

HONG KONG / JUDGMENT

HKSAR v. CNT SECURITY CO LTD

COURT

Court of First Instance

DECIDED

31 May 2007

CASE / FILE NUMBER

HCMA887/2006

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bjbj HCMA887/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 887 OF 2006 (ON APPEAL FROM KTS 13906 13911 OF 2005)

BETWEEN HKSAR Respondent and CNT SECURITY COMPANY LIMITED Appellant (, CNT Security Company Ltd () appeals against its conviction after trial in Kwun Tong Magistracy by Miss Woodcock of six summonses alleging offences, contrary to sections 7A(8), 43B(1) and (3) of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 and section 122(3) of the Mandatory Provident Fund Schemes (General) Regulations, Cap. 485. AUTONUMOUT Each of the summonses alleges that CNT, being the employer of a named employee, failed to ensure that payment was made to the trustees of the registered provident fund scheme of which the employee was a member of the full mandatory contribution required to be made in accordance with section 7A(8) of that Ordinance within the prescribed time. In respect of the employee Ho Shum, William the two alleged offences occurred on or after 11 and 17 August 2002 respectively and in respect of the employee Li Wah the four alleged offences occurred on or after 14 April 2004 and the 11th day of the months of June and July and August 2004 respectively. The magistrate imposed fines of \$500 upon CNT in respect of each summons and ordered that it pay as compensation to the Bank Consortium Trust Ltd, the registered trustee under the scheme, the sums of \$177 and \$26.25 respectively in respect of the two summonses concerning Mr Ho and the sum of \$421.75 for each of the four summonses in respect of Mr Li. AUTONUMOUT During the course of oral submissions by Mr McCoy it became apparent that it was necessary to have further transcript of the oral evidence at trial and the hearing was adjourned for that to be obtained. In the event, this court has a transcript of all of the oral evidence together with all of the exhibits. Given that the nature of these proceedings is a retrial on the evidence before the trial court (see HKSAR v. Chou Shih Bin [2005] 1 HKLRD 838 at 844J), this court is appropriately informed. THE PROSECUTION CASE AUTONUMOUT As the magistrate stated in her Statement of Findings the Admitted Facts, exhibit P9, constituted a significant part of the prosecution case. Insofar as they were relevant to the first two summonses, in respect of Mr Ho, they were in these terms

1. On 7.9.2001, the defendant, as employer and Ho Yow Shum, William, as employee, entered a Contract of Employment commencing 8.9.2001. It was signed by both the employer and the employee on 7.9. 2001, in which Ho Shum, William was employed as a security guard. A copy of the said contract of employment is produced as Prosecution Exhibit P6.
2. P 6 stated: Basic monthly salary \$1,900 Position Allowance \$1,270 Discipline allowance \$800 Housing Allowance \$1,830

Total: \$5,800 per month

5. At the material times, Ho Yow Shum, William disclosed to the defendant that he had resided at Flat B, 15/F., Eastman Court, No. 231 Hennessy Road, Wanchai, Hong Kong. This was owned by him, free from mortgage. A certified copy of the search record of the said property extracted from the Registry of Lands is produced as prosecution exhibit P3. AUTONUMOUT Insofar as the admitted facts were relevant to the four summonses in the case of Li Wah the admitted facts were in the following terms
7. On 29.10.2003 the defendant, as employer and Li Po Wah, as employee, entered a Contract of Employment commencing on 30.10.2003. It was signed by both the employer and the employee on 29.10.2003, in which Li Po Wah was employed as a security guard. A copy of the said Contract of Employment is produced as Prosecution Exhibit P7.
8. Clause 3 of P7 stated:- Basic monthly salary \$2,800 Position Allowance \$565 Housing Allowance \$2,135

Total : \$5,500

9. Clause 5 of P7 stated that the discipline allowance was \$800 per month. These two sums totalled \$6,300 (\$5,500+ \$800).
11. At the material times, Li Po Wah disclosed to the defendant that he had resided in one of the rooms at 7/F, 54A Wong Chuk Street, Sham Shui Po, Kowloon. This was rented by him at \$800 per month. A copy of the lease agreement dated 4.10.2002 and signed by Li Po Wah as tenant is produced as Prosecution Exhibit P8. AUTONUMOUT Both Mr Ho (PW2) and Mr Li (PW3) testified on behalf for the prosecution. The nub of the prosecution case is described in a short summary of the evidence in the magistrate s Statement of Findings (see appeal bundle, page PW1 and PW2 worked as security guards for the defendant company. After they left the employment of the company, they made complaints individually to the MPFA Mandatory Provident Fund Authority office against the defendant company. The complaint was that the defendant company, by labeling a large part of their income as housing benefit, were able to evade responsibility of paying more contribution to an MPF scheme. In other words, the defendant company was saving themselves money. AUTONUMOUT There was no issue that in making payments to the trustee of the registered scheme on behalf of Mr Ho and Mr Li

