IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 7

Criminal Reference No 1 of 2017

Between

PUBLIC PROSECUTOR

… *Applicant*

And

(1) LAM LENG HUNG
(2) KONG HEE
(3) TAN SHAO YUEN SHARON
(4) CHEW ENG HAN
(5) TAN YE PENG
(6) SERINA WEE GEK YIN

… *Respondents*

JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal References]

[Statutory Interpretation] — [Construction of Statute]

TABLE OF CONTENTS

Public Prosecutor
v
Lam Leng Hung and others

[2018] SGCA 7

Court of Appeal — Criminal Reference No 1 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA, Belinda Ang Saw Ean J, Quentin Loh J and Chua Lee Ming J
1 August 2017

1 February 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 At the heart of the present proceedings is a tension that does not often arise but that inevitably generates considerable divisiveness when it surfaces. On one side of the divide is the impulse to see crime punished to the full extent of the harm that it causes and in accordance with the perceived culpability of its perpetrators. On the other end is the constitutional imperative that the court's power to do justice does not include *legislative* power; in other words, the court cannot impermissibly add to or take away from statutory language because its law-making power does not extend to the statutory domain. In the overwhelming majority of disputes before the court, the tension simply does not arise because statute is reconsidered and revised to keep the criminal law and its penalties in line with modern conceptions and standards of right and wrong.

But where a governing statutory provision fails to evolve with the times and becomes unable to effectively regulate its appointed area of socio-economic activity, the impulse to augment the statutory provision in a manner that will give effect to contemporary models of justice – or simply to do what the court perceives to be justice in the particular case before it – may become urgent and overwhelming. In such cases, the impulse strains against the borders of the judicial function. However, the court cannot give way to this impulse and must remain guided by statutory language and legislative purpose in determining the result in the case before it.

2 We begin by introducing the application before us. The present application by the Public Prosecutor is yet another in a series of proceedings concerning members of the City Harvest Church ("CHC"). At its heart, this application concerns a discrete point of law that centres on the interpretation of s 409 of the Penal Code (Cap 224, 2008 Rev Ed) ("s 409"). The provision provides for the enhanced punishment of any person who commits the offence of criminal breach of trust ("CBT") in respect of property entrusted to him "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". In full, it reads as follows:

> 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. [emphasis added in italics, bold italics and underlined bold italics]

3 The provision just quoted is deceptively simple. As we will explain, its apparent simplicity belies the difficulty of the interpretive exercise required to determine its meaning. The present application raises a myriad of complex and

closely related issues. As alluded to earlier, this includes the fundamental and overarching issue as to *where the line is to be drawn between judicial interpretation on the one hand and legislative action on the other*. As we shall also see, this is a case in which careful attention must be paid to *historical analysis* – in terms of the legislative history of CBT as a statutory offence and the socio-economic concerns that led to its promulgation – all the more so because s 409 was first enacted as part of the Indian Penal Code (Act 45 of 1860) ("the Indian Penal Code") *more than a century and a half ago* and has, for all intents and purposes, remained in its original form until the present day. Indeed, both of the aforementioned issues are inextricably connected with each other given that the historical materials will serve either to *clarify* or to *confirm* the meaning of s 409, pursuant to s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the IA").

4 Given the signal importance of the issues just mentioned, perhaps a few preliminary observations might be apposite – if nothing else than to ensure that the legal lenses through which s 409 is analysed are first cleared of any grit or fogginess that might otherwise lead to a distorted analysis of the provision itself.

Some preliminary observations

5 It is axiomatic that legal analysis in general and statutory interpretation in particular must be approached in an objective manner. This may appear to be an obvious point but it is of special significance in the context of the present case. Let us elaborate.

6 As already mentioned, s 409 was enacted more than a century and a half ago. It is accordingly a statutory provision of considerable vintage and, for this reason, may bear less relevance to present times than it did to the past. This is

an issue that we will examine subsequently. For present purposes, we focus on the notion or proposal that it might be possible to adopt a "purposive approach" to statutory interpretation in order to take into account the changes (even sea changes) that have taken place since it was enacted, and thereby "modernise" the provision by robust "interpretive" means. In our view, this would be a misuse of statutory interpretation at best and potentially exceed the proper remit of the court at worst. It is essential to state at the outset that there are *limits* to the purposive interpretation of statutes, as the Singapore High Court described in unequivocal terms in *Nation Fittings (M) Sdn Bhd v Oystertec plc and another suit* [2006] 1 SLR(R) 712 at [27]:

> I pause at this juncture to note that a literal reading of the (indeed, any) statutory text could lead to a dry, brittle literalness that does no justice to the enterprise of the law in general and the text concerned in particular. On the contrary, the favoured approach nowadays (and rightly so, in my view) is a purposive approach that is exemplified not only by the case law but also by s 9A(1) of the Interpretation Act itself (Cap 1, 1999 Rev Ed). *Indeed, a purposive approach towards the statutory text does not ignore the literal meaning of the text by any means but, rather, complements it by ensuring that the purpose and intent of the statutory text itself is achieved and that any strained and, a fortiori, absurd result is avoided.* ***I should reiterate that the court's interpretation should be consistent with, and should not either add to or take away from, or stretch unreasonably, the literal language of the statutory provision concerned. In other words, the literal statutory language constitutes the broad framework within which the purpose and intent of the provision concerned is achieved. It is imperative, to underscore the point just made, that this framework is not distorted as the ends do not justify the means. Where, for example, it is crystal clear that the statutory language utilised does not capture the true intention and meaning of the provision concerned, any reform cannot come from "legal gymnastics" on the part of the court but, rather, must come from the Legislature itself.*** [emphasis added in italics, bold italics and underlined bold italics]

7 In our judgment, when considering the issues in this case it is critical to bear in mind the observations set out in the passage just quoted. The reason is

that, as the majority in the High Court below acknowledged, it is unsatisfactory that directors of companies and officers of charities and societies who commit CBT are not liable for a level of punishment that exceeds that for clerks, servants, carriers, wharfingers or warehouse-keepers. In our view, if the majority is correct in its interpretation of s 409, there would be a ***lacuna or gap*** in the law in so far as the ***punishment*** *of directors* of companies and officers of charities and societies who commit CBT is concerned – although it should be noted that there is ***no lacuna*** in so far as ***conviction*** is concerned, given that such offenders would still be criminally liable for CBT *simpliciter* punishable under s 406 of the Penal Code. In the words of the majority (*Public Prosecutor v Lam Leng Hung and other appeals* [2017] 4 SLR 474 ("the MA Judgment") (at [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* ([93] *supra*), 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. [emphasis in original]

8 However, the issue that then arises is ***which institution (*ie, *the court or Parliament)*** should fill this *lacuna or gap*. The view of the majority of the High Court was, in effect, that it had reached the limits of judicial interpretation and

that it could therefore not fill the lacuna or gap ***without becoming a "mini-legislature"*** – hence, their view was that the "task should be more properly left to Parliament" (see the extract cited above). Indeed, in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") this Court observed (in a similar vein) as follows (at [77]):

> It is important to commence our analysis in this regard by referring to a fundamental proposition that constitutes part of the wider concept of the separation of powers. Put simply, the courts are *separate and distinct from* the Legislature. More specifically, whilst the courts do "make" law, this is only permissible in the context of the interpretation of statutes and the development of the principles of common law and equity. **It is *im*permissible for *the courts* to arrogate to themselves *legislative powers* – to become, in other words, "*mini-legislatures*".** This must necessarily be the case because the courts have no mandate whatsoever to create or amend laws in a manner which permits recourse to *extra-legal policy factors as well as considerations*. The jurisdiction as well as the power to do so lie exclusively within the sphere of *the Legislature*. Indeed, the power of the Legislature to enact and amend laws is governed by quite a different procedure. Hence, **the duty of a court is to *interpret* statutes enacted by the Legislature; it *cannot amend or modify statutes* based on its own personal preference or fiat as that would be an obvious (and unacceptable) usurpation of the *legislative* function.** [emphasis in italics in original; emphasis added in bold]

9 This Court reiterated these words of caution in its conclusion in *Lim Meng Suang* (at [189]):

> **The court *cannot – and must not* – assume *legislative* functions which are necessarily beyond its remit. To do so would be to efface the very separation of powers which confers upon the court its *legitimacy* in the first place.** If the court were to assume legislative functions, it would no longer be able to sit to assess the legality of statutes from an *objective* perspective. Worse still, it would necessarily be involved in expressing views on extra-legal issues which would – in the nature of things – be (or at least be perceived to be) *subjective* in nature. **This would further erode the *legitimacy* of the court, which ought only to sit to administer the law**

> **in an *objective* manner.** [emphasis in italics in original; emphasis added in bold]

10 This brings us back to the main issue in these proceedings – *ie*, the correct interpretation to be placed upon s 409 in the light of both ***its text and context***. Before proceeding to describe the applicable principles of statutory interpretation and our analysis of the scope of s 409, it is useful to begin by setting out the relevant background as well as the two questions of law of public interest that arise therefrom and which are the subject of the present criminal reference.

Background facts

11 Given that the disputed issue is a question of law of general applicability, the specific facts of the present case are of limited relevance to our decision. The facts are set out comprehensively in the first instance judgment of the Presiding Judge of the State Courts ("the Judge"), *Public Prosecutor v Lam Leng Hung and others* [2015] SGDC 326 ("the Conviction GD"), as well as the MA Judgment. They are also summarised in our grounds of decision on an application for leave to bring a criminal reference brought by the fourth respondent, *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 ("*Chew Eng Han*") at [6]–[29]. For present purposes, it therefore suffices for us to only briefly recount the facts.

12 CHC is a Singaporean "mega-church" that embarked on what it called "the Crossover" project in 2002. This was a project that involved Ms Ho Yeow Sun ("Sun Ho"), a co-founder of CHC and wife of the second respondent, Kong Hee, recording secular pop music albums as a means of evangelical outreach. At the same time, the church was actively looking for suitable premises to accommodate its growing congregation and raised large amounts of funds for

this purpose through a pledge campaign. These donations were aggregated in a Building Fund ("the BF") and were meant to be used for the purchase of land, construction costs, rentals, furniture and fittings.

13 The Crossover was a controversial project that gave rise to allegations within the church that CHC was giving excessive attention to Sun Ho and misusing its funds to promote her career. In response to these allegations, the CHC management board announced – both publicly and to the church's executive members ("the EMs") – that church funds had not been used to purchase Sun Ho's albums or to promote her career. This was untrue.

Use of the BF to fund the Crossover through Xtron and Firna

14 Following the denouncement of the allegations, the six respondents, who were leaders of CHC, decided that greater distance should be placed between CHC and Sun Ho's music career to avoid further negative publicity. To this end, a separate company, Xtron Productions Pte Ltd ("Xtron"), was incorporated in June 2003. Xtron was, in appearance, an independent firm which was to provide artiste management services to Sun Ho. But the Judge, with whom the High Court agreed, found that Xtron was in substance no more than an extension of CHC and was controlled entirely by the church, and in particular by Kong Hee, who was the senior pastor of CHC, and the fifth respondent, Tan Ye Peng ("Ye Peng"), who was the deputy senior pastor. The directors of Xtron were no more than figureheads. From 2003, Xtron financed Sun Ho's music career using monies from various sources including donations and revenue from CHC. But these proceeds were deemed to be insufficient after it was resolved that the Crossover, and therefore Sun Ho's music career, should be extended to the USA. Eventually, a plan was hatched for Xtron to take a loan from CHC's BF, notwithstanding that the BF was a restricted fund meant to be

used for building-related expenses. This loan took the form of a bond subscription agreement ("the Xtron BSA") under which a total of $13m was transferred from the BF to Xtron in exchange for Xtron bonds. The CHC board and the EMs of the church were led to believe that the monies from the BF were to be invested to generate financial returns, since the church was unlikely to acquire a building anytime soon. In reality, these monies were diverted to the Crossover.

15 In mid-2008, the respondents came under pressure from CHC's auditors to disclose the true nature and purpose of the Xtron bonds, including the uncertainty of repayment (given that Xtron was consistently making losses) and the identity of Sun Ho as a "key player" in Xtron. Seeking respite from the auditors, they made a decision to take Sun Ho out of Xtron. This would be accomplished by transferring her to another company, Ultimate Assets, and by way of another bond subscription agreement, this time between CHC and another company, PT The First National Glassware ("Firna"). Under this bond subscription agreement ("the Firna BSA"), a further $11m was transferred from the BF to Firna. Firna was an Indonesian glassware manufacturing company. But the Firna bonds were never intended to be available for Firna's glass factory business, nor was Firna's revenue ever intended to go toward the redemption of the Firna bonds. Instead, as the courts below found, the respondents had complete control over the Firna bond proceeds and these monies were primarily used for the Crossover.

"Round-tripping" transactions to redeem the Xtron and Firna bonds

16 In late 2009, after CHC's auditors raised further questions about the Xtron and Firna bonds, it was decided that the bonds had to be redeemed. Between October and December 2009, the respondents procured a series of

transactions to redeem the Xtron and Firna bonds ("the round-tripping transactions").

17 The round-tripping transactions involved two broad components:

(a) The transfer of funds totalling $11.4m from CHC's BF and General Fund ("GF") to companies controlled by the respondents, purportedly as investments in a Special Opportunities Fund ("SOF"). These funds were then routed to Firna and paid back to CHC in order to redeem the Firna bonds.

(b) CHC entering into an Advance Rental License Agreement with Xtron ("the ARLA"), under which Xtron set off $21.5m from the sum that CHC was to pay Xtron, in order to fully redeem the bonds it had issued to CHC. As part of the ARLA, CHC also transferred approximately $15.2m to Xtron as "prepayment" of advance rental. As the courts below found, the ARLA was not a genuine commercial agreement and its purpose was simply to facilitate the redemption of the Xtron bonds and the return of the monies owed to CHC under the SOF.

18 To record these transactions, the respondents inserted accounting entries in CHC's General Journal. The courts below found that these entries were false as they did not capture the substance of the transactions, which were not genuine commercial transactions but were instead intended to create the false impression that the Xtron and Firna bonds had been redeemed through proper means.

19 The net result of the round-tripping transactions was that the Xtron and Firna bonds were redeemed, and the liabilities owed to CHC under the SOF were discharged. Subsequently, the ARLA was terminated and Xtron repaid CHC a total of $40.5m, comprising the unutilised advance rental and security

deposit paid under the ARLA (including interest). Although it is not exactly clear where Xtron obtained these funds from, it appears that a number of loans were granted to Xtron by various individuals affiliated to the respondents and CHC so that the company could make the necessary repayment to the church.

Charges against the respondents

20 Following investigations by the Commercial Affairs Department on the above facts, a total of 43 charges were brought against the six respondents. These have been characterised in the judgments below as the "sham investment charges", the "round-tripping charges" and the "account falsification charges":

> (a) The three sham investment charges, which were brought against all the respondents save for the third respondent, Tan Shao Yuen Sharon ("Sharon"), concerned the offence of conspiring to commit CBT as an agent punishable under s 409 read with s 109 of the Penal Code. These charges arose from the use of the BF to purchase the Xtron and Firna bonds. The relevant "agents" stated in the charges are Kong Hee, Ye Peng and the first respondent, Lam Leng Hung ("John Lam"), who were entrusted with the funds in their capacity as members of the CHC management board. The first sham investment charge was brought under the 1985 revised edition of the Penal Code (*ie*, the Penal Code (Cap 224, 1985 Rev Ed)), and the second and third charges were under the 2008 revised edition of the same Act (*ie*, the Penal Code (Cap 224, 2008 Rev Ed)). The only difference between the two versions of the Penal Code in relation to s 409 concerns the maximum non-life imprisonment term for the offence. This has no bearing on the present application, which concerns only the elements of the s 409 offence and not the sentences

imposed, and all subsequent references to "the Penal Code" in this judgment are to both revised editions of the legislation.

(b) The three round-tripping charges were brought against all the respondents except Kong Hee and John Lam. These charges are also for the offence of conspiring to commit CBT as an agent punishable under s 409 read with s 109 of the Penal Code, and they were brought on the basis that the BF and the GF had been misused in the round-tripping transactions. The relevant "agent" identified in these charges is Ye Peng, who was entrusted with the funds in his capacity as a member of the CHC management board.

(c) Four account falsification charges were brought against all the respondents except Kong Hee and John Lam. These charges are for the offence of falsification of accounts under s 477A read with s 109 of the Penal Code and they arose from the recording of false entries in CHC's General Journal (see [18] above).

For convenience, we will refer to the sham investment and round-tripping charges as "the CBT charges".

Decisions below

The Judge's decision

21 The Judge found the respondents guilty on all the charges against them. His decision on conviction is succinctly summarised in the MA Judgment at [51]–[58], and a summary of his decision on sentence can be found at [344]–[360] of the MA Judgment. We will only briefly summarise his analysis of whether the requirement under s 409 of the Penal Code are satisfied, *ie*, that the

funds were entrusted to the relevant respondents "in the way of [their] business as … agent[s]" (Conviction GD at [119]–[123]).

22 The Judge rejected the respondents' defence that the relevant respondents were not acting in the way of their business as agents within the meaning of s 409 of the Penal Code. The respondents had argued, relying on *Mahumarakalage Edward Andrew Cooray v The Queen* [1953] AC 407 ("*Cooray*"), a decision of the Privy Council on appeal from the Court of Criminal Appeal of Ceylon, that it did not follow from the fact that they were directors of CHC that the entrustment to them of dominion over CHC's property was therefore in the way of their business as agents. In reaching his decision, the Judge relied on the Singapore High Court judgment of *Tay Choo Wah v Public Prosecutor* [1974–1976] SLR(R) 725 ("*Tay Choo Wah*"), which had distinguished *Cooray*. In the Judge's view, *Tay Choo Wah* was binding on him and stood for the proposition that "if one is an agent, *eg*, a director, and one is entrusted with property in one's capacity as agent, that would be entrustment in the way of one's business as agent" (Conviction GD at [120]). Alternatively, he found that *Tay Choo Wah* could be read as adopting the reasoning of the Indian Supreme Court in *R K Dalmia v Delhi Administration* AIR 1962 SC 1821 ("*Dalmia*") that s 409 would operate "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" (Conviction GD at [122]). On either reading of *Tay Choo Wah*, s 409 applied to the relevant respondents since Kong Hee, Ye Peng and John Lam were unarguably agents *qua* directors of the CHC board, and had been entrusted with the funds of the BF and GF in the course of their duties as members of the board.

23 In addition, the Judge rejected the submission that he was bound by *Cooray* and should follow it instead of *Tay Choo Wah*. It was not open to him,

as a matter of *stare decisis*, to find that *Tay Choo Wah* had wrongly distinguished *Cooray*, as that would involve him sitting in judgment on a decision of a superior court (Conviction GD at [123]). We will describe the decisions in *Cooray*, *Tay Choo Wah* and *Dalmia* in greater detail subsequently.

The High Court's decision

24 Dissatisfied with the Judge's decision, the respondents appealed. The appeal was heard by a specially convened coram of three Judges of the High Court. The High Court allowed the appeals against conviction and sentence in part, with a partial dissent by Chan Seng Onn J.

25 Again, in describing the High Court's decision we will focus only on the requirement that the funds must have been entrusted *in the way of the respondents' business as agents* within the meaning of s 409. This issue is analysed in the MA Judgment at [88]–[122] by the majority, and at [444]–[474] by Chan J. In respect of the other elements of the CBT charges, it suffices to note that the coram *unanimously* agreed that these elements – namely, that (a) the respondents were entrusted with dominion over CHC's funds; (b) monies from CHC's funds were misappropriated for various unauthorised purposes in pursuance of a conspiracy to misuse CHC's funds; (c) the respondents abetted each other by engaging in the above conspiracy to misuse CHC's funds; and (d) the respondents acted dishonestly in doing so – were satisfied in this case. We also leave aside the account falsification charges, which the High Court (also unanimously) found were made out and which are outside the scope of this criminal reference.

Majority's analysis of s 409

26 The majority of the High Court, comprising Chao Hick Tin JA and Woo Bih Li J, accepted that the position in Singapore since *Tay Choo Wah* is that directors who misappropriate property that has been entrusted to them by their respective companies or organisations are liable for the aggravated offence under s 409. However, the majority took the view that this position was wrong in law. It held that the expression "in the way of his business as … an agent" in the provision 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. The fact that an individual is a director of a company or a society does not mean that he is in the *business* of an agent within the meaning of s 409. The majority made the following findings which we will examine in further detail later:

> (a) First, the language of s 409, in particular the expression "in the way of his *business*" [emphasis added], indicates that the agent contemplated by the provision is a person who is carrying on a "business" as an agent. The natural reading of the word "business" is a *commercial activity done for profit*. This conclusion is buttressed by the contrast between the expressions "in the way of his business" and "in his capacity", the latter of which is used only in relation to public servants (within the first part of s 409). The majority disagreed with the reasoning of the Indian Supreme Court in *Dalmia* that a person who is acting "in the way of his business" as an agent is acting "in connection with his duties" as an agent. According to the majority, no distinction can be drawn 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. Since Parliament would not have used two different expressions

in the same provision to mean the same thing, "in the way of his business" must mean something more than either "in the capacity of" or "in the course of his duties". Thus the approach in *Dalmia* could not be accepted (MA Judgment at [102]–[104]).

(b) Second, the words "a banker, a merchant, a factor, a broker, an attorney" that precede the reference to "an agent" suggest that the wider interpretation of the phrase "in the way of his business" adopted in *Dalmia* is incorrect. That phrase has to be applied to "a banker, a merchant, a factor, a broker, [and] an attorney" and not merely to "an agent". When read in the light of those preceding words, the phrase "in the way of his business" more sensibly means "in the occupation or the trade of" (MA Judgment at [104]–[105]).

(c) Third, the existence of those preceding words also brings into play the *ejusdem generis* principle in relation to the interpretation of the word "agent". Applying that principle, the meaning of the term "agent" must be restricted by, and inferred from, the words "a banker, a merchant, a factor, a broker, an attorney". Those words refer to persons who carry on businesses or trades of offering certain services to the public in the course of which the customer has to entrust property, or the dominion of property, with them, and who have an external relationship with the person entrusting property to them (MA Judgment at [106]).

(d) The majority also relied on *Cooray*. The majority read *Cooray* as holding that in order for an accused to be convicted of the aggravated offence of CBT as an agent, he must be in the *profession, trade or business* as an agent (what the majority referred to as a "professional agent") and must be entrusted with property in that capacity

(MA Judgment at [97]–[100]). Reference was also made to the English cases on s 75 of the Larceny Act 1861 (c 96) (UK) ("the Larceny Act 1861"), which was worded similarly to s 409, as well as remarks made in the House of Commons on the UK provision. The majority found that these materials bolstered the conclusion that s 409 of the Penal Code must be interpreted to encompass only *professional* agents (MA Judgment at [107]–[108]).

(e) Applying the above analysis, the majority held that a director who has been entrusted with the property of the company or organisation by virtue of his capacity as a director does not fall within s 409. While a director may be an agent of the company or organisation and undoubtedly holds an important position in a company or organisation, he does not offer his services as an agent to the community at large. In addition, the relationship between a director and the company 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, [or] an attorney" shares with the customer who entrusts the property to him. The majority accepted that it may perhaps be intuitively unsatisfactory for a person holding the position of a director to be liable for CBT *simpliciter* and not a more aggravated form of the offence, but decided that it simply could not ignore the wording of the section. The task of re-writing the provision was more properly left to Parliament (MA Judgment at [110] and [112]).

27 The majority also rejected the Prosecution's argument that *Tay Choo Wah* should be followed because it has been followed for over four decades, during which period Parliament had amended the Penal Code four times but had left s 409 untouched. It emphasised that any erroneous interpretation of a

provision, especially one that imposes criminal liability, must be corrected regardless of how entrenched it may have become. In addition, Parliament's intention has to be discerned at or around the time the law is passed, and the fact that Parliament did not amend s 409 post-*Tay Choo Wah* does not necessarily indicate that the position taken in that case was reflective of Parliament's intention (MA Judgment at [111]).

28 Finally, the majority rejected the respondents' argument that the court was bound by *Cooray*. This was because *Cooray* was an appeal from the courts of another jurisdiction and not the Singapore courts. The principle that the Singapore courts are bound by decisions of the Privy Council on appeals from jurisdictions other than Singapore, where such decisions concern statutory provisions that are *in pari materia* with provisions in Singapore law, had been effectively rejected by this Court in *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 ("*Au Wai Pang*") (MA Judgment at [113]–[121]).

29 The majority therefore held that the charges under s 409 were not made out as the relevant respondents were not professional agents. The CBT charges were accordingly reduced to charges under s 406 of the Penal Code, *ie*, for the offence of CBT *simpliciter*, which provides for a much lower maximum term of imprisonment than s 409. Section 409 provides that the offender "shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 20 years" while s 406 provides for a maximum imprisonment term of seven years. Consequently, the sentences imposed on the respondents were significantly reduced.

Minority's analysis of s 409

30 Chan J dissented from the majority's analysis of s 409. His reasoning can be summarised as follows:

(a) First, *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. A full appreciation of the facts of *Cooray* reveals that the decision merely stands for the proposition that an accused would not satisfy the requirement of being entrusted with property "in the way of his business as … 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) (MA Judgment at [446]–[453]). The English authorities on s 75 of the Larceny Act 1861 similarly indicate that s 409 is not intended to apply to 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]" (MA Judgment at [454]–[458]).

