

Public Prosecutor v Leng Kah Poh
[2014] SGCA 51

Case Number : Criminal Reference No 2 of 2013
Decision Date : 17 October 2014
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s) : Tan Ken Hwee, Sandy Baggett, Sherlyn Neo and Eugene Sng (Attorney-General's Chambers) for the applicant; S K Kumar (S K Kumar Law Practice LLP) for the respondent.
Parties : Public Prosecutor — Leng Kah Poh

Criminal procedure and sentencing – criminal references

17 October 2014

Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 This is a criminal reference that arises from a decision by the judge (“the Judge”) in *Leng Kah Poh v Public Prosecutor* [2013] 4 SLR 878 (“the Judgment”). Pursuant to the application, the Public Prosecutor (“PP”) has referred two questions of law of public interest to this court which relate to the interpretation of s 6(a) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) (“PCA”). This issue of interpretation arose as a result of the atypical factual matrix of the case.

Background Facts

2 The respondent in this reference (“the Respondent”) was the food and beverage manager at IKANO Pte Ltd, a Singapore company that operates the IKEA furniture stores in Singapore (“IKEA”).

3 AT35 Services (“AT35”) was a sole proprietorship registered by Andrew Tee Fook Boon (“Andrew”). Initially, AT35 was a waste management company.

4 Sometime in October, Andrew was approached by Gary Lim Kim Seng (“Gary”) to convert AT35 into a food supply business. Later in the same month, Andrew met Gary and the Respondent in a coffee shop in the Bishan area and a plan was hatched to supply food to IKEA through AT35. Gary and Andrew each contributed \$30,000 in cash to start AT35’s new food supply business but the Respondent made no direct cash contribution. Andrew was the primary manager of AT35. Later, when the value of AT35’s sales to IKEA Singapore increased, Gary and Andrew decided to set up Food Royal Trading (“FRT”), which was intended as a means to reduce the tax burden on the sales made to IKEA.

5 AT35 and FRT became the exclusive suppliers of chicken wings and dried food products to IKEA. The two entities had no other business or clients besides IKEA. The *modus operandi* of AT35 and FRT was as follows: they obtained food supplies from a food supplier with instructions for that supplier (Tenderfresh, in AT35’s case) to package its products in unmarked clear plastic bags and sold them to IKEA at a marked up rate. AT35 and FRT did not add value to the products: they merely transported the products straight from its supplier to IKEA. Where storage of the products was necessary, AT35 stored the products in rented cold rooms in Jurong and Defu industrial estates. AT35 did not have any cold rooms or storage facilities of its own. AT35 and FRT were effectively special

purpose vehicles to carry out a scheme which allowed Gary and Andrew to skim money off the top of food contracts with IKEA and share it with the Respondent. Over a period of seven years, AT35 and FRT made a profit of \$6.9m and the Respondent was given a one-third share of it, *ie*, \$2.3m.

6 The Respondent was charged with 80 counts of corruptly accepting gratification under s 6(a) of the PCA. The first charge is reproduced below:

You, ... are charged that you, on or about the 24th day of January 2003, in Singapore, being an agent, to wit, a Manager in the employ of IKANO Pte Ltd, did corruptly obtain for yourself a gratification of a sum of about \$14,125 (Fourteen Thousand One Hundred and Twenty-five Dollars) from one [Gary] Lim Kim Seng, as a reward for showing favour in relation to your principal's affairs, to wit, by being partial in placing orders for food products with AT35 Services and Food Royale Trading, and you have thereby committed an offence punishable under Section 6(a) of the Prevention of Corruption Act, Chapter 241.

The other charges were similarly framed but pertained to different amounts of gratification the Respondent received over the course of the seven years.

7 At a trial before a district judge, the Respondent was convicted on all 80 charges and was sentenced to 14 weeks' imprisonment per charge. The district judge ordered seven out of the 80 sentences of imprisonment to run consecutively for a total sentence of 98 weeks' imprisonment. The Respondent appealed against conviction and sentence, and on appeal, the Judge reversed the district judge's finding that the PP had proven its case beyond a reasonable doubt. The Judge allowed the appeal, and accordingly acquitted the appellant of the charges.

The Judge's decision

8 In reversing the district judge's decision, the Judge did not disturb the former's findings in relation to the Respondent's role in the arrangements with AT35 and FRT to supply goods to IKEA. What was of concern to the Judge were the district judge's findings in relation to the corrupt element of the transaction and the Respondent's corrupt intent or guilty knowledge (at [6] of the Judgment).

9 The Judge's decision centred on the interpretation of s 6(a) of the PCA ("s 6(a)") as to whether there was in fact any inducement of the agent (*ie*, the Respondent) by a third party (*ie*, AT35 and FRT). His starting premise was that under s 6(a), there had to be at least three parties for a corrupt transaction to take place: first, there must be a principal whose loss is at issue; second, an agent of the principal whose corrupt intention is in issue; and third, the third party, who induced the agent to act dishonestly or unfaithfully in relation to his principal's affairs. In relation to s 6(a), the Judge was of the view that it was not sufficient that a person convicted under that provision was dishonest: there *must be an inducement* on the part of the third party to the agent, for the agent *to act in a certain way*, that is, the third party must seek "to prevail on, make, cause, encourage (the agent to do something)" (see [8] of the Judgment). Therefore, an agent who has acted with dishonest intent and has interfered with the affairs of his principal, but *has not been induced* to do so by a third party may be guilty of some other crime of dishonesty, but would not be guilty of corruption as defined under the PCA. If, and as in fact was the case, the nature of the arrangements which the Respondent made with AT35 and FRT were such that the Respondent was the master mind, or a co-conspirator, then it can hardly be said that the Respondent had been induced or bribed to do the allegedly corrupt acts.

