Phang Wah and others *v* Public Prosecutor
[2011] SGHC 251

Case Number : Magistrate's Appeal Nos 251, 252 and 253 of 2010

Decision Date : 21 November 2011

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Subhas Anandan (RHT Law LLP) and Foo Cheow Ming and Low Cheong Yeow (Khattar Wong) for Phang and Neo; Philip Fong Yeng Fatt and Jasmin Kaur (Harry Elias Partnership LLP) for Hoo; Aedit Abdullah, Siva Shanmugam and April Phang Suet Fern (Attorney-General's Chambers) for the prosecution.

Parties : Phang Wah and others — Public Prosecutor

Criminal Law – Companies

21 November 2011 Judgment reserved.

Tay Yong Kwang J:

1 This case involved three separate appeals from the district court by the three accused persons and the corresponding cross-appeals by the prosecution. They arose from matters related to the business of Sunshine Empire Pte Ltd ("Sunshine Empire"). For convenience, I will identify the accused persons in the order in which they were identified in the court below.

2 Phang Wah ("Phang") and Jackie Hoo Choon Cheat ("Hoo") were charged with one charge under s 340(5) read with s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) (the "s 340 charge") as well as with eight charges under ss 409 read with 109 of the Penal Code (Cap 224, 1985 Rev Ed) (the "s 409 charges"). Phang and his wife, Neo Kuon Huay ("Neo"), were tried for six charges under s 477A read with s 109 of the Penal Code (the "s 477A charges"). Where appropriate, Phang, Hoo and Neo are referred to as the "appellants".

3 After a joint trial, District Judge Jasvender Kaur ("the DJ") convicted all three appellants on their respective charges (see *Public Prosecutor v Phang Wah and others* [2010] SGDC 505 ("*Phang Wah (DC)*"). The DJ sentenced Phang to a total of 9 years' imprisonment and to pay an aggregate fine of $60,000. She sentenced Hoo to a total of 7 years' imprisonment and imposed on Neo an aggregate fine of $60,000. Phang and Hoo appealed against their convictions and the sentences imposed while Neo appealed only against her conviction. The Prosecution cross-appealed against the sentences imposed on all three appellants.

Background Facts

4 The facts in the present case will be summarised under the three groups of charges brought against the appellants.

Facts relating to the s 340 charge

5 The charge here was that Phang and Hoo were knowingly parties to the carrying on of the business of Sunshine Empire for the fraudulent purpose of selling certain packages yielding returns

when in fact Sunshine Empire did not operate any substantive profit generating business and had no sustainable means of funding such returns and they thereby committed an offence punishable under s 340(5) read with s 340(1) of the Companies Act. At the trial, the parties agreed to proceed on the basis of an agreed statement of facts which was admitted under s 376 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). The agreed facts were set out at length by the DJ (see *Phang Wah (DC)* at [7]-[36]) and I need only mention them briefly here.

6 Sunshine Empire was incorporated on 18 July 2003 as Niutrend International Pte Ltd ("NTI"). From 1 January 2006, Hoo and one Lee Wai Kin acquired the shares from the former shareholders and were appointed as directors of NTI. On 8 January 2007, NTI was renamed as Sunshine Empire. The authorised signatories to Sunshine Empire's bank accounts were (a) Phang singly or (b) Neo and one Low Wei Ling (Phang's personal assistant) jointly. Phang was paid consultancy and other fees to provide advice on the management and business of Sunshine Empire. Payment vouchers were prepared by either Low Wei Ling or Chan Jean Yi ("Jean Yi") (a member of the accounting staff) and approved by either Phang or Neo.

7 Sunshine Empire was a multi-level marketing ("MLM") business which sold lifestyle packages comprising:

(a) First, a seasonal promotion product from e-Mall (an e-commerce platform). The only product sold was call-back services by *EM-Call* ("EM-Call talk time"). EM-Call talk time was introduced in June 2007 and was given to all participants in the Sunshine Empire scheme, even those who had signed up before the introduction of EM-Call talk time. EM-Call basically functioned by converting outgoing calls into incoming calls, enabling users with free incoming call phone plans to reduce their mobile phone charges for local and overseas calls. Any unused EM-Call talk time purchased under the prime packages would expire each month. Although EM-Call talk time could be sold by Sunshine Empire participants to others, participants were unable to purchase additional EM-Call talk time.

(b) Second, *e-Points*, which were exchangeable for cash at the rate of $1.60 per e-Point, subject to an administration fee of 5 e-Points or 0.5% of the amount converted. Some conditions on the use of e-Points were as follows:

(i) E-Points could be used to purchase additional merchant and prime packages at a rate of $1.60 per e-Point or transferred to the e-Mall account to purchase products on e-Mall.

(ii) E-Points could be transferred between participants.

(iii) E-Points could not be converted into mall points.

(iv) E-Points could not be purchased by participants and could only be earned through the Sunshine Empire compensation plan (on which, see [8] below) and/or through Consumer Rebate Privileges ("CRP") (on which, see [11] below).

(c) Third, *mall points*, which participants could use to redeem products from e-Mall platform. Mall points could not be converted into cash or e-Points and could not be transferred from one participant to another. Mall points could not be purchased by participants and could only be earned through the Sunshine Empire compensation plan (on which, see [8] below) and/or by purchasing lifestyle packages.

(d) Fourth, from July 2007, participants were also allowed to sell their products on the *e-Mall*

platform.

8 The Sunshine Empire compensation plan rewarded participants with e-Points and mall points for the purchase of lifestyle packages or for sponsoring others in the purchase of lifestyle packages. Participants would receive their e-Points and mall points in their Sunshine Empire bank account (the "e-Bank account"). To purchase the products, participants had to transfer their mall points and/or e-Points from their e-Bank account to their e-Mall account.

9 Members of the public became participants of the Sunshine Empire scheme by registering with Sunshine Empire and being sponsored by an existing participant. Such participants had to first become a Merchant Affiliate for a registration fee of 25 e-Points or $40. Merchant Affiliates were provided with Merchant Agreement contracts. Each lifestyle package was supported by a 7-day cooling off period from the date of sale, plus a 100% 60-day money back retail guarantee of satisfaction. From July 2007, a Merchant Affiliate received a free starter kit and free mentoring by the leaders of Sunshine Empire. The starter kit contained Sunshine Empire's business model, compensation plan and policy guide.

10 A concise summary of the different types of lifestyle packages available suffices for the purposes of the present judgment. Briefly, a Merchant Affiliate was entitled to purchase a lifestyle package (*ie* Bronze Merchant or Silver Merchant; where necessary, generically referred to as "Merchant package"). If a Merchant Affiliate purchased a Merchant package, he would be entitled to purchase prime packages (*ie* Bronze Prime, Silver Prime or Gold Prime; where necessary, generically referred to as "Prime package"). The main differences between a Merchant package and a Prime package were the cost of the packages (the Prime packages being more expensive), the EM-Call talk time available (the Prime packages offering more EM-Call talk time) and the entitlement to CRP (only Prime package participants were entitled to CRP).

