IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 233

Magistrate's Appeal No 9067 of 2020

Between

Public Prosecutor

… *Appellant*

And

Su Jiqing Joel

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Unlawful provision of short-term accommodation] — [Section 12 Planning Act (Cap 232, 1998 Rev Ed)]

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Public Prosecutor v Su Jiqing Joel

[2020] SGHC 233

High Court — Magistrate's Appeal No 9067 of 2020
Sundaresh Menon CJ
27 August 2020

30 October 2020 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The respondent, Su Jiqing, Joel ("the Respondent"), faced six charges under s 12(1) of the Planning Act (Cap 232, 1998 Rev Ed). These charges concerned the unlawful provision of short-term accommodation ("STA"). The Respondent had leased six private residential properties which he then sub-let on a short-term basis to local and foreign guests through the Airbnb online platform. He pleaded guilty to four charges and consented to having the remaining two charges taken into consideration for the purpose of sentencing.

2 Before the District Judge, the Prosecution pressed for an aggregate fine of at least $235,000. The Prosecution submitted that the court should adopt what it referred to as the "Bifurcated Approach" when sentencing a first-time offender under s 12(1) of the Planning Act (for the breach of which, a fine is the only prescribed punishment). In essence, this approach would require the

sentencing judge to impose a fine comprising two distinct elements: a "Disgorgement Component" and a "Punitive Component". The former would seek to *disgorge* the offender's pecuniary gains, while the latter would separately *punish* the offender and this should be calibrated having regard to the harm he caused and his culpability.

3 The Prosecution further submitted that *all* the *revenue* that the Respondent had received should be disgorged through the Disgorgement Component. This was relevant because while the Respondent received about $115,000 by way of the *revenue* generated by his committing the STA offences, his actual *profits* came to about $46,000, after deducting the monthly lease payments he had to make to the owners of the properties.

4 The District Judge did not accept either of these submissions. He rejected the Bifurcated Approach because he considered that it was not supported by precedent and was inconsistent with sentencing principles. He was also of the view that the lease payments were "reasonable expenses" which ought to be deducted for the purpose of quantifying the profits to be disgorged: see *Public Prosecutor v Su Jiqing, Joel* [2020] SGDC 91 ("GD") at [12], [23], [57]–[59].

5 In the circumstances, the District Judge imposed an aggregate fine of $88,000 for the four proceeded charges (see GD at [5]). The individual fines are set out below (at [21]).

6 The Prosecution appealed contending that both the individual sentences and the aggregate sentence are manifestly inadequate. It submitted that this was the result of the District Judge's failure to adopt the Bifurcated Approach, and

his finding that the lease payments were reasonable expenses which ought to be deducted, when computing the profits to be disgorged.

7 As the appeal raised some novel issues in sentencing, I appointed Mr Nicholas Liu ("Mr Liu") to assist me under the Young *Amicus Curiae* Scheme. I record my deep gratitude to Mr Liu, whose research and submissions were extremely thorough and of great assistance to me.

8 According to the Prosecution, this is the first time that an appellate court has been asked to consider the principles governing the imposition of fines for STA offences. Recognising the need to provide guidance on the relevant sentencing considerations, I take this opportunity to set out a sentencing framework for STA offences. This might aid sentencing judges, prosecutors and defence counsel in approaching the question of sentencing in a broadly consistent manner, having due regard to the salient factors.

Background facts

9 The facts are drawn from the Statement of Facts which the Respondent admitted to without qualification.

10 The present offences were committed in 2017 and 2018. At the material time, the Respondent was a registered real estate agent. He was also the sole proprietor of a business known as The Coffee Cart ("TCC"). As noted above, the Respondent did not own any of the Airbnb properties but leased them from their owners. He knew it was illegal to provide STA, and falsely represented to the owners that he was using the properties in question for his personal use or for TCC's business.

11 The Respondent selected properties in Geylang because he believed the residents there were less likely to lodge complaints. He used two separate host accounts on Airbnb, "Home" and "Mik". At various times, he changed the host names and admitted that he had done this in order to avoid detection by the Urban Redevelopment Authority ("URA"). The Respondent also attempted to cover up the fact that he had been providing STA. On one occasion, he lied to a condominium manager that a group of foreign guests were his business clients. On another occasion, he lied to CISCO officers who inspected one of the properties and told them that a foreign guest was his friend. When the Respondent became aware that URA was investigating him for his present offences, he deleted all his listings on Airbnb and his host accounts.

12 For ease of reference, I set out the relevant details concerning the Respondent's STA offences in the following table (with the proceeded charges being the first, second, fourth and sixth charges):

Charge	**Address**	**Lessee**	**Duration of offending**
URA 000008-2019-1 ("1st Charge")	A condominium unit at 5 Lorong 39 Geylang ("1st Unit")	TCC	15 March 2018 to 8 September 2018 (5 months 24 days)
URA 000009-2019-1 ("2nd Charge")	A condominium unit at 1 Lorong 24 Geylang ("2nd Unit")	Respondent	16 April 2018 to 12 September 2018 (4 months 27 days)
URA 000010-2019-1	A condominium unit at 1 Lorong 20 Geylang	TCC	14 January 2018 to 13 April 2018 (2 months 30 days)
URA 000011-2019-1	A condominium unit at 302 Sims	TCC	12 October 2017 to 28 September

("4th Charge")	Avenue ("4th Unit")		2018 (11 months 16 days)
URA 000012-2019-1	A terrace house at Lorong 36 Geylang	TCC	31 July 2018 to 16 August 2018 (16 days)
URA 000013-2019-1 ("6th Charge")	A condominium unit at 1 Lorong 24 Geylang ("6th Unit")	TCC	8 November 2017 to 8 September 2018 (10 months)

13 It should be noted that *prior* to the detection of the present offences, the Respondent had already been investigated by URA for providing STA. On 29 November 2017, the Respondent was investigated for providing STA at 5 Lorong 27 Geylang from 30 September 2017 to 6 October 2017 ("the Lorong 27 Offence"). In the course of investigations, he lied to URA that he had no other Airbnb properties. In fact, the Respondent had two other Airbnb properties at that time, namely, the 4th Unit and the 6th Unit (see [12] above). URA, not knowing the true position, decided not to prosecute the Respondent for the Lorong 27 Offence. The Respondent was not deterred by this. Instead, he proceeded to expand his enterprise by leasing four more properties. He also changed his host name on Airbnb from "Jo" to "Mik" following URA's investigations into the Lorong 27 Offence.

The relevant legal provisions

14 The Respondent was charged under s 12(1) of the Planning Act. Under s 12(4)(*a*), as a first-time offender, he is liable on conviction to a fine not exceeding $200,000 per charge:

> **Unauthorised subdivision, development and other works**
>
> **12.**—(1) A person must not, without planning permission, carry out or permit the carrying out of any development of any land outside a conservation area.
>
> …
>
> (4) Subject to subsections (4A) and (4B), any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and shall be liable on conviction —
>
> > (*a*) to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence continues after conviction; or
> >
> > (*b*) if the person is a repeat offender, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 12 months or to both and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence continues after conviction.

15 On 15 May 2017, various amendments were introduced to the Planning Act. These included the insertion of s 3(3)(*ca*) of the Planning Act, which provides that the use of a building or part of a building originally constructed as a dwelling-house, for a purpose specified in the Fourth Schedule, constitutes "development". The prohibition against STA is specified in cl 2 of the Fourth Schedule to the Planning Act:

> USE OF DWELLING-HOUSE CONSTITUTING DEVELOPMENT
>
> …
>
> 2. Use of a dwelling-house to provide short-term accommodation, where the dwelling-house or any part of it is occupied by the same person for a period of less than 3 consecutive months and the short-term accommodation is provided (with or without other services) in return for the payment of rent or other form of consideration, whether or not the relationship of landlord and tenant is thereby created.