that CNT had not included in the calculation of relevant income the monies paid to Mr Ho and Mr Li that were described in their contracts of employment as housing allowance. CNT's Inland Revenue Employers Return of Remuneration and Pensions for the years ended 31 March 2004 and 31 March 2005 for Mr Li are exhibits P24 and P25 respectively (see appeal bundle, pages 166 and 167). The Remittance Statement in respect of a number of employees of CNT for the period 31 July to 3 August 2002, relevant to the summonses concerning Mr Ho is exhibit P17, and for the period 31 March to 30 April 2004, relevant to the summonses concerning Mr Li, is exhibit P18. AUTONUMOUT In her Statement of Findings the magistrate described the prosecution stance succinctly (see appeal bundle, page 45) Prosecution took the stance that the allowance had to be applied to direct rental or mortgage expenses of an employee. The MPFA view it as a sham where an employer evades responsibility to make MPF contributions by reclassifying relevant income of an employee as housing allowance. THE DEFENCE CASE AUTONUMOUT The defence accepted that CNT's obligation under the Ordinance was to make payments to the trustee of the registered scheme, on behalf of their two employees, Mr Ho and Mr Li, calculated on their relevant income as defined in section 2(1) of the Ordinance, namely Relevant income means

- (a) in the case of a relevant employee, any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a housing allowance or other housing benefit), expressed in monetary terms, paid or payable by an employer (directly or indirectly) to the relevant employee in consideration of his employment under that contract [emphasis added] AUTONUMOUT The defence led evidence through Miss (DW1), a senior manager of the Personnel and Administration Department of CNT, of which the judge said in her Statement of Findings (see appeal bundle, page The defendant company did not insist on accountable housing benefits in order to save time in administration and reduce costs in administration. AUTONUMOUT The nub of the defence submissions at trial was summarised by the magistrate in her Statement of Findings thus (see appeal bundle, page 46) The defence took the view that the Ordinance does not specify housing benefit must be accountable, and that was after taking legal advice. This is the defendant company's stance in P21, its letter in response to the MPFA's letter of P20. They took the stance that even the Hong Kong Government itself took the same course of action and held the same view. They called DW2 to support this. AUTONUMOUT The magistrate described the evidence of Ms Fiona Chak (DW2) thus DW2 is the housing and quartering officer of the Civil Service Bureau. Civil Service Bureau, of course, is not directly related to this case. She was called essentially to show that the largest employer in Hong Kong, the Hong Kong Government, did pay some employees a non-accountable allowance and classified it as a housing benefit. It did not include this non-accountable allowance as employees relevant income for MPF purposes. She said the government non-accountable allowance was introduced to follow the trend in the private sector. Her letter to defendant company's representatives was exhibited as D12. It states in the last paragraph that all employees who are paid a non-accountable allowance have received basic salaries higher than \$20,000 per month, and the exclusion of the NCA the non-accountable allowance from the relevant income did not affect the amount

of MPF contribution paid by the government as an employer. The government certainly saved no money from classifying non-accountable allowance as a housing benefit, and therefore irrelevant income. THE MAGISTRATE S STATEMENT OF FINDINGS

AUTONUMOUT Of the evidence relevant to the issues in the case the magistrate said (see appeal bundle, page The evidence was largely unchallenged. What was agreed is what was most relevant to the issues. I accepted the witnesses evidence as largely credible and reliable. The issue is whether housing allowance should be used for genuine and actual housing expenditure, or can housing allowance include a non-accountable allowance. In addressing that issue, the magistrate said (see appeal bundle, page On the face of it, here we have two security guards with a monthly income of HK\$5,000 to HK\$6,000, of which a large percent is a non-accountable allowance, classified as housing allowance . This housing allowance is not relevant income for the purposes of MPF contributions. So the employer, defendant company, does pay less contribution than if it were relevant income, and a part of PW1 and PW2 s basic salary. Later, the magistrate went on to note (see appeal bundle, page I accept the employer here did not change the terms during the course of the employment, but nevertheless it is most suspect that basic salary and this housing benefit are almost equal, and these two employees are, with respect, employees on a low income. As DW2 has said, few civil servants are entitled to a non-accountable allowance, and of those that are; all are on a pay scale where the government s MPF contribution is at a maximum of \$1,000 per month. The housing benefit, whether accountable or not, is irrelevant to the calculations of the MPF contributions for those civil servant employees entitled. That is not the case where PW1 or PW2 are concerned. AUTONUMOUT Of the evidence of the manner in which CNT had behaved towards Mr Li and Mr Ho the magistrate said (see appeal bundle page The Defendant company was upfront with these employees. I accept they were informed that the housing allowance was not counted as relevant income for the purposes of Mandatory Provident Fund contributions. The magistrate went on to find that (see appeal bundle page Both PW1 and PW2 did not use their housing allowance towards housing costs.

