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ABSTRACT

This column provides a country by country analysis of the latest legal developments, cases and issues relevant to the IT, media and telecommunications' industries in key jurisdictions across the Asia Pacific region. The articles appearing in this column are intended to serve as 'alerts' and are not submitted as detailed analyses of cases or legal developments.

1. Hong Kong

1.1. *Court of Final Appeal rules Internet not to be a public place*

In the recent case of *HKSAR v Chan Yau Hei*,[1] the Hong Kong Court of Final Appeal ("**CFA**") was faced with the novel question of whether the Internet is a public place in respect of the offence of outraging public decency. The judges of the CFA unanimously decided that the Internet is not a public place for the purposes of this offence, since it is not a "place" at all. The defendant's conviction was quashed.

1.1.1. *Background*

On 11 June 2010, Chan Yau Hei ("**Mr Chan**") posted an allegedly inflammatory message in Chinese on the online forum "HKGolden"[2] using his home computer. The message in question can be translated as: "*We have to learn from the Jewish people and bomb the Liaison Office of the Central People's Government # fire #*" (the "**Message**"). Five days later, a reporter from a widely circulated Chinese newspaper raised an enquiry with the police about the message.

Mr Chan was arrested at his home on 19 June 2010 and charged with the offence of outraging public decency. After an unsuccessful appeal to the Court of First Instance, Mr. Chan brought his case to the CFA.

1.1.2. *The common law offence of outraging public decency*

It is well established under common law that it is an offence to do an act in public that is of a lewd or obscene nature, and which outrages public decency (*Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*[3]). The offence comprises two elements: (1) the public element; and (2) the nature of the act.

1.1.2.1. *The public element.*

The public element comprises two distinct parts:

(i) The first limb: the act must have been done in a place where the public had access, or in a place where what was done was capable of public view; and

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[1] (FACC No. 3 of 2013), 7 March 2014.
[2] http://forum4.hkgolden.com.
[3] [1973] AC 435 at pp 492C-493H.

http://dx.doi.org/10.1016/j.clsr.2014.05.012
0267-3649/

(ii) The second limb: the act must have been capable of being seen by two or more people who were actually present, even if they did not actually see it (the "two person rule").

There is no requirement that the act be witnessed, so long as two people were present and capable of seeing the act should they have happened to look.

1.1.2.2. The issues on appeal.
The issues on appeal were whether or not:

(i) the posting of a message on an Internet discussion forum could satisfy the public element ("**Public Element Issue**"); and
(ii) the Message, by its nature and content, was capable of satisfying the second element (i.e. the nature of the act) ("**Nature of the Act Issue**").

The Nature of the Act Issue was uncontroversial. The CFA held that the Message was a "*straightforward and unambiguous incitement to carry out an act of terrorism*".[4] The incitement to bomb premises was held potentially obscene and disgusting, due to "*the brazen disregard for potential loss of life, personal injury, damage to property and public trauma caused by an act of terrorism*".[5] The fact that the incitement targeted a government office was held to be an aggravating feature.

The CFA also noted that the incitement to bomb premises was juxtaposed with "*an extremely offensive racist slur*"[6] which suggested that Jewish people were in the habit of committing acts of terrorism. This feature was also held potentially capable of causing or exacerbating a sense of outrage.

However, the Public Element Issue warranted much more detailed discussion and in the end proved to be the sticking point which led to the quashing of Mr. Chan's sentence.

1.1.3. Public Element Issue — Why the Internet is not a place
The CFA took a rather narrow view of what the Internet is, stating that any material uploaded onto the Internet is merely computer code which cannot be understood by human beings:

> *It is a fiction to describe the Internet as a place in any physical or actual sense. The fiction arises because material uploaded to the Internet… is simply computer code and not humanly intelligible until accessed or downloaded in comprehensible form to a computer or mobile platform connected to the Internet.*[7]

This view was arrived at having considered the common law approach to deciding when online material is published for the purposes of libel. In *Oriental Press Group Limited and Ors v Fevaworks Solutions Limited & Anor*,[8] it was held that online material is published for the purposes of libel law when it is received and accessed or downloaded in a form comprehensible to the person making the request.

The CFA decided that for the purposes of the offence, the Internet is simply a medium for the commission of the offence, rather than a place. The public element of the offence requires that the act outraging public decency be committed in a physical, tangible place, which the Internet is not.

The CFA also decided that holding the Internet as a public place would amount to judicially extending the boundaries of criminal liability in an impermissible way. Because of this, and because the offence in question is a strict liability offence, the CFA declined to develop the existing common law boundaries by holding that the Internet is a public place.

1.1.4. The place which matters for the purpose of the Public Element Issue is the place where the reader downloaded the message
However, if the Internet is not a place at all, then where was the offence committed?

The CFA judgment suggests that in terms of acts outraging public decency committed via messages posted on the Internet, the place that matters for determining the Public Element Issue is the place where the material is downloaded:

> *The readers of that message may be in various different places when they access or download the relevant webpage and, because they may be using mobile Internet devices, those places may be private or public.* ***But it is in those actual places that their sense of decency may be outraged, not in some virtual place*** *[emphasis added].*[9]

Of note is that the CFA had no regard for the place where the defendant was located when he actually committed the act of posting the offending statement on the Internet forum. From the CFA's perspective therefore, until the offending message has been "published" i.e. it has been downloaded onto a device connected to the Internet, the act of offending public decency has not yet been "done" for the purposes of the first limb of the public element. In other words, the action of the person who committed the act is not by itself enough to form the actus reus of this criminal offence. This appears to be a slight modification of the first limb of the public element that applies particularly to offences committed by posting messages on the Internet.

In the present case, the CFA had not been presented with any evidence of where and by whom the Message was read. In the absence of direct evidence, the CFA was unable to decide whether the public element had been satisfied. The offence of outraging public decency therefore could not be pursued.

1.1.5. The Internet is a medium through which public decency can be outraged
Despite this, the CFA decided that public decency can nevertheless be outraged via the Internet as a medium. The judgment sets out two examples by which this might be achieved.

The first example was that a person may by means of a mobile Internet device, such as a tablet computer or a smart

[4] *HKSAR v Chan Yau Hei* (FACC No. 3 of 2013), 7 March 2014, paragraph 82.
[5] ibid.
[6] *HKSAR v Chan Yau Hei* (FACC No. 3 of 2013), 7 March 2014, paragraph 84.
[7] *HKSAR v Chan Yau Hei* (FACC No. 3 of 2013), 7 March 2014, paragraph 45.
[8] (FACV 15/2012), 4 July 2013.
[9] *HKSAR v Chan Yau Hei* (FACC No. 3 of 2013), 7 March 2014, paragraph 46.