11 Some elaboration on CRP is necessary. Phang and Hoo agreed that CRP was a privilege offered to Prime package participants and was intended to be an incentive to participants. CRP was paid on a monthly basis. Between August 2006 and December 2006, the equivalent of CRP was termed "profit-sharing"; CRP was only adopted as the scheme's name in January 2007. In order to ensure compliance with Singapore laws, Phang and Hoo consulted a lawyer, Francis Goh, on the CRP scheme. Both Phang and Hoo insisted that CRP was a non-guaranteed payment with the amount payable being at the discretion of Sunshine Empire. They also confirmed that CRP was funded from the sale of lifestyle packages, although this fact was not brought explicitly (if at all) to the attention of the participants of the Sunshine Empire scheme.

12 Between August 2006 and October 2007, a total of 25,773 lifestyle packages were sold by Sunshine Empire (2,836 Bronze Merchant, 4,002 Silver Merchant, 268 Bronze Prime, 1,883 Silver Prime and 16,784 Gold Prime). The prices of the packages were generally on an upward trend over those months. The total revenue was about $175m and the total CRP payouts were about $107m. Some US$5.1m were paid by Sunshine Empire as consultancy, management and event fees to a Hong Kong company in which Phang and one Ignatius Yong Wai Hong were directors. Sunshine Empire also paid more than US$6.97m to a company in which Hoo and Neo were directors for the purchase of mall points. This company paid a third company some US$5.9m for the purchase of EM-call talk time. Phang and the said Ignatius Yong Wai Hong were also directors of this third company. In addition, Sunshine Empire made a number of loans to the third company (almost $16m) and various other interest-free loans to others. Everything came to a halt after the Commercial Affairs Department ("CAD") raided the premises of Sunshine Empire on 13 November 2007.

Facts relating to the s 409 charges

13 These charges against Phang and Hoo were for criminal breach of trust ("CBT") as agents, alleging that the two men had engaged in a conspiracy to commit such CBT by causing Sunshine Empire to make payments to Neo on eight occasions totalling S$947,904.88 based on 1% of the preceding monthly sales, purportedly as a Group Sales Director ("GSD"), when they knew that Neo was not qualified as a GSD. It was undisputed that Phang and Hoo had agreed to pay Neo a total of S$947,904.88 and that these monies were paid on 8 occasions, *ie* on a monthly basis from November 2006 to June 2007. Hoo authorised the issuance of the 8 cheques and Phang signed the cheques. The payments were recorded as sales incentives and were based on 1% of Sunshine Empire's monthly turnover. According to Phang and Hoo, the payments were made on the basis that Neo was a GSD of Sunshine Empire.

14 The criteria for appointment as a Sunshine Empire GSD were specified in the Sunshine Empire starter kit. Briefly, to be appointed as a GSD, the criteria are "Minimum 10,000 MCF, Promote 3 x BRM". MCF referred to Merchant Car Funds and BRM was the abbreviation for Business Regional Manager. It was also explicitly stated in the starter kit that the appointee "will have to undergo interview and application is subject to Sunshine Empire final approval in its discretion".

15 Phang and Hoo testified that they regarded Neo as a GSD because she met the qualifying requirements. However, Neo was not told that she had been appointed as a GSD. Phang testified that Neo's name was not selected by the computer system which generated the names of persons who qualified. In other words, Neo was not recognised by Sunshine Empire's computer systems to have the level of sales or the number of managers required to be a GSD. However, allegedly because Neo had brought in a huge network to Sunshine Empire, Phang suggested Neo's appointment to Hoo and Hoo agreed to regard Neo as a GSD.

Facts relating to the s 477A charges

16 These charges against Phang and Neo alleged a conspiracy to falsify the payments made by Sunshine Empire by means of payment vouchers made out to Phang when the payments were actually meant for Neo. With regard to the payment vouchers arising from the 1% monthly payments made to Neo (allegedly as a GSD), Neo suggested that the vouchers should be prepared in her name for one month and in Phang's name the following month. Neo confirmed that she had told Jean Yi from the accounts department that she wanted such an alternate-month payment arrangement to be done because her income tax liability was high and she wanted to reduce that liability. She also claimed that she wanted Phang to declare a higher income for tax purposes in order for him to be eligible to obtain credit. Six payment vouchers were falsified in all.

The DJ's decision

17 17The DJ convicted Phang and Hoo on the s 340 charge for carrying on the business of Sunshine Empire for a fraudulent purpose as well as on the s 409 charges for CBT as an agent. The DJ also convicted Phang and Neo on the s 477A charges of engaging in a conspiracy to disguise six of the payments (which were the subject-matter of the s 409 charges).

18 The appellants were sentenced as follows:

(a) Phang was sentenced to 4 years 6 months' imprisonment for the s 340 charge, to imprisonment terms ranging from 15 to 30 months for the s 409 charges, and a fine of $10,000 for each of the six s 477A charges. The imprisonment terms for the s 340 charge and for two of the s 409 charges (24 months and 30 months) were ordered to run consecutively making a total sentence of 9 years and $60,000. The fines have been paid and he is on bail pending these

appeals;

(b) Hoo was sentenced to 3 years 6 months' imprisonment for the s 340 charge and to imprisonment terms ranging from 9 months to 24 months for the s 409 charges. The imprisonment terms for the s 340 charge and for two of the s 409 charges (18 months and 24 months) were ordered to run consecutively making a total of 7 years. He is on bail pending these appeals; and

(c) Neo was sentenced to a fine of $10,000 for each of the six s 477A charges, making a total fine of $60,000. She has paid the fines.

19 As mentioned above (at [3]), Phang and Hoo appealed against their respective convictions and sentences while Neo appealed only against her conviction.

Issues before this court

20 The issues before this court are as follows:

(a) Whether Phang and Hoo had knowingly carried on the business of Sunshine Empire for a fraudulent purpose, in contravention of s 340 of the Companies Act;

(b) Whether Phang and Hoo had made unlawful payments to Neo, in contravention of s 409 of the Penal Code;

(c) Whether Phang and Neo had, wilfully and with intent to defraud, falsified payment vouchers in contravention of s 477A of the Penal Code; and

(d) Whether the sentences imposed were manifestly excessive (as contended by Phang and Hoo) or manifestly inadequate (as submitted by the prosecution).

21 It is not in dispute that an appellate court customarily exercises great caution in evaluating factual findings and will not interfere with a trial judge's findings unless they are plainly wrong (*Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [22]). If an appellate court wishes to reverse the trial judge's decision, it must not merely entertain doubts whether the decision is right but must be convinced that it is wrong (*ibid*). Bearing this in mind, I turn now to analyse the first issue.

Section 340 charge

The law

22 Section 340 of the Companies Act provides:

Responsibility for fraudulent trading

340.—(1) If, in the course of the winding up of a company or in any proceedings against a company, it appears that *any business of the company has been carried on* with intent to defraud creditors of the company or creditors of any other person or *for any fraudulent purpose*, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

…

(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), *every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence* and shall be liable on conviction to a fine not exceeding $15,000 or to imprisonment for a term not exceeding 7 years or to both.