The decision below

16 I briefly summarise the decision below.

17 As noted above, the District Judge rejected the Bifurcated Approach. He considered that the Bifurcated Approach was "without precedent" and "[did] not accord with trite sentencing principles and objectives" (see GD at [23]). Instead, he decided that the following three-step sentencing approach should be applied (at [29]):

> (a) First, calibrate the appropriate fine taking into account all relevant aggravating and mitigating factors.
>
> (b) Second, consider whether the quantum arrived at is sufficient to disgorge the offender's ill-gotten gains.
>
> (c) Third, consider whether the aggregate fine should be adjusted in the light of the totality principle.

18 At the first step, the District Judge found that there were a number of aggravating factors, namely: (a) the Respondent's persistent offending; (b) the difficulty of detecting STA offences; (c) the high volume and frequency of Airbnb bookings; (d) the dishonesty and deception on the Respondent's part "at every turn"; and (e) the Respondent had unnecessarily implicated the owners of the properties (at [31]–[34], [38] and [39]). The District Judge rejected most of the mitigating factors raised by the Respondent but accepted that he was remorseful and thought that his offending was a "one-off aberration" (at [45] and [46]).

19 In the circumstances, the District Judge considered, as a starting point, that the appropriate fines would be as follows: a fine of $25,000 for the 1st Charge and 2nd Charge respectively, and a fine of $30,000 for the 4th Charge and 6th Charge respectively (at [56]).

20 Turning to the second step of his sentencing approach, the District Judge held that the quantum of profits that had to be disgorged was $46,000, given that the lease payments were "reasonable expenses". He considered that the fines imposed achieved the aim of disgorging these profits (at [57] and [58]).

21 At the final step, the District Judge considered that the aggregate fine of $110,000 was disproportionate to the Respondent's level of criminality. He considered that an adjustment on the basis of the totality principle was warranted and reduced the aggregate fine to $88,000 (in default 18 weeks' imprisonment). This was achieved by imposing a fine of $20,000 for the 1st Charge and 2nd Charge respectively, and a fine of $24,000 for the 4th Charge and 6th Charge respectively (at [59]).

Summary of the parties' submissions on appeal

22 I now briefly summarise the submissions made by the parties and the young *amicus curiae* ("YAC"), Mr Liu.

The YAC's submissions

23 Mr Liu submitted that the District Judge erred in rejecting the Bifurcated Approach. According to Mr Liu, the main problem arising from the District Judge's approach is that in a case where high profits are made, there is a real possibility that the overall fine will not be sufficiently deterrent and retributive. This is a consequence of the fact that the District Judge's approach does not specifically require the sentencing judge to consider the *net detriment* imposed on the offender – the net detriment being the difference between the *fine* that is imposed and the *disgorged profits*.

24 Under the District Judge's approach, the court *first* determines the appropriate fine and *then* considers whether "the quantum arrived at sufficiently disgorges the [offender's] ill-gotten gains" (see GD at [29]). In these circumstances, there is nothing to *ensure* that the indicative quantum of the fine would significantly or sufficiently outstrip the offender's profits. And if it did not, then the net detriment suffered by the offender might not be sufficiently punitive to achieve the aims of deterrence and retribution. Further, even if the net detriment imposed was appropriate in the circumstances, this would be purely fortuitous, and might easily have been otherwise. As put by Mr Liu, "[s]uch an approach leaves the fulfilment of the objectives of deterrence and retribution too much to chance, and is thus incompatible with the reliable and effective attainment of those aims". On the other hand, the Bifurcated Approach would first strip out the profits through the Disgorgement Component, and then through the Punitive Component, would specifically require the sentencing judge to consider the appropriate net detriment that is to be imposed on the offender.

25 Furthermore, Mr Liu submitted that the Bifurcated Approach would enhance clarity and consistency in sentencing. All things being equal, the District Judge's approach would leave an offender who had made larger profits comparatively better off than one who had made lesser profits, if they were both fined the same amount. This is not only unfair on its face, but also creates a perverse incentive for offenders to seek larger profits, because that could potentially reduce the net detriment they would suffer, if apprehended.

26 Mr Liu next contended that in quantifying the profits to be disgorged, it would be appropriate to deduct the expenses incurred by the offender, subject to some exceptions. Mr Liu's submission seemed to me to be rooted in the concept of proportionality. Among other things, he noted that the aim of

disgorgement is to restore the offender to the position he was in prior to the commission of the offence, such that it would negate any gains from the offence and so remove the incentive to embark on the offending behaviour. He submitted that it would be inherently *punitive* if the offender's expenses were included as part of the Disgorgement Component, because that would mean that he would be worse off compared to the position he had been in before he embarked on the criminal enterprise. As a matter of transparency and analytical clarity, that punitive element should be addressed through the Punitive Component. Nonetheless, Mr Liu submitted that the following expenses should *not* be deducted: (a) expenses that would have been incurred in any event; (b) expenses that have translated into a gain to the offender; and (c) expenses that were unrelated, unnecessary or unreasonable.

The Prosecution's submissions

27 The Prosecution was largely on common ground with Mr Liu as to why the Bifurcated Approach should be adopted. However, it disagreed with Mr Liu that the court should deduct the expenses incurred by the offender when quantifying the amount to be disgorged.

28 Among other things, the Prosecution submitted that the deduction of expenses would undermine the principle of deterrence when sentencing STA offenders. It could also lead to inconsistent sentencing outcomes. For example, if an offender *owned* the Airbnb property and received $100,000 in revenue without incurring any expenses, he would have to disgorge the entire sum. However, if he had spent that revenue entirely on renovating the property, the disgorgement of $100,000 might no longer be appropriate.

29 Furthermore, the Prosecution contended that there would be considerable uncertainty as to what may qualify as "reasonable" or "necessary" expenses, and whether the expenses must relate specifically to the property used in the commission of the offence. The quantification of the offender's expenses would also entail an inquiry akin to taxation in civil proceedings, which is inappropriate in the context of criminal sentencing.

30 Finally, the Prosecution submitted, that apart from having erred in respect of the two principal legal issues, the District Judge had also misconstrued the sentencing precedents and wrongly assessed the aggravating and mitigating factors. In the circumstances, the Prosecution submitted that the following fines should be imposed instead:

Charge	**Punitive Component**	**Disgorgement Component**	**Sentence**
1st Charge	At least $25,000	$15,000	**$40,000 (in default four week's imprisonment)**
2nd Charge	At least $25,000	$15,000	**$40,000 (in default four week's imprisonment)**
4th Charge	At least $35,000	$45,000	**$80,000 (in default eight week's imprisonment)**
6th Charge	At least $35,000	$40,000	**$75,000 (in default seven weeks' imprisonment)**
Total	At least $120,000	$115,000	$235,000 (in default 23 weeks' imprisonment)

The Respondent's submissions

31 The Respondent appeared before me in person. Essentially, his position was that the District Judge was correct to have rejected the Bifurcated

Approach, and the sentences imposed on him were fair and proportionate. He also urged me not to increase the fines imposed by the District Judge as this would result in significant hardship to him and his family.

The issues to be determined

32 The issues that arise in this appeal are as follows:

(a) First, whether the Bifurcated Approach should be adopted in calibrating the fines to be imposed on first-time offenders under s 12(1) of the Planning Act.

(b) Second, when quantifying the profits made by the offender for the purpose of disgorgement, whether the expenses incurred by the offender should be deducted.

(c) Third, whether the sentences imposed by the District Judge are manifestly inadequate.

Issue 1: Whether the Bifurcated Approach should be adopted

33 I begin with the first issue. It should be emphasised that this issue typically only arises in the context of a first-time offender under s 12(1) of the Planning Act, because a repeat offender is potentially liable for imprisonment under s 12(4)(*b*) (see [14] above). If the sentencing judge considers that the custodial threshold has been crossed, the purpose of an additional fine would generally be only to disgorge the profits made by the repeat offender (see [37] below).

34 I make two further points at the outset.

35 First, there is no dispute that regardless of whether the Bifurcated Approach or the District Judge's approach is to be preferred, the fine imposed should serve *both* to punish the offender *and* to disgorge any profits which he may have made from committing the offence. Indeed, even on the District Judge's approach, it would be necessary to consider "if the quantum arrived at sufficiently disgorges the [offender's] ill-gotten gains" (see GD at [29]).

