CACC233/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 233 OF 2013

(ON APPEAL FROM HCCC NO. 182 OF 2012)

BETWEEN

HKSAR	Respondent
and	
CHAN CHUN CHUEN (陳振聰)	Applicant

Before : Hon Lunn VP, Poon and Pang JJA in Court

Date of Hearing : 17, 18, 21-24 September 2015

Date of Judgment : 30 October 2015

J U D G M E N T

Hon Lunn VP (giving the Judgment of the Court) :

1. The applicant seeks leave to appeal against his conviction on 4 July 2013 after trial by Macrae J, as Macrae JA was then, and a jury of a count of forgery of the will of Nina Kung (Count 1), and a count of using that will (Count 2), contrary to sections 71 and 73 respectively of the Crimes Ordinance, Cap. 200 (the 'Ordinance'). In addition, the applicant seeks leave to appeal against the sentence of 12 years' imprisonment imposed on him by the judge in respect of each of the two counts, which sentences were ordered to be served concurrently.

The indictment

Count 1

2. The Particulars of Offence of Count 1 alleged that between 15 October 2006 and 8 April 2007 the applicant made a will of Nina Kung, to whom reference will be made by her married name Mrs Nina Wang, bearing the date of 16 October 2006:

> " …. which was false in that it purported to be made in the form that it was made by a person who did not in fact make it in that form with the intention that Chan Chun-chuen or another should use it to induce somebody to accept it as genuine, and by reason of their accepting it, to do or not to do some act to his own or any other person's prejudice."

Count 2

3. The Particulars of Offence of Count 2 alleged that, between 4 April 2007 and 3 February 2010, the applicant used that purported will:

> " …which was and which he knew or believed to be false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it, do or not to do some act to his own or any other person's prejudice."

The trial

4. Mrs Nina Wang was born in Shanghai. Her Hong Kong identity card stated that she was born on 29 September 1937.[1] On 29 September 1955, she married Mr Teddy Wang The Huei.[2] In the early 1960s they entered the property development business in Hong Kong. They were successful and the Chinachem Group of companies, as they came to be called, became the largest private property developer in Hong Kong.[3]

5. On 12 April 1983, Mr Teddy Wang and Mrs Nina Wang were kidnapped. Mrs Nina Wang was released and, on her raising and paying a ransom of US$11 million, Mr Teddy Wang was released.[4]

6. On 5 August 1988 the Chinachem Charitable Foundation Limited, a charitable company, was established under the laws of Hong Kong.[5]

7. On 10 April 1990 Mr Teddy Wang was kidnapped for a second time. A ransom of US$60 million was demanded for his release. Approximately half that sum of money was paid to accounts designated by the kidnappers. Following the arrest of some of the kidnappers in Taiwan, most of the monies that had been paid as ransom were recovered. However, Mr Teddy Wang was not released and was never seen or heard from again. He is presumed dead.[6]

8. In about April 1997, Mr Wang Din Shin, Mr Teddy Wang's father, applied to the High Court for leave to swear that Mr Teddy Wang was dead, so that he could apply for the probate of Mr Teddy Wang's will dated 15 April 1968, under which he was the sole

beneficiary. Subsequently, Mrs Nina Wang sought to propound Mr Teddy Wang's will dated 12 March 1990.[7] On 16 September 2005, the Court of Final Appeal pronounced in favour of the will dated 12 March 1990, in which the entire estate was bequeathed to Mrs Nina Wang.[8]

9. On 28 July 2002 Mrs Nina Wang executed a will in the presence of two attesting witnesses, namely Mr Heng Kim Thiam and Mr Eric Li Chi Ming, in which she bequeathed her entire estate to the Chinachem Charitable Foundation.[9]

The prosecution case

10. It was the prosecution case that although Mr Teddy Wang was not seen again after he had been kidnapped in April 1990, Mrs Nina Wang continued to believe that he was alive and that they would be reunited eventually. In 1992, she was introduced to the applicant who claimed to have expertise in feng shui and knowledge of the whereabouts of Mr Teddy Wang. From that time onwards the applicant provided Mrs Nina Wang with feng shui advice, which included digging holes at a number of Chinachem Group sites and received payments at her direction of about $3 billion in return.

11. On three separate occasions, namely 13 December 2005, 29/30 June 2006 and 23 October 2006, on Mrs Nina Wang's directions, three separate payments of $688 million each were made to the account of the Offshore Group Holdings Limited, which was a British Virgin Islands company beneficially owned or controlled by the applicant.[10]

12. In January 2004, Mrs Nina Wang was diagnosed with cancer.[11] In January 2005, she was advised that it was incurable.[12] She received treatment in the United States of America. Then, as her health deteriorated, she also received treatment first in Singapore in October 2005[13] and finally in October 2006 in Hong Kong[14].

13. On 16 October 2006, Mrs Nina Wang was scheduled to meet her doctors at the Hong Kong Sanatorium and Hospital. This was the first time that she had sought treatment for her cancer in Hong Kong. Before doing so she executed a document which made provision for a bequest to the applicant in the sum of money in excess of $10 million. She signed the document in the presence of Mr Winfield Wong, a solicitor, and Mr Ng Shu Mo, a long-standing employee of the Chinachem Group of companies. Each of them signed the document. She met her doctors at the Hong Kong Sanatorium and Hospital at 5:30 p.m. that day and arrangements were made for her admission on 18 October 2006 for chemotherapy treatment.[15]

14. It was the prosecution case that the document found its way into the hands of the applicant and formed the basis of the forged will, which bore the same date, propounded

by the applicant.

15. Mrs Nina Wang's health continued to deteriorate and on 3 April 2007 she died in the Hong Kong Sanatorium and Hospital.[16]

16. Following her death, the applicant produced a document which purported to be the will of Mrs Nina Wang dated 16 October 2006, in which he was stipulated to be the sole beneficiary of her entire state.[17] He said that he had been given a signed copy of the document, together with an unsigned version of the same document, in an envelope on the evening of 16 October 2006 by Mrs Nina Wang in her private quarters at Chinachem headquarters.

17. The conflicting terms of the two wills, the 2002 Will in which the Chinachem Charitable Foundation was the sole beneficiary, and the 2006 Will in which the applicant was the sole beneficiary, led to civil proceedings in the High Court. The prosecution adduced into evidence five witness statements filed by the applicant in those proceedings, together with a transcript of his evidence. Four of the statements were summarised. Also, the prosecution relied upon a video recorded interview conducted of the applicant by police officers. Finally, a summary of the evidence of the applicant in those proceedings was put before the jury. It was the prosecution case that, while some of the matters referred to by the applicant in those out-of-court statements were true, the applicant had told lies, in particular in respect of the circumstances in which he had come by the document which he propounded as the 2006 Will of Mrs Nina Wang.

18. It was the prosecution case that the document dated 16 October 2006 produced by the applicant was not the document bearing the same date signed by Mrs Nina Wang, Mr Winfield Wong and Mr Ng Shu Mo. For his part, Mr Winfield Wong said that the document that he had witnessed Mrs Nina Wang signing on 16 October 2006, which he and Mr Ng had also signed, was a single page typed document in English in which a sum of something in excess of $10 million was bequeathed by Mrs Nina Wang to a stipulated person. It was, as he described to her at the time, a "partial will". The document produced by the applicant was a different document. Both he and Mr Ng Shu Mo said that a single piece of paper had been passed between the three parties as they made their respective signatures on the document.

19. Also, the prosecution relied on the evidence of Dr Li Chi Keung of his examination of the 2006 document produced by the applicant. He said that none of the electric typewriters found in the Chinachem headquarters, which used carbon ribbons, had been used to type the document which had been produced by use of a fabric ribbon. Furthermore, there was a difference in font and size of the typescript. From the fact that

he discerned indentation marks on the unsigned draft of the will, it was his opinion that it had been beneath the signed version of the will when handwriting and signatures had been appended to the signed document.

The defence case

20. The applicant did not avail himself of his right to give evidence but he did call Dr Jonathan Whitaker in the defence case. The applicant relied on what he had said in the civil proceedings in the probate case. In particular, that he was never Mrs Nina Wang's feng shui master. Further, that the monies he had received from her during her lifetime had been given to him because of their long-standing intimate relationship, including a sexual relationship. She was anxious to improve his living conditions and for him to build up his own businesses. That very close relationship, also explained why he was named as the sole beneficiary of her will, which he had been given on the night of 16 October 2006 by Mrs Nina Wang. It was to disguise the true relationship that, at the behest of Mrs Nina Wang, he had become involved in hole-digging. The applicant pointed to two discs of video film of the two of them as evidencing their relationship.

21. Dr Jonathan Whitaker testified that low amounts of DNA were present on the 2006 Will produced by the applicant. He said that it was fair and reasonable to assume that each of Mr Winfield Wong and Mr Ng Shu Mo were contributors to the DNA he found.

Grounds of Appeal

Ground 1(a)

22. By ground 1(a) it was contended that the jury was inadequately directed in respect of their approach to the judgment of Lam J and the subsequent appeal proceedings. In particular, the judge erred in that he failed to give the most clear and unambiguous direction not to have regard to earlier judicial rulings. Further, the warnings he gave were generalized and related only to publicity, whereas, it was incumbent upon the trial judge to expressly address those earlier rulings, and indicate the different burden and standard of proof in those proceedings in warning the jury to try the case according to the evidence.

Ground 1(b)

23. By ground 1(b) it was submitted that the judge erred in admitting into evidence material from the probate proceedings, in particular admissions as to the fact of those proceedings, and the (i) statements and (ii) a summary of evidence of the applicant in those proceedings. Of (i) and (ii), it was contended that they were not 'mixed' statements, nor were they 'background', as had been contended. Rather, they were wholly self-

serving statements and, therefore, inadmissible.

24. Alternatively, it was submitted that the lies in the statements, if accepted as such, on which the prosecution relied in its closing speech were capable of establishing the propensity and characteristics of the forger and deceiver, such as to make it more likely the defendant was guilty as charged. So, the statements were capable of amounting to evidence of propensity, which evidence was inadmissible.

Ground 1(c)

25. By ground 1(c) it was submitted that, not having had the benefit of full submissions from the prosecution as to the use to which the material was to be put, which became apparent in its closing speech only, the judge erred in the exercise of his discretion to admit the evidence. It was only in its closing speech that the prosecution asserted that lies in the applicant's statements and evidence in the probate proceedings were capable of supporting the prosecution case. If the Court had been fully informed, it would have excluded the material.

Ground 1(d)

26. By ground 1(d) it was contended that, having admitted into evidence the statements and evidence of the applicant in the probate proceedings, the judge erred in preventing the defence from deploying in evidence relevant material concerning those proceedings. First, to rebut assertions, which were made subsequently, in respect of what was said to be the applicant's lies. Secondly, to support the applicant's case that there was a dishonest attempt to discredit the 2006 Will, and to deprive him of his true estate.

(i) The role of Ramesh Sujanani in the making of the draft witness statements of Winfield Wong

27. It was submitted that the judge erred in preventing the questioning of Mr Winfield Wong in respect of a draft statutory declaration e-mailed by Mr Sujanani to Mr Winfield Wong on 13 April 2007 and in ruling the document inadmissible. The e-mail was sent subsequent to a meeting on 12 April 2007 between them and Ms Fanny Cheng, a solicitor of Deacons, who had made contemporaneous notes of the conversation.

28. It was submitted that the material went to the very core of the defence case, as was illustrated by the central role it played within the probate proceedings. It was relevant to show the way the account of Mr Winfield Wong had been developed and led by Mr Sujanani and to understand how Mr Winfield Wong had come to decline to sign the declaration, in particular what he had said to Mr Sujanani and with which part of the draft

statutory declaration he took issue.

29. Further, it was capable of establishing that there were various people putting their heads together giving suggestions to him and eventually to the compromising of his evidence favorable to the Foundation.

(ii) The pleadings in the probate proceedings

30. It was submitted that the pleadings in the probate proceedings were inconsistent with the prosecution case. That was highly relevant to, and impacted on the credibility of Mr Winfield Wong and Mr Ng Shung Mo concerning the signing of the will on 16 October 2006, and all other witnesses, including Mr Joseph Leung, who gave evidence concerning the meetings of 7 April 2007, and thereafter, that the forgery was immediately apparent. It was to be noted that forgery was expressly disavowed in the pleadings in April 2008 and not alleged until 24 April 2009. Reference to the pleadings in the probate proceedings was relevant and gave context to the applicant's witness statements, which the judge had wrongly admitted into evidence.

31. Further, it was submitted that the judge erred in preventing cross-examination of Mr Joseph Leung and Mr Jonathan Midgley upon the pleadings.

(iii) The conduct of the applicant in the period after the death of Mrs Nina Wang

32. It was submitted that the judge erred in excluding admissible evidence concerning the conduct of the applicant in the period after the death of Mrs Nina Wang, and in particular his approach to the funding of members of her family. The material was relevant to the state of mind of the applicant at that time and not only rebutted the prosecution's assertion that he sought the estate for himself but also supported his account 15 months before he made the statement dated 15 November 2008 and some two years before he gave evidence in the probate proceedings. Further, it rebutted the assertions made by the prosecution subsequently as to the lies told by the applicant in his statements and evidence in the probate proceedings.

(iv) The conduct of prosecution witnesses and those acting on behalf of the Chinachem Foundation

33. It was submitted that the judge erred in refusing to permit cross-examination of prosecution witnesses on documents relating to the steps which had been taken by the prosecution witnesses to seek to negotiate the terms of the distribution of the estate of the deceased through mediation and offers of settlement of the litigation.

34. It was contended that the material was relevant to the truthfulness of the evidence of

witnesses for the prosecution at trial, in that it tended to undermine those accounts. In particular, that was true in respect for Mr Winfield Wong. If, as he maintained, he had made known to other key witnesses on 7 April 2007 in L'Hotel that the 2006 Will must have been a forgery then the simplest way to deal with it was to report the case to the police. Further, Mr Winfield Wong agreed that the majority of his statement dated 7 April 2007 was guided by Mr Sujanani. Finally, the subsequent conduct of the three siblings of Mrs Nina Wang, as the governors of the Foundation, was wholly inconsistent with Mr Winfield Wong's evidence on that issue.

Ground 1(e)

35. By ground 1(e) it was submitted that the judge erred in failing to review the exercise of his discretion to limit the prosecution to adduce into evidence the out-of-court witness statements and evidence of the applicant in the probate proceedings, or to discharge the jury, at the conclusion of the closing speech of the prosecution to the jury.

36. The multiple assertions of the prosecution in that speech that the alleged lies of the applicant in that material supported the prosecution case was inconsistent with the way in which they had argued earlier that the evidence was admissible. Furthermore, that approach had not been foreshadowed in the submissions in respect of the relevant law that had been made to the judge in respect of the prospective summing up. The prosecution was effectively seeking to establish a propensity to dishonesty in the applicant.

Ground 1(f)

37. By ground 1(f) it was submitted that, having directed the jury correctly, the judge erred in acceding to the repeated requests of the prosecution that he direct the jury that the lies of the applicant's in his statements and in his evidence in the probate proceedings, if the jury found them to be such, were capable of supporting the prosecution case. That caused prejudice and unfairness to the applicant.

38. The original direction was all that was proper or necessary in the instant case. Lies could not be supportive of the prosecution case. Any lies of the applicant in his witness statements and the summary of his evidence in the probate proceedings were incapable of independent proof beyond reasonable doubt. The circumstances identified in *Burge and Pegg* [1996] 1 Cr App R 193 did not arise.

Ground 1(g)

39. It was submitted, in the alternative, that the revised directions given by the judge to the jury in respect of the applicant's out-of-court lies were inappropriate, inadequate and

incorrect. First, if a *Lucas* lies direction was appropriate it was incumbent on the judge to identify to the jury in clearer terms the alleged lies of the applicant, in his statements and other summary of his evidence summaries, which could independently be supportive of the prosecution case. However, the judge failed to identify specifically the lies of the applicant that were capable of supporting the prosecution case. Secondly, he did not identify any possible innocent explanation for those lies. Finally, the jury was not expressly cautioned over the limited use to be made of the lies, nor directed that lies alone could not prove guilt.

Ground 2

40. By ground 2 it was submitted that the judge failed to direct the jury as to "how they should approach the defence evidence, namely the DNA evidence" in accordance with the judgment of the Court of Final Appeal in *Jim Fai v HKSAR*. In particular, it was contended that the judge had failed to direct the jury in respect of the exonerating effect of aspects of the evidence of witnesses called for the prosecution, namely:

> (i) Ms Christina Li, a forensic scientist with the government laboratory, who testified that, although she was unable to detect any human DNA on the 2006 Will, the unsigned draft or the envelope in which those documents were contained, no amplification of the samples had been performed, which technique was available in private laboratories in the United States of America and the United Kingdom; and
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> (ii) Dr Li Chi Keung, who testified of his examination of the signed version of the 2006 Will that he could neither confirm nor eliminate: Mrs Nina Wang as the author of date written beneath her signature; Mr Ng Shung Mo as the author of one of the three signatures or his identity card details. Further, of the date written next to the signature and the identity card details, his testimony was merely that it may not have been written by Mr Ng Shung Mo.

41. Then, it was contended that the judge had failed to deal adequately or at all with contradictions in the evidence of witnesses called for the prosecution, namely Mr Winfield Wong, Mr Ng Shung Mo and Mr Raymond Lau in respect of the circumstances in which the former two witnesses had attested the document signed by Mrs Nina Wang on 16 October 2006.

42. Similarly, it was submitted that the judge had failed to correct inaccuracies in the prosecution closing speech in respect of the evidence that Mrs Nina Wang had relied upon raising money by way of loans in order to make one of the three payments of $688 million

to the applicant, whereas it was the evidence of Mr Joseph Leung that there were available to her cash deposits in the bank to make that payment.

Ground 3

43. By ground 3, it was argued that the applicant's convictions were unsafe in light of the fresh evidence available now to the applicant. By a Notice of Motion filed with the Court on 13 March 2015, the applicant sought leave to adduce that evidence pursuant to section 83 V of the Criminal Procedure Ordinance, contending that it was credible, admissible and that there was a reasonable explanation for the failure to adduce the evidence at trial.

The conduct of the defence by trial counsel

44. At various stages throughout his presentation of the submissions on behalf of the applicant Mr Wood was critical of the conduct of the defence at trial conducted by Mr Kan. Frequently, he acknowledged that the judge had not been assisted appropriately in areas he described as critical and important. He said that concessions had been made orally during legal argument that ought not to have been made. The Court pointed out to Mr Wood that incompetence of counsel was not one of the multiple grounds of appeal. The matter was canvassed first before the morning break on the first day of the five days of the hearing. During the second day, Mr Wood informed the Court that he continued to reflect on the issue of seeking leave to amend the grounds of appeal to allege the incompetence of counsel. Then, he told the Court that he would seek leave to amend the grounds over the weekend. At the close of that day, he said that he would reflect on his position. During the third day he informed the Court that he did not intend to seek leave to amend the grounds of appeal.

45. In contrast to the vacillating position of Mr Wood took as to the issue of competence of counsel, Mr Wood remained critical throughout the hearing of aspects of counsel's defence of the applicant at trial. He submitted that in those circumstances the judge had a duty to ensure that the applicant had a fair trial. Similarly, he contended that the issue was relevant to this Court's consideration of whether or not the convictions were unsafe.

A consideration of the Submissions

46. At the outset, it is necessary to say something about the extraordinary delay of over 26 months from the date of the applicant's conviction to the commencement of the hearings in this Court. That delay is very largely attributable to the conduct of those representing the applicant. Although Form XI of the Criminal Appeal Rules, 221, by which the applicant gave notice of his applications for leave to appeal against conviction

and sentence, was filed with the Court on 10 July 2013[18] perfected grounds of appeal were not filed with the Court until 10 December 2014. Those grounds were refused by Lunn VP, as not in compliance with Practice Direction 4.2. Revised perfected grounds of appeal were not filed with the Court until 13 March 2015. Even that date was only met, after the applicant sought and had been granted two further extensions in which to comply with the orders of the Court.

47. Although, on 5 September 2013 the applicant had been directed to file perfected grounds of appeal within one month of that date, as a result of orders made by a Master in response to requests by the applicant the time by which the applicant was required to file those grounds was extended until 7 July 2014. In the face of a request for second extension of six months, Lunn VP granted an extension until 7 October 2014. At the applicant's request yet another extension was granted by Lunn VP until 7 December 2014.

Ground 1 (a): inadequate directions to the jury in respect of the earlier civil proceedings

The probate proceedings

48. The fact that there were contested probate proceedings which commenced in April 2007 by Chinachem Foundation in respect of the 2002 Will, in which the applicant was the 1st defendant, joined by proceedings commenced by the applicant in respect of the 2006 Will, was the subject of Admitted Facts made available to the jury, as was the fact that the trial before Lam J, as Lam VP was then, commenced on 11 May 2009 and concluded on 2 February 2010.[19] However, no reference was made to the judgment of Lam J, the Court of Appeal or the Appeal Committee of the Court of Final Appeal.

Chronology

49. Lam J handed down his judgment on 2 February 2010. He pronounced for the force and validity of the last will of Mrs Nina Wang dated 28 July 2002. He pronounced against the force and validity of the last will of Mrs Nina Wang dated 16 October 2006, propounded by the applicant. In doing so, the judge said:[20]

> " …I find that the 2006 Will was not signed by Nina and it was not attested to by Winfield Wong and Ng Shun Mo. The 2006 Will was not the document executed by Nina in the presence of Winfield Wong and Ng Shun Mo on 16 October 2006. I find that the document executed on that occasion was the Specific Bequest Will."

50. The applicant's appeal to the Court of Appeal was dismissed, as was his application for leave to appeal and his application to the Appeal Committee of the Court of Final Appeal on 14 February, 6 April and 28 October 2011 respectively.[21]

The judge's directions to the jury

51. At the outset of his summing up, the judge directed the jury in respect of the approach to be taken to the earlier civil proceedings. First, he gave the jury the standard Specimen Directions[22] to ignore irrelevant matters, including publicity and media and to determine their verdicts on the evidence that they had received during the trial:[23]

> " In approaching your task, do not be sidetracked or distracted by irrelevant matters. There has been considerable publicity given to the events which followed the death of Mrs Wang and the dispute over the validity of her will and there is no point in denying or ignoring this fact. However, nobody responsible for that publicity will have had the advantage, as you will have had, of hearing all of the evidence which has been put forward and examined and cross-examined in this trial. It is your task now to reach a verdict according to the evidence which has been called or produced in this courtroom, not according to newspaper or media reports, or opinion which you may have seen, read or heard outside of this court before or during this trial.
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> So I must repeat and emphasise that you must not decide this case on any publicity or opinion you may have seen, read or heard outside of this courtroom, because that is not evidence. You must put it out of your mind and decide this case only on the evidence you have heard in this courtroom."

52. Then, the judge addressed specifically the issue of the earlier civil proceedings:[24]

> " And that goes for anything you may have seen, read or heard about the probate proceedings. You may have heard the probate proceedings sometimes referred to during this trial by both counsel as 'the civil proceedings'. Members of the jury, civil proceedings, which include probate proceedings, and criminal proceedings are very different. *The way the two proceedings are conducted is different and their purpose is different. So whatever may have happened in the civil probate proceedings cannot affect the way you decide this criminal case.*
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> *Apart from* the evidence of the defendant in those proceedings, agreed summaries of which have been placed before you from those proceedings, and apart from the matters of fact set out between paragraphs 76 and 88 of the Admitted Facts relating to the probate proceedings, and apart from any matters which have been introduced by way of cross-examination of a particular witness as to what he or she said, or may have said, in those proceedings which was suggested to be inconsistent with his or her evidence in these proceedings, *the probate proceedings are irrelevant to this trial*." [Italics added.]

53. Immediately thereafter, the judge went on to remind the jury of his earlier directions in respect of the Internet:[25]

> " You must not consult the internet in relation to any matter in this case…you must ignore everything you may have seen, read or heard of any sort whatsoever outside of this court."

54. As Mr Perry reminded the Court, in his pre-empanelment remarks to the jury panel, the judge had warned the jury panel of the dangers of having regard to matters that they knew of through the media, directing them to disregard that information and to take into account only evidence in the courtroom. Having observed to the jury, "… you will probably, if not almost certainly, recognise the defendant and know in general terms what the allegation is in this case", the judge said:[26]

> " Now, can I make it clear that it is not necessary that jurors are completely ignorant as to the identity of the person they are about to try. If that were so, the famous could never be tried. However, when a case involving a particular defendant who has been in the public eye comes before the court, what is necessary and of fundamental importance is that jurors be and remain fair and impartial when they hear the case. That means that they must put out of their minds whatever they may have seen or heard about the case and concentrate only on the evidence they

> hear in the courtroom. They must not be prejudiced about a case because that would be to prejudge it.
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> Our system of law is careful to ensure that cases are decided on evidence only and, by that, I mean evidence produced in a courtroom. Things that are reported or gossiped about outside a courtroom are often second, third or fourth-hand hearsay and may well be inaccurate.
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> …..
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> In a courtroom, on the other hand, we hear directly from witnesses about events and the accuracy of what they say can be tested. So you will, I am sure, understand why I stress that is only the evidence you hear in this courtroom which will determine whether the defendant in this case is guilty or not guilty of the charges alleged against him. *Whatever you may have seen or heard is irrelevant to the decision you must ultimately make if you are chosen to be a juror and which you must make on the evidence you hear in this courtroom alone*." [Italics added.]

55. Again, as Mr Perry pointed out to the Court, immediately after the jury was empanelled the judge repeated those directions to the jury:[27]

> " I have already told you and I wish, now, to repeat that it is your duty to listen to the evidence and consider, and weigh, only the evidence you hear in this courtroom. That means, and I must emphasise it very strongly to you and ask you to follow this instruction, at all times, faithfully and honestly, that you must put out of your minds anything you may have seen or heard about this case, in any medium, whether television, radio, newspapers, magazines or the internet, or from any source whatsoever including your family and friends."

56. Having explained the obvious reasons for those directions, the judge repeated his directions:[28]

> " So you cannot allow anything you have seen or heard about this case, or the defendant, to play any part in the way you decide this case or in the way you approach the evidence, or issues, which arise in this case. You must come to the case as though you have heard nothing about it and decide it, solely and only, on the evidence produced before you, in this courtroom, over the next few weeks.
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> And that, in fact, is the oath or affirmation that you have just taken and you must be faithful to that oath or affirmation."

57. There was no dispute that at the trial no application was made on behalf of the applicant that the proceedings be stayed for pre-trial prejudicial publicity. Similarly, no objection was taken to the judge's directions to the jury in relation to the earlier probate proceedings.

58. In *HKSAR v Lee Ming Tee* [29] the Court of Final Appeal allowed the appeal of the HKSAR against the trial judge's order staying the trial of the respondent on two counts of conspiracy to defraud and four counts of publishing a false statement of account. One of the bases on which the judge had stayed the proceedings was that of pre-trial prejudicial publicity arising from the publication of a report of an Inspector appointed by the Financial Secretary, pursuant to section 143(1)(c) of the Companies Ordinance, Cap. 32, to investigate the affairs of a company connected with the respondent. The report was published six years before the applicant's committal for trial.

