

HONG KONG / JUDGMENT

HKSAR v. LEUNG WAI YIP

COURT

Court of Appeal

DECIDED

25 April 2008

CASE / FILE NUMBER

CACC315/2005

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Before: Hon Stuart-Moore VP, Yeung JA and Beeson J Dates of Hearing: 28 February 2007 and 29 February 2008 Date of Judgment: 25 April 2008 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court): This is an application for leave to appeal against conviction. The applicant was convicted of theft on 27 June 2005 following a trial in the District Court before Judge Longley. He was sentenced three days later to 18 months imprisonment suspended for 2 years and fined \$50,000. The particulars of the charge alleged that on or about 14 October 2003, the applicant stole a chose in action, namely a debt of \$646,050 owed by Hong Kong Management Association (HKMA) to Computer Graphics Technology Limited. The applicant was acquitted on a 2nd charge of theft where the particulars differed only as to the date (14 February 2004) and the amount of the debt (\$146,300). The facts Most of the evidence was agreed. The undisputed background to the case was provided in the Admitted Facts which, in paragraphs 1 to 6, dealt with the applicant s formation of Computer Graphics Technology Limited (Company 1) in July 2002 with Ng Wai-kei (PW1) and the subsequent setting up by the applicant and his brother, Leung Wai-keung, of Computer Graphix Technology Limited Company (Company 2). The business of both companies was to organise computer courses for HKMA. The applicant s purpose in forming Company 2 arose from disagreements between himself and PW1 in regard to Company 1 which had soured their business relationship. Their last meeting was shortly before 3 July 2003 when PW1 went to France. He was there until 15 July 2003. Thereafter, two sums of money owed by HKMA to Company 1 were paid into Company 2 s bank account at the applicant s request and without PW1 s knowledge. The judge, in the course of providing his reasons for verdict, summarised the essence of the prosecution s case as having been that the applicant had caused \$646,050 and \$146,300, which were the two debts owed by HKMA to Company 1 (as reflected in the 1st and 2nd charges), to be transferred by HKMA to the bank account of Company 2, noting that the sole difference between the two company names was that the in Graphics of Company 1 had been substituted with an in Company 2 s name. Company 2 was registered on 1 September 2003 after the Companies Registry had been notified of Company s Extraordinary General Meeting (EGM) which was purported to have taken place with PW1 s consent on 7 August 2003

when it was resolved that the capital of that company should be raised from \$2 to \$10,000 by the creation of 9,998 additional shares. In the Return of Allotments filed at the Companies Registry, the applicant's brother was allotted one share and the applicant 9,997 shares, reducing PW1's original 50 per cent shareholding, from the time when he and the applicant had held just one share each, to 0.01 per cent. None of these developments was known to PW1 at that time. The first six paragraphs of the Admitted Facts provide a convenient summary of the evidence relating to the setting up of Company 1 and Company 2 and of the discovery by PW1 of the existence of Company 2. These paragraphs read as follows:

1. Ng Wai-kei (PW1) and Leung Wai-yip (the Defendant) established Computer Graphics Technology Limited (Company 1) on 10 July 2002 each of them owning 50% of the shares. The total capital of Company 1 was HK\$2. Ng and the Defendant were the only directors of Company 1. A secretarial company, Success Corporate Services Limited (SCS) filed the incorporation documents in the Company Registry and also acted as company secretary. SCS resigned as Company Secretary immediately after filing and PW1 became company secretary. The registered address of Company 1 was the business address of SCS.
2. The Defendant had possession of all company documentation including Memorandum and Articles of Association, share certificates and company chop. A HSBC bank account 558-2-031307 (A/C-1) in the name of Company 1 was opened and PW1 and the Defendant were joint signatories. The business of Company 1 was organizing computer courses for the Hong Kong Management Association (HKMA). It was agreed between the Defendant and PW1 that all fees received from HKMA would be deposited into A/C-1 and, after deduction of appropriate expenses, profits if any would be shared equally between the two of them.
3. In or about May 2003, the Defendant suggested to PW1 that PW1 give up his shareholding in Company 1. The Defendant prepared a proposal to dilute the shareholding of PW1 and a discussion between PW1 and the Defendant took place on a date between 26th June and 3rd July 2003. No agreement was reached. PW1, however, signed a number of cheques. PW1 was away from Hong Kong from 3rd July for a number of days. However he had had no contact with the Defendant since June 2003.
4. In August 2003 using the services of SCS the Defendant and his brother Leung Wai-keung established another company named Computer Graphix Technology Limited (Company 2). This Company was registered on 1 Sep 03. The Defendant opened an account at HSBC in the name of Company 2, account number 558-4-032956 (A/C-2). SCS was the secretarial company for Company 2. The business of Company 2 was arranging computer courses for HKMA. The registered address of Company 2 was the business address of SCS.
5. In or about the month of February 2004, PW1 discovered an advertisement for courses organized by Company 2 in a local newspaper. PW1 then approached SCS and found that a number of changes had been made to Company 1.