36 I note also that the prescription of a maximum fine of $200,000 under s 12(4) may be interpreted as a signal that Parliament had intended for the offender's profits to be disgorged by means of an appropriate fine. By comparison, under s 303(2)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), a District Court may usually only impose a fine of up to $30,000 per charge. As the Prosecution submitted, it is difficult to envisage situations where a fine of as much as $200,000 was thought to be appropriate solely to *punish* an offender based on the harm he caused and his culpability.

37 Second, it is well established in the case law that where an offender is sentenced to an imprisonment term, the court may, *in addition* to that imprisonment term, impose a fine. The primary purpose of doing so would be to disgorge the profits which he may have made from his illegal behaviour, subject to the maximum limit of the fine prescribed by statute (see *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [77] and *Tan Gek Young v Public Prosecutor and another appeal* [2017] 5 SLR 820 at [75]).

38 In that light, the District Judge was not entirely correct to suggest that the Bifurcated Approach was "without precedent" (see GD at [23]). In substance, when a court imposes an imprisonment term on an offender, and then imposes a fine in addition to that in order to disgorge any profits, that is not materially different from the Bifurcated Approach. There, the Punitive

Component is represented by the imprisonment term and the Disgorgement Component is represented by the fine. I do not see any reason in principle why the same approach should not be adopted in the context of offences punishable only with a fine, by assessing the quantum of the fine in two distinct components.

Whether the Bifurcated Approach should be adopted as a matter of principle

39 Having concluded that the Bifurcated Approach coheres with the case law, I next consider whether the Bifurcated Approach should be adopted as a matter of principle. In my judgment, there are two main reasons why the Bifurcated Approach is to be preferred over the District Judge's approach. Both reasons were identified by Mr Liu and the Prosecution.

40 First, the District Judge's approach does not specifically direct the sentencing judge to consider the *net detriment* imposed on the offender. Accordingly, it could result in fines that fail to adequately *punish* the offender. By way of illustration, assume, on the District Judge's approach, that the appropriate fine to be imposed is $100,000. As long as the profits made by the offender are *less than* $100,000, that would seem to be the end of the inquiry. Yet, if the profits were $95,000, the net detriment suffered by the offender on this basis would only be $5,000. This is unlikely to be a penalty that is reflective of the harm caused by the offender and his culpability. The overall fine would then not be sufficiently deterrent and retributive. On the other hand, even if the net detriment of $5,000 was found to be appropriate in the circumstances, this would just be fortuitous rather than by design.

41 Conversely, the attraction of the Bifurcated Approach is that it provides a structured and transparent framework for the sentencing judge to consider the

net detriment that is to be imposed on the offender. Under this approach, the sentencing judge first determines the Disgorgement Component. Thereafter, in computing the Punitive Component, the sentencing judge considers the net detriment that is to be imposed on the offender, beyond the disgorgement of the profit. This better ensures that the offender is sufficiently *punished* in accordance with the harm he has caused and his culpability, and so better ensures that the overall fine is one that is sufficiently deterrent and retributive.

42 There is a second weakness in the District Judge's approach which pertains to the need to ensure a measure of consistency in how similarly placed offenders are punished. As far as possible, like cases should be treated alike. Yet this may not be the case under the District Judge's approach. This can be illustrated thus. Suppose A and B are both STA offenders of equal culpability and caused an equal amount of harm. Suppose further that as between them, the relevant aggravating and mitigating factors and the weight to be attached to these factors are the same. The only difference between A and B is that the former made profits amounting to $90,000, while the latter made profits amounting to $50,000. It may be assumed for the purpose of this illustration that the difference in profits is due to prevailing market conditions and has no bearing on their culpability.

43 Assume then, on the District Judge's approach, that the appropriate fine to be imposed on each of the offenders is $100,000. On this basis, A suffers a net detriment of $10,000 while B's net detriment is $50,000. This results in a perverse and unjust outcome in two aspects. First, A and B have not been punished to the same extent in circumstances where they ought to have been. Second, B is worse off compared to A when B was the offender who in fact made less profits. This has come about because the profits have, in effect, been applied to underwrite a part of the fine.

44 By contrast, the Bifurcated Approach would better ensure consistency in outcomes. Applying this approach, the Disgorgement Component for A and B would be $90,000 and $50,000 respectively, and the Punitive Component would be the *same*. This would, of course, mean that a higher aggregate fine is imposed on A, but that is an entirely fair and just outcome considering that net of the profits derived from their respective illicit ventures, both A and B will be made equally worse off, and therefore, in real terms, they would each be punished to the same extent. Contrary to the District Judge's suggestion, there is no "sentencing disparity and inconsistency" in the overall fine that would arise on this approach that ought to be avoided (see GD at [26]). The District Judge overlooked this because he failed to appreciate the need to avoid the disparity and inconsistency between the *net detriment* imposed on A and B.

45 For these reasons, I am satisfied that the Bifurcated Approach should be adopted as a matter of principle.

The purported hierarchy of sentencing objectives

46 For completeness, I note that the District Judge's rejection of the Bifurcated Approach was premised on the purported hierarchy between "punishment and deterrence" (being the "primary" sentencing objectives of a fine) and "disgorgement" (being a "subordinate" sentencing objective). It was this view that led him to conclude that the Bifurcated Approach did not accord with "trite sentencing principles and objectives", because it is "the objective of punishment and deterrence [that] should weigh foremost on the sentencing judge's mind" (see GD at [23]). The sentencing judge should therefore calibrate the appropriate fine *before* considering whether it is also sufficient to disgorge the profits made by the offender.

47 For the purpose of this appeal, it is unnecessary for me to decide whether this supposed hierarchy is sound in principle. This is because while the District Judge's view was that punishment and deterrence are the *primary* sentencing objectives of a fine, one weakness that inheres in his approach is precisely the fact that it could result in fines that fail to adequately punish and deter, where the offender has made large profits (see [40] above).

48 Nonetheless, it seems to me that the better view, as Mr Liu put it, is that disgorgement is a facet of deterrence and retribution. It does not stand as a distinct objective that is subordinate to punishment and deterrence.

49 This is supported by the case cited by the District Judge at [22] of the GD, *Public Prosecutor v Goh Ah Moi (F)* [1949] MLJ 155:

> … [T]he penalty imposed should be such that *it will take away from the convicted offender the desire to offend in a similar manner again*. Quite clearly a balance of income left in [an offender's] pocket after payment of a fine will have precisely the opposite effect and for a Court to leave any such balance would be a wrong application of the accepted principles. [emphasis added]

50 Quite apart from specific deterrence, which that passage alludes to, the disgorgement of profits also serves the objective of general deterrence, in so far as it deters other like-minded offenders from engaging in similar illegal behaviour by making it clear that the law will act to recoup their ill-gotten gains. The disgorgement of profits is also retributive in the sense that it ensures that the offender will not be better off because of his criminal enterprise. It is an "expression of the visceral objection that offenders should not be allowed to enjoy the fruits of their crime at the expense of society": see *Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2013] 1 SLR 444 at [24], in

the context of confiscation orders under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

51 In that light, the task of the sentencing judge is to ensure that the fine imposed is one that disgorges the offender's profits *and* also adequately punishes the offender. Properly understood, these purposes are not in conflict and are instead *complementary* to each other. The strength of the Bifurcated Approach is that it ensures that due consideration is given both to the need to disgorge profits and the need to punish the offender, so that the overall fine is one that is sufficiently deterrent and retributive.

The concerns expressed by the District Judge regarding the Bifurcated Approach

52 I briefly address two other concerns that were expressed by the District Judge regarding the Bifurcated Approach. With respect, it seems to me that these concerns are overstated.