AUTONUMOUT The magistrate concluded In my finding, any reasonable member of the public would see the defendant company s offer of a non-accountable allowance that is classified as housing benefit that almost equals that employee s basic pay as an attempt to save itself money in MPF contributions However, PW1 and PW2, as security guards on salaries so low that the employer needs to calculate 5 per cent of monthly income for the purposes of MPF contribution, are being short-changed. Of her reasoning for reaching the conclusion the magistrate said In the forefront of my reasoning is the Ordinance s intent to build retirement funds for employees. The defendant s company s classification of a large percentage of PW1 and PW2 s income as housing benefit and not relevant income is, in my finding, an attempt to save money, and it does defeat the purpose of the legislation. It cannot possibly be what legislators intended. I find this arbitrary classification of such a large percentage of a low income, as a housing benefit perk is an evasion of this responsibility. The issue of a reasonable excuse AUTONUMOUT Of the issue of whether or not CNT was able to avail itself of the defence, available pursuant to section 43B(1) of the Ordinance, of having a reasonable excuse for its failure to make the requisite payments the magistrate said

(see appeal bundle, page Defence have gone on to argue that the defendant company has a reasonable excuse in view of the MPFA's lack of prosecution after investigating previous complaints. I accept that the defendant company was not prosecuted previously. However, the fact is the defendant company was using this methodology in 2000 when the ordinance came into effect. They were using this methodology before any complaints. They have an excuse for perpetuating this offence, but not for their initial wrong classification of this non-accountable allowance. I find their submission will be very relevant to mitigation, but not a reasonable excuse on a balance of probability. I find the prosecution has proved beyond reasonable doubt, as required, that there has been a failure to comply with the requirement imposed on an employer of payment of mandatory contribution to be contrary to the ordinance. I find the defendant company had no reasonable excuse to fail to ensure that full contribution was made. As a result, the defendant company is convicted of all six summonses. THE APPELLANT'S GROUNDS OF APPEAL AGAINST CONVICTION AUTONUMOUT By the three grounds of appeal, it is contended on behalf of CNT that the magistrate erred in fact and law in making or failing to make the following findings :

- (i) Ground 1, in finding that the term relevant income as defined in section 2 of the Ordinance could not include a non-accountable housing allowance; (ii) Ground 2, in finding the only persons with high incomes could be entitled to a non-accountable housing allowance; and (iii) Ground 3, in not finding that CNT had a reasonable excuse for its failure to ensure payment of the requisite monies, having regard to the position of the government itself in the same respect and the fact that identical conduct in the past had been investigated and found to be compliant with the law. AUTONUMOUT McCoy submits that in approaching the construction of the Ordinance, in particular the phrase housing allowance the court is to have regard to the fact that the legislation is both penal , providing for fines and imprisonment on conviction for this offence, and fiscal in that it requires compulsory saving by the employee and a compulsory non-recoverable payment by the employer. In consequence, so it is submitted, the court is not to imply qualifications or restrictions into the plain language of the Ordinance. In support of that proposition he relies upon statements by a Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at page It is urged by Sir William Findlay that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. AUTONUMOUT In the course of his written and oral arguments Mr McCoy conflated Grounds 1 and 2 and submitted that, in the absence of qualification, the phrase housing allowance was to be construed as including a non-accountable allowance, that is to say one in which no requirement was imposed upon an employer to satisfy himself that the allowance was actually used for housing expenses, whether by requiring of employees that

they produce proof of the disbursement of the allowance on actual housing expense, for example rent or the repayment of a mortgage, or otherwise. He points out that there was no evidence before the court, nor did the court find, that CNT knew at any material time of the circumstances in which either Mr Ho or Mr Li provided for their domestic accommodation, in particular whether or not they incurred any expenses in so doing. AUTONUMOUT Furthermore, he invites the court to note the fact that the government of the HKSAR made provision for those appointed to the Civil Service after 1 June 2000 in certain circumstances to be eligible to apply for a non-accountable cash allowance under a scheme for the provision of civil service housing benefits (see exhibit D13, at appeal bundle, pages 267). In particular, he points out that those on salaries on the Master Pay Scale of 22 and below are eligible to apply and that it was the evidence of Ms Fiona Chak that the Master Pay Scale at its lowest level was \$7,674 per month. Furthermore, he invites the court to note that in some circumstances the Scheme even permits an eligible officer to apply for double housing benefits, in particular that the officer remains eligible for the Scheme even if his spouse obtains housing benefits from her employer, including the government (see appeal bundle, page 261). Finally, he asks the court to note that section 3 of the Ordinance provides that it expressly binds the government of the HKSAR. In the result, he submits that the government thereby has acknowledged that a non-accountable housing allowance is an exemption in the calculation of relevant income for purposes of the Ordinance. Reasonable Excuse AUTONUMOUT In the alternative, if the court was to rule against his primary submission as to the construction of the term housing allowance, Mr McCoy relies on the statutory defence provided for by operation of section 43B(1) of the Ordinance, namely a reasonable excuse in the appellant company for failing to make the requisite payments. He acknowledges that it is for the appellant company to establish on the balance of probabilities that it did have a reasonable excuse for its failure and contends that what is capable of constituting a reasonable excuse in any particular statute depends on the purpose of and statutory context in which the defence applies. He relies upon the judgments of the Divisional Court of England and Wales in *Cambridgeshire and Isle of Ely County Council v. Rust* [1972] 2 QB 426 and of the Court of Appeal in *R. v. Li Wing Tat* [1991] 1 HKLR

