Before: the Commission of Inquiry with the Hon Mr Justice Woo GBS VP (Commissioner and Chairman) and Mr Jark-pui Lee SBS JP (Commissioner)

Dates of Hearing: 14 and 16 March 2007

Date of Decision: 16 March 2007

DECISION

Background

1. On 15 February 2007, the Chief Executive in Council appointed Mr Justice Woo as Commissioner and Chairman of this Commission of Inquiry and Mr Lee Jark-pui as the other Commissioner. The appointments and the terms of reference were published by a Gazette Notice of the same date. The terms of reference are as follows:

(1) To ascertain the facts relevant to the following allegations made by Professor Bernard Luk Hung-kay, Vice President (Academic) of the Hong Kong Institute of Education ("the Institute"), in his undated letter to the teaching staff and students of the Institute which was published on the intranet of the Institute on 4 February 2007 and the internet website of Ming Pao News on 5 February 2007 –

(a) In January 2004, there was a telephone conversation between Professor Paul Morris, the President of the Institute and Professor Arthur Li, the Secretary for Education and Manpower ("SEM") in which the latter attempted to persuade Professor Paul Morris to take the initiative to propose a merger of the Institute with the Chinese University of Hong Kong. SEM indicated that otherwise he would allow the then Permanent Secretary for Education and Manpower to have a free hand in cutting the number of students of the Institute ("The First Allegation").

(b) In the past few years, whenever some members of the Institute published articles in local newspapers which criticised the education reform or the education policy of the Government and its implementation, shortly

afterwards senior Government Official(s) repeatedly called to request Professor Morris to dismiss such members of the Institute ("The Second Allegation").

(c) In late June 2004, in relation to a protest by a group of surplus teachers, SEM requested Professor Bernard Luk Hung-kay to issue a statement to condemn the teachers concerned and the Hong Kong Professional Teachers' Union that assisted those teachers, as such assistance would inhibit the employment of fresh graduates of the Institute. Upon Professor Luk's refusal, SEM said, "你唔肯出吖嗎？好！I'll remember this. You will pay! (我會記著，慢慢跟你算帳)" ("The Third Allegation").

(2) To ascertain, on the facts as found, if there has been any improper interference by SEM or other Government Officials with the academic freedom or the institutional autonomy of the Institute.

(3) On the basis of the findings in (1) and (2) above, to make recommendations, if any, as to the ways and manner in which any advice by the Government to the Institute, with respect to the exercise of the Institute's powers or the achievement of its objects, might be given in future."

2. It is plain from the First and Third Allegations on which the Commissioners were tasked to make inquiries and findings that Professor Arthur Li, the SEM, was the person to which those allegations were directed. However, the senior Government Officials referred to in the Second Allegation had not been identified.

3. At the first and preliminary hearing before the Commission that was held on 6 March 2007, after hearing those claimed to be interested in the Inquiry, the Commission made procedural orders and directions relating to the further conduct of the proceedings. Among such was an order that Professor Bernard Luk Hung-kay ("Professor Luk"), the writer of the letter referred to in the terms of reference and the

maker of the Allegations, was to provide to the Commission by 12 noon on Friday 9 March 2007 particulars of the Second Allegation, including the identity of the senior Government Officials mentioned in it.

4. On 9 March 2007, Professor Luk provided the particulars of the Second Allegation to the Commission. He identified the "senior Government Officials" as referring to only one person, Mrs Fanny LAW Fan Chiu-fun ("Mrs Fanny Law") (the Permanent Secretary for Education and Manpower at the material time), who had allegedly telephoned him on four occasions. This was the first time ever that the alleged "senior Government Officials" in the Second Allegation was identified.

5. In the meantime, pursuant to the directions given by the Commission on 6 March 2007, any party or person who had supplied or would supply documents to the Commission might claim privilege or confidentiality of its own documents, such claim was to be raised by 12 March 2007, and if such claims were raised, a hearing would be held on 14 March 2007. A few of such claims were raised and the Commission directed a hearing be held on 14 March 2007. Notice of the hearing was given to the parties and interested persons and publicised on 13 March, advising that the Commission would at the hearing on 14 March deal with, inter alia, the claims of privilege or confidentiality of documents and the appearance of bias. A summary of the facts that might possibly amount to a conflict of interest on the part of the Commissioners was also provided in the notice.

