

[English Translation – 英譯本]

HCMA 624/2015

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

MAGISTRACY APPEAL NO. 624 OF 2015
(ON APPEAL FROM TWS NO. 6311/2015)

BETWEEN

HKSAR

Respondent

and

Hong Kong Broadband Network
Limited

Appellant

Coram: Hon Wong J in Court

Date of Hearing: 16 March and 16 December 2016

Date of Judgment: 26 January 2017

JUDGMENT

1. A summons was issued against the appellant regarding a complaint that the appellant, being a data user, failed to comply with a data subject's request to cease using his personal data in direct marketing¹.

¹ Contrary to section 35G of the Personal Data (Privacy) Ordinance, Cap 486, Laws of Hong Kong.

2. The appellant entered an appearance in Tsuen Wan Magistrates' Court where it pleaded not guilty. The Magistrate convicted the appellant after trial and a fine of \$30,000 was imposed. The appellant appealed against the conviction.

Prosecution's allegations

3. According to the agreed facts, the prosecution witness started to subscribe to the appellant's service in December 2011 for a term of 24 months. On 8th April 2013, the prosecution witness, being the data subject, emailed an opt-out application to the appellant requesting the data user to stop using his personal data in direct marketing. The appellant acknowledged receipt of the prosecution witness's opt-out application by sending a reply to his personal email address.

4. On 17th May, a telemarketing staff member ("*Bonnie*") of the appellant called the prosecution witness on his mobile phone but the call was not answered. *Bonnie* then left a voice message:

"Hello, Mr. Chan. I am (Miss) Wong calling from Hong Kong Broadband. Well, Mr. Chan, you have been using our company's broadband service at ... your home and the contract will expire soon. Well, as (we) were notified by the company that the price for contracts renewed from June onwards will be adjusted, it will become more expensive by that time. Well, we do not hope that you Mr. Chan could not enjoy the lower price after the price increase. So, (I) would like to notify Mr. Chan that, if you are satisfied with our 1000M service, an internal special offer is available to (you) Mr. Chan within this month to ensure that (you) will not be affected by the price increase. So Mr. Chan, if you received this voice message, please call me

back at XXXXXXXX². I am (Miss) Wong. Thank you. Bye-bye.”³

5. The prosecution alleged that the content of *Bonnie*'s voice message amounted to direct marketing and thus the data [subject's] request was not complied with.

Defence case

6. During the trial⁴, the defence did not dispute the factual allegations⁵ put forward by the prosecution.

7. The defence called one witness to give evidence. The essential points⁶ of his testimony are as follows:

(1) There were 5 teams in the *Customer Relations* department of the appellant company [“the company”], namely *CRA*, *CRB*, *CRE*, *CRK* and *CRM*. Each team had its own assigned duties.

(2) *Bonnie* was under *CRK* team which was responsible for after-sales service and giving reminders of contract (renewal).

² The telephone number is not disclosed for the sake of privacy.

³ See prosecution exhibit P5A for the transcript.

⁴ The appellant was represented by Mr. Tony Li of counsel in the trial.

⁵ The prosecution did not call any witnesses. The prosecution evidence was all submitted by way of admitted facts attached with the documentary documents concerned.

⁶ See paragraphs 11 to 25 of the Statement of Findings.

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(3) The call centres of the said team were situated in Hong Kong and Guangzhou.

(4) *Bonnie* worked in Guangzhou and was responsible for dealing with existing/old customers.

(5) Before 1st April 2013 when the Personal Data (Privacy) Ordinance came into effect, there were sharing sessions and consultations between the legal department of the company and the people of the industry regarding the new legislation. There was also internal division of work in the company.

(6) The web interface of the company was altered after the new legislation came into effect. The customers might opt to receive or not to receive the promotional information of the company. They might also make use of such channels as online media, retail shops, hotline and email to notify the company that he/she refused to receive any promotional information.

(7) The personal data of the customers were recorded electronically in the database of the company. Staff members of the said 5 teams were able to view the lists of customers.

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(8) When a customer requested to have his personal data deleted, or refused to receive direct marketing information, the company would delete the customer's name from the direct marketing customer list and confirm with the customer.

(9) Despite that, the staff members of the three teams, namely *CRB*, *CRK* and *CRA*, could still view the customer's personal information in the customers' database. For this reason, *Bonnie* of *CRK* could still view the data of the prosecution witness.

(10) *CRK* team was mainly responsible for after-sales service and contract (renewal) reminder. It had nothing to do with "direct marketing".

(11) The company's understanding of "direct marketing" was as follows: The customers were divided into new customers and old customers. For new customers, the staff would introduce the various services provided by the company. For old customers, the staff would introduce the upgrade services, music software, telephone services, new services or any existing services of the company which the customers had not subscribed to before.

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(12) The customer's contract normally lasted for two years. As stipulated in the contract, after the expiry of the contract, the company would continue to provide services but at the normal price. The contractual price was \$230 while the normal price was \$490.

(13) After the implementation of the new ordinance, the company did receive complaints from customers. There were also complaints lodged with the Communications Authority accusing the company of not reminding them that the normal price would be charged upon the expiry of their contracts. Thus, the company was of the view that reminding customers about renewing contracts was an important service (to avoid complaints).

(14) *CRK* team was responsible for after-sales service and for reminding customers about renewing contracts. If a customer wished to renew his/her existing contract, *CRK* team would transfer the case to *CRB* team for follow-up.

(15) *CRA* team played a passive role. It would only return a call after it had been called upon for enquiry. If a customer who had once opted not to receive information called the company to inquire about

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contract renewal, *CRA* team could see the personal data of that customer, too.

(16) *CRB* and *CRK* teams played a more active role. They would take the initiative to call up customers regarding contract renewals.

(17) The company did provide training to the members of the *CRK* team, including “*role play*”. There were also departmental guidelines requiring them to convey accurate information or messages to customers so as to avoid misconceptions or misunderstandings.

(18) The company also provided scripts to the members of *CRK* team. The defence exhibits *D3(1)* and (2) were intended to be used for contract renewal for those customers who had opted out of use of their personal data in direct marketing. Exhibit *D3(1)* was the script for those customers who answered telephone calls and accepted the contract renewal plans recommended by the promoters. Exhibit *D3(2)* was the script for those customers who answered telephone calls but did not accept the contract renewal plans recommended by the promoters over the phone.

