IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 71

Magistrate's Appeals No 147–152 of 2015/01

Between

Public Prosecutor

… *Appellant*

And

Lam Leng Hung
Kong Hee
Tan Shao Yuen Sharon
Chew Eng Han
Tan Ye Peng
Serina Wee Gek Ying

… *Respondents*

Magistrate's Appeals No 147–152 of 2015/02

Between

Lam Leng Hung
Kong Hee
Tan Shao Yuen Sharon
Chew Eng Han
Tan Ye Peng
Serina Wee Gek Ying

… *Appellants*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Criminal conspiracy]

[Criminal Law] — [Offences] — [Property] — [Criminal breach of trust]

[Criminal Law] — [Offences] — [Falsification of accounts]

[Criminal Law] — [Statutory offences] — [Penal Code]

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

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v
Lam Leng Hung and other appeals

[2017] SGHC 71

High Court — Magistrate's Appeals No 147 to 152 of 2015
Chao Hick Tin JA, Woo Bih Li J and Chan Seng Onn J
15–16, 19–21 September 2016

7 April 2017 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the majority consisting of Woo Bih Li J and himself):

Introduction and overview

1 Sometime in September 2001, the City Harvest Church ("CHC") decided to embark on a project that used popular music for evangelism. In 2002, after a series of concerts in Taiwan and Hong Kong, this project came to be known as "the Crossover". The Crossover, which was first launched in Asia, involved Ms Ho Yeow Sun, also known by her performing name "Sun Ho", recording and launching secular music albums in order to reach out to people who might otherwise never step foot into a church to listen to a preacher, and to encourage Christians in the popular music industry to share their conversion stories and testimonies. The theological legitimacy of the Crossover as a means of evangelism is not an issue in this case.

2 Around 2004, a decision was taken within the CHC leadership to expand the Crossover into the market in the United States of America ("the US"). Within a few years after the Crossover's launch in the US, an award-winning producer, Wyclef Jean ("Wyclef"), was brought on board. Wyclef commanded substantial fees, and his participation, together with the expansion of the Crossover, led to a significant increase in the amount of funding that was necessary. This led to CHC entering into a series of transactions between 2007 and 2009 with a number of entities, namely Xtron Productions Pte Ltd ("Xtron"), PT The First National Glassware ("Firna") and AMAC Capital Partners (Pte) Ltd ("AMAC"). We will explain the details of these transactions later in this judgment. Pursuant to these transactions, funds were transferred from CHC's Building Fund ("the BF") and General Fund ("the GF") to these entities.

3 In May 2010, the Commercial Affairs Department ("the CAD") commenced investigations into the affairs of CHC. As a result of the investigations, six persons, Kong Hee, Lam Leng Hung ("John Lam"), Tan Ye Peng ("Ye Peng"), Chew Eng Han ("Eng Han"), Serina Wee Gek Yin ("Serina") and Tan Shao Yuen Sharon ("Sharon"), were charged with offences of criminal breach of trust ("CBT") relating to the above-mentioned transactions that occurred between 2007 and 2009. The latter four were also charged with falsifying certain accounts.

4 In *Public Prosecutor v Lam Leng Hung and others* [2015] SGDC 326 ("the Conviction GD") and *Public Prosecutor v Lam Leng Hung and others* [2015] SGDC 327 ("the Sentencing GD"), the Presiding Judge of the State Courts ("the Judge") convicted and sentenced the six persons on all the charges preferred against them. The six persons have appealed against their conviction. They have also appealed against the sentences imposed on them on the ground

that the sentences are manifestly excessive, whilst the Prosecution has appealed against the respective sentences, arguing that they are manifestly inadequate. Given the various cross-appeals, we will hereinafter refer to the parties simply as the appellants (or by their names individually) and the Prosecution, respectively.

5 We heard these appeals over the course of five days in September 2016. We now give our judgment, which is divided into two parts. In the first part, we deal with the appellants' appeals against conviction and in the second, we deal with the various appeals against the sentences imposed by the Judge.

Background

The appellants

6 We begin with a brief summary of the six appellants.

7 Kong Hee is the founder and was at the material time a senior pastor of CHC. He was the president of the CHC Management Board ("the CHC Board") from 1992 to 10 April 2011. He is also Sun Ho's husband and was the main decision-maker in relation to the Crossover.

8 Ye Peng was at the material time a deputy senior pastor of CHC. He was first appointed to the CHC Board in April 1995, and was elected as the vice president in 2007.

9 John Lam became a member of the CHC Board in 1993 and served as treasurer and secretary at various times. He also sat on CHC's audit committee ("Audit Committee") and the investment committee ("Investment Committee").

He was the chairman of the Investment Committee from 5 July 2007 to 1 February 2008.

10 Eng Han became a member of CHC sometime in 1995. He was a member of the CHC Board from 25 April 1999 to 7 July 2007, over which time he held various positions such as vice-president and treasurer. He served on the Investment Committee, which was then known as the finance committee, from 2006 to 2007. Eng Han was also the sole director of AMAC and held 70% of AMAC's shares. AMAC was registered as a limited private company on 26 April 2007 and operated an investment business. In July 2007, Eng Han resigned from the CHC Board after the CHC Board made a decision to appoint AMAC as CHC's fund manager. Eng Han left CHC in 2013.

11 Serina joined the accounts department of CHC in August 1999 as an assistant accountant. She rose through the ranks to become CHC's finance manager sometime in 2005. Serina resigned on 31 August 2007 in order to set up Advante Consulting Pte Ltd ("Advante") in October 2007. Advante's business is in providing accounting and corporate secretarial services. In the interim period before Advante was incorporated, Serina provided accounting services to Xtron. Her involvement in the impugned transactions was primarily as an administrator of the Crossover. She also sat on the CHC Board from 17 April 2005 to 7 July 2007.

12 Sharon was never on the CHC Board. She joined CHC's accounts department on 12 January 2000 as an assistant accountant. She took over as senior accountant after Serina resigned in August 2007 and was subsequently promoted to finance manager sometime in 2008.

The charges

13 The six appellants were convicted of 43 charges in total. These charges (which are comprehensively set out at [19]–[21] of the Conviction GD) can be broadly characterised into three categories.

14 The first category of charges which the appellants, save for Sharon, were convicted of was referred to by the Judge as the "sham investment charges". We will adopt the same terminology but needless to say, this is solely for convenience and reflects nothing more. These three charges pertained to the use of funds from the BF to purchase bonds from Xtron and Firna and were for the offence of conspiring to commit CBT by an agent punishable under s 409 read with s 109 of the Penal Code. The charges were brought under two different editions of the Penal Code, with the first charge being under the 1985 revised edition (*ie*, Penal Code (Cap 224, 1985 Rev Ed)) and the second and third charges being under the 2008 revised edition (*ie*, Penal Code (Cap 224, 2008 Rev Ed)). This was because the offences in the latter two charges occurred after the amendments to the Penal Code came into effect on 1 February 2008. Following the amendments, the maximum non-life imprisonment term for the offence was increased from ten to 20 years. We will refer to the different editions of the Penal Code collectively as "the Penal Code" unless the edition in question has significance.

15 Before the Judge, the appellants raised a preliminary objection in respect of the second of the three sham investment charges. They argued that the second charge was defective because the first and second charges both related to the same *conspiracy* (*ie*, the entering into a bond agreement to use funds from the BF to purchase Xtron bonds) albeit to different drawdowns of the fund, and thus the Prosecution ought to have preferred only one charge. The Judge rejected this

submission and held that each drawdown was a separate act being abetted and was thus capable of forming the subject of a separate charge (the Conviction GD at [100]–[102]). Although none of the appellants raised this preliminary objection in the hearing before us, their written submissions indicate that some of them are still pursuing this point on appeal. We do not think there is any merit to this argument. Where there are multiple acts of CBT pursuant to different transactions within the same overarching conspiracy, it does not follow that only *one* charge should be preferred. Each time an act of CBT is committed in pursuance of a conspiracy, that is in itself an offence and therefore a separate charge of abetment by conspiracy of CBT may be brought against the accused. The Prosecution may well decide to bring a consolidated charge against the accused and ask for a higher sentence taking into account all the acts, but it is also equally within its discretion to prefer separate charges for each act or some of the acts, as in this case.

16 The second category of charges which the appellants, save for Kong Hee and John Lam, were convicted of is the "round-tripping charges". These charges were similarly for the offence of conspiring to commit CBT by an agent punishable under s 409 read with s 109 of the Penal Code, and pertained to a series of transactions that was carried out between 9 April and 2 October 2009. The charges relate to the alleged misappropriation of sums from the BF and the GF for the purpose of creating a false appearance that the Firna bonds had been redeemed.

17 These two categories of charges (*ie*, the sham investment charges and the round-tripping charges) will be referred to collectively in this judgment as "the CBT Charges".

18 The third category of charges which the appellants, save for Kong Hee and John Lam, were convicted of is the "account falsification charges". These charges were framed under s 477A read with s 109 of the Penal Code, and pertained to the entries recorded in CHC's accounts in October and early November 2009 for the transactions that were the subject of the round-tripping charges.

19 As seen from above, not all the appellants are involved in all the charges. Sharon is not involved in the sham investment charges, while John Lam and Kong Hee are not involved in the round-tripping charges and account falsification charges. But for ease of reference, we will refer to the relevant appellants who were involved in each category of charges simply as "the appellants" at various parts of this judgment even though some of them may not be involved in that particular category of charges.

20 The facts relating to the various charges have been extensively set out by the Judge at [23]–[91] of the Conviction GD. We set out in the following section a brief summary of the facts that are relevant for consideration in the appeals.

The facts

The inception of the Crossover and its launch in the US

21 As stated above, the Crossover – which is central to the entire case – is an evangelistic endeavour to spread the gospel through the secular music of Sun Ho. It is not disputed that the Crossover had the full support of the CHC Board. The minutes of the CHC Board's meeting on 5 May 2002 expressly recorded that the board unanimously agreed that it would be "consistent with the overall objective of [CHC] to fulfil the Great Commission … by sharing the message

of faith, hope and love throughout the Chinese Community worldwide particularly in Far East Asia". Between 2002 and 2005 when the Crossover was focused on only the Asian market, Sun Ho released five Mandarin pop albums, titled "Sun with Love" (2002), "SunDay" (2002), "Lonely Travel" (2003), "Gain" (2004), and "Embrace" (2005).

22 In 2001 and 2002, the Crossover was directly funded by CHC. This was the case until the middle of January 2003, when Roland Poon, an ordinary member of CHC, alleged that CHC was giving excessive attention to Sun Ho and was misusing its funds in connection with her. Besides the CHC Board publishing a written response in a local newspaper stating that church funds had not been used to purchase Sun Ho's albums or to promote her career,[1] Kong Hee also told the executive members of CHC ("the EMs") at an annual general meeting on 27 April 2003 that no church funds had been used for the Crossover. It cannot be disputed that this was not true. He explained that the monies ($1.27m) that had been set aside for the promotion of Sun Ho's albums had in fact come from the family of a church member, Wahju Hanafi ("Wahju"), an Indonesian businessman who was also a member of CHC.

23 After the incident concerning Roland Poon, CHC began to place some distance between itself and the Crossover in a bid to avoid negative publicity. This eventually led to the concept and creation of Xtron a few months later on 18 June 2003. John Lam, Eng Han and Eng Han's wife were its founding directors and shareholders. On the same day, Xtron entered into an artiste management agreement with Sun Ho.

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[1] 2D-9.

24 Xtron obtained funding to finance Sun Ho's secular music activities from various sources, including (a) donations, which were often made in lieu of contributions to the BF; and (b) revenue directly from CHC. The latter often took the form of fees for the sub-leasing of a hall at the Singapore Expo ("Expo") from Xtron for CHC's weekend services or, starting from January 2006, for the provision of events management and audio-visual and lighting services to CHC. The audio-visual and lighting staff of Xtron were in fact originally from CHC but were transferred to Xtron in January 2006.

25 In early 2003, Kong Hee saw an opportunity for the Crossover to extend to the US. He started communicating with a producer, Justin Herz ("Justin"). Sun Ho released two English songs in the US which met with some success. Initially, the plan was for Sun Ho to release an album by March 2006, but this did not materialise.

The Crossover's need for funding and the entry into the Xtron bonds

26 In May 2006, Wyclef was engaged as an executive producer. As stated in the introduction to this judgment, Wyclef's fees contributed to a significant increase in the amount of money needed to fund the Crossover. In this context, Kong Hee, Ye Peng and Eng Han began to consider methods to obtain more funding for the Crossover. They initially contemplated taking loans from two banks, Citic Ka Wah Bank Limited ("Citic Ka Wah") in Hong Kong and UBS AG ("UBS"). But this plan was later abandoned because the interest rates charged by the banks were thought to be too high. In the minutes of a meeting of Xtron's board dated 5 May 2007, it was recorded that Citic Ka Wah had offered a loan of $9m at an interest rate of 16% per annum but the Xtron directors concluded that the interest rate was "too high and agreed to source for

other credit facilities".[2] Around this time, there was also some talk about whether Xtron should take a loan of $2.5m from the BF.

27 We digress, at this juncture, to describe the BF. The BF was where the donations of CHC's members to a campaign known as "the Arise and Build Campaign" were deposited. The purpose of the campaign was to raise funds for CHC to build its church building in Jurong West. The first cycle of the campaign was from 1997 to 2003 and the second cycle began in August 2005. In or around 2008, the aim was to raise $160m at the end of seven years for the BF. This projected aim was adjusted to $310m in or around 2010. For the purposes of the campaign, CHC's members were given pledge cards to pledge their commitment towards fulfilling the projected targets. The pledge cards that were used for the campaign in 2007 and 2008 stated that the monies in the BF were to be used "for the purchase of land, construction costs, rentals, furniture and fittings".

28 In or about the end of June 2007, Eng Han came up with the idea of obtaining financing for the Crossover through Xtron obtaining a loan from the BF. The idea was that Xtron would issue bonds which CHC would purchase with funds from the BF. The bonds could then be considered an investment from the BF in Xtron. Against this backdrop, steps were taken to obtain approval for the investment of the monies in the BF. The Investment Committee (previously known as the finance committee), which then comprised Ye Peng, Eng Han, John Lam, Serina, and another member of CHC known as Charlie Lay, was mobilised to draft an investment policy which would set out the types of investments that CHC should invest in.[3] Not all the members in the Investment

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2 A-67.

3 E-183.

Committee were aware that one of the purposes of the investment policy was to allow CHC to purchase the Xtron bonds. John Lam was tasked to take the lead in drafting the investment policy, which he forwarded to Eng Han, Serina and Charlie Lay on 27 June 2007 for their comments. On 28 June 2007, the Investment Committee discussed and approved the investment policy.[4] The investment policy provided as follows:

> **Return Objective**
>
> To maximize the return from surplus Building Fund (BF) not committed to the building expenditure, this is to maintain the purchasing power of the surplus against the increase in construction and property cost over the short-term future.
>
> The target is to attempt to achieve a minimum 3.25% return on investment.
>
> **Risk Management**
>
> BF can assume high risk given the ability of CHC to continually raise funds for BF, hence able to accept volatility and high risk instruments to seek better than average returns.

The investment policy also set out limits to the allocation to each asset class of financial instruments and provided that CHC could invest up to a maximum of 100% of its total portfolio into "SGD denominated fixed income".

29 On 5 July 2007, John Lam presented the investment policy to the CHC Board for consideration. The CHC Board unanimously approved it as being beneficial to the church.[5] Kong Hee sought the approval of the EMs for the investment of money from the BF at an extraordinary general meeting ("EGM") two days later, on 7 July 2007. He explained that CHC was unlikely to find a building to acquire any time soon, and it would thus be better to invest the money to generate financial returns than to leave the money sitting untouched

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4 A-13.

5 CH-13.

in the BF.[6] Eng Han also gave a short presentation at this EGM, explaining the parameters of the investment policy. It was announced that CHC would appoint AMAC – where Eng Han was a director and major shareholder – as fund manager to manage the initial sum of $25m from the BF that would be invested. The resolution was passed and CHC appointed AMAC as fund manager by an agreement dated 25 July 2007.[7] There was no mention of Xtron, the potential investment into Xtron bonds or the Crossover at this EGM.[8]

30 On 17 August 2007, Xtron and AMAC – as fund manager of CHC – entered into a bond subscription agreement ("the 1st Xtron BSA").[9] Under this agreement, AMAC agreed to subscribe to bonds issued by Xtron of up to $13m in value, at an interest rate of 7% per annum and a maturity period of two years. The bonds were due to mature on 16 August 2009. Clause 2.3 of Schedule 3 stated that Xtron "shall use the proceeds of the [b]onds [for] production, publicity, distribution and travelling costs related to the production and marketing of [Xtron's] music albums in the USA and Asia and salary costs". At the time the 1st Xtron BSA was entered into, Xtron's financial statements for the last financial year indicated that it was in a net deficit position of approximately $3.44m.[10]

31 From August 2007 to March 2008, $13m was transferred from the BF to Xtron in four tranches: (a) $5m in August 2007; (b) $2m in November 2007; (c) $3m in January 2008; and (d) $3m in March 2008. These transfers are the

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6 CH-28.

7 A-48.

8 CH-28.

9 A-68.

10 X-61.

subject of the first two sham investment charges (see [14] above). These monies were used, as intended, on the Crossover.

32 On 21 April 2008, Xtron and AMAC entered into a second bond subscription agreement ("the 2nd Xtron BSA").[11] This agreement was entered into pursuant to discussions to obtain more funding for Xtron.[12] No money was drawn down under this agreement, presumably because of a subsequent change in plans.

The change in plans and the entry into the Firna bonds

33 In mid-2008, the audit fieldwork for Xtron's financial year ending 31 December 2007 took place. In the course of this audit, two principal concerns were raised by the auditors. The first was that the value of the Xtron bonds might have to be written down in Xtron's financial statements, given Xtron's consistently loss-making position.[13] The second concern was that CHC and Xtron might be considered related parties and as such, the accounts of both CHC and Xtron might have to be consolidated. The appellants claim that they did not want such a consolidation and disclosure because it would undermine the discreet manner in which CHC was funding the Crossover.

34 On 21 July 2008, Serina met with Foong Daw Ching ("Foong"), a senior partner of the accounting firm, Baker Tilly Consultancy Pte Ltd ("Baker Tilly"), to discuss these concerns. In an email dated 24 July 2008, she set out the various matters that were discussed. According to her, Foong had raised, among other things, the following issues: (a) as long as there was uncertainty of repayment,

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11 A-85.

12 Prosecution's submissions below at para 42.

13 E-423, E-12.

there would have to be impairment of the Xtron bonds; (b) CHC would have to disclose that it subscribed for bonds in a company "in which a key employee is related to one of CHC's Management Board members"; and (c) Sun Ho was a "key player" in Xtron, so the auditors required disclosure of all transactions between Xtron and CHC.[14] It thus appeared that as long as Sun Ho was managed by Xtron, CHC would be required to disclose this information.

35 In these circumstances, a plan was formulated to take Sun Ho out of Xtron. This plan involved transferring Sun Ho from Xtron to another company, Ultimate Assets ("UA"),[15] and using funds from the BF to purchase bonds from Firna in order to finance the Crossover. Both UA and Firna were related to Wahju, who was and is a loyal member of CHC (see [22] above). UA was incorporated in November 2006, and is fully owned by Wahju.[16] Firna was incorporated in Jakarta in 1971, and is in the business of the manufacture of glassware. Wahju and his father-in-law are the only shareholders of the company, holding 80.4% and 19.6% shareholding respectively.[17]

36 At the same time, a plan for Xtron to purchase a commercial building in Singapore known as "The Riverwalk" was being developed. Under this plan, CHC would provide part of the purchase price by purchasing $5.2m worth of new bonds from Xtron and the outstanding amount would be financed by a bank loan secured by a mortgage over The Riverwalk.

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14 E-267.

15 Agreed Statement of Facts ("ASOF") at para 9.1.

16 ASOF at para 2.26.

17 ASOF at para 2.25.

37 On 10 August 2008, Kong Hee told the EMs at an EGM about Xtron's plan to purchase The Riverwalk. This was apparently the first time that the EMs had been informed about the existence of Xtron. They were told that Xtron had been set up in 2003 by three members of CHC to own and manage future buildings that CHC could consistently use. They were also told that AMAC had advised CHC to purchase $18.2m of bonds with an expiry date of ten years from Xtron. Notably, there was no mention of the plan to purchase Firna bonds or the fact that Xtron would be taking a bank loan to partially finance its purchase of The Riverwalk. On 11 August 2008, Xtron exercised its option to purchase The Riverwalk.

38 On 20 August 2008, Xtron and AMAC terminated the 2nd Xtron BSA via a deed of termination, and AMAC transferred the $13m worth of bonds issued under the 1st Xtron BSA to the trustees of CHC via a deed of assignment. The trustees executed a deed of ratification and accession under which they agreed to be bound by the terms of the 1st Xtron BSA.[18] On the same day, Xtron and the trustees of CHC, through AMAC as attorney, entered into an amended bond subscription agreement ("the ABSA").[19] Under the ABSA, the maximum amount of funding to be made available to Xtron was increased from $13m to $25m, and the stated interest rate was decreased from 7% to 5%. Importantly, the maturity date of the bonds was pushed back from two years of the date of issue to ten years.[20]

39 Two months later, on 7 October 2008, CHC and Firna entered into a bond subscription agreement ("the Firna BSA").[21] The agreement was that CHC

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18 A-90.

19 A-91.

20 A-91; see also ASOF at para 7.13.

would subscribe from Firna a maximum of $24.5m in bonds that would mature in three years and yield an interest at a rate of 4.5% per annum. Firna was to use the bond proceeds "for general working capital".[22] The plan of Eng Han, Ye Peng and Serina was to use the Firna bonds to fund the Crossover in the following way: (a) CHC would pay money to Firna for the bonds; (b) thereafter, Firna would transfer the money to UA; and (c) lastly, UA would transfer the funds to Justin's company for the Crossover.

40 In order to get the other shareholder of Firna, Wahju's father-in-law, to go along with the plan, the parties came up with a "secret letter"[23] to assure him that CHC would not exercise the convertibility option in the Firna BSA and convert the Firna bonds into shares in Firna. The secret letter was signed by John Lam on behalf of the CHC Board on 8 September 2008 – before the Firna BSA was entered into – and contained the written assurance of CHC that in the event that CHC exercised its convertibility option, it would sell the Firna shares back to Wahju and his father-in-law for US$1. With this, Wahju's father-in-law went along with the plan and signed the Firna BSA.

41 From October 2008 to June 2009, $11m was transferred from the BF to Firna pursuant to the Firna BSA. This was done in five tranches. These transfers are the subject of the third of the sham investment charges. It is undisputed that out of this $11m, about $7.56m was used for the Crossover and $2.5m was used by Wahju for his personal expenses.

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21 A-116.

22 Clause 2.3 of Schedule 3.

23 E-211.

Plan to redeem the Xtron and Firna bonds and the "round-tripping" transactions

42 On 9 April 2009, which was before the last two (of the five) tranches of transfers under the Firna bonds took place, Sharon, Ye Peng and John Lam met with the engagement partner from Baker Tilly, Sim Guan Seng ("Sim"), to discuss CHC's audit matters. Ye Peng and John Lam both left at some point in the meeting, but Sharon was there throughout.

43 Following this meeting, Ye Peng and Sharon (as well as Eng Han and Serina who were later informed of what transpired at the meeting) decided that the Xtron and Firna bonds had to be redeemed before the end of CHC's financial year (*ie*, 31 October 2009). The Prosecution argues that this was because they feared that Sim would continue questioning the bonds as long as they remained on CHC's accounts and that this would eventually lead to the true nature of the bonds being exposed. The defence argues, instead, that the plans to have those bonds redeemed were because Sim had taken issue with the difficulty of valuing the bonds, both of which were unquoted and not traded on the open market.

44 Ye Peng, Sharon, Eng Han and Serina then devised various plans to redeem the Xtron and Firna bonds. Around this time in early 2009, CHC was also actively sourcing for a building suitable for its church services. Eng Han played a key role in these efforts, and a number of sites, such as the Capitol Theatre, Suntec City and the Singapore Flyer, were identified as suitable acquisition targets. In June 2009, CHC (through Eng Han) made an unsuccessful bid for Suntec City. Subsequently in September 2009, concurrent discussions concerning CHC's bid for the land at Capitol Theatre and a stake in Suntec City took place. As the Judge noted at [83] of the Conviction GD, some of the plans to redeem the Xtron bonds overlapped with the plan for Xtron to purchase a building for CHC's benefit. Pursuant to this plan, CHC was to pay Xtron

advance rental so as to put Xtron in funds to purchase a property for CHC's benefit. Xtron would then lease the property back to CHC. In reality, the advance rental which CHC was to pay Xtron provided the eventual source of funds for the redemption of the Xtron and Firna bonds.

45 This formed the backdrop against which the following series of relevant transactions were entered into from 2 October to 29 December 2009 in order to redeem the Xtron and Firna bonds:

(a) On 2 October 2009, CHC transferred $5.8m from the BF to AMAC as payment for Tranche 10 of a Special Opportunities Fund ("SOF") administered by AMAC, which was recorded in CHC's General Journal under the accounts name "Investment" as a payment of $5.8m to AMAC as "Investment–Special Opportunity Fund".[24] By way of background, the SOF was an on-going fund set up by AMAC in 2009. This fund comprised several tranches by which AMAC guaranteed the principal and a fixed return to a client who invested in a particular tranche. For Tranche 10 of the SOF, the stated period of investment was from 2 October to 25 November 2009 with a fixed return of 5.05% per annum.[25]

(b) On 5 October 2009, AMAC transferred $5.8m to UA. UA received the sum (less a telegraphic transfer fee of $20) on 6 October 2009, and transferred $5.3m to Firna on 7 October 2009. On 9 October 2009, Firna transferred $5,228,750 to CHC, which was recorded in CHC's books as a partial redemption of the Firna bonds.

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24 A-143; see also ASOF at para 12.7.

25 A-140.

(c) On 15 October 2009, CHC transferred $5.6m from the GF to AMAC as payment for Tranche 11 of the SOF, which was recorded as "Special Opportunity Fund" under the accounts name "Investment" in CHC's accounts. AMAC transferred this sum (less a telegraphic transfer fee of $20) to UA on 16 October 2009. Tranche 11 of the SOF was to run from 15 October to 25 November 2009 and provided for a return rate of 5.05% per annum.[26] On 20 October 2009, UA transferred $6.1m to Firna, and Firna transferred $6,061,950 to CHC, which was recorded in CHC's books as redemption of the remaining Firna bonds with interest.

(d) Sometime after 15 October 2009, CHC signed an Advance Rental License Agreement dated 1 October 2009 with Xtron ("the ARLA").[27] Under the ARLA, CHC would have the right to use and occupy the premises provided by Xtron for eight years, in return for the payment of advance rental of $46.27m to Xtron. A further $7m was paid to Xtron as a security deposit, making the total sum under the ARLA approximately $53.27m. On 31 October 2009, an entry was made in CHC's General Journal describing a set-off of $21.5m from the sum due to Xtron under the ARLA as "Redemption of Xtron Bonds".[28]

(e) On 6 November 2009, CHC transferred $15,238,936.61 to Xtron. This payment was described in CHC's accounts as "Advance rental with Xtron".[29] Of this sum, $12m was for part payment of the advance rental under the ARLA with the remaining sum of

26 A-140.

27 A-153.

28 A-157.

29 A-162.

$3,238,936.61 being Goods and Services Tax ("GST") for the advance rental.

(f) On 1 December 2009, Xtron transferred $11.455m to Firna pursuant to a bond subscription agreement dated the same day between the two entities.[30] Firna then transferred a total of $11.476m to UA over three tranches between 4 and 11 December 2009. On 15 and 28 December 2009, UA transferred a total of $11.476m to AMAC in two tranches. On 16 December and 29 December 2009, AMAC transferred sums to CHC in respect of Tranches 10 and 11 of the SOF. CHC received a total of $11,476,625, comprising $11.4m in principal and $76,625 in interest.[31]

Like the Judge, we collectively refer to these transactions as "the round-tripping transactions".

46 The net result of the round-tripping transactions – parts of which were the subject of the round-tripping charges and account falsification charges – was that the Xtron and Firna bonds were redeemed. Through the transactions, AMAC's liability under Tranches 10 and 11 of the SOF was also discharged. In essence, the liability owed by Xtron and Firna to CHC under the relevant bond subscription agreements was transferred to a liability on Xtron's part to provide premises to CHC under the ARLA. It appears that subsequently, pursuant to the ARLA, Xtron provided CHC with premises at the Expo for a period of time.

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30 A-164.

31 ASOF at para 12.35.

Events in 2010

47 Thereafter, in January 2010, CHC acquired a stake in Suntec City through the purchase of 12.5% of the shares in another company, Harmony Partners Investment Limited, for $18.75m. Subsequently, the ARLA was terminated on 31 March 2010.[32] On 31 May 2010, the CAD commenced investigations and raided the offices of CHC, Xtron and some other companies as well as the residences of the appellants.

48 On 1 August 2010, CHC convened an EGM, where the EMs retrospectively approved CHC's use of the BF to (a) subscribe to the Xtron bonds; (b) subscribe to the Firna bonds; and (c) pay the advance rental and security deposit amounting to $53.3m to Xtron to secure an auditorium space for CHC for a period of eight years (*ie*, the ARLA). The EMs also approved the continuation of the Crossover and authorised the CHC Board to support the mission.[33] Effectively, CHC was seeking to ratify the transactions that had taken place and which were the subject of the investigations.

49 On 4 October 2010, Xtron repaid CHC a total of $40.5m which was due as the ARLA had been terminated. This comprised (a) $33,039,117.60 being the unutilised advance rental; (b) $7m being the full amount of the security deposit paid by CHC; and (c) $453,103.02 being the interest accrued from the date of termination of the ARLA until full payment was made.[34] Xtron appeared to have been put into funds to effect repayment through the obtaining of loans from various individuals.

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32 X-7.

33 A-167.

34 ASOF at para 12.37.

Part I: The appeals against conviction

50 Having set out the background, we now turn to consider the appellants' appeals against their convictions. At the outset, we emphasise that an appellate court has a limited role in disturbing the findings of fact made by a trial court, especially where these are based on an assessment of the witnesses and their credibility. Thus, unless these findings can be shown to be plainly wrong or against the weight of the evidence, an appellate court would be slow to overturn the trial judge's findings of fact.

The decision below on conviction

The CBT Charges

51 The Judge approached the analysis of the CBT Charges by identifying the elements that the Prosecution was required to prove. He held that there were five elements, being that:

(a) the relevant appellants who were on the CHC Board were entrusted with dominion over CHC's funds;

(b) such dominion was entrusted to them in the way of their business as agents;

(c) things were done that constituted a "wrong use" of CHC's funds;

(d) each of the appellants played some role in the things done; and

(e) each of the appellants acted dishonestly in doing so.

52 As to the first element, the Judge held that John Lam, Kong Hee and Ye Peng had been entrusted with dominion over CHC's funds by reason of their

membership of the CHC Board. He also held that John Lam, Kong Hee and Ye Peng had been entrusted with the funds in the way of their business as agents and thus fell under s 409 of the Penal Code. In this regard, the Judge held that he was bound by the decision of the High Court in *Tay Choo Wah v Public Prosecutor* [1974–1976] SLR(R) 725 ("*Tay Choo Wah*") where it was decided that directors who were entrusted with property in the course of their duties as directors would have been entrusted with the property in the way of their business as agents.

53 Having established the first two elements, the Judge then analysed whether the application of CHC's funds towards (a) the Xtron bonds; (b) the Firna bonds; and (c) the round-tripping transactions constituted a "wrong use" of CHC's funds. In respect of the Xtron and Firna bonds, the question of "wrong use" of the BF turned on whether the Xtron and Firna bonds could be considered investments. He held that:

> (a) The Xtron bonds constituted a "wrong use" of the BF because the Xtron bonds were not a genuine investment. Instead, the transaction was a "temporary loan" of money from the BF to Kong Hee to use in respect of the Crossover (the Conviction GD at [153]).
>
> (b) The Firna bonds were also not a genuine investment. They were no more than a device to put money from the BF into the appellants' hands in order that they might use it for the Crossover (the Conviction GD at [170]).

54 In respect of the round-tripping transactions, the considerations were slightly different. The Judge held that:

(a) Tranche 10 of the SOF constituted a "wrong use" of the BF because it was not a genuine investment. It was instead part of an overall scheme to substitute one debt owed to CHC (*ie*, the Firna bonds) with another debt owed to CHC (*ie*, under the AMAC SOF) (the Conviction GD at [174]).

(b) Tranche 11 of the SOF was disbursed from the GF, which was not a restricted fund like the BF. However, this also constituted a "wrong use" because it was not a genuine investment and, in any case, the GF could not be used for the perpetration of fraud (the Conviction GD at [174] and [178]).

(c) The disbursement of approximately $15m under the ARLA was a "wrong use" of the BF because it was not a property- or building-related expense. It was a device to repay the Tranches 10 and 11 of the SOF (the Conviction GD at [175]).

55 With the above having been established, the Judge turned to consider whether the Prosecution had proven that the appellants had participated in the plans to an extent that they could be said to have engaged in a conspiracy to put CHC's funds to wrong use, and whether they acted dishonestly in doing so. In relation to the issue of dishonesty, the Judge's approach was to decide if (a) the appellants intended to put CHC's funds to uses which amounted to wrong uses of those funds; and (b) the appellants did so knowing that they were not legally entitled to use the funds in that manner.

56 The Judge considered the appellants' argument that the critical fact that exonerated them was that they did not keep the relevant transactions hidden from the professionals who were advising them. However, the Judge was not

persuaded by this argument because he found that they had not been "open" with the professionals. In this connection, he found that:

(a) In relation to the Xtron bonds, the auditors and lawyers did not know that Xtron was controlled by Kong Hee and the other appellants, and that the directors of Xtron were merely figureheads (the Conviction GD at [207] and [212]).

(b) In relation to the Firna bonds, the auditors and lawyers did not know that (i) Kong Hee and those assisting him had full control over the Firna bond proceeds and treated the monies as theirs; and (ii) neither Firna nor Wahju was truly responsible for redeeming the Firna bonds (the Conviction GD at [220]).

(c) In relation to the round-tripping transactions, the Judge held that the substance of the transactions was not disclosed to the lawyers or auditors (the Conviction GD at [230]).

57 Finally, the Judge analysed the facts concerning each appellant, and held that they had been proven beyond reasonable doubt to have been involved in the conspiracy with the requisite dishonest *mens rea*. He therefore convicted them on the respective CBT Charges that have been brought against them. We elaborate on the Judge's findings in the various sections below.

The account falsification charges

58 On the charges relating to account falsification, the Judge's approach was to determine (a) if the accounting entries were false; (b) whether each of the appellants who had been charged for this category of offences engaged in a conspiracy for the doing of a thing that amounted to making a false entry in

CHC's accounts; and (c) whether each of those appellants acted with an intent to defraud. On each of the elements, the Judge held that:

(a) The relevant accounting entries, involving (i) Tranches 10 and 11 of the SOF; (ii) the payment of approximately $15m under the ARLA; and (iii) the redemption of the Xtron bonds, were false (the Conviction GD at [447] and [452]).

(b) The appellants had a common design to remove both the Xtron and Firna bonds from CHC's accounts, satisfying the requirement of engagement in a conspiracy (the Conviction GD at [448] and [453]–[454]).

(c) The appellants acted with an intention to defraud as they knew that the various transactions were meant to create false appearances (the Conviction GD at [449] and [458]).

The Judge thus convicted the relevant appellants on the account falsification charges.

The CBT Charges

The elements of an offence of CBT

59 We begin our analysis with a consideration of the CBT Charges. Under these charges, the appellants were charged for abetment by engaging in a conspiracy to commit CBT as agents punishable under s 409 and s 109 of the Penal Code. CBT is defined in s 405 of the Penal Code and abetment by conspiracy is defined in ss 107(*b*) of the same. Sections 107(*b*), 109, 405 and 409 of the Penal Code provide as follows:

Abetment of the doing of a thing

> **107.** A person abets the doing of a thing who —
>
> …
>
> (*b*) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; …
>
> **Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment**
>
> **109.** Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
>
> *Explanation.*—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.
>
> **Criminal breach of trust**
>
> **405.** Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits "criminal breach of trust".
>
> **Criminal breach of trust by public servant, or by banker, merchant, or agent**
>
> **409.** Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.

60 To be guilty of a CBT charge, an accused must be proven to have (a) dishonestly misappropriated property; (b) dishonestly converted property to his own use; (c) dishonestly used or disposed of property in violation of any laws

or directions; or (d) wilfully suffered any other person to do any of the acts in (a)–(c) above. The Prosecution's case is based only on the *actus reus* of misappropriation (*ie*, (a) above), and we thus focus only on that in our analysis below.

61 As for the element of abetment by conspiracy, it has been held in various cases that abetment by conspiracy requires "proof of a criminal conspiracy coupled with proof of some further act which has been done in pursuance of that conspiracy" (*Er Joo Nguang and another v Public Prosecutor* [2000] 1 SLR(R) 756 ("*Er Joo Nguang*") at [29]). Thus, the mere entering into a conspiracy is insufficient to prove abetment by conspiracy (see also *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 at [76]; *Lee Yuen Hong v Public Prosecutor* [2000] 1 SLR(R) 604 at [38]). Three elements must be shown:

(a) the person abetting must engage with one or more other persons in a conspiracy;

(b) the conspiracy must be for the doing of the thing abetted; and

(c) an act or illegal omission must have taken place in pursuance of the conspiracy in order to the doing of that thing.

62 Based on the above, we agree with the Judge that the Prosecution must prove the following five elements in order to make out the CBT Charges, which were brought under s 409 of the Penal Code, against the relevant appellants:

(a) the relevant appellants were entrusted with dominion over CHC's funds;

(b) this entrustment was in the way of the relevant appellants' business as agents;

(c) monies from CHC's funds were misappropriated for various unauthorised purposes in pursuance of a conspiracy to misuse CHC's funds;

(d) the appellants abetted each other by engaging in the above conspiracy to misuse CHC's funds; and

(e) the appellants acted dishonestly in doing so.

63 The appellants raise the following legal arguments in relation to each of the issues:

(a) The Judge was wrong to find that the relevant appellants, namely, Kong Hee, Ye Peng and John Lam, had been entrusted with dominion over CHC's funds because they were not able to deal with CHC's funds on their own.

(b) Even if Kong Hee, Ye Peng and John Lam had been entrusted with dominion over CHC's funds, they were not entrusted with the funds "in the way of [their] business as … agent[s]" under s 409 of the Penal Code.

(c) The Xtron and Firna bond transactions and the round-tripping transactions were genuine investments or involved building-related expenses and were thus not a misappropriation or misuse of CHC's funds.

(d) The appellants had acted in good faith and had not intended to cause CHC to suffer any wrongful loss. By virtue of this, they could not be considered to have acted dishonestly.

64 Besides these broad legal arguments, the appellants argue that the Judge did not give sufficient weight to various facts, including their disclosures to the professionals, which demonstrated that they genuinely believed they were on firm legal footing when they carried out the transactions. In respect of John Lam and Sharon, arguments were also made that they were not participants in the conspiracies to misuse CHC's funds. We deal with each of these broad arguments and examine the specific arguments and factual circumstances concerning each appellant's involvement in the various transactions in the sections below.

Whether the relevant appellants were entrusted with dominion over CHC's funds for the purposes of the CBT Charges

65 Dominion is an essential element that needs to be established in each of the CBT Charges. The sham investment charges allege that Kong Hee, Ye Peng and John Lam were entrusted with dominion of the BF by virtue of being members of the CHC Board. The round-tripping charges allege that Ye Peng was entrusted with the dominion of the funds of CHC as a member of the CHC Board.

66 It is undisputed that the CHC Board as a whole was, and is, entrusted with dominion over CHC's funds. Nor is it disputed that the appellants did not form a majority on CHC's board. The specific issue which arises in this case is whether Kong Hee, Ye Peng and John Lam could be said to have been entrusted with dominion over CHC's funds for the purposes of the CBT Charges by reason *only* of their membership on the CHC Board.

67 On appeal, the appellants raise the same arguments as they did before the Judge. In essence, they argue that dominion over property requires the accused to have *total* or *effective* control over the property in question. They

submit that dominion for the purposes of the CBT Charges refers to the ability of one or more persons to exercise *total* or *effective* control over the property (such as a situation where a number of people may *singly* operate a bank account) and does not include a situation where a person can only deal with the property when acting *in conjunction* with other persons. They submit that whether an accused person has total or effective control over property is a question of fact. On the facts, they argue that the element of dominion over property is not satisfied because the appellants did not have *de facto* control over CHC's funds and required the consent of other independent persons (who exercised independent judgment) to exercise control over CHC's funds. Thus, the appellants argue that it was only the CHC Board *as a whole* that was entrusted with dominion over CHC's funds.

68 In response, the Prosecution submits that the appellants have confused the concept of dominion over property with the exercise of that dominion. In the Prosecution's submission, dominion over property for the purposes of CBT does not require total control. The fact that the relevant appellants were on the CHC Board vested in them a degree of control and influence over CHC's funds, and this would be sufficient to show that the appellants had dominion over the property.

69 The *amicus curiae*, Mr Evans Ng ("the *amicus*"), submits that the question of whether a person has dominion over property is a question of fact which depends on the degree of control exercised by the person over the property. In a scenario where both the consent of X and Y are required to dispose of a property, the *amicus* submits that *prima facie* neither X nor Y alone has dominion over the property. However, if as a matter of *fact*, Y would *always* give approval for X to dispose of the property, then it can be said that X has dominion over the property even in the absence of a conspiracy with Y.

However, if the position were to be that Y *independently* exercised his judgment without abetment on the part of X, the *amicus* submits that it is highly arguable that X had no dominion over the property, even if in that instance Y had given acquiescence to X's advantage.

70 It is well-established that the factor that determines whether there has been entrustment with dominion over property is the "degree of control exercised by the accused" (see *Hon Chi Wan Colman v Public Prosecutor* [2002] 2 SLR(R) 821 ("*Hon Chi Wan*") at [48] and *Sarjit Singh s/o Mehar Singh v Public Prosecutor* [2002] 2 SLR(R) 1040 at [20]). In this connection, it has also been established that "a general degree of control can amount to dominion over a property" (see *Hon Chi Wan* at [50]). In the present case, it is clear that as directors of the CHC Board, Kong Hee, Ye Peng and John Lam had *some* control over CHC's funds. The question to be decided is whether, as a matter of law, that degree of control that the relevant appellants possessed as directors of the CHC Board was sufficient to satisfy this element of the CBT Charges. This requires the court to interpret the scope of the CBT offences under the Penal Code which in turn would further require the court to consider how the purposive interpretation mandated in s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) should be applied in relation thereto.

71 We therefore begin our analysis with a consideration of the purpose or object behind the CBT offences in the Penal Code. In *Hon Chi Wan*, Yong Pung How CJ stated that the "essence of the offence [of CBT] lies in the entrustment of property to an employee and his subsequent betrayal of that trust" (at [54]). Similarly, in Walter Morgan and A G Macpherson, *Indian Penal Code (Act XLV of 1860) With Notes* (G C Hay & Co, 1861) at p 364, the learned authors observed that the offence of CBT involved a "fraudulent appropriation of property". The authors went on to note that what distinguishes the offence of

CBT from other property offences is that CBT "is not originally a wrongful taking or moving as in theft, but the offence consists in a wrongful appropriation of property, consequent upon a possession which is lawful". In this regard, it is also useful to refer to C K Thakker *et al*, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* vol 2 (Bharat Law House, 26th ed, 2007) at p 2284, which states:

> The ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

It is therefore clear that the conduct which the offence of CBT prohibits is a situation where a person who lawfully possesses property belonging to another, in breach of directions or without authorisation, dishonestly misappropriates, converts to his own use, uses or disposes of that property. In other words, the purpose of an offence of CBT is to criminalise a dishonest betrayal of original trust. Whilst all the illustrations to s 405 of the Penal Code appear to deal with a situation where an accused has sole or total control over the property in question, it is a well-established principle that the illustrations in the Penal Code "exemplify the practical applications of the provision in relation to *particular hypothetical problems* that may arise" [emphasis added] (see *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 ("*Li Weiming*") at [82]) and ought not to be construed as an exhaustive list of situations wherein the offence might be applicable.

72 Having regard to the above, what is essential for the purposes of a CBT charge is that the accused has betrayed the trust originally reposed in him. Applied to the context of directors within a board, a director who applies his influence and vote on the board in a dishonest manner in pursuance of a

conspiracy to misuse the property entrusted to the board is *no less* guilty of a breach of trust *even if* the other directors on the board who acted in accordance with the dishonest director were not privy to the conspiracy or his dishonest intention. As Yong CJ pithily put it in *Hon Chi Wan*, though in a slightly different context (at [54]):

> [W]hat is important is only the fact that the trust was breached, and this is so equally whether or not dominion of the property was entrusted solely to a specific employee or to a number of employees, one of whom subsequently misappropriates the property. It would be ludicrous to say that the latter could not have committed criminal breach of trust simply by reason of the fact that others were also entrusted with dominion over said property.

73 We briefly explain the facts of *Hon Chi Won*. In that case, the accused was the regional service logistics manager and the accessories sales and marketing manager of a communications company. His responsibilities included the requisitioning of inventory, although the other employees of the company were also able to requisition for the goods. The accused was charged for committing CBT by conspiring with a colleague to sell the company's goods illicitly. The accused submitted that he had not been entrusted with dominion over the property because he did not have sole dominion over them. Yong CJ rejected this argument, holding that sole dominion was not a necessary condition to establishing the offence of CBT. On the facts, it was held that once the fact of the accused's position as service logistics manager was established, the accused's dominion over the relevant property was also established.

74 We recognise that the situation in *Hon Chi Won* is not on all fours with the present case. However, what may be gleaned from the decision is that the concept of dominion is not a narrow one, and that where dominion over property is concurrently exercised by a number of individuals, this suffices for the purposes of the offence of CBT.

75 In our view, it would also be consistent with the purpose undergirding the offence of CBT to hold that an accused would have dominion over property even where that dominion is exercised *collectively* or *in conjunction* with a number of other individuals.

76 We find support for this approach in the decision of the Indian Supreme Court in *R K Dalmia v Delhi Administration* AIR 1962 SC 1821 ("*Dalmia*"). In *Dalmia*, the second accused, Chokhani, was an appointed agent of the company at the material time. By a directors' resolution, Chokhani and the secretary and chief accountant, Raghunath Rai, were jointly authorised to operate the current account of the company. The court held that the "modus operandi of the joint operation of the bank account by Chokhani and Raghunath Rai amounted, in practice to Chokhani's operating that account alone" (at [13]) because Raghunath Rai had signed a number of blank cheques. The appellants rely on this to argue that the element of entrustment with dominion is satisfied only if the second accused had total or effective control over the bank accounts. However, in our view, this would be an inaccurate reading of *Dalmia*. We refer to the following remarks of the Indian Supreme Court (at [79] and [83]–[84]):

> 79 It has been urged for Chokhani that he could not have committed the offence of criminal breach of trust when he alone had not the dominion over the funds of the Insurance Company, the accounts of which he could not operate alone. Both Raghunath Rai and he could operate on the accounts jointly. …
>
> …
>
> 83 The effect of Raghunath Rai's delivering the blank cheques signed by him to Chokhani may amount to putting Chokhani in sole control over the funds of the Insurance Company in the Bank and there would not remain any question of Chokhani having *joint dominion* over those funds, and this contention, therefore, will not be available to him.
>
> 84 It was also urged for Chokhani that he had obtained control over the funds of the Insurance Company by cheating Raghunath Rai inasmuch as he got blank cheques signed by the latter on the representation that they would be used for the

> legitimate purpose of the company but later used them for purposes not connected with the company and that, therefore, he could not commit the offence of criminal breach of trust. *This may be so, but Chokhani did not get dominion over the funds on account of Raghunath Rai's signing blank cheques. The signing of the blank cheques* ***merely facilitated*** *Chokhani's committing breach of trust. He got control and dominion over the funds under the powers conferred on him by the Board of Directors, by its resolution authorising him and Raghunath Rai to operate on the accounts of the Insurance Company with the Chartered Bank, Bombay.*
>
> [emphasis added in italics and in bold italics]

From the above passage, it may be observed that the Indian Supreme Court considered that it was pursuant to the directors' resolution that Chokhani obtained dominion over the funds. The reasoning in *Dalmia* is therefore in line with the proposition that an accused may have dominion over property even though that dominion could only be exercised in conjunction with another.

77 A similar position was taken in a subsequent decision of the Indian Supreme Court in *Surendra Prasad Verma v State of Bihar* (1972) 3 SCC 656. In that case, the accused and one Ramchander Lal possessed three keys to a safe, two of which were with the accused and the third was with Ramchander Lal. In order to access the money within the safe, all three keys had to be used. Subsequently, the money in the safe was found to be missing and charges for CBT were brought against the accused. The arguments before the court concerned the issue of whether it could be proved that all three keys were in the accused's possession at the material time. In upholding the accused's conviction, the Indian Supreme Court held (at [5]) that it was immaterial whether the accused possessed all three keys. What was important was that the safe could not have been opened without the accused's participation. In the absence of evidence demonstrating that the accused had parted with the keys to the safe, he was under a duty to account for the cash within it and he was

therefore found guilty of the offences of CBT. This case thus supports the position that an accused need not be able to deal with the property *alone* before he may be found guilty of the offence of CBT.

78 We now turn to consider the cases that the appellants have cited in an attempt to argue against this position.

79 The first case is the decision of the Kuala Lumpur court in *Chang Lee Swee v Public Prosecutor* [1985] 1 MLJ 75 ("*Chang Lee Swee*"). The accused there was an executive director of a company. He transferred certain funds without the approval of the board of directors. The Prosecution in *Chang Lee Swee* argued that once the accused was appointed as an executive director in-charge of finance, he was entrusted with the company's funds (at 77). The court held that this was not the case, because of a board resolution that appointed another person referred to as "Tan" as the managing director. The court held that (at 80):

> … In my judgment when [the company] was incorporated and the directors appointed to the board in 1965 the board of directors must be considered to have been entrusted with the powers as well as the funds of the company. But the question which the court in this case had to and should have considered was the effect of the directors' resolution appointing Tan the managing director [of the company] on April 3, 1971. It was clear from the said resolution that the board of directors had in 1971 given to Tan all the powers and discretions conferred upon the board of directors by the company's article of association other than the power to borrow and make calls on behalf of it. It would therefore appear from that resolution considered together with the articles of association that the board of [the company] had delegated and entrusted to Tan all its powers except the power to borrow and make calls, but including the power to manage the funds of the company. … If both the documentary and oral evidence in this case had been carefully considered, the learned president would have come to the conclusion that the [accused], even after he was appointed an executive director in-charge of financial affairs five years after Tan … *was not in the position to manage the funds of [the*

> *company] without the overall control of Tan* and was therefore in the circumstances of this case not entrusted with or had complete dominion over its funds. [emphasis added]

80 As is apparent from the above, but for the resolution appointing Tan as the managing director, the court would have held that the board of directors was entrusted with the funds of the company. However, the resolution modified the state of affairs and entrusted Tan with the power to manage the funds of the company instead. In these circumstances, the board no longer had any dominion over the company's property. *Chang Lee Swee* thus does not stand for the proposition that an accused who exercises collective dominion over property with other persons lacks dominion over the property for the purpose of a CBT charge.

81 *Chang Lee Swee* was cited in the case of *Tan Liang Chew and others v Public Prosecutor* [1997] 5 MLJ 338 ("*Tan Liang Chew*"), which was heard by the Malaysian High Court at Kuala Lumpur. In *Tan Liang Chew*, the first accused, a director of a society, was charged with CBT as an agent. Besides being a director of the society, the first accused was also a member of a committee that recommended to the board whether applications for housing loans should be approved. An ineligible person applied for a loan, which the committee recommended to be approved despite his ineligibility. However, even before the board of directors considered the application, a cheque signed by the first accused (and co-signed by the second and third accused) was issued. KC Vohrah J acquitted the first accused, stating (at 349C):

> … [N]either the oral nor the documentary evidence show that the first accused was so entrusted with the money. There was no evidence to show that he had dominion over the money of the society. The evidence that was produced was that he sat on a committee meeting as a member that recommended housing loan applications for approval by the board of directors and that he was a signatory with the second and third accused of a cheque for an amount that is the subject matter of this charge.