10 The district judge found that Andrew had not explicitly stated the reason why the Respondent was paid huge sums of money by AT35 and FRT. Andrew had denied, at trial, the existence of a

legitimate reason to pay the Respondent, and from this the district judge drew the inference that the Respondent was paid for the illegitimate reason of showing favour and allowing the arrangement with IKEA to continue. On the other hand, the Judge found that Andrew was not the master mind of the scheme and came to partake in the scheme late. Andrew did not understand the full relationship between Gary and the Respondent either. This explained why Andrew could not state the reason why the Respondent was paid huge sums of money (at [11] of the Judgment).

11 The Judge disagreed with the district judge's inference that there was a corrupt element to the arrangement between Gary and the Respondent where the latter would be paid in order for AT35 to be given "business" by IKEA. The circumstances showed that the agreement for AT35 and FRT to be given "business" by IKEA was initiated by the Respondent or by both the Respondent and Gary (at [12] of the Judgment). Given the following considerations, the Judge found it unlikely that Gary hatched the scheme himself. First, the Respondent had discussed splitting profits "from day 1" with Gary. Second, Andrew was merely a participant who came into the picture late when the scheme had already been formed. Third, the scheme was an elaborate one which involved the use of special purpose vehicles and profiteering from contracts with IKEA, with the Respondent keeping his distance from the vehicles used to carry out the scheme. Fourth, the Respondent was also crucial as an insider that enabled the scheme to be implemented. In truth, it was likely that Gary and the Respondent had "landed on the idea together" and used AT35 (and later also FRT) as vehicles for the scheme to be carried out. The Judge thus found that the district judge's finding that the Respondent was not involved in the original scheme but was being induced to participate was, at best, "ambiguous". In his words, there was "a reasonable chance" that the Respondent was effectively paying himself in a profit-sharing scheme where he received a third of the profit and which also indicated some element of equal ownership over the scheme (at [13] of the Judgment).

12 In the result, the Judge found that the Prosecution had not proven beyond a reasonable doubt that there were three separate parties and that the Respondent was being induced as IKEA's agent by a third party to act in a particular way in relation to his principal's affairs. The Judge held that the district judge was wrong in finding that there was a corrupt element in the Respondent being induced to participate in the arrangement rather than coming up with the arrangement himself (at [13] of the Judgment). Instead, the Judge viewed the entire arrangement as one where the Respondent had come up with the idea of making use of his position within the principal in order to earn secret profits which he would share with the partners he intended to bring in to carry out the scheme. The profits from AT35 and FRT were not rewards given to him as a form of gratification, but rather secret benefits he had made from the scheme he had hatched; the profits made by the Respondent were not unlike those made in the situation where a director acted in conflict with the interest of his company and obtained a secret profit for himself and thereby giving rise to a civil claim by the company against him (at [14] of the Judgment). Therefore, the appellant was not induced by another party to carry out the alleged acts against his principal. As that element of the charge had not been made out, the Judge acquitted the Respondent of the charges.

The criminal reference

13 After the Judge gave his decision, the PP filed a criminal reference on 16 October 2013 pursuant to s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") to refer two questions of law of public interest for the opinion of this court:

- (a) For the purposes of s 6 of the PCA, where an agent initiated, master minded or co-conspired in the payment of a gratification to himself, does this *ipso facto* mean that he was not induced or rewarded in respect of his principal's affairs? ("Question 1")

(b) For the purposes of s 6 of the PCA, where an agent used his position (*vis-à-vis*, his principal) to create an arrangement for the payment of a gratification that conflicts with the interests of his principal, does this *ipso facto* mean that the agent was not, by such arrangement, induced or rewarded for showing favours in respect of his principal's affairs? ("Question 2")

14 While Mr S K Kumar did not contest the propriety of the PP's invocation of s 397 for a criminal reference, for completeness we will nevertheless consider it. We first turn to examine briefly the recent precedents discussing this area of the law. According to *Public Prosecutor v Goldring Timothy Nicholas and others* [2014] 1 SLR 586, the prosecution can refer any question that it wishes to refer to the Court of Appeal without having to obtain leave to do so. However, this only leapfrogs the leave stage and not the substantive stage where the Court of Appeal can still consider whether the case before it falls within the scope of s 397. In the subsequent case of *Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393, this court reiterated that it would be well within its jurisdiction and powers to consider whether the requirements in s 397 were satisfied before deciding whether the court should answer the substantive questions posed to it.

15 The four requirements were stated in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 at [15]:

(a) The reference must be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction ("Requirement 1");

(b) The reference must relate to questions of law and those questions of law must be questions of public interest ("Requirement 2");

(c) The question of law must have arisen from the case that was before the High Court ("Requirement 3"); and

(d) The determination of the question of law by the High Court must have affected the outcome of the case ("Requirement 4").