731. The former case arose from a case stated following the dismissal of an information laid against the defendant who for several years had pitched a stall on the highway from which he traded. At issue was whether or not he had a lawful excuse to do so. In advance of setting up a stall the defendant had consulted the police, the Urban District Council, the officers of the prosecuting council at County Hall, the district valuer and the local branch of the Ministry of Transport. Nobody told him that he could not pitch his stall where he wished to do so and he did. Indeed, the District Council had assessed the stall for rates and the appellant had paid the general rate for a period. However, the Divisional Court directed the Magistrates Court that if their acquittal of the defendant had turned on their being satisfied that he had a lawful excuse they were wrong. AUTONUMOUT The matter was dealt with in the judgment of Widgery LCJ, with whom the other two judges agreed, in the following way the defendant on reasonable grounds is honestly mistaken as to fact, and the circumstances

are such that had the fact been as he believed it to be, he would not have broken the law, the law would have been complied with. (see page 433E) I think that in order for the defendant to have lawful excuse for what he did, he must honestly believe on reasonable grounds that the facts are of a certain order when, if they were of that order, he would have an answer to the charge and indeed his conduct would be lawful not contrary to the law. I do not believe any time one can have lawful excuse for conduct because one is mistaken as to the law; everyone is supposed to know the law, but the mistake of fact of the kind which I described seems to me to amount to lawful excuse. (see page 434B) however you imagine these facts, or whatever steps you take in favour of the defendant assuming the state of mind on his part, there was not anybody in law who could grant him a licence to do what he did and in the absence of some authority competent to do that, there could be no lawful excuse, whatever the facts are assumed to be either in the mind of the defendant or elsewhere. (see page 434F-G) AUTONUMOUT In *Li Wing Tat*, Yang CJ sitting as a single judge dealt with an appeal from a defendant convicted in the Magistrates Court under section 4(17) and (29) of the Summary Offences Ordinance, Cap. 228 of the respective offences of collecting donations and using a loud hailer in a public place, in each case without a permit. The events giving rise to the prosecution had occurred during demonstrations against the draft of the Basic Law, which conduct had been persisted with despite warnings from the police. There had been only one such prosecution in the previous 18 years, arising from the use of a loudhailers in conjunction with the opening of a boutique, and it was argued that the appellants had an excuse in using the loud hailers, they honestly and reasonably believing that it was permissible or so to do. Citing the judgment of Lord Widgery in *Rust*, Yang CJ found that there was no excuse for such conduct, there being no mistake as to fact in the appeal before him. However, on the basis that the facts established that over many years even where warnings had been given to those using a loudhailers no prosecution followed, even if the warnings were ignored, Yang CJ held that the magistrate ought to have stayed the proceedings for an abuse of process (page 738I ... I would say that it offends against the sense of fairness for the police, having established a regular practice of not prosecuting over a long period of time, thereby leading those who are concerned to arrive at a legitimate, or reasonable, expectation that such practice will continue, to suddenly altered the practice without prior warning and start prosecuting those very same offences which had attracted nothing worse than a warning or repeated warnings, in the past. AUTONUMOUT In the first place, Mr McCoy relies upon the evidence adduced at trial that in 2002 the Mandatory Provident Fund Authority had investigated a complaint, by a Mr Hei, of a similar nature, namely an inaccuracy in the amount contributed to the Mandatory Provident Fund, to those the subject of the six summonses and, having become aware of the fact that the appellant company stipulated a housing allowance for the complainant Mr Li, which it deducted from his salary in order to calculate the employers contribution to the Mandatory Provident Fund, informed the appellant company that there was insufficient evidence to substantiate the allegations. Secondly, he relies upon the evidence that the Government of the HKSAR permitted non-accountable cash allowances under the housing policy for its civil servant described earlier. AUTONUMOUT Of the earlier investigation by the Authority, of the