(b) The Indian Supreme Court in *Dalmia* rightly held that the expression "in the way of his business" in s 409 of the Indian Penal Code (which is *in pari materia* to s 409 of our Penal Code) connotes the entrustment of property to an accused in "the ordinary course of his duty or habitual occupation or profession or trade". It was also noted in that case that there is a difference 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. The distinguishing factor is that 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 entrustment of property as an agent must have come about as a result of a certain trade, profession, office or occupation held by the accused (MA Judgment at [460]–[461]).

(c) The same analysis would apply to bankers, merchants, factors, brokers and attorneys, who can only be liable under s 409 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 would not be acting "in the way of his business" so as to fall within the scope of s 409 (MA Judgment at [462]).

(d) The term "agent" must be interpreted in the light of the common thread that unites persons such as bankers, merchants, factors, brokers and attorneys – *ie*, 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 (MA Judgment at [463]–[464]).

(e) In the context of directors of companies and organisations, the argument that they are *only casually* entrusted with the company's or organisation's money or property is untenable. 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. Like bankers, merchants, factors, brokers and attorneys, they 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, among others, between the public and the company or organisation, making the fictional legal entity of a company possible as a practical reality. Directors of a company or an organisation therefore fall within the class of persons contemplated under s 409 (MA Judgment at [465]–[467]).

(f) This interpretation 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. In contrast, the analysis of the respondents would result in an anomalous situation wherein a director who committed the offence of CBT would only be liable for the maximum punishment of seven years' imprisonment in the 2008 revised edition of the Penal Code, 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 incongruity ought to be avoided as the court generally avoids interpreting statutes in a manner that produces absurd results (MA Judgment at [470]).

(g) The argument that an "agent" in s 409 only covers professional agents should be rejected as neither the case authorities nor the principles of statutory interpretation require that the section be interpreted in such a narrow manner (MA Judgment at [471]).

(h) 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" depends 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 (MA Judgment at [472]).

31 Chan J therefore found that the respondents had been properly convicted for the offences punishable under s 409 read with s 109 of the Penal Code. The relevant respondents had, as members of the CHC management board, acted as agents *vis-à-vis* CHC and were entrusted with the church's property by virtue of their positions. This entrustment was in their way of their business as agents (of CHC) under s 409 of the Penal Code (MA Judgment at [473]–[474]). Thus his view was that the sentences imposed at first instance ought to stand.

Questions referred in the present criminal reference

32 We now turn to the present criminal reference. There are two questions referred by the Prosecution under s 397(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). These are as follows:

> (a) *Question 1*. For the purposes of s 409 of the Penal Code, does the expression "in the way of his business as ... an agent" refer only to a person who is a *professional* agent, *ie*, one who professes to offer his agency services to the community at large and from which he makes his living?
>
> (b) *Question 2*. Is a director of a corporation, or governing board member or key officer of a charity, or officer of a society, who is

> entrusted with property, or with any dominion over property, by the said corporation, charity, or society, so entrusted in the way of his business as an agent for the purposes of s 409 of the Penal Code?

33 Both questions concern the scope of s 409, and they are inextricably linked. The main issue of law, which is one of statutory interpretation, is what the phrase "in the way of his business as ... an agent" in s 409 means – does it refer only to a *professional* agent as the majority of the High Court held? Or should it be construed more broadly so as to encompass the persons identified in Question 2, namely, directors and board members of corporations, charities and societies?

34 A separate issue which follows from the court's determination of the questions referred is what consequential orders, if any, need to be made. The Prosecution's position is that if it prevails in its interpretation of s 409, then the original convictions of the respondents under s 409 read with s 109 of the Penal Code ought to be restored and orders enhancing their sentences accordingly ought to be made. Of course, if the majority's interpretation of s 409 is upheld, then no such consequential orders need to be made.

Summary of the parties' arguments on the scope of s 409

35 We now set out a summary of the parties' submissions on the scope of s 409, which we will examine in greater detail in the course of our analysis below.

Prosecution's submissions

36 The Prosecution relies heavily on the principle that, in construing a statutory provision, the court should always avoid absurd results save in a

situation where avoiding such results would involve a violation of the language of the provision. It submits that the majority's interpretation of s 409 would produce absurd results since high-ranking directors who are in a position to misappropriate huge amounts of money would be subject to less severe punishment than low ranking employees – a result which the majority itself accepted was "intuitively unsatisfactory" (MA Judgment at [112]). The Prosecution argues that a broader interpretation of s 409, which would not require any re-writing of s 409, much less any violation of its language, should be adopted.

37 On the language of s 409, the Prosecution argues as follows:

(a) The word "agent" has a specific legal meaning and refers to a person who agrees to act on a principal's behalf, undertakes fiduciary obligations towards the principal and has the authority to affect the principal's legal position.

(b) The majority erred in applying the *ejusdem generis* rule as the principle is used to cut down the meaning of words with wide or vague meaning whereas "agent" refers to a defined class. The principle also cannot be applied as no *genus* can be identified from the groups specified in s 409; these groups do not all share the characteristics of professional agents who have an external relationship to the person entrusting the property and who offer their services to the public at large. In addition, the absence of the word "other" before "agent" also indicates that the drafters of s 409 did not intend the word "agent" to be construed *ejusdem generis*.

(c) The phrase "in the way of his business" can and should be construed as having the meaning of "in the course of one's regular duties

> or functions", thereby excluding agents who are entrusted with property on a casual or *ad hoc* basis. It does not necessarily refer to a commercial activity done for profit.

38 The Prosecution also submits that its interpretation is supported by the structure of the CBT provisions in the Penal Code and the legislative history. In particular, it points out that the CBT provisions are organised in a system of ascending severity, based on the role or position the offender occupied when he was entrusted with the property and the extent of trust and confidence reposed in him, rather than whether the offender stands in an internal or external relationship with the victim. This analysis, the Prosecution argues, is supported by the legislative history of the Penal Code and the English parliamentary debates on the law of embezzlement in the early 19th century, which show that the intention and purpose behind s 409 was to punish more severely persons who held positions of trust and confidence, and whose breaches of trust would have serious consequences, irrespective of whether they were engaged in profit making or offered their services to the community at large.

39 The Prosecution then goes on to argue that directors and officers of companies, charities and societies should be construed as falling within s 409 as they are individuals subject to onerous fiduciary duties and in whom a high level of trust and confidence is reposed. The consequences of CBT committed by directors and officers of such corporate bodies are serious, given their ability to deal with their organisation's property, the apex position which they hold and the fact that they act for non-human principals who are less able to supervise their activities as agents. There is thus a greater need to deter CBT committed by such persons through the imposition of harsher punishment.

40 Finally, the Prosecution points out that the interpretation they have proffered is consistent with the long standing position in Singapore and India. They also submit that their interpretation is consistent with the English cases and *Cooray*, which merely indicate that s 409 only captures persons who regularly act as agents rather than casual agents who happen from time to time to act as such.

Respondents' submissions

41 As a preliminary point, the respondents object to the inclusion of the references to a "governing board member or key officer of a charity" and an "officer of a society" in Question 2 of the present application (see [32(b)] above). They submit that the issue of whether such persons would fall within the scope of s 409 was never raised in the courts below and should not be belatedly raised through a criminal reference. The respondents claim that the Prosecution is now effectively putting forward a new case which is broader than that which it ran at trial and in the appeal, and that there is no evidence as to whether the respondents were in fact "key officers of a charity" or "officers of a society".

42 On the statutory interpretation of s 409 itself, the respondents rely on the reasoning of the majority of the High Court (see [26]–[29] above) and the Privy Council's decision in *Cooray*. In particular, they observe that s 409 draws a clear distinction between the phrase "in the way of his business", used in relation to bankers, merchants, factors, brokers, attorneys and agents, and the expression "in his capacity", which is used in relation to public servants. Given this distinction, they submit that the two phrases cannot be synonymous and that the phrase "in his capacity" must therefore require "something more" than the agent merely having acted "in his capacity" as such. This point, the respondents

assert, indicates that the natural reading of "business" as referring to a commercial activity must be adopted. They contend that the Prosecution's definition of the phrase as meaning "in the course of his duties" is untenable as there is no logical or meaningful distinction between acting "in his capacity" and acting "in the course of his duties".

43 The respondents also argue that the majority's application of the *ejusdem generis* principle in interpreting the word "agent" was correct and that "agent" refers to *professional* agents in whom the public have placed confidence. The various classes of persons identified in s 409 are all trusted agents who provide services to the community at large as part of a trusted trade. According to the respondents, this is the common thread uniting the various classes of persons identified in s 409 and provides the reason why they are subject to more severe punishment.

44 Applying this analysis to directors, the respondents take the position that directors are not professional agents within the scope of s 409 because they do not carry on a business nor do they profess to offer to their services to the community at large. Even if s 409 could be read so broadly to include directors, the respondents submit that the relevant respondents in the present case should not be convicted under the provision as they were mere volunteers and were not remunerated for being board members of CHC.

45 In addition, the respondents argue that the fact that *Tay Choo Wah* has been applied for the past four decades is not a good reason as a matter of principle for rejecting the majority's analysis, since *Tay Choo Wah* has never been subject to extensive examination by the Singapore courts. In any event, even if *Tay Choo Wah* is entrenched law, that cannot stand in the way of the court taking the correct interpretation of a statutory provision which imposes

criminal liability. The respondents also submit that any anomaly or intuitive unfairness arising from the majority's decision can be explained on the basis that the drafters of the Indian Penal Code did not have directors or any other board members in mind when they drafted the CBT provisions. This gap should properly be left to Parliament to address. To do otherwise would be to disregard the separation of powers between the judicial branch and the legislative branch of government.

46 Finally, the respondents rely on the principle that if any ambiguity over the ambit of s 409 persists (after all attempts have been made at a purposive reading), the rule of strict construction of penal provisions mandates that the court gives the benefit of doubt to the respondents as accused persons.

Issues for determination

47 Before we proceed with our substantive analysis of the issues before us, we will deal with two preliminary matters. The first is a procedural question as to whether the threshold conditions for the exercise of the court's substantive jurisdiction under s 397 of the CPC are satisfied. As we will explain, if those conditions are not satisfied, it would be inappropriate for the court to proceed to determine the merits of the application. The second concerns the status of decisions of the Privy Council as allegedly binding authorities on Singapore courts save for the Court of Appeal. We deal with these procedural and methodological matters at the outset so as not to interrupt the flow of the subsequent analysis.

48 As mentioned at [33] above, the core issue in this application is whether an "agent" within the meaning of s 409 of the Penal Code refers only to a *professional* agent – in the majority's words, a person who professes to offer his

agency services to the community at large and from which he makes his living (MA Judgment at [103]). Since this is ultimately a matter of statutory interpretation, it is appropriate for us to begin by setting out the applicable principles of statutory interpretation as described in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") and as more recently elaborated upon in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"). This will provide our methodology in determining the answer to the question posed. The first step of our analysis will be an examination of the text of the provision to determine its ordinary meaning, having regard not only to the disputed words but also s 409 as a whole and other sections on CBT within the Penal Code. In adhering to the interpretive methodology, our analysis will then extend to a consideration of legislative purpose, reviewing the legislative and historical material that, in our judgment, ultimately paints a clear and complete picture of what the draftsman intended and did not intend to include by the words that he used. It is this mutually-reinforcing interaction of text and context that has led us to our conclusion on this application.

49 In the final part of our analysis, we consider the broader policy arguments that were raised by the parties and set out our observations on the limits of such arguments in the province of statutory interpretation.

Preliminary issues

Threshold conditions for the exercise of the court's substantive jurisdiction

50 The first preliminary issue concerns the threshold conditions for the exercise of the court's substantive jurisdiction under s 397 of the CPC, which governs criminal references to the Court of Appeal. It should be stressed that such criminal references are exceptional as, unlike a number of other

jurisdictions, Singapore has a system of one-tier appeal in criminal matters. As this Court explained in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [21], a liberal construction of s 397 so as to freely allow criminal references to be brought would "seriously undermine the system of one-tier appeal" as well as the principle of finality which "strongly militate[s] against the grant of such a reference save in very limited circumstances". In addition, although the Public Prosecutor does not require leave to bring a criminal reference by virtue of s 397(2) of the CPC, it is well-established that this does not mean that the Court of Appeal is invariably bound to answer all questions referred to it under this section. In the exercise of its *substantive* jurisdiction under s 397, the Court of Appeal must be satisfied that the application properly falls within the scope of the provision, and this in turn entails a consideration of whether the requirements in s 397(1) are made out (*Public Prosecutor v Lim Yong Soon Bernard* [2015] 3 SLR 717 at [16]; *Public Prosecutor v Goldring Timothy Nicholas and others* [2014] 1 SLR 586 at [26]).

51 The only type of questions that can properly be referred to the Court of Appeal under s 397 are questions of law of public interest which have arisen in the matter and the determination of which by the High Court judge has affected the case. More specifically, the following four requirements must be satisfied (*Mohammad Faizal* at [15]):

(a) first, the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in exercise of its appellate or revisionary jurisdiction;

(b) second, the reference must relate to a question of law and that question of law must be a question of law of public interest;

(c) third, the question of law must have arisen from the case which was before the High Court; and

(d) fourth, the determination of the question of law by the High Court had affected the outcome of the case.

52 In *Mohammad Faizal* at [19], this Court approved of the following approach articulated by the Malaysian Federal Court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141:

> We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so *whether it is an open question in the sense that it is* ***not finally settled by this court*** *… or is* ***not free from difficulty or calls for discussion of alternate views****. If the question is* ***settled by the highest court*** *or the* ***general principles in determining the question are well settled*** *and it is a mere question of applying those principles to the facts of the case the question would* ***not*** *be a question of law of public interest.* [emphasis added in italics and bold italics]

Notably, in order for a question of law to also be one of *public interest*, the question cannot have received a settled answer in the case law, either as a matter of directly applicable precedent or following the application of settled principles.

53 In this present reference, we are satisfied that all four conditions are met.

54 The first, third and fourth requirements are made out as the scope of s 409 of the Penal Code is an issue which arose from the case before the High Court (which was exercising its appellate jurisdiction in the appeals brought by the accused persons) and its determination of that issue undoubtedly affected the outcome of the case. The only dispute on these requirements arises from the respondents' objection to the inclusion of the references to a "governing board

member or key officer of a charity" and an "officer of a society" in Question 2 (see [41] above). We are not persuaded that the inclusion of these terms is an attempt by the Prosecution to put forward a new case which is broader than that which it ran at trial. It must be recalled that the CBT charges against the respondents are premised on the entrustment of CHC's funds to Kong Hee, Ye Peng and John Lam in their capacity as members of the CHC management board (see [20] above). This was the Prosecution's case from the inception of these proceedings, and even the respondents accept that Question 2 may refer to "directors of a corporation, or management board members of a charity or society". The Prosecution also clarified at the oral hearing that the sole reason why these terms are used in Question 2 is because this is the nomenclature utilised in the Charities Act (Cap 37, 2007 Rev Ed). In such circumstances, the references in Question 2 to a "governing board member or key officer of a charity" and an "officer of a society" neither prejudices the respondents nor expands the scope of the present criminal reference; these terms are merely alternative ways of describing the role which Kong Hee, Ye Peng and John Lam performed as members of the CHC management board.

55 In relation to the second condition, the questions are also general questions of *law* concerning the interpretation of s 409, rather than questions of fact. In addition, they are, at least at first glance, questions of *public interest* as there are conflicting High Court decisions on the legal controversy at hand, namely, *Tay Choo Wah* and the decision of the majority in this case. We observe that s 397(6) of the CPC expressly provides that "any question of law which any party applies to be referred regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest". It is also undisputed that the Court of Appeal has not yet had the opportunity to speak definitively on the disputed issue. Accordingly, we do not consider the

definition of an "agent" within the meaning of s 409 to be a settled issue. There is, however, one other factor which requires further consideration.

56 In our recent decision in *Chew Eng Han*, we held (at [46]–[50]) that the fact that a three-Judge coram of the High Court had been convened to hear the Magistrate's Appeals was a matter of legal significance in relation to whether leave should be granted for the applicant in that case to refer questions to the Court of Appeal under s 397(1) of the CPC. In summary, we took the view that when a three-Judge coram of the High Court has ruled, its decision should generally represent a final and authoritative determination of the issues arising from the case, because a three-Judge coram is a *de facto* Court of Appeal (although it is not one *de jure*) and is convened precisely to deal with important questions affecting the public interest which require detailed examination. The result is that when a party to a criminal matter seeks to have the Court of Appeal reconsider a question that has already been determined by a three-Judge coram of the High Court, leave to do so will only be granted in exceptional situations. This general principle is of weaker application, however, where the determination of the question sought to be referred involves either: (a) an overturning or overruling of other decisions of the High Court; or (b) a departure from decisions of the Court of Appeal. These are outcomes that only the Court of Appeal, and not the High Court, can accomplish as a matter of authority.

57 In our judgment, the fact that a three-Judge coram of the High Court was convened to hear the appeal is likewise a relevant consideration in the Court of Appeal's decision as to whether it should exercise its *substantive* jurisdiction to determine questions referred by the Public Prosecutor. This, of course, does not represent any limitation on the Public Prosecutor's statutory right to refer any question of law of public interest without leave under s 397(2) of the CPC. Nevertheless, the fact that the reference was made from a decision of a three-

Judge coram of the High Court is directly relevant to the Court of Appeal's assessment as to whether the requirements under s 397(1) of the CPC are met, such that the case is a proper one for the exercise of the Court of Appeal's substantive jurisdiction. We will briefly explain. As described at [51(b)] above, one of the requirements under s 397 is that the question of law referred is one of *public interest*, and this entails a consideration of whether the question (or the general principles governing it) has been *settled* by a court with the jurisprudential authority of the Court of Appeal (see [52] above). It follows that if the question referred by the Public Prosecutor has been considered and answered by a three-Judge coram of the High Court that is – as explained in *Chew Eng Han* at [47] – a *de facto* Court of Appeal that has been convened precisely to deal with important questions affecting the public interest that require detailed examination, the result is that the question can properly be regarded to have been settled and is accordingly not one of "public interest" within the meaning of s 397. In such circumstances, it would not be appropriate for the Court of Appeal to exercise its substantive jurisdiction under s 397 to answer the question referred by the Public Prosecutor, since the question does not fall within the scope of the provision.

58 In the present case, we find that the circumstances are sufficiently exceptional to justify the exercise of our substantive jurisdiction under s 397 of the CPC even though a three-Judge coram of the High Court was convened to hear the appeal below. This is on the principal basis that a determination of the disputed issue would involve *overturning or overruling High Court authority*, which – as explained in *Chew Eng Han* at [49]–[50] (see [56] above) – can only be accomplished as a matter of *stare decisis* by a *de jure* Court of Appeal. That would be the logical consequence of any decision we might make on the question sought to be referred, given that the High Court decisions before us (*ie*,

Tay Choo Wah on the one hand, and the decision of the majority on the other) have adopted diametrically opposite positions on the issue. We also note that the question sought to be referred arises not only from diverging local High Court decisions but also in the light of conflicting judgments of three superior courts of the common law – *ie*, the Privy Council in *Cooray*, the Indian Supreme Court in *Dalmia* and the Malaysian Court of Appeal in *Periasamy s/o Sinnappan and another v Public Prosecutor* [1996] 2 MLJ 557 ("*Periasamy*"). In this last-mentioned regard, we note that in *Mohammad Faizal*, this Court held at [20] (albeit in the context of an application for *leave* to refer a question of law of public interest to the Court of Appeal) that a reference may be made "where the same question was answered differently (and not due to differences in statutory provisions) in another common law jurisdiction". The inconsistent positions within both local and foreign jurisprudence therefore furnishes an additional reason for the exercise of our substantive jurisdiction in the present case.

59 The particularly vexing nature of the questions referred is further evidenced and amplified by the fact that the High Court coram was split on the result. In fact, the minority expressly approved of the established High Court authority which the majority sought to depart from (MA Judgment at [467]). This is an additional factor which indicates that an *authoritative determination* on the scope of s 409 by the Court of Appeal, as the apex court of the land, is necessary.

60 For these reasons, we are prepared to determine the questions referred to us. We emphasise, however, that this is an *exceptional case*, and that the Court of Appeal may *not* always exercise its substantive jurisdiction under s 397 of the CPC to consider questions referred to us by the Prosecution that have been answered by a three-Judge coram of the High Court. As we have explained,

such a decision is intended, for all intents and purposes, to be an authoritative pronouncement on the issues of law, including the issues of law of public importance, arising from the case.

Doctrine of* stare decisis *and Privy Council decisions

61 The second preliminary issue concerns the status of Privy Council decisions in Singapore law as a matter of the doctrine of *stare decisis*. The question can be put simply: are decisions of the Privy Council on appeal from the courts of different jurisdictions that precede the abolition of appeals to the Privy Council and which concern foreign statutory provision(s) that are *in pari materia* with the relevant Singapore provision(s) binding on the Singapore courts? Strictly speaking, the issue does not arise in this criminal reference – as compared to the proceedings in the High Court below – since the *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689 expressly states that "*the Court of Appeal* should not hold itself bound by any previous decisions of its own or of the Privy Council" [emphasis added]. However, it is worth addressing as the allegedly binding nature of *Cooray* on courts below the Court of Appeal was one of the arguments advanced in the High Court by the respondents. We therefore take this opportunity to put the issue to rest.

62 We agree with the High Court that the principle that the courts of Singapore are bound by Privy Council decisions on appeal from other jurisdictions, if the decision in question considers a statutory provision *in pari materia* with the relevant Singapore provision, is ***no longer a part of our law***.

63 In *Chin Seow Noi and others v Public Prosecutor* [1993] 3 SLR(R) 566 ("*Chin Seow Noi*") – a case relied on by the Prosecution below – the Court of Appeal observed (at [82]) that in certain previous cases, "it *seemed to have been*

accepted that the courts of Singapore were bound by 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" [emphasis added]. Crucially, however, the court *did not embark on any examination of the principle nor did it consider if it should continue to remain a part of Singapore law despite the abolishment of appeals to the Privy Council*. Indeed, the principle was not even actually applied on the facts of *Chin Seow Noi* because the Court of Appeal found that there were "significant differences" between the relevant provisions of foreign law (Indian law) and the corresponding Singapore provisions. Given these differences, the court decided that it would be "neither realistic nor logically correct" to regard the Privy Council decision in question as being applicable to the interpretation of the relevant domestic statute.

64 In contrast, the Court of Appeal in the more recent case of *Au Wai Pang* expressly observed on the same issue as follows (at [20]):

> … [*Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)* [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 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. [emphasis in bold, italics and bold italics in original]

65 While the court in *Au Wai Pang* did not refer to *Chin Seow Noi*, it is clear that it ***rejected*** the principle that was merely stated, *without any analysis or endorsement*, in *Chin Seow Noi*. We affirm the decision in *Au Wai Pang*. We also stress that the reasoning of this Court in *Au Wai Pang*, as set out in the passage extracted above, extends more broadly to all Privy Council decisions on appeal from other jurisdictions, regardless of whether they were decided before appeals to Privy Council were abolished in Singapore or even before Singapore's independence. As the High Court noted in the present case, *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.* To hold otherwise would derogate from Singapore's independence (MA Judgment at [121]).

66 Hence, Singapore courts are not bound by Privy Council decisions on appeal from other jurisdictions, even if the decision in question considers a statutory provision that is *in pari materia* with the relevant Singapore provision. Such a decision may be persuasive, but the decision whether to follow it will depend on whether it is compelling, principled and in conformity with the circumstances of Singapore.

Our decision on the questions referred

Principles of statutory interpretation

67 In *Ting Choon Meng*, Sundaresh Menon CJ described the approach toward the purposive interpretation of statutes as set out in s 9A of the IA. Menon CJ explained the three steps of this exercise as follows:

> 59 … [T]he court's task when undertaking a purposive interpretation of a legislative text should begin with three steps:
>
> > (a) First, ***ascertaining the possible interpretations of the text***, as it has been enacted. This however should never be done by examining the provision in question in isolation. Rather, it should be undertaken *having due regard to the context of that text within the written law as a whole*.
> >
> > (b) Second, ***ascertaining the legislative purpose or object of the statute***. This may be *discerned from the language used in the enactment*; … it can also be discerned by *resorting to extraneous material in certain circumstances*. In this regard, the court should principally consider the general legislative purpose of the enactment by reference to any mischief that Parliament was seeking to address by it. In addition, *the court should be mindful of the possibility that the specific provision that is being interpreted may have been enacted by reason of some specific mischief or object that may be distinct from, but not inconsistent with, the general legislative purpose underlying the written law as a whole*. …
> >
> > (c) Third, ***comparing the possible interpretations of the text against the purposes or objects of the statute***. *Where the purpose of the provision in question as discerned from the language used in the enactment clearly supports one interpretation, reference to extraneous materials may be had for a limited function – to confirm but not to alter the ordinary meaning of the provision as purposively ascertained…*
>
> [emphasis added in italics and bold italics]

68 Crucially, Menon CJ went on to make two points of particular importance (at [60]–[61]). First, the level of generality at which the legislative purpose or object is articulated must be pitched correctly. This is important because *one could, by pitching the level of generality at a desired height, describe the objects or purposes of the statute in whatever terms as would support one's preferred interpretation*. Second, the purpose behind a particular provision may be distinct from the general purpose underlying the statute as a whole. In appropriate cases, the specific purpose behind a particular provision

should be separately considered. For instance, *different sections of a particular statute may target different mischiefs*, and to that extent the general object of a statute may cast little, if any, light on the meaning of specific provisions. For this reason amongst others, "[i]t should therefore *not be assumed that the specific purpose of a particular provision does not need to be separately considered to ascertain the legislative intent*" [emphasis added].

