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# ARTICLES

## DEFENDING WHITE COLLAR CRIME IN HONG KONG: A CASE STUDY OF THE LEE MING TEE CASE

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*The Lee Ming Tee case, stretching from 1998 to 2004, is the longest and most expensive criminal prosecution in the Hong Kong Special Administrative Region thus far. This article examines the strategies employed by the defence to try to delay and abort the prosecution. The strategies are many of the same ones documented by Kenneth Mann in his study of American white collar crime attorneys. The effectiveness or potency of strategies, such as information control, information access and deflecting attention, depends on the underlying rule of law values and institutions of the society where the prosecution occurs. While some may criticize the outcomes and the many detours taken in this case, they nevertheless serve to underline the robustness of Hong Kong's independent judiciary, due process safeguards, and system of jury trials post-1997.*

### Introduction

The longest and most expensive criminal prosecution in Hong Kong's recent history came to a conclusion on 5 November 2004, more than six years after the laying of charges.<sup>1</sup> On that date, billionaire Lee Ming Tee, former chairman of the Allied Group of companies, was sentenced to one year of imprisonment after pleading guilty to two counts of publishing a false statement or account. This resolution came almost a year after the co-defendant, Ronald Tse Chu-fai (former financial controller of Allied Group), pleaded guilty to one count of publishing a false statement or account and was given a suspended sentence. By means of various tactical steps taken to prolong the case over many years, both defendants achieved very favourable outcomes in a case involving "major corporate fraud".<sup>2</sup>

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<sup>1</sup> The Secretary for Financial Services reported that the pre-charge administrative inspection into Allied Group Limited and other companies cost HK\$46,478,295.65 (US\$5.96 million): see *Official Record of Proceedings of the Hong Kong Legislative Council*, 29 May 1996. The total expenditure for retaining private counsel to carry out the prosecution from 2000 to 2005 was HK\$35,236,447 (US\$4,517,493). See annual Department of Justice "Note for Finance Committee: Legal Expenses for Briefing Out Cases of the Department of Justice" from 2000 to 2005 which can be found online on the website of the Hong Kong Legislative Council (<http://www.legco.govhk/english/>).

<sup>2</sup> This is how Justice Seagroatt described the case on the second stay application, see n 5 below, para 140. The "relatively light sentences" are criticised in "Lessons to draw from a very sorry affair", *South China Morning Post*, 6 Nov 2004, A16.

The Lee Ming Tee case had all the hallmarks of a major white-collar crime prosecution. The defendants were directors of a corporate conglomerate who from 1990 to 1991 misled its shareholders and creditors by falsely reporting large share placements by independent investors. With significant financial backing, the defendants were able to assemble a “dream team” of defence lawyers and experts, including Queens Counsel flown in from the United Kingdom. The prosecution did equally well in retaining quality representation from the local and English private bar, which explains the enormous public expenditure incurred.<sup>3</sup> The case involved a protracted period of investigation, beginning first with an administrative inspection in 1992 and followed by police investigations starting in 1993, before charges were finally laid in 1998. Over 200 prosecution witnesses were listed on the indictment.

The case had an extraordinary history, much of it contributing to Hong Kong’s human rights jurisprudence. There were three unsuccessful attempts to try the defendants: one ended in a mistrial, two ended in permanent stays of proceedings. Twice it went on appeal to the Court of Final Appeal, and on both occasions, the Court reversed the permanent stays and returned the case to trial.

While the Lee Ming Tee prosecution is hardly a typical Hong Kong criminal case, it presents itself as an interesting and useful case study of criminal defence strategies. With near unlimited resources available to the defence, this was a fruitful case for studying the decisions and tactics of the defence team. It was hardly due to luck that the defence was able to prolong the trial and resolution so long while almost terminating the case on two occasions. A close examination of the case history shows that a number of effective defence strategies were used to realise various intended and unintended tactical advantages.

This article identifies those strategies that were most effective for the defence in this case. Interestingly, many of these strategies were the same ones observed by Kenneth Mann in his unparalleled study of American white-collar crime attorneys working in the 1970s and early 1980s.<sup>4</sup> These strategies, although largely proven successful in the United States and Hong Kong, cannot guarantee success when transplanted to any jurisdiction. It will be argued that the potency of defence strategies is determined largely by the rule of law values and institutions of the legal system in which they are employed. As will be seen, the success of the strategies used in the Lee Ming Tee case was a

<sup>3</sup> By 2003, the case had already come into the hands of 9 local senior counsel. This fact was relied upon when Gerard McMahon, former Director of Enforcement in the SFC, applied to have senior English counsel qualified in Hong Kong to represent him on his criminal charge of perverting the course of justice. The argument was made that the pool of local senior counsel who had yet to be “interested” in the case was very limited. See *Re Jones QC* [2003] HKEC 751 (CFI) dismissing the application.

<sup>4</sup> Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (New Haven: Yale University Press, 1985).

product of a legal system that respects the independence of the judiciary, due process of law, and the principle of trial by jury. The case study begins with a detailed overview of the case history.

### A Case History of Many Twists and Turns

The trial judge on the second stay application aptly described the case as involving “tortuous criminal proceedings”.<sup>5</sup> The history of the case can be divided into four distinct periods. The pre-charge period from 1992 to 1998 includes all the events leading up to the laying of charges. The second period from 1998 to 2001 centres on the first permanent stay of proceedings and culminates with the unanimous decision of the Court of Final Appeal to overturn the stay. The third period concerns the events leading up to the second permanent stay, and culminates in August 2003 with the unanimous reversal of the stay by the highest court for the second time. Finally, the last period from 2003 to 2005 sees the fourth and final attempt at prosecution during which an unsuccessful stay application was brought before plea resolutions were ultimately reached for both defendants.

Effective defence strategies were used in all four periods. The material events in these periods are discussed and explained below. Table 1 provides a brief chronology of the material events.

#### *The Pre-Charge Period (1992 to 1998)*

In 1990, Lee Ming Tee was the chairman of Allied Group Limited (AGL), which was a conglomerate with over 100 subsidiaries and associated companies.<sup>6</sup> Ronald Tse was appointed a director of AGL in March 1990 and had always been the financial controller of the company. After receiving complaints, the chairman of the Securities and Futures Commission (SFC) wrote to the Financial Secretary in June 1992 seeking an inspection into the affairs of AGL and its subsidiaries in regards to certain share placements reported in 1990 and 1991.

On 14 August 1992, the Financial Secretary appointed an Inspector, Nicholas Allen, to investigate and report on certain share transactions involving AGL, its subsidiaries and other companies from 1 January 1990. As an inspector, Allen had certain powers under the Companies Ordinance (Cap 32), including the power to obtain documents and statements on pain of contempt

<sup>5</sup> See Seagroatt J at para 8 of *HKSAR v Lee Ming Tee* [2002] HKEC 1554 (CFI).

<sup>6</sup> *Allied Group Ltd Annual Report 1990* (Hong Kong, 1990) 40–44. Its core businesses were “property development and investment, industrial manufacturing and trading, food industry, and strategic investments” (at 3).