59. Although the Court of Final Appeal determined that the Inspector's report should

never have been published before the criminal trial was over, it was satisfied that, given the passage of seven years, any residual prejudice in the mind of a juror was likely to be minimal and could properly be negated by a properly conducted trial and appropriate directions to the jury. Having determined that the judge had not approached the question of whether a fair trial was still possible in conformity with principle, the Court determined that the judge's exercise of his discretion was vitiated. Having found that there was every reason to believe that the respondent would be able to receive a fair trial by an unprejudiced jury properly directed, the Court exercised its discretion against a stay of proceedings on the basis of pre-trial prejudicial publicity.

60. In his judgment, with which all the other judges agreed, Ribeiro PJ said:[30]

> " Reliance on the integrity of the jury and its ability to try the case fairly on the evidence, to put aside extraneous prejudice and to follow the directions of the judge is fundamental to the jury system itself. This was emphasised by Mason CJ and Toohey J in *The Queen v Glennon* (1992) 173 CLR 592."

61. Ribeiro PJ went on to say:

> " This also reflected Lord Avonside's views in *Stuurman v HM Advocate* (at 117) :-
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> 'It must be assumed that jurors will behave with propriety and that they will exclude from their deliberations all matters which were not given in evidence in Court in the course of a trial. If this assumption is not made then trial by jury would be meaningless in this sense, that if it were accepted that directions in law might be disregarded or disobeyed the justification for trial by jury in indictment proceedings would collapse.' "

62. Of the curative effect on the element of such prejudice of the passage of time, Ribeiro PJ said:[31]

> " There is good sense in regarding a jury, properly directed, as able to overcome prejudicial publicity in the vast majority of cases. First, with the passage of time, any recollection that a juror may have of adverse publicity can be expected to fade, lessening its prejudicial effect. This was a factor taken into account, for example, in *Stuurman v H M Advocate*, where the publications occurred less than four months before the start of the trial. Lord Justice Justice-General Emslie stated :-
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> " In considering the effect of these publications at the date of trial the Court was well entitled to bear in mind that the public memory is notoriously short and, that being so, that the residual risk of prejudice to the prospects of fair trial for the applicants could reasonably be expected to be removed by careful directions such as those which were in the event given by the trial Judge." (at 123)
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> The curative properties of a lapse of time were acknowledged by Lord Hope in the recent decision of the Privy Council in *Montgomery v H M Lord Advocate* (unreported, 19 October 2000), where he stated:-
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> " The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard." (Internet transcript at 34 of 42) "

63. Of the impact of the receipt of evidence in the trial process on the mind of a juror, Ribeiro PJ said:[32]

> " Secondly, the jury may sensibly be credited with the ability to overcome any pre-trial

> prejudice because of the nature and atmosphere of the trial process itself. Whatever impression of the case members of the jury may have gained beforehand, at the trial, they are given direct, first-hand access to the actual evidence in the case, presented systematically and in detail, with live witnesses tested by cross-examination and exhibits tendered for inspection. They are addressed as to the significance of such evidence by counsel on both sides and guided by the impartial summing-up of the judge."

64. It is clear that the scheme of the judge's directions in respect of the fact that there were contested probate proceedings before Lam J in relation to the 2006 Will reflected the approach of the parties in the trial to the issue as evidenced by the ambit of the admitted facts, which were restricted to the fact of such a trial without reference to the judgment at First Instance or in the appellate courts. Also, it was consistent with the use made by those representing the applicant of the testimony of witnesses called by the prosecution and those representing the prosecution of the testimony of the applicant in the earlier probate proceedings. So, those matters were plainly and squarely before the jury. No doubt, that is why the judge directed the jury, as noted earlier, that in respect of other matters "…the probate proceedings are irrelevant to this trial." [33] Resonating with that direction, was his earlier direction, "The way the two proceedings are conducted is different in their purposes different. So whatever may have happened in the civil probate proceedings cannot affect the way you decide this criminal case." [34]

65. The complaint made to this Court that the judge did not direct the jury "not to have regard to earlier judicial rulings" in respect of the probate proceedings was not one made to the judge. That is not surprising, since it is clear that the parties at trial were at one in avoiding reference to the judgments of the courts in the trial or on appeal. To have given the direction would have been to focus attention on an issue which it is clear that those representing the applicant to trial were content be avoided by the parties and the judge. In any event, clearly the judge directed the jury, for the purposes of their deliberations, to ignore "whatever may have happened in the civil probate proceedings."

66. Given that over 18 months had elapsed since the decision of the Appeal Committee of the Court of Final Appeal a significant period of time intervened between such prejudicial material as might have been published pre-trial before the commencement of the trial. We are satisfied that the judge's forceful directions to the jury to ignore such information and material that might be known to them and to concentrate on the evidence led before them a trial were entirely appropriate. The directions had the merit of being simple, unambiguous and readily understandable. There is no reason to doubt the jury would not have complied with those directions. In that context, the observations of Lord Hope in his judgment in the Privy Council, with which Lords Slynn, Nicholls and Hoffman agreed specifically, in *Montgomery v H M Lord Advocate* are apposite:[35]

> " The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections that may exist about reports about the case in the media."

There is no merit in this aspect of this ground of appeal.

Ground 1(b)

67. Objection was taken at trial on behalf of the applicant to the prosecution adducing into evidence material from the probate proceedings: namely, an edited version of the applicant's witness statement dated 5 November 2008; summaries of four other witness statements of the applicant; and a summary of the applicant's oral testimony in those proceedings. It was contended that they were: (i) not 'mixed' statements; (ii) that what the prosecution asserted were the applicant's lies were capable of establishing his propensity as a forger and deceiver; (iii) that the judge did not have the benefit of full submission as to the use proposed by the prosecution of the material; and (iv) with the benefit of such knowledge the judge would have excluded the material.

68. As Mr Perry submitted, there was no dispute that the applicant had elected to file his witness statements with the Court and to give oral testimony in the probate proceedings.

The judge's ruling

69. As the judge noted in his ruling[36], the primary basis of objection was that the evidence was inadmissible as hearsay. It was asserted that to allow the evidence to be adduced was to allow evidence of the propensity of the applicant. It was contended that the witness statement and the applicant's oral testimony were "…wholly exculpatory and provide no proof, for the prosecution of any facts in issue in this trial".

70. Of the question of the relevance of the material, the judge said that there was "no real issue". Having noted that the testimony and statements of the applicant produced in the civil probate proceedings went to the issue of the genuineness of a document purporting to be the will of Mrs Nina Wang dated 16 October 2006, the judge said:[37]

> " The alleged falsity of that very same document is now at the heart of these criminal proceedings. What the defendant said about the document in those proceedings is clearly relevant to the issue of the alleged falsity of the document in these proceedings.."

71. Of the broad nature of the applicant's statements and testimony, the judge said:[38]

> " In that account, the defendant describes, inter alia: how he met the late Nina Kung; how their relationship developed into one of intimacy and trust; how he was able to gain ready and constant access to her office and living quarters; how, on 16 October 2006, he came into possession of the impugned documents including the will which is the subject matter of these proceedings; why she left her entire estate to him; and how, following her death, he handed over the impugned documents to his solicitor on 5 April 2007."

72. Having regard to the nature of the material, the judge said:[39]

> " In my judgment, the statements and evidence in the probate proceedings, the more relevant effects of which I have briefly just summarised, plainly amount to admissions of relevant facts such as possession and use of the impugned document at dates which are identified but they also deal with a wealth of background circumstances from which it might be inferred that there was motive - perhaps, incentive is a more appropriate word - means and opportunity for the forgery."

73. Of the reliance that the prosecution sought to place on the material, the judge said:[40]

> " The prosecution rely, therefore, amongst other things, on what the defendant said and did during the probate proceedings as evidence on Count 2 of the use of the alleged false instrument with the requisite intent."

74. In the result, the judge determined:[41]

> " Furthermore, if a defendant has put forward an account which the prosecution contends, for various reasons, is implausible or incredible, they are surely entitled to put that account forward as evidence which supports the prosecution case that the will is false and that it was made or used with the requisite intent averred in each count.
>
> I cannot accept that the prosecution, by seeking to demonstrate that the exculpatory part of a mixed statement is implausible or incredible, have effectively created evidence of the defendant's propensity, in the sense in which that term is used in the authorities.
>
> In my judgment, the evidence which the prosecution seek to produce is not inadmissible hearsay. They are entitled to lead it as part of their case for the reasons I have stated. That leaves the question of my discretion to exclude otherwise admissible evidence."

75. Of the issue of the exercise of his discretion to exclude the evidence, the judge said:[42]

> " In my view, the probative value of this evidence is not outweighed by any prejudicial effect. The prosecution are entitled to make use of this evidence in proof of their case and I see no unfairness in their doing so. Accordingly, I see no reason to exercise my discretion to exclude this evidence."

76. In the judgment of the Court of Appeal of England and Wales delivered by Lord Parker CJ in *R v McGregor*[43], the issue of the admissibility of the evidence of the applicant given in an earlier trial at a subsequent trial on the same indictment was addressed. The applicant faced a charge of receiving stolen property. At the first trial, he gave evidence and admitted that he had possession of the property. At the retrial, the prosecution was permitted to lead evidence to that effect. In rejecting the submission that the evidence was inadmissible and dismissing the appeal, Lord Parker CJ said:[44]

> " It was in the nature of an admission or a confession made at the earlier trial on oath, and it is clearly evidence of possession, one of the relevant matters which the prosecution have to prove…in principle, as it seems to this court, there is no ground whatever in such a case why the prosecution should not give that evidence."

77. The rule in *Hollington v Hawthorn &* Co [45], namely that as a matter of principle a

judgment of one court is irrelevant and inadmissible in proceedings conducted by another court, is not in point.

Mixed statement

78. There is no dispute that an out-of-court statement of a defendant, which is 'mixed' in nature, namely including exculpatory and inculpatory statements, is admissible at the behest of the prosecution in the trial of the defendant.

79. The question of how to identify the nature of admissions which can be described as 'mixed' rather than only 'exculpatory' was addressed by the Court of Appeal of England and Wales in *R v Garrod*. [46] As the judge noted in his ruling, in the judgment of the Court Evans LJ said:[47]

> " We would hold that where the statement contains an admission of fact which are significant to any issue in the case, meaning those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt, then the statement must be regarded as "mixed" for the purposes of this rule."

80. As the judge noted, the applicant's statements and testimony in the probate proceedings were relevant to Count 2, in which the applicant was alleged to have used the 2006 Will with the intention of inducing somebody to accept it as genuine and by so doing to act to his or their prejudice. In that context, he noted that:[48]

> "The prosecution rely, therefore, amongst other things, on what the defendant said and did during the probate proceedings as evidence on Count 2 of the use of the alleged false instrument with the requisite intent."

81. We are satisfied that, in those circumstances, the judge was correct to conclude that:[49]

> " …if a defendant has put forward an account which the prosecution contends, for various reasons, is implausible or incredible, they are surely entitled to put that account forward as evidence which supports the prosecution case that the will is false and that it was made or used with the requisite intent averred in each count."

82. Further, we are satisfied that Mr Perry was correct in his submissions[50] that the reliance by the prosecution on statements made by the applicant in the probate proceedings as being lies had nothing to do with the applicant's propensity or bad character. There is no merit in this aspect of this ground of appeal.

The respondent's reliance upon the applicant's statements as lies

83. Of the submissions made on behalf of the applicant that, in the arguments advanced on behalf of the prosecution that the statements and oral testimony of the applicant in the probate proceedings be admitted in the trial, it was not made clear that it was intended to rely on them as being lies, Mr Perry invited the Court to have regard to the written and

oral submissions advanced to the lower court.

84. In his written Respondent's Submissions, filed with the Court on 15 April 2013, Mr Perry, described the reliance that the prosecution proposed to place on the statements and oral testimony of the applicant in the probate proceedings as being that, "…what the defendant had to say on the basis that his account of events (although self-serving), is inherently implausible." [51] Earlier, Mr Perry said that evidence might properly be considered "…'mixed', in the sense that although it represents his case, the Prosecution would seek to rely on what he had to say as part of the relevant background to the allegations contained in the indictment." In his oral submissions, Mr Perry said:[52]

> " …to a very large extent, I will be contending, in due course, *its untrue*." [Italics added.]

Ground 1(c)

85. Of the submission advanced by Mr Wood, that the judge was deprived of an informed opportunity to exercise his discretion in respect of the admission into evidence of the statements and oral testimony of the applicant in the probate proceedings, it is to be noted that, as Mr Perry pointed out, in his ruling the judge had noted that the prosecution contended that the applicant's account was "implausible or incredible". Further, that he determined that in those circumstances they were entitled to:[53]

> " …put that account forward as evidence which supports the prosecution case that the will is false and that it was made or used with the requisite intent averred in each count."

86. Clearly, the judge was aware that the prosecution intended to invite the jury to conclude that the applicant had lied in his account of events in the probate proceedings and, more particularly, that was evidence which supported the prosecution case that the will was false and made/used with the requisite intent.

87. Next, again as Mr Perry pointed out, in the prosecution opening its stance in respect of the applicant's statements and oral testimony in the probate proceedings was made clear:[54]

> " What the prosecution say is that when he gave evidence, in the course of those proceedings, I regret to say he did not tell the truth. *I regret to say that he lied and he lied, say the prosecution, about a number of matters* and, in particular, he lied about the circumstances in which he said he came to be in possession of that will which we've looked at behind divider 6." [Italics added.]

88. Later in his opening, Mr Perry stipulated matters that he said were lies by the applicant in his evidence in the probate proceedings. In respect of the applicant's assertions that he was not Mrs Nina Wang's feng shui adviser, he said:[55]

> " And then he says this. He says he pretended to be a fung shui adviser but that was just a

> pretence, a façade, a device designed to conceal the true nature of their relationship, and he said that by pretending to be a fung shui adviser the two of them, Nina Wang and the defendant, could stay close to each other without arousing any suspicion. So this was to mislead the world, to put up a misleading front to the world.
>
> Well, the *prosecution say that that is simply untrue*. It's inconsistent with the other evidence in the case…" [Italics added.]

89. Mr Perry went on to say:[56]

> " Well, the prosecution say that whatever the precise nature of their relationship,…… It may well be that the defendant and NinaWang had a very close relationship, but whatever the precise nature of the relationship, one thing the prosecution say is clear: he was providing fung shui advice and *he has lied about that, and if he's lied about that, you will want to ask why has he lied.*" [Italics added.]

90. Then, Mr Perry suggested the reasons that the applicant had lied about providing feng shui advice and related services to Mrs Nina Wang:[57]

> " Now why would the defendant not want to tell the truth about his involvement in digging holes? Well, …….. the prosecution case is; the defendant clearly wants to distance himself from the activities in support of his claim that the will that he produced after Mrs Wang's death was given to him properly, lawfully, genuinely, really out of love and affection."

Conclusion

91. We are satisfied that the prosecution had made it plain from the outset that it relied on what it is alleged were lies in the statements and testimony of the applicant and the probate proceedings are supporting its case. Further, the judge understood that to be the case. As Mr Perry submitted, it is to be noted that at no stage did counsel for the applicant asked the judge to reconsider his ruling admitting that material. Similarly, no complaint was made to the judge by counsel for the applicant about the use of the prosecution made of the material.

92. There is no merit in this ground of appeal.

Ground 1(d): conflict that the judge prevented the defence from deploying material in its defence

Draft statutory declaration in the name of Mr Winfield Wong and the notes of Ms Fanny Cheng

93. Mr Wood submitted that the judge had "wrongly prevented" counsel for the applicant from producing to Mr Winfield Wong in cross-examination a draft statutory declaration attached to an e-mail dated 13 April 2007 sent to the latter by Mr Sujanani.

94. In context, the e-mail followed a meeting on 12 April 2007 between Mr Winfield Wong, Mr Sujanani, Ms Fanny Cheng, a solicitor of Deacons. Mr Winfield Wong said that during the meeting he had been questioned by Mr Sujanani about the circumstances

in which he had attested a partial will signed by Mrs Nina Wang on 16 October 2006.

95. At the meeting at L'hotel on 7 April 2007, attended by Mrs Nina Wang's three siblings, Mr Joseph Leung and Mr Sujanani, Mr Winfield Wong said that he had been presented with a copy of the will propounded by the applicant and questioned about the circumstances in which he had attested the partial will signed by Mrs Nina Wang on 16 October 2006. In particular, he was questioned by Mr Sujanani, who made notes. At Mr Sujanani's direction a typed version in the form of a statement was prepared and presented to Mr Winfield Wong, which he signed on 7 April 2007 as being true.[58] He agreed that the document reflected what he had told Mr Sujanani.

96. Later, Mr Winfield Wong met Mr Sujanani at the Chinachem offices, having been told by the latter that he wished to take a statement from him. He answered Mr Sujanani's questions about the circumstances in which he had attested the partial will and the differences between that document and the 2006 Will propounded by the applicant, whilst the latter compiled a manuscript narrative account of the events.

97. It was Mr Winfield Wong's evidence that he had received the e-mail dated 13 April 2007 and the attached draft statutory declaration from Mr Sujanani.[59] However, he did not sign the draft statutory declaration. When the document was put in the hands of the witness and he was asked to confirm the date of its transmission, Mr Perry indicated to the judge that there may be "…a question of law" arising. Having confirmed that he had given witness statements to the police about the e-mail, Mr Winfield Wong was asked if he had provided reasons why he did not sign the statutory declaration. There followed an exchange between counsel and the judge, in which the judge said that if the rules of evidence were engaged the Court was to be addressed. Then, it was suggested to Mr Winfield Wong that during the probate proceedings he had been shown typed notes made by Ms Fanny Chiang and counsel for the applicant sought to provide the witness with some documents [60]. The judge intervened:[61]

> " COURT: Well, hold on. What is the provenance of this? This is not his document, is it?
>
> MR KAN: No.
>
> Q. First of all, can you go to ...
>
> COURT: Well, no, no, no. I don't think he can be asked about a document -- I mean, he may have seen it in the probate proceedings but *he can't be asked about a document made by somebody else*." [Italics added.]

98. Having been given a copy of his statement dated 7 April 2007, Mr Winfield Wong confirmed that it did not contain an assertion that the partial will he attested on 16 October 2006 contained a stipulation as to a specific sum or reference to the name "Mr Chan".[62] That was inconsistent with what he had asserted in his evidence-in-chief,

namely that "a certain sum of money would be given to a named person."[63] Then, counsel suggested to him that that he had not mentioned either of those matters to Mr Sujanani in the conference of 12 April 2007. Mr Winfield Wong said that he thought he had mentioned that a sum of money was stipulated that he could not remember if he had named person.[64]

99. Next, the following interchange ensued:[65]

> " Q. Subsequent to the meeting, that is the day after the conference you had, Mr Sujanani; Mr Sujanani emailed to you a document, did he not?
>
> A. Yes.
>
> .....
>
> COURT: ….. Just to remind you, you've already explained you've received an email at 12.37, just after mid-day, on the 13th, which was the day after the meeting.
>
> A. Yes.
>
> Q. Remember you told the police officer about this document.
>
> A. I don't quite remember.
>
> Q. Do you remember telling the police officer why you didn't sign on this document?
>
> INTERPRETER: Shall I put the question?
>
> COURT: *What has that got to do with the consistency or inconsistency of the statement?*
>
> MR KAN: Yes. Because I was going to ask him more specific questions about things that didn't mentioned.
>
> COURT: Well, put those to him. You're entitled to put -- *if you have a statement which is inconsistent with any witness' evidence, you're entitled to put matters.*…..
>
> COURT: *Provided you've laid the ground work.*
>
> Q. First of all, in that document sent by Mr Sujanani to you, ...
>
> MR PERRY: Sorry. I'm sorry, my Lord. As I understand it, that document was not approved by the witness and, therefore, to put a document which the witness himself does not accept is accurate would not be ...
>
> COURT: I don't know anything about that one. This is the emailed one.
>
> MR PERRY: Yes. My Lord, the position is that the -- as I understand it, that the witness didn't accept that it was accurate and I've no objection to my learned friend putting positive assertions to this witness, but *what he shouldn't do is put to the witness a document that this witness has not approved ...*
>
> COURT: *On the basis that he says this -- that it's put to him that this is what he had said.*
>
> MR PERRY: Yes, yes.
>
> COURT: Yes.
>
> MR PERRY: Otherwise, there's going to be some confusion.
>
> COURT: Thank you, right. I haven't myself seen this document. If I have, it was a long time ago. But I think, Mr Wong, you're being asked about a document that was emailed to you by Mr Sujanani consequent upon your meeting with him.
>
> A. Yes.
>
> COURT: Do you remember whether you did anything with that document?

A. I don't exactly remember it.

COURT: Well, did you ...

A. It seems that he did send me a statutory declaration.

COURT: Did you sign it?

A. No.

COURT: Mr Kan.

Q. Why did you not sign it?

A. Because, for many things that he had put down, I disagree with them.

Q. Tell us about the things that you didn't agree.

COURT: Well, from memory?

Q. Perhaps I'll show you that document; you looked at it ...

COURT: Ah. I don't think this is the right way to do it, Mr Kan, with respect. But I want to understand what this document is, so, perhaps, you'd ... ... give it to me."

100. In the absence of the jury, further discussion stood between the judge and counsel. Having given an illustration of how an advocate might succeed in putting into evidence an inconsistent statement of a witness, the judge said:[66]

" COURT: ….How do you propose to get it in, how do you propose to get what somebody else has recorded in statement form for him which he has not acknowledged? How do you propose that can be put to him, on what basis?

MR KAN: Now, actually, I was going through to ask him about his statement to the police about this document. He was asked about this.

…

COURT: Just give me the -- I want to try and understand, *I don't want to stop you but I want to understand that you can do it within the rules*. So, give me a flavour of what you want to put to him." [Italics added.]

101. Counsel for the applicant went on to explain that enquiries had been made of Mr Winfield Wong in witness statements he made to the police:[67]

" MR KAN: … He was asked about it by the police, as to why didn't he signed it; he gave reasons for that.

COURT: Yes.

MR KAN: And he was then asked, also in police statements, what happened next after the statutory declaration, this draft. And then, what went on subsequent to the investigation was that there were to-and-fros discussions. More importantly, I want to bring out the discussions subsequent to the statement of 7 April; he was still discussing about the 2006 one.

COURT: Without the detail, I don't really know but I would have thought you are not entitled to put to a witness a draft by -- it's the same Fenny Cheung point.

MR KAN: That's right, yes.

COURT: *You're not entitled to put what somebody else has recorded, which has not been confirmed or approved by the witness to whom it's been put, as if it was said by him and is, ...*

MR KAN: Or signed by him.

> COURT: ... *therefore, inconsistent with his evidence*; I don't think you can do it. It's as simple as that. However, you are entitled to explore the matter to some extent but I am not quite sure what you're exploring, so it's difficult for me to say at the moment. What are the discussions with the police? He's asked why he doesn't sign this and, as a result, what?
>
> MR KAN: And he gave certain areas which he didn't agree with."

102. It was in those circumstances, that the judge gave a short ruling:[68]

> " Well, I think, Mr Kan, you've heard what I say about the limited way that you may use this document but what *you may not put to him is that this is a previous inconsistent statement*." [Italics added.]

103. As is clear from the judge's ruling, the judge addressed the issue of the material being used only as a previous inconsistent statement of Mr Winfield Wong. It not having been adopted by Mr Winfield Wong, clearly the judge was correct to rule that it could not be used in that way. At no stage, did Mr Kan inform the judge, as has been suggested in the Skeleton Submissions of the Applicant, that the purpose of the cross-examination was to evidence the fact that "the account of Winfield Wong had been developed and led by Mr Sujanani"[69], for which purpose it was necessary to receive his evidence of what he had told Mr Sujanani and to invite Mr Winfield Wong to indicate what he disagreed with in the draft declaration, as a result of which he had declined to sign a document. Certainly, it was not suggested to the judge, as was suggested to this Court, that the evidence was relevant to the issue of whether or not there were, "various people putting their heads together giving suggestions to him and eventually to the compromising of his evidence favourable to the Foundation." [70]

104. Obviously, the judge could only rule on the basis of the argument presented to him by Mr Kan. Insofar as he was assisted with any argument at all by Mr Kan, and not much was advanced before him in fact, we are satisfied that his specific limited ruling was correct. Clearly, that ruling did not prevent or inhibit the suggestion being made to Mr Winfield Wong, if it was the defence case, that the draft statutory declaration of 13 April 2007 did not reflect what he had told Mr Sujanani the previous day, rather it contained a suggested version of events favourable to the Foundation, which the witness was being enjoined or cajoled into accepting. Conversely, if it was the defence case that Mr Winfield Wong had made oral statements to Mr Sujanani, reflected in the draft statutory declaration, that was a matter that could have been put to Mr Winfield Wong. If the witness denied making those oral statements, then it was open to the defence to call Mr Sujanai to rebut that evidence. Similarly, it was open to the defence in those circumstances to call Ms Fanny Chiang to rebut Mr Winfield Wong's evidence.

105. The written statutory declaration and the notes of Ms Fanny Chiang were not documents acknowledged and adopted by Mr Winfield Wong. So, they could not be used

as prior inconsistent statements to contradict Mr Winfield Wong. However, they were available to be used to refresh the memories of Mr Sujanani and Ms Fanny Chiang in the event that they gave oral testimony in the defence case.

Ground 1(d)(ii)

106. It was submitted that the judge wrongly refused to allow counsel for the applicant to make reference to the pleadings filed by the Foundation in the probate proceedings in cross-examination of Mr Joseph Leung and Mr Jonathan Midgley. At issue, was the fact that no allegation of forgery of the 2006 Will propounded by the applicant was made in the pleadings of the Foundation until 24 April 2009, notwithstanding the fact that in April 2007[71] the Foundation had sought an order of the Court that the 2002 Will was the last will of Mrs Nina Wang and the applicant had counterclaimed for an order declaring the validity of the 2006 Will.

107. In the Replies and Defence to Counterclaims dated 22 February 2008 the Foundation stated simply that the applicant was put to strict proof that the 2006 Will was duly executed by Mrs Nina Wang and was her last will and that it was not admitted that it was signed by her in the presence of the two witnesses.[72] On the other hand, it is to be noted that by paragraph 1 of those pleadings the Foundation stated that the pleading was drafted before the "Plaintiff has inspected the alleged 16 October 2006 Will" and asserted that they reserved the right to amend pleadings after inspection had taken place.[73]

108. For his part, Mr Wood submitted that the absence of an averment of forgery in the initial pleadings of the Foundation was inconsistent with the evidence of Mr Winfield Wong and the assertions that he had made him in his witness statement dated 7 April 2007, namely that the 2006 Will was not the document that he had signed on 16 October 2006.

109. In context, it is to be noted that having been filed with the Court on 16 November 2007, the 2006 Will was released on 4 December 2008 by order of Lam J to Haldanes, the applicant's then solicitors, after which it was in the possession of the legal representatives of the applicant and the foundation for forensic examination in the period 4 December 2008 to 9 June 2009.

