IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 243

Magistrate's Appeal No 9099 of 2015

Between

SENG FOO BUILDING CONSTRUCTION PTE LTD

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

Seng Foo Building Construction Pte Ltd
v
Public Prosecutor

[2016] SGHC 243

High Court — Magistrate's Appeal No 9099 of 2015
Sundaresh Menon CJ
12 July 2016

28 October 2016 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 This is an appeal against the decision of the learned district judge ("the DJ") in *Public Prosecutor v Seng Foo Building Construction Pte Ltd* [2016] SGMC 7 ("the GD"). The appellant, Seng Foo Building Construction Pte Ltd ("Seng Foo"), pleaded guilty to two charges under the Electricity Act (Cap 89A, 2002 Rev Ed). Seng Foo was prosecuted for damaging a high voltage electricity cable in the course of excavation works it carried out on 15 February 2013. The incident resulted in a brief power outage of about two minutes which affected 214 households. For the first charge, which was the failure to comply with the requirements imposed by SP PowerGrid Ltd ("SP PowerGrid"), Seng Foo was fined $15,000 ("the s 80(4)(*a*) offence"). Seng Foo was separately fined $45,000 for the second charge, which pertained to

causing damage to the cable ("the s 85(2) offence"). Seng Foo appealed the total fine of $60,000 as being manifestly excessive.

2 Having heard the parties and considered their submissions, I dismiss the appeal. I have set out the detailed grounds for my decision in this judgment for several reasons. First, when reviewing the parties' submissions, I found a lack of clarity in the precedents. I therefore take this opportunity to set down some sentencing considerations for offences under s 80(4)(*a*) and s 85(2) of the Electricity Act, which are often brought in tandem against an errant contractor.

3 Second, it is common for the errant contractor to enter a guilty plea in such cases. It is important that the sentencing judge has access to the relevant facts so that due regard may be had to the pertinent sentencing considerations. A key source of these facts will be the Statement of Facts ("the SOF"), and it would be helpful if the SOF includes facts that may bear on sentencing. I explain this further in this judgment.

4 Third, this case raises the issue of whether, and if so, how one of the important limiting principles of sentencing applies to an offender who is convicted of multiple charges attracting fines. In the context of multiple offences attracting imprisonment terms, the one-transaction rule and totality principle are two limiting principles which can help the sentencing judge decide which sentences should be ordered to run concurrently and consecutively, so that the overall sentence is proportionate to the offender's criminality as a whole. The question in the present case is whether these principles, in particular the one-transaction rule, can and should apply to reduce the overall fine that is to be imposed. Before I turn to these matters, I begin with a brief description of the facts.

Background facts

The SOF

5 Seng Foo was the main contractor for addition and alteration works to a multi-storey car park. It engaged a subcontractor, which in turn hired an excavator operator to conduct earthworks at a worksite in Woodlands Street 41. Seng Foo's liability for the actions of the excavator operator is not disputed.

6 SP PowerGrid, being an electricity licensee of the Energy Market Authority of Singapore, has control and management over high and low voltage electricity cables in Singapore.

7 On 27 August 2012, Seng Foo notified SP PowerGrid that it was commencing earthworks in the vicinity of high voltage cables. Before such earthworks begin, a contractor is required to submit a "Notice for Commencement of Earthworks Within Vicinity of High Voltage Cables". This was duly done and SP PowerGrid responded by issuing a Letter of Requirements dated 28 August 2012. The Letter of Requirements required Seng Foo to comply with, among other procedures, the following:

> 2.9 *Provide adequate and prominent signs to show cable positions*. Pegging and markings by the Licensed Cable Detection Worker (LCDW) must be durable and prominent. Ensure cable route markings are not disturbed, removed or tampered with and that the markings are reapplied from time to time to ensure they remain conspicuous.
>
> 2.33 *Cable positions must be clearly indicated at all times during the entire duration of the earthwork activities*. If necessary, the LCDW should be called to reconfirm cable positions before reapplying pegs and surface markers on the ground or inside trenches, where cables are still unexposed.
>
> [emphasis added]

8 The material parts of the SOF are as follows:

…

(c) On 15 February 2013, [Seng Foo's] Site Supervisor, Ong Kian Heng (the "Supervisor") instructed [the subcontractor's] Registered Excavator Operator, Dharmalingam Jayakumari (the "REO") to remove the steel plate shoring and to backfill the lift pit wall (the "Lift Pit Wall"). In doing so, the Supervisor informed the REO that there was an electricity cable in the vicinity, i.e. about 2 metres from the Lift Pit Wall.

(d) In order for the REO to remove the steel plate shoring, he had to excavate the earth on both sides of the steel plates.

(e) At about 8.30am on the same day, the REO started excavating the earth between the steel plate shoring and the foundation. This was completed at about noon.

(f) On the same day after lunch, under the Supervisor's supervision, the REO continued excavating at the other side of the steel plate shoring where the Supervisor had previously informed the REO that there was an electricity cable within the vicinity. While doing so, the Supervisor noticed some lean concrete in the trench obstructing the excavation. The Supervisor then instructed the REO to stop work while he checked on the lean concrete.

(g) Upon checking, the Supervisor instructed the REO to resume excavation. While the REO was excavating further, both the Supervisor and the REO noticed sparks emitting from the trench. The Supervisor then instructed the REO to stop work immediately.

(h) It was subsequently confirmed that [Seng Foo] had damaged a 300mm^2, 3-Core, Cross-Linked Polyethylene, 6.6 kilovolt high voltage electricity cable (the "Cable") while carrying out excavation works.

In relation to the 1st Charge:

(i) [Seng Foo] failed to provide adequate and prominent signs to show cable positions.

(j) [Seng Foo] also failed to clearly indicate the cable positions at all times during the entire duration of the earthworks.

(k) Accordingly, [Seng Foo] had failed to comply with [SP PowerGrid's] Requirements and has thereby committed an offence under Section 80(4)(a) of the [Electricity] Act.

In relation to the 2nd Charge:

> (l) In the course of carrying out the aforesaid earthworks, on 15 February 2013, the 6.6 kilovolt high voltage Cable, which was part of the transmission network under the management of [SP PowerGrid], was damaged by the REO under the instructions of [Seng Foo's] Supervisor.
>
> (m) Accordingly, [Seng Foo] has committed an offence under Section 85(2) read with Section 85(3) of the [Electricity] Act.
>
> (n) The damage to the Cable caused a power outage lasting about 2 minutes which affected 214 households in 3 HDB blocks.
>
> (o) The cost of repair amounted to $5,738.11 which has been fully paid by [Seng Foo].
>
> [original emphasis omitted]

The first charge – the s 80(4)(a) offence

9 The charge for the s 80(4)(*a*) offence reads:

> You … are charged that you, on or around 15 February 2013, did carry out earthworks at Woodlands Street 41 beside Block 406A, Singapore, which was within the vicinity of a 6.6 kilovolt high voltage electricity cable that is under the management of SP PowerGrid Ltd, an electricity licensee, without complying with the reasonable requirements of SP PowerGrid Ltd set out in their Letter of Requirements to you dated 28 August 2012, to wit, by:-
>
> > (a) Failing to provide adequate and prominent signs to show cable positions; and
> >
> > (b) Failing to indicate clearly the cable positions at all times during the entire duration of earthwork activities,
>
> and you have thereby committed an offence under Section 80(4)(a) of the Electricity Act (Chapter 89A) and punishable under Section 80(7) of the Electricity Act (Chapter 89A).

The second charge – the s 85(2) offence

10 The charge for the s 85(2) offence reads:

> You … are charged that you, on or around 15 February 2013, were the main contractor undertaking the "Addition & Alteration Works to Multi-Storey Car Parks" project, in which one Dharmalingam Jayakumari, an excavator operator in the

> employ of Wan Sheng Hao Construction Pte Ltd, who was subject to your instructions for the purpose of carrying out earthworks at the worksite at Woodlands Street 41 beside Block 406A, Singapore, damaged a 6.6 kilovolt high voltage electricity cable in the transmission network under the management of SP PowerGrid Ltd, an electricity licensee, while in the course of carrying out the said earthworks, and by virtue of Section 85(3) of the Electricity Act (Chapter 89A), you have committed an offence under Section 85(2) of the said Act.