53 First, the District Judge considered that the Bifurcated Approach would limit any "residual sentencing discretion" that the court has in relation to the disgorgement of profits, because "any ill-gotten gains would be taken care of by the disgorgement component as a matter of course" (see GD at [24]). With respect, I do not follow the point or see how the Bifurcated Approach would limit the sentencing judge's discretion in any way. What is important is to recognise that where a sentencing judge considers that there are principled reasons to justify not disgorging what appears to be the full extent of the profits – for example, if part of the profits have already been surrendered by the offender or otherwise been recovered by the authorities – he may do so.

54 Second, the District Judge considered that the Bifurcated Approach could give rise to the risk of double-counting, because factors such as the number and frequency of bookings and the period of offending are relevant in determining the Punitive Component. These same factors could affect the profits which are subject to disgorgement (see GD at [25]).

55 In my judgment, this concern is overstated. There will be no double-counting in general because while the Punitive Component and the Disgorgement Component both serve the sentencing objectives of deterrence and retribution, they perform distinct purposes. The Disgorgement Component ensures that the offender does not profit from his criminal enterprise. The determination of the Disgorgement Component is *quantitative* in nature – what is "counted" is simply the amount of profits made by the offender. The amount of profits does not necessarily have any bearing on the offender's culpability or on the harm caused. Indeed, as the District Judge himself noted, "[t]he profits made by an offender [are] … an unreliable indicia of an offender's culpability or the harm caused (if any) in the context of STA offences" (see GD at [26]). By contrast, the Punitive Component requires a *qualitative* assessment of the harm caused by the offender and his culpability. The two inquiries are therefore fundamentally different and are intended to achieve different purposes. If there were some overlap, this can easily be accommodated by the sentencing judge to avoid any double-counting.

56 For completeness, I agree with the District Judge that the Bifurcated Approach was not applied by the High Court in *Public Prosecutor v Project Lifestyle Pte Ltd* [2015] SGHC 251 (*"Project Lifestyle*"), a case which was concerned with s 12(2) of the Planning Act. Nor was it applied in two unreported decisions of the District Court relating to s 12(1) of the Planning Act, namely, *Public Prosecutor v Tan En Wei Terence & Anor* URA 10/2017 and others

(3 April 2018) ("*Terence Tan*"), and *Public Prosecutor v Michael Mega* URA 14/2018 (28 August 2018) ("*Michael Mega*"): see GD at [18] and [19]. However, the courts in these cases were *not* squarely faced with the issue of whether the Bifurcated Approach *should* be adopted for the purpose of calibrating fines for first-time offenders under s 12(1) of the Planning Act (or, in the case of *Project Lifestyle*, s 12(2)). This issue is now before me and, for the reasons I have set out, I am satisfied that the Bifurcated Approach should be adopted. I also note that because *Terence Tan* and *Michael Mega* did not adopt the Bifurcated Approach, they should not be relied on as precedents. This is compounded by the fact that full reasons are not available for both of these decisions. It is well established that sentencing precedents that are not fully reasoned are of little precedential value (see *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [39]).

Issue 2: Whether the expenses incurred by the offender should be deducted

57 I turn to the second issue which is whether, when quantifying the profits made by the offender for the purpose of disgorgement, the court should deduct the expenses incurred by the offender. At the outset, I stress that the issue before me is a narrow one that arises in the specific context of *fines* that are intended to disgorge the offender's profits. The issue is *not* whether an offender's expenses should be considered in all aspects of criminal sentencing. In certain contexts, such an inquiry would be inappropriate. For instance, the Road Traffic Act (Cap 276, 2004 Rev Ed) provides that for certain traffic offences, a conviction may lead to the vehicle being forfeited. In these circumstances, there is no basis for an offender to submit that it would be disproportionate for the court to make a forfeiture order because of the expenses that were incurred to obtain that vehicle, or that he should be compensated for the same.

The current state of the law

58 I begin by summarising the decision of the High Court in *Koh Jaw Hung v Public Prosecutor* [2019] 3 SLR 516 ("*Koh Jaw Hung*"). There, the appellant was convicted of vice offences under Pt XI of the Women's Charter (Cap 353, 2009 Rev Ed). Apart from the imprisonment terms that were imposed in respect of each charge, the district judge imposed an aggregate fine of $16,000 in order to disgorge the profits made by the appellant. Although the appellant had made a total of $33,145 by way of earnings from prostitution, the district judge accepted that the appellant would have incurred some expenses in the commission of the offences, for instance, in setting up the vice website and procuring hotel rooms. While there was no indication of the exact quantum of the appellant's expenses, the district judge took the "rough and ready" approach of halving the gross earnings.

59 On appeal, the Prosecution took the position that the district judge ought to have disgorged the entirety of the earnings made by the appellant. Hoo Sheau Peng J noted that there was no authority which dealt squarely with the issue of the offender's expenses. However, she found that "[the authorities] incline towards the position that the offender's expenses may be considered, and that in every case, it is the *actual gain, benefit or profit* which is sought to be disgorged" [emphasis added] (see *Koh Jaw Hung* at [47]). Accordingly, she considered the applicable legal position to be as follows (at [48]):

> To reiterate, the rationale for imposing a fine for its confiscatory effect is to get an offender to disgorge his profit, gain or benefit. As a starting point, I would say that the total earnings, takings or revenue received by an offender … would represent his profit. However, this is if there is no other evidence showing what has been expended by the offender. Thus, in my view, the burden falls on the offender to show such expenses, so as to displace the starting point. If the offender adduces evidence of expenses incurred, it seems to me that it would be fair and reasonable to take such expenses into account. Even then, it does not

> necessarily follow that full deduction must be given for all expenses claimed by the offender. If the expenses are unrelated, unnecessary or unreasonable, the Prosecution may wish to challenge the evidence of the offender, or at least take a position whether these expenses should be considered. It is for the court to then determine whether these expenses should be taken into account (either in part or in full). At the end of the day, while this is meant to be a rough and ready inquiry, the court aims to determine the actual gain, benefit or profit of the offender, and to fix a fine quantum so as to serve a confiscatory purpose. [emphasis in original omitted]

60 Applying these principles, Hoo J noted that the appellant made no attempt to substantiate his bare assertion that he had only made $10,000 in profits. In the light of the paucity of evidence, the district judge might even have been generous in assessing the quantum of the expenses that the appellant had incurred. In the circumstances, Hoo J held that there was no basis for her to find that the fines imposed were manifestly excessive (see *Koh Jaw Hung* at [53]).

Whether expenses should be deducted

61 In the present case, the Prosecution urged me to depart from the approach taken in *Koh Jaw Hung*. However, for the reasons that follow, I align myself with the broad analytical approach that was taken in *Koh Jaw Hung*, although I frame the inquiry slightly differently. The court should only permit a deduction for *necessary* expenses, meaning expenses the sole purpose of which is to enable the offender to commit the offence. The test is not one of "reasonable expenses", which appears to have been applied by the District Judge (see GD at [58]). I note that Hoo J did not explicitly state that the test was one of "reasonable expenses"; indeed, she took the view that the court need not take into account expenses that are "unrelated, unnecessary or unreasonable" (see *Koh Jaw Hung* at [48], excepted at [59] above).

62 I begin by explaining why, as a matter of principle, necessary expenses should be deducted.

63 In my judgment, the deduction of necessary expenses is a manifestation of the requirement of proportionality which runs through the gamut of sentencing decisions: see *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*") at [47]. To understand why it would be unjust and disproportionate not to account for necessary expenses, it is helpful to return to the Bifurcated Approach. The rationale for the Bifurcated Approach is that it provides a structured and transparent framework to address the two purposes of a fine imposed on first time-offenders under s 12(1) of the Planning Act – the first being to *punish* the offender and the second being to *disgorge* the profits that he has made so as to restore him to the position he was in before embarking on the criminal enterprise. These are distinct purposes which are engaged separately by the Punitive Component and the Disgorgement Component respectively. The focus of the present inquiry is on the Disgorgement Component. In my judgment, it would be disproportionate to disgorge not only the profits but also the necessary expenses incurred by the offender. This is because that would go beyond the *purpose* of the Disgorgement Component which is to negate the benefits the offender has enjoyed from his criminal enterprise. The Disgorgement Component would then become *inherently punitive*. Furthermore, that also threatens to undermine the distinction between the Disgorgement Component and the Punitive Component, which is what justifies the Bifurcated Approach in the first place.