16 We are of the view that Requirement 1 is fulfilled as the case was the Respondent's appeal against his conviction and sentence, and so the Judge was exercising his appellate jurisdiction when hearing the case. Requirement 2 was also fulfilled as the questions of law related to the interpretation of s 6(a) and as mentioned by this court in the recent judgment of *Public Prosecutor v Teo Chu Ha @ Henry Teo* [2014] SGCA 45 at [35], there is great public interest in ensuring that the principles of law relating to corruption, a huge social evil, are correctly and authoritatively decided for future cases. The principles of law will be delineated later when the questions are addressed. In respect of Requirement 3, Question 1 relates to whether inducement by a third party need be established in considering the objective corrupt element of the transaction, and hence the roles of the agent and the third party in the conception of the transactions are called into question. Question 2 relates to the Judge's finding that the payment of "secret profits" could not amount to a "gratification" for the purposes of s 6(a) and raises legal questions in circumstances where the agent has a beneficial or legal interest in the third party. We are of the view that Requirement 3 was fulfilled as the questions related to the Judge's interpretation of s 6(a) as well as the essential elements of a charge of corruption. As for Requirement 4, in the light of the foregoing, it was undoubtedly fulfilled. The Judge's interpretation of s 6(a) and his application to the facts before him caused him to overturn the decision of the district judge.

17 Before considering the two questions of law of public interest that has been posed to us, we

will address the PP's attempt in its submissions to re-characterise the two questions as three distinct questions for us to consider. While s 397 of the CPC may allow for the prosecution to refer questions of law of public interest to this court without having to obtain leave to do so, we do not think that this gives the prosecution the ability to submit new or revised questions of law to the court by way of submissions. The proper procedure would have been to refer these new questions to this court for our consideration. Therefore, we do not regard the three questions as stated in the submissions as the criminal reference for our present purposes, and will confine our analysis to the two questions initially referred.

Influence and the paradigm of corruption

18 While the PP had referred the two questions of law of public interest in relation to s 6 of the PCA, the charges preferred against the Respondent were brought under s 6(a), so our discussion will be limited only to the latter provision. We thus begin our analysis by considering the offence of corruption under s 6(a), which states:

6. If —

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

...

he 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.

For clarity, we will refer to "gratification as an inducement or reward" as the "gift", and the "doing or forbearing to do ... any act", "or for showing or forbearing to show favour or disfavour" to any person in relation to the agent's "principal's affairs or business" would be treated as the conferment of a dishonest advantage or benefit by the agent on the third party. The use of these words and phrases *are not to be treated as definitions* for the provision or relate to the definitions found in s 2 of the PCA, but are meant to be convenient terms to encapsulate concepts in this judgment without utilising the same phraseology as used in the provision.

19 The definition of "corrupt" was considered for the first time in *Chan Wing Seng v Public Prosecutor* [1997] 1 SLR(R) 721 ("*Chan Wing Seng*") by Yong Pung How CJ in the following manner (at [26]–[27]):

26 I have been very hesitant to define what "corrupt" means because the factual permutations of corruption can be endless. Any definition may thus unnecessarily circumscribe the effect of the section. However, as a starting point, it is useful to keep in view the natural and ordinary meaning of the word "corrupt" as a working guide. In this regard, one of the meanings of "corrupt" as given in *The New Shorter Oxford Dictionary* (1993 Ed) is:

Induce to act dishonestly or unfaithfully; bribe.

And, in further ascribing a meaning to "corruption", it states:

Perversion of a person's integrity in the performance of (especially official or public) duty or work by bribery etc.

27 The above is probably already what most laypersons understand by corruption. However, I stress once again that this is no more than a preliminary guide to what "corrupt" means and is clearly not definitive or exhaustive. Each case must still be examined on its own facts.

While attempting to define "corrupt", Yong CJ was also careful in emphasising that the word should not be construed only in that one manner and that his remarks were not intended to be exhaustive.

20 The elements of an offence under s 6(a) (where the agent has already obtained the gift) are set out in *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR(R) 211 ("*Peter Kwang*") at [32] as follows:

- (a) Acceptance of gratification.
- (b) As an inducement or reward (for the conferment of a benefit).
- (c) There was an objective corrupt element in the transaction.
- (d) The recipient accepted the gratification with guilty knowledge.

The first element is the *actus reus* of the offence. The other three pertain to the *mens rea* of the recipient.

21 *Chan Wing Seng* is instructive in the application of these elements. In that case, Yong CJ held that the fourth element of guilty knowledge refers to whether the accused knew or realised that what he did was corrupt by the ordinary and objective standard, and is a subjective test (at [23]). On the other hand, the third element of whether a transaction has a corrupt element is an objective inquiry that is essentially based on the ordinary standard of the reasonable man and the question is to be answered only after the court has found or inferred what the accused intended when he entered into the transaction.