11 Section 85(3) of the Electricity Act states that where an offender is subject to the supervision of another person, that other person is equally liable for the same offence. Therefore, s 85(3) operates to attribute the acts of the excavator operator to Seng Foo. Seng Foo accepts this.

The decision below

12 The DJ imposed a fine of $15,000 for the s 80(4)(*a*) offence and one of $45,000 for the s 85(2) offence. The aggregate fine was $60,000.

13 The DJ prefaced his grounds by noting that there had been many prosecutions before the State Courts against errant contractors for damaging gas pipes and electricity cables, and for failing to comply with reasonable requirements imposed during the course of works. However, he considered that these accidents were largely avoidable. He observed that fines of "sufficient gravity and weight" should be imposed in such cases to serve the needs of specific deterrence, and more importantly, general deterrence (the GD at [2]).

14 The DJ relied on the decision of the High Court in *JS Metal Pte Ltd v Public Prosecutor* [2011] 4 SLR 671 ("*JS Metal*"), which concerned damage to a gas pipe. He identified (at [10] of the GD) several mitigating factors that were present in that case, including these:

(a) the damage to the gas pipe was relatively minor;

(b) the damage was not caused deliberately or recklessly;

(c) no consumer was inconvenienced; and

(d) although SP PowerGrid was inconvenienced, the contractor paid the cost of repairing the damage.

15 In relation to these, the DJ noted that it was almost always the case that the wrongdoer would foot the repair costs before the case reached the courts. In the present case, he also accepted that Seng Foo had not caused the damage recklessly or deliberately. In considering the extent of the damage and whether consumers had been inconvenienced, the DJ noted that the damage caused a power outage of about two minutes during which 214 households in three Housing and Development Board ("HDB") blocks were affected (the GD at [16]). Compared to some other cases including *JS Metal*, where no outage or power supply dips resulted, the fact that inconvenience had been caused to consumers was a "significant difference" to be considered in arriving at an appropriate sentence (the GD at [16]).

16 The DJ turned to the precedents highlighted by the parties (the GD at [17]–[23]). In considering the appropriate fines that should be imposed, the DJ considered that Seng Foo had no antecedents, had paid the repair costs and had taken active steps to prevent a repeat incident. However, a sentence was needed that would serve "the ends of specific as well as general deterrence", without being "crushingly severe" (the GD at [24]).

17 For the s 80(4)(*a*) offence, the DJ noted that the fines did not usually go below $15,000. The requirements that Seng Foo had failed to comply with

were "not trivial or minor" and it was "vital" that the positioning of cables was clearly indicated at all material times (the GD at [25]).

18 For the s 85(2) offence, the DJ noted that there had been no evidence of the precise extent of the inconvenience caused (the GD at [26]). Had there been actual evidence of any specific inconvenience that had been caused and the nature thereof, the DJ said that he might have raised the fine for the s 85(2) offence if this was warranted.

19 From the table of precedents tendered by the Prosecution, the DJ considered Seng Foo's case to be closer to two recent cases (the GD at [27]):

(a) *Public Prosecutor v Jin Choon Civil Engineering Pte Ltd* (EMA 69-2014 and EMA 70-2014) ("*Jin Choon*"), where the accused was sentenced in March 2015 by the same DJ to a fine of $20,000 for a s 80(4)(*a*) offence and a fine of $50,000 for a s 85(2) offence. The accused pleaded guilty, had no antecedents, and paid for the repair cost which amounted to $6,997.27. The damage to the 6.6 kilovolt high voltage cable resulted in a two-hour long power outage and affected 12 consumers.

(b) *Public Prosecutor v Songcheon Engineering Pte Ltd* (EMA 43-2012 and EMA 44-2012) ("*Songcheon*"), where the accused was sentenced by another district judge in January 2013 to a fine of $15,000 for a s 80(4)(*a*) offence and a fine of $50,000 for a s 85(2) offence. The accused pleaded guilty, had no antecedents, and paid the repair cost of $2,940.74. The damage to the 6.6 kilovolt high voltage cable caused a 23-minute long power outage.

20 The DJ thought that the fines in the present case should be lower than the $70,000 imposed in *Jin Choon*. In that case, although only 12 consumers had been affected, there was a two-hour long outage. The cost of repairs in *Jin Choon* was also higher (the GD at [27]). The DJ also found that Seng Foo's fines should be lower than the $65,000 imposed in *Songcheon*. The number of consumers affected could not be compared and the cost of repairs in *Songcheon* was lower than in the present case. However, as the power outage lasted 23 minutes in *Songcheon*, the DJ took the view that Seng Foo's fines should be lower. In the premises, he sentenced Seng Foo to an aggregate fine of $60,000: $15,000 for the s 80(4)(*a*) offence and $45,000 for the s 85(2) offence.

The appeal

21 Seng Foo submits that the sentence is manifestly excessive in the circumstances on the basis that the DJ had failed to consider various factors. Specifically, Seng Foo contends that the DJ had failed to:

(a) give sufficient weight to the fact that Seng Foo was a first-time offender for the offences;

(b) consider that Seng Foo had carried out the cable detection works and dug trial holes in the worksite in accordance with the requirements of SP PowerGrid and had found no underground cables;

(c) consider that Seng Foo did not perform the excavation work recklessly or in a cavalier fashion and had done this work slowly and with much care;

(d) give sufficient weight to the fact that Seng Foo had stopped the excavation work as soon as the cable damage occurred;

(e) give sufficient weight to the fact that the outage was very brief and any inconvenience caused would have been minor and involved a brief time only;

(f) give sufficient weight to the fact that the cable damage was minor and the repair cost had been paid for;

(g) consider that Seng Foo had taken various steps and reviewed internal procedures to prevent a repeat offence;

(h) consider that Seng Foo pleaded guilty at the earliest opportunity and had been fully cooperative with the authorities; and

(i) give credit to Seng Foo for having paid the repair costs.

22 Besides contending that the DJ had failed to take into account these factors, Seng Foo also submits that the sentence failed to take into account the one-transaction rule. Seng Foo relied on *JS Metal* as a case where the High Court seemingly applied the one-transaction rule even where fines, rather than imprisonment terms, had been imposed. *JS Metal* concerned two offences under s 32(3)(*a*) and s 32A(2) of the Gas Act (Cap 116A, 2002 Rev Ed) (which are analogous to s 80(4)(*a*) and s 85(2) of the Electricity Act). JS Metal had initially been fined $10,000 for the s 32(3)(*a*) offence and $100,000 for the s 32A(2) offence. On appeal, Chan Sek Keong CJ held that both offences related in essence to the same breach, in that it was JS Metal's failure to comply with the manual digging requirement that led to the gas pipe being damaged in that case. While the $10,000 fine for the s 32(3)(*a*) offence was upheld, Chan CJ reduced the $100,000 fine that had been imposed for the s 32A(2) offence to $5,000. The aggregate fine was therefore reduced from $110,000 to $15,000.

My decision

The main sentencing considerations for the two offences

23 In deciding on the appropriate sentence where several offences are involved, the sentencing judge should, in general, first consider the appropriate sentence for each offence (*Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*") at [26]). In sentencing an errant contractor who has been convicted of both a s 80(4)(*a*) offence and a s 85(2) offence, it is therefore useful to begin by considering each offence separately as they are distinct offences.