[Emphasis added]

23 For the purposes of the Penal Code, the term "fraudulently" is defined in s 25 of the same thus:

Fraudulently

25. A person is said to do a thing fraudulently if he does that thing with *intent to defraud*, but not otherwise.

[Emphasis added]

24 Phang and Hoo were charged under the second limb of s 340, *viz*, for carrying on a business for any fraudulent purpose (see emphasis added in [22] above). In *Phang Wah (DC)* at [253], the DJ noted that the term "fraudulent purpose" connotes an intention to go "beyond the bounds of what ordinary decent people engaged in business would regard as honest" (*R v Grantham* [1984] QB 675) or involving "according to the current notions of fair trading among commercial men, real moral blame" (*Re Patrick Lyon Ltd* [1933] Ch 786 at 790).

25 The issue to be determined was therefore whether Sunshine Empire was perpetrating a fraud on the participants of the Sunshine Empire scheme and whether Phang and Hoo knew that they were perpetrating such a fraud. As the DJ correctly cautioned, the fact that the Sunshine Empire scheme would not have worked was not sufficient by itself to establish dishonesty, since over-optimistic and honest businessmen could have miscalculated their moves without being dishonest (*Phang Wah (DC)* at [256]). In the end, a finding of dishonesty on the part of Phang and Hoo was required, with knowledge here encompassing also a situation of turning a blind eye to the obvious.

26 The DJ eventually found that Sunshine Empire was an unsustainable business and that Phang and Hoo were knowingly perpetrating a fraud on the participants by the operation of the Sunshine Empire scheme (*Phang Wah (DC)* at [274]).

The arguments

27 Counsel for Phang and for Hoo raised numerous arguments that challenged the DJ's conviction of Phang and Hoo on the s 340 charge. The arguments may be classified for convenience into two major categories, *viz* (1) that Sunshine Empire's business model had been wrongly found to be "unsustainable"; and (2) that *even if* Sunshine Empire's business model was unsustainable, it did not mean that Phang and Hoo had run Sunshine Empire for a fraudulent purpose.

Whether Sunshine Empire's business was unsustainable

28 With regard to the former category of arguments, Phang and Hoo submitted as follows:

(a) First, unlike in a "Ponzi" scheme where an investor places money into the scheme on the *guarantee* of a high rate of return and where no real products or services to generate profit or

returns are involved, Sunshine Empire *did not* promise any returns (as all CRP payouts were non-guaranteed and fully discretionary) and did in fact provide real products and services in the form of EM-Call talk time and the e-Mall platform. Indeed, Sunshine Empire could be seen as a legitimate MLM business selling tangible and measurable products and services in accordance with the MLM legislation. Counsel for Phang and for Hoo raised further detailed arguments as follows:

(i) The DJ placed a wrong focus on CRP payouts and failed to appreciate that Sunshine Empire could have, at any time, decided not to distribute any of the profits for any reason. They pointed out that had Sunshine Empire refused to declare any CRP benefits, no participant could lay a claim against Sunshine Empire because it had no liability to pay any CRP benefits. This last-mentioned point was buttressed by the fact that no complaint against Sunshine Empire was ever made on the issue of CRP payouts for the 15 months or so of its operations. It was further argued that the DJ failed to realise that historical performance was no guarantee of future performance, *viz*, the fact that Sunshine Empire had paid out CRP at high rates in the first 15 months did not mean it would continue to do the same or to the same extent in the future. Finally, it was pointed out that CRP was capped at a maximum of 50% of the previous month's revenue and, accordingly, CRP payouts were *always sustainable* because they were always based on a *subset of the revenue received*.

(ii) The DJ wrongly assumed that just because a participant could potentially receive an amount far in excess of the amount initially paid for the products and services, it necessarily meant that the only source of "returns" had to be payments by new entrants. In other words, the DJ failed to see the link of *realised profit* between *profit sharing* and the *sale of products and services*.

(b) Second, Sunshine Empire was never in a state of insolvent trading; indeed, the objective evidence was that Sunshine Empire was making huge and increasing levels of profit such that it had sufficient excess to channel into various loans, projects and investments.

(c) Third, the DJ's finding of unsustainability was premised on the flawed evidence of the prosecution's expert, Luke Steadman ("Steadman"), a chartered accountant based in London and an expert in forensic accounting. Phang and Hoo contended that the DJ should instead have accepted the evidence of the defence's expert, Wilfred Wu Shek Chun ("Wu"), an accountant from Hong Kong. In this regard, Phang and Hoo contended that Steadman erred in several ways, including the following:

(i) Steadman should not have adopted a "cost" approach, *viz* ascribing value to the components of each lifestyle package (*ie* mall points, EM-Call talk time, *etc*) to determine how each participant valued the potential of obtaining returns from CRP (such value being derived from the amount unaccounted for by the various components of the lifestyle package). This is because adequacy of consideration should not be a relevant consideration and the true value of the products and services was *the amount that the participants* were willing to pay for them.

(ii) Steadman should not have used the Internal Rate of Return ("IRR") model to calculate the attractiveness of returns to an investor *vis-à-vis* investment decisions, because Sunshine Empire did not promise any financial return from the purchase of lifestyle packages.

(iii) Steadman wrongly disregarded e-Points in determining whether the Sunshine Empire business was sustainable. Contrary to Steadman's view, e-Point sales do not result in

Sunshine Empire replacing a liability (*eg* $12,000 for a Gold Prime package) for a greater liability (*eg* $19,200 payouts for a purchaser of a Gold Prime package) because Sunshine Empire was under no obligation to pay out CRP. Furthermore, Steadman was wrong to suggest that e-Point sales did not bring in new cash to Sunshine Empire, since although the net amount of cash retained by Sunshine Empire remained the same, liabilities decreased, leading to an increase in net assets.

Whether Phang and Hoo ran Sunshine Empire for a fraudulent purpose

29 With regard to the latter category of arguments, Phang and Hoo argued that the fact that a business was assessed *ex post facto* to be unsustainable would not necessarily mean that it was fraudulent or that its founders knew or intended it to be unsustainable at the time of inception of such a business model. In this regard, counsel for Phang and Hoo pointed out that when the CAD raided Sunshine Empire in November 2007, the CAD itself had no basis for believing that the business model of Sunshine Empire was unsustainable, as evidenced by the fact that Steadman's report was only ready about 21 months later in July 2009. Further, Wu disagreed with Steadman's assessment of the sustainability of the business. It would thus have been impossible for Phang and Hoo to foretell, as at August 2006 (when they started to operate the Sunshine Empire business model), what a forensic accountant might opine about their business model in July 2009.

30 Phang and Hoo also took issue with the DJ's finding that the concept of CRP was deliberately obfuscated with reference to the consumption on e-Mall and global turnover to make participants believe that there was a viable source of profits to fund the CRP returns. They argued that:

(a) First, Sunshine Empire did in fact have a viable source of profits from the sale of its packaged products and services. As mentioned above, each and every sale of the lifestyle package of products and services gave Sunshine Empire a minimum 55% gross profit, which was in turn used to fund CRP payouts.