110. On 24 April 2009 the Foundation pleaded forgery in its Re-Amended Replies and Defence to Counterclaims.[74]

111. In cross-examination on behalf of the applicant, Mr Joseph Leung agreed that he knew that the Foundation had started a civil action against the applicant in probate proceedings and that he had read the Foundation's Statement of Claim. In context, it was

his evidence that he had been a director of one or more of the Chinachem Group of companies since 1987 and that he had been a governor of the Foundation since April 1990.[75] Then, the following interchange ensued between counsel and the judge:[76]

> " Q. Yes. No claim of false document, is it?
>
> MR PERRY: I'm sorry, my Lord, but -- I'm not going to prevent my friend from investigating anything that he thinks is relevant for the jury's consideration but it is not for this witness to be asked about the pleadings, in other words, the formal legal documents that were prepared by lawyers.
>
> COURT: Yes. I agree, Mr Perry.
>
> Mr Kan, you'll be able to obtain this information, if it's not already included somewhere, as part of your case and you will be able to make that point, in due course, to the jury but elicit from the witness, if you would, facts relevant to your case. And I don't think it is appropriate or fair to ask him about legal documents - what is in it, what is not in it, why it's not in it, or whatever. You've -- that will become an issue as the trial unravels with other relevant evidence or witnesses but it's not a matter for this witness.
>
> MR KAN: Yes. Perhaps I'll deal with facts, the facts of the case.
>
> Q. Facts of the case, Mr Leung. Sometime in the year of 2007, facts of the case is, did the governors of the trust decided to settle the case with defendant?"

112. Again, Mr Perry objected, this time on the basis that what was sought was "irrelevant opinion evidence as to what was a possible course open to the governors in the civil proceedings." For his part, Mr Kan confirmed that he wished to pose the question and asserted that it was "totally relevant." The judge said simply:

> " COURT: Well, I'm against you on it."

113. During his cross-examination of Mr Midgley, in the absence of the jury, counsel for the applicant outlined to the judge a question that he proposed to ask Mr Midgley, clearly relevant to the absence in the initial pleadings of the Foundation of an averment of forgery in respect of the 2006 Will:[77]

> " It's in the year 2008, 28 March. The question I propose to ask Mr Midgley was, on that date, he had made specific inquiries to Johnson Stoke & Master whether forgery is alleged. The answer coming back from Johnson Stoke & Master, on 28 April 2008, was, at that stage, "No"."

114. In response to the judge's question, "What is the relevance of what the solicitors think?" counsel responded that it was a factual matter raised by Mr Midgley, "whether the contention, on 28 March 2008, whether …forgery was the contention made by the other party." Notwithstanding counsel's assertion that the matter was important, the judge ruled:[78]

> " But I am against you on that. I am not saying that it might not be adducible in the sort of circumstances that I've just recounted, if cross-examination were to take a particular form but, at this stage, I can't see its relevance."

115. Given that Mr Joseph Leung was a long-standing director of companies in the very

substantial Chinachem Group of companies and a long-standing governor of the Foundation, of which he was one of only five governors in April 2007, on its face he was likely to be in a position to deal with the questions, at least broadly, in respect of the litigation with the applicant. If not able to do so, it was to be expected that a man in his position would say so. It is to be noted that such questions as were asked of Mr Joseph Leung on this issue related to the fact that the Foundation had started an action against the applicant. Clearly, that was the Foundation's application to the Court in respect of the 2002 Will. His response in the affirmative was to the question of whether or not he had read that statement of claim. It was in that context that counsel framed the question "No claim of false document, is it?"

116. Although Mr Wood has focused the attention of the Court on the Foundation's Re-Amended Replies and Defence to Counterclaims, the attention of neither the witness nor the judge was drawn to those pleadings. Similarly, although Mr Wood has submitted that the issue which Mr Kan wished to canvas was the fact that the Foundation had not averred that the 2006 Will was a forgery until April 2009, no such submissions were made to the judge. On the other hand, the objection of Mr Perry to the question, with which the judge agreed, was generic, namely that it was not for the witness "to be asked about the pleadings".

117. If Mr Joseph Leung had indeed read the pleadings, and not only the Foundation's Statement of Claim, an obvious answer to counsel's question lay in paragraph 1 of the Re-Amended Replies and Defence to Counterclaims in its initial form, namely that, not having inspected the 2006 Will "the Plaintiff reserves the right to plead further after such inspection has taken place." [79] As noted earlier, it was after that inspection had taken place that the pleadings were amended to aver the forgery of the 2006 Will.

118. If on the other hand, albeit that he was one of the five governors of the Foundation on whose behalf the litigation has been conducted, he did not know why an averment of forgery was not made until April 2009, perhaps on the basis that it was a matter for the Foundation's lawyers of which he was unaware, then no doubt he would have said so.

119. In face of the judge's statement that "I don't think it is appropriate or fair to ask him about legal documents" and the suggestion that the matter might be raised with other witnesses, the judge received no submissions at all from Mr Kan as to why it was that Mr Joseph Leung was in a position to answer his question or any intimation of the objective of the line of questioning, now suggested by Mr Wood. Nor did Mr Kan pursue the issue of the viability of the judge's invitation to question other witnesses on the subject. Although Mrs Nina Wang's three siblings also gave evidence for the prosecution,

they were appointed as governors of the Foundation only days before her death. Mr Joseph Leung had been a governor for many years prior to them. If not Mr Joseph Leung, who was he to question?

120. Nevertheless, we are satisfied that Mr Kan ought to have been permitted to pursue that line of questioning with Mr Joseph Leung.

121. With respect to Mr Kan, the formulation of his proposed question for Mr Jonathan Midgley was bizarre. Given that in his proposed question he referred to the date of 28 April 2008, it is clear that he had in mind the response of the Foundation of that date to a Request for Further and Better Particulars made by the applicant. Had the question been formulated in that way, it was clearly permissible and the judge would not have been distracted in referring to the relevance of what solicitors think. The assertion in those pleadings, in response to the question of whether or not it was alleged that the will was a forgery, that "in advance of its inspection of the alleged 2006 Will, no such allegation is made of the date hereof" was clearly admissible through the evidence of the applicant's then solicitor.

122. We are satisfied that the topic on which Mr Kan wished to question Mr Midgley was a legitimate one to pursue in cross-examination. Again, we are satisfied that, with respect to him, Mr Kan's inapt way of going about his question and his failure to draw the judge's attention to clearly relevant matters played a large part in the fact that the judge declined to permit him to pursue his question.

123. Although we are satisfied, as stated above, that Mr Kan ought to have been permitted to pursue his line of questioning of both Mr Joseph Leung and Mr Midgley, the forensic advantage of doing so was of limited benefit, given that there was a ready and obvious answer, as noted earlier, as to why forgery was not averred at the outset in the pleadings.

Ground 1(d)(iii) - payments by the applicant to the family of Mrs Nina Wang

124. In the course of cross-examination of Mr Midgley, Mr Kan sought to adduce into evidence e-mails and supporting documents between Haldanes and family members of Mr Teddy Wang, in respect of provision of monies to them for their maintenance in the period June 2007 to January 2008. The e-mails spoke to requests for such financial support, which hitherto had been provided by Mrs Nina Wang, and affirmative responses made on behalf the applicant by Haldanes together with supporting documents which evidenced payments to a total of $697,580.

125. Mr Perry objected to the evidence being led on the basis that, "this previous reporting consistent statement, i.e. acting consistently with the terms of the will, is neither

here nor there so far as the jury's consideration is concerned, so it's irrelevant." [80]

126. For his part, Mr Kan responded:[81]

> " Firstly, in answer to the previous consistent statement point, it isn't a statement, my Lord: it's a course of event not initiated by the defendant, as you can see from the correspondence."

127. In the context of the evidence advanced by the applicant in the probate proceedings, which was before the jury, to the effect that apart from being named as the beneficiary in the 2006 Will, Mrs Nina Wang had asked him orally to ensure the ongoing maintenance of family members, Mr Kan submitted to the judge of the jury:[82]

> " They will obviously ask one question: "If what the defendant has said in his statements were true, what did he do? Had he done anything further to support that?" And this, we say, my Lord, is the evidence."

The judge's ruling

128. In his ruling, the judge addressed the issue of whether or not the material was a statement or a course of conduct:[83]

> " When analysed, the evidence which the defence seek to get in through this witness is not of conduct but of statements which the defendant must have made to the witness and the witness then relayed on the defendant's behalf to the inquiring party."

129. Then, the judge went on to say:[84]

> " …the statements made in the emails are consistent with the defendant's position that the will was genuine.
>
> Although it is true that there was no criminal case at this time nor, it seems, any specific allegation of forgery, nevertheless the matter was very much up in the air with this particular will clearly and already the subject of dispute. In those circumstances, it might be said that the defendant had to do exactly what it is said in those emails he would do. To have done anything else would have been to seriously compromise or undermine his position in relation to the validity of the will."

130. In the result, the judge ruled:

> " …these statements, whilst, on the face of it, superficially relevant, are inadmissible because they are evidence of consistency. The evidential value of such evidence, at this stage, can be nil."

131. In so ruling, the judge said he had regard to the judgment of the Court of Appeal on England and Wales and *R v Roberts*.[85] In the judgment of the Court, Humphreys J said:[86]

> " The law on the matter is well settled. The rule is sometimes expressed as being that a party is not permitted to make evidence for himself. That applies to civil as well as criminal cases.
>
> …
>
> So, in a criminal case, an accused person is not permitted to call evidence to show that, after he

> had been charged with an offence, he told a number of persons what his defence was going to be.
>
> The reason for the rule appears to the court to be that the evidential value of such testimony is nil. Because it does not assist in the elucidation of the matters in dispute, it is said to be inadmissible as being irrelevant."

132. The correspondence and related documents which Mr Kan sought to adduce through Mr Midgley began with a request in an e-mail dated 5 June 2007 from Mr Teddy Wang's sister informing Haldanes that, "due to estate issues", payment had been stopped for their parents expenses and requesting "Mr Tony Chan to agree to release my parents expenses". By an e-mail in response, dated 6 June 2007, Haldanes explained that probate had not been granted to Mr Chan but that, nevertheless, "..we have been asked to assure you that Mr Chan will take care of the expense in the same way as Mrs Wang did in her lifetime." A request was made that, "a list of expenses and copies of the outstanding bills be provided." Other e-mails in the same vein followed and the documentation sought to be adduced included receipts and invoices, together with correspondence and photocopies of cheques relating to payments by way of maintenance to Mr Teddy Wang's parents.

133. The judgment of the Court of Appeal in *R v Roberts* was cited with approval in the advice of the Privy Council delivered by Lord Radcliffe in *Fox v General Medical Council* [87]:

> " …as was remarked by Humphreys, J., in R v Roberts, it does not help to support the evidence of a witness who is the accused person to know that he has frequently told others before the trial what his defence was. Evidence to that effect there is, therefore, in a proper sense immaterial."

134. The legal doctrine to which the Court had regard in *R v Roberts* and *Fox v General Medical Council* is variously called the rule against narrative or the rule against previous consistent statements and is of long-standing.

135. Mr Wood made the point that those authorities refer to statements, oral or written, made by the defendant or person complained against and not to conduct. He submitted that the evidence of the payment of monies to or on behalf of Mr. Teddy Wang's family by the applicant was not a statement, but a course of conduct.

136. In response, Mr Perry referred the Court to the judgment of the Court of Appeal of England and Wales in *Corke v Corke and Cook*. [88] The respondent had separated from her husband, the petitioner, and lived in premises into which she took a male lodger. The petitioner went to the premises late at night where, having established that the two of them were in the male lodger's upstairs bedroom, he accused the respondent, when she came downstairs, of adultery. The respondent denied the allegation. The appeal arose from the judge's determination to admit into evidence the contents of a telephone conversation made by telephone at about 12:30 a.m., very shortly after the accusation of

adultery, between the respondent and her doctor in which she had asked him to come to her home to examine her and the male lodger to show that she was not culpable of adultery. The doctor declined to do so, on the basis that he could not prove anything of the kind and his evidence would be valueless.

137. The Court was unanimous in dismissing the appeal on the basis that the petitioner had failed to establish adultery. By a majority, the Court determined that the judge erred in admitting the respondent's out-of-court statements:[89]

> " …to support a defence by showing that she was ready to submit to a scientific investigation to show that the charges made against her must be untrue."

138. As Mr Wood pointed out in reply, immediately after the passage cited above, Hodson LJ went on to say:

> " If she had submitted to an examination evidence as to her condition would, of course, be relevant and admissible, but the statement that she made to the doctor that she was willing to be examined to this end, is of no value."

139. Of the twin issues of the respondent's conduct and what she had said, Hodson LJ said:[90]

> " The question is really whether the words spoken to the doctor can be received, because her conduct in thus ringing up the doctor is of no significance without the words spoken, either given in evidence or inferred from the fact that she spoke to him at all at that time."

140. For his part, Sellers LJ said:[91]

> " In my view, not only is the evidence of what the wife did and said valueless and might indeed be misleading to the court, but it is not admissible. To what issue, it should be asked, does it go? It does nothing to prove the condition of either the female or male organ respectively of the parties alleged involved. It does nothing to disprove the intercourse that the husband had alleged. The most that could be said is that the wife was showing a belief in her own story and adding some reason why the court should believe her. In this case I do not think the conduct and statement of the wife have that effect, but it is clear that *a skilful witness might well embark on circumstantial matters to bolster his or her story.*" [Italics added.]

141. Sellers LJ went on to say:

> " The wife's conduct and statement cannot, in my view, be regarded as revealing consciousness of innocence. They reveal at the most a consciousness that the doctor would not find any physical proof of guilt.
>
> …. The idea of telephoning the doctor originated in this case not from the wife but from the lodger, the co-correspondent, and after some discussion the parties got dressed and went out to a telephone kiosk. There was abundant time to weigh the advantages of such a course and to prepare, if necessary for the requested examination."

142. The fact, which is not in dispute, that the events were not initiated by the applicant but, rather were a response to a request is nothing to the point. Similarly, the fact that the applicant had not been arrested or charged is irrelevant. There is no dispute that the

applicant had advanced the 2006 Will shortly after the death of Mrs Nina Wang on 3 April 2007. A copy of it was available and it was discussed at the meeting of 7 April 2007 at L'Hotel. By late April 2007, the Foundation had initiated proceedings to propound the 2002 Will. Clearly, battle lines were drawn between the parties.

143. Obviously, the e-mails sent on behalf of the applicant by Haldanes are to be taken as reflecting his instructions. So, we are satisfied that the judge was correct in describing them as statements which had been relayed on his behalf. No attempt was made before the judge, to separate out such statements from any other documentation. Mr Kan sought to adduce the whole bundle. Clearly, the documentation was intimately connected with the e-mails. We are satisfied that the judge was correct to describe the material sought to be adduced as self-serving and inadmissible.

144. Whilst it may well have been possible for Mr Kan to make the application in respect of the documents evidencing the fact of payments simpliciter, that was not the basis of the application he made. However, even in those circumstances there is force in the observations of Sellers LJ that "a skilful witness might well embark on circumstantial matters to bolster up his or her story." As he noted, the purpose of the rule is to, "…is avoid deception of the Court by a resourceful witness".

Ground 1(d)(iv)-mediation and settlement

145. In the course of cross-examination of Mr Joseph Leung, Mr Kan sought to ask him, as a governor of the Foundation whether in 2007 the governors had considered the issue of settlement of the litigation. Objection was taken by Mr Perry to the question posed of Mr Joseph Leung by Mr Kan:[92]

> " Q. ….Sometime in the year of 2007, facts of the case is, did the governors of the trust decided to settle the case with defendant?
>
> MR PERRY: Well, I'm sorry. I'm very sorry. My Lord, my objection, just so everyone understands it and your Lordship understands it and my learned friend understands it, is, whatever the position might be about anyone's opinion is irrelevant to the issue that the jury have to decide."

146. In face of the judge's enquiry as to whether or not he wished to pursue the question, Mr Kan said:[93]

> " I just want to ask that question…I wouldn't dwelt…"

The judge's ruling

147. The judge having ruled, "Well, I'm against you on that." Mr Kan pursued the matter:

> " MR KAN: Yes, but the fact that there was a decision. I'm not asking about the reason of the decision, just the fact that that was the decision.

> COURT: But what is the relevance of that to the issue of whether Exhibit P23 is a forgery or not? What is the – Mr Perry's point is lawyers come in, decisions are made further down the road, how does that affect the fact of whether or not that document is a forgery or not?"

148. In the result, the judge ruled:[94]

> " Well, I'm against you, Mr Kan. At this stage, I see no relevance to that issue."

149. For his part, Mr Kan said simply that he would move on. He made no attempt to articulate the reason that he sought to produce that evidence nor did he produce to the judge any documentation, in particular correspondence, on the subject.

150. By contrast, at the hearing before this Court, Mr Wood invited the Court to refer to selected correspondence between Haldanes, acting for the applicant, and JSM, acting for the Foundation. Those letters were dated 25 April, 25 July and 12 September 2007. For his part, Mr Perry invited the Court to have regard to other related correspondence, beginning with letters between the solicitors dated 20 April 2007.

151. In a letter dated 21 May 2007, Haldanes stated that "We wish to discuss a settlement of the matter". It appears that initiated the process of discussions about settlement. Then, it appears that in May 2007 Haldanes stipulated a monetary offer. In a letter dated 10 July 2007, Haldane's referred to that offer:[95]

> " Since May, there has been no meaningful response to our offer to benefit the trust by HK$2 billion. We would have thought, if only for courtesy sake, your client might be expected to respond."

By letter dated 25 July 2007 JSM rejected that offer and made counter proposals.[96]

152. In his written submissions, Mr Wood submitted that the material was relevant to:[97]

> " ..the events surrounding the credibility of Winfield Wong and PWs who gave evidence concerning the events of 7 April and thereafter. It defies all credulity that negotiations of the kind entered into would have been contemplated had the witnesses been maintaining then, the account of events they maintained at trial."

153. Further, in his oral submissions Mr Wood contended that Mr Kan was wrong to restrict the ambit of his questions, in particular he submitted that the actual figures proposed in the correspondence in respect of settlement were relevant.

154. Of course, once again, the judge had to deal with the application as made to him. It is clear that Mr Kan pursued the matter before the judge in an entirely different way from that canvassed before this Court by Mr Wood. Mr Kan told the judge that all he sought was an answer to the question of whether or not at some stage in 2007 the Foundation "had resolved to settle the matter". He made it clear that he did not seek to find out the "reason of the decision". He did not provide any correspondence to the witness or the

judge. He did not say that he sought to establish the monetary amount stipulated in the correspondence dealing with the issue of settlement. He made no attempt to explain the relevance of his question. Certainly, he made no suggestion whatsoever, as Mr Wood did, that it was relevant to the account that Mr Winfield Wong was maintaining at that time in respect of the 2006 Will.

155. In those circumstances, in the absence of any explanation at all of the relevance of the question, no doubt the judge was anxious to avoid the focus of the trial being sidetracked by collateral issues. We are satisfied that, given the lack of any assistance at all provided to the judge by Mr Kan as to the reason he wished to establish the bare fact of a decision by the Foundation to resolve settle the matter, it is understandable why the judge should have ruled against Mr Kan. In those circumstances, it was not in error to do so.

Lies

Ground 1(e),(f) and (g)

156. It was submitted that, having regard to the prosecutions reliance in its closing speech on the alleged lies of the applicant, the judge erred in failing to review the exercise of his discretion to allow the prosecution to adduce into evidence the applicant's in the probate proceedings. Further, it was contended that the judge erred in the revised directions that he did give to the jury as to lies.

Discussions between the judge and counsel prior to the closing speeches and the summing up

157. In the course of discussions between the judge and counsel prior to the summing up, Mr Perry raised the issue of the alleged lies in the applicant's evidence in the probate proceedings:[98]

> " …our case is it only makes sense that he was responsible for its (the 2006 Will) creation and that is why I will have something to say about the circumstances in which the defendant says he came into possession of it.
>
> COURT: Yes.
>
> MR PERRY: Because, if the jury conclude he is lying about that, it's then only a short step to them rejecting everything that he has to say and concluding that he did play a part, both in the making and, clearly, in the subsequent using.
>
> COURT: Yes. Well, then you're going quite a long way down the route towards the possible giving of a lies direction, are you?
>
> MR PERRY: My Lord, we thought of that but, my Lord, it seems to us that - ….there's a case in the Court of Final Appeal… Yuen Kwai-choi, ….what Chan PJ said was that, if the issue between the prosecution and the defence is simply the defendant has lied in his assertion of innocence, then the lies direction is effectively catered for by the burden and standard of proof. …..It's paragraph 37, my Lord.

We thought about the lies direction, my Lord, but we thought it becomes too complicated."

158. Mr Perry went on to say:[99]

> " My Lord, we've given some consideration because there is evidence of a lie in relation to Buddha. But it seems to us that that's not the sort of lie that ordinarily would attract a lies direction because it's not -- it wasn't a lie told out of consciousness of guilt which is what the lies direction is really dealing with. That is more of a lie that is part of the general narrative of the evidence in the case."

159. For his part, Mr Kan said:[100]

> " MR KAN: As a similar situation with Mr Perry, I've thought about lies. I wouldn't have thought the Buddha point is an appropriate incident for a lie direction and, as to the other incidents which my learned friend might refer in trial bundle 2, I am similar view that a lie direction, it isn't appropriate.

COURT: Yes. Yes, all right."

The prosecution closing speech

160. It was a recurrent theme of Mr Perry's closing speech for the prosecution that the applicant had lied in his evidence in the probate proceedings about his relationship with Mrs Nina Wang, in particular that he was stipulated as the beneficiary in 2006 Will, which Mrs Nina Wang had given to him personally, because they were lovers and that was so in respect of the money advances she had given him since 1992. The latter had nothing to do with him giving her advice as a feng shui master. So, Mr Perry said:[101]

> " I regret to say, Ladies and Gentlemen, that the prosecution have to say that the defendant has not told the truth. He lied in the civil proceedings and, also, in the course of his relationship with Nina Wang, he lied to her. The prosecution say that, throughout his relationship with Mrs Wang, he was providing fung shui advice and the evidence in relation to that, we submit, is consistent and clear."

161. Mr Perry went on to describe that as a fundamental lie and detailed what he asserted were other related lies of the applicant:[102]

> " I've already made it clear he lied when *he claimed that his relationship with Nina Wang was unconnected with fung shui - that's a fundamental lie* - but what do you make about his claim that the hole-digging was largely Mrs Wang's idea and it was carried out to disguise the true nature of their relationship? And what do you make about his claim that all the payments of money he received had nothing to do with fung shui? And what do you make about his claim that he didn't even know why Mrs Wang had made the three payments of the 688 million and his lie about Mrs Wang never asking him for advice about her health and his lie about what he told Mrs Wang about living a long life?" [Italics added.]

162. Subsequently, Mr Perry posed the rhetorical question:[103]

> " But, Members of the Jury, one of the questions you will want to ask yourselves is why has he lied, if you find he has lied, about what his role was, why did he lie about his role as a fung shui adviser, as the prosecution say that he clearly has."

163. As noted earlier, it was the theme of Mr Perry's address that the applicant did so in

order to account for the vast payments of money that had been made to him and for the fact that he was stipulated as the beneficiary in the 2006 Will. In the context of his suggestion to the jury, that the applicant had changed his evidence as to the date at which he became sexually intimate with Mrs Nina Wang from September to April 1992, Mr Perry responded to his own rhetorical question:[104]

> " But the defendant shifts the date because he's got to. Why has he got to? Because he's got to make out that their relationship was not as it truly was; he's got to lie to claim that the vast payments he began to receive in 1992 were nothing to do with the search for Teddy Wang, they were gifts in consideration of love and affection."

164. Of the applicant's evidence that, having given him the 2006 Will, Mrs Nina Wang had given him additional oral instructions, including taking care of the Wang and Kung families and their education, the education of the children of Chinachem employees and to establish a scholarship, Mr Perry said:[105]

> " The story develops, it evolves, it changes, it contradicts itself and it's a complete pack of lies."

165. Of the circumstances in which the applicant said that Mrs Nina Wang had given him the 2006 Will, Mr Perry said:[106]

> " …she told him to open the envelope and check the contents but cautioned him to be careful with fingerprints. "Don't put your fingerprints on the document." Why? Why would Mrs Wang tell him, the person who was going to store the document securely? There is one reason, of course, that the defendant might add that bit of spicy detail about "Don't touch it" - of course, it might explain why Mrs Wang's fingerprints aren't on the forged document."

166. Of the fact that the applicant had said that Mrs Nina Wang had told him to return home with the documents, read them and keep them safe, Mr Perry said:[107]

> " Again, an extraordinary point of detail: two documents you can read in just a few seconds, but instead of reading them there, he's told to take them home, back to his house on the Peak from Tsim Sha Tsui, go read them carefully, keep them safely and then come back. Another odd point of detail."

167. Of the circumstances in which the applicant had said that he had come into possession of the 2006 Will, Mr Perry said:[108]

> " Now, there are four points the prosecution make in relation to the defendant's account. The first is the sheer implausibility of naming the defendant as the person to discharge the responsibilities that would fall upon the shoulders of whoever was to succeed Nina Wang.
>
> The second point is the physical condition of Mrs Wang on 16 October 2006. I may say I'll deal with the physical condition in a moment, but you remember from the video-recorded interview, the defendant said about Mrs Wang on 16 October, "She had a little cough", when he was describing her condition, "She had a little cough." That's how he described her physical condition. Contrast and compare with what Dr Kung had to say about how she was asleep in the back of his car, or lying on the back seat of the car taken to hospital and lying on the back seat of the car when she came back from the hospital - in a serious way.
>
> The third point the prosecution rely on is the inexplicable features of the defendant's version of events. And the fourth point is the secrecy in which the defendant -- with which the defendant handled the will in the period between 16 October 2006 and 4 April 2007."

Defence closing speech

168. In his closing speech, Mr Kan did not advert at all to the applicant's evidence in the probate proceedings, let alone to the lies that the prosecution alleged that he had told in that evidence.

Discussions between the judge and counsel after the closing speeches and prior to the summing up

169. After the closing speeches and prior to the summing up, but after a weekend break following the conclusion of Mr Kan's speech, the judge raised the issue of a lies direction with counsel:[109]

> " Before you gave your speeches, we discussed the question of a lies direction and neither of you wanted one.
>
> In the speech which you gave, Mr Perry, you, of course, concentrated or had quite a bit to say about lies and I think perhaps, if I had appreciated the extent of that, I might have considered a lies direction.
>
> However, I was waiting to see what the defence would -- how they would deal with it and, of course, *Mr Kan, you said very little about the earlier agreed evidence of what happened in the probate proceedings.*
>
> I have thought about whether, despite our earlier understanding, I should give one although my experience is that nobody particularly likes them. They cause trouble in higher courts. The defence don't like them because it concentrates the -- or they think it concentrates the jury's mind on explanations rather than on the prosecution's evidence, and I'm minded, therefore, to stick to my -- to our understanding which is not to give a lies direction, but I wanted to clear that with you, Mr Kan, first.
>
> MR KAN: Yes. I'm still of the view, even though with the prosecution's submission to the jury in certain aspects, I am still of the opinion that that is not important.
>
> COURT: That a lies direction is not important?
>
> MR KAN: It's not important.
>
> COURT: Right. Well, certainly that was our understanding. The speeches were given on that basis. It may be -- yes, all right. Mr Perry, you ...
>
> MR PERRY: I have nothing to add, my Lord, thank you."