69 In *Tan Cheng Bock*, Menon CJ elaborated (at [40]–[41]) on the methodology for the identification of legislative purpose, emphasising the importance of distinguishing between "the *specific purpose* underlying a particular provision and the *general purpose or purposes* underlying the statute as a whole or the relevant part of the statute" [emphasis in original]. Although there may be cases where it is the intention of Parliament that the specific purpose of a provision contradicts or undermines the more general purpose of a statute, the court must "begin by *presuming* that a statute is a coherent whole, and that any specific purpose does not go against the grain of the relevant general purpose, but rather is subsumed under, related or complementary to it"; "[t]he statute's individual provisions must then be read consistently with *both* the specific and general purposes, so far as it is possible" [emphasis in original].

70 Menon CJ also explained in considerable detail s 9A(2) of the IA, which identifies the circumstances in which consideration may be given to material that does not form part of the written law, in situations where such material is capable of assisting in the ascertainment of the meaning of the provision. It is useful to begin by setting out s 9A(2) of the IA:

> (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is *capable of assisting in the ascertainment of the meaning of the provision*, consideration may be given to that material –

> (a) to ***confirm*** that the meaning of the provision ***is the ordinary meaning*** conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
>
> (b) to ***ascertain*** the meaning of the provision when –
>
> (i) the provision is ***ambiguous or obscure***; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is ***manifestly absurd or unreasonable.***
>
> [emphasis added in italics and bold italics]

71 As Menon CJ described (at [54]), s 9A(2) sets out three situations in which extraneous material can be applied, and each of these begins with the determination of the ordinary meaning conveyed by the text of the provision in question, understood in the context of the written law as a whole. In the first situation, pursuant to s 9A(2)(*a*), extraneous material performs a *confirmatory* function, serving to endorse the correctness of the ordinary meaning. It is also "useful for demonstrating the soundness – as a matter of policy – of that outcome" (*Tan Cheng Bock* at [49]). The second and third functions are essentially *clarificatory* in nature. Under s 9A(2)(*b*)(i), resort to extraneous material can be had where the provision on its face is ambiguous or obscure. Under s 9A(2)(*b*)(ii), extraneous material can be referred to where the ordinary meaning of the text is absurd or unreasonable in the light of the underlying object and purpose of the written law.

72 If the court has referred to extraneous material in construing the provision, the last step in the process is to determine the appropriate *weight* to be placed on that material. The court's decision in this regard is guided by

s 9A(4) of the IA, which establishes that the court must have regard to (a) *the desirability of persons being able to rely on the ordinary meaning* conveyed by the text of the provision, taking into account its context in the written law and the purpose or object underlying the written law; and (b) *the need to avoid prolonging legal or other proceedings without compensating advantage*. In *Ting Choon Meng,* Menon CJ made two additional points on the approach to be taken in determining the weight to be placed on extraneous materials (at [70]–[71]). The first is a requirement that *the material in question must be clear*, in the sense that it must "disclose the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words" (citing *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 634). The court must "guard against the danger of finding itself construing and interpreting the statements made in Parliament [which are such extraneous material] rather than the legislative provision that Parliament has enacted" (*Tan Cheng Bock* at [52(b)]). The second is a requirement that the material must be "*directed to the very point in dispute* between the parties" [emphasis added]. In brief, the extraneous material must be ***clear in meaning and directly pertinent to the disputed issue*** for it to be appropriate for the court to place substantial weight on it as an interpretive aid.

The ordinary meaning of the disputed phrase

73 The interpretive methodology outlined by Menon CJ in *Ting Choon Meng* and *Tan Cheng Bock* is not only entirely consistent with s 9A of the IA but also lays the ground for a holistic but targeted analysis of disputed statutory provisions. In *Ting Choon Meng,* the majority held at [18] that ***when construing a statutory provision, both its text and its context are of the first importance; what is crucial in this exercise is the "integration of text and context"*** [emphasis added in bold italics]. Menon CJ's elaboration of this approach is

neatly structured according to s 9A of the IA and provides a useful framework of analysis that we adopt in answering the questions posed to us in this criminal reference.

Determining the ordinary meaning

74 The first step in this process involves setting up the following question for consideration: what is the *ordinary meaning* of the disputed phrase "in the way of his business as … an agent" in s 409?

75 It is easier to speak of an "ordinary meaning" of a word or phrase rather than to explain precisely what "ordinary meaning" refers to and how it may be ascertained. As observed in Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th Ed, 2013) ("*Bennion*") at p 1058, paraphrasing Mummery LJ's observation to like effect in *Football Association Premier League Ltd and others v Panini UK Ltd* [2003] 4 All ER 1290 ("*Football Association*") at [39]:

> The question of a word's meaning is normally to be answered directly, not by rushing to dictionaries, or by searching the Internet for substitute words and expressions, or by the use of a non-statutory check list; or by recourse to Hansard, or by working through a range of hypothetical situations.

76 The author of *Bennion* observes at p 1058 that a wide variety of expressions have been used by judges in describing what the "ordinary meaning" of a word or phrase entails, such as "*uti loquitur vulgus*" (*ie*, "how it is spoken by the people"), "as they are understood in common language", "the grammatical and ordinary sense of the words used", "their ordinary natural meaning" and "ordinary English meaning as applied to the subject matter with which they are dealing". *Bennion* itself prefers the phrase "***proper and most known signification***" [emphasis added in bold italics], which was coined in the

16th century by Samuel Freiherr von Pufendorf in *Of the Law of Nature and Nations* (4th Ed, 1729) at p 535. We think that Pufendorf's definition provides a useful starting point – while it is difficult and perhaps not necessarily a useful endeavour to enact a complete definition of "ordinary meaning", we are of the view that "proper and most known signification" suitably conveys the idea that the ordinary meaning of a word or phrase is that which *comes to the reader most naturally* by virtue of its ***regular or conventional usage*** *in the English language* and in the light of the ***linguistic context*** *in which that word or phrase is used*.

77 It is useful at this juncture to set out s 409 again. The provision reads as follows:

> **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.
>
> [emphasis added in italics and bold italics]

78 In our judgment, it is of the first importance to note the following two points about the structure of s 409 and the disputed phrase:

(a) First, there are ***two limbs*** *to s 409*, pertaining to two different groups of potential offenders and the manner in which property or the dominion over property has been entrusted to them. The first limb concerns a person who has been entrusted "in his capacity of a public servant". The second limb applies to a person who has been entrusted "in the way of his business as a banker, a merchant, a factor, a broker,

an attorney or an agent". The disputed phrase (*ie*, "in the way of his business as … an agent") is contained within this second limb.

(b) Second, there are ***two parts*** *to the disputed phrase*. The first part is the phrasal verb "in the way of his business as", and the second is the noun "an agent".

79 We observe that both the majority and the minority in the High Court analysed both parts of the disputed phrase separately and later in conjunction, and that the parties have essentially adopted the same method of analysis in their submissions before us. We agree that this approach promotes a closer reading of s 409, but would reiterate that in doing so, one should not forget that, in the final analysis, the disputed phrase must be read and understood in its entirety. Put another way, breaking down the disputed phrase into its constituent parts for individual analysis will be useful (and indeed appropriate) *only in so far as this exercise helps to shed light on the disputed phrase and the provision* ***as a whole***. It bears emphasising that s 9A(2)(*a*) of the IA requires the court to ascertain the ordinary meaning "conveyed by the text of the provision *taking into account its context in the written law* and the purpose or object underlying the written law" [emphasis added]. Bifurcation of the disputed phrase and magnification of its components should not cause one to lose sight of the whole and to ignore its context within the written law.

The expression "in the way of his business"

80 We begin with the first part of the disputed phrase, "in the way of his business". As described at [26] and [30] above, the meaning of this expression was the subject of considerable disagreement between the majority and the minority in the High Court. In brief, Chan J agreed with the Indian Supreme Court in *Dalmia* that the expression means "in the ordinary course of his duty

or habitual occupation or profession or trade" (MA Judgment at [460]). The majority however rejected *Dalmia*, reasoning that the expression cannot simply mean that such a person has to be acting "in connection with his duties as" an agent since that is basically indistinguishable from the meaning of "in his capacity" as an agent ("in his capacity" having been used in the first limb of s 409), and there was no reason why Parliament would have used two different expressions in the section to mean the same thing (MA Judgment at [102]). The majority preferred the reading of "in the way of his business" as "in the occupation or the trade of" (MA Judgment at [105])).

81 The Prosecution and the respondents have essentially aligned themselves with the positions of the minority and the majority, respectively. We first turn to consider the ordinary meaning of the expression "in the way of his business", read alongside the preceding expression "in his capacity of" which forms part of its context in the written law.

(1) The parallel expression "in his capacity of"

(A) A CONTEXTUAL READING

82 When one reads s 409, one immediately observes that in relation to *public servants*, the phrase "in his capacity of" is used rather than "in the way of his business as". The latter is employed only in relation to bankers, merchants, factors, brokers, attorneys and agents (in the second limb of s 409). Evidently, the drafters did not deem the expression "in the way of his business" to be suitable for use in relation to public servants. This provides an important clue as to the meaning of "in the way of his business".

83 In our judgment, the *plainest and most intuitive reason* for the drafters' decision not to use "in the way of his business" in relation to public servants is

that they used the word "business" within that expression as a reference to ***commercial activity***. As public servants are not, as a general matter, engaged in commercial activity, they are therefore not a class of persons in respect of whom the expression "in the way of his business" is apposite. We pause to note that public servants have a unique "capacity" given that they hold appointments in which the public trust and confidence is vested and may also, when acting in such "capacity", possess the authority and wield the powers of the state. Hence, when such persons are acting in their "capacity" as public servants, any CBT on their part is – rather unsurprisingly – to be treated with *the utmost seriousness* since such misconduct represents not only a dismal failure on their part to carry out the responsibilities owed to their employer (*ie*, the civil service or other relevant public body) but also a betrayal of the trust reposed in them by the public, which fully and rightfully expects public resources to be used for public (and not personal) good. Such acts serve only to tarnish the community's perception of the public service and undermine the moral authority of the state. In our view, this is why public servants – although not individuals who typically carry out commercial activities – are nevertheless singled out for enhanced punishment under s 409. The majority adopted a similar line of reasoning when it held that "*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" [emphasis added in italics and bold italics] (MA Judgment at [104]). In other words, the ordinary meaning of the phrase "in the way of his business" suggests that the "agent" referred to in s 409 must be carrying on a *commercial activity* as such.

84 At minimum, one discerns that the drafters did not intend "in the capacity of" within the first limb of s 409 to have the *same meaning* as "in the way of his business" in the second limb. If the drafters had intended those

phrases to mean exactly the same thing, they would simply have chosen to adopt one of these expressions or the other, and not two differing expressions in *the same provision*. For instance, the drafters could have applied this formulation of s 409: "Whoever, being in any manner entrusted with property, or with any dominion over property, *in his capacity of* a public servant, a banker, a merchant, a factor, a broker, an attorney or an agent…" But they did not. The fact that the drafters chose to use two distinct expressions in the same provision signifies that they had a *different understanding* of each expression, and that they did not consider "in the way of his business" to be suitable for application in relation to public servants.

85 This brings us neatly to the decision of the Indian Supreme Court in *Dalmia*. *Dalmia* is an important decision not only because of the Indian Supreme Court's observations on the expression "in the way of his business" in s 409 of the Indian Penal Code, but also for its reading of two other significant decisions that came before *Dalmia* – *R v Portugal* (1885) 16 QBD 487 ("*Portugal*") and *Cooray*. We will discuss *Portugal* and *Cooray* at a more suitable juncture below and, for present purposes, will focus on what the Indian Supreme Court in *Dalmia* had to say with regard to the expression "in the way of his business".

(B) THE INDIAN SUPREME COURT'S INTERPRETATION OF "IN THE WAY OF HIS BUSINESS"

86 *Dalmia* was the first case in India where the scope of s 409 of the Indian Penal Code was considered in detail. There were earlier Indian authorities in which it was assumed, without any reasoning, that the word "agent" could refer to non-professional agents. For example, in *Muthusami Pillay alias Kunja Pillay and others v The Queen-Empress* (1896) 6 Mad LJ 14, the Madras High Court held that a trustee or manager of a temple who misappropriates temple

jewels is an "agent" subject to the temple committee's control and would be guilty of the offence under s 409 of the Indian Penal Code. Following the Indian Supreme Court's full examination of the issue in *Dalmia*, its judgment is presently the leading case in India on the definition of the phrase "in the way of his business as … an agent".

87 Dalmia was Chairman and Principal Officer of an insurance company. The Board of Directors of the insurance company passed a resolution to authorise one Chokani to operate the account of the company with the Chartered Bank at Bombay. That account was to be used for the keeping of certain government securities held by the company in safe custody with the bank. For this purpose, Chokani was appointed as agent of the company. Subsequently, the Board of Directors also permitted the account to be operated jointly by Chokhani and one Raghunath Rai. In practice, however, Chokhani operated the bank account alone. Raghunath Rai would simply provide blank cheques to Chokhani, which Chokhani would only sign when the cheques were actually issued. This led to the use of the company's funds for unauthorised purposes. Chokhani, who was not authorised to use the monies in the account to purchase and sell securities, nevertheless went ahead to apply the monies in that manner. He would purchase securities from a company controlled by him using those monies, and keep the purchase price of the securities without actually delivering the securities contracted for. Eventually, the monies reached a separate company which was owned by Dalmia, and was used to pay off debts owed by that company.

88 Several charges under s 409 of the Indian Penal Code were brought against Dalmia, Chokhani and other accused persons. Raghubar Dayal J, delivering the judgment of the Indian Supreme Court, referred to *Cooray* which,

in the court's view, approved what was said in *Portugal*. After a discussion of these two authorities, the court proceeded to observe as follows (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 [*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 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 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 these 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, work
>
> (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 in italics, bold italics and underlined bold italics]

The court found at ([98]–[99]) that Chokhani was an agent of the insurance company, having signed various cheques as agent of the company and referred to as such in certain documents. Dalmia, as a director and Chairman of the company, was likewise an agent of the company.

89 It is necessary to unpack the reasoning of the Indian Supreme Court in the passage quoted above. The court took the view that entrustment "in the way of his business" means entrustment "in the ordinary course of his duty or habitual occupation or profession or trade". This is to be contrasted to entrustment that *does not occur* in the course of the recipient's ordinary duties as an agent – for instance, if the recipient is entrusted with property for a purpose that is different from the purpose for which he typically acts as an agent, or on an *ad hoc* basis. The point can be put more simply. In order for a recipient to be

entrusted with property or dominion over it "in the way of his business as … an agent", *the entrustment must occur* ***as part of his ordinary or regular responsibilities as an agent***. In other words, such a recipient is *already an agent* given the nature of "the ordinary course of his duty or habitual occupation or profession or trade". The entrustment of the property (or dominion over it) on the particular occasion in issue before the court is simply an ordinary *consequence* of, and not the *cause* of, his identity as an agent. This explanation of the phrase "in the way of his business" as referring to the recipient's pre-existing status as an agent, and the need for him to have received the property as part of his ordinary or regular responsibilities as such, represents the first part of the Indian Supreme Court's analysis.

90 The second part of the analysis, which flows from the first, concerns the Indian Supreme Court's attempt to distinguish the expression "in the way of his business" from "in his capacity of". The court reasoned that the drafters of the legislation used the former rather than the latter expression because entrustment of property "in the capacity of" an agent was insufficient to attract criminal liability; the accused must also have been entrusted with property "in connection with his duties" as an agent – which presumably means that he must have been entrusted with the property (or dominion over it) "in the ordinary course of his duty or habitual occupation or profession or trade" as an agent, *ie*, the characteristic of *regularity* described in the first part of the court's analysis. The Prosecution suggests that this can be juxtaposed with a "casual" agent, which refers to "someone entrusted with property on an *ad hoc* basis and who is caught under s 406 of the Penal Code if he commits CBT".

91 We accept that the position preferred in *Dalmia* has some initial attraction. The reading of "in the way of [one's] business" as a reference to acting in the course of one's regular duties does appear, at first glance, to be a

plausible ordinary meaning of the expression. *However*, it is our respectful view that this understanding of the expression is quickly proven to be unsustainable when it is read ***contextually*** alongside the parallel expression "in his capacity of a public servant". The reason is that *the characteristic of regularity is* ***just as crucial*** to this first limb of s 409. The public servant who is the subject of the first limb *must also be acting "in the ordinary course of his duty or habitual occupation" or "in connection with his duties"* (whichever is the phraseology preferred) *as a public servant* in order for him to become liable for an offence under s 409. It is only when the public servant is acting *qua* public servant – *ie*, in the purported discharge of his responsibilities and exercise of his powers as a public servant – that his culpability will be enhanced (as explained at [83] above) and his liability under s 409 triggered accordingly. The regularity of conduct needed before an individual can properly be characterised as a "public servant" is also the reason why it is conceptually unsatisfactory to speak of a "casual" or "*ad hoc*" public servant. In order to understand the point, one must bear in mind the fact that the regularity that is at issue in s 409 does not pertain to the *entrustment* of property (or dominion thereof); what must be regular are the *duties or the occupation, profession or trade* of the particular individual. That is evident from the manner in which s 409 is phrased. Regardless of whether either or both the expressions "in his capacity of" and "in the way of his business as" connote the characteristic of regularity, it is clear that the subject of both these expressions is the *occupation* of the particular individual (*ie*, whether that of a "public servant" or "a banker, a merchant, a factor, a broker or an attorney"), and not the fact of *entrustment*. Consequently, given that the notion of regularity and connection to duties is *just as central* to the (first) part of s 409 that targets public servants as it is to the (second) part of s 409 that targets bankers, merchants, factors, brokers, attorneys and agents, this *cannot* be the distinguishing factor between the meanings of the expressions "in his

capacity of" (which applies to public servants) and "in the way of his business as" (which does not).

92 In addition, the argument that the expression "in the way of his business" is required so as to make clear that the specific act of entrustment of property (or dominion over it) that is the subject of the criminal proceedings is not what *renders* the accused an agent – since the accused must already be an agent by virtue of his ordinary duties or habitual occupation or trade or profession – is impossible to square with that part of the second limb that refers to bankers, merchants, factors, brokers and attorneys. It makes little sense to say that these persons *are rendered as* bankers, merchants, factors, brokers or attorneys because of the single act of entrustment in issue. In other words, it is trite that these persons *must already be* bankers, merchants, factors, brokers or attorneys in order for them to fall within the scope of the second limb of s 409; there is no need for the regularity of their occupations to be further pronounced by way of what would be an entirely superfluous separate declaration to this effect (if "in the way of his business as" really does have the meaning that the Prosecution suggests). The Indian Supreme Court in *Dalmia* and the Prosecution in the present case have, with respect, erred in focusing on the regularity of the entrustment rather than the regularity of the ordinary duties or occupations, trades or professions of the individuals in question. This is just another way of saying – consistently with what has been discussed in the preceding paragraph – that the regularity that is relevant in s 409 necessarily pertains to the *ordinary duties or the habitual occupations, trades or professions* of these persons *as bankers, merchants, factors and attorneys*. For these reasons, it is likewise erroneous to speak of "casual" or "*ad hoc*" bankers, merchants, factors, brokers or attorneys.

93 For these reasons, we reject the interpretation of the expression "in the way of his business" adopted in *Dalmia* and by the Prosecution.

(2) The sole use of "in the way of his business" in the Penal Code

94 Our second observation is that "in the way of his business" is an expression that does not appear anywhere else in the Penal Code. It is employed ***only*** in s 409. This can be contrasted to the use of "in the capacity of" or its close equivalents in other parts of the Penal Code, including ss 381 and 477A of the Penal Code, which read as follows:

> **Theft by clerk or servant of property in possession of master**
>
> **381.** Whoever, being a clerk or servant, or being employed *in the capacity of a clerk or servant*, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.
>
> …
>
> **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.
>
> [emphasis added]

95 In our judgment, the ordinary meaning of "in the capacity of" in these provisions is that the offences enacted by those provisions are intended to apply only to accused persons who commit theft while acting *in the course of their*

regular duties or functions as a clerk or servant (in the context of s 381) or who falsify accounts while acting *in the course of their regular duties or functions* as clerk, officer or servant (in the context of s 477A). The phrase "in the capacity of" is therefore essentially ***synonymous*** with the expressions "in the course of one's regular duties or functions" and "in the ordinary course of his duty or habitual occupation or profession or trade", which are respectively used by the Prosecution and in *Dalmia* (see [88] above) to define "in the way of his business". In the preceding analysis, we have shown that this also applies in relation to *the first limb* of s 409 – the phrase "in his capacity of a public servant" must mean that the accused has received property (or dominion over it) *in the course of his regular duties or functions* as *a public servant*.

96 The fact that "in the way of his business" is not used anywhere else in the Penal Code therefore provides a powerful indication that it has a definition that is *not shared* by other phrases in the Penal Code, including "in the capacity of". When one takes this together with the fact that the phrase "in the capacity of" (and its equivalents) is used in other provisions of the Penal Code to mean "in the course of one's regular duties or functions", one is led to the logical conclusion that "in the way of his business" simply *does* ***not*** *possess that* ***same*** *meaning*.

(3) Inference from "a banker, a merchant, a factor, a broker, an attorney"

97 As we have explained at [83] above, we are of the view that when one is acting "in the way of his business", one is engaged in a *commercial activity* that one carries out as one's occupation or trade. Corroboration of the majority's interpretation of the phrase "in the way of his business" arises as a matter of inference when one turns one's attention to the subsequent references to "a banker, a merchant, a factor, a broker, an attorney" in s 409 (leaving aside the

final reference to "an agent" which is the subject of dispute in the present case). These are all ***particular trades or professions*** *that are performed or undertaken as livelihoods*. As the majority found, "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" (MA Judgment at [105]). We agree with this reasoning. As the *chapeau* to this list of persons, the expression "in the way of his business" must be understood contextually in the light of the *nature* of the persons described within the list.

98 The result is that the second limb of s 409 (*ie*, "in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent") will not encompass persons who are either (a) *not engaged in these occupations or trades altogether*; or (b) engaged in these occupations or trades but who are entrusted with the property or dominion over it in circumstances that are *unrelated to their being in those occupations or trades*. By way of example, where a banker by trade or profession is asked by a friend to safe-keep a car in his garage for a few days, the banker cannot be said to have been entrusted with his friend's car "in the way of his business as a banker". This would be a situation of "casual" or "*ad hoc*" entrustment, and there is no dispute between the parties that a person who is entrusted in such circumstances will not fall within the scope of s 409. The obvious reason is that the trade or profession of the individual as a banker would be *wholly incidental* to the entrustment of the car (or dominion over it) to him; in such a situation his particular trade or profession would not furnish a reason to punish him more severely under the aggravated offence in s 409. As we have explained, this has nothing to do with the fact that the expression "in the way of his business" is used rather than "in

his capacity of"; a person who is entrusted with property (or dominion over it) but who happens, on a completely incidental and separate basis from the entrustment, to be a banker obviously cannot be said to have been entrusted with such property (or dominion over it) "in his capacity of" a banker. In other words, whether casual or *ad hoc* entrustment falls or does not fall within the scope of s 409 is a matter that does not turn on the distinction between the expressions "in the way of his business" and "in his capacity of".

(4) Summary of the expression "in the way of his business"

99 The meaning of "in the way of his business" was a hotly contested issue before the High Court and in the present criminal reference because it sheds light on the proper definition of "an agent" within the meaning of s 409. This is because as the *chapeau* to the second limb of s 409, the phrase governs and draws a common thread through the list "a banker, a merchant, a factor, a broker, an attorney or an agent".

100 For the foregoing reasons, we are of the view that the ***ordinary meaning*** of the expression "in the way of his business" is that the individuals who fall within the scope of the second limb of s 409 are performing *commercial activities* ***in the conduct of their trades or professions***. We reach this conclusion following a *contextual* reading of the written law, having had due regard to the phrase "a banker, a merchant, a factor, a broker, an attorney" that follows the expression "in the way of his business", as well as the juxtaposition of that expression with "in his capacity of" in the preceding limb which applies only to public servants (persons who are evidently *not* engaged in commercial activity) who are acting in such "capacity".

101 We have also observed that, unlike "in the way of his business", the expression "in his capacity of" is not unique to s 409 and – as used in this and other provisions in the Penal Code – expresses the idea that one must be acting in the course of one's regular duties and functions. We therefore do not accept the argument that the expression "in the way of his business" merely connotes, without more, a sense of regularity in the performance of one's ordinary duties. The argument that "in the way of his business" rather than "in his capacity of" was used by the drafters so as to exclude "casual" or "*ad hoc*" agents within the scope of s 409 is flawed not only because the need for regularity of conduct applies to public servants just as much as it does to bankers, merchants, factors, brokers, attorneys and agents, but more fundamentally because the need for such regularity is so central to the proper characterisation of any of those roles that one finds it intuitively inappropriate to speak of "casual" or "*ad hoc*" public servants or bankers, merchants and so on. As we have explained, that intuition is backed by sound conceptual reasons.

The word "agent"

102 We turn to the second part of the disputed phrase. As we have explained, the expression "in the way of his business" provides a guide to the proper interpretation of "agent". Applying the ordinary meaning of that expression as we have described, when one acts "in the way of his business as … an agent", one is acting in the conduct of his trade or profession as an agent (or "in the occupation or the trade of" an agent, to use the majority's words (MA Judgment at [105])). Therefore "an agent" is a reference to a particular trade, profession or occupation.