(19) The said scripts were compiled after consultation with the trade. They were also checked and approved by

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the relevant department of the company. The scripts had been in use both before and after the legislation became effective. In case a customer did not answer the call, the staff member of the company would continue to call to leave a voice message and send an email as well as SMS in order to inform the customer and to ensure that he/she would receive the messages that his/her contract was due to expire and the service charge would be revised.

(20) After Mr. Chan's complaint, the company checked *Bonnie's* voice message and found that the content deviated from the script, namely (1) "the service charge at contract renewal will be revised in June", (2) "An internal special offer is available to (you) Mr. Chan within this month." The company was not able to check or find out whether there was such a matter as a service charge adjustment in June. *Bonnie* did not leave a voice message in accordance with the script provided by the company. Her voice message did not comply with the requirement of the company, either. The company had already issued a warning to *Bonnie* and its staff members were also reminded that they should strictly follow the content of the script.

(21) The purpose of the company's calling up Mr. Chan or the customers concerned was to provide them with service information, and to remind them of the

imminent expiry of their contracts and that the service charge would be revised. If the situation permitted, the company would recommend certain special offers to the customers to choose.

(22) The company would not remind its customers that their service contracts would expire soon by letters. That would only be done by phone, SMS and email. The company required that its staff members must have conversations with customers to achieve bilateral communication so as to ensure that the customers did receive the message and to avoid complaints.

(23) There were staff members in the company monitoring the telephone conversations but he was not very sure how frequent that would be. He was not very sure as to how many staff members there were in *Bonnie's* department. There might be several tens of them with perhaps 3 or 4 persons-in-charge in the department. There was a Quality Assurance Department in the company which was comprised of 5 or 6 people. The department would choose 1 or 2 phone calls each week for the purpose of monitoring the conversation. Suppose there were 90 phone calls, 1 or 2 would be picked and checked.

Findings of the Magistrate

8. According to the Magistrate, the issues in the present case are as follows:

(1) Whether the content of *Bonnie*'s voice message and her act of calling Mr. Chan were merely for the purpose of reminding the existing customer Mr. Chan of the expiry of his service contract?

(2) If the purpose was not merely to remind (the customer) about the imminent expiry of his contract but rather for the purpose of contract renewal, was such contract renewal not a "new purpose" and therefore the customer's "specific consent" was not required?

(3) Whether the contract renewal amounted to "direct marketing"?

(4) Whether the contract renewal fell within the category of exception or exemption under the relevant legislation?

(5) If the content of *Bonnie*'s voice message amounted to "direct marketing", did the company take all reasonable precautions and exercise all due diligence to avoid the commission of an offence? If it did, was that sufficient to invoke the statutory defence?

9. The Magistrate pointed out that since the evidence before her only related to this particular voice message mentioned above, she would

consider the case on the basis that the appellant only contacted the customer once.

10. She also pointed out that:

“64. ... The defendant required its staff members including *Bonnie* to communicate with Mr. Chan by different means, including by phone, email, and SMS, notwithstanding that there was still a long period of time, namely more than 6 months, before the expiry date of Mr. Chan’s contract. While these communications purported to remind Mr. Chan of the expiry of his contract soon, they in substance aimed to obtain a renewal of his contract. Whether or not *Bonnie* deviated from the script, in fact, both the content of the voice message and the script subsequently submitted by the defendant aimed at soliciting a contract renewal from the customer, that is, to reach the customer Mr. Chan, a specific person, a named specific person, by phone / voice message for the purpose of providing information in offering the defendant’s service on contract renewal, and thus amounted to “direct marketing”.

65. ... I accept the evidence from both sides. However, I am not satisfied with the argument that the defendant called up Mr. Chan at that time merely to remind Mr. Chan that his service contract was coming to an end. Nor do I agree that the renewal of contract was not a “new purpose” because Mr. Chan had already made it clear that he did not consent to his personal data being used for direct marketing. The defendant must comply with his request.

66. I consider that the defendant failed to take all reasonable precautions and exercise all due diligence to avoid the commission of the offence. On the contrary, exhibit *D3(1)(2)*, the script, reflected that the defendant neglected the will of its customer not to use his personal data in direct marketing. The defendant disguised the direct marketing of its service to an existing customer in the name of reminding him the coming expiry of his contract.”

11 For the above reasons, she convicted the appellant.

Grounds of appeal

12. At the appeal, the appellant was represented by Mr. Selwyn Yu SC and Mr. Tony Li⁷. The grounds of appeal advanced are as follows:

(1) The Magistrate failed to set out properly the elements of the offence, in particular the requisite *mens rea*⁸, and failed to adequately consider, analyse and adjudicate on the evidence in respect of this issue.

(2) In deciding whether the voice message left by the appellant to the prosecution witness, namely the information concerning contract renewal, amounted to “direct marketing”, the Magistrate committed the following errors:

(i) Drawing an inference in the absence of sufficient evidence that the appellant’s voice message was not genuinely for the sole purpose of renewing the existing service contract. And that inference was not the only reasonable inference from facts under the circumstances;

(ii) Not only mixing up motive with *mens rea* but also drawing an inference of *mens rea* and/or *actus reus* from the wrong facts, namely finding

⁷ Mr. Tony Li was the legal representative of the appellant at trial.

⁸ Mr Yu SC used 「造意」 as the Chinese equivalence for the term *mens rea*. Since this Court has all along been adopting 「犯意」 as the Chinese equivalence, for the sake of consistency, 「犯意」 will be used throughout this judgment.

that the motive of the voice message service was the *mens rea* or the *actus reus*;

(iii) Failing to give full and correct consideration as to whether the voice message in question constituted “the offering, or advertising of the availability, of goods, facilities or services”;

(iv) Finding that the appellant used the data subject’s personal data and called the prosecution witness for a “new purpose”;

(v) Finding that the appellant’s provision of contract renewal information to the prosecution witness within the term of the existing contract amounted to “direct marketing”.

(3) The Magistrate, in convicting the appellant, took into account matters irrelevant to the charge, and/or failed to consider matters that were relevant to the charge.

(4) The Magistrate wrongly, and in the absence of proper self-direction, relied on the defence witness’ testimony in reply to her questions, including those parts relating to the offences not charged against the appellant, to draw an adverse inference against the appellant and/or to convict the appellant.

(5) In view of all the evidence and circumstances in the present case, the conviction was unsafe and unsatisfactory.

Discussion and consideration

Grounds of appeal (1)

13. The offence concerned is created by Section 35G of Personal Data (Privacy) Ordinance (“the offence”), the particulars of which are as follows:

“(1) A data subject may, at any time, require a data user to cease to use the data subject’s personal data in direct marketing.