- (i) An annual return was filed on 11 July 03 stating that PW1 resigned the post of secretary and SCS was appointed as the new secretary; effective from 11th July 03. (ii) An EGM was convened on 7 Aug 03 at Unit 3506, 35/F, Tower 2, Lippo Centre, the registered office of Company 1 and the number of shares of Company 1 increased from 2 to 10,000 by the creation of 9,998 new shares. A return of allotment of 9997 of these shares to the Defendant and 1 share to Leung Wai-keung was filed in the Company Registry on 7 Aug 03; PW1 retained his original 1 share.
6. PW1 made a report to police on the 12th of February 2004. (Appeal bundle pp. 11-13) The Admitted Facts then dealt with banking evidence relating to the sums referred to in the charges. In particular, Mr Lo Hing-kwong (PW5), the manager of HKMA, was asked by the applicant to deposit \$646,050 arising from the contract between HKMA and Company 1 into A/C-2, Company 2's account. This occurred on 14 October 2003. The sum of \$146,300 referred to in the 2nd charge was deposited into A/C-2 on 14 February 2004. These paragraphs read as follows:
7. HKMA entered into a first contract with Company 1 on 2 Nov 2002 and a second contract with Company 1 on 25 April 2003. The contracts authorised Company 1 to organize computer courses for HKMA in the period of Sep 2002 to April 2004. Relevant banking documents show the following deposits were made by HKMA to A/C-1 in respect of course fees:
- (i) A HKMA Bank of East Asia cheque numbered 728075 in the amount of HK\$641,600 on 19 Nov 02; (ii) A HKMA Bank of East Asia cheque numbered 749444 in the amount of HK\$228,000 on 17 Jan 03; (iii) A HKMA Bank of East Asia cheque numbered 749839 in the amount of HK\$329,600 on 20 Feb 03; and (iv) A HKMA Bank of East Asia cheque numbered 777453 in the amount of HK\$694,640 on 22 May 03;
8. [PW5 of HKMA] was requested by the Defendant to deposit HK\$646,050 into A/C-2. [PW5] did so on 14 Oct 03. This was the course fee arising from the contract between HKMA and Co-1 [the 1st charge]. Upon instruction of the Defendant, HK\$1,145,162.5 was deposited into A/C-2 by HKMA on 13 Dec 03. This was course fees arising from the contract between HKMA and Co-2. An amount of HK\$924,650 was deposited into A/C-2 by HKMA on 14 Feb 04. HK\$146,300 out of the HK\$924,650 [were for] course fees arising from the contract between HKMA and Co-1 [the 2nd charge]. It was not in dispute that PW5 had been asked by the applicant to deposit \$646,050 into AC/-2, Company 2's bank account, despite the fact that this was money which belonged to Company 1. Details of the new company name together with its bank account details had been sent by email (exhibit P45) to Ms Joyce Choi, PW5's assistant. Part of the text of the email sent on 30 September 2003 reads: Dear Joyce : This is my company account: Computer Graphix Technology Ltd Acct number : 558-4-032956 HSBC Would you please please please submit the document to your dept head? Sorry for pushing you like that, coz I am almost broke. I am really appreciate your quick action, thank you very much !!! (Appeal bundle p. 214) This email was followed by a request from the applicant to PW5 to deposit the \$646,050 into Company 2's bank account which was duly done on 14 October 2003. In simple terms, the allegation made by the prosecution in these proceedings,

was that the moment HKMA deposited \$646,050 into Company 2's account by way of settlement of the fees arising from its contract with Company 1, the chose in action represented by HKMA's debt to Company 1 was extinguished and it was the act which caused this to happen which was the act of appropriation on the applicant's part. However, whereas the debt of HK\$646,050 was admitted by the applicant to have been credited to A/C-2 at his request, there was no evidence of any such request from the applicant for HKMA to transfer the \$924,650 into A/C-2 which included the sum of \$146,300 owed to Company 1. This distinction resulted in the applicant's acquittal on the 2nd charge as there was no evidence of an appropriation by him of the second chose in action. The whole matter came to light when, in February 2004, PW1 read an advertisement for courses being run by the new company. Police were informed and the applicant was arrested and interviewed. The applicant's replies to the police are summarised in the Admitted Facts. In effect, he denied any dishonest conduct on his part. He also denied an intention to deprive Company 1 permanently of the debt owed to it by HKMA or to deprive PW1 of his share of the profits in Company 1. Paragraphs 9 to 11 of the Admitted Facts in regard to the 1st charge, with which we are now alone concerned, read:

