

**IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 1 OF 2025 (CRIMINAL)  
(ON APPEAL FROM CACC NO. 239 OF 2021)

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BETWEEN

HKSAR

Appellant

and

MAK KWONG YIU (麥光耀) (D1)	1 <sup>st</sup> Respondent
CHAN LAI YEE (陳麗兒) (D2)	2 <sup>nd</sup> Respondent
WONG SHUK ON (黃淑安) (D3)	3 <sup>rd</sup> Respondent
LEE YICK MING (李易明) (D4)	4 <sup>th</sup> Respondent

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Before: Mr Justice Ribeiro PJ, Mr Justice Fok PJ,  
Mr Justice Lam PJ, Mr Justice Stock NPJ and  
Sir William Young NPJ

Dates of Hearing: 3-4 September 2025

Date of Judgment: 5 November 2025

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**J U D G M E N T**

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**Mr Justice Ribeiro PJ:**

1. I agree with the judgment of Sir William Young NPJ and also with the concurring judgments of Mr Justice Lam PJ and Mr Justice Stock NPJ.

**Mr Justice Fok PJ:**

2. I agree with the judgment of Sir William Young NPJ and also with the concurring judgments of Mr Justice Lam PJ and Mr Justice Stock NPJ.

**Mr Justice Lam PJ:**

3. I have read the judgments of Mr Justice Stock NPJ and Sir William Young NPJ in draft and I am in full agreement with their reasons for allowing the appeal and restoring the convictions of the defendants. In addition to the admirable analysis of Their Lordships, it is possible to reach the same result by another route. I shall set out this alternative route and some other points by way of additional reasons for allowing the appeal shortly.

4. The gravamen of the conspiracy charges is that the defendants dishonestly agreed to conceal the fact that CISL was the actual placing agent and that Gransing was only a front or disguise. That being the case, in deciding whether there was a connected transaction which needed to be concealed, the proper approach is to ask, without the concealment, with CISL being appointed as the placing agent, whether that appointment would be a connected transaction under the Listing Rules.

5. The answer to that question is clearly affirmative as it is common ground that CISL is a connected person to CFHL.<sup>1</sup> It does not matter that the

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<sup>1</sup> See judgment of the Court of Appeal at [5].

connection stems from Quincy Wong's indirect interest in CISL instead of D1's own interest because it is still a concealment to cover up CISL's agency in such circumstances.

6. It is not necessary to show that the arrangement adopted by the defendants for concealment purposes also falls into the definition of a connected transaction. If such an arrangement also attracts the consequences flowing from a connected transaction, it simply means that they adopted a scheme which did not serve their purpose well. However, even if the arrangement adopted could not come within the definition of connected transaction, it does not mean that there was no concealment. Thus, it is not essential for the prosecution to prove that Gransing was a connected person.

7. In short, the unlawfulness of the scheme lies in the concealment of the role played by CISL in the placements. There are two objectionable aspects to the concealment of the role of CISL. The first aspect is the conflict of interest of the directors involved.<sup>2</sup> The second aspect is the avoidance of the scrutiny of such potential conflict by the independent non-executive directors and the Stock Exchange under the regime governing connected transactions. Both aspects were covered by Charges 1 and 3 and relied upon by the prosecution in the present case.

8. In his Reasons for Verdict,<sup>3</sup> the learned trial judge addressed the issue of connected transaction in accordance with my above analysis.

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<sup>2</sup> See *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq. 461; *Gwembe Valley Development Co Ltd (in receivership) v Koshy and others (No. 3)* [2004] 1 BCLC 131 at [65].

<sup>3</sup> At [135], [136] and [144] of his Reasons for Verdict.

9. As regards the interposition of Gransing being a mere disguise, it is a question of fact. The trial judge made a finding to that effect. I agree with Sir William Young NPJ that there is no basis for disturbing this finding.

10. With respect, the Court of Appeal fell into error by holding that unless the placing agreements between CFHL and Gransing and the sub-placing agreements between Gransing and CISL were sham transactions according to the test laid down by Diplock LJ in *Snook v London and West Riding Investments Ltd*,<sup>4</sup> the prosecution case cannot be made out.

11. *Snook v London and West Riding Investments Ltd* was concerned with litigation between parties to a refinancing transaction in which the plaintiff claimed that the document signed by him with the defendant finance company did not reflect the true nature of the dealings between them. It was in that context Diplock LJ set out the test for determining whether a party could assert a claim not in accordance with the terms of the signed document on the basis of sham.

12. In the present case, we are addressing an entirely different issue. The prosecution alleged that the interposition of Gransing was an arrangement to conceal from the independent non-executive directors and the Stock Exchange the actual appointment of CISL to perform the role of placing agent. There is no reason in principle why such concealment could not be achieved by signing placing agreements and sub-placing agreements which took legal effect as between Gransing, CISL and CFHL.

13. In my judgment, it was an error of law to confine the possibility of concealment to the sham scenario set out in *Snook v London and West Riding*

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<sup>4</sup> *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802.

*Investments Ltd.* In the context of a criminal charge of conspiracy to defraud, the judgment of the Privy Council in *Adams v The Queen*<sup>5</sup> illustrated that such a charge could properly be brought in respect of concealment of director's breach of duties in a corporate context without resorting to the concept of sham in the *Snook* sense.

14. It was contended on behalf of the defendants that a breach of director's fiduciary duties does not in itself constitute a crime, citing *Reg v Governor of Pentonville Prison, Ex parte Tarling*<sup>6</sup> in support.

15. In this regard, it is apt to repeat Lord Jauncey of Tullichettle's response to a similar submission in *Adams v The Queen*, after citing the relevant parts of the judgment in *Ex parte Tarling*:

“Neither Lord Wilberforce nor Lord Keith of Kinkel went further than to say that non-disclosure per se amounting to breach of fiduciary duty did not amount to a crime. They were not dealing with a situation where there was a positive finding of dishonest concealment on the part of the defendants.”

16. Sir William Young NPJ has set out the elements of the offence of conspiracy to defraud as laid down in *Mo Yuk Ping v HKSAR*.<sup>7</sup> Dishonesty is an element which the prosecution has to prove.

17. In his Reasons for Verdict, the judge addressed the issue of dishonesty at some length at [157] to [171]. At [171], the learned judge said:

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<sup>5</sup> *Adams v the Queen* [1995] 1 WLR 52 at 63.

<sup>6</sup> *Reg v Governor of Pentonville Prison, Ex parte Tarling* (1980) 70 Cr App R 77 at 111, 137 and 138.

<sup>7</sup> *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at [40].

“...by adopting the *Ghosh* test as a benchmark, the defendants’ acts (and omissions) in relation to the placement of the subject bonds were obviously dishonest. They knew clearly that with Gransing as a disguise, [the independent non-executive directors] and SEHK would be unable to know that CIS was the actual/real placing agent, rendering them unable to discharge their respective duties under the Listing Rules, thereby causing the Listed Company’s shareholders (and potential investors) as a whole to suffer (or likely to suffer) economic losses or putting such persons’ economic interests at risk. Citing the CFA’s words in the judgment of *Theodore*, it is exactly ‘causing that company ... to enter into deals benefitting (DI) or his associates to the detriment of the shareholders.’”

18. I agree with Sir William Young NPJ that given the knowledge of all the defendants about the concealment and that CISL was a connected person, the implication of the concealment on the application of the Listing Rules and the detriment occasioned by it to CFHL and its shareholders, and the important roles played by each defendant in the concealment, there is no difficulty in holding that they were dishonest in their acts and omissions.

19. Apart from the scenario of an impediment to performance of a public duty, the alternative element of the offence is economic loss or prejudice to the victim. It should be noted that it is not necessary for the prosecution to prove that the defendants intended to harm CFHL. It would be sufficient if they conspired with the realization that the dishonest concealment may cause economic loss or put the economic interests of CFHL at risk, see *Wai Yu Tsang v The Queen*.<sup>8</sup>

20. The Court of Appeal concluded that this element could not be established. But that holding was based on the erroneous premise that *Snook* precluded the court from finding that the interposition of Gransing was a disguise

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<sup>8</sup> *Wai Yu Tsang v the Queen* [1992] 1 AC 269.

and there was no connected transaction. The Court also failed to have regard to D1's fiduciary duty to disclose his conflict of interests under the common law.

21. Before us, D1 submitted that there was no risk of economic loss as CFHL would have to pay reasonable commission for the placements in any event. I cannot see any merit in this argument.

22. First, it has nothing to do with Charge 3 as the prosecution case on conspiracy to defraud depends on the impediment to the Stock Exchange in the performance of its public duty instead of economic loss.

23. Second, with regard to Charge 1, the prosecution only needed to show that the defendants realized that the dishonest concealment may cause economic loss or put the economic interests of CFHL and its shareholders at risk. This issue should be considered in the extraordinary background under which the bonds were issued in relation to the Capital Investment Entrant Scheme (the details of which were set out in the judgment of Sir William Young NPJ) and the actual marketing of the bonds by the pool of consultants of the CFHL group. Against that background, in terms of the commission payable to CISL and Gransing, it would have been legitimate to query whether the commission was warranted. By side-stepping the full scrutiny of the role of CISL by the independent non-executive directors and the Stock Exchange, such query was not addressed and there is at least a risk that CFHL had suffered economic loss in that respect.

**Mr Justice Stock NPJ:**

24. I respectfully agree with the judgment of Sir William Young NPJ as well as that of Lam PJ.

25. The essence of the prosecution case was that the defendants conspired to hide the fact that CISL was in truth and at the behest of D1 engaged to be the sole placing agent for the bonds to be issued by CFHL, so that the board of directors of CFHL and the Stock Exchange would not be alerted to the question whether the transactions for the placement of the bonds were subject to the requirements of disclosure and follow-up under the Listing Rules. The evidence established a scheme to hide the fact that CISL had been appointed as the sole placing agent by an arrangement whereby CFHL entered into an agreement with Gransing, with the common understanding, including that of the management of Gransing, that Gransing would forthwith appoint CISL as sub-placing agent with the intention that all the bonds were to be placed by CISL, a company in which D1 was beneficially interested. As evidence of this, the prosecution relied on the fact that neither the Board nor the Stock Exchange was ever informed of the sub-placing agreements; that the sub-placing agreements were not disclosed in announcements or in the annual reports; and also that the sub-placing agreements were made one day after the placing agreements with Gransing, although in one instance two weeks before. These facts gave rise to only one reasonable inference, namely, that it was all along decided that CISL would place all the bonds, that Gransing would place none and that CISL's role would be kept secret.