(2) Subsection (1) applies irrespective of whether the data subject –

(a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or

(b) has earlier given consent to the data user or a third person to the use.

(3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with⁹ the requirement.

(4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

⁹ Underlining added for emphasis.

(6) This section does not affect the operation of section 26.

14. This ground of appeal is concerned with the elements of the offence. Mr. Yu SC submitted that it was incumbent on the prosecution to prove the *mens rea* of the accused, namely the intention to commit direct marketing.

15. On the other hand, Mr. Eddie Sean, Senior Assistant Director of Public Prosecutions [SADPP Sean] submitted on behalf of the respondent that the subject offence was one of strict liability¹⁰ and the prosecution need not prove *mens rea*.

16. This issue was not discussed during the trial. Counsel for both parties made supplementary submissions only after this Court had raised it.

17. Citing the cases of *Kulemesin v HKSAR*¹¹ and *HKSAR v Hin Lin Yee*¹², Mr. Yu SC submitted that it was incumbent upon the prosecution to prove the *mens rea* of the accused, for example knowledge, intention or recklessness. It was because under common law, there was the presumption of *mens rea*¹³ which must be proved by the prosecution so as to reflect the constitutionally protected right of presumption of innocence. As far as the present case is concerned, such duty of the

¹⁰ A 'strict liability offence'.

¹¹ (2013) 16 HKCFAR 195.

¹² (2010) 13 HKCFAR 142.

¹³ See cases such as *HKSAR v So Wai Lun* [2005] 1 HKLRD 443, at 447; *Sweet v Parsley* [1970] AC 132; *Gammon v AG of HK* [1985] AC 1.

prosecution has not been displaced either expressly or by necessary implication.

18. As the cases cited by Mr. Yu SC showed, there was the presumption that *mens rea* must be proved. However, this presumption could be displaced expressly or by necessary implication. In order to conclude whether the legislation carried such an implication, one should examine and consider the statutory language, the nature of the offence, the mischief intended to be prevented by the legislation, and all circumstances which could be of assistance in determining the legislative intent in the enactment of the offence. To put it simply, any attempt to undermine the presumption of innocence must be justified by very cogent reasons.

19. In *Kulemesin v HKSAR*¹⁴, the Court of Final Appeal, having examined a series of cases, set out the five possible alternatives in relation to the *mens rea* of statutory offences¹⁵:

- (1) first, that the presumption of *mens rea* persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence (hereafter referred to as “the first alternative”);
- (2) second, that the prosecution need not set out to prove *mens rea*, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he

¹⁴ (2013) 16 HKCFAR 195.

¹⁵ The judgment was written in English. I quoted what Mr. Yu SC had said in his submission.

would not be liable, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief (hereafter referred to as “the second alternative”);

(3) third, that the presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence (hereafter referred to as “the third alternative”);

(4) fourth, that the presumption has been displaced and that the accused can only rely on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives (hereafter referred to as “the fourth alternative”); and

(5) fifth, that the presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind in respect of the relevant elements of the offence in question (hereafter referred to as “the fifth alternative”).

20. Mr. Yu SC submitted that the offence in the present case belonged to the said first possible alternative. The prosecution must prove that when the accused was using the personal data of the data

subject, it had an intention to use the data for the purpose of direct marketing.

21. On the other hand, SADPP Sean submitted that the present offence belonged to the fourth possible alternative, namely the prosecution need not prove *mens rea* and the accused could only rely on the statutory defences expressly provided for.

22. Mr. Yu SC contended that the maximum penalty for the offence involved in the present case was a fine of \$500,000 and 3 years' imprisonment. He submitted that the penalty was substantial and the term of imprisonment of which was the same as that carried by such serious criminal offence as assault occasioning actual bodily harm. By the principles of consideration in the case of *Hin Lin Yee*¹⁶, one should not interpret the legislative intent as creating an offence which did not require proof of *mens rea*.

23. Besides, Mr. Yu SC also pointed out that the maximum penalty set down by the predecessor of the existing ordinance was only a fine at level 3¹⁷. By comparison, it could be seen that the present legislative intent was to create a serious offence.

24. Mr. Yu SC submitted that in considering the present case, the Court should strike a balance between safeguarding personal data privacy and facilitating business operations. He submitted that if the

¹⁶ (2010) 13 HKCFAR 142, see paragraph 28 of this judgment.

¹⁷ The current fine is \$10,000.

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offence concerned was found to be one of strict liability, this would be detrimental to business operations and affect the quality of service. He also submitted that, as far as the present case was concerned, calling up the customer with a view to give him a reminder so as to avoid a higher fee to be charged upon expiry of the existing contract was good customer service and therefore such a practice should not be hindered.

25. Mr. Yu SC also referred to Section 127(1) of the *Communication(sic) Act 2003* of the UK. He pointed out that the provisions of the said Act were similar to those of the present offence, which also focused on the act of sending a message to another person. The English Court¹⁸ found that the prosecution, apart from proving that the accused “sent” or “caused to send” the message in question, also needed to prove that the accused at the material time did have the intention to cause the said message to be of menacing and annoying character.

26. The said UK law is directed against the act of sending an improper message by a public electronic communications network. It provides:

“A person is guilty of an offence if he sends the[by] means of a public electronic communications network a message or other matter that is quashed [grossly] offensive or of an indent[indecent] character”

¹⁸ See *DPP v Collins* [2006] UKHL 40 and *Chambers v DPP* [2013] 1 A11 ER 149.

27. SADPP Sean submitted that this UK Act and the relevant ordinance in the present case were not comparable. It was because the subject matter as well as the wording of the two were different. I agree.

28. The criteria for properly displacing the presumption of *mens rea* have been stated clearly by the Court of Final Appeal in various cases¹⁹. The following legal principles were established in the case of *Hin Lin Yee*:

“(1) In deciding whether the presumption of *mens rea* has been displaced expressly or by necessary implication, the first, and potentially crucial, consideration is the statutory language including the use of any word or expression carrying a connotation of knowledge or intention. Second, the nature and subject-matter of the offence are also of great importance. The more serious the offence in terms of penalty and social obloquy, the less likely it is that the presumption will be held to have been supplanted, although this is not impossible. On the other hand, there is generally less need for the Court to feel inhibited about overriding the presumption in relation to what may compendiously be called “regulatory offences”, e.g. the offences under public health, licensing and industrial legislation. Third, the legislative purpose, and its possible frustration by insisting on full *mens rea*, is obviously important.

