ADMINISTRATIVE LAW

Judicial review – Procedural impropriety – Whether decision of professional body to cease distribution of newsletter from LegCo representative vitiated by taking into account irrelevant considerations Professions and Trades – Certified Public Accountants – Decision of Institute to cease distribution of newsletters to members of functional constituency – Whether decision irrational and must be set aside – Media and Communications – Personal data – Distribution of newsletters to members of functional constituency – Whether use of register of members to distribute newsletters offends data protection principles – Personal Data (Privacy) Ordinance (Cap 486) Sch 1 – Constitutional Law – Representative government – Functional constituencies – Role of Legislative Councillor for a functional constituency – Nature of constituency – Unique position of respondent to distribute information to constituents – Human Rights – Freedom of speech – Significance of freedom of speech

TAM HEUNG MAN MANDY
v HONG KONG INSTITUTE
OF CERTIFIED PUBLIC
ACCOUNTANTS [2007] 5 HKC 1

Court of First Instance
Constitutional and Administrative Law
List No 9 of 2007
Saunders J
24-25 July, 28 August 2007

Philip Dykes SC and Dennis Kwok (Ho, Tse, Wai & Partners) for the applicant.

David Pannick QC and Jonathon Harris SC (Richards Butler) for the respondent.

The applicant was a member of the Legislative Council elected to represent a functional constituency, namely accountants. The respondent was the professional organisation relevant to that constituency under the Professional Accountants Ordinance (Cap 50) (PAO). The applicant and the respondent came to disagree on proposed taxation reforms in Hong Kong. The Council of the respondent (the Council) took steps to distance itself from the applicant. Initially, it attached a disclaimer to a newsletter written by the applicant, which it distributed to its members. It then decided to cease distributing the newsletter altogether (the decision). At one point, the Council claimed that the decision was justified by Data Protection Principle 3 (the Principle) of the Personal Data (Privacy) Ordinance (Cap 486) (PDPO). The applicant applied for judicial review of the Council's decision.

Held, allowing the application and ordering the Council to resume the distribution of the applicant's newsletters

The decision was, clearly, unequivocally and without apparent exceptions, one to cease distribution of the newsletters. The issue was to examine the procedure by which the Council reached its decision.

The respondent had a power and a broad discretion under ss 18(1)(a) and 18(1)(n) of the PAO to decide to distribute materials to its members or to refuse, at any time, to do so. In relation to documents such as the newsletter, it was for the Council to determine, from time to time, in light of the circumstances then prevailing, whether or not a request for distribution by the applicant was appropriate or excessive.

While the court should be slow to intervene in the exercise of this power, much less substitute its own discretion for that of the respondent, there was scope for judicial review on the grounds of unreasonableness, including the taking account of irrelevant matters or the disregarding of or failure to accord appropriate weight to relevant matters.

When performing such review in the present case, it was appropriate for the court to take into account freedom of speech and representative government. It was likewise necessary to consider legal restrictions on the use of the electoral register and the register of certified public accountants.

The applicant, as a representative of a functional constituency, was a trustee for her constituents. She had to serve all her constituents, including those who disagreed with her, as best she could, having regard to what she perceived to be their best interests. She also served the wider community. In this context, freedom of speech was important. None of the foregoing could be frustrated by the respondent.

However, while the applicant was uniquely dependent on the respondent as the relevant professional organisation for her constituency, the latter was under no duty to distribute the newsletter, nor did the applicant have any right to such distribution. She simply had the right to have a decision regarding distribution made in accordance with law.

A relevant, albeit minor, consideration in making the decision had been the extent to which there were other means of communication between the applicant and her constituency.

In reaching the decision, the Council had taken into account an irrelevant consideration, namely its disagreement with the applicant and the content of her newsletters.

The Council also failed to take sufficient account of two relevant considerations, namely (a) the status of its register as the only available link between the applicant and her constituency in the context of representative government and freedom of speech; and (b) the effect of the disclaimer in ensuring that the views of the applicant were distinguished from those of the Council.

It would require very strong reasons to deny the applicant the type of access to the register or distribution that she had sought.

Once the treatment of the applicant's newsletter was compared with that accorded to the newsletters of previous representatives, it became clear that the decision violated the principle of equality and therefore amounted to an improper exercise of power. The Council should have considered its previous practice and asked whether there were any justifiable reasons to depart from that practice.

There was no breach of Data Protection Principle 3 under the PDPO because the data was being used for one of the purposes for which it was intended. In any event, the applicant had

not sought personal access to the register. The disclaimer was also in clear terms and was prominently displayed on the outside of the newsletter. It had properly and adequately met the requirements of the Principle. Accordingly, in relying upon the Principle to justify the decision, the Council had taken into account an irrelevant consideration.

Given the above, the decision was irrational and must be set aside.

行政法

司法覆核 – 程序上不當 – 專業團體停止分發立法會代表的通訊之決定，是否因作出了不相關的考慮而失效 – 專業及行業 – 會計師 – 公會決定停止向功能組別內的選民分發通訊 – 有關決定是否不合理而須予撤銷 – 媒體及通訊 – 個人資料 – 向功能組別內的選民分發通訊 – 利用會員名冊來分發通訊是否違反資料保護原則 –《個人資料（私隱）條例》（第 486 章）附表一 – 憲法性法律 – 代議政制 – 功能組別 – 屬於功能組別的立法會議員角色 – 選民的性質 – 在分發資料予選民方面，答辯人的獨特地位 – 人權 – 言論自由 – 言論自由的重要性

TAM HEUNG MAN MANDY
v HONG KONG INSTITUTE
OF CERTIFIED PUBLIC
ACCOUNTANTS [2007] 5 HKC 1

原訟法庭
憲法及行政法 2007 年第 9 號
法官辛達誠
2007 年 7 月 24-25 日、8 月 28 日

戴啟思資深大律師及郭榮鏗大律師（受何謝韋律師事務所延聘）代表申請人。

David Pannick 御用大律師及夏利士資深大律師（受齊伯禮律師行延聘）代表答辯人。

申請人為一名立法會議員，代表會計界功能組別。答辯人為在《專業會計師條例》（第 50 章）下與該功能組別相關的專業團體。申請人與答辯人就香港的稅務改革建議在看法上存在分歧，答辯人的理事會並採取步驟與申請人保持距離。最初它是在由申請人所撰寫的，並由它分發給其會員的通訊中附上一份卸責聲明，但其後它決定完全終止分發該份通訊。理事會根據《個人資料（私隱）條例》（第 486 章）中的資料保護第 3 項原則（下稱原則），聲稱該項決定是合理的。申請人就理事會的決定提出司法覆核申請。

裁定 – 批准申請，並命令理事會恢復分發申請人的通訊：
理事會的該項決定，很明顯是關於停止分發通訊，這是清晰及不存在例外情況的。法庭需要審議的，是理事會達致其決定的過程。