6. Before the commencement of the hearing on 14 March 2007, the parties and some potential witnesses were provided with a copy of the following statement declaring the positions of the Commissioners

regarding the parties or potential parties to the Inquiry ("the 14 March statement"):

(1) There has been a newspaper report that Woo VP's younger sister, a Permanent President of the Hong Kong Association of Kindergartens, criticised Professor Arthur LI Kwok-cheung in an interview last October for not understanding the nature of working with young children.

(2) There has also been a newspaper report of a statement made by the University Education Concern Group questioning the reasonableness of the appointment of Woo VP as a Commissioner of the Inquiry since he is a serving judge and since the head of the Judiciary is Mr Andrew Li CJ, who is the cousin of Professor Arthur Li.

(3) Mr Justice Woo is acquainted with Professor Arthur Li and Mrs Fanny LAW FAN Chiu-fun. In his position as a judge, but mainly as the former Chairman of the Electoral Affairs Commission, Mr Justice Woo has had on previous infrequent occasions, the opportunity of meeting Professor Li and Mrs Law. All those meetings took place before this year. However, there was little conversation between Mr Justice Woo and either of them, save from exchanging greetings. Mr Justice Woo was appointed the Commissioner on Interception of Communications and Surveillance on 9 August 2006 pursuant to the Interception of Communications and Surveillance Ordinance, Cap 589 and since then he has been performing his functions as the independent oversight authority regarding compliance with the requirements of the Ordinance by the law enforcement agencies ("LEAs"), including the ICAC. He needs to acquire information from the LEAs frequently and he pays periodical visits to their premises to check their relevant files and seek clarification. Since Mrs Law's recent appointment as the Commissioner of the ICAC, she is required as the head of an LEA to review her officers' compliance with the Ordinance and to report any possible failure to Mr Justice Woo. On 19 January 2007, Mr Justice Woo and Mrs Law had lunch together (with one other officer from each camp) to discuss matters under the Ordinance. Respectively as the Commissioner on Interception of Communications and Surveillance and the Commissioner of ICAC, Mr Justice Woo and Mrs Law will, under normal circumstances, continue with their working relationship under the Ordinance in the future. Ever since 19 January 2007, Mr Justice Woo has not met either Professor Li or Mrs Law.

(4) Mr Justice Woo's younger sister is Ms WU Chiu-ha, who runs several kindergartens, some of which are private. During the time when Professor Li and Mrs Law made known the Administration's policy on the kindergarten students' subsidy voucher scheme in not applying the scheme to private kindergartens, Ms Wu openly criticized the scheme and the statements made by Professor Li and Mrs Law in relation thereto. The newspaper report referred to in para (1) above contains a part of the criticisms.

(5) As far as Mr J P Lee is concerned, he does not know Professor Li but he met him at a Po Leung Kuk school on its 25th Anniversary Celebration on 10 March 2007. During his tenure of service from 1977 to 1989 on the Council of the Duke of Edinburgh's Award, Mrs Fanny Law also served for a period of time on the Council. This involved making decisions together on the Council as fellow members. He also met her at the Christmas party of the Corruption Prevention Department, ICAC on 22 December 2006.

(6) Mr Justice Woo does not know any of the professors, staff or board members of the HKIEd. Mr J P Lee knows Mr Eddie Ng Hak-kim, who is a Council Member of the HKIEd. Mr Lee got acquainted with him when Mr Ng worked in The Hong Kong Council of Social Service in the early 1970s.

7. The Chairman of the Commission ("Chairman") also made known at this hearing that he had taught in the Hong Kong Shue Yan College (which had achieved university status at the end of last year) for over 20 years as from 1973 and that he had been a member of its Board of Governors since 2004. This should now be corrected to read 1996.

8. At the commencement of the resumed hearing on the issue of appearance of bias this evening, the Chairman stated that Mr J P Lee had sought clarification from the office of the Hong Kong Award for Young People and ascertained that Mrs Fanny Law was a member of the Council of the Duke of Edinburgh's Award from January to March 1985 when Mr J P Lee was the Chairman of the Council. Mr J P Lee also rectified the date when he met Professor Arthur Li, which should be 10 February 2007,

instead of 10 March 2007 as stated in the 14 March statement. What had happened at that meeting was that Professor Li talked to a small group of persons including Mr J P Lee on education matters but Mr J P Lee did not say anything.

