENT STAY

1. This is our unanimous decision on the application by the Respondent for a permanent stay of these proceedings.

2. On 24th of November 2010 we made a ruling on the admissibility of some transcripts and documents objected to by the Respondent.

3. We are indebted to both parties for their extensive and detailed submissions. Both Mr McCoy SC with Mr King SC for the Respondent, and Mr Yuen SC leading Mr Pang for the Applicant, have brought to our attention numerous cases from a number of jurisdictions. We were taken carefully through the relevant passages of these cases and we have carefully considered their submissions.

4. In a stay application in our jurisdiction we are bound by the CFA in the case of *HKSAR v Lee Ming Tee and Another* ((2001) 4 HKCFAR 133). The principles to be derived from this case, and in cases prior to Lee Ming Tee and subsequent cases, are thus:

(a) The onus is on an applicant to establish on a balance of probabilities that there should be a permanent stay.

(b) Staying criminal proceedings is an exceptional course.

(c) At page 148 letter J of Lee Ming Tee:

In most such cases, the court only grants the stay because, notwithstanding the range of remedial measures available at the trial, a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process. In Jago v The District Court of New South Wales (1989) 168 CLR 23 at 30, Mason CJ put it as follows:

The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the Court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.'

(d) At page 150 letter E, CFA seemingly approved the approach in *Jago v District Court NSW*:

'If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute

fairness.

More importantly, the court's primary endeavour is to ensure that a fair trial takes place, employing the law's available resources, and not to abort it on the ground that fairness cannot be attained, save as a last resort. To quote Brennan J again:

A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimize prejudice to either party. (Jago v District Court of New South Wales (1989) 168 CLR 23 at p.46)

His Honour continued:

Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes (Murphy v The Queen (1989) 63 ALJR 422; 86 ALR 35), adverse revelations in a public inquiry (Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25), absence of competent representation (McInnis v The Queen (1979) 143 CLR 575; MacPherson v The Queen (1981) 147 CLR 512), or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. (at 47)'

And further at page 151 letter G:

'The public interest lies in the guilt or innocence of the accused being fairly and openly determined at trial. For this to be displaced, powerful reasons must exist for concluding that such a trial, although fair, would nonetheless constitute an intolerable abuse of the court's process. The instances where such an argument has any prospects of success must necessarily be very rare.'

(e) Perhaps more relevantly to the present case at page 151 letter H:

'Thirdly, in cases where the ground on which a stay is sought concerns alleged unfairness in the use of particular classes or items of evidence, the courts, for procedural reasons, are extremely reluctant to determine the evidential questions on a stay application. This is because the fairness of using the evidence may be incapable of evaluation prior to the trial itself.'

The impact of such evidence on the fairness of the trial may need to be considered in the context of the evidence as a whole so that the question may best be dealt with as a question of admissibility to be determined by the trial judge and possibly made subject to his residual discretion to exclude the same: R v Hertfordshire County Council, Ex parte Green Environmental Industries Ltd [2000] AC 412; Clinton v Bradley [2000] NIECA 8 at para 17.'

5. One of Mr McCoy's main complaints is that by reason of missing witnesses the tribunal will be unable to evaluate key evidence which cannot be tested through cross examination. This seriously prejudices the Respondent and therefore the Respondent cannot have a fair trial.

6. He also reminded us that the tribunal should not take into account that the Respondent could give evidence in the witness box and referred to the case of R v Takeshi Machiya [1990] 1 HKC 73.

7. He also referred us to the more recent case of Lam Tat Ming v Chief Executive of HKSAR [2010] 5 HKLRD 581. This case suggests that certain provisions in the Pension Benefits Ordinance (Cap 99) do not comply with article 10 of the HK Bill of Rights. To quote from holding (1) '*So one was left with an apparently biased tribunal evaluating evidence which it was unable to have tested through cross-examination of key witnesses*'.

8. Our duty is to decide whether in all the circumstances of the case and bearing in mind the legal principles involved the Respondent can have a fair trial. We have taken into account all the submissions of leading counsel on both sides.

9. In all the circumstances we are satisfied that the Respondent has failed to discharge the burden of proof to establish on the balance of probabilities that there should be a permanent stay of these proceedings. Therefore we refuse this application for permanent stay and re-iterate our belief that the Respondent will have a fair trial before this tribunal.

Dated 22nd February 2011

Cheng Huan SC

Chairman

Mr Samuel K Y Chan

Member

Professor Chan Lai-wan, Cecilia

Member