

HONG KONG / JUDGMENT

HKSAR v. LEE WING KAN

COURT

Court of Appeal

DECIDED

9 March 2007

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Before: Hon Stuart-Moore VP, McMahon and Reyes JJ Date of Hearing: 2 February 2007 Date of Judgment: 9 March 2007 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court):

Background

On 16 May 2006, the applicant was convicted, after a trial lasting about 38 days in the District Court before Deputy Judge Dufton, on three charges of conspiracy to defraud, contrary to Common Law and punishable under section 159C(6) of the Crimes Ordinance, Cap.

200. Concurrent sentences of 4 years and 6 months imprisonment were imposed on 19 May 2006 on each charge. The applicant sought leave to appeal against conviction and sentence. Originally, the applicant was jointly charged with his brother, Lee Wing-chan (D2). However, at the outset of the trial, the prosecution offered no evidence against D2 on each of the charges and the case then proceeded against the applicant on his own. All of the charges related to letter of credit (L/C) fraud as cases such as this have come to be known. The L/Cs were applied for by the applicant's company, Yue Fung Development Company Limited (Yue Fung) which made and sold calculators and other electronic products. There were, additionally, a number of import loans and trust loans for which Yue Fung was alleged to have fraudulently applied to the banks. These were closely linked to the L/Cs. Each of the conspiracy charges was couched in similar terms differing only in respect of the dates involved, as to some of the co-conspirators and as to the beneficiaries of the L/Cs. These charges are best understood in the light of a broad synopsis of the main allegation which was, essentially, that the applicant conspired with certain persons at three of the companies which supplied goods to Yue Fung to obtain monies for Yue Fung from L/Cs and bank loans in respect of which, contrary to the documentation shown to various banks, there were no underlying commercial transactions. The beneficiary companies which received the monies, and then almost immediately repaid them to Yue Fung less a relatively small commission charge, were primarily Richlink Asia Limited (Richlink), Fortune (Conductive

Carbon) PCB Factory Company Limited (Fortune) and Kingchamp Industrial Limited (Kingchamp). Richlink manufactured rubber keypads for electronic keyboards, Fortune made conductive carbon-printed circuit boards and Kingchamp made a variety of electronic parts. As will be seen, other companies related to Richlink, Fortune and Kingchamp or their directors were also involved in the LCs and their documentation. The 1st charge, which we set out as an example, alleged that the applicant, between 20 November 1998 and about 28 January 2002, conspired: with Chu Mei-yee, Fu Chu-kan, Fu Yin-ling, Lo Chun-nam and other persons, to defraud the Bank of America (Asia) Limited, the Dah Sing Bank Limited, the Fortis Bank Asia Hong Kong, the Hang Seng Bank Limited, the International Bank of Asia Limited, the Jian Sing Bank Limited, the Kwangtung Provincial Bank Hong Kong Branch, the Standard Chartered Bank, the Union Bank of Hong Kong Limited, the Citic Ka Wah Bank Limited and The Hongkong and Shanghai Banking Corporation Limited (the Banks), by dishonestly:

- (a) causing Yue Fung Development Company Limited (the Applicant) to apply for letters of credit in favour variously of Richlink Asia Limited, Gold Wo Melamine Product Company Limited and Win Linkage Limited (the Beneficiaries) and loans granted under loan facilities for making payment for goods purchased and received (the loans);
- (b) procuring the Banks to issue letters of credit in favour variously of the Beneficiaries and to grant the loans;
- (c) submitting false documents to the Banks purportedly evidencing genuine underlying commercial transactions between the Applicant and the Beneficiaries;
- (d) causing the Banks to pay the proceeds of the said letters of credit and the loans to the Beneficiaries; when there were no genuine underlying commercial transactions relating to the said letters of credit and the loans. (Appeal bundle pp. 1-2) The eleven banks to which reference is made in this charge were all local. Of the beneficiary companies referred to in the particulars, only Richlink was a supplier of goods to Yue Fung. Richlink, Gold Wo Melamine (Gold Wo) and Win Linkage Limited (Win Linkage) were subsidiaries of Gold Wo International Holdings Limited. Gold Wo s business was related to the manufacture of cutlery and other utensils and, as such, had no business interests in common with those of Yue Fung. Win Linkage engaged in no discernable business of any kind. Two of the alleged co-conspirators, Fu Chu-kan (Mr Fu) and Lo Chun-nam (Mr Lo) were the directors of Gold Wo and Mr Fu s sister, who was also the wife of Mr Lo, Fu Yin-ling (Ms Fu), was a shareholder. We were informed that they are presently on trial (in HCCC 134/2004) not only for this offence but others as well. Mr Lo and Ms Fu were also the directors and shareholders of Richlink and, in addition, Mr Lo was a director of Win Linkage. Mr Lo s co-director was Cheng Cho-man, a trusted family friend who at that time was the boyfriend of Mr Fu s daughter. Chu Mei-yee (May Chu), the other named co-conspirator, was the accounts clerk at Yue Fung. Her name appeared as a co-conspirator in each of the charges as she had prepared the L/Cs and loan application documents on behalf of Yue Fung. However, at her trial, which was severed and dealt with before the present case, she was acquitted. In the

2nd charge, relating to a conspiracy between 18 January 1999 and about 17 July 2001, the named co-conspirators, apart from May Chu, were Ho Wing-cheong (Mr Ho), Yu Shun-lin (Miss Yu) and Wong Sze-ming (Mr Wong). The particulars identified ten local banks as the intended victims of the conspiracy and the beneficiaries of the L/Cs were named as Fortune and Good News Development Limited (Good News). Mr Ho was a director of Fortune and his trial on this charge as well as others is set down, we are told, for 23 April 2007 (HCCC 10/2006). Miss Yu (PW8) and Mr Wong (PW9) were called by the prosecution as immunised accomplice witnesses from Fortune, a company with an office in Hong Kong and a factory in Dongguan where printed circuit-boards were made. Good News, on the other hand, was simply a shelf company registered in the British Virgin Islands (BVI) which was set up after Mr Ho asked Mr Wong to arrange this. In the 3rd charge, alleging a conspiracy between 1 February 2001 and about 5 July 2001, the two co-conspirators apart from May Chu were named as Chan Hak-shing (Mr Chan) and Ng Sai-ho (Mr Ng) both of whom were called by the prosecution as witnesses under immunity. Six local banks were identified as the victims in that they issued L/Cs and granted loans for making payment for goods purchased and received. The banks issued L/Cs in favour of Kingchamp (the beneficiary company) of which Mr Chan and Mr Ng were directors. They both gave evidence for the prosecution as immunised witnesses. Prosecution s case For present purposes, having regard to the nature of the grounds of appeal which have been advanced, it will suffice if we supplement the background we have already provided to these charges with a brief outline of the prosecution s case. This will be largely based upon the judge s admirably clear and concise Reasons for Verdict. The applicant and D2 were the only directors and shareholders of Yue Fung. Both of them were authorized signatories of the company bank accounts. Yue Fung, which applied for all the L/Cs and bank loans, was part of Yue Fung International Group Holding Limited, a listed company of which the applicant was the chairman and managing director. Almost all of the proceeds of the L/Cs were subsequently paid by the beneficiary companies to Yue Fung within a very short time span, mostly through two intermediary companies, Blooming Sky International Limited (Blooming Sky) and Win Concept Limited (Win Concept). Both Blooming Sky and Win Concept were BVI companies although their correspondence addresses were the same as the registered address of Yue Fung. The applicant s nephew, Li Shui-kit (Mr Li), ran Blooming Sky and Mr Li s wife ran Win Concept. In support of the 1st charge, the prosecution relied on the evidence of 16 transactions, namely 14 L/Cs and 2 import loans; for charge 2, the prosecution again adduced evidence of 16 L/C transactions, all in relation to L/Cs; and for the 3rd charge, the prosecution relied on the evidence of 11 transactions, namely 7 L/Cs and 4 trust loans. Details of all 43 transactions were summarized in the charts annexed to the prosecution s opening and the banking evidence in regard to them was admitted under section 65C of the Criminal Procedure Ordinance, Cap. 221 and set out at length in the Admitted Facts. The prosecution called eleven witnesses at trial, three of whom occupied responsible positions on the Yue Fung staff. They were Miss Ng Hang-yue (PW1), Miss Au Hoi-yee (PW2) and Miss Koo Fung-tai (PW3). In essence, they testified, as the judge stated: that they were unaware of the letters of credit and loans subject of the three charges; the transactions were not recorded in the usual