170. Although Mr Wood submitted to this Court that, in light of the prosecution submissions to the jury in their closing speech that the applicant had lied in the evidence adduced in the probate proceedings, the judge ought to have reviewed the exercise of his discretion in ruling that evidence admissible, Mr Wood conceded that no such application was made by Mr Kan nor was the matter raised by him in any manner whatsoever. Clearly, for his part Mr Kan took no issue with the manner in which the prosecution had closed its case. Nevertheless, Mr Wood submitted in his Skeleton Submissions of the Applicant that the judge, "…erred in failing to reconsider the exercise of his discretion to admit the evidence, and/or to consider the discharge of the jury." [110]

171. Highly relevant to the judge's approach to the issue was the stance taken by Mr Kan. He had made no complaint about the prosecution closing speech before making his own speech. In it, he chose not to address the issue of the alleged lies stipulated by the prosecution in the applicant's evidence adduced in the probate proceedings. That was a forensic decision of counsel. As Mr Perry pointed out in his submissions, for the defence to engage on the issue of the applicant's lies was to give the alleged lies more focus. In addition, when the judge repeatedly raised the issue with Mr Kan of whether or not his closing speech would have been different if he had known that the judge was going to give a *Lucas* direction in respect of lies in the summing up, Mr Kan answered in the negative.[111] In those circumstances, it was no part of the judge's duty in an adversarial system to second-guess the defence advanced by counsel as articulated in evidence, speeches and submissions. There is no merit in this ground of appeal.

Summing up

172. In the summing up, the judge reminded the jury that the prosecution relied on statements made by the applicant in his evidence adduced at the probate proceedings:[112]

> " It is clear from Mr Perry's closing speech to you … - that the prosecution rely on a number of things which the defendant has said in his previous witness statements and during his evidence in the probate proceeding as well as in his video-recorded interview with the police as true, and Mr Perry has said that while some parts of that evidence may be true, there are a number of matters on which the defendant has lied."

173. Then, the judge reminded the jury that in none of that evidence had the applicant admitted that the 2006 Will was forged. Thereafter, the judge gave the jury the direction on lies:[113]

> *" Therefore, even if you find that the defendant lied in any of that evidence he gave or placed before the probate court, such lies would not prove that he forged the will or used it knowing it was forged. The same may be said of the police interview where, again, there is no admission to the document being forged or the defendant knowing that it was forged.*
>
> *It is important that you understand that even if you find that the defendant lied in his statements, or in his evidence in the probate proceedings, or in his police interview, it does not mean he is guilty of either of these offences. Lies do not prove guilt." [Italics added.]*

174. The judge went on to remind the jury of the parts of the applicant's evidence adduced in the probate proceedings which the prosecution relied on as being true:[114]

> " They rely, for example, on the free and easy access which the defendant admits he had both to Mrs Wang and to her private rooms with his own key which gave him the opportunity to come in and out as he liked. You may remember that Mr Perry asked in his closing speech why the defendant should have had among the documents in his possession Mrs Wang's typing certificate from a course she attended at Mary Knoll Convent School in 1958, which was a matter he had given evidence about on the fourth day of his evidence in the probate proceedings. Mr Perry posed the question: is that something Mrs Wang might have given him from so many years ago, or did the defendant obtain it from her premises for his own purposes?

> He also relies on more substantial matters such as the vast payments which the defendant accepts he received from Mrs Wang, some of which are set out in schedule 1 to the defendant's first witness statement. Coupled with what the defendant says about his setting up of a feng shui school, his rendering of feng shui advice to certain influential people, including Mr Gilbert Leung, his giving of his father's book on feng shui to Mrs Wang, and his involvement with other feng shui activities and events, albeit, he says, at Mrs Wang's and not his instigation, such as, for example, hole digging, Mr Perry says that these vast amounts must have been for feng shui advice given by the defendant to Mrs Wang.
>
> He also relies, for example, on what the defendant accepted were Mrs Wang's reservations about his own business abilities and qualifications to suggest that Mrs Wang would never have left her entire business empire to him."

175. Of the explanations advanced by the applicant in respect of those matters, the judge said:[115]

> " …he has given an account of his intimate relationship with Mrs Wang, in which case it would not be unusual to have some of her personal items in his possession. He has explained that Mrs Wang believed in feng shui to improve her luck, that she was very inventive and would improvise and improve certain feng shui techniques and that he simply fell in with her wishes rather than became her feng shui master. He explained how Mrs Wang wanted him to be successful, to model himself on Li Ka-shing and how, for various reasons, she wanted him to inherit her estate following her death and why she trusted him to do the right thing."

176. Having given the jury the standard *Sharp* direction, namely that they were to have regard to all of the evidence adduced by the applicant and the probate proceedings in deciding where the truth lay, the judge said:[116]

> " That means you must look not only at those parts of what he has said on which the prosecution rely as true, but also on any explanations he has given and you must decide what you accept or what you think might be true and what you do not accept.
>
> But I must stress once again that even if you reject the defendant's explanations, or if you think he lied on certain matters, that does not mean he is guilty. As I have said before, *lies do not prove guilt.* It simply means you do not accept those explanations you have rejected. Even if you entirely reject the explanations put forward by the defendant, that would not relieve the prosecution of its burden or duty or responsibility to make you sure, by evidence, of the defendant's guilt. You must still decide whether, on the evidence you do accept, the prosecution has made you feel sure of the defendant's guilt." [Italics added.]

177. The judge continued his summing up until the morning break, at which point, in the absence of the jury, Mr Perry raised the issue of the judge's directions in respect of lies:[117]

> " My Lord, your Lordship's direction to the jury, if my note is accurate and complete, concluded with the words, "I must stress that even if you reject the defendant's evidence or accepted that he had lied, this does not prove the prosecution case".
>
> My Lord, we respectfully agree, however, even in a lies direction, a jury would be further directed that *lies can be regarded as evidence which support the prosecution case.* So my Lord, the point that we make at this stage for your Lordship's consideration is the direction left as it is seems to suggest that that is something that the jury ought to put to one side.
>
> My Lord, our case is, of course, lies do not in themselves prove guilt, but *if the jury conclude that the defendant lied on a central or crucial issue in the case, they can take that into account of probative of guilt when considering the evidence as a whole.*" [Italics added.]

178. Having responded in the negative to the judge's question, "…that direction about

supporting the prosecution evidence, is that not dependent on a so-called *Lucas* direction being given in full? ", Mr Perry reminded the judge [118] of a passage cited to him earlier in the judgment of Chan PJ in the Court of Final Appeal in *Yuen Kwai Choi v HKSAR*, namely:[119]

> " Where the rejection of any explanation given by an accused almost necessarily leaves the jury with no choice but to convict as a matter of logic, the usual direction on the burden and standard of proof would normally be sufficient."

179. In the result, Mr Perry submitted:

> " Now, my Lord, what we say is that's this case, because as a matter of logic, *if the jury conclude that the defendant has lied about the circumstances in which he came to be in possession of the document and about the relationship,* there's no scope for..." [Italics added.]

180. In response to the judge's observation that, if the jury rejected the applicant's explanations, the effect would be that "…well, they leave the jury no alternative but to look at the rest of the evidence which is the prosecution evidence", Mr Perry said:[120]

> " …the danger as we read it, or as I read it, is that *the direction the jury have received at the moment is, if they conclude the defendant has lied, just put it to one side because that doesn't prove guilt.*
>
> But my Lord, it may be that your Lordship would think it appropriate for there to be an additional direction to make it clear that although your Lordship is saying the lies in themselves do not prove guilt, the lies are matters that the jury could take into account when considering the evidence as a whole." [Italics added.]

181. In response to the judge's observation that, "…the simplest thing would have been, in fact, to give a *Lucas* direction." Mr Perry said:[121]

> " …the reason why we raise it, my Lord, is even with a *Lucas* direction, which your Lordship will see is at 42.2, there is the tailpiece to the direction: it's only if you're sure that he did not lie for an innocent reason that his lies can be regarded by you as evidence which supports the prosecution case.
>
> And my Lord, we maintain our position that a *Lucas* direction would not have been appropriate in this case because there can be no innocent reason for the lies, we would submit, when they are, logically, a traverse of the prosecution case and that's why we say that we're in the territory identified by Patrick Chan J."

182. In the result, Mr Perry said:[122]

> " …the submission that we would invite your Lordship to consider is merely to direct the jury that although lies do not in themselves prove guilt, if the jury concludes so that they are sure that the defendant did lie, as the prosecution suggest in his evidence in the civil proceedings, then the jury can take that into account when considering the evidence as a whole. And it is permissible to use that as evidence probative of the defendant's guilt.
>
> So my Lord, it's simply an amplification of the direction that they've already been given, because it must be, my Lord, we would submit, it must be permissible for the jury to make use of evidence if they do conclude that the defendant has lied on what we say is the very central and core issue in the case."

183. For his part, Mr Kan said:[123]

> " MR KAN: My Lord, if one goes down that route, we have to identify the sort of lies vis-à-vis the central issue. That's important, of course. I will support a general direction on the standard and burden of proof, which I think, plus the *Lucas* direction, is sufficient for that purpose. Because what Mr Perry is suggesting is if a particular lie is established and itself is central to the issue involved in this case, it follows that it must have probative value.
>
> *That would involve your Lordship's direction in that particular area to identify whether a piece of lie, if accepted or rejected, is central to that particular issue, rather than a general approach, my Lord."* [Italics added.]

184. Then, having informed counsel that he would consider the matter, the judge resumed his summing up. However, at the end of the day, again in the absence of the jury, the judge canvassed the issue of a lies direction with counsel again. The judge pointed out to counsel[124] that in its judgment in *HKSAR v Huang Song Fu* [125] this Court had resiled from its judgment in *HKSAR v Mo Shiu Shing* [126] and determined that an abbreviated lies directions was inappropriate, stating that if a lies direction was to be given, it was to be the complete direction.

185. For his part, Mr Perry said:[127]

> " My Lord, my concern is really this. We understood that your Lordship would not give a lies direction and we understood that your Lordship would be guided by what Patrick Chan J had said, giving the judgment in the Court of Final Appeal case. My Lord, what your Lordship then went on to do was to direct the jury that if the defendant had lied, then that did not mean he was guilty. My Lord, it seems to us that that is...
>
> COURT: Halfway, the halfway...
>
> MR PERRY: Halfway, without the corrective that would ordinarily be adopted in -- even in a full lies direction. So my Lord, I spent quite a considerable part of my closing address to the jury inviting them to consider that the defendant had lied in the course of his evidence in the civil proceedings, and *the effect of the direction as it stands is that what I had addressed the jury upon is not actually a matter that points to his guilt.*
>
> My Lord, I would have had no submission to make, my Lord, if your Lordship had simply followed what Patrick Chan J had had to say in the Yuen Kwai Choi case, that the usual direction on the burden and standard of proof would be sufficient because the issue between the parties left no logical scope for any conclusion other than if the defendant lied, it must be because he is guilty." [Italics added.]

186. The judge went on to say in respect of the earlier discussions as to a direction in respect of lies, given that neither party sought such a direction, that, "there may have been a miscommunication, a misunderstanding between all of us." He added, "…do you see where we've gone wrong?" [128]

187. For his part, Mr Kan confirmed that he had no objection to the way in which the judge had directed the jury and that he did not wish the judge to give the *Lucas* direction.[129] Then, the Court adjourned without the judge having indicated definitively how he intended dealing with the matter.

188. On the following morning, in the absence of the jury, the judge received further submissions from Mr Perry. He submitted that, "this is also the case that the jury are

being asked to decide on the truth of what the defendant said on a central issue in that case." Of the central issue of what the applicant had said in the probate proceedings, Mr Perry said:[130]

> " … it contained *one key assertion* and the key assertion, or the core point, that was being made was that, on 16 October 2006, Mrs Wang gave him the 2006 will and, having received it from her hands, it was in the form in which he gave it to his solicitors." [Italics added.]

189. Of that key assertion, Mr Perry said:[131]

> " The prosecution say that he has lied about that and if the jury concluded that he lied about it, there would be no scope for a direction along the lines of, "Members of the jury, you will have to consider whether there is nevertheless an innocent explanation for the lie".

190. Of the evidence advanced in support of the key assertion in the applicant's evidence in the probate proceedings, Mr Perry said:[132]

> " ….everything else in the defendant's evidence was put forward in support of that core assertion. *The defendant asserted that he had not been a feng shui adviser, that he had not assisted Mrs Wang in relation to her health, that he had received the money because they were intimate, that she gave him the will because they were lovers.*" [Italics added.]

191. For his part, Mr Kan said:[133]

> " My Lord, I agree that there's no need for the *Lucas* direction. The standard -- burden and standard of proof direction suffices. But in the present situation, the criteria as set out in the criteria as set out in Yuen Kwai Choi in relation to lie is important. That is in holding number 1(b), my Lord, of Yuen Kwai Choi, the full criteria must be met.
>
> First of all, it must be a deliberate lie. It's not anything that is not acceptable by the prosecution, it has to prove it's a deliberate lie, and that's not just the end of it. And it's relating to a material issue in the case. Thirdly, there was no innocent explanation for the lie. Fourthly, it was a lie which was either admitted or proved by independent evidence, my Lord."

192. Mr Kan went on to confirm that he did not seek a *Lucas* direction and that it was his position that the directions that the judge had given sufficed.[134] The judge read out what he described as "the standard *Lucas* direction", culminating in the direction:[135]

> " If you think that there is, or may be, an innocent explanation for his lies, then you should take no notice of them. If you are sure that he did not lie for an innocent reason, *then his lies may be regarded by you as evidence which supports the prosecution case.*" [Italics added.]

193. Then, having said earlier, "I want a straight answer to this" [136] the judge posed this question to Mr Kan:[137]

> " …if you knew I was going to give this direction, (would ?) what you told the jury would have been any different from what you've told them, since you've not mention any of the defendant's - this body of evidence."

194. Having responded twice that it would have made no difference, Mr Kan said:[138]

> " If your Lordship is prepared to modify your original direction - which, in our position, we think is suffice - but if your Lordship is of the view that you should modify because of the submission made by the prosecution, we do not quarrel with the modified direction along the

line which your Lordship has suggested, so long as it's the safest and fairest way of doing it."

195. Notwithstanding Mr Kan's repeated confirmation that the giving of a *Lucas* direction in respect of lies would have made no difference to the defence closing speech, the judge returned to the issue:[139]

> " COURT: So I'm going to ask you again, Mr Kan.
>
> MR KAN: Yes.
>
> COURT: If I bring the jury back and I said, "I told you yesterday that lies -- that the mere fact that a defendant tells a lie does not mean he is guilty," which is what I have said, "however, I wish to modify that in the light of discussion I've had" and then give them the full *Lucas* direction, would you have any complaint?
>
> MR KAN: No."

Summing up: redirections

196. When the jury returned, the judge informed them,[140] "I'm going to go back to one thing I told you on the law and qualify the direction I gave you." The judge identified the qualification as relating to his directions in respect of the alleged lies of the applicant in the evidence adduced in the probate proceedings. Then, he read out his earlier direction, pausing three times to say that he did not wish to change the particular passage that he had repeated.[141] Of his direction, "lies do not prove guilt" he said that he needed to qualify that to some extent:[142]

> " And the qualification is this. *The prosecution allege that the defendant lied in that evidence in the various ways that he explained, but in particular, in relation to how he came by the allegedly forged will on 16 October of 2006. He also relied on a number of other matters which he says the defendant put forward in that body of evidence to support that key or core assertion as to how he came by the will which he says was a genuine one.* And he says that you are entitled to consider whether those lies, if that is what you find them to be, support the case brought by the prosecution.
>
> In this regard, you should consider two questions. Firstly, you must decide whether the defendant did in fact tell these lies. If you are not sure he did, if you are not sure he did, then ignore the matter altogether. If you are sure, then you must consider the second question, which is this: why did the defendant lie?
>
> I must tell you that the mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons and they may possibly be innocent ones in the sense that they do not give any indication of guilt. For example, somebody may lie in order to make his defence sound better. The defence may be true but he may gild the lily, as we say, to embroider it, to bolster it, and in so doing, tell lies. He may tell lies to protect somebody else who may be close to him, such as his wife or his family or a friend or somebody else. He might tell lies to conceal some disgraceful conduct other than the commission of the offence itself, such as perhaps some immoral conduct, adultery or whatever. Or he may lie simply out of panic or confusion. So there may be innocent, possibly innocent, reasons as to why a person may lie.
>
> If you think that there is, or that there may be, an innocent explanation for his lies, then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason - if you are sure that he did not lie for an innocent reason - then his lies can be regarded by you as evidence which supports the prosecution case." [Italics added.]

197. Of the effect of his modified direction, the judge said:[143]

> " So members of the jury, the modification of what I said yesterday when I said lies do not prove guilt is that they may, in certain circumstances, if you go through the process I have just described, they may be supportive of the prosecution's case."

198. The judge proceeded to repeat the direction that he had given the jury earlier, until he reached his direction that even if they entirely rejected the explanations put forward by the defendant that "would not relieve the prosecution of the burden or duty of making sure, by evidence, of the defendant's guilt." Then, the judge said:[144]

> " Members of the jury, I want to modify that by repeating the direction that I gave you just now, the two-stage process of considering whether the defendant did tell any lies and, if you are sure that he did, then asking yourself why did he lie and examining any possible innocent explanations, and it is only then could you use the lie, provided you were satisfied that there was no innocent explanation, in support of the prosecution case. That is as far as it goes; it is in support of the prosecution case."

199. Thereafter, the judge reminded the jury of the burden and standard of proof, before summarising the effect of his redirections:[145]

> " So those are the modifications, members of the jury, that I wanted to make. Lies, if you find them to be, having gone through the process I have described, may be supportive of the prosecution case."

200. The complaint made by Mr Wood in the written Skeleton Submissions of the Applicant that the revised direction placed too great an emphasis on lies and ended with the words "to have those at the forefront of your minds" is misdirected.[146] That phrase in the judge's directions clearly related to his reminder to them of the standard and burden of proof:[147]

> " The second matter I want to remind you of is the standard of proof and I said that *you should have both the burden and the standard of proof at the forefront of your minds at all times in your deliberations.* The standard of proof concerns how the prosecution succeed in proving the defendant's guilt and the answer is by making you sure of it. Nothing less than that will do. If, after considering all the evidence, you are sure that the defendant is guilty, you must return a verdict of 'guilty'. If you are not sure, your verdict must be 'not guilty'. So please, on this, the second day of my summing-up, *have those at the forefront of your minds.*" [Italics added.]

201. Similarly, his complaint that the judge had failed to direct the jury that "lies alone could not prove guilt" is manifestly mistaken. As noted earlier, the judge had given the direction, "lies do not prove guilt"[148] twice in his original direction, which directions he repeated in the process of giving the jury his modified direction.[149]

202. Mr Wood's complaint in respect of the judge's revised direction in respect of the applicant's alleged lies in his evidence adduced in the probate proceedings concerned two matters. First, that the judge failed to give a direction that such lies had to be proved by independent proof. Secondly, the judge failed to specify which lies of the applicant they could take into account.

Independent proof of lies

203. There is no dispute that the judge did not give the jury a direction of the necessity for there to be independent proof of an alleged lie of the applicant before they could take it into account as a lie supporting the prosecution case. There was no requirement that he give such a direction.

204. As Chan PJ made clear in his judgment in *Yuen Kwai Choi* such a direction is not required, unless it is sought to make use of the lie as amounting to corroboration. Chan PJ said:[150]

> " Although as a general rule, a lie cannot in itself be used as proof of guilt, there are circumstances in which the prosecution may want to use a lie told by an accused to establish or assist the prosecution's case or to strengthen an inference of guilt against him. A lie may be used, for example, to provide corroboration for an accomplice's evidence (*R v. Lucas* (1981) 73 Cr. App. R. 159) or to support identification evidence (*R v. Goodway* [1993] 4 All ER 894). In such circumstances, the law requires that certain criteria must be met before a lie is permitted to be used in such a way. These criteria were set down by the Lord Chief Justice in *R v. Lucas* (at p.162 to 163). Briefly, they are: it must be a deliberate lie, relating to a material issue in the case; there is no innocent explanation for the lie and it is a lie which is either admitted or proved by independent evidence.
>
> It must be borne in mind that this set of criteria (sometimes loosely described as a *Lucas* direction) was given by the Lord Chief Justice in a case where it was sought to make use of a proved untruth or lie as amounting to corroboration of an accomplice's evidence. Hence, it is necessary, for example, to have the 4th requirement, namely, that the lie must be admitted or proved by evidence other than the accomplice's evidence which it is sought to corroborate. See *R v. Chong Chak On* [1995] 2 HKCLR 226; and *Edwards v. R* (1993) 178 CLR 193."

205. In *R v Chong Chak On* this Court considered a submission that the effect of the judgment of the Court of Appeal of England and Wales in *R v Goodway* [151]was to extend the requirement that all four criteria stipulated by Lord Lane CJ in *R v Lucas* "to all cases where lies are relied upon to support evidence of guilt." [152] The fourth of criteria is that the lie "must be shown to be a lie by either an admission by the defendant or by the evidence of an independent witness." In *Goodway*, the prosecution sought to rely as support for identification evidence on the lies told by the appellant in out-of-court statements to the police. In the judgment of this Court of which Chan J, as Chan PJ was then, was a member, Power Ag. CJ said:[153]

> " We are satisfied that the court in *Goodway* was holding no more than that the fourth requirement also had application where it was sought to use the lie as evidence to support less than satisfactory evidence of identification. *Goodway* is not authority for the proposition that where a court is dealing with a lie which it is suggested supports evidence of guilt, i.e. a *Broadhurst* lie simpliciter, all four Lucas requirements have application. In such a case the court need consider only the first three requirements."

206. In *Edwards v R* [154] the High Court of Australia was concerned with a direction by the trial judge that the alleged lies of the defendant in evidence was capable of being corroboration of the evidence of the complainant to an indecent assault by a fellow male prisoner in a prison van, if the jury was satisfied of the four criteria articulated by

Lord Lane CJ in *Lucas*. In the judgment of the majority, Deane, Dawson and Gaudron JJ, allowing the appeal the circumstances in which the fourth criteria was required was addressed:

> " If the telling of a lie by an accused is relied upon, not merely to strengthen the prosecution case, but as corroboration of some other evidence, the untruthfulness of the relevant statement must be established otherwise than through the evidence of the witness whose evidence is to be corroborated."

207. As the judge's direction made clear, in the instant case if the jury was satisfied that the applicant had lied in his evidence adduced in the probate proceedings, that finding was capable of supporting the prosecution case. The issue of corroboration did not arise. Accordingly, we are satisfied that there is no merit in this ground of appeal.

Identification of the lies

208. In his written Skeleton Submissions of the Applicant, Mr Wood complained that the judge had "failed to identify the specific lies capable of supporting guilt". Further, it was submitted that the judge had failed to advance any possible explanations for those lies.[155]

209. In his initial directions in respect of lies, the judge reminded the jury of the applicant's evidence adduced in the probate proceedings that "Mr Perry has said that while some parts of that evidence may be true, there are a number of matters on which the defendant has lied." [156] In the course of identifying the parts of the applicant's evidence in the probate proceedings upon which the prosecution relied, the judge referred to the undisputed receipt of vast payments of money from Mrs Nina Wang, together with the evidence of the applicant's involvement in the practice of feng shui. In doing so, the judge identified the prosecution case in respect of those two matters; namely, "Mr Perry said that these vast amounts must have been for feng shui advice given by the defendant to Mrs Wang." [157]

210. Then, the judge reminded the jury of the explanations advanced by the applicant.[158] First, that he enjoyed an "intimate relationship with Mrs Wang". Secondly, that Mrs Wang believed in feng shui to improve her luck, and that he "simply fell in with the wishes rather than became her feng shui master." Thirdly, that she had wanted him to be successful in business and to inherit her estate and "trusted him to do the right thing."

211. Later in his summing up, in his consideration of the defence case, the judge returned to the issue of the explanations advanced by the applicant in the evidence adduced in the probate proceedings.[159] In doing so, the judge summarised the fundamental aspects of

the applicant's case as advanced in that evidence, namely that he enjoyed an intimate sexual relationship with Mrs Nina Wang and it was in that context that she had given him vast sums of money. Although he was knowledgeable in feng shui and had set up a feng shui school at one time, he was never Mrs Nina Wang's feng shui master and the monies she gave him, was not for feng shui services. On 16 October 2006 she had given him the will, which was typewritten. Mrs Nina Wang knew how to type. He did not ask her why she gave him the will. He did tell her that it was all "very troublesome" for him.

212. In the course of his further direction to the jury in respect of the issue of lies, as noted earlier, the judge identified further the alleged lies of the applicant relied upon by the prosecution:[160]

> " The prosecution allege that the defendant lied in that evidence in the various ways that he explained, but in particular, in relation to *how he came by the allegedly forged will on 16 October of 2006. He also relied on a number of other matters which he says the defendant put forward in that body of evidence to support that key or core assertion as to how he came by the will which he says was a genuine one.* And he says that you are entitled to consider whether those lies, if that is what you find them to be, support the case brought by the prosecution." [Italics added.]

213. Although the judge had identified the key or core assertion as being "how he came by the will", without further particularisation, it would have been obvious to the jury that was a reference to the fundamental issue in the case, namely the intimate sexual relationship that the applicant said in his evidence in the probate proceedings he enjoyed with Mrs Nina Wang. That was why she gave him vast sums of money. He was not paid by her for feng shui services. They were lovers and she trusted him.

214. The judge's reference to other lies of the applicant on which the prosecution relied was unparticularised. The judge said merely that the prosecution:[161]

> " …relied on a number of other matters which he says the defendant put forward in that body of evidence to support that key or core assertion as to how he came by the will which he says was a genuine one."

215. No doubt, it was with that direction in mind that Mr Wood complained in his oral submissions that the direction was "inappropriately broad". It was not focused. He said that the danger was that the jury might have given weight to a lie (s) which did not support the prosecution case. Significantly, however he did not identify any such lie, other than that in relation to the applicant's statement to Mrs Nina Wang's sisters, namely Dr Molly Gong and Mrs Tong, that he had lied to Mrs Nina Wang in telling her that she would live until 90 years of age, because he had talked to/communicated with Buddha.

216. During the hearing, Mr Wood took the Court through Mr Perry's closing speech at very considerable length, identifying what he categorised as being 56 alleged lies by the

applicant in his evidence adduced in the probate proceedings. Certainly, Mr Perry did not use the word lie to categorise each of those statements. However, the statements to which Mr Perry pointed in his speech to the jury as being variously lies, unbelievable and untrue fell into the category described by the judge, as put forward by the applicant in support of how it was that he came by the will. On the one hand, there was his evidence of their sexually intimate relationship. That was why she gave him money. Even within two or three days of her death, she invested in his businesses. On the other hand, there was his evidence that he was not her feng shui master. Insofar as he conducted himself as if he was her feng shui master, that was a pretence only, so that they could be in each other's company more easily.

217. Whilst it is normally required that the judge should identify to the jury which specific lies, if determined to be such by the jury, are capable of supporting the prosecution case and direct them which lies are not so capable, there is force in Mr Perry's submission that if the judge had done so in any detail it would have distorted the balance of the summing up. In that context, it is to be remembered that, in the defence closing speech, Mr Kan did not address the issue of the alleged lies of the applicant at all. As Mr Perry put it, the danger was that, if the judge addressed the alleged lies in detail in his further directions on the summing up, he would have been accused of making a second prosecution speech.