26. Viewed thus, it was not necessary to prove that the agreements constituted a connected transaction; it was sufficient to prove that the conspirators so arranged matters to divert the Board and others from enquiring about the propriety of the overall arrangement, given the connection between CFHL and CISL.

27. This case was reflected in the charges themselves:

(a) Charge 1 asserted that the defendants conspired together to defraud CFHL, its board of directors, shareholders and potential investors by dishonestly:

- “(i) causing [CFHL] to enter into agreements with [Gransing] to purportedly engage [Gransing] as the placing agent for the placement of bonds to be issued by [CFHL];
- (ii) arranging [Gransing] to enter into agreements with [CISL] to purportedly engage [CISL] as the sub-placing agent of the said bonds;
- (iii) concealing or failing to disclose that [CISL] was the actual placing agent of the said bonds; and
- (iv) causing [CISL] to be paid of a total commission of \$49,600,680 Hong Kong currency for the said placement of the bonds.”

(b) Charge 3 asserted a conspiracy to defraud the Stock Exchange by dishonestly concealing that CISL was the actual placing agent thereby causing the Stock Exchange not to raise any enquiries in relation to the placement and not to request CFHL to comply with the relevant Listing Rules.

28. At the heart of the Court of Appeal’s reasoning was its conclusion that the agreements with Gransing were not a sham in that they did not purport to give the appearance of legal obligations which were different from the rights and obligations created by the documents themselves and, more specifically, that Rule 14A.25 did not apply since it defined connected transactions as “[a]ny transaction between a listed issuer’s group and a connected person”; and since, so the reasoning went, the agreements were “between” Gransing and CFHL and not “between” CHFL and CISL, the provision did not apply. Therefore the suggestion that the arrangements might reasonably be thought to be connected transactions was baseless and so the prosecution case fell.

29. As stated above, it was not necessary to prove a connected transaction. But in any event, the evidence did establish the existence of such a transaction. The Court of Appeal's approach was, with respect, to take too narrow a view of the reach of the word "transaction" in the context of Rule 14A.25. It ignored the reality of the process revealed by the evidence and concentrated on only one step in that process to the exclusion of the other closely connected steps, steps which were agreed in advance. It ignored the fact – known to the defendants – that the agreements between CFHL and Gransing and between Gransing and CISL constituted one package or, put another way, one composite arrangement, a composite arrangement which, if revealed to the Board and if known by the Stock Exchange, was bound to raise serious concerns as to whether the arrangement constituted a connected transaction and almost certainly lead to the conclusion that it did.

30. There is a passage in the judgment of Lewison J (as he then was) in *Berry v Revenue and Customs Commissioners*<sup>9</sup> which encapsulates the point. Although that was a tax appeal, the principles are, in my judgment, applicable in the context of the present case. The question was whether a series of transactions constituted a transaction as that term was contemplated by the applicable legislation. At paragraph [31], he said:

“(i) The *Ramsay* principle is a general principle of statutory construction (*Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], ... *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* ... [2005] 1 AC 684 at [36]).

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(x) In approaching the factual question whether the transaction in question answers the statutory description the facts must be viewed

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<sup>9</sup> *Berry v Revenue and Customs Commissioners* [2011] STC 1057.

realistically: *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [36], [2005] 1 AC 684.

(xi) A realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually: (*WT Ramsay Ltd v IRC* [1981] STC 174 at 180, [1982] AC 300 at 324; *Stamp Comr v Carreras Group Ltd* [2004] UKPC 16 at [8], [2004] STC 1377 at [8]; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [35], [2005] 1 AC 684.

(xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that they will be carried through as a whole and no likelihood in practice that they will not: *WT Ramsay Ltd v IRC* [1981] STC 174 at 180, [1982] AC 300 at 324.

(xiii) In considering the facts the fact-finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate: (*Astall v Revenue and Customs Comrs* [2009] EWCA Civ 1010 at [34], [2010] STC 137 at [34], 80 TC 22).”

31. As noted above, the line of authorities cited by Lewison J endorses the approach adopted by this Court in *Arrowtown*. Applying that approach to the present case, in other words, viewed realistically, what was agreed was a composite transaction between the three parties, the true effect of which was the appointment by CFHL of CISL as the sole placing agent. It was therefore at all times a connected transaction and in any event a scheme which, if revealed to the Board and the Stock Exchange, was bound to raise a concern to that effect which the defendants were keen to avoid. D1 decided upon allaying those concerns by employing the artifice of inserting Gransing between CFHL and CISL and by dishonestly withholding that information from the Board and from other potentially affected parties. He did so intending or foreseeing the risk of a loss to CFHL represented by the payment to CISL of approximately HK\$50 million. As

is demonstrated by the judgment of Sir William Young NPJ, the other defendants were party to the ongoing conspiracy.

32. Accordingly, I too would allow the appeal.

**Sir William Young NPJ:**

***A. The appeal***

33. Following trial in the District Court, MAK Kwong-yiu (D1), CHAN Lai-yee (D2), WONG Shuk-on (D3) and LEE Yick-ming (D4) were found guilty on charges of conspiracy to defraud. These charges related to the affairs of Convoy Financial Holdings Ltd (“CFHL”) and agreements it had entered into with Gransing Securities Co Ltd (“Gransing”). D1 was an executive director of CFHL and D2 and D3 were employed by CFHL in senior accountancy and reporting roles. D4 was the general manager of Gransing.

34. The defendants appealed successfully to the Court of Appeal and their convictions were set aside.

35. The prosecution now appeals.

***A.1 The background to the appeal***

36. CFHL’s shares were listed by the Stock Exchange of Hong Kong Limited (“Stock Exchange”). The Listing Rules of the Stock Exchange (“Listing Rules”) required CFHL to have at least three independent non-executive directors

(“Independent Directors”).<sup>10</sup> As at August 2014, there were four Independent Directors and four executive directors.

37. Between July 2014 and January 2015, CFHL issued four batches of bonds.

38. In June 2014, at a meeting attended by D3, D1 indicated that CFHL would be appointing Convoy Investment Services Ltd (“CISL”) as its agent to place the bonds.

39. CISL was not part of the CFHL group of companies. However, three of CFHL’s executive directors, Mr Quincy Wong, Ms Rosetta Fong and D1, had between them what amounted to a 28.41% indirect interest in CISL. As well, D1 was a director of CISL. CISL operated from the same building as CFHL and the companies were in similar lines of business.

40. The Listing Rules of the Stock Exchange (“Listing Rules”) provide stringent process and public announcement requirements for “connected transactions”, that is transactions between a listed issuer (such as CFHL) and a “connected person”.

41. At the meeting to which I have just referred, there was discussion about whether CISL was a connected person in relation to CFHL. D1 thought that his interest in CISL was not large enough to make it a connected person. However, D3 noted that there was a need for review. It is now common ground that CISL was a connected person. This resulted not from D1’s indirect interest

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<sup>10</sup> See rules 3.10 and 3.10A.

in CISL, but Mr Quincy Wong's somewhat larger interest and the particular way in which he held it.

42. That this was so was presumably soon recognised as D1's proposal that CFHL would appoint CISL as placing agent did not proceed as originally envisaged, at least in form. Instead, CFHL appointed Gransing as placing agent for the four batches of bonds and Gransing entered into sub-placement arrangements with CISL. D1 represented both CFHL and CISL. D4 was the person principally involved on the Gransing side.

43. When CFHL's board of directors ("Board") came to approve the placement agreements with Gransing, there was no disclosure of the sub-placement agreements with CISL. As well, nothing was said to alert the Board to the possibility that the connected transaction rules might be engaged.

44. Implementation of the placement and sub-placement agreements was dealt with by, amongst others, D2 and D3.

45. CISL (via consultants) placed all the bonds. For this, it received commissions and a bonus from Gransing totalling HK\$50.8 million. This was approximately 98.5% of the HK\$51.5 million placement fees paid by CFHL to Gransing.

46. The events just described resulted in D1, D2, D3, and D4 being found guilty of having conspired to defraud CFHL, its Board and shareholders and potential investors ("Charge 1") and D1, D2, and D3 of having conspired to defraud the Stock Exchange ("Charge 3"). The charges are reproduced in Appendix 1. The trial judge ("Judge") found that the placement/sub-placement agreements were connected transactions and that this had been dishonestly

concealed from the Board and the Stock Exchange. He was also of the view that there had been dishonest concealment of the interests that Mr Quincy Wong, Ms Fong and D1 had, via CISL, in the placing arrangements and that this provided an independent basis for conviction on Charge 1.

47. The Court of Appeal took a different approach. On this approach, the convictions of the defendants could only be upheld if the placement/sub-placement arrangements were connected transactions, and, being of the opinion that they were not, it set aside the convictions.

### *A.3 Overview of issues on the appeal to us*

48. The prosecution appeals, arguing:

- (a) It was not required to show that the placement/sub-placement arrangements were connected transactions;
- (b) In any event, the arrangements were connected transactions;  
and
- (c) Conflict of interest, associated with concealment and non-disclosure, provided a sufficient foundation for a charge of conspiracy to defraud.

49. The defendants sought to uphold the approach adopted by the Court of Appeal. As well, they argued that even if the reasons given by the Court of Appeal were wrong, the result it arrived at (that is setting aside the convictions) could be justified on other grounds.

50. Against that background, the issues are:
- (a) The correctness or otherwise of the basis on which the Court of Appeal allowed the appeals. And, if that basis was incorrect;
  - (b) The merit, or otherwise, of the other grounds relied on by the defendants.

51. Before I discuss these issues, I will discuss the connected transaction rules, review the facts in more detail and outline the way the case developed in the lower courts.

### ***B. The Listing Rules***

52. Chapter 14A of the Listing Rules deals with connected transactions.

53. The purpose of the connected transaction rules is explained in rule 14A.01 in this way:

“The connected transaction rules ensure that the interests of shareholders as a whole are taken into account by the listed issuer when the listed issuer’s group enters into a connected transaction.”

54. This was elaborated on by Ribeiro PJ in *HKSAR v Cheng Chee Tock Theodore (No.2)* (“*Theodore*”) who said that the rules were:<sup>11</sup>

“... aimed at preventing someone who is likely to have influence over a listed company’s affairs causing that company or its subsidiaries to enter into deals benefiting himself or his associates to the possible detriment

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<sup>11</sup> *HKSAR v Cheng Chee Tock Theodore (No.2)* (2016) 19 HKCFAR 86 at [20].

of the shareholders, hence the requirements for disclosure, authorising resolutions and a restriction on voting by the connected person.”