books of accounts of Yue Fung but in a separate account called a temporary (suspense) account; and that Gold Wo, Win Linkage, Good News, Win Concept and Blooming Sky had no business with Yue Fung. (Appeal bundle p. 159) The judge then dealt with the four witnesses (PWs 4

- 7) who were called from Richlink and Gold Wo whose evidence also covered Win Linkage, summarising the effect of their evidence as being that: the letters of credit were handled contrary to usual accounting practice; the goods subject of some of the transactions were not goods sold by Gold Wo; and that Win Linkage had no genuine business being purely set up to facilitate the repayment of money back to Yue Fung. (Appeal bundle p. 159) All of this evidence, including the testimony given by the three members of the Yue Fung staff, was covered in greater detail (paras. 96-136) later in the Reasons for Verdict. The judge next summarised the evidence given under immunity by Miss Yu and Mr Wong from Fortune regarding the 2nd charge. In the judge's words, Miss Yu effectively testified that the L/Cs were all processed as transfer payments back to Yue Fung without genuine underlying transactions. The evidence of Mr Wong will likewise show the transfer payments and that Good News was purely set up to handle these transfer payments. The evidence of these two witnesses and the three Yue Fung witnesses in relation to charge 2 was later dealt with by the judge in depth (paras. 142-209). The effect of the evidence given under immunity by Mr Chan and Mr Ng, the directors of Kingchamp, was that an agreement was reached with the applicant for Kingchamp to process L/Cs for which there were no genuine underlying commercial transactions. The proceeds would then be returned to Yue Fung. As to the agreement reached by the applicant with Mr Chan and Mr Ng, later the judge said, amongst other things:
226. At the beginning of 2001 Mr Ng was not able to match all the letters of credit issued by Yue Fung with the monthly statement provided by Kaiko Chan [responsible for accounts receivable and L/Cs issued by customers]. Two applications for letters of credit dated the 1st February 2001, exhibits P33a and P34a (bundle 533 and 548) were received for which there was no match. On receipt of the first letter of credit Mr Ng asked Mr Chan about the use of the letter of credit
227. Mr Chan telephoned the defendant and asked whether the letter of credit was for an order of goods. The defendant replied there was no order and asked Kingchamp to collect the money on the letter of credit after which he would give Mr Chan an invoice of a supplier so Kingchamp could return the money collected to this supplier.
228. In relation to the goods, the defendant said he would make arrangements on the Mainland after which the supplier would then return the money to the defendant, so that the problem of the defendant being hard up for money could be solved. The defendant said there would be a number of letters of credit amounting to about \$10 million. Mr Chan, concerned with the tax implications of what the defendant suggested, said he would have to discuss the matter with Mr Ng.

229. This was not the first time Mr Chan had heard about the defendant being hard up for money. At the end of 2000 Mr Chan had tea with the defendant when the defendant mentioned that business was getting worse and that a lot of goods had accumulated as stock. Mr Chan said he could not lend the defendant any money. The defendant said he was not trying to borrow money but in the event he needed help he would approach Mr Chan.
230. Mr Chan informed Mr Ng about what the defendant had told him. Mr Ng felt that the transactions were not real and [were] just a way of helping Yue Fung to get some cash. Mr Chan wanted to help the defendant and felt that this help should not pose a great effect on Kingchamp.
231. Mr Ng and Mr Chan were of the view that Yue Fung being a listed company would not be forced to close down and would pay the money back to the bank. After giving the matter some thought and considering their business relationship with Yue Fung Mr Chan and Mr Ng decided to help the defendant.
234. After agreeing to help, Mr Ng instructed Kaiko Chan to prepare the commercial invoice for presentation to the bank. Kaiko Chan prepared exhibit P33c (bundle 536), which Mr Ng signed. Mr Ng instructed the sales co-ordinator to prepare exhibit P176a (bundle 953), which was for internal company use in the accounts.
235. The letter of credit was submitted to the bank and payment collected. Mr Chan informed the defendant who arranged for an invoice to be faxed to Kingchamp, which invoice the defendant said was from the Mainland. The invoice, exhibit P176b (bundle 954) was for a sum less than the letter of credit and was in the name of Blooming Sky. The defendant then asked Mr Chan to write out a cheque payable to Blooming Sky for the amount of the invoice and somebody would collect the cheque. Mr Ng having confirmed with Mr Chan the cheques to be issued to Blooming Sky would be transferred back to Yue Fung authorised payment.
236. Mr Chan and Mr Ng both confirmed no goods had ever been supplied to Kingchamp by Blooming Sky and no goods sold by Kingchamp to Yue Fung as stated in the letters of credit and trust loans (exhibits P33a-P43g, bundle 533-661).
237. Mr Ng explained that although these were not real transactions documents were prepared for use by the accounting department to make accounting entries because the money had been deposited into Kingchamp's bank account. Mr Chan when asked by Mr Grossman in cross-examination why the documents were kept if the transactions did not exist explained they were required by Inland Revenue to keep accounts for 7 years and that the accounts department had been told they were actual transactions so they keep the documents. (Appeal bundle pp. 214-217) The prosecution's allegation that there were no commercial transactions underlying the L/Cs or bank loans was the central issue in the case. The applicant's defence, to which we shall turn next, directly contradicted this allegation. Defence case The applicant's case was that there were genuine commercial transactions underlying the L/Cs. These, he said, took place in the Mainland. However, because some of

the processing work was carried out by prisoners in the Mainland, the transactions had to be kept secret from the Yue Fung staff in Hong Kong. The applicant gave evidence at trial and three additional witnesses were called on his behalf. Two of these witnesses were Mainland ex-prisoners (DW2 and DW3) and the third was a driver, Mr Leung (DW4), employed by Yue Fung's Mainland factory, the Yuen Shan Pui Electronics Factory. The combined effect of the evidence given by DWs 2-4 was to lend support to the applicant's version that there were genuine underlying commercial transactions in the Mainland which were directly referable to the L/Cs and the bank loans. In addition, the applicant produced several bundles (the Defence Bundles) which purported to provide documentary proof of the existence of these underlying transactions. Amongst the documents which the defence produced, there were three charts (exhibits D68-70) setting out the transactions which were subdivided into eight steps. The charts, together with the Defence Bundles, were said by Mr McCoy SC, on the applicant's behalf, to have formed the thrust of the defence. Having regard to their importance, the judge's helpful summary of the steps described in the charts bears repetition. This was as follows:

34. Step 1 the sale of raw materials to Yue Fung by Richlink, Gold Wo, or Win Linkage (chart 1) and by Fortune or Good News (chart 2) with payment to be made in Hong Kong. Delivery of the raw materials by Richlink, Gold Wo, Win Linkage, Fortune or Good News to Yue Fung was direct to Yue Fung's factory on the Mainland, the Yuen Shan Pui Electronics Factory (the Yuen Shan Pui factory).
35. The business licences of the Yuen Shan Pui factory are exhibited as D11 and D12 (defence bundle 3, 989-994) and the co-operation agreements between the factory and Yue Fung (and their predecessor Wing Peak Company) are exhibited as D13-D18 (defence bundle [3] 995-1030).
36. The defendant explained Gold Wo, Win Linkage and Good News were used in addition to Richlink and Fortune because given the fact that Yue Fung was a listed company in Hong Kong if the business was over-concentrated in one company the auditors every year would have to make a risk assessment and may put down some reservations in the annual reports. Therefore, in order to diversify business turnover the defendant asked Mr Fu of Richlink and Mr Ho of Fortune to use several more companies to sell electronic parts to Yue Fung. Hence the use of Gold Wo, Win Linkage and Good News.
37. Step 2 Yue Fung would then sell the raw materials to Blooming Sky or Win Concept who in turn at Step 3 would sell the raw materials to the Yuen Shan Pui factory. No actual delivery of the raw materials by Yue Fung to Blooming Sky or Win Concept and by Blooming Sky or Win Concept to the factory took place because Richlink, Gold Wo, Win Linkage, Fortune or Good News had already delivered the raw materials to the Yuen Shan Pui factory at Step 1.

38. Step 4 the Yuen Shan Pui factory would then deliver the raw materials to Dongguan Sun Chow Prison (the prison) for processing. After the finished products were completed they would be delivered back to the Yuen Shan Pui factory, which would sell the finished products to Richlink, Gold Wo, Win Linkage, Fortune or Good News at Step 5.
39. The raw materials were sold at Step 2 to Blooming Sky or Win Concept for the reason that Yue Fung did not have the right to sell products in Mainland China and because the raw materials were to be processed by prisoners.
40. The defendant explained that under Chinese law if raw materials were imported into China they had to be exported to Hong Kong after being processed into finished products and not disposed of internally in the Mainland. Therefore if Yue Fung were found selling products on the Mainland, Yue Fung would be considered as smuggling and dodging taxes. Further the defendant explained that the process of the raw materials by prisoners was in contravention of Chinese law, which states that foreign traders are not allowed to cooperate with the inmates of any prison and was also in contravention of international law on trade.
41. If the auditors and accountants discovered that Yue Fung had done something illegal on the Mainland this would result in a risk assessment and qualified comments in the annual reports of Yue Fung. Arrangements were therefore made by the defendant for Blooming Sky or Win Concept to act in the middle and take all the risks involved in allowing the processing work to be done by the prison and by reason of Yue Fung s lack of domestic sales right. With Blooming Sky or Win Concept acting as intermediary Yue Fung would not be directly involved as far as domestic sales right was concerned.
42. So as not to be regarded as domestic sale in Mainland China the delivery notes issued by Richlink, Gold Wo, Win Linkage, Fortune and Good News stated the address for delivery was Yue Fung Hong Kong. Similarly, the addresses for delivery shown in the delivery notes issued by Yue Fung to Blooming Sky or Win Concept were Hong Kong addresses.
43. Returning to Step 5 - the Yuen Shan Pui factory would deliver the finished product to Richlink, Gold Wo, Win Linkage, Fortune or Good News and at the same time charge a processing fee on behalf of Yue Fung, which would be payable in Renminbi on the Mainland.
44. Step 6 - the Yuen Shan Pui factory instead of receiving payment for the finished products from Richlink, Gold Wo, Win Linkage, Fortune or Good News would send Richlink, Gold Wo, Win Linkage, Fortune or Good News a payment instruction to make payment direct to Blooming Sky and/or Win Concept in Hong Kong. This payment would be taken as settlement of the price of the raw materials the factory purchased from Blooming Sky/Win Concept at Step 3. Defence exhibit D24 (1-13) (defence bundle 3, 1106-1119L) are the annual payment instructions issued by the Yuen Shan Pui factory to Richlink, Fortune, Gold Wo and Good News.

45. Step 7 - After Richlink, Gold Wo, Win Linkage, Fortune or Good News settled the payment with Blooming Sky and/or Win Concept, Blooming Sky and/or Win Concept would in turn at Step 8 pay Yue Fung in respect of the raw materials purchased from Yue Fung at Step 2.
47. In respect of chart 3 Blooming Sky or Win Concept sold the raw materials to Kingchamp at Step 1 then Kingchamp sold the same raw materials to Yue Fung at Step 2. The defendant explained that Mr Li wished to place some private business for processing electronic products with Yue Fung. The defendant turned down the business because Mr Li was a high-ranking management person in Yue Fung and if he sold something to Yue Fung from which he made profit the defendant would find it very difficult to account for this before the board of directors. The defendant therefore introduced the business to Kingchamp because Kingchamp wished to become a listed company and had asked the defendant to introduce more business to them.
48. By placing Kingchamp between Blooming Sky and Yue Fung the defendant could help Mr Li without placing an order with Yue Fung direct and at the same time help Kingchamp to get more business and make more money to meet the requirements to get listed.
49. The defendant explained that Yue Fung paid Kingchamp before Kingchamp paid Blooming Sky because Kingchamp was only acting as a middleman earning a little bit of commission and further Kingchamp did not have sufficient money to pay Blooming Sky if they were not first paid by Yue Fung.
50. The defendant further explained that for Kingchamp to appear in the middle Mr Li was required to pay the commission to Kingchamp. The commission was payable on the Mainland in Renminbi, however Mr Chan of Kingchamp requested payment to be made in Hong Kong dollars therefore Yue Fung paid the commission to Kingchamp on behalf of Mr Li with Yue Fung collecting the equivalent amount in Renminbi from Mr Li.
51. At Step 3 Yue Fung faced the same problems as in charts 1 & 2 arising from Yue Fung having no right of sale in China and that the goods were to be processed by the prison. Therefore arrangements were again made for the raw materials to be sold to Blooming Sky or Win Concept so they could take all the risks as in charts 1 & 2. The procedure thereafter follows the same course as in charts 1 & 2 save and except that when the finished products are ready the Yuen Shan Pui factory delivers them to Blooming Sky or Win Concept or their customers.
52. Blooming Sky paid Yue Fung at Step 7 in respect of the purchase of the raw materials by Blooming Sky at Step 3. The defendant explained that the payment was less than the amount Yue Fung had paid Kingchamp for the raw materials at Step 2 because Yue Fung had paid Kingchamp the commission. (Appeal bundle pp. 160-166) Grounds of appeal Against this background, Mr McCoy ultimately advanced five substantive grounds of appeal in his amended perfected grounds of appeal. We shall refer to these by their original numbers.