> *If at all, the dominion over the property appears to [lie with] the board of directors since it had the power to approve housing loans.* The evidence may well show a lax environment for the processing of loan applications and of financial procedures and management but that is not the same as saying [that] the first accused had dominion over the property. [emphasis added]

82 On its face, *Tan Liang Chew* may appear to stand for the proposition that it is the board of directors that is entrusted with the society's property, and that the first accused's position as a director was not sufficient to establish the element of entrustment with dominion. However, on closer analysis, we do not think that *Tan Liang Chew* assists the appellants. It must be recalled that in that case, a loan could only be issued *after* it had been approved by the board of directors. In breach of this, the first accused signed a cheque for the disbursement of the loan. He was charged with misappropriating the sums disbursed under that cheque. Critically, there was also no evidence that the board of directors was vested with the power to deal with the society's property other than to issue approval for housing loans. In such circumstances, the first accused's signing of the cheque was an unauthorised and illegitimate act on his part. The money which found its way into the hands of the first accused, and for which he was charged for misappropriating, was thus not obtained lawfully. Evidently, such a scenario would *not* satisfy the elements of a CBT offence, which as explained above, requires the accused to come into possession of the property *lawfully*. But in any case, we agree with the Judge that the court in *Tan Liang Chew* does not seem to have considered the specific issue of whether a single director, as opposed to the board of directors as a whole, has dominion over the property of the company or society. As the Judge noted in the Conviction GD at [108], the court in *Tan Liang Chew* did not appear to have addressed the question of whether the first accused could be said to have been entrusted with dominion over the money by virtue of his directorship. While the court did note that the first accused was a director of the society, it did so only

in the context of ascertaining whether the element of being entrusted with property *in the way of his business as an agent* is made out. In answering the question of whether the first accused had been entrusted with dominion over property, the court seemed to have focused only on his capacity as a member of the *committee* that made recommendations on housing loan (see the quote in the preceding paragraph). Given this, we agree with the Judge that little, if any, weight can be placed on this authority.

83 Another case that the appellants rely on is a decision of the Johor Bahru High Court in *Yap Sing Hock and another v Public Prosecuto*r [1991] 2 MLJ 334 ("*Yap Sing Hock*"). That was a case where the first and second accused persons were principal directors and shareholders of a company, Yap Sing Hock Holdings Sdn Bhd ("Holdings"). Holdings entered into a sale and purchase agreement to purchase another company, Lien Hoe Sdn Bhd ("Lien Hoe"), but it transpired that Holdings did not have sufficient funds to do so. The accused persons then devised a plan for Lien Hoe to provide financial assistance to Holdings for the purchase. As part of the plan, the accused persons were appointed as directors of Lien Hoe, while the previous set of directors resigned, and a resolution was passed to make them signatories of Lien Hoe's bank accounts and to give them authority to use three fixed deposit receipts as security for an overdraft. The funds obtained were transferred to Holdings' account and were used to complete the purchase. The court held that the accused persons, who were charged for CBT for misappropriating the funds that had been transferred from Lien Hoe, had dominion over those funds and observed as follows (at 342):

> … I have already, in considering the first ingredient whether the first and second [accused persons] were agents, to wit, directors, made a finding [that] they were at the relevant time directors of Lien Hoe. *Over and above that they were directors*, I also found as a fact that the first and second [accused persons]

> had dominion and did [exercise] dominion over the $12m assets of Lien Hoe. The old directors allowed the first and second [accused persons] to utilize the three fixed deposit receipts of Lien Hoe, they allowed them to be signatories to Lien Hoe's bank account to apply and to seek approval for the $12m facilities in the form of overdraft. … On this evidence, I am more than satisfied that the first and second [accused persons] had dominion over the $12m when the overdraft was approved to Lien Hoe. Clear proof of [this] dominion is the capacity and the capability of the first and second [accused persons] to have $12m transferred from Lien Hoe to Holdings' account just opened by them. [emphasis added]

84 The appellants argue that the italicised phrase above – "over and above that they were directors" – shows that Abu Mansor J had held that something more than the mere appointment as a director was required in order for the accused to have been entrusted with dominion over the funds of Lien Hoe. In our view, one ought not to read too much into this phrase. We agree with the Judge's analysis of this case at [113]–[115] of the Conviction GD, and would only add two further points. First, Mansor J did not explicitly hold that being a director was insufficient to confer entrustment with dominion over the company's property. Second, it is clear that Mansor J's point in the above passage was that over and above their *legal* position as directors of the company, they also had *factual* control over the company's assets, which was clear from the fact that they managed to transfer the funds from Lien Hoe's account to Holdings' account. In the circumstances, we, like the Judge, do not find that *Yap Sing Hock* advances the appellants' position.

85 Finally, the appellants cite two Singapore cases, *Lai Ah Kau and another v Public Prosecutor* [1988] 2 SLR(R) 128 ("*Lai Ah Kau*") and *Cheam Tat Pang and another v Public Prosecutor* [1996] 1 SLR(R) 161 ("*Cheam Tat Pang*") in support of their position. In *Lai Ah Kau*, F A Chua J held that (at [27]):

> A person in *total control* of a limited liability company, by reason of his shareholding and directorship[,] or two or more such

> persons acting in concert, are capable in law of stealing the property of the company. [emphasis added]

The appellants seize on the phrase "total control" to submit that dominion over property requires "total control" over property. With respect, this is not borne out by the case, which set out only *one* scenario where the element of dominion over property for a CBT charge could be satisfied and was not intended to be exhaustive. Furthermore, Chua J made this statement in the context of addressing the argument that the companies were not "other persons" as they were owned and controlled by the accused persons; he was not addressing the issue of whether an accused's position as a director of a company vests him with dominion over the company's property.

86 Turning to *Cheam Tat Pang* (which had not been addressed by the Judge), the issue of entrustment of dominion was not disputed by counsel there (see *Cheam Tat Pang* at [14]). The main issues in the case were whether (a) the *actus reus* that the accused persons had used the entrusted property in violation of a direction of law prescribing the mode in which the trust is to be discharged; and (b) the *mens rea* of dishonesty had been proven. In the circumstances, we do not think that the case is helpful.

87 Having considered precedent, principle and policy, we hold that where a group of persons is collectively entrusted with dominion over property, each member of the group has also been entrusted with dominion over property for the purposes of satisfying that element of a CBT charge under the relevant provisions of the Penal Code. Thus, in the present case, the fact that the innocent directors on the CHC Board had, together with the guilty director(s), approved the plans devised and proposed to them by the appellants, merely *facilitated* the commission of the breach of trust, and does not absolve the appellants of criminal liability. In a similar vein, the fact that the drawdowns had to be

authorised by signatories who were independent of the appellants also does not detract from a finding that the relevant appellants were entrusted with dominion over CHC's funds. To hold otherwise would be to allow the appellants to rely *solely* on the innocence of other independent persons to absolve themselves of criminal liability. This runs counter to the purpose and object of the CBT offences.

Whether the entrustment was "in the way of [their] business as … agent[s]"

88 The next contested issue is whether the relevant appellants (namely, John Lam, Ye Peng and Kong Hee), who were members of the CHC Board, were entrusted with the monies in the BF and the GF "in the way of [their] business as … agent[s]". This issue has a bearing on whether the correct charge against the appellants is that of CBT *simpliciter* under s 406 of the Penal Code or the aggravated offence of CBT *in the way of [their] business as agents* under s 409. The maximum punishment of the former is three years' imprisonment under the 1985 revised edition of the Penal Code and seven years' imprisonment under the 2008 revised edition of the Penal Code while that of the latter is life imprisonment (with the maximum determinate sentence being ten years' imprisonment under the 1985 revised edition of the Penal Code and 20 years' imprisonment under the 2008 revised version of the Penal Code).

89 For ease of reference, we again set out the relevant portion of s 409 of the Penal Code:

> **Criminal breach of trust by public servant, or by banker, merchant, or agent**
>
> **409.** Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or *in the way of his business* as a banker, a merchant, a factor, a broker, an attorney or *an agent*, commits criminal breach of trust in respect of that property, shall be punished with imprisonment … [emphasis added]

For our present purposes, the key words in the provision are "in the way of his business as … an agent". The parties do not dispute that the existing position in Singapore, since the High Court decision of *Tay Choo Wah*, is that directors who misappropriate the property of the company or organisation which they are entrusted with are liable for the aggravated offence of CBT in the way of their business as agents under s 409 of the Penal Code.

90 In coming to its decision, the High Court in *Tay Choo Wah* considered two conflicting authorities. The first is a decision of the Privy Council on appeal from Ceylon, *Mahumarakalage Edward Andrew Cooray v The Queen* [1953] AC 407 ("*Cooray*"), which held (or at least, on one reading, appears to have held) that an agent in the context of s 392 of the Ceylon Penal Code (which is *in pari materia* with s 409 of the Penal Code) is limited to one who carries on an agency business and does not comprehend a person who is casually entrusted with money.

91 The second is a decision of the Indian Supreme Court, *Dalmia* (the facts of which have been summarised at [76] above), which held that *Cooray* did not stand for the proposition that a person must first be in the profession of an agent before this element is made out. Instead, the court in *Dalmia* held that the requirement of entrustment "in the way of his business" as an agent for the purposes of s 409 of the Indian Penal Code (which corresponds to s 392 of the Ceylon Penal Code and s 409 of our Penal Code) would be satisfied as long as the accused is an agent of another and that other person had entrusted him with property or with any dominion over that property in the ordinary course of his duties as an agent.

92 The High Court in *Tay Choo Wah* agreed with *Dalmia*. The effect of the court's holding in *Tay Choo Wah* was that directors of a company or an

organisation who were entrusted with the company's or organisation's property and had dishonestly misappropriated such property would be liable for the aggravated offence of CBT in the way of their business as agents under s 409 of the Penal Code.

93 Before the Judge, the appellants argued that *Dalmia*, and therefore *Tay Choo Wah* which followed it, had wrongly interpreted *Cooray* and was wrongly decided. The appellants submitted that the position in *Cooray*, which was adopted by the Court of Appeal of Malaysia in *Periasamy s/o Sinnappan and another v Public Prosecutor* [1996] 2 MLJ 557 ("*Periasamy*"), was correct. The appellants further argued that *Cooray* (a 1953 Privy Council decision on appeal from Ceylon) rather than *Tay Choo Wah* (a High Court decision) was binding on the Judge, who was exercising the jurisdiction of the State Court.

94 The Judge held that he was bound by *Tay Choo Wah* because as a matter of *stare decisis*, a higher court's decision which distinguished an even higher court's decision was binding on the lower court, and it was thus not open for him, sitting at the State Court level, to find that *Tay Choo Wah* had wrongly distinguished *Cooray* (the Conviction GD at [123]). The Judge found that *Tay Choo Wah* stood for either of the following propositions, neither of which would assist the appellants: (a) that there would be an entrustment in the way of one's business as an agent as long as the person is an agent and is entrusted with property *in his capacity* as an agent; or (b) that there would be such entrustment as long as he was entrusted with the dominion over the property *in the course of his duties* as an agent. He therefore concluded that given that John Lam, Kong Hee and Ye Peng were agents *qua* directors of the CHC Board, and were entrusted with CHC's monies in their capacities as agents and in the course of their duties as members of the board, they fell within s 409 of the Penal Code.

95 On appeal, the appellants argue that *Tay Choo Wah* should not be followed because (a) *Cooray* is binding – both on the Judge and on this court; and (b) in any event, even if *Cooray* is not binding, the approach taken therein is correct in principle and should be followed, while conversely, the approach in *Tay Choo Wah* (and *Dalmia*) is wrong. The appellants submit that unlike the Judge, this court is not bound by *Tay Choo Wah* and therefore can and *should* depart from that decision. For this latter argument, the appellants point to *Periasamy*, where the Court of Appeal of Malaysia had applied *Cooray* and had observed (at 574I–575A) that to adopt the approach in *Dalmia* would be "tantamount to rewriting the section by means of an unauthori[s]ed legislative act".

96 The Prosecution, on the other hand, argues that the Judge's decision should be upheld because (a) *Cooray* is not binding on either court; (b) in any event, the facts of the present case, like that of *Dalmia* and *Tay Choo Wah*, are distinguishable from *Cooray*; and lastly, (c) the reasoning in *Dalmia and Tay Choo Wah* is correct. For the last argument, the Prosecution places great emphasis on the fact that *Tay Choo Wah* – which has been consistently followed in Singapore for the past four decades – stands for the important proposition that directors, who occupy positions of great power, trust and responsibility in companies and organisations, will be liable for the offence of CBT in the way of their business as agents in respect of property that has been entrusted to them in the course of their duties as directors. To hold otherwise, the Prosecution submits, would result in a highly anomalous situation where a director would be liable for a less serious offence (*ie*, CBT *simpliciter*) than a clerk, servant, carrier or warehouse keeper who would be liable for an aggravated offence under ss 407 and 408 of the Penal Code. The Prosecution argues that this would go against the mischief that s 409 is meant to target – to impose harsher

punishment for CBT by persons who hold positions which require "absolute trust" in their integrity and where the breach of such trust "may have severe public repercussions" (as set out in *Public Prosecutor v Tan Cheng Yew* [2013] 1 SLR 1095 ("*Tan Cheng Yew*")).[35]

97 In our reading of *Cooray*, the Privy Council's holding was that in order for an accused to be convicted of the aggravated offence of CBT as an agent, the accused must be in the profession, trade or business as an agent (which we will hereinafter refer to as "professional agent" in short) and must be entrusted with property in that capacity.

98 We note that this was not the view of the courts in *Dalmia* and *Tay Choo Wah*, which held that the Privy Council's decision in *Cooray* that the aggravated charge of CBT as an agent was not made out was *not* because the accused was not a *professional* agent but was instead because the accused had not been entrusted with the monies in any capacity and certainly not in the course of the duties that he had to discharge as the office-bearer of the various institutions he was in charge of (see [94] of *Dalmia*).

99 We are, however, of the view that the Privy Council in *Cooray* had applied its mind to – and was addressing – the question of whether an accused had to be a professional agent before he could be caught under s 392 of the Ceylon Penal Code. This was the primary issue before the Privy Council. The Court of Criminal Appeal of Ceylon, from which the appeal to the Privy Council had originated, had convicted the accused on the basis that s 392 of the Ceylon Penal Code covered any kind of agent acting for any principal. The arguments of both counsel during the appeal before the Privy Council centred on the

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[35] Prosecution's submissions at paras 86 and 88.

soundness of this holding, with counsel for the accused arguing that the section covered only professional agents. Further, the analysis of the Privy Council (as set out at 416–419 of *Cooray*) also focused on the issue. From our reading of the case, the holding in *Cooray* was that s 392 of the Ceylon Penal Code applied only to *professional* agents in the sense of agents who are engaged in a *business* of agency, and not persons who only casually acted as agents. The court there might have gone further when it observed (at 419–420) that factually, the accused "was in no sense entitled to receive the money entrusted to him in any capacity" nor was he made an agent to hand over the monies to the bank, but this did not detract from or undermine its earlier holding in respect of the legal requirements of the section.

100 However, we acknowledge that these final observations in *Cooray* – where the Privy Council held that it was not "deciding what activity is required to establish that an individual is carrying on the business of an agent" and that the accused "was in no sense entitled to receive the money entrusted to him in any capacity" – may have introduced some ambiguity into the court's exact *ratio decidendi*. To some extent, as a result of those observations, there may be room for some doubt as to whether the Privy Council laid down a strict legal principle that for the aggravated charge of CBT in the way of one's business as an agent to be made out, an accused must be a professional agent, or whether the Privy Council had decided the case only on its specific facts (*ie*, that the accused could not fall within the section because he "was in no sense entitled to receive the money entrusted to him in any capacity").

101 In any event, regardless of what the exact holding in *Cooray* was, we are of the view that for the requirement that the accused be entrusted with property "in the way of his business as … an agent" under s 409 of the Penal Code to be fulfilled, the accused must, at the time of the entrustment of the property, be in

the *business* of an agent, and being a director of a company or a society does not render a person to be in the *business* of an agent.

102 In our judgment, the interpretation that s 409 of the Penal Code refers to professional agents rather than casual agents is borne out by the language of the section, in particular the expression "in the way of his *business*" [emphasis added]. This expression, in itself, reflects that the agent contemplated by the section is a person who is carrying on a business as an agent. It could not conceivably encompass a person who has been appointed the treasurer of a society and by virtue of that appointment is holding onto the funds of the society. This conclusion is buttressed when we contrast the expression "in the way of his business" with the expression "in his capacity", which is used in relation to public servants in an earlier part of the section. The fact that two different expressions are concurrently employed within the same section must mean that a person who is merely acting "in his capacity" as an agent would not be caught by the section. We note that the court in *Dalmia* had attempted to explain the use of the two expressions in the following manner (at [96]):

> … The expression "in the way of business" means that the property is entrusted to him "in the ordinary course of his duty or habitual occupation or profession or trade". He should get the entrustment or dominion in his capacity as agent. In other words, the requirement of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. … A different expression "in the way of his business" is used in place of the expression "in his capacity" to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make … the criminal breach of trust by the agent a graver offence than any of the [other CBT] offences… The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property *not only in his capacity as an agent but also in connection with his duties as an agent*. … [emphasis added]

With respect, we find it difficult to follow this reasoning. We do not see a distinction between a person who is acting "in his capacity" as an agent and a person who is acting "in connection with his duties" as an agent. The court in *Dalmia* appears to be of the view that the latter requirement serves to prevent two types of persons from being liable for the aggravated offence of CBT in the way of one's business as an agent: the first is a person who may be an agent of another for some purpose other than the purpose that he was being entrusted with the property for, and the second is a person who may be an agent because of that very act of entrustment. In our view, the requirement that one must be entrusted with the property in his capacity as an agent would have been an equally effective safeguard insofar as the two instances, just mentioned, are concerned. We are unable to agree with the court's explanation of the use of two different expressions in the section and its interpretation of the expression "in the way of his business".

103 In our judgment, the expression "in the way of his business as … an agent" must mean something more than "in the capacity of" an agent or "in connection with his duties as an agent"; it must necessarily refer to a professional agent, *ie*, one who professes to offer his agency services to the community at large and from which he makes his living. This is reflected both by the use of the word "business" as well as the words, "a banker, a merchant, a factor, a broker, an attorney", preceding the words "or an agent".

104 The natural reading of the word "business" is that it refers to a commercial activity done for profit, where the person in that business offers a service or product that another can employ or purchase. The existence of the preceding words, "a banker, a merchant, a factor, a broker, an attorney", makes it clear, in two ways, that the phrase "in the way of his business as … an agent" should be interpreted in the manner we have defined above. The first is in

relation to the effect of those words on the interpretation of the phrase "in the way of his business" while the second is in relation to their effect on how the words "an agent" should be interpreted.

105 First, the phrase "in the way of his business" has to be applied to all the stated capacities and not merely to an agent. This, in our view, casts some doubt on the finding in *Dalmia* that the phrase "in the way of his business" means "in the course of his duties" (at [96]). While this may appear to be a possible way to interpret the phrase given the wider definitions of the words "in the way of" and "business" as found in various dictionaries which were set out in *Dalmia* (at [96]), we find that to utilise such interpretations would be to stretch the natural sense to be placed on the relevant words in s 409, especially when seen in the light of, and applied to, the words "a banker, a merchant, a factor, a broker, an attorney". In our view, when read in the light of these words, the phrase "in the way of his business" more sensibly means "in the occupation or the trade of". Read holistically, s 409 of the Penal Code can logically apply only to persons who are entrusted with property when carrying on a business or trade as a banker, a merchant, a factor, a broker, an attorney or an agent.

106 Second, on a related though separate note, the existence of the preceding words also bring into play the *ejusdem generis* principle in relation to the interpretation of the word "an agent". Applying that principle, the meaning of the words "an agent" must be restricted by, and implied from, the words "a banker, a merchant, a factor, a broker, an attorney". Each and every one of these persons carries on a business or a trade (in the sense of a type of commercial activity) of offering certain services to the public in the course of which the customer has to entrust property, or the dominion of such, with him. Further, each of those capacities refers to an *external* relationship between the person

who is entrusting the property and the person who is being entrusted the property.

107 In *Cooray*, the Privy Council accepted the submission made by counsel for the accused that the court could take guidance from the English cases on how s 75 of the Larceny Act 1861 (c 96) (UK) had been interpreted (at 418–419). Section 75, which was repealed and replaced with the offence of fraudulent conversion of property under s 1 of the Larceny Act 1901 (c 10) (UK), was not identical to s 392 of the Ceylon Penal Code (or s 409 of the Penal Code) but consisted of similar terms. It read as follows:

> **As to frauds by agents, bankers, or factors:**
>
> 75. Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent …

The position taken by the English courts in respect of s 75 was that the section, including the words "other agent", comprehends only those engaged in a particular occupation. As pointed out by counsel for Sharon,[36] this is also borne out by the remarks made in the House of Commons at the first reading of the bill to amend s 75 of the Larceny Act 1861 (see United Kingdom, House of Commons, *Parliamentary Debates* (3 May 1901) vol 93 at col 623). In explaining why there was a need for s 75 to be amended, the Attorney-General, Sir Robert Finlay, also referred to the *ejusdem generis* principle and stated as follows:

> … Thirdly, it has been held that the sections, which *enumerate a number of specific cases of agents, only apply to persons who are agents ejusdem generis*. There was a case in which a conjuror by profession induced a woman to invest in shares, and he misappropriated the money, but *escaped conviction on the ground that his ordinary business was that of a conjuror, and*

[36] Sharon's submissions at para 181.

> *that he only casually acted as an agent*. This Bill proposes to repeal the sections altogether, and to substitute a short and clear enactment rendering punishable all classes of fraudulent misappropriation of property entrusted to or received by an agent. … [emphasis added]

108 While we recognise that s 75 of the Larceny Act 1861 is worded differently from s 409 of the Penal Code, we agree with the Privy Council in *Cooray* that guidance can still be derived from how the former provision had been interpreted. The Prosecution submits that the absence of the key phrase "in the way of his business" from s 75 of the Larceny Act 1861 strongly suggests that the case law on that provision will not be useful in the interpretation of s 409 of the Penal Code.[37] We do not agree. If anything, the fact that s 75 of the Larceny Act 1861 had been interpreted in such a manner which drew a distinction between professional and casual agents, even without the presence of the expression "in the way of his business", bolsters the conclusion that s 409 of the Penal Code must, *a fortiori*, be interpreted to cover professional agents and not simply casual agents (*ie*, someone who does not offer his services as an agent to the community at large and from which he makes his living). We also do not think that the fact that s 409 of the Penal Code contains the words "or an agent" rather than "or *other* agent" [emphasis added] (as in the case of s 75 of the Larceny Act 1861) in any way changes the analysis.

109 On this issue, we note that the CBT Charges merely state that the appellants had engaged in a conspiracy to "commit [CBT] by an agent". The charges do not mention the requirement that the entrustment of property (or the dominion of such property) to Kong Hee, Ye Peng or Eng Han must be "*in the way of [their] business* as … agent[s]" [emphasis added]. This requirement – being one that is important and, in fact, central to the aggravated offence of CBT

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[37] Prosecution's submissions at para 92.

under s 409 of the Penal Code – should have been stated in the charges. The conspicuous absence of the crucial words "in the way of his business" in the CBT Charges, in our view, may reflect a single-minded focus on the part of the Prosecution on the phrase "by an agent" and a lack of appreciation of the significance of the requirement that is encapsulated by the words "in the way of his business".

110 We turn to consider whether a director falls within the scope of s 409 of the Penal Code as we have set out above. In this connection, there is no dispute that a director may be an agent of the company or organisation *vis-à-vis* certain acts that he does on behalf the company or organisation. What is crucial is whether a director is acting *in the way of his business* as an agent for the purposes of s 409 of the Penal Code. We do not think so. While a director undoubtedly holds an important position in a company or organisation, it cannot be said that a person by becoming a director has offered his services as an agent to the community at large and makes his living as an agent. Additionally, the relationship between a director (who is entrusted with the property) and the company (which is the one entrusting the property) is an *internal* one and this stands in stark contrast to the *external* nature of the relationship that "a banker, a merchant, a factor, a broker, an attorney" shares with his customer who entrusts the property with him. For these reasons, we do not think that a director who has been entrusted with the property of the company or organisation by virtue of his capacity as a director can fall within s 409 of the Penal Code.

111 As we said during the hearing, we are not persuaded by the argument, assuming that one is being made, that *Tay Choo Wah* should be followed because the ruling therein has been applied in Singapore for the past four decades. If an interpretation of a statutory provision is erroneous, especially where the provision imposes criminal liability, it must be corrected

notwithstanding how entrenched it may have become. The Prosecution also argues that Parliament had amended the Penal Code four times since *Tay Choo Wah* was decided but had not seen the need to amend s 409 of the Penal Code to correct any supposed mistake made in *Tay Choo Wah*, and that this indicates that the holding in *Tay Choo Wah* is in line with Parliament's intention. We are not persuaded by this argument. Parliament's intention is to be discerned at or around the time the law is passed (see *BFC v Comptroller of Income Tax* [2013] 4 SLR 741 at [46]) and merely because Parliament had not amended s 409 of the Penal Code post-*Tay Choo Wah* does not necessarily indicate that *Tay Choo Wah* represents Parliament's intention. Absent a clear indication from Parliament through the proper process, the court should not and will not undertake any such speculative exercises.

112 We agree with the Prosecution that directors, who occupy positions of great power, trust and responsibility, are more culpable than employees when they commit CBT offences against their companies or organisations. To that extent, we agree that it is intuitively unsatisfactory that a director would only be liable for CBT *simpliciter* under s 406 of the Penal Code while a clerk, servant, carrier or warehouse keeper would be liable for an aggravated offence under either ss 407 or 408 of the Penal Code. This does not, however, mean that we can ignore the wording of the section. Like the Malaysian Court of Appeal in *Periasamy*, we are of the view that adopting the interpretation put forward by the Prosecution may be "tantamount to rewriting the section by means of an unauthori[s]ed legislative act" (at 575A). Such a task should be more properly left to Parliament. For instance, we note that the relevant expression of the equivalent provision in the Malaysian Penal Code was amended in 1993 to read "in his capacity of a public servant or an agent". We further note for completeness that while *Periasamy* was decided *after* the amendment was

made, the amended provision had no application to the appeals as the offences were committed before the amendment came into force.

113 Given our findings above, the question of whether *Cooray* – a Privy Council decision from a *different jurisdiction* and decided *prior* to the abolishment of appeals to the Privy Council – is binding on this court becomes immaterial. We will, however, make some brief observations on this issue given that the parties and the *amicus* have devoted much attention to it.

114 The appellants submit that *Cooray* is binding because it was handed down before the abolition of appeals to the Privy Council, which took effect on 8 April 1994. They rely on a line in the *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689 ("the Practice Statement") that provides that the statement, which was issued on 11 July 1994 in the wake of the abolition of the appeals to the Privy Council, was "not intended to affect the use of precedent in the High Court or in any subordinate courts".[38] The appellants submit that, therefore, while the Practice Statement provides that the *Court of Appeal* has the discretion to depart from Privy Council decisions that were decided prior to 8 April 1994 where adherence would cause injustice or constrain the development of the law in conformity with the circumstances of Singapore, *the High Court and other subordinate courts* do not have such discretion and are bound by such decisions.

115 The appellants take the position that this applies even for decisions of the Privy Council from *other jurisdictions* as long as the decision in question considers a statutory provision *in pari materia* with the relevant Singapore provision.[39] For this, they rely on the Court of Appeal decision in *Chin Seow*

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38 Sharon's submissions at para 203.

Noi and others v Public Prosecutor [1993] 3 SLR(R) 566 ("*Chin Seow Noi*"). In *Chin Seow Noi* (at [82]), the Court of Appeal appeared to have impliedly affirmed the proposition in cases such as *Wo Yok Ling v Public Prosecutor* [1977–1978] SLR(R) 559, *Jacob v Attorney-General* [1968–1970] SLR(R) 694 and *Public Prosecutor v Cheng Ka Leung Edmund* (Criminal Case No 14 of 1986, unreported) that the courts of Singapore were bound by the decisions of the Privy Council on appeals from jurisdictions other than Singapore at least where the Privy Council was considering a statutory provision *in pari materia* with the relevant Singapore provision. The court went on, however, to find that it was not bound by the particular Privy Council decision in that case, which was on appeal from India, because there were significant differences between the material parts of the law of evidence in India and that in Singapore.

116 The Prosecution, on the other hand, argues that Privy Council decisions, as a whole, are no longer binding on any Singapore court. For this, the Prosecution principally relies on (a) the observations made by the Court of Appeal in *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 ("*Au Wai Pang*") (at [20]) in holding that it was not bound by a Privy Council decision on appeal from the Supreme Court of Mauritius which was decided in 2014;[40] and (b) the Practice Statement, which the Prosecution submits highlighted the importance of developing legal rules appropriate for Singapore.[41]

117 The *amicus*, too, submits that *Cooray* is not binding on this court. However, he employs a different reasoning to reach that conclusion. The *amicus* submits that *Cooray* does not bind this court (or any other Singapore court for

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39 Sharon's submissions at para 204.

40 Prosecution's submissions at para 66.

41 Prosecution's submissions at para 68.

the matter) because the Privy Council, which was hearing a matter on appeal from Ceylon and not Singapore, was not acting as a court within Singapore's judicial hierarchy when it decided *Cooray*.[42] He submits that as observed in the High Court of Australia case of *Favelle Mort Ltd v Murray* (1976) 8 ALR 649, the ultimate foundation of precedent is that a court or tribunal higher in the hierarchy of the *same* juristic system – and thus able to reverse the lower court's judgment – has laid down the principle as part of the relevant law. Furthermore, the essential basis for the observance of a decision of a tribunal by way of binding precedent is that the tribunal can correct the decisions of the court which is said to be bound (see *Viro v R* (1978) 18 ALR 257 at 260).

118 In our view, we are not bound by *Cooray* notwithstanding that it was decided before the abolishment of appeals to the Privy Council and notwithstanding the Practice Statement because *Cooray* is an appeal from another jurisdiction and not Singapore. While the Court of Appeal in *Au Wai Pang* did not address or expressly overrule its decision in *Chin Seow Noi* or the earlier cases cited in *Chin Seow Noi* (see [115] above), we think that it had implicitly done so. The Court of Appeal observed as follows in *Au Wai Pang* at [20]:

> … *Dhooharika [v DPP* [2015] AC 875] is a decision of the Privy Council on appeal from the Supreme Court of ***Mauritius***. Put simply, it is a decision of the Privy Council on appeal from ***another jurisdiction*** which was handed down *almost five decades after Singapore became an independent nation state*. As was pointed out in an extrajudicial article published over three decades ago, the Singapore courts ***cannot*** be bound by such decisions (see Andrew Phang, "'Overseas Fetters': Myth or Reality" [1983] 2 MLJ cxxxix, especially at cxlix-cli). If nothing else, embracing such an approach would *militate directly against the independent status of Singapore in general and its courts in particular*. Indeed, the Singapore legal system has

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42 *Amicus'* submissions at paras 12–13.

> developed apace during the last half a century since the nation's independence (see, in this regard, the excellent and recent volume by Goh Yihan and Paul Tan (gen eds), *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015), and it would be incongruous – if not wholly contrary to logic and commonsense – to argue that this court could be "fettered" by a decision of the Privy Council, let alone one handed down for a completely different jurisdiction altogether.
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> [emphasis in italics and bold italics in original; emphasis in underline added]

119 We are cognisant that the situation in *Au Wai Pang* is not entirely on all fours with that in the present case (or with that in *Chin Seow Noi*) because it was concerned with a Privy Council decision from another jurisdiction that was decided *after* appeals to Privy Council were abolished in Singapore. The Privy Council decision in question in *Au Wai Pang* was decided in 2014. In contrast, *Cooray* was decided before the abolishment and also before Singapore became independent. The situation in the present case is thus less straightforward. There *may* consequently be some doubt whether the Court of Appeal's observations in *Au Wai Pang* as set out in the preceding paragraph applies to the present situation.

120 But, as said earlier, we are of the view that the Court of Appeal in *Au Wai Pang* had in effect, though not expressly, reversed its earlier decision in *Chin Seow Noi*. This can, in particular, be seen from its observations in the line that we have emphasised in underline in the quote at [118] above. There, the Court of Appeal had not only referred to, but had agreed with, an article which had expressed strong doubts and criticisms on the position that Privy Council decisions from other jurisdictions that construe statutes which are *in pari materia* are binding. It is useful to quote substantially from the article (which was written before the abolishment of appeals to the Privy Council) in order to fully understand what the Court of Appeal in *Au Wai Pang* was expressing

agreement with (see Andrew Phang, "'Overseas Fetters': Myth or Reality" [1983] 2 MLJ cxxxix at p cxlix-cli):

> Another problem, no nearer to home, concerns the effect of Privy Council decisions on appeal from other jurisdictions on a general point of law. The leading authority is … *Bakhshuwen* … which holds that such decisions are binding. …
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> The criticisms of *Bakhshuwen* are compelling, the main one being that the Privy Council "possesses institutional unity, but functional diversity", *i.e.* when sitting on, for example, an appeal from Singapore, it sits as a *Singapore* court and thus, its decision cannot strictly be binding on the courts of another country. This approach would mesh with the everpresent need to take account of local circumstances and conditions…
>
> It could, of course, be argued that the Privy Council is unlikely to diverge from a previous decision of its own and, indeed, it is admitted that in most cases – especially with regard to, for example, cases involving trade and commerce, where principles of law are neutral and value-free, with a premium being placed on predictability and uniformity – the Board is very likely to follow a previous decision although it originated from another jurisdiction. Thus, there is some merit in the local court holding itself bound by the previous Privy Council decision. It is submitted, however, that in the light of a few cases that may have to be decided otherwise so as to attain justice in the light of local conditions and circumstances, it would, so far from saving the time and money involved in a further appeal to the Privy Council, generate exactly the opposite result. If, as may plausibly be the case, the potential appellant has not the requisite funds to appeal, the injustice perpetrated would remain unremedied. The greatest benefit would thus result from holding Privy Council decisions from other jurisdictions as being of the highest persuasive value, for there would always remain a flexibility so necessary to cope with the occasional, but no less important, "hard" case.
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> ….
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> The question remains, however, as to whether we should … allow certain Privy Council decisions from other jurisdictions to be binding [*ie*, where the Privy Council was considering a statute from another jurisdiction that is similar or *in pari materia* to a local statute]. … It is submitted that [this] should not be followed and that … [it] falls foul of the general criticisms levelled against Privy Council decisions from other jurisdictions set out above.
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> [emphasis in original]

121 In our view, when the Court of Appeal's comments in *Au Wai Pang* are read in the light of the relevant portions of the article cited above, the inference is that the Court of Appeal in *Au Wai Pang* disagreed with the position taken in *Chin Seow Noi* (though no reference was made to the latter case). We agree that the position in *Au Wai Pang* is to be preferred because, as submitted by the *amicus*, a decision should only be binding if it was made by a court or tribunal higher in the hierarchy of the *same* juristic system as the court considering this issue. Further, to hold otherwise would abrogate Singapore's independence. Decisions of the Privy Council from another jurisdiction (insofar as they relate to statutes that are *in pari materia*) may have, at the time of *Chin Seow Noi* and the earlier cases where appeals to the Privy Council were still possible, been held to be "binding" for *practical* reasons given that the court deciding the issue was ultimately bound by decisions of the Privy Council (in line with the extrajudicial observations of Andrew Phang JA cited above), but as appeals to the Privy Council have been abolished, this rationale clearly no longer applies. For the above reasons, we are of the view that *Cooray* is not binding on us.

122 Following our interpretation of the requirement of "in the way of his business as … an agent" under s 409 of the Penal Code, the charge under s 409 is not made out. Therefore, even if the Judge's findings in respect of the other elements of the CBT Charges are upheld, the appellants should only have been convicted of the offence of CBT *simpliciter* under s 406 of the Penal Code. While the appeals against conviction are allowed at least to such an extent, this is through no fault of the Judge as he was bound by the High Court case of *Tay Choo Wah*.

Whether there was "wrong use" of CHC's funds

123 We move on to discuss the next element of the CBT Charges – whether there was "wrong use" of CHC's funds. For the CBT Charges to be made out, it must be proven that the appellants had misappropriated the funds (either from the BF or the GF) that were entrusted to them. Misappropriation is defined as the act of setting aside or assigning to the wrong person or wrong use (see *Phang Wah v Public Prosecutor* [2012] 1 SLR 646 at [48] ("*Phang Wah*")). The Judge found that this element was made out for both categories of CBT Charges as the transactions that the appellants entered into fell outside the scope of authorised uses of the funds. We will now examine his decision and the appellants' arguments. Like the Judge, we will deal with the sham investment charges and the round-tripping charges separately because they involve different analyses.

(1) The sham investment charges

(A) OVERVIEW AND GENERAL OBSERVATIONS

124 Before the Judge, the appellants raised two main arguments as to why the purchase of the Xtron and Firna bonds did not constitute a wrong use of the funds from the BF. First, they argued that the use of church funds to fund the Crossover could not be a wrong use as the Crossover was not only a "church purpose" but was a core mission of CHC. Second, they argued that in any event, the purchase of these bonds was an authorised use of the BF as the bonds were investments that would generate returns for CHC.

125 Save for Eng Han,[43] the appellants do not appear to be pursuing the first argument on appeal. In any event, as the Judge found at [124]–[125] of the

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[43] Eng Han argues that wrong use only happens when property is applied wrongfully to the use or benefit of the offender or another person other than the owner, as so happens

Conviction GD, the appellants cannot rely on this argument because the BF, from where the monies came to purchase the Xtron and Firna bonds, was a restricted fund meant for specific purposes and could not simply be used for any "church purpose". As stated above, the BF can only be utilised for two authorised uses: (a) to pay for property- and building-related expenses; and (b) to invest in order to generate returns.

126 The issue of whether there was "wrong use" thus ultimately turns on whether the Xtron bonds and Firna bonds constituted genuine investments. The appellants argue that an investment encompasses any outlay of money in the hope or expectation that the principal sum will be paid back with additional return. The Judge was of the view that this was too broad a definition as it would suggest that *any* outlay of money no matter how exorbitant or unrealistic and any *hope or expectation* no matter how tenuous and unfounded, can form a basis for asserting that a genuine "investment" was being made (the Conviction GD at [147]). We agree, and will add that a further problem with this definition is that it suggests that *any* amount of *return*, no matter the type or quantum, would suffice. In our judgment, whether the Xtron and Firna bonds were investments must be assessed from CHC's perspective and on the basis of the *substance* (and not merely the form) of the transactions. In assessing the substance of the transactions, we find that several factors are relevant. These include objective evidence of the commercial viability and purpose of the transaction, whether the risk undertaken was commensurate with the expected returns, and whether the parties to the transaction transacted at a fair value.

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with theft and other related offences (para 42 of his submissions). On his argument, there can only be wrong use where the owner is wrongfully kept out of the benefit of using the property, the use of the property for an alternative purpose of the owner cannot constitute "wrong use".

127 Some of the appellants, most notably Ye Peng,[44] argue that the purpose of investments need not be restricted to the making of financial gains, but may be to achieve certain social goals. Put another way, they are arguing that these funds were used to "invest" in the Crossover for the social purpose of evangelism. This shades into their first argument which we dealt with at [125] above. While it is possible for investments to also be motivated by non-financial purposes, this argument must fail in this case because the investment policy, the relevant portions of which were set out at [28] above, clearly envisaged that the funds in the BF were to be used for *financial* investments. After all, the whole point was to allow the monies in the BF to generate returns rather than stagnate in the account. Neither the policy nor the discussion within the CHC Board when the investment policy was approved made any mention about other forms of investments, such as "social" or "spiritual" investments. Thus, the question boils down to determining whether the purchases of the Xtron and Firna bonds were true *financial* investments.

128 Before the Judge, the Prosecution took the position that these transactions were not investments and were merely "shams", as defined in *Snook v London and Western Riding Investments Ltd* [1967] 2 QB 786 ("*Snook*"), because the appellants who brought about the execution of the 1st Xtron BSA and the Firna BSA did not intend that they should generate the legal rights and obligations that the documents appeared to create. The Judge rejected this submission on the basis that there was no suggestion that the remaining members of the CHC Board, apart from the relevant appellants who were on the board, had the intention that the transactions would not create the legal rights and obligations that it appeared to create. The Judge found, however, that notwithstanding that the relevant documents were effective contractually, the

[44] Ye Peng's submissions at paras 340-343.

transactions were, in *substance,* not investments and were merely a device that enabled them to take money from the BF and put it into their hands so that they could use it for the Crossover.

129 The appellants, in particular Kong Hee,[45] argue that the Judge had erred because the transactions must be genuine investments once they are found not to be "sham" investments under the test in *Snook*. They argue that these are "two sides of the same coin". In our judgment, the inquiry is not a binary one. Merely because a *transaction* is not a "sham" in the *Snook* sense does not necessarily mean that it is an *investment*. We agree with the Judge that the pertinent question is not whether the relevant documents (*ie*, 1st Xtron BSA or the Firna BSA) created genuine legal obligations, but whether the transactions could properly be regarded as investments. This requires an examination of the entire factual matrix, including the circumstances surrounding the transactions and the terms of the transactions (*eg*, whether the rate of return was commercially justifiable). This entails not only an objective assessment of the transactions but also a consideration of the actions of the parties when the transactions were entered into (*eg*, whether any due diligence or commercial assessments were performed). In assessing whether things were carried out that constituted "wrong uses" of CHC's funds, we are not concerned with what the appellants *intended*, but what the appellants *did*, and the substance of the transactions.

130 On the facts of the present case, to the extent that the Xtron and Firna bond transactions cannot be properly characterised as investments, any drawdown on the BF for the purpose of the bonds would constitute a "wrong use" of the BF. In this connection, whether the Xtron and Firna bond transactions may properly be characterised as investments is determined at or

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[45] Kong Hee's submissions at para 161.

prior to the point in which the respective transactions were entered into (*ie*, the date of each drawdown on the funds). Events that transpired *after* the respective transactions would be relevant only insofar as they are able to shed light on what had happened at the point the transactions were entered into.

131 With this approach in mind, we turn to examine the substance of the respective transactions relating to the Xtron and the Firna bonds.

(B) XTRON BONDS

132 The Judge's conclusion that the Xtron bonds were not an investment but were a "temporary loan" of money from the BF to Kong Hee to fund the Crossover was premised on two key findings of fact. The first was that Xtron was effectively controlled by Kong Hee, with the assistance of at least Ye Peng, and hence the monies disbursed from the BF effectively came under the control of Kong Hee and were at his disposal (the Conviction GD at [153]). The second was that the responsibility for redeeming the Xtron bonds lay not with Xtron but with Kong Hee, Ye Peng, Serina and Eng Han (the Conviction GD at [154]). The Judge found that the transactions were not for the purpose of financial returns and thus could not be an investment, or even a "hybrid" or "dual purpose" investment (the Conviction GD at [155]). In any event, he held that the appellants' alternative submission that the transactions were a "hybrid" or "dual purpose" investment was a mere "afterthought" (the Conviction GD at [159]).[46]

133 The appellants argue that these two reasons do not support the Judge's finding that the Xtron bonds were not genuine investments.[47] They submit that

46 [159] of the Conviction GD.

47 Kong Hee's submissions at para 175; Eng Han's submissions at para 75.

even if it is conceded that the appellants controlled Xtron (though most of them save for Eng Han maintain on appeal that Xtron was not controlled by them), it did not mean that the Xtron bonds were not genuine investments. In this regard, they highlight that it is not uncommon for companies or persons to incorporate a special purpose vehicle or employ other corporate structures for legitimate reasons or simply for creating a perception of independence or distinctiveness, which was merely the case here in relation to Xtron and CHC.[48] They submit that the Judge's finding thus goes against commercial practice and is contrary to the basic legal tenet that companies are separate legal entities.

134 As for the second factor (*ie*, the responsibility of redemption), the appellants (in particular, Kong Hee)[49] argue that the fact that they may have *subsequently* seen fit to help Xtron devise solutions to resolve the issue of redemption of the bonds did not alter or detract from the fact that they had at the outset when signing the 1st Xtron BSA intended for Xtron to bear the burden. The appellants further argue that the very nature of a bond is such that it is both an investment of the bond holder (*ie*, CHC in this case), and a loan to the issuer of the bond (*ie*, Xtron in this case), therefore the fact that CHC made a loan to Xtron through the Xtron bonds, and that Xtron in turn used the money for its own purposes, such as to fund the Crossover, cannot make the bonds anything less than an investment on CHC's part.[50] In our judgment, the last argument can be summarily dismissed with because it involves a misinterpretation of the Judge's finding. The Judge at no point held that the Xtron bonds were not an investment because they were bonds or solely because the investee, Xtron, had used the bonds to fund the Crossover.

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48 Kong Hee's submissions at para 176(2).

49 Kong Hee's submissions at para 177(2).

50 Kong Hee's submissions at paras 173–174.

135 Turning to the arguments relating to the first factor, the appellants may be correct insofar as their submission is that the fact that an "investor" has control over the "investee" or even over the use of the funds that have been invested does not mean that the transaction cannot be an investment. As we have stated at [129] above, to determine if the transactions are genuine investments, the entire factual matrix must be examined. This would include determining, amongst other things, if consideration had been given to the commercial and financial justification for the transaction viewed from the perspective of CHC and in the light of the restricted uses to which the BF could be put.

136 As we understand it, the Judge's approach is in line with this. The Judge's finding was not that CHC's purchase of the Xtron bonds was not an investment merely *because* some of the appellants had control over Xtron or *because* some of the appellants, in addition to Xtron, bore the responsibility of ensuring repayment. These two facts are merely a part of the entire factual matrix that led the Judge to his eventual finding that the transactions were not a genuine investment but were instead a way for the appellants to use the funds in the BF for the Crossover. The other considerations which the Judge took into account included the fact that the appellants were not seriously concerned about whether, and if so when, CHC would obtain financial return under the 1st Xtron BSA[51] as well as the admissions made by some of the appellants either during investigation or cross-examination that the bonds were for the purposes of the Crossover and not for investment (the Conviction GD at [158]).

137 It is to this factual matrix that we now turn. But before that, we should state for the avoidance of doubt that it is quite clear to us that the Judge's finding that Xtron was controlled by some of the appellants is correct.

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[51] See [293]–[294] and [297]–[298] of the Conviction GD.

138 We start with the background that led to the Xtron bonds. It is not disputed that in 2007, more financing was needed for the Crossover. In order to meet this greater need for funds, some of the appellants began to source for monies. After considering several plans including the taking of a $9m loan from Citic Ka Wah which demanded an interest of 16% per annum, it was eventually decided that financing for the Crossover would be obtained through the execution of the 1st Xtron BSA and the purchase of the Xtron bonds by CHC (see [26]–[30] above). Although Xtron was the bond issuer, the subscription was not proposed by the directors of Xtron but was decided and controlled by the appellants. In fact, the Xtron directors did not even appear to have taken part in negotiating the terms of the bonds although a substantial sum of $13m was involved.

139 The evidence also reflects that the appellants made no consideration on CHC's behalf as to whether the interest rate of 7% per annum for a loan of $13m to Xtron under the 1st Xtron BSA was a commercially viable rate of return. It could not have been lost on the appellants, and it is certainly not lost on us, that Citic Ka Wah was only willing to lend the sum of $9m to Xtron for the purpose of funding the Crossover at a far higher interest rate of *16%* per annum. Against this background, we doubt that the return of 7% per annum for a larger loan of $13m under the 1st Xtron BSA was a commercially justifiable rate of return commensurate with the risk CHC was taking on. Furthermore, at the time the 1st Xtron BSA was entered into, Xtron was not in a sound financial state and had been in a loss-making position for a number of years.[52] Even more importantly, as admitted by some of the appellants, no due diligence or cash flow projection was properly done on CHC's behalf before the execution of the 1st Xtron BSA to determine if Xtron was financially sound or if the bonds could

[52] X-61.

be repaid with interest on maturity such that the investment made financial and commercial sense from CHC's perspective. For example, Eng Han – CHC's appointed fund manager – stated that the extent of his due diligence comprised only asking Kong Hee about the potential profitability of Sun Ho's US album and how many copies it would sell.[53]

140 The events that occurred after the purchase of the Xtron bonds up to the redemption of the bonds through a set-off under the ARLA also reflect that the transactions were not investments and support the conclusion that the appellants, and not Xtron, bore the responsibility of ensuring that the bonds could be redeemed. As stated at [130] above, we are cognisant that subsequent events can only be taken into account insofar as they are able to shed light on what had happened or could have been intended *at the point* the transactions were entered into.

141 In February 2008, Ye Peng sent Kong Hee an email proposing a way in which Xtron could redeem the bonds without having to depend on the revenue from the sale of Sun Ho's albums.[54] His proposal was that CHC could pay money to Xtron for audio-visual and multimedia services as well as for advance rental; and furthermore, Wahju could donate $1m a year to Xtron instead of to the BF as he had originally intended to. In July 2008, Eng Han also proposed to Kong Hee and Ye Peng a plan to increase Xtron's income. This plan, which involved Xtron purchasing The Riverwalk and leasing it back to CHC,[55] was eventually put into action. It is also significant that in August 2008, Xtron and AMAC (acting as CHC's fund manager) entered into the ABSA (see [38]

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53 Transcript 5 February 2015, p 173.

54 E-3.

55 E-100.

above), which (a) increased the maximum amount of funding to Xtron from $13m to $25m; (b) varied the interest rate downwards from 7% to 5% per annum; and (c) pushed back the maturity date of the bonds to ten years from the date of issue. While we are mindful that the ABSA and its terms are to be distinguished from the 1st Xtron BSA and the Xtron bonds, the fact that the terms of the earlier transactions were so easily and readily altered to CHC's detriment sheds light on the true nature of the earlier transactions.

142 Lastly, we address the Judge's observation at [156] of the Conviction GD that he was prepared to accept that if CHC's funds had been invested *directly* into Justin's company in the US for the purpose of funding the Crossover, this would have been a genuine investment because the appellants would have relinquished control over CHC's funds. We are ambivalent about this finding. In our view, whether pumping funds directly into Justin's company would constitute a genuine investment must ultimately be assessed on the facts (for example, whether the transaction was commercially justifiable, or whether it was an attempt to cause wrongful loss to CHC or wrongful gain to Justin). In any case, we do not think that this issue is relevant to this appeal. It concerns a scenario that could possibly have happened, but did not. There is thus no need for us to reach a firm landing on this issue.

143 In the light of all the above, we agree with the Judge that the Xtron bonds were not in *substance* investments which the appellants were legally authorised to use the funds in the BF for. The Xtron bonds were in effect a means through which the appellants could take out funds from the BF to use on the Crossover. The Judge was thus correct to have found that the use of the funds in this manner was an unauthorised or "wrong use" of the monies from the BF.

144 We turn next to examine if the Firna bonds were investments.

(C) FIRNA BONDS

145 The appellants argue that the purchase of $11m worth of bonds in Firna, which was a profitable company, at an interest rate of 4.5% per annum with a maturity period of three years was an investment. They submit that CHC's "investment" into the Firna bonds co-exists independently and legitimately with the separate agreement that they had with Wahju, which would allow them to fund the Crossover. The supposed separate agreement was that Firna would use the bond proceeds for its working capital, thus freeing up a corresponding amount of its funds which would allow Firna to return Wahju the monies that he was owed pursuant to a shareholder's loan that he gave to Firna in the past, which would then provide Wahju with the financial ability to support the Crossover. The appellants rely heavily on the evidence given by Wahju during the trial which corroborated their account of events.

146 The Judge did not accept this characterisation of the Firna bonds. Similar to the way he viewed the Xtron bonds, the Judge held that Kong Hee (assisted by Ye Peng, Eng Han and Serina) had complete control over the Firna bond proceeds and that Wahju (or more accurately, Firna) was no more than a conduit through which the funds flowed (the Conviction GD at [161]). He noted that the Firna bond proceeds were intended to be used for two purposes: the bulk of the proceeds was to fund the Crossover, while $2.5m was a loan to Wahju. The Judge also found that the appellants never intended for Firna to bear the responsibility to redeem the bonds with profits from its glass factory business and that the appellants bore the responsibility to source for funds to redeem the Firna bonds when that was called for. In totality, the Judge held that the Firna bonds were not an investment, and that they were, as in the case of the Xtron bonds, a means through which the appellants could obtain funds from the BF to fund the Crossover. He found that the Firna BSA was no more than a guise

meant to lend an appearance of legitimacy to the transaction (the Conviction GD at [172]).

147 We agree with the Judge's findings. Having regard to the *substance* of the Firna bond transaction, the evidence clearly shows that although what was authorised was an investment into Firna, the true nature of the transaction was a loan of monies to Kong Hee and the other appellants, which they would use on the Crossover and for other purposes (*eg*, extending a loan of $2.5m to Wahju).

148 On a formalistic level, it appeared that the proceeds of the Firna BSA would be used for Firna's "general working capital".[56] We note that when the CHC Investment Committee discussed the possibility of this investment on 29 July 2008, the impression given was that Firna had *initiated* the bond issuance, and that it was a good investment because Firna was reported to be earning up to US$2m a year.[57] The minutes of the meeting stated:

> 4.1 It was brought up to the attention of the Investment Committee that Firna Glassware, the largest glass factory in Indonesia, is issuing convertible bonds. This corporation is reported to earn about US$2m per year. The convertible bonds to be issued are 3 years, with a return of 4.5% per annum. There will be no currency risk as the transaction will be done in Singapore dollar. Attached is a detailed report of Firna Glassware.
>
> 4.2. The Investment Committee discussed and agreed that it is a good investment and the risk is considerably low. They deliberated and suggested selling away some of the current bonds or equity to purchase bonds from Firna Glassware.
>
> 4.3. After much discussion and consideration, the Investment Committee unanimously agreed that it is beneficial for CHC to

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56 A-116, Clause 2.3 of Schedule 3.