*The s 80(4)(*a*) offence*

24 The relevant sub-sections of s 80 of the Electricity Act read as follows:

> **Carrying out earthworks within vicinity of high voltage electricity cable**
>
> **80.—**(1) Subject to this section, no person other than an electricity licensee shall commence or carry out, or cause or permit the commencement or carrying out of, any earthworks within the vicinity of any high voltage electricity cable which belongs to or which is under the management or control of an electricity licensee unless the person —
>
> > (*a*) has given to the electricity licensee not less than 7 days notice in writing of the date on which it is proposed to commence the earthworks;
> >
> > (*b*) has obtained from the electricity licensee the necessary information on the location of such high voltage electricity cable and has consulted the electricity licensee on the steps to be taken to prevent the high voltage electricity cable from damage while the earthworks are being carried out; and
> >
> > (*c*) has caused cable detection work to be carried out by a licensed cable detection worker in order to confirm the location of the high voltage electricity cable.
>
> (2) No person other than a licensed cable detection worker shall commence or carry out any cable detection work within

> the vicinity of any high voltage electricity cable which belongs to or which is under the management or control of an electricity licensee.
>
> …
>
> (4) It shall be the duty of the person who carries out any earthworks referred to in subsection (1) —
>
> > (*a*) to comply with all reasonable requirements of the electricity licensee for the prevention of damage to the high voltage electricity cable;
> >
> > (*b*) to ensure that reasonable precautions are taken when carrying out such earthworks to prevent any damage to the high voltage electricity cable; and
> >
> > (*c*) to allow the electricity licensee reasonable access to the work site for the purpose of inspecting or taking any necessary measures to protect the high voltage electricity cable.
>
> …
>
> (7) Any person who contravenes subsection (1) or (4) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.
>
> (8) Any person who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 12 months or to both.
>
> (9) Subject to subsection (10), in any proceedings for an offence under subsection (7), it shall be a defence for the person charged to prove —
>
> > (*a*) that he took all reasonable steps to discharge his duty under subsection (1) or (4), as the case may be; or
> >
> > (*b*) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
>
> …

25 The legislated procedures that are to be followed for earthworks near high voltage cables can be divided into two phases. Section 80(1) sets out the actions that must be taken *before such earthworks can even begin*. In particular, the contractor must:

(a) submit a notice for commencement of earthworks;

(b) obtain the necessary information on the cable location;

(c) consult the electricity licensee (*ie*, SP PowerGrid in the present case) on the steps it is required to take in order to prevent cable damage during the course of the intended earthworks; and

(d) have caused cable detection work to be carried out to confirm the location of the high voltage electricity cable.

Further, under s 80(2), the contractor must use a licensed cable detection worker ("LCDW") to confirm the locations of the cables.

26 The second stage, which involves the *actual conduct of earthworks*, is contained in s 80(4). Under s 80(4), three separate duties are imposed on the contractor. First, the contractor must comply with all reasonable requirements that are imposed by SP PowerGrid to prevent damage to the high voltage electricity cable (s 80(4)(*a*)). Second, it is duty-bound to take reasonable precautions while carrying out earthworks to prevent any damage to the cable (s 80(4)(*b*)). Third, the contractor must allow SP PowerGrid reasonable access to the worksite to inspect or take any required measures to protect the said cable (s 80(4)(*c*)). All three duties are concerned with the steps that the contractor must perform to *prevent cable damage*, but they are separate and independent duties. For example, the duty to take reasonable precautions in s 80(4)(*b*) is wider than the duty to comply with the requirements imposed pursuant to s 80(4)(*a*); the former is an independent duty to take care. From the cases that have been brought to my attention, prosecutions that have been brought under s 80(4) have invariably concerned breaches of s 80(4)(*a*). But a

contractor can clearly be charged for dereliction of duty under the other limbs of s 80(4) as well, where the circumstances occasion this.

27 Parliament's intention behind imposing these duties on contractors is to ensure that they do their part to prevent damage to high voltage electricity cables, owing to the potentially grave repercussions that can result from damage to such cables. Section 80 of the Electricity Act can be traced to a provision that came into law with the passing of the Public Utilities (Amendment) Act 1999 (Act 35 of 1999) on 18 August 1999. During the second reading of the Public Utilities (Amendment) Bill (Bill 29 of 1999), the then Minister for Trade and Industry, BG George Yeo, said as follows (*Singapore Parliamentary Debates*, *Official Report* (18 August 1999) vol 70 at cols 2159–2163 (BG George Yong-Boon Yeo, Minister for Trade and Industry) ("the 1999 *Parliamentary Debate*") at cols 2160–2161):

> … To minimise damage to high-voltage cables in the course of construction work, section 95 of the [Public Utilities Act] will be amended to differentiate the requirements for earthworks in the vicinity of low-voltage electricity cables from those in the vicinity of high-voltage electricity cables.
>
> *A new section 95(A) is proposed to require PowerGrid Ltd, which is the owner of high-voltage electricity cables, and contractors to work together to prevent damage to cables.* This new section will regulate earthworks and cable detection work within the vicinity of any high-voltage electricity cable which belongs to or which is under the management or control of a public electricity licensee. *Offenders face a fine not exceeding $100,000, or imprisonment for a term not exceeding five years, or both fine and imprisonment, if they do not follow the legislated procedures. …*
>
> [emphasis added]

28 The Minister emphasised that damage to high voltage electricity cables could lead to voltage dips, which could severely impact industries which require a reliable supply of electricity for their work processes (the 1999 *Parliamentary Debate* at col 2160). This concern remains relevant today.

Between 2010 and 2016, there were 37 convictions under s 80(4) and s 85(2) of the Electricity Act. According to an article on SP PowerGrid's website which was published in September 2005, about 85 per cent of cable damage had reportedly been caused by earthworks, with mechanical excavation alone accounting for about six in ten of all cable damage cases (see <http://www.singaporepower.com.sg/irj/go/km/docs/wpccontent/Sites/SP%20PowerGrid/Site%20Content/Resources/documents/Working%20Together%20to%20Prevent%20Cable%20Damage.pdf> (last accessed: 27 October 2016)).

29 Clearly, many of the instances of damage could have been avoided if the contractor had adhered to the legislated procedures in s 80 of the Electricity Act. In my judgment, s 80(4) is centrally concerned with deterring risk-taking behaviour and correspondingly, encouraging diligent adherence to risk-management and risk-limiting processes. The observance of the various duties in s 80(4) are well within the powers of the contractor, who can and should be discouraged from not adhering to its statutory duties by cutting corners and taking risks. In this regard, I agree with the following observation of the learned magistrate in *Public Prosecutor v Pay Ah Heng Contractor Pte Ltd* [2006] SGMC 4 (at [12]):

> … It is obvious that Parliament has mandated that a person must exercise all due diligence in carrying out such earthworks in the vicinity of high voltage cables as opposed to low voltage electricity cables as the consequences resulting from damage to such high voltage electricity cables can be potentially serious and far-reaching. Public interest requires that such risks are avoided or at least minimised. Further, it is also plain that Parliament intended for such offences to be treated seriously as reflected by the hefty fine of up to $100,000 or a maximum imprisonment term of 12 months or both (see Section 80(7)). It is therefore the duty of the courts to enforce these standards by imposing an appropriate sentence which reflects the want of compliance with the requirements.

30 Under s 80(7), a breach of any of the duties in s 80(4) attracts a maximum fine of $100,000, or a jail term of up to 12 months, or both. The maximum penalty set by Parliament signals the gravity with which it views that offence. The sentencing judge should take note of the maximum penalty and apply his or her mind to determine precisely where the offender's conduct falls within the spectrum of punishment that has been prescribed by Parliament (*Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 ("*Angliss*") at [84]; *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [60]). The need for deterring risk-taking behaviour should be considered when calibrating the sentence across the full range of the available punishment. Inevitably, this must and will "be tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender" (*Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 at [31], cited in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [35]).