103 In this part of the analysis, however, we focus on a separate aspect of the majority's reasoning, that is, its reliance on the *ejusdem generis* principle in

reaching its conclusion as to what "an agent" means. As described at [26(c)] above, the majority took the view that "a banker, a merchant, a factor, a broker, an attorney" brought into play the *ejusdem generis* principle in construing the words "an agent". It considered that each of the persons in that phrase carries on a business or trade of offering certain services to the public in the course of which the customer has to entrust property, or the dominion of such, with them (MA Judgment at [106]). This should therefore also apply to "an agent". The Prosecution argues that the majority should not have applied the *ejusdem generis* principle to ascertain the meaning of the disputed phrase for four main reasons, which we will describe and evaluate subsequently.

104 Preliminarily, we observe that Menon CJ in *Tan Cheng Bock* explained (at [38]) that the court's effort to determine the *ordinary meaning* of a provision *may be aided by the rules and canons of statutory construction*. In *Tan Cheng Bock* itself, the court considered and applied two such interpretive canons, that Parliament shuns tautology and does not legislate in vain, and that Parliament is presumed not to have intended an unworkable or impracticable result. The *ejusdem generis* principle is one such interpretive tool. We begin by describing the principle and how it may properly be applied to ascertain the ordinary meaning of "an agent" as used in s 409.

(1) The *ejusdem generis* principle

105 *Bennion* provides the following introductory description of the *ejusdem generis* principle (at p 1105):

> The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-

> describing terms followed by wider residuary or sweeping-up words.

106 The *ejusdem generis* principle is a principle of statutory construction with distant and venerable origins (recognised and applied across at least the past four centuries of the history of the common law). Over the course of its application, the *ejusdem generis* principle has developed into a complex and nuanced linguistic canon with its own network of sub-rules. We point out three important aspects of the *ejusdem generis* principle that are relevant for present purposes, beginning with the principle of *noscitur a sociis* that forms the broader rubric of which the *ejusdem generis* principle is part.

(A) THE *NOSCITUR A SOCIIS* PRINCIPLE

107 The *ejusdem generis* principle is described as a "detailed application", "precept" or "branch" of the *noscitur a sociis* principle (*Bennion* at pp 1100 and 1108). When translated into English from the original Latin, "*noscitur a sociis*" means "it is recognised by its associates". It establishes that a word or phrase is not to be construed as if it stood alone but in the light of its surroundings.

108 Viscount Simmonds in the House of Lords decision of *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 provided (at 461) a useful and vivid summation of the *noscitur a sociis* principle: "words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context". Diplock LJ (as he then was) in the English Court of Appeal decision of *Letang v Cooper* [1965] 1 QB 232 remarked (at 247) that the *noscitur a sociis* principle may be applied only if one "know[s] the *societas* to which the *socii* belong" – in other words, the nature of the intended society (or *societas*) can only be gathered from the words used. Shortly put, the principle

emphasises the relevance and importance of ***context*** in determining the intended meaning of a word or phrase.

109 The *noscitur a sociis* principle has been employed to determine the meaning of an otherwise neutral word; as *Bennion* describes it (at p 1101), "[w]here an enactment includes a word which in itself is neutral or colourless, the context provides the colouring agent". For instance, in the English Court of Appeal decision of *Lee-Verhulst (Investments) Ltd v Harwood Trust and another* [1973] 1 QB 204 ("*Lee-Verhulst*"), the question before the court was whether the tenant company "occupied" the premises for the purposes of its business within the meaning of that word in s 23 of the Landlord and Tenant Act 1954 (c 56) (UK). Stamp LJ held (at 217) that "the words 'occupation' and 'occupier' are ***not words of art having an ascertained legal meaning applicable***, or prima facie applicable, wherever you find them in a statute, but ***take their colour from the context of the statute in which they are found***" [emphasis added in bold italics]. Given the context of statutory provisions to furnish security of tenure to business tenants, Stamp LJ decided that he would not give the word "occupied" a construction which would exclude a part of the house (which the tenant leased for its letting business) in which the business was carried on day by day, and the whole of which was used by the tenant for the purposes of its business.

110 The principle has also been used to reach a finding that the context of the expression in question indicated that a *restricted or less usual meaning* was intended instead of the literal or usual meaning, or even that a *special meaning* was intended (*Bennion* at pp 1102–1104). By way of illustration as to how linguistic context may indicate that a particular term has a less usual meaning, *Bennion* remarks (at p 1103) that the well-understood meaning of the word "whisky" is "obviously displaced when the word is found in a provision such as

the local Act which was the subject of inquiry in [*Simpson v Teignmouth and Sheldon Bridge Co* (1903) 72 LJKB 204]". The provision in that legislation authorised the laying of a toll on any "coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whisky, chair or coburg and every other carriage hung on springs". Given the context, the word "whisky" in that provision certainly could not be understood as a reference to a particular alcoholic beverage, but rather to "a light two-wheeled one-horse carriage".

111 The point we wish to make is that the *ejusdem generis* principle, as an elaboration or a more detailed application of the *noscitur a sociis* principle, likewise emphasises the *overriding importance of* ***linguistic context*** in statutory construction. It is a means of giving effect to the *noscitur a sociis* principle, which is a principle of "general application and validity" (*Bennion* at p 1100).

(B) APPLICATION OF THE *EJUSDEM GENERIS* PRINCIPLE

112 The *ejusdem generis* principle may be used to resolve ambiguity or uncertainty (*Bennion* at p 1107; Ruth Sullivan, *Driedger on the Construction of Statutes* (Butterworths, 3rd Ed, 1994) at p 204).

113 *Bennion* further explains as follows (at p 1108):

> (1) For the *ejusdem generis* principle to apply there must be a *sufficient indication of a category* that can properly be described as a ***class or genus***, even though not specified as such in the enactment. Furthermore the genus must be narrower than the general words it is said to regulate.
>
> (2) *The nature of the genus is gathered by implication from the express words which suggest it* (… referred to as the ***genus-describing terms***). Usually these consist of a *list or string of substantives or adjectives* (… referred to as the ***generic string***).
>
> [emphasis added in italics and bold italics]

114 It is clear that the crucial part of the analysis in determining whether, and if so how, the *ejusdem generis* principle may be applied is the identification of the "genus" or common thread that runs through all the items in the list (or "generic string") that includes the disputed term. As Farwell LJ in the English Court of Appeal's decision in *Tillmanns & Co v SS Knutsford, Limited* [1908] 2 KB 385 observed (at 402–403), "there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category".

115 How then does the court determine the genus that will thereafter enable it to ascertain the proper meaning of the disputed term? In the English High Court decision of *SS Magnhild v McIntyre Brothers and company* [1920] 3 KB 321, McCardie J held (at 330) that "the specified things [*ie*, the items in the generic string] must possess some ***common and dominant feature***" [emphasis added in bold italics]. *Bennion* further observes (at p 1110) from a review of the authorities that the courts' tendency has been to restrict the imputed genus to an area that goes ***no wider than is necessary to encompass the entire generic string***.

116 In addition to the generic string, *other parts of the statutory context* may give assistance in finding the genus. The English Court of Appeal decision of *Soden and another v British and Commonwealth Holdings plc (in administration) and another* [1996] 3 All ER 951 (affirmed in [1998] AC 298) provides an example. The provision in issue in that case was s 74(2)(*f*) of the Insolvency Act 1986 (c 45) (UK), which established that in a winding up, the following was not deemed to be a debt of the company in competition with non-member creditors: "a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise…". The court held that a sum due as damages was not within the class indicated by the string "dividends, profits", the court having been aided in arriving at this conclusion

by the words in parenthesis, which preceded the generic string. Put simply, by looking at other parts of the statute or provision in question, the court may identify clues that go toward ascertaining the genus.

(C) INDEPENDENCE FROM FORM

117 The final point which we wish to draw attention to is the fact that in order for the *ejusdem generis* principle to be applied, *it is* ***not necessary*** *for the phrase or expression in question to have a* ***particular form or structure***. The author of *Bennion* is at especial pains to clarify this (at p 1106): "[t]he principle is *not tied to any particular formula*. As the above examples show, it ***does not****, as has been suggested,* ***apply only where there is a string of genus-describing terms followed by wide residuary or sweeping-up words*** (though this is a common example of its application)" [emphasis added in italics and bold italics].

118 The following two useful illustrations are provided (*Bennion* at p 1105):

> *Example 379.1* The phrase 'having in possession', if taken alone, embraces the concept of ***legal as well as physical possession***. When used in an enactment which reads 'having in possession or conveying in any manner' (where 'conveying' is clearly limited to physical removal) the phrase has ***by implication a more limited meaning***. ***It must be limited 'making the one co-extensive with the other, and confining it to "having"*** **ejusdem generis** ***with "conveying"*** [citing *Hadley v Perks* (1866) LR 1 QB 444, *per* Blackburn J at 457].'
>
> 'The context I am considering is the transfer of "property, rights or liabilities", and in this context it would be anomalous to construe "property" as meaning something physical, when there is a clear non-physical genus' [quoting from *R (on the application of the Lord Chancellor) v Chief Land Register (Barking and Dagenham London Borough Council, interested party)* [2005] EWHC 1706 (Admin), [2005] 4 All ER 643, *per* Stanley Burnton J at [23]].
>
> [emphasis added in bold italics]

These two illustrations are worthy of consideration because they demonstrate that the *ejusdem generis* principle may be applied to *narrow down* the understanding of a term used in a statute, in circumstances where that term has a number of potential meanings, one of which is as *a legal term of art*. In the first example provided, linguistic context revealed that it was the "physical" rather than the "legal" meaning of the disputed term that was intended. In the second example, such context indicated that the "non-physical" rather than the "physical" understanding of the term was correct.

119 *Bennion* goes on to explain (at p 1107):

> Since it is independent of form, the *ejusdem generis* principle ***does not necessitate use of the word other in the residuary phrase*** (eg 'offal, garbage, or other refuse') [referencing *Brownsea Haven Properties Ltd v Poole Corpn* [1958] Ch 574 at 598]. Nor need a word like 'similar' be used; indeed the point of the principle is to treat the presence of the word as implied. [emphasis added in bold italics].

Hence, in circumstances where the *ejusdem generis* principle may properly be applied, it is *inconsequential* that the statutory provision in question adopts (or does not adopt) a particular form, or uses (or does not use) particular words or phrases, or whether the term sought to be defined is (or is not) a residuary term. The principle is relevant whenever a genus can be identified from the generic string and that genus extends to the disputed term.

120 Indeed, as *Bennion* observes (at pp 1111–1112), the *ejusdem generis* principle has been applied to infer the meaning of a disputed term even where the generic string consists only of a single other word or term; "[t]he question is invariably one of the *intention conveyed by the entirety of the passage*, and there can be no absolute rule. The better view appears to be that usually the *ejusdem generis* principle should be applied in the one-word case in *recognition of the fact that the drafter must have specified the word for some purpose*"

[emphasis added]. In our view, this is really another indication that the *ejusdem generis* principle is not a distinct technical rule of interpretation but is simply an aspect of the broader precept that a word or phrase is not to be construed as if it stood alone but must be read in the light of its surroundings – *ie*, as an expression of the *noscitur a sociis* principle.

121 In the final analysis, it must be remembered that the *ejusdem generis* principle is simply a tool to ascertain the ordinary meaning of a disputed term or phrase as part of the purposive approach to interpretation laid down in s 9A of the IA. It has no independent purpose from this and should not at any point be allowed to override or veer away from legislative intent. In this regard, the sound advice of Lord Scarman in the House of Lords decision of *Quazi v Quazi* [1980] AC 744 at 824 should be borne well in mind:

> If the legislative purpose of a statute is such that a statutory series should be read *ejusdem generis*, so be it: the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. *The rule, like many other rules of statutory interpretation, is* ***a useful servant but a bad master***. [emphasis added in italics and bold italics]

(2) Application of the *ejusdem generis* principle to s 409

122 Having identified the key rules for the application of the *ejusdem generis* principle, we turn to consider whether, and if so, how the principle may be applied to determine the definition of "an agent" in s 409. We begin by considering whether there was any error in the majority's application of the principle. We will then consider the objections raised before us by the Prosecution that it was inappropriate to apply the principle and that in any event the way in which the majority applied it was incorrect.

(A) EVALUATION OF THE MAJORITY'S APPROACH

123 The majority's reasoning concerning the *ejusdem generis* principle is succinct and can be set out here in full (MA Judgment at [106]):

> 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.* [emphasis in original removed; emphasis added in italics and bold italics]

124 In our judgment, the majority's reasoning represents a proper and sound application of the *ejusdem generis* principle and cannot be impugned. As a preliminary matter, we note that the fact that the phrase "a banker, a merchant, a factor, a broker, an attorney or an agent" does not contain (or does not obviously contain) a residuary phrase is irrelevant. As explained at [117]–[121] above, the applicability of the *ejusdem generis* principle is *independent from the form of the statutory provision* in question. Likewise, the fact that the drafters did not include the word "other" before "an agent" does not preclude the application of the *ejusdem generis* principle to determine what "an agent" means (see [119] above).

125 We break down the majority's reasoning in order to demonstrate more fully that its application of the *ejusdem generis* principle was correct. The majority recognised that the words "a banker, a merchant, a factor, a broker, an attorney" are *genus-defining terms* and, together with "an agent", constitute the *generic string* (although the majority did not use these particular technical terms

of reference). It then sought to ascertain the *common and dominant feature* possessed by these genus-defining terms, and found that each element of the generic string referred to a particular "business or 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". The majority then reasoned that this common quality, or genus, therefore also had to apply to "an agent", which formed part of the generic string. This yielded the conclusion that "an agent" must likewise refer to a person in such a "business or trade", *ie*, a professional agent.

126 We do not see any ground on which the majority's interpretive approach or conclusion can be faulted. We agree that each of the items in "a banker, a merchant, a factor, a broker, an attorney" are ***particular trades or professions***, involving the conduct of particular types of commercial activities, by which persons occupying those trades or professions make their living. When this is applied to "an agent", one reaches the conclusion that "an agent" must refer to a ***professional agent***, *ie*, a person who offers, as his trade, profession or business, agency services to interested clients in return for remuneration. It would cover persons such as freight forwarders (or forwarding agents), ship's agents, insurance agents, housing or property agents, mortgage brokers, and auctioneers, among others (*Bowstead and Reynolds on Agency* (Peter Watts gen ed) (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead and Reynolds*") at paras 3-023–3-030 on the usual authority which such professional agents have "where employed in the course of business as agent").

127 In addition, as explained at [116] above, it is legitimate to have regard to *other parts of the context* beyond the generic string in order to identify the genus. In relation to s 409, this includes *the expression "in the way of his business"* immediately preceding the generic string. For the reasons set out at

[82]–[101] above, that phrase affirms the majority's interpretation of "an agent".

128 It is also worth noting that in *Portugal*, the English High Court employed reasoning that was extremely similar to that of the majority. *Portugal* concerned an accused person who was employed by a British firm of railway contractors, for commission, to use his influence to obtain for them a contract for the construction of a railway and docks in France. The railway contractors entrusted the accused person with a cheque for this purpose, which he then misappropriated for his own use. The issue was whether he had been entrusted with the cheque as an "agent" for the purposes of s 75 of the Larceny Act 1861, which penalises "a Banker, Merchant, Broker, Attorney, or other Agent" for embezzlement of money, security or proceeds entrusted to him. The Queen's Bench Division of the English High Court, comprising Mathew and Smith JJ, held in favour of the accused person and acquitted him. The court's reasoning is worth setting out in detail (at 490–492):

> It was contended by the Crown, that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not intrusted with either sum of money in any of those capacities, yet he came within the term, 'other agent intrusted with money or valuable security' within the meaning of s. 75.
>
> To this it was answered that, if that contention of the Crown be correct, the section should have said, 'whosoever, having been intrusted as agent with any money,' &c. ; that no interpretation or effect would be given to the words 'banker, merchant, broker, or attorney ;' and that, *it was obvious that* ***some effect must be given to those words, if possible, in construing the section****, for otherwise the section might be held to apply to everybody intrusted with money to be applied as by the section is provided. In this we agree.* We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed,-see ss. 31, 38, 40, 50, 60, 62, and 63,-proceeds to specify certain classes of persons who may be guilty of the offences therein described; for

> instance, from s. 67 to s. 73, clerks, servants, or persons in the public service are classified; in s. 74, tenants and lodgers are classified; and in s. 75 and afterwards the class aimed at is that of agents, bankers, factors. 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 like 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 added in italics and bold italics]

129 Hence, it is clear that the court in *Portugal* was of the view that the word "agent" in s 75 of the Larceny Act 1861 was intended to include only agents who carry on the ***business or profession of receiving property for safe custody or other special purpose*** and that mere casual agency is insufficient. The court, agreeing with the accused's argument, placed particular store on the fact that the words "banker, merchant, broker, or attorney" preceded the reference to "an agent" and that the court had to place weight on these words in determining the definition and scope of "an agent". This is, *in substance*, *an application of the* ejusdem generis *principle*. As Romer LJ remarked in *Brownsea Haven Properties Ltd v Poole Corporation* [1958] Ch 574 at 610, the *ejusdem generis* principle is an aspect of the wider principle that "where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document". The court in *Portugal* reached its decision on what "an agent" meant by reading those words in the light of the preceding part of the generic string.

130 As a final matter, we find that if one were to apply even the broader principle of *noscitur a sociis*, one would reach the same conclusion that the majority did. The colour and content of the words "an agent" are derived from their ***context***, *ie*, the governing expression "in the way of his business" and the immediately proximate phrase "a banker, a merchant, a factor, a broker, an attorney". This context *narrows and brings into focus the proper understanding* of "an agent" within the meaning of s 409 of the Penal Code. To use the words of Stamp LJ in *Lee-Verhulst* (see [109] above), once one reads the phrase in context and divines the relevant *societas*, one finds that the words "an agent" are "not words of art having an ascertained legal meaning applicable, or prima facie applicable, wherever you find them in a statute, but take their colour from the context of the statute in which they are found" – in this case, the *trades or professions* found in the phrase "a banker, a merchant, a factor, a broker, an attorney".

(B) EVALUATION OF OBJECTIONS TO THE APPLICATION OF THE *EJUSDEM GENERIS* PRINCIPLE

131 The Prosecution suggests that "an agent" in s 409 has a "clear legal meaning". That meaning is the definition of an "agent" ***in the law of agency***, *ie*, a person who (a) agrees with another person (the principal) to act on his behalf; (b) undertakes fiduciary obligations towards the principal; and (c) has the authority to affect the principal's decision. For ease of reference, we will refer to the Prosecution's definition as that of a "legal agent" (as opposed to a "professional agent"). As will be examined below, the Prosecution advances four arguments in support of its interpretation.

132 We respectfully disagree with the arguments proffered by the Prosecution. As elaborated above, when the governing phrase "in the way of his business" is read ***contextually*** – in the light of the other parts of s 409 and the

other provisions in the Penal Code – it becomes clear that the subsequent reference to "an agent" should be specifically understood as a reference to a person in a particular trade or profession and is engaged in commercial activity, and not merely to a general definition of an "agent" in agency law. The application of the *ejusdem generis* principle further clarifies and consolidates the majority's understanding of "an agent". The genus-defining terms "a banker, a merchant, a factor, a broker, an attorney" are particular professions or trades carried out as livelihoods, and therefore "an agent" – which belongs in the very same generic string – must be understood to be a term with this common quality. Merely attributing to "an agent" a definition found in the law of agency simply does not suffice to capture this quality.

(I) DETERMINING IF THE ORDINARY OR TECHNICAL MEANING OF A TERM APPLIES

133 Before we proceed to describe and provide our views on each of the Prosecution's four arguments, we think it useful to begin by briefly setting out some general rules of thumb that apply where the disputed word or phrase has ***both*** *an ordinary and a technical meaning*. This is plainly relevant in the present case given that the definition of "an agent" that the Prosecution urges upon us is a *technical legal term* that is found within the law of agency.

134 The key determinant is, once again, the ***context*** of the disputed word or phrase. *Bennion* explains (at p 1081) that *if the surrounding words are technical*, it is a reasonable assumption that the term is intended to bear its ***technical*** meaning. However, *if the term is used in a non-technical context*, then it is presumed to have its ***ordinary*** meaning. The English High Court's decision in *R v Dudley Crown Court, ex parte Pask and Moore* (1983) 147 JP 417 is provided as an example. The question in that case was whether the applicants, who sought a justices' license for a community block, had *locus standi* as

"persons interested" in those premises within the meaning of s 6(1) of the Licensing Act 1964 (c 26) (UK). It was argued that in order to be a person "interested" in the premises, one had to have either a legal or an equitable interest in the property. Taylor J rejected the submission, finding that there was "*no reason why one should import automatically* any requirement of an interest in property, legal or equitable, nor any requirement of any actual contractual right to operate on the premises" [emphasis added]. He held that the phrase had to be construed "looking broadly at the circumstances of the individual application and what was proposed to be carried out and by whom". On the facts, Taylor J concluded that the applicants were in fact persons "interested" in the premises.

135 The more recent decision of the House of Lords in *Burton v Camden London Borough Council* [2000] 2 AC 399 furnishes an even clearer example of the court's contextual preference for the ordinary meaning of a word in a statute over its technical legal definition. The appellant was a co-tenant of a flat under a joint tenancy. Her co-tenant subsequently signalled her intention to move out, leaving the appellant with a financial difficulty because she currently enjoyed housing benefit only in respect of her one-half of the rent payable for the flat. With the departure of her co-tenant, she feared that her housing benefit would continue to be assessed at one-half – and not the whole – of the rent for the flat, which meant that she would have to pay the other half of the rent. The appellant therefore wanted her co-tenant to transfer her tenancy into the appellant's sole name. The difficulty for the appellant was that under s 91(1) of the Housing Act 1985 (c 68) (UK) ("the Housing Act"), a periodic secure tenancy was "not capable of being assigned". Somewhat ingeniously, the appellant decided to enter into a deed of release, as opposed to a deed of assignment, with her co-tenant, under which the co-tenant purported to release

her interest to the appellant as sole tenant. The House of Lords, with Lord Millett dissenting, held that the deed of release was ineffectual. Lord Nicholls of Birkenhead, delivering the principal judgment of the court, held (at 404–406) that the "ancient distinction" between a release and an assignment "[did] not provide the answer to the issue"; it would make "no sense" for the effectiveness of s 91(1) of the Housing Act to depend on which of these two conveyancing modes was used. Lord Nicholls found that "as a matter of *ordinary usage*" [emphasis added], a transfer of a lease under which the identity of the tenants was changed would be regarded as an assignment within the meaning of s 91(1) of the Housing Act, and that this was so "whatever form of words was used: release, surrender, transfer, assign, convey, grant. In colloquial terms, this tenancy bore a label 'not transferable'". Hence, the technical meaning of the word "assigned" was rejected.

136 *Bennion* also explains (at p 1084) that where a term has both an ordinary and a technical meaning, the court will also consider whether the term is accompanied in the legislation by *other related technical terms* in construing the term. This, like the other guidelines to ascertaining the meaning of a word that has both an ordinary and a technical meaning, emphasises again the need to pay heed to the linguistic context of a word or phrase and not to assume, simply because the word or phrase when read in isolation may have a well-known definition in law, in a particular technical field, or in common parlance, that that meaning must have been within the drafter's intention.

137 We will now describe and assess each of the Prosecution's four arguments on their merits.

(II) ARGUMENT 1: THE WORD "AGENT" REFERS TO A WELL-DEFINED CLASS OF PERSONS AND SHOULD NOT BE CONSTRUED EJUSDEM GENERIS

138 The Prosecution submits that the word "agent" refers to a "well-defined class of persons" and hence should not be construed *ejusdem generis*. According to the Prosecution, the majority had misapplied the *ejusdem generis* principle. It argues that "[t]he *ejusdem generis* principle is used to cut down the scope of a word where *its ordinary meaning is so wide and vague that giving effect to it would lead to absurd or unacceptable results, or would otherwise frustrate the legislative purpose*. Words that are properly subject to the application of the *ejusdem generis* principle *would typically take the form of general phrases such as 'other place' and 'any other goods', which potentially have unlimited scope*. In such cases, there is a need to limit the scope of these words (and the potential reach of the statute) by applying the *ejusdem generis* principle, or some other canon of interpretation" [emphasis in original removed; emphasis added]. The Prosecution suggests that in the present case, "had s 409 been drafted as referring to 'a banker, a merchant, a factor, a broker, an attorney *or other person'*, the application of the *ejusdem generis* principle to restrict the interpretation of the phrase 'other person' to persons of the same type as the preceding specific terms may have been justified" [emphasis in original removed; emphasis added].

139 For the following reasons, we are of the view that this is not an accurate description of the *ejusdem generis* principle. To begin, it is incorrect to say that the *ejudem generis* principle may *only* be applied where the ordinary meaning of a word is "so wide and vague that giving effect to it would lead to absurd or unacceptable results, or otherwise frustrate the legislative purpose". No authority was cited for this proposition. As explained at [110] above, the application of the principle is not restricted to such restricted scenarios, but can

be used broadly to resolve ambiguity or uncertainty perceived in the statutory provision.