57 A-113.

> purchase the bonds issued by Firna. This will be brought up to the Board for final approval.

The CHC Board reviewed and approved the Investment Committee's minutes on 23 August 2008.[58] The Firna BSA was then executed on 7 October 2008 and a total sum of $11m was drawn down between 8 October 2008 and 22 June 2009.

149 However, the evidence shows that irrespective of the form of the Firna BSA and the transactions, the reality was that the Firna bonds were devised as a means through which the appellants could obtain monies from the BF to fund the Crossover, as well as extend a loan to Wahju presumably so as to secure his cooperation. Put simply, the appellants were working backwards to ensure that they could obtain funds from the BF for the financing of the Crossover.

150 Contrary to what was told to the Investment Committee, the idea of entering into the Firna bonds originated not from Firna but from Eng Han, Serina, John Lam and Ye Peng sometime in July 2008.[59] The appellants needed to find a way to obtain a further $18m that was required to fund Sun Ho's album,[60] and around the same time, they were also trying to take Sun Ho out of Xtron so as to avoid queries from the auditors in relation to the Xtron bonds.

151 The correspondence between the appellants revealed first, that the appellants' intention was to obtain funds from the BF in the form of the bond proceeds, which would then mostly be routed to fund the Crossover, and second, that Firna was not expected to bear the responsibility to redeem the bonds

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58 CH-43.

59 See for instance, E-152 and E-103.

60 See *eg*, E-152, E-154 and E-103.

notwithstanding its contractual obligations under the Firna BSA. One such correspondence is a BlackBerry message from Ye Peng on 27 July 2008 where he told Eng Han: "[w]e also need to think if the proj[ect] fails, how do we bail Wahju out".[61] Kong Hee's emails to Ye Peng, Eng Han and Serina the next day, which discussed how the bond proceeds obtained by Firna could be used for the Crossover and how the Crossover profits might subsequently be used to redeem the Firna bonds, are also telling.[62] In one of these emails, Kong Hee queried how Wahju would "pay the principal and bond interests" if the projected Crossover profits did not materialise, and asked if there was a way that *AMAC* could "further inject funds to help [Firna] pay the principal and bond interests", and how that would be done.[63] Eng Han eventually came up with two proposals to do so in mid-August 2008 before the Firna BSA was entered into, both of which involved using funds from Xtron.[64]

152 Furthermore, the terms of the Firna BSA were decided almost unilaterally by the appellants, in particular Eng Han, without any negotiations between CHC and Firna. Although Wahju initially insisted when he gave his evidence at trial that he had negotiated the terms of the Firna BSA, he later admitted that the terms were "explain[ed]" to him by Eng Han.[65] As in the case of the Xtron bonds, there was no proper consideration on behalf of CHC as to whether the 4.5% interest rate for a loan of up to a maximum of $24.5m was a fair and commercially justifiable rate of return commensurate with the risk CHC was undertaking. Crucially, the appellants even cut down on supposedly

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61 BB-66.

62 E-154, E-19.

63 E-19.

64 E-491.

65 Transcript 4 September 2013, pp 49:9–50:3.

protective features in the Firna BSA through the use of the secret letter, which effectively negated the convertibility feature of the Firna bonds (see [40] above). This secret letter was signed by John Lam, purportedly on behalf of the CHC Board. However, the CHC Board neither discussed the letter nor authorised John Lam to sign it. Instead, Eng Han, Serina and John Lam edited and arranged for the execution of the secret letter amongst themselves, keeping Ye Peng informed, without involving the rest of the CHC Board at all.

153 Further, all the drawdowns pursuant to the Firna BSA – be it the amount or the timing – and how the proceeds of the drawdowns were to be used were also determined by the appellants, and not Firna, notwithstanding that the bond proceeds were purportedly for Firna's working capital. This was not only admitted by Serina[66] but is also evidenced by the various emails sent from Serina to Wahju in which she gave instructions for each drawdown under the Firna BSA.[67] This exemplified who genuinely controlled the bond proceeds.

154 The events that occurred after the Firna BSA was executed also reflect the true nature of the transactions. Sometime around 24 October 2008, a complication arose where UBS held onto certain funds in UA's UBS account (to which the Firna bond proceeds had been routed). Wahju wrote to Eng Han and Ye Peng on 25 October 2008, referring to the funds being held by UBS as "all *your* fund" [emphasis added].[68] Again, on 2 November 2008, Wahju told Eng Han and Serina that "Firna is *only helping to pass thru the money*" [emphasis added].[69] It is clear from these contemporaneous documents that

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66 Transcript 13 May 2015, p 40.

67 E-21, E-216. E-370, E-47 and E-224.

68 E-261.

69 E-260.

Wahju (and the appellants) knew that he had no entitlement to those monies and that Firna was merely acting as a conduit for the appellants to obtain monies from the BF to fund the Crossover. It is also telling that the appellants and Wahju always treated the sum of $2.5m that was handed to Wahju as a loan from them to Wahju even though pursuant to the Firna BSA, this sum belonged to Firna.

155 To be clear, we accept the appellants' submission that the fact that the Firna bond proceeds were used for the Crossover, or that they had control of the proceeds, does not, without more, lead to the conclusion that the Firna bonds were not a genuine investment. As they argue, this could also be due to a separate and concurrent arrangement they had with Wahju and Firna. But when we look at the entire factual matrix which we have set out above, the only conclusion that can reasonably be drawn is that the Firna bonds were not truly an investment but were a means for the appellants to obtain funds. The appellants were not only indifferent to the commercial viability or sensibility of the transactions assessed from CHC's perspective, but were very concerned about finding ways and means to ensure that the bonds could be repaid. Had this truly been an investment in Firna, the responsibility of payment would lie with Firna and the most natural source of monies for the repayment would be the profits from Firna's glass factory business. Looking at all the above, it is clear that although the *appearance* was given that Firna had initiated the bond issue and that the Firna bonds were an investment, this was *not* the true *substance* of the transaction. Instead, the appellants wanted a method of extracting funds from the BF for the Crossover and were content to effect it through any means possible. The Judge was thus correct to have found that the use of the funds in this manner was a "wrong use" of the monies from the BF and that the

drawdowns under the Firna BSA constituted a misappropriation of the monies in the BF.

(2) The round-tripping charges

156 Having dealt with the sham investment charges, we move on to consider if the round-tripping transactions constitute a "wrong use" of the funds. The analysis in respect of the round-tripping transactions differs as these transactions involve not only funds from the BF but also the GF. In respect of the transactions that involved funds from the BF, the question of whether there was "wrong use" depends on whether the transactions fell within the two authorised uses of the BF (*ie*, whether they were investments or a form of building-related expense). As for the transactions that involved funds from the GF, the inquiry differs as the GF, unlike the BF, is not a restricted fund.

157 To recapitulate (see [45] above), the round-tripping charges relate to three transactions:

(a) The disbursement of $5.8m from the BF to AMAC on 2 October 2009 (*ie*, Tranche 10 of the SOF). The flow of funds shows that approximately $5.2m was received by CHC from Firna on 13 October 2009, partially redeeming the Firna bonds.

(b) The disbursement of $5.6m from the GF to AMAC on 15 October 2009 (*ie*, Tranche 11 of the SOF). The flow of funds shows that approximately $6m (which included further sums that had been transferred from UA to Firna) was received by CHC from Firna on 23 October 2009, redeeming the outstanding Firna bonds.

(c) The disbursement of approximately $15.2m from the BF to Xtron under the ARLA. The flow of funds shows that approximately

> \$11.455m was received by CHC by 29 December 2009 from AMAC as AMAC's repayment of CHC's investment under Tranche 10 and 11 of the SOF. As set out at [45(e)] above, a further sum of approximately \$3.2m was reflected as for the payment of GST on the advance rental and the balance of \$545,000 remained with Xtron.

It should be pointed out at this juncture that while the set-off of the sum owed by Xtron under the Xtron bonds with the sums CHC was to pay Xtron under the ARLA was not the subject of the round-tripping *charges*, the redemption of the Xtron bonds was closely related to the ARLA and was part of the round-tripping *transactions* (see [45(d)] above). Thus, where relevant, the redemption of the Xtron bonds will also be briefly considered below.

158 The Judge held that he was "entirely unable to see how Tranches 10 and 11 of the SOF were investments"[70] given that they were part of an overall scheme to substitute one debt owed to CHC (*ie*, the Firna bonds) with another debt owed to CHC (*ie*, by AMAC under the SOF). In respect of Tranche 11 of the SOF, the Judge additionally observed that it might plausibly be argued – though he did not understand the argument to have been made – that it was not a "wrong use" to use the funds for "restructuring" because the funds had come from the GF, which was not a restricted fund, rather than the BF. But he rejected this argument on the basis that the transactions pertaining to Tranche 11 (and Tranche 10) were not "restructuring" but amounted to the perpetuation of a fraud and could not thus have been an authorised purpose of the GF. As for the disbursement under the ARLA, he held that this was not a true building-related expense, but was similarly part of a design to create the impression that AMAC was returning the sums under Tranches 10 and 11 of the SOF with interest.

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[70] [174] of the Conviction GD.

159 The appellants do not dispute that the round-tripping transactions occurred. In fact, Eng Han candidly submits that "the SOF monies were used to retire or replace the Firna bonds owing to [CHC], and the ARLA monies was used [by Xtron] to buy new [Firna] bonds which in turn went into redeeming the SOF debt owed [by AMAC] to [CHC]" [emphasis in original removed].[71] The appellants maintain, however, that the transactions did not involve unauthorised uses of the two funds (*ie*, the GF and the BF).

160 Relying on a House of Lords decision of *Macniven (Inspector of Taxes) v Westmoreland Investments Limited* [2001] 2 WLR 377 ("*Westmoreland*"), counsel for Serina argues that the Judge's decision is flawed as there is nothing wrong with "round-tripping" transactions (*ie*, funds being passed around in a circle) between related entities by the same persons. With respect, the case of *Westmoreland* and this submission do not assist the appellants. *Westmoreland* involved a different factual context and different legal issues. The transactions in *Westmoreland* were structured for the purpose of taking advantage of certain provisions under the relevant tax statute. The issue in the case was whether this was permissible and *not* whether the funds were used in a manner that was unauthorised by the respective entities. Contrary to counsel's submission, in the present case, the finding of the Judge was not that round-tripping was impermissible or illegal but that the use of the funds from the GF or the BF for the purposes of the transactions that constituted the subject-matter of the round-tripping charges was a "wrong use" of those funds.

161 It is clear from the evidence that the round-tripping transactions were part of a whole plan devised by Eng Han, Ye Peng, Serina and Sharon to redeem the Xtron and Firna bonds. In a series of BlackBerry messages captured in

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[71] Eng Han's submissions at para 254.

Exhibit BB-89a ("BB-89a"), Eng Han informed Ye Peng, Serina and Sharon of the two phases of the plan.[72] The first phase of the plan involved Tranches 10 and 11 of the SOF and the redemption of the Firna bonds, while the second phase of the plan involved the execution of the ARLA, the redemption of the Xtron bonds, and the repayment under Tranches 10 and 11 of the SOF. Given the context in which the various transactions were entered into, one cannot view a particular transaction in isolation when assessing whether that amounted to a misappropriation of CHC's funds. In our judgment, when considered on the whole, the round-tripping transactions were nothing less than a perpetuation of a fraud, or at the very least, a devious scheme to use the funds in the BF and the GF for unauthorised purposes. The net effect of the totality of the transactions was to substitute Xtron's and Firna's liability to CHC under the bonds with Xtron's liability under the ARLA to provide premises for CHC. The disbursement of funds pursuant to that scheme amounted to a misappropriation of those funds.

162 We will now elaborate on the above, beginning with a consideration of Tranches 10 and 11 of the SOF. While the disbursements of funds into Tranches 10 and 11 of the SOF *appeared* to be an investment by CHC into the SOF, the *substance* of these transactions was clearly not so. There is no evidence as to what AMAC would use the funds for nor any study made as to the likely returns which the funds would earn for the SOF. These transactions were clearly not motivated or dictated by any genuine investment objectives. On the contrary, the reason for these transactions was to redeem the Firna bonds so as to get them off CHC's accounts, as questions in relation thereto had been raised by the auditors. In fact, as pointed out by the Prosecution, the sole reason why there were even two separate SOF tranches was because CHC did not have enough

[72] BB-89a.

money for the appellants to fund the redemption of the Firna bonds in a single transaction.[73]

163 The appellants knew that CHC would not obtain any genuine financial return from Tranches 10 and 11 of the SOF. While CHC had been promised an interest of 5.05% per annum, it was clear that the appellants did not see this as an investment opportunity for CHC to profit. It was always envisaged that as part of the round-tripping plan, the two SOF tranches would be redeemed almost immediately and that the funds for redemption of the two SOF tranches would come wholly from CHC itself, through the ARLA. Had Tranches 10 and 11 of the SOF been genuine investments, there would have been no need for CHC to transfer a sum of $15.2m under the ARLA (which was round-tripped to AMAC) to repay itself under those tranches of the SOF, and CHC could have had the use of that $15.2m *in addition* to obtaining a repayment under Tranches 10 and 11 of the SOF. We thus agree with the Judge that the disbursements of funds from the BF and the GF to the two SOF tranches were not investments and were hence a "wrong use" of the funds.

164 Turning to the payment under the ARLA, the payment thereunder was made from the BF, of which building-related expense was an authorised use. The appellants argue that the payment of $15.2m under the ARLA (which comprised $12m as advance rental and $3.2m as GST) was a "building-related expense" which would allow CHC to obtain the *right* to occupy premises provided by Xtron.[74]

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73 Prosecution's submission at para 412; see also BB-89a (image 61) and E-76.

74 Serina's submissions at para 179.

165 Having considered the objective evidence, we find that the ARLA was merely a mechanism which the appellants used to enable funds to be transferred from CHC to Xtron. It was significant to us that the appellants were unable to refer us to any contemporaneous objective evidence which showed how they arrived at (a) the rental that had to be paid in a particular year, and (b) the number of years for which CHC was to pay Xtron advance rental. Instead, the contemporaneous objective evidence reveals that the amount to be transferred under the ARLA was based on the sums needed to redeem the Xtron and Firna bonds. In an email to Sharon and Serina on 25 September 2009, Eng Han stated: "The agreement is ready. Just need to fill in the amts [*sic*]". Serina then replied the same day, stating: "… isn't the amount what we need to clear the bonds? That's all right?".[75] Subsequently, when Serina was asked in another email dated 9 October 2009 why a figure of $7m annually was provided for in the ARLA, Serina replied stating: "It is just an arbitrary figure. No one has worked out any details I believe. You can double check this with Eng [H]an".[76] Tellingly, in an earlier version of a document prepared by Serina which set out the "advance rental" that was required under the ARLA along with a breakdown of the uses of the "advance rental", it was stated that the bulk of the advance rental was meant to redeem the Xtron and Firna bonds, with "nothing left for bidding for any building project".[77]

166 On this issue, Eng Han argued at the hearing before us that Serina's statements in the contemporaneous documents were not reflective of the true state of affairs because she was not aware of the true state of affairs and had thus mistakenly thought that there would be insufficient money to purchase a

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75 E-69, see also E-70.

76 E-28.

77 E-35.

building. He explained that this was because Serina was not directly involved in the decision making and was only responsible for the execution of the transactions. To support this submission, Eng Han pointed us to several documents, namely, Exhibits E-712, 4D-26, A-134 and 4D-35, which he argued showed that CHC had always contemplated the purchase of a building, perhaps through Xtron.

167 This, in our view, does not assist the appellants. Whether the ARLA was a genuine building-related expense is a separate matter from whether CHC had, at all material times, a plan to purchase a building through Xtron. All that the documents put forward by Eng Han show is the latter, and the existence of the latter does not make the ARLA a genuine commercial agreement or a building-related expense. The fact remains that when the entire factual matrix that had led to the ARLA is examined in the light of the round-tripping transactions as a whole, the purpose of the ARLA, along with the other round-tripping transactions, was simply to redeem the bonds and for the substitution of debts owed to CHC.

168 In our judgment, the ARLA was not a commercially justifiable agreement that provided CHC with fair value for the sums that it contracted to pay thereunder. The appellants had manipulated the form of the transactions (*ie*, the ARLA) so as to make it appear as though the funds applied thereto were "building-related expenses". To accept the appellants' argument would be tantamount to accepting the proposition that the payment of *any* amount under the ARLA that would give CHC a right to occupy premises provided by Xtron would qualify as a "building-related expense". This cannot be the case. As much as we agree with Serina's submission that the focus of the inquiry should not be on what the landlord (*ie*, Xtron) intends to do or does with the advance rental but on what the tenant (*ie*, CHC) gets in return for the payment of the advance

rental (*ie*, the right to occupy premises), the latter issue must surely involve an assessment of the commercial viability of the agreement. Thus, if the amount of "advance rental" was arbitrarily determined without reference to market value or commercial justification, the mere couching of a payment as "advance rental" under the ARLA cannot make the payment *in substance* a "building-related expense".

169 For the reasons just stated, we agree with the Judge's finding that the payment of $15.2m (which includes a GST component of $3.2m) to Xtron for the purported purpose of advance rental in November 2008 constituted a "wrong use" of the BF because the whole arrangement was not genuine. Indeed, we find it egregious that the appellants were willing to allow CHC to incur a GST expense of $3.2m on the ARLA for the purpose of conveying the impression that the ARLA was a genuine agreement, despite their knowledge that it was merely a tool to extract funds from CHC to effect repayment of the Firna and Xtron bonds. We will deal with this in more detail below when we consider the parties' appeals against the sentences imposed by the Judge (see [407] below).

170 Finally, we also note that the appellants have attempted to characterise the entire series of transactions as a "restructuring" of the Firna and Xtron bonds, where the obligations under the Firna and Xtron bonds were transformed from a debt owed by Firna and Xtron to CHC under those bonds to an obligation owed by Xtron to CHC under the ARLA. We agree with the Judge (for example, at [176] and [222]–[223] of the Conviction GD) that to characterise the transactions as a "restructuring" of the debt owed by Firna (and Xtron) to CHC under the bonds to Xtron's obligation under the ARLA would be to acknowledge that Tranches 10 and 11 of the SOF were not genuine investments and that the payment under the ARLA was not a genuine building-related expense because the aim of the whole exercise would be to allow for the

redemption of the Xtron and Firna bonds rather than for the purpose of actual financial profit, as would be expected from an investment. While the mere moving around and substituting of debts is not illegal, it cannot be characterised as an investment or in the case of the ARLA, a building-related expense. Thus, to the extent that the appellants have sought to maintain this characterisation on appeal, we find that this undermines rather than supports their case. Indeed, the fact that the appellants have maintained that the transactions were genuine investments and building-related expenses as well as "restructuring" within the same breath demonstrates the incongruity of their position. We agree fully with the Judge's assessment at [177] of the Conviction GD that the series of round-tripping transactions was nothing less than the perpetration of a charade which involved the appellants using CHC's own money to create the appearance that other entities (*ie*, Firna, AMAC and Xtron) had fulfilled their obligations to CHC.

The approach to determine if the appellants had acted dishonestly

171 We turn now to the final element: whether the appellants had the requisite *mens rea*. Dishonesty is the *mens rea* that is required in order for an accused to be found guilty of a charge of CBT. Much of the argument during the hearing of the appeals centred on the contention that the Judge had misdirected his mind on the proper approach in determining whether the appellants had acted dishonestly. We therefore begin by restating the approach which the Judge had applied in determining the element of dishonesty.

172 The Judge explained his approach at [180]–[193] of the Conviction GD. In summary, he held that the Prosecution had to prove beyond reasonable doubt that the appellants intended to cause wrongful loss. This, in turn, required the Prosecution to prove (a) that the appellants intended to put CHC's funds to uses

which amounted to wrong uses of those funds, and (b) that the appellants did so knowing that they were not legally entitled to use the funds in that way. With regard to the first point, the Judge found that the uses to which the appellants had put the funds were a wrong use of those funds, and that the appellants did not put the funds to those unauthorised uses inadvertently or accidentally. As for the second point, the Judge held that the answer depended, to a large extent, on the assessment of the degree to which the appellants hid or obscured material facts from other persons, specifically, the EMs of CHC, the CHC Board, and the auditors and lawyers who advised them on matters concerning the transactions. Thus, on the Judge's approach, the question of whether there was an intention to cause wrongful loss was equated with the question of whether the appellants intended to use CHC's funds for an unauthorised purpose with the knowledge that they had no legal entitlement to do so.

173 The appellants argue that the Judge failed to consider the pertinent issue, *viz*, whether the appellants had intended to cause wrongful loss. They submit that the Judge erred in conflating an intention to cause wrongful loss with an intention to put CHC's funds to unauthorised use. Reference is made, in this regard, to illustration (*d*) of s 405 of the Penal Code ("illus (*d*)"). For ease of reference, both illustrations (*c*) and (*d*) of s 405 are set out here:

> (*c*) A, residing in Singapore, is agent for Z, residing in Penang. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits $5,000 to A, with directions to A to invest the same in Government securities. A dishonestly disobeys the direction, and employs the money in his own business. A has committed criminal breach of trust.
>
> (*d*) But if A, in the last illustration, *not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank X,* ***disobeys Z's directions****, and buys shares in the Bank X for Z, instead of buying Government securities*, here, though Z should suffer loss and should be entitled to bring a civil action against A on account of that loss, yet A, not

> having acted dishonestly, has not committed criminal breach of trust.
>
> [emphasis added]

174 The appellants argue that based on illus (*d*), the element of dishonesty cannot be made out by mere knowledge of wrong use. The Judge considered illus (*d*) and held that the illustration was "confined to a situation where a person is authorised to make a specified investment for purposes of financial profit, and instead makes a different investment honestly believing that this would bring in greater financial profit" (the Conviction GD at [189]). The appellants argue that the Judge was wrong to confine illus (*d*) in such a manner. Instead, they submit that illus (*d*) demonstrates that it is possible for dishonesty to be absent even though the accused misappropriated the property in the knowledge that he was not authorised to do so. This is also the submission of the *amicus*. In other words, the appellants say that an intention to act to the advantage of the property owner necessarily precludes a finding that the accused intended to cause wrongful loss to him.

175 The Prosecution submits that illus (*d*) was meant as a practical reminder that it is not sufficient for criminal liability that an agent breaches the directions of his principal and that it must be demonstrated that the agent had acted dishonestly. Whilst the Prosecution agrees with the appellants that knowledge of unauthorised use itself does not make out the *mens rea* of a CBT charge, it submits that knowledge of unauthorised use will be a substantial component of proof of *mens rea*.

176 In determining how dishonesty as an element of the CBT Charges should be established, the starting point must be the definition of dishonesty in the Penal Code. This can be found at s 24 of the Penal Code, which states as follows:

> **"Dishonestly"**

> 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.

In turn, "wrongful gain" and "wrongful loss" are defined in s 23 of the Penal Code in the following manner:

> **"Wrongful gain" and "wrongful loss"**
>
> 23. "Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled; "wrongful loss" is loss by unlawful means of property to which the person losing it is legally entitled.
>
> *Explanation.*—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

177 The explanation to s 23, which provides a definition of how "loss" is defined under the Penal Code, is pertinent. As is clear from the explanation, the Penal Code does not define "loss" in terms of financial or monetary loss, but in terms of legal entitlement. A person would have "lost wrongfully" under the Penal Code if he was "kept out" or "deprived of" property to which he is legally entitled. Thus, once property is put to an unlawful or unauthorised use, the property owner would be found to have "lost wrongfully" under the Penal Code, irrespective of whether the original property would be ultimately returned to the owner and irrespective of whether there may be a potential gain to the owner (with the caveat of illus (*d*) which we address below). We would also highlight that wrongful loss may also be made out even if the loss is only a temporary one (see Explanation 1 to s 403 of the Penal Code; *Lee Yuen Hong v Public Prosecutor* [2000] 1 SLR(R) 604 at [45]–[48] and *Goh Kah Heng (alias Shi Ming Yi) v Public Prosecutor and another matter* [2010] 4 SLR 258 ("*Goh Kah Heng (HC)*") at [54]).

178 It is also clear from the authorities that the mere fact that property has been put to an unauthorised use (*ie*, the presence of *actus reus*) does not make the accused guilty of the offence of CBT, even where the accused intended to perform the unauthorised act (see *Public Prosecutor v Goh Kah Heng alias Shi Ming Yi and another* [2009] SGDC 499 at [123] ("*Goh Kah Heng*") upheld on appeal in *Goh Kah Heng (HC)*). In *Dr Hari Singh Gour's Penal Law of India: Analytical Commentary on the Indian Penal Code* vol 1 (Law Publishers (India), 11th ed, 2011), the learned author similarly states (at 220) that the "doing of every unauthorised act is not necessarily unlawful, nor is the doing of every unlawful act dishonest so as to expose the doer to the severities of penal law". In order to establish the requisite dishonest *mens rea*, the accused must *know* that the gain or loss was wrongful (see *Ang Teck Hwa v Public Prosecutor* [1987] SLR(R) 513 at [36]). Thus, where it can be shown that the accused genuinely believed that he was legally entitled to perform the relevant transactions, dishonesty would not be present (see *Tan Tze Chye v Public Prosecutor* [1997] 1 SLR(R) 876 at [49]).

179 Sharon submits that intention and knowledge must be distinguished, and that the court ought not to conflate the *actus reus* with the *mens rea* of an offence of CBT.[78] She argues that a court ought not to infer a dishonest intention merely because the accused performed an unauthorised transaction. We agree fully with these principles. A finding of dishonesty must be premised on the interaction between intention and knowledge. Where an accused knows that an action is unauthorised but nonetheless proceeds to execute it voluntarily, this would strongly support a finding of dishonesty.

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[78] Sharon's submissions at para 63.

180 Reading both ss 23 and 24 of the Penal Code together with the authorities, we hold that an accused would have done an act dishonestly if he, among other things, did that act intending to wrongfully keep out or wrongfully deprive a person of property to which that person is legally entitled. In assessing this, motive must be separated from intention. One may have the most admirable of motives, but if the aim underlying that motive was achieved through unlawful means, this does not exonerate the accused from criminal liability. To put it simply, *why* an accused committed a crime is not relevant to *what* he thought or knew at the material time the offence was committed. As the Court of Appeal explained in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 at [53]:

> The framers of the Code were careful not to ascribe a definitive role to motive, whether good or bad, in the determination of criminal responsibility. In Indian Law Commissioners, First Report (cited in Sir Hari Singh Gour, *The Penal Law of India* (Law Publishers, 10th Ed, 1982) vol 1 at p 235), the rationale for not ascribing a greater weight to motive bears mention:
>
> > We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply as defence or excuse under a criminal charge. We hold … that to allow any man to substitute for law his own notions of right would be in effect to subvert the law. To investigate the real motive, in each case, would be impracticable, and even if that could be done, a man's private opinion could not possibly be allowed to weigh against the authority of [the] law.

181 The approach we have set out above is consistent with the approach the Judge took. The appellants' submission that the Judge had omitted to consider the essential element of whether there was intention to cause wrongful loss stems from a misconception on their part of what constitutes "wrongful loss".

182 We turn to address illus (*d*). On appeal, much has been made of this illustration and it was argued that the Judge failed to apply the illustration

appropriately. Whilst we do not agree with the Judge that illus (*d*) ought to be confined to its facts, we do not think that this affected the Judge's conclusion.

183 In our view, illus (*d*) is entirely consistent with the framework of a CBT charge. Under the scenario in illus (*d*), the agent did not intend to wrongfully deprive the principal of the principal's funds. There are three important points to note. First, despite the breach of direction, the funds were still invested for the principal's financial benefit and any financial gains would have accrued to the principal. Second, it is not clear from the scenario under illus (*d*) whether the agent *knew* that he was *not legally entitled* to disobey his principal's direction as to how the funds were to be invested on the principal's behalf. Indeed, the fact that illus (*d*) states that the agent acted "in good faith" and "not dishonestly" itself appears to suggest that the agent did not believe that his disobedience of his principal's direction was wrongful in the circumstances. There may be a fine line, but it is conceivable that mere knowledge of a disobedience of direction does not necessarily equate to knowledge of a lack of legal entitlement to do an act; much will depend on the facts and circumstances surrounding the breach of direction. Finally, it is apparent from illus (*d*) that the agent had made a comparison between what he was instructed to do, and what he eventually did, and held the honest belief that what he did would be *more* to his principal's benefit than what his principal had originally instructed him to do. In a situation where such an assessment is made, and where what is perceived to be the more advantageous course of action is proceeded with, we are of the view that a lack of dishonesty would be more readily inferred even where the property had been used in an unauthorised manner. Conversely, where no comparison is made, this is less likely to be the case.

184 In our judgment, there is therefore no inconsistency between the approach taken by the Judge and illus (*d*). The pertinent question, in the

assessment of dishonesty in a CBT charge, is whether the accused intended to do an act that would cause wrongful gain or wrongful loss to another in circumstances where he knew that he was not legally entitled to do that act. Such an intention would often have to be proved by inference from the surrounding circumstances.

185 The appellants argue that they genuinely believed that they were legally entitled to perform the respective transactions which we have found amount to wrong uses of CHC's funds. As proof of their lack of dishonesty, the appellants rely on the fact that they had disclosed the transactions to, and sought the advice of, the auditors and lawyers for the Xtron and Firna bonds and the round-tripping transactions, and that they had informed the CHC Board of the round-tripping transactions. We turn to consider this submission in the next section.

The appellants' disclosure of the transactions to third parties

186 In respect of the Xtron and Firna bonds, the appellants submit that they were fully frank with the auditors and lawyers who were advising them and did not keep the transactions or their affairs hidden from the auditors and lawyers. Their argument is that their honesty and frankness with the accounting and legal professionals negate any dishonesty on their part. The Judge did not agree with the appellants' submissions. In particular, he held that crucial facts such as issues of effective control were not disclosed to the professionals. Therefore, it was not possible for the appellants to rely on advice from the professionals to assert that they genuinely believed that they were legally entitled to enter into the respective transactions.

187 In respect of the round-tripping transactions, the appellants submit that the critical fact was that they had fully disclosed an earlier version of the

transactions to the CHC Board and had obtained the board's approval for those transactions. They argue that this showed that they did not know that they were not legally entitled to carry out the round-tripping transactions. The Judge found that the CHC Board was probably told about an earlier version of the round-tripping plans and expressed no objections to this plan. But he held that this was not determinative of the question of whether the relevant appellants acted dishonestly in designing and executing the round-tripping transactions, and that their readiness to disclose the information to the CHC Board had to be weighed against their failure to apprise the auditors and lawyers of the round-tripping plan.

188 There are two aspects to the inquiry concerning the appellants' dealings with the relevant third parties. The first aspect of the inquiry is to examine whether the appellants had indeed informed these third parties of the material facts of the various transactions. The second is to examine if the appellants had asked for or received any advice or indication which expressly stated that they were legally entitled to carry out the various transactions. To the extent that the evidence reveals that the appellants had disclosed the full facts of the transactions to such third parties and received advice sanctioning the transactions, this may lead to a strong inference that the appellants genuinely believed that they were on firm legal footing in carrying out the transactions. On the contrary, if the evidence shows that they were not frank and had deliberately withheld information from the third parties, this would support the Prosecution's case that the appellants knew that they were not legally entitled to deal with the funds in the manner they did.

(1) Xtron bonds

189 There is no documentary evidence of CHC or AMAC seeking or receiving any formal professional advice on the *legality* or *financial propriety* of the Xtron bonds prior to, or at the time, the 1st Xtron BSA was entered into on 17 August 2007. Whilst a lawyer, Christina Ng ("Christina"), was involved in drafting the 1st Xtron BSA, there is no evidence that she gave Eng Han (who was her point of contact amongst the appellants) any legal advice as to the propriety of the Xtron bond transaction and whether this transaction would be in accordance with the investment policy or CHC's constitution. In fact, the Judge found that there was no evidence to demonstrate that Christina knew that Xtron was in effect wholly controlled by Kong Hee and the other relevant appellants who assisted him. This was a point corroborated by Eng Han, who stated in cross-examination that he did not tell Christina that CHC had "full control" over Xtron.[79] Having failed to give Christina the full picture, the appellants cannot take the benefit of advice (if any) given by her in connection with the Xtron bonds. Further, by not calling Christina to testify on their behalf, the court is entitled, pursuant to s 116(*g*) of the Evidence Act (Cap 97, 1997 Rev Ed), to draw an adverse inference against them.

190 Turning to the auditors, the Judge held that whilst the auditors knew a great deal about Xtron, they did not know that Xtron was effectively controlled by the CHC leadership, and, in particular, that Kong Hee was making the decisions on Xtron's behalf in relation to the Crossover and the Xtron directors were mere figureheads. We agree with the Judge's assessment. Crucially, well

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[79] Transcript 19 March 2015, p 87. It may be noted that the reason Eng Han gives for not telling Christina that CHC had full control over Xtron is because he says he did not himself know whether CHC had full control over Xtron. However, the Judge disbelieved him (see the Conviction GD at [363]).

before the 1st Xtron BSA was entered into in August 2007, the appellants had given the auditors the impression that Xtron and CHC were *independent* entities, and this impression was perpetuated even after the 1st Xtron BSA was executed. As stated at [137] above, we have no doubt that Xtron's appearance of independence was a false one and that Xtron was at all material times controlled by Kong Hee, Ye Peng, Serina and Eng Han. Nor do we have any doubt that this state of affairs was one that was known to Kong Hee, Ye Peng, Serina and Eng Han. To the extent that the appellants represented otherwise, we find that this was a misrepresentation on their part. We set out the evidence that leads us to this conclusion below.

191 In July 2004, Serina stated in an email to Ye Peng that she had explained to the auditors that "all business decisions are made by Xtron's directors independantly [*sic*] from CHC's board".[80] This description of Xtron continued into early 2006, when Foong of Baker Tilly was informed by Serina that Xtron was a company that was "not related to" and "very separate from" CHC.[81]

192 Even after the 1st Xtron BSA was executed and Xtron had drawn down $13m on the facility, the appellants still painted a picture to the professionals that Xtron was independent and separate from CHC. In July 2008, when the auditors were preparing CHC's financial statements for the year that ended on 31 December 2007, concerns surfaced that Xtron's accounts would have to be consolidated with CHC's accounts. Again, the appellants maintained the position that Xtron and CHC were unrelated and independent entities. This is made clear in an email sent by Ye Peng to Foong on 21 July 2008 attaching a

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80 E-88.

81 E-362.

paper that Kong Hee had edited.[82] In the paper, the purported relationship between Xtron and CHC is set out as follows:[83]

> The reason why a fully privatized company needs to be formed to manage CHC's commercial property is because it is difficult, and not in the objects of a church, to engage in rental and events management services. Moreover, secular agencies in the marketplace are reluctant to enter into such a commercial arrangement with a non-profit religious organization like a local church. As such, we do need to have a *professionally-run, private company* to build and manage a commercial building that is open for a church to use on a long-term basis.
>
> *CHC has no shareholding but has a close working relationship with Xtron*. Many of the staff in Xtron were former workers of CHC. Working in Xtron will give them the opportunity to take on non-church-related projects, expanding their secular exposure and improving their competence in the field of large-scale events management. This is also very much in line with CHC's teaching and vision to encourage its congregation to excel in the marketplace, especially in the arenas of business, education, pop culture, arts and entertainment, and the mass media.
>
> …
>
> *When the directors of Xtron saw the potential of Ms. Sun Ho's singing career*, they signed her on as an honorary, non-salaried artiste to manage her public relations and music productions.
> …
>
> … The directors of Xtron saw an opportunity for Sun to release a global English album in the USA to extend her reach and influence globally.
>
> Since May 2007, the directors [of Xtron] have been trying to source for funding for the [Crossover] project which requires a budget of $18.5 million over a period of two years.
>
> [emphasis added]

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82 E-269; E-483.

83 E-269.

193 To our minds, the impression that was unequivocally conveyed in this paper is that the directors of Xtron made decisions concerning the Crossover independently of CHC, Kong Hee, and the other relevant appellants. It is clear that the real relationship between Xtron and CHC continued to be obscured. From the above, it cannot be doubted that the impression given to the auditors was that Xtron, though linked to CHC, operated independently of it. We therefore agree with the Judge's assessment of the state of the auditors' knowledge concerning the relationship between Xtron and CHC. Accordingly, any advice given by the auditors would have been on an erroneous premise, and importantly, the appellants would have known of this. The paper also shows that Kong Hee and Ye Peng deliberately misrepresented the state of affairs to the auditors. We will expand more on this when discussing Kong Hee's and Ye Peng's states of mind in relation to the Xtron bonds.

(2) Firna bonds

194 As for the Firna bonds, the Judge held that the professional advisors knew that the Firna bonds were being bought to allow CHC to channel funds to the Crossover. However, he held that two crucial pieces of facts were not revealed to the auditors and lawyers, which were that Kong Hee and the other relevant appellants treated the monies lent to Firna as theirs to use, and that Firna and Wahju did not bear the responsibility of repaying CHC.

195 We agree with the Judge's assessment of the facts and would only add the following brief comments. Whilst Christina and Foong were informed that the Firna bond proceeds would be used for the Crossover, what they were told was that Wahju was supporting the Crossover "independently" and "in his personal capacity".[84] We have held at [147] above that the Firna bond

transaction amounted, in substance, to CHC providing a loan of funds to Kong Hee and the other appellants for use on the Crossover and other purposes, and as we explain below, Kong Hee, Eng Han, Ye Peng, Serina and John Lam knew this to be the case. Thus, in our judgment, to the extent that the appellants gave the professionals the impression that Wahju was *independently* supporting the Crossover and that Firna would be responsible for payment under the bonds, these amounted to misrepresentations. These misrepresentations concealed the fact that the appellants would have use of the funds, that Wahju and Firna were merely conduits through which the monies flowed, and that the ultimate use of the bond proceeds was left in the hands of the appellants and similarly the redemption of the bonds also lay with the appellants.

196 Besides the lack of full disclosure to the professionals, there are a number of other pertinent points. The first concerns a draft CHC board resolution prepared by a lawyer, Jocelyn Ng from Rajah & Tann LLP ("R&T"), who was then an associate of Christina. R&T made it clear that the draft CHC board resolution was "meant to be points of reference" for Serina and Eng Han because R&T did not act for CHC but AMAC, and it was therefore "not proper for [R&T] to liaise with representatives of CHC for whom [R&T did] not act".[85] This is crucial as it demonstrates that R&T was not engaged to advise *CHC* on the propriety of the Firna bond transaction. The alleged "sanction" of the Firna bond transaction by the lawyers is, therefore, far from true since it was not within their remit to advise CHC, much less sanction any of CHC's actions.

197 Returning to the draft board resolution prepared by R&T, the contents reflect that the lawyers had advised the appellants that as (a) the Firna bond

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84 Transcript 16 March 2015, p 177.

85 E-633.

proceeds would be used to fund the Crossover; and (b) Kong Hee would thus have "an interest" in the Firna bond transaction because it would ultimately benefit Sun Ho or promote her career, Kong Hee should abstain from voting on the board resolutions with respect to the subscription of the Firna bonds.

198 However, it is not clear whether these draft board resolutions were eventually voted on or approved, or whether the CHC Board was even informed that the Firna bond proceeds would be used to fund the Crossover.[86] In respect of the latter, the Judge found it "unlikely" that the CHC Board was apprised in August 2008 that the Firna bond proceeds would be used for the Crossover (see the Conviction GD at [215]). It thus appears that the appellants did not eventually heed the advice given by the lawyers that Kong Hee's interest in the Firna bond transaction should be disclosed. Furthermore, the lawyers were also *not* informed or asked to advise on the secret letter that had been drafted by Serina and signed by John Lam purportedly on behalf of the CHC Board. In this regard, Eng Han testified that Christina was not informed about the secret letter and that it "never became a part of the whole set of legal documentation".[87]

199 Based on the above, we find the appellants' argument in respect of the Firna bond transaction – that they relied on the advice of the professionals and therefore were not dishonest – unmeritorious. Not only did the appellants fail to heed the advice of the lawyers when they *did* receive it, they also painted a misleading version of the transaction to the professionals.

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86 CH-43, minutes of CHC board meeting dated 23 August 2008. The Firna bonds were not discussed. The minutes of the meetings of the Investment Committee on 29 July 2008 also do not state that the Firna bond proceeds would be used to fund the Crossover (A-113).

87 Transcript 17 March 2015, pp 119–120.

(3) Round-tripping transactions

200 In respect of the round-tripping transactions, it is clear from the evidence that the appellants did not inform the professionals of the full details of the transactions or the fact that the various transactions were designed as part of an overarching plan to redeem the Xtron and Firna bonds. It is also clear that the appellants did not even attempt to procure or obtain any legal advice as to whether it would be legally in order to redeem the Xtron and Firna bonds in such a manner.

201 On the contrary, the appellants only informed the professionals of selective parts of the transactions. For example, Sim was unaware that Tranches 10 and 11 of the SOF would be used to redeem the Firna bonds and that the payment of advance rental under the ARLA would be used to repay CHC for Tranches 10 and 11 of the SOF. When Sim queried the nature of Tranches 10 and 11 of the SOF in the course of auditing CHC's 2009 accounts, he was informed that they were "fixed income instruments" and no further details were given.[88] Indeed, the use of the device of an "investment" in the SOF to deceive Sim was consistent with the appellants' intentions. In the series of BlackBerry messages recorded in BB-89a, in response to Sharon's query about what AMAC would show if the auditors were to ask about the details of Tranches 10 and 11 of the SOF, Eng Han responded that "Sim won't question details because in [November] it will be redeemed!".[89] Additionally, whilst Sim was informed at a meeting on 22 September 2009 that Xtron would be redeeming the bonds through an advance rental arrangement, he was not apprised of the appellants' real motive in arranging the execution of the ARLA. He was led to believe that

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88 Transcript 21 January 2014, pp 33–34, 49, 64–65.

89 BB-89a, image 67.

the reason for CHC entering into the ARLA was to obtain a discount in return for pre-payment of rental as well as to provide Xtron with funds to obtain a property for CHC's use[90] and that the $7m rental per year under the ARLA was "mutually agreed" and "a commercial term",[91] when the reality was that the $7m was merely an "arbitrary figure". Clearly, the appellants had never intended to, and never did, reveal to Sim the true nature and purpose of the round-tripping transactions.

202 Likewise, the appellants did not inform Christina of the full details of the round-tripping transactions. She was engaged to draft the ARLA as well as the documentation for the new Firna bonds that Xtron bought, but apart from this, she was neither given the full specifics of the round-tripping plan nor asked to advise on the propriety of the plan to redeem the Xtron and Firna bonds through the use of the SOF and the ARLA. In fact, Eng Han admitted that Christina did not know anything about Tranches 10 and 11 of the SOF.[92] Nor was she told that the Xtron bonds would be set off against the sums of advance rental due under the ARLA.[93] On the face of Eng Han's evidence, we agree with the Judge's finding (the Conviction GD at [230]) that Christina was not aware that the various transactions had been orchestrated by Eng Han, together with Ye Peng, Serina and Sharon, as a plan to redeem the Xtron and Firna bonds, without officers of Xtron or Firna having participated in the process.

203 Not surprisingly, the appellants do not place much weight in their appeals on the argument that the round-tripping transactions were sanctioned by

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90 Transcript 21 January 2014, p 4.

91 Transcript 21 January 2014, p 16.

92 Transcript 19 March 2015, p 79.

93 Transcript 19 March 2015, p 75.

the professionals. Rather, they point out that the CHC Board had approved an earlier version of the round-tripping transactions, and argue that their forthrightness with the CHC Board is demonstrative of their genuine belief that they were legally entitled to carry out the round-tripping transactions.

204 According to the appellants, there were two meetings where the CHC Board was informed of the earlier versions of the round-tripping plans. The first was on 18 July 2009 and the second on 12 September 2009. While this was disputed by the Prosecution for the reason that it was not reflected in the official minutes of the two meetings, the Judge accepted (the Conviction GD at [238]) – and we find no reason to disagree – that the CHC Board had been told about an earlier version of the round-tripping plans in which, among other things, Pacific Radiance (a company where John Lam was the Chief Financial Officer) would provide Firna with funds in order to redeem the Firna bonds. The Judge also accepted that the CHC Board had approved the round-tripping plans involving Pacific Radiance after they were informed by Ye Peng at the meeting on 12 September 2009 that the auditors and lawyers had been consulted and did not raise any issues with regard to the proposed transactions. The Judge found, however, that the approval of the CHC Board had been given on a false representation because the CHC Board had been falsely informed that the auditors and lawyers had approved the plan.

205 We agree with the Judge's analysis that the mere fact that approval had been obtained from the CHC Board for the earlier version of the round-tripping transactions does not necessarily exonerate the appellants. First, it is not clear from the evidence whether the CHC Board was informed of the true nature and purpose of the round-tripping transactions. In particular, it appeared that the CHC Board was given the impression that the redemption of the Xtron bonds was *incidental* to the proposal for CHC to pay advance rental to Xtron, rather

than being the very *raison d'etre* for the arrangement in the first place. Second, there was a crucial difference between the plan which the CHC Board approved and the plan which was eventually carried out, that is, the CHC Board only gave approval for a plan which involved *Pacific Radiance* investing into the SOF and not for *CHC* to invest into the SOF for the purpose of redeeming the Firna bonds. At no time was the proposition that the funds for redemption of the Firna bonds would originate from CHC itself placed before the CHC Board for approval. Finally, and importantly, as found by the Judge, the fact that false information was given to the CHC Board that the auditors and lawyers had been consulted and did not raise any issues with the round-tripping transactions means that the approval was obtained on a false premise. Given this state of affairs, the mere fact that the CHC Board had approved an earlier version of the round-tripping transactions is hardly adequate for us to conclude that the appellants *must* have believed they were legally entitled to carry out the round-tripping transactions.

(4) Summary

206 What the above analysis shows is that the appellants cannot rely on the advice given by the professionals (and in the case of the round-tripping transactions, the apparent approval given by the CHC Board) to argue that they genuinely believed that they were legally entitled to carry out the respective transactions. Ye Peng submits that the auditors should have approached the transactions, in particular the Xtron bonds, with a degree of professional scepticism and would have been able to find out the truth of the transactions if they had investigated the facts closely enough. We see little merit in this argument. What is pertinent is *not* what the auditors and lawyers *could* or *should* have found out, but the appellants' states of mind when interacting with the

auditors and lawyers. The withholding of crucial information from the professionals says it all.

207 The question which therefore remains is whether, against the background of a lack of express legal advice or board approval for the respective transactions, the appellants knew that they were not legally entitled to carry out the transactions. It is to this question, as well as the role of each appellant in the various conspiracies, that we turn in the next section.

The analysis of each appellant's role and intention

208 We begin this analysis by examining the Judge's findings in relation to the respective involvement, and the state of mind, of each of the appellants. Here, we are concerned with two key issues: whether each appellant can be said to have engaged in a conspiracy to commit the offence of CBT, and whether they can be said to have acted dishonestly. As explained at [184] above, the latter inquiry depends on whether each appellant intended to cause wrongful loss in that he or she knew that they were not legally entitled to use the funds in the manner in which they did.

(1) John Lam

209 The crux of John Lam's defence at the trial was that he should be assessed differently from the other appellants. He submitted that unlike them, he was not part of the Crossover team and had only as much knowledge in the transactions as any other member of the CHC Board who has not been accused of being complicit in the offences. He argued that he had always thought that the transactions were genuine investments, and his involvement had always been limited to responding to audit and accounting queries. In support of this submission, he pointed to the fact that he was not privy to many of the key

correspondence between the other appellants from which the Judge had drawn inferences of dishonesty.

210 While accepting that John Lam's participation and involvement were much less extensive compared to those of the other appellants, the Judge found that there was ample evidence which showed that John Lam thought and acted dishonestly like a conspirator. The Judge found that John Lam, who held key positions of financial responsibility such as being the Investment Committee chairman and an Audit Committee member, was the "inside man" of the appellants from within CHC's trusted inner circle (the Conviction GD at [283]).

211 On appeal, John Lam raises largely similar arguments. In particular, John Lam argues that the Judge was wrong to have drawn the inference that he was part of the conspiracy when such an inference was neither inexorable nor irresistible as he was not in possession of all the facts in the case, and therefore the test for the drawing of inferences as set out in *Er Joo Nguang* was not met.

212 This submission alludes to a separate and unique test of a higher threshold beyond that of reasonable doubt that must be met before inferences can be drawn or before guilt can be concluded purely from circumstantial evidence. As was made clear by the Court of Appeal in *Public Prosecutor v Oh Laye Koh* [1994] 2 SLR(R) 120 at [17], this is not correct. As the court observed, there is one and only one principle at the close of trial, and that is that the accused's guilt must be proven beyond a reasonable doubt. This principle applies equally, be it where the evidence relied on by the Prosecution is wholly circumstantial or where direct evidence has been adduced. Ultimately, the court must assess the totality of the evidence and consider whether the Prosecution has satisfied its burden of proof. We are satisfied that this is what the Judge did.

There is therefore no basis for John Lam to argue that the Judge had misdirected himself on this legal issue or had wrongly applied a less stringent test in this regard. For the avoidance of doubt, whilst we make these observations in connection with John Lam's argument, the legal principles that we have articulated apply equally to the other appellants.

213 We now turn to examine John Lam's submissions in respect of the alleged errors of the Judge's *factual* findings, beginning with the transactions pertaining to the Xtron bonds.

(A) XTRON BONDS

214 John Lam argues that it is significant that unlike in the case of the other appellants (save for Sharon), the Judge did *not* find that he controlled the use of the bond proceeds or was one of those responsible for the repayment of the bond proceeds.[94] He submits that there was thus no basis for the Judge to have found that he was part of the conspiracy or that he knew that the transactions were a sham. As submitted by the Prosecution, this argument presupposes that the Judge's finding is, and can only be, premised solely on whether the individual appellant has control over the proceeds or bore responsibility for repayment of the bonds. This is not correct, and is not the effect of the Judge's decision. A person would be part of the conspiracy with the other appellants and would have acted dishonestly (in that he knew that they were using the funds in a manner they were not legally entitled to and were therefore causing wrongful loss) as long as he has acted in pursuance, or for the furtherance, of the conspiracy. As emphasised time and again by the Judge, this did not require John Lam to know or be involved in every part of the conspiracy. We are satisfied that John Lam

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[94] John Lam's submissions at para 127.

was involved in the conspiracy by drafting and assisting in the passing of the investment policy to facilitate the Xtron bond transaction. For the same reason, the fact that he was not a party to the key correspondence that the Judge found reflected dishonesty on the part of the other appellants does little to assist him as long as there is sufficient evidence – and we agree with the Judge that there is – which shows that he had sufficient knowledge and involvement to satisfy the *mens rea* for the offences of CBT.

215 Next, John Lam asserts that he had grounds to believe that the Xtron bonds were a genuine investment because of Eng Han's alleged misrepresentations at a meeting in June 2007. He says that Eng Han represented to him first, that Wahju had given a personal guarantee for the redemption of the bonds and second, that the revenue from Sun Ho's album sales would enable Xtron to redeem the bonds. But as found by the Judge, the evidence – in particular Eng Han's evidence to the contrary – contradicts John Lam's account. Further, as pointed out by the Prosecution,[95] John Lam has given at least three different accounts of the *timing* of this meeting and more importantly, the *content* of the discussion between him and Eng Han. Given the presence of contradictory evidence, the absence of supporting evidence and the inherent inconsistencies in his own accounts during trial and on appeal, there is no basis for us to disturb the Judge's finding that no such meeting or misrepresentations took place.

216 In any event, we agree with the Judge that John Lam could not have genuinely believed that Xtron had the ability to redeem the bonds upon maturity given his knowledge of its financial status. Even if we accept that he may have truly thought that the monies could come from Sun Ho's album sales, his lack

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[95] Prosecution's submission at para 256.

of interest, due diligence or enquiry into the projected sales to ensure this was realistic, notwithstanding his roles of financial responsibility within CHC, also suggests that he never saw the Xtron bonds as a genuine investment.

217 Moving to a discrete piece of evidence, John Lam argues that the Judge was wrong to have found that the fact that he had allowed Eng Han to hide material information from Charlie Lay revealed that he knew the Xtron bonds were problematic and not a genuine investment.[96] He argues that their motivation for secrecy and keeping this knowledge to an "inner circle" is the fear that another episode of negative publicity like the Roland Poon incident (see [22] above) would recur if others knew that CHC was involved with Xtron and Sun Ho. Further, he argues that the Judge failed to assess the full context of what transpired because if the Judge did, the Judge would have noted that instead of withholding information, John Lam was the one pushing for details regarding the Xtron bonds to be told to the Investment Committee.[97]

218 *Prima facie*, there is some merit in this argument because from the chain of email correspondence alone, we agree that we cannot rule out the *possibility* that John Lam may have believed that a measure of discretion and secrecy was necessary in order to prevent a repeat of the Roland Poon incident. But this does little to assist John Lam's case for two reasons. First, the Judge made it clear that he was aware that there could be *other* explanations for John Lam's agreement to go along with Eng Han's plan not to tell Charlie Lay and thus the appropriate conclusion could only be drawn in the light of the totality of evidence (the Conviction GD at [256]). What John Lam is arguing here has thus already been taken into account by the Judge.