Table 1: Chronology of Materials Events in the Lee Ming Tee Case

	Date or Period	Event	
	1990 & 1991	Offences committed.	
	11 Jun 1992	Securities and Futures Commission (SFC) writes to Financial Secretary (FS) recommending an inspection of the Allied Group.	
	8 Aug 1992	FS establishes a Steering Group consisting of the Deputy Secretary for Monetary Affairs and representatives from the Attorney General's Chambers and the SFC. One of the purposes of the Group is to monitor the progress of the Inspector.	
	14 Aug 1992	FS appoints Inspector.	
	Nov 1992	Ronald Tse brings <b>judicial review proceedings</b> challenging the compulsion powers of the Inspector. High Court Judge Jones dismisses application and appeal withdrawn in the Court of Appeal following refusal to amend grounds.	
	Jan 1993	Inspector interviews the defendants.	
	15 Jan 1993	Police begin to receive documents and materials obtained by Inspector even before his report is completed.	
First Period	12 Feb 1993	Gerard McMahon, the SFC's representative on the Steering Group, returns his draft of the Inspector's report after making numerous handwritten comments.	
	May–Sept 1993	Lee Ming Tee brings <b>judicial review proceedings</b> alleging that the Steering Group and the SFC have compromised the independence of the Inspector. McMahon files an affidavit in response to application. High Court Judge Kaplan dismisses the application in June and appeal fails in the Court of Appeal.	
	15 Sept 1993	Police execute a number of high profile search warrants in the offices of the Allied Group companies.	
	18 Sept 1993	Press conference held. Abridged version of Inspector's report released to the public.	
	Sept 1993	Police assemble a task force to begin the task of preparing a case for prosecution.	
	7 May 1997	Ronald Tse arrested in Australia. He agrees to return to Hong Kong without extradition.	
	25–26 Aug 1998	<b>Lee Ming Tee and Ronald Tse arrested in Hong Kong and charged with offences.</b>	
	Second Period	16 Jun 1999	Defendants committed for trial.
		Apr–Jun 2000	Trial before Justice Pang – application for stay of proceedings heard.
		21 Jul 2000	<b>Justice Pang grants a permanent stay of proceedings.</b>
22 Mar 2001		<b>Court of Final Appeal sets aside the stay and orders defendants to be tried before a different judge.</b>	

Table 1: (Cont'd)

	Date or Period	Event
Third Period	5 Nov 2001	New trial (2nd trial) begins before Justice Seagroatt and a jury.
	22 Mar 2002	Trial ends on its 76th day in a mistrial with the jury being discharged. Material information about the prosecution's expert witness had not been disclosed.
	End of May 2002	Prosecution changes expert witness. New trial (3rd trial) tentatively set to begin in Nov 2002.
	18 Nov 2002	Hearing begins before Justice Seagroatt on defence application for a permanent stay.
	13 Dec 2002	Justice Seagroatt grants a permanent stay of proceedings.
	15 Aug 2003	McMahon is prosecuted for perjury and acquitted by the District Court.
	22 Aug 2003	Court of Final Appeal sets aside the stay and orders case to be tried.
Fourth Period	13 Oct 2003	Justice Pang fixes 11 Oct 2004 as the date for the new trial (4th trial).
	9 & 11 Dec 2003	Ronald Tse pleads guilty before Justice Burrell to one count of publishing a false statement or account and is given a two year suspended sentence and disqualification from being a director for five years. The charges of conspiracy to defraud is not pursued.
	May 2004	Hearing before Justice Tang on defence application for permanent stay on the ground that Lee Ming Tee's right to be tried without undue delay under Art. 11(2)(c) of the Hong Kong Bill of Rights has been violated.
	8 Jun 2004	Justice Tang dismisses stay application.
	5 Nov 2004	Lee Ming Tee pleads guilty to two counts of publishing a false statement or account and is sentenced by Justice Burrell to one year imprisonment and disqualification from being a director for four years. Lee Ming Tee also agrees to pay HK\$15 million in costs. The conspiracy to defraud charges are not pursued.

from the officers and agents of the inspected companies.<sup>7</sup> A person could not refuse to answer the inspector's questions on grounds of self-incrimination, but the legislation prohibited the use of the answer in criminal proceedings against the person if such immunity was claimed before answering.<sup>8</sup>

One of the first legal proceedings to take place in this period was initiated by Ronald Tse on the basis that his compliance with the inspector's powers of compulsion would violate his rights and freedoms under the Hong Kong Bill of Rights (BOR).<sup>9</sup> In rejecting the main argument based on the right against

<sup>7</sup> See Companies Ordinance (Cap 32), s 145.

<sup>8</sup> *Ibid.*, s 145(3A) and (3AA).

<sup>9</sup> See *Regina v Allen, ex p Ronald Tse Chu-fai* (1992) 2 HKPLR 266 (HC), *affd* 6 days later on appeal, see (1992) 2 HKPLR 282 (CA). The BOR is found in Part II of the Hong Kong Bill of Rights Ordinance (Cap 383), s 8.

self-incrimination, the High Court held that the right in Article 11(2)(g) of the BOR was inapplicable to Tse as he had not yet been charged.<sup>10</sup> On 26 November 1992, only six days after the High Court's decision, the Court of Appeal refused to allow Tse to appeal on the basis of different BOR rights, which were not argued in the High Court.<sup>11</sup> The appeal was subsequently withdrawn.

Shortly before appointing the Inspector, the Financial Secretary established a Steering Group whose function included monitoring the Inspector's progress and assisting him in administrative matters. The composition of the Steering Group was supposed to consist of the Deputy Secretary for Monetary Affairs, and a representative from both the SFC and the Attorney General's Chambers. It was much later revealed that members of the police commercial crime unit had attended the meetings of the Steering Group.<sup>12</sup> The representative from the SFC on the Steering Group was a person by the name of Gerard McMahon. One of the issues discussed by the Steering Group was whether and when the Inspector's report would be made public. Ultimately, it was agreed that an abridged version of the report would be released to the public shortly after it was completed. The abridged version was released at a press conference held on 18 September 1993.

The decisions to establish the Steering Group and to make public an Inspector's report pending criminal charges were unprecedented.<sup>13</sup> In the 10 years prior to 1992, the Financial Secretary had appointed inspectors in eight cases and in none of them were either of these decisions taken.<sup>14</sup> The existence and purposes of the Steering Group were not well known. It was not until April 1993, eight months after the establishment of the Group, that the new directors of AGL "realised the significance of the Steering Group" while being interviewed by the Inspector.<sup>15</sup> It was this realisation that led to the second judicial review application, this time brought by Lee Ming Tee, challenging both the appointment of the Inspector and the establishment of the Steering Group on grounds of perceived bias and lack of independence on the part of the Inspector.<sup>16</sup> Justice Kaplan of the High Court ultimately refused leave to hear the application. The Court of Appeal upheld this decision

<sup>10</sup> *Ibid.*, pp 276–77 (HC). BOR Art 11(2)(g) provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality- . . . (g) not to be compelled to testify against himself or to confess guilt."

<sup>11</sup> Note 9 above (CA). The speed with which these proceedings were dealt has been the subject of commentary: see Andrew Byrnes and Johannes M. M. Chan (eds), *Bill of Rights Bulletin, Vol 2, No 1* (Hong Kong: University of Hong Kong, 1992) 29.

<sup>12</sup> The failure by the Inspector's solicitors to reveal this fact was the subject of criticism by the Court of Final Appeal: see below n 13, pp 181–182 (CFA).

<sup>13</sup> See facts reported in *Regina v Attorney General and Another, ex p Allied Group Ltd and Others* (1993) 3 HKPLR 386, 390 (HC); *HKSAR v Lee Ming Tee and Another* (2001) 4 HKCFAR 133, 192 (CFA).

<sup>14</sup> See Secretary for Monetary Affairs, *Official Proceedings of the Hong Kong Legislative Council* (Hong Kong: HKSAR Legislative Council, 21 Oct 1992) 200–202.

<sup>15</sup> See Justice Kaplan's decision above n 13, pp 391–392 (HC).