140 Second, while it is *generally* correct to say that words that are properly subject to the *ejusdem generis* principle "typically take the form of general phrases such as 'other place' and 'any other goods'", this is only a *partial* but not the *complete* truth. We have explained at [117]–[121] above that the *ejusdem generis* principle is not tied to any particular formula and does not apply only in cases where there is a string of genus-describing terms followed by wide residuary or sweeping-up words. Nor is the term "other" (or "any other") a necessary component of an expression that is properly subject to the *ejusdem generis* principle. And for the reasons explained in the preceding paragraph, there is no need for a phrase to "potentially have unlimited scope" for the *ejusdem generis* principle to become relevant as an interpretive tool. For the same reasons, we think that it is incorrect as a matter of principle to argue that the application of the *ejusdem generis* principle by the majority "may have been justified" only if s 409 had "been drafted as referring to 'a banker, a merchant, a factor, a broker, an attorney *or other person*'" [emphasis in original removed; emphasis added]. The applicability of the *ejusdem generis* principle is independent of form.

141 The Prosecution also suggests that "agent" is "plainly not" a term "of a similar vague or general character", but instead refers to "a well-defined class of persons" defined according to the law of agency, and "therefore, should not be construed *ejusdem generis* with the other specified terms in s 409". This argument assumes what it seeks to prove. It presupposes that the applicable definition of "an agent" is that found in the law of agency, and then takes this as the basis for its subsequent assertion that the *ejusdem generis* principle therefore cannot have any application as that principle is relevant only where

there is definitional ambiguity. Put another way, the argument is circular – it begs the question as to the correct understanding of "an agent". Hence, with respect, it adds little that is of value to the analysis.

(III) ARGUMENT 2: BANKERS AND MERCHANTS CANNOT BE CONSIDERED TO BE MERE ENUMERATIONS OF AGENTS

142 The Prosecution further argues that the *ejusdem generis* principle "should only be applied to construe *a general term*, when the string of specified terms in the statutory provision can be regarded as *mere enumerations* of the type of persons/objects/species that the general term was meant to include" [emphasis added]. Thus the term "agent" "should only be construed *ejusdem generis* with the five specified persons in s 409, if these five specified persons can be regarded as *mere enumerations of the type of agents that s 409 was meant to cover*" [emphasis in original removed; emphasis added]. This, the Prosecution argues, is not so – in particular, bankers and merchants cannot be considered to be mere enumerations of agents.

143 In our judgment, this argument merely compounds the problems caused by its earlier erroneous account of the *ejusdem generis* principle. As we have explained, the *ejusdem generis* principle is applicable not only in situations where one seeks to construe "general terms" that are preceded by "specified terms". The principle is of broader application than that. It may be applied in situations where the term sought to be construed is likewise a "specified term" (to use the Prosecution's language), as long as the *genus-defining terms* in the generic string appropriately shed light on its meaning. Examples where the term sought to be construed cannot by any means be considered to be a residuary or sweeping-up term have been provided in the extract from *Bennion* at [118] above. Therefore, the Prosecution, with respect, errs when it suggests that in order for the *ejusdem generis* principle to be relevant in determining the

meaning of "an agent", the expression "an agent" must be a "general term" in relation to which "a banker, a merchant, a factor, a broker, an attorney" are "mere enumerations". Its argument therefore ought to be dismissed on this basis alone.

144 On a more fundamental level, however, we think it important also to highlight that the Prosecution's argument appears to be based on a ***misreading*** of the majority's reasoning. The majority *never* sought to demonstrate that bankers, merchants, factors (and so on) are "mere enumerations" of agents. Rather, the majority applied the *ejusdem generis* principle in order to demonstrate that because bankers, merchants, factors (and so on) are *professions or trades*, so must the reference to an "agent" refer to a *profession or trade*. The majority's analysis in the MA Judgment at [106] puts this beyond any doubt:

> …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. … [emphasis added]

145 Thus, in our view, the Prosecution's arguments, advanced at some length, as to why bankers and merchants "do not share the core characteristics of agents" and "can be entrusted with property in capacities other than as agents" simply miss the mark and are accordingly irrelevant to the analysis. It was *never* the majority's intent to demonstrate that bankers and merchants (and factors, brokers and attorneys) are all subspecies of "an agent".

(IV) ARGUMENT 3: NO GENUS CAN BE IDENTIFIED FROM "A BANKER, A MERCHANT, A FACTOR, A BROKER, AN ATTORNEY"

146 We turn to the Prosecution's argument that there is *no genus* that can be identified from the "specified terms" in s 409. The Prosecution submits that factors and attorneys are, contrary to the majority's view, not persons who carry on a business or trade of offering certain services to the public at large and who are in an external relationship with the person entrusting the property.

147 We find that this is plainly incorrect with regard to a *factor*, who "is an agent whose ordinary course of business is to sell or dispose of goods, of which he is entrusted with the possession or control by his principal" (*Bowstead and Reynolds* at para 1-035). The Prosecution also relies on an article on the legal history of factors (Roderick Munday, "A Legal History of the Factor" (1977) 6 Anglo-Am LR 221 ("*Munday*")) in an attempt to show that some commentators and courts in the 18th and 19th century treated the factor as "simply an employee or *clerk* entrusted with the management and conduct of business" [emphasis added]. But there is no indication, on a plain reading of s 409, that this broad characterisation was intended to apply to the word "factor" in s 409, particularly given the limiting expression "in the way of his business". More importantly, when *Munday* is read with care, it becomes clear that the article does not support the historical proposition for which it is cited. According to *Munday* (at p 223), from at least the 16th century, the factor in England was "an agent chiefly engaged in foreign trade", described at the time as follows:

> Factors are Persons appointed by written Commissions from private Merchants or commercial Companies to reside in foreign Countries, to transact the Business of selling the Commodities exported by their Principals and consigned to them, to purchase other Merchandize in the Countries where they reside, to be sent home to their Principals; and to negotiate Bills of Exchange and Remittances in Money, for the Sale, or Purchase of such Merchandize, or the Balance of Accounts.

Although *Munday* does observe (at p 226) that in the 17th century – a considerable period before the enactment of the Penal Code or its predecessors – the factor was regarded largely as a species of servant, he notes that the 17th century "marked the beginning of the *commercial middlemen's* great rise to prominence" [emphasis added] (at p 227). As *Munday* explains (at p 228), "[f]rom the decisions and statutes there emerges a picture of an agent fulfilling an increasingly dominant financial role in international and, to a certain extent, domestic commerce" [emphasis added]; in all of the factor's financial activities, "the importance of the factor as *an essential mercantile financier* is important" [emphasis added]. In fact, the commercial influence of the factor grew to such an extent that the UK Parliament thought it necessary to enact legislation to protect third parties who dealt with the factor. The Factors Acts of 1823 (c 83) (UK) and 1825 (c 94) (UK) ("the early Factors Acts") were passed essentially to preserve security of transactions between factors and third party purchasers and pledgees (at pp 246–250). It was only toward the turn of the 20th century – after the enactment of the Indian Penal Code – that the commercial world witnessed the decline of the factor due to improved means of communication and speedier methods of transport that meant that buyers and sellers could deal with each other directly (at p 250).

148 The crucial point for present purposes is that while the factor *originally* occupied "an important but subordinate position as a species of servant", *by the 18th century* the factor "came to assume *an independent status, often of great financial strength*, buying and selling on commission on behalf of his various principals" [emphasis added] (at p 259). In the circumstances, we find that there is little historical basis to support the Prosecution's submission that a factor is merely a species of an employee or clerk. On the *contrary*, the historical material demonstrates that by the time the Penal Code was drafted, a factor was

regarded as a *commercial tradesman* engaged in the *trade or profession* of dealing with foreign merchants on behalf of his principal, and who simultaneously also carried out a number of other important financial functions such as giving advances to his principal and granting credit to purchasers.

149 In relation to "attorney", the Prosecution relies on the definition of the word as referring to both a "private attorney" and a "public attorney" as stated in the Oxford English Dictionary Online (3rd Ed) and *Dr Hari Singh Gour's Penal Code of India* vol 4 (Law Publishers (India) Pvt Ltd, 11th Ed, 2011) ("*Gour*") (which was cited by the High Court in *Public Prosecutor v Tan Cheng Yew and another appeal* [2013] 1 SLR 1095 ("*Tan Cheng Yew*") at [98]–[99]). It argues that this definition shows that not all the classes of persons enumerated in the second limb of s 409 are professional agents who offer their services to the community at large for reward.

150 We are reminded, first of all, that the meaning of a word as used in a statute should not be ascertained by "rushing to dictionaries" (see Mummery LJ's remark in *Football Association* quoted at [75] above). The ordinary meaning of the disputed word or phrase is to be ascertained through the examination of the disputed word or phrase within its linguistic context. Turning to the Prosecution's argument, we find that the difficulty that argument encounters is that even if the word "attorney" does include a "private attorney" – *ie*, a person who holds a power of attorney and who is appointed by another to transact any business for him out of court – this does not necessarily mean that *all* private attorneys, professional or otherwise, will be caught under the ambit of s 409. It must still be proved that such a person was *acting "in the course of his business"* as a "private attorney". Therefore, even accepting that a "private attorney" falls within the scope of s 409, only a "private attorney" who is exercising powers of attorney given to him by his clients *as part of his*

business or trade would fall within the scope of s 409. The ruling of the court in *Tan Cheng Yew* at [103] that s 409 refers to "trusted agents employed by the public in their various businesses", *including attorneys*, supports this analysis. Crucially, we note that *Tan Cheng Yew* was a case concerning a solicitor, *ie*, a "*public* attorney" who was clearly acting in the course of his *professional* activities. And, in any event, the High Court simply did not have to consider the proper scope of the expression "in the way of his business" and its impact on the definition of "attorney", as the question did not arise in that case. In the circumstances, we find that *Tan Cheng Yew* is therefore *not* authority for the proposition that "private attorneys" do necessarily fall within the scope of s 409.

(V) ARGUMENT 4: THE ABSENCE OF THE WORD "OTHER" SUGGESTS THAT THE DRAFTSMAN DID NOT INTEND THE WORD "AGENT" TO BE CONSTRUED EJUSDEM GENERIS

151 The Prosecution's final argument is that the fact that s 409 uses the phrase "or an agent" rather than "or other agent" is a matter of some significance. It suggests that "[t]he use of the term *'other'* after a string of specific terms suggests that the drafters *intended the preceding specific terms to be examples of the general term* … Conversely, the *absence* of the word *'other'* suggests that the drafters were *referring to distinct categories* when drafting the provision, and did not intend the general term to be construed *ejusdem generis*" [emphasis added].

152 Once again, this reflects a misunderstanding of the circumstances in which it is appropriate to apply the *ejusdem generis* principle. We have explained that the *ejusdem generis* principle is form-independent – even if the statutory provision does not include the word "other", the principle may still properly be applied to determine the meaning of the expression in question (see [117]–[121] above). On a more fundamental level, the argument reflects a

persistent flaw in the Prosecution's submissions – the argument erroneously assumes that the *ejusdem generis* principle ought only be applied to a "general term" in contrast to "specific terms". As discussed above, this is neither correct in principle nor reflective of the courts' practice.

153 The Prosecution submits that the English High Court in *Portugal* and the Privy Council in *Cooray* "placed heavy emphasis on the presence of the word 'other' before the word 'agent'". It reproduces, in its written submissions, the following sentence in the extract from *Portugal* set out at [128] above: "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 like kind with the class before enumerated." The Prosecution surmises that "[i]t is therefore clear that the court in *Portugal* regarded the existence of the word 'other' as significant in showing that the drafters of s 75 of the UK Larceny Act 1861 intended the provision to apply to similar classes of persons".

154 However, when that sentence is read in *context* (*ie*, as part of the entire the paragraph), it becomes clear that the English High Court's decision was reached *primarily* because it agreed with the accused's submission that if he was to be regarded as coming within the term "other agent intrusted with money or valuable security" (as the Crown argued), this would mean that "no interpretation or effect would be given to the words 'banker, merchant, broker, or attorney;' and that, *it was obvious that some effect must be given to those words, if possible, in construing the section*" [emphasis added] (*Portugal* at 491). Second, the court noted that the other relevant sections in the Larceny Act 1861 "specif[ied] certain classes of persons who may be guilty of the offences therein described", such as clerks, servants, persons in the public service, tenants, lodgers, and thereafter, in s 75, "agents, bankers, factors". The court surmised that "s. 75 is limited to a class" and applies "only to the class of

persons therein pointed out". It was ***only then*** that the court stated, "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 like kind with the class before enumerated" [emphasis in original] (*Portugal* at 491). In other words, this was merely an ***additional and supporting ground*** *that the English High Court identified in support of the conclusion, that* ***it had already reached***, on the proper interpretation of the phrase "or other Agent".

155 We note that the Privy Council in *Cooray* adopted ***the very same analysis*** in considering the relevant provision of the Ceylon Penal Code (which *did not* contain the word "other" as s 75 of the Larceny Act 1861 did) in light of *Portugal*. The Privy Council held that while "[i]t [was] true that the judges who tried [*Portugal*] went on to place some reliance on the fact that the [Larceny Act 1861] uses the words 'banker, merchant, broker, attorney, or *other* agent' and to draw the inference therefrom that the agent must, like the preceding types, form one of a class" [emphasis in original], the Privy Council found that "*this [was] only an* ***additional ground*** *for their decision* and [was] ***merely used as a support*** *of the view which they already entertained*" [emphasis added in italics and bold italics] (*Cooray* at 418). We will describe the facts and decision in *Cooray* in more detail at [248]–[253] below.

156 In summary, we find that the Prosecution's reliance on the absence of the word "other" in s 409 of the Penal Code in criticising the majority's application of the *ejusdem generis* principle must be rejected as a matter of principle. Its assertion that the absence of the word "other" ought to be determinative of the proper interpretation of "an agent" is also unsupported by *Portugal* and *Cooray* (not to mention a line of consistent English authority to the same effect, which we will describe subsequently).

(C) SUMMARY ON THE *EJUSDEM GENERIS* PRINCIPLE

157 For the foregoing reasons, we are satisfied that the majority's application of the *ejusdem generis* principle to determine the meaning of "an agent" in the light of the generic string "a banker, a merchant, a factor, a broker, an attorney" is sound in its method and correct in its conclusion. The conclusion yielded is that "[e]ach 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" (MA Judgment at [106]). We do not accept the Prosecution's submission that the majority's application of the *ejusdem generis* principle was flawed.

158 It is also worth highlighting that the result that the majority reached following its application of the *ejusdem generis* principle was *entirely consistent* with its understanding of the preceding expression "in the way of his business". As we have explained earlier, we agree with its reading of that expression. This means that definitions of "in the way of his business", "a banker, a merchant, a factor, a broker, an attorney" and "an agent" are *coherent* and *mutually reinforcing*. This is a result of the contextual approach to statutory interpretation that we have adopted.

(3) Schema of the CBT provisions

159 Finally, we turn to the general structure of the CBT provisions in the Penal Code. This schema, in our view, further supports our view that the ordinary meaning of the second limb of s 409 only encompasses persons who are acting in the course of a certain trade, profession or occupation. It indicates that the word "agent" cannot be read as referring to any agent under the general law.

160 To be clear, these are the various specific classes of persons who fall within aggravated CBT provisions in the Penal Code:

(a) Carriers, wharfingers and warehouse-keepers (s 407);

(b) Clerk or servant (s 408);

(c) Public servants (first limb of s 409); and

(d) Bankers, merchants, factors, brokers, attorneys and agents (second limb of s 409).

161 It is plain that these are all references to ***specific trades or professions*** rather than general legal categories. For instance, in so far as s 407 is concerned, even though carriers, wharfingers and warehouse-keepers are all clearly enumerations of bailees, there is no reference in s 407 to "bailee". Similarly, clerks, servants and public servants are specific occupations, not categories that have received definitions in law. The same is true of bankers, merchants, factors, brokers, and attorneys, as we have explained above. In the circumstances, it is implausible that the word "agent" was intended to refer, *quite exceptionally*, to a general category in law.

162 The Prosecution submits that the CBT provisions in the Penal Code are on a "sliding scale of severity of offences". It argues that the scheme of these offences indicates that the majority's reading of "agent" was wrong, given that not all the persons falling within ss 407–409 stand in an "external relationship" with the victim or offer their services to the public at large. Section 408 also suggests that it does not matter whether, and how much, the accused person is remunerated, since a clerk or servant can have a nominal salary. In the Prosecution's analysis, there are three key considerations underlying the

legislature's choice of the specific classes of persons listed in s 409: (a) the position occupied by such persons; (b) the high level of trust and confidence reposed in them; and (c) the responsibilities they discharge.

163 These arguments are, in our view, neither here nor there. It is true that there are normative distinctions between the various classes of persons identified in the aggravated CBT provisions. However, this is only natural given that they are *distinct* classes of persons falling within different aggravated CBT provisions. So the fact that some of these classes may not share the characteristics of a professional agent *cannot* be used as a basis for construing "agent" within s 409 more broadly. That would, with respect, be a *non sequitur*. What *is* relevant upon an examination of the scheme of the CBT provisions are the *similarities* between the various classes. And here, the Prosecution is correct, at a high level of abstraction, in noting that these are all persons in whom a considerable level of trust and confidence is reposed. But that is only one similarity. It is *also* clear, as noted above, that these are all ***specific trades or professions rather than general legal categories***. That is the critical point for present purposes.

Conclusion on the ordinary meaning of the disputed phrase

164 Two competing interpretations of the disputed phrase "in the way of his business as … an agent" were put before us. The Prosecution contends that it refers to acting in the course of one's regular duties or functions as a legal agent, and the respondents submit that the phrase refers to acting in the profession, trade or occupation of a professional agent. At this stage of the interpretive exercise, the court's aim is to ascertain the possible interpretations of the disputed phrase and it does so not only by examining the provision in question

but also by having due regard to the context of the statutory provision within the written law as a whole (*Ting Choon Meng* at [59]; see [67] above).

165 Taking the disputed phrase alone, we have examined its constituent parts, applying the *ejusdem generis* principle (and the broader *noscitur a sociis* principle) to "a banker, a merchant, a factor, a broker, an attorney" to identify the genus that is to be applied to "an agent". We have also considered the disputed phrase in the context of the other part of s 409, comparing the expression "in the way of his business" in the second limb of s 409 to "in his capacity of" within the first limb. The disputed phrase was then viewed within the wider context of the remaining CBT provisions in the Penal Code, comparing the targeted classes of persons in those provisions with "an agent" in the disputed phrase. Through this telescopic exercise of statutory interpretation, transitioning from a granular focus on s 409 to the broader statutory landscape, we have concluded that the ***ordinary meaning*** of the disputed phrase is that which the majority had identified, *ie*, that *when a person is acting* ***"in the way of his business as … an agent"****, he is engaged in* ***commercial activity in the conduct of his profession or trade, which is the offering of his agency services to the community at large, through which he makes his living.***

166 Hence, we do not accept that the definition of the disputed phrase offered by the Prosecution can be adopted, having regard to the language of the provision as a whole and its broader statutory context. On this basis alone, we ***reject*** the Prosecution's submission on Question 1. Furthermore, as we will set out in the next two sections of our judgment, the broad interpretation of s 409 argued for by the Prosecution is also not in line with the legislative purpose of the provision, both as gleaned from the text itself as well as from the extraneous material on the provision's legislative history and background. Instead, the

legislative purpose of s 409 entirely supports the ordinary meaning of the provision that we have just elucidated.

Legislative purpose of s 409 as gleaned from the text

167 As Menon CJ explained in *Ting Choon Meng* (at [59]) (see [67] above), after ascertaining the possible interpretations of the text having due regard to the context of the text within the written law as a whole, the court must then ascertain the *legislative purpose or object* of the provision. This may be discerned from the language used in the provision and from extraneous material where appropriate (this is discussed subsequently). We now turn to consider the legislative purpose of s 409 as ascertained from the language of the provision and the schema of the CBT provisions in the Penal Code.

168 In our judgment, the legislative purpose of the second limb of s 409 as derived from the language of the provision is ***to punish more severely the commission of CBT by persons who are engaged in certain trusted trades or professions, in circumstances where they are entrusted with property or dominion over it in the course of their commercial activity***. One of the trusted trades or professions identified in s 409 is ***the business of agency,* ie, *professional agents***. We reach this finding from our earlier examination of (a) the concurrent use of the phrases "in the way of his business" and "in the capacity of" by the drafters of the Penal Code; (b) how the *ejusdem generis* principle ought properly to be applied to ascertain the meaning of "an agent"; and (c) the statutory context provided by the other CBT provisions in the Penal Code.

169 In contrast, we find that there is simply *no indication* that s 409 is intended to broadly capture "persons of higher station in whom great trust and

confidence is reposed and who discharge heavy responsibilities", including all legal agents (except *ad hoc* or casual agents), as the Prosecution submits. This vague and abstract statement of legislative purpose is unsupported by the actual text and statutory context of the provision. More problematically, the Prosecution's articulation of legislative object is set at ***too high a level of generality***. This has serious implications because, as Menon CJ expressly cautioned in *Ting Choon Meng* (at [60]) (see [68] above), one can, by pitching the legislative purpose at too high a level of generality, essentially derive support for whatever interpretation of the disputed word or phrase that one subjectively desires.

Extraneous material on legislative history and background to s 409

170 We now turn to the extraneous material on the legislative history and background to s 409 of the Penal Code. In order to present a complete picture of the history of the offence of CBT as an agent, it will be necessary to review on a broader canvas how the offence of CBT *simpliciter* and its associated provisions came to be enshrined in statute. We will focus, of course, on the legislative developments that occurred at or around the time these provisions were promulgated (*ie*, in the 19th century), since this is the relevant timeframe for ascertaining the Parliamentary intention (*Ting Choon Meng* at [18]).

171 Having carefully reviewed the historical material, we are of the view that the legislative history of s 409 provides clear support for the majority's finding that an "agent" within the meaning of s 409 of the Penal Code means "a professional agent" and does *not* include persons who are not in the *business* of agency, such as directors. In other words, this is a case where the extraneous material ***confirms*** *that the meaning and purpose of the provision is the ordinary*

meaning conveyed by the text of the provision (s 9A(2)(*a*) of the IA; see [71] above).

Introduction to the legislative history of s 409

172 Section 409 of the Penal Code was first enacted as a provision within the Indian Penal Code in 1860, which was thereafter brought into force in Singapore by the Legislative Council of the Straits Settlements in 1872 as Ordinance 4 of 1871 (Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-legal Perspectives* (Butterworths, 1990) at p 180).

173 As originally enacted, s 409 of the Indian Penal Code read as follows:

> 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, merchant, factor, broker, attorney, or agent*, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine. [emphasis added]

174 The current version of the provision in Singapore, *ie*, s 409 of the 2008 Revised Edition of our Penal Code, carries, for all intents and purposes, the same language, save for the prescribed punishment:

> 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. [emphasis added]

In other words, (and this is a crucial point to note) ***the language of s 409 has remained materially unchanged since 1860,*** ie*, for more than a hundred and fifty years.*

175 The genesis of s 409 can be traced back a further 50 years before the enactment of the Indian Penal Code, to the provisions of the Embezzlement by Bankers, *etc* Act 1812 (c 63) (UK) ("the Embezzlement Act 1812") and the Larceny Act 1827 (c 29) (UK) ("the Larceny Act 1827"), which made "embezzlement" (*ie*, CBT) by bankers, merchants, factors, brokers, attorneys and other agents a crime. In the next two sections, we will outline the development of the UK embezzlement provisions and explain the historical connection between those earlier provisions and s 409 itself.

Early embezzlement provisions in the UK

176 Under the old English common law, there was a requirement that to constitute larceny or theft at common law that there should be a felonious "taking," which was understood to mean a "taking out of the possession of some person entitled to [the property]". Thus fraudulent misappropriation of property was not a crime if the possession of the property was originally acquired honestly (Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol III (Macmillan and Co, 1883) ("*Stephen*") at pp 150–151 and 158).

177 In 1529, the Embezzlement Act (c 7) (UK) was passed, making it a felony for any *servant*, not being an apprentice or under 18 years of age, to embezzle any money or chattel entrusted to him by his master to be kept for his use. This was followed by the first general enactment which altered the old common law rule extensively – the Embezzlement Act 1799 (c 85) (UK), which

criminalised embezzlement by any *clerk* or *servant* in the UK. The catalyst for this development was a case involving one Bazeley, who was a clerk in a bank and had applied a note for £100 for his own purposes rather than putting it to the credit of the customer who had paid it in (*Stephen* at pp 152–153).

(1) Embezzlement Act 1812

178 In 1812, the Embezzlement Act 1812 was passed by the UK Parliament. The Embezzlement Act 1812 introduced a further statutory exception to the strict common law rule by criminalising embezzlement by any "Bankers, Merchants, Brokers, Attornies and other Agents of any Description whatsoever" (s 1). This was the *first time* that embezzlement by bankers, merchants, brokers, attorneys and other agents was established as a crime in the UK.

179 This legislative intervention was once again prompted by a case that had, in the words of Mr Henry Drummond ("Mr Drummond"), who moved the 1812 Bill, "made much noise in the country" (United Kingdom, House of Commons, *Parliamentary Debates* (25 February 1812) vol 21 at col 943). This was the case of *R v Walsh* (4 Taunton 258), in which a stockbroker who misappropriated moneys entrusted to him had been acquitted on the basis that he was neither a clerk nor a servant (*Stephen* at pp 154–155).

