IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 21

Criminal Reference No 4 of 2017

Between

(1) Kong Hoo (Private) Limited
(2) Wong Wee Keong

… *Applicants*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Offences] — [Endangered species]

[Statutory Interpretation] — [Penal statutes] — [Endangered Species (Import and Export) Act]

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v
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[2019] SGCA 21

Court of Appeal — Criminal Reference No 4 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA, Steven Chong JA
2 July 2018

8 April 2019 Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

Introduction

1 This criminal reference concerns the interpretation of s 2(2) of the Endangered Species (Import and Export) Act (Cap 92A, 2008 Rev Ed) ("ESA"). The said s 2(2) defines what it means for a scheduled species to be "in transit" in Singapore. If a scheduled species is in transit, pursuant to the definition provisions in the ESA, it would not be considered to be imported into or exported from Singapore when it enters or leaves Singapore. The legal consequence is that a permit from Singapore for import or export is not required. If it is imported into or exported from Singapore, a permit from the Director-General of the Agri-Food and Veterinary Authority of Singapore ("AVA") would be required under s 4 of the ESA. If a scheduled species is in transit in Singapore, although no permit from the AVA is required, the trader must

possess permits from the country of export and the country of import (if so required by the country of import).

2 The applicants, Kong Hoo (Private) Limited ("Kong Hoo") and its director, Mr Wong Wee Keong ("Mr Wong"), were charged and convicted of importing Madagascan rosewood ("the rosewood"), a scheduled species under the ESA, without a permit, an offence under s 4(1) of the ESA. Their defence was that they did not need an import permit because the rosewood was in transit in Singapore. They were acquitted in the District Court but convicted on appeal in the High Court on the basis that the rosewood was imported into Singapore rather than being in transit here. Leave was granted subsequently for the applicants to file this criminal reference on what constitutes a scheduled species "in transit".

3 There are two conditions in s 2(2) of the ESA to be satisfied for a scheduled species to be considered to be in transit. First, it is brought into Singapore for the sole purpose of taking it out of Singapore ("the sole purpose condition"). Second, it remains in the conveyance at all times while in transit but if it is taken off the conveyance, it has to be under the control of an authorised officer ("the control condition").

4 The two questions in this reference relate to each of these conditions respectively. They read:

> (a) Whether, in determining if a scheduled species is considered in "transit" within the meaning of s 2(2) of the ESA, it is necessary to prove that, at the time of entry of the scheduled species into Singapore, the scheduled species will leave Singapore at a defined date? ("Question 1")

(b) Whether, in determining if a scheduled species – which was removed from the conveyance in or on which it was brought into Singapore – was kept under the control of an "authorised officer" as defined under s 2(2) of the ESA, it must be shown that the officer knew of the existence of the scheduled species and exercised conscious oversight over the scheduled species? In any event, who bears the applicable legal burden of proof? ("Question 2")

5 In the High Court, the Judge held that the answers to the questions were both yes, primarily because such an interpretation would promote the purpose of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (3 March 1973) 993 UNTS 243 (entered into force 1 July 1975) ("CITES"), which Singapore is a party to. The ESA was enacted to give effect to CITES, which aims to protect endangered species by regulating their movement and trade.

6 Before us, the parties agree that Question 1 should be answered in the negative but they differ on Question 2. The applicants submit that Question 2 should also be answered in the negative but the Prosecution contends the opposite. However, both parties agree that the applicable legal burden to prove the absence of the control condition in Question 2 is on the Prosecution.

7 For the reasons given below, we answer the questions as follows:

(a) Question 1: **No**. In determining if a scheduled species is considered to be in "transit" within the meaning of s 2(2) of the ESA, it is not necessary to prove that, at the time of entry of the scheduled species into Singapore, the scheduled species will leave Singapore at a definite date, although it is a relevant consideration. This was not

disputed by the parties. Although this question used the words "defined date", in this judgment, we have used the term "definite date" instead.

(b) Question 2: **No**. In determining if a scheduled species – which was removed from the conveyance in or on which it was brought into Singapore – was kept under the control of an "authorised officer" as defined under s 2(2) of the ESA, it is not necessary to show that the authorised officer knew about the arrival and the location of the scheduled species and was in a position to exercise conscious oversight over it.

(c) Both parties agree that the Prosecution bears the burden of proof in respect of the control condition, in that the Prosecution has to show that there was no control over the scheduled species by any authorised officer. Given the parties' agreement, we need say no more about this issue.