appellant company in respect of similar allegations, namely that the appellant company had made miscalculations in making payments to an employee's mandatory provident fund scheme, Mr McCoy drew attention to the fact that in a letter to the appellant company from the Authority, dated 23 July 2002, the appellant company was informed that following a complaint received in respect of the company's previous employee Mr Li Tim Hei the Authority was investigating and made a request of the company to supply to the Authority relevant documents relating to the contributions to the Mandatory Provident Fund, including such as those payment statements provided to the trustee company during contribution period, contribution payment record given to the employee and confirmation letter issued by the bank relating to Mandatory Provident fund contribution payment, etc. (see exhibit D9 of the appeal bundle, pages 212-214). AUTONUMOUT He submits that those documents, including monthly records of payroll slips and remittance statements sent to the bank trustee company, were supplied to the Authority and are to be found at exhibit D11 (see appeal bundle, pages 251). In support, he points to the evidence of Ms Dianna Chan that she believed that they had been supplied with all the information requested for the purposes of that investigation (see appeal bundle, page 384H). Next, Mr McCoy points to Ms Chan's acceptance in evidence, notwithstanding her inability to remember whether or not she received these particular document, that it is apparent from reading the documents that a housing allowance has been deducted from gross income before the employer's contribution to the Mandatory Provident Fund was calculated (see appeal bundle, page 379A G). Finally, Mr McCoy points to the letter from the Authority to the appellant company dated 24 September 2002 in which they were informed that there was insufficient evidence to substantiate the allegations (see exhibit D10A, appeal bundle, pages 217). AUTONUMOUT McCoy relies upon that correspondence together with the evidence of Miss Fan Wai Han, the senior manager of the appellant company's Personnel and Administrative Department at all material times, to the effect that she was aware contemporaneously of those inquiries but at no stage was she advised by the Authority that the deductions made in respect of the housing allowance from gross salary, in order to calculate the employers contribution to the Mandatory Provident Fund in respect of Mr Li, was wrong. Similarly, reliance is placed on further inquiries made of the appellant company in 2003 and 2004 without any complaint by the Authority. THE RESPONDENT'S SUBMISSIONS AUTONUMOUT On behalf of the respondent Mr Liu submits that for a payment to an employee and described as housing allowance or housing benefit to be properly deductible from gross income in arriving at relevant income for purposes of calculating the employers contribution to an employee's Mandatory Provident Fund the housing allowance or housing benefit must not be a sham fake or disguise. Rather, it must be genuine. Mr Liu contends that determination of whether the housing allowance or benefit is genuine is not to be determined only by whether it is accountable or non-accountable. Of course, he submitted the direct payment by an employer to an employee's landlord of rent or the provision of rent receipts by an employee to his employer would readily satisfy a test of genuineness. In the absence of such documentary proof of the actual use of the monies provided by the employer to the employee and described as a housing allowance or housing benefit he submits that an

indicia of lack of genuineness is a disproportionate size of the monies described as housing allowance to the gross money payments made to the employee. AUTONUMOUT Liu takes issue with Mr McCoy's submission to the court that the proper approach to a construction of the Ordinance is to be had by regarding it as a taxing Ordinance. He submits that no taxes are levied or collected. He invites the Court to note that the long title of the Ordinance describes the object is being the establishment of non-governmental Mandatory Provident Fund Schemes for the purpose of funding benefits on retirement. AUTONUMOUT In respect of the issue of whether or not CNT had a reasonable excuse for its failure to make the requisite payments Mr Liu invites the court to note that in *R. v. Soo Fat Ho* [1992] HKCLR 114 the Court of Appeal said of Yang's judgment in *Li Wing Tat* that he had proceeded on an erroneous view of the law. In the judgment of the court, delivered by McDougall JA, the reasoning of Yang CJ was criticised (see page 118 line 21 we find ourselves unable to accept that an earlier failure to prosecute a particular alleged offender or, indeed offenders in general, is a matter that is relevant to the exercise by a court of its power to stay proceedings on the ground that they constitute an abuse of its process. This is so whatever may have been the reason for the failure of the prosecuting authority to take prosecution action in the past. In that case, the magistrate had refused to grant a stay of proceedings in a prosecution in which the appellant was charged with an offence under the Marine Fish Culture Regulations, Cap. 353 of maintaining a mariculture raft that exceeded the permitted area. He had been warned on a number of occasions over a number of years, but never prosecuted. A

CONSIDERATION OF THE SUBMISSIONS AUTONUMOUT Section 19 of the Interpretation and General Clauses Ordinance, Cap. 1 requires of the court in the construction of legislation to approach the matter thus An ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit. As Mr Liu pointed out the preamble to the Ordinance states of the Ordinance that it is An Ordinance to provide for the establishment of non-governmental Mandatory Provident fund schemes for the purposes of funding benefits on retirement AUTONUMOUT Of obvious relevance in this context is the fact that the Ordinance not only proscribes conduct by the creation of criminal offences but also section 43B(3) of the Ordinance provides for substantial maximum penalties, for example penalties for a first offence committed under section 43(1), of failing to comply with the requirement imposed upon an employer by a section 7A, of fines at Level 6 and a term of imprisonment of up to six months; and penalties for conviction on a second or subsequent occasions for the same offence of fines of up to \$200,000 and imprisonment for 12 months. Clearly, in construing the relevant parts of this Ordinance regard is to be had to the fact that the legislation creates criminal offences of substantial gravity and penalty. AUTONUMOUT Section 7A(2)(1) of the Ordinance is perfectly clear and simple. It states An employer who enters into a contract of employment with a relevant employee after the commencement of this section must, for each contribution period occurring after the commencement of the employment