180 The Prosecution refers to certain comments by the English Members of Parliament who welcomed the 1812 Bill, remarking that the legislation, among other things, fixed the "singularly disgusting anomaly" in the law that that masters and employers were not criminally liable for fraudulent breaches of trust although their servants were. In our view, these comments cannot be taken out of context. The Embezzlement Act 1812 was merely an ***incremental*** extension of the previous law to the ***specific mercantile persons*** identified in

the Act. Mr Drummond, in moving the 1812 Bill, specifically stated that the legislation "*could hardly be said to be an addition to the criminal code of the country*; it was more properly *an extension of an act already in existence*, by which it was made felony for servants or clerks to embezzle or misapply the property of their masters entrusted to them" [emphasis added] (United Kingdom, House of Commons, *Parliamentary Debates* (25 February 1812) vol 21 at col 943). In other words, the Embezzlement Act 1812 was *not* intended to be a radical overhaul of the law such as to *generally* capture "masters" or anyone in a higher status or position of trust. It was specifically targeted at embezzlement by *bankers, merchants, brokers, attorneys and other agents*.

(2) Larceny Act 1827

181 In 1827, the provisions of the Embezzlement Act 1812 were re-enacted by the UK Parliament in the Larceny Act 1827. The purpose of the Larceny Act 1827 was essentially to *consolidate* the provisions of the Embezzlement Act 1812, with some minor modifications. It criminalised embezzlement by "any Banker, Merchant, Broker, Attorney, or other Agent" entrusted with money for any special purpose (s 49). In addition, it introduced a provision relating to "any Factor or Agent" who fraudulently pledges for his own use any goods or documents of title entrusted to him for the purpose of sale (s 51). These provisions "only put fraudulent breach of trust by agents, and in particular by merchants, bankers, brokers, attorneys, and factors, on the same footing as embezzlement by servants. The old common law principle still protected all other fraudulent breaches of trust" such as those by bailees (*Stephen* at pp 155–156).

Passage of the Indian Penal Code

182 In this section, we outline the passage of the Indian Penal Code and the connection between s 409 and the UK embezzlement provisions discussed above.

(1) First draft of the Indian Penal Code – 1837

183 Although the Indian Penal Code was enacted in 1860, the drafting of the code started more than 20 years before that. In 1837, the first draft of the Indian Penal Code was submitted by the Law Commission of India under the chairmanship of Lord Thomas Macaulay ("the Indian Law Commissioners") to the Governor-General of India. This first draft contained early provisions on CBT *simpliciter* (s 386) and aggravated punishment for public servants in the Post Office Department who misappropriate letters of packets entrusted to them (s 388). But there was no equivalent of s 409 (*A Penal Code prepared by the Indian Law Commissioners, and Published by Command of The Governor General of India in Council* (Pelham Richardson, 1838) at p 52).

(2) English Digest – 1839 and 1843

184 In parallel, a similar codification effort was underway in England. The Commissioners on the Criminal Law of England ("the English Law Commissioners") were tasked with consolidating into a single statute the criminal law of England, including the law of embezzlement. In 1839 and 1843, the English Law Commissioners released reports containing a draft Digest of the English Criminal Law Commissioners ("the English Digest") (*Fourth Report of Her Majesty's Commissioners on Criminal Law* (Her Majesty's Stationery Office, 1839) ("the *Fourth Report*") and *Seventh Report of Her*

Majesty's Commissioners on Criminal Law (Her Majesty's Stationery Office, 1843) ("the *Seventh Report*").

185 The English Digest was never passed into law in England; but the English Digest and the accompanying reports by the English Law Commissioners are important documents as *they were specifically relied on by the Indian Law Commissioners in revising the Indian Penal Code*, as we will explain shortly.

186 In the English Digest, the English Law Commissioners recommended introducing a general prohibition on embezzlement *simpliciter* (s 6, Art 1 of the *Seventh Report*). In addition, the English Digest provided for offences of aggravated embezzlement in relation to clerks and servants (s 6, Art 11 of the *Seventh Report*), "a banker, merchant, broker, attorney, or other agent" (s 6, Art 13, the *Seventh Report*), and factors and agents (s 6, Art 15 of the *Seventh Report*).

187 Two significant points emerge from the English Law Commissioners' reports on the English Digest.

188 First, the English Law Commissioners made clear that the provisions on aggravated embezzlement in the English Digest were taken directly from the Larceny Act 1827 "*unaltered* except in respect of formal phraseology" [emphasis added]. This was because it was considered that the English Law Commissioners would "not be justified in making any material alteration in so modern a law [*ie*, the Larceny Act 1827], which was expressly founded on defects made apparent by Walsh's case … [and] one so material to the interests of the commercial classes" (Note to Art 92 of the *Fourth Report*).

189 Second, in so far as the specific provisions dealing with bankers, merchants, brokers, factors, attorneys and other agents were concerned, the English Law Commissioners in the *Fourth Report* made the important observation that the "*the term 'Agents,' as used in this law, is somewhat indefinite, even when construed, as probably it would be, in reference to the context*" [emphasis added] (Note to Art 92 of the *Fourth Report*). They then went on to expressly note, in reference to the same term, that *"**[i]t is presumed that the words ["other agents"] would be restrained to other agents,*** **ejusdem generis** ***with those specified***" [emphasis added] (Note to Art 97 of the *Fourth Report*). Therefore, it is evident that the English law Commissioners intended and assumed that ***the term "agent" would be read*** **ejusdem generis** ***in the statutory context*** *rather than broadly as referring to any legal agent*.

(3) Review of the Indian Penal Code based on the English Digest – 1846

190 In 1846, the Governor-General of India specifically instructed the Indian Law Commissioners to review the English Commissioners' reports to detect "any omissions or other imperfections that may exist" in the 1837 draft of the Indian Penal Code (*Special Report of the Indian Law Commissioners on the Indian Penal Code* (1847) ("*Indian Law Commissioners' Special Report*") at para 1).

191 In the same year, the Indian Law Commissioners set out their findings on the various provisions of the 1837 draft of the Indian Penal Code after considering the reports of the English Commissioners. They expressly stated that ***the offence of CBT in the Indian Penal Code "takes the place" of embezzlement in the English Digest***, and that ***there was "no material difference between the two"*** *save that the English code exempted trustees from*

criminal liability [emphasis added] (*Indian Law Commissioners' Special Report* at paras 553 and 557).

(4) Eventual enactment of the Indian Penal Code – 1860

192 The status of the Indian Penal Code then remained in limbo due to objections and further revisions (Wing-Cheong Chan, Barry Wright & Stanley Yeo, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, 2011) at p 37). It was finally enacted in 1860, and came into force in 1862 in India.

193 In the Indian Penal Code, s 405 defined the general offence of CBT *simpliciter*. In addition, through ss 408 and 409 of the Indian Penal Code respectively, the specific classes of persons identified in the English Digest and the Larceny Act 1827 – namely (a) clerks and servants; and (b) bankers, merchants, factors, brokers, attorneys and agents – were identified as classes of persons who should be punished more severely for aggravated CBT. The other class of persons identified as liable for aggravated CBT in the Indian Penal Code of 1860 was bailees – specifically, carriers, wharfingers and warehouse-keepers (s 407 of the Indian Penal Code). These three provisions on aggravated CBT survive, materially unchanged, in our Penal Code in the present day.

Punishment of Frauds Act 1857

194 Critically, in 1857 – which was three years before the enactment of the Indian Penal Code in 1860 *but almost a decade after the CBT provisions in the Indian Penal Code were reviewed in 1846 based on the English Digest* – the UK Parliament passed the Punishment of Frauds Act 1857 (c 54) (UK) ("the Punishment of Frauds Act 1857"). ***For the first time, fraudulent***

misappropriation of property by trustees, bailees and directors and officers of body corporates was criminalised in the UK.

(1) The provisions of the Punishment of Frauds Act 1857

195 We start by setting out the key provisions of the Punishment of Frauds Act 1857. Section II of the Act states:

> **II. Bankers, &c. fraudulently selling, &c. Property;**
>
> If any Person being a *Banker, Merchant, Broker, Attorney, or Agent*, and being intrusted for safe Custody with the Property of any other Person, shall, with Intent to defraud, sell, negotiate, transfer, pledge, or in any Manner convert or appropriate to or for his own Use such Property or any Part thereof, he shall be guilty of a Misdemeanor.
>
> [emphasis added]

Section V of the same Act provides as follows:

> **V. Directors, &c. fraudulently appropriating Property;**
>
> If any Person, being a *Director, Member, or Public Officer of any Body Corporate or Public Company*, shall fraudulently take or apply, for his own Use, any of the Money or other Property of such Body Corporate or Public Company, he shall be guilty of a Misdemeanor.
>
> [emphasis added]

196 As we will elaborate below, s II of the Punishment of Frauds Act 1857 (which was based on s 49 of the Larceny Act 1827) was *not intended to effect any change in the law* beyond the removal of the requirement in s 49 of the Larceny Act 1827 that, in order for the offence of embezzlement by a banker, merchant, broker, attorney or agent to be made out, the directions to the offender on how the money should be applied must have been given in writing.

197 In our judgment, having regard solely to the text of the Punishment of Frauds Act 1857, we find that it would have made *little sense* for the UK Parliament to have included s II alongside s V in the very same statute if it took the view that directors *already fell* within the scope of the prohibition in s II. There is very little to commend an interpretation of s II that renders s V otiose. We accordingly are of the view that the Punishment of Frauds Act 1857 provides compelling support for our finding that *the word "agent" in the phrase "a banker, merchant, broker, attorney, or agent" in s II (as taken from s 49 of the Larceny Act 1857 and later transplanted into s 409 of the Penal Code) was* ***not intended to include directors or officers of body corporates***. The legislative background to the Punishment of Frauds Act 1857 makes this point even clearer.

(2) Background to the Punishment of Frauds Act 1857

198 As can be seen from the historical account that we have provided above, the CBT provisions in England were products of particular social concerns that were in the public eye at the relevant points in time. The catalyst for the enactment of the Punishment of Frauds Act 1857 was no different. This is a matter of significance to the present analysis because it demonstrates that the Punishment of Frauds Act 1857 was enacted in order to target a social menace that had not previously come to attention, and that therefore had to be dealt with by way of ***new*** *legislation* containing ***new*** *offences*.

199 The origins of the Punishment of Frauds Act 1857 can be traced to one of the most notorious financial scandals of the 19th century (see the illuminating article by Sarah Wilson in "Tort Law, Actors in the 'Enterprise Economy', and Articulation of Nineteenth-century Capitalism with Law: The Fraudulent Trustees Act 1857 in Context" in *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (TT Arvind & Jenny Steele eds)

(Hart Publishing, 2013) at ch 17 ("*Wilson*")). This was the collapse of the Royal British Bank in 1856. The Royal British Bank had acquired a considerable reputation in London, and from this it had also accrued a substantial body of business from mercantile and private clients. The bulk of these customers did not know, however, that the directors of the Royal British Bank had a secret ledger of advances for clients who were keen to avoid publicity in their dealings. The directors also helped themselves to the bank's money as it suited them and made advances to their friends from the bank's funds without regard to security. The result of this misappropriation was the eventual collapse of the bank, leading to financial ruin for thousands of clients including numerous small traders and private individuals of limited means.

200 Following the collapse, a raft of litigation ensued together with an upwelling of public outrage demanding a response by the criminal law. The directors of the Royal British Bank were subsequently prosecuted and convicted for the common law offences of conspiring falsely and fraudulently to represent that the bank was sound and prosperous during 1855, knowing this to be untrue, and with intent to deceive shareholders and to induce the Queen's subjects to become customers (*Regina v Esdaile and others* (1823) 1 F&F 212 ("*Esdaile*")).

201 The following observations in *Wilson* at pp 367–368 about the events leading up to the enactment of the Punishment of Frauds Act 1857 are illuminating:

> …there was recognition that existing legal responses were found to be outdated whether they were coherent or otherwise. This is evident from the way that, a short time prior to the collapse of the Royal British Bank, there was the trial and conviction of Strahan, Paul and Bates for embezzlement of money entrusted to them by clients. In this latter trial, it had been remarked by counsel that embezzlement had only been a

> crime since 1812, but *by the time of the Royal British Bank collapse, it was clear that* ***the criminal law would need to evolve to accommodate misconduct*** *on the part of bankers which fell short of this*. Furthermore, the enterprise economy would increase the extent to which *those other than bankers undertook the safe custody of property belonging to others, and who would come face to face with opportunities for its misuse including misappropriation*, but also other types of impropriety. [emphasis added in italics and bold italics]

(3) Parliamentary debates on the Punishment of Frauds Act 1857

202 The above observations in *Wilson* are completely consistent with the speech of the English Attorney-General, Sir Richard Bethell (later Lord Westbury LC), in Parliament, who introduced the Bill for the Punishment of Frauds Act 1857. The relevant extract of Sir Richard's speech is as follows (United Kingdom, House of Commons, *Parliamentary Debates* (21 May 1857) vol 145 at cols 679–681):

> … There were other breaches of trust of a more dangerous character, because of more extended influence, committed by persons who did not stand in exactly the relation of a trustee, but which ***required the introduction of some particular law, in order to meet delinquents who at present might remain untouched. He alluded to those persons who, in the prosecution of those great undertakings which were almost peculiar to this country, had formed companies and had placed themselves in the position of directors or managers of those companies.*** *The next set of clauses which he proposed to introduce into the Bill had been framed to meet the delinquencies*, which he regretted to say were so frequent and so gigantic, of persons standing in that situation. ***In those cases in which such persons fraudulently and openly appropriated sums of money, there could, of course, be no doubt as to their liability to prosecution****; but these appropriations were for the most part much too cleverly executed to render it necessary that they should have recourse to a proceeding so clumsy and common as a direct and manifest fraud.* Their appropriations of money were, as the House was well aware, effected through the medium of false accounts and fraudulent representations. He had therefore introduced into the Bill a series of clauses under whose operation, if they should pass into a law, the act of keeping false accounts, of making false entries, or disguising the nature of those transactions, by

means of untrue representations, should be made criminal. He had also framed two other clauses, which would embrace in their operation that extensive system of fraud which was produced through the medium of false representations, coupled with acts to give a colour to those representations, such as fraudulent statements of the affairs of a company, the payment of dividends out of a fictitious capital, or other wrongful acts which went to the perpetration of great public cheats. *Whether the law, as it stood, was or was not sufficient to meet such cases, there could be no harm whatsoever in making the particular mode of robbery to which he referred the subject of a direct criminal enactment.* While speaking upon that point, he might perhaps be allowed to advert to an answer which he had a few evenings before given to a question of an hon. Gentleman who had asked him to inform the House whether he would not institute criminal proceedings against certain persons, who were concerned in transactions by which the public mind had of late been much occupied. … *[H]e had no hesitation in saying that he would try, without a moment's delay, whether the law as it now stood was not strong enough to meet that case.* He trusted, therefore, the House would feel that in giving the answer to which he had just alluded he had been guided by his own conscientious convictions, and that he would not permit himself, as first law officer of the Crown, to be dictated to by a newspaper, nor adopt its suggestions, unless they happened to be such as to command his individual assent.

But *to proceed to the provisions of the Bill: he had further to state that it proposed to deal not merely with the trustees, directors, and managers of companies*, but also with the numerous class of persons who came under the designation of assignees of bankrupts and insolvents, to whose case the same principle would be extended. ***With reference to bankers and agents the law now stood in the position which he was about to state. The jurisprudence of the country was greatly indebted to the hon. Member for Surrey (Mr. Drummond) for the passing of the Act of the 52nd of Geo. III. [ie, the Embezzlement Act 1812], the introduction of which measure was occasioned by the frauds which had been committed by a stockbroker named Walsh. That Act, however, so far as agents, brokers, and bankers were concerned, was limited altogether to meet the case in which the instructions to the agent happened to have been given in writing***, and such was the feeling at the time of its passing that, notwithstanding the exertions of the hon. Gentleman the Member for Surrey, a clause was introduced into the Bill expressly excluding trustees, mortgagees, and other persons occupying positions of that description from its operation. The Act was repealed by the 7th & 8th of Geo. IV. [*ie*, the Larceny Act 1827], but which, while it introduced certain

> Amendments into the wording of the Act, made but little substantial alteration—so far as related to the particular subject of his remarks—in its provisions. He scarcely need, however, inform the House that ***the Bill which he had framed proposed to extend the law to all cases of property committed to the charge of agents, although they might not have received any instructions in writing.***
>
> [emphasis added in italics and bold italics]

203 We draw the following conclusions from Sir Richard's speech. First, the offences relating to directors of companies in the Punishment of Frauds Act 1857 were enacted to counteract *a new evil*. This is evident from the language that Sir Richard employed. He explained that breaches of trust by such persons "*required the introduction of some particular law, in order to meet delinquents* ***who at present might remain untouched***" [emphasis added in italics and bold italics]. The clauses "which he proposed to introduce into the Bill had been *framed to meet those delinquencies*" [emphasis added].

204 Second, Sir Richard's statement that "[i]n those cases in which such persons *fraudulently and openly appropriated sums of money*, there could, of course, be no doubt as to their liability to prosecution; but these appropriations were for the most part much too cleverly executed to render it necessary that they should have recourse to a proceeding so clumsy and common as *a direct and manifest fraud*" [emphasis added] is a reference to cases of direct and manifest fraud ***under the common law****, and not to any existing statutory offence such as that those under the Larceny Act 1827*. Indeed, it was for fraud under *the common law*, and not any sort of statutory offence (such as that under s 49 of the Larceny Act 1827), that the directors of the Royal British Bank were prosecuted in *Esdaile*.

205 Third, Sir Richard drew a clear distinction in his speech between, on the one hand, the new provisions of the Punishment of Frauds Act 1857 that

targeted directors and officers of body corporates, and on the other hand, the existing offence in s 49 of the Larceny Act 1827 concerning bankers, merchants, brokers, attorneys and agents. He referred to the "provisions of the Bill", which dealt with "trustees, directors and managers of companies" and also "the numerous class of persons who came under the designation of bankrupts and insolvents". He immediately went on to say, "With reference to *bankers and agents* the law now stood in the position [as reflected in the Embezzlement Act 1812] … That Act, however, so far as *agents, brokers, and bankers were concerned*, was limited altogether to meet the case in which the instructions to the agent happened to have been given in writing" [emphasis added]. He then informed the legislature that "the Bill which he had framed proposed to extend the law to all cases of property committed to the charge of agents, *although they might not have received any instructions in writing*" [emphasis added]. In other words, the Bill was intended to ***only remove the writing restriction in s 49 of the Larceny Act 1827***, as reflected in s II of the Punishment of Frauds Act 1857 (see [196] above). It was *not* intended to otherwise affect the *scope* of the phrase "Banker, Merchant, Broker, Attorney, or Agent".

206 On the other hand, it is clear that Sir Richard regarded the provisions on ***directors*** in the Punishment of Frauds Act 1857 as being part of the ***new law***, *distinct from the existing law* (in s 49 of the Larceny Act 1827) which governed bankers, merchants, brokers, attorneys and agents. As noted in *Wilson* (at pp 376–377), "[t]here was some awareness of the 'special' position of company directors, whereby such persons sat ambiguously and somewhat uncomfortably between trustees and 'agents for hire'". Indeed, when the House of Commons deliberated on the Punishment of Frauds Bill, the phrase "agents for hire" was expressly used by Sir John Rolt. He expressed a concern that one of the new provisions (a prohibition on fraudulent conversion or appropriation by trustees

(later enacted as s I of the Punishment of Frauds Act 1857)) would prevent persons of character and responsibility from accepting the office of trustee, and asked the Committee to "draw a distinction between trustees and agents for hire – as *bankers or others*" [emphasis added] (United Kingdom, House of Commons, *Parliamentary Debates* (26 June 1857) vol 146 at col 495).

207 Drawing these strands of analysis together, one is led to the conclusion that *the UK Parliament intended the Punishment of Frauds Act 1857 to address a problem that* ***did not find a solution under the law as it stood prior to the introduction of that Act.*** In so far as the law *did* apply to the conduct of directors, it was the common law of fraud that was relevant, but this was a blunt tool that could not effectively regulate the sophisticated machinations of misbehaving directors. And to the extent that the Bill also addressed bankers, merchants, brokers, attorneys and agents – or "agents for hire" – this was *only* to remove the requirement of writing that unnecessarily hindered the existing prohibition in s 49 of the Larceny Act 1827. There was nothing to suggest that s 49 of the Larceny Act 1827, or the new s II of the Punishment of Frauds Act 1857, encompassed directors within its scope.

208 All of this is consistent with the historical reason for the introduction of the Punishment of Frauds Act 1857. The collapse of the Royal British Bank sparked public concern about the need to place directors under regulation. Hence a suite of new provisions, ranging from the prohibition on fraudulent taking or applying of the money or property of a company (under s V) to the publication of fraudulent statements or accounts with intent to deceive or defraud members, shareholders or creditors of companies (under s VIII), were introduced in the legislation to allay and alleviate the concerns of the public.

(4) Parties' submissions on the Punishment of Frauds Act 1857

209 As the respondents did not deal in detail with the Punishment of Frauds Act 1857 in either their written or oral submissions, we will focus on the Prosecution's submissions on the same Act.

210 In brief, the Prosecution argues, relying on Sir Richard's speech, that the Punishment of Frauds Act 1857 was introduced "not because directors were not caught under the existing law", but because there was a need to respond to the ability of directors to "misuse their position to cover up their embezzlement by clever disguises and falsehoods" [emphasis in original removed] and circumvent evidential difficulties. The Prosecution suggests that the provision that already made directors liable "*may* have been s 49 of the Larceny Act 1827, which punished embezzlements by 'any Banker, Merchant, Broker, Attorney or other Agent'" [emphasis in original removed; emphasis added]. It also submits that "[t]he provision in the [Punishment of Frauds Act 1857] on the misappropriation of company property by directors [*ie*, s V] was *presumably* inserted as a *consolidating provision* given the subject matter of the Act" [emphasis added].

211 In our judgment, there are three reasons why the Prosecution's understanding of the Punishment of Frauds Act 1857 *cannot* be accepted.

212 The first is derived from ***Sir Richard's explanation*** *of the Bill* leading up to the Punishment of Frauds Act 1857. The Prosecution is, with respect, in error in suggesting that s V of the Act was "presumably inserted as a consolidating provision". This assertion is purely speculative and runs contrary to Sir Richard's speech that s V was intended to criminalise something that *had not previously been criminalised before* (see [202]–[203] above).

213 The second is based on a reading of *the **text** of the Punishment of Frauds Act 1857*. Alongside s V of the Punishment of Frauds Act 1857 is s II, which is the provision targeting bankers, merchants, brokers, attorneys and agents. We have explained at [197] above that it is simply implausible that the UK Parliament would enact two parallel provisions in the same statute if one provision already encompassed the other.

214 The third is based on the ***historical background** to the Punishment of Frauds Act 1857*. Section V of the Act was introduced because the common law offence of fraud was not sufficiently sophisticated to effectively target and deter CBT by directors. As described at [204] above, Sir Richard was referring to the *common law* offence of fraud when he mentioned that directors were liable to be prosecuted under the existing law (as was done in *Esdaile*); he was not, as the Prosecution suggests, referring to *s 49 of the Larceny Act 1827*, which he separately addressed in the same speech (see [205] above). The submission that s 49 of the Larceny Act 1827 "may" have covered directors is thus not only ***entirely speculative***, but also ***ahistorical***.

(5) Disconnect between the Punishment of Frauds Act 1857 and the Indian Penal Code

215 Finally, we reiterate that, although the Indian Penal Code of 1860 was passed only after the introduction of the Punishment of Frauds Act 1857, ***the Punishment of Frauds Act 1857 and the socio-historical context leading up to its enactment did <u>not</u> form part of the material on which the Indian Penal Code was based***. This is because, as explained above at [194], ***the CBT provisions in the Indian Penal Code were based on a review of the embezzlement provisions in the English Digest in 1846, which was <u>more than a decade before</u> the enactment of the Punishment of Frauds Act 1857***.

216 This historical disconnect between the two statutes explains *the complete absence of s V of the Punishment of Frauds Act 1857 or any equivalent provision in the Indian Penal Code*. Indeed, it is telling that ***there is no reference to directors of companies anywhere in the Penal Code***. In our judgment, in so far as legislative intent is to be discerned "at or around the time the law [was] passed" (*Ting Choon Meng* at [18]), it is clear that the drafters of the Indian Penal Code would not have considered CBT by directors – *which was penalised only* ***subsequently*** *through the introduction of new legislation in the UK* – as falling within the scope of s 409. ***Put simply, it was never intended that directors and other officers of body corporates were to fall within s 409 as "agents".***

Subsequent legislative developments in the UK

217 Although this is not directly relevant to the interpretation of s 409 as such, we briefly describe, for completeness, the development of the embezzlement provisions in the UK *after* the Punishment of Frauds Act 1857 and the subsequent enactment of the Indian Penal Code.

218 One year after the enactment of the Indian Penal Code, the Larceny Act 1861 was passed in the UK. This was another consolidating statute which brought together, amongst others, the Larceny Act 1827 and the Punishment of Frauds Act 1857. It reproduced the separate provisions criminalising embezzlement by "a Banker, Merchant, Broker, Attorney, or other Agent" (ss 75 and 76) and fraudulent misappropriation by "a Director, Member, or Public Officer of any Body Corporate or Public Company" (s 81). It should be emphasised that these two prohibitions therefore existed as *separate and parallel* provisions within the Larceny Act 1861. In addition, breaches of trust

by factors (s 78) and bailees (s 3) were also criminalised, in line with the provisions of the previous acts.