9. The Defendant was arrested and interviewed under caution. The Defendant claimed under caution that he did all the work in running Company 1 and PW1 was there only to share the profit. He had been discussing with PW1 for him to resign. However, no final agreement could be reached and subsequently he could not contact PW1 since June 2003. The staff in SCS, Shum Wai-chun (PW3) and Lai Lok-ki (PW2) then suggested to him that he could increase the shares of Company 1 and add another shareholder. He said they also gave him relevant forms to sign for the Companies Registry. He never forged any signature of PW1. He did not know the procedure of holding an EGM. He never gave any written notice to PW1 about any EGM. Leung Wai-keung was his brother and the brother knew nothing at all. Leung Wai-keung simply helped him to set up Company 2. He used a similar name for Company 2 because he wanted the good reputation of Company 1 to continue. He notified his business clients about the establishment of Company 2 and they dealt with him using the name of Company 2. HKMA entered into contract with Company 2 starting Sep 03.
10. The Defendant said under caution that he requested HKMA to deposit HK\$646,050 being the course fees arising from the contracts between HKMA and Company 1 into A/C-2 on 14 Oct 03 without the consent of PW1. He knew that any income of Company 1 should normally be deposited into A/C-1. He, however, denied any intent to deprive PW1 from sharing this amount of money. There had to be 2 signatures for the operation of A/C-1. He transferred the money to Company 2 because he could not contact PW1 and he needed money for the running of Company 2 and to deal with existing liabilities of Company 1. Company 2 simply received the sum on behalf of Company 1. After the deduction of expenses, the net profit would then be transferred to Company 1. He claimed he did this for convenience of operation. He also paid the running fees of Company 1 (e.g. salary for the tutors and other operational expenses) out of his own pocket. There was no profit arising from conducting the business of Company 1 after Company 2 came into existence.

11. The Defendant also said under caution that PW1 orally confirmed that he was willing to sell his shares and leave Company 1 in June or July 03. No final formal agreement was reached so the Defendant then increased the share capital in order to facilitate the future running of Company 1. He did not want the bad working relationship between shareholders to ruin the business. He was then advised by SCS that he could become a majority shareholder by increasing the share capital. He was waiting for PW1 to sign the necessary documents for selling his 1 share and he (the Defendant) could then have the final say in the company. In fact, it was him alone, he claimed, who obtained the business from HKMA since he had been their part time tutor and he knew the manager Lo Hing-kwong [PW5] very well. PW1 contributed nothing in establishing markets. In any event, he had no intention to deprive PW1 from sharing the profits. PW1 could still have 50% of the profit from Company 1 as agreed. (Appeal bundle pp. 14-16) Defence case The applicant, who was 38 years old at the time of conviction, had no previous convictions. He gave evidence at trial setting out the attempts he had made to persuade PW1 to leave Company 1 and how he had tried to find PW1 when he disappeared for a time by telephoning him. He said that he had the idea of increasing the share capital of Company 1 after his failure to discover PW1's whereabouts and he had obtained advice from Winnie Sham (PW3) at Success Corporate Services Limited (SCS) as to what he should do. However, despite the alterations to Company 1's structure, the applicant said that he still found that it was impossible to withdraw money from A/C-1 without PW1's signature. It was then, according to the applicant, that he set up Company 2. He said that he again took advice from PW3 who told him it would be possible to have money owed to Company 1 put into the account of Company 2. He then explained to the relevant personnel at HKMA what he was doing and he said that he was given approval to have the tuition fees owing to the old company (Company 1) paid temporarily into the new company's account. His purpose was to enable him to pay lecturers fees on behalf of Company 1 as well as the marketing and advertising expenses. Ms Joyce Choi, PW5's assistant, who was called as a witness on behalf of the applicant, gave evidence about PW1's disappearance from the scene and she said that when she spoke to the applicant she learnt from him that he had formed a new company to ease the urgency of the situation. The judge's assessment In the light of the factual background to the case, only two real issues on the 1st charge emerged at trial. These were set out by the judge in the Reasons for Verdict as follows: there is no doubt on the evidence that there was an appropriation by the defendant of a chose in action belonging to another, namely the debt of \$646,050 owed by the HKMA to the original company. Not only had the money been transferred to the new company in breach of contract at the defendant's request but on the evidence at least part of that sum was used by the new company in November 2003.
30. The matter in issue insofar as the 1st charge is concerned is the state of mind of the defendant at the relevant time, in particular, whether he was acting dishonestly and with the intention of permanently depriving the original company of it. In assessing the applicant's state of mind, the judge considered, amongst other things, that by using the same secretarial company in relation to the proposed expansion of shares and in relation to the setting up of