<sup>16</sup> *Ibid.*, *affd* (1993) 3 HKPLR 404 (CA).

with Penlington JA noting that there was “nothing in the affidavits filed on behalf of the applicants suggesting that Mr Nicholas Allen has in fact been in any way biased or unduly influenced in the carrying out of his duties by anything suggested to him by a member of the steering committee”.<sup>17</sup>

In the High Court, Gerald McMahon filed an affidavit dated 2 June 1993, in which he stated the following:

“I can assure the applicants that the Inspector has not sought my opinion in relation to the conclusions he is reaching in respect of the inspection and nor have I offered any opinions in relation thereof . . . I have not sought to nor have I in any way improperly influenced the Inspector or prevented him from adopting an independent approach to his investigation.”<sup>18</sup>

Unforeseen by the parties at the time, it was this “McMahon affidavit” that would in years to come bring much grief to McMahon himself and lead to the demise of the first trial.

#### *The First Stay of Proceedings (1998 to 2001)*

Around the time the Inspector’s report was released to the public, the Commercial Crime Bureau of the Hong Kong Police began their own investigations aided by the information gathered and provided by the Inspector. These investigations continued for three and a half years before steps were taken to arrest and charge the defendants in 1998. The defendants were each charged with two counts of conspiracy to defraud and four counts of publishing a false statement or account in relation to events between 1990 and 1992. The substance of the charges is neatly summarised in Justice Ribeiro’s judgment in the first case before the Court of Final Appeal:

“The charges related to four separate transactions which were announced to have taken place during 1990 and 1991 involving the issue and placement of a substantial number of shares in Allied Group Ltd (AGL), Allied Tung Wing Ltd (ATWL) and Allied Properties (HK) Ltd (APL). These were companies listed on the Stock Exchange and formed part of a larger group (the Allied Group) of which AGL was the holding company.

The first respondent held a controlling interest in AGL and was at the material times, chairman and a director of AGL and APL, and a director of ATWL. The second respondent was a director of AGL and acted as financial controller of AGL and other companies in the Allied Group.

The gist of the prosecution’s case was that the public had been misled, with the respondents’ connivance, into believing that the four

<sup>17</sup> *Ibid.*, p 409 (CA).

<sup>18</sup> Recorded in *HKSAR v Lee Ming Tee*, above n 13, p 180 (CFA).



transactions had genuinely resulted in the raising of corporate funds by the issue of shares to independent investors. It was alleged that only a small fraction of the proceeds of the share issues had actually been received by the issuing companies, the reality being that other companies in the Allied Group had been enabled, under the disguise of certain sham banking arrangements, to acquire the shares without payment.”<sup>19</sup>

By the time the first trial was to begin before Justice Pang in April 2000, the defence had made some important discoveries in the bundle of “unused materials” disclosed by the prosecution. In particular, important items of correspondence between the Inspector and members of the Steering Group made during the inspection and report drafting period came to light. The most significant item found was a copy of a draft chapter of the report with numerous annotations handwritten by McMahon and evidently given to the Inspector in February 1993.<sup>20</sup> Many of these comments were more than comments on the format of the report, but were directed to its very substance. In his judgment on the stay application, Justice Pang was highly critical of the misleading evidence from McMahon and the Inspector in the earlier judicial review leave proceedings before Kaplan J. He found that their conduct “demonstrate[d] the extent to which the Inspector and some members of the Steering Group would go to in maintaining the appearance that they were independent of each other.”<sup>21</sup> On this point, the Court of Final Appeal found that Justice Pang’s criticism was “entirely justified”.<sup>22</sup> The Court described McMahon’s affidavit as “inaccurate and highly misleading” and that it had fallen short of the “candour and honesty” of which the Court was entitled to expect.<sup>23</sup>

In the years following, these comments by the Court were a catalyst to a criminal prosecution against McMahon for perverting the course of justice<sup>24</sup> and a civil suit against the Secretary for Justice and Nicholas Allen for having obtained a judgment on false evidence.<sup>25</sup> But notwithstanding these very critical comments, the Court of Final Appeal found that this misconduct did not preclude a fair trial and fell “very far short of ‘an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed’.”<sup>26</sup>

<sup>19</sup> *Ibid.*, pp 141–142 (CFA).

<sup>20</sup> See *HKSAR v Lee Ming Tee* [2000] HKEC 854 (CFI).

<sup>21</sup> *Ibid.*

<sup>22</sup> Note 13 above, p 181 (CFA).

<sup>23</sup> *Ibid.*

<sup>24</sup> McMahon was tried and acquitted on 15 Aug 2003. See Sara Bradford, “Judge throws out case against former SFC chief”, *South China Morning Post*, 15 Aug 2003.

<sup>25</sup> See *Allied Group Ltd and Another v Secretary for Justice and Another* [2003] HKEC 1221 (CA), leave to the CFA refused [2004] HKEC 413 (CA).

<sup>26</sup> *Ibid.*, 185 (CFA), citing from *Regina v Latif* [1996] 1 WLR 104, 112 (HL).

The decision to stay the proceeding, however, did not only turn on the official misconduct in the judicial review proceedings. Justice Pang also based it on two other reasons: (a) the impropriety of the Inspector in releasing the information obtained with compulsory powers to the police both before and after he had finalised his report; and (b) the pre-trial publicity of the report having undermined the defendants' right to a fair trial.<sup>27</sup> Justice Pang thought that releasing the information to the police was improper because it went beyond the authority of the Inspector as provided for in the statute and because the defendants had a common law immunity not to have information derived from answers given under compulsion used against them in a criminal proceeding (ie a so-called "derivative use immunity").<sup>28</sup> The Court of Final Appeal rejected these grounds for the stay. It found that the sharing of information with the police was well within the scope of the legislative scheme and that the alleged "derivative use immunity" could find no legal basis either under the common law or BOR.<sup>29</sup> Finally, although it found that the pre-trial publicity of the abridged report was prejudicial and should never have been published before the trial's completion, the Court concluded that the defendants could still receive a fair trial, noting particularly the seven-year time span between the trial and the publication of the report and also "the efficacy of the Judge's directions to counteract prejudice."<sup>30</sup>

After rejecting all the arguments for ordering the stay, the Court, on 22 March 2001, unanimously remitted the case to trial before a different judge. In its decision to order costs against the defendants in May 2001, the Court noted that "[b]y seeking a permanent stay, the [defendants] took the proceedings on a long and costly detour. The trial has now been placed back on track by the result of the appeal."<sup>31</sup> It was not long before the case swerved off track again.

#### *The Second Stay of Proceedings (2001 to 2003)*

The second trial began on 5 November 2001 before Justice Seagroatt and a jury.<sup>32</sup> The court heard over three and a half months of prosecution evidence. On Day 53 of the trial, 5 February 2002, the court heard testimony from an expert witness for the prosecution by the name of Meocre Li. Li testified in the capacity of a forensic accountant who between 1993 and 1997 was retained by the Attorney General's Chambers to examine the share transactions of AGL and related companies. Li's evidence covered three days, with

<sup>27</sup> Note 20 above.

<sup>28</sup> *Ibid.*

<sup>29</sup> Note 13 above, pp 152–179 (CFA).

<sup>30</sup> *Ibid.*, 194 (CFA).

<sup>31</sup> *HKSAR v Lee Ming Tee* [2001] HKEC 488 (CFA).

<sup>32</sup> Most of the factual details in this section can be found in the Court of Final Appeal's judgment, *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 (CFA), and in Justice Seagroatt's judgment, *HKSAR v Lee Ming Tee*, n 5 above (CFI).

the cross-examination and re-examination lasting only 85 minutes. At the time, no issue had been taken with the expert's qualifications.