219 We conclude in the early years of the 20th century, when the UK Parliament finally departed from the old common law rule by passing the Larceny Act 1901 (c 10) (UK) ("the Larceny Act 1901"). The Larceny Act 1901 amended and generalised the relevant provision on breach of trust by "a Banker, Merchant, Broker, Attorney, or other Agent" in ss 75 and 76 of the Larceny Act 1861 to breach of trust by anyone "entrusted, either solely or jointly with any other person, with any property". It did not, however, effect any changes to s 81 of the Larceny Act 1861 (*ie*, the separate offence of fraudulent misappropriation by ***directors***), which continued to *separately* exist alongside the amended ss 75 and 76. We will return to the 1901 amendment later (see [247] below). At this juncture, it suffices to note that the amendment was prompted by a dissatisfaction with the state of UK law under the Larceny Act 1861.

Professional agents in the 19th century

220 Finally, to round up the historical analysis, we consider the status of agents as a class of persons in the 19th century. In our view, a proper appreciation of the history of agents as a ***profession*** is crucial to understanding the *context* in which the statutory provisions discussed above were enacted, in particular s 409.

221 The essence of legal agency, as traditionally understood, is the power of the agent to affect the principal's legal relations with third parties (*Bowstead and Reynolds* at para 1-004). It developed from the relationship of master and servant, and emerged as a "single and significant" subject at the turn of the 19th century (S J Stoljar, *The Law of Agency: Its History and Present Principles*

(Sweet & Maxwell Limited, 1961) ("*Stoljar*") at p 14 and more generally at pp 3–17). Its growth was sparked in many ways by the development of commercial life, such as the growth of trading companies, from the 17th century onwards (G H L Fridman, *The Law of Agency* (Butterworths, 7th Ed, 1996) at p 7).

222 From the beginning, it was recognised that "agents" were not a homogenous category and that there were different classes of agents. *Stoljar* notes as follows (at p 2):

> … there are professional middlemen like the factor and broker mainly concerned with market exchanges, and there are organisational agents such as a manager, a director or a salesman who help in the functioning of larger commercial concerns, whether a firm or a company, a shop or an office.

223 *Stoljar* also makes clear that the "*professional middlemen* like the factor and broker" [emphasis added] were among the "most important agents" (at p 2). Other historical commentators were of the same view. For instance, William Paley wrote an early treatise on the law of agency in 1819 which "chiefly concern[ed] mercantile affairs" (William Paley, *A Treatise on the Law of Principal and Agent: Chiefly with Reference to Mercantile Transactions* (Joseph Butterworth and Son, 2nd Ed, 1819) at p viii). He noted, at p 13, that "[i]n addition to the … general duties, which affect all descriptions of agents alike, there are distinct duties depending upon their respective employments: of which the present treatise chiefly concerns such as regard mercantile affairs". Paley then went on to describe "mercantile agents" and, in particular, factors and brokers as examples of such mercantile agents. Similarly, Harold Greville Hanbury in *The Principles of Agency* (Stevens & Sons Limited, 2nd Ed, 1960) ("*Hanbury*"), at p 13, identified five "important classes" of agents – factors, brokers, commission agents, *del credere* agents and auctioneers.

224 The reason for the importance of professional agents was the central role which they, and in particular factors and brokers, played in commerce. Factors were mercantile agents who, in the ordinary course of business, were entrusted with the possession of goods or the documents of title thereto (*Hanbury* at p 13). Brokers were analogous to factors save that they were mercantile agents who were employed to make contracts for the purchase or sale of personal property of which they *were not entrusted with possession*, or documents of title thereto (*Hanbury* at p 13). The terms were fluid, but what is clear is that these professional agents played an important role not just in facilitating the transactions of their principals, but also in providing finance and were therefore crucial to all aspects of commerce. *Munday* gives the example of the "Blackwell Hall factor", in reference to factors who facilitated sales at the cloth market at Blackwell Hall. He notes that "[t]he Blackwell Hall factor of the seventeenth and eighteenth centuries … presents a good example of an agent whose dominant position within his own branch of commerce led him to adopt the role of a financier" (*Munday* at p 231).

225 Likewise, when Singapore was still within the Straits Settlements, professional agents in the form of commission agents played a central role in the flourishing entrepot trade of the colony right from its founding in 1819. As chronicled by George Windsor Earl, these mercantile agents "receive[d] consignments of goods from merchants in Great Britain and [made] returns in oriental produce purchased in the settlement" (George Windsor Earl, *The Eastern Seas* (Wm H Allen and Co, 1837; Oxford University Press, Reprint, 1971) at p 415). They also handled the transhipment of goods between East and West, operating through the great merchant and agency houses of Singapore such as those established by Alexander Guthrie, John Purvis and Edward Boustead (Peter Drake, *Merchants, Bankers, Governors: British Enterprise in*

Singapore and Malaya 1786–1920 (World Scientific, 2017) ("*Drake*") at pp 5–14; see also the detailed academic exercise by Loh Wen Fong, *Singapore Agency Houses: 1819–1900* (1958) (unpublished academic exercise, University of Malaya in Singapore, archived at the National University of Singapore). *Drake* emphasises that these Singapore mercantile houses were not "mere subsidiaries or extensions of London firms or Calcutta agency houses". Instead, they were independent and important, having strong commercial relationships with numerous Asian traders and producers in the Straits Settlements and, following the growth of banks in the Straits ports in the 1840s, frequently dealing with banks for the discounting of bills of exchange and promissory notes or seeking overdraft accommodation. Due in no small part to the influence and entrenchment of these mercantile agents, Singapore's entrepot trade continued to flourish even after the East India Company's monopoly in China was abolished in 1833 (*Drake* at pp 7–10). This stands testament to the nature of mercantile agents in the 19th century as an independent, powerful and wealthy professional class.

226 Focussing in greater depth on the class of "mercantile agents", it is worth noting that, in the early 19th century, a special common law exception to the *nemo dat quod non habet* principle was carved out for this category of agents to allow mercantile agents who, in the customary course of business as agents, had the authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods, to give good title to a third party (*Pickering v Busk* (1812) 15 East 38 as cited in *Hanbury* at pp 14–15). As alluded to earlier at [147], this common law exception was supplemented by the enactment of the early Factors Acts which covered "agents entrusted" with property. *Despite the ostensibly wide terminology used in the early Factors Acts, the phrase "agent entrusted" was construed as* ***referring only to***

mercantile agents. Notably, in construing the term "agent entrusted" in the Factors Act 1823, Willes J in *Heyman v Flewker* (1863) 143 ER 205 held that "the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; *but only persons whose employment corresponds to that of* ***some known kind of commercial agent, like that class (factors) from which the act has taken its name***" [emphasis added in italics and bold italics] (at 209). This construction was later incorporated into the Factors Act 1889 (c 45) (UK) which was expressly limited to the "mercantile agent". There is a telling parallel between the way in which the courts construed the wide phrase "agent entrusted" in the early Factors Acts as referring to *mercantile agents*, and the judicial interpretation of the similarly broad phrase "other agents" in the Embezzlement Act 1812 and the Larceny Act 1827 as referring only to *professional agents* (see [239]–[246] below). These cases indicate that it was well understood at the time that the word "agents", in the commercial or business context, referred to ***professional or mercantile agents*** *who provided services to the public as part of the emerging market economy of that era*.

227 Our brief review of the history of professional agents therefore reveals that professional agents – which included factors, brokers and the like – were already a *recognised and distinct class of persons* throughout the Commonwealth when the Larceny Act provisions were first enacted by the UK Parliament in the early 19th century, and certainly by the time the Indian Penal Code was passed in 1860.

Conclusions to be drawn from the historical material

228 From a review of the above historical material, three vital points can be distilled.

229 *First*, the history of the early embezzlement provisions in the UK indicates that these provisions were ***legislated in a piecemeal fashion to capture particular professions and trades*** *in response to specific cases which brought about widespread public concern.* There is no indication from the legislative debates or the historical material that the UK Parliament intended to inculpate persons based on broad legal categories. These specific classes found their way into the provisions on aggravated CBT in the Penal Code, including s 409, through the English Digest. And it was expressly presumed by the English Law Commissioners who drafted the English Digest that the "somewhat indefinite term" "agent" used in the aggravated offence of CBT would be interpreted in its statutory context and "restrained to other agents, *ejusdem generis* with those specified" (see [189] above).

230 *Second*, CBT by ***directors*** was only first criminalised in the UK when the ***Punishment of Frauds Act 1857*** was enacted. However, as we have explained at [215]–[216] above, there was a sharp historical disconnect between the Punishment of Frauds Act 1857 and the Indian Penal Code. Accordingly, it could not have been intended by the Indian Law Commissioners that directors and other officers of body corporates were to fall within s 409 as "agents". This is also evident from the lack of any reference to company directors in the Penal Code. There was also no reference in the English Digest or in the earlier UK statutes to directors. All of this was merely a corollary of the fact that the special position of company directors, and the "new evil" arising from the misuse and abuse of the joint-stock company, had not yet surfaced in the public consciousness. As described at [198]–[208] above, this became a public concern only in 1856, following the collapse of the Royal British Bank. The Indian Penal Code, in contrast, was based on the state of English law ***prior to*** *the enactment*

of the Punishment of Frauds Act 1857, at a time when only CBT by "agents for hire" was covered by statute.

231 *Third*, the Indian Penal Code and the earlier UK Embezzlement Act provisions were enacted at a time when professional agents, which included factors, brokers and the like, were a ***recognised and distinct class of persons*** *who provided agency services to the public*. Therefore, as the English cases on the early Factors Acts as well as on the Embezzlement Act 1812 and the Larceny Act 1827 indicate (see [239]–[246] below), it was readily understood at the time that the ostensibly broad references to "agents" in these Acts had to be construed purposively as referring to professional or mercantile agents who provided commercial services to the community at large as part of the emerging market economy of that era.

232 These points, both individually and taken together, support the textual analysis of s 409 set out in the earlier part of our judgment. In other words, the extraneous material ***confirms****, pursuant to s 9A(2)(*a*) of the IA, that the meaning of s 409* ***is the ordinary meaning*** *conveyed by the text of the provision*, taking into account its context in the CBT provisions of the Penal Code and the purpose or object underlying the provision. The history also readily explains why the phrase "in the way of his business" is employed in s 409 (*viz*, as a reference to commercial activity), and reinforces the need for the term "agent" to be read *ejusdem generis*. Finally, on the crucial issue of legislative purpose, the historical material on s 409 and the related embezzlement provisions unequivocally indicate that the provision was intended to capture not any legal agent, but *only* professional agents, who played an important role in commercial life by providing services to the public at large, and who were entrusted with property in the way of their businesses.

Principle against doubtful penalisation

233 The respondents advocated the application of the "strict construction rule" (also known as the principle against doubtful penalisation) in the event that ambiguity persisted in the proper interpretation of the disputed phrase, arguing that the application of the rule "would mandate that the Court gives the benefit of [the] doubt to the accused".

234 The principle against doubtful penalisation and its applicability as an interpretive canon in Singapore law was fully discussed by V K Rajah JA in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 ("*Low Kok Heng*") at [30]–[38] (which was endorsed by this Court in *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 ("*Nam Hong*") at [28]). Rajah JA reviewed the historical origins of the principle and how the rule has been regarded in more recent times, observing (at [33]) that in the modern era "[c]ourts have often declined to apply the strict construction rule in its absolute form, and have instead adopted a purposive and broader interpretation of penal statutes, even when such an interpretation proves to be detrimental to an accused". While the principle "remains an integral part of the collective principles and policies which the courts draw upon in the construction of penal provisions", its application is subject to one important constraint – it applies only as *a "tool of last resort"* [emphasis added] (*Low Kok Heng* at [35] (citing *Forward Food Management Pte Ltd and another v Public Prosecutor* [2002] 1 SLR(R) 443 at [26])). As this Court summarised in *Nam Hong* (at [28(b)]):

> The strict construction rule is a "tool of last resort" to which recourse may be had only if there is ***genuine ambiguity*** *in the meaning of the provision* ***even after the courts have attempted to interpret the statute purposively***. If the meaning of the provision is *sufficiently clear after the ordinary rules of construction have been applied*, there is ***no room*** for the

> application of the strict construction rule … [emphasis in original removed; emphasis added in italics and bold italics]

235 This is merely a consequence of the fact that the controlling principle to the interpretation of statutes in Singapore is the need to promote the purpose or object underlying the written law, as enshrined in s 9A(1) of the IA. The court's first duty is to interpret the statutory provision purposively as a means to give effect to Parliament's intention. Any other principle or canon of statutory interpretation in the common law, no matter how well-established or how distinguished its pedigree, can only be of secondary importance in comparison to this statutory duty.

236 In the present context, we have explained our finding that the phrase "in the way of his business as … an agent" not only has a *clear ordinary meaning* (see [165] above) but that the historical background of s 409 and the other CBT provisions in the Penal Code also *confirms* that the drafters intended those words to convey that ordinary meaning (see [232] above). In the circumstances, we are of the view that there is ***no "genuine ambiguity"*** (to use the language of *Nam Hong*) in the proper construction of the disputed phrase. In these circumstances, the rule simply does not apply.

237 Having said that, we agree with the respondents that *if* we had indeed found, following our examination of the text and context of the provision, that genuine ambiguity and uncertainty persisted as to whether the scope of s 409 extended to directors of companies and officers of charities and societies, *then (and only then)* we would have been prepared to find that the rule against doubtful penalisation militated in favour of the conclusion that the provision did not encompass those persons. As Rajah JA emphasised in *Low Kok Heng* at [35], the rule against doubtful penalisation is "by no means purely a relic of the past"; "in its qualified and less rigid form, [the rule] remains an integral part of

the collective principles and policies which the courts draw upon in the construction of penal provisions". Indeed, *Bennion* describes the rule as "a principle of legal policy" that "belongs to the common law and prevails in all common law countries" (at p 749). It is a rule with ancient origins, introduced in order to alleviate the heavy punishments for serious crimes in the 15th century following the legislative ousting of the benefit of clergy defence (see *Low Kok Heng* at [32]). Although the historical justification of the rule has since faded into oblivion, it continues to exert a strong pull on the mind of the court given the gravity of penal consequences for accused persons. In the context of the present case, these penal consequences consist of the significantly higher maximum sentence for the offence under s 409 as compared to that under s 406 (see [29] above). Accordingly, if we had found that the principles of statutory interpretation discussed above yielded no clear answer, we would have been satisfied that the rule against doubtful penalisation thereby assumed primacy as the governing interpretive principle and that it militated in favour of the narrower interpretation of an "agent" advocated by the respondents.

Judicial interpretation of s 409 and analogous provisions

238 Having analysed both the text and context of s 409, we turn to consider how the courts have construed the provision, including the related UK embezzlement provisions outlined above. We find that these authorities amply support the majority's interpretation of s 409.

UK decisions on the Embezzlement Act 1812 and the Larceny Act 1827

(1) *Prince*

239 The earliest case is *Rex v Daniel Prince* (1827) M&M 22 ("*Prince*"). It concerned an accused person who had applied for his own use a bill of exchange

deposited with him as agent for the owners. He was not a professional bill broker but was merely a friend of the owner and was to receive no commission for discounting the bill. The accused person was charged under s 1 of the Embezzlement Act 1812 which (it will be recalled) covered "Banker or Bankers, Merchant or Merchants, Broker or Brokers, Attorney or Attornies, *or Agent or Agents of any Description whatsoever*" [emphasis added].

240 It is significant that despite the extreme width of the statutory language (*ie*, the phrase "Agents of any Description whatsoever") – which is far wider than the language in s 409 of the Penal Code – Lord Abbott CJ considered that it was of the first importance to have regard to the *specific references to bankers, merchants and so on* in construing the provision. He held that "***if [the section] had been intended to comprehend… deposits for any purposes … all the preceding words, "banker, merchant, &c." would have been unnecessary, and might have been omitted***" [emphasis added]. Lord Abbott CJ therefore found that legislature intended to confine the statute to "persons who, in the exercise of their functions, receive securities and afterwards embezzle them" (at 22). In particular, the provision did not include the parties in the case who were merely friends, accustomed to accommodate each other. Consequently, the accused person was acquitted.

241 *Prince* is therefore a case that buttresses the view that the term "agent" must be construed in the light of the preceding words "a banker, a merchant, a factor, a broker, an attorney". The importance of applying a contextual approach to statutory interpretation, having regard to the language of the provision as a whole, was not lost on Lord Abbott CJ. Indeed, as will be seen, this interpretive technique was employed consistently thereafter by the English courts in construing the provision and its equivalents.

(2) *Portugal*

242 The next significant case is *Portugal*, in which the case of *Prince* was applied to s 75 of the Larceny Act 1861. The decision has already been discussed above at [128]–[129]. As explained, the English High Court applied the *ejusdem generis* principle to the word "Agent" in the phrase "a Banker, Merchant, Broker, Attorney, or other Agent". It was thus held that the word was intended to include only agents who carry on the ***business or profession of receiving property for safe custody or other special purpose.*** Once again, this is a decision that supports the majority's analysis of s 409.

243 We have explained at [151]–[156] above that the English High Court's reliance on the words "or other agent" within s 75 of the Larceny Act 1861 was *only an additional ground* for reaching its decision that the accused did not fall within the scope of the provision. It relied primarily on the fact that "Banker, Merchant, Broker or Attorney" preceded the reference to "or other Agent".

244 For similar reasons, we reject any attempt to rationalise *Portugal* and the other relevant UK cases on the basis that those cases *merely concerned casual or* ad hoc *agents*. While we may accept that the accused persons in those cases may be described as casual agents, this is a ***factual*** observation which does *not* affect the ***reasoning*** in *Portugal*. As elaborated upon above, the English High Court in *Portugal* applied the *ejusdem generis* principle and surveyed the other relevant embezzlement provisions on clerks, servants and the like and concluded that the word "agent" in s 75 of the Larceny Act 1861 "*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***" [emphasis added in italics and bold italics] (see passage cited at [128] above).

We acknowledge that toward the end of that passage, the court did refer to casual agents "who may happen from time to time to undertake some fiduciary position, whether for money or otherwise". But this reference was made only to contrast casual agents with *professional* agents. It was immediately preceded by the court's pronouncement that s 75 of the Larceny Act 1861 "*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***" [emphasis added in italics and bold italics]. In other words, the English High Court emphasised that the focus of the analysis was on *whether the accused was engaged in the particular trades, professions or occupations* identified in the provision. The language and reasoning of the court simply could not be any clearer.

245 Finally, we note that the court in *Portugal* construed the word "agent" in s 75 of the Larceny Act 1861 as referring to professional agents ***even though s 75 did not contain the phrase "in the way of his business" when referring to bankers, merchants and so on, unlike s 409*** (and likewise the corresponding provision in the Indian Penal Code). As the majority of the High Court in the present case noted, the fact that the phrase "in the way of his business" was expressly included in s 409 by the drafters of the Penal Code demonstrates, *a fortiori*, that "agent" in s 409 was intended to refer only to professional agents, given that the English courts drew a distinction between professional and casual agents even without the need for the phrase (MA Judgment at [108]).

(3) *Kane*

246 *Portugal* was cited and applied later in *The Queen v Kane* [1901] 1 QB 472 ("*Kane*"). That was a case in which the accused person was a conjuror and thought-reader by trade. He received a cheque from the victim for the purpose

of paying a deposit for shares in a railway company, but cashed the cheque and misappropriated the proceeds. He was also charged under s 75 of the Larceny Act 1861. Lord Alverstone CJ held (at 475), in his favour, that the 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]. Once again, the focus was on the *specific classes of persons* identified within the provision. The accused person, who was engaged in an *unrelated business or profession*, did not fall within any of those classes.

(4) Amendments to the Larceny Act 1861 in 1901

247 The above was the established position under the Larceny Act 1861. Over time, it led to dissatisfaction and, eventually, the passing of the Larceny Act 1901, which we briefly referred to earlier (at [219] above). As we have explained, the Larceny Act 1901 generalised the crime of embezzlement in the UK and removed the requirement, in ss 75 and 76 of the Larceny Act 1861, for the offender to have acted as "a Banker, Merchant, Broker, Attorney, or other Agent". In introducing the proposed amendments in Parliament, the then UK Attorney-General, Sir Robert Finlay, made the following observations (United Kingdom, House of Commons, *Parliamentary Debates* (3 May 1901) vol 93 at cols 621–623):

> The law on the subject is at present contained in Sections 75 and 76 of the Act [*ie*, the Larceny Act 1861], and I do not think I am using language too strong when I say that these sections have long been the opprobrium of our criminal law. Confused and overlapping as they are, they are unable to deal with the worst cases. *This may be explained by the fact that these enactments have gradually grown; they have been passed to meet particular cases, instead of being prepared on a principle.* …
>
> There are three principal blots in the statute. In a great many cases there can be no conviction unless there have been directions in writing, and in cases which have unfortunately been so frequently before the public, where solicitors are

> concerned, it often rested with the solicitors to say whether directions should be so drawn up. If there were none, the solicitor would appropriate the money with impunity. In the second place, it has been held that the sections do not apply to the cases of those who are agents to receive as distinguished from agents to pay. *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* [*ie*, *Portugal*] *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 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 in italics and bold italics]

During the second reading of the Bill, Sir Robert similarly noted that the amendments were necessary "to remove the blots upon that portion of the law which dealt with the offence of misappropriation by persons entrusted with property by others" and that "no good reason could be given for *the state of the law which declared that only* ***agents by profession*** *should be amenable* to the provisions of the sections" [emphasis added in italics and bold italics] (United Kingdom, House of Commons, *Parliamentary Debates* (10 June 1901) vol 94 at cols 1544–1545). So it is clear that the UK Parliament was cognisant of, and prompted by, the deficiencies in the earlier provisions of the Larceny Act 1861 which were brought to light by cases such as *Portugal* and *Kane*. *It is critical, however, to note that* ***this change in the law required legislative amendment*** *to the language of s 75 of the Larceny Act 1861.*

Decisions from other jurisdictions on s 409 and its equivalents

(1) Privy Council on appeal from Ceylon – *Cooray*

248 The first case in which the language of s 409 was considered in detail by an appellate court was the decision of the Privy Council, on appeal from the Ceylon courts, in *Cooray*. The appellant in *Cooray* was the president of the Salpiti Korale Union, a body which supplied goods to retail stores of the Union through wholesale depots. He was also president of the sub-committee which controlled one of the depots, and vice-president of the bank which provided advances to member business societies to enable them to buy the goods. The normal practice was for the bank to receive weekly repayments for those advances by the member business societies, and for the bank then to pay in the money orders, cheques or cash received to its account with the Bank of Ceylon.

249 The appellant secured the appointment of a certain individual to be the manager of the depot controlled by his sub-committee. According to the prescribed routine, the manager was to collect payments of sums due from that depot and deposit those monies with the bank. Instead, the appellant instructed the manager to collect large sums from the retail stores in cash and hand them directly to him to be transmitted to the bank. Thereafter, rather than paying those sums to the bank, the appellant appropriated the cash and substituted for it his own cheques for the amount due. In addition, the appellant, acting as vice-president of the bank, ensured that in many instances (35 in total) those cheques were not forwarded to the Bank of Ceylon for collection. In the result, the appellant was found to have misappropriated a sum of Rs 57,500.

250 The appellant was convicted by the Supreme Court of Ceylon of the offence of criminal breach of trust as an agent under s 392 of the Ceylon Penal

Code (which carries the same language as s 409). The Court of Criminal Appeal of Ceylon dismissed the appeal, and the appellant brought a further appeal to the Privy Council. The appellant argued that the offence under s 392 was "limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or, indeed, on a number of occasions, provided that the evidence does not establish that he carries on an agency business". He submitted that the phrase "in the way of his business" within s 392 excluded the possibility of anyone who does not carry on an agency business from coming within the section. Further, such a reading was in conformity with the general scheme of similar offences found in ss 390–392 of the Ceylon Penal Code, each of which referred to particular classes of persons such as carriers, wharfingers, clerks, servants, bankers, merchants and so on (*Cooray* at 415–416).

251 The Privy Council allowed the appeal. Lord Porter, delivering the judgment of the Privy Council, noted (at 417) that the issue was "fully argued" before the Court of Criminal Appeal in Ceylon, which rejected the appellant's argument. Lord Porter referred with approval to *Prince, Portugal* and *Kane*, and relied in particular on the reasons given in *Portugal* in allowing the appeal. He went on to find (at 419) that the Privy Council should adopt the construction put upon those words by the English courts, given that that construction reflected "a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years".

252 Finally, Lord Porter observed (at 419–420) that the appellant was "in no sense entitled to receive the money entrusted to him in any capacity, nor, indeed, had [the manager] authority to make him agent to hand it over to the bank". In the circumstances, the Privy Council allowed the appeal, discharged the

conviction under s 392, and substituted it for a conviction under s 389 (*ie*, the offence of CBT *simpliciter*).

253 The majority of the High Court in the present case explained that, from its 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 [the majority] hereinafter refer[red] as a "*professional agent*" in short) and must be entrusted with property in that capacity" [emphasis added] (MA Judgment at [97]). It noted at [98] that the courts in *Dalmia* and *Tay Choo Wah* considered that the reason why the Privy Council acquitted the accused in *Cooray* was "*not* because the accused was not a *professional* agent but was instead because the accused had not been entrusted with the moneys 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" [emphasis in original]. The majority then expressed its disagreement (at [99]) with such a reading of *Cooray*. It took 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" [emphasis added]. The Ceylonese courts in *Cooray* had convicted the accused because they took the position that the accused did not have to be a professional agent in order to be liable under s 392 of the Ceylon Penal Code. The arguments of counsel before the Privy Council centred on this issue, as did the Privy Council's eventual analysis. The majority surmised that "the holding [of the Privy Council] 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" [emphasis in original]. The Privy Council "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 moneys to the bank, but this did not detract from or undermine its earlier holding in respect of the legal requirements of the section".