答辯人在《專業會計師條例》第 18(1)(a) 條及 18(1)(n) 條下，享有權力及廣泛的酌情權來決定分發資料予會員，或是於任何時間拒絕所求。關於通訊等文件，是由理事會根據當時的實際情況，來確定申請人的分發要求是屬於適當，還是屬於過份的要求。

雖然法庭不應太早干預此一權力的行使，更不應太早以其本身的酌情權來代替答辯人行使酌情權，但它仍可基於所提出的不合理指稱進行司法覆核，包括將不相關事宜納入考慮範圍，或是對相關事宜加以忽視或未能對其給予適當重視的指稱。

法庭就本案進行覆核時，其對言論自由及代議政制等問題作出考慮是適當的。此外，它亦須對選舉登記冊及會計師名冊等在使用上的法律限制加以考慮。

申請人作為其功能組別的代表，亦即是其功能組別內的選民的受託人。她必須盡力為所有在她的功能組別內的選民服務，並以他們的最佳利益為依歸，包括與她意見相左的人。不單如此，她亦需要更廣泛地為整個社會服務。因此，言論自由是非常重要的，而所有這些都不能為答辯人所損害。

然而，答辯人作為申請人所在的功能組別的相關專業團體，雖然是申請人的唯一依賴，但答辯人並沒有義務分發該等通訊，而申請人亦沒有任何權利享有該等分發服務。她所享有的，是要求就該分發依法作出決定的權利。

在作出決定方面的一項相關考慮因素（雖是較為次要），是在申請人及其選民之間的其他溝通途徑，究竟可以達到怎樣的程度。

理事會在達致其決定時，曾對一項不相關的因素作出考慮，即是它不同意申請人以及申請人的通訊中的內容。

此外，理事會亦沒有對兩項相關因素給予充分考慮，計為：(a) 在代議政制下以及在言論自由範圍內，選民名冊乃申請人與其選民之間唯一可藉以取得聯繫的途徑；及 (b) 卸責聲明的作用，是要確保能將申請人的意見與理事會的意見區別開來。

假如不讓申請人取得她所要求的名冊或分發，這便需要提出相當有力的理據。

一旦將對待申請人的分發通訊要求，與對待以前的代表的分發通訊要求比較，便顯示答辯人的決定有違平等原則，並因此構成對權力的不當行使。理事會應考慮到以前的做法，並自問是否有任何適當理由不遵循以前的做法。

申請人並沒有違反《個人資料(私隱)條例》下的資料保護原則第 3 項，因為該等資料是為所意圖達致的其中一個目的而被使用。不管如何，申請人並沒有要求個人獲得該名冊。此外，卸責聲明亦載有清晰條款，並展示於通訊的版面顯眼地方，而它亦已適當及充分地符合了該項原則的要求。因此，根據該原則來衡量該項決定，理事會事實上乃作出了不相關的考慮。

基於以上的分析，答辯人所作的決定並不合理，必須予以撤銷。

CIVIL PROCEDURE

Appeal – Leave to adduce fresh evidence – Circumstances in which discretion will be exercised in public law cases

DR KWONG KWOK HAY v
MEDICAL COUNCIL OF HONG
KONG (NO 2) [2007] 4 HKC 446

Court of Appeal
Civil Appeal No 373 of 2006
Ma CJHC, Stock JA and Stone J
5, 27 September 2007

Michael Beloff QC and Nicholas Cooney (Wilkinson & Grist) for the appellant/respondent.

Adrian Huggins SC and Alfred KC Fung (Johnson Stokes & Master) for the respondent/applicant.

This was an appeal by the respondent Medical Council from a refusal to allow it to adduce fresh evidence in its appeal against findings that in four respects relating to advertising, its Professional Code and Conduct for the Guidance of Registered Medical Practitioners breached arts 27 and 39 of the Basic Law and art 16 of the Hong Kong Bill of Rights. The respondent sought to introduce affidavits from the Chairman of its Ethics Committee. The main issue on the appeal proper was whether the various restrictions on practice promotion contained in the Code were justifiable, so the court was required to determine whether the relevant restrictions were proportionate to a legitimate purpose. In the Court of First Instance the respondent provided little explanation as to why the restrictions criticised were deemed necessary arguing it was sufficient for the Council to show that the Code' s rules on practice promotion had been drafted following a reasonable process of consultation among doctors and lay persons. The respondent now sought to place before the court four affidavits stating its reasons in arriving at its decision. Tang VP dismissed the application because he was of the opinion that the evidence was available at trial, and while he acknowledged that in public law cases the *Ladd v Marshall* principles for admission of fresh evidence on appeal could be departed from in exceptional cases, he was not satisfied that exceptional circumstances had been demonstrated. He took the view that the refusal of further evidence would not lead to a miscarriage of justice.

Held, allowing the appeal, but ordering costs here and below to be paid by the respondent

The evidence adduced on behalf of the respondent in the court below and before Tang VP was inadequate. The material now sought to be disclosed in the affidavits ought to have been before the court below. Only with this material before it could the court fully determine the aspects of rationality, necessity and proportionality. In light of the exceptional circumstances of great public importance, this court should interfere with the Vice President's discretion.

Whilst the *Ladd v Marshall* principles were applicable in public law, where the interests of justice required, the court had a discretion to depart from those principles where firstly, the circumstances must be wholly exceptional; secondly, it must be demonstrated that a strong public interest existed; and thirdly, the burden was on the party seeking the exercise of discretion to show cogently that exceptional circumstances existed. A mere general reference to the public interest would not suffice.

In the present case, the first requirement of *Ladd v Marshall* was not satisfied. It was not sufficient that the respondent had apparently followed the advice of its legal advisors in not providing the evidence that was now sought to be used in the appeal.

There was a compelling case that this evidence ought nevertheless be admitted now. The actual reasoning and thought processes of the respondent were crucial. Where evidence of this was available, it would be wholly unrealistic for the court not to be able to examine such evidence. The present litigation not only involved the applicant and the respondent. The public and all medical practitioners had a significant interest in the outcome. Justice demanded that the evidence was admitted.

It must be stressed that the admission of further evidence on appeal in the present case should be regarded as wholly exceptional. But for the public interest identified above, the application would simply have been dismissed.

Where an allegation of an infringement of the freedom of expression (or, of any other fundamental freedom) was in issue, it was for the body imposing the restriction – in this case, the Council – to show a justifiable societal objective for the restriction, and that the restriction went no further than was necessary to achieve that objective. It was difficult to envisage an infringement that could be justified without a clearly explained rationale, even though the depth of the explanation required would vary according to the nature of the restriction and its context. But to state merely that the decision accorded with the majority view of a professional body as revealed in a consultation exercise came nowhere close to an acceptable rationale.