31 In ascertaining the culpability of the errant contractor, it will be relevant to consider precisely how it has breached the requirements in s 80(4) and whether this reveals egregious disregard for the requirements or other indications that would warrant the imposition of a more onerous sentence. As an illustration, an errant contractor who flouts several of SP PowerGrid's reasonable requirements imposed pursuant to s 80(4)(*a*) would generally be more culpable than a contractor who has failed to adhere to just one of these requirements. Simply put, the greater the extent of non-compliance with s 80(4), the heavier the punishment should ordinarily be. However, it is not mitigating for the contractor to claim that it has substantially complied with the legislated procedures, save for the requirement the breach of which forms the subject of the charge. To put it another way, if a contractor who has been charged under s 80(4)(*a*) for failing to comply with the reasonable

requirements of the electricity licensee submits that it had otherwise taken reasonable precautions to prevent cable damage, all this would amount to is the absence of an aggravating factor. This is logical given that in taking such precautions, the contractor was merely fulfilling its statutory obligation under s 80(4)(*b*) and doing exactly what it was required by law to have done.

32 It follows from what I have just said that the contractor's mitigation should be directed at satisfying the sentencing judge as to *why* that which should have been done was not done. It will not generally be fruitful to dwell on the other steps or procedures that the contractor had followed but which are unrelated to the particular breach that forms the subject of the charge because in assessing the culpability of the contractor, the sentencing judge will consider why and how the non-compliant acts or omissions in question arose. For example, the facts and circumstances which are relevant in the present case will be those which explain Seng Foo's failure to provide adequate signs to show cable positions and to indicate them clearly during the course of the earthworks. If the absence of signs was due to the fact that an LCDW was not even hired to detect, confirm and mark the cable locations (which in itself is an offence under s 80(1)(*c*)), the punishment for the s 80(4)(*a*) offence should reflect the blatant disregard for the legislated procedures. Where an LCDW was engaged but the contractor simply failed to mark any of the cables or stripped off the markings before earthworks were even completed, the offence might be viewed somewhat differently even if it remained serious in nature.

33 On its face, s 80(4) is not directly concerned with punishment for harm done as it targets the contractor's failure to comply with its various duties rather than the consequences of its non-compliance. Nevertheless, where harm does ensue, this may be seen as an aggravating factor where a separate charge under s 85(2) is not brought. To take the fact of harm into account is not

unfair, since it is within the contractor's contemplation that its failure to follow legislated procedures comes, almost inevitably, with an increased risk of damage to a high voltage cable, which can in turn trigger wider repercussions. But whether or not harm results, quite serious penalties can already be imposed depending on the extensiveness and egregiousness of the contractor's failure to comply with s 80(4).

34 The courts often impose fines of $15,000 and $20,000 for s 80(4)(*a*) offences where the contractor is also charged with a s 85(2) offence. However, the considerations behind the quantum of the fine imposed for the s 80(4)(*a*) offence are often not clearly articulated. The punishment should not take the form of a "flat" fine irrespective of the facts and considerations which reveal the degree of extensiveness and egregiousness of the non-compliances in question. Apart from the factors that I have discussed here, general sentencing factors such as the presence of antecedents and whether the contractor pleaded guilty should result in the sentence being suitably adjusted.

The s 85(2) offence

35 I turn to the offence under s 85(2) of the Electricity Act. The relevant parts of s 85 state:

> **Damage to property of electricity licensee**
>
> **85.**—(1) Any person who wilfully removes, destroys or damages any electrical plant or electricity cable in the transmission network belonging to or under the management or control of an electricity licensee or hinders or prevents the electrical plant or electricity cable from being used or operated in the manner in which it is intended to be used or operated shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both.
>
> (2) Notwithstanding subsection (1), any person who, in the course of carrying out any earthworks, damages or suffers to be damaged any high voltage electricity cable in the

> transmission network belonging to or under the management or control of an electricity licensee shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1 million or to imprisonment for a term not exceeding 5 years or to both.
>
> …
>
> (5) In any proceedings for an offence under subsection (2), it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
>
> (6) If in any proceedings for an offence under subsection (2), the defence involves acting on information supplied by a licensed cable detection worker, the person charged shall not, without leave of the court, be entitled to rely on that defence unless he has, within 14 clear days before the hearing, served on the prosecutor a notice in writing giving such information as was then in his possession identifying or assisting in the identification of the licensed cable detection worker.

36 The language of s 85(2) makes it is clear that this provision is concerned with punishing an offender for the *damage* caused to a high voltage electricity cable. An offender can be punished with a fine of up to $1m or jailed up to five years, or both. Compared to an offender who is prosecuted under s 80(4) for example, an errant contractor who is convicted for a s 85(2) offence can be punished far more severely, with the essential element here being the infliction of damage.

37 As I explained earlier (at [27]–[28] above), Parliament was concerned over the severe impact that voltage dips could have on industries. The Minister said then that for "Singapore to continue to attract high-tech, knowledge-based activities like wafer fabrication, we must ensure the high quality and reliability of our power supply" (the 1999 *Parliamentary Debate* at col 2160). It was noted that in 1998, about 57% of voltage dip complaints arose from cable damage. In introducing what is now s 85(2) of the Electricity Act, the Minister said (the 1999 *Parliamentary Debate* at col 2161):

> The serious consequence to the economy as a result of damage to high-voltage cables makes a severe penalty necessary. A deterrent penalty of $1 million is therefore proposed for damage to a high-voltage cable. Section 107(3) [of the Public Utilities Act] will be amended to enhance the current fine of $200,000 to $1 million. The enhanced fine is the same as that provided under the Telecommunication Authority of Singapore Act for damaging telephone cables. At the present level of penalty, some contractors are tempted to risk hitting a cable rather than suffer project delay and payment of liquidated damages. A fine of $1 million will deter such irresponsible behaviour. With the amendments, offenders will face a maximum fine of $1 million, imprisonment for five years, or both. The maximum five-year imprisonment for high-voltage cable damage remains as before. At the same time, section 95 as amended will reduce the maximum term of imprisonment for damaging a low voltage cable from three years to 12 months, as this is less serious. Apart from a deterrent penalty, we will require reasonable precautions to be taken against damage to high-voltage cables. …

38 It may be noted that the Minister spoke of imposing a "deterrent penalty" of $1m. This raises a question as to the relevance of "deterrence" in the context of strict liability offences and whether this is such an offence.

39 In *Jupiter Shipping Pte Ltd v Public Prosecutor* [1993] 1 SLR(R) 402 at [11] (cited in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) ("*Sentencing Principles in Singapore*") at para 14.002), Yong Pung How CJ observed that the only objective for the most part that could reasonably guide sentencing for a strict liability offence is that the sentence be retributive. In my judgment, this observation should be somewhat qualified. It may be true that *guilt* in such a case will be unaffected by considerations of culpability because liability is strict. Hence as long as the proscribed event or outcome occurs, guilt will be established. But this does not mean that considerations such as deterrence have no relevance. I say this because when it comes to *sentencing*, it will often be relevant to have regard to

the culpability of the offender when calibrating the precise punishment that is to be meted out; in that sense, deterrence can play a part.

40 The offence under s 85(2) appears on its face to be a strict liability offence. The severity of the prescribed penalty does not bar it from being a strict liability offence: *Sentencing Principles in Singapore* at para 14.003. But it is noteworthy that s 85(5) provides a statutory defence in that it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. In the context of the offence comprehended by s 85(2), this must mean the taking of reasonable steps to avoid the incidence of damage even if these steps were ultimately unsuccessful. In *Leu Xing-Long v Public Prosecutor* [2014] 4 SLR 1024, Chan Seng Onn J, in distinguishing between strict liability and absolute liability offences, held (at [22]) that offences which do not require the Prosecution to prove a specific fault element but allow the accused to avoid criminal liability on proof of due diligence or a reasonable mistake of fact are nonetheless termed strict liability offences (citing Stanley Yeo, Neil Morgan, WC Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at pp 170–171). Professor Andrew Ashworth on the other hand observes that in truth, there is no "clear convention" on when criminal liability should be classified as "strict", and that offences that prescribe liability without fault but which allow the accused to avoid liability on proof of "due diligence" might arguably not be termed as strict liability offences (see Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) ("*Principles of Criminal Law*") at p 160). In the final analysis, nothing much in this case turns on whether the offence under s 85(2) is or is not termed a strict liability offence. I say this because, as I have observed, even if it were a "conventional" strict liability offence that does not admit of any defence once the proscribed event occurs, the fact that the punishment is likely to be

affected by the actual culpability of the offender would warrant deterrence being taken into account as a sentencing factor. This is all the more so where the defence under s 85(5) is considered because the policy of the law should be to deter any acts that deviate from the application of precaution and diligence to prevent the occurrence of the offence.