- (1) Evaluation of the Defence Bundles In the 1st ground of appeal, it was submitted that the judge had failed to evaluate or make any findings in relation to well over 700 pages of documents which were included in the Defence Bundles (exhibits D19-67). Mr McCoy as we have indicated, having described these documents as the thrust of the case for the defence because they purported to demonstrate that there were in fact genuine transactions underlying the L/Cs in question, alleged that the judge had failed to give cogent reasons for rejecting the defence evidence with particular regard to the Defence Bundles . As the ground is drafted: The judge only referred to this critical evidence most superficially in his Reasons for Verdict. (See paras. 46 and 59, pp. 164 and 167 of the Appeal bundle) The Reasons for Verdict occupy 85 pages and it is abundantly clear from its 312 paragraphs that the judge had paid close and careful attention to the evidence called by both sides. We have no hesitation in rejecting as totally unfounded any suggestion that the judge had misunderstood or misinterpreted the evidence called by the defence or had failed to realise its potential significance. With commendable brevity, the judge was able to bring every important aspect of the sometimes complex evidence adduced at trial into clear focus. The law applicable to the case was also dealt with accurately and concisely and no criticism has been made by Mr McCoy of any of the judge s directions in law. As the judge rightly pointed out:
18. There can be no doubt that if there were no genuine underlying commercial transactions relating to the letters of credit and loans the economic interest of the banks is put at risk. It is admitted that had the banks known there was no underlying business transactions the letters of credit and loans would not have been granted and payment [would not have been] made to the beneficiaries (see paragraph 7.1 of the admitted facts, exhibit P221). (Appeal bundle p. 156) As we have indicated, it was this element of the case which was primarily at issue in the trial. In order to assist the judge in reaching his eventual conclusions, he was provided with daily transcripts covering the evidence given at trial (1,700 pages) in addition to the trial documentation of over 1,000 pages. As to all of this, the judge expressed himself as having fully familiarised himself. He went on to say, as indeed would have been obvious to all concerned, that in his Reasons for Verdict it would not be possible to refer to all the evidence in detail . In more precise terms, the judge referred to the general nature of the evidence, including the defence documentation early on in his Reasons for Verdict (paras. 21 and 22). Later, (at para. 33) the judge dealt with the three defence charts (exhibits D68-70) and, in relation to the first two of these, went on (in paras. 34-45) to describe the eight steps which these charts were intended to illustrate and which were said by the defence to be a full explanation of the procedures adopted in all the transactions supported by the documentation they had produced. These passages we have set out at paragraph REF _Ref158177515 \r \h (above). Then (at para. 46), the judge went on to deal with the delivery lists and receipts which purported to show the commercial transactions underlying the L/Cs saying: Bundle 2A (exhibits, D36-51) are the documents relating to the transactions in charge 1. Bundle 2B (exhibits, D52-67) are the documents relating to the transactions in charge 2. The defendant demonstrated with reference to the documents in bundles 2A and 2B how they related to the transactions with cross-reference to the prosecution bundle, transaction

2.2 (charge 1) and transaction 3.5 (charge 2). The quotation forms issued by the Yuen Shan Pui factory after agreement was reached with the prison and signed by the person acting on behalf of the prison factory were also produced (exhibit D19, defence bundle 3, 891-988). (Appeal bundle p. 164) After this, the judge (in paras. 47-52) described the 3rd chart (exhibit D70) which the defence had produced in relation to the 3rd charge, setting out in brief form, and with complete accuracy, the seven steps illustrated in the chart before dealing with other central features of the defence case (in paras. 53-54). For the sake of completeness, the judge also dealt (at paras. 55-58) with defence submissions in relation to evidence which was not, or could not be, admitted at trial and (in para. 59) he crystallised the main issue at trial by saying that, having considered all the evidence and submissions: The evidence of the prosecution and the defence materially conflicts in whether there were genuine underlying commercial transactions in support of the letters of credit and loans. The issues to be determined very much rest on the credibility and reliability of the witnesses, who were asked to recall events, which occurred between 1998 and 2002. (Appeal bundle p. 167) The judge (in paras. 60-68) then undertook an analysis of his approach to the evidence, taking into account (at para. 63): that on the defendant's own evidence he devised a scheme to avoid any implication to Yue Fung for breaches of Chinese Law and international trade law, which involved preparing documentation to show delivery was in Hong Kong and not Mainland China.

64. I take into account with regard to charge 3 the defendant guessed the goods sold by Blooming Sky to Kingchamp were smuggled goods yet nevertheless was prepared to purchase the goods from Kingchamp. The defendant explained if the opportunities outweighed the risks he would take the opportunity because the purpose of business was earning money, even if this involved breaking the law. (Appeal bundle pp. 168-169) Importantly, in the context of this ground of appeal, the judge shortly thereafter stated:
67. On the other hand if the court thinks that the defence evidence pointing to innocence is true or may be true, it would follow that the defence has raised sufficient doubt in the prosecution case (see paragraph 16 of the judgment). If there were or might have been genuine commercial transactions underlying the loans and letters of credit the defendant is entitled to be acquitted. (Appeal bundle p. 169) The judge (at para.
- 69) rejected the applicant's evidence that there were genuine underlying transactions, setting out (in paras. 70-80) cogent reasons for so doing. Amongst other things, he said: 70. I do not find credible that the supplier/beneficiary would first need to sell his raw materials so they could be processed after which he would then buy back the finished products. This in my view does not make commercial sense, in particular considering the supplier could simply arrange the processing of the raw materials direct with a factory.

71. I do not find credible that Yue Fung pays immediately for the raw materials by letter of credit without taking advantage of the credit periods offered. In my view it does not make commercial sense for Yue Fung to take all the risk by paying first, for what was in each case not an insubstantial sum, thereby incurring a debt to the bank for which interest was no doubt payable.
74. In respect of charge 3, I do not find credible Blooming Sky would sell raw materials only to buy them back later on in the chain first from Yue Fung and second from the Yuen Shan Pui factory after processing, which transactions the defendant admitted, in answer to the court, reduced the profit made by Blooming Sky at Step 1.
75. I reject the defendant's explanation as to why Yue Fung needed to pay Kingchamp first and why Yue Fung received less than they paid Kingchamp. I do not find credible that Blooming Sky having sold the raw materials to Kingchamp would then be required to pay the commission to Kingchamp arising from Kingchamp's sale to Yue Fung. I do not find credible the use of Blooming Sky and Win Concept, both BVI companies set up by relatives of the defendant. (Appeal bundle pp. 170-171) Later in the Reasons for Verdict, the judge, with reference to the Defence Bundles, stated:
80. I do not find credible the defendant's explanations that these transactions were not entered in the books of accounts because they wished to keep secret from the staff that the prison was processing raw materials when at the same time the goods were delivered to the prison in a crate bearing the name Yue Fung. I note also that the quotation forms, exhibit D19 (defence bundle 891-988), which are signed by the prison, all prominently show the name Yue Fung Corporation at the top of the letterhead. (Appeal bundle p. 173) Numerous paragraphs were then devoted to a summary of the evidence given by prosecution witnesses in the course of which the judge commented:
121. Kit Lee [the Gold Wo accounts clerk] testified that Gold Wo were in the business of manufacturing melamine eating utensils which were manufactured by Gold Wo and sold to customers from many countries. Gold Wo did not sell electronic parts and Kit Lee did not have any impression of Gold Wo selling desktop schedulers.
122. In this regard I note in the annual report 2000 (defence bundle 0060h) reference is made to Yue Fung acquiring 25% interest in Richlink one of the major silicon keypads and melamine products manufacturers with no mention of electronic parts. Similarly I note also in the annual report 2001 (defence bundle 0090i) reference to Yue Fung's investment in Gold Wo, stating Gold Wo as a major silicon keypad and melamine products manufacturer with again no mention of electronic parts. (Appeal bundle p. 184) The judge's assessment of the evidence had been carried out not only with immense care but with the added benefit of having seen and heard the witnesses whose testimony provided the background against which the documentation in the case had to be considered. We have borne in mind, as the judge would have done, that some documentation was obviously available to the defence as there would have had to be some accounting documents retained by Yue Fung to cover the L/