- (a) from the employer's own funds, contribute to the relevant registered scheme the amount to be determined in accordance with subsection (3) Subsection
- (3) provides For the purposes of subsections (1)(a) the amount to be contributed by an employer for a contribution period is
- (a) in the case of a relevant employee an amount equal to the prescribed percentage of the employee's relevant income for that period Clearly, the effect of those provisions is to impose upon the employer a duty to make the required payment as calculated by reference to the appropriate percentage of the employee relevant income . AUTONUMOUT The term relevant income in the case of a relevant employee is defined in section 2(1) of the Ordinance as being ...any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a housing allowance or other housing benefit) expressed in monetary terms, paid or payable by an employer (directly or indirectly) to the relevant employee in consideration of his employment under that contract Clearly, the ambit of the duty imposed upon the employer to make payment to the appropriate provident scheme for the benefit of the employee is cast widely. The wide ambit of the duty is narrowed in respect of specific exceptions, namely a housing allowance or other housing benefit AUTONUMOUT One effect of the permissible deduction in respect of a housing allowance or other housing benefit is to reduce the employee relevant income , upon which the employer is required to make a payment for the benefit of the employee to the appropriate provident scheme. The employer obtains thereby a monetary benefit, in that he pays less to the employee's provident scheme, and the employee suffers a loss, in that the monies paid by the employer to the provident fund for his benefit are diminished. AUTONUMOUT In my judgment, the term housing allowance or other housing benefit in the definition of relevant income in section 2(1) of the Ordinance is to be construed as encompassing only actual and real expenses of that nature and not the mere attribution of that description to a part of an employee's monetary payments. Were it to be construed otherwise the whole purpose of the legislation could be defeated at the whim of an employer. For example, it would be open to an employer to stipulate in the contract with the employee, and to make consequent calculations for purposes of payments for the benefit of the employee under this Ordinance, that all but \$1 of the monies paid to each of his employees, no matter the total amount of such payments, was a housing allowance , thereby reducing the employer's contribution per employee to five cents per employee, whether or not any of those monies were actually used for housing . Clearly, the Legislative Council cannot have intended that to be permissible within that this legislation. AUTONUMOUT The evidence before the magistrate established, in the case of the employee William Ho, that throughout the period encompassed in the several summonses in which he was named he lived in premises owned by him that were free of any mortgage. There was no evidence of any expenses that he incurred in respect of providing for his own housing. His contract of employment described \$1,830 of his total monthly monetary payments of \$5,800 from CNT as a housing allowance . In the case of the employee Li Wah the evidence established that, throughout the period encompassed in the summonses in which he was named, he lived in premises for which he paid rent of \$800 per

month. There was no evidence of any other expenses incurred by him in respect of providing for his own housing. His contract of employment described \$2,135 of his total monthly monetary payments \$6,300 from CNT as a housing allowance. Evidence of the approach of the appellant company to the attribution of the description housing allowance of part of the monetary payments made to their employees generally, and to Mr Li and Mr Ho in particular, came from Miss Han, the senior manager of the Personnel and Administrative Department of CNT throughout the material period. She said CNT had around 1,000 employees in 2001 and about 1,500 employees in 2005. She was unable to provide any information as to how the different housing allowances attributed to Mr Ho and Mr Li were calculated, other than to say that it depended on salary and rank and had been a long-standing company policy. She confirmed that CNT did not require their employees, including Mr Ho and Mr Li, to provide proof of any expenditure in respect of accommodation. She explained why that was the case (see appeal bundle, page 406O) if we asked them to be accountable for that, that would add up (sic) the workload of the administrative section. Miss Fan confirmed in terms that CNT had never asked either Mr Li or Mr Ho to furnish information concerning payment of rent or of mortgages (see appeal bundle, page 423Q T). As noted earlier, there was no dispute that in making payments to the respective provident funds for both Mr Li and Mr Ho that CNT had deducted the money described as housing allowance in each case in calculating their respective relevant income. In the case of Mr Ho, there being no evidence of any expenses incurred by him in respect of his provision of his own housing, he living in his own mortgage-free premises, CNT was not entitled to deduct the monies they described as a housing allowance in calculating his relevant income upon which they made payment to Mr Ho's provident fund scheme. In the case of Mr Li, the evidence established that he had domestic rental expenses of \$800 per month at the times specified in the respective summonses. Although CNT were unaware of such expenses, no doubt because they chose to make no inquiries of Mr Ho, nevertheless those expenses were obviously expenses incurred in Mr Ho making provision for his own housing. As such, they were expenses that fell within the ambit of a housing allowance and, accordingly, in my judgment were properly deductible in the calculation of relevant income and the payments made to Mr Ho's provident fund scheme. However, CNT in calculating Mr Ho's relevant income deducted the whole of the \$2,135 described in the contract as Mr Ho's housing allowance. Beyond \$800 they were not entitled so to do. In the result, CNT failed in their duty to make the requisite payments required of them in respect of both Mr Ho and Mr Li to the extent indicated earlier. Next, it is necessary to consider whether or not CNT had a reasonable excuse for that failure. Unlike the cases of Li Wing Tat and Soo Fat Ho no issue arises of whether or not these proceedings ought to be stayed for an abuse of process. In overruling the judgment of Yang CJ in Li Wing Tat in their judgment in Soo Fat Ho the Court of Appeal held that earlier failures to prosecute a defendant for his known misconduct is not a barrier to a subsequent prosecution. Neither court was concerned with the relevance of that factual background to the issue of a reasonable excuse for the failure to discharge a duty under an Ordinance. In that respect, those judgments are not on point.

