IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 71

Criminal Revision No 9 of 2020

Between

Prime Shipping Corporation

… *Petitioner*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure And Sentencing] — [Confiscation and forfeiture]
[Criminal Procedure And Sentencing] — [Disposal of property]

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Introduction

1 Prime Shipping Corporation ("the Applicant") filed this application for criminal revision of the order made by a Senior District Judge ("SDJ") on 9 October 2020 for forfeiture of a ship under s 364(2) of the Criminal Procedure Code (Cap. 68, 2012 Rev Ed) ("CPC"). I dismissed the application and now set out the full reasons for my decision.

Background Facts

2 The Applicant, a Vietnamese company, is the owner of the chemical oil vessel tanker M/T Prime South ("Prime South"). Prime South was seized by the authorities on 8 January 2018 in the course of criminal investigations. Prior to that date, Prime South was captained by Nguyen Duc Quang ("Quang"). The investigations revealed that Quang had acted in conspiracy with Tran Quang

Tuan ("Tran"), Nguyen Manh Cuong ("Cuong"), and Nguyen Quoc Tuan ("Tuan") to illegally misappropriate 14,380.52 metric tonnes of gasoil (valued in excess of US$7 million) from Shell Eastern Petroleum Pte Ltd's ("Shell") Refinery at Pulau Bukom over 11 occasions between 1 February 2017 and 7 January 2018. At all material times, Tran was the Chairman of the Applicant's Board of Directors until his resignation on 31 October 2018.

3 A total of 12 charges under s 411 read with s 108B and s 109 of the Penal Code (Cap. 224, 2008 Rev Ed) ("Penal Code") were brought against Quang, with 11 relating to Prime South. Quang pleaded guilty to five proceeded charges and was sentenced to an aggregate sentence of 70 months' imprisonment. Notably, other vessels belonging to the Applicant were also involved, with another ship's captain receiving an aggregate sentence of 66 months' imprisonment after pleading guilty to various similar charges. Dang Van Hanh ("Hanh") a chief officer of Prime South, pleaded guilty to related charges and was sentenced to 30 months' imprisonment. In total, nine individuals were charged in connection with the misappropriation and receipt of stolen gasoil involving Prime South, including seven employees of Shell. Charges against Tran were filed as well, but Tran has thus far remained out of jurisdiction.

4 Following the conviction of Quang and Hanh, an order to forfeit Prime South was sought and a disposal inquiry was held in due course. It was not disputed by the parties that Prime South had been used in the commission of the offences involving the stolen gasoil. At the disposal inquiry, the SDJ found that there was uncontroverted evidence that Tran was involved in the offences and had given Quang instructions to go to Pulau Bukom to collect the misappropriated gasoil alongside legitimately purchased gasoil. The SDJ went

on to order the forfeiture of Prime South under s 364(2) of the CPC on the following grounds:

(a) Tran was the "living embodiment" of the Applicant using the applicable test in *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327 ("*Tom-Reck*"). Accordingly, Tran's "transgressions were therefore the [Applicant's] transgressions".

(b) The Applicant was complicit in the offences as evidenced by lack of proper internal investigations after the illegal activities were exposed.

(c) There was no attempt by the Applicant to seek further information about Tran's involvement or bring a claim or file a police report against Tran.

(d) Prime South was used extensively to commit the offences of misappropriation, with the legitimate purchase of gasoil being an attempt to hide the misappropriation.

(e) The forfeiture of Prime South (valued at US$4.5 million) was proportionate considering the gravity of the offences, *ie* the sentence imposed on Quang (70 months out of a maximum of 5 years), and the value of gasoil misappropriated using Prime South (US$7 million).

(f) Pursuant to *Hong Leong Finance Ltd v Public Prosecutor* [2004] 4 SLR(R) 475 ("*Hong Leong Finance*"), where the offence is sufficiently serious and there is a risk that the property would be used to commit further offences, forfeiture may be warranted notwithstanding the claimant's innocence.