(b) Second, the reference to consumption on the e-Mall platform was meant to ensure that the description of Sunshine Empire's business in the legal documentation complied fully with the MLM legislation and was never meant to confuse participants about the source of CRP.

(c) Third, the reference to CRP as being based on Sunshine Empire's "global turnover" was accurate. Although it was true that CRP payouts in Singapore would be based on the sales in Singapore, this did not mean that CRP payments had nothing to do with global turnover. Global turnover did affect Phang's discretion and was a consideration in deciding how much CRP payments were to be paid out in each country. Therefore, although the source of CRP payout in Singapore was derived from the sales in Singapore, Hoo asserted that it was, nonetheless, strictly-speaking based on Sunshine Empire's global turnover. Accordingly, the description was accurate.

(d) Fourth, there was no duty for Sunshine Empire to inform participants on the source of funding CRP if in fact there was a valid source to fund CRP. The Sunshine Empire participants were *stakeholders*, *not shareholders* in Sunshine Empire. There was thus no obligation on the part of Sunshine Empire to account to them on the source of funding CRP if there was a valid source to fund CRP.

31 Finally, counsel for Hoo argued that Hoo had relied on the vastly experienced and capable Phang, as well as sophisticated computer software, to monitor the company's performance. In this regard, Hoo pointed out that Phang went into full-time MLM in 1990 and had for 10 years prior to that

been involved in part-time MLM, *ie*, that Phang had around 30 years of experience in MLM. Phang was also hugely successful in managing MLM businesses, with his company becoming one of the top 3 MLM companies in Southeast Asia. By contrast, Hoo claimed that he was new to managing MLM companies and was accordingly well justified in relying on Phang and the computer systems. Therefore, Hoo argued, even if Sunshine Empire's business was somehow unsustainable, he would not have known that was the case.

32 In summary, Phang and Hoo contended that the prosecution had failed to prove *actus reus* beyond reasonable doubt because Sunshine Empire was operating a highly profitable, sustainable, fully solvent and legitimate MLM business. They also contended that the Prosecution had failed to prove *mens rea* beyond reasonable doubt because Sunshine Empire did not obfuscate the source of CRP to anyone, whether to its legal advisor or to its participants. Hoo additionally argued that even if Sunshine Empire was running a fraudulent business, he did not know this because he had relied on Phang's judgment.

The decision of the court

Whether Sunshine Empire's business was unsustainable

33 The key plank in Phang's and Hoo's argument was that CRP was non-guaranteed and that the DJ erred in accepting Steadman's analysis based on historical payout in finding that Sunshine Empire was an unsustainable business.

34 There is some merit in this argument, insofar as Sunshine Empire was not legally bound to pay out CRP at the rates it had been paying for the 15 months in question (or at all). However, one cannot rely solely on a legalistic view of Sunshine Empire's business model. While making a business decision to enter into a contract is undoubtedly influenced by the legally binding terms of the contract, such business decisions are also often influenced by other extra-legal considerations, such as a particular contracting party's consistent business practices (and, it must be emphasised, regardless of whether that party was legally bound to continue such practices or not).

35 For the avoidance of doubt, I am not here making any allusion to the concept of implied terms, which constitute legally binding (albeit unwritten) terms of the contract. I am, instead, merely stating that it is important to be cognisant of all the circumstances of the case, including Sunshine Empire's consistent business practice (quite apart from their legal obligations) in determining whether the Sunshine Empire business was being carried on for a fraudulent purpose. On the facts, it was clear that CRP constituted a very high proportion of Sunshine Empire's revenue, that the high rates of CRP payout were paid for by the sale of new packages (it was undisputed that 99% of the revenue of Sunshine Empire came from the sale of packages) (*Phang Wah (DC) at [275]*) and, crucially, that there was a consistently high level of payout over 15 months, leading to a return of 160%. The irresistible inference that is drawn is that the highly attractive feature of Sunshine Empire's lifestyle packages is their historical payout, notwithstanding that Sunshine Empire was not legally bound to continue paying out at high rates or at all. On the evidence, it had to be blatantly obvious to Phang and Hoo that if CRP had been stopped or reduced significantly, the enticing glitter of the packages would have faded almost immediately and further sales thereof would have been severely affected, thereby cutting off the life blood of the scheme. There was no credible alternative source of revenue despite the allusions to vague future business plans and some minor *ad hoc* investments.

36 At this juncture, I turn to consider Phang's and Hoo's related argument that there may be conceptual difficulties with the "cost" approach adopted by the DJ (see [28(c)(i)] above). Their argument is that from an economist's perspective, it is arguable that the value of a package is the

amount that a participant was willing to pay for it, rather than a piecemeal valuation of the individual components within the package. To support this argument, Phang and Hoo pointed out that adequacy of consideration was not a relevant factor.

37 However, I see merit in taking the "value" of the individual components into consideration. Such a hypothetical valuation based on a reasonable market value would provide some indication as to the motivations of the purchaser in buying the product, especially where the purchase price paid far exceeds the reasonable market value of the product. A very simple example illustrates this point: it is highly unlikely that a reasonable purchaser would be willing to pay Company X $10,000 for a product that is similar to that sold by Company Y at a mere $1,000, unless there are exceptional circumstances (for instance, very attractive fringe benefits or some sentimental or familial link to the seller) which draw the purchaser to Company X.

38 Returning to the facts of the present case, it is undisputed that the Gold Prime package was the most popular package. More than 65% of the packages purchased (16,784 out of 25,773 packages) were Gold Prime packages, notwithstanding that such packages were by far the most expensive packages available and that there was no real additional benefit in the Gold Prime package over the other Prime packages, save for some additional EM-Call talk time and the prospect of getting a higher return in CRP. In purchasing a Gold Prime package, a participant would have spent $12,000 to get 15,000 mall points worth at most $1,200 (*ie* 10% of package price), 2,100 minutes of monthly talk time (worth 4% of the package price under Steadman's formulation or 10% of the package price under Wu's formulation) and the e-Point bonus for purchasing packages (6% of package price). Although the valuation exercise just conducted may run into the technical difficulties highlighted *vis-à-vis* the "cost" approach, such an exercise makes it patently clear that the various components of the packages would have constituted only a small proportion of what a reasonable participant would have spent on a package. Reasoning by analogy to the example I raised regarding Companies X and Y, it would make little sense for a participant to spend $12,000 on a Gold Prime package to get products worth at most 26% of that value, unless there are some exceptional circumstances motivating such a decision. In the present case, it was clear that the exceptional circumstance was that of the prospect of a higher CRP payout, which was consistently providing returns of about 160% over 15 months, notwithstanding that Sunshine Empire was not legally bound to continue paying out at this rate (or at all). This finding is supported by the evidence of the prosecution and defence witnesses who testified that they were drawn to the scheme by the prospect of high returns, something totally unsurprising and entirely reasonable. While some of the defence witnesses testified that they participated for other reasons (*eg* the attractiveness of the e-Mall platform), the DJ rightly pointed out that the credibility of some of these witnesses were affected by prior inconsistent statements given by them showing that they had in fact participated in the scheme for the high payouts.