64 I consider the two concerns that were raised by the Prosecution.

65 First, the Prosecution contended that the deduction of expenses (whether necessary or otherwise) undermines the principle of deterrence in the sentencing

of STA offences. In effect, it legitimises a criminal business model that comes with low financial cost and the potential of high returns. There is low financial cost because of the offender's ability to use the illicit revenue to make his monthly lease payments.

66 With respect, it does not follow that the deduction of necessary expenses would lead to the principle of deterrence being undermined. It is always incumbent on the sentencing judge to satisfy himself that the *overall fine* is one that achieves the objectives of both general and specific deterrence. To the extent that there is a concern that the sentence would not be a deterrent one, that concern is best addressed transparently through the *Punitive Component*. After all, as I have explained above, it is the Punitive Component that determines the extent to which the offender should be *punished* and, in that connection, regard should be had to all the circumstances, including factors going towards the culpability of the particular offender.

67 Indeed, this is also likely to be a more efficacious means of achieving a deterrent sentence. This is because the Punitive Component can be calibrated in accordance with the relevant sentencing considerations. Thus, if, for instance, the concern is that the offender has ploughed the illicit revenue back into the illegal enterprise, thereby expanding the criminal enterprise (see [65] above), that may be a relevant consideration when calibrating the Punitive Component, because it might point to a degree of sophistication and permanence in the illegal enterprise, as noted by Hoo J in *Koh Jaw Hung* ([58] *supra*) at [50].

68 Second, the Prosecution contended that if the deduction of expenses were permitted, it would lead to inconsistent sentencing outcomes. The Prosecution provided the following scenarios which I propose to examine more closely because they seem to me, with respect, to reveal certain conceptual

misunderstandings in relation to the deduction of expenses. Suppose A, B, C and D each receive revenue from STA offences amounting to $100,000. Suppose further that there is no difference as regards the harm caused or their culpability. The differences between the four offenders are set out in the following table:

Facts	**A**	**B**	**C**	**D**
The offender's interest in the property rented out	Owned property		Rented property	
Manner in which the offender had used revenue	Saved $100,000	Used $100,000 for renovation works on property	Used $60,000 for lease payments	Used $30,000 for lease payments
Disgorgement Component according to the Prosecution (if expenses are deducted)	$100,000	NIL	$40,000	$70,000

69 In the Prosecution's view, the Disgorgement Component for all four offenders ought to be the same. Yet, the Prosecution submitted that if expenses were allowed to be deducted, it would result in different outcomes in terms of the Disgorgement Component. It was submitted that this would give rise to a sentencing disparity that would be unprincipled and objectionable. Further, the unfairness was thought to be exacerbated by the fact that B "would … benefit most from his crime because the illicit revenue was used to enhance the value of his property".

70 I first address the disparity between A and B. Contrary to the Prosecution's suggestion, the Disgorgement Component for B would be $100,000. In the first place, to the extent that renovation works do not go towards the offender's ability to commit the offence, these are not necessary expenses. There is a further reason why such expenses should not be deducted. Although B might have *spent* $100,000 on renovation works, B would nonetheless have *retained the benefit* of the amount he spent through the putative increase in value of his property. Put another way, the illicit revenue has been translated into a gain which *remains* in B's hands and should therefore be disgorged. As I pointed out in the course of the arguments, the analysis would be no different if B had used the $100,000 to purchase a new car.

71 By contrast, it is principled to draw a distinction between A and B, on the one hand, and C and D, on the other. While A and B have retained the benefit of the $100,000, C and D have used part of that revenue as lease payments to *third parties*, which were necessary expenses. Moreover, that expenditure has not been translated into a gain that remains in their hands. It should therefore be deducted when quantifying the gains they have made from the offences they have committed, for the reasons provided at [63] above. In the circumstances, the Prosecution's concern over inconsistent sentencing outcomes is, with respect, more apparent than real.

The scope of the inquiry

72 I now return to the point that I alluded to earlier, namely, that the inquiry should be reframed such that it is only *necessary* expenses that are deducted (see [61] above).

73 The inquiry should be framed in these terms rather than in terms of the offender's "reasonable expenses". This is because an inquiry into "reasonable expenses" may entail a granular examination of the offender's expenses, akin to a taxation or an accounting exercise. Such an exercise would be inappropriate in the criminal context, given that the offences would relate to *illicit* enterprises that the offender should not have embarked on in the first place.

74 It should be emphasised that the question of whether an expense is necessary is one that has to be answered with a measure of common sense. In the context of STA offences, such expenses would almost invariably have to relate to the *property* used in the commission of the offence, such as lease payments to the owner of the property. Even then, it does not follow that all expenses which relate to the property would constitute necessary expenses. For instance, the Prosecution submitted that expenses incurred to pay for cable TV subscriptions, or to replace old but serviceable furniture, might end up being considered as necessary expenses. I do not see it that way. Such expenses cannot be seen as *necessary* expenses because they have nothing to do with *enabling* the offender to commit the offence but were incurred just to make the Airbnb property more attractive to prospective guests.

75 Finally, there may be necessary expenses that have not been incurred at the time of sentencing but might become payable *in the future*. My present and provisional view is that such future expenses should *not* be deducted because this would introduce a degree of speculation and uncertainty into the sentencing exercise. There is no certainty that these expenses would in fact be incurred. However, the issue of whether future expenses should be deducted does not arise in this case and I therefore leave it open for final determination on a future occasion.

Framework to determine whether expenses should be deducted

76 To summarise, where a fine is imposed on an offender to disgorge his profits, the issue of whether his expenses ought to be deducted should be approached in the following manner:

(a) The inquiry is a broad-based one rooted in the overarching principle of proportionality. The sentencing judge should adopt a rough and ready approach to determine the amount that is appropriate in order to disgorge any profits.

(b) The goal is to disgorge the offender's actual profits and to ensure that the offender is not better off by reason of having committed the offence. To this end, the sentencing judge is entitled to start from the premise that the entire revenue represents the offender's profits.

(c) The court will only permit a deduction for *necessary* expenses, meaning expenses the sole purpose of which is to enable the offender to commit the offence.

(d) The burden is on the offender to identify any necessary expenses. The Prosecution may dispute the fact that the expenses were incurred, or the precise quantum. If so, the burden lies on the offender to substantiate his claim. The Prosecution may also dispute whether the expenses were necessary expenses.

(e) The following types of expenses should *not* be deducted regardless of whether or not they constitute necessary expenses:

(i) expenses that have translated into a gain of some sort for the offender (see the discussion at [70] above); and

(ii) expenses that would have been incurred by the offender regardless of whether the offence was committed. For example, if the offender leased the entire property for his own use and decided to rent a spare room, the lease payments should not be deducted.

Issue 3: The appropriate sentences in the present case

77 Before I consider whether the sentences imposed by the District Judge are manifestly inadequate, it is appropriate to first set out a five-step sentencing framework for STA offences, modelled after the framework developed in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 ("*Logachev*"). The sentencing judge should apply this framework when calibrating the *Punitive Component* of the fine. In my judgment, this is preferable to the approach adopted by the District Judge, which was to calibrate the sentences in accordance with what he considered to be two relevant precedents, *Project Lifestyle* ([56] *supra*) and *Terence Tan* ([56] *supra*) (see GD at [52]–[56]). As observed elsewhere, such an approach is not always conducive to achieving broad consistency in sentencing across cases. Furthermore, sentences which are either too high or too low may have an undesirable cascading effect on future cases: see *Public Prosecutor v Wong Chee Meng and another appeal* [2020] SGHC 144 at [50].