Legal context

8 In determining the questions raised in this reference, it is helpful to have some knowledge about the history of CITES and of the ESA.

CITES

9 CITES is a multilateral treaty which aims to protect endangered wildlife by regulating its movement and trade. It entered into force in 1975. All the countries mentioned in this case (Madagascar, Singapore and Hong Kong) are parties to CITES.

10 The premise of CITES is that peoples and states are and should be the best protectors of their own wild fauna and flora. Therefore, the regulation of

movement and trade of endangered species is carried out through domestic permits issued by member states. Protected species are listed in Appendices I to III to CITES depending on the level of protection they require, with those in Appendix I requiring the most protection. The regulation of the species in the Appendices differs in respect of the permits that are required for their trade. For example, Appendix I species can only be exported with a permit, known as a CITES export permit, issued by the country of export and can only be imported with another permit, known as a CITES import permit, issued by the country of import: Art III of CITES. Appendix II species also require a CITES export permit for their export but CITES does not require specifically that an import permit be obtained before they are brought into the country of import. However, this does not prevent the parties to CITES from adopting stricter domestic measures (Art XIV(1) of CITES) and some countries do require such import permits.

11 Madagascan rosewood was listed in CITES Appendix II in March 2013 and therefore requires an export permit from Madagascar if exported for trade. CITES does not require the country of import to issue an import permit for this species but Singapore law nevertheless requires it: s 4(1) of the ESA.

12 The parties to CITES meet regularly every two to three years to review the implementation of the treaty. This is known as the Conference of the Parties. Resolutions are passed at the Conference of the Parties which are essentially non-binding recommendations to improve the effectiveness of CITES (Art XI(3)(e) of CITES). A particular resolution, namely Conf 9.7, was relied upon heavily by the High Court Judge ("the Judge") and the Prosecution for the interpretation of s 2(2) of the ESA and we consider it in detail below.

ESA

Legislative history

13 Singapore acceded to CITES in November 1986 with no reservations as to any listed species. In 1989, it enacted the Endangered Species (Import and Export) Act (No 4 of 1989) ("ESA 1989") to give effect to CITES. As explained by then Senior Minister of State for National Development, Dr Lee Boon Yang, at the second reading of the bill, up until then, Singapore had been enforcing the CITES requirements through existing Acts such as the Wild Animals and Birds Act (Cap 351, 2000 Rev Ed) and the Fisheries Act (Cap 111, 2002 Rev Ed). However, these Acts were limited in reach as they were primarily intended for disease control and general animal welfare rather than for the trade in endangered species. The ESA 1989 was thus enacted to "effectively control the trade in endangered species to meet CITES's requirements" (*Singapore Parliamentary Debates*, *Official Report* (26 January 1989) vol 52 at cols 561–562).

14 Under the ESA 1989, a permit from the then Primary Production Department (now the AVA) was required for the import, export, re-export or introduction from the sea of scheduled species. Specimens in transit would not be considered to be imported or exported and therefore did not require such permits. The definition of transit was provided in s 2(2) of the ESA 1989 as follows:

> (2) For the purposes of this Act, a scheduled *species shall be deemed to be in transit if it is brought into Singapore solely for the purpose of taking it out of Singapore* and —
>
> (*a*) remains at all times in or on the conveyance in or on which it is brought into Singapore;
>
> (*b*) is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance

> before being despatched to a place outside Singapore, and is kept under the control of the Director or an authorised officer while being so removed, returned or transferred; or
>
> (*c*) is removed from the conveyance in or on which it was brought into Singapore and kept under the control of the Director or an authorised officer for a period not exceeding 14 days or such longer period as the Director may permit pending despatch to a place outside Singapore.
>
> [emphasis added]

15 In 2006, the ESA 1989 was repealed and re-enacted with amendments. The explanatory statement to the Endangered Species (Import and Export) Bill (Bill No 43 of 2005) stated that the re-enactment sought to (a) increase the penalties for certain offences to deter illegal wildlife trafficking; (b) enhance AVA's enforcement powers; and (c) update and streamline the Act. There were two notable changes in this re-enactment. First, the first line of s 2(2) of the ESA (emphasised in [14] above) was changed such that a "scheduled species shall be considered to be in transit if, and only if" the attendant requirements were met, rather than "deemed to be in transit" as in the ESA 1989. Second, a new offence was created. The new s 5 stated that every shipment of a scheduled species in transit had to be accompanied by a CITES export permit and/or CITES import permit (if required by the country of import) or comparable documentation. It would be an offence if no such permits accompanied the shipment. It was therefore only in 2006 that the transit of scheduled species in Singapore was regulated with criminal sanctions under the ESA.