55. A “connected person” is defined in rule 14A.07 as:

- “(1) a director, chief executive or substantial shareholder of the listed issuer or any of its subsidiaries;
- (2) a person who was a director of the listed issuer or any of its subsidiaries in the last 12 months;
- (3) a supervisor of a PRC issuer or any of its subsidiaries;
- (4) an associate of any of the above persons;
- (5) a connected subsidiary; or
- (6) a person deemed to be connected by the [Stock Exchange].”

56. It is common ground that Mr Quincy Wong’s indirect shareholding in CISL meant that CISL was his “associate” for the purpose of rule 14A.07(4) and thus a connected person in respect of CFHL.

57. Rule 14A.07(6) refers to “a person deemed to be connected by the [Stock] Exchange”. As to this, rule 14A.19 provides:

“The [Stock] Exchange has the power to deem any person to be a connected person.”

This is fleshed out, but in a non-exhaustive way, by rule 14A.20:

“A deemed connected person includes a person:

- (1) who has entered, or proposes to enter, into:
  - (a) a transaction with the listed issuer’s group; and
  - (b) an agreement, arrangement, understanding or undertaking (whether formal or informal and whether express or implied) with a connected person described in rule 14A.07(1), (2) or (3) with respect to the transaction; and

- (2) who, in the [Stock] Exchange's opinion, should be considered as a connected person."

58. Rule 14A.22 should be read with rule 14A.20. It provides:

"The listed issuer must inform the [Stock] Exchange of any proposed transaction with the person described in rule 14A.20(1) or 14A.21(1) unless it is exempt from all of the connected transaction requirements. It must provide information to the [Stock] Exchange to demonstrate whether or not the transaction should be subject to connected transaction requirements."

59. Rules 14A.19, 14A.20 and 14A.22 warrant brief comment.

60. Gransing had entered into placing arrangements with CFHL and associated sub-placing arrangements with CISL, a connected person of CFHL. It was nonetheless not within rule 14A.20(1) as its status as a connected person arose under rule 14A.07(4) rather than under rule 14A.07(1), (2) or (3) (which are the sub-rules referred to in rule 14A.20(1)). This meant that there was no requirement to inform the Stock Exchange under rule 14A.22.

61. Rule 14A.20 not being exhaustive of those who can be deemed to be connected persons by the Stock Exchange, it would have been open to the Stock Exchange to deem Gransing a connected person of CFHL. Indeed, had it known all the facts, it might be thought to be at least likely that it would have done so. There was evidence to this effect at trial. As I will explain later, I think that the prosecution case at trial was in part premised on the thinking that but for the dishonest concealment of CISL's role, it is likely that the Stock Exchange would have become involved and may have deemed Gransing a connected person of CFHL. In this way, the dishonest concealment from the Board of CFHL of CISL's role could be said to have impeded the Stock Exchange in the execution of its supervisory role in relation to the Listing Rules.

62. Rule 14A.23 describes connected transactions as:

“... transactions with connected persons, and specified categories of transactions with third parties that may confer benefits on connected persons through their interests in the entities involved in the transactions. They may be one-off transactions or continuing transactions.”

Under rule 14A.25, any transaction “between” a listed issuer’s group and a connected person is a connected transaction.

63. Rule 14A.24 defines, or perhaps more accurately describes, “transactions” in this way:

“‘Transactions’ include both capital and revenue nature transactions, whether or not conducted in the ordinary and usual course of business of the listed issuer’s group. This includes the following types of transactions: ...”

There follows a long list which describes types of commercial activity rather than particular types of contract. By way of example, sub-rules (5), (7) and (8) are in these terms:

- “(5) entering into an agreement or arrangement to set up a joint venture in any form (e.g. a partnership or a company), or any other form of joint arrangement;
- ...
- (7) providing, receiving or sharing services; or
- (8) acquiring or providing raw materials, intermediate products and/or finished goods.”

64. Under the Listing Rules, connected transactions are subject to process, approval and reporting requirements, including being:

- (a) documented in a written agreement;
- (b) publicly announced;

- (c) approved by shareholders (following consideration by an independent board committee and an independent financial adviser); and
- (d) disclosed in the listed issuer's annual report.

65. As will be apparent, there were four placement agreements between CFHL and Gransing and four sub-placement agreements between Gransing and CISL. If these were connected transactions, they may also have been continuing connected transactions under rule 14A.31.<sup>12</sup> This provides:

“Continuing connected transactions are connected transactions involving the provision of goods or services or financial assistance, which are carried out on a continuing or recurring basis and are expected to extend over a period of time. They are usually transactions in the ordinary and usual course of business of the listed issuer's group.”

Continuing connected transactions are subject to additional requirements in terms of documentation of the basis for calculating payments to be made, the period of the agreement being fixed, the imposition of a cap expressed in monetary terms, annual review by the Independent Directors and reporting by CFHL's auditors.

66. Rule 14A.73 provides for exemptions from connected transaction requirements in relation to particular types of transactions of listed issuers. These include what are described as *de minimis* transactions.

67. For the sake of completeness, I should also mention rules 14.06 and 14.09 which provide for classification of transactions on the basis of, amongst other things, their size calculated against specified ratios.

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<sup>12</sup> We did not hear argument directed to whether the placement/sub-placement agreements were continuing connected transactions. We therefore express no view as to whether they were.

## ***C. The facts in more detail***

### ***C.1 Evolution of the placement and sub-placement agreements***

68. The early June 2014 meeting between D1 and D3 that I have already mentioned was also attended by PW1, the financial controller of CISL.

69. There was another meeting later in the same month that was attended by PW1, D1 and a Mr Chu who was the head of CISL's sales department. At this meeting, D1 said that an initial batch of HK\$50 million in bonds would be issued to test the market reaction, with Gransing as the placing agent. At either this meeting or shortly afterwards, D1 told PW1 that the commissions payable to Gransing and CISL would be of 8.11% and 7.8% respectively. PW1 commented that this meant that Gransing was to retain a net commission of only 0.31%. D1 responded by saying Gransing's role was just as a custodian and to manage documents. On 17 June 2014, D2 sent D4 an email with a draft of the placement agreement.

70. Between 8 July 2014 and 21 January 2015, CFHL issued four batches of bonds and, in relation to each batch, entered into placement agreements with Gransing in which it appointed Gransing as the placing agent. There were matching sub-placement agreements between Gransing and CISL. In respect of the first, third and fourth batches, the sub-placement agreement was entered into the day after the placement agreement. But, in respect of the second, the sub-placement agreement was entered into 16 days before the placement agreement.

### ***C.2 The commercial context in which the bonds were issued***

71. Hong Kong's immigration rules as they were in 2014, provided an investment pathway to obtaining the right of abode. Permitted investment classes

included debt securities of companies whose shares were listed on the Stock Exchange, as CFHL's shares were.

72. It was in this context that CFHL promoted a Capital Investment Entrant Scheme ("CIES"). The idea was that CFHL would issue bonds which could then be relied on by the bondholders to show that they had sufficiently invested in Hong Kong to meet the investment criteria applied by the immigration authorities.

73. A striking feature of CFHL's CIES was that the funding arrangements were circular. A subsidiary of CFHL lent to the bondholders the amount they were to subscribe, or perhaps had just subscribed, for the bonds.

74. In his judgment, the Judge referred to the bond purchasers as "CIES clients":<sup>13</sup>

"... Subscribing for [CFHL] bonds could help CIES clients fulfil the investment amount requirement under the scheme. The fund obtained from bond issuance would then be used to provide loan services to the above clients. The loan interest from those clients, after deducting the bond yield of the bond holders and administrative fees, would become the net profit of [CFHL]."

75. The CFHL group companies, along with CISL, marketed their financial offerings through what the Judge saw as a single pool of consultants. In the case of the bonds in issue in this appeal, all were placed by the consultants with people who were CIES clients of CFHL group companies. It was never envisaged that the bonds would be sold to anyone outside of this group.

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<sup>13</sup> At [44] of his Reasons for Verdict.

76. As will be apparent, there was not much substance to the bonds. Consistently with this, all bonds were issued in the name of Gransing, which held them as trustee for the bondholders. While the bonds were ostensibly assignable, the restrictions around this made assignment impracticable without the co-operation of Gransing. All interest payments on the bonds were made to CISL.

### ***C.3 The placement/sub-placement arrangements***

77. Many of the activities of CFHL and CISL involved the use of the single pool of consultants to whom I have referred. They operated as independent contractors and were remunerated on a commission basis. The CIES clients/bond purchasers dealt directly with the consultants. Of the approximately HK\$51.5 million received by CISL from Gransing, it paid around HK\$26 million to a CFHL subsidiary, presumably so that it could pay commissions to the consultants.

78. Implementation of the arrangements involved some paper work on Gransing's part. As well, when the bond placements came to be documented, it was named as custodian of the bonds and the bonds were issued in its name (to be held on trust for the investors). But, on the Judge's findings of fact in relation to the implementation of the placement/sub-placement agreements, there was nothing that Gransing did that CISL could not itself have done. As well, there was never any intention on anyone's part that Gransing would have any real role in the placing of the bonds. Indeed it is plain that but for the awkwardness of the connected transaction rules, Gransing would never have become involved.

***C.4 The interplay between conflict of interest and concerns about the connected transaction rules***

79. The prosecution maintained that there were two aspects of the placement/sub-placement arrangements that were objectionable: first, that they were (or may have been) connected transactions; and secondly, that the role of CISL was not disclosed to the Board of CFHL, despite the indirect interests in that company held by three executive directors of CFHL.

80. It may be that if it were not for the difficulty imposed by the connected transaction rules, D1 would have disclosed to the Board the conflict of interest issue in relation to CISL. Indeed, I have difficulty seeing how he could have avoided doing so. But, as CISL was a connected party of CFHL, disclosure of the placement/sub-placement arrangements would probably have concerned the Board and, in particular, the Independent Directors and would thus be likely to have resulted in further inquiry. The risk of such inquiry could only be avoided by not disclosing the sub-placement agreements.

***C.5 WhatsApp messages between D2 and D3***

81. An important part of the prosecution case at trial consisted of a series of WhatsApp messages between D2 and D3. The most critical exchange started at 10.30pm on 6 August 2014 and concluded just before midnight on the same day. These WhatsApp messages are reproduced in the appendix to this judgment.

