



ALB Hong Kong Anti-Corruption & Corporate Compliance Forum 2021

Recent Developments in the Law of Bribery in the Private Sector

Mr. William Tam, SC
Deputy Director of Public Prosecutions

*Prosecutions Division
Department of Justice
22 April 2021*



Bribery in the private sector

SJ v Chan Chi Wan Stephen (2017) 20 HKCFAR 98

About four years ago, the CFA handed down its judgment in the case of *Stephen Chan*. The Court held that the law of bribery does not criminalise all payments of money made to an agent without the principal's knowledge and consent. In order to support a conviction, the law requires an examination of the nature, purpose and context of the payment. The induced conduct of the agent should be aimed at the principal's affairs or business and it should be adverse to the principal's interests. The purpose of the bribery offence is not to stigmatize conduct of an agent which is beneficial to and congruent with the interests of the principal.



Bribery in the private sector

SJ v Chan Chi Wan Stephen (2017) 20 HKCFAR 98

When the judgment was handed down, there was perception (erroneous) in some quarters that the holding was somewhat contradictory to the conventional notion that the law of bribery is to invariably prosecute secret or undisclosed commissions. This CFA judgment tells us that a more nuanced analysis will now have to be conducted to assess all the circumstances of the case in order to come to a conclusion as to whether a bribery offence has been committed. The case of *Stephen Chan* is a milestone in the development of the law of bribery in the private sector.



Bribery in the private sector

SJ v Chan Chi Wan Stephen (2017) 20 HKCFAR 98

Probably because the case involved a TVB celebrity and during the trial it had received so much public and media attention that both the legal profession and the compliance industry had paid much interest to the developments of the case including the final appeal. And I am sure a lot of you have made the effort to read and consider this important judgment so that you can now properly advise your clients on the ambits of the offence of bribery.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

But recently, in the context of the bribery law, another case probably as important as *Stephen Chan* was heard and decided in the CFA and it may not have received as much attention as it deserves. That is the case of *Chu Ang* which judgment was handed down in June last year. It concerned a much more low profile appeal from a magistracy decision. In that case, the facts were that a violin teacher introduced a parent of her student to buy a violin from a shop and she got a secret kickback from the shop for that introduction of business. The parent paid \$80,000 for the violin and out of that, the teacher received a rebate of \$20,000.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

From the prosecution's point of view, it was a straight-forward case of an agent receiving an advantage in the form of an undisclosed commission. The case was tried in the magistracy but the court there held that there was no agent-and-principal relationship between the violin teacher and the parent for that transaction. Why did the court so find? Because the parent never paid the teacher for the introduction. The teacher did the introduction upon request and she was not legally obliged to help the parent find a shop or choose a violin for the student. Everything that she did was voluntary. In fact, there were five cases altogether involving violin teachers getting a kickback in similar circumstances and they were all acquitted in the magistracy after trial. All the courts there held that no agent-and-principal relationship existed in those circumstances.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

The prosecution appealed the acquittal in four of those cases to the Court of First Instance but those appeals were also dismissed. The Court there adopted similar reasoning and held that where the alleged agent merely offered assistance on a non-commercial, voluntary basis in a “social or friendly” context, his or her conduct would not be caught by the offence of bribery. The Court held that without the teacher’s referral, the parent would not have known where to buy the violin. And the teacher had negotiated the price with the shop for her and the parent got a discount as a result. And the parent got what she wanted without suffering any economic loss.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

Being dissatisfied with the dismissal of the appeals, the prosecution took the case of *Chu Ang* to the CFA. Finally, the CFA allowed the prosecution's appeal and held that a person is an "agent":-

"... where he or she 'acts for another', having agreed or chosen so to act *in circumstances giving rise to a reasonable expectation, and hence a duty*, to act honestly and in the interests of that other person to the exclusion of his or her own interests. There is no need for any pre-existing legal relationship between them. Acceptance of a request to act may suffice. Indeed, it may be sufficient for the agent to choose to act for another even without a request to do so." (para. 43)



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

The Court of Final Appeal further held:-

“... a fiduciary duty often arises in similar circumstances. There is, however, *no need to burden the construction of section 9 by detailed discussion of the law of fiduciaries or other branches of the law*. It is clear, for instance, from the expansive nature of the definition of ‘principal’ set out above, that the *section 9 scheme goes well beyond ordinary principles of agency law*.” (para. 36)



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

The CFA also held that the Court of First Instance had erred in applying the *Stephen Chan* case:

“The relevant question, applying the *Stephen Chan* case, was whether, in accepting an advantage consisting of the secret commission, Ms Chu had subverted the integrity of the agency relationship with PW1... *Acceptance of such a secret commission while acting for PW1 in the purchase of the violin placed Ms Chu in a conflict of interest situation, which is one example of a case where the integrity of an agency relationship such as existed between Ms Chu and PW1 would be subverted.*” (paras. 41 and 45)