41 As I have noted above (at [30]), the sentencing judge must take note of the maximum penalty and apply his or her mind to determine precisely where the offender's conduct falls within the spectrum of punishment devised by Parliament. Given the wide prescribed range of punishment in s 85(2), the punishment should be calibrated based on (a) the culpability attaching to the offender in the circumstances of the offence and (b) the extent of the harm that arises from the cable damage. The latter of these will entail having regard to (i) the damage to the cable; and (ii) the consequential damage as a result of the damage to the cable.

42 That the extent of cable damage is relevant is obvious as damage to the cable is exactly what the offence proscribes. Courts have relied on the cost of repairs as a proxy measure for how badly damaged the cable is. This may be a useful measure assuming that the cost of repairs is closely correlated to the extent of damage. Based on the precedents, the cost of repairs can vary widely. For example, the cost of repairs in *Songcheon* was about $2,900 while in *Public Prosecutor v HHK-Delta Corporation Pte Ltd* (DSC 900033-2014 and anor) (20 March 2015), the repair costs were about $380,000. In the present case, the DJ observed that it was almost always the case that the wrongdoer will bear the repair costs before the case goes to court (see [15] above). Where the cost of repairs is high, should the fact that the contractor foots the bill be mitigating? In my judgment, where the essence of the offence is the infliction

of damage, the better perspective would be to view the failure to meet the repair costs as an aggravating factor.

43 If consequential damage results from cable damage, this should be seen as a significant step up in the severity of the harm. It seems obvious that where others are harmed, the case assumes a different complexion which should then be reflected in the punishment. This is consistent with the legislative intent as evident from the extracts of the Minister's speech that I have referred to (see [27]–[28] and [37] above). The courts do bear this in mind in sentencing offenders under s 85(2). In *Jin Choon*, the cost of repair was about $7,000 but 12 consumers were affected for two hours. The fine imposed for the s 85(2) offence was $50,000. In *Public Prosecutor v Hexagroup Pte Ltd* [2013] SGDC 154 ("*Hexagroup*"), the cost of repair was similar (about $6,500) but no consequential damage arose. The fine imposed for the s 85(2) offence was $6,000. The learned district judge said that had there been power outage, that would have been a relevant factor in determining sentence and more so if the outage caused damage to industrial enterprises (at [19]). The Prosecution appealed the fine but the appeal was dismissed.

44 The Prosecution usually presents evidence of consequential damage in two ways: the duration of the power outage and the numbers affected by the power outage. These are relevant dimensions but I consider that such information should usefully be furnished in a more granular fashion. Besides the numbers affected and the duration of the disruption, the court should also be presented with information such as the profiles of those who were affected. For example, it may be relevant, in view of Parliament's intention to ensure a safe and steady supply of electricity to commercial users, to determine if domestic or commercial users were affected. It may also be relevant to

describe and quantify, where possible, the consequences that eventuated. For example, in *Public Prosecutor v Fonda Global Engineering Pte Ltd* [2013] 1 SLR 778, besides the repair costs of $393,706.83, there was specific information that a chiller at a private university had been damaged, resulting in losses of $9,000. Obviously, where the cable damage has interfered with production lines, this would be much more serious than the inability of some domestic consumers to use their electrical appliances. On the other hand, the position may be different where residents have been trapped in lifts for a long period of time by reason of the damage. The possible instances that come to mind are legion, but what this illustrates is that the evidence of the consequences should be provided in sufficient detail to give the courts a reasonable idea of their severity.

45 The consequences that may arise from damage to the cable will generally not be predictable in advance. Yet in holding that the extent of consequences is a relevant factor in assessing the severity of the offence, it may legitimately be asked whether this is fair to the contractor. This philosophical issue was discussed in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 (at [68]) ("*Hue An Li*"), where the court compared the control principle, which encapsulates the notion that no man should be held criminally accountable for that which is beyond his control, with the outcome materiality principle, which is the brute principle that moral (and indeed legal) assessments often depend on factors that are beyond an actor's control. In *Hue An Li*, we held in the context of criminal negligence, that the outcome materiality principle should trump the control principle for three reasons. First, the relevant Penal Code (Cap 224, 2008 Rev Ed) provisions that criminalise negligent conduct are predicated on outcome materiality – the maximum punishment for each criminal negligence offence is broadly correlated to the degree of bodily harm (at [71]). Second, we noted, as a more fundamental

reason, that the law takes into account considerations that go beyond moral assessments (at [73]). Third, "a countervailing species of legal luck can operate in favour of a putative offender", who takes the benefit of legal luck if adverse consequences do not eventuate. Therefore, it is only fair that the control principle ought not to be raised as a shield when a harmful outcome does transpire (at [74]).

46 I am satisfied that this is another context where outcomes are material. When Parliament raised the possible fine that could be imposed on an offender by five times to $1m from $200,000, it recognised the severe repercussions that could emanate from damage caused to a high voltage cable. This suggests that Parliament intended that the errant contractor be punished along a wider spectrum having regard to the seriousness of the consequences of its actions. While contractors who cause cable damage may well not have been actuated by conscious wrongdoing, most negligence arises due to insufficient care being taken and the degree of care that contractors bring to bear can be increased by means of the penal law (*Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [44]). In any event, s 85(5) provides a due diligence defence such that only a contractor who cannot show that it had taken all reasonable precautions will be held responsible for the damage. Aside from this, an errant contractor also takes the benefit of legal luck operating in its favour in this context if adverse consequences do not eventuate from the cable damage; it should then not be in a position to argue that it had no control over the outcome when graver consequences ensue.

47 While it is important to punish having due regard to the harm that has eventuated when sentencing an offender for a s 85(2) offence, this is not to say that the offender's culpability is completely irrelevant (see [39]–[41] above). As explained in *Angliss* (at [32]), in the context of strict liability offences,

there must clearly be a distinction between breaches where the offender acted deliberately and with intent on the one hand, and breaches which are merely the result of negligence and oversight on the other. Indeed, I would suggest that even the degree of negligence or oversight may have a bearing on the sentences. However, this is subject to an important qualification. Where the contractor is also charged at the same time with an offence under s 80(4) and it is therefore already being punished for the lack of diligence and care under this separate offence, it will neither be necessary nor appropriate to factor this again into the sentencing matrix for the offence under s 85(2) (see, for example, *ADF v Public Prosecutor* [2010] 1 SLR 874 at [92], which was cited in *Shouffee* at [78]).

48 Having set out some of the considerations for sentencing in the context of the offences under s 80(4)(*a*) and s 85(2) of the Electricity Act, I now turn to consider whether the sentences in the present case are manifestly excessive.

The appropriate sentence for the offences

The importance of adequate information for sentencing

49 In determining the appropriate sentences for the two offences, I was somewhat limited by the information that was available. In cases where the offender pleads guilty at an early stage, there is often little to go on beyond the SOF and the mitigation plea. In these circumstances, as observed by Chan J in *Public Prosecutor v Andrew Koh Weiwen* [2016] SGHC 103 at [14], the SOF tendered by the Prosecution and admitted by an accused person, along with the charges, should set out the admitted facts for the court's consideration at the sentencing stage. Similarly, in *K Saravanan Kuppusamy v Public Prosecutor* [2016] 5 SLR 88 at [27], I said that where a material factor, which either aggravates or mitigates the offence, is to be put forward by either side, it is

incumbent on the parties to either have it agreed, or to prove it at a *Newton* hearing or to seek to persuade the court to come to a conclusion on the basis of submissions, though in this latter case, any reasonable doubt will be resolved against the Prosecution.