民事訴訟程序

上訴 – 提出新證據的許可 – 在公法的案件中行使酌情決定權的情況

DR KWONG KWOK HAY v MEDICAL COUNCIL OF HONG KONG (NO 2) [2007] 4 HKC 446

上訴法庭
民事上訴 2006 年第 373 號
高等法院首席法官馬道立；
法官司徒敬、石仲廉
2007 年 9 月 5 日、27 日

Michael Beloff 御用大律師及 Nicholas Cooney 大律師 (受高露雲律師行延聘) 代表上訴人／答辯人。

Adrian Huggins 資深大律師及馮國礎大律師 (受孖士打律師行延聘) 代表答辯人／申請人。

本案的答辯人香港醫務委員會，被法庭裁定其《香港註冊醫生專業守則》在與賣廣告有關的四個方面，違反《基本法》第 27 條及第 39 條，以及《香港人權法案》第 16 條。在其提出的上訴中，它不被批准提出新證據，為此它提出上訴。答辯人要求提交其道德事務委員會主席的誓章。上訴的主要爭議，乃守則中對業務推廣所作的各種限制是否恰當。因此，法庭需要裁定該等限制的實施，與合法目的是否相稱。在原訟階段，答辯人對於為何有需要實施該等備受批評的限制，只是作出了很少解釋，並辯稱只要醫務委員會證明了守則中有關業務推廣的規則，是依據在醫生和普羅大眾中的合理諮詢程序來進行草擬，這便已告充分。答辯人現時要求提交四份誓章予法庭，述明其達至有關決定的理由。副庭長鄧國楨駁回了該項申請，因他認為該等證據於原審階段時已經可以提出。雖然他承認，在公法的案例中，*Ladd v Marshall* 一案所訂立的有關上訴過程中接納新證據的原則，在例外情況下可以不予遵循，但他並不信納答辯人已經在本案

展示了例外情況。他認為，拒絕批准答辯人提出進一步證據，在本案並不會帶來司法不公。

裁定 – 上訴得直，但命令答辯人須支付本庭以及下級法庭的訟費：

答辯人在下級法庭及鄧國楨副庭長席前提出的證據並不充分。只有連同此等向法庭提交的資料，法庭才能全面地就合理、必須及相稱性作出裁定。由於例外情況對公眾確具有相當重要性，因此對於副庭長所行使的酌情決定權，本法庭應予作出干預。

雖然 *Ladd v Marshal* 一案所訂立的原則適用於公法，但在需要考慮司法利益的情況下，法庭有酌情決定權不遵循該等原則，前提是：第一，該等情況必須完全屬於例外；第二，必須顯示涉及龐大公眾利益；第三，尋求行使酌情決定權的一方須有力地證明例外情況的存在。假如只是概略地提述公眾利益，這明顯並不足夠。

在本案中，*Ladd v Marshall* 的第一項要求未能得到符合。至於答辯人所稱的其未有提供現時要求在上訴過程中提出的證據，只是依循法律顧問的意見，此一論點其理據並不充分。

該等證據乃是應當予以接納的。答辯人如何進行論證以及其考慮過程，對案件而言均是至關重要。當該等證據被提出而法庭卻不能對其加以審視，這實在是不應當的。本訴訟除涉及申請人和答辯人，其結果亦涉及公眾人士以及所有醫生的重大利益。從公正的角度出發，法庭必須接納該等證據。

必須強調的是，在本案的上訴程序中，法庭接納進一步提供的證據，這完全應視為屬於例外情況。若非基於以上提及的公眾利益事宜，該申請必然會被駁回。

當有違反表達自由（或任何其他基本自由）的指控提出時，施加該等限制的團體（在本案中即醫務委員會）需要證明，該等限制的實施是為了達至正當的社會目的，而它們的實施程度，並無超越達成該目的之所須程度。假如沒有清楚地作出解釋，便很難會令人設想到有關的違反是否有任何存在的理由，即使解釋的程度會因著該等限制的性質及其內容而存在差異。但假如只是提出正如在諮詢過程中所顯示的，該決定符合一個專業團體的大多數成員的看法，這並不能成為可被接納的理據。

CONTEMPT OF COURT

Committal for contempt – Disclosure by liquidator of records of private examinations conducted under s 221 – Whether leave of court required for disclosure – Whether use or disclosure without leave constituting contempt – Companies Ordinance (Cap 32) s 221 – Companies (Winding-up) Rules (Cap 32H) r 62 – Civil Procedure – Judgment and orders – Order of Court of Appeal – Application for variation of order before sealing of the order – Misapprehension of facts

RE KENNEDY [2007] 5 HKC 75

Court of Appeal
Civil Appeal No 244 of 2004
Tang VP, Yeung and Yuen JJA
3, 12 October 2007

John Jarvis QC and Eugene Yim (Barlow Lyde & Gilbert) for the appellants/applicants.

Jonathan Harris SC (Clifford Chance) for the respondent.

Linda Chan for the Official Receiver.

The applicants were directors of a company and the respondent was the liquidator appointed by the court in the liquidation of the company. The applicants sought to commit the respondent for criminal contempt of court for providing transcripts of private examination depositions to the police without obtaining leave of the court. The depositions were given by the applicants under s 221 of the Companies Ordinance (Cap 32). Kwan J dismissed the application for committal for contempt on the ground that the respondent had no case to answer (see [2004] 3 HKC 411). The applicants appealed contending that the judge erred in law in holding that leave of the court was not required before supplying the transcripts to the Commercial Crime Bureau (CCB).

By a judgment dated 18 August 2006, the Court of Appeal held that the respondent was obliged to obtain leave of the court but the judge was correct in finding that there was no significant and adverse effect on the administration of justice, as leave was subsequently granted by Barma J (the Barma Order) to disclose part of the depositions and therefore, there was no case to answer for contempt and dismissed the appeal (see [2006] 4 HKLRD 58). Before the order of the Court of Appeal was sealed, the applicants sought the court's reconsideration on the ground that there had been a misapprehension of facts, in that the Barma Order did not cover the depositions disclosed.

Held, varying the earlier order and remitting the matter to Kwan J for rehearing

It was common ground that before an order was sealed, a court had jurisdiction to vary it. However, strong reasons were required before the court would do so and this power would only be exercised in exceptional cases.

Misapprehension of facts

This court was mistaken in taking the view that the respondent had obtained leave to disclose the subject depositions to the police. That misunderstanding arose in the course of argument when counsel for the respondent submitted 'Justice Barma actually made an order to direct that the matter be reported to CCB'. The court's understanding from the submissions was that due to the proximity of time between the Barma Order and the hearing of the motion for committal before Kwan J, in effect 'no harm had been done' from the initial failure to obtain leave, leading the court to conclude that the applicants' case for contempt had been 'technical'.