22 With regards the second element of corruption under s 6(a), this is normally part of the same factual enquiry as the third element, as stated in *Chan Wing Seng* and *Yuen Chun Yii v Public Prosecutor* [1997] 2 SLR(R) 209 ("*Yuen Chun Yii*") and as recently followed in *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 ("*Tey Tsun Hang*"). As stated by Woo Bih Li J in *Tey Tsun Hang* at [17]:

Although the second and third elements [as stated in *Peter Kwang*] are conceptually different, they are part of the same factual enquiry. *The question is whether the recipient received the gratification believing that it was given to him as a quid pro quo for conferring a dishonest gain or advantage on the giver in relation to his principal's affairs.* The court has treated these two elements together in its assessment of whether an offence is made out. Thus, *the causal, or consequential, link between the gratification and the act of favour alleged to be procured was examined ... under the rubric of an objective corrupt element.* [emphasis added]

23 Keeping these elements in mind, we consider the paradigm of corruption under s 6(a). As pointed out in the passages from Tan Boon Gin, *The Law of Corruption in Singapore* (Academy Publishing, 2007) ("*The Law of Corruption*"), and by the Judge at [8] of the Judgment, the starting premise for the paradigm in s 6(a) is that it involves at least three parties for a transaction to be

corrupt: the principal, the agent, and the person who gives the gift (henceforth referred to as “the third party”). The purpose of the third party in giving the agent the gift is to cause the agent to act in the third party’s interest, and against the interest of the principal, in breach of the agent’s duty (*The Law of Corruption* at paras 3.4–3.5). *The Law of Corruption* proceeds to explain that this paradigm of corruption could be found in s 6 of the PCA (at para 3.5):

... where the intent behind the transaction is to cause an agent to act against his principal’s interest in breach of the duty he owes to his principal, this taints the transaction with an objectively corrupt element for the purposes of s 6 of the PCA. ...

24 Taking the cases and authorities cited above together, the paradigm of corruption under s 6(a) brings to fore the characterisation of the gift as being intrinsically tied to the third party’s intention of giving the gift for the purpose of obtaining a benefit conferred by the agent at the expense of the principal’s interest. In the prosecution of the agent under s 6(a), the intention of the third party would inform the presence of an objective corrupt element in the transaction and the agent’s subjective guilty knowledge. The third party’s intention, or ulterior motive, is to be considered not only from the third party’s point of view but also from the agent’s (see *Chan Wing Seng* at [41] in relation to the third party; and *Yuen Chun Yii* at [93] in relation to the agent).

25 From the perspective of the agent, the reason why an agent’s actions can be considered as being corrupt in a transaction is because the nature of the gift or a promise of it is such that it seeks to *influence* the agent to act improperly, *ie*, for the benefit of that third party who gave the gift or the promise of it, at the expense of the principal’s interests. This is the objective corrupt element of the transaction. Where the agent recognises the gift or the promise of it as having such a connection to the conferment of an advantage upon the third party and then goes on to act against the interests of the principal for the benefit of the third party, he would have done so because he had been *influenced* by the gift or the promise of it from the third party. This is the agent’s subjective guilty knowledge. Together, they form the agent’s *mens rea* in a corruption offence under s 6(a).

26 In each case, it must be established that there is, first, a *quid pro quo* between the gift received or promised and the dishonest benefit or gain conferred against the principal’s interests and, second, that the agent perceives this to be so. The agent’s recognition that his actions were objectively corrupt, his subjective knowledge, is crucial because *the agent must recognise that the gift is meant to act as an improper influence on his actions*. If the agent receives a gift but does not perceive it to be somehow linked to or intended to influence his actions *vis-à-vis* his principal, but does end up benefitting the third party, it would be difficult to see how that gift would have affected the agent’s relationship with the principal, and any benefit conferred upon the third party would be unrelated to the agent’s performance of his duties to the principal. *Yuen Chun Yii* provides a negative example where the gift was not an influence on the agent. Yong CJ noted (at [97]) that the \$5,000 received by the agent did not affect the performance of the agent’s duties in relation to the principal, and the agent’s actions for the third party were done with the due expedition he would normally have done in performing his duties *vis-à-vis* his principal. There was also no ulterior motive in the receipt of the \$5,000 that could be said to be a gratification that was an “inducement or reward” and was therefore not caught by the PCA.

27 Woo J had raised in *Tey Tsun Hang* the possibility of the fourth element of subjective knowledge causing arbitrary results (at [325]):

Allowing the recipient’s subjective knowledge to come into play could lead to arbitrary results. For example, a recipient who is a police officer who genuinely believes that it is acceptable to receive a sum of money from a suspect because the recipient comes from a society that believes that

this is lawful conduct may validly claim that the fourth element is not made out. I doubt that this is the law in Singapore but I will say no more.

We have some reservations with regard to these obiter remarks by Woo J. Where the recipient police officer believes that it is lawful conduct to receive money from a suspect, the real issue at hand is still whether that money from the suspect affected the policeman's duties *vis-à-vis* his principal, and in the conferment of a dishonest benefit or advantage upon the suspect. It is not so much the belief in the lawfulness of the conduct. Ultimately, it is the influence the gift has on the policeman and his discharge of his duties *vis-à-vis* his principal that matters. The policeman may very well recognise that it is lawful to receive money, but that should not be the end of the inquiry; the court should go further to determine whether the money did in fact improperly influence his actions in a manner that conflicted with his principal's interests and that the policeman recognised this influence the money would have.

28 We find support for such an analysis from the English understanding of corruption. The offence of corruption in the form of s 6(a) has its roots in the common law offence of bribery. "Bribery" was defined in J W Cecil Turner, *Russell on Crime* (Stevens & Sons, 1964, 12th Ed) at p 381 as:

... the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.

In this definition, the objective of the third party with the gift is *to influence behaviour*, and allow for an agent to *form an inclination* to act contrary to his principal's interest.

