

For the attention of:

S Oshidar
c/o Dispute Resolution Faculty
RICS

Dear Mr Oshidar

I read with interest the article you referenced in your last International Legal & ADR Update, regarding the independence of the expert witness in the planning arena (NSW, Australia). As you probably know, the pressure in the United Kingdom for experts to be independent is judiciously enforced.

I would like to comment more particularly on the situation in Hong Kong, which appears somewhat varied. I would draw to your attention some elements of three court judgments. Two occurred in 1996. And the third comes 10 years later, 2006.

In the first judgment, which was *R v Kai Tai Construction Engineering Co Ltd*, Magistracy Appeal No. 1123 of 1995, Duffy J. heard an appeal against conviction. The key evidence for the conviction was based upon the evidence of an employee of the Labour Department. Counsel below and at the appeal submitted that evidence from that witness could not be deemed to be independent as he was an employee of the same body, which was prosecuting the accused.

Duffy J. agreed. On 8 February 1996 he said, **“It could not be right for the Labour Department, which was responsible for the prosecution of these matters, to call its own officers as expert witnesses to give opinion evidence to the Courts about the reasons for the accident.”** The appeal was successful and the conviction was quashed.

Almost 2 months later, in *R v Chung Chen-Hsin*, [1996] 2 HKC 156, there was another appeal against conviction. This time the conviction was based upon the expert evidence of a police officer. The police officer gave evidence for the prosecution. On this occasion those instructed in the appeal thought necessary to instruct silks on both sides as the feelings were running high that the need for independent experts was at risk. That feeling was justified.

The judge in this instance, Stuart-Moore J, took careful note of the judgment of only two months previously. Since the judgment was of the same level it would not bind him. I will quote a couple of paragraphs from the judgment so that the flavour of the comments can be obtained:

“9. Experts do not decide cases but they may give an opinion to assist the tribunal in having a better understanding as to how the evidence can be viewed based upon their special skill, learning and experience. There are sometimes conflicts of evidence in this category, and the tribunal of fact will then be left to decide which evidence it prefers.

10. The criminal law does not set limits on who may be regarded as an expert in any particular case beyond the fact that it must be established that the witness is competent and properly qualified to give such evidence. Where competency is disputed, that will be for the judge to decide.

11. From time immemorial, there has never been a requirement that an expert witness must be independent of the prosecuting authority or, if called by the defence, of the accused. If such a restriction were imposed on the prosecution, police officers could, by way of examples, never give evidence in drugs' cases as to value or the average consumption of an addict, or in road traffic cases about accident reconstruction, or in fingerprint cases about the result of their comparison with the accused's known prints. Equally, if an inspector from the Labour Department is able to give competent expert evidence in a case prepared and presented by his Department, the law says nothing which would prevent this.

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The learned Judge had great experience, and I would doubt that he confused an issue of admissibility with the separate issue of assessing the weight of admissible evidence. I am driven to the conclusion that Duffy J., in his somewhat concise judgment in *The Queen v. Kai Tai Construction Engineering Company Limited* (above), has omitted to explain the powerful reasons that must have existed to cast a doubt upon the expert called in that case or in the other case he cited. **It was not, however, a "material irregularity" for the prosecution to have called a properly qualified expert from the same department responsible for that prosecution. (Emphasis added by editor)** That particular choice of phrase by Duffy J. seems to me to have been an unfortunate one, and it is to be hoped that it has not led to confusion elsewhere.”

In this case, the conviction was upheld.

Almost 10 years later, the matter came up for discussion before the Court of Appeal of Hong Kong in *HKSAR v Ng Jit-Man* CACC 137/2005 and CACC 125/2005. The independence of a handwriting expert was called into question. The expert was an employee of the bank, who had been allegedly and apparently placed at a disadvantage by the activities on the accused. The Court of Appeal gave a united judgment. The court found that, in spite of the fact that the expert was an employee of the disadvantaged party and might legitimately have been thought to be biased, he was sufficiently independent allow his evidence to stand. The leading, and indeed only, judgment cited the case of *R v Chung Chen-Hsin*, citing favourably a paragraph from the judgment. The leading judgment was given on 3rd July 2006 by Stuart-Moore J, now Vice-President of the Court of Appeal:

“Mr Subagio’s alleged lack of independence as a witness was an issue raised at trial and the regurgitation of the point in these proceedings made it no stronger than before. However, although Mr Grossman conceded that this allegation was perhaps an “overstatement”, he nevertheless maintained the point as a ground of appeal. As the judge remarked, only someone who worked at BNI could give evidence as to the authenticity of documents issued in their name. We can add, adopting what was said in *R v Chung Chen-hsin* [1996] 2 HKC 156 at 160 that:

“... possible lack of *expertise* (not ‘evidence’ as the typographical error in the law report which also appears in the headnote seems to suggest) is only relevant to the *weight* to be attached to [the expert’s] evidence. If his opinions are clouded by any bias in favour of the [investigators], that will be a matter for the jury to assess ...”
(Emphasis added) Editor’s emphasis noted.

19. Leaving aside that a possible lack of impartiality goes only to the weight of the evidence and not to its admissibility, it is in any event abundantly plain that Mr Subagio was independent of the prosecution. BNI, as Mr Turnbull for the respondent pointed out, had no particular interest in the outcome of the proceedings. The documentation which the prosecution alleged was forged was not presented to BNI but to various other banks in Hong Kong and it was those banks which were placed at risk.”

I hope you and your readers will find these observations and extracts of interest.

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Called to the Bar at [Inner Temple](#) in 1978, Ben Beaumont had chambers in Hong Kong until 2004. Now a member of Clarendon Chambers in the Temple, he is a consultant to various firms including Fairbairn Wild of Banbury. He has received more than 130 domestic and international appointments. He is a Panel member of WIPO and CIETAC. He has taught arbitration and trained Arbitrators under the banners of the CI Arb, AMINZ and the HKIA. He has also taught at UK universities including [Imperial College London](#) and [Oxford Brookes](#) as well as various Universities outside the UK. He co-founded the [Forum for International Conciliation and Arbitration \(FICACIC\)](#) in 1998: <http://www.ficacic.com>

He has written and co-written various books relating to arbitration including *Arbitration and Rent Review* now in its 3rd edition. He is now co writing, with John Papworth, Edward Quigg and Fatos Selita, a small work on arbitration in England and Wales. His work at UNCITRAL continues.