39 I address two other issues related to the evidence given by the experts. First, I am not convinced by Wu's assertion that IRR should not be used because the Sunshine Empire model is not a n investment scheme. Instead, I agree with Steadman that the IRR is used merely to compute financial attractiveness of a particular scheme and provide some basis for comparison, regardless of whether the scheme was strictly speaking an "investment" scheme or not. Second, I am also unconvinced by Wu's assertion that e-Point sales should be regarded as actual sales (and should therefore be considered revenue as well). It was clear that no additional cash was brought into Sunshine Empire when e-Points were used to purchase packages. Indeed, as the Prosecution pointed out, Wu maintained the somewhat artificial position that e-Point sales should be considered as cash even if nothing but e-Point sales occurred month after month.

40 Finally, I note that despite Phang and Hoo's insistence that CRP was capped at a maximum of 50% of the previous month's revenue (see [28(a)(i)] above), Sunshine Empire's historical record

revealed that it continued to pay CRP at a level which breached this threshold consistently from February 2007 (*Phang Wah (DC)* at [300]).

41 In the circumstances, I agree entirely with the DJ's finding that Sunshine Empire's business was clearly unsustainable. As the prosecution pointed out, in October 2007 (just before the CAD raid in November that year), around $21m was received by Sunshine Empire but over $25m was paid out. It was clear that collapse of the Sunshine Empire scheme was inevitable. However, as was noted above, the fact that its business was unsustainable would not by itself establish the *mens rea* requirement for the s 340 charge. I therefore turn now to examine whether Phang and Hoo had the requisite *mens rea* for the purposes of the s 340 charge.

Whether Phang and Hoo ran Sunshine Empire for a fraudulent purpose

42 I also agree with the DJ's finding that the concept of CRP had been deliberately obfuscated with reference to the consumption on the e-Mall platform and "global turnover" to make participants believe that there was a viable source of profits to fund CRP returns (*Phang Wah (DC)* at [288]). Some of the reasons which compel me to agree with the DJ's finding are as follows:

(a) First, Phang had admitted that participants were not informed that CRP returns were paid from revenue from the sale of packages. Instead, participants were informed that the returns were from the consumption on e-Mall (*Phang Wah (DC)* at [283]). When Hoo was testifying on this point, the DJ found his evidence to be guarded, evasive and vague (*Phang Wah (DC)* at [284]). Although Hoo acknowledged that it was nowhere stated that CRP returns were paid from sales of packages, he persisted in his contention that the references to privileges being "dependent on the Sunshine Empire worldwide performance" and "based on 10% of Sunshine Empire's global turnover on the e-mall platform" were sufficient to let the participants know how CRP returns were funded (*Phang Wah (DC)* at [284]). I note that on appeal Hoo argued that "global turnover" affected Phang's discretion and was a consideration in deciding how much CRP payments were to be paid out (see above at [30(c)]). However, this appears contrived as it was an argument raised in submissions rather than in evidence by Hoo when he was on the witness stand. Furthermore, it would have been considerably easier and more accurate for Sunshine Empire to have stated that the privileges were "dependent on the Sunshine Empire's ability to secure sales of new packages". The failure to make such a statement, coupled with the decision to make references to grand concepts such as "worldwide performance" and "global turnover", showed that the concept of CRP was indeed deliberately obfuscated.

(b) Second, on the evidence, even senior distributors like Liew Chiew Lan (see also [54(b)(iii)] where she is referred to again) did not know that CRP was funded from the sale of packages (*Phang Wah (DC)* at [285]). A number of witnesses (both prosecution and defence witnesses) confirmed that they were told about projects overseas and that they consequently believed that CRP returns were from the projects (*Phang Wah (DC)* at [286]). Indeed, some participants were even offered free air tickets to Taiwan to see the development of the so-called Taichung project (*Phang Wah (DC)* at [286]).

(c) Third, the legal advisor involved in drafting the documentation, Goh, was not given the details on how CRP was funded (*Phang Wah (DC)* at [287]). Goh testified that he did not give legal advice on the operations of Sunshine Empire's business as he did not know the business and how the CRP rebates were being funded.

43 Therefore, the fact that the Sunshine Empire scheme was apparently drafted in consultation with a legal advisor in conformity with the MLM legislation does not affect the s 340 charge. The

affixation of tinsels and other decorations (by way of mall points and EM-Call talk time) as well as the making of vague references to "worldwide performance", "global turnover" and various international projects were disingenuous – it was part of a well thought-out scheme designed to defraud participants under an aura of legitimacy and respectability.

44 In conclusion, I agree that both the *actus reus* and *mens rea* elements in respect of the s 340 charge were made out beyond reasonable doubt and the DJ was correct in convicting Phang and Hoo on this charge. I therefore dismiss Phang's and Hoo's appeal against conviction for this offence.

Section 409 charges

45 The eight s 409 charges against Phang and Hoo were for committing CBT as agents by virtue of their engagement in a conspiracy to cause Sunshine Empire to make payments based on 1% of the monthly sales to Neo as commission purportedly as a GSD when they knew that she was not qualified under Sunshine Empire's compensation plan.

The law

46 Section 409 of the Penal Code provides:

> **Criminal breach of trust by public servant, or by banker, merchant, or agent.**
>
> 409. Whoever, being in any manner entrusted with property, or with any *dominion over property*, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.
>
> [Emphasis added]

47 Section 109 of the Penal Code provides;

> **Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment**
>
> 109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
>
> *Explanation*. – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

48 In order to constitute the offence of criminal breach of trust, the accused person must be entrusted with the property and must have dishonestly misappropriated it (*Tan Tze Chye v Public Prosecutor* [1997] 1 SLR(R) 876 ("*Tan Tze Chye*") at [36], cited in *Goh Kah Heng v Public Prosecutor* [2010] 4 SLR 258 at [44]). To "misappropriate" means "to set apart or assign to the wrong person or wrong use" (*Tan Tze Chye* at [37]).

49 Sections 23 and 24 of the Penal Code provide the following definitions:

> **Wrongful gain**

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled.

Wrongful loss

"Wrongful loss" is loss by unlawful means of property to which the person losing it is legally entitled.

Explanation.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

Dishonestly

24. Whoever does anything with the *intention* of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.

The arguments

50 There was no dispute that Hoo, as director of Sunshine Empire, was entrusted with dominion over the monies belonging to the company. There was also no dispute that the monies in the eight charges, totalling $947,904.88, were paid out either to Phang (on behalf of Neo) or to Neo between December 2006 and August 2007 by way of cheques signed by Phang. It was further agreed that it was Phang who approached Hoo to make the payments to Neo and that Hoo agreed to the request and authorised the issuance of the eight cheques.