29 The English statutory offence of corruption was created in three statutes that were collectively known as the Prevention of Corruption Acts 1889 to 1916 (*per* Prevention of Corruption Act 1916 (c 64) (UK), s 4(1)), and were targeted at offences within public bodies. Section 6(a) is *in pari materia* with s 1(1) of the Prevention of Corruption Act 1906 (c 34) (UK). Section 1(1) of the Prevention of Corruption Act 1906 read as follows:

If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

... he shall be guilty [of an offence] ...

Notably, the word "corruptly" appeared in the Prevention of Corruption Acts 1889 to 1916 but was not defined therein.

30 Subsequently, the Royal Commission on Standards of Conduct in Public Life, chaired by the Rt Hon Lord Salmon from 1974 to 1976 (hereinafter referred to as "the Salmon Commission"), recommended that the Prevention of Corruption Acts 1889 to 1916 be consolidated and amended. In its report, the Salmon Commission analysed the offence of corruption as containing three main ingredients (at para 51):

- (a) That a gift or consideration was given or offered by one party to another;
- (b) That the gift or consideration was given, or received, as an inducement or reward for

services to be rendered or already rendered in relation to official duties; and

(c) That the transaction took place corruptly.

In relation to the second and third ingredients, the Salmon Commission considered them as involving the *mens rea* of the corrupt act (at para 53):

... The prosecution have to establish a particular intention on the part of the person giving or receiving a gift – namely that matters relevant to the affairs of a third party (the public body or principal) should be *improperly influenced*. It is an offence corruptly to accept a gift offered as an inducement even if the recipient has no intention of letting the gift influence his conduct: *it is the recipient's perception of the gift as an intended inducement that counts*. [emphasis added]

In this statement, there is a refinement of the definition of “bribery”, and especially so in relation to the establishment of *mens rea* in a corrupt act: *it is the influence that the received gift would have on the agent and his conduct that matters*, and the use of the word “inducement” seems to be synonymous with an improper influence which the gift would exert on the agent. While the offence was delineated, the definition of “corruptly” was left out on the basis that a statutory definition would fail to capture a corrupt intent in all cases. The Salmon Commission’s conclusion was that the “law should continue to rely on the ordinary English word ‘corruptly’ to speak for itself” (at para 56).

31 We note that the elements which Yong CJ had enumerated in *Peter Kwang* (see [20] above) bear a close similarity to the three main ingredients that the Salmon Commission identified. Additionally, the reservations that Yong CJ had in defining “corrupt” and “corruptly” (see *Chan Wing Seng* at [26]–[27]) are similarly alluded to in the report by the Salmon Commission.

32 Twenty years on, the Law Commission published a consultation paper, *Legislating the Criminal Code: Corruption (Consultation Paper)*, [1997] EWLC C145 (15 January 1997) followed by the Law Commission Report in 1998, *Legislating the Criminal Code: Corruption*, LCR 1998, Law Com No 248 (“the 1998 Report”) in an attempt to codify the law as it stood. The Law Commission similarly stated the essential character of corruption as that set out above at [23]. In the reports, the Law Commission was of the view that the Prevention of Corruption Acts 1889 to 1916 concerned itself not with the breach of duty by the agent but with the influence which the gift had on an agent’s performance of his or her functions as an agent (at para 5.73). The 1998 Report took the position that the law of corruption, as it stood, was meant to protect the agency relationship of trust and loyalty which is broken by the tempting of the third party; the agent has an obligation as the person entrusted to act in the best interests of the principal who has entrusted him or her (at paras 5.22–5.23). The *real criminality of the agent’s conduct* lies in the fact that the agent has allowed his or her *judgment to be influenced* by a gift or future hope of obtaining one *and thereby performs his or her functions corruptly* (at paras 5.54 and 5.109).

33 Based on the approach of the Law Commission, it is evident that the corrupt act performed by the agent must be a cause or consequence to the gift he obtains or hopes to obtain, and this is very much the same as the *quid pro quo* nature of the gift that Woo J had highlighted in *Tey Tsun Hang*. Moreover, in considering the elements of an objective corrupt element to the transaction and the agent’s subjective knowledge, the focus of the enquiry of the agent’s intention is not so much on the act of inducement by a third party or the actual receipt of the gift but, more importantly, on the *influence* that the gift from the third party has on the agent.

34 From the discussion of the various reports above, it is clear that the cornerstone of the s 6(a) offence is that the agent has been influenced or tempted by the gift given or promised by a third

party and proceeds to or intends to perform his acts corruptly, and it is *that* influence which the law of corruption aims to criminalise.

35 This makes sense when we consider that there is neither a need for any gift to have actually passed hands, nor a need to find that the fidelity of the agent's duty has actually been breached before an objective corrupt element is established. In most cases, the breach of duty would have occurred, but it is foreseeable that in some instances, there is a possibility that an agent can be prosecuted for corruption when the breach of duty has not yet occurred. For example, where the agent asks for a gift and promises to confer a benefit or advantage upon the third party which is against the interests of the principal and is apprehended before he actually acts, such a situation would still be caught by s 6(a) as seen from the permutation that the offence of corruption is established when an agent attempts to obtain a gift for "forbearing to show favour" to the third party in relation to his principal's affairs or business. The broad scope of s 6(a) is meant to protect the fidelity of the agent/principal relationship which through the gift (or a promise of it) the third party intends to subvert and this is an underlying theme found in the case law (see *Public Prosecutor v Mohamed Abdul Gofar* [1997] 1 SLR(R) 23 at [33]).