(2) Given the severe consequences, an absolute liability should only be found to arise where the conclusion is compelling. The mere fact that the relevant offence is regulatory is not sufficient, in itself, to justify absolute liability.

¹⁹ For example, *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR142, *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, and *Lee To Nei v HKSAR* (2012) 15 HKCFAR162.

Rather, as per the *Lim Chin Aik* principle, it is necessary to justify absolute liability on the basis that it serves some useful purpose, i.e. it could affect observance of the law. Further, the *Lim Chin Aik* principle is supplemented by an additional consideration, namely the court has to be satisfied that the statutory purpose cannot be sufficiently met by making the offence subject to the common law defence.

(3) There are two situations, amongst others, where absolute liability may in principle be imposed. The first is where the law does not consider the conduct in question to be essential or even necessarily acceptable from a societal point of view, as in the case of certain sexual offences. The second involves the statutory imposition of a duty on a person (which may be a corporate body) where the conduct or task which is the subject of the duty is in practice likely to be carried out by someone else, such as an employee or a contractor. Many regulatory offences may fall within the second class.²⁰

29. The penalty which Mr. Yu SC considered important was merely one of the considerations. The most important matter still is to establish the legislative intention.

30. As far as the ordinance involved in the present case is concerned, the statute does not specifically provide that *mens rea* is one of the elements of offence, nor does it specify that the offence is one of strict liability. I am obliged to scrutinize all relevant circumstances to confirm whether the statute does provide the necessary implication that

²⁰ The judgment was written in English. The Chinese version of the headnote in the law report is adopted.

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B proof of *mens rea* is not required. As to the relevant circumstances, they
C are what as stated in paragraph 28 of this judgment.

D 31. I consider that, obviously, the offence involved is a
E regulatory offence in nature rather than a crime in the ordinary sense; it
F aims at dealing with the contravention of requirement regarding the use
G of personal private data. The data user is not allowed to disregard the
H data subject's request for not using his personal data for the purpose of
I direct marketing. Though the penalty can be substantial depending on the
facts of the case, the culpability of the offence is after all far less than
those offences which are truly criminal in nature.

J 32. The language of the statute and the defence provided for
K therein also indicated the legislative intent that proof of *mens rea* be
L unnecessary.

M 33. In practice, many data users are organizations, enterprises or
N merchants rather than individuals. However, those who carried out the
O acts that contravened the requirement are usually employees of these
P organizations, enterprises or merchants but not employers or persons-in-
Q charge. If such kinds of *mens rea* as put forward by Mr. Yu SC in his
R submission must be proved, the effect of the Ordinance will be greatly
S undermined. On the contrary, displacing the requirement of proving
T *mens rea* will enhance the implementation of the legislative purpose and
U compliance of the Ordinance by the public at large.

V 34. The basis of imposing punishment [on a proprietor or an
employer] for the acts of his subordinates was elucidated in the case of

*Reynolds v Austin & Sons Ltd*²¹, in which Devlin J said: A man may be made responsible for the acts of his employees, or for defects in his business arrangements, because by such sanctions people are induced to keep themselves and their organizations up to the mark expected by the public. Although in one sense he is being punished for offences of others, it can be said that, if he had been sufficiently alert to see that the law was observed, the offence might not have been committed.²²

35. In *Hin Lin Yee*, Ribeiro PJ²³ said: If the employer knows that he will be held to account, even without actual fault on his part, if his employee or contractor is slack, sloppy, careless or incompetent on the job that concerns his business, he will have the will and incentive to ensure that the job is properly done, or even to replace employees or contractors who are not up to the task.²⁴

36. This is being said for absolute liability offences²⁵. However, in considering whether to establish strict liability, the same rationale should also be applicable.

37. Although the people who can access or know about others' personal private data may have different capacities and play different roles, they must take appropriate steps, having regard to their respective

²¹ [1951] 2 KB 135, 149.

²² This is an English case and the aforesaid is the gist of the judgment of the court.

²³ Ribeiro PJ.

²⁴ The judgment was written in English. It does not have an official Chinese translation. This is a gist of the judgment, see paragraph 158 of the judgment.

²⁵ Absolute liability offence[s].

capacities, roles and the actual circumstances, to make sure that the law will not be contravened.

38. One of the points Mr. Yu SC submitted was what direct marketing was and this involved the examination of the intention of the actor. My view is that whether an act constitutes direct marketing is simply a matter of *actus reus*²⁶, an element of the offence concerned. One only needs to look at what the actor says and does. There is no need to care about the purpose behind.

39. I therefore rule that the clear legislative intent is that proof of *mens rea* is not necessary.

40. The ordinance does not create an offence of absolute liability but an offence of strict liability. The burden of proof is partly reversed, thereby derogating from the presumption of innocence. However, that is for the pursuit of a legitimate social aim²⁷ and meets the requirements of the rationality²⁸ and proportionality²⁹ tests.

41. As to rationality, this is to inquire whether the measure is rationally connected with the pursuit of a legitimate [societal] aim. It is beyond doubt that the provisions concerned do satisfy the requirement of the test of rationality.

²⁶ *Actus reus*.

²⁷ Legitimate social aim.

²⁸ Rationality.

²⁹ Proportionality.

42. On the issue of proportionality, it considers where the constitutional right of presumption of innocence is to be undermined, whether the extent is more than it is necessary for achieving the aim required. This relates to two matters:

(1) Whether the offence is one of absolute liability or strict liability; and

(2) if it is of the latter, then, whether the party who puts up a defence has the persuasive burden³⁰ or merely the evidential burden³¹.

43. The offence in the present case is obviously not an offence of absolute liability. Therefore, I only need to consider item 2 in the above.

44. The Magistrate in her judgment dealt with the defendant merely on the basis of evidential burden. I have no objection to her so doing.

45. Since the consideration in the present case has been on the basis that the appellant only bears the evidential burden, proportionality is really not a problem.

46. Mr. Yu SC also pointed out that if the Court found an offence was one of strict liability, other than the statutory defence, the defence under the common law should also be allowed. As far as the

³⁰ Persuasive burden.

³¹ Evidential burden.

present offence is concerned, the defence should be: the accused honestly and reasonably believed that his conduct was only for following up the customer's after-sale service.