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96 E-322.

97 John Lam's submissions at para 174.

219 Second, while we accept that the relevant emails and subsequent events showed that John Lam had asked that the Xtron bonds be told to the Investment Committee, we do not think that this showed that he thought that the Xtron bonds were a genuine investment or that he did not think there was anything to hide. This must be weighed against the other instances where he chose to withhold information from the Investment Committee even though he was the chairman. For instance, he did not tell the members of the Investment Committee that Xtron was a loss-making company or that the Xtron bonds were "high risk" bonds. Instead, he acted to ensure that the investment policy was of a wide enough mandate to encompass the Xtron bonds even though as the chairman of the Investment Committee, it was his responsibility to ensure that the funds from the BF would be used for prudent and safe investments. Further, the fact that he wanted to tell the Investment Committee or Charlie Lay about the Xtron bonds does not in itself reflect an innocent mind. As stated in his email, this might simply be because he knew the bonds would "be there for a long time" and Charlie Lay "might find out eventually" and he thus proposed that it would be "better to test him out while it's still early".[98]

220 Lastly, John Lam argues that the Judge was wrong to have relied on information that was only available to him in 2008 to assess his state of mind at the material time when the 1st Xtron BSA was executed, and when the drawdowns occurred, in 2007.[99] In other words, John Lam is arguing that the Judge had erred in considering post-transaction events and information given that the material point to consider his state of mind should have been at the time of the relevant drawdowns or when the 1st Xtron BSA was entered into.

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98 E-322.

99 John Lam's submission at para 163.

221 As we have observed at [130] above in relation to the issue of wrong use, such events may still be taken into account *insofar* as they are able to shed light on what had happened *at the point* the transactions were entered into. In our view, this was the purpose for which the Judge relied on the information. For instance, the conclusion that the Judge drew from John Lam's involvement in various audit matters in mid-2008 was that his indifference and lack of concern when it became clear that the Xtron bonds could not be redeemed *corroborated* the finding that he did not genuinely believe the bonds could be redeemed and suggested that he was unconcerned *all along* with Xtron's ability to meet its obligations under the 1st Xtron BSA (the Conviction GD at [270]).

222 For the reasons above, we are not persuaded by the arguments raised by John Lam and see no reason to disturb the Judge's finding that he was part of the conspiracy and was dishonest. In our judgment, the Judge had meticulously dealt with and analysed the voluminous evidence in a manner that was fair towards John Lam. For instance, the Judge was always mindful that John Lam had little or even no participation in various aspects and periods of the transactions and the Crossover. Further, the Judge was careful not to draw unfavourable conclusions of dishonesty from lone pieces of evidence such as the drafting or reverse-engineering of the investment policy or John Lam's acquiescence to lie to Charlie Lay. We are satisfied that the Judge had sufficiently and carefully considered the evidence in its totality before reaching his finding that John Lam, albeit having less involvement and knowledge in the transactions than Kong Hee, Ye Peng, Eng Han and Serina, was dishonest and was part of the conspiracy to misuse the BF to purchase the Xtron bonds.

(B) FIRNA BONDS

223 Similarly, we do not see any basis to interfere with the Judge's finding that John Lam had acted dishonestly and was part of the conspiracy involving the unauthorised use of the funds from the BF to purchase the Firna bonds.

224 The Judge's finding was premised on three main points. First, he found that John Lam had participated in the conspiracy by signing the secret letter ostensibly on behalf of the CHC Board (the Conviction GD at [274]). In this letter, CHC undertook that in the event that it exercised the convertibility option in the Firna BSA and acquired Firna shares, it would sell those shares back to Wahju and his father-in-law for a nominal sum of US$1 (see [40] above).

225 Second, the Judge noted that John Lam had received an email from Serina on 30 September 2008, in which she informed him that Eng Han was "thinking of reducing the Firna bonds but increasing the [Xtron] bonds".[100] The Judge concluded from this that the common premise between Serina, Eng Han and John Lam must have been that the Firna and Xtron bonds were interchangeable and were similar in that both were merely a means to the end of funding the Crossover (the Conviction GD at [276]). Further, the Judge also noted that in an earlier email (a few emails down in the same email thread), Eng Han had suggested a course of action that would allow them not to "have to crack [their] brains on how [F]irna is going to pay back the 5.8m one day [*sic*]". The Judge disbelieved John Lam's claim not to have seen or read this email, and held that, in any event, the material point was that Serina and Eng Han had no qualms forwarding this email to John Lam. This, in his view, suggested that John Lam was part of the conspiracy and knew that the responsibility for

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100 E-609.

figuring out how to redeem the Firna bonds lay with the appellants and not Firna, as one would expect had this been a genuine investment.

226 Third, the Judge noted that John Lam had not been truthful in relation to the Firna bonds on at least two occasions (the Conviction GD at [278]). The first occasion was at the meeting with Sim on 9 April 2009 when John Lam, together with Ye Peng, informed Sim that the Firna bonds were "a pure commercial paper for investment".[101] The second was in the course of investigations by the CAD when he again said that the bonds were "purely investment".[102] These statements could not have been truthful given that John Lam's own case is that the Firna bonds were a "dual purpose" investment meant both for financial returns and the funding of the Crossover. While cognisant that this does not necessarily lead to a conclusion that he was dishonest, the Judge was satisfied that this was an inference that could be drawn in the light of all the circumstances in this case.

227 John Lam takes issue with each of the three points. In respect of the secret letter, he submits that the Judge had failed to take the context and circumstances in which he had signed the letter into consideration. He submits that he had signed the secret letter only because of the following reasons. First, he was placed under time pressure because he saw the email only on the morning that the letter had to be signed and sent to Serina. His point here is presumably that he had little time to consider. Second, he was assured by the other appellants that Wahju had no intention to enforce or use the secret letter which was only meant to be used as a means to appease Wahju's father-in-law. Third, he did not think that CHC would in any event have used the convertibility feature and

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101 CH-3.

102 P-1, question 292.

become a minority shareholder in an Indonesian glass factory company which had nothing to do with the church's objectives. Fourth, he asserts that he had expected Eng Han to follow up with the CHC Board in his capacity as the investment manager, and was not aware that Eng Han did not do so.

228 We do not find John Lam's explanation persuasive. In our judgment, this is clearly an attempt by him to explain away a fact that he knows, once admitted, would be almost fatal to his claim of innocence. None of the reasons given by him satisfactorily explains why he would have been willing to sign the secret letter – and sanction an undertaking that would cause CHC, the investor, to lose an additional security feature – and not raise any objection or demand a more formal explanation if he, as he claims, did not have knowledge of the true nature of the entire transaction. Indeed, one would have expected John Lam to have at least consulted the CHC Board at the earliest opportunity after signing the secret letter. His silence in this regard is telling. Quite apart from the giving up of an additional security feature, the fact that the relevant appellants and Wahju were trying to "trick … and … bluff" Wahju's father-in-law would surely have raised concerns in his mind about the legitimacy of the entire transaction had he been truly innocent.[103]

229 As for Serina's email to him on 30 September 2008, John Lam argues that the Judge had drawn a wrong conclusion by reading too much into the phrase "thinking of reducing the Firna bonds but increasing the [Xtron] bonds" and had failed to consider that John Lam was not a recipient of the remaining 14 emails in the chain, which suggests his lack of involvement in the entire transaction. Again, we are unable to accept John Lam's tenuous explanation. In our judgment, the Judge was entitled and was correct to have drawn the

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[103] Transcript 7 August 2014, p 44.

inferences that he did from the emails, in particular from the fact that Serina and Eng Han were comfortable to let John Lam have sight of the earlier emails.

230 Lastly, John Lam argues that the Judge was wrong to have drawn the inference of dishonesty from the two occasions that he was not truthful to Sim and the CAD about the nature of the Firna bonds. He submits that these two incidents took place *after* 6 October 2008 (*ie*, after the period that the conspiracy was alleged to have taken place) and thus cannot be relied on to establish that he had the requisite *mens rea*. Again, this submission reveals that John Lam has misunderstood the import of the Judge's finding. The Judge was only using John Lam's state of mind at a later period of time to draw the inference from the fact that John Lam had lied and was not forthcoming that John Lam was complicit in the conspiracy *all along* and was not an innocent party as he would like to portray himself to be.

231 There is therefore no basis for us to interfere with the Judge's finding that John Lam was part of the conspiracy and was dishonest in respect of the Firna bonds.

(2) Kong Hee

(A) XTRON BONDS

232 It is undisputed that Kong Hee was the leader of the Crossover and that the other appellants generally took the cue from his leadership. On his own account, he had oversight of the budgeting and financing of the Crossover. The Judge found that Kong Hee must have known that the Xtron bonds were not genuine investment instruments and were instead merely a means to divert funds from the BF to finance the Crossover, and were an unauthorised use of the funds from the BF. The reasons for the Judge's finding were as follows:[104]

(a) Kong Hee knew that he had full control over Xtron, and that the Xtron bond proceeds would be controlled by him and the other relevant appellants for the purposes of the Crossover;

(b) he knew that the so-called profit that CHC would earn from the Xtron bonds were not "real" or "actual money in from the 'world'" as evidenced from a BlackBerry message sent by Sharon to Ye Peng; [105]

(c) he knew that Xtron would not be able to redeem the bonds at the time of maturity and would likely need financial assistance from CHC or other sources to do so;

(d) he was involved in alternative ways to put Xtron into funds so that Xtron could meet the expenses incurred in relation to the Crossover and redeem the bonds; and

(e) he misled the auditors as to the true nature of the relationship between CHC and Xtron.

233 Kong Hee raises two main arguments against the Judge's finding of dishonesty against him. The first argument pertains to the knowledge and involvement of the auditors and lawyers. He argues that the Judge had failed to consider that he had always sought the advice of the lawyers and auditors and that he did not proceed with the transactions until he was assured of their legality. His point, in short, is that he could not have been dishonest given that he was always open to having the professionals scrutinise the transactions. He relies on cases such as *Cheam Tat Pang* and *Madhavan Peter v Public*

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104 [304] of the Conviction GD.

105 BB-33.

Prosecutor and other appeals [2012] 4 SLR 613 ("*Madhavan Peter*") where the court had taken the fact that the accused persons had consulted legal and professional advice into consideration in finding that they did not have a dishonest intent.[106]

234 On a related note, Kong Hee also argues that the Judge had erred in finding that he had misled the professionals and in inferring dishonesty from that. He emphasises that there is a material difference, and thus a crucial need to distinguish, between (a) whether he intended and had set out to mislead the professionals; and (b) what the professionals themselves actually knew or did not know about the transactions.[107] He submits that only the former is relevant to the question of *mens rea*, and that the Judge had erred in taking into account the latter and conflating the two. Further, Kong Hee takes issue with the fact that the Judge relied on documents which were only drafted or signed *after* the period of the alleged conspiracy in concluding that he had the intention to mislead.[108]

235 It should be clear from our findings in respect of the professional advice that had allegedly been sought and given in connection with the Xtron bonds (see [186]–[206] above) that we are not persuaded by this argument. It is indeed true that in ascertaining *mens rea*, what matters is not so much the scope of knowledge that the legal and accounting professionals had but what information the appellants conveyed to them or what the appellants may have understood from these professionals. This is consistent with the approach of the court in *Cheam Tat Pang* and in *Madhavan Peter*. For the reasons the Judge gave at

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106 Kong Hee's submissions at para 243.

107 Kong Hee's submissions at para 247.

108 Kong Hee's submissions at para 262(1).

[288]–[289] of the Conviction GD, it is clear that Kong Hee knew that Xtron and CHC were not independent entities. Yet, Kong Hee *deliberately obscured* (or had directed the other appellants to obscure) the true nature of the relationship between Xtron and CHC from the professionals. Besides editing a misleading paper conveying the message that Xtron and CHC were independent and unrelated (see [192] above), Kong Hee also signed management representation letters for the financial years 2007, 2008 and 2009 which represented to Baker Tilly that Xtron was not related to CHC.[109] The fact that Kong Hee had misrepresented the relationship of the two entities to the auditors not only bars him from relying on the argument that he had consistently and repeatedly sought professional advice to ensure the propriety of their actions, but also reflects a dishonest state of mind.

236 Also, the fact that these documents containing the misrepresentations (*ie*, the paper that had been edited by Kong Hee[110] and the management representation letters[111]) were created only *after* the period of the alleged conspiracy does not mean that these documents are irrelevant. These documents are consistent with, and corroborative of, Kong Hee's overall intention to convey the false impression to the legal and accounting professionals that Xtron and CHC were separate and independent.

237 Kong Hee's second argument is that the Judge had failed to give sufficient weight to the numerous budgeting exercises that he did in relation to the Crossover.[112] He submits that he could not have intended to cause wrongful

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109 TFW-9, TWF-10 and TWF-11. See also E-568.

110 E-269; E-483.

111 TFW-9, TFW-10 and TWF-11. See also E-568.

112 Kong Hee's submissions at para 274.

loss to CHC because he had been very meticulous and had been more than careful in ensuring that the projections were accurate and had sought to ensure that the Xtron bonds could be repaid.[113]

238 This submission reveals a misconception of the *mens rea* of the offence of CBT and what "wrongful loss" entails. As we sought to clarify at [177] above, wrongful loss does not mean financial or monetary loss. It refers to the deprivation of another person from property that he is legally entitled to. Therefore, it is of no defence for Kong Hee to argue that he had sought to ensure that CHC would not lose any monies from the Xtron bonds by making sure that the Xtron bonds would be redeemed and that CHC would be repaid at some point. The question that is pertinent for *mens rea* is whether Kong Hee knew that they were not legally entitled to use the funds from the BF to purchase the Xtron bonds. In this regard, it is relevant to analyse – as the Judge did – whether Kong Hee and the other appellants had caused CHC to enter into the 1st Xtron BSA knowing that Xtron would be unlikely to have sufficient funds to redeem the bonds on maturity. If so, this would be indicative that they did not believe that the Xtron bonds were a genuine investment and thus knew that they were using the funds from the BF for an unauthorised purpose. This is where the projections in respect of the Crossover may be relevant.

239 As noted by the Judge at [297] of the Conviction GD, the projection closest in time to the 1st Xtron BSA was a sale of 200,000 units of albums.[114] The appellants were aware that this would be insufficient for the redemption of the Xtron bonds, as evidenced from Serina's email to Eng Han and Ye Peng on

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113 Kong Hee's submissions at para 276.

114 E-1.

3 July 2007 ("E-1"), before the 1st Xtron BSA was entered into, in which she wrote:

> We are quite sure we will not be able to collect much sales on the English Album by end 2008 so *we will definitely have to issue another bond come end 2008 when this bond matures*. Does Xtron need to physically transfer money to repay the bonds before issuing a new one? If yes, Xtron will have a problem. [emphasis added]

Shortly after the 1st Xtron BSA was executed, Serina sent an email on 27 August 2007 to Ye Peng stating:[115]

> Hi TYP,
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> I just wanted to let you know and remind you that as per past discussions with Pst Kong & yourself, the 13M inflow from Bonds issue is used to cover the following. No part of it will go to repay Suhardiman's ($2M) and Siow Ngea's ($1.07M) loans. *We have budgeted for US sales of 200K units*. If we get that, we will only have enough to pay back Siow Ngea and not Suhardiman and *the last we discussed was to direct some BF to Xtron to be able to pay them back*. If we sell 200K units, we will also not have the money to do a second album.
>
> In view of this, I think this time round we should start to find additional people to give to Xtron so that we can start paying back a portion of Suhardiman's loan. We already have people like Cheong Hui giving to Xtron. Hopefully Wahju can give $500K or more to BF (I've yet to budget). All in all, we need to raise an additional $2M before Dec 09 providing Suhardiman doesn't ask us to repay his loan sooner.
>
> [emphasis added]

These emails are significant as it reveals the state of affairs immediately before and after the 1st Xtron BSA was entered into, *viz*, that there was no (or little) prospect of Xtron being able to repay $13m worth of bonds upon maturity. It is undisputed that Kong Hee was aware of the various projections.

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115 E-145.

240 Kong Hee and the other appellants attempt to counter the detrimental impact of these pieces of evidence by submitting that this projection of a 200,000-units sale is merely a "worst-case scenario" and by pointing to other more optimistic projections.[116] Kong Hee submits that the Judge had erred in ignoring these other projections which were made from 30 August 2006 to October 2008.[117] But like the Judge (see his analysis at [295]–[298] of the Conviction GD), we do not find this argument persuasive. The appellants must have regarded the projection as being realistic which was why Xtron's cash flow was planned around it. Further, even if we take into account the presence of the more optimistic projections, the fact that they entered into the Xtron bonds on behalf of CHC despite being aware of the worrying projection in E-1 indicates, at the very least, that Kong Hee and the others were indifferent to the issue of whether Xtron had the financial means to redeem the bonds because they did not regard the bonds as a genuine investment. The email of 27 August 2007 from Serina to Ye Peng, which is set out in the preceding paragraph, speaks volumes.

241 Neither of the two arguments raised by Kong Hee has persuaded us that the Judge had erred to have found, on the totality of evidence as summarised at [232] above, that Kong Hee played a role in the conspiracy and had acted dishonestly in that he knew that the Xtron bonds were not a genuine investment and that they were not legally entitled to use the funds from the BF for that purpose.

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116 Ye Peng's submissions at para 354.

117 Kong Hee's counsel notes at para 6.

(B) FIRNA BONDS

242 It is clear from our discussion of the appellants' *actions* at [149]–[155] above that Kong Hee must have *known* that the Firna bonds were also not a genuine investment but were merely a means through which funds could be diverted from the BF to the Crossover. Kong Hee knew that (a) he, Ye Peng, Eng Han and Serina would have full control of the bond proceeds; (b) responsibility for repayment of the bonds lay not with Firna but with him and those assisting him; and (c) their ability to effect repayment of the Firna bonds would depend on the profitability of the Crossover or by otherwise obtaining funds from other sources. In fact, as found by the Judge at [306] of the Conviction GD, the evidence shows that Kong Hee, together with Ye Peng and Eng Han, had orchestrated the entire arrangement and the flow of the funds.

243 On appeal, Kong Hee raises only one argument specifically in respect of the Firna bonds. As with his submission in respect of the Xtron bonds, he submits that the Judge had failed to give sufficient weight to the fact that he had consistently insisted and made sure that the transactions were approved by the auditors and lawyers, and that the Judge had erred in finding that he had misled the professionals. In support of this submission, Kong Hee points to the documentary evidence showing that he had intended the transactions to be proceeded with only if they were legally above-board.[118]

244 However, as we have discussed and found at [195] above, Kong Hee may have asked the legal and accounting professionals to vet the transactions relating to the Firna bonds but this must be viewed in the light of the fact that the *substance* of the transactions was not made known or disclosed to the

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118 E-19. See also BB-20, BB-21 and BB-22.

professionals. While the lawyers and auditors may have known that the Firna bond proceeds would be used for the Crossover, they were given the false impression by the appellants that this was through an added step where Wahju would independently support the Crossover. The professionals were not told that the ultimate responsibility for the use and more importantly for the redemption of the bonds lay with the appellants and not with Firna, a seemingly independent and profitable company. While there is no direct evidence that shows that *Kong Hee* knew that the lawyers and auditors were operating under false assumptions as to the independence of Firna, we are of the view that the totality of the circumstances as well as the very fact that the vehicle of Firna was chosen lend weight to the conclusion drawn by the Judge that Kong Hee knew that the professionals were given a misleading picture. Indeed, we, like the Judge, are satisfied that the appellants generally acted under Kong Hee's instructions or acquiescence. Had Kong Hee been genuinely concerned with the legality of the transactions as he claims, he would have ensured that *express* legal advice as to the legitimacy of the Firna bond transaction was obtained. That there is no record of Kong Hee or the other appellants obtaining any such advice is, to our minds, telling of what their genuine intentions were. This same observation may also be made in respect of the Xtron bond transaction.

245 Additionally, during the EGM on 1 August 2010 with the EMs (*ie*, after the CAD had commenced its public investigations), Kong Hee allowed Ye Peng to actively mislead the EMs on the true substance of the transactions. Ye Peng falsely represented to the EMs that Firna bond proceeds were intended as a commercial investment to help Firna's normal business operations, that Wahju's use of "part" of the funds to support the Crossover was just a side detail, and that this expenditure was an independent decision made by Wahju himself.[119] This story presented to the EMs during the EGM is in line with the

impression that the appellants were conveying at the material time to the auditors and lawyers and further corroborates our finding that Kong Hee was not fully frank with the auditors and lawyers in respect of the substance of the Firna bond transaction.

246 We thus see no reason to disturb the Judge's finding that Kong Hee was part of the conspiracy and was dishonest in respect of the transactions relating to the Firna bonds.

(3) Ye Peng

(A) XTRON BONDS

247 The Judge found that Ye Peng was Kong Hee's second-in-command and that Ye Peng's state of mind in respect of the Xtron bond transaction was indistinguishable from Kong Hee's (the Conviction GD at [327]). The Judge found that like Kong Hee, Ye Peng was fully aware of Xtron's lack of independence, the true purpose of the Xtron bonds, the likelihood that Xtron would not be able to redeem the bonds on maturity, and the fact that CHC might have to provide Xtron with the funds to redeem the bonds notwithstanding that CHC itself was the bond holder. In fact, the Judge found that Ye Peng was not only aware of this but had taken on part of the responsibility for ensuring that Xtron would have enough funds to redeem the bonds by thinking of ways in which CHC could transfer money to Xtron under the guise of legitimate transactions. Further, he also found that Ye Peng assisted in misleading the auditors in respect of Xtron's true relationship with CHC. In our judgment, these findings fully accord with the evidence.

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[119] CH-29.

248 Broadly speaking, the key arguments that Ye Peng raises on appeal mirror those of Kong Hee. He argues first, that the Judge had failed to give sufficient weight to the correspondence between him and the other appellants which showed that he genuinely believed there was a prospect of financial return from the Crossover, which could be used to redeem the Xtron bonds on maturity.[120] In particular, he submits that the Judge had erred in focusing only on the "worst-case scenario" of a 200,000-unit sale in E-1, and in ignoring all the other more optimistic projections that had led them to believe that there would be sufficient financial gains from the Crossover to redeem the bonds on maturity. As we have explained at [240] above in dealing with the same argument raised by Kong Hee, we do not find this persuasive. Further, Ye Peng's submission is contradicted by his own evidence in cross-examination where he conceded that what was really important to him was not so much whether repayment would be made at the two-year maturity period, but whether one day, in the long term, CHC would get its money back. The exact question posed to him and his answer were as follows:[121]

> Q: … So would this be your position as well, that at the time the church entered into the first Xtron BSA, what is really important is not so much whether repayment is going to be made at the two-year maturity period, but whether one day, in the long term, the church is going to get its money back? Because after all, the maturity period can always be extended.
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> A: Yes, [Y]our Honour, and it's based on my understanding from Eng Han's explanation in email E-1.

249 Ye Peng's second argument is that the Judge had erred in disregarding the fact that they had sought advice from legal and accounting professionals before entering into the transactions and in finding that they had deliberately

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120 Ye Peng's submissions at para 345 onwards.

121 Transcript 7 April 2015, p 87.

misled them in respect of the true relationship between Xtron and CHC. We reject this submission for the same reasons that we rejected Kong Hee's (see [235] above). It is clear from the evidence which the Judge highlighted at [319]–[321] of the Conviction GD that Ye Peng knew that the directors of Xtron were merely figureheads and that the executive decisions were in fact made by him and Kong Hee. However, Ye Peng intentionally misled the auditors not only by telling them that CHC and Xtron were not related parties but by going further to tell them that Xtron was "independent" from CHC (see [191]–[193] above). It is thus not open for him to rely on the fact that they had sought advice from the professionals to negate any dishonesty on his part. On the contrary, we agree with the Judge that his repeated attempts to obscure the truth from the auditors reveal a dishonest state of mind.

250 For the reasons above, there is no basis to disturb the Judge's finding that Ye Peng was part of the conspiracy and was dishonest in respect of the transactions pertaining to the Xtron bonds.

(B) FIRNA BONDS

251 In respect of the Firna bonds, Ye Peng was involved in assisting Kong Hee with the drawing down of funds under the Firna bonds and remitting the same to Justin (presumably through UA).[122] It can be inferred from the factual matrix that we have set out at [149]–[155] above that Ye Peng knew from the outset (a) that the purpose of the Firna bonds was to fund the Crossover; (b) that the Firna bond proceeds would be controlled by him, Kong Hee, Eng Han and Serina; and (c) that the responsibility to repay the bonds lay not with Firna and its glass factory business as it should, but with them, and the plan was that this

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122 E-553, E-495, BB-28, E-498.

would be paid out of the profits (if any) from Sun Ho's albums. These were also the Judge's findings (see [328]–[330] of the Conviction GD). It necessarily follows from the above that Ye Peng knew that the Firna bonds were not a genuine investment and therefore that they were not legally entitled to use the funds in the BF for that purpose.

252 The Judge further found that Ye Peng's dishonest intentions and knowledge that they were not legally entitled to use the funds in that manner may be inferred from his misleading statements to the auditors and lawyers. The Judge noted that Ye Peng admitted to having told one of the lawyers, Jimmy Yim, that "Wahju will independently be taking over this Crossover Project" (the Conviction GD at [331]). He was also involved in the meeting with Sim where Sim was told that the Firna bonds were "a pure commercial paper for investment" (see [226] above).

253 Beyond the examples raised by the Judge, we also note that Ye Peng had testified that he told Foong on 1 August 2008 that the Firna bonds were an investment in Wahju's glass factory and that Wahju would independently support the Crossover. He later sought to argue that he was not being dishonest to Foong because this was truly his understanding of the transactions. But like the Judge, we find this difficult to believe given his intimate participation in, and knowledge of, the entire plan. It follows from this that Ye Peng, like Kong Hee, cannot argue that their disclosure of the transactions in respect of the Firna bonds to the professionals should displace any inference of dishonesty. Additionally, as we pointed out at [245] above, Ye Peng was also the person who had misrepresented the substance of the Firna bond transaction to the EMs at the EGM on 1 August 2010. His main argument on appeal in respect of the Firna bond transactions thus fails.

254 In the circumstances, we see no reason to disturb the Judge's findings that Ye Peng was part of the conspiracy and was dishonest in respect of the transactions pertaining to the Firna bonds.

(C) ROUND-TRIPPING TRANSACTIONS

255 Coming to the round-tripping transactions, it is clear that Ye Peng was privy to the whole scheme.[123] Whilst he was not as involved as Eng Han, Sharon and Serina in formulating and carrying out the round-tripping transactions, he played a key role in overseeing and approving the plans which the other appellants came up with.

256 Ye Peng's involvement in the round-tripping transactions began at the meeting that the appellants had with Sim on 9 April 2009. It is not disputed that Sim raised concerns with regard to the Xtron and Firna bonds at this meeting. Although Ye Peng left early, he was informed by Sharon of the remarks that Sim had made during the meeting. In particular, Sharon informed Ye Peng that Sim hoped "to see this [Xtron] issue being resolved in this [financial year]".[124] A few days later, on 10 April 2009, Eng Han informed Ye Peng that he had thought of a plan to "clear the bonds in firna and xtron". Ye Peng then asked Eng Han when Eng Han could share the plan with him, and also informed Eng Han that he had told Kong Hee about "the need to clean up the situation".[125] Following this, Ye Peng supervised and directed Eng Han, Sharon and Serina in coming up with plans to remove the Xtron and Firna bonds from CHC's accounts. In an email from Serina to Sharon on 2 May 2009, three plans for redeeming the Xtron bonds were presented and the third of these scenarios was

123 See *eg*, BB-89a.

124 E-68.

125 BB-62.

said to be "what Pst Tan [*ie*, Ye Peng] had asked for".[126] On 25 September 2009, Sharon emailed Eng Han and Serina informing them that Ye Peng wanted them to "settle this within the next 1 week"; "this" included the "Whole [Xtron], Firna and CHC transaction".[127] Subsequently, when Eng Han came up with the final plan for the round-tripping transactions sometime on 30 September 2009, Ye Peng was included in the conversation where Eng Han explained the finalised plan, and Ye Peng gave his approval for the transactions to take place.[128] Based on the above, we agree with the Judge that Ye Peng was clearly involved in the conspiracy to carry out the round-tripping transactions to create an impression that the Xtron and Firna bonds had been redeemed, and that he knew that (a) Tranches 10 and 11 of the SOF were not genuine investments and (b) the payment of $15.2m under the ARLA was not in truth for advance rental. He was clearly aware of the fact that the outlays of CHC's funds were intended to be used by Firna and AMAC respectively for the redemption of the outstanding Firna bonds and the repayment to CHC under Tranches 10 and 11 of the SOF.

257 On appeal, Ye Peng does not deny being involved in the round-tripping transactions. However, he argues that his participation and involvement were not accompanied by a dishonest *mens rea*. In this regard, Ye Peng submits that the appellants believed that Sim wanted the Xtron and Firna bonds off CHC's books and that this was what motivated him and the other appellants to carry out the round-tripping transactions. His position is also that he genuinely believed that he was legally entitled to carry out the round-tripping transactions as he believed that the round-tripping transactions were to "restructure" the

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126 E-59.

127 E-69.

128 BB-89a, image 65.

Xtron and Firna bonds and that his lack of dishonesty was demonstrated by his forthrightness with the CHC Board.

258 In the first place, we do not find Ye Peng's stated motivation for carrying out the round-tripping transactions an exculpating circumstance. Even if we accept that Ye Peng believed that it was Sim who wanted the Xtron and Firna bonds to be redeemed, the appellants would have known of Sim's opinion that the purchase of those bonds was problematic. A simple solution would have been to inquire if Xtron and Firna were able to effect early repayment of the bonds under the respective agreements. Adopting another questionable enterprise (*ie*, by undertaking the round-tripping transactions) is hardly the way to resolve this perceived problem. The point is that the mere fact that Ye Peng believed that Sim wanted the Xtron and Firna bonds redeemed did not mean that he believed that Sim was suggesting that any *method, irrespective of its propriety or legality*, could be adopted to redeem the Xtron and Firna bonds.

259 As to Ye Peng's second argument, we do not agree that Ye Peng had been entirely truthful with the CHC Board. At the CHC Board meeting on 12 September 2009, Ye Peng was recorded as having informed the CHC Board that R&T and Foong had no objections to the proposed transactions,[129] and Ye Peng accepted that he probably informed the CHC Board of Foong's approval based on his meeting with Foong on 27 April 2009.[130] However, as we have explained above, this was a misleading statement as the auditors were not aware of the full details of the plan. Indeed, in April 2009, only the bare outlines of a plan for CHC to pay Xtron advance rental had been proposed. We thus find that Ye Peng

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129 CH-50b.

130 Transcript 25 March 2015, p 5.

had intentionally misrepresented the state of affairs to the CHC Board in an effort to obtain its approval for the proposed transactions.

260 We also find the series of BlackBerry messages recorded in BB-89a highly incriminating. After Eng Han explained the two phases of the finalised round-tripping transaction plan, the following conversation then ensued:

[Sharon]:	I am definitely ok with not using Pacrad [presumably referring to Pacific Radiance]. But I am thinking we have put in a lot in special opportunity fund… Wonder if Mr Sim will want to see details?
[Ye Peng]:	I am ok, as long as wahju says the money won't be stuck in UA or Firna
[Sharon]:	And if he wants, what will Amac show?
…	
Eng Han:	What's your question sharon about what amac shows?
[Sharon]:	If auditor ask what is this special opportunity fund, what will Amac show?
Eng Han:	Sim won't question details because in nov it will be redeemed!
Serina Wee:	The funds will give chc returns right
Eng Han:	Yes … I doubt sim will query as long as he knows money already [paid] back to chc with good returns
[Ye Peng]:	Since we have precedence [*sic*] about special opportunity fund through Transcu, PacRad in the past, I think Sim will be ok.
[Sharon]:	Last year dun have [*sic*]. Only started this FY. But ok, as long as we show him it is redeemed.
Eng Han:	Anyway all the [previous] special opp fund will be redeemed before oct31..except for this new tranche of 11.6m. … Yes as long as by the time he audits the money is back in chc it will be ok
…	

> [Sharon]: Must be back by mid nov. That's when we need to submit acc to them.

261 It is clear from this short conversation that Sharon was concerned that the true nature of Tranches 10 and 11 of the SOF might have to be revealed to Sim during the audit. In our judgment, Ye Peng's responses, especially when read together with the entire conversation between the four of them, demonstrate that he knew that they could not and would not be above-board with Sim about the true nature of Tranches 10 and 11 of the SOF. As we see it, this shows that Ye Peng knew that Tranches 10 and 11 of the SOF were not genuine investments and strongly indicates that he knew that they were not legally entitled to carry out those transactions.

262 Subsequently, after investigations into the transactions had commenced, Ye Peng informed the EMs at the EGM held on 1 August 2010 that when the various transactions such as the redemption of the Xtron and Firna bonds and the execution of the ARLA were structured, the "advice of lawyers and other professionals" was relied on "at every step".[131] In our judgment, there is no doubt that this representation was again false and that Ye Peng knew it to be so. That Ye Peng continued to mask the true nature of the Xtron and Firna bond redemption even after investigations had commenced in an effort to obtain *ex post facto* ratification of the transactions casts serious doubt on his credibility.

263 In the circumstances, we hold that the Judge was fully entitled to find that Ye Peng's participation in the round-tripping conspiracy was dishonest and we see no reason to disturb the Judge's finding in this regard.

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131 CH-29, p 34.

(4) Eng Han

(A) XTRON BONDS

264 It is undisputed that Eng Han was the Crossover's financial specialist, and was involved in the financing of the Crossover. He was in fact the one who devised the plan to use the Xtron bonds as a means of funding the Crossover. As it would be recalled, several other plans to obtain funding for the Crossover (including attempts to take loans from two banks, Citic Ka Wah and UBS (see [26] above)) failed or were abandoned from end-2006 to the first half of 2007 before he conceived this idea. The Judge concluded from this that what was foremost on Eng Han's mind when he came up with the idea of the Xtron bonds was to be able to use the BF to fund the Crossover, and that his current characterisation of the bonds as an investment is a mere afterthought. We agree with this conclusion. We think that at all times Eng Han intended by his plan to make it appear that funds from the BF were being put to legitimate use when the truth of the matter was otherwise. We do not think Eng Han (and the others) did really at any time consider the purchase of the Xtron bonds as a *commercially sensible* investment for CHC. It seemed to us that they were just hoping that when the time for redemption came, they would be able to somehow find the money to redeem the bonds.

265 As the Judge found, the evidence shows that Eng Han knew that it was unlikely that Xtron could redeem the bonds on maturity. In court, Eng Han testified candidly that Xtron was controlled by Kong Hee and Ye Peng. He was also familiar with Xtron, having been one of its three founding directors. As the Judge found at [355] of the Conviction GD, Eng Han must have known that there were only two major sources of potential income from which Xtron could redeem the bonds: (a) by using revenue from the sales of Sun Ho's albums; and (b) by further relying on CHC. The Judge found that Eng Han could not have

expected any genuine financial returns for CHC from the Xtron bond transaction because (a) he must have known that the sales from Sun Ho's albums were poor and insufficient for the redemption of the bonds; and (b) the alternative solution of using *CHC's* funds to redeem the Xtron bonds would not generate any genuine financial return for CHC.

266 On appeal, Eng Han does not challenge the latter point but takes issue with the first finding. He submits that the Judge had erred in finding that he knew or thought that the revenue from the album sales would be insufficient to repay the bonds. He argues that the Judge had erred in not distinguishing his state of mind from those of the other appellants,[132] and in disregarding the evidence that showed that he had been misled and deceived by Kong Hee and the rest to think that Sun Ho's album sales were very good, which caused him to have the reasonable belief that her album in the US – from which the funds for the redemption of the Xtron bonds were to come – would be profitable.[133] He points to representations that Kong Hee had made to the CHC Board in July 2007 and to many others, including him and Justin, that Sun Ho did well in the Chinese market, and further submits that he was not privy to the actions of those who had rigged Sun Ho's album sales in the past.

267 But it is undisputed that, slightly more than a month before the 1st Xtron BSA was signed, Eng Han had sight of E-1, where Serina informed Ye Peng and him that the projection was that only 200,000 albums could be sold, and that it was thus estimated that Xtron would take ten years to redeem the bonds. In the light of E-1, even if we accept that he was not privy to the poor album sales in the past, by July 2007, he must have known that Xtron would, or at the

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132 Eng Han's submissions at para 209.

133 Eng Han's submissions at paras 154–155, 176.

very least might, have difficulties in redeeming the bonds. Like the others, Eng Han argues that the Judge had erred in focusing exclusively on E-1 and in ignoring the other more optimistic projections. We have already explained why we are not persuaded by this submission at [240] above.

268 Even leaving E-1 aside, Eng Han's assertion that he believed Xtron would be able to redeem the bonds upon maturity is also contradicted by his statement in an email chain between him, Serina and Ye Peng where the plans to issue Xtron bonds were discussed in which he said: "Hopefully in 2 to 3 years [*sic*] time, I am able to get funds from elsewhere to buy the bonds".[134] As observed by the Judge, this suggested that he knew from the outset, even before the 1st Xtron BSA was entered into, that he and the other appellants might have to figure out how the bonds should be redeemed as the Crossover profits might not be sufficient. It also revealed that he did not have a firm idea as to where CHC's supposed financial return from purchasing the bonds would come from. Eng Han must then necessarily have been aware that the Xtron bonds could not properly be regarded as a true investment for CHC, but were merely a "bond issue method" that they "came up with" to obtain funding from the BF for the Crossover.[135]

269 Eng Han argues that the Judge had taken his words out of context and had misunderstood him. He asserts that what he meant by "[getting] funds from elsewhere to buy the bonds" was that he would get another investor to come in and buy over the bonds rather than having to bail Xtron out. He argues that in fact, his concern over the bonds showed that he always thought that they were genuine transactions. We are not persuaded by Eng Han's attempt to re-

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134 E-197.

135 E-197.

characterise what he had said in the email. It is quite clear to us that, however he may wish to package it now, what he had meant then was that he, Serina and Ye Peng might have to think of ways to repay the monies to the BF pursuant to the terms of the 1st Xtron BSA when the time for repayment came. To that extent, we accept that he regarded the transactions as having legal effect. But as we explained at [129] above, the question we are concerned with is not whether the transactions created genuine legal obligations, but whether they constituted *investments*, and in this regard, we are satisfied that Eng Han knew that the Xtron bonds were not a genuine investment. As we observed at [126] above, whether a transaction is a real investment depends, among other things, on whether there had been a proper assessment of the potential financial returns (which ought to correspond to the risk undertaken). There was no such assessment done here. The appellants even blatantly disregarded the fact that the entity issuing the bonds (*ie*, Xtron) had a poor track record of profitability. Generally speaking, bonds issued by an entity such as Xtron, which the appellants had recognised as an "insolvent company",[136] are not the sort of financial instruments which funds like the BF should be used to invest in.

270 The Judge also found that Eng Han participated in conveying misleading information to the auditors, Christina, as well as Charlie Lay, an Investment Committee member, and that this reflected a dishonest state of mind on his part. Eng Han contends otherwise, and submits that the transactions had been carried out with absolute transparency towards the CHC Board, auditors and lawyers.[137] But as pointed out by the Prosecution,[138] this is not consistent with Eng Han's own evidence at trial, where he candidly conceded that the appellants were not

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136 E-346.

137 Eng Han's submissions at para 299.

138 Prosecution's submissions at para 293.

completely open with the auditors in order to "preserve the Crossover". We highlight the pertinent parts of his evidence in cross-examination:[139]

> Q: The question is: between wanting to be discreet and being accurate and truthful in representations to the auditors, the decision would be made in favour of the desire to be discreet; that was your understanding, correct?
>
> A: Yes, [Y]our Honour. Because I think to Kong Hee and Tan Ye Peng, to preserve the Crossover was important for them.
>
> Q: In fact, it's not merely a question of being or preferring discretion over accuracy in dealing with the auditors; that lack of accuracy then filters into the accounts and so would affect the accounts as they are seen by the whole world. Correct?
>
> A: Yes, [Y]our Honour.

Even more telling is his email dated 31 July 2008, where he replied as follows when Ye Peng asked if he was allowed to inform the CHC Board that Xtron was under CHC's control:[140]

> Not in such bold terms… The only problem of using the word control is that *if it gets to the auditors*, then they might get ultra conservative and say we own xtron and therefore we need to consolidate. So we need to find a balance between what we tell our agm (they want full control) and *what we tell auditors (we don't want them to think we control xtron*). [emphasis added]

While we accept that it may be possible for Eng Han (and the other appellants) to argue that this was not indicative of a dishonest mind but was simply to avoid an association of the Crossover with CHC and cause a repeat of the Roland Poon incident, this does not appear to be the natural inference to draw in the light of the other evidence.

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139 Transcript 3 February 2015, p 35:8-21.

140 E-331.

271 We are also not persuaded by Eng Han's submission that the Judge had drawn the wrong conclusion from the fact that he had not told Charlie Lay the truth about CHC using Xtron to finance the Crossover.[141] In any event, even if we leave this piece of evidence aside and accept that he had lied to Charlie Lay for other reasons, the Judge's finding is still supported by the other evidence which we have discussed above.

272 In these circumstances, we can see no reason to disturb the Judge's finding that Eng Han had acted dishonestly and had conspired with the other appellants in using the funds from the BF to enter into the Xtron bond transaction.

(B) FIRNA BONDS

273 As for the Firna bonds, the evidence shows that Eng Han knew that it was not a commercial investment into Firna but was yet another mechanism for them to funnel funds from the BF to the Crossover.

274 Eng Han was privy to the emails where Serina gave instructions to Wahju on how Wahju should use the monies once they were in Firna's hands. He would have known from those emails that the understanding between them and Wahju was that the monies were theirs and thus they could direct Wahju on how the monies should be used. While these emails were only sent *after* the Firna BSA was executed and the drawdowns thereunder effected, the fact that the other appellants felt comfortable about letting him have sight of such information and that he did not raise any concern thereafter show that he had known all along of the true nature of the transactions.

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141 Eng Han's submissions at para 94.

275 Further, the evidence also shows that Eng Han knew that the responsibility for redeeming the Firna bonds lay not with Firna but with him and the other appellants. For instance, in an email sent on 29 September 2008 – *before* the Firna BSA was entered into, Eng Han proposed a different idea to obtain financing for the Crossover before commenting that "[t]his way we don't have to crack our brains [on] how firna is going to pay back the 5.8m one day".[142] Had the Firna bonds truly been an investment into Firna, which for all intents and purposes appeared to be a legitimate profit-making company, there would have been no need for the appellants to "crack [their] brains" in respect of the redemption of the bonds. This email shows that Eng Han was clearly aware from the outset that the Firna bonds were not a genuine investment but were a temporary means of obtaining funds from CHC for the purpose of funding the Crossover. Eng Han's knowledge of this arrangement is particularly telling from an exchange of emails he had with Wahju about the payment of legal fees that had been incurred as a result of the bonds. Wahju had asked whether Firna should pay the fees given that the "whole set up was more for [AMAC] or Xtron purpose and *Firna is only helping to pass thru the money*" [emphasis added].[143] To this, Eng Han replied: "What I mean is firna 'pays' but of course in the end it is us who will take care of the repayment of the bonds when it matures…just as for the crossover costs".[144]

276 Additionally, Eng Han was also involved in the execution of the suspicious secret letter that was used to "trick … and … bluff" Wahju's father-in-law. Indeed, Eng Han admitted in cross-examination that he did not consult Christina about this letter so that it would not form part of the legal

142 E-609.

143 E-260.

144 E-260.

documentation for the Firna BSA.[145] This was not the only thing that he had kept away from Christina. On his own evidence, he had told her that Wahju would be using his "personal monies" to fund the Crossover after withdrawing the shareholder's loan that he had previously extended to Firna. This clearly could not have been his genuine belief. We agree with the Judge that this was a calculated move to give Christina a misleading impression of the Firna bonds.

277 Looking at the arguments raised by the parties and the evidence as a whole, we do not see any reason to disturb the Judge's finding that Eng Han was part of the conspiracy and was dishonest in relation to the Firna bonds.

(C) ROUND-TRIPPING TRANSACTIONS

278 Eng Han was the main architect of the round-tripping transactions. Although he did not attend the 9 April 2009 meeting with Sim, he became heavily involved in formulating plans to redeem the Xtron and Firna bonds sometime in July 2009, and the eventual plan that was carried out was Eng Han's brainchild. Being the chief designer of the round-tripping transaction, we agree with the Judge that Eng Han knew that (a) Tranches 10 and 11 of the SOF were not genuine investments as the so-called return came from CHC itself and (b) the payment of $15.2m under the ARLA was not a genuine building-related expense as the bulk of the funds would be round-tripped back to CHC as repayment of Tranches 10 and 11 of the SOF. In fact, in respect of the ARLA, Eng Han admitted in cross-examination (notwithstanding the position he later took in the hearing before us (see [166] above)) that the figure of $7m was an arbitrary figure.[146]

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145 Transcript 17 March 2015, pp 119–123.

146 Transcript 19 March 2015, p 186.

279 Eng Han does not in fact deny that he knew (and intended) that the round-tripping transactions were to repay the debts owed to CHC under the Xtron and Firna bonds. In his own words during the trial, Tranches 10 and 11 of the SOF were effectively monies going out of "one pocket of CHC" and "back into the other pocket".[147] Instead, he submits that he did not think there was anything illegal or illegitimate about this because the transactions were, in his view, merely restructuring and were consistent with financial market practice.

280 There is no objective evidence to substantiate Eng Han's assertion that round-tripping transactions were common in the financial market. Even assuming that that was so, the legality or propriety of such transactions must necessarily depend on the object of the exercise as well as the nature of the funds being utilised. Illegality arose in the present case because of the restrictive character of the BF, *ie*, it could only be used for very limited objects. Here, the round-tripping transactions amount to "wrong use" of CHC's funds as they involved transactions not grounded on any genuine commercial objective, a point which Eng Han has admitted.[148] Furthermore, as pointed out by the Prosecution,[149] none of the entities involved in the round-tripping transactions (*ie*, UA, Firna and AMAC) had independently made the decision to enter into the transactions for genuine commercial reasons. Quite the contrary, Eng Han admitted that Wahju's job, as far as UA and Firna were concerned, was to "pass the amounts that were ultimately given to him through and back to CHC".[150] Eng Han has not pointed us to any example of a legally-sanctioned round-

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147 Transcript 28 January 2015 p 133:4-15.

148 Transcript 18 March 2015, p 123.

149 Prosecution's submissions at para 463.

150 Transcript 18 March 2015, p 90.

tripping scheme that featured the same lack of independence and commercial justification, and not having done so, his bare assertion carries little weight. In any event, we would reiterate that the pertinent issue is not whether round-tripping schemes *per se* are themselves legal or permissible, but whether the funds from CHC that were used for the round-tripping transactions had been used for legitimate purposes (see also our observations at [160] above).

281 We agree with the Judge's finding that Eng Han knew that the round-tripping transactions were not legally above-board. Like our analysis for Ye Peng and for the same reasons that we have set out at [260]–[261] above, we find BB-89a highly incriminating in respect of Eng Han. Eng Han's knowledge that the round-tripping transactions were improper is also corroborated by his actions in subsequently hiding the true substance of the transactions from the auditors who were looking into the transactions from CHC's and Xtron's perspectives. For instance, he told Sharon a day before an audit meeting was going to be held on 31 December 2009:[151]

> Pls inform [John Lam] to steer away from the topic of what [the SOF] invests in. The $11.4m outstanding was all to UA and we don't want that to surface ok.

Subsequently, on 28 April 2010, when Serina asked him how she should answer the auditor's query concerning how Xtron had funded the purchase of $11.455m worth of Firna bonds, he answered as follows:[152]

> … Tell them the whole story why the advance rental was done, and then since xtron had no immediate need for all the funds, it was parked in bonds. Let them know The [*sic*] bonds can be redeemed when xtron needs the funds.

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151 E-326.

152 E-32.

282 Eng Han tries to argue that "whole story" here means the truth, but we do not think that is convincing. In our view, the reference to "whole story" here is to the stated purpose of the ARLA being to financially equip Xtron to secure a property for CHC. This was clearly a purpose which Eng Han knew to be false since he had been informed by Serina that there would be "nothing left for bidding for any building project" (see [165] above). This is yet another example of Eng Han's dishonest intent.[153] Additionally, as pointed out by the Prosecution, it was a clear lie to say that Xtron had purchased bonds from Firna because it had no immediate need for the funds under the ARLA, given that the appellants' intention from the start was for the monies from the bonds to be round-tripped back to CHC to redeem Tranches 10 and 11 of the SOF.

283 Based on all the above, we find no reason to differ from the Judge's finding that Eng Han had acted dishonestly and had conspired with Ye Peng, Serina and Sharon to commit the round-tripping offences.

(5) Serina

(A) XTRON BONDS

284 The Judge found that Serina was the administrator of the Crossover, and was responsible for preparing cash flow statements and projections which would keep track of the expenses and anticipated revenue from Sun Ho's planned albums.

285 We do not see any basis to disturb the Judge's finding that Serina knew that the Xtron bonds were in substance not investments, but were a way in which the appellants could obtain funds to finance the Crossover. Serina was fully

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153 E-35.

aware that Xtron was controlled by Kong Hee and Ye Peng. In fact, she assisted in obscuring the relationship between Xtron and CHC by drafting false Xtron meeting minutes to create the appearance of executive decision-making when some of these meetings did not even take place. She does not dispute that she had done so.[154] In addition to showing that she knew the true relationship between Xtron and CHC, there is irrefutable evidence that she had participated in misleading the auditors. She was also the one who had prepared the first draft of the paper which Ye Peng sent to Foong on 21 July 2008 where they had sought to portray CHC and Xtron as independent entities despite knowing that this was not true (see [192] above).

286 More importantly, Serina knew at the time of the execution of the 1st Xtron BSA that there was no realistic prospect of Xtron having sufficient revenue for the redemption of the bonds when they matured in two years' time. She was the author of E-1, the email that we have been referring to, in which a projection of sales of 200,000 albums and an estimate that Xtron would take ten years to repay the bonds were made.

287 We acknowledge that while Serina was the author of this email, she did not really know what a realistic assessment of the album sales would be. We also accept that the numbers were furnished to her by Ye Peng and Kong Hee. But even so, we do not see how this assists her case. The fact remains that she was privy to this information a month and a half before the signing of the 1st Xtron BSA. As the Prosecution submits, this meant that even as she was preparing for CHC to enter into a bond investment with a two-year maturity period, she (and the other appellants) had already contemplated that repayment of the bonds could possibly take ten years. This militates against her assertion

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154 Transcript 4 May 2015, pp 44–45.

that she saw the Xtron bonds as a genuine investment for the purpose of obtaining financial returns for CHC. Like the others, Serina argues that the Judge was wrong to have placed emphasis on E-1 and to have ignored the other projections. We have already dealt with this at [240] above. This conclusion is buttressed by the content of the emails that she sent on 27 August[155] and 28 September 2007[156] (soon after the 1st Xtron BSA was entered into) where she summarised discussions that she had with Ye Peng and Eng Han about using other means to secure the repayment of the bonds.

288 Serina argues that her assertion that she believed the Xtron bonds to be an investment is supported by references to them as "investments" in contemporaneous documents such as the Investment Management Agreement with AMAC and an email in which she used the word "invested" in relation to the Xtron bonds when corresponding with Eng Han.[157] With respect, this is a weak argument. In particular where the formal documents are concerned, it is hardly surprising that the words "investment" would be used as that was the misleading impression that the appellants were trying to convey.

289 Serina next argues that even if she knew that CHC had control over Xtron, this did not mean that she would have known that the transactions were not genuine investments because she did not know that control in the investee would negate an investment. She said that she was always under the impression that this was permissible because CHC's interest in its wholly-owned subsidiary, Attributes, had been described as an "investment" in CHC's books and no concerns had ever been raised by the auditors.[158]

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155 E-145.

156 E-146.

157 Serina's submissions at para 62, E-197.

290 We are not persuaded by this argument. The Judge's finding that she was dishonest is not premised solely on her knowledge that Xtron was controlled by CHC. There was other more incriminatory and telling evidence, such as the fact that she was aware of the likelihood that Xtron might not have been able to redeem the bonds upon maturity and yet still went along with the transaction. She was also aware that if the Crossover profits were insufficient, she and the other appellants would have to find other means to obtain funds to redeem the bonds. At no point did she and the other appellants consider whether the transaction was a financially sensible one for *CHC*. Further, as we have found above, she was also privy to the fact that the professionals were being misled, and had assisted in the misrepresentation of the facts to them. The entirety of the evidence shows that she was aware that the transactions were in substance not an investment, no matter what their form took.

291 In these circumstances, we do not see any basis to disturb the Judge's finding that she was part of the conspiracy and had acted dishonestly in respect of the Xtron bonds.