218. Nevertheless, it would have been desirable for the judge to have directed the jury specifically that the alleged lies which were capable of supporting the prosecution were those that went to the issue of the relationship that the applicant enjoyed with Mrs Nina Wang, namely lover or paid feng shui adviser. If the jury was satisfied that he had lied about being her lover in the various statements that he had made to that effect and/or that he had lied about not giving her feng shui advice, for which he was paid, those lies were capable of supporting the prosecution case.

The applicant's admission that he had lied to Mrs Nina Wang in telling her that she would live to 90 years because he talked to Buddha

219. The judge reminded the jury of the evidence of Dr Molly Gong and Mrs Tong of the applicant's statement to each of them at a meeting on 4 April 2007 that the only lie that he had told Mrs Nina Wang was that she would live to 90 years of age and that he knew that to be the case because he had talked to or communicated with Buddha.[162] In cross-examination, each of them had said that they thought that he may have/had told their sister that in order to comfort her.[163]

220. In his closing speech, Mr Perry addressed the issue:[164]

> " …at that meeting on 4 April that he admitted to the siblings that he had lied to Nina and that he'd lied, the prosecution say, in a very significant way.
>
> Now, of course, it will be suggested, I've no doubt, that this was a white lie. A white lie, I suppose, is a trivial lie, an insignificant lie, one that doesn't matter: ……..the lie that we all tell because they help ordinary relationships to function. But do you think telling a dying woman, and a woman who was gullible and superstitious, that you could speak to Buddha is a white lie?
>
> ……
>
> when someone said to Mrs Wang they could speak to Buddha, we know that Mrs Wang was very superstitious, we know she held very strong opinions about fung shui and religion and, for all her skill and wonderful ability in business, you may think that she was deeply credulous, too ready to believe what she was told, too ready to believe what she was told and this made her gullible, easily persuaded or deceived. And, Members of the Jury, you may think that the defendant took full advantage of her trust in him and he abused it.
>
> Because, set against the background of the evidence in the case as a whole, the nature of their relationship is obvious: clearly, Nina Wang believed the defendant had special powers; clearly, Nina Wang believed the defendant had special powers in relation to her health."

221. Clearly, there were two aspects to the applicant's admitted lies to Mrs Nina Wang. Comforting a dying woman by saying that she would live to a great age was one matter. In the context of this case, telling Mrs Nina Wang that he was able to say that because he had spoken to Buddha was quite another matter. Clearly, it was relevant to the issue of the nature of the relationship between Mrs Nina Wang and the applicant, in particular whether or not he was her feng shui adviser, whom she believed to be possessed of special powers. Relevant to that issue was the evidence of Dr Molly Gong of her first meeting with the applicant at the Hong Kong Sanatorium on 23 March 2007, of which the judge reminded the jury:[165]

> " Dr Gong said she was quite emotional at the time and asked the defendant to use his powers to help her sister. The defendant replied: "Yes, I do have powers. I don't want others to know. All along, I have been doing things to help her. Don't cry, all along your sister is very confident"."

222. Earlier, in the discussions between counsel and the judge in respect of the directions to be given in the summing up, at which point counsel were agreed that no lies direction was required and that a direction as to the burden standard of proof would suffice, Mr Perry said of this evidence:[166]

> " My Lord, we've given some consideration because there is evidence of a lie in relation to Buddha. But it seems to us that that's not the sort of lie that ordinarily would attract a lies direction because it's not -- it wasn't a lie told out of consciousness of guilt which is what the lies direction is really dealing with. That is more of a lie that is part of the general narrative of the evidence in the case.
>
> COURT: But I think, also, the witnesses, the sisters, have basically treated it as a white lie ...
>
> MR PERRY: Yes, yes.
>
> COURT: ... told to comfort somebody who's nearing the end of her life.
>
> MR PERRY: Yes. *I will have something to say about that in my closing* but ..." [italics added.]

223. No doubt, in describing the applicant's admitted lie in relation to Buddha as being part of the general narrative of the evidence, Mr Perry had in mind that it was part of the evidence that supported the prosecution case that the applicant was acting as a feng shui adviser to Mrs Nina Wang and that he claimed falsely to have special powers. Certainly, that is how he approached the matter in his closing speech.

224. We are satisfied that this admitted lie of the applicant was capable of supporting the prosecution case in respect of the key or core issue, namely the relationship between the applicant and Mrs Nina Wang.

Innocent reasons/explanations for the applicant's lies

225. The judge did direct the jury to have regard to whether or not possibly there were innocent reasons for the applicant's lies:[167]

> " I must tell you that the mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons and they may possibly be innocent ones in the sense that they do not give any indication of guilt. For example, somebody may lie in order to make his defence sound better. The defence may be true but he may gild the lily, as we say, to embroider it, to bolster it, and in so doing, tell lies. He may tell lies to protect somebody else who may be close to him, such as his wife or his family or a friend or somebody else. He might tell lies to conceal some disgraceful conduct other than the commission of the offence itself, such as perhaps some immoral conduct, adultery or whatever. Or he may lie simply out of panic or confusion. So there may be innocent, possibly innocent, reasons as to why a person may lie.
>
> If you think that there is, or that there may be, an innocent explanation for his lies, then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason - if you are sure that he did not lie for an innocent reason - then his lies can be regarded by you as evidence which supports the prosecution case."

226. It is clear that Specimen Direction 42.2 of the 'Specimen Directions in Jury Trials' of the Judicial Institute was the template for the judge's directions. However, given that most of the alleged lies were to be found in the evidence produced by the applicant in the probate proceedings, that template did not resonate particularly with the circumstances of this case. Here, the applicant's alleged lies were advanced in support of a positive case in respect of the 2006 Will in the probate proceedings. So, there was no question of the applicant acting in panic or confusion or of his concealing disgraceful conduct other than the commission of the offence. The account advanced by the applicant was a deliberate and calculated decision to propound the validity of the 2006 Will.

227. There is no dispute that the judge did not condescend to give any specific example, in relation to any of the alleged lies, of an innocent reason (s) for making that lie (s). That is not surprising, since no attempt was made to do so in the closing speech of the applicant's counsel at trial. Indeed, as noted earlier, he did not advert to the alleged lies at all. In all the circumstances, it is very difficult to see what the judge could have said about the issue to the jury.

Conclusion

228. We are satisfied that there is no merit in the several grounds of appeal advanced in respect of the judge's directions relevant to the applicant's lies.

Ground 2

The judge's failure to direct the jury properly as to their approach to the defence case

229. Having given the jury the standard directions as to the burden and standard of proof[168], at an early stage of his summing up the judge directed the jury as to their approach to the defence case:[169]

> " The defendant does not have to prove his defence. He does not have to prove anything. On the contrary, because of what I have just told you about the burden and standard of proof in criminal cases, it is for the prosecution to satisfy you so that you are sure of the elements of each count in the indictment.
>
> Of course, if *the defence put forward by the defendant* is true, then he must be acquitted, but he must also be acquitted if that defence may be true because, if it may be true, you could obviously not be sure of his guilt." [Italics added.]

230. Earlier, in his post-empanelment directions to the jury, in giving the jury a brief outline of the procedure in a criminal trial, the judge addressed the issue of the purpose of cross-examination of prosecution witnesses by the defence:[170]

> " After examination-in-chief, counsel for the defence may, if he wishes, cross-examine the witness by putting questions to him or her and the purpose of cross-examination, as we call it, is to: test the truth and accuracy of the evidence; to help the witness to recall other facts which had, maybe; suggested he has or she has forgotten; *to bring out in -- evidence in favour of the accused* or to put the defence case to the witness." [Italics added.]

231. In context, it is clear that in directing the jury to have regard to the "defence put forward by the defendant", the judge was directing the jury to have regard not only to the defendant's evidence, as advanced in the probate proceedings and in his video recorded interview with the police, but also to the evidence adduced from prosecution witnesses, in particular that resulting from cross-examination, relied on by the defence. We do not accept Mr Robert Lee SC's submission that the direction related to the evidence of the applicant only and not to all the evidence adduced in all of the defence case, including evidence from prosecution witnesses. Clearly, the effect of the judge's directions was that, if that evidence might be true, the applicant was to be acquitted. Although the judge did not specifically state so, clearly that applied to evidence that was relevant and material to the issue of whether or not the applicant was guilty or not guilty of the charges.

232. We are satisfied that the judge's direction accorded with the fundamental principle identified in the judgment of the Li CJ in his judgment, with which all the other judges

agreed, in the Court of Final Appeal in *Jim Fai v HKSAR* [171] namely:

> " If…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. In that case, the jury had to acquit him."

233. It was the scheme of the judge's summing up, to address the points made by the defence in reminding them of the evidence of each of the witnesses in cross-examination in the course of reminding the jury of the evidence of each witness.

Dr Christina Li

234. It was contended that, in the context of Dr Whittaker's evidence in respect of DNA, Dr Christina Li's evidence constituted "exonerating prosecution evidence" and that the judge failed to direct the jury that if that might be the case they must act on it to acquit the applicant. It was her evidence, which it was accepted was accurately summarised by the judge, that analysis of the swabs taken from the 2006 Will, the unsigned and the envelope revealed "no detectable amount of human DNA being present."[172] At issue, was her evidence that:[173]

> " …no amplification of DNA samples had been done so as to make them amenable, or more amenable, to detection. She explained that some large laboratories in the United States or the United Kingdom - which, in re-examination, she said were private laboratories would do that, but the Hong Kong Government Laboratory did not. She said their own studies suggested that the results of amplification were not very meaningful. She later explained in re-examination that the process had its limitations, particularly with the amplification of low level DNA. Nor did the Hong Kong Laboratory do any enhancement testing process beyond that of amplification."

235. Of Dr Whittaker's evidence, the judge said:[174]

> " Having got the DNA into a solution, the next step was to quantify the level of DNA. He said that the Hong Kong Government Laboratory tests stopped at that point, whereas he was able to conduct further tests on some of the samples, in particular by way of amplification and enhancement."

236. The judge went on to remind the jury that it was his evidence that, "there was DNA present from multiple contributors….there was at least one male contributor." Dr Whitaker said that:[175]

> " the results were very low level and it was not possible to perform a statistical analysis. … Nevertheless, having compared his results with the known DNA profiles of Mr Winfield Wong, Mr Ng Shung-mo and the defendant, and bearing in mind the poor quality of the DNA samples, he was able to give his opinion that it was fair and reasonable to assume that each of them was a potential contributor to the DNA samples."

237. However, the judge went on to remind the jury that Dr Whitaker accepted that:[176]

> " …the results he saw could have occurred by coincidence as a result of the complexity of the results and the number of possible contributors, so that the DNA bands matching Mr Winfield Wong and Mr Ng Shung-mo might not have originated from them but from other possible

contributors."

238. Further, in cross-examination, Dr Whitaker agreed that:[177]

> " …the DNA readings which he obtained were low level profiles from low amounts of DNA, which meant that the DNA profiles were of poor quality. When one had possible mixtures of DNA from two or more people, the interpretation of the results became more complicated. He said that the poor quality of the DNA profiles, as well as the mixing of DNA from more than two contributors, precluded, that is prevented, a statistical approach to the results but there was still room for a qualitative evaluation of the results."

239. In consequence, Dr Whitaker accepted:[178]

> " …that, in the absence of a statistical result as to the chances of these DNA readings belonging to another person who happened to have the same DNA profile, the results he was able to get would have to be looked at in the light of other evidence in the case."

240. It was submitted by ground 2, paragraph 8(iii) that in directing the jury in those terms, the jury was "in effect wrongly directed that they could only take into consideration the DNA evidence if it was confirmed they were in fact the contributors to the DNA samples." In fact, as the judge stated, he was doing no more than reminding the jury of the evidence of Dr Whitaker to that effect, as a result of questions posed of Dr Whitaker by the judge at the conclusion of his evidence:[179]

> " Q. …Do I understand you to be saying that, because you cannot form a statistical result in the sense that Mr Perry indicated, in other words, that there's a one-in-3-billion chance of the maker of a bloodstain being somebody other than the defendant's DNA in the population, that sort of statistic which we often see, ...
>
> A. Yes.
>
> Q. ... because you can't make that sort of statistic, then the highest you can say is that these readings that you found suggest that PW3 and PW4 could be contributors - that far, do ...
>
> A. Yes.
>
> Q. ... but you accept that other evidence may either confirm them as contributors or exclude them as contributors?
>
> A. Yes. And if I could just draw your attention to page 34, the top paragraph, again, I make that point."

241. Those directions to the jury were entirely consistent and resonated with the directions that the judge had given the jury in respect of expert evidence generally earlier in the summing up:[180]

> " …you have received expert evidence in the field of DNA from Miss Christina Li for the prosecution and from Dr Jonathan Whitaker for the defence. It is for you to decide whose evidence and whose opinions you accept, if any. You should remember, however, that this evidence relates only to part of the case and that whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence."

Dr Li Chi Keung-Handwriting

242. It was submitted by ground 2 paragraph 9(b) that, having regard to Dr Li's findings

in respect of some of the writing on the 2006 Will, apparently attributable to Mrs Nina Wang (the date), Mr Ng Shung Mo (the signature, the identity card number and the date), which were the subject of admitted facts, the judge had erred in failing to direct the jury that the writing in question was "possibly genuine writing" of those two persons.[181] In those circumstances, it was submitted that the judge ought to have directed the jury that, if they accepted "… Dr Li's as possibly true, they must act on it to acquit the applicant."

243. The admitted facts, on which the applicant relies, in respect of Dr Li's evidence relevant to Mrs Nina Wang and Mr Ng Shung Mo were that Dr Li had formed the following opinions:[182]

> "(vi) Dr Li can neither confirm or eliminate that the handwritten entry "Oct 16 2006" was written by Nina Wang.
>
> (x) Dr Li can neither confirm nor eliminate that the questioned signature pertaining to Ng Shung Mo and the controlled signature provided by Ng Shung Mo was written by the same person.
>
> (xi) Dr Li can neither confirm nor eliminate that the questioned handwritten entry "(A 925115 (7))" and the handwritten specimen provided by Ng Shung Mo was written by the same person.
>
> (xii) The entry "16/10/2006" may not have been written by Ng Shung Mo."

244. It is to be noted, in context, that evidence was to be viewed together with the other admitted facts in respect of the evidence of Dr Li, in particular that the questioned signatures of both Mrs Nina Wang and Mr Winfield Wong were "highly probably" not written by them.[183]

245. At an early stage in his summing up, the judge had given the jury a warning in respect of their approach to the evidence of Dr Li respect of handwriting:[184]

> " And I must give you this further warning in relation to handwriting expert evidence. Handwriting analysis is not an exact science and the opinion of a handwriting expert as to whether or not a particular signature or piece of handwriting belongs to a particular person, however objective the opinion may be, cannot be as precise as other types of scientific analysis. Whether you accept a handwriting expert opinion depends very much on how sound and convincing the reasons for his opinion are. Having borne these warnings in mind, however, you are entitled to come to a conclusion based on the whole of the evidence you have heard and that, of course, includes the expert evidence."

246. There is no dispute that the judge came to give that direction at the request of Mr Kan, made in legal submissions at the close of evidence and prior to closing speeches.[185]

247. Later in his summing up, the judge repeated his general warning in respect of expert handwriting evidence and addressed the nature of Dr Li's evidence:[186]

> " I ought to give you this warning. Dr Li's opinion, so far as authorship of the signatures and handwriting on Exhibit P312 is concerned, is not a conclusive opinion. At its highest, he expressed his conclusions in relation to some of the signatures and handwriting on the

> documents in terms of strong probability and referred to his opinion as a strong qualified opinion. So you could not find that the impugned will was a forgery on this evidence alone since, if it stood alone, it would not satisfy the high standard of proof about which I told you this morning, namely proof beyond reasonable doubt or proof so that you are sure.
>
> However, it is evidence in the case which, if you accept it, you may take into consideration, along with other evidence, in deciding whether, on all the evidence, you are sure that the document in question is a forgery."

248. Of Dr Li's evidence in respect of the apparent signature of Mrs Nina Wang on the 2006 Will, the judge said:[187]

> " …he was of the opinion that the questioned signature was highly probably not written by Mrs Wang. As to what he meant by "highly probably", he referred to the opinion scale used in his laboratory and which you have set out at tab 2 of the green bundle. He said this was the strongest of the qualifying opinions short of a definite identification."

249. Of the circumstances in which Dr Li expressed the opinion that he could neither confirm nor eliminate Mrs Nina Wang as the author of the date "Oct 16 2006", the judge said:[188]

> " Dr Li said that like the control samples, the words were naturally written, showing no sign of hesitation in their execution. Although there was a difference in the way the letter "c" was formed, the control specimens were limited in quantity and the full range of Mrs Wang's writing variations could not be accurately assessed and evaluated."

250. Of the circumstances in which Dr Li said that he could neither confirm nor eliminate that the questioned signature of Mr Ng Shung Mo or the identity card number and the controlled signature and the handwriting samples were written by the same person, the judge said:[189]

> " the witness said that the signature was easy to imitate because it was simple in design and judging by the control samples, there were wide variations in the signatures…
>
> So far as the handwritten entries of Mr Ng's identity card number… he said there were limited control specimens of similar entries for comparison, so the range of variation could not be conclusively assessed. Besides, there were limited characteristic writing features useful for comparison and the designs of the numbers, capital letter and symbols rendered them easy to imitate."

251. Of the circumstances in which Dr Li said that he questioned the date, namely "16/10/2006" may not have been written by the person who provided the controlled handwriting samples, namely Mr Ng Shung Mo, the judge said:[190]

> " …the witness referred to three differences between the questioned handwriting and the controlled handwriting which are set out at paragraph 8.6 of his statement. In particular, there was evidence of hesitation and an abrupt blunt ending of the second '0' in the year 2006, whereas in the control specimens, they were fluently written without hesitation and with a clear connection between the second '0' and the number '6'."

252. It was submitted on behalf of the applicant that the opinion of Dr Li, in effect, that Mr Ng Shung Mo may not have written the date next to his name on the 2006 Will was the equivalent of him saying that it may have been written by Mr Ng Shung Mo.

Conclusion

253. We are satisfied that the judge directed the jury correctly in respect of their approach to the evidence in respect of handwriting on the 2006 Will. First, given the qualified opinion that Dr Li had expressed in respect of the handwriting the jury could not conclude on that evidence alone that the will was forged. On the other hand, depending on what it was that the jury accepted of Dr Li's opinions, it was evidence which they could consider together with all the other evidence in determining whether or not they were satisfied that the will was forged. In determining what it was that they accepted of Dr Li's opinions they had to have regard to all his opinions, not selected opinions, together with all the other evidence. It would have been wholly erroneous for the judge to have directed that the jury to have regard to opinions which tended to drawing one conclusion only, without having regard to opinions which tended to drawing another conclusion. Regard was to be had all of the evidence.

Mr Winfield Wong, Mr Ng Shung Mo and Mr Raymond Lau

254. In addressing the points made by the defence in the evidence of Mr Winfield Wong, the judge reminded the jury of differences between his evidence and his out-of-court statements. In his evidence-in-chief, he had said of the document handed to him by Mrs Nina Wang on 16 October 2006:[191]

> " there was only one piece of paper which should have been about A4 size. As far as he could remember, the document consisted of four or five paragraphs of English which he believed was typed by a typewriter.
>
> As for the contents, he said he had a rough general look and saw that it was a will. When he had read almost to the end of the document, he said to Mrs Wang, "This is a partial will". He told us that the reason he described it as a partial will was because it did not deal with all of Mrs Wang's assets. He remembered that one of the paragraphs in the document said that a certain sum of money, which was a figure over $10 million was to be given to a named person.
>
> …In re-examination, he said…The named person was unknown to him but it seemed to be a person with the surname Chan"

255. By contrast, the judge reminded the jury that in cross-examination, Mr Winfield Wong had accepted in respect of his statement dated 7 April 2007 that:[192]

> " the surname Chan is not recorded in paragraph 8 of that statement."

256. Earlier, in the context of giving examples of inconsistent statements, the judge had referred to the same issue in respect of Mr Winfield Wong:[193]

> " The point Mr Kan was making was that in his evidence before you, the witness was saying the name he thought he saw was Chan, whereas in the 7 April 2007 statement taken by Mr Sujanani, he had said he could not recall the name of the beneficiary. Mr Kan was thereby inviting you, by virtue of this inconsistency, to entertain doubts as to what Mr Winfield Wong really saw on the document he signed on 16 October 2006."

257. The complaints made out in paragraph 9(a)(i) and (ii) of ground 2 that the judge failed to mention that Mr Winfield Wong said that, in making his statement of 7 April 2007, he had been guided by Mr Sujanani and that the statement does not stipulate the beneficiary as being named as Mr Chan are simply not made out. As noted above, at an early stage in the summing up the judge reminded the jury of Mr Winfield Wong's evidence in respect of the 7 April 2007 statement, which subject he return to later, namely:[194]

> " The witness accepted that the surname Chan is not recorded in paragraph 8 of that statement. He said he thought that he had definitely mentioned the fact of a specific sum being recorded in the will which he witnessed but he could not remember such details as to whether he had mentioned the person surnamed Chan."

258. Similarly, the judge reminded the jury that Mr Winfield Wong had explained to the police, in a statement dated 10 March 2009, the apparent discrepancies between his statement to the police of 5 March 2009 and the statement of 7 April 2007:[195]

> " he told them that the 7 April 2007 statement came about as a result of questions asked by, and answers he gave to, Mr Sujanani. As a barrister, Mr Sujanani had his own views and would ask whether such-and-such was possible. He told the police that, in addition, Mr Sujanani also *guided him* and used certain hypotheses in asking his view about the impugned will.
>
> It would seem, members of the jury, that what the witness was trying to explain was that Mr Sujanani had made certain assumptions about what had happened and what Exhibit P312 meant, which the witness was not entirely happy with. In any event, he signed the document when he was assured that it did not matter because he could make amendments to it later. As far as he was concerned, the most important thing was that he considered it to be a partial will and that fact was in the statement. He did agree, however, that there was no later statement making amendments to the one of 7 April 2007." [Italics added.]

259. Contrary to the assertion made in ground 2 paragraph 9(a)(iii), the judge did not fail to remind the jury of the discrepancies in the evidence of both Mr Winfield Wong and Mr Ng Shung Mo in respect of the circumstances in which they attested the document signed by Mrs Nina Wang on 16 October 2006. Such discrepancies as there were in their accounts were made apparent in his summary of their evidence. It beggars belief that it was contended that their descriptions of the sequence in which they entered and left the conference room relative to each other and Mrs Nina Wang was a "key contradiction". The witnesses were describing events that occurred almost seven years earlier.

260. Of Mr Winfield Wong's account, the judge said:[196]

> " he went up to the 16th floor and into the conference room where he saw Mr Ng Shung-mo……shortly afterwards, Mrs Wang came into the room from her office and sat at the head of the conference table…… She then explained that she wanted him to witness her signature on a document which he thought she had brought into the conference room with her. …….Mr Wong asked Mrs Wang if she would allow him to look at it. She agreed and handed it to him. He glanced over it very quickly and recalled that there was only one piece of paper which should have been about A4 size. As far as he could remember, the document consisted of four or five paragraphs of English which he believed was typed by a typewriter. ……..When

> he had read almost to the end of the document, he said to Mrs Wang, "This is a partial will"……because it did not deal with all of Mrs Wang's assets. He remembered that one of the paragraphs in the document said that a certain sum of money, which was a figure over $10 million was to be given to a named person……. The named person was unknown to him but it seemed to be a person with the surname Chan. ……He then passed the document back for her to sign and date……Having done so, she then passed the document back to Mr Wong who asked Mr Ng Shung-mo to sign first. Mr Ng did so and the witness reminded him to put down his identity card number. The witness himself then picked up the document, signed it, wrote his name in English and put down his identity card number. As far as he could recall, he did not have a stamp or chop with him and, after signing the document, he gave it back to Mrs Wang and left the office."

261. Of Mr Ng Shung Mo's evidence in respect of the events of 16 October 2006, the judge said:[197]

> " When he arrived, Mrs Wang and Mr Winfield Wong were already there. Mrs Wang said that she would like Mr Winfield Wong, PW3, to attest a document for her but she did not explain the nature of the document. He described Mrs Wang as holding a paper between her fingers in a loop fold rather than a flat fold. She then slid the document over to PW3 who asked if he could read it. Mrs Wang agreed and after PW3 had read it, he said to Mrs Wang that it was a partial will, using that term in English and suggesting that she find a solicitors' firm to prepare a more formal complete will. To that suggestion, Mrs Wang said, "I know".
>
> Mr Ng did not himself read the will as he did not think it was appropriate for him to do so. However, after PW3 had read the document, he gave it to Mr Ng to sign. Seeing that Mrs Wang had already signed on the document, Mr Ng signed and, upon PW3's instruction, put down his identity card number and the date. He then pushed it back to PW3 who also wrote on the document. However, he did not see him apply any stamp or chop to the paper. The witness asked if there was anything else and when Mrs Wang nodded, he left."

262. Of more significance, perhaps, was the fact that, although Mr Ng Shung Mo said that at the meeting on 16 October 2006 he had not read the document that he had signed in the conference room with Mrs Nina Wang and Mr Winfield Wong, nevertheless in his witness statement for the probate proceedings, dated 13 April 2007, he had said that it provided for a specific gift of $10 million to a Mr Chan, whom he had named as Chan Chun Chuen in a police statement dated 4 March 2009. Of that issue, the judge reminded the jury that it was Mr Ng Shung Mo's evidence that he was able to give the full name of the beneficiary because, "that was the name given to him by Mr Winfield Wong on 17 October when Mr Winfield Wong was explaining the contents of that will." [198]

263. Earlier, the judge had reminded the jury that Mr Winfield Wong had also testified that such a meeting had taken place:[199]

> " Mr Wong explained that the will gave a specific sum to an individual and that he thought it was a partial will……..When it was put to the witness that he never told Mr Ng about the specific bequest at this meeting, the witness disagreed."

264. Similarly, contrary to the contentions in ground 2, paragraph (a)(iv), the judge did remind the jury of the differences in the accounts of Mr Winfield Wong and Mr Raymond Lau of a conversation in which the former told the latter that he had witnessed a will of

Mrs Nina Wang. The judge reminded the jury that Mr Winfield Wong said that he had had a conversation with Mr Raymond Lau, his principal at Messrs Ford, Kwan & Co. about the events of 16 October 2006, namely that:[200]

> " …he also told Mr Raymond Lau of his firm about his attesting a partial will for Mrs Wang and that he had probably also said something about a sum of money being given to a person surnamed Chan. Later, in re-examination, he said that this meeting with Mr Lau was one or two days after his conversation with Mr Ng.
>
> It was put to him that he had never mentioned to Mr Lau the specific bequest of a sum of money to someone called Chan. He said he could remember mentioning the fact of a specific bequest but he could not remember whether he had mentioned the surname Chan."

265. The judge reminded the jury that, by contrast, Mr Raymond Lau said:[201]

> " …in cross-examination of an occasion when he saw an email from Mr Winfield Wong notifying him of a meeting that he had had with Mrs Wang in the Chinachem headquarters. He could not remember the date of this email except that it was some time well before Mrs Wang's death. Mr Winfield Wong had subsequently told him that Mrs Wang had asked him to witness a will for her but it was not something important. He said in re-examination that he had not heard of any fees being charged for witnessing the document."