47. SADPP Sean submitted that a defence under common law should not be allowed. It was because such a defence was not consistent with a statutory defence. The reason was that the standard required for a statutory defence was higher than that for a common law defence as proposed by the appellant. Pursuant to the finding of *Hin Lin Yee*, the latter should be removed and the accused could only rely on statutory defence.

48. Although the parties' views as to the definition of defence diverged, they both stated that other than *Hin Lin Yee*, they did not find other cases which further elaborated on this point.

49. The statutory defence of the offence involved in the present case required the accused to do some positive act³². Obviously, this could not encompass a defence that can be established by virtue only of belief. I therefore find that in respect of the present offence, the accused can only rely on the statutory defence.

50. For the said reasons, I find that the offence in question is a strict liability offence. The elements of the offence are as follows:

³² Positive act.

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- (1) There is a data subject who has required a data user to cease to use the data subject's personal data in direct marketing;
- (2) The data user has received such a request from the data subject;
- (3) The data user fails to comply with the request.
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The prosecution has to prove the above 3 elements beyond all reasonable doubt.

51. Where the above 3 elements have been proved, unless the accused is able to rely on the defence under Section 35G(5)³³, he or she must be convicted as charged.

52. As far as the present case is concerned, the prosecution has already proved the elements of the offence as it has to. The prosecution is not obliged to prove *mens rea*. Accordingly, this ground of appeal fails.

Grounds of appeal (2)

53. The issue in this ground of appeal is whether the Magistrate was wrong to find that the voice message in question constituted direct marketing.

54. I have already found the subject offence a strict liability offence. In relation to this ground of appeal, I only need to take into

³³ See paragraph 13 of this judgment.

consideration whether Bonnie’s conduct constituted direct marketing and disregard any other arguments.

55. The definition of direct marketing in the ordinance is:

- “(a) the offering, or advertising of the availability, of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes, through direct marketing means.”³⁴

56. The definition in part (a) is relevant to the present case.

57. Both parties pointed out that the meaning of “offering” and “advertising” in the ordinance has not been previously elaborated in any cases.

58. Mr. Yu SC referred to some records of proceedings of the Legislative Council and the bill of the ordinance when it was amended in 2011. He submitted that the legislative intent of the ordinance was to safeguard personal privacy by legislating on the protection of personal data. That included the provisions against the nuisance caused by cold calls. However, at the same time as governing the use of personal data, the legislators had given attention to ensuring efficient business management and operation. Therefore, he submitted that when interpreting the term “direct marketing” in Section 35G, one should consider at the same time achieving a proper balance between

³⁴ Section 35A of the ordinance.

safeguarding personal data privacy and facilitating efficient business operations.

59. Mr. Yu SC submitted that:

(1) One should adopt the comprehension of the concept of “offer” as in the law of contract for the meaning of term “offer” in the definition provision. He quoted the annotation of this term in Cihai³⁵:

“Offering’: a party proposes to the other the request or construction (sic) of making a contract. It is an indispensable procedure for mutual undertaking to enter into a contract. Apart from expressing his wish of signing a contract, the offeror must also state clearly the basic terms and conditions which can sufficiently determine the contents of the contract. It is made either orally or in writing. An oral offer shall become effective as soon as the other party understands the contents of the offer. A written offer usually becomes valid when the document is served on the other party. The offer normally stipulates the period of undertaking. The offeror shall be bound by the offer within this prescribed period. The other party shall make an undertaking period (sic) within the prescribed period. The offeror shall be bound by the offer within this prescribed period. As soon as the other side makes an undertaking, the contract shall be established forthwith. As a common rule in the law of every country, an offer can be cancelled before it is accepted.”

(2) “Advertising” means the act to provide the people/audience or the general public with information.

³⁵ See Cihai, Vol. 3, 1999 Edition.

Again, he quoted the annotation of “advertising” and “propagating” from Cihai³⁶:

“Advertising’: it is a way of propagation which introduces a product, a service and a business to the public through mass media. In the broadest sense of the word, any propagation which gives publicity to the news and deeds of people in the society, promotes culture and entertainment or advocates ideas falls into the scope of advertising ...

“propagating’’: A social activity in which an individual or a group, with the aid of various media, expresses his/their own values or assertions in order to influence the recipients’ attitude and thinking. Such activity is comprised of such factors as propagandists, the message for propagation and the objects of propagation. It is target-oriented, societal, class-oriented and dependency-related. In terms of the content, it can be classified as political propaganda, scientific and technological propaganda, economic propaganda, cultural propaganda, religious propaganda and so on. In terms of style, it can be divided into oral propaganda, written propaganda and imagery propaganda and so on.”

60. On the other hand, SADPP Sean’s submission in essence is as follows:

(1) Item (a) of the statutory definition of “direct marketing” includes two types of conduct:

(i) The offering of goods, facilities or services;

³⁶ See Cihai, Vol. 2, 1999 Edition.

- (ii) The advertising of the availability of goods, facilities or services.

Since the word “or”³⁷ is used to separate (i) and (ii) of the provision, in other words, proof of either one of the two items will prove that the conduct in question constituted “direct marketing”.

61. SADPP Sean pointed out that in many cases, the Court considered that a concept in civil law was not applicable to criminal law, like *HKSAR v Fung Hok Cheung*³⁸. He submitted that:

(1) the term “offering” in the ordinance meant the proposal of providing goods or services. It did not refer to the specific meaning of offer, nor was it limited to advertising.

(2) Advertising is not limited to the service provided to the general public or the people outside the scope of the contract.

62. Mr. Yu SC nonetheless contended with vigour that the respondent’s case did not stand, especially as it was a fact that the term “offer”, which carried a specific definition in civil contract law, was adopted in the ordinance, and not a word which carried the general meaning of the word “offer”, such as “provide”. From this, one could see

³⁷ See paragraph 55 of this judgment.

³⁸ [2008] 5 HKLRD 846 and 853.

A
B that the legislative intent was that there should be the conduct or intent of
C offer as in the concept in contract law and only then would direct
D marketing be constituted.

E 63. This issue is about how the ordinance should be interpreted.
F Section 19 of Interpretation and General Clauses Ordinance stipulates:

G “An Ordinance shall be deemed to be remedial and shall receive such
H fair, large and liberal construction and interpretation as will best ensure
I the attainment of the object of the Ordinance according to its true
J intent, meaning and spirit.”