36 From our discussion of the case law and interpretation of s 6(a), it is plainly obvious that under s 6(a), the gift, or a promise of it, must come hand in hand with the third party. It is conceptually flawed to say that an agent can influence himself to act contrary to the principal by giving a gift to himself. There is also the question of whom the benefit has been conferred upon if there is no third party on whom such a conferment can be made. Without a third party present, s 6(a) is not engaged. The provision requires that the agent receives the gift or a promise of it "from any person" which in the paradigm is the third party. However, the mere presence of a third party alone would not suffice; it must play the role as the giver of the gift or the promisor of the gift to the agent and who has the intention of using the gift to obtain a benefit for himself – this much is also encapsulated within the words of the provision itself where the agent obtains the gift *from* the third party *for* the conferment of the benefit.

37 Therefore, having regard to the paradigm as stated above, it must be kept in mind that in considering what constitutes an objective corrupt element and the subjective guilty knowledge of an agent, it is crucial to establish that the gift from that third party (given or promised) exerted an *influence* over the agent such that he would act corruptly by conferring a dishonest benefit or advantage upon the third party and at the expense of the interests of his principal, and the agent recognises that influence to be so. The focus of s 6(a) thus remains on the possibility of the weakening of the agent/principal relationship given this external influence.

38 With this understanding, we will now consider the two questions referred to us.

Question 1

39 Question 1 states:

For the purposes of s 6 of the PCA, where an agent initiated, master minded or co-conspired in the payment of a gratification to himself, does this *ipso facto* mean that he was not induced or rewarded in respect of his principal's affairs?

40 The question pertains to whether an agent could be "induced or rewarded" in respect of his principal's affairs where the idea of receiving a gratification from the third party did not come from the third party but from the agent himself. The focus of the question is on the roles of the agent and the third party in the conception of the transactions and whether they matter to establishing a

"gratification" for the purposes of s 6(a).

41 According to the Judge, the agent in this case was the master mind or co-conspirator, and that he had conceived of the plan with Gary. If so, he could not be said to have been induced to act in the way he did by a third party. To the Judge, the role of the agent mattered to the question of whether the third party could be said to have induced the agent into acting the way that he did. If it could not be found that the agent had been induced to act in that manner, the dishonest intent of the agent and the objective corrupt element of the transaction could not be established.

Acts of inducement and "gratification as an inducement"

42 It seems to us that the Judge, as well as the PP, conflated the idea of inducement as an *act of persuasion* with "inducement" as a *descriptor of a "gratification" within s 6(a)*. In the Judgment, inducement for the agent to act in the way he did by the third party requires the third party "to prevail on, make, cause, encourage (to do something)". We do not disagree with such a definition of an act of inducement. On the other hand, "inducement" is used in s 6(a) as constituting "gratification" and must be read in that manner. The phrase in the provision is "any gratification *as an inducement or reward*" [emphasis added]. What acts as the inducement or a reward *is* the gratification (and which we have referred to above as "the gift"). This way of considering the elements of corruption was accepted in *Peter Kwang* (see above at [20]) as well as by the Salmon Commission (at para 51):

... that the gift or consideration was given, or received, as an **inducement** or **reward** for services to be rendered or already rendered ... [emphasis in original]

43 Establishing the gratification as an inducement or reward is only part of the factual enquiry. It must be linked as the cause or consequence of the conferment of the benefit upon the third party as an analysis under the rubric of an objective corrupt element (see above at [25]). Thus, the correct approach is to ask the question: was there a gratification *by* inducement or reward to the agent *that* led to a dishonest or improper gain or advantage being conferred by the agent on the third party? This retains the importance of establishing the influence the gift has on the agent and its relation to his acts of conferring the benefit upon the third party and at the expense of the interests of his principal (see above at [37]). The inquiry in relation to an "inducement" in the context of s 6(a) is *not* about the presence of an act of inducement by the third party. As a matter of principle, whether an objective corrupt element exists, and which is related to a finding of a "gratification", *cannot* be dependent on who initiated the promise of a gift.

44 If the finding of an act of inducement by the third party is always necessary to establishing a "gratification", then s 6(a) would be rendered potentially ineffective in certain scenarios and lead to absurd outcomes. Should the agent be the first in time in asking for the gift *eg*, because the agent had conceived of the intended transaction and had asked for the gift, he would not be considered corrupt as he was not influenced by the third party who agrees with his suggestion to give the gift, and does not make the offer in the first place. This would also mean that the more outrageously an agent behaves in soliciting for the gift the less likely he would be guilty of the offence of corruption. If "inducement" is interpreted to mean the act of the third party in persuading the agent, then such scenarios will not fall within s 6(a). That is not only an unsatisfactory outcome but also undermines the entire object of PCA. Indeed, common sense would suggest that an agent who solicits a "gratification" is equally, if not more culpable than one who responds positively to receiving a "gratification" by the third party. In addition, two vital words in s 6(a) – "accepts" or "obtains" – clearly point to the passive or active role which the agent could have played in receiving the "gratification" from the third party. This was not considered by the Judge. In our opinion, the initiation

of the transaction by a third party does not necessarily have to be found as a fact in all cases in order to establish "gratification" under s 6(a).