Neither defendant gave evidence, but it was clear that the substance of their defence was to point to the lack of direct evidence proving their guilty knowledge in respect of the illicit share trading which they attributed to another director of the Group who had since fled the jurisdiction.<sup>33</sup>

The trial came to a halt on Day 76, ironically on the one-year anniversary date of the Court of Final Appeal's decision. Justice Seagroatt was about to finish his summing up when Lee Ming Tee's counsel advised the court that they had only recently, the previous day, learned of salient news surrounding the expert witness, Meocre Li. The news revealed that Li was a non-executive director of a company, known in the short form as "Guangdong Kelon", whose board of directors had resigned in December 2001 after suspicions that the company had engaged in the same type of misconduct alleged against AGL (ie engaging in undisclosed connected transactions within the company). The circumstances that followed, leading up to the discharge of the jury, are interesting and reflect exemplary advocacy on the part of the defence team.

Immediately following the revelation about Li, the defence team informed the judge that it would be applying to have Meocre Li recalled as a witness and to call further evidence in respect of Guangdong Kelon. The submission was made that the expert witness had failed in his duty to the court to act with utmost good faith. In reply, the trial judge agreed and stated "[i]t was the first thing that came to the very forefront of [his] mind".<sup>34</sup> The events that followed are clearly described in the following passages from the Court of Final Appeal's judgment:

"34. Shortly afterwards, the Judge stated his views to counsel upon the significance of what had come to light. He said

' . . . Everybody knows . . . that an expert is expected, by virtue of the status that he either attains or seeks to attain, to disclose anything at the earliest possible opportunity which may affect two things; one, his status as an expert and, two, the basis of his evidence . . . one is concerned that experts should demonstrate and adhere to the principles behind the privileged status from which they give their evidence in vital matters.'

He invited counsel to consider (a) what would have been the position of the prosecution had this matter been disclosed (to his mind there was no

<sup>33</sup> *Ibid.*, para 28 (CFA).

<sup>34</sup> Recorded in *ibid.*, para 33 (CFA).

difficulty in answering that question); (b) the fact that in his summing-up he had referred to 'expert evidence which has gone unchallenged'; (c) that evidence which had been withheld from the jury which was material to the status of the expert and the level of his expertise and perhaps to his probity would call for most careful consideration; and (d) whether the jury was to be expected to deal with a 'patchwork quilt'.

35. That afternoon, counsel for the respondent said that he had listened with great care to the Judge's comments made that morning and now submitted that the trial was fatally flawed. The practical problems of recalling Meocre Li were, he said, insuperable. He applied for the discharge of the jury. He referred to 'devastating criticisms of the company and the Board collectively'. He handed up copies of documents that had been obtained from the SEHK pursuant to the Court's order.

36. Later, he submitted that another relevant matter for cross-examination was that Meocre Li, as a director

'appears to have been unaware as a director that these connected transactions were occurring over this period of time to very large amounts and that funds, according to the CSRC investigation, had been usurped . . . a fundamental plank of our case. Simply because you are a director does not mean that you are all knowing and all seeing, and yet Meocre Li, the expert, as a director failed to appreciate apparently what was going on in Guangdong Kelon . . . that is a highly material issue'.

37. The Judge later said to prosecuting counsel

' . . . it is an unarguable proposition that an expert, if he is aware of anything which could remotely affect or lead anyone to challenge either his expertise or his reputation, it is incumbent upon him to disclose that and the document itself'.

38. Prosecuting counsel sought to point out that on the information before the Court, Meocre Li had only been a non-executive director of Guangdong Kelon, and that there was reason to think that it was the company itself that had discovered and reported the irregularities to the authorities. Moreover, Meocre Li had not yet been heard on the complaint of wrongful non-disclosure.

39. Prosecuting counsel informed the Judge that Meocre Li was within the court precincts and available to be recalled. He suggested that the Judge hold a *voir dire* to give Meocre Li an opportunity to meet the serious

suggestions that had been levelled at his conduct; alternatively that he be recalled for further cross-examination. Counsel for the respondent and Ronald Tse opposed this course and the Judge refused to follow it. No concession was made by the prosecution as to the materiality of the Guangdong Kelon matter, although counsel said that he would have disclosed it, if he had known of it. The Judge reserved his decision until the next morning.

40. On 22 March 2002 the Judge, in the absence of the jury, gave a reasoned ruling in favour of the defence application that the jury be discharged. He held that Meocre Li had breached his duty of disclosure to the Court by not mentioning that he was a director of Guangdong Kelon who had 'resigned no doubt as a result of the matters which had come to light'. It was too late, he said, to investigate or to recall him, or to modify the summing-up. Though it was not the fault of any of the parties, the recent developments could not, he said, be accommodated in this trial. He then told the jury what had happened and formally discharged them."<sup>35</sup>

This narrative of events revealed a trial judge who did not hide his thoughts and a defence team that perceptively read the signals from the bench to serve their client's interests.

The less impassioned Court of Final Appeal, however, thought that the trial judge's decision not to hear from Meocre Li, thereby denying him an opportunity to explain the circumstances, was a mistake.<sup>36</sup> Had the judge heard from Li, he may have realised, what was accepted to be true later on, that no misconduct from the Guangdong Kelon affair could be imputed to Li. This left only the argument that Li might have provided helpful evidence for the defence particularly on the issue of knowledge since Li himself stood in circumstances similar to those of the two defendants. Even if this was true, the Court found that it could neither be a basis for impeaching the status of Li as an expert witness nor ground a disclosure obligation for either the witness or prosecution.<sup>37</sup>

After the jury was discharged, it was contemplated by the court and all parties then that a new trial would commence before Justice Seagroatt after the defence had sufficient time to explore the circumstances surrounding Meocre Li and the Guangdong Kelon affair. This plan was not to materialise when further revelations about Li's past emerged. In 1998, Li had become the chief executive of a newly formed joint venture known as ICEA. A year later, ICEA was involved in a substantial placement of shares for a company known

<sup>35</sup> *Ibid.*, paras 34–40 (CFA).

<sup>36</sup> *Ibid.*, para 180 (CFA).

<sup>37</sup> *Ibid.* (CFA).

as Kin Don Holdings Limited. This placement became the subject of investigation by the SFC after a sharp fall in the share price when the illicit placement (ie the issuance of HK\$78.5 million worth of shares at discount from the market price) became known.<sup>38</sup> The SFC investigated the matter for two years. Although at one point it had considered giving Li a public reprimand, the SFC closed the file against him in June 2001, five months before the start of the second Lee Ming Tee trial. The stated reason for closing the file was insufficient evidence to prove that he was a party to the illicit placement.

As with the Guangdong Kelon affair, neither the expert witness nor the prosecution had disclosed the circumstances of the Kin Don placement to the defence. As it turns out, the prosecution had not been aware of the SFC investigation into Li, since the SFC had never advised them of it. It was not until 7 May 2002 that the matter came to light when defence counsel informed the trial judge that they had “heard of” this SFC investigation and wanted the prosecution to provide more information.<sup>39</sup> By the end of May, the prosecution had decided to drop Li as a witness in the new trial. After a full hearing into the circumstances of the Kin Don placement and the SFC’s handling of the matter, the defence made its second application for a permanent stay in November 2002. The application was granted on 13 December 2002.