Cs and bank loans applied for by that company. The question to be decided by the judge, which heavily depended upon which testimony given by the witnesses was believed, was whether the prosecution had established that the documentation in the Defence Bundles painted a false picture. If the prosecution's witnesses were telling the truth, this provided a powerful body of evidence to found a basis for a finding that the documents purporting to provide evidence of genuine commercial transactions underlying the L/Cs must have been false. The applicant gave evidence for ten days which, on the issues material to the defence, the judge rejected and on the wealth of evidence which we have summarised there were, in our opinion, ample reasons for the judge to have done so. Mr McCoy's submission that the judge had failed to make a proper evaluation of the Defence Bundles is, we are satisfied, unwarranted and misconceived.

- (2) Applicant's guilt inconsistent with D2's acquittal The 2nd ground alleged that the findings of guilt made against the applicant were inconsistent with the formal acquittal of his brother (D2) in that:
- (a) both the applicant and Lee Wing-chan [D2] were directors and major shareholders of Yue Fung;
 - (b) out of a total of 43 transactions relied upon by the prosecution, Lee Wing-chan was involved in at least 12 transactions by signing on either the applications for the letters of credit or other related documents such as invoices and cargo receipts;
 - (c) Lee Wing-chan was not cited as an accomplice in the charges;
 - (d) the judge wrongly found that there was a case to answer in respect of the 12 transactions; and
 - (e) the prosecution did not apply to amend the charges upon offering no evidence against Lee Wing-chan. Mr McCoy's central theme on this ground was that the evidence against D2 was almost the same as the evidence against the applicant and he pointed out, also, that when convicting the applicant on each of the charges, the judge had not dealt with D2's direct involvement in twelve of the transactions covered by those charges. In our opinion, there is no substance whatever in this ground. Inconsistency in this context relates to two different verdicts reached by a judge or a jury on a consideration of evidence which, for all practical purposes, is the same and where there is no logical distinction to be drawn between the evidence against the two defendants charged with the same offence and for which there is no sensible explanation. In *HKSAR v Li King-sing, Ivan*, CACC 288/2000, this court briefly reviewed a number of decisions in relation to verdicts which were said to be inconsistent, stating (at pages 10-11): In our approach to the submissions of counsel on both sides in this application, we think it right to adopt the two-stage test, taken from *Durante* [1972 56 Cr App R 708], which was propounded by Hutchison LJ in *R v Clarke & Fletcher* CA, July 30 1997, Cases 96/5638/X2 and 96/5797/X2 (unreported), at page 5 in the report provided to us by Mr Chapman, where he said: To succeed the appellant must show, first, that the verdicts are logically inconsistent and, secondly, that they are so inconsistent as to demand interference

by an appellate court - i.e. that there is no way in which the logically inconsistent verdicts can be sensibly explained. In the same year as that decision, the English Court of Appeal held in *R v Van Der Molen* [1997] Crim L R 604 at 605 that: it did not follow that because the jury must have disbelieved a witness or rejected his or her evidence with the result that it acquitted on one count, it was necessarily acting irrationally to rely on the evidence of the same witness to convict on another count. The Court had to be very careful not to usurp the role of the jury who had heard the witnesses and considered the matter long and hard. In the following year, in *R v G* [1998] Crim L R 483, the English Court of Appeal held that: A person's credibility is not a seamless robe, any more than is their reliability. The jury had to consider (as they were rightly directed) each count separately, and might take a different view of the reliability of the evidence on different counts. It was too simplistic to draw a stark distinction between reliability and credibility (as had been put in the argument). It was for the jury to decide on the basis of all the material before it whether it was sure of the particular allegation in each count. All of these decisions, and those to which we earlier referred, serve to illustrate yet again the importance of according respect to the verdict given by a jury. Having said that, obviously, if the verdict amounts to what can effectively be described as nonsense, then it cannot be allowed to stand. Here, as the respondent's written argument adopted by Mr Zervos indicated, the evidence against the applicant was substantially different to the evidence against D2. The prosecution's decision to offer no evidence against D2 was because, it is said, there was a lack of cogent evidence to incriminate him. From the written submissions of the respondent, we were informed, and we accept, that the reason why D2 was not eventually proceeded against resulted from a review of D2's position in the light of certain evidence given by the employees of Yue Fung on the severed trial of May Chu. The applicant, on the other hand, after full and proper consideration by the judge, was convicted on an abundance of evidence. The judge was not, in any event, unmindful of the possible significance of the points now raised by Mr McCoy. In the concluding paragraph of the Reasons for Verdict, he said:

311. Finally I have considered the impact of the prosecution offering no evidence against Lee Wing-chan, the former D2, at the commencement of the trial (see paragraphs 38-40 of the written submission) and that May Chu was acquitted after trial. These facts do not in any way cause me to doubt the verdicts I have reached. (Appeal bundle p. 236) The unworthy remark made by Mr McCoy that this resembled a token addition perhaps reveals the threadbare nature of this ground. Finally, as an illustration of the insubstantial nature of this ground in the light of the evidence presented against the applicant, the judge, when reaching his verdict on the 3rd charge, said:
296. Taking into account, inter alia, the circuitous movement of the funds resulting in repayment of the money to Yue Fung within a short time span after Yue Fung paid Kingchamp; that the staff of Yue Fung had never come across any documents concerning business transactions with Blooming Sky or Win Concept; the only records were made by May Chu in a temporary (suspense) account and not in Yue Fung's accounts receivable together with the evidence of Mr Chan and Mr Ng that there [were] no genuine commercial transactions, I find I am

satisfied so I am sure on all the evidence the only inference to draw is that there was no genuine commercial transactions underlying the letters of credit and loans.