K 64. In *HKSAR v CHEUNG Kwun Yin*³⁹, the Court of Final
L Appeal pointed out that in Hong Kong, when an ordinance needs to be
M interpreted, the approach of purposive interpretation⁴⁰ would be adopted:

N “The statutory language is construed, having regard to its context and purpose.
O Words are given their natural and ordinary meaning unless the context or
P purpose points to a different meaning. Context and purpose are considered
Q when interpreting the words used and not only when an ambiguity may be
R thought to arise. ... The context of a statutory provision should be taken in its
S widest sense and certainly includes the other purposes of the statute and the
T existing state of law. ... The purpose of a statutory provision may be evident
U from the provision itself. Where the legislation in question implements the
V recommendations of a report, such as a Law Reform Commission report, the
report may be referred to in order to identify the purpose of the legislation.
The purpose of the statutory provision may be ascertained from the
Explanatory Memorandum to the bill. Similarly, a statement made by the

³⁹ (2009) 12 HKCFAR 568.

⁴⁰ “Purposive interpretation”.

responsible official of the Government in relation to the bill in the Legislative Council may also be used to this end.”⁴¹

65. There is some difference between the meanings of the Chinese and the English versions of the word “offer”. The meaning of the latter may be broader. Other than its specific meaning under contract law, it also carries an even broader general meaning. Nevertheless, the Chinese version of the word “offer” is not the same. It appears to be a technical term created under contract law and is seldom used under normal circumstances. Such point is accepted by both parties. It is also in support of the argument advanced by Mr. Yu SC.

66. However, one still has to interpret the ordinance according to Section 19⁴² mentioned above.

67. I agree with the views of SADPP Sean. If one has to apply the concept of “offer” in civil contract law to the criminal issues of the present case, the scope will be too narrow. Besides, this will easily give rise to unnecessary technical disputes and thus the purpose of creating this offence can hardly be served.

68. In civil litigation involving contract law, there have been disputes from time to time as to what conduct constitutes an offer and what conduct does not constitute an offer such as it was only an invitation to treat⁴³. In my view, as far as the offence of the case is concerned, it

⁴¹ From the Chinese translation of the headnote in the law report.

⁴² See paragraph 63 of this judgment.

⁴³ Invitation to treat.

definitely will not be the case that the ordinance only caters for conduct that unequivocally constitutes an offer under contract law but not that which may only constitute an invitation to treat.

69. Under contract law, a valid offer has to be unequivocal and certain so that the offeree⁴⁴ can accept it and make a promise. If the provisions of the ordinance, particularly section 35G, only cover the scenario where an unequivocal offer has been made under contract law, then the scenario in which someone is badgering the other side obviously for the purpose of marketing goods or services but, as a result of the other side's refusal or failure to give a direct response, the sale conditions of the goods or the conditions for the provision of services have not been mentioned in detail so that there is no offer under contract law will not constitute direct marketing and thus not to be subject to the ordinance. Obviously this is not the legislative intent.

70. The English version of the Chinese expression “要約提供” is “*offering*”. “*Offering*” carries multiple meanings. It may include the meaning of providing and proposing to provide. The Chinese version adopts the meaning of “*offering*” which probably includes the conduct of proposing to provide.

71. Section 10B of Interpretation and General Clauses Ordinance⁴⁵ stipulates as follows:

⁴⁴ Offeree.

⁴⁵ Cap.1, The Laws of Hong Kong.

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- (1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.
- (2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.
- (3) Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.

72. In my opinion, by virtue of the general principles of interpretation in Section 19, the meaning of “offering” should not be confined to the meaning of the word “offer” in contract law but rather should include the conduct of proffering to provide something. In other words, “offer” may carry a broader meaning. Even if one may need to quote Section 10B⁴⁶, then having regard to the object and purposes of the ordinance, he or she would adopt the meaning which best reconciles both texts and the same conclusion would be reached.

73. If the English language and the Chinese language texts in fact disclose a different of meaning, according to Section 10B(3) of Interpretation and General Clauses Ordinance, the Court should first try

⁴⁶ See paragraph 71 of this judgment.

A
B to resolve it by adopting the rules of statutory interpretation ordinarily
C applicable. The rules of interpretation to be adopted are those stipulated
D in Section 19 of Interpretation and General Clauses Ordinance⁴⁷ and
E those⁴⁸ the Court of Final Appeal stated in the *Cheung Kwun Yin* case.

F 74. In view of the rules quoted, I think that both the English and
G Chinese versions of “offer” include the meaning of proffering to provide
H goods, facilities or services.

I 75. In order to interpret this rule, I think we should not consider
J the word “offer” with the specific meaning under civil law. “Offer” shall
K include the conduct described in the preceding paragraph.

L 76. As to the word “advertising”, the general understanding of it
M may be exactly the same as what Mr. Yu SC said, namely an act of
N providing information to the public. However, SADPP Sean submitted
O that such interpretation was too narrow and did not reflect the legislative
P intent.

Q 77. I agree with SADPP Sean’s submission. The ordinance aims
R at safeguarding personal data privacy. Section 35G of the ordinance
S concerned the act of using direct marketing on an individual. If the act of
T making phone calls to an individual is to be excluded from the scope of
U control, the impact of achieving the purpose of making this rule will be
V largely undermined. Moreover, the evidence of the case shows that the

⁴⁷ Cap.1, The Laws of Hong Kong.

⁴⁸ See paragraph 64 of this judgment.

conduct of the appellant company, namely the so-called reminder to the customer, was not done solely to the complainant of the present case but to all customers within the same category. To me, such act constitutes advertising for the purpose of promoting services.

78. Another issue in the present case is the Data Protection Principles⁴⁹. The Court has to consider whether Principle 3, which concerns the use of personal data, has anything to do with offence involved in the present case.

79. At trial, the defence⁵⁰ pointed out that the matter was related to the renewal of the contract. This was something derived from the existing contract. It was not a new purpose as stated in the ordinance.

80. According to Section 4 of the ordinance:

“A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance.”

81. Among the various principles, Principle 3 provides that:

“Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.”⁵¹

⁴⁹ Set out in the Schedule to the ordinance.

⁵⁰ At trial, the Appellant was represented by Mr Tony Li of counsel.

⁵¹ Paragraph 3(1) of Schedule 1 to the ordinance.

82. The so-called new purpose, in relation to the use of personal data, means any purpose other than:

- “(a) the purpose for which the data was to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”

83. The trial magistrate stated that she did not agree with the assertion that renewal of a contract was a new purpose⁵². However, she had earlier indicated that whether she thought it was a new purpose or not was not a matter applicable to the present case.⁵³

84. Mr. Yu SC submitted that the purposes behind Section 35G and Principle 3 are consistent. Besides, the design of the legislation also aimed at ensuring a balance between facilitating business operations and safeguarding personal data privacy. If the conduct of the company was not for achieving a new purpose, it could not fit in within the scope of Section 35G. The objective of the ordinance was to prevent cold-calling for direct marketing purpose.