(B) FIRNA BONDS

292 In respect of the Firna bonds, the Judge found that Serina must have known that it was not a genuine investment because she knew (a) that the purpose of the Firna bonds was to fund the Crossover; (b) that contrary to what the appellants represented to others, the plan did not involve Wahju funding the Crossover with his personal monies; and (c) that there was no intention to look to Firna's glass factory business for repayment as she was one of those who had

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158 Serina's submissions at para 68.

been tasked by Kong Hee to think of a way to redeem the bonds if the Crossover profits were not sufficient.

293 Serina argues that the Judge's findings were wrong as she had genuinely regarded the Firna bonds as an investment, backed both by Firna's strong financial position and Wahju's personal guarantee. However, Serina's assertion does not sit well with the evidence. There is ample evidence which shows that she knew that Wahju (and Firna) was merely a conduit. She was the one who gave Wahju detailed instructions as to the use of the Firna bond proceeds.[159] She had on more than one occasion referred to the bond proceeds as "our money", and had even suggested charging Wahju interest or taking a cut of the profits made by Wahju when she found out that he had used some of the bond proceeds for his personal trades.[160] Like the rest, she was also aware that Wahju viewed the proceeds as the appellants' funds.[161] This clearly showed that she was aware that the Crossover was not to be funded by Wahju's "personal monies" but by the funds that came from the BF to purchase the Firna bonds.

294 Serina also played a very active and important role in arranging for sources of money other than Firna to repay the Firna bonds.[162] She was tasked to work out how the interest amounts under the Firna BSA were to be paid from further drawdowns, which essentially meant that she knew that CHC was using its own funds to pay itself interest payments for the bonds. As for the principal debt under the Firna BSA, she was working along with Eng Han and Ye Peng, on Kong Hee's instructions, to find ways to redeem the bonds in case the

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159 See *eg*, E-21, E-370.

160 Conviction GD at [398].

161 E-261.

162 See *eg*, E-154.

Crossover profits were not sufficient and only one-third of the budgeted revenue materialised.[163] As the Prosecution points out, none of the plans involved enforcing the Firna BSA against Firna or even Wahju whom they claim had given a personal guarantee. Serina was also privy to the exchange of emails between Wahju and Eng Han, in which Eng Han assured Wahju that they would take care of the repayment of the bonds (see [275] above), and to the suspicious secret letter that they had furnished to "trick" and "bluff" Wahju's father-in-law.

295 Further, Serina admitted to not having been completely honest with the auditors, including Foong, who was misled into believing that CHC would invest in Firna and that Wahju would *then* use the proceeds of the Firna bonds as his own money to support the Crossover.[164] This is quite different from the true nature of the Firna bonds. She also admitted that Foong was not told about how the interest and principal of the bonds were going to be repaid.[165]

296 In these premises, we do not see any reason to disturb the Judge's finding that Serina did not believe that the Firna bonds were a genuine investment and had acted dishonestly in causing CHC to transfer funds from the BF to Firna for an unauthorised use.

(C) ROUND-TRIPPING TRANSACTIONS

297 The Judge found that Serina was "somewhat more removed" from the round-tripping transactions than the other appellants who were involved, but that she was nevertheless involved in the conspiracy as she played a role in making plans for the redemption of the Xtron bonds in October to December

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163 E-154.

164 Transcript 13 May 2015, p 19: 9–18.

165 Transcript 13 May 2015, pp 19:19–20:1.

2009 (the Conviction GD at [400]–[401]). She was also brought into the exchange of BlackBerry messages (*ie*, BB-89a) where the final round-tripping plan was discussed and subsequently edited a spreadsheet setting out the detailed timelines for the execution of the round-tripping transactions.[166] We see no reason to differ from the Judge on his decision in this respect.

298 On appeal, Serina submits that the Judge erred in finding that she acted dishonestly. She points to BB-89a, where she asked Eng Han whether Tranches 10 and 11 of the SOF would "give CHC returns", as evidence of her genuine preoccupation about whether CHC would enjoy financial returns. She also submits that she did not think that a circular flow of funds would be illegal and objectionable. She points to an email from Christina to Eng Han where Christina made reference to "'legitimate' round[-]tripping" and argues that this gave her the impression that this was not illegal.[167] As for the ARLA, she submits that the Judge had erred in finding that that was not a genuine investment because he had confused what CHC paid the money for with what Xtron meant to use –and did use – the payment for.[168] She submits that she believed the ARLA to be a genuine rental agreement to help CHC purchase a property and that the auditors had no issues with the intended set-off between the amount Xtron owed under the bonds and the advance rental sums payable by CHC to Xtron under the ARLA.

299 We find that Serina's arguments do not bear scrutiny. Once again, in respect of Serina, the BlackBerry messages found in BB-89a are highly incriminating. Serina seeks to argue that her query as to whether Tranches 10

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166 E-34.

167 E-580; Transcript 28 April 2015, pp 25–26.

168 Serina's submisisons at para 176.

and 11 of the SOF would "give CHC returns" demonstrates her genuine concern that CHC would obtain financial gain from the transactions. However, given her knowledge of the entire plan, and specifically the two phases which Eng Han explained just prior to her question, we cannot see how Serina could have believed that any "returns" to CHC would be genuine. Rather, like the Judge (the Conviction GD at [404]), we find that her question was directed to ensuring that the *form* of Tranches 10 and 11 of the SOF would look acceptable, although she knew that the *substance* of Tranches 10 and 11 of the SOF would be objectionable.

300 We also do not accept her submission that Christina's reference to "'legitimate' round[-]tripping" in the email was a reasonable basis for Serina to have the impression that there was nothing wrong with the round-tripping transactions. As we observed at [160] above when discussing the relevance of the case of *Westmoreland*, the problem with the round-tripping transactions in the present case does not lie in the fact that they involved monies travelling in a circle *per se*. The illegality in these transactions lay in the fact that they involved unauthorised uses of either the BF or the GF. To provide further context, we set out the text of the email from Christina:[169]

> Based on oral discussions with IRAS it is likely that they will treat our "legitimate" roundtripping no differently than normal round tripping.

But as seen from the reference to "IRAS", which given the context must refer to the Inland Revenue Authority of Singapore, Christina's statement in the email was targeted at addressing the concern of whether the tax authority would take issue with the round-tripping transactions and *not* the issue of whether the transactions were legal *vis-à-vis* the use of CHC's funds. We cannot see how

[169] E-580.

Serina can argue that she had received assurance of the latter from this email alone. Moreover, the juxtaposition of "legitimate" round-tripping schemes with "normal" round-tripping schemes ought also to have alerted Serina to the possibility that not all round-tripping schemes might be considered legitimate.

301 Finally, we turn to Serina's submission that she believed that the ARLA was a genuine rental agreement. Again, we find this submission entirely unconvincing. Serina edited a detailed schedule which Sharon sent her showing the movement of funds in the round-tripping transactions and a timeline for the transactions. It was noted that at the end of this schedule there was "nothing left for bidding of any building project".[170] It cannot be disputed that Serina knew that Xtron would use the sums that CHC owed it under the ARLA – which was *supposedly* meant to put Xtron in funds to acquire a property on CHC's behalf – to purchase new bonds from Firna so that repayment could be made to CHC in respect of the monies taken under the two tranches of the SOF as well as to redeem the Xtron bonds. Subsequently, when Xtron was under audit for its 2009 accounts, Serina sent Eng Han, Ye Peng and Sharon the following email:[171]

> Dear All,
>
> Xtron is going through its audit for 2009 accounts. The auditor asked about how the $11.455M Firna bonds was [*sic*] funded?
>
> The funds actually came from the advance rentals. Is there any issue to say this way? Cos I cannot see how else we can answer this.
>
> Require your input.
>
> Thanks,
> Serina Wee

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170 E-35.

171 E-32.

302 We have set out Eng Han's reply to this email at [281] above. For present purposes, what this demonstrates is that Serina knew that Xtron's use of the funds from the advance rental received under the ARLA to purchase new Firna bonds was not a matter that was entirely above-board. This is why she required "input" from Eng Han, Ye Peng and Sharon on the appropriate information to provide to the auditors. This email also highlights the fact that the auditors were not informed of the whole series of the round-tripping transactions.

303 In the circumstances, we fully agree with the Judge that Serina had acted dishonestly in relation to all three round-tripping charges and see no reason to disturb his finding in this regard.

(6) Sharon

304 Sharon's position differs from the other appellants in at least two ways. First, she was an employee and was never a board member or part of the leadership in CHC. At the time of the round-tripping transactions, she was the head of CHC's finance department, a position that she took over from Serina in January 2008 after joining CHC's finance department in January 2000. Second, she was not prosecuted for the sham investment charges, and it is not the Prosecution's case that she knew that the Xtron and Firna bonds were not in substance investments (though the Judge observed that the evidence suggested that she had the knowledge that the other appellants had control of the bond proceeds (the Conviction GD at [414])).[172]

305 Sharon submits that it is incumbent on the Prosecution to first show that she knew about the substance of the Xtron and Firna bonds in order for the Prosecution to prove that there was a meeting of minds between her, Eng Han,

172 Prosecution's submissions at para 399.

Ye Peng and Serina to prevent the substance of the Xtron and Firna bonds from being uncovered. She also submits that she had, at all times, acted with CHC's best interests in mind and in the assurance that the plans were only carried out after CHC's legal and accounting advisors as well as the CHC Board had been consulted and had approved the transactions. She portrays herself as an unsophisticated and naïve church employee who relied on Eng Han and Ye Peng, and submits that she has no reason to believe that the round-tripping transactions were improper.

306 In our judgment, the Prosecution is not required to prove that Sharon knew that the Xtron and Firna bonds were not genuine investments for Sharon to be guilty of the round-tripping charges. It suffices that she knew (a) about the conspiracy to create the impression that the Firna bonds had been redeemed; (b) that Tranches 10 and 11 of the SOF were not genuine investments; and (c) that the payment of $15.2m under the ARLA was not a genuine building-related expense. To the extent that Sharon knew that the Xtron and Firna bonds were not genuine investments, this would only have supplied an incriminating motivation on Sharon's part to ensure that the Xtron and Firna bonds were redeemed. However, even accepting that she was not aware of the true nature of the Xtron and Firna bonds, Sharon was present at the 9 April 2009 meeting and was clearly aware of Sim's serious concerns with the bonds. She updated Ye Peng and John Lam after the meeting that Sim was "not convinced about the reasons we gave him about [Xtron]" and that "[Sim] chose to stop asking just now [because] he knows that we will give some more stories which will trigger off more questions from him". [173]

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173 E-68.

307 In line with the above, we also agree with the Judge's conclusions that Sharon was involved in the plans to redeem the bonds and that she had participated in discussing and refining those plans. It also cannot be seriously disputed that Sharon had full knowledge of the transactions by which the Xtron and Firna bonds were redeemed. By virtue of that knowledge, we find that Sharon knew that (a) Tranches 10 and 11 of the SOF were not genuine investments and that (b) the payment of $15.2m under the ARLA was not a genuine building-related expense, and we hence agree with the Judge's observations at [428] of the Conviction GD.

308 Sharon argues that she genuinely believed that the round-tripping plan had been approved by the CHC Board, the auditors and lawyers, and went along on that basis, believing that the plan was legitimate. However, we find her actions inconsistent with this assertion. Although the CHC Board did approve an earlier version of the round-tripping plans, the finalised round-tripping transactions were never approved by the CHC Board or auditors. In fact, as seen from BB-89a, Sharon questioned if Sim would "want to see details" of Tranches 10 and 11 of the SOF. She was only comfortable with proceeding with the transactions after being assured that Sim would *not* query Tranches 10 and 11 of the SOF. To that extent, we do not accept that Sharon had relied on the approval of the auditors, CHC Board, or lawyers, when she agreed to execute the round-tripping transactions knowing that they had not been informed of the latest plans, and, even more egregiously, with the knowledge that they would *not* thereafter be informed of the truth of the transactions.

309 Like the Judge, we also find Sharon's willingness to selectively record events at CHC's meetings highly disturbing (see [433]–[435] of the Conviction GD). In particular, we are deeply troubled by how the 9 July and 12 September 2009 CHC Board meetings were officially recorded. In both instances, the

finalised advance rental figures under the ARLA had been retrospectively inserted into the minutes of the 9 July and 12 September 2009 meetings as having been approved, although the evidence demonstrates that these figures were only finalised at a later stage.[174] Sharon also falsely recorded that the CHC Board approved CHC's investment into Tranches 10 and 11 of the SOF on 12 September 2009, although it is clear from the evidence that at the time of the 12 September 2009 board meeting, the plan was for Pacific Radiance, and not CHC, to invest into the SOF.

310 Sharon was also involved in working "backwards" to determine the interest payable under Tranches 10 and 11 of the SOF "to ensure that nothing is left in the Firna accounts".[175] This is clear evidence of her knowledge that Tranches 10 and 11 of the SOF were not genuine investments, for if they were genuine investments, the interest payable to the bond subscriber would have been determined before the transactions had been entered into. Sim had testified at trial that this would have been a "red flag" to him had he known about this *ex post facto* change,[176] and we find that this is another piece of evidence that plainly indicates Sharon's complicity in the conspiracy. Further, she was also the recipient of Eng Han's email dated 30 December 2009, where Eng Han instructed her to tell John Lam to "steer away" from the topic of the SOF "investments" at the audit meeting that would be held the next day[177] (see [281] above). Her reply was "Got it!". Read in context and in the light of all the evidence, we agree with the Judge that this reflects her collusion in the entire series of round-tripping transactions.

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174 E-70.

175 E-40.

176 Transcript 21 January 2014, p 71:11–19.

177 E-326.

311 In these circumstances, we find no reason to depart from the Judge's finding that Sharon was part of the conspiracy and had acted dishonestly.

(7) Concluding observations

312 We turn lastly to address the appellants' submission that the Judge was wrong to have found that they were dishonest when he had also found that they had "acted in what they considered to be the best interests of CHC" (the Conviction GD at [500]). The appellants argue that these two findings are inconsistent.

313 We do not agree with the appellants. As we have held at [180] above, motive must be separated and analysed in contradistinction to intention. Having considered the parties' submissions and the evidence before us, we accept that the appellants had acted in *what they considered* to be the best interests of CHC. But whilst the appellants may have had the best of motives, what the law is concerned with is the specific *mens rea* required under the charge. In the context of our analysis above, all that is required is for the Prosecution to prove beyond a reasonable doubt that the appellants intended to do an act that would cause wrongful loss to CHC in the knowledge that they were not legally entitled to do that act. As we have demonstrated in our general and specific analysis of the evidence, we are satisfied that each of the appellants possessed the requisite dishonest intention (in the sense that we have summarised at [184] above) for the purposes of the CBT Charges.

314 We should also state that our finding that each of the appellants was dishonest is not premised solely on their preference for discretion and discreetness. The appellants may have had legitimate reasons for discretion and discreetness, but this would not give them *carte blanche* to carry out

transactions on CHC's behalf in any manner they deemed fit. In fact, given their aim of avoiding negative publicity and ensuring that the Crossover was suitably distanced from CHC, one would have expected the appellants to have exercised a higher degree of prudence and circumspection in the affairs relating to the Crossover, and to obtain express legal advice in connection with these affairs so that their actions would be entirely proper and legitimate. Instead, the appellants were content to create the *appearance* of independence and to carry out all manner of transactions on CHC's behalf irrespective of their legality. The totality of the evidence shows that their discreet behaviour was motivated not only by a fear of negative publicity in the aftermath of the Roland Poon incident, but also because they knew that the transactions were not above-board and properly authorised.

Conclusion in respect of the CBT Charges

315 In the light of the foregoing, we affirm the Judge's findings of fact concerning the appellants' participation in the conspiracy and their dishonest *mens rea*. However, as we have held that the offence of CBT as an agent under s 409 of the Penal Code covers only professional agents, we reduce the respective CBT Charges against the appellants from charges of CBT by a person in the way of his business as an agent under s 409 of the Penal Code to charges of CBT *simpliciter* under s 406 of the Penal Code, and convict the appellants on the reduced charges.

The account falsification charges

316 We move on to the next category of charges – the account falsification charges – involving four of the appellants, namely, Eng Han, Serina, Ye Peng and Sharon.

The elements of an offence of account falsification

317 The account falsification charges were brought under s 477A of the Penal Code, which provides as follows:

> **Falsification of accounts**
>
> **477A.** Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud destroys, alters, conceals, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, electronic record, paper, writing, valuable security or account, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.
>
> *Explanation.*—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud or any particular day on which the offence was committed.

318 An account falsification charge under s 477A of the Penal Code can only be brought against a "clerk, officer or servant". In this connection, it is undisputed that Sharon and Ye Peng, who were the finance manager and a salaried partner respectively, were officers or servants of CHC. The four account falsification charges state that Sharon instigated one Dua Poh Teng (Lai Baoting) to make the following false entries in CHC's accounts, and that the other appellants (namely, Eng Han, Ye Peng, and Serina) participated in a conspiracy to do so. The four false entries pertaining to each of the four charges are as follows:

(a) an entry on 2 October 2009 describing a payment of $5.8m made to AMAC as "Investment–Special Opportunity Fund" under the

accounts name "Investment" in CHC's accounts, when the said payment was not an investment;[178]

(b) an entry on 27 October 2009 describing a payment of $5.6m made to AMAC as "Special Opportunity Fund" under the accounts name "Investment" in CHC's accounts, when the said payment was not an investment;[179]

(c) an entry on 31 October 2009 describing a set-off amounting to $21.5m in favour of Xtron as "Redemption of Xtron Bonds" in CHC's accounts, when the said set-off of $21.5m was not a redemption of bonds;[180] and

(d) an entry on 6 November 2009 describing a payment of $15,238,936.31 made to Xtron as "Advance Rental with Xtron" under the accounts name "Prepayments" in CHC's accounts, when the said payment was not advance rental.[181]

319 In order to prove the elements of the account falsification charges, the Prosecution must prove that:

(a) the entries were made in CHC's accounts and were false;

(b) the appellants abetted each other by engaging in a conspiracy to make the false entries in CHC's accounts; and

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178 A-143.

179 A-156

180 A-157

181 A-162.

(c) in engaging in the conspiracy, the appellants were aware that the entries were false and possessed an intention to defraud.

320 There is no dispute that the four allegedly false entries were made in CHC's books on Sharon's instructions. On appeal, Eng Han, Ye Peng, Sharon and Serina argue that they should be acquitted on the account falsification charges. Broadly, they submit that the entries were not false because they reflected the actual transactions that took place, whether or not the transactions were found to be shams. In this connection, they submit that even a dishonest transaction can be faithfully and accurately recorded in CHC's accounts. The appellants also argue that there was no intention of defrauding the auditors and the auditors were not misled or defrauded by the entries. Each of these points will be examined in turn.

Whether the respective entries were false

321 The appellants' submission that the accounting entries were not false would succeed if the question as to whether an accounting entry is false is assessed based on the *form* of the transaction. However, in our judgment, the issue of whether an accounting entry is false under s 477A of the Penal Code ought to be analysed on the basis of the *substance* of the underlying transaction.

322 Eng Han argues that the question of what the correct accounting entry should be is a question of fact and that in that regard, evidence of normal accounting practice would be relevant.[182] This submission, which we agree with, ironically works against him. There are various sources of evidence that demonstrate that normal accounting practice looks to the substance and not the

[182] Eng Han's submissions at para 281.

form of the transactions. For example, in the Financial Reporting Standard 24 (2006) (Related Party Disclosures) issued by the Council on Corporate Disclosure and Governance (now dissolved and taken over by the Accounting Standards Council since 1 November 2007 which has since issued a revised version in 2010),[183] it is stated at para 10 that "[i]n considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form". This is also consistent with the evidence of the auditors at trial. In his examination-in-chief, Sim testified that the "starting point is that the financial statement should … have been prepared to show a true and fair view, reflecting all transaction, according to the *substance* of the transaction" [emphasis added].[184] On this basis, we hold that the question as to whether the respective entries in CHC's accounts were false must therefore be analysed on the basis of the *substance* of the transaction.

(1) Tranches 10 and 11 of the SOF and the payment of advance rental of $15.2m under the ARLA

323 In our judgment, the accounting entries which record CHC making an "Investment" in Tranches 10 and 11 of the SOF, as well as the payment of $15.2m recorded as "Advance Rental with Xtron", are clearly false accounting entries. This is because the payments of $5.8m and $5.6m from CHC's accounts on 2 and 15 October 2009 were not, in truth and in substance, "Investments" into a "Special Opportunity Fund" (*ie*, the SOF), and the payment of $15.2m on 6 November 2009 was not, in truth and in substance, a payment for "Advance Rental".

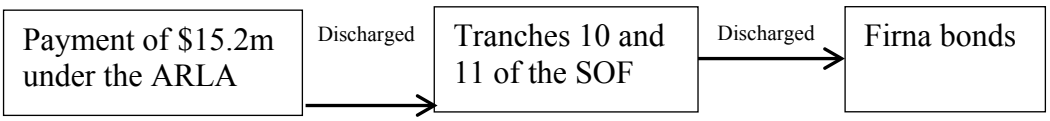
324 The agreement by CHC to participate in AMAC's SOF stated:[185]

183 TFW-6.

184 Transcript 20 January 2014, p 112.

> AMAC Capital Partners (Pte) Ltd invites City Harvest Church (CHC) to participate in the AMAC Special Opportunities Fund.
>
> The fund will guarantee the principal and a fixed return to the client. This fund has the objective of achieving above average returns for clients by capitalising on opportunities arising from special situations, such as anomalies in interest rates and bond yields, corporate plays and development, and unusually low valuations in asset prices. The fund will only divest into investments which are of a low risk nature, and have little exposure to market price risks.

However, as we have shown above, it is clear from the factual matrix that Tranches 10 and 11 of the SOF were not a genuine investment into any such fund. Instead, Tranches 10 and 11 of the SOF were no more than a pretext for funds to be transferred to AMAC and then routed to Firna for redemption of the Firna bonds. Subsequently, AMAC then repaid this supposed "Investment" after CHC put it in funds through its payment of $15.2m on 6 November 2009 to Xtron under the ARLA. Thus, the payment of $15.2m under the ARLA was, in substance, ultimately used to put Firna in funds to give the appearance that the Firna bonds had been redeemed through the interposition of Tranches 10 and 11 of the SOF. A pictorial representation of the round-tripping transactions is as follows:



325 The transfers of CHC's funds to AMAC involving Tranches 10 and 11 of the SOF were recorded as an "Investment", and the payment of $15.2m to Xtron was recorded as "Advance Rental". In our view, having regard to the above, these were clearly false descriptions. In respect of Tranches 10 and 11,

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185 A-139.

the description "Investment" conveyed the false impression that AMAC would generate returns for CHC *independent* of CHC. Nor was the payment of $15.2m under the ARLA a genuine "building-related expense" because the amount of advance rental and the duration for which advance rental was to be paid under the ARLA were arbitrary and determined without reference to market value or commercial justification (see [165]–[168] above).

326 Counsel for Ye Peng argues that the auditors had made "critical concessions" in their favour. He points to examples in the notes of evidence where Sim agreed that the payments to AMAC were correctly recorded as "Investment".[186] The short answer to this submission is that irrespective of what Sim had stated under cross-examination, the question as to whether an entry was true or false is a *legal* one for the court's judgment. Furthermore, if one looks at Sim's answers in cross-examination more closely, his agreement that the payments could be recorded as an "Investment" was qualified as follows:[187]

> It will only be correct if SOF is really a financial investment. But earlier on you were trying to make some statement that this whole round tripping, as you call it, [was] just to allow Firna to redeem the bond. If that's the intention, then I wouldn't call it an investment. It's some other motive. An investment must be something which you do for the purpose of getting a return. … with that qualification, I will agree that it's the right entry.

Thus, the question remains as to whether Tranches 10 and 11 can be validly termed and described as "Investment[s]", and we hold that they cannot.

327 The Judge held that a truthful entry in relation to Tranches 10 and 11 of the SOF would have reflected the fact that the whole purpose of the payments was to enable Firna to redeem the bonds that CHC had purchased, and a truthful

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186 Ye Peng's submissions at para 412.

187 Transcript 23 January 2014, pp 123–124.

entry in relation to the ARLA payment would have reflected the fact that the whole purpose of that payment was to enable AMAC to return CHC the money that had been disbursed intro Tranches 10 and 11 of the SOF (the Conviction GD at [447]). We agree with the Judge's analysis. In our view, the true entry in CHC's accounts should have reflected the *substance* of the transactions and the *true purpose* of the various payments and transfers, being the use of CHC's money to effect the ultimate redemption of the Firna bonds. The relevant accounting entries gave a false impression or description of the purpose of the fund transfers, and were accordingly false entries.

(2) The set-off of the advance rental with the redemption of the Xtron bonds

328 In relation to the entry concerning the set-off of advance rental with the redemption of the Xtron bonds, the Judge stated that whilst he was not able to identify what the "true" entry was, he was nevertheless satisfied that the entry was false. This was because a true redemption of the Xtron bonds would have involved Xtron using its own money to redeem the bonds, and what had occurred was the creation of a false appearance that the Xtron bonds had been redeemed (the Conviction GD at [452]).

329 The appellants contend that the Judge had erred and that the transaction was accurately recorded. The Prosecution, in turn, submits that the entry was false and relies on the Judge's reasoning. The Prosecution goes further and submits that because the Judge held at [178] of the Conviction GD that the ARLA was nothing more than an excuse for CHC to transfer money to Xtron, this meant that the ARLA was not a genuine agreement laying down genuine legal obligations, and thus there was nothing against which the Xtron bonds could have been set-off. Instead, for all intents and purposes, the entry should have stated that the Xtron bonds were being *written off*.

330 In our judgment, the entry recording the set-off of advance rental with the redemption of the Xtron bonds totalling $21.5m is undoubtedly false. A set-off connotes the balancing of mutual debts, which would require that the mutual debts are matched value for value. In the present case, whilst a conversion of Xtron's liability under the bonds was converted into a liability to provide premises under the ARLA, Xtron's liability to CHC could only be set-off fully if Xtron's liability under the ARLA was worth as much as (or at least of comparable value with) Xtron's liability to CHC under the bonds. As we have held that the value of the advance rental under the ARLA was arbitrary, it follows that it cannot be said that Xtron's liability under the ARLA was equivalent to or exceeded Xtron's liability to CHC under the bonds. In this connection, the fact that CHC had agreed to pay Xtron a sum of approximately $53m under the ARLA does not mean that Xtron's obligations under the ARLA were worth that amount to CHC because the appellants who devised the ARLA scheme were not entirely frank with the CHC Board. In the circumstances, we find it impossible to conclude, on the evidence before the court, that Xtron's obligations under the ARLA were of an equivalent value to CHC as the sum CHC had disbursed to Xtron under the Xtron bonds.

331 Instead, we find that the sums payable by CHC to Xtron under the ARLA were falsely inflated so as to allow CHC to use its own funds to redeem the Xtron bonds on Xtron's behalf. This, in our view, amounted *in substance* to CHC *writing off* the Xtron bonds from its books, and accordingly, the entry which recorded that the Xtron bonds were redeemed was false. We therefore uphold the Judge's finding that this particular entry was false.

The analysis of each appellant's role and intention in the respective transactions

332 We now turn to consider whether each appellant participated in the making of the false entries and possessed an intention to defraud in doing so. In this regard, an "intent to defraud" under s 477A of the Penal Code "is simply an intent to defraud directed at an object, which may be proven by adducing *evidence that supports a finding or inference of fact* of an intention to either defraud persons generally or a named individual or entity" [emphasis in original] (*Li Weiming* at [85]).

333 In our judgment, each of the four appellants had abetted the account falsification offences by engaging in a conspiracy to use the SOF and the ARLA to create the false impression that the Xtron and Firna bonds had true value and had been redeemed using funds acquired from genuine commercial transactions. As it was necessary for accounting entries to be recorded in CHC's accounts in order to achieve this, we find that the appellants thus abetted the account falsification offences by engaging in a conspiracy to make the various false accounting entries for which they are charged with even if they had not been directly involved in the acts of making the entry into the accounts.

334 In respect of the use of Tranches 10 and 11 of the SOF to redeem the Firna bonds, and the use of the payment under the ARLA to discharge AMAC's liability under Tranches 10 and 11 of the SOF, we have made our findings on the respective appellant's role and state of mind when we dealt with the round-tripping charges. To summarise, we find that Eng Han came up with the plan in discussion with Serina, Ye Peng and Sharon, and that Sharon gave the instruction for the round-tripping transactions to be recorded in CHC's books. We also found above that each of the respective appellants knew that (a) Tranches 10 and 11 of the SOF were not true investments into any so-called

"fund" but would be used to redeem the Firna bonds, and (b) the payment under the ARLA would be used to repay CHC in respect of Tranches 10 and 11 of the SOF. In our judgment, the appellants' participation in the conspiracy with the aforementioned knowledge demonstrates that the appellants had engaged in a conspiracy to create false accounting entries in the full knowledge that those entries were false. We, like the Judge, find that this is sufficient to constitute intent to defraud on each of the four appellants' part.

335 We turn next to the use of the ARLA to effect a "redemption" of the Xtron bonds. We find that the four appellants participated in a conspiracy to create a false impression that the Xtron bonds were redeemed using funds acquired by Xtron from genuine commercial transactions. In an email dated 2 May 2009 from Serina to Sharon, Serina detailed a plan to use "advance rental for [The] Riverwalk" to redeem a portion of the Xtron bonds, stating that this was "what [Ye Peng] asked for".[188] Subsequently, Serina, Sharon and Ye Peng worked together to formulate various other plans to redeem the Xtron bonds.[189] It is clear that the appellants' chief purpose was to redeem the Xtron bonds, and the various plans formulated were reverse-engineered to achieve that purpose. In an email chain on 25 September 2009 where Serina, Eng Han and Sharon discussed the amount required to be paid under the ARLA, Serina stated that the amount required was what was needed to "clear the bonds".[190] This, as well as other pieces of evidence which we have analysed above (see, for example, [165] and [301] above), demonstrated the appellants' understanding that the amounts under the ARLA were not arrived at after a proper calculation of

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188 E-59.

189 BB-62, E-502 and E-608.

190 E-69.

genuine advance rental expenses, but solely on the basis of the amounts the appellants needed to "clear" the Xtron and Firna bonds off CHC's books.

336 The finalised plan crystallised sometime at the end of September 2009 when Eng Han met with Sharon and Serina to discuss the series of transactions that would be carried out so as to redeem the Xtron and Firna bonds.[191] Following this, the detailed finalised plan was set out in a series of BlackBerry messages in BB-89a which we have already referred to above. In an email on 3 October 2009 from Serina to Sharon and Eng Han, and in a further email in reply from Sharon to Serina, Eng Han and Ye Peng, a detailed timeline for the various transactions was set out, including the plan to use the "advance rental" sums under the ARLA for the "redemption" of Xtron bonds.[192] After the Xtron and Firna bonds and other Crossover expenses were accounted for, there was only a sum of $6.5m left for the rental of Expo, and "nothing left for bidding of any building project".[193]

337 In our judgment, the evidence proves beyond reasonable doubt that Eng Han, Ye Peng, Sharon and Serina were involved and participated in the conspiracy to use the advance rental under the ARLA, which was not a genuine commercial transaction, to create the false impression that the Xtron bonds had been redeemed. The above evidence also demonstrates that these four appellants were aware that the sums payable by CHC to Xtron under the ARLA were falsely inflated without regard to commercial reality so that they could use CHC's funds to redeem the Xtron bonds – effectively writing off Xtron's liability to CHC. In our view, this is sufficient to prove beyond reasonable doubt

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191 ASOF at para 11.1; and A-134.

192 E-35 and E-278.

193 E-35.

that these four appellants had an intention to defraud in connection with the entry recording a redemption of the Xtron bonds.

338 The appellants argue that they had no intention to defraud as the auditors knew at the material time that CHC would be paying Xtron advance rental and Xtron would be redeeming the bonds by way of set-off. Sim stated under cross-examination that he knew that $21.5m of advance rental was not being paid in cash, but was being set off against the redemption of the Xtron bonds.[194] However, the mere fact that Sim was so informed does not exonerate the appellants if it is clear that Sim did not have a full understanding of the transactions. In our view, the significant questions are whether Sim knew that the amounts under the ARLA did not accord with commercial reality but were reverse-engineered, and whether he knew that the real purpose of the ARLA was, in substance, to allow the Xtron and Firna bonds to be taken off the books of CHC rather than for Xtron to acquire property on CHC's behalf.

339 We find that the evidence demonstrates that Sim did not, at the material time, have a full understanding of the ARLA. Significantly, it is clear that Sim did not even know what the *real purpose* of the ARLA was. He testified as follows:[195]

> Q: … Mr Sim, at the time of your audit, were you told the purpose of the ARLA was to facilitate the redemption of the [Xtron] bonds?
>
> A: No.
>
> Q: For the record, what were you actually told the ARLA's purpose was?

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194 Transcript 23 January 2014, p 86.

195 Transcript 24 January 2014, pp 13–14.

> A: I think I stated earlier they wanted Xtron to help them to look for a place to -- to provide a place for their regular worship and also to provide additional funds for Xtron to look for a property for the church.
>
> Q: If it were true that the purpose of the ARLA was to facilitate the redemption of the bond, would that have made a difference to your treatment of the ARLA in your audit of CHC's financial year 2009?
>
> A: If the whole purpose is just to facilitate the redemption of bond, then it can be quite complex, the issue. One is, is this ARLA agreement what it is? Secondly, the fact that the bond is redeemed, of course, we move the problem of valuing the bond but then you go back -- you have to one step back and ask yourself whether Xtron can really repay the bond in the first place. So, if the conclusion is no, then one would actually ask more question[s] on the whole purpose of the ARLA agreement. I mean, the intention will have to be evaluated and then that have to be taken into account in term[s] of our audit.

340 It is therefore apparent that Sim was not privy to the full facts concerning the ARLA. It is his evidence that he would have inquired further if he knew that the whole purpose of the ARLA was to facilitate the bond redemption. Further, as the Judge found and as we have held at [190]–[193] above, the auditors did not know that Xtron was not an independent entity and was controlled entirely by the appellants. Indeed, at the meeting of 31 December 2009 between Sim, John Lam and Sharon, Sim made repeated inquiries as to whether Xtron and CHC were related parties.[196] This discussion with Sim suggests that he did not know whether Xtron and CHC were related parties. The consistent impression given to him was that Xtron and CHC should not be considered related parties. The appellants thus cannot rely on their partial disclosures to the auditors to assert that they had no intention to defraud when they had hidden the true

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196 E-287.

relationship between Xtron and CHC, and the true nature of the payments under the ARLA from the auditors.

Conclusion in respect of the account falsification charges

341 In the light of the foregoing, we affirm the Judge's conviction of Ye Peng, Sharon, Eng Han and Serina on the account falsification charges. Accordingly, we dismiss the appeals of these four appellants against their convictions on these charges.

Conclusion on the appeals against conviction

342 For the reasons above, the respective appeals against conviction are dismissed, save for the reduction of the CBT Charges from the aggravated charge of CBT under s 409 of the Penal Code to a charge of CBT *simpliciter* under s 406 of the Penal Code.

Part II: The appeals against sentence

343 We come now to the appeals against sentence. The appellants appeal on the basis that the sentences imposed on them by the Judge are manifestly excessive. They highlight, in particular, that they neither received personal gain nor caused permanent loss to CHC. The Prosecution has cross-appealed, arguing that the sentences imposed by the Judge are manifestly inadequate and that the Judge failed to give due weight to the fact that massive amounts of charity funds were misappropriated through numerous complex and sophisticated transactions which were designed to obscure the true nature of the misappropriations. The Prosecution also argues that the Judge placed too much emphasis on the mitigating factors than was warranted in the light of all the circumstances of the case.

The decision below on sentence

General deterrence is the key sentencing principle

344 While the Judge held that general deterrence should underpin the court's sentencing approach, he also found that:

(a) deterrence does not necessarily entail the imposition of a disproportionately crushing sentence, and that given the present factual context, the mere prospect of a criminal conviction already carries some deterrent value (the Sentencing GD at [34]); and

(b) there is less force for general deterrence in cases like the present where there is no direct personal gain or intention of such gain. This, he explained, is because a deterrent sentence presumes that an accused is capable of rational reasoning and in a case without personal gain, the offender is not incentivised or enticed by the prospect of gain so it is not entirely clear how a heavy-handed sentence in the name of deterrence might influence his reasoning (the Sentencing GD at [35]).

345 It was (and is) not disputed that the principle of *specific* deterrence was not relevant in this case as there was virtually negligible risk of any of the appellants reoffending (the Sentencing GD at [33]).

Aggravating factors

346 The Judge accepted the Prosecution's position that the following aggravating features were present:

(a) misuse of a huge sum of charity funds;

(b) betrayal of a high degree of trust reposed in the appellants as CHC's leaders;

(c) manipulation and exploitation of CHC's culture of secrecy and deference to formal authority;

(d) deliberate deception and circumvention of governance through covert measures and cover stories; and

(e) planning and premeditation to avoid detection and to frustrate investigative efforts.

347 The Judge held that some of these factors were weightier than others. The primary aggravating factor, in his judgment, was that the offences involved the misuse of massive amounts of donations from members that were received and held by CHC. He found that the breach of trust in the present case was "all the more egregious" given that some of the appellants were trusted leaders and senior members of CHC, and were duty-bound to act with the utmost integrity and accountability (the Sentencing GD at [8]). He also placed emphasis on the culture of absolute and unquestioning trust in CHC that Kong Hee (and some of the rest, such as Ye Peng) had built and subsequently abused. While he had characterised the appellants – save for Kong Hee – as being both "trusted and trusting", he was quick to emphasise that they were not just blind followers but were the leaders and part of the most trusted inner circle of CHC, who had chosen to support the endeavour with "enthusiasm, resourcefulness and not a small measure of guile" (the Sentencing GD at [12]).

348 The Judge observed that there was extensive evidence of manipulation, deception and concealment in order to carry out the planned and premeditated wrongful schemes to systematically misuse CHC's funds. He noted too that it

took a long time to expose the dishonest schemes because of the appellants' active concealment of their tracks, their fabrication of misleading cover stories and the careful cultivation of a climate of unquestioning trust within CHC (the Sentencing GD at [16]).

Mitigating factors

349 As for mitigating factors, the Judge accepted that the following should be given weight, and that consequently the case is "some distance away" from the precedents cited by the Prosecution which mainly involved accused persons with profiteering motives:

(a) the appellants enjoyed no personal gain from the offences;

(b) no permanent loss was caused to CHC;

(c) the funds were used for the Crossover, which was a "church purpose";

(d) the monies were subsequently returned; and

(e) the appellants had done much good in their role as church leaders and workers.

The Judge noted that while the return of the monies ought to count in the appellants' favour, the weight that ought to be given to this must be discounted by the fact that their motivation for restitution cannot be regarded as being purely *bona fide* as it was to avoid detection (the Sentencing GD at [27]).

350 The Judge also took cognisance of the fact that the Crossover had the support of the majority of the members of CHC, even though he equally noted that the extent of the support must be understood in the context of what was *not*

made known to the members. In this regard, he also noted that the BF, where most of the funds had been misappropriated from, was an accumulation of donations that were specifically contributed for the purpose of purchasing or securing a building for the use of CHC's members. There was no evidence that the donors would have all agreed to the diversion of the funds to the Crossover, though the Judge accepted that a number of CHC's members did continue to express their support for the Crossover even after the full facts had been brought to light (the Sentencing GD at [23]).

351 In the Judge's view, the case was therefore one which was "unique". Compared with the typical precedents where "avarice, self-interest and personal enrichment often feature heavily" (the Sentencing GD at [26]), the Judge emphasised that this case concerned a situation where there was lack of personal gain and motive of self-enrichment, no permanent loss caused to the victim, and the return of the monies in full to the victim.

Decision in respect of the sham investment charges

352 The Judge declined to place much weight on the sentencing precedents provided by the Prosecution given the unique nature of this case. In his judgment, it was unhelpful to anchor the inquiry by looking at the very high sentences that had been imposed in certain cases where a large amount of money had been misappropriated, and then working downwards from them and apply a "discount" to factor in the lack of personal gain. This approach, in his view, placed too much emphasis on the amount of money misappropriated and skewed the sentencing enquiry in that direction (the Sentencing GD at [46]).

353 The Judge found the district court case of *Joachim Kang Hock Chai v Public Prosecutor* (DAC 15621 of 2003, unreported) ("*Joachim Kang*") to be a

"relevant reference point" though "certainly not a benchmark" (the Sentencing GD at [49]). The offender there was a priest who had misappropriated $5.1m worth of church monies entirely for personal gain. Nineteen charges of the offence of CBT *simpliciter* under s 406 of the 1985 revised edition of Penal Code were brought against him. Six charges were proceeded with and 13 charges taken into consideration for the purpose of sentencing. The offender was sentenced to a global imprisonment term of seven years and six months upon his eventual plea of guilt after 13 days of trial.

354 Extrapolating from *Joachim Kang* whilst bearing in mind the unique nature of the present case, the Judge held that:

(a) The sentences that should be imposed on Kong Hee for the three sham investment charges should be five, three and five years' imprisonment respectively. The second and third charges were to run consecutively, making the total sentence eight years' imprisonment. In this regard, the Judge found Kong Hee, who was the overall leader and the driver of the efforts to use the BF to fund the Crossover, the most culpable of the appellants (the Sentencing GD at [49]).

(b) As for Ye Peng, Eng Han and Serina, the sentences were lowered slightly because they were ultimately following the vision and direction set by Kong Hee, their spiritual leader. Their sentences were four, two and four years' imprisonment for the three sham investment charges respectively (the Sentencing GD at [50]). Ye Peng, Eng Han and Serina also faced the round-tripping and account falsification charges, and the sentences that were ordered by the Judge to run consecutively are set out at [360] below.

(c) Finally, the Judge found John Lam the least culpable as he was much less involved in the conspiracy as compared to the other appellants. He thus sentenced John Lam to two, one and two years' imprisonment for the charges. The Judge ordered the sentences for the second and third charges to run consecutively, making his total sentence three years' imprisonment (the Sentencing GD at [51]).

Decision in respect of the round-tripping charges and account falsification charges

355 The Judge considered the latter two categories of charges together as he regarded them as being part of the same overall criminality. In his judgment, these charges involved a significantly lower degree of culpability than the sham investment charges because the net effect of the transactions was that certain debts would be substituted by another obligation, and there was thus no attempt to extinguish any debts owed to CHC. However, the Judge noted that the round-tripping charge that involved the payment of $15.2m under the ARLA ought to be viewed more seriously because it comprised of a payment of some $3.2m purportedly as GST, which would have represented *actual* loss to CHC had the ARLA not been rescinded and the monies, including the GST, subsequently been returned (the Sentencing GD at [52]–[53]).

356 In terms of culpability, he found Eng Han, who had devised and structured the round-tripping transactions, to be the most culpable. He considered Ye Peng and Sharon to be of an equal level of culpability. Though Sharon was not a leader in CHC, she was more involved in the transactions. The reverse applied for Ye Peng; he was in a position of greater leadership and responsibility though he was less involved in these transactions. Finally, he found Serina to be least culpable because her involvement in the round-tripping

transactions was arguably as minimal as Ye Peng, but she did not stand in the same leadership role as him (the Sentencing GD at [54]).

357 Based on the above, the Judge imposed the following sentences:

(a) In relation to Eng Han:

(i) 15 months' imprisonment for each of the two round-tripping charges concerning the misappropriation of CHC's funds in relation to Tranches 10 and 11 of the SOF;

(ii) two years' imprisonment for the round-tripping charge concerning the misappropriation of CHC's funds pursuant to payment made under the ARLA; and

(iii) three months' imprisonment for each of the four account falsification charges.

(b) In relation to Sharon and Ye Peng:

(i) 12 months' imprisonment for each of the two round-tripping charges concerning the misappropriation of CHC's funds in relation to Tranches 10 and 11 of the SOF;

(ii) 18 months' imprisonment for the round-tripping charge concerning the misappropriation of CHC's funds pursuant to payment made under the ARLA; and

(iii) three months' imprisonment for each of the four account falsification charges.

(c) In relation to Serina:

(i) nine months' imprisonment for each of the two round-tripping charges concerning the misappropriation of CHC's funds in relation to Tranches 10 and 11 of the SOF;

(ii) one year's imprisonment for the round-tripping charge concerning the misappropriation of CHC's funds pursuant to payment made under the ARLA; and

(iii) a slightly lower sentence of two (as opposed to three) months' imprisonment for each of the four account falsification charges.

358 Notably, in coming to his decision in this regard, the Judge did not place much weight on precedents. In fact, he did not refer to any precedents, save as to juxtapose the sentences imposed for the round-tripping charges with those imposed for the sham investment charges.

Total sentence

359 For Ye Peng, Serina, and Eng Han who each faced a total of ten charges, the Prosecution had submitted (and submits) that at least three charges ought to run consecutively to reflect their enhanced culpability in having participated in two distinct sets of conspiracies. The Judge was not persuaded, and was instead of the view that the key question was whether the totality of the sentence fairly and accurately reflected the overall culpability of each offender. He held that the notion of having participated in two criminal enterprises would be appropriately reflected by running the longest sentence imposed for the sham investment charges consecutively with the longest sentence imposed for the round-tripping charges (the Sentencing GD at [59]–[60]).

360 With that, the total sentence received by each of the appellants was as follows:

(a) Kong Hee: eight years' imprisonment (the sentences for the second and third sham investment charges of three and five years' imprisonment respectively running consecutively);

(b) John Lam: three years' imprisonment (the sentences for the second and third sham investment charges of one and two years' imprisonment respectively running consecutively);

(c) Eng Han: six years' imprisonment (the sentences for the third sham investment charge relating to the Firna bonds and the round-tripping charge relating to the ARLA of four and two years' imprisonment respectively running consecutively);

(d) Ye Peng: five years and six months' imprisonment (the sentences for the third sham investment charge relating to the Firna bonds and the round-tripping charge relating to the ARLA of four years and 18 months' imprisonment respectively running consecutively);

(e) Serina: five years' imprisonment (the sentences for the third sham investment charge relating to the Firna bonds and the round-tripping charge relating to the ARLA of four and one years' imprisonment respectively running consecutively); and

(f) Sharon: 21 months' imprisonment (the sentences for the round-tripping charge relating to the ARLA and the account falsification charge concerning Tranche 10 of the SOF of 18 months and three months' imprisonment respectively running consecutively).

361 Having summarised the Judge's decision on sentence, we turn to consider the appeals on sentence, starting with the sentences in respect of the CBT Charges.

The CBT Charges

The reduction in charge from s 409 to s 406 of the Penal Code

362 We begin the analysis of the appropriate sentences to be imposed for the CBT Charges by first reiterating that for the reasons set out at [88]–[112] above, we have reduced the charges from the aggravated charge of CBT by an agent under s 409 of the Penal Code to a charge of CBT *simpliciter* under s 406 of the Penal Code. While we have reduced the CBT Charges from s 409 to s 405 of the Penal Code, we will continue to refer to them as the "CBT Charges", "the sham investment charges" or "the round-tripping charges" for ease of reference.

363 This reduction in charge has a significant impact on the sentences that may be meted out on the appellants because the maximum punishments of the two provisions are markedly different. The maximum determinate punishment (leaving aside the maximum punishment of life imprisonment) under s 409 of the 1985 revised edition of the Penal Code was ten years' imprisonment, and has become 20 years' imprisonment since the 2008 revised edition came into force on 1 February 2008. In contrast, the maximum punishment under s 406 for the offence of CBT *simpliciter* was three years' imprisonment under the 1985 revised edition and is now seven years' imprisonment under the 2008 revised edition. As highlighted at [14] above, the first sham investment charge falls under the 1985 revised edition while the rest of the CBT Charges fall under the 2008 revised edition.

364 Accordingly, we have approached the sentences for the CBT Charges afresh, though in doing so, we will take into account the Judge's findings and the parties' submissions on the aggravating and mitigating factors as well as the relative culpability of the respective appellants to the extent that they continue to be applicable or relevant.

General sentencing considerations

365 The Prosecution submits that save for the sentences in respect of the round-tripping charges relating to the misappropriation of CHC's funds through Tranches 10 and 11 of the SOF which it is not appealing against, the sentences for the CBT Charges are manifestly inadequate. In particular, the Prosecution submits that the Judge erred in (a) failing to give due weight to the sentencing precedents and placing too little emphasis on the quantum of monies that was involved; (b) taking reference solely from the decision in *Joachim Kang*; and (c) not accounting sufficiently for the aggravating factors which included (i) the misappropriation of a large amount of charity funds; (ii) the cultivation and abuse of the trust and faith placed in the appellants by CHC's members; and (iii) the extensive planning and premeditation and subsequent cover up of the misappropriation to avoid detection.

366 On the flipside, the appellants argue that the present case is a unique one without a directly analogous precedent, though they seek to use the case of *Seaward III Frederick Oliver v Public Prosecutor* [1994] 3 SLR(R) 89 ("*Seaward*") – for which the sentence of a day's imprisonment and a fine of $10,000 had been meted out and upheld on appeal – to submit that a non-custodial sentence or a nominal imprisonment term should be imposed for their offences. They point out that they did not commit the offences for personal gain, and that CHC did not end up suffering any financial loss as the bonds were fully

redeemed with interest. They argue that, moreover, although there had been a "wrong use" of CHC's funds, the "wrong use" of the funds was ultimately to advance the Crossover, which, as the Judge recognised at [124] of the Conviction GD, was "an integral aspect of CHC's evangelistic efforts" and "a core mission of the church". The Judge's observation at [500] of the Conviction GD that the appellants "believed that they had acted in what they considered to be the best interests of CHC" has also been repeatedly referred to by the appellants to emphasise the exceptional considerations that are present in this case.

367 We accept the general proposition that in respect of property offences, including that of CBT, the starting consideration ought to be the value of the property misappropriated. This principle has been reiterated in many cases. In *Wong Kai Chuen Philip v Public Prosecutor* [1990] 2 SLR(R) 361 ("*Philip Wong*"), Chan Sek Keong J (as he then was) observed (at [18]) that in an offence like CBT, "it [was] a matter of common sense that, all other things being equal, the larger the amount dishonestly misappropriated the greater the culpability of the offender and the more severe the sentence of the court". More recently, in the case of *Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756, Sundaresh Menon CJ stated in a similar vein that the "primary yardstick" involved in sentencing for an offence of cheating under s 417 of the Penal Code would often be the "value of the property involved" (at [48]).

368 While the value of the property misappropriated ought ordinarily to be the starting point for the analysis of the appropriate sentence, it also bears emphasis that the court's discretion in sentencing is never restricted to the application of a mathematical formula based on the amount in question (see, for example, the observations of Yong CJ in *Amir Hamzah bin Berang Kuty v*

Public Prosecutor [2003] 1 SLR(R) 617 at [60]). As Lee Seiu Kin J observed in *Tan Cheng Yew* at [184], it is common sense that sentences for CBT offences do *not* bear a relationship of linear proportionality with the sums involved. The appropriate sentence to be imposed must be arrived at after having regard not just to the amounts in question, but also to the totality of the circumstances, particularly the specific facts of the case.

369 In this connection, we find the following non-exhaustive factors set out by the English Court of Appeal in *R v John Barrick* (1985) 81 Cr App R 78 at 81–82 relevant. While these factors were set out in the context of the offences of theft and fraud, we find them to be also relevant in the context of the offence of CBT. These factors were also cited in *Philip Wong* at [25]. They include (a) the quality and degree of trust reposed in the offender, which would encompass a consideration of his rank; (b) the period over which the act was perpetrated; (c) the use to which the money or property that was dishonestly taken was put; (d) the effect upon the victim; and (e) the impact of the offences on the public and public confidence.

370 In our judgment, this case is *sui generis* and without direct precedent. Although the sums involved are indeed substantial, we find that there are a number of other mitigating factors to which due consideration must be given. In particular, this was a situation which, as accepted by the Prosecution, involved *no personal gain* on the appellants' part. In fact, as the Judge found at [500] of the Conviction GD, and as we accepted at [313] above, the appellants acted in what they considered to be the best interests of CHC. In other words, they believed that their acts, especially where the sham investment charges are concerned, would *ultimately* have advanced the interests of CHC by allowing them to evangelise through the Crossover. In this regard, we also accept that the Crossover was generally endorsed by the body of CHC. Although it is clear that

not 100% of CHC was in support of the Crossover, and that in some instances, the support of the church was obtained without full disclosure of the facts (for example, the members were falsely led to believe after the Roland Poon incident that CHC had never funded the Crossover directly), it is also equally clear and telling that a substantial proportion of CHC's membership continued to support the mission of the Crossover even *after* the full facts surrounding the CBT Charges were brought to light (see also the Sentencing GD at [23]).

371 At this point, we would like to make a clarification in relation to the use of the term "charity funds". The Prosecution refers to the funds that were misappropriated as "charity funds", and submits that an egregious aggravating factor in this case is that the appellants had misappropriated a very substantial amount of "charity funds". The Prosecution's characterisation of the funds as "charity funds" is presumably on the basis that these were funds that belonged to CHC, which is a registered charity. In our view, there is a need to draw a distinction between funds held by a charity *per se* and funds held by a charity that is *also* an Institution of Public Character ("IPC"), which is an organisation approved by the Commissioner of Charities to receive tax-deductible donations. The funds held by CHC belong to the former and not the latter category.