The objection

9. At the commencement of the hearing on 14 March 2007, on behalf of Professor Paul Morris ("Professor Morris") and Professor Luk, Mr Hectar Pun raised an objection to the Chairman continuing to sit in the Inquiry, on the basis of the Chairman's relationship with Mrs Fanny Law, as disclosed in paragraph (3) of the 14 March statement.

10. In the written submission of Mr Gerald McCoy SC, now leading Mr Hectar Pun, the objection had been widened to cover Mr J P Lee and the grounds of the objection had also been extensively expanded. Mr McCoy has, however, fairly withdrawn the objection against Mr J P Lee upon the Chairman's clarification referred to above.

The Law and Practice

11. The rationale for the law on the presiding judge recusing himself from the case was stated by Lord Esher MR in *Allison v General Council of Medical Education & Registration* [1894] QB 750, 758:

> "In the administration of justice, whether by a recognized legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased."

12. The test to be applied for determining the existence or otherwise of the appearance of bias is well-settled: whether a fair-minded

observer, neither complacent nor unduly sensitive or suspicious, who is aware of all the relevant circumstances and adopts a balanced approach, having regard to the context of the relevant decision-making process and considered the facts, would conclude that there is a real possibility that the tribunal is biased. See *Johnson v Johnson* (2000) 201 CLR 488, *Deacons v White & Case Ltd & Ors* (2003) HKCFAR 322, *Lawal v Northern Spirit Ltd* [2003] UKHL 35 and *PCCW-HKT Telephone Ltd v The Telecommunications Authority*, HCAL 112/2006 (Reyes J, 13 February 2007, unreported).

13. A number of points need to be emphasised:

(a) It is necessary to consider the impression which the same facts might reasonably have upon the parties and the public: *Johnson v Johnson*, p 508.

(b) Public perception of the possibility of unconscious bias is the key: *Lawal*, p 862; and the indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago: *Lawal*, p 865.

(c) The fair-minded observer can be expected to be aware of the high standards of integrity on the part of members of the judiciary in our jurisdiction: *Taylor v Lawrence* [2003] QB 528, at 548 and of the fact that they are expected to be faithful to their judicial oath to adjudicate on the basis of the evidence and the evidence alone.

14. A useful summary of some significant propositions can be found in *President of the Republic of South Africa v South African Rugby*

Football Union, 1999 (4) SA 147, 177 (cited by the Court of Appeal in *Locabail (HK) Ltd v Bayfield Properties* [2000] QB 451 at 479):

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

15. Where apparent bias is established, the affected party is entitled to object to the tribunal continuing to hear the matter; the party is also entitled to waive the right to object and unless he is in full knowledge of the facts and freely waives the right, the decisions of the tribunal are liable to be set aside: *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370.

16. In practice, this right of waiver is often exercised. Where a judge is aware of facts that may give rise to this right to object, especially where the question of whether he should sit could only be answered in the light of discussion with counsel, he will mention the facts to the parties and seek their views as to whether he should continue hearing the case. In many cases, the parties will raise no objection and the judge carries on to hear and decide the case. It is only when an objection has been taken that the judge will hear counsel's submissions and decide on the issue.

17. In this connection, the following observation of Court of Appeal in *Taylor v Lawrence* at p 549 is pertinent:

> "…[J]udges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations, disclosure can unnecessarily undermine the litigant's confidence in the judge."

<u>The present case</u>

18. In the present case, since Mr McCoy SC, leading Mr Pun, on behalf of Professors Morris and Luk, has maintained the objection to the Chairman continuing sitting in this Inquiry, no question of waiver arises. The issue that has to be decided is whether applying the test, there is a real possibility of bias on the part of the Chairman that he should recuse himself from the Inquiry.

19. There is no dispute amongst all the parties that have addressed us that they do not allege actual bias. They also agree that the credibility and reliability of the key witnesses in the Inquiry, especially those making accusations and those implicated, is most important and is central to our factual findings regarding the issues of the Inquiry. The significance of credibility is accentuated by the fact that there is a dearth, if any, of contemporaneous documents relating to the Allegations.

20. It is submitted by Mr McCoy that Professor Morris and Professor Luk are concerned about the lateness in disclosing the acquaintanceship. Looking at the facts as related under the head of

Background above and the view that we take of the arguments relating to Professor Li (see below), the concern is plainly unjustified. Again, Mr McCoy is no longer complaining about such lateness.