When the Barma Order was referred to by the court on the mistaken assumption that it covered the subject depositions, nothing was done on behalf of the respondent to disabuse the court from that belief. The respondent would not have breached the confidentiality of the order by telling the court that it did not actually cover the subject depositions.

It was on the mistaken assumption of facts that the court previously took the view that no substantial harm had been done to the administration of justice. Had the court not been labouring under that mistaken premise,

it would have found that the judge was in error in finding that there was no case to answer.

Case to answer

The actus reus comprised of the supply by the respondent of the subject depositions without obtaining leave of the court. That was sufficient evidence of a substantial interference with the administration of justice.

As for the mens rea for contempt, there was prima facie evidence that the respondent had twice referred to his intention to approach the court but eventually failed to do so. An intention to interfere with the administration of justice could be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. In supplying the transcripts to the CCB, the respondent must have known that he was destroying the confidentiality of the depositions which r 62 of the Companies (Winding-up) Rules (Cap 32H) was intended to prevent.

藐視法庭

因藐視法庭而交付審判 – 清盤人披露該等根據第 221 條進行的非公開訊問的紀錄 – 是否必須事先取得法庭的許可才能作出披露 – 未取得法庭許可之前予以使用或披露，是否構成藐視法庭 –《公司條例》（第 32 章）第 221 條 –《公司（清盤）規則》（第 32H 章）第 62 條 – 民事訴訟程序 – 判決及命令 – 上訴法庭命令 – 在將命令蓋印之前申請變更命令 – 對事實的誤解

RE KENNEDY [2007] 5 HKC 75

上訴法庭
民事上訴 2004 年第 244 號
上訴法庭副庭長鄧國楨；
上訴法庭法官楊振權、袁家寧
2007 年 10 月 3 日、12 日

John Jarvis 御用大律師及嚴永錚大律師（受博禮祈律師事務所延聘）代表上訴人／申請人。

夏利士資深大律師（受高偉紳律師行延聘）代表答辯人。

Linda Chan 代表破產管理署署長。

申請人為一家公司的董事，答辯人為法院所委任對該公司進行清盤的清盤人。申請人指答辯人在未獲得法院許可情況下，將非公開訊問的供詞謄本交予警方，要求以刑事藐視法庭罪將答辯人交付審判。該等供詞乃由申請人根據《公司條例》第 221 條而作出。關淑馨法官駁回該以藐視法庭為由而要求交付審判的申請，理由是答辯人無須就有關指控作出答辯（參見 [2004] 3 HKC 411）。申請人提出上訴，指法官認為在向商業罪案調查科提供有關謄本前，無須事先取得法庭的許可，在法律上是犯了錯。

上訴法庭於 2006 年 8 月 18 日作出一項判決，裁定答辯人必須事先取得法庭的許可，但指出原審法官認為在秉行公正方面，並沒有受到重大和不利影響，此一裁斷是正確的，因為鮑晏明法官其後授予許可，允准披露部分該等供詞（以下稱鮑晏明法官的命令），故無須就藐視法庭罪提出答辯，上訴因而被駁回（參見 [2006] 4 HKLRD 58）。上訴法庭頒發的命令被蓋印前，申請人要求法庭作出重新考慮，理由是鮑晏明法官的命令並不涵蓋該等被披露的供詞，故對於本案的事實是有所誤解。

裁定 – 變更先前頒發的命令，並將案件發回關淑馨法官再作聆訊：

在法庭命令被蓋印之前，法庭有權將其修改，但必須具備強而有力的理由才能如此行事，而此一權力必須在例外情況下才可行使。

對事實的誤解

法庭誤以為答辯人事先已取得向警方披露標的供詞之許可。此一誤解的產生，是在辯論過程中，當答辯人的代表律師述及「鮑晏明法官作出了一項命令，指示將事情向商業罪案調查科報告」之時。而法庭對該等陳述的理解是，基於鮑晏明法官頒發的命令，在時間上與在關淑馨法官席前進行的交付審判動議聆訊相當接近，因而令人以為雖然於開首時並沒有取得法庭的許可，但在實際上「並沒有造成傷害」，以致法庭斷定申請人所提出的藐視法庭罪只是屬於「技術性」的範疇。

當法庭基於一項錯誤的假設（即鮑晏明法官的命令乃涵蓋標的供詞）而提述他的該項命令時，答辯人的代表律師並沒有採取任何行動以消除法庭的該項誤解，而答辯人亦不會因告知法庭該命令實質上並不涵蓋該標的供詞，違反了對該項命令的保密。

法庭是因為基於對事實方面的錯誤假設，因而在初時認為對秉行公正並沒有造成實質傷害。假如沒有白白浪費了力氣在錯誤的前提上，法庭便應會裁定原審法官所作的無須就指控提出答辯的裁斷乃屬犯錯。

提出答辯

本案的致罪行為，乃包含答辯人在未取得法庭許可之前交出標的供詞，而這是在實質上干預了秉行公正的充分證據。

在藐視法庭的致罪意念方面，有表面證據顯示答辯人曾經兩次提述其接觸法庭的意圖，但最終未有如此實行。干預秉行公正的意圖，可以從所有的情況來進行推斷，包括是否能預見其行為的結果。答辯人在向商業罪案調查科提供有關謄本時，他必然知悉自己正在破壞對供詞的保密，而這正是《公司（清盤）規則》（第 32H 章）第 62 條旨在避免發生的事情。

COURTS AND JUDICIAL SYSTEM

Hearing closed to the public – Whether good reasons – Hong Kong Bill of Rights Ordinance (Cap 383) art 10 – Practice Direction 25.1 – Civil Procedure – Chambers proceedings – Setting aside statutory demand – Application for recusal of judge – Judge refusing to order hearing of recusal to be open to public or allow publication of transcript

HUANG HSIN YANG v BANK OF CHINA (HONG KONG) LTD [2007] 4 HKC 572

Court of Appeal
Civil Appeal Nos 186 and 219 of 2007
Tang VP and Le Pichon JA
10, 17 August 2007

Eugenia Yang (Pansy Leung Tang & Chua) for the applicant.

Po Wing Kay (Ford Kwan & Co) for the respondent.

The applicant sought to set aside a statutory demand served on him by the respondent. A deputy judge at first instance (the judge) heard the originating summons and reserved judgment. The applicant, acting in person, applied for an order for recusal requiring the judge to disqualify himself for apparent bias. Before the hearing of the recusal application, the applicant applied by letter for leave to publish the transcript of the setting aside proceedings, stating that it was his wish to make public such proceedings in the interest of justice. He also applied by letter for the recusal hearing to be open to the public. The respondent opposed both applications. The judge refused the applications on the grounds that (i) there had not been any change of circumstances to justify changing the mode of hearing and (ii) publication of the transcript would not enhance the administration of justice before the availability of the decisions on the applications for recusal and to set aside. The applicant appealed against both decisions.