372 CHC, as well as most churches, are charities as defined under the Charities Act (Cap 37, 2007 Rev Ed) because under general law, the advancement of religion is a charitable purpose. To that extent, the funds within CHC's control can be termed as "charitable funds" or "charity funds". But such funds of a religious body are not of the same genre as funds of IPCs such as the National Kidney Foundation, the Society for the Aged Sick, and the Singapore Association of the Visually Handicapped, whose objects are for the promotion of welfare for the benefit of all Singaporeans and not confined to sectional interests of groups based on race, belief or religion. As mentioned, persons who

donate to charities conferred the status of IPCs can claim tax relief (presently, 250% of the donations), but persons who donate to charities like CHC cannot. Unlike the funds that are held by IPCs whose objects are to serve the needs of the community in Singapore as a whole, the funds in the possession of a body like CHC are, in general, for its own use and for the benefits of its members. Donations to entities like CHC are invariably made by its members for the benefit of the church, and do not enjoy any tax deduction. Thus while the funds of IPCs and bodies like CHC can both be regarded as "charity funds", their characters are quite distinct.

373 On the issue of the lack of personal gain, we note that Kong Hee objects to the Judge's allusion at [21] of the Sentencing GD that he had indirectly benefited from the sham investment offences as the misused funds had been used to advance his wife's music career. He argues that the Judge had erred in letting his decision be coloured by this erroneous finding.

374 We are of the view that there is no merit to Kong Hee's objection. It is clear to us that the Judge did not factor the possible indirect gain on the part of Kong Hee into his sentencing analysis. While it is true that the Judge had mentioned that "there was undoubtedly also a form of indirect benefit for Kong Hee" in the form of an advancement of his wife's music career (at [21] of the Sentencing GD), it is crucial to note that he went on to say in the very next paragraph that "it is not the [P]rosecution's case that *even* Kong Hee had enjoyed any wrongful gain" [emphasis added] and that as such, he would say no more on this issue. There was also no mention of this factor in his subsequent analysis as to why Kong Hee was, in the Judge's opinion, most culpable and thus deserving of the highest sentence. When the Judge's observations and decision are viewed in this light, we do not see any room for the argument that the Judge's decision had been erroneously coloured by this factor.

375 On a related though separate issue, we note that the Prosecution had not focused on any gain to third parties for its case on conviction and sentence, even though this may have been suggested in the charges (especially the sham investment charges). While the Prosecution did, in its oral submissions before us, attempt to make the point that a benefit had accrued to Sun Ho,[197] this point was not raised in its written submissions for the appeal and was also not raised before the Judge. In the circumstances, we approach the sentencing in this case as one without any element of wrongful gain or personal financial benefit, either direct or indirect.

376 Another important aspect of this case concerns the fact that the appellants did *not* intend any permanent financial loss to CHC where the CBT Charges are concerned (save for the round-tripping charge concerning the disbursement of $15.2m under the ARLA, which we will discuss later). It is true that as regards the Xtron and Firna bonds, the appellants were reckless with CHC's funds and ran the risk that CHC would suffer financial loss. But we equally accept that the appellants had, at all times, *intended* for the funds which they misappropriated from CHC via the Xtron and Firna bonds to be *eventually* returned to CHC with the stated interest even if they might not have been entirely sure as to how or when they could do so at the time when they entered into the transactions. As matters transpired, the mechanism which was employed to repay the Xtron and Firna bonds was by making CHC put Xtron into funds through the obligations under the ARLA. Though we have found at [168] above that the ARLA was not a commercially justifiable agreement that provided CHC with fair value for the sums it contracted to pay thereunder, we note that the Prosecution's case is that, apart from the sum of $3.2m that was paid as GST under the ARLA, no permanent financial loss would be caused to

197 Transcript, 21 September 2016, p 36.

CHC as a result of the round-tripping charges which allowed for the redemption of the Firna bonds. Given this, we accept that the position on which the sentences for the CBT Charges should be meted out ought to be on the basis that the appellants would ensure that CHC would not have suffered, and had in fact not suffered, any permanent financial loss (save for the sum of $3.2m that was paid as GST, though we note that this sum was eventually also returned to CHC when the ARLA was rescinded).

377 In our judgment, the present case should not be viewed as a sinister and malicious attempt on the appellants' part to strip the church of funds for their own purposes. We accept that because the appellants wanted to keep the use of the BF for the Crossover confidential, and feared questions being asked thereon, they resorted to deceit and lies. This included inflating Sun Ho's success, keeping the true nature of the various transactions from the auditors, lawyers, the CHC Board and CHC's members and presenting a misleading picture to CHC's members even after the CAD had commenced its investigations. Such prevarication is undoubtedly an aggravating factor and should not be condoned, especially since most of the funds in question were from the BF, which were funds donated to CHC for a specific and restricted purpose. But, at the same time, the appellants' various non-disclosures take on a different character when underscored by the overarching theme that they were acting in what they genuinely *believed* to be in CHC's interests. Whether this may *in fact* be so is a matter open for debate, but what is crucial is that this was their *belief*. Thus, despite the fact that a large amount of funds from CHC was misappropriated, which would ordinarily have attracted a sentence at the higher end of the sentencing spectrum, we would allow for a significant discount given the exceptional mitigating factors in the present case. None of the appellants, particularly Eng Han, Ye Peng, John Lam, Serina and Sharon, could be said to

have gained anything from what they did other than pursuing the objects of CHC. Their fault lies in adopting the wrong means.

378 Apart from the various aggravating and mitigating factors, the Prosecution also submits that the dominant sentencing principle applicable to this case is that of general deterrence. It argues that the Judge failed to correctly apply the principle of general deterrence for two reasons. First, it submits that the Judge erroneously accepted that the mere prospect of a criminal conviction, let alone a substantial custodial term, already carries some deterrent value. This, the Prosecution submits, runs dangerously close to the "clang of the prison gate" argument – that the shame of going to prison is sufficient punishment for a person of standing in society – that the Judge had himself found inapplicable (the Sentencing GD at [28]).

379 Second, the Prosecution argues that the Judge erred in agreeing with the appellants that there was less need for general deterrence in cases where an offender was *not* motivated by personal gain because it was unclear how such offenders would be deterred by the prospect of a deterrent sentence, since a rational cost-benefit analysis would not be in play in such cases (the Sentencing GD at [35]). The Prosecution submits that this is clearly wrong because unlike offenders with mental disorders, offenders who do not commit crimes for personal gain can still reason rationally.

380 In our view, there is merit to both arguments, in particular the second argument. Offenders who do not commit crimes for personal gain, but for other reasons, for example, altruistic motives or even vengeance, can be deterred as long as they can think rationally. To put it simply, whether a person can be deterred is not dependent on his motive for committing the offence but on whether he is capable of rational thinking. As for the first argument, while we

agree with the Judge that the prospect of a custodial term in itself carries deterrent weight, we are cautious (and to that extent agree with the Prosecution) that not too much weight must be given to this. Thus, the sentence meted out must be proportionate to the principle of general deterrence, which we agree is the dominant sentencing principle applicable to the present case.

381 Having said that, the principle of general deterrence does not in all cases call for a sentence at the higher end of the sentencing spectrum. The question which must be considered in all cases involving the principle of general deterrence is whether the sentence in question would suffice to deter other offenders from committing an offence similar in nature to the one in question. In the present case which does not involve offenders motivated by personal gain but instead by what they believed was in the interests of CHC, we are of the view that *generally speaking*, the prospect of a not insubstantial custodial sentence would be sufficient to deter would-be offenders from furthering their altruistic motives through unlawful means.

382 We should also add, before we move on to address the specific categories of charges, that contrary to the appellants' submissions,[198] we find *Seaward* to be of little relevance to the present case. One of the offenders in *Seaward* was a chairman of a church, the Calvary Charismatic Centre. He was convicted of the offence of abetting a conspiracy to cheat a finance company by inflating the prices of audio-visual equipment purchased from the US by about US$10,000 under a hire-purchase arrangement. He was sentenced to a day's imprisonment and a fine of $10,000, and the sentence was upheld on appeal. In sentencing the offender, the court had placed weight on the fact that there was no suggestion that the offence had been committed for his personal gain.

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198 See for instance, Kong Hee's submission at para 321.

383 Insofar as the appellants are relying on *Seaward* for the submission that we should follow the court's approach there to place mitigating weight on the fact that the appellants' motives were not to gain or profit from the offences of CBT, we do not find this controversial and have taken their motives and the absence of personal gain into account (see [370] above). But if what the appellants are seeking is that a similar sentence to that in *Seaward* (that is, a nominal imprisonment term and a fine) should be imposed here, this clearly cannot be correct as the facts there bear almost no similarity to the present case save that it also involved a church. For one, *Seaward* involves the cheating of a third party, and not the offence of CBT of property that the church had entrusted to the offender. Further, the amount involved in *Seaward* was also nowhere near the present. Given these distinguishing factors, we do not think *Seaward* is an entirely relevant precedent, save for the principle therein that a lower sentence would generally be imposed for certain types of property offences where there is no suggestion of the offender receiving (or intending to receive) personal gain (see also *Lim Ying Ying Luciana v Public Prosecutor and another appeal* [2016] 4 SLR 1220).

384 With that, we move on to address the specific categories of charges, beginning with the sham investment charges.

Sentencing considerations in relation to the sham investment charges

385 There are three sham investment charges. The first sham investment charge was brought under the 1985 revised edition of the Penal Code and attracts a maximum imprisonment term of three years. The second and third sham investment charges were brought under the 2008 revised edition of the Penal Code and they attract a maximum imprisonment term of seven years.

386 The increase in the maximum imprisonment term for the offence of CBT in the 2008 revised edition of the Penal Code was the result of a comprehensive review of the penalty regime across a number of offences under the Penal Code carried out by the Ministry of Home Affairs, the Attorney-General's Chambers, the Ministry of Law and other government agencies. During the second reading of the Penal Code (Amendment) Bill 2007 (Bill 38 of 2007), the Senior Minister of State for Home Affairs identified four principles by which the review of the penalties for the various offences was undertaken. These principles were as follows: (a) the type and quantum of punishment should provide sufficient flexibility to the courts to mete out an appropriate sentence in each case; (b) the prevalence of the offence; (c) the proportionality of the penalty to an offence, taking into account the seriousness of the offence; and (d) the relativity in punishment between related offences (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 col 2201 (Senior Minister of State for Home Affairs Assoc Prof Ho Peng Kee)).

387 It is clear from the tenor of the Parliamentary Debates on the amendments that where Parliament increased the maximum sentence imposable for a particular offence, this signified that Parliament viewed the offence as more serious and therefore requiring stiffer punishments in line with current societal trends and circumstances (see also *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 col 2425–2444 (Senior Minister of State for Home Affairs Assoc Prof Ho Peng Kee)). This is also consistent with the observations in *Mehra Radhika v Public Prosecutor* [2015] 1 SLR 96 where Menon CJ said as follows (at [27]):

> … As a generally operative background factor, if Parliament has increased the punishment for an offence on the basis that the mischief in question was becoming more serious and needed to be arrested … the courts would not be acting in concert with the legislative intent if they fail to have regard to this in

> developing the appropriate sentencing framework or if they nonetheless err on the side of leniency in sentencing.

388 Applying this to the present case, there is thus a need for us to give due weight to the increase in the maximum sentencing range in sentencing the appellants for the CBT Charges where those charges fall under s 406 of *the 2008 revised edition* of the Penal Code as opposed to those under the 1985 revised edition. With that in mind, we turn to some relevant sentencing precedents for the offence of CBT *simpliciter* under the 1985 and 2008 revised editions of the Penal Code.

389 The first case which we find relevant is the case of *Public Prosecutor v Lee Siew Eng Helen* [2005] SGDC 84. There, the accused was convicted of two counts of CBT under the 1985 revised edition of the Penal Code. She worked as the general manager of an insurance brokerage firm and in that capacity had access to funds in an Insurance Broking Premium Account. This account held premiums and commissions from clients and insurers and could only be used for purposes stipulated in the Insurance Intermediaries Act (Cap 142A, 2000 Rev Ed). The accused withdrew sums of $24,028 and $134,296 for the payment of various office expenses, which were not within the stipulated purposes of the account. In respect of both sums which formed the basis of the two charges, the district judge sentenced the accused to concurrent imprisonment terms of three and six months, respectively. He also imposed a $10,000 fine for each charge. The global sentence imposed was thus six months' imprisonment and a $20,000 fine. In arriving at the sentence, the district judge noted "the strong mitigatory factor here that the offender did not benefit herself, and used the funds for the company" (at [115]).

390 On appeal, in *Lee Siew Eng Helen v Public Prosecutor* [2005] 4 SLR(R) 53 ("*Helen Lee*"), the High Court upheld the sentence imposed. Yong CJ

considered that the sentence was not manifestly excessive taking into account the large sums of money involved and the fact that the accused had not pleaded guilty or made restitution. In respect of the argument that she did not receive any personal gain, Yong CJ remarked that this did not make her any less morally culpable because the breach of a relationship of trust was in itself an aggravating factor (at [31]).

391 In another case, *Goh Kah Heng (HC)*, one of the two offenders, who was the head of a charity, was, among other charges, convicted of a charge under s 406 of the 1985 revised edition of the Penal Code for misappropriating $50,000 of charity funds by approving a loan to his personal executive. He was sentenced to an imprisonment term of four months for this charge. On appeal, Tay Yong Kwang J (as he then was) upheld the sentence of four months' imprisonment. In Tay J's view (at [93]), the misuse of funds in a charitable organisation was a serious offence. Further, the amounts involved in *Goh Kah Heng* were not small. Moreover, while the offender in question made restitution of the $50,000, this was only after the authorities had begun looking into the matter.

392 We refer, too, to the decision of *Joachim Kang*. To recapitulate, the offender in *Joachim Kang*, who was a priest, had misappropriated $5.1m over a period of eight years from the church for his personal benefit, such as to purchase a property and to buy computer equipment for his god-daughters. Only $2.5m was recovered. After a short trial, the offender pleaded guilty. Six charges under s 406 of the 1985 revised edition of the Penal Code were proceeded with and a further 13 charges were taken into consideration. The district judge imposed the following sentences:

(a) for the misappropriation of $60,000: 10 months' imprisonment;

(b) for the misappropriation of $305,500: 18 months' imprisonment;

(c) for the misappropriation of $500,000 (two counts): 27 months' imprisonment each;

(d) for the misappropriation of $600,000: 28 months' imprisonment; and

(e) for the misappropriation of $1m: 35 months' imprisonment.

The district judge ran three of the sentences consecutively (being that in respect of one count of (c), (d) and (e) above), resulting in a total sentence of an imprisonment term of seven and a half years.

393 The Judge considered *Joachim Kang* to be "[p]erhaps the most persuasive precedent that ha[d] been raised for [his] consideration"[199] as the case too involved the misuse of church funds, though he recognised that there were other significant differentiating factors such as the fact that the offender acted out of a desire for personal gain and the lack of restitution. The Prosecution and the appellants have all taken issue with the Judge's reliance on this precedent. We express some doubt over whether *Joachim Kang* (which involved offences of CBT *simpliciter*) ought to have been used by the Judge as the appropriate starting point when he sentenced the appellants for the aggravated offence of CBT as a professional agent under s 409 of the Penal Code. Putting that aside, we find that whilst the case is useful as a precedent in respect of a *normal* case under s 406 of the 1985 revised edition of the Penal Code, it is less so for the present case because of two significant factors, namely, personal gain was not a motivating factor here and there being full restitution.

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199 [36] of the Sentencing GD.

394 Seen as a whole, the above authorities demonstrate that in sentencing for offences of CBT under s 406 of the 1985 revised edition of the Penal Code, the greater the sum misappropriated, the greater the sentence of imprisonment imposed. At the same time, the quantum of monies misappropriated is clearly not the only factor to take into account when sentencing an offender. A clear comparison can be made between the misappropriation of $60,000 by the offender in *Joachim Kang* and the misappropriation of about $130,000 by the offender in *Helen Lee*. Although the offender in the latter case had misappropriated more than twice the amount of the former, her sentence was six months' imprisonment, four months less than the offender in *Joachim Kang* who received a sentence of ten months' imprisonment for that particular charge. One clear differentiating factor between the cases is the lack of any motive for personal gain in the case of the offender in *Helen Lee*.

395 It is only logical that the same principles should apply in respect of the sentences that are to be imposed for the offence of CBT under s 406 of the 2008 revised edition of the Penal Code. The main, if not sole, difference between the sentencing of the same offence under the two revised editions of the Penal Code should only be that the sentences under the latter edition should, generally speaking, be higher.

396 In our review of some of the cases that have been decided under s 406 of the 2008 revised edition of the Penal Code, the sentences that have been imposed for a misappropriation of sums of $20,000 to $40,000 have been between four and five months' imprisonment (see, for example, *Public Prosecutor v Suresh K Menon* [2015] SGDC 29 and *Public Prosecutor v Nur Aisyah Binte Churimi* [2016] SGDC 172). There appears to have been only one case, *Public Prosecutor v Yang Yin* [2016] SGDC 264 ("*Yang Yin*"), which has dealt with misappropriation of sums in excess of $1m. In that case, a Chinese

tour guide preyed on the vulnerability of an elderly lady. He was charged with two charges of misappropriating, for his own benefit, sums of $500,000 and $600,000 respectively, which he pleaded guilty to after a number of days of trial. The district judge sentenced the accused to 32 months' imprisonment and 40 months' imprisonment on the respective charges, and ordered that both sentences run consecutively to give a total term of imprisonment of six years. It may be noted that the district judge considered that there were a dearth of mitigating factors (at [83]). In contrast, the aggravating factors included the accused's deep betrayal of the extreme trust reposed in him, a substantial degree of planning and premeditation, cunning deceptions to avoid detection, lack of remorse, near total depletion of the victim's assets and a failure to make restitution. On appeal, Tay JA increased the sentences imposed, raising the total sentence to nine years' imprisonment. In delivering his oral judgment on 3 March 2017 in *Public Prosecutor v Yang Yin* (Magistrate's Appeal No 9238 of 2016/01, unreported), Tay JA noted that while the district judge took the various aggravating factors into account, he failed to accord these factors the weight they deserved in the circumstances. Though the present case is certainly some considerable distance away from the accused's egregious conduct in *Yang Yin*, that case is a useful example of the sentences imposed in cases where the conduct in question is deplorable and substantial sums are involved.

397 Bearing in mind the above precedents, we turn to consider the sham investment charges. In this regard, the total sum involved in the sham investment charges – $24m – is certainly high. At the same time, this must be balanced against the significant mitigating circumstances which we have detailed above (at [370], [376]–[377]). Taking into account the precedents (none of which is really germane given the unique nature of this case), the aggravating and mitigating factors and the need for general deterrence, in our view, the

starting points for the custodial sentences to be imposed on the appellants are as follows:

(a) **12 months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **12 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds; and

(c) **two years' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds.

398 We should state for the avoidance of doubt that in deriving the starting points above (as well as those for the round-tripping and account falsification charges below), we have in mind a single offender with the attributes and factors that we have discussed above, and who committed the offences by himself. Given that the offences here were committed not by a single person but by the appellants as part of a conspiracy, and as the appellants have varying degrees of culpability, we will go on, in a later section of this judgment (from [418] onwards), to consider the appropriate custodial sentence that should be imposed on the each of the appellants *vis-à-vis* the starting points for each of the offences, bearing in mind their specific roles in the criminal enterprise and, in turn, their culpability.

Sentencing considerations in relation to the round-tripping charges

399 The sentencing considerations in respect of the round-tripping charges are, in general, similar to those involving the sham investment charges. In

respect of the round-tripping charges involving Tranches 10 and 11 of the SOF, both the Judge and the Prosecution recognised that these charges involve "a significantly lower degree of culpability" than the sham investment charges (at [52] of the Sentencing GD).

400 In line with this, the Prosecution has not appealed against the sentences concerning these two charges, where the Judge imposed a sentence of 15 months' imprisonment per charge on Eng Han, 12 months' imprisonment on Ye Peng and Sharon, and nine months' imprisonment on Serina. However, the Prosecution submits that the sentence for the round-tripping charge relating to the payment of $15.2m under the ARLA ought to be increased from the existing range of one to two years' imprisonment to four to five years' imprisonment. The appellants, on the other hand, submit that all the sentences imposed for the round-tripping charges are manifestly excessive.

401 Like the sham investment charges, the round-tripping charges have been reduced from the more serious offence of CBT as a professional agent under s 409 of the Penal Code to CBT *simpliciter* under s 406 of the Penal Code. This therefore requires us, irrespective of the appeals, to recalibrate the appropriate sentencing range for the round-tripping charges.

402 We first consider the round-tripping charges relating to Tranches 10 and 11 of the SOF. Specifically, these charges concern (a) the transfer of $5.8m from the BF to AMAC as a purported investment in Tranche 10 of the SOF, and (b) the transfer of $5.6m from the GF to AMAC as a purported investment in Tranche 11 of the SOF. Both sums were round-tripped through various entities, including Firna, back to CHC. This created the impression that the Firna bonds (worth $11m) were redeemed by Firna with interest.

403 The sentences which the Judge imposed for these charges were substantially lower than those he imposed for the sham investment charges. This was justified on the basis that the inherent nature of these transactions would not result in CHC suffering permanent financial loss. Indeed, the transactions were structured for the very purpose of moving $11.4m out of CHC and *returning* almost the same amount back to CHC within a very short time through the redemption of the Firna bonds. Whatever remained outstanding was also intended to be returned back to CHC subsequently, during the second cycle of the round-tripping transactions involving the payment of sums under the ARLA. The Prosecution accepts this, but submits that the sting of the offences lies in the fact that through the appellants' actions, the false appearance that the Firna bonds had genuinely been redeemed was created.

404 We agree with the Judge and the Prosecution. Although each charge involves a large amount of more than $5m, it is inherent in the nature of the transactions that the appellants had not intended to cause CHC to suffer financial loss, and in fact, the sums were returned (albeit under a different label) a few days after they had been transferred out of CHC. On this basis, we find that there should be a substantial discount in the sentences as compared with the sham investment charges. Furthermore, as the charges have been reduced from being under s 409 of the Penal Code to under s 406 of the Penal Code, we consider that the appropriate starting point for the custodial sentences to be imposed on the appellants in respect of the first two round-tripping offences is **nine months' imprisonment** each.

405 Turning to the round-tripping charge involving the payment of $15.2m under the ARLA, we note first that there is a large difference between what the Prosecution seeks and what was meted out by the Judge. We also note that the sentence which the Prosecution is seeking *vis-à-vis* the round-tripping ARLA

charge is much greater than the sentences which it considers appropriate for the charges concerning Tranches 10 and 11 of the SOF (which it hence did not appeal against). The Prosecution submits that the difference is warranted because unlike the round-tripping charges involving the SOF tranches (*ie*, the fourth and fifth charges), the sixth charge involves an actual loss that would have been caused to CHC had the ARLA not been later rescinded. This actual loss comprises (a) $3.2m that was paid out as GST; and (b) $545,000 that was left in Xtron.

406 The Judge, who imposed a slightly higher sentence in respect of the round-tripping ARLA charge than the other two round-tripping charges, must have clearly agreed with the Prosecution that the conduct underlying that charge was more egregious that the other two round-tripping charges. However, what he did not agree with was that it was *that much more* egregious that it should warrant such a significant increase in the sentence. We generally agree with the Judge in this regard. While we accept that a possible loss of between $3m and $4m is no doubt significant, we do not think that that warrants such a significant increase of one to two *years'* imprisonment in terms of the sentences to be imposed for the round-tripping ARLA charge as opposed to the charges in respect of Tranches 10 and 11 of the SOF.

407 In our view, the sting of the ARLA charge is two-fold. First, the payment of $15.2m under the ARLA charge is part of the round-tripping transactions which sought to perpetuate the false impression that Tranches 10 and 11 of the SOF had been repaid. Second, in order to create the false impression that the ARLA was a genuine agreement for advance rental, the appellants were willing to allow CHC to pay $3.2m in GST which would have represented actual loss to CHC if the ARLA had not later been rescinded. Besides these, it must also be recalled that the ARLA was the mechanism that the appellants used to

redeem the Xtron bonds. As there was risk of the loss of the funds (and hence an element of recklessness involved), we think that it is appropriate to take reference from the starting point for the second sham investment charge (which involved the misappropriation of $3m under the Xtron bonds). We have observed above (at [397(b)]) that the starting point for this charge ought to be 12 months' imprisonment. The sum representing the loss in respect of the round-tripping ARLA charge is slightly more than $3m and, in our view, this charge is also somewhat more aggravated than the second sham investment charge because (a) the appellants knew that some measure of loss would result to CHC and (b) this loss would have been caused in the context of the perpetration of a scheme to cover up the unauthorised Firna bonds. In the round, we therefore consider that the starting point for the sentence in respect of the round-tripping ARLA charge ought to be **16 months' imprisonment**.

The account falsification charges

408 We move on next to the account falsification charges, which involve the false accounting entries for (a) the payment of $5.8m for Tranche 10 of the SOF; (b) the payment of $5.6m for Tranche 11 of the SOF; (c) the set-off of $21.5m in Xtron bonds; and (d) the payment of over $15.2m as the cash component of the ARLA. The Judge imposed three months' imprisonment on Eng Han, Ye Peng and Sharon and a slightly lower sentence of two months' imprisonment on Serina for each of the four account falsification charges.

409 The appellants argue that the sentences for the account falsification charges are manifestly excessive. Sharon and Serina, in particular, argue that the Judge should have imposed a fine instead of a custodial sentence for the charges. The Prosecution, on the other hand, argues that the sentences imposed are manifestly inadequate because (a) the starting point for the sentences should

be six months' imprisonment (instead of three months as adopted by the Judge); and (b) the charge involving the set-off of $21.5m worth of Xtron bonds against the ARLA should attract a higher sentence of nine months' imprisonment because the set-off was essentially a disguised write-off of the Xtron bonds which would have caused an outright loss to CHC if not for the subsequent rescission of the ARLA.

410 We begin by considering the arguments raised by the appellants, who rely on the cases of *Chua Li Hoon Matilda and others v Public Prosecutor* [2009] SGHC 116 ("*Matilda Chua*") and *Phang Wah*. They take issue with the fact that the Judge had not considered or addressed these cases in the Sentencing GD. They argue that the Judge should have followed these sentencing precedents, where a fine had been imposed for the offences of account falsification even though the offenders there had been motivated by, and had obtained, a direct benefit as a result of the offences. They submit that, *a fortiori*, the account falsification charges in the present case ought to only attract a fine since they had no intention to benefit from the acts of falsification.

411 In our view, neither *Matilda Chua* nor *Phang Wah* assists the appellants. The cases do not stand for the proposition or sentencing principle that all (or even most) of the charges under s 477A of the Penal Code will attract only a fine. In any event, this would be wholly inconsistent with the sentencing range set out in s 477A, which provides for a maximum punishment of ten years' imprisonment with fine. The sentencing range itself clearly shows that Parliament must have intended and envisaged that imprisonment terms could and should be imposed for the offence if the circumstances call for such a sentence. A custodial term has also been meted out for this offence in many cases (see *eg*, *Tan Puay Boon v Public Prosecutor* [2003] 3 SLR(R) 390 ("*Tan Puay Boon*"), *Goh Kah Heng*, *Public Prosecutor v Loke Chee Kwong* [2012]

SGDC 334, *Public Prosecutor v Noriza Binte Aziz* [2015] SGDC 157 and *Public Prosecutor v Chew Soo Chun* [2015] SGDC 22).

412 In the light of the applicable sentencing range and the precedents cited, the appellants would have to do more than simply raise two precedents where fines had been meted out to convince us that the custodial threshold has not been crossed in the present case. This is especially so given that the facts of these two cases bear little, if any, similarity to the present. For instance, the false accounts in *Matilda Chua* had not been "foisted on the public at large or on any group of particularly vulnerable individuals" (see *Public Prosecutor v Mathilda Chua Li Hoon and others* [2008] SGDC 290 at [145]). In *Phang Wah*, the recipient of the funds had been falsely stated in the accounts so as to reduce the actual recipient's liability to be taxed. While this involved a fraud on the revenue, the amounts involved were not substantial and there was a lack of sophistication on the offenders' part (see *Public Prosecutor v Phang Wah and others* [2010] SGDC 505 at [346]). On appeal, Tay J agreed with this and further noted that there had been no attempt by the offenders to conceal the *purpose* of the falsification (at [86]). On these facts, Tay J considered that the fines imposed by the district judge were neither manifestly excessive nor manifestly inadequate.

413 Such mitigating circumstances are not present here. The purpose of the falsification of the accounts was to create the false impression that Xtron and Firna had fulfilled their obligations to CHC. Apart from the appellants, there had certainly been no disclosure of these acts of deceptions to other persons. The offences involved deceiving not only CHC's auditors, but also the EMs and those general members of CHC who had perused the accounts. Furthermore, the underlying transactions were complex and involved millions of dollars. In our

judgment, given these facts, the custodial threshold in respect of the account falsification charges has been crossed.

414 This leaves us to consider whether there is merit to the Prosecution's submission that the sentences imposed for the account falsification charges are manifestly inadequate. The Prosecution refers to the decision of *Tan Puay Boon*, where Yong CJ set out (at [47]) two important factors to consider in sentencing offenders under s 477A. These factors are (a) whether there was deviousness or surreptitious planning; and (b) whether the falsifications were committed for one's personal gain. The Prosecution argues that both these factors are present in this case because (a) the account falsification offences were an integral part of a complex scheme to defraud the auditors and remove the bonds that were the subject of the sham investment charges; and (b) the scheme was entirely a self-serving enterprise on the part of Ye Peng, Serina and Eng Han, who were involved in the sham investment transactions, to ensure that their earlier wrongdoing would not be revealed.[200]

415 The Prosecution also relies on the decision in *Goh Kah Heng*, where the first offender who was a head of a charity falsified a payment voucher to cover up the fact that an unauthorised loan of $50,000 had been made out of the charity's funds to the second offender. The offenders were sentenced to an imprisonment term of six and seven months for their s 477A charges (which were read with s 109 of the Penal Code) respectively. Relying on the above, the Prosecution submits that the starting point of six months' imprisonment is warranted in the present case. As stated above at [409], the Prosecution also submits that the account falsification charge concerning the set-off of the Xtron bonds with the sums payable under the ARLA ought to attract a higher sentence

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200 Prosecution's submissions on sentence at para 179.

of nine months' imprisonment to reflect that if not for the subsequent rescission of the ARLA, this set-off would have caused an outright loss to CHC.

416 We do not see any reason to disturb the starting point of **three months' imprisonment** that the Judge had imposed for the account falsification charges. While the account falsification offences involved careful planning and allowed the appellants to remove the questionable Xtron and Firna bonds from CHC's books, it is also important to bear in mind that the offenders were not motivated by financial gain and had in fact also made no gain (unlike in *Goh Kah Heng*). Moreover, as the falsification of the accounts was an integral part of the round-tripping offences and these acts were in essence part of the same criminal enterprise, the court must be cautious to ensure that the appellants are not doubly punished.

417 We also do not agree with the Prosecution that there is a need to impose a higher sentence for the account falsification charge that relates to the set-off of $21.5m. While this charge involves a considerably higher amount than the other account falsification charges and essentially amounted to a write-off of the Xtron bonds, this outcome was part and parcel of the appellants' plans under the ARLA and some of the considerations relating to the ARLA have already been dealt with when sentencing the appellants for the round-tripping ARLA charge (see [407] above). In our view, the account falsification charges are largely consequential.

Sentences in respect of each of the appellants

418 With that, we turn to consider the appropriate individual and aggregate sentences for each of the appellants, beginning with Kong Hee.

Kong Hee

419 Kong Hee argues that the Judge had breached the principles of proportionality and parity in imposing the highest sentence on him when he, together with John Lam, was convicted of the least number of charges and had not been privy or involved in the second conspiracy involving the round-tripping charges. He argues that even though he was the spiritual leader and the one who came up with the Crossover, this must be distinguished from a situation where a person is the mastermind of a criminal enterprise. He submits that there is no reason to single him out; he did not formulate the idea of utilising the Xtron and Firna bonds.

420 We agree with the Judge that Kong Hee's overall culpability and criminality are the greatest of the appellants. Kong Hee was the ultimate leader both of the Crossover and the appellants and it was he who provided the appellants with the overall direction and moral assurance for their actions. He was also the one who instilled the appellants with the confidence in the mission of the Crossover and Sun Ho's ability to be successful in the US. While we accept that Kong Hee neither directed nor participated in the conspiracy to redeem the bonds, it cannot escape our notice that the round-tripping transactions would not have been necessary if the Xtron and Firna bonds had never been entered into in the first place. It is clear from the circumstances of this case that Kong Hee was one of the main players – if not *the* main player – who had set things in motion in relation to the sham investment charges where he had directed and influenced the other appellants, in particular Eng Han, to come up with plans when increased funding for the Crossover was needed. Kong Hee's role as the spiritual leader of the other appellants, and the breach of trust *vis-à-vis* not just CHC but also the other appellants whom he led and mentored, ought to be reflected in the sentences imposed.

421 Given Kong Hee's role in the entire scheme, we are of the view that sentences slightly above the starting points ought to be meted out on the charges preferred against him. We sentence him as follows:

(a) **14 months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **14 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds; and

(c) **28 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds.

We order that the sentences for the second and third charges are to run consecutively, with the remaining sentence to run concurrently, making the total sentence for Kong Hee **an imprisonment term of three years and six months**.

John Lam

422 John Lam seeks to rely on the arguments raised by the other appellants on the issue of sentencing, and argues only that the Judge was correct to have considered him the least involved in the sham investment transactions.

423 The Prosecution submits that the Judge should not have pegged John Lam's culpability at a level lower than that of Serina, Eng Han and Ye Peng as his participation was integral to the success of the conspiracy.[201] In this regard,

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[201] Prosecution's submissions on sentence at paras 162–165.

the Prosecution argues that John Lam was the "inside man" who occupied key positions of financial responsibility as treasurer, a member of the Investment Committee and Audit Committee, and points to the fact that he had (a) drafted the investment policy that ensured that the Xtron bonds would fall within the mandate given to AMAC; (b) consented to hiding information from Charlie Lay, a fellow Investment Committee member; and (c) drafted and signed the "secret letter", without which Wahju's father-in-law would not have agreed to enter into the Firna BSA.

424 We do not agree with the Prosecution. In our judgment, the culpability of John Lam, who was involved to a relatively limited (though important) extent and only at some junctures, is lower than that of Serina, Eng Han and Ye Peng. His sentences should be below the starting points set out at [397] above. We sentence him as follows:

(a) **six months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **six months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds; and

(c) **12 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds.

We order that the sentences for the second and third charges are to run consecutively, with the remaining sentence to run concurrently, making the total sentence for John Lam **an imprisonment term of one year and six months.**

Eng Han

425 As for Eng Han, we are of the view that his sentences should follow the respective starting points that we have set out above. Eng Han employed his wits and financial expertise to mask the *reality* of the transactions. Although he was not a spiritual leader of CHC, he was trusted when it came to financial matters. It is therefore appropriate to sentence him as if he had single-handedly committed the various offences. We thus sentence him as follows:

(a) **12 months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **12 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds;

(c) **two years' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds;

(d) **nine months' imprisonment** for the round-tripping charge that relates to Tranche 10 of the SOF;

(e) **nine months' imprisonment** for the round-tripping charge that relates to Tranche 11 of the SOF;

(f) **16 months' imprisonment** for the round-tripping charge that relates to the payment of $15.2m under the ARLA; and

(g) **three months' imprisonment** for each of the four account falsification charges.

426 A further issue remains in respect of Eng Han (as well as Ye Peng and Serina). The Prosecution submits that the Judge erred in not running three sentences consecutively in respect of Eng Han, Ye Peng and Serina even though they faced a total of ten charges and were involved in two separate conspiracies. In this regard, the Judge held that the key question was whether the totality of the sentence fairly and accurately reflected the overall culpability of the offender, and was of the view that the notion of them having participated in two criminal enterprises would be appropriately reflected by running the longest sentence for the sham investment charges consecutively with the longest sentence for the round-tripping charges.

427 The Prosecution submits that this approach is wrong and illogical, and as a result, the sentences imposed on these appellants fail to reflect their greater level of criminality in that unlike the rest, they participated in two sets of conspiracies. It submits that the Judge's error is apparent when one considers that these three appellants would have each received cumulative sentences of six years' imprisonment under the Judge's sentencing rubric (with the second and third sham investment charges running consecutively, as in the case of Kong Hee and John Lam), if they had *only* been convicted of the sham investment charges. In essence, the Prosecution argues that it is illogical and perverse that the fact that these appellants have been convicted of a second conspiracy has no effect or actually leaves the appellants in a better position than if they had only been involved in a single conspiracy. Simply put, the appellants appeared to have gained or paid no additional penalty for having committed more crimes.

428 We are of the view that it is appropriate to run two of the sentences consecutively. We agree with the Judge that running two of the longest sentences consecutively for Eng Han, Ye Peng and Serina would fairly reflect their relative culpability, and would be proportionate to the offences for which

they have been convicted. Moreover, we note that the total sentence imposed on Eng Han would be more than the total sentence he would have received if he was only convicted of the sham investment charges; this addresses the nub of the Prosecution's submissions. We will therefore run the sentences of the third sham investment charge (at [425(c)] above) and the third round-tripping charge (at [425(f)] above) consecutively. The other sentences are to run concurrently. The total sentence for Eng Han will thus be **an imprisonment term of three years and four months**.

Ye Peng

429 As for Ye Peng, we are of the view that his sentences for the sham investment charges should be pitched at the starting points which have been set out above. Like Kong Hee, he was a spiritual leader in CHC though the trust and authority reposed in him by CHC's members was not as great as those reposed in Kong Hee. We do not see any other aggravating or mitigating factors peculiar to Ye Peng that would warrant a departure from the starting point in respect of the sham investment offences.

430 However, we would impose slightly lower sentences than the starting points for Ye Peng's round-tripping and account falsification charges. As we have explained, the mastermind behind the round-tripping transactions was Eng Han and a discount ought to be reflected in Ye Peng's sentence to account for that. We thus impose the following sentences on him:

(a) **12 months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **12 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds;

(c) **two years' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds;

(d) **eight months' imprisonment** for the round-tripping charge that relates to Tranche 10 of the SOF;

(e) **eight months' imprisonment** for the round-tripping charge that relates to Tranche 11 of the SOF;

(f) **14 months' imprisonment** for the round-tripping charge that relates to the payment of $15.2m under the ARLA; and

(g) **two months' imprisonment** for each of the four account falsification charges.

As in the case of Eng Han, we order that the sentences for the third sham investment charge and the third round-tripping charge are to run consecutively. The other sentences are to run concurrently. The total sentence for Ye Peng would thus be **an imprisonment term of three years and two months**.

Serina

431 Turning to Serina, we agree with the Judge that her sentences in respect of the CBT Charges should generally be lower than those imposed on the others because she was less culpable. Unlike Kong Hee and Ye Peng, Serina was not a spiritual leader of the church. While she was the administrator of the

Crossover and helped out with the accounts and the documentation, she is less culpable than Eng Han as she did not devise the illicit bonds or the round-tripping transactions. Thus, we impose sentences for Serina in respect of the sham investment charges below the starting points set out above and peg Serina's sentences for the round-tripping charges to slightly below those that we imposed in respect of Ye Peng. We see no reason to disturb the sentences imposed on her by the Judge for the account falsification charges. We therefore sentence her as follows:

(a) **nine months' imprisonment** for the sham investment charge under the 1985 revised edition of the Penal Code for the misappropriation of $10m which relates to the Xtron bonds;

(b) **nine months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $3m which also relates to the Xtron bonds;

(c) **18 months' imprisonment** for the sham investment charge under the 2008 revised edition of the Penal Code for the misappropriation of $11m which relates to the Firna bonds;

(d) **six months' imprisonment** for the round-tripping charge that relates to Tranche 10 of the SOF;

(e) **six months' imprisonment** for the round-tripping charge that relates to Tranche 11 of the SOF;

(f) **12 months' imprisonment** for the round-tripping charge that relates to the payment of $15.2m under the ARLA; and

(g) **two months' imprisonment** for each of the four account falsification charges.

As in the case for Eng Han and Ye Peng, the sentences for the third sham investment charge and the third round-tripping charge are to run consecutively. The other sentences are to run concurrently, making the total sentence for Serina **an imprisonment term of two years and six months**.

Sharon

432 We turn finally to Sharon. Sharon submits that the Judge was wrong to have found that she was *as* culpable as Ye Peng in respect of the round-tripping and the account falsification charges and should instead have found her to be less culpable than all the appellants because of the following reasons:

(a) First, she played a minimal role in the round-tripping transactions. She emphasises that she was a mere follower and did not initiate any of the proposals.

(b) Second, she highlights that her motives were fundamentally different from the other appellants as she was the only one whose involvement did not extend to the sham investment charges. As such, unlike the other appellants, she cannot be said to have the devious motive of (using the language of the Prosecution in its submissions before the Judge) "ultimately intend[ing] to screen the Xtron and Firna bonds from further inquiry, in order to avoid detection of their sham nature".[202] In essence, her point is that given her unique position of not

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202 Prosecution's submissions on sentence at para 123.

being tainted by the sham investment charges, she should logically be in a position of lower culpability than the others.

(c) Third, she relies on the fact that she was never a leader in CHC, and therefore the Judge's "damning indictments" against some of the appellants' "careful cultivation of unquestioning trust within CHC" cannot apply to her.[203]

433 We are persuaded by Sharon's submissions, in particular by the fact that she was at no point a leader of CHC, the Crossover or the illegal transactions. For this reason, we agree with Sharon that her culpability in respect of the round-tripping and the account falsification charges should not be pegged to that of Ye Peng. While she may have been more directly involved in the round-tripping transactions than he was, the fact remains that she was only an employee, and was merely carrying out the decisions and instructions of the decision-makers in CHC. Therefore, in respect of both categories of charges, we sentence her to a considerably lower sentence than the other appellants. Her sentences are as follows:

(a) **three months' imprisonment** for the round-tripping charge that relates to Tranche 10 of the SOF;

(b) **three months' imprisonment** for the round-tripping charge that relates to Tranche 11 of the SOF;

(c) **six months' imprisonment** for the round-tripping charge that relates to the payment of $15.2m under the ARLA; and

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[203] Sharon's submissions at para 268(f).

(d) **one month's imprisonment** for each of the other four account falsification charges.

434 We order that the most severe round-tripping charge is to run consecutively with the first account falsification charge. Like the Judge, we do not think there is a need to run two of the most severe sentences consecutively in the case of Sharon. Unlike the other appellants (namely, Eng Han, Serina and Ye Peng) who had participated in two distinct conspiracies, Sharon had participated in only one (*ie*, the round-tripping transactions for which the acts of account falsification were consequential to). The other sentences are to run concurrently. The total sentence for Sharon will thus be **an imprisonment term of seven months.**

Conclusion

435 For the above reasons, we allow the appellants' appeals against conviction only to the extent that we reduce the CBT Charges against them to the less aggravated charge of CBT *simpliciter* under s 406 of the Penal Code. We impose the sentences on each of the appellants as set out above. Accordingly, the appeals brought by the appellants against the sentences are allowed to the extent stated above, and the appeals brought by the Prosecution against the sentences are dismissed. A summary of the sentences can be found in the table that is annexed to this judgment. For ease of comparison, the format of the table follows that of the table annexed to the Sentencing GD.

436 Lastly, we would like to express our gratitude to the *amicus curiae*, Mr Evans Ng, for the assistance that he has rendered to this court through his research and submissions.

Chao Hick Tin
Judge of Appeal

Woo Bih Li
Judge

Chan Seng Onn J (dissenting):

Introduction

437 I have the advantage of reading in draft the judgment of the majority of Chao JA, with which Woo J concurs. I refer to this as the majority Judgment. For ease of reference, I adopt the same abbreviations and references used in the majority Judgment, unless otherwise stated. In respect of the CBT Charges, I agree with the majority that (a) the relevant appellants were entrusted with dominion over CHC's funds; (b) there was "wrong use" of CHC's funds; and (c) each of the relevant appellants did abet by engaging in a conspiracy with some of the other appellants to commit the offence of CBT by, as stated in the relevant charges, dishonestly misappropriating monies from (i) the BF for the purpose of funding Sun Ho's music career (and, in respect of the Firna bonds, for the additional purpose of providing funds to Wahju); and (ii) the GF and the BF for the purpose of generating a false appearance that certain purported investments in the Firna bonds had been redeemed. I also agree with the conviction of the relevant appellants where the account falsification charges are concerned.

438 While I agree largely with the majority Judgment, I respectfully depart from the majority in three areas. First, on the law and in respect of the CBT Charges, I do not agree with the holding of the majority that s 409 of the Penal Code applies only to professional agents and that the appellants are accordingly liable only under s 406 of the Penal Code as all of them were not professional agents even though some of them were directors or members of the CHC Management Board (referred to in the majority Judgment as "the CHC Board") at the material time.

439 Second, on the facts, I respectfully disagree with the majority on two points. The first relates to the majority's approval of the Judge's holding that at the time the 1st Xtron BSA was executed in August 2007, the premise upon which Kong Hee, Ye Peng, Eng Han and Serina operated was that Sun Ho's planned English album was projected to sell only 200,000 copies. In other words, the majority agrees with the Judge that the appellants did *not* honestly believe at the time when the appellants entered into the 1st Xtron BSA that the planned English album would be successful and instead knew that the revenue from the projected 200,000 copies would not be sufficient either to redeem the Xtron bonds under the 1st Xtron BSA with interest at maturity or even thereafter should the maturity period be extended by a few years.

440 Although I agree with the majority that the projections viewed as a whole do not strictly show that the 1st Xtron BSA could be redeemed at maturity, I am inclined to believe, having regard to the totality of the evidence, that the projection of 200,000 copies was only the worst-case scenario contemplated by the appellants. I will explain the reasons for my disagreement subsequently, but it suffices to say at this juncture that my view is that the relevant appellants, on a balance of probabilities, did honestly believe, at the time when they *first* sought external financing for Sun Ho's English album and later caused CHC to enter into the 1st Xtron BSA, that the album would be successful and they would be able to effect repayment within a few years after the maturity of the bonds from the net profits that they believed could be generated from the album sales and various associated downstream activities arising therefrom.

441 Besides the assessment of the appellants' mind-sets concerning the success of Sun Ho's English album across the various transactions, I also differ from the majority on certain mitigating factors which were taken into account.

In particular, I am of the view that, contrary to the position taken by the parties including the Prosecution, the impugned transactions in question involved elements of benefit to Kong Hee and Sun Ho and financial loss (including permanent financial loss even after "full restitution") to CHC.

442 Finally, in the light of my decision on the law and on my assessment of the facts, I – unlike the majority – would not allow the appeals against sentence.

443 I will discuss each of these issues *seriatim*.

The entrustment of dominion over CHC's property to the relevant appellants was "in the way of their business as agents"

444 The crux of this issue is whether the relevant appellants, namely John Lam, Ye Peng and Kong Hee, who were members of the CHC Management Board, were entrusted with dominion over CHC's property "in the way of [their] business as … agent[s]" pursuant to s 409 of the Penal Code. The appellants submit that s 409 does not apply to them. Their argument rests on two premises. First, they submit that in the context of s 409 of the Penal Code, the term "agent" refers only to a professional agent. Second, they take the position that directors of a company or organisation are not such professional agents. The appellants base these two premises on the decision of the Privy Council in *Cooray* and the decision of the Malaysian Court of Appeal in *Periasamy*, which adopted the position in *Cooray*. On this basis, they submit that s 409 of the Penal Code cannot apply to them as John Lam, Ye Peng and Kong Hee were not professional agents.

445 In making the above submission, the appellants urge this court to depart from the position in *Tay Choo Wah*, where the High Court held that directors

who misappropriate the property of their company may be liable for the offence of CBT as an agent under s 409 of the Penal Code if they were entrusted with such property in their capacity as directors. Against this, the Prosecution argues that *Tay Choo Wah* should be followed. It further argues that *Cooray* can be distinguished and that, in any event, the reasoning in *Tay Choo Wah* ought to be preferred over that in *Cooray*.

446 Given the way the arguments were framed, it is unsurprising that much of the submissions on this issue centred on the correctness of the decision in *Cooray*. However, to centre the issue in question on whether the holding in *Cooray* is correct and ought to be followed creates, in my view, a false dichotomy. This is because the decision in *Cooray* in no way bears on the question of whether a director of a company or organisation, being in that capacity entrusted with the property of the company or organisation, can be liable for the aggravated offence of CBT as an agent if he misappropriated that property. To explain why this is so, the facts of *Cooray* and the holding of the Privy Council must be closely scrutinised. It is to this that I now turn.

447 The accused in *Cooray* was the president of the Salpiti Korale Union ("the Union"), which supplied goods to its member societies through three wholesale depots. Member societies would pay for the goods through an advance by the Colombo Cooperative Central Bank ("the Central Bank"), and the member societies would repay the Central Bank weekly by money orders, cheques or small sums of cash, which the Central Bank would then pay into its account with the Bank of Ceylon. Besides being president of the Union, the accused was also the vice-president of the Central Bank and the president of a committee ("the Committee") that controlled one of the three wholesale depots. In the proper case, payments made to the depot were to be promptly deposited in the Central Bank by the manager of the depot. Additionally, when the Central

Bank received such payments in the form of cheques, the Central Bank was to immediately send such cheques to the Bank of Ceylon for collection.

448 Instead of following the prescribed procedure, the accused procured the manager of the depot to collect cash and thereafter hand the monies to him. The accused misappropriated the cash and substituted it with his own cheques which he sent to the Central Bank. Additionally, the accused ensured that certain cheques received by the Central Bank were not sent for collection. The accused was charged with misappropriating a sum of money, entrusted to him *by the manager of the depot* in the way of the accused's business as an agent, which was to be deposited to the credit of the Union in the Central Bank.

449 Before the Privy Council, the accused argued that he was not a professional agent and could not be caught by s 392 of the Ceylon Penal Code (which is *in pari materia* with s 409 of the Penal Code) as he had only been *casually* entrusted with money. Against this, the Crown argued that the section applied to anyone acting in the *capacity* of an agent, whether professional or otherwise. Notably, the Crown contended that, on the facts, the accused was an agent because he had been entrusted with the monies by the manager of the depot "to act as [the manager's] agent and as agent of the Union to take the moneys to the bank" and that the reason why the manager entrusted the monies to the accused was because he was the president of the Union (at 412).

450 The Privy Council disagreed with the Crown, holding that, on the facts of *Cooray*, the accused was clearly not carrying on the business of an agent and "was in no sense entitled to receive the money entrusted to him *in any capacity*" [emphasis added] (at 419). This means that the accused was not entitled, on the facts, to receive the money as the president of the Union, the president of the Committee or the vice-president of the Central Bank. The Privy Council also

held that the manager of the depot did not have the authority to make the accused an agent to hand the money over to the bank (at 420). In coming to this holding, the Privy Council expressly cautioned that it was *not* "deciding what activity is required to establish that an individual is carrying on the business of an agent" (at 419).

451 It is therefore clear, when the full facts of *Cooray* are considered, that the issue before the Privy Council was whether the accused could be sentenced under s 392 of the Ceylon Penal Code when the charge against him was for misappropriating monies entrusted to him *by the manager of the depot* in circumstances where, according to the prescribed procedure, the manager should not have done so. In other words, the charge against him alleged that he acted as *the manager's* agent. It was in this context that the Privy Council considered that the accused did not fall within s 392 of the Ceylon Penal Code. Not only was the accused not permitted to receive any monies from the manager of the depot, and to the extent that he did so, he received the monies casually and in no sense "in the way of his business as … an agent" *vis-à-vis* the manager. The Privy Council in *Cooray* was therefore not considering the separate question which now confronts this court, that is, whether a director, properly entrusted with dominion over the monies of the company or organisation *by virtue of his position as director*, can be liable for the aggravated offence of CBT as an agent if he misappropriated such monies.