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

It may be important to note that the CFA had gone beyond the facts of the case and considered an example which tends to suggest that the agent-and-principal relationship under section 9 of the POBO has a wider scope than one may expect:

“[In] this example, C had been requested by D to buy the coffee and provided by D with the money to do so. As a result, C collects stamps from the coffee-shop, presumably as part of a customer-loyalty programme which entitles C to have a free cup of coffee when sufficient stamps are collected.” (para. 55)



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

Ribeiro PJ held: “[I]n the coffee example, I think it clear that C would not be guilty of a section 9 offence, but not because of the meaning of ‘agent’... *C may well come within the definition of an ‘agent’ in acting for D in the purchase of the coffee.* However, applying the *Stephen Chan* case, in so far as earning the coffee stamps might be regarded as the ‘advantage’ under section 9(1)(a), it is impossible to see how that could be regarded as conduct by C aimed at D’s business, being conduct which subverts the integrity of the agency relationship in relation to buying the cup of coffee for D... One can readily agree that the section 9 offence should not be given such a wide ambit that it unacceptably criminalises helpful assistance given to another person honestly and in good faith...” (paras. 57, 58 and 59)



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

What are the lessons learnt?

- A POBO agency relationship is no longer restricted to the situation where there is a pre-existing legal, contractual or fiduciary duty for the purported agent to act in the transaction in question.
- Even if there was no such pre-existing duty, one should continue to consider the role of the purported agent, i.e. whether he or she had undertaken to perform such a function for, or had assumed such a responsibility to, the purported principal to act, with or without the latter's request, in relation to the transaction in question. A person may have agreed or chosen so to act *in circumstances giving rise to a reasonable expectation, and hence a duty*, to act honestly and in the interests of that other person to the exclusion of his or her own interests. Acceptance of a request to act *may* itself suffice. Indeed, it *may* be sufficient for the agent to choose to act for another even without a request to do so.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

What are the lessons learnt?

- Such a POBO agency relationship should arise where the circumstances of the case give rise to the requisite reasonable expectation. A fiduciary duty often arises in similar circumstances but the construction of section 9 should not be burdened by a detailed discussion of the law of fiduciaries or other branches of the agency law.
- In each case, it will require an assessment to be made of all the circumstances of the relevant “affairs or business”, including the nature, purpose and context of the payment, taking into account the role of the purported agent in respect of the transaction in question, and bearing in mind that after all, an agent/principal relationship is one of trust and loyalty. On the other hand, also keep in mind the example considered by Ribeiro PJ of a person buying a cup of coffee for his friend: “*C may well come within the definition of an ‘agent’ in acting for D in the purchase of the coffee*”.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

What are the lessons learnt?

- Even when the person is an agent in respect of the transaction in question, the induced conduct of the agent should be aimed at the principal's affairs or business. On this issue, *economic loss is neither an element of the offence nor essential*. Where the acceptance of a secret commission places the agent in a *conflict of interest situation* with the principal, that would be one example of a case where the integrity of an agency relationship would be subverted and that would also be sufficient to demonstrate the necessary detriment to the principal.
- In each case, an assessment will have to be made as to whether, in all the circumstances, the offering, solicitation or acceptance of an advantage is *of such a nature* as to give rise to the necessary detriment to the principal. That requires an examination of the *nature, purpose and context of the payment* in question in each case.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

From the angle of compliance:

- Where a person has done something or acted in a transaction for another person, even though he may not have been legally obliged to do so, simply by so acting, he may have assumed the role of an agent under the POBO; and as a result, any advantage that he has gained out of the transaction may be subjected to the requirements of the POBO provisions. Under the POBO, an agent/principal relationship does not only arise out of the usual employment or contractual context. As clarified in *Chu Ang*, the definition of “agent” under the POBO is an expansive one and the scheme goes well beyond ordinary principles of agency law and fiduciary principles.



Bribery in the private sector

HKSAR v Chu Ang (2017) 23 HKCFAR 194

Corruption Prevention Best Practices

“A person acting honestly and in good faith can easily avoid POBO liability by disclosing the commission arrangement rather than keeping it secret from the person for whom he or she is acting. The other person’s prior permission to accept the rebate might be sought. No doubt some parents in PW1’s position, if informed of the commission, might be content to permit the tutor to accept and keep it out of appreciation for the tutor’s services, or viewing it as a needed part of the tutor’s remuneration, or as payment for the help given in selecting and buying the instrument. Others, if told, might suggest that the tutor should share the commission with them to reduce the expense of the purchase; or they might suggest that the commission should result in reduced tuition fees, and so forth. Or they may be unwilling to proceed on the basis of the tutor receiving a rebate. These would be matters for negotiation and the tutor could deal appropriately with their reactions, acting honestly and in good faith.”

(para. 60)



Thank You !