Held, allowing the appeal against the refusal to order the recusal hearing to be in public but dismissing the appeal against the refusal to direct publication of the transcript

An application to set aside a statutory demand would usually not be open to the public (Sch 2 of Practice Direction 25.1). However, in a suitable case, the court may order that the hearing be open to the public, for example, where the alleged debtor wished the proceedings to be conducted in public.

Open administration of justice was of fundamental importance. Unless one or more reasons could be shown that hearings should not be in public under art 10 of the Hong Kong Bill of Rights, the recusal hearing should be heard in public. The judge's reason for refusing to order the recusal hearing to be open to the public was not sound; the recusal hearing was itself an important change in circumstance. Although there was a strong likelihood that the transcript of the proceedings to set aside the statutory demand would be referred to and relied on in the recusal hearing, it should not be a reason for not hearing the recusal application in public. If necessary some limitation on reporting could be made by the judge.

The setting aside proceedings had not been concluded, pending the recusal proceedings which might result in a re-hearing. There was no urgency in having the transcript published. On the material before the court, there was no good reason to interfere with the judge's exercise of discretion.

法院及司法制度

聆訊不公開 – 是否具備適當理由 – 《香港人權法案條例》（第 383 章）第 10 條 – 《實務指示》第 25.1 條 – 民事訴訟程序 – 內庭法律程序 – 撤銷法定要求償債書 – 提出法官迴避申請 – 法官拒絕命令迴避聆訊的公開進行或是准許謄本的公布

HUANG HSIN YANG v BANK OF CHINA (HONG KONG) LTD
[2007] 4 HKC 572

上訴法庭
民事上訴 2007 年第 186 及 219 號
上訴法庭副庭長鄧國楨及法官郭美超
2007 年 8 月 10 日、17 日

楊元晶大律師（受梁鄧蔡律師事務所延聘）代表申請人。
布穎琪大律師（受梁錦濤, 關學林律師行延聘）代表答辯人。

申請人尋求撤銷答辯人向他送達的一份法定要求償債書。原訟法庭的一位暫委法官對原訴傳票進行了聆訊並押後宣告判決。申請人親自應訊，並提出迴避命令申請，以原審法官明顯存在偏見為理由，要求法官取消其在該案的審訊資格。在提出迴避聆訊申請前，申請人另以信函提出申請，要求獲得授予許可，公布與撤銷法定要求償債書的法律程序有關的謄本，並聲明基於公正目的，他希望該等法律程序公開進行。此外，他亦以信函提出申請，要求公開進行迴避聆訊。答辯人對該兩項申請均提出反對。法官拒絕接納該等申請，理由是 (i) 本案並沒有發生任何環境改變，足以支持將聆訊的方式改變，及 (ii) 在有關迴避申請及撤銷法定要求償債書的法律程序之裁決未作出前將謄本公布，並不能有助秉行公正。申請人就該兩項裁決提出上訴。

裁定 – 就原訟法庭法官拒絕下令迴避聆訊公開進行而提出的上訴得直，但就原訟法庭法官拒絕指示謄本公布而提出的上訴被駁回：

要求將法定要求償債書撤銷的申請，通常不會公開進行（《實務指示》第 25.1 條附表二）。然而，在適當情況下，法庭可以命令聆訊公開進行，例如當所指稱的債務人要求有關的法律程序公開進行時。

公開地展示秉行公正，有著其根本的重要性。除非具有一項或更多的理由，顯示根據《香港人權法案》第 10 條，聆訊不應公開進行，否則迴避聆訊應該公開進行。法官拒絕迴避聆訊公開進行的理由，並不令人信服；事實上，迴避聆訊本身已經是環境方面的重要改變。雖然關於撤銷法定要求償債書的法律程序的謄本，很可能會在迴避聆訊中被提述和倚據，但這不應作為有關迴避申請的聆訊不公開進行的一項原因。倘有需要，法官可以對報導作出若干限制。

撤銷法定要求償債書的法律程序並未完結，有待迴避的法律程序進行，並最終可能導致需要進行重新聆訊。本案並沒有急切需要將謄本公布，而根據向法庭提交的資料，亦不存在任何適當理由干預原審法官行使其酌情權。

CRIMINAL LAW AND PROCEDURE

Forgery – Making or using false instruments – Meaning of 'false' – Instrument purporting to be made in circumstances not in fact made – Whether document genuinely produced but containing lies a 'false' instrument – Need for existence of circumstance prior to making of document – Crimes Ordinance (Cap 200) ss 69(a)(vii), 71, 73

SECRETARY FOR JUSTICE v YEUNG HON KEUNG LARRY [2007] 4 HKC 397

Court of Appeal
Criminal Appeal No 359 of 2006
Stuart-Moore VP, Burrell and Barnes JJ
21 August, 6 September 2007

William Tam (Department of Justice) for the appellant.
Gary Plowman SC and Derek Chan (Fung & Fung) for the respondent.

The respondent had applied to study for the Postgraduate Certificate in Laws (PCLL) at the University of Hong Kong on a part-time basis. In order to do so, it was necessary for him to produce a letter of support from his employer. Apprehending that such a letter might be refused by his true employer, the respondent obtained a letter from the then manager of the Tai Po Hotel (the Hotel) falsely stating that the respondent was employed by the Hotel and that the latter supported the proposed study. An identical letter, save that it was signed by the respondent's sister, was also used by the respondent.

The respondent was convicted in the District Court on a number of charges. However, the trial judge acquitted the respondent on charges of using a false instrument contrary to s 73 of the Crimes Ordinance (Cap 200) (the Ordinance) and forgery contrary to s 71 of the Ordinance. The Secretary for Justice appealed by way of case stated in respect of the acquittal of these charges. At the hearing of the appeal, the critical issue was whether the two letters in question were 'false', in the sense that they were purported 'to have been ... made ... in circumstances in which [they were] not in fact made', within the meaning of s 69(a)(vii) of the Ordinance.

Held, allowing the appeal and ruling that the two letters were false instruments and were admissible in evidence against the respondent

Attorney-General's Reference (No 1 of 2000) [2001] 1 Cr App R 218 was to be applied to s 69(a)(vii) of the Crimes Ordinance. Accordingly, the letters were false. They were purportedly made in circumstances in which they were not made, as the employment of the respondent by the Hotel was a circumstance that had to exist before the letters could properly be made.