The current scheme of the ESA

16 Currently, the trade of scheduled species is regulated under the ESA through a permit system. Two offence-creating sections, ss 4 and 5, cater to the import/export of scheduled species into/from Singapore and the transit of scheduled species in Singapore respectively. The two sections thus regulate two

mutually exclusive situations, although they provide for the same penalties of a fine of $50,000 per scheduled species up to a maximum of $500,000 and/or imprisonment up to two years. In summary, the legislation requires as follows:

(a) The import and export of scheduled species into and from Singapore require a permit from the Director-General of the AVA. Failure to do so would be an offence under s 4(1) of the ESA. Therefore, if the rosewood was imported from Madagascar into Singapore (which the applicants deny), an import permit from Singapore would be required. There is no express domestic legislative requirement that an export permit from the country of export (here, Madagascar) is required for import into Singapore but this is one of AVA's requirements before an import permit can be issued in Singapore. The CITES factsheet produced by AVA's witness Ms Lye Fong Keng ("Ms Lye") states that the applicant for an import permit has to enclose the CITES export permit from the country of export.

(b) If the scheduled species is not imported into or exported from Singapore but is merely in transit, the ESA still requires that the scheduled species be accompanied by a CITES export permit or other written permission and a CITES import permit (if required by the country of import). Failure to do so would be an offence under s 5(1) of the ESA. Therefore, if the rosewood was exported from Madagascar and was intended for import into Hong Kong but transited in Singapore (which the applicants claim), when it is in transit in Singapore, it must be accompanied by a CITES export permit from Madagascar and a CITES import permit from Hong Kong (if required by Hong Kong).

17 Whether a species is in transit is determined by s 2(2) of the ESA. As mentioned above, there are two conditions required by the ESA:

(a) First, the scheduled species has to be brought into Singapore solely for the purpose of taking it out of Singapore; and

(b) Second, it either has to remain in or on the conveyance at all times or if it is removed from the conveyance, it has to be kept under the control of an authorised officer. An "authorised officer" is defined in s 2(1) of the ESA and includes any police officer, any customs officer within the meaning of the Customs Act and any public officer, AVA officer or officer of any other statutory authority appointed by the Director-General under s 3(2) of the ESA.

Facts

The rosewood

18 It is not disputed that Mr Wong had, on behalf of Kong Hoo, agreed to purchase the rosewood from a business associate in Madagascar. He had also engaged Jaguar Express Logistics Pte Ltd ("Jaguar Express"), which provides transportation and warehousing services, to unload the rosewood when the vessel berthed in Singapore, repack them into containers and truck them to another port managed by the Port of Singapore Authority ("PSA Port").

19 On 28 February 2014, the consignment of rosewood entered Singapore waters on board the vessel MV Oriental Pride ("the vessel") from Madagascar. Around that time, AVA officers received information that the vessel was believed to be carrying an illegal export of timber from Madagascar. The relevant shipping and customs-related documents contained the following information:

(a) The rosewood was shipped under two bills of lading. The port of discharge was stated as Singapore and the consignee and notify-party was "Kong Hoo Private Limited". The cargo particulars furnished by the shipper was "pieces de BOIS", the French word for wood.

(b) The cargo manifest stated that the vessel was carrying a total of 30,657 logs of wood and the port of discharge was Singapore. The consignee was Jaguar Express. The manifest was submitted to Jurong Port's online system by Jaguar Express's stevedore, B.S.K. Stevedoring Pte Ltd, before the vessel berthed in Singapore. The Harmonised System Code ("HS Code") entered for the goods to be shipped was "44(01–05)", which related to wood generally instead of the specific HS Code for rosewood (which would be 44039990).

(c) The pre-arrival notification stated that the vessel was carrying logs. It was submitted to the Maritime and Port Authority of Singapore ("MPA") by Mr Ernest Wee Pan Ann ("Mr Wee") on behalf of the vessel's manager, AMMShips Pte Ltd, on 26 February 2014, two days before the vessel entered Singapore waters.

20 On 11 March 2014, the vessel berthed at the Jurong Port in Singapore. Over the next three days, Jaguar Express unloaded 6,164 rosewood logs from the vessel ("the unloaded rosewood") and moved them to a yard within the Jurong Port (J16). It is not disputed that the rest of the logs ("the remaining rosewood") were also intended to be unloaded to the yard but before this could be done, AVA officers boarded the vessel on 14 March 2014 and subsequently seized all the unloaded and the remaining rosewood. The shipment was subsequently ascertained to comprise 29,434 logs of rosewood in total, and not 30,657 logs as indicated in the export documents (see [23] below).