In Justice Seagroatt’s judgment to stay the proceedings, he found that the investigation into the Kin Don placement was a matter that ought to have been disclosed by both the expert witness and the SFC.<sup>40</sup> These were matters relevant to the “status and integrity” of the witness and “could render his expertise or reputation subject to cross-examination”.<sup>41</sup> Seagroatt J also found the SFC’s abrupt closing of the case problematic. In holding that the continuation of the prosecution against the defendants would constitute an abuse of process, he found that the SFC by terminating their inquiry into Meocre Li had “consciously” though “not deliberately” removed an “impediment to his existing professional commitment” thereby producing a “trial which was as flawed as the expert who failed to reveal matters concerning his commercial integrity.”<sup>42</sup>

The Court of Final Appeal, in a unanimous judgment written by Sir Anthony Mason NPJ, took a different view of the matter. The Court found that the judge exercised his discretion to stay on erroneous findings of fact. While the evidence raised a suspicion against the SFC, the allegation of ulterior intention or purpose had not been made out to the requisite standard

<sup>38</sup> What made the placement illicit was that ICEA had used a non-registered agent to carry out the transaction. This agent had disseminated false information to prospective sub-placing agents. On 19 July 2001, the SFC publicly reprimanded this agent who agreed to surrender her registration for 8 months: *ibid.*, para 106 (CFA).

<sup>39</sup> *Ibid.*, para 44 (CFA).

<sup>40</sup> Note 5 above, paras 102–127 (CFI).

<sup>41</sup> *Ibid.*, para 123 (CFI).

<sup>42</sup> *Ibid.*, para 147 (CFI).

of proof.<sup>43</sup> On the issue of non-disclosure, the Court agreed with Seagroatt J that the SFC should have disclosed the Kin Don investigation to the prosecution because this was information that was “potentially damaging to Meocre Li’s integrity and standing as an expert witness”.<sup>44</sup> But, absent an adverse finding of misconduct against the SFC, there was no longer a basis for the permanent stay of proceedings. According to the Court, “public confidence in the administration of the justice would be shaken if the respondent were not brought to a second trial simply because the SFC and Meocre Li failed to inform the prosecution of the inquiry, thereby putting the prosecution in breach of its duty of disclosure to the defence.”<sup>45</sup> Thus, on 22 August 2003, the Court of Final Appeal sent the case back to trial for the second time.<sup>46</sup> The Court subsequently had little difficulty in ordering costs against Lee Ming Tee in favour of both the prosecution and the intervener, the SFC.<sup>47</sup>

#### *The Plea Resolutions (2003 to 2005)*

In October 2003, the matter came before the first trial judge, Justice Pang, to set the new trial date. Given the estimated trial time of 80 days, the judge fixed 11 October 2004 as the trial date without objection from the defence, who obviously welcomed such a long delay. Unfortunately for the defence, the lack of objection on this occasion spoiled a subsequent motion to have the prosecution stayed on grounds of undue delay.

A major turn of events occurred on 9 December 2003, when Ronald Tse, pursuant to a plea bargain with the prosecution, plead guilty to one count of publishing a false statement or account.<sup>48</sup> All the other charges were not pursued. In sentencing Tse to 16 months’ imprisonment suspended for two years, Justice Burrell took note of exceptional mitigating circumstances including the one year of imprisonment Tse spent while awaiting extradition from Australia, the extraordinary legal history of the case including the two occasions when Tse had grounds to believe the case was over, and Tse’s poor state of health.<sup>49</sup> Justice Burrell also disqualified Tse from being a company director for five years.<sup>50</sup>

<sup>43</sup> Note 32 above, paras 136–137 (CFA).

<sup>44</sup> *Ibid.*, para 179 (CFA).

<sup>45</sup> *Ibid.*, para 188 (CFA).

<sup>46</sup> There was no need to specify that the case be heard by a different judge because coincidentally the date of the Court of Final Appeal’s decision was Seagroatt J’s last day on the Hong Kong bench. See Sara Bradford, “Is justice being served, defence lawyer asks”, *South China Morning Post*, 23 Aug 2003.

<sup>47</sup> *HKSAR v Lee Ming Tee & Securities and Futures Commission (Intervener)* [2003] HKEC 1399 (CFA).

<sup>48</sup> See Ravina Shamdasani, “Allied Group finance chief enters guilty plea”, *South China Morning Post*, 9 Dec 2003, C4.

<sup>49</sup> It was reported that Tse “had had five eye operations and was also suffering from occasional depression, angina and osteoporosis”: see Sara Bradford, “Ex-Allied finance chief is spared jail time”, *South China Morning Post*, 12 Dec 2003, C3.

<sup>50</sup> This discretionary disqualification order was made pursuant to s 168E of the Companies Ordinance (Cap 32) which provides for a maximum disqualification period of 15 years.

The prosecution of Lee Ming Tee continued, and in late May 2004, he lodged what would be his final attempt to derail the prosecution. Before Justice Tang, Lee Ming Tee argued that his right to be tried without undue delay under Article 11(2)(c) of the BOR had been violated. While Justice Tang found that the overall elapsed period from the date of charge (ie 25 August 1998) gave grounds for real concern, he ultimately concluded that the defendant's right under Article 11(2)(c) was not violated, and even if it was, he found that a stay of proceedings would be an inappropriate remedy in the circumstances of this case.<sup>51</sup> The defence had argued that the eight month period from the first stay until the Court of Final Appeal's decision, the eight month period from the second stay until the Court of Final Appeal's decision, and the 14 month period from the second Court of Final Appeal decision until the new trial were all periods of undue delay. However, Justice Tang, looking at each period separately rather than globally, found that none of the periods were unreasonable having regard to the "[c]omplicated issues of fact and law [that] were involved" and the general lack of complaint from the defence to any of those periods of delay at the time.<sup>52</sup> In rejecting the defence argument that it was futile to object to the final 14 months of delay since it was the only available court time for the trial, Justice Tang observed that the defendant had "the best possible legal team and he was never slow to stand on his legal right."<sup>53</sup> On two occasions, the Court noted that "there [was] no indication in this case that the defendant was ever desirous of an early trial."<sup>54</sup> While Justice Tang's dismissal was a clear affirmation that the defence could not have their cake and eat it too, it did not preclude the defence from benefiting indirectly from the delay in the form of a plea bargain.

On 5 November 2004, the plea bargain was made public. Before Justice Burrell, Lee Ming Tee pleaded guilty to two counts of the lesser offence of publishing a false statement or account. The remaining charges, including the two counts of conspiring to defraud, were not pursued. While counsel for Lee Ming Tee sought a suspended sentence, Justice Burrell felt it was necessary to impose a one-year custodial sentence and a disqualification order from being a director for four years. The judge took note of Lee's heavy responsibility as chairman and the very serious nature of such offences occurring in a

<sup>51</sup> See *HKSAR v Lee Ming Tee* [2004] HKEC 682 (CFI). On the remedial issue, Justice Tang applied the majority's position in *Attorney General's Reference (No 2 of 2001)* [2004] 2 WLR 1 (HL), which held that where there has been a breach of the defendant's right to a trial without undue delay under the Human Rights Act 1998 (UK), a stay of proceedings would not be appropriate unless "(a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant" (*per* Lord Bingham, paras 24–25).

<sup>52</sup> *Ibid.*, paras 43, 45–48.

<sup>53</sup> *Ibid.*, para 48.