the new company as the applicant and PW1 had used when setting up Company 1, it was virtually inevitable that PW1 would find out what the applicant had done. The judge also took into account that PW1 had made no effort to perform his duties under the contracts between HKMA and Company 1, that Company 2 had sufficient funds in its bank account to repay the gross amount due to Company 1 and that PW1's unannounced disappearance (to France as it turned out) for about twelve days meant that telephone calls to PW1's home were left unanswered. However, up to the time PW1 returned to Hong Kong on 15 July 2003, the judge noted that no messages had been recorded on the voicemail of his mobile telephone. Furthermore, the applicant had made no attempt to email PW1 although he was aware that the issue concerning their respective shareholding was central to their dispute. The judge was satisfied that there had been a fundamental difference of opinion between the applicant and PW1 as to how the profits of Company 1 should be divided and, arising from this, as to how the value of their respective shares should be assessed. The judge went on to conclude that the applicant must have been well aware of this and yet, despite this, he had proceeded to dilute the shares of Company 1 and had made false representations to the Companies Registry that an EGM had been held on 7 August 2003 to endorse the allotment of new shares. With these considerations in mind, the judge concluded that the applicant's failure to elicit a response from PW1 on the telephone was in the nature of a pretext, rather than a reason, for his actions leading up to the time he requested HKMA to deposit the money owing to Company 1 into Company 2's account. The judge rejected the claim by the applicant that he needed to pay the expenses of Company 1. A number of cheques, for the express purpose that lecturers could be paid, had been signed by PW1 and left in the applicant's possession during the final meeting between the two of them. Furthermore, there was no suggestion that the absence of PW1 caused any difficulty in filing the company's annual return but, if he had genuinely found it impossible to trace PW1, the judge considered that the applicant might then have needed to take lawful steps to overcome this. The judge was satisfied that the applicant had not genuinely sought to trace PW1 and would have been well aware that the situation did not justify the steps he was taking. The judge did not accept the shifting of blame by the applicant onto PW3 of SCS, from whom the applicant said he had taken advice, because PW3's testimony, which the judge accepted, was that she could only recall the applicant giving her instructions to increase the share capital of Company 1. She had no recollection of the applicant explaining to her, as he had alleged, that he was doing this because he was unable to find his business partner and was, therefore, unable to run the company. Indeed, in July 2003, PW3 had very limited knowledge of company matters and, until a short time before, she had simply been working as a receptionist. By contrast, the applicant was a graduate from university in the United States of America and the judge found that he would have been aware that what he was doing was not honest particularly as this involved signing the record of an EGM that had never occurred. It was significant in the judge's view that the explanation the applicant gave for the increase of shares was in direct conflict with what he had told the police on 18 March 2004 in his 3rd video-recorded interview. The account he gave in his evidence was that Company 1 could not run new courses for HKMA in the absence of PW1 whereas the account he had

given to the police on 18 March 2004 was that the increase of shares was effected by him to facilitate his own running of Company 1 after PW1 had resigned. The judge was satisfied also that the applicant did not, contrary to the evidence given by the applicant, ask PW5 or his assistant, Joyce Choi, whether it was possible, when PW1 had disappeared and Company 1 needed to pay its expenses, for HKMA temporarily to pay the fees owed to Company 1 into the account of Company 2. The judge found that the applicant was dishonest in his attempt to increase the share capital of Company 1 in both the objective and the subjective sense set out in *R v Ghosh* [1982] 75 Cr App R 154. The applicant realised that, even with an increase of shares in the company, he could not gain access to the bank account of Company 1 without the consent of PW1 and the judge was satisfied that the applicant, in setting up the new company and asking HKMA to pay the money owed to Company 1 into the account of Company 2, did this with similar dishonest intent. The purpose, the judge found, was to do business in the name of Company 2 without having the encumbrance of PW1 and without needing to obtain the consent of PW1 to withdraw the money or to acknowledge his right to a share of the profits. The judge found that the appropriation of the debt in the 1st charge was not only dishonest but done with the intention of permanently depriving Company 1 of it. While the applicant may have intended to pay Company 1's expenses, he intended to treat the balance as his own to dispose of regardless of the rights of others. By contrast, as we have indicated already, the judge acquitted the applicant on the 2nd charge because he had not at any stage given specific instructions to HKMA to transfer the sum due into Company 2's account and the applicant had taken no action in regard to that sum which could amount to an assumption by him of the rights of an owner. We do not have to decide whether this was a somewhat generous assessment on the part of the judge if the theft in charge 1 was correctly found to have been proved. The applicant had arranged for the creation of Company 2 in such a way that it would be taken to have replaced Company 1. Having asked for the funds covered by charge 1 to be transferred to the bank account of Company 2, it might well be argued, if charge 1 was properly made out, that HKMA had implicitly been given the message that Company 1 was defunct and that all subsequent payments should be made to Company 2. Ground of appeal Mr Phillip Ross, on the applicant's behalf, advanced a single ground of appeal, submitting that the judge had: erred in finding there had been an appropriation of property belonging to another since when the Applicant requested [PW5, HKMA's manager] to deposit \$646,050, representing the value of a debt belonging to Computer Graphics Technology Limited [Company 1], into the account of Computer Graphix Technology Limited [Company 2]:

- (a) there was no finding by the learned judge nor was there sufficient evidence that the Applicant had appropriated the debt by such request; [and]
- (b) the subsequent electronic transfer of \$646,050 into the account of [Company 2] or the use of this money thereafter could not amount to an appropriation by the Applicant of property belonging to [Company 1]. We can indicate at this stage that we are not concerned with the last of Mr Ross submissions which was, in effect, that once the \$646,050 had been credited by inter-bank transfer to Company 2's account there could be no appropriation of Company