51 The general tenor of the arguments raised by counsel for Phang and Hoo was that Neo "deserved" to be appointed a GSD by virtue of her immense contributions to Sunshine Empire and the fact that she was not formal*ly* appointed did not cause the payments made to her as a GSD to have been made dishonestly. More specifically, the arguments raised were as follows:

(a) Neo had contributed greatly to Sunshine Empire, for instance, by giving Sunshine Empire her considerable network of downlines. Furthermore, she did not receive any consideration for her contributions, including giving up her entire money-making and profitable network to Sunshine Empire.

(b) Neo qualified as a GSD within the Sunshine Empire's compensation plan and she was regarded and treated by Phang and Hoo to be a GSD. Although Phang and Hoo testified (and conceded) that Neo was not formally appointed as a GSD, they argued that the failure to comply with the company's formalities did not mean that their acts were carried out with dishonest intention. In any case, the fact that Phang and Hoo thought Neo qualified as a GSD and regarded and treated her as one would mean that they were not dishonest when they caused Sunshine Empire to pay Neo 1% as a GSD; at worst, they had directed Sunshine Empire to make the payments under a mistake of fact, thus entitling them to the defence provided in s 79 of the Penal Code which reads:

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

[The "illustration" in the section is not reproduced here.]

(c) As Neo had attained an "even higher" status or rank (of "International Sales Director") at least 10 years ago, there was no need for any ceremonial appointment of her as a GSD.

(d) There was no concealment of facts or of the payments made to Neo, as the payments were transparent in Sunshine Empire's accounting books and the company's accounts department was aware that the payments were made for Neo's contributions to Sunshine Empire.

(e) If Hoo had made the wrong decision to pay Neo, he would only be liable for breach of s 157 Companies Act (duty of directors to act honestly and to use reasonable diligence) rather than CBT as there was no dishonesty on his part.

52 Based on the above arguments, Phang and Hoo argued that neither the *actus reus* nor *mens rea* of the s 409 charges had been proved beyond reasonable doubt.

The decision of the court

53 The DJ was satisfied that there was dishonesty because Phang and Hoo knew that Neo did not meet the qualifications of a GSD but went ahead to direct that payments be made to her as a GSD (*Phang Wah (DC)* at [323]).

54 Having perused the evidence and considered the submissions on appeal, I agree with the DJ's findings and affirm the convictions for the reasons that the DJ set out in detail in her written decision. They are briefly summarised in the following paragraphs.

(a) First, Neo was not in fact appointed as a GSD. On her own evidence, she neither knew that she qualified as a GSD nor that she had been so appointed. Phang and Hoo testified that they had regarded Neo as a GSD but had not announced the appointment to her because there was no need for her to know of the appointment. This was strange against the backdrop that, according to Phang's testimony, such appointments were often made ceremonially at company events. The inference to be drawn was therefore that Neo was not in fact appointed as a GSD.

(b) Second, there was no evidence that Neo qualified to be a GSD.

(i) On Phang's evidence, the names of managers who met the qualification criteria were generated by the computer system and Neo's name had not been recognised as having the level of sales or managers required for appointment as a GSD.

(ii) Phang and Hoo did not provide any evidence of the purported extensive network of downlines attributable to Neo.

(iii) Further, one of the requirements for qualification as a GSD was that the prospective appointee should have 3 BRMs. At the time when Neo started receiving the 1% payments in 2006, the evidence was that one of Neo's purported BRMs, Liew Chiew Lan (see also [42(b)] above), had not yet been promoted to BRM. Indeed, Liew had earlier told the CAD that she was promoted to BRM only in May 2007.

(c) Third, the evidence suggested that the payment to Neo as a GSD was made for extraneous reasons (*viz*, not because Neo qualified as a GSD under the compensation plan). Phang and Hoo repeatedly testified that Neo deserved the 1% payment in recognition of her

contributions to Sunshine Empire. The same reason was apparently given to Jean Yi, who additionally testified that she had never been told that the payment was pursuant to Neo's appointment as a GSD.

55 The 1% payments to Neo amounted to misappropriation of Sunshine Empire's monies because the payments involved assigning the monies to the wrong person (Neo) and wrong use (as payment as a GSD when Neo was neither qualified nor appointed as GSD). The said payments were also made dishonestly, with the intention of causing wrongful gain to Neo (as she was not entitled to the payments) and wrongful loss to Sunshine Empire.

56 Accordingly, I find that both the *actus reus* and *mens rea* elements of the s 409 charges were also made out beyond reasonable doubt. I therefore dismiss Phang's and Hoo's appeal against conviction on these charges.

Section 477A charges

57 The six charges under ss 477A read with 109 of the Penal Code against Phang and Neo were for their engagement in a conspiracy to disguise six payments (which were the subject-matter of the s 409 charges) by causing them to appear to have been paid to Phang when they were meant for Neo.

The law

58 Before analysing the facts in the s 477A charges, I have a short comment on the form of the charges. I do not think it is necessary to invoke s 109 in a charge under s 477A ("Falsification of accounts") when abetment is alleged in the circumstances here. This is because s 477A already makes reference to the offence of abetting the falsification of accounts, as follows:

> **Falsification of accounts**
>
> 477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or ***wilfully and with intent to defraud makes or abets*** the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, paper, writing, valuable security or account, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.
>
> *Explanation.*—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud or any particular day on which the offence was committed.
>
> [Emphasis added in bold italics]

However, the addition of s 109 in the s 477A charges does not change the meaning of the charges in any case and no injustice of any sort has been occasioned.

The arguments

59 The DJ found that the falsehood in the six payment vouchers was clearly established because they were stated in the name of Phang when they were meant for Neo (*Phang Wah (DC)* at [327]). It was undisputed that Neo had instructed Jean Yi of the accounts department to make the payment vouchers in Neo's name in one month and Phang's name in the following month. As Neo herself testified, her purported intention in making such an arrangement was to reduce her tax liability.

60 Phang and Neo argued that another reason for making the said arrangement was for part of Neo's income to go to Phang so as to avoid Phang's embarrassment in having a low income despite being the International President of the Sunshine Enterprise Group of Companies. Indeed, Phang went so far as to assert in a statement to the CAD (recorded under s 121 of the Criminal Procedure Code on 19 December 2007) that save for the said arrangement (of falsifying the payment vouchers), he would have to be "declared $0 income". [note: 1]

The decision of the court

61 The DJ was correct in finding that the falsification of the payment vouchers was a dishonest act intended to lessen the amount of tax to be paid, thus amounting to defrauding the tax authority (*Phang Wah (DC)* at [328]). Counsel for Phang and Neo argued on appeal that no evidence was led on how much tax Neo would be able to save by the device of the false payment vouchers. The DJ opined that if the purpose had been achieved, "it would have led to [Neo] paying about less than $21,000 in income tax" (*Phang Wah (DC)* at [346]), although it is not immediately apparent how that figure was derived. In this regard, I note that the rate of income tax is between 3-17% for the first $320,000 of taxable income, with a flat rate of 20% thereafter (see the Second Schedule of the Income Tax Act (Cap 134, 2004 Rev Ed)). It therefore follows that if Phang had a low income or no income whatsoever (as he claimed, "$0 income"), the falsification of the payment vouchers and the consequent transfer of income to him would certainly have had the effect of reducing the overall income tax payable, thereby defrauding the tax authority. In any case, the explanatory note to s 477A makes it clear that it is sufficient to assert a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud (see [58] above).