82. On the prosecution case, the WhatsApp messages make it clear that D2 and D3 were well aware of the role that CISL was playing and that it was to be concealed; in particular they knew Gransing was just a “buffer” and were prepared to go along with this. Counsel for D2 and D3 argued that the WhatsApp

messages should not be construed in this way. I will discuss this in detail later in this judgment.

### ***C.6 Public announcements and annual reports***

83. On 16 September 2014, CFHL publicly announced the placement agreement with Gransing for the second batch of bonds. It did not refer to the sub-placement agreement between Gransing and CISL. There may be scope for argument as to whether the absence of reference to the involvement of CISL meant this announcement breached the requirements of rule 2.13(2) of the Listing Rules as to completeness and the omission of material facts.<sup>14</sup>

84. There is less (in fact I would say no) scope for argument about the way in which the CFHL 2014 Annual Report dealt with “directors’ interests in contracts of significance”:

“No contract of significance, to which the Company, its holding companies, fellow subsidiaries or subsidiaries was a party and in which a director of the Company had a material interest, whether directly or indirectly, subsisted at the end of the year or at any time during the year.”

Three of CFHL’s directors had indirect interests in CISL and those directors therefore had material interests, at least indirectly, in the placement/sub-placement arrangements. CFHL was a party to the placement/sub-placement

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<sup>14</sup> Rule 2.13(2) requires that “the information contained in [a public announcement] must be accurate and complete in all material respects and not be misleading or deceptive. In complying with this requirement, the issuer must not, among other things:— (a) omit material facts of an unfavourable nature or fail to accord them with appropriate significance ...”.

arrangements, and they were of significance to CFHL. This declaration was therefore untrue. So too was a similar statement in the 2015 Annual Report.<sup>15</sup>

### ***C.7 The Stock Exchange learns of what had happened***

85. In 2016, the Stock Exchange became aware of the involvement of CISL in the placement/sub-placement arrangements. It did not apply rule 14A.19.

86. I have mentioned this only because it was relied on by counsel for the defendants. I do not, however, see it as material as (a) the awareness of the Stock Exchange was well after the fact; and (b) we do not know the reasons for the approach the Stock Exchange took.

### ***D. How the prosecution presented its case at trial***

87. As I read it, Charge 1 alleged:

- (a) A conspiracy to defraud CFHL, its board of directors, shareholders and investors.
- (b) As dishonest means, the insertion of Gransing (as a purported placing agent) between CISL (described as the “actual placing agent”) to conceal the role of CISL in the placements and non-disclosure of CISL’s involvement.

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<sup>15</sup> In relation to “directors’ interests in transactions, arrangements or contracts”, it said “Save as disclosed above, no Director nor a connected entity of a Director had a material interest, either directly or indirectly, in any transactions, arrangements or contracts of significance to the business of the [CFHL Group] to which the holding company of the [CFHL], or any of the [CFHL’s] subsidiaries or fellow subsidiaries was a party during the year”.

- (c) The defendants caused CISL to be paid approximately HK\$50 million.

88. For Charge 3:

- (d) The dishonest means alleged were the dishonest concealing of CISL's role as the "actual placing agent".
- (e) The victim was the Stock Exchange, which, because of the dishonesty, did not inquire into the placements or require CFHL to comply with the Listing Rules.

89. Charge 1 refers to concealment and non-disclosure and the payment of commission to CISL and, in these respects, is consistent with allegations of non-disclosed conflict of interest. The charges did not assert that the placing arrangements were connected transactions. Indeed, the language used in Charge 3 is broad enough to encompass dishonest concealment of facts for the purpose of precluding inquiry by the Stock Exchange. In this context, the words "purportedly" in relation to Gransing and "actual placing agent" in relation to CISL are most easily read as meaning that despite the legal form of the placing and sub-placing arrangements, the placements were arranged by CISL and not Gransing. And, as I will explain, his reading is consistent with the way the prosecutor opened.

90. In his opening, the prosecutor said:

"25. [CISL] was a connected person of the [CFHL] and any transactions (providing, receiving or sharing services) between [CFHL] and [CISL] were connected transactions. The transactions between [CFHL] and [CISL] concerning the first to fourth bond placements or

sub-placements were a series of connected transactions all carried out or completed within the same 12-month period ...”

The assertion that the placement/sub-placement arrangements were connected transactions was thus on the table (albeit not fleshed out in detail). But the case was also put more broadly. Thus, when discussing Charge 1, the prosecutor said:

“40. The 1<sup>st</sup> to 4<sup>th</sup> Defendants were aware that the actual arrangements regarding the bond placements involved [CISL], and they knew or believed that the arrangements could lead to conflicts of interest among the directors of [CFHL] and/or potentially involve connected transactions. They participated in the bond placement arrangements and concealed the relevant matters, with the intention of causing or with the knowledge that it could cause economic losses to [CFHL] or put its economic interests at risk, meaning that out of the payment of the placing commission of HK\$51,571,050 made to [Gransing], HK\$49,600,680 was paid to [CISL]. The economic interests of the shareholders and potential investors of [CFHL] were also put at risk, i.e. causing them to be unable to make fully informed investment decisions regarding the securities of [CFHL].”

And, as to Charge 3:

“44. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants were aware that the actual arrangements regarding the bond placements involved [CISL]. They knew or believed that those arrangements entailed conflicts of interest among the directors of [CFHL] and/or could potentially involve connected transactions. Their concealment or failure to disclose caused the [Stock Exchange] not to fulfill its public duty, i.e. (i) to raise enquiries with [CFHL] in relation to the said placement of the bonds; and (ii) to request [CFHL] to comply with the said Listing Rules, as indicated in the third charge.”

91. The prosecution called evidence from the Independent Directors of CFHL along the lines that if informed of CISL’s role in the placing arrangements, they would have either assumed that the connected transaction rules applied (in the case of PW17) or thought that they might apply (in the case of PW18). Neither would have been party to written resolutions approving the bond issues. Further consultations would have been possible, depending on the advice received. There

was also evidence from the Vice-President of the Stock Exchange's Listed Issuer Regulation Department. His evidence was to the effect that, if fully informed, the Stock Exchange may have deemed Gransing to be a connected person of CFHL under rule 14A.19.

92. In his closing address, the prosecutor again advanced the contention that the placement arrangements were connected transactions:

“81. ... [T]he relevant arrangements were undoubtedly placing/sub-placing services provided by [CISL] to [CFHL], which were connected transactions as defined in the Listing Rules ...”

As well, he did not abandon the broader basis on which he had put the case in opening. So, as to Charge 1, he said:

“124. The Prosecution submits that when [CISL] acted as the actual placing agent in the issuance of bonds by [CFHL], there existed a conflict of interest involving directors and possibly constituted a connected transaction under the Listing Rules. D1 to D3, as senior executives of [CFHL], were under a duty to disclose these circumstances to [CFHL] ...”

And he dealt with Charge 3 in a way that was also consistent with the basis on which he had opened.

93. Counsel for the defendants argued and, as I will explain, the Court of Appeal held, that the reference in Charge 1 to “potential investors” limited the conspiracy alleged to the connected transaction rules. It was argued that a conspiracy based only on non-disclosure of a conflict of interest would not, in itself, put the economic interests of potential investors at risk. As I will explain, I do not agree.

94. When defining a conspiracy, a prosecutor will usually seek to identify an agreement between the defendants that can be implied from their

actions. One agreement can encompass a range of activities and more than one purpose.

95. I accept that the reference in the charge to “potential investors” can be construed as an indication that an actual or possible breach of the connected transaction rules was relied on, as indeed was the case. However, that reference did not confine the prosecution to a conspiracy limited to actual or potential breaches of the connected transaction rules. In a criminal trial where not all particulars in respect of a charge have been established, the jury or judge, as the case may be, may return a verdict of guilty in relation to such particulars as are established. On this basis, if the Judge had not found that the placement/sub-placement arrangements were connected transactions (thus putting interests of “potential investors” at risk), it would have been open to him to have convicted the defendants of a conspiracy that was not as broad as that alleged.

96. An agreement that encompasses a range of activities and more than one purpose may be broken down into discrete agreements (perhaps sub-agreements), dealing with only some of those activities and purposes. This is how I see Charge 3. It focuses on the Stock Exchange, rather than CFHL, as the victim. I do not see it as duplicitous or otherwise open to legal objection.

## ***E. The approach taken in the Courts below***

### ***E.1 The approach of the Judge***

97. In his Reasons for Verdict, the Judge addressed whether the placement/sub-placement arrangements were connected transactions and

concluded that they were.<sup>16</sup> This was essentially on the basis that “the purpose of appointing Gransing as agent was to use it as a tool/means to disguise [CISL].”

98. In finding the defendants guilty, the Judge acted on the basis that the placement/sub-placement arrangements were connected transactions, the defendants knew this, the defendants knowing this nonetheless agreed to implement the arrangements which resulted in CISL receiving more than HK\$50 million and they did so by the dishonest concealment of CISL’s role.

99. He separately dealt with conflict of interest. As to this, he said:

“173. Apart from connected transaction, the prosecution asserted that D1 used Gransing as a disguise to circumvent the relevant requirements / restrictions under the Listing Rules with a view to enabling [CISL] (a company in which he and the other two directors indirectly held interests) to obtain substantial benefits, so it obviously constituted a conflict of interest. The other three defendants knowingly participated / assisted in the arrangement, which was equivalent to assisting in concealing the conflict of interest. I agree with this point made by the prosecution.”

## ***E.2 The approach of the Court of Appeal***

100. In the Court of Appeal, the prosecution’s basis for asserting that the placement/sub-placement arrangements were connected transactions did not appear to have been spelt out with precision. The prosecution did not allege sham. Nor did it rely on the arguments that were presented in this Court which I will be discussing shortly. There was reliance on rules 14A.19 and 14A.20 and reference was made to the possibility that Gransing could have been deemed to be a connected person under rule 14A.19.

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<sup>16</sup> At [144] of his Reasons for Verdict.

101. The Court concluded that the placement/sub-placement agreements were not connected transactions and that the prosecution could not succeed on a conflict-only basis.

***F. The correctness or otherwise of the basis on which the Court of Appeal allowed the appeals***

102. The Court of Appeal seems to have approached the case on the basis that it involved two largely distinct questions, the first concerning the application of the connected transaction rules and the second whether there could be conviction on a conflict-only basis.