1 s money when it was used by the applicant as, by that stage, this use related to a new chose in action belonging to Company 2. Neither the prosecution nor the respondent in these proceedings has ever suggested that the appropriation of the funds, or a part of them, from the Company 2 account could amount to the appropriation alleged in this case although, no doubt, it was highly relevant to the judge s conclusion that the applicant had acted dishonestly and with an intention permanently to deprive. We return, therefore, to Mr Ross submission that the applicant had not committed any act of appropriation at the time the \$646,050 was transferred into Company 2 s account which could amount to theft. Mr Ross contended that the applicant s request to PW5 to pay \$646,050 to Company 2 could not amount to an act of appropriation by the applicant when the actual payment had not been made by an innocent agent but rather was made by someone who had exercised an independent discretion to pay . By this, Mr Ross was referring to the fact that although PW5 had spoken about having just acted according to the instructions he had been given, he had also said that he had come to the conclusion that PW1 and the applicant had reached settlement to dissolve the first company . This independent assessment on PW5 s part was said by Mr Ross to distance the applicant from any act of appropriation that might otherwise be suggested in the light of this court s decision in HKSAR v Wong Cho-sum and Ors [2001] 3 HKLRD 76. We shall return later to that case. Mr Ross brought to our attention in support of his argument the decision of the English Court of Appeal in R v Briggs [2004] 1 Cr App R 451. The prosecution s case, summarised in the headnote (at page 451), was that the appellant had: submitted to a firm of licensed conveyancers an authority signed by the victims authorising the transfer of the money which was subsequently applied to the purchase of a property in the names of the appellant and her father. The prosecution alleged that the credit balance was appropriated by the appellant when she caused the money to be transferred for her own purposes, namely, the purchase of the property, in her own name, which was contrary to the wishes of the victims that the money would be used to ensure that the property was conveyed into their names. The trial judge directed the jury that it was open to them to conclude that there had been an appropriation of the credit balance, notwithstanding that it had been transferred with the victims consent, if that consent was induced by fraud. It was argued for the appellant in that case that there could be no appropriation of property if, by fraud, a person induced the owner to part with the item, an argument which relied on a passage (cited in the judgment at page 454) from R v Naviede [1997] Crim LR 662 in which Hutchison LJ said: We are not satisfied that a misrepresentation which persuades the account holder to direct payment out of his account is an assumption of the rights of the account holder as owner, such as to amount to an appropriation of his rights within s.3(1) of the 1968 Act. The court in Briggs went on to say: A similar approach has been suggested by the late Professor Sir John Smith in his cogent and persuasive commentary on R. v Naviede [1997] Crim L.R. 662 at 665 where he explained that: - In Archbold News (Issue 9, November 14, 1996) I considered the question and, referring to my commentary Caresana [1996] Crim L.R. 667, doubted whether it could be theft because the diminution in V s thing in action is effected by V or by V s agents and it is not easy to discern the necessary act of appropriation. The opinion of the court [in Naviede quoted in para. 8

above] seems to be exactly the same I distinguished the case where D induces V to make a telegraphic transfer from that where D dishonestly presents a cheque drawn on V's account causing it to be debited. This, it is submitted, does amount to an appropriation of the thing in action belonging to V. In the telegraphic transfer case it is true that D procures the whole course of events resulting in V's account being debited; but the telegraphic transfer is initiated by V and his voluntary intervening acts break the chain of causation. It is the same as if V is induced by deception to take money out of his safe to pay to D. D does not at that moment appropriate it V is not acting as his agent. D commits theft only if and when the money is put into his hands. In response, Mr Barry contends that there was an appropriation in this case as is illustrated by the decision of this court in *R. v Hilton* [1997] 2 Cr.App.R. 445, which was a case in which a defendant on a theft charge, who was one of the designated signatories to a bank account had caused monies to be transferred out of that account to other accounts. This court held that the instructions of the defendant had caused the bank to make the transfers and therefore the defendant had appropriated the charity's credit balance by assuming the charity's right to the balance. In that case, we consider that there was a clear act of appropriation because, in the words of the late Professor Sir John Smith in the case note on *Naviede* to which we have already referred at p.666:- There, [the defendant] had direct control of a bank account belonging to a charity. He caused payments to be made from that account to settle his personal debts. That was a completely straightforward case of theft of a chose in action belonging to another. We also agree with his further comment that that is a totally different case from the situation in cases such as *Naviede*, which were all concerned with the situation where [the defendant] by deception induces [the victim] to initiate a transaction whereby [the victim's] bank account is debited and that of the [defendant] is credited ([1997] Crim L.R. 662 at 666). In other words, we consider that where a victim causes a payment to be made in reliance on deceptive conduct by the defendant, there is no appropriation by the defendant. We are fortified in coming to that view by three further factors. First, no case has been cited to us where it has been held that an appropriation occurs where the relevant act is committed by the victim albeit as a result of deception. Second, if Mr Barry was correct, there would be little need for many deception offences as many acts of deceptive conduct would be covered by theft but it is noteworthy that the Theft Act 1968 (as amended) contains deception offences to deal with the case where a defendant by deception induces a person to take a step which leads to the wrongdoing of gaining property by deception (s.15) or obtaining a money transfer by deception (s.15A) or obtaining a pecuniary advantage (s.16). Third, we have already referred to the explanation of the word appropriation in s.3(1) of the Theft Act 1968 and it is a word which connotes a physical act rather than a more remote action triggering the payment which gives rise to the charge. The Oxford English Dictionary defines appropriation as to take possession for one's own, to take to oneself. It is not easy to see why an act of deceiving an owner to do something would fall within the meaning of appropriation. Indeed, we consider that in this case the appropriate charge might have been for an offence of deception. Our conclusion is that the conviction on count 1 must be quashed as there was no appropriation by the appellant of 49,950. We have, with respect, had difficulty in following

