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HCMP 1112/2012

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MISCELLANEOUS PROCEEDINGS NO 1112 OF 2012**

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IN THE MATTER of section 40(3)  
of the Elections (Corrupt and Illegal  
Conduct) Ordinance (Cap 554)

and

IN THE MATTER of 2012 Chief  
Executive Election

and

IN THE MATTER of an application  
made by the Honourable  
Mr LEUNG CHUN YING to  
correct the Election Return lodged  
on 24 April 2012

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Before: Hon Au-Yeung J in Court  
Date of Hearing: 9 October 2012  
Date of Judgment: 10 October 2012

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**J U D G M E N T**

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1. Mr Leung Chun Ying (“the Applicant”) applies under section 40 of the Elections (Corrupt and Illegal Conduct) Ordinance, Cap 554 (“the Ordinance”) to correct a number of errors in his election return.

*BACKGROUND*

2. The Applicant was a candidate and subsequently elected as the Chief Executive at the election held on 25 March 2012. On 24 April 2012, the Applicant filed his Return and Declaration of Election Expenses and Election Donations (“the Election Return”).

3. It was subsequently discovered that there were a number of errors in the Election Return. As a result, the Applicant applies to court to correct the same pursuant to sub-sections 40(3) and (4) of the Ordinance. There is a subsequent application to amend the originating summons, which is not opposed by the Secretary for Justice (“SJ”).

*THE LEGAL PRINCIPLES*

4. Under sub-section 40(3) of the Ordinance, a candidate can apply to the court for an order enabling him to correct any error in an election return or in any document accompanying the return.

5. Under sub-section 40(4), upon hearing such an application, the court may make the order sought only if it is satisfied that the error was due to, amongst others, “inadvertence or an accidental miscalculation by the applicant or any other person; or any reasonable cause, and was not due to the applicant’s bad faith”.

6. “Inadvertence” means negligence or carelessness where the circumstances show an absence of bad faith. The evidence should show some reasonable excuse for the inadvertence and the negligence must not be of so gross a nature or so culpable as of itself to raise doubts concerning the good faith of the applicant: *Re Brook Bernacchi & Ors* [1957] HKLR 185, at 186. See also *Wong Yee Him v Secretary for Justice*, HCMP 611/2000, 10 March 2000, Deputy Judge Li.

7. Where a deliberate decision has been made to exclude an item from an election return, the applicant may not avail himself of the “inadvertence” exception under section 40(4)(b) of the Ordinance. It would be a conscious decision, albeit erroneous. However, the applicant may rely on the “any reasonable cause” exception under section 40(4)(c) of the Ordinance: *Re Liu Sing Lee* [2003] 3 HKLRD 162, at paras 26-27.

8. The burden is on the applicant to prove that the pre-conditions for grant of relief are established on the evidence and that there was no bad faith on his part: *Re Liu Sing Lee* [2003] 3 HKLRD 162, at para 29.

#### *POSITION OF THE SECRETARY FOR JUSTICE*

9. The SJ represents interested entities including the ICAC, the Registration and Electoral Office and the Director of Public Prosecutions. His role is to draw to the court’s attention relevant facts and matters which may be pertinent to the determination of this application. Having reviewed the explanations put forth by the Applicant both in evidence and correspondence, SJ confirms on behalf of the interested entities that there

is no objection to the proposed corrections to the Election Return under the amended originating summons.

10. Despite the SJ's position, an applicant has still to satisfy the court that the corrections sought meet the requirements of sub-sections 40(3) and (4) of the Ordinance.

*CORRECTIONS SOUGHT*

11. Mr Mok SC leading Mr Philips Wong have helpfully classified the errors set out in Exhibit TKYT-4 into 5 categories:

- A. Clerical errors which mainly involve typographical errors regarding the dates and numbers;
- B. WISERS expenses;
- C. Exclusion of certain items as suggested by the Department of Justice;
- D. Other consequential and/or miscellaneous corrections; and
- E. Omission to produce supporting voucher.

All references to page numbers below are to those in the Election Return.

*A. Clerical errors*

12. One type of error under this category concerns the number of persons attending particular events during the campaign. The second type relates to the dates of some events held. The third type refers to the correct date of an event, quantity, description and amount.

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13. With regard to the first type of errors:

(a) *Page 13-1: Dinner with Agents/Assistants/Helpers on 25.3.2012*

The number of persons attending should be 76 instead of 74. The error was due to inadvertence on the part of Phiona Tam, the Compliance Assistant at the Administration Department of the Campaign Office. The correct number was derived at by adding up the number appearing on 2 invoices.