(g) Pursuant to *Magnum Finance Bhd v Public Prosecutor* [1996] 2 SLR(R) 159 ("*Magnum Finance*") and *Chandra Kumar v Public Prosecutor* [1995] 2 SLR(R) 703 ("*Chandra*"), both specific and general deterrence were relevant considerations.

The present application

5 Following the decision of the SDJ, the Applicant filed the present application for Criminal Revision pursuant to ss 400 and 401 of the CPC. The Applicant made 11 submissions on why the forfeiture order should be set aside. These submissions can be broadly categorised into four main grounds contending that the SDJ had erred in:

(a) finding complicity on the part of the Applicant;

(b) finding that Tran was the Applicant's "living embodiment";

(c) holding that the forfeiture was proportionate in the circumstances; and

(d) considering that the offences were sufficiently serious to warrant forfeiture on the basis of deterrence.

6 In response, the Respondent argued that the High Court's revisionary powers are only to be exercised sparingly, where there has been an error resulting in material and serious injustice (see *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [14]-[15]). Accordingly, the Respondent submitted that as the SDJ had applied the legal principles and made the findings of fact correctly, there was no fundamental error or failure of justice that called for the exercise of the High Court's revisionary powers.

A preliminary point

7 At the outset, it would be appropriate to restate the applicable burden of proof in disposal proceedings. In *Sofjan and another v Public Prosecutor* [1968–1970] SLR(R) 782 ("*Sofjan*") at [14], the Court of Appeal had held that disposal inquiry proceedings are not criminal in nature, since even though the court has to be satisfied that an offence has been committed, ultimately there is neither a conviction nor a sentence. Following from that, it would mean that the standard of proof in disposal inquiries is the civil standard of proof, which is on a balance of probabilities (see *Halsbury's Laws of Singapore* vol 8(2) (LexisNexis Singapore, 2020) at para 95.208).

Issues to be determined

8 Turning to the present case, three key issues arose in this application. First, whether forfeiture could be ordered against an innocent party. Second, whether the actions of Tran could be attributed to the Applicant and, on a related note, whether there was complicity on the part of the Applicant. Third, whether forfeiture of Prime South should have been ordered in the circumstances.

Whether forfeiture could be ordered against an innocent party

9 The central thrust of the Applicant's submissions was that it was an innocent party in this entire matter. The Applicant maintained that it was not an active participant in the criminal conduct and was not wilfully blind to the same. Accordingly, as an innocent party, it should not be penalised. However, the Respondent contended that the Applicant was not an innocent party but was complicit in the commission of the offences. Moreover, where the primary offences concerned are serious or where there was a risk that the property would

be used in the commission of similar offences, the property should be forfeited notwithstanding that the claimant may have been an innocent party.

10 In this regard, it is pertinent to begin by examining two established authorities, both of which were canvassed by the parties and relied upon for their respective propositions both below and before me.

11 The first case is *Magnum Finance*, where Yong Pung How CJ had observed, *inter alia*, that where the claimant was innocent of any complicity in the offence, it would not be justifiable to "penalise" the claimant for forfeiture even if he had assumed "foreseeable commercial risk" in respect of the use of the property (see *Magnum Finance* at [36]–[38]). On the facts, Yong CJ set aside the lower court's forfeiture order and ordered the return of the seized vehicle to the claimant, a hire-purchase company.

12 The second case is *Hong Leong Finance*, where the claimant, also a hire-purchase company, had sought to set aside a forfeiture order made under the Wholesome Meat and Fish Act (Cap 349A, 2000 Rev Ed) ("WMFA"), to forfeit a truck used to illegally import meat products into Singapore.

13 In *Hong Leong Finance*, Yong CJ observed that the claimant was an innocent party and had been reasonably prudent in granting hire purchase facilities. Nevertheless, the forfeiture order was upheld in view of the seriousness of the offence and possible adverse consequences on the health of Singapore's population (see *Hong Leong Finance* at [26]). Yong CJ also observed that the forfeiture should not be disproportionate to the offence and maximum punishment prescribed for it (see *Hong Leong Finance* at [27]). Similar observations were made in *Magnum Finance* at [26].