452 I should state that I am not alone in my understanding of the decision in *Cooray*. I refer, in this connection, to the decision of the Indian Supreme Court in *Dalmia*. The facts of this case have been summarised in the majority Judgment and I do not intend to repeat them here. In that case, the Indian Supreme Court also considered *Cooray* and made two important observations on the scope of that decision. First, the Indian Supreme Court noted that the Law

Lords in *Cooray* left open the question as to what kind of activity on the part of the person alleged to be an agent would satisfy the requirement that he be carrying on the business of an agent. The court noted that this "[made] it clear that the emphasis is not on the person's carrying on the *profession* of an agent, but on his carrying on the *business* of an agent" [emphasis added] (at [90]). Second, the Indian Supreme Court also noted the Privy Council's holding that the accused in *Cooray* was not entitled to receive the money entrusted to him in *any capacity*. The court then continued (at [94]):

> It follows from [the Privy Council's abovementioned holding] that [the accused in *Cooray*] could not have received the money in the course of his duties as any of these office-bearers [*ie*, as an office-bearer of the Union, the Committee, or the Central Bank]. Further, the Manager of the depot had no authority to make the accused an agent for the purposes of transmitting the money to the [Central Bank]. The reason why the accused was not held to be an agent was not that he was not a professional agent. *The reason mainly was that the amount was not entrusted to him in the course of the duties he had to discharge as the office-bearer of the various institutions.* [emphasis added]

453 *Cooray*, therefore, does not squarely address the present issue in contention. Nonetheless, it is still a relevant authority to have regard to as it sets out the principle that an accused would not satisfy the requirement of being entrusted with property "in the way of his business as … an agent" and be liable for the aggravated offence of CBT by an agent if he is acting as an agent only in a casual sense (*ie*, one who happens to be entrusted with property on an informal or *ad hoc* basis).

454 Besides *Cooray*, it is also useful to refer to two other cases upon which the Privy Council relied in deciding *Cooray*. These are *R v Portugal* (1885) 16 QBD 487 ("*R v Portugal*") and *R v Kane* [1901] 1 QB 472 ("*R v Kane*"). These two decisions concerned prosecutions under s 75 of the Larceny Act 1861 (c 96) (UK) ("the 1861 Act"). Though not identical to s 392 of the Ceylon Penal

Code (or s 409 of the Penal Code), s 75 of the 1861 Act consisted of similar terms, and the Privy Council in *Cooray* accepted the submission made by counsel for the accused that the court could take guidance from the English cases on how the section had been interpreted. Section 75 of the 1861 Act read as follows:

> **As to frauds by agents, bankers, or factors:**
>
> 75. Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or *other agent*, with any other chattel or valuable security … for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith and contrary to the object and purpose for which such chattel … was intrusted to him sell, negotiate, pledge etc, or in any manner convert to his own use or benefit or the use or benefit of any person other than the person by whom he shall have been so intrusted … shall be guilty of a misdemeanour.
>
> [emphasis added]

455 In *R v Portugal*, the accused approached a firm of railway contractors offering to use his influence to obtain for the firm a contract for the construction of a railway and docks in France in return for commission. The firm agreed to the accused's offer, and for this purpose, entrusted him with a cheque to allow him to open an account in the firm's name in Paris. He was charged, amongst other things, for misappropriating the cheque for his own use. The main question before the court was whether the accused was an "agent" within the meaning of s 75 of the 1861 Act. The court held that the accused was not such an agent, stating (at 491):

> … In our judgment, s. 75 is ***limited to a class***, and ***does not apply*** to everyone ***who may happen to be intrusted*** as prescribed by the section, but only to the class of persons therein pointed out.
>
> Moreover, the words of the section are not "banker, merchant, broker, attorney, or agent" but "or *other* agent," pointing, in our opinion, to some agent of the kind with the class before

> enumerated. In our judgment, the "other agent" mentioned in this section means one ***whose business or profession*** it is to receive money, securities, or chattels for safe custody or other special purpose; and that the term does not include a person who carries on no such business or profession, or the like. The section is aimed at those classes who carry on the occupations or similar occupations to those mentioned in the section, and not at those who carry on no such occupation, ***but who may happen from time to time*** to undertake some fiduciary position, whether for money or otherwise.
>
> [emphasis in original in italics; emphasis added in bold italics]

456 Thus, on the facts, the accused, who had only on one solitary occasion been entrusted with a cheque to open an account for the firm, and thereby *happened* to become an agent for the firm as a result, did not fall within the class of persons mentioned in s 75 of the 1861 Act and was not caught by that section. In this regard, I also agree with *Dalmia*'s analysis of *R v Portugal*, where the Indian Supreme Court stated (at [88]):

> [*R v Portugal*] therefore is authority to this effect only that the term 'agent' in [s 75 of the 1861 Act] does not include a person who just acts as an agent for another for a particular purpose with respect to some property that is entrusted to him, i.e., [the section] does not include a person who becomes an agent as a consequence of what he has been charged to do, and who has been asked to do a certain thing with respect to the property entrusted to him, but includes such person who, *before* such entrustment [and] *before* being asked to do something, *already carried on such business or profession or the like* as necessitates, in the course of such business etc, his receiving money, securities or chattels for safe custody or other special purpose. That is to say, he is *already an agent* for the purpose of doing such acts and is subsequently entrusted with property with direction to deal with it in a certain manner. *It is not held that a person to be an agent within that section must carry on the profession of an agent or must have an agency*. The accused, in that case, was therefore not held to be an agent. [emphasis added]

457 *R v Portugal* was followed in *R v Kane*. In that case, the accused who was stated to be a "conjuror and thought-reader" had advised an acquaintance to make an investment. The acquaintance then entrusted the accused with some

money for the purposes of the investment. Instead of investing the money, the accused used the proceeds for his own purposes. In finding that the accused was not caught by s 75 of the 1861 Act, the court held (at 475) that "[t]he section does not apply to any person who *happens* to act on behalf of another; it applies only to agents of the class indicated in the preceding words of the section" [emphasis added]. It is clear from *R v Portugal* and *R v Kane* that s 75 of the 1861 Act did not apply to *anyone* who, by happenstance or as a result of a particular transaction, finds himself an agent of another. Rather, it had to be demonstrated that the accused was *already* an agent, and was, by virtue of that agency, entrusted with property which he subsequently misappropriated.

458 I am in agreement with the general principles set out in *Cooray*, *R v Portugal* and *R v Kane* as they apply to s 409 of the Penal Code. Section 409 of the Penal Code is not intended to increase the punishment substantially for the offence of CBT by persons who find themselves agents as a result of fortuitous reasons or as a result of a particular transaction, but only agents who are entrusted with property or with dominion over property "in the way of [their] business as … agent[s]".

459 The question of when an agent is entrusted with property or dominion over property "in the way of his business as … agent" was considered thoroughly by the Indian Supreme Court in *Dalmia*. The court's analysis is instructive and it is fruitful to quote it in full (at [96]):

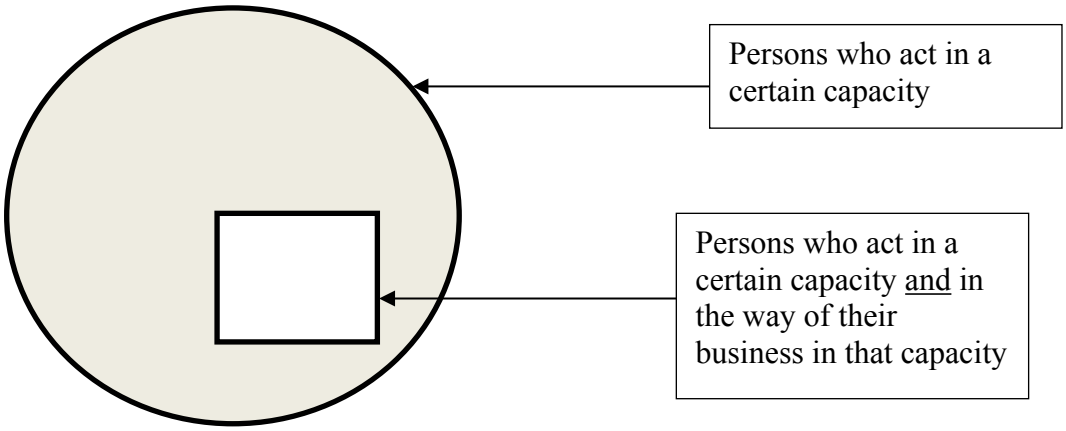
> What S. 409 [of the Indian Penal Code] requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. *The expression 'in the way of his business' means that the property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'.* He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the

person be an agent of another and that person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of S. 409 [of the Indian Penal Code] if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in [*R v Portugal*] or in [*Cooray*], and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity' to make clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in Ss. 406 to 408 [of the Indian Penal Code]. *The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as agent but also in connection with his duties as an agent.* We need not speculate about the reasons which induced the Legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more powers in dealing with the property of the principal and, consequently, there are greater chances of his misappropriating the property if he be so minded and less chances of his detection. However, *the interpretation we have put on the expression 'in the way of his business' is also borne out from the Dictionary meanings of that expression and the meanings of the words 'business' and 'way'*, and we give this below for convenience.

> 'In the way of'—of the nature of, belonging to the class of, in the course of or routine of
>
> (Shorter Oxford English Dictionary)
>
> —in the matter of, as regards, by way of
>
> (Webster's New International Dictionary, II Edition, Unabridged)
>
> 'Business'—occupation, word
>
> (Shorter Oxford English Dictionary)
>
> —mercantile transactions, buying and selling, duty, special imposed or undertaken service, regular occupation

> (Webster's New International Dictionary, II Edition Unabridged)
>
> —duty, province, habitual occupation, profession, trade
>
> (Oxford Concise Dictionary)
>
> 'Way'—scope, sphere, range, line of occupation
>
> (Oxford Concise Dictionary)
>
> [emphasis added]

460 I agree entirely with the above passage. In particular, I – like the court in *Dalmia* – consider that the expression "in the way of his business" under s 409 of the Penal Code connotes the entrustment of property to an accused in "the ordinary course of his duty or habitual occupation or profession or trade". I also consider that the fact that the specific phrase "in the way of his business as … an agent" is used, in contradistinction to the expression "in his capacity" (which is used in s 409 in the context of public servants), means that something *more* than being entrusted in the capacity as an agent must be shown in order for s 409 of the Penal Code to be engaged. In my judgment, the former (*ie*, "in the way of his business …") is a subset of the latter (*ie*, "in his capacity ..."), which is a broader category. In other words, one who is entrusted with property in the way of his business as an agent must *necessarily* be entrusted with property in his capacity as an agent. However, someone entrusted with property in his *capacity* as an agent may not necessarily be entrusted with property in the way of his *business* as an agent. A diagrammatic representation of this is as follows:



461 What, then, is the distinguishing factor between an agent who acts merely in his capacity as an agent and one who *also* acts in the way of his business as an agent? In my judgment, the phrase "in the way of his business" connotes a sense of regular activity, *or* the inhabitation of a particular trade, profession, office or occupation. Thus, in order for one to be entrusted in the way of his *business* as an agent, the Prosecution must demonstrate that the entrustment of property as an agent came about as a result of a certain trade, profession, office or occupation held by the accused. It would not suffice for the accused to be entrusted with property or dominion over property "in his capacity" as an agent if he did not also, in his regular dealings, act as an agent in such a trade, profession, office or occupation. To take a concrete example, the accused persons in *R v Portugal* and *R v Kane* could be described as having been entrusted with property in their "capacity" as agents for their respective principals where the transactions in question were concerned, but as this entrustment did not come about as a result of a particular trade, profession, office or occupation held by the accused persons, they would not, if the charge was brought under the Penal Code, have fallen within the scope of s 409. Hence, if the accused acted in his capacity as an agent of the property owner on only one particular occasion without also holding a trade, profession, office or occupation of agency by virtue of which property was entrusted, this would not,

in my view, satisfy this particular element of s 409 of the Penal Code as, in such a case, the entrustment would not have occurred in the way of the accused's business as an agent.

462 The same analysis would, in my view, apply to bankers, merchants, factors, brokers and attorneys. Such persons can only be liable under s 409 of the Penal Code if they are entrusted with property whilst in their trade, profession, office or occupation as a banker, merchant, factor, broker or attorney. One, who by the circumstance of a *particular* transaction, *happens* to become – for the purpose of that transaction – a banker, merchant, factor, broker or attorney and is entrusted with property or dominion over property in that capacity, would not, in my view, be said to have been acting "in the way of his business" so as to fall within the scope of s 409 of the Penal Code.

463 While the above analysis explains the use of the phrase "in the way of his business" in s 409 of the Penal Code, a further question that remains is the scope of the term "agent" under that section. In my view, useful guidance may be derived from the decision of Lee Seiu Kin J in *Tan Cheng Yew*, where Lee J held that the term "attorney" in s 409 of the Penal Code included an advocate and solicitor. In arriving at his finding, Lee J considered the legislative history and context of s 409, and stated (at [103]):

> In my view, the mischief that s 409 targets is the commission of CBT by persons who perform ***certain trusted trades***, when they act in the way of their business. As stated in [*Dr Hari Singh Gour's Penal Law of India* vol 4 (Law Publishers (India) Pvt Ltd, 11th Ed, 2011)] at p 4037:
>
> > *'Banker, merchant, factor, broker, attorney or agent'*: All these persons are ***trusted agents employed by the public in their various businesses***. …
>
> Where it is normal for the public to rely on a person's trade as a mark of his trustworthiness and integrity, and where such trust facilitates commercial transactions, it is important that

> such transactions are above board. A commission of CBT by a person in the performance of his trade would shake the confidence of the public in those trades and impede the ability of persons in such trades to serve the public. A breach of trust in such circumstances "may have severe … public repercussions" (see Butterworth's commentary at p 621). Therefore, s 409 provides that CBT committed in the capacity of a public servant or in the way of business of a banker, a merchant, a factor, a broker, an attorney or an agent, would be punished more severely than CBT committed by persons who are trusted on an **ad hoc *basis*** under s 406.
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> [emphasis added in bold italics]

464 It is clear from the above passage that Lee J distinguished between persons who performed certain trusted trades and persons who were trusted on an *ad hoc* basis. I agree with this analysis. The common thread that unites persons such as bankers, merchants, factors, brokers and attorneys is that they act in a certain trusted trade, profession, office or occupation which the public relies on or utilises to facilitate the course of commercial dealings when they act in the way of their business, carrying out or performing those trusted trades, professions, offices or occupations. The term "agent" must therefore be interpreted in that light.

465 I turn now to the appellants' principal submission on this issue. It is clear that the underlying basis of the appellants' submission that the members of the CHC Management Board were not entrusted with CHC's funds in the way of their business as agents under s 409 of the Penal Code is that directors of companies and organisations are *only casually* entrusted with the company's or organisation's money or property and are hence only casual agents who do not come within the ambit of s 409 of the Penal Code. I find this basic premise on which the appellants' submission is based untenable. It is trite that whilst a company is a separate legal person, it can only act through the medium of human beings. When directors act for and on behalf of the company, they act as agents

of the company (see *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 689 at [29]). As Cairns LJ stated in *Ferguson v Wilson* (1866) 2 Ch App 77 (at 89):

> What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent.

466 It is, to my mind, unarguable that when directors are entrusted with the property of their company or organisation *in their role as directors*, they are entrusted with the property in accordance with that role and office. I do not see how it can be said that a director's dealings with the property of his company or organisation in his role as an office-holder may be said to be casual in the same way the accused persons in *R v Kane* and *R v Portugal* were said to be casual agents *vis-à-vis* the accused's acquaintance and the firm of railway contractors respectively. Rather, I find that directors, like bankers, merchants, factors, brokers and attorneys, hold a formal position in which they, in the usual course of that position, undertake to act on someone else's behalf, and in the course of doing so, receive or hold property on that person's behalf. The directorship of a company or organisation facilitates the course of commercial dealings, *inter alia*, between the public and the company or organisation, making the fictional legal entity of a company possible as a practical reality. Directors are subject to onerous fiduciary and directors' duties, and are in a position of trust as much as (or even more so than) bankers, merchants, factors, brokers and attorneys are *vis-à-vis* their principals or clients. Additionally, directors are usually remunerated for their services through fees in a manner similar to the remuneration typically received by bankers, merchants, factors, brokers and attorneys (though it is not invariably the case that all such persons would receive financial remuneration).

467 I would therefore hold that directors of a company or an organisation fall within the class of persons contemplated under s 409 of the Penal Code, and in so doing, I agree with the position laid down in *Tay Choo Wah*. A director may therefore be liable for the aggravated offence of CBT by an agent if he misappropriates funds entrusted to him in the course of his directorship. This applies *mutatis mutandis* to directors who sit on the board of registered societies, which, like companies, are recognised as possessing separate legal personality (see, generally, s 35 of the Societies Act (Cap 311, 2014 Rev Ed), *Chee Hock Keng v Chu Sheng Temple* [2016] 3 SLR 1396 at [28] and *Chen Cheng and another v Central Christian Church and another appeal* [1996] 1 SLR 313 at [38]).

468 To the extent that the appellants' submission is based on case authorities, I would note that save for the decision of the Malaysian Court of Appeal in *Periasamy* and the cases following it, no reference has been made to any other case that has held that a director of a company who is entrusted with the company's property in that capacity is only entrusted with the property *casually*. It is therefore apt to delve deeper into the decision of *Periasamy*. In *Periasamy*, the Malaysian Court of Appeal stated as follows (at 575):

> While accepting that under [s 409 of the Malaysian Penal Code (Cap 45), which is *in pari materia* with s 409 of the Penal Code] a single act of entrustment may constitute a man an agent within the section, we would emphasize that for the section to bite, there *must* be evidence that the entrustment was made to the particular accused by way of his business as an agent.
>
> By way of illustration, the managing director of a company who, either by his contract with his company or by general law, is entrusted with dominion over his company's property is not to be presumed to be falling within the terms of s 409 by reason of that fact alone. A managing director of a company has, no doubt, been held by the general law to be an agent of the company; but he cannot, upon that sole consideration, be held to have been entrusted in the way of his business as an agent. In other words, the section refers – as was contended at the bar

> of the Privy Council in *Cooray* – to persons who are professional agents and not to casual agents, such as a company director.
>
> [emphasis in original]

469 It may be observed from the passage cited above that the proposition that directors of companies are merely casual agents was an assertion by the court made without much legal analysis. With respect, I find it somewhat contradictory for the court to have noted that directors are, by general law, agents of a company, whilst at the same time stating that such agency is merely casual in nature. Furthermore, to the extent that *Periasamy* may be said to have followed *Cooray*, it is pertinent to note that *Cooray* did *not* set out the position that directors of companies were to be considered only as casual agents. Indeed, it may be recalled that the Privy Council in *Cooray* expressly stated that it was not "deciding what activity is required to establish that an individual is carrying on the business of an agent" (at 419). Additionally, as I have analysed above (at [451]), although the accused in *Cooray* held the positions of president of the Union, vice-president of the Central Bank and president of the Committee, the entrustment which the accused was charged to have breached was *not* a result of these *positions* of his but because the manager of the depot had improperly handed over the monies to the accused. Indeed, if the prescribed procedures had been strictly followed, the accused would *not* have been entitled to obtain the monies in question. In the circumstances, I decline to follow *Periasamy*.

470 Importantly, the interpretation which I have adopted is also in line with the framework of the Penal Code, which provides for an increase in the scale of punishment according to the degree of trust reposed. If I had adopted the appellants' interpretation, an anomalous situation would result wherein a director who committed the offence of CBT of the property of his company or organisation would only be caught by s 406 of the Penal Code which would attract a maximum punishment of seven years' imprisonment in the 2008

revised edition, whereas a clerk or servant who misappropriates the property of the company could be liable to a much heavier sentence of up to 15 years' imprisonment under s 408 of the same edition of the Penal Code. This would result in a highly unsatisfactory state of affairs, as directors in their positions of leadership are regarded as being reposed with greater power, trust and responsibility than clerks or servants. The interpretation which I have adopted avoids this incongruity, and, in my judgment, is to be preferred as it is well-established that the court generally avoids interpreting statutes in a manner that produces absurd results (see *Public Prosecutor v Heah Lian Khin* [2000] 2 SLR(R) 745 at [53]–[54]; *Comfort Management Pte Ltd v Public Prosecutor* [2003] 2 SLR(R) 67 at [17]). In holding that directors fall within the class of persons referred to in s 409 (*ie*, bankers, merchants, factors, brokers, attorneys and agents), my decision is in line with the principles set out in the authorities such as *Cooray* and *Dalmia* as well as the language, framework and legislative purpose of s 409 of the Penal Code.

471 Finally, insofar as the argument is made that "agent" for the purpose of s 409 of the Penal Code covers only those who are professional agents, in the sense that they carry on a livelihood of being an agent, it follows from the analysis above that I do not accept this argument. The words "in way of his business as … an agent" should not be interpreted so narrowly, in my view, to limit the possible application of s 409 of the Penal Code only to persons who own (as a major or majority shareholder) or carry on an "agency business", or for that matter to persons who are employed in an "agency business", an "agency profession" or an agency-type of business or profession. In other words, there is no additional essential or mandatory element that the person must first be carrying on an "agency business" or be an owner of an "agency business" before he can even be considered to be liable for an offence under s

409. Similarly, s 409 should also not be restricted only to those persons whose occupation or profession bears the label "agent", such as real estate agents or insurance agents because of the words "as … an agent" in the section. As is clear from the analysis above, neither the case authorities nor the principles of statutory interpretation require that the section be interpreted in such a manner. Instead, as I have stated above, what is crucial is that the accused in question is entrusted with property or dominion over property when acting in the course of a certain trusted trade, profession, office or occupation held by the accused wherein he in the ordinary course acts as an agent.

472 In the final analysis, whether a person has been entrusted with property "in the way of his business" whether as "a banker, a merchant, a factor, a broker, an attorney or an agent" is very much a question of fact depending on all the facts and circumstances, including the nature and scope of his duties arising from his trade, profession, office or occupation, the circumstances under which the property was entrusted to him, and the degree and nature of the connection that the entrustment has with the nature and scope of those duties, having regard to the type of trusted trade, profession, office or occupation that the person is in.

473 Turning to the facts of this case, the appellants do not dispute that when John Lam, Kong Hee and Ye Peng, as members of the CHC Management Board, acted in that capacity on behalf of CHC, they acted as agents *vis-à-vis* CHC. In my judgment, this characterisation is accurate both as a matter of law and on the facts of this case. Whenever the CHC Management Board deals with CHC's property (including monies donated by the public to CHC) in accordance with CHC's constitution, the members of the CHC Management Board would always and necessarily be entrusted by CHC to act as agents to deal with such property. Having found that these appellants were entrusted with dominion over

CHC's property by virtue of their position as members of the CHC Management Board, I hold – based on the principles set out above – that this entrustment of dominion over CHC's property to the relevant appellants was in the way of their business as agents (of CHC) under s 409 of the Penal Code.

474 Accordingly, I am of the view that all the appellants are properly found guilty of, and convicted for, offences punishable under s 409 read with s 109 of the Penal Code for the offence of abetment by engaging in a conspiracy with certain other appellants to commit CBT by an agent in respect of CHC's monies.

The appellants' evolving mind-sets across the various timeframes

475 I turn now to analyse the mind-sets of the relevant appellants at the time the 1st Xtron BSA was executed on 17 August 2007. In particular, I refer to E-1, which is an email conversation between Serina, Eng Han and Ye Peng in early July 2007 concerning the appropriate term of borrowing and the amount required for the bonds under the 1st Xtron BSA. Serina clarified that in order to pay back the 1st Xtron BSA, Xtron would first obtain funds from another company known as "UEPL" and Xtron would then take ten years to repay the loan from UEPL. To this, Eng Han queried whether it was necessary for Xtron to take ten years to repay the loan and intimated that his impression was that "the sales of [the] album[s] [could] cover back the majority of the loan". Serina then responded:

> We based our projection on 200,000 copies of English Album sold which will only yield us $2.17M, hardly enough to pay off the $13M. So we will need 10 years as previously discussed assuming no other new unbudgeted expenditure.

476 Taking reference from E-1 as well as other correspondence between the appellants around that period, the Judge held that Kong Hee, Ye Peng, Eng Han and Serina were aware at the time the 1st Xtron BSA was executed that Xtron

would not, realistically speaking, be able to redeem the bonds when they matured in two years (see [293]–[298], [322], [356]–[357] and [393] of the Conviction GD). The Judge rejected the submission of the appellants that the projection of a sale of 200,000 albums was a "worst case scenario", especially since the projection of a sale of 200,000 albums was the only Xtron cashflow in existence around the material time. He was also unconvinced that the appellants could have had a genuine belief in Sun Ho's prospects of success in the US since the appellants were aware of Sun Ho's *dubious* commercial track record (see [466] of the Conviction GD).

477 Unlike the majority, I do not entirely agree with this aspect of the Judge's holding. In my view, it does not accord with the mentality of rational persons – such as Kong Hee, Ye Peng, Eng Han and Serina – to enter into a venture which would inevitably end up in utter commercial failure. In my assessment of the evidence, I accept the appellants' submission that they not only believed that Sun Ho would be a successful artiste in the US in the light of the representations by Justin and Wyclef but they *also* believed, in the several months leading up to the signing of the 1st Xtron BSA, that it was more likely than not that they would have been able to ensure that Xtron would eventually have sufficient funds to redeem the bonds within a few years and make substantial profits thereafter. For clarity of analysis, I will, in the discussion that follows, refer to the appellants' use of CHC's funds "for the purpose of funding [Sun Ho's] music career" (as was stated in the sham investment charges) through the corporate vehicle of Xtron (and later, UA) as the "Investment". This is distinguished from "the Crossover", which I will use to refer specifically to CHC's mission of using secular music to evangelise.

478 In arriving at the finding stated above, I find that the projection of a sale of 200,000 albums was a case of "scenario planning" and did not in fact reflect

the appellants' honest belief in Sun Ho's potential and ability to win over consumers in the US. It appears to me that Justin for his own reasons was fanning the appellants' ambition to make Sun Ho an internationally renowned singer, calling this "an opportunity to go huge, world wide [*sic*]" and "to break a new international super star"[204] and providing the appellants with very optimistic figures and projections. For instance, in an email dated 23 November 2006 to Kong Hee and Ye Peng, Justin commented that Wyclef was projecting sales of "multi-million units".[205] Justin also expressed great enthusiasm for Sun Ho's music videos, "China Wine" and "Mr Bill", in April 2007.[206] Subsequently, after the 1st Xtron BSA was executed, Justin informed Kong Hee and Ye Peng on 18 November 2007 that the plan was to launch Sun Ho's English album in the third or fourth quarter of 2008.[207] Not being experts in the US music industry, it was reasonable for the appellants to rely on Justin's expertise. At the time that the 1st Xtron BSA was executed, there appeared to be little to detract from the optimistic and bullish picture that Justin was portraying in respect of Sun Ho's foray into the US music market.

479 Moreover, in terms of concrete projections, a consistent theme within the appellants' various correspondence was a projected sale of 1.5 million albums at US$7 apiece. This formula was applied in the projected Xtron cashflow as at 18 January 2007,[208] in the Xtron budget as at 9 May 2007,[209] and again in the projected Xtron cashflow as at 28 September 2007.[210] It is also

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204 E-361, p 1.

205 E-361, p 2.

206 E-232.

207 E-398.

208 E-191.

209 E-537.

telling that in an email dated 28 September 2007, Serina informed Ye Peng that the cashflow "based on the *conservative estimate of 200K albums sold*"[211] [emphasis added] would be insufficient to repay the Xtron bonds or to finance a second album. I accept that Serina's description of a sale of 200,000 albums as a "conservative estimate" reflected the truth of the appellants' attitude towards the Investment in Sun Ho's music career and Sun Ho's potential in the US market at or around that particular period. In other words, I accept that while the appellants may have considered that there was a risk of failure, they did not genuinely believe this to be a significant risk which was likely to materialise when they first embarked on the project for Sun Ho to produce an English album and when they devised the plan to obtain funds by way of the Xtron bonds under the 1st Xtron BSA.

480 As late as 29 March 2008, Justin was still providing fairly detailed five years' estimates of profit and loss to Kong Hee. At this stage, the projected release date for Sun Ho's English album was in the second quarter of 2009, which was prior to the date on which the Xtron bonds would mature under the 1st Xtron BSA.[212] Sun Ho also appeared to be slated to perform on a tour with other artistes. These estimates of profit and loss showed that although the Investment was likely to suffer losses of less than US$1m in that year (*ie*, 2008), a profit in excess of US$4m yearly would be made from 2009 onwards with the revenue from recorded music, traditional media, touring, licensing, merchandising and digital media projected to be streaming in continuously. Justin projected for Kong Hee a very rosy picture of securing a total accumulated net profit in excess of US$32m by 2012.[213] This would have been

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210 E-146.

211 E-146.

212 E-361, p 9.

more than enough to repay the Xtron bonds, perhaps not at maturity, but soon thereafter with the huge profits that could be generated progressively.

481 However, as more projections were subsequently done, the picture appeared less and less rosy. The appellants' mind-sets must have correspondingly changed. As at 4 July 2008, it was projected that the Investment would suffer a loss of approximately US$6m and US$1m in 2008 and 2009 respectively, with a net profit well under US$1m in 2010.[214] Around this time (*ie*, in the middle of 2008), it became apparent to the appellants that the revenue from the Investment would be insufficient to repay the Xtron bonds.[215] In fact, the Investment required even more funds than the $13m that had already been disbursed under the 1st Xtron BSA.[216] At the same time, the appellants were facing auditing issues as regards the Xtron bonds, such as the need to write down the value of the bonds given Xtron's weak financial position and the likelihood that Xtron would be unable to redeem the bonds on maturity.[217] Further, concerns also arose that Xtron's and CHC's accounts might have to be consolidated if Xtron was viewed as being related to CHC. In order to address these issues, the appellants came up with various solutions which involved (a) moving Sun Ho out of Xtron; (b) extending the maturity period of the Xtron bonds; and (c) obtaining fresh funds from other sources (*ie*, Firna).

482 I find the appellants' conduct in the period leading up to and after the execution of the Firna BSA highly objectionable. Upon discovering, and despite

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213 E-361, p 13.

214 E-361, pp 42–44.

215 E-266.

216 See *eg* E-103 and E-152.

217 See *eg* E-346.

knowing, that Xtron would be unable to repay 1st Xtron BSA within the timeframe they had originally planned for, the appellants caused CHC and Xtron to enter into the ABSA which varied the below market interest rate of a very low 7% per annum to an *even lower* interest rate of 5% per annum, extended the deadline for repayment from two years to *ten years* and even increased the maximum amount of funding under the bonds from $13m to $25m, all of which were changes very detrimental to CHC and made without the provision of any valuable consideration to CHC by Xtron in exchange for CHC's agreement to those variations. The appellants were not even at all concerned that with the ABSA, they were almost doubling CHC's financial exposure to a financially strapped company that was already experiencing severe financial difficulties. Additionally, the appellants caused CHC to enter into the Firna BSA, diverting even *more* funds from CHC to fund the Investment at a stage when the production of the album had been beset by various delays, serious budget overruns and other issues. The appellants also used the funds that CHC ostensibly lent to Firna under the Firna BSA to provide a large sum of $2.5m to a third party, Wahju, for his personal expenses.[218] I infer that the $2.5m lent to Wahju was to seek his cooperation to allow the appellants to use Firna as the corporate vehicle to conceal their siphoning of funds out of CHC for the appellants' own purposes. It is clear to me from the chain of events that the appellants treated CHC's funds as their private piggybank which they could draw on as and when they deemed fit. Indeed, when it became apparent that they might not be able to return the funds initially misappropriated under the Xtron bonds due to budget overruns and delays, the appellants had no qualms about amending the repayment terms or misappropriating even more funds from CHC to fund their Investment under the guise of the Firna BSA.

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[218] See ASOF para 9.5 and A-132.

483 In a similar vein, I find the appellants' conduct in relation to the round-tripping transactions completely unacceptable and criminal in nature. When faced with auditing queries surrounding the Xtron and Firna bonds, Eng Han, Ye Peng, Serina and Sharon had no hesitation in manipulating various entities and transactions to make it appear as though both Xtron and Firna had redeemed the bonds. The use of the ARLA was critical in this regard. The ARLA was a mechanism which the appellants employed to extract funds from CHC in order to effect repayment of the Xtron and Firna bonds. This is apparent when one considers, amongst other things, how the appellants derived the sums CHC was to pay Xtron under the ARLA. The lack of any contemporaneous evidence as to whether the annual rental amount was fair value is telling; it demonstrates that the appellants did not consider whether it was in CHC's interest to enter into the ARLA at all. Instead, the appellants reverse-engineered the sums payable under the ARLA in order to ensure that the Xtron and Firna bonds could be repaid with the stipulated interest so as to not alert the auditors who were growing suspicious.

484 As the appellants' motives and mind-sets evolved over the period during which the various offences were committed, it would not, in my judgment, be appropriate to paint the appellants' motives for the various sets of offences with the same brush. Although I accept that at the very beginning when sourcing for external funds for their Investment, the appellants might have believed in the commercial viability of their Investment and in their ability to use the profits from their Investment to repay the Xtron bonds eventually (even if not by the initial maturity date, then perhaps just a few years after receiving the large revenue streams and making the huge net profits as projected by Justin), I find that this belief was gradually lost as time wore on. In 2008 when the appellants discovered that the repayment of the Xtron bonds was at risk, they had no

reservations about extending the repayment period and in having Xtron, and later Firna, issue riskier bonds for CHC to take up. Things came to a head in 2009 when, instead of repaying the bonds, the appellants orchestrated the round-tripping transactions to replace the debts owed by Xtron and Firna to CHC with Xtron's obligations under the ARLA. In my view, the evolving nature of the appellants' motivation and considerations is a factor that cannot be ignored in the sentencing process. On the one hand, I consider that my finding that the appellants' genuine belief at the time the 1st Xtron BSA was entered into that they would have been able to make sufficient profits from their Investment to repay the bonds, if not at maturity then shortly thereafter, ought to be taken into account in sentencing on the basis that the monies criminally misappropriated *vide* the Xtron bonds, in particular those under the 1st Xtron BSA, were *originally intended* to be for a limited period only. However, their subsequent actions in allowing CHC to enter into the Firna bonds despite the relatively negative prospects of their Investment at that stage is, in my view, far more aggravating in nature. Additionally, where the round-tripping charges are concerned, I find the appellants' use of one colourable device (*ie*, the round-tripping transactions) to cover other colourable devices (*ie*, the Xtron and Firna bonds) to be an aggravating factor that ought to be taken into account in sentencing Eng Han, Ye Peng, Serina and Sharon on these charges.

485 Before moving to my decision in respect of the appeals against sentence, I should explain that my finding that the appellants had genuinely believed, especially at the time the 1st Xtron BSA was executed, that the Investment would be commercially successful such that the Xtron bonds under the 1st Xtron BSA could be repaid if not on maturity, then soon thereafter, in no way impinges on the findings made in the majority Judgment in respect of the sham investment charges – which I agree with – that (a) the Xtron and Firna bonds were not

investments when viewed though the lenses of CHC and thus amounted to a "wrong use" of the BF and (b) each of the appellants as members of the CHC Management Board or holders of important official positions of responsibility within CHC as the case may be possessed a dishonest intention as they knew that they were not entitled to put the BF to such a use. In my view, the Xtron bonds and the Firna bonds amounted to a "wrong use" of the BF irrespective of the appellants' initial belief in the commercial viability of their Investment. I agree entirely with the finding that the Xtron and Firna bonds were not investments when assessed objectively from the perspective of CHC but were effectively a means through which the appellants could utilise the funds in the BF for their Investment and their other purposes (*eg*, conferring an interest-free loan of $2.5m on Wahju for his personal use[219]). In line with this, there was therefore a clear lack of any consideration on CHC's behalf from the very beginning as to whether the 1st Xtron BSA issued by an insolvent company with the bond proceeds to be used for a rather high-risk project should be purchased at all by CHC, and yet for all the risks to be taken by the bond holder, the coupon rate offered was only 7% per annum. Their total disregard of CHC's financial interest resulting in serious breaches of their obligation to protect and safeguard CHC's financial interest at all times permeated throughout the rest of the transactions they undertook on behalf of CHC.

486 More egregiously, the appellants were concealing the fact that Kong Hee, with the assistance of the other appellants, was in full control of Xtron, and were perpetuating the impression to the auditors and lawyers that Xtron and CHC were independent entities. The scope and potential for conflict of interest, especially where Kong Hee was concerned, were enormous. The Xtron bonds were not, as the appellants made it seem, a genuine arms-length commercial

219 E-175.

investment, but were part of a carefully orchestrated method to systematically extract funds from CHC to further their own purposes. An analogy may be drawn between the appellants' use of CHC's monies for their Investment and a rogue trader who misuses his client's money for his own purposes to make very risky investments with very high potential returns. If the investments turn out to be profitable, the trader simply returns the client's money and keeps the large profits to employ as he wishes. If the investments turn out badly, then the client may suffer all the loss as the rogue trader may not have the means to repay the client for the full sum of money originally taken out of the client's account to enter into those risky trades. Basically, the rogue trader takes all the upside and the client takes all the downside. The rogue trader's honest belief that he will be able to return the client the money that he had taken because he honestly believes that his trades would be profitable is irrelevant to the fact that he had, in fact, dishonestly misappropriated his client's funds for an unauthorised purpose.

487 Likewise, the fact that the appellants might have genuinely believed at the time the 1st Xtron BSA was executed that the Investment, though likely to involve substantial financial risk, would, if successful, eventually garner more than sufficient revenue and net profit for repayment of the bonds, is irrelevant to the finding that the appellants acted dishonestly in causing CHC to enter into the 1st Xtron BSA and thereby dishonestly misappropriated the funds of CHC. While I have drawn an analogy above between the *actions* of a rogue trader and the appellants, I acknowledge that their underlying *motives* may not be entirely identical. While the rogue trader's motives may be wholly self-serving, the appellants' motives may be mixed, *ie*, partially to benefit CHC by investing in what they believe to be a better and more effective means of evangelisation to non-believers worldwide, and partially to use criminally misappropriated

CHC's funds to invest in Sun Ho's music career to make huge profits (as can be seen from the detailed financial projections made) both (a) to directly benefit Sun Ho by spending large sums of money to build up her secular music career, and transform her into an internationally renowned singing diva, and paying her very attractive financial benefits and commissions from sale revenues (in the course of which her husband, Kong Hee, would benefit indirectly (see [509] below)) and (b) to directly benefit the shareholders of the private company, Xtron (namely Choong Kar Weng ("Kar Weng"), Koh Siow Ngea and those others who are in effective control of it), and later UA (which is fully owned by Wahju), should the huge projected profits from their investment in Sun Ho as an artiste be realised.

488 On appeal, the appellants strenuously advance the argument that they had never intended to cause CHC to suffer any financial loss and thus they were never dishonest. Instead, they submit that they had at all times acted in CHC's best interests. They contend that their states of mind then were analogous to the accused described in illus (*d*) to s 405 of the Penal Code and hence, they ought to be acquitted of the CBT Charges.

489 I reject the appellants' argument on two levels. In the first place, I agree with the Judge and the majority that the appropriate question is *not* whether the appellants intended to cause CHC *financial* loss, but whether the appellants knew that they were not legally authorised to use CHC's funds in the manner which they did, even when there was in fact no intention to cause CHC *financial* loss, which I do not accept on the evidence. My finding that the appellants, at the time of the 1st Xtron BSA, honestly believed that Sun Ho's English album would be successful and that Xtron would have been able to effect repayment of the Xtron bonds if not at maturity, then soon thereafter does not, in my view, controvert the holding that they knew that, in any event, they were *not* legally

entitled to cause CHC to enter into the 1st Xtron BSA, which in itself is sufficient to make out the element of dishonesty for the purpose of the offence of CBT under the Penal Code. Their dishonest *mens rea* is apparent from their lack of full and frank disclosure of the true relationship between Xtron and CHC to the CHC Management Board, the EMs, the auditors and the lawyers in circumstances where Kong Hee's interest was clearly potentially in conflict with the interests of CHC. Yet, despite circumstances which cried out for legal advice and disclosure, the appellants nevertheless conspired with Kong Hee to cover up the truth and to misappropriate monies from the BF for the purposes of their Investment.

490 On a more fundamental level, *even if* I do accept the appellants' legal argument that a finding that they had never intended to cause CHC financial loss would lead to their acquittal on the CBT Charges, I wholly reject the appellants' characterisation of their intention on the facts. I will explain this in greater detail in my discussion below on the appeals against sentence, but it suffices to note for the present purpose that, in my view, it cannot be doubted that the appellants had intended to enter into transactions that were not to CHC's financial advantage. In fact, those transactions were to CHC's financial detriment and the appellants had intended to and did cause financial loss to CHC at the time the transactions were entered into by them on behalf of CHC. Where there existed such an intention to cause financial loss to CHC, the appellants must know that they were, *a fortiori*, not legally authorised to use CHC's funds in such a manner, especially where the various transactions were purportedly meant to be investments on CHC's part. Not only would this further make out the element of "dishonest misappropriation" of CHC's property beyond a reasonable doubt to satisfy the elements of CBT under the Penal Code for the purpose of conviction, it in itself is relatively more aggravating than a case

where no such loss was intended. Needless to say, this factor must also be taken into account at the sentencing stage along with an examination of the magnitude of that financial loss intended and caused to CHC.

My decision in respect of the appeals against sentence

491 With the above in mind, I now consider the appellants' and Prosecution's respective appeals against the sentences imposed by the Judge. In brief, the appellants seek a substantial reduction of their sentences while the Prosecution seeks an increase in the sentences imposed (save for the round-tripping charges relating to Tranches 10 and 11 of the SOF).

492 The Judge considered that the aggravating factors were that the offences involved the misuse of massive amounts of charity funds held by CHC; the betrayal of the high degree of trust reposed in the appellants as CHC's leaders who were duty-bound to act with the utmost integrity and accountability; the manipulation and exploitation of CHC's culture of absolute and unquestioning trust and deference to the wisdom of the CHC's pastors; the unmistakably clear pattern of fraudulent and deceptive conduct, of flawed corporate governance and active concealment, and of planning and premeditation; and the fabrication of misleading cover stories to avoid detection.

493 On the other hand, the mitigating factors taken into account by the Judge were that the appellants were first offenders and were not motivated by "personal gain"; no "permanent loss" was intended nor caused to CHC; and all the monies misappropriated were subsequently returned to CHC with interest (the Sentencing GD at [33]). He noted however that the motivation for restitution was not entirely *bona fide* but to cover up their earlier misdeeds and

to avoid detection and allay suspicions, and did not come about solely due to the appellants' personal sacrifice (the Sentencing GD at [27]).

494 I agree with the aggravating factors that the Judge identified. However, I express reservations on whether some of the mitigating factors were correctly taken into consideration given the evidence before the court. As I have alluded to above, I do not agree that (a) all the appellants' motivations were purely or entirely altruistic with no elements whatsoever featured of any direct or indirect gain to Kong Hee and his wife arising from the use of the misappropriated funds; (b) the appellants had always acted in CHC's best interests and did not intend to cause CHC any financial loss at the time when the appellants caused CHC to enter into the transactions in question; and (c) CHC ultimately did not suffer any permanent financial loss as the Judge assumed. The methods which the appellants employed to effect restitution of the monies when the ARLA was rescinded must also be examined more closely before giving due weight to the act of restitution. I will go on to consider each of these factors, beginning with the first point identified above.

Whether the appellants were motivated by purely altruistic motives

495 In convicting the appellants, the Judge stated at [187] of the Conviction GD that he believed that the appellants "loved CHC and had no wish to do any harm to it", and that in using CHC's funds for the Crossover, the appellants "believed that they were using church funds for an evangelistic purpose that was not just permitted but positively mandated by the vision and mission of CHC". Consistent with this analysis, the Judge observed at the sentencing stage that the appellants were not motivated by any "personal gain", and that in any case, there was no evidence of any "wrongful personal gain" on the part of all six appellants (the Sentencing GD at [20]–[21]). However, the Judge also added that as the

funds misappropriated were ultimately intended to finance Sun Ho's music career, there was, in a limited sense, an "indirect benefit for Kong Hee if efforts to advance his wife's music career had benefitted from the availability of these funds". The Judge then went on to note that perhaps only in this limited and indirect sense, Kong Hee (but not the others) could be said to have been motivated by greed and self-interest in obtaining a wrongful indirect gain for himself. However, the Judge highlighted that it was not the Prosecution's case that even Kong Hee had enjoyed any "wrongful gain". As none of the submissions before him alluded to it, he thus decided not to say any more about this aspect.

496 In my view, the use of the term "personal gain" has the potential to give rise to ambiguity and consequently disagreements. Indeed, it is not easy to decipher what the Judge meant when he stated on the one hand that there was no evidence of "wrongful personal gain" on the part of *any* appellant, but on the other hand that there was "undoubtedly also a form of indirect benefit for Kong Hee" ([21] of the Sentencing GD). I prefer instead to view the concept of gain or benefit that may have accrued to the individuals in question in four specific forms, and will refer to these forms in the analysis below. These are (a) direct financial benefit; (b) direct non-financial benefit; (c) indirect financial benefit; and (d) indirect non-financial benefit. I therefore interpret the Judge's remarks at [20]–[22] of the Sentencing GD to mean that:

(a) There was no evidence of any *direct* benefit (whether financial or non-financial) to any of the six appellants.

(b) Sun Ho clearly derived a *direct* benefit (both financial and non-financial) as CHC's funds were channeled to Xtron and used to finance and advance her music career.

(c) Kong Hee undoubtedly enjoyed a form of *indirect* benefit (both financial and non-financial) since his wife benefitted both financially and non-financially from the expenditure of the CHC funds to finance and advance her music career. However, as the Prosecution's case was not that Kong Hee had enjoyed any gain whether direct or indirect, the Judge did not say any more about this aspect.

497 Having set out the above points at [20]–[22] of the Sentencing GD, the Judge also noted a few paragraphs down (the Sentencing GD at [26]) that he was "not quite able to see how there was a pure 'altruistic' purpose for the use of the Crossover funds, contrary to the submissions of the defence". As he saw it, the "direct beneficiary [of the appellants' actions] … was Sun Ho [who was not in any financial hardship], [and] whose music career in the US was being sponsored through these funds". But the Judge did not go on to address the significance of this point (*ie*, that the appellants' use of CHC's funds cannot be said to be purely altruistic given that Sun Ho had obtained a benefit from it) in the latter part of that paragraph. Instead, he observed that no matter how pure the appellants' motives were, the end did not justify their dishonest means, though these motives were not altogether irrelevant in sentencing and should feature towards mitigating the seriousness of the offences. When the Judge's observations are read as a whole, it appears clear, at least from his remarks at [22] of the Sentencing GD, that the Judge did not take into account any indirect benefit that may have accrued to Kong Hee as a factor in his decision on sentence. At the same time, it is not entirely clear whether the Judge had placed any weight on the fact – which had not escaped his attention – that the appellants had intended to, by their actions, directly benefit a third party, Sun Ho, in terms of her music career beyond the aims of evangelism as envisaged by the Crossover.

498 The position taken by the Prosecution on the direct benefit that had accrued to Sun Ho, and the indirect benefit that might have accrued to Kong Hee, is even less clear or consistent. Neither of these points featured in its submissions before the Judge. In fact, neither of these points featured in its written submissions before us. Yet, in the hearing before us on 21 September 2016, the Prosecution attempted to bring in the point that Sun Ho had benefitted from the offences.[220] The Prosecution's purpose in raising this point appears to be that this should be a factor that the court ought to take into account for the purpose of sentencing when considering what the appellants were motivated by and therefore lead the court to find that the appellants were not driven *purely* by altruistic motives. In essence, the Prosecution on appeal is in fact relying on the existence of a direct benefit being conferred on Sun Ho by the appellants as a factor in sentencing. However, the Prosecution did not go further and submit that Kong Hee had obtained a form of indirect benefit that ought to be counted against him as an aggravating factor or to show that his motives for the use of the criminally misappropriated monies were not entirely altruistic. Instead, the Prosecution appears to accept that all the appellants did not benefit "personally", but submits that the Judge had placed too much weight on this mitigating factor.

499 The Prosecution's submission at the appeal in respect of the benefit that had accrued to Sun Ho was met with strong objections from counsel for the appellants. For instance, counsel for Kong Hee submitted in reply that this was a "sudden change of [the Prosecution's] undisputed and uninterrupted position below of no wrongful gain" and that this went against the position that the Prosecution took since the first day of trial.[221] In fact, the Prosecution's submission even prompted the majority in this court to question, on a few

220 See, *eg*, Transcript, 21 September 2016, at p 23.

221 Transcript, 21 September 2016, at pp 64-65.

occasions, whether it contradicted the case that the Prosecution had run at trial, which appeared to be premised on the basis that wrongful gain was not a factor.[222]

500 For context, it is useful to set out what the Prosecution stated on the first day of trial that gave rise to the present state of affairs. It seems that clarification was sought specifically in relation to s 24 of the Penal Code on whether the Prosecution was relying on the limb of "wrongful loss" or "wrongful gain" (or perhaps both "wrongful loss" and "wrongful gain"). To this, the Prosecution clarified that it was relying only on "wrongful loss", in the following manner:[223]

> Your Honour, Mr Sreenivasan has also made the point about the prosecution not having specified whether we are alleging an intention to cause wrongful gain or wrongful loss. For the purposes of proving these charges, your Honour, it will be the prosecution's case that the mens rea of dishonesty as an element of the CBT charges can and will be made out by our showing an intention to cause wrongful loss, and we'll be adducing the necessary evidence.

501 It bears noting that causing "wrongful loss" to one party may or may not lead to a resulting "wrongful gain" to another party. An example of a person causing "wrongful loss" without resulting in any "wrongful gain" to anyone would be an arsonist physically damaging church property. In many cases, particularly those involving the misappropriation of monies, "wrongful loss" to a person often results in a corresponding "wrongful gain" at the same time to another person. An example would be the misappropriation of church monies for the benefit of the person committing the misappropriation or for the benefit of a related third party. These examples show that it does not follow that the presence of "wrongful loss" necessarily means that there has to be *no* "wrongful

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222 See, *eg*, Transcript, 21 September 2016, at p 23 and p 37.

223 Transcript, 15 May 2013, p 45.

gain" whatsoever. Two alternatives are therefore present: the presence of "wrongful loss" without leading to "wrongful gain" and the presence of "wrongful loss" leading to "wrongful gain". Without further clarification on which of the two alternatives is applicable, it is not surprising that misunderstandings may arise leading one party to make an assumption favourable to itself when the other party may not have meant it that way. In any case, irrespective of which of the two alternatives is applicable, it was also not clear whether the Prosecution's position that it would seek to prove an *intention* on the part of the appellants to cause "wrongful loss" to CHC necessarily meant that there was therefore *no* resulting gain or benefit of any kind *factually accruing* to any person including a third party, like Sun Ho or Wahju, as a result of the criminal misappropriation, or that this was a consequential fact that the Prosecution was also accepting from the commencement of the trial. It bears further noting that the ambit of "wrongful gain" in this context was not defined or made clear by the parties to the court below whether it included all forms of gain (*ie*, both financial and non-financial, direct or indirect) conferred by the appellants on themselves and also all forms of gain (*ie*, both financial and non-financial, direct or indirect) conferred by the appellants on third parties.

502 As can be seen, the manner in which this issue was dealt with by the parties leaves matters in an unsatisfactory state. In my view, it is clear that Sun Ho had obtained a direct benefit – both financial and non-financial – and Kong Hee, as her husband, had necessarily obtained an indirect benefit – both financial and non-financial – from the use of the criminally misappropriated funds "for the purpose of funding one [Sun Ho's] music career" as specified in the sham investment charges. Yet, because of the manner that this issue had been dealt with, these factors were not properly ventilated and were thus not taken into account by the Judge during sentencing. It also raises the difficult

question of whether in these circumstances, all the relevant facts and circumstances affecting sentence, not limited only to those necessarily needed to prove the elements of and the particulars stated in the charges (including those not taken into account by the Judge), may now be taken into account by this court during an appeal against sentence.

503 I turn to this difficult question – which unfortunately relates not only to these two factors but also to the important factor of whether there was indeed permanent financial loss – from [548] onwards below. For now, I will explain and refer to some aspects of the evidence that lead me to my view that Sun Ho in fact obtained a direct financial and non-financial benefit and Kong Hee in fact obtained an indirect financial and non-financial benefit because of the funding of Sun Ho's music career with monies dishonestly misappropriated from the BF of CHC pursuant to a conspiracy which Kong Hee himself had engaged in together with Ye Peng, Eng Han, John Lam and Serina.

504 To set the context, I accept that CHC may take the view that it could make use of an internationally renowned singing star to attract large groups of non-believers and then spread the Christian message to them as they gather together perhaps at a secular concert. I also note the Prosecution's position that the theological legitimacy of such a means of evangelism is not an issue in the present case. Yet, even accepting the theological soundness of the Crossover, one would have expected that a sensible course of action would be to assess if the Crossover (*ie*, the use of popular culture for evangelical outreach) as a means of evangelism was prudent and cost-effective prior to embarking on the project. And, if it was accepted that the Crossover was in principle and in concept a worthwhile project for the church to undertake, the appellants as leaders of CHC in their various capacities ought to have carefully examined what would be the most cost-effective means to execute the Crossover, especially when large sums

of monies, which were taken from donations made by churchgoers to CHC no less, were going to be expended.