the English Court of Appeal's conclusion that appropriation connotes a physical act rather than a more remote action triggering the payment. Appropriation in both the English statute and the Hong Kong ordinance is defined as any assumption by a person of the rights of an owner. Neither from these words nor from the dictionary definition to take possession for one's own, to take to oneself do we consider that appropriation necessarily implies a physical taking of property belonging to another. In *Wong Cho-sum's* case (above), this court extensively reviewed the law in regard to what is meant by appropriation in the context of a charge of theft of a chose in action. In that case, funds had been electronically transferred from the bank accounts of the victims of fraud, either by the victims themselves or by a defendant using a victim's credit card, into the bank account of a model agency being run by fraudsters. It was the factual basis of the 10th charge on which, for present purposes, this application has focused. In that example, where Mr Ross advanced a very similar argument to the present, the victim had herself effected the transfer of money and it was this factor, as Stock JA, giving judgment stated, which required particular attention. The relevant passage in the judgment (at pages 89-90) reads as follows: Charge 10

32. In relation to charge 10, the facts differ from those which apply to the other choses in action charges, in that the electronic transfer was actually effected by the victim, in other words, by herself pressing the relevant keys. The victim was a lady named Li Lai Ying. The facts can be found in the reasons for verdict as follows: PW4, Madam Li Lai Ying, was dealt with in the usual manner. Her manager's name was Rosemary who promised her 18 hours work at \$2,960 per hour, less 15 per cent commission. She accepted that job offer. Rosemary then told her that the company had to be paid \$24,500 in advance for a portfolio of photographs. She was brought to an ATM machine by a scout, where she had second thoughts and returned to the company. There, Rosemary worked on her to try to persuade her once more. She returned to the ATM machine with Rosemary and there transferred \$24,500 to an account number that Rosemary had given her. She soon felt cheated however, and tried to contact Rosemary but was unsuccessful. (Tr pp. 39-40).
33. The argument is that there has in this case been no act of appropriation by D4. The act of appropriation, the act of diminution of the credit balance was, it is said, the act of the account holder who pressed the keys, and it was on her part a voluntary and consensual act.
34. The fact that such diminution in the credit balance was effected with the consent of the holder of the account does not preclude the act by which that diminution has been effected from being an appropriation: see *DPP v Gomez* [1993] AC 442. As Lord Browne-Wilkinson observed in *DPP v Gomez* at p. 495H: ... the word appropriation in isolation [is] an objective description of the act done irrespective of the mental state of either the owner or the accused an approach endorsed in the recent decision of the House of Lords in *R v Hinks* [2001] 2 AC 241.
35. We have been taken in some detail to commentaries by Professor Smith, proffered on a number of occasions and in response to various decisions, the effect of which have been to suggest that it is difficult to discern an appropriation by the defendant where the only act