刑法及刑事訴訟程序

偽造 – 製造或使用虛假文書 – 「虛假」的定義 – 文書看來在某些情況下製造，但事實上並非在該等情況下製造 – 文件屬真實地出示但含有謊言，是否屬於「虛假」文書 – 文件製造前必須先行存在的情況 –《刑事罪行條例》（第 200 章）第 69(a)(vii), 71, 73 條

SECRETARY FOR JUSTICE v YEUNG HON KEUNG LARRY [2007] 4 HKC 397

上訴法庭
刑事上訴 2006 年第 359 號
上訴法庭副庭長司徒冕；
原訟法庭法官貝偉和及張慧玲
2007 年 8 月 21 日、9 月 6 日

譚耀豪（代表律政司）代表上訴人。
包樂文資深大律師及陳政龍大律師（受馮霄．馮國基律師行延聘）代表答辯人。

答辯人申請報讀兼讀制的香港大學法律深造證書課程。他需要提交一封函件表明得到其僱主支持方可報讀。答辯人理解到其真正僱主可能拒絕寫這一封信，於是向當時的大埔酒店經理取得信函，訛稱自己獲酒店受僱工作，而酒店亦支持他修讀上述課程。此外，答辯人亦使用了另一封內容相同的信函，唯一的分別是函件的簽署人是答辯人的姊妹。

答辯人被控數項罪名，在區域法院裁定罪名成立。然而，主審法官就答辯人違反《刑事罪行條例》（第 200 章）第 73 條（使用虛假文書的罪行）以及第 71 條（偽造的罪行），裁定答辯人罪名不成立。律政司以案件呈述的方式，就上述罪行被判無罪提出上訴。在上訴聆訊中，關鍵的問題是該兩封信函是否屬於「虛假」，即是就《刑事罪行條例》第 69(a)(vii) 條而言，它們看來是「在某些情況下製造，但事實上並非在該等情況下製造」。

裁定 – 上訴得直，裁定兩封函件都屬於虛假文書，並可被接納作為針對答辯人的證據：

Attorney-General's Reference (No 1 of 2000) [2001] 1 Cr App R 218 **乃適用於《刑事罪行條例》第 69(a)(vii) 條。因此，該等函件皆為虛假。它們看來是在某些情況下製造，但事實上並非在該等情況下製造，原因是該兩封函件被適當地製造之前，答辯人受僱於酒店的事實必須先行存在。**

EMPLOYMENT

Employees' compensation – Illegal worker – Factors to be considered in exercising court's discretion to allow recovery of compensation – Public policy considerations – Employees' Compensation Ordinance (Cap 282) s 2(2) – Coroners – Evidence – Admissibility of inquest evidence at employees' compensation trial – Whether trial judge may rely on hearsay declarations – Evidence Ordinance (Cap 8) ss 47, 49 – Admissibility – Facts in issue – Whether evidence at coroner's inquest admissible in employees' compensation proceedings – Whether trial judge may rely on hearsay declarations – Evidence Ordinance (Cap 8) ss 47, 49

YU NONGXIAN v NG KA WING & ANOR [2007] 4 HKC 551

Court of Appeal
Civil Appeal No 270 of 2006
Tang VP, Cheung JA and Lam J
6 July, 6 September 2007

Patrick Lim (Ambrose Ng & Co) for the applicant.
First respondent in person, absent.
Horace Wong SC (Gallant YT Ho & Co) for the second respondent.

The deceased, a Mainlander, entered Hong Kong on a two-way permit and was fatally injured while engaged in work for which he was not lawfully employable. The applicant was a dependant of the deceased. She brought a claim against the first respondent (Ng) for employees' compensation. Ng disputed that he was the employer.

But on the evidence before a coroner's inquest, it was concluded that Ng was the employer. Ng was uninsured. The Employees' Compensation Assistance Fund Board (the Board) was joined as second respondent on its own application. The evidence before the trial judge included hearsay declarations made by witnesses who gave evidence in the coroner's inquest but not at trial. The Board challenged the admissibility of such evidence on grounds of hearsay but it did not apply to cross-examine the makers of these declarations under O 38 r 21. The judge disregarded the declarations and dismissed the applicant's claim on the ground that she failed to prove that the deceased had been employed by Ng. Ng did not appear at trial and the Board asserted that he was not traceable.

On appeal by the applicant, two issues were to be determined: (1) whether the deceased was the employee of Ng at the material time; (2) whether the court should exercise its discretion in the applicant's favour under s 2(2) of the Employees' Compensation Ordinance (Cap 282) (ECO), which enabled the court to treat a person employed under an illegal contract as if he was employed under a valid contract. Counsel for the Board submitted that evidence at the coroner's inquest was inadmissible at trial.

Held, unanimously allowing the appeal with costs against the Board and ordering the first respondent to pay compensation to the applicant in the sum of $303,000 with interest

Whether the deceased was an employee of Ng

Whether hearsay evidence was admissible was regulated by s 47 and its weight by s 49 of the Evidence Ordinance (Cap 8). The trial judge had apparently overlooked both provisions. The declarations should not have been excluded. Insofar as the judge ignored the evidence given before the coroner, he was also mistaken.

Having regard to the evidence (both hearsay and at the inquest) on the first respondent's involvement with the demolition work on the date of the accident, the deceased was an employee of Ng and the accident had arisen out of and in the course of the deceased's employment by the first respondent.

Exercise of discretion

The focus must be first on the primary relationship of the employer and the employees. It was most important whether the employee was doing lawful work under the contract. Hong Kong was by all accounts a caring society, it would be extremely cynical and harsh to say that public policy should deprive an employee who was physically injured or killed in an accident from recovering compensation from an employer who knowingly employed him to carry out lawful work despite his lack of permission to work in Hong Kong. Irrespective of whether insurance coverage had been provided to the employees, the employer was still personally responsible for compensation.

In addition to the observations in Chung Man Yau, the court must have regard to the policy behind the legislation. If no compensation was payable, the employee would have no incentive to come forward as a potential prosecution witness and the employer was likely to get off scot-free. Further, in order to stop illegal employment, it was important to target employers. In the circumstances of the present case, there was every public policy reason to permit the applicant to recover.

Although payment by the Board would be a burden on the community, the court had to deal with the position as it stood, because the question of illegal workers in Hong Kong had become more serious. It would not offend the ordinary right-thinking citizen if the applicant was allowed to recover. Indeed, it would be conducive to serving public policy. Since the Board was formed to protect uninsured employees, it would be ironic if it had the effect of 'depriving' an uninsured employee of his claim against his employer. Having regard to all circumstances, the court should exercise its discretion in the applicant's favour.

Since the primary responsibility to compensate the employee lay with the employer, whether an employee could recover from his employer and whether he could seek payment from the Board were separate issues. Even if potential liability of the Board to satisfy the award was a relevant factor, the discretion would still be exercised in favour of the applicant.