14 In my view, notwithstanding the different outcomes in the two cases cited above, there is no real conflict in the positions taken by the High Court. As noted in *Magnum Finance* at [23]–[24], in considering the exercise of the court's discretion in ordering forfeiture (if any), the court's first port of call is the offence-creating legislation and the policy and purpose underlying it. *Hong Leong Finance* was a case concerning the WMFA, which was primarily enacted to safeguard the health of Singapore's population. Seen in this light, the balance of considerations in *Hong Leong Finance* and *Magnum Finance* respectively was different, justifying the different outcomes notwithstanding the similar circumstances of ownership.

15 In short, whether forfeiture can be ordered against an innocent party turns on the facts and the applicable statutory context in each instance. In the court's exercise of its discretionary power to forfeit, the court must carefully weigh the various considerations which include the value and use of the property sought to be forfeited, the purpose of forfeiture, and also whether the claimant is complicit in the commission of the offence in question. As *Hong Leong Finance* demonstrates, the owner's innocence may not necessarily be sufficient in itself to justify the release of the seized property.

Whether the actions of Tran could be attributed to the Applicant, and whether there was complicity

Attribution

16 The Applicant argued that the SDJ had erred in law in applying the "living embodiment" test from *Tom-Reck*. It sought to distinguish *Tom-Reck* on the basis that the prosecution had sought in that case to impute direct criminal liability on the company via corporate attribution, unlike the circumstances in

the present case. Further, the Applicant argued that the SDJ had erred in finding that Tran rather than the managing director of the Applicant was the "living embodiment" of the company.

17 In *Tom-Reck*, Yong CJ held that the actions of an employee or agent of the company can only be attributed to the company where that person is considered to be the "living embodiment of the company", or if that person's acts were performed as part of a delegated function of management (see *Tom-Reck* at [17] and [19]).

18 However, it should be noted that the "living embodiment" test above was articulated in the context of criminal liability, and not civil liability. Having regard to the Court of Appeal's decision in *Sofjan* as noted above at [7], the civil standard of proof applies to disposal inquiries and not the criminal standard. In the civil context, the Court of Appeal in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings)* [2014] 3 SLR 329 ("*Ho Kang Peng*") at [47]–[50], had adopted Lord Hoffman's three rules of attribution in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*"). These three (disjunctive) rules of attribution are:

> (a) the company's "primary rules of attribution" found in the company's constitution or in company law, and which vest certain powers in bodies such as the board of directors or the shareholders acting as a whole;
>
> (b) general rules of attribution, comprising the principles of agency premised on actual or ostensible authority, and vicarious liability in tort; and

(c) special rules of attribution fashioned by the court in situations where a rule of law, either expressly or by implication, excludes the attribution on the basis of the general principles of agency or vicarious liability.

19 Following from the above, it is also clear that the "living embodiment" test laid down in *Tom-Reck* is pegged at a higher standard than Lord Hoffman's more expansive rules of attribution in *Meridian*. Accordingly, if the "living embodiment" test is fulfilled, it would indicate a stronger indication of a company's involvement in the criminal activities conducted. As stated in *Chandra Kumar v Public Prosecutor* [1995] 2 SLR(R) 703 at [13]–[14], a finding of involvement of the owner of the property sought to be forfeited, "whether by participation or through Nelsonian knowledge, would be sufficient to attract forfeiture".

20 In the present case, the Applicant did not appear to take the position that Tran was not the directing mind of the Applicant, but only that Tran was not involved in the daily operations of the company. While I accepted that Tran may not have had a direct role in the Applicant's daily operations, he was clearly in a position of authority as the Chairman. He did not merely play an oversight role as contended by the Applicant. From the evidence given by the Applicant's witnesses, Tran was a major shareholder and had been the Chairman of the Applicant from 2007 (when the Applicant was founded) to 2018.