that has been done has been done by the [holder of the credit balance] himself and he has not done it as agent of D (see *R v Hilton* [1997] 2 Cr App R 445 at p.453, citing Professor Smith in [1996] Crim LR 667 at p.669). We do not think that the case now before us poses that problem; a problem predicated on a self-contained act by a credit holder who is induced by a deception to effect a transfer. The charge with which we are presently concerned is not a case where the defendants have merely accepted a transfer of funds as a result of some act instigated by their misrepresentation. D4 has in the present case actively assisted in the very act of transfer itself; in the act of appropriation itself. It is clear from the evidence that she influenced and coerced Ms Li to make the transfer, went with her to ensure that it was done, stood by her to ensure that it was done, providing the account number without which the transfer could not be effected. It matters not whether one concludes that the act was done at her direct command, or by Ms Li as D4's agent. It suffices to conclude, as one safely can, that she directly participated in the very act of transfer itself, thereby engaging in an appropriation. Her conduct was no different from that of the appellant in *R v Hinks* [2001] 2 AC 241, as described in that judgment at [7], who influenced and coerced the victim to withdraw his money and who accompanied him to the bank to make sure that the moneys were withdrawn. We are satisfied that there has in the case of charge 10 been a dishonest appropriation by D4, for which D1 is jointly liable, and that that appropriation was with the intent that Ms Li should permanently be deprived of the chose in action which was thus appropriated. Mr Ross placed heavy reliance on the main factual difference between the present case and the 10th charge in *Wong Cho-sum's* case. Here, there was no direct participation by the applicant in the act of transfer. The question for us has been whether this difference is one of real significance. For the applicant to be guilty of theft in the present circumstances it would mean that a fraudulent request to PW5 to remit the money owing to Company 1 into the bank account of Company 2 instead could itself amount to an act of appropriation (or an attempted appropriation if the request to do this had not been acted upon). On the present facts and in the light of what is set out in *Wong Cho-sum* and *Ors*, we consider that an appropriation sufficient to establish theft can be made out provided the other elements necessary to establish theft are proved. Stock JA, in *Wong Cho-sum* and *Ors* (at page 84) said:

16. A study of the decision in *R v Kohn* (1979) 69 Cr App R 395 highlights, we suggest, the following important distinction, a distinction relevant to the present case: that whereas the fraudster who himself causes the transfer of money from the victim's bank account does not thereby obtain a chose in action belonging to another, because what he obtains is a fresh chose in action belonging to himself, he may nonetheless be guilty of theft of the victim's chose in action if it be shown that by his act he has appropriated it. Appropriation is not to be equated with obtaining. And where there is an act of appropriation, in other words an act by which the fraudster assumes the rights of the owner of the chose in action, and the thing recoverable by action is diminished or extinguished by the act of appropriation, then the fraudster is guilty of theft. That is because each element of the offence as defined by s.2(1) of the Ordinance is then made out. There has been an appropriation (the interference with the

owner's rights); of property belonging to another (the credit balance belonging to the victim); with the intention permanently to deprive the owner of that property (it is not intended that the proceeds will be utilised to restore the balance); and, assuming dishonesty is shown, the offence is complete. We have not found it easy to determine the point at issue but we have difficulty in seeing how, realistically, this court's decision in *Wong Cho-sum* can properly be distinguished on the facts of the present case. Although, in the former case, the defendant was present in a physical sense when the victim transferred the funds to the account of the fraudsters and was effectively coercing the victim to do so, the applicant, in the instant case, dishonestly caused a diversion of the funds away from Company 1's account as the direct result of his misrepresentation to PW5 by fax and by telephone. In such circumstances, we consider that the line of reasoning in *R v Gomez* [1993] AC 442 would have application although we notice that in *Briggs* no mention is made of *Gomez* despite, according to the headnote, the court in *Briggs* having been referred to that case. In *Gomez*, the defendant who was an assistant shop manager, persuaded his manager to authorise the sale of property knowing that the customer's cheques were stolen. He was charged with the theft of the property. The English Court of Appeal allowed the appeal against conviction for theft but certified (at page 444) a point of law of general public importance was involved in its decision in the following terms: When theft is alleged and that which is alleged to be stolen passes to the defendant with the consent of the owner, but that has been obtained by a false representation, has (a) an appropriation within the meaning of section 1(1) of the Theft Act 1968 taken place, or (b) must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner? The Theft Act 1968, in all material respects, is in precisely the same terms as the Theft Ordinance, Cap. 210 which provides, so far as it is relevant:

2. Basic definition of theft

- (1) A person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and thief and steal shall be construed accordingly. 3. Dishonestly

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest-

- (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; 4. Appropriates

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, 5. Property (1) Property includes money and all other property, real and personal, including things in action and other intangible property. The House of Lords in *Gomez* allowed the appeal by the Director of Public Prosecutions, holding that an act which was expressly or impliedly authorised by the owner of property, or which was consented to by him, could amount to an appropriation of the goods within section 1(1) of the Theft Act where such authority had been obtained by deception. Having considered the speech of Viscount