(b) *Page 13-1: Staff team building lunch on 17.12.2011*

The date was mistakenly stated to be 17.12.2012. The number of persons should have been "62 (approximately)" instead of "5". The error was discovered as a result of media comment that 5 persons attended a lunch which cost \$22,750. The number "5" actually referred to the number of tables. Phiona Tam put down "5" at the time because she was not aware of the number of persons attending the occasion. She made a mental note in her mind at the time that after finishing her work on Section F of the Election Return, she would go back and ascertain the exact number of persons attending the occasion. However, due to the heavy workload, she had inadvertently forgotten to attend to the matter subsequently. The payment vouchers did not contain the information of the number of persons attending. When alerted to the error in late April 2012, she immediately checked the email invitation and learnt that there were approximately 62 persons on the invitation list, ie around 12 persons per table.

14. Phiona Tam has given a detailed account. I accept the errors arose out of inadvertence on her part. The correct amounts spent for the 2 occasions have been disclosed in the Election Return. There was plainly no question of bad faith in making the errors.

15. In relation to the second type of errors, the errors were either in misstating the year, or mixing the date and month of an item. There are 13 items:

- (a) Page 5 – Section D – Table 2 – item 6
- (b) Page 6 – Section D – Table 3 – item 2
- (c) Page 13-1 – “Water for media briefing” in Section F
- (d) Page 13-1 – “Staff Team building lunch” in Section F
- (e) Page 13-1 – “Christmas party for staff” in Section F
- (f) Page 13-8 – “Shirts” in Section F
- (g) Page 13-8 – “Legal services” in Section F
- (h) Page 13-9 – “Domain names” in Section F
- (i) Page 13-9 – “Web design & development” in Section F
- (j) Page E(4)-1 – “Electricity (13/F) 23/12/12-20/01/12” in Table 4 (“Others”) of Section E
- (k) Page E(4)-1 – “Electricity (13/F) 23/11/12-22/12/12” in Table 4 (“Others”) of Section E
- (l) Page E(4)-1 – “Electricity (13/F) 2/11/12-22/11/12” in Table 4 (“Others”) of Section E
- (m) Page E(4)-2 – “Newspaper (Dec 2011 & Jan 2011)” in Table 4 (“Others”) of Section E

16. The election campaign straddled 2011/2012. When considering the items in context and the supporting documents, the

misstatements of the year, and the date and month (in numeral form) were clearly inadvertence. The errors occurred on the part of Mr Wong Tat Chi (program coordinator) and Ms May Li (Financial Controller) during the process of inputting a large volume of data into the computer. There was no error in amounts involved and the supporting documents had been filed with the Election Return. There was plainly no question of bad faith.

17. With regard to the third type, the corrections sought are to tally with what was stated on the supporting documents already submitted with the Election Return. They relate to the following items:

- (a) Page 2-16 of Section B – item 17 – “Assistants” for “Community Outreach” – wrong date;
- (b) Page 11-1 of Section D8 – item 3 – “Magazine Ad” - understated quantity;
- (c) Page E(2)-2: wrong description of “CD paper bag” as “Keys and holders”;
- (d) Page E(4)-1 - wrong month of “Phone & fax cabling (22/F rental)”;
- (e) Page E(4)-3 – “Refund of deposit” – wrong amount;
- (f) Page E(4)-3 – “Sale of furniture” – wrong amount.

18. The errors were clearly made out of inadvertence. There was no question of bad faith involved.

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B *B. WISERS expenses* B

C 19. Wisers Information Limited (“WISERS”) was a content C  
D provider focusing on assembling news articles of Greater China. The D  
E Applicant had been subscribing to its services since late 2008. WISERS E  
F had been issuing monthly invoices to the Applicant’s personal office at F  
G Jardine House. The Applicant’s secretarial assistant, Ms Maytrick Lee, G  
H had been taking care of the payments, which were made out of the H  
I Applicant’s personal account. I

J 20. On 27 April 2012, the Chief Executive–Elect Office received, J  
K for the first time there, an invoice from WISERS dated 26 April 2012. K  
L The invoice was passed to the Applicant who, at that time, was not aware L  
M that the previous invoices issued by WISERS had not been included in M  
N the Election Return. As a result of investigation directed by the N  
O Applicant, it transpired that none of the WISERS invoices had been O  
P accounted for in the Election Return. P

Q 21. Maytrick Lee had, during the election, been asked by the Q  
R Campaign Office to keep and report all of the Applicant’s expenses R  
S relating to the election campaign for the purpose of including the same in S  
T the Election Return, including the Applicant’s travelling expenses, meals T  
U and other election related expenses. She was told generally which items U  
V of expenses should be reported to the Campaign Office as election V  
expenses but was never told that those relating to WISERS were among  
them. She was unfamiliar with the statutory meaning of “election  
expenses”. It never occurred to her that the WISERS expenses should be  
considered as such, especially since the Applicant had been subscribing



A  
B to such service long before he publicly announced to stand as a candidate  
C at the Election on 27 November 2011.