505 For instance, could the more cost-effective method be to engage an already well-established and renowned singer with a large fan base who could just as well attract a very large secular crowd? Kong Hee could then suddenly appear on stage to preach to the captive audience as was indicated to the court when Eng Han was asked how the evangelisation could be effected via a secular mega-concert.[224] If so, there would then have been no need to undertake the huge financial risk of investing millions, if not tens of millions of dollars, into a venture to turn Sun Ho into an international singing star. In fact, in order to attract large and different crowds each time, it may well be that having the flexibility of engaging different internationally renowned singers each time would be more effective to gain a far wider outreach to different crowds rather than using the same singer (perhaps with the same fan base) all the time. With some imagination, numerous other feasible options could be explored to identify the option which would best achieve the same objective at perhaps the most reasonable cost. However, no proper evaluation of other alternatives and their cost-effectiveness appears to have been done by the appellants. The apparent single minded pursuit of only one option to use Sun Ho without even considering the *possibility* of other better and more cost-effective alternatives to achieve the same evangelisation objective itself raises questions as to whether at the back of it all, the appellants had a predominant motive to benefit Sun Ho specifically and to benefit Kong Hee indirectly, with evangelisation being just a distant objective. The undue preference by the appellants for this single option to the total exclusion of all others is compelling.

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[224] Transcript, 16 September 2016, pp 76–77.

506 Against that backdrop, it is impossible, in my view, to characterise the appellants' use of various covert devices to move monies out of CHC to a *private company*, Xtron, and later another *private company*, Firna, as anything other than the misappropriation of CHC's funds for the purposes of privately *investing* in or *funding* Sun Ho's *music career* in the US. In fact, this is exactly what was stated in the charges. The sham investment charges all stated that the appellants had misappropriated CHC's funds "for the purpose of funding [Sun Ho's] music career". With all the numerous and detailed Microsoft Excel spread sheets meticulously prepared to establish the projected revenues, expenses and the potentially huge net profits that would accrue to Xtron, and having regard to the terms of the artiste management agreements signed between Xtron and Sun Ho which were financially very advantageous to Sun Ho (see [508] below), it appears to me that making money out of their Investment was at the forefront of their motives. The appellants say that they were pursuing a "church purpose" in that the investment into Sun Ho's music career was to advance the Crossover, but it is evident from the above analysis that though the aims of the Crossover and Sun Ho may have intersected, they would not have overlapped entirely. Although the plan was for Sun Ho to use the fame and influence derived from the Investment for evangelistic purposes via the Crossover, any assertion that the fame and influence Sun Ho obtained through the Investment did not *also* directly benefit her and indirectly benefit her family (including her husband, Kong Hee) would, to my mind, be entirely contrived.

507 In my view, it is very clear from the evidence before the court that Sun Ho gained both a direct financial benefit as well as a direct non-financial benefit from the appellants' use of the criminally misappropriated funds to fund her music career. Quite apart from whether her music career in the US would have taken off, Sun Ho had obtained a direct financial benefit once the funds were

used for the purposes of and to fund her music career. On this issue, I agree with the Judge's observations (though not with his subsequent treatment (or non-treatment) of this point) that she was the direct beneficiary of the use of the misappropriated funds. Indeed, I struggle to see what possible evidence can be adduced to show the contrary or how it can be argued otherwise given that Sun Ho's music career was being *sponsored* through the use of those funds.

508 Apart from this, Sun Ho would have gained further financial benefits. In this regard, I find it pertinent to refer to the various artiste management agreements which Sun Ho signed with Xtron, and later, UA.[225] These are undisputed documentary evidence. I do not believe that the appellants, in particular Kong Hee, were unaware of the advantageous terms in these agreements relating to Sun Ho. Instead, it appears clear to me from these undisputed documentary evidence that the appellants had an intention of benefitting Sun Ho financially. For instance, under the agreement between Sun Ho and Xtron (which was varied in January 2006), Sun Ho was to receive 25% of the *gross* income received by Xtron as well as a monthly salary of US$10,000. This means that if Xtron were to receive any sales revenue from her concerts, albums and tours including other licensing and merchandising activities, Sun Ho would have been entitled to 25% of that sum even *before* accounting for any amounts that were expended to earn that income. Sun Ho was therefore always effectively in a position of net financial gain; any losses suffered would be borne exclusively by Xtron. The same framework was applied to her agreement with UA, under which she was entitled to 10% of the *gross* income as well as 100% of the royalties that UA received on her behalf from Justin's company.[226] During the hearing, it was submitted that Sun Ho had

225 A-38, X-52, X-53 and A-40.

226 A-40.

always donated the monies which she received as an artiste to the church or to various other charitable causes. It is not clear whether this was in fact true, but even assuming that this was so, this does not change the fact that she was *contractually entitled* to a substantial financial benefit without having to bear any of the corresponding risk. This was a benefit in and of itself. Apart from these direct financial benefits to Sun Ho, the use of the misappropriated funds to finance the development of her music career with the objective of turning her into a mega-star also conferred a direct non-financial benefit on Sun Ho in allowing her to build up her music career at CHC's expense and to gain international fame and success for herself.

509 In my judgment, the very fact that Kong Hee is Sun Ho's husband necessarily means that he must also have obtained a financial and non-financial benefit – albeit in an indirect way – from the use of the misappropriated funds on her and her career. It cannot escape notice that having the church pay for all the expenses involved in building up Sun Ho's music career meant that Kong Hee and his family would not need to provide their personal funds for Sun Ho's music career development. Just as this was a form of direct financial benefit to Sun Ho, it was an indirect financial benefit to Kong Hee. Equally, the income and potential profits that Sun Ho was entitled to were also a form of indirect financial benefit to him, while the fame and success that Sun Ho could gain (and gained) as a direct non-financial benefit to herself was also a form of indirect non-financial benefit to Kong Hee as her husband. Taken together, these factors would call for the imposition of a more severe sentence on Kong Hee than that imposed by the Judge as they would demonstrate that his motivations were not pure or altruistic, and that he was coloured by greed and self-interest.

510 In the light of the above, I find it somewhat perplexing that the Prosecution – at least up till the oral hearing before us when it appeared to have

suddenly changed (or clarified) its position – chose to base its case *exclusively* on the element of wrongful loss and to ignore all manner of gain to any party for the purposes of *both* conviction and sentence. But I must clarify one point in this regard. It is *not* that where the Prosecution chooses to run its case on *conviction* on the basis of "wrongful loss" as opposed to "wrongful gain", it is estopped from raising any evidence or making any submissions at the *sentencing stage* on benefits or gains that would accrue or had accrued to an accused person or a third party. Some of the submissions by the appellants come close to suggesting this. Even where the offence of CBT is premised on wrongful loss, it remains open to the Prosecution to raise the submission in sentencing that the offences had been committed for the benefit of an accused person or a third party. The problem in this case is not that the Prosecution had premised its case against the appellants exclusively on wrongful loss in respect only of proving the elements of the CBT Charges; it is that the Prosecution appears to have accepted, for the purposes of *both* conviction and sentence, that Kong Hee obtained no direct or indirect financial or non-financial benefit *as a fact*, and had further proceeded largely on the basis that any direct financial and non-financial benefit, though clearly present on the facts, to Sun Ho was also to be ignored.

511 These issues might have stemmed from the Prosecution's acceptance or "concession" that the Crossover is synonymous with Sun Ho's secular music activities and that the two may be used interchangeably (at [25] and [124] of the Conviction GD). I would have thought that the particulars of two of the three sham investment charges as framed are fairly clear in that the monies were dishonestly misappropriated "from the said Fund *for the purpose of funding one [Sun Ho's] music career*" [emphasis added]. The third sham investment charge as framed is even clearer with a dual purpose that the monies were dishonestly

misappropriated "from the said Fund *for the purpose of funding one [Sun Ho's] music career* and *for the purpose of providing funds to one Wahju Hanafi*" [emphasis added]. The appellants were convicted on these charges without amendments to the particulars. All the three charges do *not* say that the monies were dishonestly misappropriated "from the said Fund *for the sole purpose of funding CHC's evangelisation*" with no reference whatsoever to Sun Ho's music career or Wahju. However, as a result of this "concession" by the Prosecution, it appears that the appellants may have sought to *interpret* the sham investment charges as meaning that the criminally misappropriated funds did *not* confer any direct benefit whatsoever on Sun Ho (and consequently, no indirect benefit on Kong Hee) but instead went wholly towards furthering the Crossover, a church purpose, as if these charges were amended to read that the monies were dishonestly misappropriated "*for the sole purpose of funding CHC's evangelisation*" when it is patently not the case. As a result, the presence of benefits to Sun Ho and Kong Hee does not appear to have been properly ventilated at trial (although evidence in relation to the benefits was adduced before the court) and the appellants have not been given a full opportunity to address the court on them. I discuss the implications of this from [548] onwards below.

512 Before turning to the next factor, it should be pointed out that, as stated above, the misappropriation of the BF for the Firna bonds was not solely for the purpose of funding Sun Ho's career, but was also "*for the purpose of providing funds to one Wahju Hanafi*" [emphasis added]. The Judge found that not all the Firna bond proceeds were intended to be used to fund the Crossover, and that out of the $11m drawn down on the Firna bonds, $2.5m of that was lent without interest to Wahju for his personal use (which included certain trading activities) (at [162] and [398] of the Conviction GD). In my view, the unequivocal and

only inference to be drawn from the particulars of the third sham investment charge and the Judge's corresponding finding is that the appellants' criminal acts further resulted in a third party, Wahju, obtaining a large sum of money from the BF for his *personal use* under a guise of a loan of monies to Firna. This undoubtedly amounts to a clear form of direct financial benefit to Wahju that has been proven beyond reasonable doubt and which the court may have regard to for the purpose of sentencing. In my view, the presence of this fact means that where the third sham investment charge is concerned, the appellants' motivations cannot be described as exclusively or solely altruistic.

Whether the appellants acted in what they believed to be in CHC's best interests and without an intention of causing CHC to suffer financial detriment

513 The next issue is whether the appellants acted in what they believed to be in CHC's best interests and without an intention of causing CHC to suffer financial detriment. The Judge appears to have accepted as mitigating facts that the appellants had acted in what they considered to be the best interests of CHC and without any intention to cause any harm to CHC (see, *eg*, the Conviction GD at [187] and [500] and the Sentencing GD at [4], [20] and [33]). In relation to the issue of whether the appellants intended to cause CHC to suffer financially, the Judge held that the appellants did not have an intention to cause CHC to suffer "permanent loss" seemingly for the following reasons:

(a) In respect of the Xtron and Firna bonds, the Judge found the substance of these transactions to be a "temporary loan" or a "loan" of money from the BF to Kong Hee (and the other appellants) for the use on the Crossover (see [153] and [172] of the Conviction GD) which the appellants intended to repay sometime in the future, even though how

they would do so might have been unclear (see [464] of the Conviction GD).

(b) In respect of the ARLA, the Judge held that the appellants did not intend to cause CHC to suffer "permanent financial loss" because the "net effect of the transactions was that certain debts owed to CHC, *viz*, the Xtron and Firna bonds, would be substituted by another obligation, namely, the obligations owed under the ARLA, and there was thus no attempt to extinguish the debts owed to CHC" (at [52] of the Sentencing GD). However, having said this, the Judge acknowledged that had the ARLA not been rescinded, CHC would have suffered an actual loss of $3.2m which it was required to pay as GST under the ARLA (at [53] of the Sentencing GD).

514 In its submissions on appeal, the Prosecution submits that the Judge erred in giving undue weight to his finding that no "permanent loss" was intended to CHC because while the criminally misappropriated funds were ultimately returned to CHC, the means by which this was to be achieved was never specifically planned for by the appellants when they misappropriated CHC's monies. Having failed to do so, the Prosecution argues that the appellants knowingly put CHC's interests at risk. The Prosecution highlights that the Xtron and Firna bonds were "not investments intended to generate returns for CHC", as claimed by some of the appellants. With regard to the round-tripping charges, the Prosecution also emphasises the potential loss of $3.2m as GST on CHC's part and submits that this ought to be taken into account as a significant aggravating fact because the appellants were willing to "squander more than $3.2m of CHC's money to pay GST on the sham ARLA" in order to perfect the deception created by the round-tripping transactions.[227]

515 I disagree with a number of aspects of the Judge's finding. In particular, I do not accept that the appellants believed, at all times, that they were acting in CHC's best interests. Nor do I accept that the appellants *intended* no "permanent loss" to CHC. I agree, in this regard, with the submissions of the Prosecution as detailed in the paragraph above. However, the underlying basis and reasons for my holdings go somewhat further than the submissions of the Prosecution. Before dealing with my findings in detail, I first explain the concepts of "best interests" and "loss" and the relationship between them.

516 In the framework of the analysis that follows, the concept of whether the appellants acted in what they believed to be CHC's best interests is the overarching topic that will be discussed. Whether the appellants may be said to have done so must be assessed in a holistic manner. The broad question is whether their conduct demonstrates that they pursued the course of action that they believed provided the greatest benefit and advantage to CHC. In this regard, I accept that in construing the benefit and advantage to CHC, this may include not only financial profit but also the realisation of other non-financial goals, such as evangelisation. At the same time, the question of whether the appellants acted in CHC's best interests, and believed themselves to be doing so, cannot be divorced from the methods the appellants had employed to further their objectives. The comments I made at [504]–[505] above about the assessment of cost-effectiveness and other feasible alternatives when pursuing a particular aim are also relevant in this context.

517 The issue of whether the appellants intended to cause CHC to suffer financial loss is therefore a subset of this broader inquiry. To the extent that the

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[227] Prosecution's sentencing submissions, paras 125–128; Transcript, 20 September 2016, p 96.

appellants allowed CHC to enter into financially detrimental and unprofitable transactions in pursuit of other objectives whilst at the same time omitting to consider whether there were other more cost-effective and feasible alternatives to achieve their aims would, in my view, cast doubt on their assertion that they had at all times believed that they were acting in CHC's best interests.

518 In this connection, there are a variety of ways in which one may be said to suffer financially. The approach which the Judge adopted views the issue of "loss" from the *form* of the transactions which the appellants caused CHC to enter into. Thus, he found that because the appellants intended, ultimately, to comply with the terms of the transactions, the appellants had thus not intended to cause "permanent loss" to CHC.

519 Whilst I accept that the Judge's approach is one way of tackling the issue of whether CHC suffered "loss" (and whether the appellants had an intention to cause such "loss"), it would be, in my view, erroneous to centre the inquiry *solely* on whether the appellants intended at some point in the future to comply with the terms of the transactions without going further to inquire if the *substance* of the various transactions which the appellants caused CHC to enter into were fair and commercially justifiable in the first place. It is important, in this connection, not to conflate the appellants' eventual return of certain monies on the terms of the various transactions (which only occurred in 2010 after the appellants faced the prospect of criminal investigation) with the inherent nature of the transactions that the appellants caused CHC to enter into. To take a simple example, *if* the appellants caused CHC to purchase high-risk bonds with a low interest rate of 4.5% per annum when they knew that the fair interest rate that the market would have demanded for such an investment ought to have been a much higher one of 16% per annum, the appellants would have intended to cause CHC to suffer loss *even if* the appellants had *also* intended to repay the

bonds with the stated interest (at 4.5% per annum). Seen from this perspective, the evidence clearly demonstrates that the appellants had intended to short-change CHC on multiple fronts.

520 With the above in mind, I will analyse each of the transactions (*ie*, the Xtron bonds, the Firna bonds, and the ARLA (which was the mechanism by which the Xtron bonds and Firna bonds were redeemed)) to explain my view that the appellants did not genuinely believe that they were acting in CHC's best interests when causing CHC to enter into these transactions. I will also consider specifically Kong Hee's position *vis-à-vis* CHC, the Crossover and Sun Ho and whether he had acted in what he believed to be in CHC's best interests in the light of that position.

The Xtron bonds, Firna bonds and the ARLA

521 I begin with the Xtron bonds. The appellants submit that the Xtron bonds were a genuine investment meant to achieve two separate objectives for CHC, *viz*, evangelisation and financial profit. However, when the transaction is properly analysed, it becomes clear that financial profit for CHC was never a real consideration in the appellants' calculations. In fact, CHC had clearly overpaid for the Xtron bonds as an "investment" into bond financial instruments. This is because the financial risk that CHC undertook in entering into the Xtron bonds was not commensurate with the interest returns payable under the 1st Xtron BSA. It would appear from the evidence that the *market* required a substantially higher rate of return (sometimes referred to the effective "yield to maturity" of the bond) because of the relatively high risk of lending monies to Xtron. Not to factor in the magnitude of the financial risk involved, which forms an integral element of establishing the fair market return or the "yield to maturity" expected from bonds as an investment, is to ignore

commercial reality. I have in mind, in this regard, the undisputed fact that Citic Ka Wah had demanded a much higher interest rate of 16% per annum on a loan of $9m to Xtron, a loss-making music production company (with hardly any assets) that was intending to use the entire loan proceeds to embark on perhaps a high-risk investment in Sun Ho as an artiste. From this perspective, CHC had clearly provided Xtron more value than what the Xtron bonds were in fact worth. Indeed, that this was the case is illustrated by the fact that in the middle of 2008, there were auditing concerns that the value of the Xtron bonds might have to be written down. In these circumstances, it is clear to me that the appellants did not have CHC's financial best interests at heart when they caused CHC to enter into the 1st Xtron BSA that paid an interest rate of 7% per annum, which was substantially below what I would consider to be a fair market rate given the magnitude of the financial risks and the fact that Citic Ka Wah was demanding a much higher interest rate of 16% rate per annum for the level of risks involved. This disregard for CHC's interests is further exemplified when non-repayment under the Xtron bonds appeared imminent. At this stage, the appellants were happy to amend the terms of the 1st Xtron BSA to CHC's further detriment with the execution of the ABSA which extended the repayment period, decreased the interest rate payable and increased the maximum amount of funding for the Xtron bonds, without Xtron providing any valuable consideration for such variations to the terms (see also [482] above).

522 The appellants applied the same attitude to the Firna bonds. While it is true that Firna appeared to possess a profitable glass factory business, no commercial due diligence was done to ensure that a rate of interest of 4.5% per annum on a sum of up to $24.5m corresponded to an interest rate that would be fairly demanded by the market for bonds issued by Firna. Nor was a survey of other investment opportunities done to ensure that the Firna bonds were the best

or most appropriate investment option for CHC out of the range of other bond options available in the market. This is clearly because the Firna bonds were not a genuine investment but were merely a façade or a convenient conduit employed by the appellants to extract even more funds from CHC for the purposes of financing Sun Ho's secular music career and providing funds to Wahju for his personal use. Furthermore, the underlying truth of the transaction, which was that Firna would not be responsible for payment under the bonds, was hidden from public scrutiny. Even more appallingly, the appellants engineered the use of the secret letter, which cut down the protective features under the Firna BSA. Thus, even if it could be said that a return of 4.5% per annum reflected the fair market value of the returns to be expected from bonds issued by a company of Firna's standing, the fact that material information about the transaction were undisclosed meant that the rate of interest of 4.5% per annum would not have reflected the real return that the market would have demanded if it had been aware of the true circumstances and purposes for which the bonds were issued, even on the assumption that there would be willing buyers for such Firna bonds, which I very much doubt there would be if all the material facts had been fully disclosed. Yet, these were the kind of bonds that the appellants caused CHC to invest in.

523 The above analysis thus shows that the appellants compromised on CHC's financial interests by causing CHC to enter into unprofitable transactions for the purpose of extracting monies from CHC to fund Sun Ho's music career (and also, where the Firna bonds are concerned, for the additional purpose of providing funds to Wahju for his personal use). The appellants also willingly put CHC's legal welfare in jeopardy through the use of covert devices such as the secret letter which cut down on terms that were meant to give CHC proper legal protection. It is difficult to see, when these facts are considered, how it can

be accepted that the appellants believed that they were acting in CHC's best interests and had no intention to cause CHC to suffer financial loss of any kind at the time the transactions were entered into.

524 In fact, assuming that Sun Ho had achieved astronomic success in the US, the manner in which the appellants structured the various transactions would have ensured that Sun Ho's success would not have accrued substantially, if at all, to CHC. The financial fruits of the Investment would have gone directly to Sun Ho and to the company which was managing her (*ie*, Xtron or UA). The only returns that CHC would receive on funding Sun Ho's music career would then be the paltry interest it was to be paid under the Xtron and Firna bonds, which was not commensurate with the market interest that would be commercially demanded for bonds of such a high-risk nature offered by a company, especially one like Xtron, which was in a weak financial position and had minimal assets. It bears reiterating that Citic Ka Wah wanted to charge a much higher interest rate of 16% per annum on its loan to Xtron for the purposes of the Investment. I am inclined to believe that the bank would have evaluated the appropriate interest rate to charge for a commercial loan to Xtron on the basis of (a) the financial standing of Xtron, primarily as "a production house for music albums, concert organi[s]er, distributor, wholesaler, retailer of albums and compact discs",[228] which was intending to apply the whole loan proceeds to invest in Sun Ho as an artiste; and (b) the commercial viability, the risks and potential profits of that *sole* investment undertaken by Xtron without any diversification of that investment risk. I do not think that evangelisation in the name of the Crossover would have been a factor in the bank's commercial considerations. Therefore, even putting aside the possible failure of the Investment undertaken by the appellants as their commercial project using

[228] ASOF at para 2.12.

Xtron as the corporate vehicle to do so (which failure could well result in Xtron collapsing financially, the Xtron bonds becoming valueless and the bond holder (*ie*, CHC) getting nothing back), the appellants nevertheless caused CHC to enter into these Xtron bond transactions which were, from the church's perspective, patently risky and unfavourable. I do not see how it can be said that such an arrangement could be in CHC's best interests or how the appellants could be said to have believed that these transactions could be in CHC's interests when viewed from CHC's perspective.

525 In respect of the round-tripping transactions, there was also in fact quantifiable financial loss suffered by CHC when the Xtron and Firna bonds were converted into an obligation on Xtron's part to provide premises under the ARLA. It must be remembered that the stated purpose of the ARLA was to provide Xtron with a lump sum in order to procure premises for CHC. Clauses 5.1 and 5.2 of the ARLA state as follows:[229]

> 5.1 The Licensee [*ie*, CHC] recognizes that the Licensor [*ie*, Xtron] does not have permanent premises which it is able to designate as the Licensed Area, but that it is in the process of identifying and acquiring appropriate premises with which to do so. The parties further agree that part of the reason for the lump sum Licence Fee is to enable the Licensor to negotiate with the necessary third parties to secure the Licensed Area and guarantee the availability to the Licensee of the Licensed Area for the Appointed Days [*ie*, days which CHC requires to use the area].
>
> 5.2 The Licensor agrees that it will, in a timely manner, procure reasonably acceptable premises for the Licensee as the Licensed Area…

526 The licence under the ARLA was for a period of eight years commencing on 1 October 2009. The rental payable under the ARLA was $7m per year for a period of eight years.[230] As Xtron would be receiving funds

229 A-153.

upfront, a discount of 5% was applied to arrive at the net present value of approximately $46m which formed the licence fee under the ARLA. During the hearing, Eng Han informed the court that he had derived the rental amount of $7m per year by estimating what it would cost to rent the convention hall at Suntec City[231] (though, as I have noted above at [483], there is little contemporaneous evidence to substantiate Eng Han's assertion).

527 At the time of the ARLA, Xtron had no premises of such worth to provide and was in the process of procuring these premises. It appears that in place of the premises to be procured, Xtron was at the time providing premises at Expo, which, according to Eng Han, was apparently worth $2.5m per annum.[232] Despite this, CHC was required to pay the full rental sum over a period of eight years discounted to present value. What this means is that under the ARLA, CHC had *paid* for the right to occupy a set of premises worth a rental of $7m per year for eight years when Xtron in fact had no premises of that worth to offer. A simple example will illustrate the loss CHC suffered in *entering into* the ARLA. Suppose that Xtron only procured suitable premises for CHC at Suntec City two years after the ARLA had been entered into, on 1 October 2011, and that for those two years, Xtron had only been providing premises at Expo (worth $2.5m per annum). Under the ARLA, CHC would only have the right to occupy the premises at Suntec City for a further six years (as the ARLA would expire on 1 October 2017). This did not give CHC what it paid for; indeed, under the example, CHC would have lost out on two years' worth of premises at Suntec City. On a simple linear calculation, CHC would have in fact financially lost out on $4.5m per annum for every *year* it was required to use

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230 E-28.

231 Transcript, 16 September 2016, p 92.

232 Transcript, 16 September 2016, pp 99–100.

the premises at Expo instead of those at Suntec City despite having paid in full for rental to occupy premises that were supposed to have been in Suntec City for those two years. In other words, although CHC contracted to receive eight years' worth of premises worth $7m per annum from the date of the ARLA, CHC did not receive its money's worth as Xtron had no premises of that worth to provide at that juncture, and in fact only provided premises worth much less than what CHC had actually paid for. CHC had thus been overcharged by a huge amount of $4.5m per annum as it was only provided with the premises at Expo. This constituted real financial loss to CHC at the time the ARLA was executed. Accordingly, CHC was, as a result of the ARLA, made to suffer financial loss at the rate of $4.5m for every year that it did not have the Suntec City premises to use.

528 As exemplified by the above illustration, it is clear that the ARLA was not an agreement that was in CHC's best interests. Immediate substantial financial loss was caused to CHC once it agreed to and executed the ARLA on the terms as set out. The agreement was structured to disadvantage CHC financially from the beginning. An agreement of this nature was not one that the appellants ought to have caused CHC to enter into, even assuming that the ARLA was a genuine agreement for advance rental. Additionally, at the time the ARLA was executed, there was *no suggestion* that the appellants intended to rescind the ARLA and repay the monies thereunder sometime in the future. In the circumstances, I find it very difficult to accept the point made by all the parties (including the Judge) that the round-tripping transactions merely allowed for the substitution of debts and did not in fact cause CHC to suffer any financial loss save for the GST sum. Indeed, based on the above, at the time CHC executed and made payment to Xtron under the ARLA, apart from the possible loss of more than $3m paid in GST, CHC also suffered a loss of monies

as the advance rental was paid on the basis of immediate occupancy even though Xtron had no premises of that worth to offer. This was "permanent loss" that the appellants *intended* for CHC to bear at the time the ARLA was executed, and their *subsequent* decision to rescind the ARLA in no way impinges on this. In my judgment, Eng Han, Ye Peng, Serina and Sharon could not have believed that the ARLA would have been in CHC's best interests; indeed, I find that in causing CHC to execute the ARLA, they clearly *intended* to cause CHC to suffer financial loss and to cause a third party private company, Xtron, to gain financially.

Conflict of interest on Kong Hee's part

529 Apart from the various transactions and the manner in which they were structured, I also find that Kong Hee did not act in the best interests of CHC. As Sun Ho's husband, Kong Hee was undoubtedly in a position of conflict where CHC's monies were to be spent on building up Sun Ho's secular music career and making her a singing artiste with international fame. Kong Hee had on a number of occasions even indicated that he was willing to go the extra mile for Sun Ho (see, in this regard, the examples cited by the Judge at [316] of the Conviction GD). Whilst it appeared that Kong Hee was acting in Sun Ho's best interests, it is not an ineluctable proposition that the best interests of Sun Ho's music career would at all times coincide with CHC's best interests. Given these various areas for potential (or actual) conflict of interest, it is incumbent upon Kong Hee to ensure that all that he did with respect to the relationship between CHC and Sun Ho's music career, especially where this involved the use of CHC's funds, was above-board. This would be the case *a fortiori* since Kong Hee was also the head of the church, with the responsibility to be a good custodian of the charity funds which CHC raised. However, Kong Hee abused the trust placed in him and failed to ensure that he was totally transparent and

honest with the CHC Management Board, the EMs, the members of CHC and the professionals who were advising him or even with the other appellants. Indeed, there were various instances where he made false or misleading statements (see, for example, those cited by the Judge at [301]–[302] of the Conviction GD and [15] of the Sentencing GD).

530 In the circumstances, quite apart from the issue of whether Kong Hee received any indirect benefit and could therefore be said to be motivated by greed and self-interest, I find that Kong Hee did not act in the best interests of CHC when he used CHC's funds to invest in Sun Ho's music career. Rather, it appears to me that Kong Hee used the BF as his personal funds from which he could draw down without limit and spend on building up his wife's singing career in the name of the Crossover. In misappropriating the BF, Kong Hee ultimately obtained a heavily subsidised loan from CHC to fund his wife's secular music career in conflict with CHC's best interests, while – at least at the beginning – harbouring high hopes that the Investment would make so much money that he would be able to return the monies criminally misappropriated. Kong Hee could only have done all of this with the participation of John Lam, Ye Peng, Eng Han and Serina, who assisted and supported him in conceiving of and administering the illicit schemes. I find that Kong Hee was the leader of the conspiracy which caused harm to CHC. I will however leave open the question whether Kong Hee had harboured a thought or a belief at the time the sham investment offences were committed that he would be able to get away with the misappropriation of massive amounts of CHC's monies under the cover of the Crossover in the event that the Investment should turn out to be unsuccessful and the monies could not be repaid. If he did, that would have been a very serious aggravating factor to be considered for the purpose of sentencing.

Concluding remarks on this factor

531 In the light of the above, I do *not* accept that the appellants acted with CHC's best interests at heart or had no intention of causing CHC to suffer financial loss as a result of the various transactions. Though my treatment of this aggravating factor goes somewhat further than the Prosecution's submissions, all the matters which I have referred to above are based on the evidence that is already before the court. Moreover, the issue of whether the appellants acted in what they believed to be CHC's best interests and without any intention of causing CHC to suffer financial loss was the crux of the appellants' submissions at trial and on appeal and thus, the appellants had been given ample opportunity to be heard on these issues. In rejecting the appellants' submissions on the basis of the evidence before the court, my findings in this regard do not run into the same hurdles which I will address from [548] onwards below. Accordingly, I am of the view that, to the extent that the Judge had imposed a lower sentence on the appellants on the basis that they had acted with CHC's best interests at heart and had no intention of causing CHC to suffer financial loss, this is erroneous.

Whether CHC suffered permanent financial loss

532 The issue of whether the appellants had *intended* to cause CHC to suffer financial loss at the time they caused CHC to enter into the various transactions is a different question from whether CHC had *in fact* suffered *permanent* financial loss (*ie*, financial loss that is continuing even *after* the appellants had made restitution to CHC).

533 The latter question entails two separate considerations. The first consideration is whether CHC may be said to have suffered permanent financial loss as a result of the use of its funds for the Xtron and Firna bonds,

notwithstanding the fact that these bonds were later redeemed. This consideration arises, amongst other things, because of the opportunity cost involved in the use of CHC's funds for the Xtron and Firna bonds. In other words, if the appellants had not criminally misappropriated CHC's funds for the Xtron and Firna bonds, CHC *may* have used the monies to invest in other financial instruments which may have allowed it to obtain a greater return for the *same* amount of financial risk taken. I emphasise again that the amount of fair return expected must always be assessed having regard to the amount of financial risk taken when performing any financial evaluation. Regrettably, however, there was a lack of focus during the trial on the precise financial aspects of these transactions. No evidence was led on comparable market values or investments for comparable risks where these were relevant to the transactions in order to assess the actual financial loss suffered by CHC. Thus, though it seems to me entirely likely that CHC suffered permanent financial loss as a result of the entry into (and subsequent redemption of) the Xtron and Firna bonds, it is difficult to ascertain the *actual amount* that CHC may be said to have permanently lost as a result of the various transactions on the basis of the material before the court for the purpose of sentencing.

534 However, a very broad estimate may be made which still remains useful and relevant for sentencing. For instance, with respect to the 1st Xtron BSA, the example of the loan of $9m offered by Citic Ka Wah to Xtron demonstrated that the interest rate that would have been fairly demanded by the market for the purchase of such bonds would have been a rate of about 16% per annum. However, under the 1st Xtron BSA, Xtron was only required to pay CHC an interest of 7% per annum. On this basis, *even if* the bonds were fully redeemed with the payment of interest at 7% per annum, CHC effectively subsidised Xtron by being unable to collect the difference of 9% of interest per annum which it

would have ordinarily otherwise have earned had the 1st Xtron BSA been a genuine arms-length commercial transaction. This means that CHC would effectively have lost out on $1.17m of interest per annum on the $13m which it lent to Xtron under the 1st Xtron BSA. This was further exacerbated when the interest rate was subsequently decreased from 7% to 5% per annum by the execution of the ABSA. As may be seen from this broad estimate, it is very likely that CHC suffered substantial and continuing losses as a result of the various bond transactions which the appellants caused CHC to enter into despite the fact that the bonds were subsequently redeemed with full payment of the stipulated bond interest.

535 The second consideration concerns the purported "full restitution" made by the appellants when they realised that their misdeeds might be publicly exposed. The "full restitution" to which I refer concerns the rescission of the ARLA on 31 March 2010 and the subsequent return of $40.5m from Xtron to CHC on 4 October 2010. To recapitulate, the sum of $40.5m comprised (a) $33,039,117.60 being the *unutilised* advance rental that had, at the material time, been paid by CHC; (b) $7m being the full amount of the security deposit paid by CHC; and (c) $453,103.02 being the interest accrued from the date of the termination of the ARLA until full payment was made.[233] The pertinent question, in this regard, is whether as a result of this repayment, CHC suffered no loss in entering into the ARLA and the round-tripping transactions.

536 I do not agree that the repayment made by the appellants amounted to "full restitution". In my view, besides the interest that had accrued from the date of termination of the ARLA until full payment, interest also ought to have been paid on the unutilised licence fee that CHC had paid Xtron from the time of

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[233] ASOF at para 12.37.

payment to the date the ARLA had been rescinded. This is because during this period, Xtron had the full use of CHC's monies. If the purpose had in fact been to compensate CHC *fully* for the termination of the ARLA, Xtron ought to have, in the ordinary course, paid interest also on the sums it received from CHC from the time it received those sums to the time those sums were eventually returned. In my view, this entire sum of interest which ought to have been paid was *not* fully paid. The shortfall in the amount represents the actual and permanent financial loss suffered by CHC. It cannot therefore be said that the appellants had made *full* restitution of the misappropriated sums together with interest.

537 The Prosecution appears to accept that as a result of the appellants' "full restitution" that CHC suffered *no* permanent financial loss. This is, in my view, factually inaccurate for the reasons aforementioned. However, as a result of the Prosecution's position, the permanent financial loss suffered by CHC as a result of the entry into the Xtron and Firna bond transactions as well as the shortfall in the so-called "full restitution" was not dealt with, and the appellants did not have an opportunity to address the court on these points. As in relation to the issues surrounding the direct benefit to Sun Ho and the indirect benefit to Kong Hee, I discuss the implications of this from [548] onwards below.

The mitigating impact of the appellants' restitution

538 The last factor to which I turn to consider is the mitigating impact of the appellants' restitution. Whether the fact of restitution counts in an accused's favour must depend on all the facts of the case. In particular, where the act of restitution indicates genuine remorse on the accused's part, this may be a ground on which the sentence could be reduced (see *Krishan Chand v Public Prosecutor* [1995] 1 SLR(R) 737 at [13]). In the present case, however, there is unequivocal documentary evidence showing that the appellants' motive for

rescinding the ARLA was to pre-empt any investigation by the authorities and to avert any suspicion of dishonesty. In an email from Kar Weng, a CHC member and a director and shareholder of Xtron, to Kong Hee on 31 March 2010 (the same day the ARLA was terminated), Kar Weng discussed a "worst case" scenario, which involved considering "[i]f the authorities view[ed] all the parties as related and look[ed] at all these as 1 project, [would] there be a case of CBT?".[234] This clearly demonstrated that the concern within the top leadership of CHC was that they could be exposed to criminal liability. One of the solutions Kar Weng alluded to in the email was a plan formulated by Ye Peng and Eng Han "to wipe out Xtron's losses (for the album project) as well as repay CHC's Advance Rental". Kar Weng believed that the plan was "workable" and stated that it would be better to embark on the plan as soon as possible. It is therefore no surprise that the ARLA was terminated on the same day this conversation took place.

539 In a conversation over BlackBerry a few days later on 5 April 2010, Kar Weng, Sun Ho, Kong Hee, Ye Peng and Eng Han, among others, discussed the possibility of a special audit. What Kar Weng said is notable and I quote him in full here:[235]

> Sun [*ie*, Sun Ho], one of the main reasons why I proposed the Special Audit is to buy us time to fill up the hole. We don't want all the issue to grow to the extend [*sic*] that the authorities step in BEFORE we fill up the hole. By appointing our auditors, it will be easier to talk and get things done. If the report turns out to be lacking in some areas, we will improve and change. They can help us.
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> That's why to me, it is important to let the relevant authorities know that we initiate a special audit. They will at least not do anything till the report comes out. By then, the hole is filled.

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234 E-240.

235 BB-1.

540 The above demonstrates two important points. First, the appellants were aware that they had created a "hole" in Xtron (and correspondingly, CHC) which had to be filled. The appellants required time to source for funds to allow Xtron to repay the outstanding sums to CHC under the newly rescinded ARLA. This demonstrates their awareness that the advance rental liability under the ARLA was not proper and that this had to be rectified. Second, the appellants' desire to "fill up the hole" was not motivated by genuine remorse but by a desire to avoid detection, with a sense of urgency coming from the need to do so before closer scrutiny by the authorities. The Judge's observation at [53] of the Sentencing GD is also pertinent in this context.

541 Apart from the motive for doing so, the *manner* in which the appellants went about procuring funds to "fill up the hole" also severely limits the mitigating weight that can be accorded to the appellants for this. To obtain funds quickly, Kong Hee, Ye Peng and Eng Han were involved in sourcing for a number of external loans that would be pumped into Xtron. It appears that these loans, amounting to a sum of approximately $30m, were procured from individuals affiliated to the appellants or CHC.[236] In an excel sheet prepared by Serina dated on 15 April 2010, Serina detailed these loans, and titled that sheet "What we need to pay back CHC".

542 It is not clear from the evidence whether three of the four individuals who provided the loans to CHC (detailed in the excel sheet as "Surhardiman", "Labelindo" and "Roy Tirtaji"; the fourth individual was Wahju) were affiliated to CHC or members of the church. More evidence in this regard would have been helpful. For instance, if these funds or part of these funds that had been loaned were funds that these persons had originally intended to be *donated* to

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[236] E-356 and E-557.

CHC, I would consider this an additional aggravating factor rather than a mitigating factor since the appellants' acts would then have effectively kept CHC out of funds that it would have received *but for* the appellants' wrongdoing. However, as there was scant evidence concerning this, I say no more about it.

543 To facilitate the repayment of the outstanding sums to CHC under the rescinded ARLA, Serina maintained a loan schedule setting out the timing for the loans to be disbursed to Wahju. Wahju was then supposed to transfer the monies to Xtron. Wahju was included as an intermediary to channel the external loans to Xtron as the appellants sought to create the impression that he was putting his own money into Xtron in fulfilment of a personal guarantee he had purportedly given in favour of Xtron in 2007 to underwrite any losses suffered. In reality, this guarantee was drafted only by Serina on Eng Han's instructions in March 2010 and backdated to 2007.[237] To provide assurance to Wahju that the guarantee was merely cosmetic, Eng Han also instructed Serina to draft a cross-guarantee by, *inter alia*, Kong Hee, Ye Peng and Eng Han in favour of Wahju, in the event the personal guarantee he had given had to be called upon.[238]

544 It is therefore clear that the appellants did not intend that Wahju would be responsible for repaying the external loans. Instead, it was Kong Hee, Ye Peng, Eng Han and Serina who took it upon themselves to raise money for repayment. Eng Han's proposal for repaying the external loans was to implement a scheme whereby he would invest CHC's surplus funds at an agreed rate of 5% interest while aiming to achieve a 16% return. The surplus 11%

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237 E-341 and E-254.

238 SWGY-2, SWGY-3 and SWGY-5.

return on the investment of funds could then be used to repay the external loans.[239]

545 It is not clear if this plan was ever carried out. Be that as it may, what it demonstrates is that in spite of all the controversy surrounding the appellants and their acts at that material time, they had nevertheless, at least at one point, intended or considered using CHC's funds as "investment capital" so as to generate funds to repay the external loans taken. This again demonstrates that the appellants still viewed CHC's funds as monies which they could control and use for whichever purpose best suited their needs. In the light of such facts, there is little weight, if any, that can be given to the fact of restitution. Indeed, I would venture so far as to say that the appellants' conduct in *considering*, once again, to misuse CHC's funds despite the spectre of criminal liability demonstrates their lack of remorse (and this is quite apart from their insistence of their complete innocence both at trial and at the appeal).

The appeals against sentence

546 In the light of the above, I turn now to consider the appeals against sentence. It will be apparent from the above discussion that I disagree with the Judge (and the majority) on a few issues, which have a bearing on the sentences that should have been imposed. First, I am of the view that the evolution of the appellants' mind-sets and motives over the various periods ought to have been taken into account in the sentencing equation. Second, I am of the view that in respect of all the sham investment charges, Sun Ho had directly benefitted from the use of the funds to advance her music career and that Kong Hee had indirectly benefitted from that, and, in respect of the third sham investment

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239 See *eg* BB-39, BB-41, E-557.

charge specifically, a direct financial benefit was also conferred upon Wahju. Third, it appears clear to me that, for various reasons, the appellants' motives were not purely altruistic. Fourth, I do not accept that the appellants were acting in the best interests of CHC and had no intention of causing CHC to suffer financial detriment at the time the various transactions were entered into. Fifth, I do not agree that no permanent financial loss has been caused to CHC. Lastly, I will also ascribe far less mitigating weight to the fact that the monies were returned.

547 If I were able to take all the above into consideration, I would not hesitate to allow the Prosecution's appeals and substantially increase the sentences of the appellants, in particular those of Kong Hee. The question then is whether I ought to do so. This question arises because three of the above issues – namely, (a) whether there was indirect benefit to Kong Hee; (b) whether there was direct benefit to Sun Ho; and (c) whether CHC continued to suffer permanent financial loss despite restitution having been made – were not properly ventilated at trial or even on appeal. It appears that the parties were of the mutual view that there was no indirect benefit to Kong Hee and that CHC suffered no permanent loss because full restitution was made. There also appears to be some confusion and misunderstanding between the parties concerning the relevance of the direct benefit to Sun Ho by the funding of her music career to the appellants' conviction and sentence (see [498] and [510] above). As I have alluded to above, this has resulted in a rather unsatisfactory state of affairs. It also raises some difficult questions.

548 The first question that it raises is whether in dealing with a case like the present, the court is in law precluded from (a) considering any reliable factual evidence that is already properly admitted before the court; and (b) making any legitimate inferences of fact therefrom simply because all the parties *have*

agreed internally among themselves or have all chosen (i) not to rely on that evidence in their submissions; (ii) to treat that evidence as if it has been expunged from the record; or worse (iii) to treat as factually true what is on the reliable evidence established to be factually untrue. In short, what does a court do when the parties mutually agree on a position (*eg*, that there is no permanent financial loss as a result of the appellants' restitution) but the court is of the view that that position appears contrary to the facts? A potential objection or concern that comes to mind is that the party whom the court is minded to find against will be prejudiced in not having been afforded the opportunity to run his case in a different manner, *eg*, to tender certain evidence or make certain submissions to defend himself against that point.

549 Another equally difficult, or perhaps even more difficult, question is what the court is to do when it transpires that the parties had misunderstood each other's position and thought that they were agreed on an issue when they were not, and as a result of this misunderstanding, one party has (or both have) been deprived of the chance to pursue the case or the defence in a certain direction.

550 The first question, which contemplates a situation where the parties have an intact agreement on an issue but the court does not agree with their position and is of the view that the evidence shows otherwise, arises in respect of the issues of (a) whether there was an indirect benefit to Kong Hee; and (b) whether CHC continued to suffer permanent financial loss despite restitution having being made. As far as it appears to me, the Prosecution had consistently proceeded on the basis that neither of these factors were present. The second question, which contemplates a situation where the parties thought they had agreed on an issue but in fact had not, arises in respect of the issue of whether Sun Ho had obtained a direct benefit from the use of the misappropriated funds and whether the appellants had intended as such. While the parties appeared to

have all proceeded in the court below and even in their written submissions on appeal that the presence of a direct benefit to Sun Ho is not a factor that would be raised in the sentencing context, what transpired in the oral hearing before us indicates that the parties may not have fully understood each other and may have been talking at cross-purposes.

551 Although in this case these two questions arise at the appellate stage, they can equally arise at first instance (*eg*, at the end of trial or when closing submissions are made by the parties). I have not had the benefit of submissions from the parties on these questions, but in my provisional view (without deciding this issue), the common principle that governs how the court should act in all the above situations – whether it be in either of the two situations and whether it be at first instance or on appeal – is that the rules of natural justice must be adhered to. My view, in essence, is that a court should *not* be precluded from considering any reliable factual evidence that is admitted and making legitimate inferences of fact therefrom even if parties have agreed that the position on the issue is otherwise, *provided* that the party whom the court is provisionally minded to find against is afforded an opportunity to be properly heard.

552 In this regard, I consider that some guidance may be obtained from the principles set out in the case of *R v Robert John Newton* (1982) 4 Cr App R (S) 388 ("*Newton*") (from which the phrase "*Newton* hearing" is derived), even though the situation there – dealing with a situation involving a divergence of facts between an offender's mitigation and the Prosecution's case – is not on all fours with the situations we are presently discussing. In *Newton*, the English Court of Appeal set out three options that a sentencing court has when dealing with a divergence of facts between an offender's mitigation and the Prosecution's case. Only the second and third options are relevant as the first

option relates to a system with juries. The Court of Appeal held that where there is such a divergence, the court could:

> (a) either hear evidence from both sides and decide the fact – in what we now know as a *Newton* hearing ("the Second Option"); or
>
> (b) just hear submissions of counsel and come to a conclusion ("the Third Option").

The court was quick to add that where the Third Option was adopted (*ie*, a decision is made on submissions, without hearing evidence in a *Newton* hearing) and "where there is a substantial conflict between the two sides, [the court] must come down on the side of the [offender]". Subsequent cases have further clarified that *Newton* hearings should be "the exception rather than the norm and should not ordinarily be convened unless the court is satisfied that it is necessary to do so in order to resolve a difficult question of fact that is material to the court's determination of the appropriate sentence" (see *Ng Chun Hian v Public Prosecutor* [2014] 2 SLR 783 at [24]).

553 While the situations that we are presently discussing are quite different from what was envisaged in *Newton*, I am of the view that a similar approach – undergirded by the principles of natural justice and fairness to the accused person – should apply. Where a court – be it a first instance or an appellate court – disagrees with the parties (or one party) notwithstanding a prior agreement between the parties or some *bona fide* confusion among them that might have led one or some of them reasonably to omit to put forward certain evidence or make certain submissions, the court should first invite the parties to submit on its provisional view. This may occur during the scheduled hearing or at a subsequent hearing if the court arrives at its view at a later stage. This would afford the party whom the court's provisional view is against a chance to mount

a defence whether with or without further evidence and to make further submissions to persuade the court otherwise.

554 In the event that the party is of the view that he has to put in further evidence to defend himself and persuade the court otherwise which he would have done had there not been such an agreement or confusion, the court must then make a judgment as to whether further evidence – which would entail either a re-opening of the trial (if this occurs at first instance) or remitting the case to the first instance court to take in further evidence (if this occurs on appeal) only on that limited aspect – is required. This decision would depend on, among other things, the importance and relevance of the point in dispute and whether further evidence is indeed necessary. As with *Newton* hearings, the taking of further evidence should be the exception rather than the norm and should not ordinarily be convened unless the court is satisfied it is necessary to do so. Where the situation occurs on appeal, the threshold that has to be reached for the court to decide to remit the matter to the lower court to take in more evidence would, in my provisional view, be even higher.

555 If the court is of the view that further evidence may help the accused but decides that it should not be taken after weighing the considerations, the court should then resolve the matter in the accused's favour when considering the submissions of the parties on the issue without the benefit of the further evidence (*ie*, the Third Option set out in *Newton*).

556 Returning to the situation in the present case, my view is that in the light of how the proceedings and arguments had ensued as a result of the parties' agreement (for the two issues of indirect benefit to Kong Hee and permanent financial loss) and the confusion (for the issue of direct benefit to Sun Ho), I should not take into account all these three factors. Given that these three factors

are all major and material aggravating factors, I would not be prepared to take these factors into account without first hearing from the appellants. And while I may have ordinarily asked for submissions from the parties and hear what the appellants have to say about my view based on the evidence before the court that there is permanent loss, and that benefits have accrued to Kong Hee and Sun Ho, I do not think it is appropriate or necessary to do so in this case, considering the circumstances as well as the fact that I am in the minority.

557 Once I leave these three major aggravating factors aside, there is, in my view, insufficient basis to allow the Prosecution's appeals against sentence. While I disagree with some of the Judge's findings including some of the mitigating factors that he had taken into account, and am therefore inclined to the view that some of the sentences imposed by the Judge in respect of the CBT Charges are at the low end of the sentencing spectrum, I am unable to say – without these three major aggravating factors – that the sentences imposed by the Judge are *manifestly* inadequate such that they would justify appellate intervention.

Conclusion

558 For the above reasons, I dismiss the appeals of all the appellants including that of the Prosecution.

559 In the event that I am wrong on the applicability of s 409 of the Penal Code having regard to the facts of this case, and that the correct charges should have been framed under s 406, then I would, as the majority has done, allow the appellants' appeals against the sentences imposed on them *only* for the reason that the charges have been reduced from the most serious to the least serious of the four types of CBT offences under the Penal Code. It must be emphasised

that the maximum imprisonment term of seven years for the reduced charge of CBT *simpliciter* under s 406 of the 2008 revised edition of the Penal Code (and three years under the 1985 revised edition) is only about *one-third* of the maximum determinate imprisonment term of 20 years (putting aside the sentence of life imprisonment) that may be imposed for the most serious form of CBT by a public servant, banker, merchant, factor, broker or agent under s 409 of the 2008 revised edition of the Penal Code (and, aside from the sentence of life imprisonment, an imprisonment for a maximum term of ten years under the 1985 revised edition).

560 I note that the majority has more or less halved the overall sentences imposed by the Judge on Kong Hee, John Lam, Ye Peng, Eng Han and Serina. In the case of Sharon, the majority has reduced her overall sentence to one-third of the original sentence. Although I may not entirely share the views of the majority on the various mitigating factors and the weight to be placed on them, nevertheless on the whole, I do not think that the total sentence imposed by the majority on each of the appellants can be regarded as manifestly inadequate when the proper charges are under s 406 and not s 409. Thus, if I were wrong that the CBT Charges should be framed under s 409 of the Penal Code, I would not be minded to disagree with the majority on the total sentence that they have imposed on each of the appellants on the basis of the reduced charges.

Chan Seng Onn
Judge

Mavis Chionh *SC*, Tan Kiat Pheng, Christopher Ong, Grace Goh, Joel Chen, Jeremy Yeo, Tan Zhongshan and Eugene Sng (Attorney-General's Chambers) for the Public Prosecutor;
Kenneth Tan *SC* (Kenneth Tan Partnership) (instructed) and Nicholas Narayanan (Nicholas & Tan Partnership LLP) for Lam Leng Hung;
Edwin Tong *SC*, Jason Chan, Lee Bik Wei, Peh Aik Hin, Kelvin Kek, Aaron Lee and Jasmine Tham (Allen & Gledhill LLP) for Kong Hee;
Paul Seah, Calvin Liang, Cheryl Nah and Sean Lee (Tan Kok Quan Partnership) for Tan Shao Yuen Sharon;
N Sreenivasan *SC* and S Balamurugan (Straits Law Practice LLC), Chelva Rajah *SC*, Burton Chen, Chen Chee Yen, Megan Chia and Lee Ping (Tan Rajah & Cheah) for Tan Ye Peng;
Andre Maniam *SC* and Russell Pereira (WongPartnership LLP) for Serina Wee Gek Yin;
Chew Eng Han in-person;
Ng Hian Pheng Evans (TSMP Law Corporation) as *amicus curiae*.

Annex A: Sentences imposed on the appellants

Category of charges	Charge	Subject-matter	John Lam	Kong Hee	Sharon	Eng Han	Ye Peng	Serina
Sham investment charges (reduced to s 406 of the Penal Code)	1st**	Xtron bonds ($10m)	6 months	14 months		12 months	12 months	9 months
	2nd	Xtron bonds ($3m)	6 months	14 months		12 months	12 months	9 months
	3rd	Firna bonds ($11m)	12 months	28 months		24 months	24 months	18 months
Round-tripping charges (reduced to s 406 of the Penal Code)	4th	SOF T10 ($5.8m)			3 months	9 months	8 months	6 months
	5th	SOF T11 ($5.6m)			3 months	9 months	8 months	6 months
	6th	ARLA ($15.238m)			6 months	16 months	14 months	12 months
Account falsification charges	7th	SOF T10 ($5.8m)			1 month	3 months	2 months	2 months
	8th	SOF T11 ($5.6m)			1 month	3 months	2 months	2 months
	9th	ARLA set-off ($21.5m)			1 month	3 months	2 months	2 months
	10th	ARLA cash ($15.238m)			1 month	3 months	2 months	2 months
Total sentence on appeal			1 year and 6 months	3 years and 6 months	7 months	3 years and 4 months	3 years and 2 months	2 years and 6 months

**This charge was brought under the 1985 revised edition of the Penal Code, while the remaining CBT Charges were brought under the 2008 revised edition.

[For ease of comparison, the format of this table follows that of the table that is annexed to the trial judge's sentencing judgment.]