85. SADPP Sean nonetheless submitted that there was no differentiation in the law whether the direct marketing activity by the data user was targeted at existing customers or strangers. The ordinance also had not stated expressly or impliedly that the aim and operation of Section 35G was regulated by Principle 3.

⁵² See paragraph 65 of the Statement of Findings.

⁵³ See paragraph 44 of the Statement of Findings.

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86. I agree with the submission of SADPP Sean. Section 35G aims to govern direct marketing activities. As long as the data subject requests the data user to stop using his/her personal data in direct marketing, the data user upon receiving the request must comply with such request.

87. Therefore, the issue is whether the data user is using the personal data of the data subject for the purpose of direct marketing. Although such conduct should, in at least most of the conceivable direct marketing situations, be for a new purpose, the consideration of whether the conduct is for a new purpose is not addressing the real issue.

88. For the above reasons, I am of the view that in the present case, the duty of the Court is to find whether the prosecution can prove beyond all reasonable doubt that:

- (1) a data subject did request the data user to stop using the personal data of the data subject in direct marketing;
- (2) the data user did receive such request from the data subject;
- (3) the data user did not comply with such request.
- (4) If all have been proved, the Court then has to consider whether the defence can succeed by relying on the statutory defence.

89. The trial magistrate found that the content of *Bonnie*'s voice message constituted direct marketing. Mr. Yu SC made various criticisms of the analysis and considerations of the magistrate.

90. One of those criticisms made by Mr. Yu SC was directed to one paragraph of the magistrate's statement of findings quoted in the following. He commented that the magistrate had got motive and *mens rea* mixed up and thus made a wrong finding of fact:

"It can be seen from the above that whether it was even where *Bonnie* had followed the script provided by the defendant [whether it was D3 (1) or (2)], or *Bonnie*'s voice message, after all, it was, she, a staff member of the defendant, through communication by telephone/voice message, conveying information, namely a renewal plan, to a specific person Mr. Chan to promote the defendant's service offer. In my view, this was sufficient to constitute direct marketing."

91. The magistrate's statement of findings seemed to have been structured to discuss and consider the key points put forward by the defence at trial one by one. The above-mentioned part dealt with the content of the script provided to staff members by the company. The magistrate also expressed her own views: even if the staff member contacted the customer based on the content of the script, this also amounted to direct marketing.

92. What the prosecution was against was not the content of the script but the content of *Bonnie*'s actual voice message. Nonetheless, the content of the script was not totally unrelated to the finding, and that must be taken into consideration, especially in considering the statutory

A
B defence. The key point of the case was whether *Bonnie*'s voice message
C constituted direct marketing. The magistrate's finding was in the
D affirmative. At paragraph 57 of the statement of finding, the magistrate
E stated:

F "… *Bonnie*'s voice message ... was sufficient to constitute
G direct marketing."

H At the "concluding" part, the magistrate stated:

I "Whether *Bonnie* departed from the script or not, the content of
J the voice message ... for the purpose of renewing contract with
K the customer ... was to offer, ... constitute direct marketing."⁵⁴

L 93. I totally agree with the magistrate's finding. Although in her
M opening, *Bonnie* prompted that the existing contract was expiring soon, if
N one considers the voice message as a whole, I am sure that *Bonnie* was
O actually offering to provide services, namely to provide the customer with
P a concessionary offer to continue to enjoy the same service at a price
Q which should have been different, or to advertise the availability of the
R said services. Yet, the evidence is not sufficient for me to make a finding
S as to whether the contract was to be renewed at the expiration, or the new
T contract was to commence at an earlier date, or any other arrangements.
U Anyway, as far as the present case is concerned, there was an offering, or
V advertising of the availability, of services.

94. The magistrate once mentioned that there was/were defence
witness(s) admitting that the company indeed wished the customer would

⁵⁴ See paragraph 64 of the Statement of Findings.

renew the contract⁵⁵. I agree with the submission of Mr. Yu SC that this point did not serve the purpose of proof in relation to the matters that the magistrate had to find. However, having carefully read the full statement of finding, one can see that the magistrate based her finding on the other situations she stated and she was entitled to consider those situations as well.

95. The defence witness pointed out that reminding the customers of the expiry of their contracts was an important service. It was especially so because according to the terms and conditions of the original contract, the company would continue to provide service after the expiration date but the fee would revert from the contractual fee of \$230 to the regular fee of \$490. There have been complaints from their existing customers that they were charged with regular prices without any reminder at all.

96. It is a good practice for the appellant company to give its customers a reminder. Whilst the customer made an request under section 35G(1) of the ordinance, the appellant could still remind the customer of the expiry of contract through proper means and presentation without breaching the stipulations under section 35G(1) as that was not direct marketing. Unfortunately, *Bonnie's* act and presentation showed that it was not just a reminder and the way she did was more than a reminder and stepped into the scope of direct marketing.

97. This ground of appeal fails.

⁵⁵ See paragraph 56 of the Statement of Findings.

Grounds of appeal (3)

98. Mr. Yu SC criticized the magistrate for taking into consideration matters that were unrelated to the summons and/or did not consider matters that were related to the summons. What he sought to argue was as follows:

- (1) The customers were reminded of the expiry of his contract 6 months prior to the expiration date;
- (2) Whether the means of reminding the customer of the expiry of his contract was appropriate;
- (3) The said reminder merely served as an “opening line”;
- (4) Defence exhibits D3(1) and D3(2), namely the contents of the scripts.

99. All these matters were mentioned in the magistrate’s statement of finding. The trial of the present case did not proceed on the basis that the subject offence was one of strict liability. The magistrate did not state very clearly her reasons for taking into consideration these matters. It appears that it might be for the purpose of examining the genuine purpose or intention of the voice message in question. In resolving the dispute at the trial, taking such an approach gives no cause for much criticism.

100. Now that I have found that the present offence is one of strict liability, the prosecution actually does not need to prove the purpose or intention of the voice message. Therefore, the magistrate should not have considered these matters. However, even though those matters were

given consideration, that does not necessarily mean that the conviction was unsafe, bearing in mind that the magistrate's finding of facts had already covered the matters that must be proved by the prosecution and the consideration whether the defence could rely on the statutory defence.

