

Client Alert

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Brief respite for convicted City Harvest Church leaders as the High Court reduces their sentences on appeal

Introduction

In the latest chapter of the long-running saga involving Kong Hee and the other convicted leaders of City Harvest Church, the High Court (by a majority of 2:1) allowed the Defendants' appeals against conviction in part, and reduced each of their sentences.

The Prosecution has since filed a criminal reference on questions of law of public interest to the Court of Appeal. This has set the scene for a final hearing between the parties that is very likely to have wide-ranging implications, not just for the Defendants themselves, but also on the law in respect of criminal breach of trust.

Facts

The 6 Defendants had been involved in a conspiracy to use church funds to purchase sham investment bonds. Through a complex web of transactions, these bonds were used to fund the Crossover Project. This was an evangelistic outreach program built around the musical career of Sun Ho, who is the wife of Kong Hee.

A more extensive summary of the background facts was set out in our earlier client alert in respect of the District Court judgment, and a copy of this can be found [here](#).

Following a trial that spanned almost 3 years, the Defendants were convicted by the District Court of 43 charges. These included, amongst others, the following:

- abetment by conspiring to commit criminal breach of trust, under Section 409 of the Penal Code ("**PC**"), read with Section 109 of the PC; and
- abetment by conspiring to falsify accounts, under Section 477A of the PC, read with Section 109 of the PC.

The Defendants appealed against their conviction and respective sentences. The Prosecution cross-appealed against the sentences on the basis that they were manifestly inadequate.

Issues

The main issue before the High Court pertained to the scope and operation of Section 409, which provides for an aggravated form of criminal breach of trust committed by, amongst others, agents. The High Court was also asked to consider the various elements of the offence of falsifying accounts under Section 477A. The Defendants' appeal on this latter point was unanimously dismissed by the High Court.





Decision

Criminal Breach of Trust

In order for the Section 409 charges to be made out, the Prosecution had to prove the following elements, namely:

- (a) the Defendants were entrusted with dominion over the church funds;
- (b) monies from the church funds were misappropriated for unauthorised purposes;
- (c) the Defendants acted dishonestly in doing so; and
- (d) the entrustment was in the way of the Defendants' business as agents.

Dominion: The Defendants argued that they were not entrusted with dominion as they did not have *total* or *effective* control over the funds, and the consent of the other members of the church's board was required. The High Court rejected this argument on the basis that it would allow accused persons to rely solely on the innocence of other independent persons to absolve themselves of any criminal liability. This would run counter to the purpose and object of Section 409. So long as a group of people had dominion over property collectively, it was sufficient to establish that each of them had dominion over that property individually.

Misappropriation for unauthorised purposes: The Defendants argued that the "sham investment" and "round-tripping" transactions were genuine investments or had involved building-related expenses. The High Court rejected this argument and found, on the facts, that the Xtron and Firna bonds were shams as the transactions were merely a guise for the Defendants in order to permit them to withdraw funds from the Building Fund. The transactions were also an illegitimate use of the Building Fund and the General Fund as it was intended to create a façade (i.e. that the sham investments yielded returns when it did not).

Dishonesty: The Defendants argued that they had not acted dishonestly, and that they had acted in the best interests of the church. The High Court rejected this argument and held that it was sufficient for the Prosecution to prove that the Defendants had intended to do something that would cause wrongful loss to the church, in the knowledge that they were not legally entitled to do so. This was made out on the facts.

The Defendants as agents: This was the most contentious issue in the appeal. The majority of the High Court found that Section 409 applied only to persons who were *carrying on the business* of an agent (i.e. professional agents), as opposed to persons who were merely *acting in the capacity* of an agent.

At issue was the decision of the Singapore High Court in *Tay Choo Wah v. Public Prosecutor* [1974-1976] SLR(R) 725 ("Tay Choo Wah"), which held that directors were "agents" within the meaning of Section 409.

In the present case, the majority disagreed with the decision in *Tay Choo Wah* for the following reasons:



- (a) Section 409 used the expression “*in the way of his business*” when referring to an agent, while it used the expression “*in his capacity*” when referring to a public servant. This indicated that the mere fact of acting in one’s capacity as an agent was insufficient to come within the scope of Section 409.
- (b) Section 409 listed “*agent*” alongside “*banker*”, “*merchant*”, “*factor*”, “*broker*” and “*attorney*”, which are professions offering certain services to the public in the course of which the customer has to entrust property. The term “*agent*”, used alongside these professions, must have been intended to refer to a profession likewise (e.g. a professional agent).

