



## Summary of Judicial Decision

### **HKSAR (Appellant) v Chu Ang (Respondent) FACC 6/2019; [2020] HKCFA 18**

<b>Decision</b>	<b>: Appeal by the Appellant allowed against the ruling of no case for the Respondent to answer and the orders for costs in favour of the Respondent</b>
<b>Date of Hearing</b>	<b>: 1 June 2020</b>
<b>Date of Judgement</b>	<b>: 30 June 2020</b>

### Background

1. The Respondent (“R”) had been engaged as a private music teacher for several years by a mother for teaching her boy violin and she was paid HK\$650 for each 1 hour lesson. She was asked by the mother to help her purchase a new violin for the boy. As a result, R recommended a musical instrument company which the mother had never heard of before. R not only made arrangements in advance with the company to make available a number of violins for inspection; she also attended the company with the boy and the mother to try the violins. She tested them and advised the mother that one of them, which had a price of HK\$99,000, was preferable. R further participated in the bargaining process and helped the mother negotiate the price down to HK\$80,000 which the mother paid for the violin. About two weeks later, R received a rebate of HK\$20,000 from the company which was a commission for the purchase made by the mother. R had known that she would be paid a commission but she had never told the mother about it.
2. The mother testified that she had sought R’s advice and assistance in the purchase because R was her son’s violin teacher and she would not have bought the instrument if R had not recommended it; and she would not have allowed R to receive the rebate had she been informed of it.

### Issue in dispute

3. R was prosecuted for the offence of “an agent accepting an advantage”. In the POBO, the word “agent” is defined to include any person “acting for” another. At the trial, the Magistrate found no pre-existing legal relationship between R and the mother that made the teacher an “agent” of the mother for the violin purchase, and thus ruled that there was no case to answer. This ruling was upheld by the Deputy Judge on the prosecution’s appeal in the Court of First Instance.



4. The central issue is what qualifies a person as an “agent” for the purposes of section 9 of the POBO?

### **Department of Justice’s Summary of the Court’s rulings**

(full text of CFA’s judgement can be found at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=129074&QS=%28Chu%2BAnq%29&TP=JU;](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=129074&QS=%28Chu%2BAnq%29&TP=JU;)

press summary issued by the Judiciary can be found at

[https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACC000006\\_2019\\_files/FACC000006\\_2019ES.htm](https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACC000006_2019_files/FACC000006_2019ES.htm))

5. The CFA unanimously allowed the prosecution's appeal. It applied the rulings of two highly germane decisions, namely, HKSAR v Luk Kin Peter Joseph (2016) 19 HKCFAR 619 (“the Peter Luk case”) and Secretary for Justice v Chan Chi Wan Stephen (2017) 20 HKCFAR 98 (“the Stephen Chan case”) and reaffirmed the legal principles as follows:-

- (a) no pre-existing legal relationship is required for one to be an “agent” of another under section 9. It needs not even be proved that the other person had requested the agent to act. Acceptance of a request to act may suffice. It may be sufficient for the agent to choose to act for another even without a request to do so [paras. 36 and 43];
- (b) a person is an “agent” by having “acted for another” where that person has 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 [para. 43];
- (c) Applying the Peter Luk case,
  - (1) the courts below erred in requiring proof that R’s acceptance of HK\$20,000 occurred pursuant to a pre-existing legal relationship in order to establish her role as an “agent” under section 9 [para. 37 (a)] ;
  - (2) they also erred in focusing on the independent contract for services whereby R gave violin lessons to the student as the relevant pre-existing relationship. They ought instead to have concentrated on the role R had played regarding the purchase of the violin [para. 37 (b)];
  - (3) they wrongly held that R was not an “agent” in relation to the purchase of the violin because that transaction fell outside the



- scope of the pre-existing contractual relationship [para. 37 (c)];
- (4) they also erroneously held that even if one were to focus on the violin purchase, R was not an “agent” because she was acting voluntarily and did not thereby come under an enforceable duty of trust and loyalty in favour of the mother [para. 37(d)];
- (d) in the Stephen Chan case, it was emphasized that the detriment does not require the principal to suffer any economic loss. Hence, it was erroneous for the Judge to suggest that R was not caught by section 9 because the mother had not suffered economic loss. In this case, R made a secret profit representing a significant economic gain equivalent to about 7¾ months’ worth of the boy’s tuition fees. The relevant question, applying the Stephen Chan case, was whether, in accepting the secret commission, R had subverted the integrity of the agency relationship with the mother [paras. 40 & 41];
- (e) the Judge’s suggestion that a person escapes liability under section 9(1)(a) if he or she accepts an advantage in a situation where commissions might be considered “normal practice”, overlooks section 19 of the POBO which provides that it shall not be a defence to show that any such advantage is customary in any profession, trade, vocation or calling [para. 42];
- (f) acceptance of such a secret commission while acting for the mother in the purchase of the violin placed R in a conflict of interest situation, which is one example of a case where the integrity of an agency relationship such as existed between R and the mother would be subverted. Accordingly, the decisions below could not be supported [para. 45];
- (g) in the present case, R was acting for, and thus the agent of, the mother in the violin purchase. R’s conduct created a reasonable expectation that she would act honestly and in good faith in the interest of the mother to the exclusion of her own interest in connection with such purchase. By accepting a secret commission, she put herself in a situation of conflict of interest which clearly subverted the integrity of the agency relationship between her and the mother [paras. 44 & 59];
- (h) 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. [para. 60]



6. R sought to argue that the costs order should be maintained on the grounds that (1) this appeal is a test case; (2) R was selected arbitrarily to face trial; (3) the Magistrate and the Deputy Judge found the charge to be ambiguous; and (4) if, hypothetically, the case were to proceed to trial, R could ultimately succeed. None of those grounds has any merit. The costs order made in favour of R should be set aside. [paras. 66-69]

**Prosecutions Division**

**Department of Justice**

**July 2020**