78 I also briefly comment on the District Judge's reliance on the decision of the High Court in *Project Lifestyle*, which, in my view, demonstrates why it is necessary to have a sentencing framework that is targeted specifically at STA offences. The District Judge considered that *Project Lifestyle* was a "useful reference point" (see GD at [52]). There, the offender pleaded guilty to an offence under s 12(2) of the Planning Act for having converted its premises in

Kampong Glam (a conservation area) from a restaurant to a bar without *conservation permission*. I agree with the Prosecution that it is generally inappropriate to rely on precedents under s 12(2) for STA offences. This is because there are sentencing considerations which are unique to each offence. For instance, in *Project Lifestyle*, the High Court found that the nature of the change in use had impacted the heritage character of the Kampong Glam area, and would probably have caused some disquiet given the close proximity of the premises to Malay-Muslim landmarks (at [9]). These are not relevant considerations in the context of STA offences.

79 I should emphasise that the sentencing framework developed in this judgment only applies to STA offences and does not apply to *all* offences under s 12(1) of the Planning Act. An offence under s 12(1) can be committed in a wide range of situations, such as the unauthorised provision of dormitory accommodation. It is conceivable that these other factual situations may attract different sentencing considerations.

A sentencing framework for the Punitive Component

The relevant sentencing considerations for STA offences

(1) Offence-specific factors

80 I begin by setting out some of the relevant sentencing considerations for STA offences. The following non-exhaustive offence-specific factors are relevant at the first step of the framework:

Offence-specific factors	
<u>Factors going towards harm</u>	<u>Factors going towards culpability</u>
(a) Disamenities that were actually caused	(a) Motive in committing the offence

(b) Number and frequency of bookings	(b) Duration of offending (c) Level of sophistication (d) Scale of the criminal enterprise (e) Degree of determination to maintain or grow the criminal enterprise (f) Concerted efforts to avoid detection

81 As I have emphasised previously, sentencing judges should be mindful not to double count the offence-specific factors in their sentencing assessment. The categories or labels used to describe the offence-specific factors may not always be watertight, and the sentencing court should be wary of assessing the offender's culpability based only on the *number* of factors that are found on the facts (see *Logachev* ([77] *supra*) at [38]).

82 With that caution in mind, I set out the factors which go towards determining the harm that was caused by the offence.

83 First, the sentencing court should consider whether there were disamenities that actually resulted from the STA offences. These could include security breaches, public nuisance and damage to common facilities.

84 Second, it is also relevant to consider the number and frequency of bookings. This may be justified on two grounds. The first is that of *potential harm*. As the Prosecution submitted, the higher the number and frequency of bookings, the greater the turnover of transient guests and the greater the extent of disamenities that can be caused. Further, the unlawful provision of STA *inherently* results in a loss of privacy for the neighbouring residents. There could also be safety concerns. In prohibiting STA, Parliament's intent was to address

these concerns as well, and not merely the physical and tangible harm arising from the unlawful provision of STA. This may be discerned from the following extract from the speech of the then Minister for National Development, Mr Lawrence Wong, during the second reading of the Planning (Amendment) Bill (Bill No 3/2017) (see *Singapore Parliamentary Debates, Official Report* (6 February 2017) vol 94):

> … URA had undertaken public consultation on this matter of short-term accommodation in 2015, and in its focus group discussions with stakeholders such as Neighbourhood Committees and managing agents of private residential developments, there was also *strong endorsement of the need to preserve the privacy and sanctity valued by the vast majority of homeowners.*
>
> …
>
> Indeed, over the past year, *URA has already seen a 60% rise in complaints from homeowners about breaches of this short-term rule in their residential properties, and the complaints are related to public nuisance or even safety concerns for their families.* These are issues that we take seriously and we should enforce the current rules, as we are already doing, and make sure that the issue does not worsen further. The amendments to the [Planning] Act will enable URA to do so.
>
> [emphasis added]

85 I turn to the factors which go towards determining culpability. Most of these factors have been extensively discussed in the case law: for the offender's motive, see *Ye Lin Myint v Public Prosecutor* [2019] 5 SLR 1005 at [51]–[53]; for the duration of offending, see *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [73]; and for the level of sophistication, see *Logachev* ([77] *supra*) at [57]. As for the offender's degree of determination to maintain or grow the criminal enterprise, a harsher sentence is justified where there is a sustained and considered commitment towards law-breaking. This may, in turn, be discerned from the extent of planning and the degree of premeditation that went into the commission of the offence(s) in question (see *Logachev* at [56]).

86 I briefly comment on the two remaining factors.

87 First, in relation to the scale of the criminal enterprise, care should be taken to avoid double-counting where and to the extent this is already reflected in the fact that multiple charges have been preferred against the offender.

88 Second, if an offender has taken active steps to avoid detection, that should be regarded as an aggravating factor that warrants a more severe sentence. This factor has particular significance in the context of STA offences that are committed through Airbnb. As the Prosecution observed, such offences are difficult to detect to begin with. This is because offenders need not reveal their actual identities on Airbnb. They may rely on pseudonyms and are able to communicate directly with their guests through the platform. Further, the exact address of the Airbnb property is not made publicly available and is only revealed to guests who have a confirmed reservation. In that light, where an offender has taken specific steps to avoid detection, that should be regarded as aggravating.

(2) Offender-specific factors

89 I turn to the offender-specific factors. These do not relate only to STA offences and are generally applicable across all criminal offences. The following non-exhaustive factors are well established in the case law, and I do not go into them in detail here:

Offender-specific factors

Aggravating factors	Mitigating factors
(a) Offences taken into consideration for sentencing purposes (b) Relevant antecedents	(a) A guilty plea (b) Co-operation with the authorities

(c) Evident lack of remorse	

The sentencing framework

90 Having identified some of the relevant sentencing considerations, I turn to the five steps of the sentencing framework, modelled after that developed in *Logachev* ([77] *supra*).

91 The first step involves the identification of the level of harm caused by the offence and the level of culpability, having regard to the offence-specific factors outlined at [80] above. Both harm and culpability can be classified into three categories scaled according to increasing severity.

92 The second step is to identify the applicable indicative sentencing range in the light of the relevant offence-specific factors. This can be determined using the following sentencing matrix:

Harm / **Culpability**	**Slight**	**Moderate**	**Severe**
Low	Up to $20,000	$20,000 to $40,000	$40,000 to $60,000
Medium	$20,000 to $40,000	$40,000 to $60,000	$60,000 to $80,000
High	$40,000 to $60,000	$60,000 to $80,000	Above $80,000

93 This sentencing matrix applies only to a first-time offender who claims trial. As I have observed at [33] above, a repeat offender is liable for enhanced punishment under s 12(4)(*b*) of the Planning Act. A first-time offender can only

be sentenced under s 12(4)(*a*) to a maximum fine of $200,000 per charge. Having affirmed the Bifurcated Approach above, and having found that Parliament intended for a disgorgement element to feature in the fines imposed for STA offences (see [36] above), I have structured the matrix on the basis that the maximum fine imposed under the Punitive Component will not *generally* exceed $100,000. The residual portion of the permitted fine can then be applied to the Disgorgement Component. These limits are not intended to proscribe the sentencing judge's discretion and may be departed from in exceptional cases.

94 The third step calls for the identification of the appropriate starting point within the applicable sentencing range, while the fourth step involves making adjustments to the starting point to take account of the relevant offender-specific factors.

95 Finally, the fifth step requires the court to consider whether the totality principle warrants any final adjustments to the sentence.

Disgorgement Component

96 I now apply the Bifurcated Approach and the sentencing framework to the case at hand and consider whether the sentences imposed by the District Judge are manifestly inadequate in that light.

97 I begin with the Disgorgement Component. I am satisfied that the lease payments incurred by the Respondent, amounting to about $69,000, were necessary expenses (see the framework at [76] above). The sole purpose of these payments was to enable the Respondent to commit the offences in question. The lease payments were paid to third parties and did not translate into a gain to the Respondent.