297. I am satisfied so I am sure the prosecution have proved beyond reasonable doubt the conspiracy charged. The defendant was the chairman of the Yue Fung group, in charge of the Hong Kong office from where all the applications originated; and signed a good deal but not all of the banking documentation. Mr Chan at the request of the defendant agreed that Kingchamp would process letters of credit and trust loans issued by Yue Fung for which there were no genuine underlying commercial transactions. I find I am satisfied so I am sure the defendant was a party to the conspiracy to defraud the banks and applying the test in Ghosh find the defendant acted dishonestly.
298. The prosecution have proved all the elements of the charge beyond reasonable doubt. The defendant is convicted of charge 3.
299. In reaching my verdict I have carefully considered all the points made by Mr Grossman both individually and collectively. I am satisfied so I am sure there are no material and significant discrepancies, improbabilities or omissions in the evidence, which cause me to doubt the findings I have made, in particular on the central issue of whether there [were] genuine commercial transactions underlying the letters of credit and loans. (Appeal bundle pp. 232-233)
- (4) Judge s rejection of defence case The 3rd ground as originally drafted was abandoned so that we can move on to a consideration of the 4th ground which alleged that the judge may have rejected the defence case on the wrong premise particularly bearing in mind that Yue Fung was a thriving and vibrant company without cash flow problems. Repayments were made within the credit periods allowed and the rapidly expanding nature of the company enabled it to raise large sums of money without having to resort to fraud. Thus, without adding to his written submissions, Mr McCoy suggested that the prosecution s allegation that there were cash flow problems was unsubstantiated. He contended, also, that the judge had used words which appeared to confirm Yue Fung s status as a thriving company without cash flow problems so that, in effect, this was a motiveless crime which was a factor the judge had not properly taken into consideration when rejecting the case for the defence. In fact, this ground overstates the findings of the judge who (at paras. 280 and 310) merely took into account these matters which had been put before him as a part of the defence. The judge concluded, however, that they did not in any way cause [him] to doubt the findings [he] had made or the evidence (set out above at para. REF _Ref158446049 \r \h above) given by Mr Chan to the effect that Yue Fung had cash flow problems. As the judge went on to say: Whether the defendant told the true reason for requiring [Chan s] help was another matter . Ground 4 was without substance. (4A) The meaning of local delivery and its relevance to the charges Mr McCoy submitted in ground 4A that: There was a material irregularity in the trial in that the judge wrongly, of his own motion, impermissibly widened the prosecution case to include a specific allegation that the applicant falsely represented in the L/C applications that the goods were delivered locally when they were delivered on the Mainland in that:

- (1) he asked the applicant the question concerning local delivery after re-examination by leading counsel [see transcript from pp 904M to 905T of the Appeal Bundle];
- (2) it was not an issue at trial as it was all along the prosecution case that there was no genuine underlying commercial transactions relating to the L/Cs and bank loans and nothing else; and
- (3) there was no challenge to the applicant's understanding that the term local delivery included delivery to the Mainland which the judge disbelieved in his verdict. [See paras. 76-79, Verdict, pp. 171-172 of the Appeal Bundle.] The main point which Mr McCoy sought to make was that this was not a case concerning allegations of furnishing false documents intended to mislead the banks into thinking that goods were being delivered to Hong Kong when in truth they were going to the Mainland. Here, the allegation, as laid in the particulars of the three charges, was that there were no underlying commercial transactions relating to the L/Cs and the bank loans at all. It was submitted that the judge, by asking questions on a topic never raised by the prosecution, widened the ambit of the prosecution's case by adding of his own volition a false representation made to the banks by Yue Fung that goods were being delivered locally. Having done so, it was argued that the judge compounded what he had done by misunderstanding the applicant's evidence when he tried to answer questions from the judge on this topic and this, in turn, reflected badly on the applicant's credibility. The passage in the transcript to which Mr McCoy referred us arose when, after the applicant had been re-examined on the last day of his evidence, the judge was given the following answers to two questions asked by him: Q. Mr Lee, the documents submitted by your company to the bank stated that delivery in every case was local delivery. You tell the court that delivery wasn't local delivery, but was delivery on the Mainland. Why were the banks not told the correct position? A. Well, it's all stated, yes. Q. Yes, but why didn't you tell the banks the correct position? Why were the banks told it was local delivery? A. Because initially I often had lunches with the FCs and the banks, and we had mentioned about it to more than one bank. Besides, I remember that on one occasion I went to the HSBC on the 40th floor and I was then with the then chairman of the HSBC, And there's a translator for me and him, and this person is the sub-branch manager of Wan Chai. Well, he is not the only one that is talking about the goods were delivered on the Mainland. And if a LC is to be opened, according to the regulations of the bank, strictly speaking, it should not be taken as something that happened in Hong Kong, but outside Hong Kong. Then I said that on the Mainland, as to the transportation of the goods, the truck of our factory would be used and the truck of the other party would be used. And we didn't have the airway bill or the bill of lading, nor did we buy any insurance. So how can a LC be opened and the other party can also receive the money? Then all of them said to me words to the same effect: Well, as far as the regulations of the banks are concerned, they are very strict, and what was said was that all the other customers of them in Hong Kong have the same problem, that's why they and you, meaning us, would also use this option of local delivery. That's why all the Hong Kong, including Yue Fung, would do it in this way. Furthermore, there were some banks which said, Now in Hong Kong the manufacturing traders would make investments in

Guangdong Province , so they didn't find them to be a problem. (Appeal bundle pp. 904-905) Mr McCoy suggested that these questions should never have been asked by the judge as this was a new and hitherto unexplored part of the case. We reject this submission. The references to local delivery were contained in the L/C documentation and this was plainly a matter which went to the applicant's credibility. The fact that the prosecutor had seemingly missed the point was no reason for the judge to ignore it. Mr McCoy then suggested that from this last answer given by the applicant it could be seen that he was not saying that the HSBC regarded local delivery as including delivery to the Mainland. The applicant, argued Mr McCoy in his written submissions, meant that he understood the bank's regulations were strict but the reality was that goods were delivered to the Mainland for processing . This was a contention which, with respect, we had considerable difficulty in following as it seemed, in the context, almost meaningless. Again, we have no hesitation in rejecting it. It seems plain to us, from the full context of the applicant's answer, that he was effectively saying that the bank staff had themselves suggested to him that he, like other customers , could use this option of local delivery . It follows, therefore, that the judge's conclusion about this aspect of the case, and about the applicant's credibility in particular, is one which we accept. This was expressed as follows:

76. I do not find credible the defendant's explanation to the court that the banks in Hong Kong, including the then chairman of Hongkong Bank, regarded local delivery as including delivery to the Mainland. Whilst many of the documents simply state local delivery this is not the case for all the documents. (Appeal bundle p. 171) After this, the judge identified in his Reasons for Verdict the applications for L/Cs wherein local delivery in Hong Kong was specifically stated. The judge also noted that the addresses for delivery shown in the delivery notes issued by the companies described as the beneficiaries in the L/Cs and by Yue Fung to Blooming Sky and Win Concept were all Hong Kong addresses. More precisely, the judge said:
77. Transaction 2.5 (annex 1E) and transaction 3.2 (annex 1B) involve applications for letters of credit with the Standard Chartered Bank. The letters of credit exhibit P5(a) (bundle 61) and exhibit P18(b) (bundle 313) clearly state local delivery in Hong Kong. Further in respect of transaction 2.5 the invoice of Richlink, exhibit P5(c) (bundle 66) states local delivery in Hong Kong. Similarly in transaction 2.16 (annex 1P) the invoice of Gold Wo, exhibit P16(b) (bundle 288) submitted in support of an application for an import loan from the Hongkong Bank again states local delivery in Hong Kong.
78. In transaction 3.11 (annex 2K) the invoice of Fortune, exhibit P27(c) (bundle 456) submitted in support of an application for letter of credit from the Dah Sing Bank again states local delivery in Hong Kong. Similarly in transaction 3.16 (annex 2P) the invoice of Good News, exhibit P32(c) (bundle 519) submitted in support of an application for letter of credit from the International Bank of Asia again states local delivery in Hong Kong.