<sup>54</sup> *Ibid.*, paras 52, 88.



financial centre such as Hong Kong.<sup>55</sup> In mitigation, Justice Burrell noted Lee's guilty plea, previous good character and his willingness to pay HK\$15 million in costs.<sup>56</sup> In a public statement, the Director of Public Prosecutions stated that the offences and facts admitted by Lee Ming Tee "adequately reflected the criminality which was alleged" and "there was no longer any public interest to be served" in pursuing the other charges.<sup>57</sup> He noted the difficulties that had confronted and were overcome by the prosecution, and it was believed that justice had "finally been achieved."<sup>58</sup>

### The Use of Effective Defence Strategies

In his book, *Defending White-Collar Crime*, Kenneth Mann documented a number of defence strategies unique to white-collar crime cases.<sup>59</sup> From his interviews with American attorneys specializing in the area, he observed that white-collar crime defence work normally began some time before charges were laid.<sup>60</sup> Indeed, "issuance of a criminal charge is already a significant failure for the defence attorney" in these types of cases.<sup>61</sup> With sophisticated clients often having significant financial resources, the white-collar crime defence lawyer can afford to apply a different approach to criminal defence than those handling the more typical street crime cases. Mann described some of the differences between these two groups of defence attorneys:

"unlike the street-crime defense attorney . . . the white-collar defense attorney does not assume that the government has the evidence to convict his client. Instead, he starts with the assumption that, though his client is guilty, he may be able to keep the government from knowing this or from concluding that it has a strong enough case to prove it. Though in the end he may have to advise his client to plead guilty and bargain, he often starts his case with the expectation of avoiding compromise.

The white-collar crime defense attorney is zealous in his advocacy of his client's interest, often rejecting government overtures to negotiate and compromise. In contrast to the attorney handling street crime, his time is not a scarce resource, and each case is individually cultivated with great care. In white-collar cases, the defense attorney is usually called in by the

<sup>55</sup> See Magdalen Chow, "Lee Ming Tee saga ends with a year's jail for tycoon", *South China Morning Post*, 6 Nov 2004, A1.

<sup>56</sup> *Ibid.*

<sup>57</sup> Hong Kong Department of Justice Press Release, "Statement by the Director of Public Prosecutions", 5 Nov 2004, which can be found at <http://www.doj.govhk>.

<sup>58</sup> *Ibid.*

<sup>59</sup> Note 4 above.

<sup>60</sup> *Ibid.*, p 4.

<sup>61</sup> *Ibid.*, p 9.

client to conduct a defense before the government investigation is completed and in some cases even before it begins. The defense attorney employs his own investigators, who are experts in accounting and finance, as well as a staff of legal researchers . . . This attorney, in distinct contrast to the attorney handling street crime, has a number of opportunities to argue the innocence of his client before the government makes a decision to issue an indictment.”<sup>62</sup>

This description of the white-collar crime defence attorney appears to fit the defence team in the Lee Ming Tee case quite well. The many tactical steps taken in the first period of the case demonstrated an attempt to “conduct a defense before the government investigation [was] completed”.<sup>63</sup> Mann observed that the seasoned white-collar crime defence attorney will apply not only substantive defence strategies (ie those that go to the substance of the charge) but also a full range of strategies aimed at controlling access to information and obtaining access to information. Again, as illustrated below, the defence team in the Lee Ming Tee case made full use of these types of strategies. One additional strategy that was very effective for the team was the tendency to exaggerate procedural faults and misconduct as a means to deflect attention from the actual substantive charges.

#### *Controlling the release of information*

Mann described the defence of information control and the role of defence attorneys in these terms:

“Information control entails keeping documents away from and preventing clients and witnesses from talking to government investigators, prosecutors, and judges . . . It occurs before the substantive defense and is in some ways a more important defense. If successful, it keeps the raw material of legal argument out of the hands of the government, it obviates argument about the substantive legal implications of facts about crime, and it keeps the government ignorant of evidence it needs in deciding whether to make a formal charge against a person suspected of committing a crime. And, even if a formal charge is made, it keeps facts about a crime out of the arena of plea negotiations and out of the courtroom if a trial takes place. For these reasons, information control lies at the very heart of the defense function, preventing the imposition of a criminal sanction on an accused person who has committed a crime, as well as on the rare one who has not.

<sup>62</sup> *Ibid.*, p 5.

<sup>63</sup> *Ibid.*

...

For the defence attorney, winning almost always entails helping the client to conceal facts. To the seasoned practitioner and the student of law, it is elementary that a defense attorney would not disclose information about a client to persons seeking to determine whether an offense has been committed. Two of the most basic tenets of the Anglo-American legal system are the confidentiality between client and attorney and the principle prohibiting government-forced self-incrimination. Though some lay readers may think that the self-incrimination privilege and the attorney-client privilege are strange – after all, why shouldn't the perpetrator of crime have to explain to the police what he did? – practicing attorneys rarely if ever question their propriety. They assume that concealment and cover-up are fundamental parts of the attorney's role in the adversary system. They are integral to the mandates to act zealously and to resolve doubt in favour of one's client."<sup>64</sup>

From the very beginning, the defence lawyers in the Lee Ming Tee case zealously adopted strategies to prevent the release of any potentially incriminating information. Had the clients had the opportunity to remain silent during the first period, there is little doubt that it would have been taken. Indeed, in the almost completed trial before Seagroatt J, the two defendants had chosen not to testify. However, the legislative scheme under the Companies Ordinance removed that choice in the pre-charge period and compelled them to cooperate with the Inspector. This did not stop their lawyers from asserting what Mann described as "adversarial information control" in the form of the two judicial review applications.<sup>65</sup> These two applications in their essence were meant to derail the information gathering processes of the Inspector. Even though criminal charges were far from contemplation at the time, the defence lawyers knew that negative findings by the Inspector would trigger a chain reaction towards a full-scale criminal investigation and prosecution. This administrative inspection was rather significant since ordinary police powers were incapable of gathering the kind of detailed company and financial information obtained by the Inspector.

In large part, the proceedings in the second period were concerned with controlling information. The defence had argued, and Justice Pang accepted, that the passing of information from the Inspector to the police was an abuse of process. Justice Pang also found that the police were not allowed to make derivative use of compelled answers obtained by the Inspector. Notice that these two points were aimed not at the admissibility of evidence at trial but

<sup>64</sup> *Ibid.*, pp 7, 155.

<sup>65</sup> *Ibid.*, p 7.

went to the prior question of what information the police could rely upon in carrying out its investigation.

There is also evidence that the defence team made attempts, though not always successful, to control information outside of judicial proceedings, a defence which Mann called “managerial information control”.<sup>66</sup> One example was seen when Ronald Tse, before agreeing to be interviewed with the Inspector, tried to seek an assurance from the Inspector that the answers given would not be used by other authorities in the form of derivative evidence. When the assurance was not given, Tse complied only after contempt proceedings were threatened.<sup>67</sup>

Overall the defence strategies used in controlling the release of information realised a number of tactical advantages. As was mentioned in the second Court of Final Appeal judgment, the case against the defendants remained at all times largely a circumstantial one insofar as the issue of *mens rea* was concerned. Except for one witness whose credibility was in question, the defence succeeded in keeping out any direct evidence of the defendants’ knowledge of the illegal transactions.

Furthermore, there was the obvious advantage of delaying the trial by bringing the numerous, albeit ultimately unsuccessful, court challenges to the release of information. It should not be assumed that delay is always prejudicial to the defendant. On the contrary, as Justice Cory of the Supreme Court of Canada has observed in the context of the right to a speedy trial, delay can be seen in quite a different light by the defendant:

“the last thing that some wish for is a speedy trial. There is no doubt that many accused earnestly hope that the memory of a witness will fail and that other witnesses will become unavailable. This factor was noted by the Honourable T. G. Zuber in his *Report of the Ontario Courts Inquiry* (1987), at p 73:

‘It is, however, the observation of this Inquiry that those accused of crime and their counsel are often disinterested in trial within a reasonable time. Delay is perceived not as a factor which will impair the ability of the accused to present a defence but rather a factor which will erode the case for the prosecution.’