98 The total Disgorgement Component is therefore $46,000. I note that this figure represents the actual profits that were made in respect of all six properties, and not merely the four properties that form the subject matter of the proceeded charges. Nonetheless, given that the Respondent has consented to having the two remaining charges taken into consideration for the purpose of sentencing, I do not see any reason not to disgorge all the profits made by the Respondent. Otherwise, it would require the Prosecution to proceed on all the charges in order to disgorge the full profits, and that would only result in a higher aggregate fine being imposed on the Respondent. Moreover, it is well established that the sentencing judge may adjust the sentence for the proceeded charges to account for charges taken into consideration.

Punitive Component

First step: Identify the level of harm and the level of culpability

99 To determine the Punitive Component, I now apply the sentencing framework that I have set out above.

100 The first step is to have regard to the offence-specific factors set out in the table at [80] above and identify: (a) the level of harm caused by the offences; and (b) the level of the offender's culpability.

101 With respect to the level of harm caused by the Respondent's offences, there was, as noted by the District Judge, "no tangible or appreciable harm or loss caused" (see GD at [59]). However, as the District Judge pointed out, the number and frequency of bookings must have been "quite high" (see GD at [34]). I have explained why it is relevant to consider the number and frequency of bookings in determining the level of harm (at [84] above). The District Judge found, on a rough computation, that the properties would have been booked for

approximately 804 days in total. Before me, the Respondent did not suggest that the number and frequency of bookings were lower than what was suggested by the District Judge.

102 In the circumstances, I assess the harm caused by the offences as falling within the middle of the "slight" category.

103 I turn to consider the factors going towards culpability.

104 First, the Respondent was motivated solely by profit and the provision of STA provided him with a regular source of income. The amount of profits made, amounting to $46,000, was substantial.

105 Second, the criminal business model in this case was a fairly sophisticated one. As Hoo J observed in *Koh Jaw Hung* ([58] *supra*) at [50], where an offender chooses to plough the criminal proceeds back into the illegal enterprise as "investments", this may point to a higher degree of sophistication and permanence in the illegal enterprise. Here, the Respondent did not own any of the six properties. He was able to use the illicit revenue to settle his monthly lease payments. It was, as described by the Prosecution, a self-funding model with high returns. The Respondent also did not have to expend a significant amount of time or energy towards the commission of the offences. In short, the criminal enterprise reflected that operated by a sophisticated offender.

106 Third, the Respondent was determined to expand the criminal enterprise, and this calls for specific deterrence. The District Judge rightly pointed out that the Respondent could be characterised as a recalcitrant offender (see GD at [31]). Although he was treated leniently by URA in respect of the Lorong 27 Offence, he took a considered and calculated risk not only to continue his

criminal enterprise, but to *expand* it by leasing four more properties. To be clear, the Lorong 27 Offence does not, in and of itself, constitute an aggravating factor. An offender cannot be punished for conduct which has not formed the subject of the charges brought against him. However, on these facts, the circumstances surrounding the Lorong 27 Offence are relevant to the Respondent's *state of mind* at the time the *present offences* were committed. They can therefore be taken into account in assessing his culpability at the sentencing stage (see the recent decision of the Court of Appeal in *Public Prosecutor v Bong Sim Swan, Suzanna* [2020] SGCA 82 at [64]–[66]).

107 As for the duration of offending, the offences were perpetrated over a sustained period of time and were certainly not one-off in nature. In particular, the duration of offending in respect of the 4th Charge and the 6th Charge was nearly a full year. I note that the District Judge considered the analysis of the duration of offending not to be a meaningful way of determining the gravity of the offending and focused instead on the number and frequency of bookings (see GD at [33] and [34]). I agree with the District Judge in so far as his comment was made in the context of assessing the *harm* caused by the offence. However, the duration of offending does go towards the offender's *culpability*; it indicates how determined the offending conduct is, and is tied to the notion of specific deterrence (see *Logachev* ([77] *supra*) at [59]). Nonetheless, it seems to me appropriate to amalgamate this factor with the previous one, given that the duration of offending is, on these facts, also evidence of a sustained commitment to the criminal enterprise.

108 Finally, the Respondent took concerted efforts to avoid detection. On this, I note that the District Judge took a different view. As regards the Prosecution's submission that the Respondent had made a calculated decision to rent properties in Geylang to avoid detection, the District Judge considered

that "[t]his was a hollow assertion as there was no evidence or explanation as to why the Geylang district mattered". Further, he also did not accept the Prosecution's submission that the Respondent sought to avoid detection by changing the host names of his Airbnb accounts. According to the District Judge, "[t]hese host names are usually pseudonyms or monikers to begin with. Changing one pseudonym to another would not … *have made detection any more difficult*" [emphasis added] (see GD at [35]).

109 However, in the Statement of Facts, the Respondent had admitted to locating his Airbnb properties in Geylang so as to avoid detection, because he believed the residents there were less likely to lodge complaints. He also admitted to changing his host names to avoid detection (see [11] above). Where an offender has *admitted* to taking steps to avoid detection, that should ordinarily be treated as being aggravating for the purpose of sentencing. The court generally does not go further to inquire whether detection was, in fact, made any more difficult. In any case, it is not difficult to see how the changing of host names would have made detection more difficult. For instance, after the investigations into the Lorong 27 Offence, URA would have associated the Respondent with the host name "Jo". The fact that he changed his host name to "Mik" would clearly have made detection more difficult (see [13] above).

110 Furthermore, apart from the acts that were referred to by the District Judge, there is overwhelming evidence that the Respondent took active steps to avoid detection: he used pseudonyms on Airbnb; he lied to the owners of the properties telling them that he was leasing the properties for legitimate purposes; and he deleted all his Airbnb listings and host accounts when he realised that URA was investigating him for his present offences (see [10] and [11] above). I note that the District Judge considered some of these acts as evidence of dishonesty, which he regarded as an offender-specific aggravating

factor (see GD at [38]). I accept, in principle, that an offender's dishonesty can be regarded as an aggravating factor where it is not an element of the offence (see *Soh Guan Cheow Anthony v Public Prosecutor and another appeal* [2017] 3 SLR 147 at [176]). However, I do not treat the Respondent's dishonesty as a separate aggravating factor in this case so as to avoid double-counting. I also do not regard the scale of his criminal enterprise as being an aggravating factor when this is already reflected in the number of charges preferred against him (see [87] above).

111 Taken in the round, I assess the Respondent's culpability as falling in the middle of the "medium" category.

Second and third steps: Identify the applicable indicative sentencing range and appropriate starting point within that range

112 I turn to the second and third steps of the sentencing framework. Based on the matrix set out at [92] above, the applicable indicative sentencing range would be a fine of between $20,000 and $40,000 for each charge. Bearing in mind that the Respondent's culpability falls in the middle of the "medium" category, and the harm in this case falls in the middle of the "slight" category, the following starting points within the sentencing range are appropriate:

(a) 1st Charge: $28,000

(b) 2nd Charge: $28,000

(c) 4th Charge: $32,000

(d) 6th Charge: $32,000

113 The higher fine for the 4th Charge and the 6th Charge reflects the fact that the duration of offending was significantly more protracted, and the number of bookings would have been higher (see [12] above).

Fourth step: Make adjustments to the starting points to take into account offender-specific factors

114 I now consider the fourth step of the sentencing framework, which is whether any adjustments ought to be made to the starting points to take into account the relevant offender-specific factors.

115 Here, there were two charges that were taken into consideration for the purpose of sentencing. However, given that the duration of offending in respect of both charges was relatively short compared to the proceeded charges, this factor alone does not warrant an uplift in the sentences.

116 The only offender-specific mitigating factor that applies here is the Respondent's plea of guilt. There would have been an undeniable saving of time and expense. However, the mitigating weight to be attached to the Respondent's plea of guilt has to be assessed in the light of his attempt to deflect responsibility in his mitigation plea (see GD at [41] and [42]). The Respondent had claimed that there were mixed messages from the authorities that the provision of STA was legal. However, he had admitted in the Statement of Facts to knowing that it was illegal to provide STA. The Respondent had also claimed that he was under the impression at the material time that the rule against STA was only a "guideline" that would not be enforced. I do not accept that the Respondent genuinely held this belief. There would have been no reason for him to take elaborate steps to avoid detection if he believed the rule against STA was only a "guideline". He also could not reasonably maintain this in the light of the circumstances surrounding the Lorong 27 Offence.