21 There was direct evidence from two ship captains, one of whom was Quang, showing that they took instructions from Tran and proceeded to collect the gasoil; this was also clear from the Statement of Facts that was admitted when the ship captains pleaded guilty. From the evidence of Quang, it was clear

that Tran had directly instructed the ship captains in relation to the misappropriation of the gasoil, and had coordinated a significant part of the illegal operations. The ship captains have pleaded guilty and accepted responsibility for their roles. There was no reason for them to falsely implicate Tran. Crucially, while the ship captains had unequivocally implicated Tran as the one who instructed them to collect the gasoil, Tran himself had instead disavowed the acts of his crewmen by e-mail, claiming it had "nothing to do with [him]".

22 Tran has refused to cooperate with the investigations apart from a token offer to be interviewed by telephone or video, relieved from any attendant consequences if false information were to be furnished. Accordingly, it was reasonable to infer that even if a telephone or video interview were to be conducted, he would simply reiterate the contents of his email to the Attorney-General's Chambers and claim that the crew's wrongdoing had "nothing to do with [him]" and reject "any involvements with the crew [*sic*] illegal acts". Though a warrant was issued for his arrest, he has remained at large and outside jurisdiction. According to the Applicant's witnesses, Tran's whereabouts were unknown.

23 Having considered the evidence, I am of the view that the SDJ was justified in finding that Tran was the "living embodiment" of the Applicant. The SDJ would arguably also have been equally justified using the civil rules of attribution, to attribute the actions of Tran to the Applicant with reference to the Applicant's Articles of Association. As Tran's wrongful actions were directly attributable to the Applicant, it cannot be said that the Applicant was wholly innocent.

Complicity

24 The Applicant argued that the SDJ had erred in finding that it was complicit in the criminal activities. It pointed out that it had conducted internal investigations, as evidenced by its letters to Shell, the Singapore Criminal Investigation Department, Singapore Police Coast Guard, Singapore Maritime Port Authority, and the Vietnamese Embassy. In respect of the SDJ's finding that Tran as the Chairman of the Board stymied internal investigations, the Applicant argued that the Respondent had not led evidence from the Applicant's directors or staff to prove that Tran had indeed suppressed internal investigations.

25 The Respondent in turn submitted that the fact that the Applicant had not implemented measures to prevent the recurrence of criminal conduct using its ships, that no investigation of wrongdoing took place, and that the scale of involvement of the Applicant's employees and ships was extensive, all clearly indicated that the Applicant was complicit.

26 I noted that, at best, nominal efforts were made by the Applicant to prevent any recurrence of such wrongdoing using its ships. The evidence in fact disclosed that no preventive measures were implemented. It was clear from the available evidence that the Applicant did not conduct any genuine or proper investigation into these incidents. This was apparent from the evidence of the Applicant's company secretary (and HR and Admin Manager) Nguyen Huu Dung, who testified that the purported investigations comprised of verbally asking unidentified company staff if they were involved in "any abnormal activities". No written record of the investigations was made. In my view, the complete lack of any contemporaneous records to reflect that an investigation

had taken place demonstrated that the Applicant did not take the matter seriously at all.

27 More likely, the Applicant had swept the matter under the carpet and chosen to turn a blind eye. Tellingly, when the Applicant's current managing director Mai Van Toan ("Toan") was asked why he was not even aware of the outcome of the purported investigations, he claimed that he did not have the time to concern himself with it. Toan's lackadaisical attitude again demonstrated that the Applicant was uninterested and unconcerned. The Applicant's attempts to deflect its responsibility to the Singapore Police only served as yet another indicator that there was little or no interest on the Applicant's part to get to the bottom of matters concerning the Prime South.

28 The Applicant's position in relation to Tran was also inconsistent and inherently contradictory. The SDJ rightly noted that, if as the Applicant's witnesses claimed, there was shock and surprise that Tran was allegedly involved and had sabotaged the Applicant, it was "most baffling" why there was plainly no attempt to hold Tran to account or to take any follow-up action against him. The Applicant claimed to have had no "concrete evidence" against Tran to justify making any police report against him. In fact, the purported internal investigations were placed under the purview of the Applicant's board of directors, chaired by Tran. Further, Tran was allowed to resign by the end of 2018, and there was evidence that Tran's brother, Mr Tran Manh Cuong, who had been closely involved in the supply of the Applicant's ships and staffing, was allowed to resign alongside Tran.