The effectiveness of the 2006 Will having regard to the provisions of the 2002 Will

266. Complaint was made in the applicant's written Skeleton Submissions of the Applicant that the judge had failed to draw to the attention of the jury the evidence of Mr Winfield Wong and Dr Kung as to the likely ineffectiveness of the 2006 Will to result in the applicant becoming the beneficiary of the whole of the estate of Mrs Nina Wang, as alleged by the prosecution. Again, the complaint is simply not made out.

267. In respect of Mr Winfield Wong, having adverted to the fact that the 2006 Will addressed, "…all of the rest, residue and remainder of my estate, both real and personal", the judge reminded the jury:[202]

> " Since this will purported to deal with the remaining part of the will, he considered it to be a codicil; in other words, an auxiliary or supplementary will to one already made. In his view, the will…..purported to deal with the remainder of the estate but did not mention whether other wills were made previously. He considered that looking at the way the will was written made the will a big problem, and since the 2002 will had stipulated that after Mrs Wang's death, all of her property or properties should be bequeathed to Chinachem Charitable Foundation Limited, there was no remaining part of her estate to be dealt with."

268. In respect of Dr Kung, the judge said:[203]

> " He said he knew about the 2002 will although he did not remember the details of the contents. As to Nina Wang leaving her estate to the Chinachem Charitable Foundation, this was something that she had mentioned repeatedly and he understood, in his mind, that the entire estate would be given to the Foundation under her will."

269. Although no specific complaint was made in respect of Dr Kung's testimony that Mrs Nina Wang had mentioned repeatedly that the entire estate would be given to the Foundation under her will, complaint was made in respect of Mr Joseph Leung's

testimony to the same effect. It was submitted that the testimony was "inadmissible, prejudicial hearsay…as to the alleged intention of NW of bequeathing her money to charity".[204] Of his testimony, the judge reminded the jury:[205]

> " As for Mrs Wang's intentions so far as her money was concerned, she often said that she would leave it for charitable purposes and her particular interests were educational, medical and agricultural. He was aware, in 2002, that she had drawn up a will because she asked him to witness it. However, since he was out of Hong Kong at the time, he refused because he understood she needed to be present so that he could actually witness her signature."

270. Needless to say, no objection was taken on behalf the applicant when the evidence was led from Mr Joseph Leung.[206] That, is hardly surprising, since it had been part of the applicant's evidence in the probate proceedings that, in about 2002, Mrs Nina Wang had told him that she intended to make it known that she intended leaving her estate to charity. She wished that to be made known to improve her image, in particular in regard to the ongoing probate proceedings in respect of Mr Teddy Wang's will.[207] She had told him that whether or not in fact she left her money to charity was a matter that she could decide later.[208] There is no merit in this ground of appeal.

271. Next, complaint was made that the judge had erred, not only in allowing Dr Molly Gong, Mrs Nina Wang's sister, to give evidence of her dealings with Mrs Nina Wang, which evidenced her belief in feng shui, but also in reminding the jury of the evidence.[209] Further, she was allowed to testify that Mrs Nina Wang never mentioned the existence of the 2006 Will which, when she came to know of its existence and terms on 7 April 2007, she described as "..not in her sister's style, tone, all or language." [210]

272. Needless to say, once again, no objection was taken when the evidence was led from Dr Molly Gong. So, in respect of Mrs Nina Wang's failure to keep scheduled medical appointments, Dr Molly Gong testified: [211]

> " Q. What I'm going to ask you about, Dr Gong, is did your sister tell you why she couldn't keep the medical appointment?
>
> A. She mentioned it and she said that sometimes her master commented that she could not fly on certain dates."

273. Of the fact that she was unaware of the existence of the 2006 Will until 7 April 2007, she testified:[212]

> "Q. Had your sister, herself, ever mention to you a will that she had executed in 2006?
>
> A. No."

274. Of her reaction to the revelation of its existence on 7 April 2007 and her discovery of its terms she said:[213]

> "Q. ….what was your view about the contents of that will?

A. At that time, my immediate response was that it was impossible. My second reaction was that that simply was not the tone of my sister.

Q. "Not the tone of your sister"?

A. Not her tone, not her style. She would not have put down things in this style; that is not her language."

275. In respect of Dr Molly Gong's evidence of statements by Mrs Nina Wang that she acted on the advice of a master in feng shui matters the judge directed the jury:[214]

" …what Mrs Wang reportedly told the witness as to what her master had said is not evidence that the master, whoever he was, actually said it. It is only evidence as to Mrs Wang's state of mind, that she believed in feng shui and that there were certain days on which she could not fly."

276. We are satisfied that the direction was wholly appropriate and that the evidence was properly admissible as going to the issue, not disputed by the applicant at trial, that throughout the period Mrs Nina Wang reposed considerable belief in the powers of feng shui, which belief she openly acknowledged.

277. The judge reminded the jury of Dr Molly Gong's evidence that Mrs Nina Wang had never mentioned the existence of a 2006 Will and of her reaction to learning of the terms of the 2006 Will, namely "it was not in her sister's style, tone or language."[215] Of the complaint, made in oral submissions, that there was no evidence that Dr Molly Gong had any knowledge of Mrs Nina Wang's "tone, style and language" in respect of a will, is to be noted that issue was not taken with her in cross-examination. Insofar as Dr Molly Gong was asked to explain that evidence in cross-examination, the following interchange ensued:[216]

" Q. Right. Have you looked at the 2002 will, Dr Gong?

A. Mm-hm.

Q. Yes.

Q. That was not in the tone, language and style of Mrs Wang, is it?

A. That resemble hers much more than that for 2006 will because it was in Chinese. (In English) Right.

Q. Yes.

A. And it was written by my younger sister.

…….

Q. Yes. And, as far as you were concerned, was your elder sister more proficient in Chinese or English?

A. She was more proficient in Chinese."

278. Clearly, the evidence of Dr Molly Gong's reaction to learning of the terms of the 2006 Will was of limited significance. We are satisfied that, in context, the judge did not

suggest otherwise to the jury. Insofar as she explained her statement, that it was not in the "style, tone or language" of her Mrs Nina Wang, the only amplification she gave was that it was not in Chinese, as was the 2002 Will. Although, as the judge reminded the jury, Mrs Molly Gong had said that her relationship with Mrs Nina Wang was "very close" [217], she gave no further justification for her statement. Further, she noted, which was not disputed, that their sister Mrs Tong had been involved in drafting that will.

The payment of $688 million to the applicant by Mrs Nina Wang on 13 December 2005

279. There is no merit in the complaint made by ground 2, paragraph 9(c) that the prosecution erred in asserting in its closing speech that loans had been raised in order to make the payment of the first of the three $688 million sums of money paid to the applicant by Mrs Nina Wang and that the judge had failed in not correcting the assertion in his directions to the jury. Not surprisingly, no such complaint was made to the judge by Mr Kan at the conclusion of the prosecution's closing speech.

280. In his closing speech, Mr Perry said:[218]

> " The first payment for 688 million was the first occasion that he'd received funds by way of a direct transfer and not by cash, and *he said that Mrs Wang told him she'd sold some assets and wanted him to have the cash.*
>
> Well, that's not consistent with the fact that loan funding had to be arranged for this payment to be made, so if Mrs Wang did tell him that, she was lying to him. But, if you have to choose between Mrs Wang lying or the defendant lying, which one would you put your money on? [Italics added.]

281. It was an admitted fact that "loans facilities were used to effect the transfer" of $680 million on 13 December 2005 to a company controlled by the applicant.[219]

282. It was the applicant's evidence in the probate proceedings in respect of the first transfer of $688 million to his benefit in December 2005 that Mrs Nina Wang:[220]

> "…told me she had sold some assets and wanted to transfer to me a substantial sum of money."

283. In his evidence, Mr Joseph Leung said:[221]

> " Q. May I just ask you, Mr Leung, Goldman Sachs were going to provide $388 million and United Commercial Bank were going to provide $300 million, and we know from the admitted facts that loan facilities were going to be used to effect this transfer; was that your understanding?
>
> A. Yes.
>
> Q. In other words, it was being -- the money was being borrowed from the banks?
>
> A. But Mrs Wang had enough assets placed with the bank.
>
> Q. Yes. So did she have cash of $700 million?
>
> A. Yes, but not in Hong Kong currency.
>
> …….

> A. ... 10 December, she called me from overseas, she said that she needed to use a sum of substantial ... money. I asked her purpose but I did not get an answer. Eventually I disagreed and I did not prepare this sum of money for her to transfer. What I meant was that I disagreed to his transfer but there was enough money in the bank."

Ground 3: Fresh evidence

284. By ground 3, it was argued that the applicant's convictions were unsafe in light of the fresh evidence available now to the applicant. By a Notice of Motion filed with the Court on 13 March 2015, the applicant sought leave to adduce that evidence pursuant to section 83 V of the Criminal Procedure Ordinance, contending that it was credible, admissible and that there was a reasonable explanation for the failure to adduce the evidence at trial.

285. Section 83 V provides:

> " (1) For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice-
>
> > (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
> >
> > (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court of Appeal whether or not he was called in those proceedings; and
> >
> > (c) subject to subsection (3), receive the evidence, if tendered, of any witness.
>
> (2) Without prejudice to subsection (1), where evidence is tendered to the Court of Appeal thereunder the Court of Appeal shall, unless it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise its powers of receiving it if-
>
> > (a) it appears to it that the evidence is likely to be *credible* and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
> >
> > (b) it is satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it."

Oral testimony

286. The applicant invited the Court to receive the oral testimony of :

- Mr Koo Hang Pang;
- Mr Siu Yim Kwan Sydney; and
- Mr Chan Shu Chun.

287. It was submitted that if, at the time of the trial, it was known that Mr Koo could gave evidence relevant to the testimony of Mr Gilbert Leung, a witness called the prosecution, he would have been called as a witness for the defence. Similarly relevant, so it was

contended, was the testimony of Mr Sidney Siu. More generally, it was contended that the evidence to be anticipated from Mr Chan Shu Chun was also relevant to the cross-examination conducted on behalf of the applicant of prosecution witnesses, Dr Kung, Mr Joseph Leung and Mr Ng Shu Mo.

The trial

288. It was suggested that the relevance of the evidence lay in the cross-examination of prosecution witnesses at the applicant's trial in respect of lots of land in Ng Chung Chai Village, Tai Po sold in June 2007 by a subsidiary of Chinachem to a company controlled by Mr Gilbert Leung. That was at about the time that he was called to give evidence on behalf of the Foundation in the probate proceedings. There was no dispute that, having bought the land in 1986 for $500,000,[222] Mr Gilbert Leung, had sold that land to Chinachem in 1988 for "$1 million odd", for which price he repurchased it on 22 June 2007. In cross-examination of Mr Gilbert Leung, the Village Representative's letter of 20 March 2007 [223] was put before him and it was suggested to him that he had been able to repurchase the land at the same price he had sold it for 19 years earlier, "… in return for giving evidence favourable in Chinachem in the probate proceedings".[224] As the judge noted, Mr Gilbert Leung said that, "the two matters were entirely different and there was no such precondition to his giving evidence." The same suggestion was made to and denied by Mr Ng Shung Mo.[225] Mr Joseph Leung was cross-examined about the circumstances in which the sale of the land was made.[226]

The production of documents

289. In addition, Mr Wood sought an order from the Court, pursuant to section 83 V(1)(a) of the Criminal Procedure Ordinance, directing Mr Chan Shu Chun to produce all the documents in his possession in respect of the flow of monies in January 2009, which resulted in a credit to the bank account of the Foundation of $50 million.

The respondent's submissions

290. Mr Perry, for the respondent, opposed the applications. He characterised the evidence in support of the applications as being in a state of disarray, such that the application should be refused without further consideration. He submitted that the Court had received no submissions in respect of the impact of the fresh evidence on the safety of the convictions of the applicant, in particular having regard to the compelling expert evidence in respect of handwriting, ESDA, DNA and fingerprints. Then, he contended that Mr Koo and Mr Sidney Siu were not credible witnesses. Also, he said that the Court had received no reasonable explanation for why the defence had failed to adduce the

evidence of Mr Koo and Mr Sidney Siu at trial. He pointed to the undisputed evidence that both of them had been interviewed by the applicant's then solicitors during the probate proceedings in May and June 2009 respectively. They had been interviewed about the very matters in respect of which it was now sought to adduce fresh evidence.

291. Of the applications in respect of Mr Chan Shu Chun, having noted that they were based on the pleadings only, Mr Perry submitted that the pleadings were not evidence. There was no explanation as to why a statement of Mr Chan Shu Chun had not been placed before the Court. Further, there was no evidence of any attempts to obtain the underlying material sought to be the subject of a production order.

Affidavits, affirmations and witness statements

292. In support of that application, the applicant invited the Court to receive his own affidavit and an affirmation of his brother, Mr Chan Chun Kwok Ricky each dated 10 December 2014. Also, filed with the Court on the same day, was a statement by Mr Chan Yiu Pun Jimmy a solicitor employed by those representing the applicant. On 6 August 2015, a second statement of Mr Jimmy Chan was filed with the Court. The applicant invited the Court to admit into evidence all those affidavits, affirmations and witness statements.

293. Then, on the afternoon of the second day of the hearing, namely Friday, 18 September 2015, Mr Wood presented to the Court a third statement of Mr Jimmy Chan and a statement of Mr Sidney Siu, both of which statements were dated 18 September 2015.

294. Finally, at the outset of the proceedings on 23 September 2015, the fifth day of the hearing, Mr Wood informed the Court that his instructing solicitors were in possession of three 'Defences' filed in the proceedings brought by Mr Chan Shu Chun. However, he said that they were subject to a 'confidentiality' restriction. He asked the Court to exercise its powers under section 83 V(1) to order production of the material. In his reply, at the conclusion of that day of the hearing, in response to a question from the Court, Mr Wood confirmed that no application had been made to the Registrar of the High Court, pursuant to Order 63 rule 4 of the Rules of the High Court, for the applicant to be permitted to inspect the documents. Candidly, he informed the Court that that was, "… probably because it did not cross the minds of anyone."

295. Mr Ricky Chan affirmed that having received a letter, dated 20 July 2013, apparently from Mr Koo Hang Pang who asserted that he had information, "which may assist your elder brother clearing the case", he had met Mr Koo on 27 and 29 July 2013. He made an

audio recording of their conversations. The latter meeting was held at the offices of Haldanes, the applicants' instructing solicitors, and was attended by Mr Jimmy Chan, amongst others. By a letter dated 26 August 2013, he reported the information provided to him by Mr Koo to the police. Subsequently, he made a witness statement to the police, dated 27 September 2013, addressing those issues.

296. No doubt, as a result of that report Mr Koo was questioned by the police. He made a statement, dated 25 September 2013. In the statement, he stated that he did not want to answer questions. Mr Wood said that he had been provided with those statements by the respondent on 14 September 2015.

Mr Koo Hang Pang: the meetings of 27 and 29 July 2013

20March 2007 letter

297. Mr Ricky Chan said that Mr Koo told him that he was a villager and resident of Ng Chung Chai Village. He produced a letter dated 20 March 2007 on the letterhead of the Rural Committee Ng Chung Chai Village, Tai Po, purportedly signed and sent in his name as the Village Representative to the owners of stipulated Lots in the village.[227] He said that the letter had been sent to him attached to a letter dated 27 May 2009 from Haldanes. The text of the letter asserted that Koo Cheuk Wah and his family:

> " …have been carrying out development and agriculture on the above lots since 1990."

Mr Koo said that he had not signed the letter, he was not the Village Representative and knew nothing of the letter.

27 July 2013-Transcript

298. In the course of a meeting in a restaurant on 27 July 2013 with Mr Ricky Chan and Mr Bobby Chan, Mr Koo said that he had met the applicant at the offices of Haldanes.[228] Also, he said that he had sent the applicant a letter. He added, "He must be aware of what was the point in relation to the matter…..he was told at the Haldanes' office." [229]

299. The meeting at Haldanes' office had resulted from a letter sent by Haldanes to Mr Koo dated 27 May 2007.[230] The letter stated:

> " We refer to a letter signed by you dated 20 March 2007 (copy attached).
>
> This letter was produced to the court and to Mr. Gilbert Leung on Thursday, 21 May 2009 by Counsel for the Chinachem Charitable Foundation.
>
> We would like to talk to you about the letter and any subsequent conversations that you had with anyone from the Chinachem Group."

300. The letter identified Mr Patrick Rattigan and Mr Eric Tang as persons with whom Mr Koo was invited to make contact. As stated, attached to the letter was a letter dated 20 March 2007 in the name of Mr Koo, as Village Representative of Ng Tung Chai Village, in respect of various lots of land in Tai Po.

301. Of the letter of 20 March 2007, Mr Koo said "This document was a forged one." [231] When asked if the signature, apparently in his name, was his signature he said, "That's not mine." [232] He explained that he had not reported the matter to the police, because it was "not the appropriate timing." [233] Mr Koo went on to indicate that, from reading the newspapers, he was aware that the document had been exhibited at the trial of the applicant and of the cross-examination by Mr Kan of Mr Gilbert Leung on the issue.[234] Of the nature and effect of the 20 March 2007 letter, Mr Kan said, "Perverting.. it is exactly perverting (the course of justice). …Forging documents." [235] He suggested that an application be made for bail for the applicant and suggested that there be "an immediate appeal." [236] When upbraided for not having approached the defence during the trial with the information, Mr Koo repeatedly said "It was not appropriate at that time." [237]

302. Noting that Mr Gilbert Leung had purchased the land for $1,010,000, and that he had been a witness for the Foundation, he asserted that, "It was 100% transfer of benefit. You did in exchange for him to be the witness." [238] Having been referred apparently to the 20 March 2007 letter and having confirmed that his apparent signature was not in fact his, the following exchange occurred:[239]

> " Q. You mean at that moment, you had already informed Mr Midgley that this was forged?
>
> A. Yes, something wrong."

Later, the issue was addressed again:[240]

> " Q …Mr Midgley knew that this signature was not.. not genuine
>
> A. He knew that the content in this document was all false, all false."

303. Finally, having agreed to meet the Mr Ricky Chan a lawyer's office, Mr Koo said, "If at that time I help him to settle this matter, I will leave Hong Kong." [241]

29 July 2013 meeting

304. For his part, Mr Jimmy Chan confirmed that he had attended the meeting of 29 July 2013 at the offices of Haldanes, together with Mr Ricky Chan and Mr Koo. The latter had provided him with a recording of the meeting, which he had caused to be transcribed.

305. The meeting of 29 July 2013 was attended by numerous other people, including

Ms Anita Wong and Mr Kan, his counsel at trial. Mr Koo confirmed that he had met the applicant on an earlier occasion at the offices of Haldanes.[242] The following exchange occurred, in which Mr Kan responded to questions:[243]

> " Q. Did you tell Mr Midgley about this matter?
>
> A. On that day, there were so many people at the Haldanes' office…I mean couldn't hear.
>
> Q. That means nothing was mentioned about that…what we are talking about mainly is the document.
>
> A. Yes."

306. Having confirmed that he had not signed the letter of 20 March 2007, nevertheless Mr Koo went on to say of the conference at Haldanes:[244]

> " I went there but after we met, there were too many people and we couldn't talk."

307. Mr Koo said he had another meeting with a solicitor called Mr Lai at the Shangri-La Hotel. However, when asked whether or not he had told Mr Lai that the signature on the letter of 20 March 2007 was not his signature, Mr Koo said, "He didn't ask me this question at that time." He confirmed that he had not revealed that information.[245] Mr Koo said that the information in the letter of 20 March 2007 as to the occupation of the land was, "not true".[246] He added that at the request of Mr Gilbert Leung, who paid him $10,000, he had arranged for scaffolding to be erected on the land and photographs taken to record its condition, which were then sent to Chinachem.[247] Further, he said that the date on the letter, namely 20 March 2007 was incorrect. He had dealt with Mr Gilbert Leung in May 2007.[248] Whilst he said that he was prepared to report the matter to the ICAC,[249] he was not prepared to permit the documents that he had produced at the meeting to be photocopied.[250]

308. Although Mr Ricky Chan said that he had written to Mr Koo on 27 August 2014 inviting him to meet, so that a witness statement could be drafted in respect of what Mr Koo had to say about Mr Gilbert Leung, no such meeting had taken place. Mr Koo had telephoned him on 24 September 2014, acknowledging receipt of the letter. Mr Koo said that he "needed to consider". On 13 October 2014, Mr Koo said that he would be leaving Hong Kong for "10 to 20 days". On 7 November 2014, Mr Koo telephoned Mr Jimmy Chan again and asked to contact Mr Ricky Chan. Although he was asked again to make a statement, to which request he gave a positive answer, he terminated the telephone call.

309. Mr Jimmy Chan said that he next tried to contact Mr Koo on 9 September 2015. Finally, he was successful on the afternoon of 10 September 2015. However, Mr Koo "refused to attend court on the 17 September 2015."

310. Mr Jimmy Chan said that, as noted earlier, on 14 September 2015 the prosecution had disclosed a statement made by Mr Koo to the police on 25 September 2013. In it, Mr Koo indicated that he did not wish to answer any questions.

311. In his affirmation, filed with the Court on 10 December 2014, the applicant asserted that he had been present at a meeting in the conference room of Haldanes at which Mr Koo, Mr Midgley and others had been present. Although he was unable to remember the date, the applicant said it was during the probate proceedings. Of the Village Representative letter, dated the 20 March 2007, the applicant said that Mr Koo "… indicated that he had nothing to say about the said letter. As a result, Koo left the meeting in a short period of time." [251]

Mr Sidney Siu

312. Until the Court was provided with the witness statement of Mr Sidney Siu on the second day of the hearing, such information as was provided to the Court was in the form of a 'Conference Note' of a conference held with him at Haldanes, at which Mr Jonathan Midgley and Ms Frances Lok attended, on 26 June 2009.[252] They were respectively the applicant's solicitor and junior counsel in the probate proceedings. Mr Midley was the applicant's solicitor in the criminal proceedings until November 2011. There was no dispute that at the time of the conference the applicant was giving evidence in the probate proceedings. He did so from 24 to 30 June 2009.

313. In his affidavit, the applicant asserted that neither he nor his current solicitors, who represented him in his criminal proceedings in the Court of First Instance, were aware of the fact of a conference at Haldanes with Mr Sidney Siu on 26 June 2009 or of the Conference Note.[253] The same was true of Messrs Li & Lai, who were his solicitors in the criminal proceedings in the Magistracy.[254] He said that the Conference Note had been provided to his solicitors, together with two other conference notes, dated 17 and 21 May 2009, by Baker & McKenzie after the commencement of a defamation action on 10 July 2014, in which they are acting for Edmond Chang. He said that he believed that they had been produced by Ms Francis Lok during her testimony. She was his junior counsel at the probate proceedings.

314. The Conference Note of 26 June 2009 recorded that Mr Sidney Siu said that Mr Gilbert Leung told him he had "…some information to help Chinachem. That he would be the witness", but that "there should be some return for doing that." [255] Mr Sidney Siu said that he was present on 28 April 2007 when Mr Gilbert Leung gave a statement at the offices of JSM. Mr Joseph Leung, of Chinachem, and Ramesh Sujanani

were also present. Some days afterwards Mr Gilbert Leung discussed with him a plan to make money in return for his assistance to Chinachem. That involved him re-purchasing land in Tai Po, which he had purchased first of all "under the Teddy era." Mr Gilbert Leung told him that he had rejected Joseph Leung's suggested price of "0.5 million" as being too obvious. Mr Gilbert Leung said that "the concept of adverse possession" would be used as an excuse to justify the sale to him at undervalue to market value. He said that:[256]

> " GL found a villager (GL gave him some money) to write a letter to create the impression of the land being used by trespasser. JL then granted the sale within very short time."

315. The Conference Note concluded with observations made by Mr Jonathan Midgley and Ms Frances Lok of Mr Sidney Siu. It was observed:[257]

> " 20. Nothing obvious was discussed in the JSM meeting
>
> 21. SS were very keen to give evidence. But his demeanour is not too convincing. His speech was not very articulate or coherent on many points."

316. Obviously, the ongoing probate proceedings were the immediate context of the meeting with Dr Sidney Siu. It appears that the negative assessment of him as a witness was relevant to a consideration by the applicant's then solicitors and junior counsel of whether or not to call Mr Siu as a witness in the probate proceedings.

Notes of a meeting on 17 May 2009

317. The notes of a meeting on 17 May 2009 describe an earlier meeting with Mr Sidney Siu at Haldanes' office at which the topic of settlement of the probate litigation was discussed.[258] Those described as attending were: the applicant, Mr Jonathan Midgley, Ms Frances Lok, Ms Esther Chan and Mr Sidney Siu. Of the latter, it was said that he: "… purports to represent a third party in these proceedings".

318. Mr Sidney Siu said of Ms Chan that she had:[259]

> " …found an informant to prove that GL gives evidence based on some interest…The informant is still considering whether to give evidence, should be reported to the police, etc."

Mr Siu said that Ms Chan proposed "a service fee", stipulated as "5% or 4% to be deducted" from a settlement of "5B". Having stated that, "…all I want is to have the service charge", Mr Siu went on to say, "…5B, including the commission, I say 2%". The issue of a settlement was left unresolved at the meeting.

Mr Sydney Siu's statements to the police: 7 November 2014 and 11 June 2015

319. Mr Sydney Siu made statements to the police on 7 November 2014 and 11 June

2015. In the former statement, he said that, although he had accompanied Mr Gilbert Leung to the premises, he had not taken part in the discussions between Mr Joseph Leung and Mr Gilbert Leung at JSM in April 2009.[260] He said that a few days after the meeting, Mr Gilbert Leung told him that he intended buying some land in the name of his company, Land Perfect Limited, in Ng Tung Chai Village in Tai Po and asked him to provide the capital in return for which he would be given shares. He declined, but agreed to lend the money. Nothing came of that proposal. He identified the land as being that described in the letter of 20 March 2007. He said that he did not know Mr Koo Hon Pang, described in the letter as that Village Representative, or Mr Koo Cheuk Wah.

320. In his statement of 15 June 2015, Mr Sidney Siu said that he had known Mr Gilbert Leung since the 1970s. Both of them knew the applicant. He said that Mr Gilbert Leung hated the applicant for having become rich, having been introduced by the applicant to Mrs Nina Wang. Mr Sidney Siu said that in 2007, at Mr Gilbert Leung's request he had accompanied him to a meeting at a law firm, where the latter had a discussion with Mr Joseph Leung in his absence. Soon afterwards, Mr Gilbert Lam told him that he intended to buy some land in Ng Tung Chai Village, which a friend being named as Kwan had sold to Chinachem earlier. Since the disappearance of Mr Teddy Wang no one had taken care of the land. Mr Gilbert Leung said that he could get help from a villager by having the villager write to Chinachem to assert that they had been using the land for over 10 years. He would obtain photographs which would show that the land had been occupied, so that the land could be bought on the basis of 'adverse possession' of the land. For his part, Mr Sidney Siu said that he rejected Mr Gilbert Leung's offer that he participate in the development of a columbarium on the land.