Doherty J wrote to the same effect in a paper delivered to the National Criminal Law Program in July 1989. He wrote:

<sup>66</sup> *Ibid.*, p 8. However, without an insider’s view of the case, it is difficult to determine the full extent to which strategy of managerial information control was used.

<sup>67</sup> Nicholas Allen, *Allied Group Limited Allied Properties (HK) Limited Crusader Holdings Limited Paragon Holdings Limited Wai Yick Limited Investigation under s 143(1)(c) of the Companies Ordinance, Chapter 32 of the Laws of Hong Kong, Vol 1* (Hong Kong, 1993) 8.

'Many accused do not want to be tried at all, and many embrace any opportunity to delay judgment day. This reluctance to go to trial is no doubt a very human reaction to judgment days of any sort; as well as a reflection of the fact that in many cases delay inures to the benefit of the accused. An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.'

...

As these comments from distinguished jurists indicate, the s 11(b) right [trial within a reasonable time] is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused."<sup>68</sup>

These were the same sentiments expressed by Justice Tang in dismissing Lee Ming Tee's undue delay BOR challenge. But in the final result, both Lee Ming Tee and Ronald Tse benefited in their plea negotiations and sentence as a result of the delay and the extraordinary history of the case, much of it involving tactics to prevent the release of potentially incriminating evidence. Had the prosecution obtained more "self-incriminatory" evidence from the defendants, the defence would certainly have had less bargaining power than it did in negotiating the plea bargains.

#### *Accessing information*

According to Mann, the purpose of accessing information in the pre-charge period is to "evaluate the extent to which inculpatory information is accessible to the government and usable to frame an indictment".<sup>69</sup> Mann pointed out that the defences of information control and information access should not be seen in isolation but can operate in tandem:

"One goal is gathering information in order to determine what overall and what specific strategies should be used. The other is influencing the disposition of information, because the basic defence strategy has already been set: deny all or some of the guilt attributable to one's client. In handling the real case, there is some chronological ordering in these tasks. Information gathering often takes place before a full-fledged information control campaign. But there is also a great interweaving of the tasks, which is particularly important in the defense attorney's handling of third

<sup>68</sup> *Regina v Askov* [1990] 2 SCR 1199, 1221–1222.

<sup>69</sup> Note 4 above, p 38.

parties. Often an attorney will be able to obtain only one meeting, if any, with a potential witness. Thus, while he is learning what the third party knows he is simultaneously exercising whatever influence he has to persuade the witness to act favorable to his client. In this sense, information access and information control are meshed in time and execution.”<sup>70</sup>

In the Lee Ming Tee case, the meshing of information access and information control was evident in the first period. In any pre-charge period, information access has an important significance because the usual disclosure obligations by the prosecution have yet to be engaged. Persons under suspicion will often be operating in a vacuum about how much evidence the investigators have on them. Yet this did not deter the Lee Ming Tee defence team from accessing important information during this stage. A good example was seen when persons aligned with the defendants (ie the new appointed directors) were interviewed by McMahan. They had used the opportunity to find out more information about the investigation itself, particularly the role of the Steering Group. This information then led to the bringing of the second judicial review application, which itself had the effect of gathering more information favourable to the defence (although the advantage was not fully appreciated at the time). It was in this proceeding that the government provided the ill-fated ‘McMahan affidavit’ that several years later would jeopardize the first trial. One can see that the many pro-active steps taken by the defence team in the first period, although done for the purpose of controlling information, had the effect of accessing (or even creating) important information with potential value in the subsequent criminal proceeding.

The failures to try the defendants on the second and third attempts were also largely related to effective information access strategies. On both attempts, the collapse was triggered by a revelation from the defence team about the expert witness, Meocre Li. These revelations had been disclosed by neither the prosecution nor the SFC. In both cases, the prosecution apparently had not known of the information. This meant that the revelation must have come from information diligently obtained by the defence team from third parties or other sources, possibly governmental sources.<sup>71</sup>

In the Court of Final Appeal, the issue of information access as a substantive right was at the forefront of the second appeal. As expected, counsel for Lee Ming Tee argued for a very broad conception of the right, that “the State is bound to disclose all relevant material in the possession or control of its

<sup>70</sup> *Ibid.*, pp 157–158.

<sup>71</sup> Mann noted that “government agencies collect a wide range of facts about the behavior and status of individuals and business entities. This information may be important to the defense attorney for evaluating the client’s conduct and building a substantive defense”: *ibid.*, p 93.

organs and agencies.”<sup>72</sup> The Secretary for Justice, on the other hand, argued that the duty to disclose only extended to materials in the possession or control of the prosecution (in its narrow sense) and any materials known to the prosecution to be in the possession or control of an investigating agency. While the Court rejected the Secretary for Justice’s position, it was not prepared to go as far as the position proposed by counsel for Lee Ming Tee, though it acknowledged that this may be “the way in which the law may develop”.<sup>73</sup> It held that the duty to disclose extended to materials in the possession or control of other governmental agencies “if there are particular circumstances suggesting that it may have such material”.<sup>74</sup> As will be discussed below, the Court’s recognition of a broad disclosure obligation for the prosecution is important in understanding the potency of defence strategies.

*Deflecting attention by making fair process the issue*

Despite the number of court proceedings that arose in relation to the Lee Ming Tee case, very few judges ever had occasion to consider the merits of the substantive charges. Justice Seagroatt came the closest, having heard all of the evidence in the second trial. In his judgment to stay the proceedings, he made two passing comments on the merits: “I have had the opportunity of considering all the evidence in this case. On the face of it, it discloses major corporate fraud.”<sup>75</sup> The only other occasion for substantive consideration of the charges was in the final guilty pleas made some 14 years after the original offences and six years after charges were laid.

The ability to deflect judicial and public attention away from the substantive charges was one of the enduring strategies of the defence team. By taking every arguable opportunity to reverse roles by putting the State on trial for alleged unfairness and misconduct paid dividends in terms of delay, near dislodging of the prosecution, and the ultimate disposition of the charges. Part of the strategy required skilful advocacy and the quick ability to read the thought processes of the judge in the heat of the trial. This was clearly seen in the second stay application where, had it not been for the (subconscious) nudging by the judge, the defence team would probably not have made as much noise about the revelations of a witness who was of modest significance to the case before the revelations were made.

The Court of Final Appeal, of course, did not think much of these procedural issues. The attitude of this Court was probably captured best by Justice Ribeiro’s statement in the first case, “Corporate fraud is today a matter of major concern which calls for strong regulation”, made in relation to the

<sup>72</sup> Note 32 above, para 166 (CFA).

<sup>73</sup> *Ibid.*, para 168 (CFA).