*The appropriate sentence for the s 80(4)(*a*) offence*

50 The DJ in the present case noted that the fine for the s 80(4)(*a*) offence does not usually go below $15,000 (see GD at [25]). He found that the requirements that Seng Foo failed to comply with were not trivial or minor, and that it was "vital" that the cable positions be clearly indicated at all times. On appeal, Seng Foo contends that the fine should be $10,000 on the basis that the DJ failed to give sufficient weight to certain mitigating factors.

51 The key is to assess the degree of culpability surrounding Seng Foo's failure to comply with the reasonable requirements. But there was a gap in the information as to why and how the two requirements came to be breached. The SOF states that Seng Foo failed to provide adequate signs to show cable positions and to clearly indicate these positions at all times during the execution of the earthworks. But there is little more to go on. Even accepting that Seng Foo engaged an LCDW to conduct a cable detection exercise, it was not clear to me whether the worker was instructed at all to mark any of the cables or whether the markings were made but were later removed by Seng Foo or those it was responsible for. Seng Foo's mitigation plea was likewise of little help. Its mitigation plea and written submissions in this appeal were founded almost entirely on showing that it had been compliant in every *other* way but for the reasonable requirements in question. Seng Foo says that it tried its "best to exercise due diligence" in performing the stipulations in SP PowerGrid's Letter of Requirements. In distinguishing its situation from other cases, Seng Foo draws attention, among other things, to the fact that it dug

trial holes manually with the help of a mini-excavator operated by a registered excavation operator. A full-time supervisor was at the scene to supervise the entire process. But even if Seng Foo had substantially complied with all other requirements, that would only signify the absence of an aggravating factor in the sense that a failure to comply with any other requirements would have rendered Seng Foo even more culpable (see [31] above).

52 At the hearing, I therefore asked counsel questions that were specifically directed at Seng Foo's non-compliance with the two requirements in question. The responses that emerged do not put Seng Foo in a favourable light. As it turned out, the damage to the cable occurred not within the worksite but along its perimeter. The work at the worksite had been completed without incident. While vacating the site, the steel plates surrounding the site and which were in the ground had to be removed. Excavation works were required for this purpose because the plates functioned as a temporary earth-retaining structure. It was when attempting to withdraw the steel plate that the cable was struck. It would appear that Seng Foo complied with all the legislated procedures within the worksite but not in the area immediately adjacent to it. This helps explain why there were no cable markings at the area where the damage occurred, notwithstanding the engagement of an LCDW to conduct cable detection works and the digging of trial holes *within* the worksite.

53 Indeed, counsel for Seng Foo confirmed that an LCDW had been engaged and the worker did mark out the various spots *within* the worksite where there were cables. However, he could not confirm whether it undertook the same process for the area along the perimeter of the worksite. If the LCDW was not even told to perform cable detection in the vicinity of the steel plate before its removal was attempted, that would be an egregious breach of

the requirements which were defined by reference to works done in the *vicinity of the cable* (see s 80(1)) rather than by reference to the contractor's worksite. The short point is that so long as earthworks had to be done, the contractor was duty-bound to comply with the relevant requirements, even if the particular spot was outside the worksite. Seng Foo's counsel conceded as much. Assuming that the LCDW had been instructed to go over the perimeter of the worksite, the fact that there was no marking at the incident spot shows that he had either not been told to put up markings or that the markings had been removed. On either count, that would still be an egregious breach.

54 To exacerbate matters, the SOF reveals that the site supervisor had informed the excavation operator that there *was* an electricity cable in the vicinity, about two metres from the lift pit wall. Yet, it appears that nothing was done to comply with the statutory duties notwithstanding the supervisor's knowledge that there was an underground cable near the steel plate. In its mitigation plea, Seng Foo took pains to describe the care that it took just before the incident. It stressed that when the site supervisor discovered lean concrete in the soil, he immediately suspended excavation works, which were resumed only after physical checks found "[nothing] particularly concerning" in the excavation hole. With great respect, such conduct is far from mitigating. If Seng Foo had failed to abide by the prescribed procedures, this would not be ameliorated by Seng Foo executing its own brand of "safety" procedures. Being aware of the existence of a cable in the vicinity, the concerns should have been acted upon by having an LCDW survey or resurvey the area. Instead, the works continued without this being done and despite Seng Foo's knowledge of the risk it was running. During the hearing, the Prosecution clarified that in fact, the lean concrete that was sighted was the identification slab for the cable. It is evident that if the personnel had complied with the

reasonable requirements, they would have known exactly where the cable was and the cable damage would then probably not have occurred.

55 In the circumstances, I am inclined to the view that Seng Foo's failure to comply with the reasonable requirements was egregious but I decline to make definitive findings to this effect in view of the insufficiency of information and the fact that the Prosecution has not appealed against the quantum of the fine imposed for this offence. However, I am satisfied that the fine which was imposed in the circumstances for the s 80(4)(*a*) offence is not manifestly excessive.

The appropriate sentence for the s 85(2) offence

56 The Prosecution's table of precedents shows that the fines imposed by courts for s 85(2) offences are generally bunched around a fairly tight range between $45,000 and $70,000. The table sets out very basic information on whether the contractor in each case had antecedents, the extent of power outage and the cost of repairs in each case. However, I was unable to derive significant assistance from the tabulation of these cases, many of which were cases where the penalties had been imposed without written grounds such that little weight should be attributed to them (*Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [11(d)]).

57 In the present case, it is relevant to note that the cable damage triggered a power outage that lasted for about two minutes and affected 214 households in three HDB blocks. Further details could have painted a better picture of just how severe the consequences were. Nevertheless, even on the available facts, I see no reason to disturb the fine of $45,000 that was imposed for the s 85(2) offence. Seng Foo paid about $5,600 for the repairs to the damaged cable, which suggests that the damage was not particularly serious.

However, the fact that consequences ensued warrants a significant step up in liability. It should be noted that in terms of the available sentencing range which extends to a fine of $1m and/or a term of imprisonment of up to five years, a fine in the amount imposed in this case is at the low end of the range.

58 In contending that the appropriate fine should be between $15,000 and $20,000, Seng Foo relied on *JS Metal* (see [22] above), where the High Court slashed the fine for causing damage to the gas pipe from $100,000 to $5,000 (the fine of $10,000 for non-compliance with reasonable requirements was not disturbed). Leaving aside for the moment the court's apparent reliance on the one-transaction rule to reduce the fine for causing damage to the pipe, *JS Metal* is distinguishable on the facts. There, no consequential harm arose from the damage to the pipe, which was a low pressure pipe that was repaired for $968. The pipe was only "very slightly bent" (*JS Metal* at [12]). In the present case, Seng Foo says that cable was merely "grazed", but the reality is that this contact was serious enough to cause a power outage that affected 214 households for about two minutes.

59 Seng Foo further contends that even if the consequences of cable damage are taken into account, it is being punished too harshly as the harm is of a different order and magnitude from that occasioned in *Public Prosecutor v ED. Zublin AG* (MSC 90086-2014 and anor) (6 February 2015) ("*Zublin*"). In *Zublin*, the voltage dip affected major industries in the western part of Singapore and attracted 62 complaints. The cable damage was extensive – the repair costs were about $245,000. Despite all this, *Zublin* was fined $70,000 for the s 85(2) offence (and a further $15,000 for the s 80(4)(*a*) offence). In contrast, Seng Foo's counsel emphasised that in the present case, the power outage, which occurred after lunch time on a weekday, was so brief that it might even have passed unnoticed. In fact, the Prosecution had not adduced

evidence of any complaints. In my judgment, the fine imposed in *Zublin* appears to have been unduly lenient. Furthermore, no written grounds were issued. I therefore do not regard it as a relevant precedent.