79. Further in this regard I note at the same time the banks were said to regard local delivery as including delivery to the Mainland that according to the defendant's evidence the delivery notes issued by Richlink, Gold Wo, Win Linkage, Fortune and Good News stated the address for delivery was Yue Fung Hong Kong and the addresses for delivery shown in the delivery notes issued by Yue Fung to Blooming Sky or Win Concept were Hong Kong addresses. I also note the observations of Stock JA as to local delivery in *HKSAR v Chan Kar-leung & others* CACC 287/2004 (see in particular paragraph 36). (Appeal bundle p. 172) Mr McCoy even took issue with the judge's adoption of Stock JA's observations at paragraph 36 in *HKSAR v Chan Kar-leung and Ors*, CACC 287/2004 (unreported), saying that these could only be relevant in a case where a person is charged with either false accounting or procuring the making of an entry in a bank record by deception. This contention, however, is not borne out from a reading of paragraph 36 in that case which reads: a bank engaged upon documentary credit transactions is concerned with security and in that respect the present case was no different. And it is in that respect that the truth or falsity of representations of fact made by documents may well be highly pertinent. If a bank looks to the goods referred to in the application and in the documentary credit, once issued, as its security, a representation that there are goods, when there are not, or that the goods are available as security locally, when they are not, is hardly irrelevant. And if invoices and cargo receipts and trust receipts are produced which contain deliberate falsehoods in order to further a deception operative on the mind of the bank, it matters not that in other circumstances, and in another case, and another situation, an issuing bank may be unconcerned that the parties named upon an application and in the documentary credit do not reflect the actual parties to the underlying contract. (Emphasis added) Finally, in this regard, we do not consider that the failure of the prosecutor to make a specific challenge upon this point is a matter of any real significance when, throughout the applicant's cross-examination, it was a constant theme of the questioning that the applicant was not speaking the truth about the existence of genuine commercial transactions underlying the L/C applications. The prosecution made it perfectly apparent that they were suggesting that the documents produced by the applicant were false.
- (6) Judge's assessment of the evidence of Mr Chan and Mr Ng of Kingchamp The 6th ground was relevant only to the 3rd charge. This amounted to an assertion that in assessing the veracity and reliability of Mr Chan (PW10) and Mr Ng (PW11), the directors of Kingchamp, the judge had failed to make a finding that: they were giving false evidence particularly with regard to the following:
- (a) the improbability of Mr. Chan's story that Kingchamp did not make any profit out of the transactions and would only be reimbursed for the bank charges and tax:

- (i) the relevant bank charges for each letter of credit were in the region of HK\$2,000 (see e.g. Admitted Facts, Exh. P221, paras. 4.7.2 and 4.8.2, pp. 122-123 of the Appeal Bundle) but the sums earned by Kingchamp varied from HK\$16,397 to HK\$25,333.40 (representing approximately 1.5% of the amount of the letters of credit); (ii) the aforesaid objective evidence (which supports the defence case) totally contradicted Mr. Chan and Mr. Ng's story that Kingchamp did not earn any commission as a middleman ...
- (b) there was an internal contradiction in the evidence of Mr. Chan and Mr. Ng in respect of transaction 4.4 (3D) which the judge found not proved and did not take into account. Mr. Chan's evidence was that the proceeds of the letter of credit in the sum of \$1.9 million was used to purchase shares for the applicant's friend on the Mainland at the request of the applicant whereas Mr. Ng's evidence was that the money was returned to Yue Fung. The judge failed to explain why he rejected their evidence and did not take this into account when assessing their credibility
- (c) Mr. Chan and Mr. Ng's denial of having any plan or taking any steps to have Kingchamp listed (which formed the very basis of their joining in the arrangement and acting as the middleman between Li Shui Kit and Yue Fung) was totally contradicted by the letter from Kingston (Exh. D35) which clearly showed Kingchamp's plan for listing;
- (d) Prior to trial, both Mr. Chan and Mr. Ng had attended the ICAC offices for memory refreshing exercises conducted by the officer in charge of the case, (PW15). [See paras. 262-270 Reasons for Verdict, pp. 223-225 of the Appeal bundle] The judge was well aware of the way Mr Chan and Mr Ng needed to be approached having reminded himself on more than one occasion that their evidence, given under immunity from prosecution, had to be approached with caution. He said also: Both Mr Chan and Mr Ng were subject to extensive cross-examination. On reaching my verdict, I have taken into account all the criticisms of their evidence set out at some length in the written submission of Mr Grossman. The judge (at paras. 239-283) dealt in detail with the extensive criticisms of these witnesses which leading counsel for the defence had made. The judge's summary of those criticisms occupied eleven pages in the Reasons for Verdict. The painstaking analysis undertaken by the judge nevertheless left him able to rely on their evidence that they had processed L/Cs and import loans issued in favour of Kingchamp for which there were no genuine underlying commercial transactions. This was the central issue on charge 3 as it was in all the charges. Before we leave this ground, we should say that the complaint that Mr Chan and Mr Ng had attended the offices of the Independent Commission Against Corruption (ICAC) for the purposes of a memory refreshing exercise caused us to feel some degree of alarm as indeed it is apparent that the trial judge also felt when this emerged. The judge described this aspect of the case in the following way:

262. Memory refreshing by the ICAC At paragraph 71(v) of the written submission Mr Grossman submits that Mr Chan s evidence that he was tested on his statement by the ICAC and told to stick to his statement, which contained the truth is particularly revealing. Whilst Mr Chan said he was told to talk about what was in his statement, reminded to remember his statement clearly and was questioned about his statement to see what his answers would be his evidence on this aspect must be looked at as a whole.
263. It is in my view clear from the answers in cross-examination that the emphasis was on Mr Chan being told to tell the truth (see transcript 389M-391H and 449K-450S). Similarly Mr Ng said the ICAC emphasised he must tell the truth (see transcript 624O-626E). Both Mr Chan and Mr Ng were re-examined on this issue (see transcript 473D-474H and 642C-H).
264. ICAC officer (PW15) who was the case officer was called as an additional witness and who testified with regard to the memory refreshing exercise with Mr Chan and Mr Ng. In cross-examination [the officer] specifically disagreed that he told the witnesses that if they don t stick to their statements they would be prosecuted. [He] told Mr Chan and Mr Ng that if they remembered something wrongly they must tell the truth (see transcript 702R-703K).
265. [The ICAC officer] gave detailed explanations on different days to Mr Chan and Mr Ng as to court procedure. The immunity was explained telling the witness to give a full account of the whole truth and they were told not to discuss their evidence with each other. Other than explaining the immunity and telling Mr Chan and Mr Ng to tell the truth [the officer] did not in any way indicate to them what evidence they have to give.
266. There was a need for them to read their statements and be shown the exhibits referred to in the statements for the purpose to help them remember things. After each paragraph was read [the officer] would give a summary of each paragraph. [He] explained because he was not the one who had taken the statements if there was any mistakes or the witness had remembered the contents wrongly he would consider taking a further statement. In cross-examination [he] further explained that after reading a paragraph he would ask if there was anything the witness was not clear about but would not ask questions in relation to each and every paragraph.
267. Mr Grossman further complains no real reason was given as to why witnesses could not refresh their memories at home (see paragraph 71(vi) of the written submission). In cross-examination [the ICAC officer] said he thought it would be better face to face and that the documentation could be shown to the witness.
268. In my view it is not a must witnesses refresh their memory at home. To provide witnesses copies of their statements to take home and read can provide the opportunity for witnesses to sit down together and compare their statements. It is however perfectly proper and standard practice for witnesses to refresh their memory prior to trial. I am satisfied it was necessary for the memory refreshing exercise to take place at the offices of the ICAC, in particular by reason of the voluminous documentation involved.

