

Statement by Director of Public Prosecutions

The following is a statement issued by the Director of Public Prosecutions, Mr David Leung, SC, today (December 21) on the case of Houses 3 and 4, Villa de Mer, Tuen Mun (the houses owned by the Secretary for Justice, Ms Teresa Cheng, SC, and her husband Mr Otto Poon Lok-to):

Introduction

On December 27, 2017, the Buildings Department (BD) received a media enquiry about suspected unauthorised building works (UBWs) at certain units at Villa de Mer, 5 Lok Chui Street, Tuen Mun, including Houses 3 and 4 (House 3 and House 4 respectively). At the material times, House 4 was owned by a company with the Secretary for Justice, Ms Teresa Cheng, SC (Ms Cheng), as the sole director, while House 3 was owned by Mr Otto Poon Lok-to (Mr Poon), the husband of Ms Cheng, and Ms Karen Poon Wing-yun (Ms Poon).

In early January 2018, in order to avoid any possible perception of bias, partiality or improper influence, the Secretary for Justice delegated to the Director of Public Prosecutions (DPP), Mr David Leung, SC, the authority to handle all prosecutorial matters relating to any reports, allegations and complaints in the matter, including (should it become necessary to do so) the decision as to whether any prosecution action should be commenced against any persons involved in the present case.

On January 9, 2018, BD officers conducted an on-site inspection of both Houses 3 and 4 and identified various UBWs. After conducting investigation and preparing the necessary investigation report and seeking experts' opinion, on November 23, 2018, BD submitted the investigation file to the Prosecutions Division of the DoJ for legal advice. BD recommended prosecuting Mr and Ms Poon in respect of the UBW at House 3 but not prosecuting Ms Cheng in respect of the UBWs at House 4.

To avoid possible perception of bias, the DPP decided to instruct a Senior Counsel at the Bar of Hong Kong. On November 29, 2018, the DPP instructed Mr Edwin Choy, SC, who has no conflict of interest in this case, to provide an independent opinion on the sufficiency of evidence to institute a criminal prosecution in relation to the UBWs at House 3 and House 4.

On December 19, 2018, the DPP received a finalised advice from Mr Choy who advised that while there is a reasonable prospect of conviction against Mr Poon for the UBW, namely a pool structure (approximate size 2.5metres x 4.65m x 1.24m(H)), at House 3, there was insufficient evidence to establish a reasonable prospect of conviction against (1) Ms Cheng in relation to the UBWs at House 4 and (2) Ms Poon in relation to the UBWs at House 3.

Having considered the advice of the Senior Counsel, the evidence submitted by BD, the applicable law and the principles in the Prosecution

Code, the DPP agreed that there was insufficient evidence and hence no reasonable prospect of conviction against (1) Ms Cheng with regard to the UBWs at House 4 and (2) Ms Poon in relation to the UBWs at House 3, but there is a reasonable prospect of conviction against Mr Poon for the UBW at House 3.

Since the UBWs in respect of House 3 came to the notice of BD on December 27, 2017, pursuant to section 40(8) of the Buildings Ordinance, Cap 123, the time limit for prosecution falls on December 27, 2018. In this regard, information has been laid to apply for summons against Mr Poon for the offence of "Knowingly commenced or carried out building works, without having first obtained from the Building Authority his approval and consent in writing" contrary to sections 14(1) and 40(1AA) of the Buildings Ordinance, Cap 123.

Prosecution Criteria

According to the Prosecution Code, a prosecutor must consider two issues in deciding whether to prosecute. First, whether there is sufficient evidence to justify instituting or continuing proceedings. Second, if there is sufficient evidence, whether the public interest requires a prosecution to be pursued. A prosecution should not be instituted or continued unless the prosecutor is satisfied that there is legally sufficient evidence to support a prosecution: that is, evidence that is admissible and reliable and, together with any reasonable inference able to be drawn from it, likely to prove the offence. The test is whether the evidence demonstrates a reasonable prospect of conviction. In the present case, the decision not to prosecute is solely based upon insufficiency of evidence.

For an offence contrary to sections 14(1) and 40(1AA), the prosecution must prove that the subject person has knowingly commenced or carried out any building works without having first obtained from the Building Authority his approval and consent in writing. In the present case, the main issues are (a) whether the UBWs identified at the respective houses were built after Mr and Ms Poon and Ms Cheng had assumed ownership of their respective properties; and (b) if so, whether they knew (i) those structures were built on their respective property at the material time; and (ii) they were built without the requisite consent or approval.

House 3

As the proceedings against Mr Poon in respect of the UBW at House 3 have been instituted, it is not appropriate to comment further on the matter or the detailed reasons of insufficiency of evidence against Ms Poon.

House 4

The BD has identified the following UBWs at House 4:

(a) a rooftop structure, a horizontal extension at the Ground Floor, an L-shape glass canopy outside G/F carpark, a garden deck, a small canopy and cover screens;

(b) a basement; and

(c) other relatively small UBWs, including:

- i. supporting frames for air-conditioners;
- ii. a reinforced concrete cabinet;
- iii. additional partitions;
- iv. glass protective barriers; and
- v. a supporting antenna frame.

For the rooftop structure, the horizontal extension at the Ground Floor, the L-shape glass canopy outside G/F carpark, the garden deck, the small canopy and cover screens, aerial photographs taken in November 2007 and July 2008 show that these UBWs had been constructed before Ms Cheng's company became the registered owner of House 4 on October 23, 2008.

For the basement, according to expert opinion, there is no reliable testing method capable of assessing the age of concrete structure to a precise period of time. Judging solely on the existing condition of the concrete structure, it is not possible to evaluate or estimate the date of construction of the basement. There is also other evidence which suggests that the basement had been constructed before Ms Cheng purchased House 4. For the reasons set out in paragraph 23.4(d) and (e) of the Prosecution Code (Note 1), it would be inappropriate to divulge details of such other evidence.

For the other relatively small UBWs, it is not possible to ascertain from the aerial photographs or other available evidence when they were constructed.

Other alterations and modifications found at House 4, for example, the door opening at the fence wall between House 3 and House 4, are exempted works under section 41 of the Buildings Ordinance, Cap 123.

Mr Choy, having carefully considered all the available evidence and materials, advised that there was no evidence to suggest that the UBWs were constructed after Ms Cheng had purchased House 4 or that she had knowingly commenced or carried out UBWs after she became the owner. Hence, Mr Choy concluded there was insufficient evidence to warrant a charge of "Knowingly commenced or carried out building works, without having first obtained from the Building Authority his approval and consent in writing" contrary to sections 14(1) and 40(1AA) of the Buildings Ordinance, Cap 123, against Ms Cheng.

The decision not to institute prosecution against Ms Cheng in respect of the above UBWs has been made in accordance with the Prosecution Code and the applicable law.

Disclosure of Reasons for Decision

The decision taken has been explained, in accordance with the principles in paragraph 23 of the Prosecution Code, so that the public are fully and

properly informed about this case which has been the subject of public concern.

David Leung, SC
Director of Public Prosecutions
Department of Justice
December 21, 2018

Note: Whilst references are made to legal advice in this Press Statement, neither the BD nor the DoJ waives any legal professional privilege.

Note 1:

Paragraph 23.4(d): "may expose information given confidentially or sensitive information, the exposure of which may give rise to legitimate concern to individuals"; and

Paragraph 23.4(e): "may be contrary to protections given by the Personal Data (Privacy) Ordinance, Cap 486".