60 Finally, I should touch on one further point. I have said at [41] above that it will be relevant to have regard to the culpability of the offender. However, I reiterate the qualification that I have made at [47] above, which is that this would not be so in a case such as the present where a separate charge has been brought for the offence under s 80(4)(*a*) and where, as here, it is the failure to comply with the reasonable requirements that is said to constitute the culpability of the offender.

Whether the cumulative sentence is manifestly excessive

Whether the one-transaction rule and the totality principle apply in the context of fines

61 I have considered the two offences individually and concluded that each sentence is not excessive. However, both offences are usually brought together against an errant contractor. In most cases, the damage that is caused to the cable can be traced to the contractor's initial failure to comply with the reasonable requirements. It appears that the lower courts, following *JS Metal*, have come to accept that both offences should be viewed as one transaction. In *Hexagroup* therefore, the district judge imposed a "less severe sentence" of $6,000 for the s 85(2) offence for the minor damage that was caused to the cable while imposing a $10,000 fine for the s 80(4)(*a*) offence for the failure to comply with two requirements (at [23]). In *JS Metal*, it was held (at [49]) in the context of the Gas Act that:

> … where non-compliance with [SP PowerGrid's] requirements in the course of carrying out earthworks (*ie*, the s 32(3)(*a*) offence) results in damage to a gas pipe or gas plant (*ie*, the

> s 32A(2) offence), the proper approach to sentencing for the two offences is to consider *both* offences together. If the damage resulting from the s 32A(2) offence requires that offence to be punished more severely than the s 32(3)(*a*) offence, then the sentence imposed for the s 32A(2) offence should be harsher than that imposed for the s 32(3)(*a*) offence. Conversely, if the damage resulting from the s 32A(2) offence is relatively minor (as in the present case), then the sentence imposed for the s 32A(2) offence should be less severe than that imposed for the s 32(3)(*a*) offence.
>
> [emphasis in original]

62 Seng Foo accepts that the punishment for the s 85(2) offence ought to be heavier than that for the s 80(4)(*a*) offence due to the damage that was caused to the cable. However, Seng Foo submits that where both offences form part of a single transaction, such that the failure to comply with the statutory duties led to the very damage in question, the courts should impose a fair punishment that reflects the totality of the offending. Therefore, it contends that the global fine should be between $25,000 and $30,000 (being $10,000 for the s 80(4)(*a*) offence and a range of between $15,000 and $20,000 for the s 85(2) offence).

63 This engages the question of whether two principles that limit the extent of punishment – the one-transaction rule and the totality principle – apply in the context of multiple fines. At the end of the hearing, I requested counsel to tender further submissions on this issue. Seng Foo's position is that the principle underlying the one-transaction rule, as subsumed under the totality principle, ought to apply in the context of fines as this is in line with the overarching principle of proportionality. The Prosecution's position is that the court can and should apply both the one-transaction rule and the totality principle when imposing fines for more than one offence. Having perused their submissions, I find myself in complete agreement with neither of their analyses. I consider that in sentencing an offender for multiple offences

involving fines, the one-transaction rule does not apply. However, the totality principle applies and the ultimate concern that underlies the application of the one-transaction rule, which is proportionality, can be dealt with within the framework of the totality principle.

64 I start with a discussion of the one-transaction rule. According to this rule, where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive (D A Thomas, *Principles of Sentencing* (Heinemann, 2nd Ed, 1979) at p 53). This principle was identified by D A Thomas and has been referred to in other sentencing texts (see Martin Wasik, "Concurrent and Consecutive Sentences Revisited" in ch 17 of Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012)). The one-transaction rule has come to be well-entrenched in our sentencing jurisprudence, at least in the context of offences concerning multiple imprisonment terms (see *Shouffee* at [27] and the cases cited therein).

65 The one-transaction rule is in essence a rule of fairness. It rests on the notion that an offender should not be doubly punished for what is essentially the same conduct, notwithstanding the fact that the conduct discloses several distinct offences at law (see *Shouffee* at [32] and [39]). To prevent excessive punishment, when selecting which of the multiple imprisonment sentences ought to run consecutively, the court should generally not select sentences for offences that in fact form a single transaction.

66 The courts have said on many occasions that the one-transaction rule is neither an inflexible nor rigid principle. To determine whether the rule is engaged, I suggested in *Shouffee* (at [40]) that it might be useful to have

regard to such factors as proximity in time, proximity of purpose, proximity of location of the offences, continuity of design and unity (or diversity) of the protected interests. These are simply signposts and it can be a difficult task in some cases to evaluate if certain offences form parts of the same transaction. However, the determination is ultimately one of common sense (*Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437 at [17]; *Shouffee* at [40]).

67 It is also important to note that the rule is not mandatory. In *Shouffee*, I pointed out (at [81(b)]) that there could be circumstances where the court may well order two sentences to run consecutively even though the offences do form part of the same transaction. Such circumstances would include ensuring that the sentence reflects the increased culpability of the accused from multiple offending or gives sufficient weight to the interest of deterrence so as to discourage the behaviour in question and to ensure that the punishment is commensurate with the gravity of the offence. In other words, the one-transaction rule may be departed from in order for the courts to arrive at a just sentence. It is not an invariable rule. Moreover, the rule is subject to the mandatory requirements in the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). Section 307 of the CPC requires the court to order sentences for at least two offences to run consecutively where the offender is convicted of and sentenced for at least three distinct offences. In short, the vigour of the one-transaction rule varies even in the context of multiple offences involving imprisonment terms.

68 It is possible to incorporate the one-transaction rule within the sentencing matrix adopted by the court where it is dealing with multiple *imprisonment* terms because the CPC explicitly sanctions the imposition of concurrent sentences. Section 306(2) states that "where these punishments consist of imprisonment", the court can direct these punishments to run

consecutively or concurrently (subject to s 307 as described above). The effect of imposing concurrent sentences is to wholly annul any *additional* punitive impact upon the offender arising from the multiple offences. There is also provision for concurrency for community work orders (s 344) and community service orders (s 346). However, there is no such provision in relation to situations where the punishments are fines, which are thus inevitably cumulative. It is the same with caning, subject to the legislative limit of 24 strokes. Hence, in principle, it is difficult to see how the rule can lend itself to application in the context of cases where the court is faced with imposing multiple fines. This, however, gives rise to a concern that if the court must impose separate fines for each offence, with no limit, the court might find that it has to impose an aggregate fine that is out of all proportion to the gravity of the offences.

69 Different analytical tools have been deployed by the courts in various jurisdictions to deal with this problem of excessive and disproportionate fines. In the United Kingdom, the cumulative effect of fines has been ameliorated by ordering that there be "no separate penalty" for some of the fines. In *R v John Pointon & Sons Ltd* [2008] 2 Cr App R (S) 82 ("*Pointon*"), the English Court of Appeal suggested (at [20]) that it would not be wrong for a judge to pass a fine for every count; neither would it be wrong to impose one fine for the most serious offence while imposing no separate penalty for other counts. But the court cautioned that whichever course a judge chose to adopt, the totality of the fine must not be manifestly excessive. The practice of ordering no separate penalty has found its way into the UK's Sentencing Council's definitive guideline, which applies to all offenders from 11 June 2012 (Sentencing Council, *Offences Taken into Consideration and Totality: Definitive Guideline* (2012)). In the context of multiple fines for non-imprisonable offences, the Sentencing Council states (at p 12) that:

> … where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences.

70 The practice of ordering no separate penalty also appears to be possible in Hong Kong (see *HKSAR v Chan Kim Chung Nelson* [2013] 2 HKC 448 at [18]). In Singapore however, an insuperable obstacle to applying the one-transaction rule in the context of fines is the mandatory rule in the CPC that the court must impose a sentence for every offence the offender is charged with. Section 306(1) of the CPC states that where a person is convicted of any two or more distinct offences, the court "must sentence him for those offences to the punishments that it is competent to impose". This means that it is not possible to impose no separate fines for some offences to prevent the fines from snowballing into an unreasonable amount.