D 22. I find Maytrick Lee's explanation to be genuine. I accept that  
E she had been briefed on the meaning of "election expenses" though she  
F did not make the right decision. It was her inadvertence in failing to pass  
G the WISERS invoices to the Campaign Office for inclusion in the  
H Election Return. There was no bad faith involved.

I 23. There was one other aspect of the WISERS expenses  
J discovered in the course of the investigation directed by the Applicant  
K after receipt of the April invoice – that 15 members of the Campaign  
L Office had been forwarded the contents of WISERS during the campaign  
M period, in addition to the authorized users under the original licenses. At  
N the Applicant's request, Mr Cheung Chun Yuen Barry (the Election  
O Agent and one of the 3 Election Expense Agents of the Applicant),  
P approached WISERS and asked them to charge the Applicant the fair  
Q value attributable to the additional usage, which WISERS did.

R 24. WISERS expenses for the period between November 2011  
S and March 2012 amounted to HK\$149,016. As the donations received  
T which had not been used for the election had already been donated, the  
U Applicant is prepared to pay the additional expenses himself.

V 25. I am satisfied that the mistake in not including this aspect of  
WISERS expenses was due to inadvertence. The Applicant has taken  
prompt action upon discovery of the April invoice to correct the mistake.  
There was no bad faith involved.

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B *C. Exclusion of certain items* B

C 26. The Department of Justice suggests that the following should  
D not be regarded as election expenses: the Now TV subscription, the phone  
E and fax cabling service fee, email hosted exchange service charge,  
F newspaper subscription fees and leasing of furniture. That, in my view,  
G was correct as they were all incurred beyond the campaign period. It was  
H owing to different judgment that they had been originally included. The  
I inclusion of these items was a deliberate decision and thus do not fall  
J within the "inadvertence" limb of section 40(4)(b). However, there was  
K reasonable cause for their correction under section 40(4)(c). There was  
L no question of bad faith because all the supporting documents had been  
M filed along with the Election Return.

N *D. Consequential and/or miscellaneous corrections* N

O 27. These corrections arise out of the corrections above or in the  
P light of events occurring after the filing of the Election Return. P

Q 28. After filing of the Election Return, there were: Q

- R (a) Refund from service providers; R  
S (b) Various expenses incurred in relation to closing down of the  
T Campaign Office; and T  
U (c) Ascertainment of the actual amount of what were originally  
V estimated expenses or rental deposit refund. V

29. With regard to donations, at the time of filing of the Election  
Return, not all deposits and refunds had been collected. The donation  
was eventually made on 25 May 2012 and the receipt was issued by the

Community Chest on 28 May. The Applicant proposed to add a remark "Receipt was submitted to Chief Electoral Officer on 28 May 2012", which was a perfectly proper move.

30. As a result of the errors in Categories B and C, there were further amounts donated to charity, including the WISERS expenses borne by the Applicant. There will therefore be consequential corrections as regards "donations of more than \$1,000", "donations disposed of" and revisions to total amounts in page 1 and 15-1 of the Election Return.

31. As all of these matters occurred after the filing of the Election Return and/or were consequential, there was reasonable cause for the corrections. There clearly was no question of bad faith involved.

*E. Omission to produce supporting voucher*

32. The supporting voucher for one item of "Bank Charge (Net)" was omitted. I am satisfied that this arose out of inadvertence. The correct amount had been stated in the Election Return. There was plainly no question of bad faith involved in the omission.

*THE OVERALL PICTURE*

33. In summary, despite the number of errors involved, I do not consider them, taken individually or as a whole, to be of so gross a nature as to raise doubt concerning the good faith of the Applicant.

34. I have considered all the affidavits filed. As the evidence stands, the Applicant had engaged a team (including certified public

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B accountants and solicitor) with combined expertise to ensure that the  
C stringent legal requirements for, amongst others, preparation of the  
D Election Return were met. There was division of labour in the  
E preparation of various sections of the Election Return. Mr Thomas Tang,  
F one of the Election Expenses Agents, monitored its overall preparation.  
G He had deposed to the fact of how the Campaign Office had educated its  
staff members on the legal requirements on, amongst others, election  
expenses.