<sup>74</sup> *Ibid.*

<sup>75</sup> Note 5 above, para 140 (CFI).

compulsory powers of the Inspector.<sup>76</sup> For the normal defendant, the threat of a cost sanction is usually enough to deter potentially unmeritorious challenges that take “proceedings on a long and costly detour”.<sup>77</sup> But this was hardly true for these defendants who seemed to have near unlimited resources. This is not to say that they would not try to recover unjustified cost orders made against them, as this appears to be the purpose of the civil suit brought by the Allied Group against the government for having obtained the Kaplin J judgment on the basis of false evidence.<sup>78</sup>

### Conditions for the Potency of Effective Defence Strategies

The Lee Ming Tee prosecution provides not only a good case study for studying effective defence strategies but also an opportunity to reflect upon why those strategies were in fact effective. It is not the intention here to provide a general theory on this question. Mann, to some extent, has already articulated a general model for thinking about the conditions of defence strategies.<sup>79</sup> In his three-dimensional model, he looks at a series of factors related to the offence (eg influence over information sources and dispersion of potential evidence, etc), offender (eg client resources, etc) and the criminal process (eg method of agency precharge review, if any, quality of defence counsel, etc).<sup>80</sup>

However, absent from Mann’s model is a consideration of more basic and systemic factors that are essential for the potency of defence strategies. Potency here refers to the capacity of a defence strategy to confer a tactical advantage on a suspect or defendant in answer to a criminal investigation and prosecution. It is submitted that the potency of a defence strategy is determined by the rule of law fabric of the cloth that binds the criminal justice system together. In other words, certain rule of law values and institutions are of critical importance to the potency of many of the strategies identified by Mann and applied in the Lee Ming Tee case.

It may be that Mann had taken for granted some of these critically important factors, being within the United States and writing for an American audience. The Lee Ming Tee case is a useful vehicle for bringing to light some of these factors. One way of exposing them is to ask whether transplanting these defence strategies to another jurisdiction, for example the neighbouring mainland of the People’s Republic of China, would realize the same advantages

<sup>76</sup> Note 13 above, p 176 (CFA).

<sup>77</sup> Note 31 above.

<sup>78</sup> Note 25 above, paras 14, 50.

<sup>79</sup> Note 4 above, pp 231–240.

<sup>80</sup> *Ibid.*



seen in Hong Kong. By thinking in this way, one soon realises that the potency of the defence strategies used in the *Lee Ming Tee* case was largely a product of the rule of law values and institutions respected and observed by the Hong Kong legal system. Three rule of law values are relevant and discussed below.

#### *An Independent Judiciary*

The *Lee Ming Tee* case is testament to the strong independent judiciary that existed in Hong Kong before 1 July 1997 transfer of sovereignty and afterwards. In none of the court proceedings was there any unusual deference to governmental or political policy. This is true even in the Court of Final Appeal, where the two decisions are well reasoned and referenced to international jurisprudential principles. Far from showing deference, the two judges at the trial level showed feisty independence and fearlessness in staying a prosecution into which an enormous amount of resources had been invested. Nor can Justice Tang's dismissal of the undue delay application be criticized for being overly deferential. The decision exposed an underlying inconsistency in the defence desire for delay, on the one hand, and the defence complaint on grounds of delay, on the other.

#### *Respect for Due Process*

While the Court of Final Appeal deprecated the detours taken as a result of the two stay applications, the fact that they were ordered is a reflection nonetheless of the Hong Kong justice system's respect for the due process of law. The case history flows from a system that has refused to subscribe to the aphorism that "the end justifies the means". Indeed, in both Court of Final Appeal decisions, the discretionary jurisdiction of a court to stay proceedings where there has been an abuse of process amounting to an affront to the public conscience was affirmed.

Two other aspects of due process that were critical to the effectiveness of the defence strategies in this case included the privilege against self-incrimination and the rules governing prosecutorial disclosure. It was the common law privilege against state compelled self-incrimination that was central to Pang J's decision to stay. The unfairness in forcing a person, before criminal charges are laid, to provide information leading to evidence that could be used to incriminate that person after charges are laid seemed obvious to the judge. It was less obvious to the Court of Final Appeal, but the issue of the admissibility of derivative evidence has yet to be decided.

The rules governing prosecutorial disclosure were a major factor in the two decisions to stay the proceedings. In the first instance, it was because there had been a well-accepted practice in Hong Kong for the prosecution to disclose both used and unused materials to the defence that led to the

discovery of the draft report with McMahon's handwritten comments in the unused materials. This discovery together with the McMahon affidavit significantly contributed to the first stay of proceedings. In the trial before Seagroatt J, it was because of the perceived breach of disclosure obligations by the witness, the SFC and the prosecution that led to the initial mistrial and second stay of proceedings. In the Court of Final Appeal, it was recognised that Hong Kong had inherited strong disclosure rules from the United Kingdom, whose rules had themselves developed from a series of detected miscarriages of justice resulting from governmental non-disclosure.<sup>81</sup>

### *Trial by Jury*

From the outset, the prosecution chose not to transfer the case to the District Court, where the case would have been heard by a judge without a jury and the cap on the maximum term of imprisonment was seven years.<sup>82</sup> This meant that the only mode of trial for this case was by judge and jury.<sup>83</sup> Conducting the case as a jury trial in the common law tradition makes it more susceptible to miscarriage given the vulnerabilities of the lay tribunal of fact. Thus, defence strategies that accentuate these vulnerabilities can inhibit the reaching of a conviction due to the exclusion of evidence, the obtaining of favourable jury instructions and, in the extreme case, the complete stay of the proceedings.

In the Lee Ming Tee case, the adverse reaction, by both the trial and appeal courts, to the pre-charge publicity of the Inspector's report was indicative of the importance placed by the Hong Kong system on the integrity of jury trials. Although the two courts differed on the extent to which it was possible to minimise the prejudice to the jury in the circumstances of this case, both courts recognized the possibility of judicial remedies to cure or reduce possible prejudice. But as for permanent stays, the Court of Final Appeal felt that they would be "exceedingly rare".<sup>84</sup>

### **Conclusion**

In the statement by the Director of Public Prosecutions on the day of Lee Ming Tee's plea and sentence, the following hope was expressed: "that the message will go forth that no matter how long it takes, those who engage in

<sup>81</sup> Note 32 above, para 140 (CFA).

<sup>82</sup> District Court Ordinance (Cap 336), s 82.

<sup>83</sup> Article 86 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China provides that the "principle of trial by jury previously practiced in Hong Kong shall be maintained".

<sup>84</sup> Note 13 above, pp 189–190 (CFA).

commercial crime must expect ultimately to be brought to justice.”<sup>85</sup> Whether the two defendants were “brought to justice” in the full sense of that expression is debatable, but the outcomes could not be said to be perverse nor was there any significant public outcry over them. The defence strategies, although effective in delaying the prosecution and facilitating a favourable plea resolution, were not so potent as to allow matters to get out of hand. The case demonstrates that in the rule of law values and institutions that exist in Hong Kong there are adequate counter weights to ensure a sense of balance and proportionality in matters of criminal justice and human rights. Hong Kong’s Court of Final Appeal has emerged from the saga as an impartial and objective institution willing to make negative findings against the government while keeping the juridical consequences of those findings within reason and proportion.

There are many more stories to be told and lessons to be learned from the Lee Ming Tee case. Unaddressed in this article are the possible criticisms of the handling of the case by the prosecution, the police and the SFC. More to the point is the question of why the case could not have been more expeditiously prosecuted by sending it through the District Court where the maximum punishment of seven years’ imprisonment could have comfortably accommodated the possible range of sentences for both defendants. While the prosecution was fortunate enough to recover a significant amount of the enormous costs it spent in retaining outside counsel, it is certainly regrettable that so much time and expense had to be expended by all parties in this case. This is not a criticism of defence strategies which one expects to find in great abundance in any society that enjoys a vibrant rule of law. Rather, while the Lee Ming Tee case can be celebrated for the rule of law values that were reflected in the history of the proceeding, it should also be scrutinised for ways in which the investigation and prosecution of corporate crime in Hong Kong can be made more efficient and expeditious in the future.

<sup>85</sup> Note 57 above.