103. As I have already explained, the primary purpose of D1 was to ensure that CISL was paid commission on the placing of the bonds. It is at least possible that, but for the connected transaction rules, the Board would have approved CISL receiving such commission. But CISL being a connected person of CFHL, those rules practically precluded CISL's appointment as placing agent. Disclosure of the sub-placement agreements to the Board would have triggered concerns, at least on the part of the Independent Directors, as to the application of the connected transaction rules. Ensuring that CISL would be paid commission on the placement of the bonds therefore required concealment of the sub-placement arrangements.

104. Given all of this, I do not see the case as involving two substantially discrete elements, the connected transaction rules and the undisclosed conflict of interest.

105. As I have explained, the prosecution case in the District Court appears to have been partly premised on the theory that impeding the ability of

the Stock Exchange to decide whether to utilise rule 14A.19 to deem Gransing a connected party of CFHL provided a basis for Charge 3. As it happened, the prosecution in this Court eschewed reliance on rule 14A.19. That being so, and given that I am in any event of the view that the placement/sub-placement arrangements were connected transactions, I do not propose to express a view on the merits of the rule 14A.19 theory.

***F.1 Were the placement/sub-placement arrangements connected transactions?***

106. The arguments of the prosecution on this aspect of the case before us differed significantly from those advanced to the Court of Appeal. For this reason there is no point in reviewing in any detail the way the Court of Appeal approached the issue save to repeat that the Court of Appeal concluded that the placement/sub-placement arrangements were not connected transactions and, in reaching this conclusion, relied heavily on *Theodore*.<sup>17</sup> As *Theodore* was also relied on heavily by the defendants in this Court, it is necessary to discuss it.

107. The defendant in *Theodore* had been a director of two companies, the first, Sino Strategic International Ltd (“SSI”) and the second, CY Foundation Group Ltd (“CYF”). Sino Joy Holdings Ltd (“Sino Joy”), a subsidiary of SSI, owned a property in Hong Kong. In issue was a series of transactions that, for the sake of simplicity, I will treat as involving transfers of the shares in Sino Joy, starting with their sale by SSI and concluding with their purchase by CYF. It was alleged against the defendant that he and his alleged co-conspirators had falsely concealed from CYF his “beneficiary [sic] or financial interest” in the Hong Kong

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<sup>17</sup> *HKSAR v Cheng Chee Tock Theodore (No.2)* (2016) 19 HKCFAR 86. This is the case referred to earlier [54] above.

property and had falsely represented to CYF that the purchase was not a connected transaction.

108. It was true that the defendant was at both ends of the string of transactions, first, as a director of, and shareholder in, SSI, and secondly, as a director (although not a shareholder) of CYF. But, there was no evidence to suggest that when CYF acquired the shares in Sino Joy, the defendant retained any interest in them. As well, the focus of the prosecution was on the sale of the shares in Sino Joy to CYF. But the vendor of the shares was not a connected person in relation to CYF. As Ribeiro PJ explained:

“65. As we have seen, r.14A.13(1)(a) [now rule 14A.23] defines a connected transaction as ‘any transaction between a listed issuer and a connected person’. There can be no doubt as to what ‘between’ means in that context: the listed issuer and the connected person must be mutual parties to the transaction. There is no room for suggesting that the rule can be construed so that a ‘connected transaction’ is constituted by a transaction between a listed issuer and someone who is not a ‘connected person’.”

109. At the end of his judgment, Ribeiro PJ added:

“68. It should be emphasised that this judgment examines the Listing Rules as applied to the decisions of the Courts below and to the way the case was analysed and presented by the prosecution on this appeal with a view to assessing whether criminal liability for conspiracy to defraud was properly established. The case might of course have been quite differently presented. The intervening share disposals might have been differently characterised and reliance might have been placed on other Listing Rules, including those involving ‘associates’ of the connected person. Differently approached in a future case, the context might call for particular concepts used in the Rules to be given a wider or narrower meaning. Whether in some future case, a string of transfers or some other complex commercial arrangement might properly be characterised as a single connected transaction may depend on issues of fact and construction arising in the specific setting.”

110. In the same case, Spigelman NPJ, after referring to the way in which the prosecution had framed its case in this Court and the reasons why it was rejected, noted:

“75. ... the word ‘transaction’ is itself a word of wide import capable of encompassing a series of inter-related steps.”

111. The prosecution had not argued that SSI was a connected party of CYF. Nor had it contended that the string of transactions in relation to the shares in Sino Joy was, in substance, between SSI and CYF. Instead, the case was that the defendant was himself a party to the sale of the shares to CYF. This means that *Theodore* was argued on a basis that does not correspond to the arguments presented to us. These arguments, as advanced in this Court by the prosecution require us to address whether the placement/sub-placement arrangements involved what Riberio PJ described as “a single connected transaction” and Spigelman NPJ called “a series of inter-related steps” comprising a transaction.

112. On this aspect of the case, the prosecution argued that “transaction” in the Listing Rules should be construed in the manner alluded to by Ribeiro PJ and Spigelman NPJ in *Theodore*. In doing so they relied on principles of law that have been developed primarily in relation to tax avoidance schemes.

113. The connected transaction rules have a purpose that extends to guarding against company insiders dealing with their company non-transparently, and in ways that favour themselves and put the interest of the company at risk. The rules operate alongside the fiduciary duties that such insiders owe to the company.

114. As a matter of ordinary English usage, “transaction” can extend to an arrangement that brings about a particular result even though it has a number of components. This was recognised by both Ribeiro PJ and Spigelman NPJ in *Theodore*. For this reason, the expression “composite transaction”, often enough used in tax cases, is not an oxymoron. The rule 14A.24 definition (or description) of “transaction” is consistent with this because it refers to commercial activities, such as “providing, receiving or sharing services”, rather than particular types of contract. There is thus no reason to construe the requirement that a connected transaction be “between” a listed issuer and a connected person as requiring a contract to which they are both parties.

115. When assessing the effect of a series of inter-related steps in a tax avoidance scheme, courts are likely to disregard a step that has no commercial purpose other than tax avoidance. In doing so, they apply principles first stated authoritatively in *WT Ramsay Ltd v Inland Revenue Commissioners*.<sup>18</sup> Disregarding a non-commercial step is not premised on a free-standing legal principle that enables courts to give effect to the substance rather than the form of contracts. Rather it results from the application to the facts as found by the court of the provisions of the taxing statute as construed by the court. All of this is explained in *Collector of Stamp Revenue v Arrowtown Assets Ltd*.<sup>19</sup> As Chan PJ put it:

“6. ... What this principle entails, as elaborated and developed in subsequent cases, is this: when faced with a tax avoidance scheme, the court’s task is to ascertain the nature of the transaction or composite transactions in question and the true meaning of the relevant statutory provision having regard to the purpose and intention of the legislation and then apply it to the facts of the case, not taking into account any steps

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<sup>18</sup> *WT Ramsay Ltd v Inland Revenue Commissioners; Eilbeck (Inspector of Taxes) v Rawling* [1982] AC 300.

<sup>19</sup> *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 HKCFAR 517.

in the transactions which have no commercial purpose other than to avoid tax. The court adopts a purposive construction on the tax legislation and applies it to the end result of the transactions.”

To the same effects are the comments of Ribeiro PJ in the same case:

“35. Accordingly, the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically. Where schemes involve intermediate transactions having no commercial purpose inserted for the sole purpose of tax-avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes ... .”

116. Also material in light of some of the arguments presented to us is the rejection in *Carreras Group Ltd v Stamp Commissioner* of arguments as to uncertainty advanced by a taxpayer:<sup>20</sup>

“16. ... In any case, their Lordships think that it is inherent in the process of construction that one will have to decide as a question of fact whether a given act was or was not a part of the transaction contemplated by the statute. In practice, any uncertainty is likely to be confined to transactions into which steps have been inserted without any commercial purpose. Such uncertainty is something which the architects of such schemes have to accept.”

117. Although the *Ramsay* principle has primarily been applied to cases of tax avoidance, it involves what Ribeiro PJ referred to in *Arrowtown* in the passage already cited as “a general rule of statutory construction”. It is therefore not confined to tax statutes.<sup>21</sup>

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<sup>20</sup> *Carreras Group Ltd v Stamp Commissioner* [2004] STC 1377.

<sup>21</sup> See *Financial Conduct Authority v Asset LI Inc and others* [2016] 3 All ER 93.

118. Counsel for the defendants argued that the scheme of the connected transaction rules militated against attributing a meaning to “transaction” that would justify the result contended for by the prosecution. Rule 14A.20 contains safeguards in relation to certain types of back-to-back transactions that enable an intermediate party such as Gransing to be deemed a connected party of the listed issuer. Also able to be invoked is the more general deeming power conferred by rule 14A.19. These provisions mean that there is no need for the broad interpretation contended for by the prosecution. As well, these rules identify a solution in situations in which there may be grounds for concern – treating the party in the middle as a connected person – that differs from the results arrived at on the prosecution’s interpretation. Further, under the connected transaction rules, the ultimate decision-maker in the doubtful situations addressed by rules 14A.19 and 14A.20 is the Stock Exchange and taking a broad approach to “transaction” would cut across that. Counsel also stressed that the obligation to consult with the Stock Exchange under rule 14A.22 is narrow and was not engaged in this case. This narrowly expressed requirement can be compared with a much broader and general requirement to consult with the Stock Exchange in doubtful cases that earlier versions of the Listing Rules imposed.<sup>22</sup>

119. I see the purpose of rule 14A.20(1) as extending to arrangements where the connected person may have had a role in the overall arrangement far less significant than that of CISL in this case. Rule 14A.20 does not use the expression “back-to-back arrangements” and I do not construe it as excluding an approach to “transaction” in this case that (a) is consistent with its ordinary non-technical meaning; (b) gives effect to the way it is defined/described in rule

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<sup>22</sup> Rule 14A.05 of the Listing Rules in force at the time of *Theodore* provided, “If a listed issuer proposes to enter into a transaction which could be a connected transaction, it is essential that the listed issuer consult the Exchange at an early stage so that, in cases of doubt, the listed issuer can ascertain whether and to what extent the provisions of this Chapter apply ... .”

14A.24; (c) implements the purpose of the connected transaction rules; and (d) responds appropriately to the reality that the insertion of Gransing between CFHL and CISL served no purpose other than to avoid, if avoidance was possible, the connected transaction rules.

120. On the approach of the prosecution, the insertion of Gransing between CFHL and CISL can be ignored, leaving a transaction between CFHL and CISL, one in which CFHL put up bonds for placement and CISL placed them. This is generally consistent with the way in which the *Ramsay* principle usually operates.