62 I therefore agree with the DJ's finding that the falsification in this case was done wilfully and with intent to defraud. Accordingly, I also dismiss Phang's and Neo's appeals against conviction on the s 477A charges.

The Sentences

63 I now deal with the appeals and cross-appeals against the sentences meted out to the appellants upon their conviction on the respective charges. Section 261 of the Criminal Procedure Code states:

> **Grounds for reversal of judgment, etc., of District Court or Magistrate's Court.**
>
> 261. No judgment, sentence or order of a District Court or Magistrate's Court shall be reversed or set aside unless it is shown to the satisfaction of the High Court that the judgment, acquittal, sentence or order was either wrong in law or against the weight of the evidence, or, in the case of a sentence, manifestly excessive or inadequate in the circumstances of the case.

64 In *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [14], the Court of Appeal held that an appellate court will only interfere with a sentence if:

(a) The trial judge had made the wrong decision as to the proper factual matrix for sentence;

(b) The trial judge had erred in appreciating the material before him;

(c) The sentence was wrong in principle;

(d) The sentence was manifestly excessive, or manifestly inadequate. A "manifestly inadequate" sentence is one which is "unjustly lenient… and requires substantial alterations rather than minute corrections to remedy the injustice" (*Kwong Kok Hing* at [15], citing *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22]).

65 With these principles in mind, I turn now to consider whether the sentences ordered by the DJ ought to be varied in type, reduced or enhanced, as the case maybe.

Section 340 charge

66 The punishment prescribed for the s 340 charge is provided in s 340(5) of the Companies Act (see [22] above), *viz*, a fine not exceeding $15,000 or imprisonment for a term not exceeding 7 years or both. For this charge, the DJ sentenced Phang and Hoo to 4 years 6 months' imprisonment and 3 years 6 months' imprisonment respectively.

67 Counsel for Phang and Hoo submitted that the sentences meted out for the s 340 charge were manifestly excessive for the following reasons:

(a) First, no loss was suffered by participants of the Sunshine Empire scheme.

(b) Second, to date, no complaint or law suit has been filed against Sunshine Empire claiming wrongful loss or damages.

(c) Third, all the realisable assets of Sunshine Empire and its associate companies were seized by the CAD and are now in safe custody. The said assets amounted to about $21m. Hence, all available funds have been preserved for distribution to the participants of the Sunshine Empire scheme.

(d) Fourth, there was no evidence that either Phang or Hoo profited personally from Sunshine Empire's business.

(e) Fifth, the DJ erred by finding that the elaborate set-up (brochures, publicity, *etc*) of the Sunshine Empire scheme was an aggravating factor; instead, the elaborate set-up indicated that Sunshine Empire was a well thought-out and genuine corporate mechanism.

68 Phang and Hoo also raised arguments specific to their own culpability and the appropriate punishment.

(a) Phang submitted that he had already suffered a business failure due to the intervention by the CAD and that the destruction of his company – the culmination of many years' effort and ingenuity – was already sufficient punishment.

(b) Hoo argued that his culpability was low because he had in fact arranged to meet the CAD on the day of the raid to discuss the Sunshine Empire business model. He further pointed out that Phang was the dominant personality and the mastermind of the Sunshine Empire model, whereas

he had always looked to Phang for guidance.

69 On the other hand, the prosecution submitted that the DJ's sentences were manifestly inadequate and that deterrent sentences would be appropriate in the circumstances here. The prosecution suggested that the sentences imposed should be way past the median and closer to the higher end of the prescribed maximum punishment of 7 years' imprisonment. As an overall view of the aggregate sentences, the prosecution argued that the individual imprisonment terms should be increased and more such terms should be made to run consecutively.

70 Looking at everything in perspective, I see no reason to vary the nature of the sentences or to lower or enhance the sentences ordered by the DJ. It is clear that Sunshine Empire's fraudulent business scheme was propagated on a large scale involving more than a hundred million dollars from the trusting public. Despite attempts to clothe the scheme with trappings of legitimacy, such as the e-Mall platform and EM-Call talk time, it was, shorn of its camouflage, a money circulation scheme without genuine sale of goods and services. It was marketed primarily as a compensation plan, with high CRP payouts being the irresistible lure of the scheme. Participants were carefully steered away from realising that the profits they would be earning would not come from investments in various projects but were monies injected by more purchases of packages, whether by new participants or existing ones. There was a palpable sense that the Sunshine Empire scheme had been designed specifically to avert and thwart law enforcement.

71 The failure of Phang's business clearly cannot be a mitigating factor in the present case because his business is the precise vehicle through which the fraudulent business was conducted. Also, despite Hoo's arguments that his sentence should be far lower than Phang's to reflect his lower culpability, it is apparent that Hoo also had a big part to play in the sophisticated set-up. He was in charge of training sessions to ensure that Sunshine Empire was marketed as a sustainable, substantive and legitimate enterprise and was the director having control over the activities of the company. Even if he had looked to Phang for leadership, it is clear that he was not merely a passive onlooker or subservient follower in the fraudulent business.

72 If Phang and Hoo did not gain financially from the Sunshine Empire scheme over the 15 months or so of its operations, one wonders why they were in the business in the first place. It would indeed be highly surprising considering the millions of dollars piling up in the coffers of Sunshine Empire. The unlawful payments to Neo already added up to almost $1m. We must also not overlook the huge payments and loans made to their affiliated companies (see [12] above). Obviously, the appellants were enjoying the richness of the financial oasis that they created in the barren desert of Sunshine Empire by luring more and more unwary participants with the mirage of a highly successful enterprise churning out huge returns on a regular basis.

73 I also do not think that the sentences are manifestly inadequate in the sense of being "unjustly lenient" (see [64] above). As matters stand, no participant in the scheme appears to have been adversely affected in any way but that is of course largely due to the pre-emptive and timely intervention by the CAD. As the scheme grows ever larger and the CRP payouts become impossible to service, one can see the potential for massive losses to the later participants as the mirage caused by the Sunshine Empire scheme begins to disappear. On the totality of the evidence here, the sentences imposed by the DJ struck a good balance between deterrence and the legal and moral culpability of Phang and Hoo. The imprisonment terms ordered were already at least half of the maximum permissible under s 340. On the principles propounded in *Kwong Kok Hing*, I see no cause for enhancing the imprisonment sentences for Phang and Hoo on the s 340 charge.

Section 409 charges

74 Section 409 of the Penal Code carries mandatory imprisonment and, at the time of commission of the s 409 offences (*ie*, before the 2008 Revised Edition of the Penal Code came into force), the maximum imprisonment term was life imprisonment or a term of up to 10 years (see [46] above). There is also liability to be fined.