321. Having been shown the Conference Note dated 26 June 2009, Mr Siu said that it was incorrect in stating that he had suggested the meeting. In fact, Ms Esther Chan had invited him to attend the meeting.[261] Finally, Mr Sidney Siu said that he did not know the name of the villager described by Mr Gilbert Leung or in fact if the villager had helped Mr Gilbert Leung.[262] Of Mr Gilbert Leung's evidence in the probate proceedings, Mr Siu said: [263]

> "I know that the evidence he gave in court was true."

Mr Sidney Siu's statement dated 18 September 2015

322. In his witness statement dated 18 September 2015, Mr Sidney Siu said that Mr Gilbert Leung had told him that he wanted to give evidence for "…Chinachem as a witness. He thought that he should be to obtain some benefit therefrom."[264] Amongst

the proposals that Mr Gilbert Leung made to obtain a benefit was an invitation to him, which he refused, to fund his purchase of: [265]

> " … land in Wu Tong Village at an extremely low price and also put forward a fake adverse possession claim. Leung Kam Ho further said that he had already drafted a letter and found a villager to endorse on the sais draft letter in support of the saying of adverse possession. He also said that, by using this method to purchase the land, Chinachem would quickly approve the sale of the land to Leung Kam Ho."

323. Mr Siu said that, prior to making the statement, he had never told the applicant or his solicitors the information contained in the statement.[266]

324. Of his two statements to the police, Mr Siu explained the absence of the account provided in his witness statements by saying that he had not made mention of it because:[267]

> " …. the police pointed out to me that I should be careful about my words and that was no need to say too much, or else I could be dragged into the case."

Chan Shu Chun

325. Amongst the material which the Court was invited to receive encompassed in the witness statements of Mr Jimmy Chen were the pleadings in ongoing civil actions in the Court of First Instance, inter alia, between:

(i) HCA 832/2014

Chan Shu Chun	1st Plaintiff
King Base Engineering Limited	2nd Plaintiff
v	
Dr Kung Yan Sum	1st Defendant
Hero Fortune Limited	2nd Defendant
Chinachem Charitable Foundation Limited	3rd Defendant
Philip KH Wong, Kennedy YH Wong & CO Limited	4th Defendant

(ii) HCA 114/2015

Right Margin

v

King Base Engineering Limited

(iii) HCA 113/2015

Right Margin Limited	Plaintiff
v	
Philip KH Wong, Kennedy YH Wong & CO	Defendant

(iv) HCA 115/2015

Right Margin Limited	Plaintiff
v	
Hero Fortune Limited	Defendant

(v) HCA 118/2015

Right Margin	Plaintiff
v	
Joseph Leung Wing Kong	Defendant

(vi) HCA 120/2015

Right Margin	Plaintiff
v	
Ng Shung No	Defendant

326. It was submitted that the relevance of this material lay in the fact that Dr Kung, Mr Joseph Leung, Mr Winfield Wong and Mr Ng Shung Mo were witnesses called for the prosecution at the applicant's trial. At trial, it was alleged that they were "…involved in a dishonest conspiracy". It was contended that this evidence tended to show that the witnesses "…through fraud, false accounting and a sham sought to procure funds to fund the litigation against the applicant" in the probate proceedings.

327. The writs issued in items (ii) to (vi) resulted from the transfer of money, over $122 million, from Right Margin in January 2009.

328. The action at item (i) brought against Dr Kung and others arises from the alleged fraud in the sum of $50 million practised on the plaintiffs, which monies it was alleged were channelled to the Foundation to fund the probate action against the applicant.

Against Philip KH Wong, Kennedy YH Wong & CO it was alleged that they breached their duty to the plaintiffs and dealt with the monies having reasonable grounds to believe that they were the proceeds of an indictable offence.

329. The action brought against Mr Joseph Leung and Mr Ng Shung Mo by Right Margin was on the basis of their breach of duty of care and skill and/or a fiduciary duty owed to Right Margin. Mr Winfield Wong was a partner of the firm of solicitors Philip KH Wong, Kennedy YH Wong & CO. The action brought against the firm was on the basis of their alleged breach of a retainer with Right Margin and/alternatively or contractual tortious negligence arising from their role in the payment of those monies. The action brought against Chan Shu Chun arose from the alleged breach of a guarantee in respect of monies due and payable to Right Margin.

330. Although Mr Jimmy Chan asserted, in his affirmation dated 22 October 2014, that he had[268] "…recently become aware" of the litigation launched by Mr Chan Shu Chun against the four defendants and although he returned to that subject in his affirmation dated 31 July 2015, the only evidence to which he referred of steps taken to contact Mr Chan Shu Chun was in September 2015. No witness statement of Mr Chen Shu Chun has been provided to the Court. No evidence has been filed of any attempts to obtain the material underlying the litigation. As noted earlier, during the hearing Mr Wood informed the Court that his solicitors had copies of three of the Defences filed in those proceedings, saying that they were subject to an undertaking as confidentiality. However, he provided no evidence of how, what or when the material had been provided and why it was restricted by an undertaking as confidentiality. Apart from indicating that no thought has been given to the matter, he had no answer to the enquiry as to why no application had been made to the Registrar for inspection of the material filed by the defence, pursuant to order 63 rule 4 of the Rules of the High Court.

331. For his part, Mr Wood submitted that the Court should order not only that Mr Chan Shu Chun should give oral evidence and produce the documents sought from him but also it should direct the police to make enquiries into the subject matter of the litigation. In context, that is in circumstances where not only has no witness statement on Mr Chan Shu Chun being provided to the Court but also no explanation given as to why there was no such statement and what, if any, efforts were made and when in that regard.

A consideration of the submissions

332. For the purposes of considering the applications to receive the oral testimony of witnesses and the application that the Court order the production of documents, the Court has received, *de bene esse*, the affidavit, affirmations and statements put forward by

Mr Wood.

333. There is no dispute that those then representing the applicant had interviewed both Mr Koo and Mr Sidney Siu during the probate proceedings in May and June 2009 respectively. The enquiries made of them included the circumstances in which Mr Gilbert Leung, then a witness for the Foundation, had come to purchase land in Ng Tung Chai Village in Tai Po in June 2009. Clearly, the purpose of those meetings was to determine whether or not they were able to provide evidence relevant to the defence case in the probate proceedings. At issue, in particular, was whether or not Mr Joseph Leung and Mr Ng Shung Mo had permitted the sale of the land to Mr Gilbert Leung as part of an arrangement to reward him from giving evidence favourable to the Foundation. In the event, neither of them was called in the probate proceedings.

334. Relevant to the application for leave to call fresh evidence is first the question of why it was that those witnesses were not called in the criminal trial, which commenced about four years later. The same issues were raised in the defence case in the latter proceedings. Secondly, is the issue of their credibility. Finally, there is the issue of the impact of the fresh evidence on the applicant's convictions in light of the grounds of appeal.

Mr Koo - explanation for not calling him

335. There having been no dispute that Mr Koo had been present at a meeting, which had taken place at Haldanes in May 2009, attended by the applicant and Mr Midgley, the latter was clearly a witness relevant to the issue of what Mr Koo said about Mr Gilbert Leung in respect of the purchase of the Tai Po land sale and purchase. It is clear from the Attendance and Conference Notes of meetings at Haldanes that a proper professional practice was in place to record those events. Yet, no statement has been made available to the Court from Mr Midgley about that meeting with Mr Koo. Indeed, no evidence was made available to indicate whether or not any enquiry was even made of Mr Midgley about the existence of such records or his own memory of those events. Although the matter was raised by the Court during the hearing, nothing was done to redress the absence of that material.

336. As Mr Perry pointed out, those representing the applicant at his criminal trial would have been aware of the findings made by Lam J in his judgment in the probate proceedings in respect of the suggestion that the sale of the land in Ng Chung Chai Village, Tai Po was an advantage given to Mr Leung in exchange for his evidence in the probate proceedings. Noting that the issue was a, "collateral issue relevant only to credit",

Lam J determined that the applicant, "…did not have a solid ground for suggesting an advantage was given to Gilbert Leung. There was a valuation report showing the sale was not conducted at an undervalue and Joseph Leung explained why the sale was in the interests of the Chinachem Group." [269] Whilst the issue in the civil proceedings was a collateral issue, nevertheless it raised the question of an interest/bias in Mr Gilbert Leung in giving his testimony and clearly it was highly arguable that Mr Koo's evidence was admissible in rebuttal of Mr Gilbert Leung.

337. Further, in his unsuccessful application for leave to appeal to the Court of Final Appeal in the probate proceedings, the applicant had put before the Appeal Committee[270] fresh evidence, which it received *de bene esse*, relating to Mr Winfield Wong, namely three witness statements made to the police by him in March 2009.[271] As Mr Perry suggested, in those circumstances it was to be expected that the applicant and those advising him would do all they could to ensure that all material relevant to the defence case was available at the criminal proceedings.

338. The relevance of Mr Koo to the defence case as advanced in cross-examination of Mr Gilbert Leung in respect of the letter of 20 March 2007 was obvious. First, it was suggested that Mr Koo was not and never had been the Village Representative. Secondly, it was suggested to the Village Representative was a Mr Yau.[272] Thirdly, it was suggested that the purpose of the letter was to claim adverse possession of the land.[273] The relevance of Mr Gilbert Leung's response, that the question ought to be directed to the author of the letter, would have been obvious to those representing the applicant.

Credibility

Mr Koo

339. There exists a material and obvious inconsistency in the explanations advanced by Mr Koo in the meetings of 27 and 29 July 2013. On the former occasion, he asserted in terms of his meeting with the applicant and Mr Chan in 2009, that Mr Midgley knew that the contents of the letter of 20 March 2007 were false and that he had not signed the document. By contrast, at the meeting of 29 July 2013, Mr Koo asserted that because the meeting was too noisy and there were too many people he had not said anything about the falsity of the letter or the fact that he had not signed the letter. In context, it is to be remembered that the whole purpose of the meeting was to address that very issue.

340. Further, it does not enure to the benefit of a consideration of the credibility of Mr Koo that, when asked about these events by a police officer in September 2013, he had declined to answer any questions.

341. Next, it is clear from the transcripts of the 27 and 29 July 2013 meetings that, having initiated contact with Mr Ricky Chan, Mr Koo was actively marketing himself as a witness. He suggested that his evidence could be used as the basis not only for an appeal but also for an application for bail pending appeal.[274] His statement that, having helping the applicant "settle this matter", then "I will leave Hong Kong" is consistent with an implied invitation for compensation or reward.

Mr Sidney Siu

342. As far as Mr Siu is concerned, it is clear from the Conference Note of 26 June 2009 that Mr Jonathan Midgley and Ms Frances Lok took a negative view about him as a potential witness. However, complaint is made on behalf of the applicant that neither he nor his solicitors at the criminal trial knew of the fact of the meeting let alone the contents of the Conference Note until 2014. In support of the applicant's bare assertion in his affidavit to that effect, reliance was placed on correspondence from his solicitors, who where his solicitors in the criminal trial, to the effect that the Conference Note was not in the material passed onto them from Haldanes. What is singularly missing from the material advance before the Court is not only evidence from Mr Midgley and Ms Frances Lok but also evidence of any attempt whatsoever to contact them. Clearly, they were best placed to provide an account of the information provided to them by Mr Siu at their meeting with him on 26 June 2009 and by them to the applicant. No suggestion has been made, and none could be, that they were and are not available.

343. Whilst it is readily understandable that the applicant was not present at the meeting with Mr Sidney Siu on 26 June 2009, given that he was in the middle of his evidence in the probate proceedings, it would have been extraordinary if the information provided by Mr Sidney Siu and the assessment of him as a potential witness for the defence, had not been passed on to the applicant at the conclusion of his evidence. In that context, it is to be noted that the subject matter was of sufficient interest to the applicant that he accepted that he was present at the meeting at Haldanes with Mr Koo about a month earlier when the same subject was addressed. Clearly, and perfectly understandably, the applicant took a personal interest in the steps taken to marshal the defence case in the probate proceedings. There is every reason to think that he would have taken an even greater interest in respect of the criminal case.

344. The professional care with which Mr Midgley and Ms Frances Lok dealt with the matter is evident from the detailed note of the information provided by Mr Sidney Siu and their subsequent analysis and determination of his worth as a witness. In that context, it is to be noted that Haldanes continued to be the applicant's solicitors after he had been

charged on 26 May 2011 and remained his solicitors until November 2011.

345. Central to a consideration of the credibility of Mr Sidney Siu are the witness statements that he made to the police, in particular his statement that the evidence that Mr Gilbert Leung had given in the probate proceedings was true. As noted earlier, in order to extricate himself from that assertion, Mr Sidney Siu claimed in his statement of 18 September 2015 that, during the making of his two statements to the police:[275]

> " …the police pointed out to me that I should be careful about my words and that was no need to say too much, or else I could be dragged into the case. As such, in those interviews I did not mention any particulars and details related to this case." [276]

346. Mr Siu went on to assert that he had not attended either the civil probate proceedings or the criminal trial of the applicant, so that "I am therefore not in any position to comment on the accuracy of testimony of Leung Kam Ho."

347. It is inherently improbable and implausible that police officers would interview Mr Sidney Siu as a potential witness not once, but twice, but on each occasion encourage him not to say anything about the matters about which they were enquiring. Further, it is to be noted that on each of the two police statements the applicant signed the statement immediately beneath the declaration not only that it was, "…true to the best of my knowledge and belief" but also that it was made in the knowledge that, if he knew that it was false or that he did not believe it to be true, he was liable to prosecution for a criminal offence. So, it was in those circumstances that he stated that the evidence of Mr Gilbert Leung about Mr Koo was true.

Mr Chan Shu Chun

348. Given that the Statement of Claim filed by Mr Chan Shu Chun, and the other Statements of Claim filed by Right Margin against the various defendants, including witnesses called by the prosecution in the criminal trial of the applicant, all post-date the applicant's criminal trial by a year or more, we are satisfied that the material, whatever it may be, was not available to the applicant at the time of the trial. However, in the absence of any witness statement from Mr Chan Shu Chun, for which absence there is no explanation, and in the absence of any underlying material at all, it is not known what his evidence might be. The bare assertions in the pleadings do not constitute evidence.

349. Reliance was placed on the statement of truth signed by Mr Chan Shu Chun verifying the contents of the pleadings. The reliance was misplaced. For the purpose of such a statement of truth is to provide that the consequence of making a false statement without honest belief in its truth is punishable by contempt.[277] The statement of truth does not turn the pleadings into evidence.

350. The suggestion by Mr Wood that the Court direct the police to make enquiries into the circumstances underlying the litigation involving Mr Chan Shu Chun was extraordinary, given the complete absence of any evidence to support the bare assertions in the pleadings. On appropriate occasions, at the end of a trial or other hearing a court may refer the papers to the Director of Public Prosecutions for his consideration as to what, if any, action ought to be taken in light of evidence adduced before the Court. Here, the Court received no evidence. It is no part of the Court's duties, nor does it have the power, to direct the law enforcement authorities to make enquiries on the basis of the pleadings only in civil litigation.

Conclusion

351. For the reasons set out above, we were satisfied that it was not appropriate for the Court to exercise its powers under section 83 V(1) of the Criminal Procedure Ordinance and, as we indicated at the hearing, we declined to make the orders sought by Mr Wood.

352. We grant the applicant leave to appeal in respect of the grounds of appeal in relation to the judge's directions as to lies. However, for the reasons set out above, we are satisfied that there are no merits in the grounds of appeal against conviction. Accordingly, the appeal against conviction is refused.

Ground of Appeal against Sentence

353. Mr Wood submitted that the sentence of 12 years' imprisonment on each count, ordered to be served concurrently was manifestly excessive. He contended that the trial judge took into account irrelevant material, and gave undue weight to the charitable status of the victim and to the feelings of the deceased:

- The trial judge paid undue weight to the fact that during Mrs Nina Wang's lifetime the applicant had received HK$3 billion from her, in circumstances which the judge appeared to have regarded as aggravating features.

- The judge said that the applicant was a "beguiling charlatan", who had "inveigled" himself into her presence and got "out of her, two days before she died, no less than £30 million".

354. It was submitted that the judge erred in having regard to those matters, since the applicant was not charged with any misconduct in his dealings with Mrs Nina Wang in her lifetime.

355. Further, the judge failed to give sufficient weight to the fact that the attempt at fraud

had failed. No monies were obtained under it. Save for the costs of the proceedings, which the applicant was ordered to pay, the true beneficiaries did not suffer loss, for the forgery was uncovered.

356. In concluding that this was "the worst type of offence which comes before the court", the judge erred. Clearly, a case where the money had been obtained and dissipated, so that it was beyond the reach of the charitable foundation, would be a worse case. So, the judge was wrong to conclude that the circumstances justified "…the application of the maximum sentence for forgery as a starting point."

357. By an amended ground of appeal, filed with the Court on the sixth day of the hearing, Mr Wood contended that the judge erred in sentencing in adverting to the "vast fortune you would have obtained had your crime been successful." It was submitted that, "Whether it is "vast" or not was a question unknown." Mr Wood pointed to the Determination of the Appeal Committee of the Court of Final Appeal, refusing the applicant leave to appeal in the civil proceedings, in which Ribeiro PJ said:[278]

> " Until adjudicated upon, it would not have been possible to quantify the financial benefit to the Applicant or financial detriment to the Foundation (if any) flowing from the Court's order validating the 2006 Will."

358. Mr Wood submitted that "…the CFA could not even be satisfied of whether the Applicant would be entitled to amount of more than $1 million."

359. Finally, it was submitted that the sentences imposed on the applicant were outwith the range of sentences imposed for failed frauds.[279]

Reasons for Sentence

360. Having noted that the maximum sentence for each of the offences under the Crimes Ordinance for which the applicant had been convicted by the verdict of the jury was 14 years' imprisonment, the judge observed that, "…serves to show how, in some circumstances, forgery can be an extremely serious offence." [280]

361. Of the applicant's conduct, the judge said:[281]

> " Not only is yours a story of unbelievable greed, but you intended to take for yourself what should have passed to the Chinachem Charitable Foundation Limited under the terms of Mrs Wang's last will dated 28 July 2002. The real victim of your crime, apart from the good name and reputation of Mrs Wang, was a charitable foundation which Mrs Wang hoped would provide charitable works "until eternity", as she put it."

362. In the result, the judge determined of the applicant:[282]

> " ….you are nothing more than a clever and, no doubt, beguiling charlatan. From the moment you inveigled yourself into Mrs Wang's presence in early 1992, claiming that the husband whom she loved so much was still alive somewhere on the eastern part of the Hong Kong

> seaboard, to the last days of her life when she lay in hospital on her deathbed, you were still boasting of your powers which would allow her to overcome her misfortunes.

Extraordinarily, notwithstanding that Mrs Wang must have been extremely sick and frail in her final days, you still managed to get out of her, two days before she died, no less than £30 million."

363. Of the advantage that the applicant had taken of Mrs Nina Wang's vulnerability, the judge said:[283]

> " Mrs Wang has come out of these proceedings, in her final years, as a sad, lonely and somewhat tragic figure but you took full advantage of her sadness and loneliness and her tragic life, at first by claiming that you could find her kidnapped husband and then by claiming that you had the answer to her terminal illness. I have no doubt that she trusted you, or trusted in you, or she would not have enriched you to the tune of over $3 billion during her lifetime.
>
> But your final act was the cruellest and most egregious of all, *and that, not your earlier conduct, is the one for which I must sentence you.* Cruel because, by this forgery, not only did you insult Nina Wang's friendship by changing what was her treasured legacy, but egregious because, had you succeeded, you would have cheated a charitable foundation out of what they would have been entitled to distribute in accordance with Mrs Wang's wishes to deserving causes under that legacy. The result would have been that, instead of benefiting mankind as Nina Wang wanted to be remembered for, the only one to benefit would have been you." [Italics added.]

364. Of the applicant's sustained and protracted attempts to propound the validity of the 2006 Will, the judge said:[284]

> " …the Chinachem Foundation has been forced to spend, no doubt, many millions of dollars in litigation to challenge the claims which you made under that forgery. Yet never once, since that extremely ill-advised press conference at the Grand Hyatt Hotel on 20 April 2007, until today, six years later, has there been the slightest remorse in your conduct."

Starting point for sentence

365. In stipulating 14 years' imprisonment as the appropriate starting point to be taken for sentence for each of the offences, the judge said:[285]

> " I have canvassed with your counsel, such is the exceptional nature of this case and the sheer magnitude of the estate from which you stood to benefit under the forged will, whether the appropriate starting point should be the maximum sentence available to me under the law. Sentencing judges should not use their imaginations to conjure up unlikely worst possible kinds of cases. What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type.
>
> In my judgment, this is one such case. But even if I were to try and conjure up in my imagination a worse possible case than this, I would have extreme difficulty in thinking of one. The reason is not just the vast fortune you would have obtained had your crime been successful, but the shameless dishonouring of a woman who must have placed great faith, personal trust and friendship in you during her life and the wicked way in which the true beneficiaries, a charitable organisation, would have been cheated and deprived of the means of carrying out Mrs Wang's obvious and much vaunted charitable aims.
>
> I am also conscious that this is not an amateurish or clumsy forgery but an extremely well-executed and planned forgery which has resulted in millions of dollars now being spent by Mrs Wang's real intended beneficiaries in civil proceedings, not to mention this criminal prosecution, in order to show what has now, today, been conclusively proved. And this particular forgery involves a will which is, by its nature, a particularly nasty and insidious type of forgery because the person who ostensibly made the will can no longer speak in defence of his or her true intentions."

Discount

366. Of the issue of the element, if any, of discount it was appropriate to afford the applicant from the starting point taken for sentence, the judge noted: [286]

> " ….you have not pleaded guilty, you have shown no remorse, and nor are you a person of unblemished character as the details of your criminal record have now made clear."

367. However, the judge went on to determine that it was appropriate to afford the applicant a discount from that taken as the starting point for sentence to reflect the manner in which the defence had been conducted at trial and the element of delay in bringing the matter on for trial.

Conduct of the defence

368. Having noted that the trial had been fixed for 60 hearing days, the judge said:[287]

> " It has taken exactly half of that time and the reason it has only taken 30 days, or 31 days, is because of the way your legal team, in particular Mr Kan, have conducted your defence. It has been done sensibly and sensitively, concentrating on the essentials needed to put forward your case."

369. Of the manner in which the applicant's case had been presented, the judge said:[288]

> " The case which you have put forward has not been so much a positive case as an attack on the validity and cogency of the prosecution evidence, which was an entirely proper and, one might argue, more sensible course for you to take."

370. In consequence, the judge determined:[289]

> " Defendants should be encouraged to streamline complex cases in this way and you must take credit for having instructed or permitted your counsel to conduct the case in the way that they have."

Delay

371. Of the issue of the delay in bringing the matter on for trial, the judge said:[290]

> " I wish to make clear that there has been no fault whatsoever on the part of the prosecution in prosecuting this case since they could not realistically arrest and charge you until the probate proceedings had run their course. Nor has there been any fault on the part of the prosecution in prosecuting this case since your arrest."

372. Of the delay, resulting from the decision of the defence to seek a preliminary enquiry, the judge said: [291]

> " It is clear that the case became unnecessarily stalled in the Magistrates Court in 2011 and 2012, after you had received advice from a succession of solicitors and senior counsel for the purposes of a wholly unmeritorious preliminary inquiry which, having read the entire transcript of those proceedings, did not begin to fulfil the purpose for which preliminary inquiries are properly required."

373. In consequence, the judge determined:[292]

> " Any delay since your arrest on 3 February 2010, has been entirely of your own making. …
>
> Nevertheless, the fact remains, as a matter of history, that you were not arrested, or could not be arrested, until February 2010, nearly three years after the forged will first came to public attention. To that extent, this factor is an element - albeit not as strong as it might have been had there been any fault on the part of the prosecution - which I will throw into the equation when assessing your mitigation."

374. In the result, the judge said that he afforded the applicant a discount of two years' imprisonment from that taken as the starting point for each of the offences, observing:[293]

> " *That may seem a generous discount for these factors but I have adopted a high starting point.* I intend to make the sentences on both counts wholly concurrent. Although one could argue that the offences are different, nevertheless, they both derive from the same conduct and intent." [Italics added.]

Sentence

375. The judge ordered that the sentences to be served concurrently. Accordingly, the total sentence imposed on the applicant was 12 years' imprisonment.

A consideration of the submissions

376. There is no doubt that the applicant's attempts to propound the 2006 Will as valid were both protracted and sustained. From the time that he produced the 2006 Will first in April 2007, the applicant persisted in his endeavours to have it determined valid, until the Appeal Committee of the Court of Final Appeal ruled against him on 28 October 2011. In doing so, he adduced his own multiple witness statements into evidence in the probate proceedings and gave oral testimony in support of his case. That evidence was roundly rejected in his judgment by Lam J.

377. We are satisfied that the judge was correct to have regard to that evidence and, in particular, to the consequences in costs to the Chinachem Foundation in the probate proceedings as relevant to determine the appropriate starting point for sentence. The applicant had done all that he possibly could to propound the forged 2006 Will. Not surprisingly, the judge found that he had shown no remorse.

The value of the applicant's interest in the estate of Mrs Nina Wang

378. With respect to Mr Wood, the Determination of the Appeal Committee of the Court of Final Appeal is of no assistance in determining the issue of the value of the estate, and more particularly the benefit that the applicant sought to obtain, if he had succeeded in having the forged 2006 Will determined to be valid. In his judgment, Ribeiro PJ noted:[294]

" The Applicant now seeks leave to appeal under section 22(1) of the Court's statute[295] which relevantly provides as follows:

(1) An appeal shall lie to the Court in any civil cause or matter

(a) as of right, from any final judgment of the Court of Appeal, where the matter in dispute on the appeal amounts to or is of the value of $1,000,000 or more, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $1,000,000 or more;"

379. Having dismissed reliance on the first limb of section 22(1)(a) as unarguable, Ribeiro PJ went on to say that the applicant: [296]

" …relies also on the second limb of section 22(1)(a), applying for leave to appeal on the basis that "the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $1,000,000 or more".

380. In addressing the submission, Ribiero PJ said: [297]

" If the Applicant were to be granted leave, the order he seeks, namely, one pronouncing in favour of the 2006 Will's validity, must have the immediate effect of conferring on him a financial benefit in a clearly quantified sum in excess of the $1 million threshold amount (with a corresponding quantified detriment to the Foundation). It is not enough to show that such a financial consequence is a likely eventual result of the appeal. By way of elaboration, as previously indicated, the immediacy requirement means that the order sought in the proposed appeal, if granted, would have the effect of conferring the quantified financial benefit without need for any further adjudicatory process to determine any question of fact or law, including any process of assessment, quantification or apportionment."

That requirement is not satisfied in the present case. At the trial, Lam J identified nine issues arising in respect of the 2006 Will. The first eight relate to the authenticity and validity of that will. However, Issue 9 was formulated as follows:

"...whether the 2006 Will was, on its true construction, only a partial will, taking effect only in respect of property not disposed of by the 2002 Will." [298]

As Lam J pointed out,[299] it is purely an issue of construction and would have had to be addressed if the Applicant had succeeded in proving the validity of the 2006 Will. The Judge would, in that eventuality, have had to construe the competing 2002 and 2006 Wills side-by-side to decide whether the latter had revoked the former or whether it took effect only as a codicil to the former. In the latter event, he would have had to determine what part of the estate passed to the Applicant under the codicil. Until adjudicated upon, it would not have been possible to quantify the financial benefit to the Applicant or financial detriment to the Foundation (if any) flowing from the Court's order validating the 2006 Will.