71 In *JS Metal*, Chan CJ was clear that the one-transaction rule "applies to punishment by way of imprisonment" (at [47]) and in the context of fines, he said that there was no reason why these should not be subject to "*the principle underlying* the one transaction rule" (at [48]) [emphasis added].What then is the "principle underlying the one-transaction rule"?

72 In my judgment, the rule is one of fairness and it is often expressed in terms of the need to avoid punishing an offender twice for the same criminality. This suggests that the rule is ultimately rooted in concerns of proportionality, which entails considerations of fairness and of avoiding excessive punishment. The principle of proportionality – that penalties be proportionate in severity to the gravity of an offender's criminal conduct – is a "basic requirement of fairness" (Andrew von Hirsch, "Proportionality in the

Philosophy of Punishment" [1992] 16 Crime and Justice 55 at p 55). It stands to reason that courts do not punish offenders twice for the same criminal conduct precisely because it would be unfair and disproportionate to do so.

73 In *Royer v Western Australia* [2009] WASCA 139, the Court of Appeal of Western Australia embarked on an extensive discussion of the basic rationale for the one-transaction rule, noting that at its heart, the rule recognises that care must be taken so that an offender is "not punished twice (or more often)" where "there is an interrelationship between the legal and factual elements of two or more offences" (at [22]). On the question of how the one-transaction rule is to be understood and applied, the court held (at [30]:

> *… Save for the instances in which the interrelationship between multiple offences is so close that injustice can only be avoided by concurrency of terms, the answer will usually emerge from considerations of proportionality to or with the criminality of the offender's conduct viewed in its entirety. Looked at in this way, the one transaction principle and the totality principle are closely connected.* A sentencing judge is obliged to impose an effective term that she or he judges to be appropriate for the overall criminality of the offender's conduct. Even where, on a strict and literal understanding of the one transaction principle, it might be said that the concurrency of terms can be justified, the need for proportionality might demand cumulative or partly cumulative terms.
>
> [emphasis added]

74 If the one-transaction rule is so related to proportionality, the concern underlying the one-transaction rule can also be dealt with within the application of the totality principle, which is a manifestation of the requirement of proportionality that runs throughout the gamut of sentencing decisions (*Shouffee* at [47]).

75 The totality principle is a consideration that is applied at the end of the sentencing process (*Shouffee* at [58]). It requires the sentencing judge to take a "last look" at all the facts and circumstances and be satisfied that the aggregate sentence is sufficient and proportionate to the offender's overall criminality. The totality principle must be applied even in cases where the one-transaction rule is not applied for the reasons that I have outlined (see [67] above). If the sentencing judge considers that the cumulative sentence is excessive, he or she can either opt for a different combination of sentences *or adjust the individual sentences* though in doing so, the sentencing judge must be diligent to articulate the reasons (*Shouffee* at [81]). If adjustments can be made to impose lower individual sentences in the context of imprisonment terms, I see no reason why the same technique cannot be used in the context of fines to address the concern underlying the one-transaction rule.

76 This is consistent with the approach taken in some Australian courts. In *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] 105 ACSR 403, the court held (at [41]):

> The totality principle applies to the fixing of fines [case citations omitted]. The court must fix a fine for each offence and then review the aggregate, considering whether it is just and appropriate, as a reflection of the overall criminality. *Such consideration may lead to moderation of the fine imposed in respect of each offence*: [case citation omitted]. *It is at this stage that it is relevant to consider matters such as whether the separate offences were part of a single course of conduct* (or whether the offences may be grouped together in some way as representing separate courses of conduct) and whether there is an overlap between the legal elements of some of the offences.
>
> [emphasis added]

77 In *Environment Protection Authority v Barnes* [2006] NSWCCA 246, the New South Wales Court of Criminal Appeal also stated (at [50]) that if the sentencing judge believed that the totality principle "required an adjustment to

the fines which may otherwise be appropriate, the amount of each fine had to be altered". The plaintiff in that case had also referred to *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR683 ("*Camilleri*"). *Camilleri* was an appeal against penalties imposed for three air pollution charges. The appellant pleaded guilty to causing the emission of an odour from its premises on three separate dates while carrying on its business of fat extraction works. The appellant was fined A$35,000 for each offence. On appeal, the New South Wales Court of Criminal Appeal agreed that a fine of A$35,000 was appropriate for the first offence, but found the total quantum of A$105,000 to be excessive having regard to the totality principle. The court reasoned that the "close time frame of the three offences charged together with the fact that the remedying of the underlying problem would have taken much more time than elapsed between the offences suggests … that the three offences are to be seen as connected and to be punished accordingly". Accordingly, the penalties for the second and third offences were adjusted to A$17,500 and A$8,750 respectively to reflect the appellant's total criminality.

78 Similarly, in Canada, the Alberta Court of Appeal held in *R v Great White Holdings Ltd* [2005] ABCA 188 that where some of the multiple convictions stem from closely related acts (such as illegal hunting and possessing the animal then killed), the court must look at the total burden (at [26]). While fines cannot be made concurrent, the totality principle applies to and modifies fines for multiple offences (at [29]).

79 In keeping with the foregoing discussion, it is perhaps unsurprising then that the totality principle has already been held to apply to multiple offences involving fines in Singapore. In *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163, the district judge had imposed about $4.6m in total fines on the appellant for nine charges of importing uncustomed goods. The

fines had been computed on the basis of a fine of some 15 times the amount of Goods and Services Tax ("GST") payable for each offence. On appeal, Yong CJ held that the totality principle could be applied in the context of a cumulative sentence comprising fines for several distinct offences (at [11]), and found on the facts that the cumulative effect of the fines was to impose a "crushing sentence" on the appellant contrary to the totality principle. Thus, Yong CJ reduced the aggregate fine to about $1.55m, concluding that the fines should be five times the GST payable for each charge. In *Chandara Sagaran s/o Rengayah v Public Prosecutor* [2003] 2 SLR(R) 79, Yong CJ reiterated (at [14]) that the totality principle applied to a cumulative sentence made up of fines.

80 To summarise, in my judgment, where an offender faces multiple fines, the one-transaction rule does not apply. However, any concern of unfairness arising from double or excessive punishment can be dealt with by the application of the totality principle, which allows for the adjustment of individual fines so that the cumulative fine is sufficient and proportionate to the offender's overall criminality. This, however, would be subject to any contrary statutory provisions having mandatory force.

Whether Seng Foo's cumulative fine is manifestly excessive

81 I had already concluded that the individual sentences for the s 80(4)(*a*) offence and the s 85(2) offence are not excessive. Taking both offences together, I do not consider that on the facts, the concern underlying the one-transaction rule is engaged, such that in applying the totality principle, further adjustments to the individual fines are necessitated. I consider that while the offences were proximate in fact, they violated different legally-protected interests. The s 80(4)(*a*) offence punishes Seng Foo for failing to comply with SP PowerGrid's reasonable requirements, while the s 85(2) offence punishes

Seng Foo for having caused harm. In assessing each of the sentences, I have disregarded the element of culpability when considering the s 85(2) offence because that is already being punished by the s 80(4)(*a*) offence. Similarly, I have disregarded the element of damage in assessing Seng Foo's culpability for the s 80(4)(*a*) offence because that has been separately dealt with in the s 85(2) offence. I also do not regard the overall sentence as excessive.

Conclusion

82 In the circumstances and for these reasons, I dismiss Seng Foo's appeal.

Sundaresh Menon
Chief Justice

Raymond Lye and Ashley Phua Xin Jie (Union Law LLP) for the appellant;
Ruth Teng and Ho Lian-Yi (Attorney-General's Chambers) for the respondent.