45 The case law has also shown that an active procurement of a gift by the agent would also be evidence of "gratification". In *Tan Tze Chye v Public Prosecutor* [1996] 3 SLR(R) 357, the offender was the managing director of a company in the business of property consultancy. He was instructed to sell an industrial property and was also to secure the printing of publicity brochures to promote the sale of the property. The offender approached one Ang from Akira Advertising Pte Ltd to do the printing, and asked Ang for a 10% commission. Ang agreed and made the payment out to a sole proprietorship managed and run by the offender which was recorded as consultancy services. The offender was charged and convicted with accepting \$383 as a reward for showing favour to Ang by engaging Akira Advertising Pte Ltd to do the printing of the brochures. In *Wong Teck Long v Public Prosecutor* [2005] 3 SLR(R) 488 ("*Wong Teck Long*"), the offender who was a manager of private banking in a Singapore branch of an international bank was approached by a borrower to arrange for a quick loan of RM100m. The accused suggested to the borrower to open more accounts in the name of other high-net-worth individuals thereby circumventing the need to comply with the required approval procedure for a large loan. The offender colluded with the borrower in submitting false information on the net worth of individuals and the loan was approved. Pursuant to hints to the borrower, the offender obtained a sum between RM300,000 and 400,000 as a reward for the help he rendered to the borrower and was convicted under s 6(a). In *Pandiyan Thanaraju Rogers v Public Prosecutor* [2001] 2 SLR(R) 217, one Manjit Singh who needed assurances and wanted to be kept apprised of the details of his assault case approached the accused who was a police officer. The accused constantly assured Manjit and made representations to the effect that he could assist Manjit with police matters. The accused later asked for a sum of \$2,000 from Manjit, and Manjit agreed to it. The accused was charged and convicted for accepting a sum of \$2,000 as an inducement. In the above cases, the third party's act of inducement of the agent could not have arisen on the facts as it was the agent who had first asked or hinted at a gratification to be made. Section 6(a) of the PCA therefore allows for a breadth of factual matrices where either party, *ie*, the agent *or* the third party, can initiate the procurement of a gift for a benefit to be conferred when establishing the objective corrupt element of the transaction.

46 We recognise, and as also correctly noted by the Judge, where an agent plays an equal or greater role in creating the corrupt scheme, it cannot be said that he was persuaded or induced by another to join in the scheme. Saying so would be to understate and, indeed, even distort the agent's actual role. That said, and given our foregoing analysis, it is incorrect to determine "gratification" based on the act of inducement of the agent by the third party as that is not the basis of inquiry when considering whether an objective corrupt element exists. Instead, the focus should be on the nature of the gift and the influence it has on the agent and his subsequent actions, which as we mentioned above is key to establishing the objective corrupt element of the transaction and the agent's subjective guilty knowledge. With respect, we hold that the Judge had erred in defining "inducement" in the context of s 6(a) in the way that he did, and find that the fact that an agent had not been induced by the third party into entering the scheme is not fatal to establishing the "gratification" in the transaction.

47 However, we should add that this is *not* to say that the initiation of a scheme is not relevant to the inquiry. Active solicitation or acts of inducement by a third party would go towards establishing the circumstances before or after the gratification is given and would go some way to show that the agent believed that the gratification that was promised or given to him was so that an advantage would be conferred upon the third party or another and thereby show that the agent was influenced by the receipt of the gratification or promise of it. To that extent, where it was the third party who initiated the scheme, the third party's role as the initiator will be an important fact to consider, and

would also go to establishing the objective corrupt element of the transaction and the agent's guilty knowledge. Of course, evidence that the third party was not corrupt in making the gift (eg, because he meant it as a *bona fide* gift without an expectation of a dishonest gain or advantage) would also be relevant in establishing what the intention or ulterior motive behind the giving or promise of the gratification was (see *Chan Wing Seng* at [37] and [41]).

48 In conclusion, we answer Question 1 in the *negative*. We are of the view that it is not necessary in every case of establishing the "gratification" of the transaction that it must be proven, as a fact, that there was an act of inducement by the third party upon the agent. Such a finding may not arise in all cases and will be largely dependent on the facts before the court.

Question 2

49 Question 2 states:

For the purposes of s 6 of the PCA, where an agent used his position (*vis-à-vis* his principal) to create an arrangement for the payment of a gratification that conflicts with the interests of his principal, does this *ipso facto* mean that the agent was not, by such arrangement, induced or rewarded for showing favours in respect of his principal's affairs?

50 On the face of it, Question 2 seems to raise very much the same query as Question 1. However, in the light of the views of the Judge and the PP's submissions, we have taken it to have raised the query whether, in a situation where the agent has some beneficial or legal interest in the third party, the agent's drawing of his share of the profits obtained by that third party from the benefits conferred could be considered a "gratification" for the purposes of s 6(a).

51 According to the Judgment, the money that was received by the Respondent should be considered as secret profits which he shared with his partners and such profits could not amount to a "gratification" for the purposes of s 6(a). The crux of the Judge's reasoning is that the benefits which the Respondent conferred on AT35 and FRT were effectively secret profits which the Respondent had created for himself using AT35 and FRT as business entities. The Judge was of the view that the agent was effectively benefitting himself which meant that there was no third party upon whom the agent was conferring a benefit – the party that the agent was conferring a benefit upon included, or was, himself, as there was some evidence of equal ownership in the two entities by Andrew, Gary and the Respondent (see [13]–[14] of the Judgment). In other words, when the Respondent drew his entitlement from the profits obtained by the two entities (his one-third share), that was his share of the secret profits and could not be considered as "gratification". He was withdrawing what was his as he had a beneficial ownership in the third party (*ie*, the two entities). The Judge's analysis thus proceeded on the basis that because of this, it could not amount to a corrupt transaction. In other words, you could not give a gratification to yourself.