75 Phang was sentenced to imprisonment for terms of between 15 and 30 months on each of the eight s 409 charges, with the sentences in DAC 7826/09 (30 months) and DAC 7827/09 (24 months) to run consecutively, making a total of 54 months' (or 4 years 6 months') imprisonment for the CBT offences. Phang did not raise any specific grounds of appeal against this sentence, relying instead on the general grounds summarised in [67] above and arguing that the totality of the imprisonment terms (*viz*, 9 years' imprisonment for the s 340 and s 409 charges) was manifestly excessive.

76 Hoo was sentenced to imprisonment for terms of between 9 and 24 months on each of the eight s 409 charges, with the sentences in DAC 7755/09 (24 months) and DAC 7756/09 (18 months) to run consecutively, making a total of 42 months' (*ie* 3 years 6 months') imprisonment. Hoo contended on appeal that the DJ erred in failing to give sufficient weight to the fact that Hoo did not obtain any benefit from the transactions and that Neo had deserved the 1% remuneration by virtue of her vast contributions to Sunshine Empire.

77 The prosecution submitted that the sentences were inadequate, pointing out that the amounts involved in the charges ranged from $51,652.94 to $245,027.05. According to the prosecution, the charges with the lower amounts should carry imprisonment terms in the region of a few years, while those with higher amounts should be in the mid-range of the second tier maximum sentence of 10 years' imprisonment. Therefore, bearing in mind what the sentences for each charge ought to be, the prosecution sought to persuade me that the aggregate imprisonment terms of 4 years 6 months (Phang) and 3 years 6 months (Hoo) in respect of the s 409 charges were manifestly inadequate.

78 It is trite that CBT is a serious offence. As explained in Andrew Ashworth, *Sentencing and Penal Policy* (Weidenfield & Nicolson, 1983) at p 194:

> Where an offence involves a breach of trust, this is generally treated as an aggravating factor. Its powerful influence is shown by the degree to which it outweighs factors which would normally go in mitigation. Indeed, there is a the paradox that some of the strongest factors in mitigation (unblemished career, model citizen, good employment record) are often present in these cases and yet do not tell greatly in the offender's favour. The reason is that positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very characteristics. The individual who puts himself forward as trustworthy, is trusted by others and then takes advantage of his power for his own personal ends can be said to offend in two ways – not only does he commit the crime charged…, but in addition he breaches the trust placed in him by society and by the victims of the particular offence.

79 It should further be noted that CBT by a director of property within his dominion and control merits a significant sentence since it is a clear abuse of the trust that was reposed in him. This is reflected in the maximum punishment under s 409 (CBT as an agent) being much heavier than that under s 406 (simple CBT which carries a maximum of 3 years' imprisonment, a fine or both).

80 The present case involved an egregious case of CBT, with a total of $947,904.88 taken from Sunshine Empire over a number of months from December 2006 to August 2007. These were not one-off lapses but were part of sustained activity, reducing the funds available to Sunshine Empire. I do not think that there is any mitigation value in the fact that Neo may have "deserved" some of the

misappropriated amounts because of her alleged contributions to Sunshine Empire because the extent of Neo's contributions was not proved and, more tellingly, because Neo claimed that she was entitled to the 1% payments as she was Phang's wife (rather than due to any alleged "contributions" on her part).

81 I agree with the DJ's finding that Phang's blameworthiness here was higher than that of Hoo (*Phang Wah (DC)* at [338]). It was Phang who set in motion the CBT offences and the monies were paid to his wife, Neo. While there was no evidence of Hoo obtaining any personal benefit from the s 409 offences, Hoo was a director of Sunshine Empire and the company's property was clearly within his dominion and control. He abused the trust reposed in him and the fact that he may not have obtained any direct personal benefit from his CBT is therefore not of great mitigation value.

82 The DJ ordered a sentence of 30 months (Phang) and 24 months (Hoo) for the most serious act of CBT involving $245,027.05. She also ordered the imprisonment terms for two of the most serious charges (for Phang and Hoo respectively) to run consecutively. In my view, the aggregate imprisonment terms of 4 year 6 months (Phang) and 3 years 6 months (Hoo) were neither manifestly excessive nor manifestly inadequate. They were a good measure of the respective culpability of the two men, considering the period over which the CBT offences took place, the amount involved and the fact that the offences would in all likelihood have continued but for the CAD raid. There is therefore no need to vary the sentences here downwards or upwards.

Section 477A charges

83 The prescribed punishment under s 477A of the Penal Code is imprisonment for a term not exceeding 7 years or fine or both (see [58] above). The DJ fined Phang and Neo $10,000 on each of the 6 charges, totalling $60,000 for each of them.

84 Phang did not raise any specific grounds of appeal against this sentence, relying instead on the general grounds summarised in [67] above. As mentioned earlier, Neo did not appeal against the $60,000 fine which she has paid.

85 The prosecution appealed against the sentences passed on Phang and Neo, claiming that the DJ erred in (a) placing insufficient weight on aggravating factors (*ie* that Phang and Neo had conspired to falsify the payment vouchers), (b) insufficiently considering the principle of deterrence, and (c) wrongly holding that the consequences flowing from Neo's action (*ie* to conceal the s 409 offences) were irrelevant in sentencing. The prosecution suggested that an aggregate imprisonment term of 6 months would be appropriate for Neo while the overall sentence for Phang (in respect of all the offences under the Companies Act and the Penal Code) should be enhanced subject to the then maximum of 14 years' imprisonment which the district court could impose at any one trial.

86 As pointed out by the DJ (*Phang Wah (DC)* at [346]), Phang and Neo did not attempt to conceal the purpose of falsifying the vouchers from the staff in Sunshine Empire's accounting department. Further, the deception was not intended to avoid declaring the whole amount of income or to declare a lower fictitious amount; all Neo had done was to try to lessen the amount she had to pay by declaring it under Phang's name. However, there would be some loss to the revenue and the falsification of payment vouchers, like the CBT offences, would in all probability have continued if the CAD had not intervened to investigate the illusion of the Sunshine Empire scheme. In the circumstances, I find that the fines imposed by the DJ were neither wrong in principle nor manifestly excessive or manifestly inadequate.

87 Counsel for Phang and Neo argued that 4 out of the 6 s 477A charges were "not separate,

stand-alone or independent transactions" but were "subordinate to and even steps preparatory of the s 409 charges" and that once the appellants were punished for the s 409 offences, it was unnecessary to impose any separate and substantial punishment for the s 477A offences because there were no separate or distinct losses. However, it cannot be denied that falsification of accounts need not always go hand-in-hand with CBT. They are distinct offences. Here, one could say that the CBT charges relate to the company's loss while the s 477A charges relate to the tax authority's loss. It was therefore correct that a separate set of punishments be imposed for the s 477A charges and that Phang should pay the fines in addition to the sentences for the s 409 charges.

Conclusion

88 In cases where multiple charges are involved, it is the number of consecutive imprisonment terms that is of ultimate concern to all involved. The DJ has given appropriate sentences for each category of offences for the appellants. The aggregate sentences for the appellants also reflected their culpability and should serve as sufficient deterrence against such offences. Accordingly, I dismiss all the appeals brought by the appellants and by the prosecution.

[note: 1] Exhibit P69, Record of Proceedings p 7987, Question 682

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