H 35. There was a huge volume of transactions involving election  
I expenses/donations of over \$11.3 million. Additional hands were  
J engaged in the course of preparation of the Election Return.  
K Considerable effort had been spent on verifying information, retrieving  
L supporting documents and reconciliation of data. The time was tight. In  
M the meantime, the Campaign Office had to handle other matters such as  
vacating one office and some staff members also started working at the  
Chief Executive-Elect Office after the election.

N 36. Upon discovery of the WISERS invoice for April 2012,  
O investigation was not limited to that item of expenses but there was a  
P thorough check on the election expenses and Election Return. Upon  
Q discovery of the error in connection with the staff team building lunch  
R and upon advice by solicitors, Thomas Tang also asked members of the  
Election Return Team to conduct a thorough check on the Election  
Return such that other errors were found.

S 37. I find that the errors now sought to be corrected did not  
T involve bad faith on the part of the Applicant or any one. Nor was it a  
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B situation of the Applicant willfully disregarding the law or deliberately  
C shutting his eyes to the obvious: *Re Liu Sing Lee* [2003] 3 HKLRD 162 at  
D 29-30. The SJ does not suggest bad faith on the part of anyone either. It  
E is just to grant the relief sought.

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*TERMS OF THE RELIEF*

F 38. The SJ does not oppose to paragraphs 1 and 2 of the  
G amended originating summons. However, Mr Ho, SC suggests that any  
H relief granted by this court should be limited only to the proposed  
I corrections in this application, with express reservation that any relief  
J granted would not prejudice any appropriate steps to be taken by the  
K relevant government agencies under the Ordinance to take matters further,  
L if necessary. A lack of objection by the SJ should be considered in that  
M context.

L 39. The concern of Mr Ho, SC stems from a potential issue in  
M the Election Return arising from the judgment of *Mok Charles Peter v*  
N *Tam Wai Ho & Anor* [2012] 3 HKC 398. It was there held that the  
O election expenses regime under the Ordinance commences from the date  
P when a candidate makes a public declaration of an intention to stand in  
Q the election. Whether and when a person had made that public  
R declaration is a question of fact.

R 40. In the present case, the Applicant affirmed to the fact that he  
S formally announced on 27 November 2011 that he would be a candidate  
T in the 2012 Chief Executive election. The Election Return accordingly  
U proceeded on the basis that 27 November 2011, and no earlier date, was  
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B the relevant commencement date for the disclosure of election expenses.  
C There were, however, news reports showing that the Applicant had  
D described himself as preparing for election (備選) on 9 September 2011.  
E Whether that made the Applicant a candidate earlier than 27 November  
F 2011, whether that may have an impact on the Election Return and  
G whether there may be the criminal consequences flowing from  
eg sections 20, 24 and 38 of the Ordinance, may need to be considered by  
the authorities.

H 41. Whilst I note the concern of the SJ, I do not think that it  
I needs to be spelt out in the order itself. As the terms of the amended  
J originating summons makes clear, the errors to be corrected are those  
K contained in the Election Return as set out in exhibit TKYT-4 to the  
L 2<sup>nd</sup> affidavit of Thomas Tang. I bear in mind that according to section  
M 38(3), a candidate is not liable to be convicted of an offence under  
N subsection (1) for failing to have lodged an election return as required by  
O section 37 if the failure is the subject of an order made under section 40.  
The subject of any order I shall make pursuant to section 40 shall not go  
beyond what has been prayed for in the amended originating summons.  
It is not the intention of the order to prejudice anyone or any investigation.

P *ORDER*

Q 42. I order as follows:

- R (1) There be leave to amend the originating summons; service is  
S dispensed with.  
T (2) There be an order in terms of paragraphs 1 and 2 of the  
U amended originating summons so that the Applicant is at  
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liberty to correct the Election Return in the manner sought and he shall file the corrected version within 21 days. The time for lodging the Election Return is so extended.

(3) There be no order as to costs.

43. I thank counsel for their assistance.

(Queeny Au-Yeung)  
Judge of the Court of First Instance  
High Court

Mr Johnny Mok, SC and Mr Philips B F Wong, instructed by Sit, Fung, Kwong & Shum, for the applicant

Mr Ambrose Ho, SC and Mr Jin Pao, instructed by the Department of Justice, for the interested entities including the Independent Commission Against Corruption, the Registration and Electoral Office and the Director of Public Prosecutions