AUTONUMOUT However, in *Li Wing Tat Yang CJ* did consider and reject the contention that the appellants had an excuse for their conduct. He did so, relying upon the dictum of *Widgery LCJ in Rust*, in the context of construing the term lawful excuse (see page 734 I There Lord Widgery CJ, sitting with Shaw and Wien JJ, described the word excuse as a reasonable belief that you have the right to do what you seek to do. A defendant therefore has a lawful excuse if, on reasonable grounds, he is honestly mistaken as to a fact (at p. 433E, p. 434B). He went on to say, I do not believe at any time one can have one can have lawful excuse for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistake of fact of the kind which I have described seems to me to amount to lawful excuse. AUTONUMOUT Evidence supporting the company's alternative assertion that it had a reasonable excuse for failing to make the requisite payments to the appropriate Mandatory Provident Fund Scheme in respect of both Mr Ho and Mr Li was given at trial by Miss Han, the senior manager of the Personnel and Administrative Department throughout the material periods and, in particular, at the time that the Authority investigated a complaint by their former employee Mr Hei. As noted earlier, in a letter from the authority to CNT dated 23 July 2002 CNT was advised that the Authority had commenced the investigation into his complaint in respect of the inaccuracy in the amount contributed to the Mandatory Provident Fund. Miss Fan gave no evidence of whether or not CNT had supplied the documentation requested in that letter. Dianna Chan Man Wah, an inspector of the Authority, gave some evidence in that respect. Miss Fan did testify in respect of receipt of the letter from the Authority to CNT dated 24 September 2002 (see exhibit D10, appeal bundle, pages 9). In that letter CNT were advised that the investigation was complete and that the Authority had not discovered evidence which is sufficient enough to substantiate that allegation. AUTONUMOUT In consequence of that investigation and the exchange of correspondence Miss Fan testified (see appeal bundle, page 405Q) I found that the way our company calculated the relevant income and the contribution for MPF were correct and the MPFA that there was no problem. It is to be noted, in any event, that the letter from the Authority to CNT of 24 September 2002 post-dates the date stipulated in the two summonses in which Mr Ho is named, namely dates in August 2002. AUTONUMOUT In addition, Miss Fan testified of being aware of investigations of CNT in respect of their payment of contributions to the Mandatory Provident Fund Schemes of their employees by the Authority in 2003 and 2004. Of those investigations, Miss Fan testified that she was not made aware that the Authority had indicated that CNT had done anything wrong calculation of relevant income for purposes of making payments to the Mandatory Provident Fund Scheme on behalf of their employees. In answer to questions from the court in respect of the investigations of 2003 and 2004 Miss Fan testified that she had been involved or had knowledge of those investigations. Some were routine checks but others were as a result of complaints. The following exchange took place between the court and Miss Q. Right, well those that were complaints that the company had not paid the full contribution, was it specifically that the company had not considered housing allowance as relevant income, was that the complaint? A. At that time the housing allowance was mentioned because in our contribution remittance, one of these section is concerning lump sum salary and there's