52 Two related issues arise from the Judge's findings: (i) where a benefit is conferred upon an entity in which an agent has a beneficial interest, could such an entity be the third party for the purposes of s 6(a); and (ii) whether the agent receiving his share of the profit made from the benefit conferred upon the entity would constitute "gratification" for the purposes of s 6(a). As these two issues are closely connected, we will consider them together.

53 We also note, cursorily, that while what are loosely termed as "secret profits" may be the subject of an actionable civil wrong, that does not preclude it from being relied upon as evidence of an objective corrupt element. Nothing in the PCA provides that civil wrongs cannot also be a criminal wrong. Prosecution of cases such as the present do not amount to the "broadening [of] the scope of

the offence of corruption” as the PCA can capture civil wrongs in the appropriate cases (see [14] of the Judgment).

Interest in a third party

54 The starting premise is – what should the court be concerned about when the agent has some form of a beneficial or legal interest in the third party which is conferred the benefit?

55 In this regard, we would make the following observations. It must be borne in mind that persons who have a shareholding, legal and/or beneficial ownership or interest in a legal entity are not synonymous with that legal entity, and the two must be treated as distinct. We do not see why the separate legal entity doctrine should not otherwise apply in the context of s 6(a).

56 In this case, the vehicles used to confer the benefits were two business entities (AT35 and FRT), which were not incorporated companies. However, we do not think that that should matter as the two business entities were no less separate entities from the people who owned them. Following the doctrine of separate legal entity, some form of ownership in a legal entity does not preclude it from being considered a third party for the purposes of s 6(a). On that premise, an agent’s ownership in the entity does not alter the fact that it is a separate legal entity and is a third party distinct from the agent and his principal. The position of the agent in the entity would be like any other person who has a beneficial or legal ownership in the entity. Thus, the mere fact that the agent is a legal and/or beneficial owner of the third party does not mean that the requirement for there to be an agent, principal, and third party under s 6(a) cannot be satisfied. We would hasten to add that there may be situations in which, due to the fact that the agent owns the third party, that the lines between the agent and the third party may be blurred. For example, where the third party is a sole proprietorship with the agent being the proprietor or the third party is an incorporated company with the agent being the sole shareholder. In such circumstances, arguably the agent and the third party could be considered (looking at the substance) to be the same or identical. Such a situation does not arise in the present case and there is thus no need for us to make a definite ruling on the PCA’s proscription for such situations. Accordingly we say no more and leave it for another day.

57 Where the three parties are established, and s 6(a) is engaged, whether the secret profits received by the agent would be considered a “gratification” would be dependent on the same factual inquiry of an objective corrupt element that we posited earlier (at [43]): was there a gratification *by* inducement or reward to the agent *that* led to a dishonest gain or advantage being conferred by the agent on the third party?

58 So, the court will balance the fact that the agent had an entitlement to the profits made by the beneficially owned legal entities with the other facts which might otherwise show that an objective corrupt element is still present. Some relevant, but non-exhaustive, factors would be: the workings of the scheme; how the secret profits were derived; the setting up of the third party; the duration and purpose of the third party; fair competition against other entities for contracts with the principal; fair competition against the principal for contracts by other parties; and the agent’s actions *vis-à-vis*, the principal and the third party in making the profit. Depending on the facts of the case, the scheme may be considered as having an objectively corrupt element despite the agent’s beneficial interest in the monies received by the third party.

59 It would thus be incorrect to assume that simply because the agent has a part ownership in the third party and the agent has obtained his share of the profits from it that the agent could not be said to have obtained that share of the profits as a “gratification”. An inquiry into all the circumstances of the case is called for. The Judge had erred in thinking that because the Respondent

had some beneficial ownership in the third party (AT35 and FRT) and had merely obtained his share of the profits of AT35 and FRT that a corrupt transaction could not thereby take place. The beneficial ownership and the agent's share of the profits obtained are only part of the picture, and a proper inquiry must be made into the true nature of the arrangements between the agent and the third party. Otherwise, it would be all too simple for an agent to devise inventive and sophisticated schemes related to skimming secret profits off the principal in order to escape the sanction of s 6(a). An agent who seeks to obtain a gift under the guise of a cleverly devised scheme may very well find himself guilty of corruption as the court will not hesitate to look beyond the pretext or the guise and determine the presence of an objective corrupt element in the transaction and the true nature of the arrangement.

60 Therefore, our answer to Question 2 is in the *negative*. Where the agent has a beneficial interest or ownership in a legal entity, this does not mean that the entity is not a separate legal entity and is not a third party for the purposes of s 6(a). In determining whether so-called secret profits received by the agent are a "gratification", the court will take into consideration the agent's beneficial interest in the profits, but this is not determinative. The court must consider all the facts surrounding the transaction to see if an objective corrupt element is present.

Conclusion

61 Given our analysis and for the reasons above, we have arrived at the conclusion that both the questions referred to this court, and which relate to s 6(a), must be answered in the *negative*.

62 Under s 397(5) of the CPC, this court may make such orders as the High Court might have made as this court considers just for the disposal of the case. In light of our answers to the questions raised in this criminal reference, parties are to address us on the appropriate orders that this court should make in relation to the decision of the Judge.

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