117 In these circumstances, the Respondent's plea of guilt only warrants a modest discount to the starting points.

118 I do not consider that there are any other applicable offender-specific mitigating factors:

(a) The Respondent's co-operation with the investigating authorities is not a mitigating factor because there was overwhelming evidence against him (see *Public Prosecutor v BDB* [2018] 1 SLR 127 at [74]). In respect of the 1st Unit, the condominium manager had uncovered the fact that he was providing STA. As for the 2nd Unit, 4th Unit and 6th Unit, CISCO officers had inspected the properties and discovered that they were being used to provide STA.

(b) The Respondent's decision to terminate the remaining leases within one month of the conclusion of URA's investigations does not warrant a reduction in the sentence, because it was entirely in his self-interest for him to cut his losses at that stage. A continuation of the offending behaviour could have been regarded as aggravating.

(c) Contrary to the view of the District Judge, I do not consider the Respondent's conduct as a "one-off aberration" (see GD at [46]). It is not open to the Respondent to assert that his offences were one-off in nature, given that he had already been investigated for the unlawful provision of STA prior to the detection of the present offences (see *Kanagaratnam Nicholas Jens v Public Prosecutor* [2019] 5 SLR 887 at [44]). Further, the expansion of his criminal enterprise makes this an untenable conclusion (see [106] above).

(d) Finally, while the Respondent has claimed that an increase in the fines imposed would result in significant hardship to him and his family, it is well settled that, except in the most exceptional circumstances, hardship to the offender's family has very little, if any, mitigating value (see *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [75]). I reiterate that the Respondent was motivated by profit and made a calculated risk to expand his criminal enterprise. In that light, the fines imposed are the inevitable consequence of his own acts.

119 In the circumstances, given that the only relevant offender-specific mitigating factor is the Respondent's plea of guilt, I make the following adjustments to the starting points stated at [112] above:

(a) 1st Charge: $26,000

(b) 2nd Charge: $26,000

(c) 4th Charge: $30,000

(d) 6th Charge: $30,000

Fifth step: Consider whether the totality principle warrants any final adjustments

120 The fifth step of the framework requires me to consider whether the sentences ought to be adjusted on account of the totality principle. As I noted above at [21], the District Judge considered that the totality principle warranted a reduction in the fines imposed.

121 The totality principle, as I explained in *Shouffee* ([63] *supra*), is a manifestation of the requirement of proportionality (at [47]). It is to be applied

at the end of the sentencing process, and 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: see *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen Balakrishnan*") at [73].

122 The totality principle contains two limbs. The first limb examines whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed, and the second limb considers whether the effect of the sentence on the offender is crushing and not in keeping with his past record and his future prospects (see *Shouffee* at [54] and [57]). The principle can be justified on two bases. First, it is a recognition of the fact that an aggregation resulting in a longer sentence is going to carry a compounding effect that bears more than a linear relation to the cumulative and overall criminality of the case. Second, an extremely long aggregate sentence may induce a feeling of hopelessness that destroys all prospects of the offender's subsequent rehabilitation and reintegration (see *Raveen Balakrishnan* at [77] and [78]). These considerations are of course more readily appreciated in the context of sentences of imprisonment than in the context of fines.

123 In *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201 ("*Seng Foo*"), I considered whether the totality principle (and the one-transaction rule) applies to an offender who is convicted of multiple charges attracting fines. I held that the one-transaction rule does not apply in the context of multiple fines, for reasons which I do not need to go into in this judgment. Nonetheless, I held in *Seng Foo* that the totality principle does apply in the context of multiple fines. Furthermore, the ultimate concern that underlies the application of the one-transaction rule – that an offender should not be doubly

punished for what is essentially the same conduct – can be dealt with under the framework of the totality principle (at [63] and [65]).

124 I take this opportunity to reiterate three principles that apply in considering the totality principle.

125 First, it is obvious that the mere fact that an offender faces multiple charges attracting fines does not mean that the aggregate fine will fall foul of the totality principle. As I have previously emphasised, the totality principle is not an invariable rule and it should not be rigidly and blindly applied to all cases (see *Shouffee* ([63] *supra*) at [51]).

126 Second, although the totality principle has generally been taken to possess a limiting function, it is equally capable of having a boosting effect on individual sentences where they would otherwise result in a manifestly inadequate overall sentence (see *Gan Chai Bee Anne v Public Prosecutor* [2019] 4 SLR 838 at [20]).

127 Third, a sentencing judge should be mindful to articulate the precise limb of the totality principle that justifies a reduction in the sentence imposed. I digress here to observe that it has been said elsewhere that the second limb of the totality principle does not ordinarily apply in the context of *fines*, as opposed to *imprisonment terms*. In *Pannacchione v City of Rockingham* [2014] WASC 221, the Supreme Court of Western Australia said that "[t]he reference to the 'crushing' effect of a total sentence is not relevant to a fine" (at [31]). Further, in *R v Pearlman* [2005] RJQ 1465, the Superior Court of Quebec noted at [45]:

> It seems to me that the totality principle should be qualified when imposing consecutive fines arising from the commission of several separate offences. Whereas in criminal offences, the freedom of individuals is at stake and the accumulation of

> consecutive sentences may well exceed the applicant's overall culpability or constitute cruel punishment within the meaning of the Charter, the same considerations do not apply as strongly to offences for which a monetary penalty is provided. …

Nonetheless, in the absence of full arguments on this point, I leave it open for determination on a future occasion.

128 I now return to the case at hand. I am satisfied that the aggregate fine in respect of the Punitive Component does not offend either limb of the totality principle. Nor do I consider that the concern underlying the one-transaction rule is engaged.

129 Here, the multiple charges related to *distinct profit-seeking endeavours*. The Respondent had leased separate properties which were then sub-let to different guests over different periods of time. Each property generated its own stream of revenue. These were therefore *distinct offences* which did not form part of a single transaction. It should be emphasised that the Respondent made a conscious and deliberate decision to *expand* his criminal enterprise. There is no reason why a reduction in the individual fines is warranted, given that an offender who operated on a smaller scale may not have received such a reduction. Such a reduction is tantamount to a "bulk discount", which is not the function of the totality principle (see *Raveen Balakrishnan* ([121] *supra*) at [75]).

Conclusion

130 In summary, I have answered the two principal legal issues as follows. First, the Bifurcated Approach should be adopted when calibrating fines for first-time offenders under s 12(1) of the Planning Act (see [38]–[45] above).

Second, where a fine is imposed on an offender to disgorge his profits, the court should deduct the necessary expenses incurred by the offender (see [76] above).

131 Finally, having applied the Bifurcated Approach and the sentencing framework developed in this judgment, I am satisfied that the sentences imposed by the District Judge are manifestly inadequate. In the circumstances, I allow the Prosecution's appeal and impose the following sentences on the Respondent:

Charge	**Punitive Component**	**Disgorgement Component**	**Sentence**
1st Charge	$26,000	$11,000	**$37,000 (in default five week's imprisonment)**
2nd Charge	$26,000	$11,000	**$37,000 (in default five week's imprisonment)**
4th Charge	$30,000	$12,000	**$42,000 (in default six week's imprisonment)**
6th Charge	$30,000	$12,000	**$42,000 (in default six weeks' imprisonment)**
Total	$112,000	$46,000	$158,000 (in default 22 weeks' imprisonment)

132 I once again thank Mr Liu for his tremendous assistance and commend him for the thoroughness of his research and the admirable clarity and objectivity with which he made his submissions to me.

Sundaresh Menon
Chief Justice

Kow Keng Siong, Winston Man and Gabriel Lim (Attorney-General's Chambers) for the appellant;
The respondent in person;
Nicholas Liu (Singapore Management University) as young *amicus curiae*.