21. It was on 9 March 2007 that Professor Luk made available the particulars of the Second Allegation that identified Mrs Fanny Law as the "senior Government Official(s)" who had telephoned him. That gave rise to the Chairman disclosing his working relationship with Mrs Fanny Law, in their respective capacities of the Commissioner on Interception of Communications and Surveillance ("CICS") and Commissioner of the Independent Commission Against Corruption ("C, ICAC"). The 14 March statement also disclosed the other facts stated therein which were disclosed merely for the sake of completeness.

22. It is not always easy to decide on an objection to disqualify oneself from being the judge of a case. Although the applicable test is objective, it is sometimes difficult to consider one's own position in an objective manner. One can only try one's best in doing so. Fortunately in this case, there are two Commissioners and each can consider the grounds of the objection raised against the other in an objective manner, if necessary.

23. Most grounds of the objection against the Chairman are not only based on the facts that the Commission has disclosed in the 14 March statement, but if we may say so, are also based on wrong assumptions of facts, speculation and undue sensitivity and suspicion. We will not spend too much time in dealing with these unmeritorious points, save very briefly as follows:

(a) Mr McCoy relies on the open criticisms of the Chairman's sister on Professor Li or his education policy. Mr McCoy submits that if the Commission rules against Professor Li, that decision may well be criticised by the public which might perceive the Chairman as biased against Professor Li because the Chairman would side with his sister. This is a wholly unrealistic argument and has failed to take into consideration that a fair-minded and informed observer would, conscious of the fact of the Chairman being a professional judge, consider that he would not take his sister's view on a matter wholly irrelevant to the subject of the Inquiry to affect his determinations in the Inquiry.

(b) Mr McCoy says that the description of the Chairman's acquaintance with Professor Li is devoid of particularity. This is an unjustifiable comment in view of the facts disclosed in paragraph (3) of the 14 March letter that the Chairman had on previous infrequent occasions before this year had the opportunity of meeting Professor Li but had little conversation with him save from exchanging greetings. We also accept the submission of counsel for the Commission that a fair-minded observer would know that Hong Kong is a small place, and there are likely to be occasions or functions when senior judges would meet with senior members of the Administration; this alone should not give rise to any justifiable appearance of bias.

(c) Mr McCoy relies on the alleged facts that Professor Li was the decision-maker in elevating the Hong Kong Shue Yan College to a university, and that Professor Li also

recommended a grant in the sum of $200 million made by the Legislative Council to Shue Yan. Counsel for the Commission submit, correctly, that there cannot be a perception of possibility of bias arising from the Chairman's position in Shue Yan vis-à-vis Professor Li. On the other hand, counsel for Professor Li and Mrs Fanny Law point to certain matters that are inconsistent with these allegations: in effect the elevation of the status of Shue Yan and the grant to it cannot be rightly considered as the decision or work of Professor Li alone. We do not think Mr McCoy's submission that the Chairman should recuse himself because of his connection with Shue Yan is factually justified.

24. Mr McCoy's objection based on the working relationship between the Chairman and Mrs Fanny Law, however, finds support from counsel for the Commission, although Mr Johnny Mok SC, acting on behalf of Professor Li and Mrs Fanny Law, takes a different view.

25. On behalf of Professor Li and Mrs Fanny Law, Mr Mok submits that the Chairman's acquaintance with Mrs Fanny Law and their working relationship would not give rise to the fair-minded informed observer a real possibility of bias. He refers us to the judgment of the Court of Appeal in *Locabail*, paragraph 25:

> "… a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw

> doubt on his ability to try the issue with an objective mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection."

26. Mr Mok further draws our attention to *R v Haslam* [2003] EWCA Crim 3444 where the trial judge was asked to recuse himself because a witness, whose credibility was in issue, was his own court clerk. Leveson J observed:

> "If, in this case, the relevant clerk of the learned judge had been in court for months let alone years, it appears to us that it may well have been very difficult to avoid the appearance of partiality. Here the facts were very different. Judge Fox had not met the clerk until that week and the suggestion that partiality might arise from the fact that he expected to continue to have a working relationship with her cannot be right."