Per curiam

As for the possible liability of the Board to pay compensation out of the fund under the Employees Compensation Assistance Ordinance (Cap 365) (ECAO), consideration should be given to amend the ECAO to provide for a second tier discretion when claims were made against the Board following the applicant's successful application under s 2(2) ECO.

僱傭

僱員補償 – 非法勞工 – 法庭行使酌情權准予追討賠償所考慮的因素 – 公共政策的考慮 –《僱員補償條例》（第 282 章）第 2(2) 條 – 死因裁判官 – 證據 – 在僱員補償案的審訊中，死因研訊證據的可接納性 – 原審法官是否可以倚據傳聞聲明 –《證據條例》（第 8 章）第 47、49 條 – 可接納性 – 所爭議的事實 – 在死因研訊中提出的證據是否可以在僱員補償法律程序中接納為證據 – 原審法官是否可倚據傳聞聲明 –《證據條例》（第 8 章）第 47、49 條

YU NONGXIAN v NG KA WING & ANOR [2007] 4 HKC 551

上訴法庭
民事上訴 2006 年第 270 號
上訴法庭副庭長鄧國楨、法官張澤祐；
原訟法庭法官林文瀚
2007 年 7 月 6 日、9 月 6 日

林敏純大律師（受伍卓達律師行延聘）代表申請人。

第一答辯人無代表律師，缺席聆訊。

黃旭倫資深大律師（受何耀棣律師事務所延聘）代表第二答辯人。

死者為內地人，持雙程證來港，在非法受僱期間，因工傷重死亡。申請人是死者的一名受養人，她向第一答辯人（吳先生）提起僱傭補償申索。吳先生否認曾是死者僱主，但根據死因研訊的證供，確定吳先生是死者的僱主。僱員補償援助基金管理

局（管理局）申請成為本案的第二答辯人。在主審法官席前提交的證據，包括證人的傳聞聲明，而他們是在死因研訊中作供，並未有在審訊中作供。管理局以這些證據屬於傳聞證據而質疑其可接納性，但它並不適用於根據第 38 令第 21 條來盤問作出該等聲明的人士。法官不理會該等聲明，並以申請人未能證明死者受僱於吳先生為理由，駁回申請人的申索。吳先生未有出席聆訊，而管理局稱無法得悉其下落。

申請人提出上訴，法庭需要就下列兩項問題作出裁定：（一）死者在關鍵時間是否吳先生的僱員；（二）法庭是否應根據《僱員補償條例》（第 282 章）(ECO) 第 2(2) 條，行使有利於申請人的酌情權，使某人雖然是在非法合約下受僱，但法庭能夠視其為有如在有效合約下受僱一般。管理局的代表律師稱，在死因研訊所提出的證據不可在審訊中被接納。

一致裁定上訴得直，訟費須由管理局支付，並命令第一答辯人向申請人支付 303,000 元的賠償連利息：

死者是否吳先生的僱員

傳聞證據是否可被接納，受《證據條例》（第 8 章）第 47 條受規限，其份量則受第 49 條所規限。原審法官很明顯忽略了上述兩項條文。該等聲明不應被排除，而原審法官忽視了向死因裁判官提交的證據，亦屬犯錯。

在審視了有關第一答辯人在意外發生當日參與拆卸工程的證供（皆為傳聞證據和用於死因研訊中）後，確定死者是吳先生的僱員，而該意外是在死者受僱於第一答辯人的期間發生。

行使酌情權

法院須先把焦點放在僱主和僱員的基本關係上。該名僱員是否根據合約受僱而從事合法工作，這一點是至關重要。我們時常都說香港是一個關懷的社會，而假如我們說根據公共政策，一名為僱主所僱用從事合法工作但在意外中受傷或死亡的僱員，由於他未獲得批准在香港工作，因此不應獲得補償，這將會是非常諷刺和無情。不管該名僱員是否獲得提供保險保障，僱主本人仍然需要對賠償負責。

除了 *Chung Man Yau* 一案的論述外，法院亦必須考慮法例背後的政策。假如僱主不需要作出賠償，僱員便不會獲得鼓勵挺身而出，成為控方證人，而僱主亦很可能得以逍遙法外。再者，為了遏止非法僱用的情況發生，將焦點放在僱主身上是非常重要的。在本案的情況中，基於公共政策，有絕對理由容許申請人得到賠償。

雖然由管理局作出支付，便意味著需要由社會來承擔有關費用，但法庭必須按實際的情況來作出處理，因為本港的非法勞工問題愈來愈嚴重，申請人如獲准追討賠償，明白事理的一般市民當不會對此有何異議。事實上，這將有助符合公共政策的目的。由於管理局的成立，是為了保障沒有投保的僱員，因此，假如它「剝奪」了未有投保的員工向僱主提出索償的權利，這將會是很諷刺的。在考慮了種種情況後，法庭實應行使有利於申請人的酌情權。

由於賠償該名僱員的主要責任是在僱主身上，因此僱員是否可以向其僱主追討賠償，以及他是否可以要求管理局作出支付，這是兩項不相關的問題。即使管理局履行判決的潛在法律責任，乃一項相關的因素，但法庭仍應行使有利於申請人的酌情權。

引用法官判詞

管理局可能有責任需要根據《僱員補償援助條例》（第 365 章）（ECAO）規定從基金中支付賠償金額，因此當申請人根據 ECO 第 2(2) 條成功提出申請而向管理局提出申索時，我們應考慮修訂 ECAO 從而令第二層次的酌情權得以行使。

LEGAL PRACTITIONERS

Solicitors – Costs in the Solicitors Disciplinary Tribunal – Complaints against solicitor dismissed by Tribunal – Whether costs to follow the event – Proper approach on costs when complaints dismissed – Legal Practitioners Ordinance (Cap 159) s 25 – Civil Procedure – Costs – Costs of solicitors disciplinary proceedings

A SOLICITOR (274/06) v
LAW SOCIETY OF HONG KONG
[2007] 5 HKC 58

Court of Appeal
Civil Appeal No 274 of 2006
Ma CJHC, Stone and Sakhrani JJ
18 July, 13, 23 August 2007

KM Chong and Shuni Yoneya (Ng, Tam, Ko & Chan) for the appellant.

Simon Westbrook SC (Lovells) for the respondent.

The appellant solicitor was one of the two respondents to complaints by the Law Society arising out of conveyancing transactions. The complaints were heard by a Solicitors Disciplinary Tribunal (the Tribunal). There were three complaints against the appellant, but only two were relevant: (i) an alleged failure by the appellant to disclose to his client, as purchaser of the properties, that the vendor was the wife of his partner in the same firm of solicitors (the first respondent in the disciplinary proceedings), and (ii) either as a partner or as a solicitor, the appellant failed to ascertain whether the properties required a Certificate of Exemption or an Occupation Permit or, alternatively, to advise his client that none had been issued. The primary dispute was who was the solicitor in charge of the transactions. All complaints against the appellant were dismissed by the Tribunal, but no order as to costs was made. The appellant appealed against the costs order. On appeal, there were two issues to be determined: (i) what approach the Tribunal should take when it dismiss the complaints before it; and (ii) whether on the facts the Tribunal was correct to make no order as to costs, notwithstanding that the complaints against the appellant were dismissed.