29 There was no evidence whatsoever of the Applicant seeking to hold Tran accountable in any way. In my view, the SDJ reasonably inferred that the lack

of any proper investigation would have been attributable to Tran still being the Applicant's Chairman at the time the vessel was seized. In the circumstances, the SDJ rightly held that the Applicant was not wholly innocent, but was complicit in the commission of the offences.

Whether forfeiture should have been ordered in the present case

30 The Applicant submitted that the forfeiture of the Prime South, which was estimated to be worth US$4.5 million, was disproportionate as the value of the Prime South far exceeded the District Court's jurisdiction to impose a maximum fine of $30,000. In the alternative, the Applicant argued that forfeiture as an additional punishment should not be inflicted on the Prime South's "innocent owners". The Applicant also sought to distinguish *Hong Leong Finance* on the basis that the public health considerations in that case warranted the forfeiture of the vehicle, in contrast to the purely financial loss in the present case.

31 The Respondent argued that the value of the property misappropriated through the use of the Prime South (at US$7 million) far outstripped the value of the Prime South itself, and that therefore the order for forfeiture would not be disproportionate. In this regard, the Respondent submitted that the forfeiture of the Prime South was justified on the basis of preventing the property which was used in a serious offence from being used to commit further offences, to specifically deter the Applicant's indifference and disregard to its ships being used in criminal activity, and as a form of general deterrence to protect Singapore's reputation as a global maritime centre.

The scope of forfeiture under s 364 of the CPC

32 The *locus classicus* in Singapore law concerning forfeiture under s 364(2) of the CPC is Yong CJ's decision in *Magnum Finance*. In *Magnum Finance*, a vehicle which was on hire-purchase with the claimant was forfeited under s 386 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which has since been re-enacted under s 364 of the CPC. The claimant argued that the court could not rely on the CPC to order forfeiture where no punishment of forfeiture was expressly provided for, and that the court should not order forfeiture where the owner is an innocent third party. Yong CJ held that the court had the general power to order forfeiture, and that forfeiture is not limited to cases where the property was unlawfully or improperly obtained or where ownership cannot be ascertained.

33 The following principles in relation to the court's discretionary exercise of its power of forfeiture under the former s 386 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (now s 364 of the CPC) may be discerned from *Magnum Finance*:

(a) The court should first have regard to the relevant legislation which may state in clear and unambiguous terms that forfeiture is mandatory. In such situations, there is no question of any exercise of discretion on the part of the court (see *Magnum Finance* at [23]).

(b) It is only when the offence-creating provisions in the relevant legislation are silent on the issue of disposal of property used or concerned in any offence that s 364 of the CPC will come into consideration (see *Magnum Finance* at [24]).

34 In relation to the scope of forfeiture, in *Magnum Finance*, Yong CJ held that as forfeiture under s 364 of the CPC is discretionary, there was a need for the court to consider the policy and purpose behind an order for forfeiture, as well as its potentially draconian consequences, before exercising its discretion. This would include the degree of complicity of the claimant, whether the claimant could have taken any preventive measures, the value of the property, the proportionality of forfeiture with respect to the gravity of the offence committed and the maximum punishment which may be imposed, and the extent of use of the property in commission of the offence (see *Magnum Finance* at [26]).

35 In *United States v Bajakajian* 524 US 321 (1998) ("*Bajakajian*"), the respondent was caught trying to fly out of the United States without declaring that he was carrying US$357,144 in cash. The respondent was eventually convicted, and the authorities sought to confiscate the full sum. At first instance, the court found that the forfeiture of the full sum would have been disproportionate, and instead ordered forfeiture of US$15,000 in addition to the maximum fine of US$5,000 and three years' probation. The sentence was upheld on appeal to the Court of Appeals and the United States Supreme Court. Delivering the opinion of the Supreme Court, Justice Clarence Thomas held that in considering if the forfeiture would be disproportionate to the offence, both the harm caused and the maximum fine that can be imposed for the offence must be considered (*Bajakajian* at 339–340). On the facts of *Bajakajian*, it was found that the respondent had no intention to launder money and had earned the full sum legitimately and was transporting it to pay off a legitimate debt. Additionally, the harm caused to the authorities was minimal as there was no fraud or loss caused to the public fisc (*Bajakajian* at 339).