another section concerning the relevant income because we needed to take 5% out. The witness went on to describe the two sections as being firstly, the total amount of income received, that is salary plus allowance and secondly, the relevant income upon which the 5% contribution of the employer was calculated. Miss Fan went on to say (see appeal bundle, page 427S A. From the form they could see that there was difference between the total income and the relevant income and we explained to the inspector that that was because housing allowance was deducted. Q. So all this matter was specifically investigated? A. Yes, yes all along they knew it. AUTONUMOUT In cross-examination, Dianna Chan was unable to confirm that the documents presented to her, exhibit D11 (see appeal bundle, pages 251), had been provided by CNT in response to the letter of 23 July 2002 from the Authority. Those documents include remittance statements in respect of the complainee Li Hei that had been sent from the company to the trustee of the relevant provident fund scheme, one of the category of documents requested in the Authority's letter of 23 July 2002. Ms Dianna Chan was able to say that she believed she had received documents in reply to the letter and that they would have reached her because she dealt with this company. However, she said that she had no impression of what documents she had received. In answer to a question from the court, of whether she knew that CNT did not require any of their employees to prove where they've lived, or what mortgage they had or what rent they paid Ms Chan said (see appeal bundle, page 379M I knew about this housing allowance. And it seems to me that the company did mention that it didn't ask for the proof for this housing allowance from the employees. AUTONUMOUT By a letter dated 3 March 2005 the Authority wrote to CNT in respect of a complaint made by Mr Lo Kwok Chu of the failure of CNT to make a Mandatory Provident Fund Scheme contribution in his case for the element of his monetary payments described as housing allowance (see appeal bundle, pages 9). That letter contained in this assertion The findings of our investigation revealed that the remuneration package of your employees included housing allowance . You should be aware that for exemption from MPF contributions, housing allowance has to be determined on the basis of employees actual expenses on housing. AUTONUMOUT In cross-examination, Ms Dianna Chan said that she thought that she had explained that position to the company prior to that letter but she was unable to remember when or under what circumstances she had done so. Clearly, no weight could be or was placed on that part of her testimony. AUTONUMOUT It is clear from the letter of 24 September 2002 from the Authority to CNT that no amplification or explanation was given as to why the Authority had concluded that they had not discovered evidence which is sufficient enough to substantiate the allegation. One obvious possibility is that it had been found that the complainee had incurred housing expenses that matched or were greater than the housing allowance provided by CNT. Clearly, not only does that letter not state any detail whatsoever of the results of the inquiry but also there was no direct statement in the letter that the authority knew of the fact that CNT operated, in effect, a non-accountable housing allowance scheme and, in particular, that they would not initiate prosecution proceedings even if a particular employee who was the beneficiary of a housing allowance incurred no housing expenses. Furthermore, in my judgment CNT were not entitled to infer that that was the position of the Authority from that investigation and that

correspondence nor from the subsequent investigations and inquiries made of CNT by the Authority in the following years. AUTONUMOUT Finally, it is necessary to consider Mr McCoy's submission that that CNT had a reasonable excuse for failing to make the requisite payments to Mr Ho and Mr Li arising from the fact that the Government of the HKSAR operated a scheme in which certain employees were eligible to apply for a non-accountable housing allowance. In the first place, it is to be observed that the only employee of the company called on its behalf at the trial, namely Miss Fan, made no reference whatsoever to knowing of this scheme let alone of relying upon it as a basis for continuing the housing allowance scheme operated by CNT at any time relevant to any of the six summonses. In any event, with great respect to Mr McCoy this issue is a complete red herring. The evidence led at trial clearly established that in operating the scheme the government had not granted any application to any employee who earned less than the salary at which the government was required to pay the maximum contribution as employer to the Mandatory Provident Fund on behalf of the employee. In other words, there was no saving to the government as an employer in respect of its duty to make payments to the Mandatory Provident Fund Scheme of its employees by operation of this scheme. By contrast, from the documentation contained in the appeal bundle it is clear that there was a monetary saving to CNT in respect of payment of the employers contribution to the employees Mandatory Provident Fund Scheme for all of the employees there described as receiving the housing allowance.

CONCLUSION

AUTONUMOUT For the reasons that I have set out earlier, in my judgment, CNT was not entitled to deduct from the amount of money that it was under a duty to pay to the Mandatory Provident Fund Scheme on behalf of Mr Ho and Mr Li any of the housing allowance of \$1,830 of Mr Ho and no more than \$800 per month from the housing allowance of \$2,135 provided to Mr Li. In making those deductions in their calculations of relevant income and then making the resulting payments CNT failed to discharge their duty to make the payments required under section 7A(2) of the Ordinance. Furthermore, for the reasons that I have discussed in some detail earlier CNT has failed to establish on the balance of probabilities that it had a reasonable excuse for failing to make the requisite payments. Accordingly, the appeals against CNT's convictions in respect of the six summonses are dismissed. AUTONUMOUT In light of the conclusion that I have reached in respect of Mr Li and the payments CNT were required to make, it is clear that amounts stipulated as compensation in each of the orders made on each summons concerning him is too great. I invite written submissions from the parties within 14 days on what amount is appropriate. (Michael Lunn) Judge of the Court of First Instance High Court Mr Liu Yuen Ming, SGC of Department of Justice, for HKSAR Mr Gerard McCoy, SC, instructed by M 1udk 1udk S T U V &`#\$ "5Ld !tdO ~Qb]J ~Qb] !tdO & 6" ABC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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