The Law Society argued that the Tribunal should not award costs against it in the absence of dishonesty, bad faith or unless there was good reason to do so, and, since the Law Society was a statutory body and brought proceedings in the public interest, the appellant should not be entitled to costs simply by succeeding in defending the complaints.

Held, allowing the appeal and ordering the Law Society to pay 65% of the appellant's costs before the Tribunal and on appeal

The Tribunal's approach on costs

Where there was a costs order against the Law Society of Hong Kong, it could seek reimbursement under s 25 of the Legal Practitioners Ordinance (Cap 159). That was not the position in England and Wales. Accordingly, the standard approach of the Tribunal when complaints against a solicitor were

dismissed should be that unless good reason existed, the solicitor should be entitled to an order of costs in his favour.

Considerations of public regulatory functions and/or funding circumstances of any particular regulator should not, prima facie, be regarded as determinative of the approach toward the award of costs in disciplinary proceedings. They were only factors which might be considered when exercising the broad discretion of that regulator as to costs.

The existence of regulatory disciplinary proceedings was important in promoting public trust. As a matter of principle, such proceedings should not be instituted absent most careful and rigorous considerations. In terms of the costs' position for domestic tribunals, the 'usual' rule was that of a wholly unfettered discretion on the part of that tribunal in the specific circumstances of any given case. Any variation in the fundamental approach as to costs would not assist.

If it be the case that in the absence of 'good reason' to do so, there should be no costs sanction against a regulator in the event of a successful defence of disciplinary proceedings, then s 25 would not work because it would be impossible for the Law Society to claim reimbursement of its expenses in the exercise of its powers or duties under the Legal Practitioners Ordinance.

Whether the Tribunal was correct in making no order as to costs

The appellant's failure to reveal the identity of the partner in charge until a relatively late stage in the proceedings only applied to one complaint. He should get the costs of defending the other complaints because, quite simply, he was the successful party.

法律執業者

律師 – 在律師紀律審裁組程序中涉及的訟費 – 審裁組駁回針對律師的投訴 – 訟費是否須視訴訟結果而定 – 投訴被駁回時訟費處理的適當方式 – 《法律執業者條例》（第 159 章）第 25 條 – 民事訴訟程序 – 訟費 – 律師紀律程序的訟費

A SOLICITOR (274/06) v
LAW SOCIETY OF HONG KONG
[2007] 5 HKC 58

上訴法庭
民事上訴 2006 年第 274 號
高等法院首席法官馬道立；
法官石仲廉、施鈞年
2007 年 7 月 18 日、8 月 13、23 日

莊啟文大律師及 Shuni Yoneya（受吳維喜律師行延聘）代表上訴人。

韋仕博資深大律師（受路偉律師行延聘）代表答辯人。

本案的申請人（一名律師），乃律師會就有關物業轉讓交易所作之投訴的其中一名答辯人。該投訴由律師紀律審裁組（以下簡稱審裁組）進行聆訊。律師會針對上訴人而作出的投訴共有三項，但只有兩項相關，計為：(i) 上訴人被指未能向其當事人（有關物業的買方）披露賣方實乃其律師行一名合伙人的妻子（即該紀律程序中的第一答辯人），及 (ii) 不論上訴人是作為律師行合伙人還是律師，他未能確定有關物業是否需要獲得簽發豁免證明書或是入伙紙，或是未能告知其當事人兩者皆未獲簽發的事實。本案的主要爭議是，該項交易是由哪一位律師負責處理。審裁組最後駁回針對上訴人的所有投訴，但並沒有就訟費作出頒令。上訴人就訟費令提出上訴。法庭就本案的上訴，需要對兩項問題作出裁定：(i) 審裁組應以甚麼方式駁回投訴；及 (ii) 就本案情況而言，即使針對上訴人的投訴最後被駁回，審裁組不對訟費作出頒令是否正確。

律師會辯稱，除非是存在不誠實或惡意，又或是除非具備適當理由，否則審裁組不應向律師會頒發訟費令。律師會乃一法定團體，它是從公眾利益出發來提起訴訟，因此不應因為上訴人成功地就有關投訴提出抗辯而獲判給訟費。

裁定 – 上訴得直，並命令律師會支付上訴人在審裁組及在上訴程序中百分之六十五的訟費：

審裁組處理訟費問題的取態

法庭如向律師會頒發訟費令，律師會可以根據《法律執業者條例》（第 159 章）第 25 條要求獲得償付，而在英格蘭及威爾士的情況則並非如此。因此，當審裁組駁回針對該名律師的投訴時，正確的處理方式是：除非存在適當理由，否則該名律師應獲頒有利於他的訟費令。

我們不應以公共監管職能及／或特定監管者的財政來源，作為考慮判給紀律程序訟費的取態的決定性因素，而只應是當監管者就訟費行使廣泛的酌情決定權時，可對其加以考慮的因素

為進行監管而施行的紀律程序，對公眾信心的維持是非常重要的。所須遵循的原則是，在提起有關法律程序之前，必須先作出最謹慎和嚴格的考慮。就本地審裁機構的訟費處理方式而言，「一般」的規則是，審裁機構於案件的具體情況中，享有完全不受約束的酌情決定權。要對訟費的基本處理方式作出任何更動，實際上不會帶來好處。

假如不存在如此行事的「適當理由」，則即使被告人於紀律程序中成功進行抗辯，亦不應對監管機構實施訟費制裁的話，「法律執業者條例」第 25 條便等如形同虛設，因為將不會發生律師要求償付其根據該條例行使權力或職責所招致的開支的情況。

審裁組不就訟費作出頒令是否正確

雖然上訴人只是在程序的較後階段才披露處理有關交易的合伙人身份，但這只是涉及一項投訴。他應該就該等針對他的投訴獲判給進行抗辯的訟費，而理由很簡單，因他是勝訴的一方。

Correction 更正

With reference to *HKSAR v Ng Po On & Anor* [2007] 3 HKC 59 on p 76 of the August 2007 issue: the Chinese name of the barrister who represented the 1st Appellant in the said case was misprinted as**黃志傑**; but was in fact **黃志偉**.

查登載於本刊 2007 年 8 月號第 76 頁的案件 *HKSAR v Ng Po On & Anor* [2007] 3 HKC 59，當中代表第一上訴人的大律師，其中文名稱應為黃志偉，但誤印為黃志傑，特此更正。