27. Mr Mok stresses that the Chairman and Mrs Fanny Law are mere acquaintances and cannot be described as closely acquainted and that the lunch they had on 19 January 2007 was not a social occasion. Their relationship was statutory and is the very antithesis of that of "close acquaintances" said to give rise to apparent bias as in *Locabail*. He relies on the analogy with *Haslam*, "the suggestion that partiality might arise from the fact that he expected to continue to have a working relationship with her cannot be right."

28. While we denounce, as Mr Mok and Mr Yu do, the descriptions of the relationship between the Chairman and Mrs Fanny Law adopted by Mr McCoy, such as "statutory-marriage" and "business-partner" as inapt, we are reminded by Mr Yu that the working relationship and the expectation of such relationship being continuous is a relevant consideration (see *In re Medicaments and Related Classes of*

Goods (No. 2) [2001] 1 WLR 700). Mr Yu further submits that given the existence of the working relationship which has been established, albeit only briefly, between the Chairman and Mrs Fanny Law, and the fact that this relationship is likely to continue, a fair-minded observer may harbour doubts as to whether the Chairman may unconsciously be less disposed to find against Mrs Fanny Law.

29. The fair-minded and informed observer will appreciate the following facts and circumstances. The Chairman as CICS is the independent authority appointed pursuant to the Interception of Communications and Surveillance Ordinance, Cap 589 and is entrusted with the function, inter alia, of overseeing and reviewing the operation of the LEAs under the Ordinance and the compliance by officers of the LEAs of the requirements of the Ordinance. ICAC is one of the four such LEAs and Mrs Fanny Law is the head of the ICAC. As the oversight and review authority, the Chairman would need to have contact with the LEAs and their senior officers at not infrequent intervals. The Chairman is obliged to conduct reviews on compliance by the LEAs and their officers with the requirements of the Ordinance; and when circumstances so demand, he will make findings in particular reviews, notify the heads of the LEAs of such findings and make recommendations to them (see, for example, ss 40, 41, 42, 52 and 54 of the Ordinance). During the performance of these functions, the Chairman may need to rely on the cooperation, integrity and honesty of the LEAs and the reasonableness of the explanations given to him. The Chairman may, in the course of performing his functions, possibly form an opinion on the degree of such cooperation, integrity, honesty and reliability of the LEAs and their heads. Such an opinion, if formed, might arguably affect his decision unconsciously on the credibility of Mrs Law, as the head of ICAC, as a

witness in the Inquiry and, in particular, as the person accused in the Second Allegation.

30. Moreover, under normal circumstances, this working relationship between the Chairman and Mrs Law is to continue. It is also arguable that a real possibility of bias may also arise in that at least unconsciously, the Chairman would like to trust Mrs Law and to rely on her cooperation and integrity in the further dealings under the Ordinance.

31. This significance of the real possibility of bias is highlighted by the fact that the credibility of the witnesses from the two opposing camps in the Inquiry, the accusers and the accused, is crucial for the decision on the veracity of the three Allegations under the first term of reference, which will also affect the outcome of the second term of reference. The dearth of contemporaneous documentation as to the Allegations, requiring assessment by demeanour of witnesses, as well as the availability of a casting vote to the Chairman, further reinforce the point. The situation in this Inquiry involving the credibility of an implicated person with little documentation also distinguishes itself from the facts of *Gillies v Secretary of State for Work and Pensions* [2006] CR 267 heavily relied on by Mr Mok.

32. It should also be noted that in *Locabail* from the passage cited above (in paragraph 25) by Mr Mok, the court continued to offer counsel as follows:

> "In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

33. Mr Mok suggests that even if there remains any lurking doubt, the doubt could be addressed by invoking certain legislative and practical

safeguards, such that Mrs Fanny Law would delegate her duties as the Commissioner, ICAC towards the Chairman as CICS under Cap 589 to her senior officers. This suggestion, in our view, does not resolve the problem, for insofar as there is a real possibility of bias in the eyes of the fair-minded informed observer, it is difficult to use other measures, unless these measures are certainties, to effectively eradicate the risk as perceived.

Conclusion

34. In such circumstances, we are of the opinion that what can best be done in the interests of justice is for the Chairman to recuse himself from further participating in the Inquiry. The position of Mr J P Lee as a Commissioner of this Commission is totally unaffected by this decision. The consequence is that the Commission will advise the Chief Executive in Council of the Chairman's recusal so that appropriate action for reconstituting the Commission can be taken without any delay.

(K H Woo) Chairman and Commissioner	(J P Lee) Commissioner