101. Although my present finding takes the issues of the trial out of focus, Mr. Yu SC expressed categorically that this did not affect the defence in proving their case. If the defence had right from the outset defended their case against an offence of strict liability, the evidence the defence had to produce was exactly the same anyway.

102. Under the circumstances, as the magistracy appeal has already been conducted by way of a rehearing⁵⁶, I do not think that it would be unfair to make findings on the basis of the evidence that had been submitted to the magistrate and was not in dispute.

103. I find and agree that what *Bonnie* did constitute direct marketing. Thus, this ground of appeal fails.

Grounds of appeal (4)

104. The main point of this ground of appeal is that the magistrate, in making a finding adverse to the appellant, took into consideration the testimony contained in the evidence in relation to an offence which was not prosecuted.

⁵⁶ Rehearing.

105. Mr. Yu SC in his written submission listed out the magistrate's questions to the defence witness after re-examination as follows:

- (1) How many times had s/he called this customer by telephone;
- (2) If the customer could not be reached, did the company have any instruction as to how many times the customer had to be called by telephone;
- (3) Would s/he try to contact the customer by other means;
- (4) Why not send a letter to the customer;
- (5) Why the company insisted on contacting the customer by telephone.

The defence witness's answers to the above matters are the subject matter of this ground of appeal.

106. The foundation of the argument of uncharged offence originated from a number of decisions after the Court of Final Appeal case of *Chim Hon Man v HKSAR*⁵⁷. The so-called uncharged offence carries a particular meaning. I do not think the above matter was the concern of these cases and it cannot be regarded as an uncharged offence that the cases referred to.

107. Furthermore, as far as the present case is concerned, what the prosecution has to prove and is in dispute is whether the content of the voice message constituted direct marketing. The Court can make a

⁵⁷ (1999) 2 HKCFAR 145.

judgment solely from the content. Therefore, even if the magistrate had considered some inappropriate matters, that did not have any effect on the subject matter/topic in the present appeal. Besides, I have already made a finding on this subject matter.

108. As I have already found that the matter was direct marketing, what remains now is whether the defence can succeed by relying on the statutory defence.

109. As to the point whether the appellant can succeed in relying on the statutory defence, the evidence should come from the defence witness. The appealing party (sic) has already discharged its evidential burden.

110. The question is whether the appellant:
(1) has taken all reasonable measures, and
(2) has exercised all due diligence to avoid the non-compliance of the data subject's request concerned.

111. Having considered the whole evidence concerned, I agree with the magistrate's finding and the answers to the above questions are in the negative.

112. The evidence shows that the departments of the appellant company include the following 5 teams of staff members of the *Customer Relations*, namely *CRA*, *CRB*, *CRE*, *CRK* and *CRM*.

113. When a customer makes a request to refuse to receive marketing information, the appellant company will delete the said customer from the direct marketing customer list. However, staff members of teams *CRB*, *CRK* and *CRA* can still see the information of the said customer in the customer database.

114. *Bonnie* was under team *CRK* and so she could see the information. As far as the allocation of work was concerned, team *CRK* was responsible for after-sales service and reminder of contract renewal. It did not carry out direct marketing work.

115. According to the evidence of defence witness Mr. Ho, the defendant company's understanding of "direct marketing" was as follows: Firstly, the customers were divided into new customers and old customers. For the new customers, the staff members would introduce to them the services provided by the company. For the old customers, the staff member would introduce to them the upgrade service, music software, telephone services, new services or the company's existing services that the customer had never subscribed to.⁵⁸

116. The other parts of evidence of the defence witness are stated in paragraph 7 of this judgment.

117. Once the company has received the request, it has the obligation to take all reasonable measures and exercise all due diligence to avoid non-compliance of the request concerned. The request is not

⁵⁸ See paragraph 17 of the Statement of Findings.

A
B absolute: all measures should only be reasonable measures and all
C diligence should only be due diligence.

D 118. What the company had done included providing training and
E code of conduct but the details of which are unknown.

F 119. Even following the standard script⁵⁹ provided by the
G appellant company, its content also includes the guidance that staff
H members can take the initiative to propose that s/he may make an
I introduction of the renewal plans. I agree with the magistrate's view that
this constitutes direct marketing.

J 120. The script in question had been in use even before the
K relevant ordinance came into effect. Even if the staff member followed
L the script to communicate with the customer, this also involved
M introducing renewal plans and if the customer did not give a positive
N response instantly, the staff member would also try to ask the customer
O whether s/he can contact him another day. Such arrangement can barely
be said to have fulfilled the requirement of the statutory defence.

P 121. For the purpose of reminding the customer of the fact that
Q higher fees might be charged upon expiration of his contract, one of the
R ideal ways to do it is to notify the customer in writing since the wording
S is unambiguous and there is no room for human error. The purpose can
be best served and this can certainly meet the statutory requirement.

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⁵⁹ Defence exhibits D3(1) and (2).

122. This of course is not the only channel. However, regarding the means adopted by the company at the material time, not only might it amount to direct marketing but also it was really difficult to guarantee that there would not be any act going beyond the boundary.

123. Furthermore, in view of the company policy at the material time, although there was the recording of the content of the telephone communication between the staff member and the customer, such measure could not ensure that there was no breach. In considering the so-called reasonable precautions and all due diligence, what have been stated in paragraph 117 of this judgment should also be taken into account. To remind the customer without committing direct marketing, one may contact the customer by way of written notification with proper wording so as to avoid the risk emerged in the present case.

124. I agree with the magistrate's finding that the defence did not succeed in relying on the statutory defence.

Grounds of appeal (5)

125. This is a general ground of appeal. For the reasons given earlier on, this ground of appeal cannot be sustained, either.

Conclusion

126. Basing on the above-mentioned reasons, I find that the prosecution has proved all elements of the offence as they are obliged to prove. On the other hand, the appellant does not succeed in relying on

A
B the statutory defence. Therefore, I find that the conviction is safe and the
C appeal is thus dismissed.
D

E (Albert Wong)

F Judge of the Court of First Instance
G

H Selwyn Yu, SC and Tony Li, instructed by Woo, Kwan, Lee & Lo, for
I the appellant.

J Eddie Sean, Senior Assistant Director of Public Prosecutions of the
K Department of Justice, for the HKSAR, the respondent.
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M Translated by the Judgment Translation Unit of the Judiciary and vetted
N by Mr. P. Y. Lo, Barrister-at-law.
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