254 We agree with the majority's reading of *Cooray*. The Privy Council's decision was *primarily* based on its agreement with the reasoning in *Portugal*, from which Lord Porter (who delivered the judgment of the Board) quoted extensively (*Cooray* at 418). Lord Porter considered the reasoning in that case to be "*directly applicable to the case under consideration*, subject to such immaterial variations as the provisions of the [Ceylon Penal Code and the Larceny Act 1861] require[d]" [emphasis added]. He further observed that *Portugal* was "a long-established decision as to a particular section of an Act of Parliament", and that there was indeed "a series of decisions over a period of years" to the same effect. It was only toward the end of the Privy Council's grounds that Lord Porter found that the accused was "in no sense entitled to receive the money entrusted to him in any capacity, nor, indeed, had [the manager] authority to make him agent to hand [the cash] over to the bank". In the circumstances, we have little doubt that the Privy Council had fully considered the question of whether s 392 of the Ceylon Penal Code applied only to persons engaged in certain specified businesses or professions, and expressed unreserved agreement with the conclusion of the English High Court in *Portugal*, which answered that question in the affirmative.

255 The corollary is that the minority of the High Court in this case was, with respect, incorrect to state that "when the full facts of *Cooray* are considered, … 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 moneys entrusted to him *by the manager of the*

depot in circumstances where, according to the prescribed procedure, the manager should not have done so" [emphasis in original] (MA Judgment at [451]). As explained above, this misses the main thrust of the Privy Council's reasoning and instead focuses on a tangential and secondary finding made only towards the end of the Privy Council's judgment. For these reasons, we likewise disagree with the Prosecution's argument that the minority's reading of *Cooray* should be accepted.

(2) India – *Dalmia*

256 We briefly turn again to *Dalmia*, the facts and decision of which we have described at [86]–[90] above and which we have also discussed at various points in the preceding analysis. We have explained in full at [91]–[93] above why we respectfully disagree with the Supreme Court of India's *textual* analysis of the expression "in the way of his business" as "in connection with his duties", and we do not propose to reiterate our analysis here.

257 In addition, it should also be noted that the Supreme Court of India in *Dalmia* did not consider the relevant *context* (*ie*, the legislative history and background of s 409), which plainly runs contrary to the interpretation of the provision which was adopted in that case.

(3) Malaysia – *Periasamy*

258 This was a decision of the Malaysian Court of Appeal. The first appellant was chief executive and a member of the board of directors of a co-operative society. The first appellant approved a loan to a certain individual. One of the conditions for the grant of the loan expressed in the offer was that the borrower was to deposit, by way of a pledge, four million shares in a particular company. It transpired that those shares were not deposited when the

loan was released. After the release of the loan, the bank's management committee met and decided to dispense with the condition that required the deposit of the shares. The first appellant was charged for committing criminal breach of trust as an agent under s 409 of the Malaysian Penal Code (FMS Cap 45) ("the Malaysian Penal Code"). That provision was *in pari materia* with s 409 of our Penal Code, but was amended in 1993 to replace the relevant part of the section from "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" to simply "*in his capacity of a public servant or an agent*".

259 A separate section, s 402A, was also enacted in the Malaysian Penal Code to provide definitions to various terms used in the Penal Code, including the word "agent". The definition of "agent" in the provision expressly included a broad range of classes of persons, *including directors.* The word "director" itself was also given a specific definition. Section 402A of the Malaysian Penal Code provides as follows:

> **Definition of "agent", "company", "director" and "officer"**
>
> **402A.** For the purposes of sections 403, 404, 305, 406, 407, 408, 409 … of this Chapter, unless the contrary appears from the context:
>
> ***"agent"*** includes any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any company or other person whether as agent, partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, ***director, manager or other officer of any company, club, partnership or association*** *or in any other capacity either alone or jointly with any other person*, and whether in his own name or in the name of his principal or not;
>
> …

> "director" includes any person occupying the position of director of a company, by whatever name called, and includes a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act, and includes an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person;
>
> [emphasis added]

260 *Periasamy*, however, was based on s 409 as it stood ***before*** the 1993 amendment to the Malaysian Penal Code. In construing the pre-amendment provision, the Malaysian Court of Appeal remarked as follows (at 571):

> The amendments made by Parliament to the section in 1993 have no application to these appeals as they came into force well after the alleged commission of the offences with which the appellants were charged.
>
> It may be seen at once that the section [*ie,* s 409] is in two parts. The first part applies in cases where there has been entrustment of property or its dominion to a person – to quote the words of the section – 'in his capacity of a public servant'. The second part of the section applies to cases of entrustment to a category of persons, including an agent – again to quote the section – 'in the way of his business'. Thus, *the word 'capacity' applies to a public servant but not to an agent.*
>
> That *the bifurcation we have alluded to existed in the section as it was previously cast* [*ie,* prior to the 1993 amendments] was given judicial recognition by the (then) Supreme Court in *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714. Peh Swee Chin SCJ (as he then was) who delivered the judgment of the Supreme Court on that occasion made the following observation (at p 725 of the report):
>
> > *The modifying words 'in his capacity' refer to a public servant and the words 'in the way of his business' refer to 'banker, agent …'.* Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to serious arguments in court.
>
> [emphasis added]

261 The court then referred to *Cooray* and *Dalmia*, and reasoned as follows (at 574–575):

> With respect, we are unable to accept the interpretation placed upon the section by their Lordships of the Indian Supreme Court [in *Dalmia*]. To adopt the view expressed in the passage above quoted would, in our judgment, be tantamount to rewriting the section by means of an unauthorized legislative act. We would, therefore, with respect, prefer the reasoning of the board in *Cooray*.
>
> While accepting that under the former s 409 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 removed; emphasis added in italics and bold italics]

262 The Malaysian Court of Appeal's reasoning in *Periasamy* is entirely consistent with our view that the reasoning in *Dalmia* is unpersuasive and out of line with the legislative intent. The purposive interpretation of s 409 by reference to its text and context indicates that the court in *Periasamy* was right to find that "the section refers … to persons who are professional agents and not to casual agents, such as a company director" (at 575). As the court in *Periasamy* noted, *the legal position in Malaysia only shifted* ***after*** *s 409 of the Malaysian Penal Code was amended by the Malaysian legislature in 1993.*

Local decisions

(1) *Tay Choo Wah*

263 In *Tay Choo Wah*, the appellant was a subscriber and director of Sin Chew Realty Pte Ltd ("Sin Chew"). Sin Chew held 3,000 shares in Modern Housing Development Pte Ltd ("Modern Housing"), a company in which the appellant was also a subscriber. The subscribers and directors of Sin Chew and Modern Housing reached an agreement with the Income Tax Department to pay $7.5m including penalties in exchange for the Comptroller's undertaking not to prosecute the subscribers and directors and the two companies for tax evasion. Thereafter, the board of directors of Sin Chew passed a resolution that the 3,000 shares in Modern Housing be sold at par value, but without stating the names of the purchaser or prospective purchaser. Those shares were then sold at par and transferred to the appellant's nephew and family. The appellant was convicted of three charges for the offence of criminal breach of trust as an agent under s 409 of the Penal Code.

264 One of the submissions made by counsel for the appellant was that the Prosecution had failed to prove that the appellant carried on business as a mercantile agent, and therefore the appellant had not been entrusted property "in the way of his business as an agent". F A Chua J referred to *Cooray* before turning to *Dalmia*. Chua J expressed his agreement (at [25]) with the reasoning in *Dalmia* and held (at [27]) that "[t]he reasoning in *Dalmia*'s case makes it clear that *Cooray*'s case can be and was accordingly distinguished". He did not, however, provide any further elaboration. He proceeded to state at [30] that the appellant was "at all material times a director and agent of both the companies, Sin Chew and Modern Housing" and that the appellant "received the 3,000 Modern Housing shares in his capacity as agent".

265 On the facts, Chua J found (at [59]) that the appellant knew at the time he sold the Modern Housing shares that those shares were worth substantially more than par value, and concluded that the district judge rightly found the appellant guilty on all three charges against him.

266 Although *Tay Choo Wah* is a longstanding decision, we note, with respect, that its sole basis as authority on this point of law was Chua J's agreement with the views expressed in *Dalmia*. This means that the correctness of the decision stands or falls with that of *Dalmia* which, as we have explained, is flawed both as a matter of interpretation of the language of the provision as well as its compatibility with the legislative history.

267 Indeed, we should point out that the Judge at first instance in the present case found that there was some room for speculation as to the *ratio decidendi* of *Tay Choo Wah* (see [22] above). He noted, rightly in our view, that the case could be read as authority for the extremely broad proposition that "if one is an agent … and one is entrusted with property in one's capacity as agent, that would be entrustment in the way of one's business as agent" (Conviction GD at [120]). The broad interpretation of s 409 preferred in *Tay Choo Wah*, if accepted, would mean that *even* ad hoc *and casual agents will fall within the provision*, which is a position that even the minority in the High Court and the Prosecution saw as untenable.

268 We agree with the majority of the High Court that the longstanding nature of the interpretation of s 409 adopted in *Tay Choo Wah* is simply *not* a justifiable reason for upholding that decision. First, *Tay Choo Wah* has never been considered in detail by this Court, until the present. In fact, it was not scrutinised in any subsequent High Court authority until the present case. Hence, limited weight can be given to its longstanding nature. In any event, and

as the majority held in the MA Judgment at [111], "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***" [emphasis added in italics and bold italics]. This is a point of the first importance and we pause to highlight its significance. To persist in applying an incorrect interpretation of a statutory provision, particularly a penal provision, because that error has not been rectified for a long time, in circumstances where the court's eyes have been opened to the error, is not only to ***perpetuate*** *error without proper basis*, it would also involve the ***conscious compounding*** *of such error* and – perhaps even more crucially – amount to ***judicial usurpation of legislative decision-making***, given that the court is deliberately preferring an interpretation of the provision that it knows does not reflect Parliament's intention in enacting that provision. Accordingly, the court *cannot* close its eyes to an erroneous interpretation of a statutory provision. We thus agree with the majority of the High Court that *Tay Choo Wah* was wrongly decided, and should no longer be followed.

(2) *Tan Cheng Yew*

269 *Tan Cheng Yew* is another decision of the Singapore High Court. The accused was charged under s 409 of the Penal Code for committing CBT "in the way of his business as an attorney", essentially for using some sums of money entrusted to him for his own purposes. His defence at trial was that the term "attorney" in s 409 referred to a person who was "delegated to do something in the absence of the appointer" and did not include an advocate and solicitor. Lee Seiu Kin J observed that s 409 of the Penal Code was *in pari materia* with s 409 of the Indian Penal Code and decided (at [96]) that the meaning of "attorney" in the latter Code might be instructive in determining the meaning of the same word in the former Code.

270 Lee J referred to *Ratanlal & Dhirajlal's The Indian Penal Code* (V R Manohar gen ed) (LexisNexis Butterworths Wadhwa Nagpur, 33rd Ed, 2010) ("*Ratanlal*"), which defined "attorney" (at p 883) as "one who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated". He also noted (at [99]) that in *Gour*, the author adopted a "twofold" definition of "attorney": (a) a "private attorney" who is "one who holds a power of attorney and who is appointed by another to transact any business for him"; and (b) a "public attorney" who is an "attorney-at-law [which] connotes one who is a practitioner in a court of law, who is among a class of lawyers". The author also remarked that in England, since 1873, "attorneys are by statute called solicitors".

271 Lee J found (at [99]) that since the term "attorney" was "broad enough to encompass *both* the 'private' and 'public' aspects" [emphasis in original], the accused, as an advocate and solicitor, would be caught within the ambit of s 409. He further held (at [100]) that given that prior to 1873, the understanding of the word "attorney" in England would correspond to that of a "solicitor", and the Indian Penal Code was enacted before 1873, the drafters would have relied on the pre-1873 understanding of "attorney" as including a solicitor. Finally, he found (at [101]) that this view of "attorney" is "consistent with the framework of the Penal Code", and proceeded to observe as follows (at [103]–[104]):

> 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 Gour 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.
>
> 104 The practice of law has long been held to be *an honourable profession* in which absolute trust in the integrity of its practitioners is essential not only for the administration of justice but also to the smooth operation of the wheels of commerce. It would be *a glaring omission were the profession to be excluded from the list of "banker, merchant, factor, broker, attorney and agent"* singled out for greater punishment, when *much more trust is normally reposed in an advocate and solicitor than the other trades*.
>
> [emphasis added in italics and bold italics]

For these reasons, Lee J concluded (at [105]) that the word "attorney" in s 409 includes an advocate and solicitor.

272 We have already discussed *Tan Cheng Yew* at [150] above, and would presently only reiterate Lee J's observation, in the passage cited above, that 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***" [emphasis added in bold italics].

Conclusion on judicial interpretation of s 409 and analogous provisions

273 From the above review of the relevant authorities, it is clear that there is a *coherent and well-established line of authority, tracing back to almost two centuries,* that an "agent" within the meaning of s 409 (and other analogous provisions) must be an individual who is in the *business or profession* of providing agency services, and who receives money and other property in the

way of that business. The only decision which is out of step with this clear line of authority is that of the Supreme Court of India in *Dalmia*. But as we have elaborated in detail at [89]–[93] above, the Indian Supreme Court's superficially attractive interpretation of "in the way of his business" ultimately proves to be unsustainable and consequently cannot be accepted.

The limits of the purposive approach to statutory interpretation

274 The final part of our analysis concerns the Prosecution's arguments based on fairness and public policy. In essence, the Prosecution focuses on what it deems to be the absurdity and injustice which would result if directors and officers of charities and societies, including the respondents in the present case, are not inculpated under s 409.

275 Specifically, the Prosecution argues that the majority's analysis would result in illogical and absurd situations such as where a chairman or managing director of a company would be subject to a lower maximum punishment for committing CBT *simpliciter* (under s 406) than a secretary or office boy who would be liable for the aggravated punishment prescribed in s 408 of the Penal Code. Another example provided is a professional liquidator who is appointed as the company's legal agent in a members' or creditors' voluntary winding up. The professional liquidator would fall within the scope of s 409, unlike a director who is appointed to act as a liquidator in a voluntary winding up, despite the fact that the professional liquidator exercises the very same powers as the board of directors. Put simply, it is argued that a narrow reading of s 409 would produce a lacuna in the law.

276 As we mentioned at the beginning of this judgment (see [7] above), we readily acknowledge that in the modern context, where directors of companies

and officers of charities and societies play key roles in the lives of companies and the economy as a whole, there does not appear to be a good policy reason to ignore their heightened culpability and the enhanced potential for harm were they to commit CBT. To use the language that we adopted in our introduction to this judgment, there is a *strong and urgent impulse* to ensure that persons in such positions of responsibility are made to undergo a sentence that reflects the full measure of their harm and culpability. But we have also explained that the court ***cannot arrogate to itself the legislative function*** *that belongs exclusively to Parliament* by adding to or taking away from language in a statutory provision in a manner that goes beyond the boundaries of what is permissible in statutory construction. The impulse to see crime punished to what the court considers to be the appropriate extent *cannot*, within the tenets of our constitutional framework, be permitted to surge beyond the borders of the judicial function.

277 In the present context, the key question for this Court is whether this perceived lacuna in the CBT provisions of the Penal Code can and ought to be plugged by adopting the Prosecution's suggested interpretation of s 409 of the Penal Code, or whether this Court should leave the task of law reform to Parliament. As a matter of constitutional principle and public policy, we are firmly of the view that, in the present case, ***the shaping of a remedy should be left to Parliament***.

278 In so far as the Prosecution's submission is concerned, we begin by cautioning against reasoning backwards from specific (and, in particular, extreme) hypothetical examples. As the Prosecution accepts, the *objective* and *purposive* approach to statutory interpretation must take precedence. More importantly, a closer examination of s 409 indicates that the perceived injustice and "gaps" in the law arising from the dated nature of the provision will not

only remain but will even be exacerbated if it is construed as liberally as the Prosecution proposes. The reason is that ***s 409 will remain both over-inclusive and under-inclusive even if the Prosecution's wide definition of s 409 as referring to any legal agent is adopted***.

279 This is a consequence of the fact that there are limits to how effectively the "purposive approach" to statutory interpretation can be used to achieve desired outcomes. More fundamentally, it highlights that there are real constraints on the institutional ability of the courts to give effect to preferred policy outcomes through the means of statutory interpretation, even if an overly liberal approach to such interpretation is adopted. Put another way, *there are* ***limits*** *to statutory interpretation as a technique to fashion and promote policy.*

280 The reason why the wide definition of s 409 would be ***over-inclusive*** is because legal agents (even excluding *ad hoc* and casual agents) constitute an extremely broad category that encompasses not only directors and officers of body corporates, but *also low level workers* who are, for instance, given regular responsibilities to buy office supplies for the company. We think it most unlikely that the legislature would have intended that persons of such varying stature be subject to the same potential enhanced penalties under s 409, the maximum of which is *life imprisonment*. The extreme breadth of the category of legal agents would also mean that there would be a substantial overlap between the persons who are liable for the aggravated offence in s 409 and those who are liable merely for the offence of CBT *simpliciter* under s 406, since the class of persons who are entrusted with property or dominion over it but not on a casual or *ad hoc* basis is a very wide one. Consequently, if such a broad reading were taken, it would become critical as a matter of policy to reconsider the punishment provisions provided in s 409, in particular whether the maximum term of life imprisonment is warranted for *all* persons falling within

the provision. This recalibration of the punishment provisions is plainly something that the courts cannot do.

281 On the other end of the spectrum, we consider that even if s 409 were read as broadly as the Prosecution proposes, its inculpatory scope would still be ***under-inclusive*** as there remain many significant categories of persons deserving of greater punishment who would not come within the provision. Trustees are the most notable example. It is well-established that although agents and trustees have many similarities, the two roles are conceptually distinct. An agent acts for another while a trustee holds property for another as principal, not as agent, but subject of course to equitable obligations (see *Bowstead and Reynolds* at para 1-028). Hence, in a future case, if offenders in the respondents' position are entrusted with funds, not as board members of their organisation, but as trustees, then the problem of a lacuna in the law would once again arise. This problem, however, does not arise in other jurisdictions such as Malaysia where the legislature has reformed their equivalent of s 409 by specifically enacting a broad provision, tailored for the modern commercial context, which targets (amongst others) trustees, directors and managers or other officers of any company, club, partnership or association (see [259] above). A sweeping reform that is carried out following a careful and comprehensive evaluation of the classes of persons who are deserving of enhanced criminal punishment is an outcome that a court simply *cannot* achieve through the exercise of statutory interpretation.

282 Accordingly, we are of the view that even a broad interpretation of "in the way of his business as … an agent" in s 409 would leave the law in an unsatisfactory state. This is a consequence of the dated nature of the provision and the piecemeal fashion in which CBT by various classes of persons was criminalised, leading up to the enactment of s 409 as part of the Indian Penal

Code in 1860. Filling the specific lacuna in relation to directors, which has been brought to light in this case, through a strained application of interpretative principles would only represent a proverbial papering over of part of the conceptual cracks and shortcomings in s 409 that have accrued over the last century and a half, and which continue to widen as socio-economic conditions evolve. This is an endeavour that simply *cannot be sustained* as disputes arising from the increasingly inadequate nature of s 409 continue to come before the courts. We therefore conclude that the best course to take is to allow Parliament rather than the courts to intervene. The courts are ill-suited, and lack the institutional legitimacy, to undertake the kind of wide-ranging *policy* review of the various classes of persons who deserve more or less punishment for committing CBT in the 21st century. In our view, such a review is not only essential but it is also long overdue. Nor is it appropriate or realistic for the court to calibrate the ranges of punishment to which these various classes of persons ought to be subjected.

283 Having said that, it should be remembered that the respondents in the present case are not getting away unpunished. They are facing *substantial terms of incarceration*, which the majority of the High Court saw fit to impose after its consideration of the harm and culpability associated with the respondents' conduct. Our fundamental consideration is that a hard case should not be allowed to make bad law – in this case, to *undermine the principle of separation of powers which is one of the very bedrocks of our Constitution*. The text, context, and legislative history of s 409 all support the majority's interpretation of the provision and for this Court to now generalise "an agent" within the meaning of s 409 to encompass all legal agents would be a radical departure from legislative intent.

284 We end our analysis by reiterating the following cautionary words of this Court in *Lim Meng Suang* (at [189]), which we began (see [9] above), and now close, this judgment with:

> **The court *cannot – and must not* – assume *legislative* functions which are necessarily beyond its remit. To do so would be to efface the very separation of powers which confers upon the court its *legitimacy* in the first place.** If the court were to assume legislative functions, it would no longer be able to sit to assess the legality of statutes from an *objective* perspective. Worse still, it would necessarily be involved in expressing views on extra-legal issues which would – in the nature of things – be (or at least be perceived to be) *subjective* in nature. This would further erode the *legitimacy* of the court, which ought only to sit to administer the law in an *objective* manner. [emphasis in italics in original; emphasis added in bold]

Conclusion on the interpretation of the disputed phrase

285 In conclusion, we accept and affirm the majority's ruling that an "agent" within the meaning of s 409 of the Penal Code refers 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" (MA Judgment at [103]).

286 First, this interpretation is supported by the language and structure of s 409 itself, which not only makes a clear distinction between the phrase "in the capacity" and "in the way of his business" but also identifies five other trades or professions alongside that of an "agent". Second, the legislative history of the provision amply indicates that the provision was intended to be read *ejusdem generis* and only capture professional agents. The fact that the UK Parliament saw it fit to enact an offence specifically targeting CBT by directors is also a compelling indication that such persons were not intended to fall within the scope of the early provisions on embezzlement by bankers, merchants, brokers, factors, attorneys and other agents on which s 409 was based. Hence, ***both the***

text and context of s 409 indicate that "in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent" only encompasses persons who are entrusted with property or dominion over it in the course of the commercial activities of their trusted trades or professions – including those who are in the business of agency (ie, professional agents). In addition, an examination of the relevant authorities reveals a coherent and well-established line of authority that an "agent" within the meaning of s 409 must be an individual who is in the *business or profession* of providing agency services, and who receives money and other property in the way of that business.

287 The next question is whether the classes of persons identified in Question 2, namely directors of corporations, governing board members or key officers of a charity, and officers of a society, fall within the scope of s 409 as "agents". This question must be answered in the *negative*. Following from the above analysis, such persons are not in the *business* of agency. Nor do they provide their services to the community at large. We accept that company directors do play a vital role in corporate governance, and consequently have a significant impact on commerce and enterprise. However, a director of a company has only one principal, *ie*, his company, and it would be a stretch to argue that he is in the *business* of agency even if he does receive remuneration for his services. In other words, a company director, while clearly a legal agent with onerous fiduciary duties, is not a *professional* agent within the object of s 409. As we have explained, this is the reason why legislative amendment was found to be necessary both in the UK and Malaysia to specifically target CBT by directors. The same difficulties arise, but *a fortiori*, in relation to governing board members or key officers of a charity, and officers of a society given that these persons are not even engaged in any commercial activity or business, let

alone the business of agency. We are therefore led to the conclusion that directors of corporations, governing board members or key officers of a charity, and officers of a society are *not* "agents" within the scope of s 409. The majority of the High Court thus correctly found that the respondents cannot be convicted under s 409.

Conclusion: Our answers to the questions referred

288 For the foregoing reasons, we answer the questions referred to us in the present criminal reference as follows:

(a) *Answer to Question 1*. For the purposes of s 409 of the Penal Code, the expression "in the way of his business as ... an agent" refers only to a person who is a *professional* agent, *ie*, one who professes to offer his agency services to the community at large and from which he makes his living.

(b) *Answer to Question 2*. A director of a corporation, or governing board member or key officer of a charity, or officer of a society, who is entrusted with property, or with any dominion over property, by the said corporation, charity, or society, is *not* entrusted in the way of his business as an agent for the purposes of s 409 of the Penal Code.

289 Given our answers to both questions, there is no need for us to make any consequential orders. The sentences meted out to the respective respondents by the High Court will remain.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge

Quentin Loh Judge	Chua Lee Ming Judge

Hri Kumar Nair SC, Christopher Ong, Zhuo Wenzhao, Tan Zhongshan and Germaine Boey (Attorney-General's Chambers) for the applicant;
Kenneth Tan SC (Kenneth Tan Partnership) (instructed) and Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP) for the first respondent;
Edwin Tong Chun Fai SC, Aaron Lee Teck Chye, Jason Chan Tai Hui, Lee Bik Wei, Peh Aik Hin, Kelvin Kek, Lee May Ling and Jasmine Tham (Allen & Gledhill LLP) for the second respondent;
Seah Zhen Wei Paul and Liang Hanwen Calvin (Tan Kok Quan Partnership) for the third respondent;
Fourth respondent in person;
N Sreenivasan SC (Straits Law Practice LLC), Chelva Retnam Rajah SC and Megan Chia (Tan Rajah & Cheah) for the fifth respondent;
Andre Maniam SC and Pereira Russell Si-Hao (WongPartnership LLP) for the sixth respondent.