121. Another approach is to recognise the placement agreements between CFHL and Gransing but see them for what they were at their very best, components in three-sided arrangements in which CFHL contracted with Gransing but on the basis that Gransing and CISL both agreed with each other and CFHL that they would enter into the sub-placement agreements. This way of looking at the situation is not artificial. It accords with what must have been the intention of D1. He would never have contemplated Gransing setting out to place the bonds without involving CISL. An attempt to do so would have been well outside what he would have seen as the underlying arrangement. It is also consistent with the dating of the documents in relation to the second bond issue. By the time the placement agreement was executed, Gransing had already appointed CISL as sub-placing agent. On this approach too, the placement/sub-placement arrangements involved transactions between CFHL and CISL. This would be consistent with the remarks of Spigelman NPJ in *Theodore*.

122. Either way, the outcome is the same, the connected transaction rules were engaged and not complied with.

123. So, in respectful disagreement with the Court of Appeal, I am of the view that the placement/sub-placement arrangements were or included connected transactions between CFHL and CISL.

***F.2 Was the Court of Appeal right to conclude that conflict alone would not be enough to support a conspiracy to defraud conviction?***

124. The Court of Appeal gave three reasons for concluding that conflict alone would not be enough to support a conspiracy to defraud conviction.

“51. It is true that the prosecution relies not only on the disclosure obligation under the Listing Rules, but also the fiduciary duty of D1 to D3 to make disclosure, as well as D1’s obligation as a director to make a declaration of interest under section 536 of the Companies Ordinance, Cap 622, Laws of Hong Kong. However, where no connected transaction was involved, it seems that when [CFHL] was to decide whether Gransing should be engaged as a placing agent, it would not be necessary for D1 to make any declaration of interest regarding his shareholding in [CISL]. At that juncture, what the Board of Directors needed to consider was whether they should enter into an agreement with Gransing, which had nothing to do with [CISL] at all. Nevertheless, if the Board had made it clear that they did not wish Gransing to appoint any connected person of [CFHL] as a subplacing agent, the situation might have been different, but that is not the case of the prosecution.

52. In any event, regarding D1’s shareholding in [CISL], we accept Mr Chan’s submission that if it was the only basis that the prosecution relied on, it simply would not constitute the conspiracy to defraud as specified in the 1<sup>st</sup> Charge, the reason being that it is alleged under the 1<sup>st</sup> Charge that there was a conspiracy of the applicants to defraud [CFHL], its Board of Directors, shareholders, and potential investors. However, if the case did not involve any connected transaction, there would be no need for [CFHL] to publish an announcement or convene a shareholders’ meeting. In other words, even if there were a conspiracy, it would not involve defrauding shareholders and potential investors, and therefore it could not be the conspiracy alleged by the prosecution as specified in the 1<sup>st</sup> Charge.

53. Furthermore, as pointed out by the applicants, there is no evidence in this case to show how the Board of Directors would decide

if they were made aware of D1's shareholding in [CISL]. After all, D1 just indirectly held an approximately 12% shareholding in [CISL], and the trial judge had mentioned at the sentencing stage that even if D1 had made a disclosure to the Board of Directors, [CFHL] 'likely would still agree to appoint [CISL] as a placing agent'."

125. I see the conflict of interest as distinctly more serious than the Court of Appeal recognised.

- (a) The conflict of interest was not just confined to D1's interest in CISL. The Court of Appeal did not address the fact that three directors of CFHL indirectly held what in total was a substantial stake in CISL. Their fiduciary obligations required full disclosure by all of them and the approval of the Board before they (or any of them) were parties to committing CFHL to the placing arrangements with Gransing.<sup>23</sup>
- (b) Further, the arrangements with Gransing were not as straightforward as the Court of Appeal implied. Gransing had been inserted between CFHL and CISL for no good commercial reason. This warranted disclosure and explanation.
- (c) The result of the placement/sub-placement agreements was that the bonds were placed by the single pool of consultants utilised by both CFHL and CISL. CISL made in excess of HK\$25 million (after paying out around HK\$26m to a subsidiary of CFHL for the commissions due to the consultants). The net result was that in excess of HK\$25 million was diverted from CFHL to CISL, a

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<sup>23</sup> This is spelt out in rule 3.08 of the Listing Rules. This rule was not relied on by the prosecution until the hearing in this Court. It is, however, just a statement of the obvious.

company in which three CFHL directors were indirectly interested. This too required disclosure to the Board and explanation as well, for instance as to whether the commission payable to Gransing was appropriate.

126. As to the second reason, I have already explained in some detail both my analysis of what Charges 1 and 3 alleged and how the case was opened and later conducted in the District Court. As will be apparent, I do not see Charge 1 as confined to complaints about the connected transaction rules.

127. As to the third reason given, that if full disclosure had been made, the Board of CFHL might have approved the arrangements, the Court of Appeal was influenced by an observation made by the Judge when sentencing the defendants:

“30. As a matter of fact, I believe, given the position of the 1<sup>st</sup> defendant in [CFHL] and that at least two other directors from the Board of Directors were closely related to [CISL], even if the 1<sup>st</sup> defendant had chosen to comply with the requirements on connected transactions as set out in the Listing Rules, [CFHL] would nevertheless have likely agreed to the appointment of [CISL] as the placing agent.”

This comment strikes me as a little odd. First, I think it unlikely, to say the least, that CFHL and CISL would have been prepared to go through the approval and disclosure requirements that would have been necessary if the arrangements had been recognised as connected transactions. In the unlikely event that they had attempted to do so, I do not see how the CFHL directors who had indirect shareholdings in CISL could have properly voted.

128. More generally, the approach of the Court of Appeal does not reflect the reality that, absent disclosure and the informed approval of the Board, D1

(along with Mr Quincy Wong and Ms Fong) had no right to be involved in committing CFHL to the placement arrangements. As it happened there was no exculpatory out-of-court statement by, or evidence from, D1 to the effect that he had not acted dishonestly because he was confident that approval would have been given if disclosure had been made. Had such an explanation been offered, it would have invited the question, “Why then, was disclosure not made?”

***G. Other grounds relied on by the defendants***

***G.1 Preliminary comments***

129. Because the Court of Appeal dealt with the case on the basis that the connected transaction rules were not engaged and that the prosecution case could not succeed on a conflict-only basis, it did not address other grounds of appeal that had been advanced by the defendants.

130. Having concluded that the basis on which the Court of Appeal allowed the appeals was wrong, we have to determine whether to rule on the other grounds on which the defendants seek to uphold the decision of the Court of Appeal or remit the case to the Court of Appeal.

131. I would take the former course. All issues have been argued before us, so the delays and expense that would result from remitting the proceedings to the Court of Appeal would not be justified.

132. I propose to discuss the other grounds under the following headings:

- (a) What did the prosecution have to prove to establish conspiracy to defraud;
- (b) The WhatsApp messages between D2 and D3;

- (c) Other challenges to specific factual findings of the Judge;
- (d) The liability of D1;
- (e) The liability of D2 and D3; and
- (f) The liability of D4.

***G.2 What did the prosecution have to prove to establish conspiracy to defraud?***

133. Conspiracy to defraud is a common law offence. In *Mo Yuk Ping v HKSAR*, Sir Anthony Mason NPJ described its elements in this way:<sup>24</sup>

“... the offence is constituted by becoming a party to an agreement with another or others to use dishonest means: (a) with the purpose of causing economic loss to, or putting at risk the economic interests of, another; or (b) with the realization that the use of those means may cause such loss or put such interests at risk. The offence extends also to cases in which the dishonest means cause a person to act contrary to his public duty ...”

134. The test for dishonesty in Hong Kong accords with the approach taken in *R v Ghosh*.<sup>25</sup> In the course of argument, reference was made to the later judgment of the Supreme Court of the United Kingdom in *Ivey v Genting Casinos (UK) Ltd*.<sup>26</sup> But the continuing applicability in Hong Kong of *Ghosh* not having been previously challenged in these proceedings, I am content to proceed on the basis that dishonesty is to be assessed in accordance with *Ghosh*. This is not to the disadvantage of the defendants as the *Ghosh* test is more favourable to them than that adopted in *Ivey*.

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<sup>24</sup> *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at [40].

<sup>25</sup> *R v Ghosh* [1982] 1 QB 1053. As to its continuing status in Hong Kong, see Archbold Hong Kong, vol 2 at [22-20].

<sup>26</sup> *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.

135. For D1, Mr Winter KC took us to the recent judgment of the Supreme Court of the United Kingdom in *R v Hayes; R v Palombo* and, in particular to remarks of Lord Leggatt:<sup>27</sup>

“... a conspiracy to defraud cannot comprise an agreement to achieve a lawful object by lawful means. The object of the conspiracy alleged here – to make a profit from trading in derivatives that would (as the defendant knew) inevitably result in a corresponding loss to the counterparty to the trade – was not unlawful. It was the basic purpose for which traders such as Mr Palombo were employed. The element of unlawfulness required for the offence must therefore be found in the means intended to be used to achieve that object. We were not addressed on whether a breach of the civil law would suffice for this purpose. I find it hard to see in principle why it should. Unless the intended means involves criminal conduct, I see no reason why an agreement to use that means to achieve a lawful object should be a crime. For example, given that refusing to pay a debt, even if known to be due, is not a criminal offence, it would make no sense for the common law to treat agreeing with someone else not to pay a debt (knowing that this will cause loss to the creditor) as a criminal offence.”

136. Mr Winter contended that D1 and the other defendants had done no more than agree to achieve a lawful object (raising money for CFHL) by lawful means (the bond issues) and they could not be guilty of a conspiracy to defraud unless the means they agreed to use to fulfil that object were independently criminal.

137. I do not see Lord Leggatt’s remark as apposite in the present context. Nor do I accept Mr Winter’s categorisation of the prosecution case. The allegation is not that there was “an agreement to achieve a lawful object by lawful means”. Rather, the prosecution alleges a conspiracy which involved dishonestly concealing CISL's involvement in the placements from the Board and the Stock Exchange and resulted in (a) CFHL paying CISL commission to which, in the

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<sup>27</sup> *R v Hayes; R v Palombo* [2025] 1 WLR 3553 at [216].

absence of disclosure, it was not entitled and (b) the Stock Exchange being impeded in the performance of its supervisory duties.

138. Mr Winter also argued that the prosecution could only succeed if it could show that D1 knew that the connected transaction rules applied.

