

DPP's statement on Mr Franklin Lam Fan-keung's case

The following is a statement given today (August 1) by the Director of Public Prosecutions of the Department of Justice, Mr Kevin P Zervos, SC, on the case of Mr Franklin Lam Fan-keung:

In late October 2012, the Independent Commission Against Corruption (ICAC) received complaints against Mr Franklin Lam Fan-keung, a non-official member of the Executive Council (ExCo), which also involved his wife in relation to the sale of 4 properties held by them through various companies.

At the outset of this case, the Secretary for Justice (SJ) delegated it to the Director of Public Prosecutions (DPP) in order to avoid any possible perception of bias as a result of Mr Lam being a colleague of the SJ in ExCo.

The ICAC conducted a comprehensive investigation and submitted their finalised report to the DPP for consideration in late May 2013.

The DPP considered the case and instructed a Senior Counsel at the Bar of Hong Kong, Mr Peter Duncan, SC, to provide an independent opinion on the issue of whether a prosecution of Mr and Mrs Lam was appropriate upon the application of the law and established prosecution policy to the evidence.

Mr Duncan submitted his finalised advice to the DPP in late July 2013. He advised the DPP not to prosecute Mr and Mrs Lam.

The DPP considered the opinion of Senior Counsel, the evidence, the law and all other relevant material. He concluded that there was insufficient evidence and therefore there was not a reasonable prospect of securing a conviction against Mr and Mrs Lam.

The DPP explained to the SJ the basis of his decision. Having studied the materials, the SJ agreed with the decision of the DPP.

Prosecution criteria

According to The Statement of Prosecution Policy and Practice, a prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings. Second, if it is, does the public interest require a prosecution to be pursued? See paragraph 7.1.

A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by a person. The proper test is whether there is a reasonable prospect of a conviction. See paragraph 8.1.

The complaints

On July 1, 2012, Mr Lam was appointed a non-official member of ExCo. On October 27, 2012, new measures were implemented in the form of Buyer's Stamp Duty and an increased rate and extended holding period for Special Stamp Duty to regulate the property market. It was complained that Mr Lam in putting up his 4 properties for sale may have used privileged information obtained in his capacity as an ExCo member. It was also complained that in offering extra commission to the selling agent of the properties he was offering an advantage to an agent under section 9(2) of the Prevention of Bribery Ordinance, Cap 201.

The relevant offences

In order to understand the decision that has been reached in this case, it is necessary to summarise the relevant aspects of the criminal offences upon which the evidence gathered was assessed.

The allegations investigated by the ICAC centred on the offences of misconduct in public office and offering an advantage to an agent.

The offence of Misconduct in public office is committed where:

- (1) a public official;
- (2) in the course of or in relation to his public office;

(3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. See HKSAR v Shum Kwok-sheer [2001] 3 HKLRD 399; HKSAR v Sin Kam-wah (2005) 8 HKCFAR 192. See also HKSAR v Wong Lin-kay [2012] 2 HKLRD 898 which requires misconduct by a public officer in relation to powers and duties exercisable by him for the public benefit.

Section 9(2) of the Prevention of Bribery Ordinance, Cap 201 (POBO) requires proof:

(1) that there exists a principal/agent relationship; (See Ng Siu-chau v HKSAR (2000) 3 HKCFAR 621, HKSAR v Fung Hok-cheung [2008] 3 HKLRD 846 (CA));

(2) that there be an offer to an agent that comes within the definition of those terms in ss.2(2) (a) of the POBO;

(3) of an advantage within the definition in s.2(1) of the POBO;

(4) that the offer of the advantage be as an inducement to, reward for or otherwise on account of;

(5) that agent conducting himself in relation to his principal's affairs or business, by either

(i) doing or forbearing to do an act in relation to his principal's affairs or business; or

(ii) showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business (See Commissioner of the ICAC v Ch'ng Poh [1997] HKLRD 652(PC)).

The use of confidential information

As we know, on October 27, 2012 the cooling measures for the property market were implemented. From the information gathered by the ICAC, in early June 2012, Mr Lam became aware that he was to be appointed a non-official member of ExCo. At about this time, Mrs Lam engaged a property agent from a Property Agency to sell 4 properties. It was on July 1, 2012 that Mr Lam was appointed to ExCo. It was in late August 2012, that senior members of Government began to discuss implementing concrete measures to regulate the property market. On September 13, 2012, the Financial Secretary gave instructions to introduce such measures. On October 17, 2012, senior Government officials decided that specific cooling measures would be announced on October 26, 2012 to be implemented the following day. On October 25, 2012 a meeting of ExCo was arranged for October 26, 2012 to discuss the proposals. Mr Lam was not in Hong Kong at the time and did not attend the meeting.