Dilhorne in *R v Lawrence* [1972] AC 626, Lord Keith, in *Gomez* (at 457B) said: It will be seen that Viscount Dilhorne's speech contains two clear pronouncements, first that it is no longer an ingredient of the offence of theft that the taking should be without the owner's consent and second, that an appropriation may occur even though the owner has permitted or consented to the property being taken. Lord Keith went on (at 459F-G), following an analysis of Lord Roskill's speech in *R v Morris* [1984] AC 320 (which concerned the switching of price labels on property in a supermarket), to state: In my opinion Lord Roskill was undoubtedly right when he said in the course of the passage quoted that the assumption by the defendant of any of the rights of an owner could amount to an appropriation within the meaning of section 3(1), and that the removal of an article from the shelf and the changing of the price label on it constituted the assumption of one of the rights of the owner and hence an appropriation within the meaning of the subsection. Lord Keith continued, with reference to *Morris* case by saying (at 460D): While it is correct to say that appropriation for purposes of section 3(1) includes the latter sort of act, it does not necessarily follow that no other act can amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner can in any circumstances do so. Indeed, *Reg. v Lawrence* [1972] A.C. 626 is a clear decision to the contrary since it laid down unequivocally that an act may be an appropriation notwithstanding that it is done with the consent of the owner. It does not appear to me that any sensible distinction can be made in this context between consent and authorisation. In the later speech of Lord Browne-Wilkinson (at 495F-496C), (where the references to sections 1 to 5 in the English statute equate with sections 2 to 6 in the Theft Ordinance), he stated: The fact that Parliament used that composite phrase- dishonest appropriation -in my judgment casts light on what is meant by the word appropriation. The views expressed (obiter) by this House in *Reg. v. Morris* [1984] A.C. 320 that appropriation involves an act by way of adverse interference with or usurpation of the rights of the owner treats the word appropriation as being tantamount to misappropriation. The concept of adverse interference with or usurpation of rights introduces into the word appropriation the mental state of both the owner and the accused. So far as concerns the mental state of the owner (did he consent?), the Act of 1968 expressly refers to such consent when it is a material factor: see sections 2(1)(b), 11(1), 12(1) and 13. So far as concerns the mental state of the accused, the composite phrase in section 1(1) itself indicates that the requirement is dishonesty. For myself, therefore, I regard the word appropriation in isolation as being an objective description of the act done irrespective of the mental state of either the owner or the accused. It is impossible to reconcile the decision in *Lawrence* (that the question of consent is irrelevant in considering whether there has been an appropriation) with the views expressed in *Morris*, which latter views in my judgment were incorrect. It is suggested that this conclusion renders section 15 of the Act of 1968 otiose since a person who, by deception, persuades the owner to consent to part with his property will necessarily be guilty of theft within section 1. This may be so though I venture to doubt it. Take for example a man who obtains land by deception. Save as otherwise expressly provided, the definitions in sections 4 and 5 of the Act apply only for the purposes of interpreting section 1 of the Act: see section 1(3). Section 34(1) applies subsection (1) of section 4 and subsection (1) of section

5 generally for the purposes of the Act. Accordingly the other subsections of section 4 and section 5 do not apply to section 15. Suppose that a fraudster has persuaded a victim to part with his house: the fraudster is not guilty of theft of the land since section 4(2) provides that you cannot steal land. The charge could only be laid under section 15 which contains no provisions excluding land from the definition of property. Therefore, although there is a substantial overlap between section 1 and section 15, section 15 is not otiose. From these observations, it is apparent to us that in deciding whether theft has been established against a person who is shown to have intended to deprive the owner permanently of the property he has taken, dishonest appropriation should bear its natural meaning. In circumstances such as the present, this will sometimes, perhaps even more often than not, involve a marked overlap with the offence of obtaining property by deception, contrary to section 17 of the Theft Ordinance (or section 15 of the English statute). Giving dishonest appropriation its natural meaning in the present case, we are satisfied, with the judge's findings in mind, that this was made out in the present case. The applicant had, to adopt the vocabulary of Lord Browne-Wilkinson in *Gomez*, adversely interfered with, or usurped, the rights of the owner to achieve the misappropriation of the debt of \$646,050 owed by HKMA to Company 1. Lastly, Mr Ross submitted that the fact that Company 1 was in a position to sue HKMA or Company 2 for the debt it was owed meant that the debt to Company 1 owed by HKMA had not been extinguished. All that we need to say in this regard is that while perhaps, Mr Ross may be correct as a matter of civil law in suggesting that a right of action by Company 1 against HKMA or Company 2 did exist, we regard this as a red herring in the context of the criminal law. We do not consider that the success of a criminal prosecution for theft in such circumstances as these can be dependent upon the victim having no civil remedy available to seek recompense for the loss.

Conclusion

The conclusion we have reached traverses difficult legal concepts summarised in Blackstone's Criminal Practice [2008], paragraph B4.28, which states: Despite Briggs, the difficulties associated with identifying the act of appropriation would suggest that this remains a matter worthy of further consideration. The difficulties encountered are exacerbated by the wide range of activities that may be identified as an appropriation after the interpretation of that phrase by the House of Lords in *Morris* [1984] AC 320 and *Gomez* [1993] AC 442 (see B4.26). We shall grant leave but, treating the hearing as the appeal, the appeal is dismissed. (M. Stuart-Moore) Vice-President (W. Yeung) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance Mr Zervos SC, SADPP, and Ms Teresa Kam, GC, of the Department of Justice, for the Respondent on 28 February 2007. Mr Robert SK Lee, SADPP and Ms Teresa Kam, Ag SGC of the Department of Justice, for the Respondent, on 29 February 2008. Mr Phillip Ross, instructed by Messrs Reimer & Partners, for the Applicant. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* "0+ i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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