36 While the statutory regime in *Bajakajian* is different from the present case and there are constitutional safeguards found in the excessive fines clause of the Eighth Amendment to the United States Constitution, the principles set out by Justice Clarence Thomas with regard to the proportionality of forfeiture are apposite. The court has to consider the gravity of the underlying offence and the harm caused in addition to the maximum punishment that can be imposed for the underlying offence. These echo the same key considerations outlined in *Magnum Finance* and *Hong Leong Finance*.

37 Finally, I made the observation that forfeiture can serve several distinct though interrelated purposes. First, it can serve as a form of punishment by imposing an "additional penalty" on the claimant (see *Magnum Finance* at [12]). Second, it can act as a deterrent against both potential offenders (deterring against the commission of future similar offences) and offenders (deterring against the re-commission of future similar offences) alike. Such deterrence is most meaningful where the property sought to be forfeited belongs to the accused, or to someone tainted with complicity (see *Magnum Finance* at [33]–[34]). Third, it can serve as prevention, by removing the property which was used to commit the crime from circulation (see *Hong Leong Finance* at [19]). Fourth, it can serve as a way to prevent a complicit or convicted claimant from being unjustly enriched (see the decision of the Supreme Court of Western Australia in *Macri v The State of Western Australia* [2006] WASCA 63 at [15]; Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) at para 33.004).

The exercise of discretion

38 The present forfeiture order was made under s 364 of the Penal Code and it is discretionary in nature. Following from my finding that the Applicant had been complicit in the criminal activities, or in the alternative having attributed Tran's actions to the Applicant, the Applicant could not say that it was a wholly innocent party. Additionally, it would appear from the letters sent by the Applicant to Shell proposing to engage an independent surveyor and install security cameras and a tracking system to their ships, that there were preventive measures that the Applicant could have adopted in the first place to prevent its ships from being used in criminal activities. As noted above at [26], no such measures were implemented.

39 With regard to the Applicant's jurisdictional argument, s 364(2) of the CPC clearly states that "[d]uring or at the conclusion of any inquiry or trial under this Code, the court may make an order as it thinks fit for the disposal of *any property* produced before it" [emphasis added]. Accordingly, it cannot be said that the court's jurisdiction to order forfeiture is strictly bound in any way to the maximum fine it may impose. In fact, in *Hong Leong Finance* at [27], Yong CJ had held that forfeiture of a vehicle valued in excess of the maximum fine stipulated for the underlying offence was not disproportionate.

40 In my view, the Applicant's jurisdictional argument was essentially an argument premised on the proportionality of the forfeiture order as compared to the gravity of the underlying offence. On the facts, the quantum of gasoil misappropriated with the use of the Prime South alone was in excess of US$7 million, and it cannot be said that the harm caused was not serious. In the circumstances, I do not find that the value of the Prime South is disproportionate

to the offences committed, especially when considered in light of the scale of the criminal activities involved.

41 Having considered the evidence in totality, I was of the view that the SDJ was justified in ordering the forfeiture of the Prime South on the basis of general and specific deterrence. While the Applicant, or Tran for that matter, was not convicted of a criminal offence, its complicity in the criminal activities concerned meant that the forfeiture of the Prime South would serve as a form of "punishment" to the Applicant, as well as to deter both potential offenders and the Applicant itself from committing similar offences in Singapore. It would also serve to remove the Prime South from circulation and prevent the Applicant from using it in any future criminal activity.

Conclusion

42 For the reasons above, I agreed that the SDJ had correctly found that the Applicant had been complicit in the criminal activities committed through the use of the Prime South, and that the SDJ had correctly exercised his discretion to forfeit the Prime South.

43 The application for revision was accordingly dismissed.

See Kee Oon
Judge of the High Court

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