139. In light of my conclusions in relation to conflict-only liability and my preferred approach to the case,<sup>28</sup> this aspect of Mr Winter's argument largely falls away in relation to Charge 1. It is, however, material to Charge 3.

140. My conclusion that the connected transaction rules are engaged is based on my assessment of the facts and interpretation of the Listing Rules. D1 knew all the facts. He was also well aware of the connected transaction rules. He must have realised that it was at least probable that inserting Gransing into the placing arrangements would not be an effective avoidance device. Otherwise, why would he have bothered concealing CISL's involvement? It would however be difficult to conclude that he knew for sure that the insertion of Gransing between CFHL and CISL would be ineffective. This is illustrated by the Court of Appeal's conclusion that the connected transaction rules did not apply.

141. In support of his contention that knowledge that the placement/sub-placement arrangements were connected transactions was essential, Mr Winter referred us to discussion in *Arlidge and Parry on Fraud*.<sup>29</sup> Although he cited other authorities as well, his point can be adequately dealt with by reference to what appears in *Arlidge and Parry on Fraud*. The passage he relied on addresses tax evasion. It proceeds on the basis that non-payment of tax that is known to be due

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<sup>28</sup> See [104] above.

<sup>29</sup> *Arlidge and Parry on Fraud* (6th edn., Sweet & Maxwell 2020) at [14-077].

is, in itself, dishonest. It then discusses the situation where a taxpayer has sought to avoid the payment of tax but the avoidance device is ineffective. According to the authors:

“Where the scheme is ineffective as a matter of tax law, it is intended to avoid paying tax which is in fact payable. Whether it is criminal should in principle depend on whether the defendant knows that that will be the effect if the scheme works as intended. If he knows that the scheme is ineffective but seeks to exploit it anyway, there is no obstacle to a finding of dishonesty. If he mistakenly believes that the scheme is effective, on the other hand, it is submitted that he cannot properly be found to have acted dishonestly, because his intention is merely to exercise his legal right to minimise his liability.”

In the example discussed, the taxpayer believes the scheme was effective. But what if the taxpayer was of the view that the scheme was of doubtful effectiveness?

142. Shortly after the passage just cited are the following remarks:

“The defendant may have been advised that the scheme might be effective in law, but that it could be challenged by HMRC, and that the challenge might succeed. If the scheme turns out to be ineffective and a charge of cheating the public revenue is brought, it will be a matter for the jury whether it was dishonest of the defendant to make the attempt.”

This second passage suggests that if a taxpayer and advisers were aware that a tax avoidance scheme might be ineffective but they went ahead with it anyway, it may be open to a jury to conclude that they were dishonest. Whether this is so will depend heavily on the context. For instance, if the taxpayer and advisers had lied to a tax inspector to prevent the revenue authorities from learning about the

doubtful tax avoidance scheme, liability for conspiracy to defraud (or something similar) might be thought to be reasonably obvious.<sup>30</sup>

143. The prosecution sought to establish that the defendants agreed to use dishonest means to ensure that CFHL did not realise that it was entering into arrangements that were, or might be, connected transactions and impede the Stock Exchange in the administration of the connected transaction rules. D1 and the other defendants knew exactly what the facts were. They sought to conceal these facts by a combination of using Gransing as “a cloak” and concealment from the Board of information which D1 was legally required to disclose. There was also the untruth in the 2014 and 2015 Annual Reports. I see this as enough to found liability: this on the basis that an agreement to use dishonest means to preclude legitimate inquiry into what is recognised to be at best a doubtful transaction can be a conspiracy to defraud.<sup>31</sup>

144. There is one further point as to what the prosecution had to prove that I should mention.

145. It was suggested on behalf of some of the defendants that dishonest concealment from the Board of CISL’s involvement in the placement/sub-placement transactions would only have impeded the Independent Directors in the performance of their private duties, a consequence which, it was said, cannot be relied on to establish conspiracy. I do not see it that way. Where disclosure of a conflict of interest to the board of a company is required, non-disclosure has the tendency to deny the board of the opportunity to address the situation in the

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<sup>30</sup> There is substantial American jurisprudence in relation to this and what are known as “Klein conspiracies”, see *United States v Klein* 247 F. 2nd 908 (2nd Cir. 1957).

<sup>31</sup> *Grant Adams v The Queen* [1995] 1 W.L.R. 52; c.f. *R v Governor of Pentonville Prison, ex parte Tarling* (1980) 70 Cr. App.R. 77; see also J.C. Smith “Theft, Conspiracy and Jurisdiction: Tarling’s Case” [1979] Crim. L.R. 220.

interests of the company, a denied opportunity that exposes the company to actual, or the risk of, loss.

### ***G.3 The WhatsApp messages between D2 and D3***

146. Those that are primarily relevant are reproduced in Appendix 2 to this judgment.

147. The context for this exchange was that placement of the first set of bonds was then underway. What initially sparked the messages was concern as to how the subscriptions for the bonds should be documented. There had already been a subscription for bonds on a form that identified CISL as the “custodian” of the bonds with the investor named as the bondholder. This had come to D1’s attention. One of the messages said that this had made D1 “so angry”. From the drift of the messages construed in light of what followed, it is clear that D1 wanted the bonds to be issued in the name of Gransing (on trust for the investors) and for Gransing also to be custodian of the bonds.

148. Counsel for D2 and D3 maintained that these messages should not be read as demonstrating awareness of the fact that Gransing had been inserted into the arrangements for no purpose other than concealing the involvement of CISL.

149. Some of the messages refer to other issues. For instance, a reference to the “size test” could have been to the cap that applies to continuous connected transactions, the *de minimis* exemption from the application of the connected transaction rules or perhaps rule 14.06.<sup>32</sup> As well, administrative decisions had to be made as to the documentation. It was critical to ensure that the investors did

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<sup>32</sup> See [66] above.

not separately deal with the bonds, for instance by assigning them to someone else, and that there be no risk of the investors directly receiving interest on the bonds and not repaying the interest they owed to CFHL.

150. Counsel for D2 and D3 maintained that the critical messages relied on by the prosecution related not to the sub-placement agreements with CISL, but rather to early versions of the documentation which envisaged that the bonds would be issued in the names of the investors and describing CISL as the custodian of the bonds.

151. To explain the argument, it is appropriate to set out the key messages:

“To my understanding, we can also disclose [Gransing] in all doc

I guess henry [who was the solicitor who drafted the documents] didnt know [D1’s] concern

But not [CISL] or individual

No mention [CISL] is a must ...

‘Coz it will constitute CT if the agent is [CISL]

The purpose of Gransing is to act as a buffer”

152. “CT” means “connected transaction”. The argument was that “Coz it will constitute CT if agent is [CISL]” should be read as, “Coz it will constitute CT if [custodian] is [CISL]”. On this approach, what D2 and D3 were discussing was the risk of creating accidentally a connected transaction directly between CFHL and CISL unrelated to the underlying placement/sub-placement agreements.

153. I agree that the messages make it clear that D1 did not want CISL to be named as custodian. However, I do not think it is likely that this concern was primarily because naming CISL as custodian might give rise to an accidental connected transaction. The ostensible role of the custodian was to hold the bonds for the bondholders and it is not obvious to me why that might be thought to create an accidental connected transaction of the type postulated.

154. That said, I accept that naming CISL as bondholder in whose name the bonds would be issued, and who would hold them as trustee for the investors, would have been seen as problematic by D1. The trustee bondholder was to have a direct legal relationship with CFHL, and I can see why D1 did not intend for CISL to have that role. However, I do not see such a concern as providing an innocent explanation for the messages:

- (a) Since it had never been proposed that CISL be the bondholder, I have difficulty accepting that this is what the “CT” message was referring to.
- (b) The statement that the “purpose of Gransing is to act as a buffer” must be a reference back to the preceding message – to the effect that the connected transactions rules would apply if CISL was the “agent” – and thus to refer to Gransing being a “buffer” between CISL and another party. So read, it is not consistent with the bondholder explanation. As a bondholder, Gransing would not be acting as a buffer between CISL and anyone else.
- (c) The messages refer to the mechanisms of how the bonds were being placed, the roles of CISL and the consultants and how and by whom the commissions were to be paid to the consultants. In this way, they

show familiarity with the way the placement/sub-placement arrangements were working out in practice. And in relation to those arrangements, the word “buffer” was entirely consistent with Gransing’s role.

155. Looking at the situation more broadly, D3 knew that D1 had originally intended CISL to be the placing agent but that there was a connected transaction problem. By early August 2014, she knew that Gransing was the placing agent but that the CFHL/CISL consultants were doing the actual placing of the bonds and that the interest on the bonds was to be paid to CISL. It would not have required a huge leap of imagination for her to realise that the appointment of Gransing was because of the connected transaction problem but that despite that problem, CISL was nonetheless actively involved. The easy flow of the messages leaves it open to inference that D2 too was aware of all of this.

156. More generally, what the messages mean is best assessed in the broader context of what was happening and why. This was context that the Judge who heard all the evidence was better placed than us to assess. As well, in deciding what weight to place on the innocent interpretations proffered by both counsel for D2 and D3, he was entitled to take into account the absence of evidence from D2 and D3 to support these interpretations. In those circumstances, I see no error in the approach taken by the Judge.

#### ***G.4 Other challenges to specific factual findings of the Judge***

157. I can deal with these briefly.

158. The first is a credibility challenge to the prosecution witness (PW1) who gave evidence about the meeting in June 2014 in which D1 indicated that

CFHL would appoint CISL as the placing agent and D3 indicated that a review was necessary.

159. This challenge was not fleshed out in argument and I see no error in the Judge's approach to his evidence.

160. The second is a challenge to the Judge's finding that Gransing was just a front for CISL. Once again I have no issue with the Judge's finding, given (a) the placements were, as was always going to be the case, effected by the CFHL/CISL team of consultants, (b) the initial proposal to use CISL as the placing agent that was abandoned after discussion about the connected transaction rules, and (c) the lop-sided nature of the commission arrangements between Gransing and CISL. If the arrangement was to have any credibility, the placements had to be documented in a way which accorded with it. Otherwise, the placement agreements would have been seen as shams. For this reason, the very limited documenting functions that Gransing carried out do not detract from the Judge's conclusion.

161. A third set of challenges related to the awareness of other people within CFHL (including members of the Legal and Compliance Department) and the auditors that CISL had played a part in the placement of the bonds.