The fact that the Judge, having found the 2006 Will to be a forgery, was not required to resolve Issue 9 does not mean that it was not a genuine issue or that it could be ignored. If the Applicant had succeeded or were to succeed on appeal, a remitter of Issue 9 to the Judge for determination would be necessary, demonstrating that the financial consequences of a ruling in favour of the validity of the 2006 Will are, pending such determination, unquantifiable.

The proposed appeal accordingly falls outside section 22(1)(a) and does not qualify for leave to appeal as of right."

381. Clearly, the issue addressed by Ribeiro PJ was simply whether the order sought by the applicant:[300]

" …namely, one pronouncing in favour of the 2006 Will's validity, must have the immediate effect of conferring on him a financial benefit in a clearly quantified sum in excess of the $1 million threshold amount."

382. In determining that it did not, the Appeal Committee of the Court of Final Appeal did not determine that the applicant's claim to the estate of Mrs Nina Wang was of a value of less than $1 million. It merely determined that it was unquantified, pending the resolution of outstanding issues identified by Lam J in his judgment.

383. As Le Pichon JA noted, in the judgment of the Court of Appeal refusing the applicant leave to appeal to the Court of Final Appeal from the judgment of Lam J, the applicant's position as to his entitlement under the 2006 Will to the estate of Mrs Nina Wang was:[301]

> " … that if he were to succeed in having the 2006 Will pronounced in solemn form he would be beneficially entitled to the entire state of deceased as sole legatee."

384. As Mr Perry pointed out, the assumed valuation of the estate stipulated in a letter from JSM to Haldanes dated 25 July 2007, in which those representing the Foundation responded in tentative negotiations to reach a settlement of the litigation, was a lower figure of $50 billion and a higher figure of $90 billion.[302] In response to his enquiry of Mr Perry prior to sentencing, the judge was informed that, although there was "no formal evidence", the prosecution understood that the value of the estate of Mrs Nina Wang was in the region of $83 billion.[303]

385. We are satisfied that the factor relevant to the issue of sentence is the value of the estate that the applicant intended and attempted to secure for himself. Clearly, that was all the estate of Mrs Nina Wang, which on any view was huge. The judge was entitled to have regard to what he described as, "the vast fortune", which the applicant sought to secure for his own benefit.

386. Although the judge determined that the evidence demonstrated clearly that the applicant was a charlatan, who had inveigled his way into the trust of Mrs Nina Wang, as a result of which he had been rewarded with the payment of over $3 billion in her lifetime, he made it clear that was not relevant to the determination of sentence for the offences of which the applicant had been convicted, stating that it was for that conduct, "not your earlier conduct… for which I must sentence you." Nevertheless, we are satisfied that the applicant's earlier conduct gave context to the circumstances in which he propounded the 2006 Will.

The starting point for sentence: the maximum sentence

387. As noted earlier, in adopting as the starting point the maximum sentence available in respect of each of the counts of which the applicant had been convicted, the judge acknowledged that, he had "…adopted a high starting point." [304] In doing so, the judge

stated that he was satisfied that the circumstances of the commission of the offence fell within the "broad band" of the worst kind of case for which the maximum sentence was appropriate.[305] Noting that the applicant's conduct involved an "extremely well executed and planned forgery" [306] and that, if it had been successful, "it would have cheated and deprived"[307] a charitable foundation of the means of carrying out charitable works, the judge said that he would have had "extreme difficulty in thinking of " [308] a worst possible case. Obviously, in having regard to those factors, the judge was alive to the fact that, despite his persistent best efforts, the applicant has failed to secure any benefit from the estate of Mrs Nina Wang that he sought by his making and using the forged 2006 Will.

388. Nevertheless, with respect to the judge, the failure of the applicant's persistent efforts to secure the benefit of the estate by the use of the forged will, pointed to an obviously worse circumstance in the commission of the offences, namely success in that endeavour followed by dissipation of the assets. In those circumstances, the Foundation would have been conclusively deprived of the use of those assets in charitable works.

Conclusion

389. In the result, we are satisfied that the judge fell into error in stipulating a starting point for sentence for each of the counts of 14 years' imprisonment. In our judgment, notwithstanding the very grave circumstances of the commission of the offence it was not appropriate to stipulate the maximum sentence available for each of the offences. We are satisfied that the appropriate starting point for sentence for each of the counts was 13 years' imprisonment.

Discount

390. As noted earlier, in affording the applicant a discount of two years' imprisonment from the starting point he stipulated of 14 years' imprisonment, to reflect the fact of the conduct of the defence at trial and the delay in bringing the applicant to trial, the judge acknowledged, "That may seem a generous discount for these factors."

391. Although the judge identified two factors in stipulating a discount of two years' imprisonment, he did not distinguish specifically in weight between either factor. Having acknowledged that the trial had occupied only half the estimated length of trial, the judge acknowledged that the defence had been conducted, "…sensibly and sensitively, concentrating on the essentials needed to put forward your case." The judge was entitled to say, as he did, that the applicant was entitled to credit in consequence of the manner in which the defence had been conducted.

392. By contrast, although the judge noted that the applicant had first propounded the 2006 Will in April 2007 and that it was not until May 2013 that the criminal proceedings began, as noted earlier the judge went on to exonerate the prosecution of any culpability for delay:[309]

> " …there has been no fault whatsoever on the part of the prosecution in prosecuting this case since they could not realistically arrest and charge you until the probate proceedings had run their course. Nor has there been any fault on the part of the prosecution in prosecuting this case since your arrest."

393. Moreover, the judge determined specifically that the defence required a "wholly unmeritorious"[310] preliminary enquiry in the Magistracy, with the result that "…the case became unnecessarily stalled in the Magistrates Court in 2011 and 2012". Understandably, the judge determined of that period, "Any delay since your arrest on 3 February 2010, has been entirely of your own making." [311] Albeit that the judge acknowledged that the fact of delay in arresting the applicant was merely an element in mitigation which, "I throw into the equation" [312], with respect to the judge, it is very difficult to see how in those circumstances the applicant was entitled to any discount in sentence on that basis. That element of delay was entirely attributable to the applicant's conduct in persisting in propounding the forged 2006 Will.

Conclusion

394. We are satisfied that the judge fell into error in affording the applicant a discount of 2 years' imprisonment from that stipulated as the starting point for sentence. We are satisfied that the applicant was entitled to a discount of 12 months' imprisonment, from a starting point of 13 years' imprisonment to reflect the manner in which his defence was conducted. He was not entitled to any discount for the element of delay.

395. In the result, we are satisfied that the sentence of 12 years' imprisonment imposed on each of the counts was entirely appropriate. Accordingly, we refuse the application for leave to appeal against sentence.

Costs

396. Counsel for the respondent having indicated at the hearing that the respondent wished to apply for an order of costs in its favour, if the appeals were dismissed, we order that the respondent file such written submissions in support of that application with the Court, as it may wish to do so, within 10 days hereof and that the appellant, if he opposes the application, file such written submissions with the Court, as he may wish to do so, within 10 days thereafter. The respondent is to file with the Court any written reply within seven days thereafter. The written submissions of the parties are to be limited to

10 pages and the reply to five pages. In other respects, the submissions are to comply with the provisions in respect of written submissions of Practice Direction 4.2.

(Michael Lunn)	(JEREMY POON)	(DEREK PANG)
VICE-PRESIDENT	JUSTICE OF APPEAL	JUSTICE OF APPEAL

Mr David Perry, QC, Counsel on fiat, Ms Anna Y. K. Lai SADPP and Mr Eric Tsoi, Counsel on fiat, of the Department of Justice, for the respondent

Mr James Wood, QC, Mr Robert S. K. Lee, SC and Ms Anita L. C. Wong, instructed by Cheung & Liu, for the applicant

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[1] Appeal Bundle; page XI, paragraph 1.

[2] Appeal Bundle; page XI, paragraph 3.

[3] Appeal Bundle; page XI, paragraph 5.

[4] Appeal Bundle; page XII, paragraph 6.

[5] Appeal Bundle; page XII, paragraph 7.

[6] Appeal Bundle; page XII, paragraph 8.

[7] Appeal Bundle; page XII, paragraph 16

[8] Appeal Bundle; page XIV, paragraph 17.

[9] Appeal Bundle; page XIV, paragraph 22.

[10] Appeal Bundle; page XX, paragraphs 63-5.

[11] Appeal Bundle; page XIV, paragraph 24.

[12] Appeal Bundle; page XV, paragraph 28.

[13] Appeal Bundle; page XVI, paragraph 36.

[14] Appeal Bundle; page XVIII, paragraph 55.

[15] Appeal Bundle; page XVIII, paragraph 55.

[16] Appeal Bundle; page XIX, paragraph 59.

[17] In part it read:

> "HERE IS MY WILL:-
>
> ALL of the rest, residue, and remainder of my estate, both real and personal, of every kind and description, wherever situated on whether now owned or hereafter acquired, including any power of appointment, I give, devise, and bequeath to MR CHAN CHUN CHEN (HKID: D 516801 (6)), who was born in Hong Kong on 23 December 1959.
>
> To my belief, MR CHAN CHUN CHEN, will be capable of determining the distribution and use of my estate in a good and proper way. My will is established entirely and wholeheartedly with the knee and good of my family and loved ones. It is my great appreciation that my wheel could be announced fairly and righteously as stated."

[18] Appeal Bundle, unpaginated (first document).

[19] Appeal Bundle; page XXII, paragraphs 76-8.

[20] Appeal Bundle; page 522, paragraph 876.

[21] Appeal Bundle; pages 545-591; 592-600; and 601-644.

[22] The Judicial Institute's 'Specimen Directions in Jury Trials'-Specimen Direction 4.1.

[23] Appeal Bundle; page 4 I-S.

[24] Appeal Bundle; pages 4 S - 5 I.

[25] Appeal Bundle; page 5.

[26] Appeal Bundle; page 645.

[27] Appeal Bundle; page 655.

[28] Appeal Bundle; page 656.

[29] *HKSAR* v Lee Ming Tee (2001) 4 HKCFAR 133.

[30] *HKSAR v Lee Ming Tee*, page 190 G.

[31] *HKSAR v Lee Ming Tee*, page 191 D-H.

[32] *HKSAR v Lee Ming Tee*, page 191 H-J.

[33] Appeal Bundle; page 5 H-I.

[34] Appeal Bundle; page 5 B-C.

[35] *Montgomery v H M Lord Advocate* [2003] 1 AC 641, at 673 H.

[36] Appeal Bundle; pages 729-734.

[37] Appeal Bundle; page 730.

[38] Appeal Bundle; page 731.

[39] Appeal Bundle; page 731.

[40] Appeal Bundle; page 733.

[41] Appeal Bundle; page 733.

[42] Appeal Bundle; page 734.

[43] *R v McGregor* [1968] 1 QB 371.

[44] *R v McGregor*, page 377.

[45] *Hollington v Hawthorn & Co* [1943] 1 KB 587.

[46] *R v Garrod* [1996] EWCA Crim. 1149.

[47] *R v Garrod*, page 13.

[48] Appeal Bundle; page 733.

[49] Appeal Bundle; page 733.

[50] Respondent's Submissions, paragraph 47.

[51] Appeal Bundle; page 2039, paragraph 42.

[52] Appeal Bundle; page 1248.

[53] Appeal Bundle; page 735.

[54] Appeal Bundle; page 1272.

[55] Appeal Bundle; page 1298.

[56] Appeal Bundle; pages 1299-1300.

[57] Appeal Bundle; page 1303.

[58] Appeal Bundle; pages 869-873.

[59] Appeal Bundle; page 1517.

[60] Appeal Bundle; pages 890-1.

[61] Appeal Bundle; pages 1520-1.

[62] Appeal Bundle; page 1551.

[63] Appeal Bundle; page 1491.

[64] Appeal Bundle; page 1552.

[65] Appeal Bundle; pages 1552-4.

[66] Appeal Bundle; page 1555.

[67] Appeal Bundle; page 1556.

[68] Appeal Bundle; page 1557.

[69] Skeleton Submissions of the Applicant, paragraph 35.

[70] Skeleton Submissions of the Applicant, paragraph 35.

[71] Appeal Bundle: Admitted Facts; page XXII, paragraph 76.

[72] Appeal Bundle; page 1078, paragraphs 407-8.

[73] Appeal Bundle; page 1010.

[74] Appeal Bundle; page 1078, paragraph 408A.

[75] Appeal Bundle; page 1410.

[76] Appeal Bundle; pages 1450-1.

[77] Appeal Bundle; page 1653.

[78] Appeal Bundle; page 1654.

[79] Appeal Bundle; page 1010.

[80] Appeal Bundle; page 1644.

[81] Appeal Bundle; page 1649.

[82] Appeal Bundle; page 1650.

[83] Appeal Bundle; page 1651.

[84] Appeal Bundle; page 1651.

[85] *R v Roberts* (1943) 28 Cr. App. R. 102.

[86] *R v Roberts*, page 105.

[87] *Fox v General Medical Council* [1960] 3 All ER 225 at 230 G.

[88] *Corke v Corke and Cook* [1958] P 93.

[89] *Corke v Corke and Cook*;Hodson LJ, page 101 and Sellars LJ, page 111.

[90] *Corke v Corke and Cook*, page 98.

[91] *Corke v Corke and Cook*, page 111.

[92] Appeal Bundle; page 1450.

[93] Appeal Bundle; pages 1450-1.

[94] Appeal Bundle; page 1452.

[95] Appeal Bundle; page 1148 w.

[96] Appeal Bundle; pages 1149-1154.

[97] Skeleton Submissions of the Applicant, paragraph 55.

[98] Appeal Bundle; pages 1781-2.

[99] Appeal Bundle; page 1783.

[100] Appeal Bundle; page 1785.

[101] Appeal Bundle; page 742.

[102] Appeal Bundle; page 752.

[103] Appeal Bundle; page 758.

[104] Appeal Bundle; page 763.

[105] Appeal Bundle; page 778.

[106] Appeal Bundle; page 795.

[107] Appeal Bundle; page 796.

[108] Appeal Bundle; page 797.

[109] Appeal Bundle; pages 1920-1.

[110] Skeleton Submissions of the Applicant, paragraph 65.

[111] Appeal Bundle; page 103 A-J.

[112] Appeal Bundle; pages 17 R - 18 B.

[113] Appeal Bundle; page 18 G-M.

[114] Appeal Bundle; pages 18 N - 19 J.

[115] Appeal Bundle; page 19 L-S.

[116] Appeal Bundle; page 20 B-J.

[117] Appeal Bundle; page 24 E-L.

[118] Appeal Bundle; page 24 O-R.

[119] *Yuen Kwai Choi v HKSAR*,pages 128 J - 129 B, paragraph 37:

> "In cases where the rejection of any explanation given by an accused almost necessarily leaves the jury with no choice but to convict as a matter of logic, or where the jury are asked to decide on the truth of what an accused said on a central issue in the case, the usual direction on the burden standard of proof would normally be sufficient."

[120] Appeal Bundle; page 25 E-G.

[121] Appeal Bundle; pages 25 T - 26 E.

[122] Appeal Bundle; pages 26 Q - 27 C.

[123] Appeal Bundle; pages 27 Q - 28 B.

[124] Appeal Bundle; pages 87 Q - S; 91 N - 92 A.

[125] *HKSAR v Huang Song Fu* [2006] 3 HKC 319.

[126] *HKSAR v Mo Shiu Shing* [1999] 2 HKLRD 155.

[127] Appeal Bundle; pages 87 S - 88 F.

[128] Appeal Bundle; page 92 C-J.

[129] Appeal Bundle; page 93 B-K.

[130] Appeal Bundle; page 95 J-K; M-O.

[131] Appeal Bundle; page 95 P-R.

[132] Appeal Bundle; page 96 A-D.

[133] Appeal Bundle; page 101 B-G.

[134] Appeal Bundle; pages 101 O-P; 102 A-B.

[135] Appeal Bundle; page 102 J-R.

[136] Appeal Bundle; page 102 J.

[137] Appeal Bundle; page 103 B-C.

[138] Appeal Bundle; page 103 M-P.

[139] Appeal Bundle; page 105 L-P.

[140] Appeal Bundle; page 109 H-J.

[141] Appeal Bundle; pages 109 U; 110 G and L.

[142] Appeal Bundle; pages 110 M - 111 M.

[143] Appeal Bundle; page 111 M-O.

[144] Appeal Bundle; pages 113 Q - 114 B.

[145] Appeal Bundle; page 114 K-N.

[146] Applicant's Skeleton Submissions, paragraph 74.

[147] Appeal Bundle; page 114 E-K.

[148] Appeal Bundle; pages 18 L, 19 E-F.

[149] Appeal Bundle; pages 110 L; 111 N ; 113 M.

[150] *Yuen Kwai Choi v HKSAR*,paragraphs 34-5.

[151] *R v Goodway* 96 Cr. App. R. 11.

[152] *R v Chong Chak On* [1995] 2 HKCLR 226, at 232, lines 34-6.

[153] *R v Chong Chak On*, page 234, lines 21-9.

[154] *Edwards v R* (1993) 178 CLR 193.

[155] Skeleton Submissions of the Applicant, paragraph 76.

[156] Appeal Bundle; page 18 A-B.

[157] Appeal Bundle; page 19 F-G.

[158] Appeal Bundle; page 19 K-R.

[159] Appeal Bundle; pages 115 J - 117 S.

[160] Appeal Bundle; page 110 M-S.

[161] Appeal Bundle; page 110 O-Q.

[162] Appeal Bundle; pages 62 I-T; 68 T - 69 B.

[163] Appeal Bundle; pages 63 F-H; 70 R-T.

[164] Appeal Bundle; pages 1343-4.

[165] Appeal Bundle; page 61 O-S.

[166] Appeal Bundle; page 1783.

[167] Appeal Bundle; page 111 B-P.

[168] Appeal Bundle; page 6 B-T.

[169] Appeal Bundle; pages 6 P - 7 B.

[170] Appeal Bundle; page 652.

[171] *Jim Fai v HKSAR* [2006] 9 HKCFAR 27, at paragraph 16.

[172] Appeal Bundle; page 77 D.

[173] Appeal Bundle; page 77 D-J.

[174] Appeal Bundle; page 119 H-J.

[175] Appeal Bundle; pages 119 Q - 120 C.

[176] Appeal Bundle; page 120 D-G.

[177] Appeal Bundle; page 120 K-O

[178] Appeal Bundle; page 120 P-S.

[179] Appeal Bundle; page 1762.

[180] Appeal Bundle; page 12 H-L.

[181] Applicant's Skeleton Submissions, paragraph 93.

[182] Appeal Bundle; pages XXVIII and XXIX, paragraph103.

[183] Appeal Bundle; page XXVIII, paragraph 103 (v) and (vii).

[184] Appeal Bundle; pages 12 Q - 13 C.

[185] Appeal Bundle; page 1792.

[186] Appeal Bundle; page 80 E-M.

[187] Appeal Bundle; page 82 H-K.

[188] Appeal Bundle; page 82 M-P.

[189] Appeal Bundle; page 84 B-J.

[190] Appeal Bundle; page 84 M-Q.

[191] Appeal Bundle; page 41 E-M.

[192] Appeal Bundle; page 45 O-P.

[193] Appeal Bundle; page 9.

[194] Appeal Bundle; page 45 Q-T.

[195] Appeal Bundle; page 46 J-T.

[196] Appeal Bundle; pages 40 R - 42 B.

[197] Appeal Bundle; pages 47 Q - 48 G.

[198] Appeal Bundle; page 51 Q-S.

[199] Appeal Bundle; pages 44 S-U and 45 B-C.

[200] Appeal Bundle; page 45 C-I.

[201] Appeal Bundle; page 71 M-R

[202] Appeal Bundle; pages 43 R - 44 D.

[203] Appeal Bundle; page 59 A-D.

[204] Applicant's Skeleton Submissions, paragraph 91 (c).

[205] Appeal Bundle; page 36.

[206] Appeal Bundle; page 1418.

> " Q. Did you ever discuss, with Mrs Wang, her plans for the Charitable Foundation, what her intentions were, her state of mind in relation to it?
>
> A. She very often say that she would leave her assets for charity purpose, but she did not particularly mention that she would leave her assets to the Charitable Foundation."

[207] Appeal Bundle; page 725, paragraphs 24-5 - Summary of the applicant's evidence:

> "Nina Wang had told him that the 2002 will was a contrivance designed to please the Chinese government. He said Nina Wang had told him that around 2002 to 2003…. She told him that the purpose of the will was to induce the Chinese government to give her assistance."

[208] Appeal Bundle; page 684 - applicant's statement of 5 November 2008, paragraphs 88-9.

[209] Appeal Bundle; page 60 D-S.

[210] Appeal Bundle; page 63 D-E.

[211] Transcript page 620.

[212] Appeal Bundle; page 1923 f A-C.

[213] Appeal Bundle; page 1923 e.

[214] Appeal Bundle; page 60.

[215] Appeal Bundle; page 63 B-E.

[216] Appeal Bundle; page 788 F-K.

[217] Appeal Bundle; page 59 R.

[218] Appeal Bundle; page 1387.

[219] Appeal Bundle; page XX, paragraph 63.

[220] Appeal Bundle; page 691, paragraph 119.

[221] Appeal Bundle; page 1420 H-S.

[222] Appeal Bundle; page 1380.

[223] Appeal Bundle; page 2101.

[224] Summing Up, page 36 A-C.

[225] Appeal Bundle; page 1626:

> "I put it to you, Mr Ng, you are part of a conspiracy to induce Mr Gilbert Leung to give evidence in the probate proceedings to smear the defendant.
>
> A. Disagree."

[226] Appeal Bundle; pages 1452-9.

[227] Appeal Bundle; page 2101.

[228] Appeal Bundle; page 2150, counter 29.

[229] Appeal Bundle; page 2153, counters 81-83.

[230] Appeal Bundle; page 2099.

[231] Appeal Bundle; page 2157, counter 180.

[232] Appeal Bundle; page 2158, counter 186.

[233] Appeal Bundle; page 2158, page 190.

[234] Appeal Bundle; pages 2158-9, counters 204-216.

[235] Appeal Bundle; page 2161, counters 258-261.

[236] Appeal Bundle; page 2163, counters 302-304.

[237] Appeal Bundle; page 2167, counters 376-382.

[238] Appeal Bundle; page 2170, counter 426.

[239] Appeal Bundle; page 2172, counters 471-2.

[240] Appeal Bundle; page 2177, counters 585-6.

[241] Appeal Bundle; pages 2181-2, counter 720.

[242] Appeal Bundle; page 2266, counters 174-183.

[243] Appeal Bundle; page 2267, counters 196-201.

[244] Appeal Bundle; page 2280, counter 471.

[245] Appeal Bundle; page 2281-2, counters 494-496.

[246] Appeal Bundle; page 2284, counters 544-5.

[247] Appeal Bundle; pages 2284-7.

[248] Appeal Bundle; page 2288, counter 637.

[249] Appeal Bundle; page 2301, counter 911.

[250] Appeal Bundle; page 2316, counters 1153-4.

[251] Appeal Bundle; pages 2070-1, paragraphs 9-11.

[252] Appeal Bundle; page 2317.

[253] Appeal Bundle; page 2074, paragraph 26.

[254] Appeal Bundle; page 2074, paragraph 27.

[255] Appeal Bundle; page 2317.

[256] Appeal Bundle; page 2318, paragraph 13.

[257] Appeal Bundle; page 2319.

[258] Appeal Bundle; pages 2416-9.

[259] Appeal Bundle; page 2417, paragraph 8.

[260] Appeal Bundle; page 2319 f-h.

[261] Appeal Bundle; pages 2319 k-l, paragraph 6.

[262] Appeal Bundle; page 2319 m; Answer 3.

[263] Appeal Bundle; page 2319 m.

[264] Appeal Bundle; page 2097 ah, paragraph 11.

[265] Appeal Bundle; page 2097 ak, paragraph 21.

[266] Appeal Bundle; page 2097 ak, paragraph 22.

[267] Appeal Bundle; page 2097 al, paragraph 24.

[268] Appeal Bundle; page 2086, paragraph 14.

[269] Appeal Bundle; pages 249-250, paragraph 90.

[270] Determination of the Appeal Committee of the Court of Final Appeal, 24 October 2011.

[271] Appeal Bundle; pages 628-643, paragraphs 67-105.

[272] Appeal Bundle; page 1384.

[273] Appeal Bundle; pages 1388 and 1389.

[274] Appeal Bundle; page 2163, counters 302-4.

[275] Statement of 18 September 2015, paragraph 24.

[276] Statement of 18 September 2015, paragraph 24.

[277] Hong Kong Civil Procedure, 2016 Edition, Vol. 1, para 18/20A/1 at p. 460.

[278] *Chinachem Charitable Foundation Limited v Chan Chun Chuen and the Secretary for Justice* (FAMV 20/2011; unreported, 28 October 2011) paragraph 33.

[279] *HKSAR v Lim Ban Hoong and Ma Ping* (CACC 465/2007; unreported, 29 July 2009).

[280] Appeal Bundle; page 129 O.

[281] Appeal Bundle; pages 129 S - 130 B.

[282] Appeal Bundle; page 130 K-Q.

[283] Appeal Bundle; pages 130 Q - 131 E.

[284] Appeal Bundle; page 130 H-K.

[285] Appeal Bundle; pages 131 L - 132 D.

[286] Appeal Bundle; page 132 I-K.

[287] Appeal Bundle; page 132 M-O.

[288] Appeal Bundle; page 133 B-D.

[289] Appeal Bundle; page 133 A-B.

[290] Appeal Bundle; page 133 F-H.

[291] Appeal Bundle; page 133 H-K.

[292] Appeal Bundle; page 133 N-U.

[293] Appeal Bundle; page 134 A-C.

[294] *Chinachem Charitable Foundation Limited v Chan Chun Chuen and the Secretary for Justice* , paragraph 4.

[295] Hong Kong Court of Final Appeal Ordinance, Cap 484.

[296] *Chinachem Charitable Foundation Limited v Chan Chun Chuen and the Secretary for Justice*, paragraph 6.

[297] *Chinachem Charitable Foundation Limited v Chan Chun Chuen and the Secretary for Justice*, paragraphs 31-5.

[298] Lam J §11.

[299] At §20.

[300] *Chinachem Charitable Foundation Limited v Chan Chun Chuen and the Secretary for Justice*, paragraph 31.

[301] *Chinachem Charitable Foundation Limited v Chan Chun Cheun and the Secretary for Justice* (CACV 62/2010; unreported, 6 April 2011) at paragraph 16.

[302] Appeal Bundle; page 1149 at 1151.

[303] Appeal Bundle; page 155 Q.

[304] Appeal Bundle; page 134 A-B.

[305] Appeal Bundle; page 131 N-P.

[306] Appeal Bundle; page 132 A-B.

[307] Appeal Bundle; page 131 S-T.

[308] Appeal Bundle; page 131 Q-R.

[309] Appeal Bundle; page 133 F-H.

[310] Appeal Bundle; page 133 I.

[311] Appeal Bundle; page 133 N-O.

[312] Appeal Bundle; page 133 T.