269. Whilst it may have been better [if the ICAC officer] did not summarise each paragraph to Mr Chan and Mr Ng, I am satisfied the ICAC have done nothing improper which amounts to coaching or training the witnesses or in anyway casts doubt on the reliability of Mr Chan and Mr Ng's evidence.
270. I have carefully considered the decisions in *R v Momodou* [2005] 2 All ER 571 and *HKSAR v Leung Kai-chung* [2002] 1 HKLRD 771. The facts in *Momodou* that led to a stinging criticism from both the Court of Appeal and the trial judge are far removed from the facts of the present case. I note in that case the criticisms of training and coaching witnesses were levelled at the activities of a third party and not the investigating authorities. (Appeal bundle pp. 223-225) It is right at this stage to emphasise that Mr McCoy was very properly not suggesting that the ICAC officer had acted in bad faith. However, he submitted that in Hong Kong there should be clearly defined limits as to what the investigating authorities can properly do to ensure that witnesses are not coached, either intentionally or even inadvertently, when being allowed to remind themselves about their statements and any exhibits relevant to their future testimony. The English Court of Appeal decision in *R v Momodou & Anor* [2005] 2 All ER 571 to which the judge referred was, in our opinion, rightly distinguished by him on the facts from anything which had occurred in the present case. We reject the notion advanced by Mr McCoy that the judge had misunderstood that decision. It has long been permissible for witnesses to be allowed to refresh their memories from their statements prior to trial. If it were otherwise, the trial process could be turned into an unnecessary test of memory. Here, Mr Chan and Mr Ng were able to refresh their memories and, but for one factor, there could be no criticism of anything which occurred. This sole factor was that there was a departure from a straightforward exercise in memory refreshing which occurred when the investigating officer decided to provide the witnesses with a summary of each paragraph in their statements. One possible danger in the adoption of such a practice, as Mr McCoy pointed out, is that witnesses may feel compelled to agree with the summary given to them and to adopt it in their testimony later whether or not the phraseology used in the summary had been strictly accurate. Another problem associated with any relaxation of the present rules in this regard is the difficulty which almost inevitably arises in drawing the line between what it may or may not be permissible for an officer attached to a law enforcement agency to discuss with a witness who has earlier made a statement and who wishes to refresh his or her memory before giving evidence at trial. It is quite clear that the training or coaching of witnesses is not permitted as distinct from witness familiarisation about the court process which is permitted. This was described in *R v Momodou* at page 588, para. 62, as: pre-trial arrangements to familiarise the witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the

experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out-of-court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness own uncontaminated evidence ... Of course, if the witness expresses concerns about the accuracy of any previous statement, it would be prudent in such circumstances for the officer to take a further statement correcting the error in the earlier version. In the present case, we do not consider, however laudable the motives of the ICAC officer undoubtedly were, that summarising each paragraph of the witnesses statements in the manner described by the judge was appropriate. In our view, this practice must stop. Having said this, in the present case, the judge was satisfied that what took place had not amounted to witness training. He accepted that the concern of the ICAC officer was to ensure that Mr Chan and Mr Ng, who were seen on entirely separate occasions, were intending to speak the truth. In all the circumstances outlined by the judge, we are satisfied that this was not a material irregularity. Accordingly, leave on this ground is refused. Conclusion on conviction The arguments raised on the applicant s behalf do not give rise to anything which leads us to consider that the conviction of the applicant on any of the charges was unsafe or unsatisfactory. On the contrary, he was convicted on overwhelming evidence and, accordingly, this application is dismissed. Sentence Two grounds were before us in regard to sentence. These suggested that a term of 4 years and 6 months imprisonment was manifestly excessive. Firstly, it was contended that the judge had failed to treat the applicant as a first offender given the length of time since his last conviction in 1986 and the fact that in any event he had received only fines for his earlier offences. The applicant s offence covered by the first conspiracy extended over three years and two months between 20 November 1998 and 28 January 2002. The remaining two conspiracies were committed during that same period. It follows that the applicant s actions during that time reveal extensive evidence of dishonesty and, in our view, any suggestion that the applicant s previous character deserved to be regarded as, in some way, a mitigating circumstance, was far-fetched. The second ground was that the judge allegedly failed to have any or sufficient regard that the risk to the banks was anything more than notional . As to this ground, we have borne in mind that, whilst the banks ultimately suffered no loss, the sums involved in the L/Cs, as the judge indicated, were substantial, totalling almost \$92 million. The judge went on to disagree with the suggestion made by trial counsel that the banks had only suffered a notional risk saying, in words with which we find ourselves in agreement: The funds granted by the letters of credit and loans were focused on the existence of genuine underlying commercial transactions. The risk assessment made by the banks in respect of each application depends on the authenticity of such transactions. The risk to the banks would be greatly affected by the absence of any genuine commercial transactions. As was admitted at trial the banks would not have made any payment under any of the letters of credit or loans had they known there were no underlying business transactions. (Appeal bundle p.239) Plainly, had the banks suffered actual losses, the sentence would have been far longer than the applicant has received. As it is, the sentence

was not inappropriate as Mr McCoy to some extent recognised when describing these grounds as only being there in case some of the charges fell by the wayside . If such was the case, however, there was no requirement to settle any grounds in respect of sentence having regard to the court s power under section 83B of the Criminal Procedure Ordinance, Cap. 221, to pass a substituted sentence on any remaining charge following a successful appeal against conviction on at least one of the charges. This application is dismissed. (M. Stuart-Moore) Vice-President (M.A. McMahon) Judge of the Court of First Instance (A. T. Reyes) Judge of the Court of First Instance Mr Kevin P Zervos, SC, Ag DDPP, and Mr Martin Hui, SGC, of the Department of Justice, for the Respondent. Mr Gerard McCoy, SC, and Ms Alice Lee, instructed by Messrs Haldanes, for the Applicant. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* "0+ "0, "0- "0. "0/ "00 "01 "02 "03 "04 "05 "06 "07 "08 "09 "0: "0; "0< "0= "0> "0? "0@ "0A "0B "0C "0D "0E "0F "0G "0H "0I "0J "0K "0L "0M i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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