162. There are references in contemporaneous documents to members of the Legal and Compliance Department having drafted and reviewed documentation associated with the placement/sub-placement arrangements and they must have been aware that CISL was involved. But there is nothing to suggest that they had reviewed whether the connected transaction rules applied.

163. Similar considerations apply with the auditors. They did know of some CISL involvement. But the complete position was not laid out clearly to them. That the auditors would appear not to have pried into the details of all of this is not of controlling significance.

164. In short, I have no difficulty with the way in which the Judge dealt with these issues.

### ***G.5 The liability of D1***

165. D1 was the key player. He was responsible for the set-up of the placement/sub-placement arrangements. He knew of all the facts, which on my approach to the law, means that the placement/sub-placement arrangements were connected transactions, and he must have realised that disclosure of the involvement of CISL would have been likely to result in the Independent Directors of CFHL forming their own judgment as to whether the connected transaction rules applied, possibly informing the Stock Exchange, and in any event scrutinising the commission arrangements in favour of CISL. His concealment of CISL's involvement, by the use of Gransing, coupled with the breach of his duties of disclosure were dishonest. The untrue denial in the 2014 and 2015 Annual Reports of conflicts of interest is further evidence of his dishonesty.

### ***G.6 The liability of D2 and D3***

166. From July 2014, D2 was the Group Financial Controller of CFHL and head of the Finance and Accounting Department. She became Group Chief Financial Officer of CFHL on 1 January 2015. She reported to D1 and, as head of the Finance and Accounting Department, was accountable to the Board.

167. In July 2014, D3 was manager of the Finance and Accounting Department and her responsibilities extended to the preparation of annual reports. She became Senior Manager for Group Strategic Development in January 2015 but carried on with working on the 2014 Annual Report. She resigned on 20 April 2016.

168. D2 and D3 were both Certified Public Accountants of the Hong Kong Institute of Certified Public Accountants. They were both involved in the way in which placing/sub-placing arrangements were implemented, including payments of commission to Gransing. D2 and D3 were involved in the preparation of the 2014 Annual Report, and D2 in the preparation of the 2015 Annual Report as well. In neither was CISL's role mentioned.

169. They knew of all the facts which, on my appreciation of the law, meant that the placement/sub-placement agreements were connected transactions, and that the only purpose of inserting Gransing between CFHL and CISL was to create a buffer. They must likewise have recognised that the corollary of this concealment exercise was that D1 would not be making a proper disclosure to the Board in relation to both the possible application of the connected transaction rules and his conflict of interest. That no such disclosure had been made was apparent from the 2014 and 2015 Annual Reports.

170. In his reasons for verdict, the Judge was of the view that D2 and D3 were themselves in breach of personal duties of disclosure they owed to CFHL, including in relation to "deliberate concealment of information". I do not have any difficulty with that conclusion, but I do not see it as necessary. That they facilitated breaches by D1 of his duties to CFHL is sufficient.

171. In light of all of this, it was open to the Judge to infer that they were parties, along with D1, to conspiracies to defraud.

### ***G.7 The liability of D4***

172. As mentioned earlier, D4 was the general manager of Gransing and was the primary point of contact with CFHL and CISL. At the time of the bond issues, D4 held a licence from the Securities and Futures Commission.

173. D4 was interviewed at the time of his arrest. His explanation for Gransing's role in the placement of bonds was along the lines that it accorded with normal business practice. He denied any involvement with CISL before the first of the placement agreements on 8 July 2014 and said that he subsequently dealt with two employees of CISL (other than D1). He acknowledged, however, that he had recognised that D1's signature on the sub-placement agreement implied that he was amongst "the top management" of CISL. He had tried unsuccessfully to involve two other firms in relation to the sub-placement of the bonds. He used CISL as the sub-placing agent for the second, third and fourth batches of bonds because of its involvement with the first batch. He knew that the Listing Rules of the Stock Exchange required public disclosure of connected transactions but did not know whether CFHL and CISL were connected persons.

174. The Judge rejected the critical parts of D4's narrative as untrue. It was not easily consistent with the dates on which the first set of placement and sub-placement agreements were entered into (8 and 9 July 2014, respectively). And, in any event, in June 2014, D1 had announced that Gransing and CISL would be the placing and sub-placing agents and discussed the commission

arrangements.<sup>33</sup> This meant that D4's narrative of how the arrangements developed was untrue. As well, his account of how the commission arrangements (under which CISL received around 98.5% of the commission payable to Gransing) were arrived at was not credible. Further, his assertion that he had approached two other firms about placing the first set of bonds was contrary to at least the drift of the evidence of witnesses who worked for those firms, and the fact that those firms did not have the licences required to provide for such placing assistance. As to this, the Judge might have added that as there was never going to be any occasion for anyone other than the CFHL and CISL consultants to be involved in placing the bonds, there was no need for outside assistance in placing the bonds.

175. On the evidence which the Judge accepted, D4 played a central role in arrangements under which Gransing was inserted between CFHL and CISL for no good commercial reason. As D4 knew, D1 was both a director of CFHL and in "the top management" of CISL. Having rejected D4's exculpatory out of court statement, and in the absence of any other innocent explanation, the Judge was entitled to conclude that D4 knew that the purpose of this insertion was to conceal CISL's role in the placing of the bonds from those who had a legitimate interest in knowing about it, including the CFHL Board, and that this concealment would only be effective if D1 did not make proper disclosure to the Board.

176. I have no difficulty with the Judge's conclusion that he too was guilty of conspiracy to defraud.

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<sup>33</sup> Although not mentioned by the Judge in this context, D2 sent D4 an email on 17 June 2014 with a draft of the placement agreement.

**H. Result**

177. I would therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the convictions of the defendants and other orders made in the District Court.

**Mr Justice Ribeiro PJ:**

178. Accordingly, the Court unanimously allows the appeal, sets aside the judgment of the Court of Appeal and restores the convictions of the defendants and the orders made by the Judge set out in his Reasons for Sentence dated 16 October 2021.

(R A V Ribeiro)  
Permanent Judge

(Joseph Fok)  
Permanent Judge

(M H Lam)  
Permanent Judge

(Frank Stock)  
Non-Permanent Judge

(William Young)  
Non-Permanent Judge

Ms Human Lam, SPP and Mr Ivan Shiu, SPP, of the Department of Justice, for the Appellant

Mr Ian Winter KC, Mr Derek Chan SC, Mr Tony C.H. Chow and Mr Sik Chee Ching, instructed by Ma Tang & Co., for the 1<sup>st</sup> Respondent

Mr David Perry KC, Ms Maggie Wong SC, Ms Rachel Lau and Ms Karry Lau, instructed by Edward C.T. Wong & Co., for the 2<sup>nd</sup> Respondent

Mr Martin Hui SC, Ms Vivian W.M. Wong and Mr Sean O'Reilly, instructed by K.L. Chan & Co., for the 3<sup>rd</sup> Respondent

Mr Edwin Choy SC, Ms Karen Y.Y. Lau and Ms Vivian Lam, instructed by Chiu, Szeto & Cheng, for the 4<sup>th</sup> Respondent

## **Appendix 1: the charges on which the defendants were found guilty**

### **Conspiracy to defraud (1<sup>st</sup> Charge)**

#### **Particulars of Offence**

[D1], [D2], [D3] and [D4], between the 1<sup>st</sup> day of June 2014 and the 27<sup>th</sup> day of April 2017, both dates inclusive, in Hong Kong, conspired together to defraud [CFHL], its Board of Directors, shareholders, and potential investors by dishonestly:-

- (i) causing [CFHL] to enter into agreements with [Gransing] to purportedly engage Gransing as the placing agent for the placement of bonds to be issued by [CFHL];
- (ii) arranging Gransing to enter into agreements with [CISL] to purportedly engage [CISL] as the sub-placing agent of the said bonds;
- (iii) concealing or failing to disclose that [CISL] was the actual placing agent of the said bonds; and
- (iv) causing [CISL] to be paid of a total commission of \$49,600,680 Hong Kong currency for the said placement of the bonds.

### **Conspiracy to defraud (3<sup>rd</sup> Charge)**

#### **Particulars of Offence**

[D1], [D2] and [D3], between around the 1<sup>st</sup> day of June 2014 and the 31<sup>st</sup> day of January 2016, both dates inclusive, in Hong Kong, conspired together to defraud [the Stock Exchange] by dishonestly concealing that [CISL] was the actual placing agent for the placement of bonds to be issued by [CFHL]; thereby causing [the Stock Exchange] not to:

- (i) raise any enquiries in relation to the said placement of the bonds with [CFHL]; and
- (ii) request [CFHL] to comply with the relevant Rules Governing the Listing of Securities on [the Stock Exchange].

## Appendix 2: WhatsApp messages between D2 and D3 on 6 August 2014

D3: If all 50m bond issued to [Gransing], instead of individuals, any issue for lending workflow?

D3: Need to calculate size test?

D2: I think there is no listing rules implication for issue of bond, no matter issuing to agent or individual holders...

D3: But now our bond cert to [Gransing] only

D3: So will any problem on lending?

D2: But talking abt the lending workflow...seems more complicated!!!

D3: Yup

D3: Actually today we know issue to [Gransing]

D3: Not to individual

D3: ... [D1] so angry that we made a mistake ...

D3: As [Gransing] not mention

D3: But instruction doc asked us to issue to individual

D2: Anyway, ultimately the bondholders will still be those investors??

D3: Tmr we will meet with [CISL] team to clarify

D3: Suppose [Gransing] is custodian and only [Gransing] know the individual list

D3: [CFHL] only know [Gransing]

D3: But some issues on commission payment and consultant enquiry

D3: As I dont think [Gransing] will pay to consultant

D3: So a bit complicated

D2: But Henry has gone thr' the whole set doc w [D1] directly before ga  
wor

D3: Really got confused

D3: Anyway tmr will have meeting with [CISL]

D3: And will invite kwok to attend for lending part

D3: Coz many workflow behind

D2: Cant understand, how can work btn agent & [CISL]

D3: To my understanding, we can also disclose [Gransing] in all doc

D2: I guess henry also didnt know [D1's] concern

D3: But not [CISL] or individual

D2: No mention [CISL] is a must ...

D2: 'Coz it will constitute CT if the agent is [CISL]

D2: The purpose of Gransing is to act as a buffer

D3: But if not know individual

D3: I just think the backend will complicated

D3: Say consultant enquiry, commission, lending...

D3: As it will be [CFHL] to pay commission

D3: Or ask [Gransing] to perform this role