Although a director was undoubtedly an agent of the company, he could not be said to have acted “*in the way of his business as an agent*” as that involved an “internal” relationship, i.e. between the director and the company, as opposed to an “external” relationship, e.g. between the director and an external party (e.g. a customer). A director could not also be said to be making his living as an agent of the company. The majority consequently found that directors do not fall within the scope of the term “*agent*”, and the Section 409 offence was not made out on the facts. The majority amended the conviction to that of criminal breach of trust *simpliciter* under Section 406 of the PC, which does not require proof that the Defendants’ entrustment was in the way of the Defendants’ business as agents.

In his dissenting judgment, Justice Chan Seng Onn was of the view that it was sufficient that the Defendants had been entrusted with property when acting in the course of a “*trusted trade*” in which they would, in the ordinary course, act as agents. A directorship was such an example of a “*trusted trade*” and, on that basis, Section 409 was the appropriate charge on the facts.

Chan J further held that this was consistent with the framework of the Penal Code, which provided increasing levels of punishment according to the degree of trust placed in the accused. Chan J held that the majority’s interpretation would lead to the absurd result that a director, who was clearly in a position of power, trust and responsibility, would be less culpable than a clerk or servant, both of whom had enhanced punishments under Section 408 of the PC.

This incongruity was acknowledged by the majority, but they held that any changes to the law could only be made by Parliament enacting legislation.

Sentencing

As the majority had found the Defendants guilty of criminal breach of trust *simpliciter* under Section 406 (instead of the aggravated criminal breach of trust offence under Section 409), the sentences had to be re-considered. The majority took into account the District Court’s finding on these key issues:

- (a) the lack of personal gain;
- (b) the honest belief that the Defendants had been acting in the best interests of CHC; and
- (c) the Defendants had made full restitution of the sums.

Lack of personal gain: The majority recognised that there could have been indirect gain, particularly to Kong Hee since Sun Ho was the primary



beneficiary of the illicit funding. However, the majority declined to make any findings on this issue on the ground that it had not been substantially raised by the Prosecution.

Best interests of the church: The majority accepted the District Court's finding that the Defendants had believed that they had been acting in the best interests of the church and that they did not intend to (and had not, in fact) cause the church any financial loss. The majority held that their fault lay in adopting the wrong means to further the church's interests.

Chan J disagreed and found that the Defendants had intentionally entered into the bonds on commercially unjustifiable terms. In so doing, the Defendants had ensured that the church would have borne the risks while the fruits of the venture would have accrued to other parties and not the church. Entering into such transactions were clearly not in the best interests of the church.

Full restitution: The majority found that the Defendants had made full restitution. Chan J disagreed on this issue as the Defendants had not repaid the interest on the funds that the Defendants had utilised. He also found that the mitigating impact of the restitution was minimal as it was rendered to pre-empt the criminal investigations.

Further, whilst the Defendants had made restitution, they continued to act as though the church funds could be used in whatever manner that best suited their needs. This showed a lack of remorse on the Defendants' part. However, Chan J acknowledged that there was insufficient evidence and arguments before the High Court to make concrete findings on these issues.

The majority therefore reduced the sentences of the Defendants, taking into account the mitigating factors and the sentencing limits under Section 406.

Comments

"Can a director be considered an 'agent' for the purpose of Section 409?"

The apparent simplicity of this question belies the complexity of the underlying issues which the High Court was asked to grapple with. In a rare sitting of 3 judges in the High Court, the learned justices themselves were ultimately split in their views. The *dicta* of the majority effectively overturns 4 decades of well-established jurisprudence regarding the scope and interpretation of Section 409. The Prosecution has filed a criminal reference to the Court of Appeal on the issue and we eagerly await the decision of the Court of Appeal.

From a compliance perspective, this case nevertheless serves as a cautionary reminder to anyone who is entrusted with the funds of an organisation to ensure that such funds are only used for authorised purposes, regardless of what the ultimate objective may be. It is also not necessary for the prosecution to prove dishonesty *per se* - the offence would equally be made out if the Defendants intended to do something that would cause wrongful loss to the organisation, knowing that they were not entitled to do so.

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