On the information available, it is clear that Mr Lam did not use such information in relation to the sale of the properties in question. According to the evidence, they were put on the market in early June 2012, well before any consideration or discussion had taken place at senior levels of Government for the implementation of cooling measures which were subsequently implemented on October 27, 2012.

As stated to the ICAC by the Permanent Secretary for Transport and Housing, the proposal of the Buyer's Stamp Duty was first discussed at a meeting on August 23, 2012 and throughout the formulation of the new measures there was no consultation or discussion with any non-official member of ExCo, including Mr Lam. There does not appear to be any other means by which Mr Lam may have received or come to know about the new measures and in any event could not have done so before late August 2012 when the measures were the subject of high level discussion within Government.

There was simply no evidence to support an offence of misconduct in public office against Mr Lam.

Mr Lam gave two radio interviews on October 31 and November 1, 2012. In the interview on October 31, 2012, he explained that he had decided not to buy or sell any property during his term as an ExCo

member in order to avoid any possible conflict of interest but wished to raise funds for meeting exigencies which might arise so he decided to sell some of his properties.

The extra commission

In a statement to the ICAC by the property agent, in early June 2012 when Mrs Lam engaged him to sell the 4 properties, she told him that should the properties be sold at prices higher than the bottom prices she had set, the difference could be given to the agents who had successfully facilitated the transactions as extra commission. The agent however explained to Mrs Lam that such a proposal was not feasible as the Property Agency's policy was to disclose all the commission to both the purchaser and the vendor in the preliminary Sale and Purchase Agreement and in general a purchaser would not agree to the agent collecting an extra commission. Mrs Lam responded that if that was the case, the difference would be donated. It was the only occasion that mention was made by Mrs Lam of extra commission. The agent nevertheless caused an entry to be made into the Property Agency's computer system that if the selling price exceeded the bottom price, the difference will go to the agent.

The Chief Executive Officer of the Property Agency also stated that the amount of commission to be paid by the vendor and the purchaser to their respective agents, whether it be higher or lower than the usual 1% of the purchase price, had to be fully disclosed to the other party and the Property Agency.

Subsequently, only 1 property was sold by the Property Agency in September 2012. The agent who transacted the sale confirmed that no extra commission was paid. Another 1 of the 4 properties was sold to the wife of a friend of Mr Lam in October 2012 without the involvement of the Property Agency or any other property agent. The other 2 properties were not sold.

The agent engaged by Mrs Lam stated to the ICAC that sometime in June 2012, Mr Lam had a telephone conversation with him and told him that he was selling the properties to raise funds as he would be performing public duties on a voluntary basis. There was no mention of an extra commission.

In the radio interview on October 31, 2012, Mr Lam mentioned the extra commission but in another radio interview on November 1, 2012, he added that in discussion between his wife and the agent it was suggested that the difference between the purchase price and the bottom price could be donated.

There was only one discussion about the extra commission and that was between Mrs Lam and the property agent in June 2012. It was somewhat unclear and it is not certain whether it was suggested to be paid to an agent or a charity. It was inputted into the Property Agency's computer as a payment to an agent but there was discussion about it being donated. In any event, the commission payment from the records was 1% in relation to only 1 property that was sold.

The payment of the extra commission was not concealed within the Property Agency. It was inputted into its computer and with respect to each of the 4 properties. It was permissible within the Property Agency for agents to receive a commission higher than 1% of the transaction price but it was required by the Property Agency that it be fully disclosed to the other party to the transaction. It cannot be said to be a secret commission between the property agent and his or her principal, the Property Agency.

Senior Counsel's opinion

Senior Counsel carefully evaluated the evidence and materials and advised that there was no evidence to warrant a charge of misconduct in public office against Mr Lam; there was insufficient evidence to warrant a charge of offering an advantage to an agent against Mr and Mrs Lam and no other offences were revealed.

Senior Counsel concluded that there was no evidence that Mr Lam used confidential information obtained in his capacity as an ExCo member. In relation to the extra commission, he is of the view that the evidence suggested that Mrs Lam was not offering a commission that was secret. He was of the view that the compelling conclusion was that the proposal envisaged the payment to be made with the full knowledge of the principal.

Conclusion

A prosecution can only ever be instituted on the basis of sufficiency of evidence and it should never be started unless there is admissible, substantial and reliable evidence to justify placing a person upon trial. From the provable facts of a case, there must be a reasonable prospect of securing a conviction before a prosecution may be brought. In this case, there simply was not.

The decision taken has been explained so that the public are fully and properly informed about this case which has been the subject of public concern.

Ends/Thursday, August 1, 2013