21 The applicants' case is that they had intended to import the rosewood into Hong Kong. They did not provide any details of their buyer in Hong Kong and the country and the buyer was not stated in any of the shipping or export documents. However, two months earlier in January 2014, Jaguar Express had provided them with quotations for (a) transhipment of cargo from Jurong Port to PSA Port (including unloading, repacking, transportation) and (b) ocean freight charges from Singapore to Hong Kong and the possible vessels for that route. It is not disputed that the applicants had not selected a vessel departing to Hong Kong, had not made any confirmed bookings for the voyage and Jaguar Express's task was limited to bringing the consignment from Jurong Port to PSA Port.

AVA's investigations

22 AVA commenced investigations into the seized rosewood. The rosewood did not have the following import permits:

(a) An import permit from AVA to import the rosewood into Singapore; and

(b) An import permit from the Hong Kong authorities for import of the rosewood. Hong Kong had not regulated this and thus did not require an import permit for rosewood at the material time. This is not disputed by the parties.

23 As for country of export permits, during the investigations, the applicants passed AVA a set of documents ostensibly showing that they had been authorised to export the rosewood from Madagascar (collectively the "Madagascan export documents"). These comprised:

(a) a letter from the Director-General for the Madagascan Forestry Ministry dated 10 March 2010 authorising the export of 5,000 tonnes of rosewood ("the 2010 authorisation letter"). This was the only document that mentioned rosewood specifically instead of "wood";

(b) two documents dated 17 and 18 February 2014, purportedly from the Madagascan Forestry Ministry authorising a total of 3,065 cubic metres (30,657 logs) of "wood" (the type of wood was not specified) to be exported for commercial purposes ("the 2014 authorisation documents");

(c) two certificates of declaration and verification on forest products for export for a total of 3,065 cubic metres of "wood" dated 17 and 18 February 2014 ("verification for export documents");

(d) two certificates of origin for 3,065 cubic metres of "wood" dated 17 and 18 February 2014 ("certificates of origin"); and

(e) two phytosanitary certificates for 30,657 pieces of "wood" dated 17 and 18 February 2014 ("phytosanitary certificates").

24 AVA doubted the authenticity of the Madagascan export documents for two main reasons. First, the documents did not comply with CITES procedure. Second, Madagascar had imposed a zero export quota on rosewood and it was unclear whether this was still in force. If so, the applicants could not have been authorised to export the rosewood. After Madagascan rosewood was listed in CITES Appendix II in March 2013, the Madagascan government imposed a zero export quota on rosewood from 13 August 2013 to 13 February 2014. On 26 February 2014, about two weeks after the end of the zero export quota period, a notification was sent to the CITES member states stating that the Madagascan

government had extended the zero export quota until 14 April 2014. However, the notification did not clarify whether the interim period between the end of the first quota period and the notification date (14 to 25 February 2014) was subject to the export embargo. This was relevant because the two bills of lading for the rosewood were issued on 19 February 2014 and they stated that the cargo was shipped on 18 February 2014. Further, most of the Madagascan export documents produced by Mr Wong were dated 17 and 18 February 2014.

25 During AVA's investigations, the following events occurred:

(a) On 19 March 2014, Ms Lye wrote to the Madagascan Forestry Ministry to seek clarification on the authenticity of the export documents. A Mr Jean Claude, bearing the title of Director-General in the Ministry, replied to say that the documents were not authentic.

(b) On 28 March 2014, Ms Lye received an email from the Madagascan Forestry Ministry's web domain that referred to her request for authorization and stated that "Mr… Soilihi has been exceptionally allowed to export these merchandises under the bill of lading". Mr Soilihi was listed as a shipper in the bills of lading and was also the person ostensibly authorised to export the rosewood in the 2010 authorisation letter ([23(a)] above). Later, Ms Lye was informed by the CITES Secretariat that the Ministry's email account had been hacked.

(c) On 4 November 2014, the Madagascan Forestry Ministry wrote to the CITES Secretariat (with copy to Ms Lye) to say that Madagascar would send a "significant delegation to the countries that seized [rosewood], for negotiation…"

(d) On 20 January 2015, after a Madagascan delegation visited Singapore, Mr Ramparany Anthèlme from the Madagascan Forestry Ministry wrote to Ms Lye stating that the export documents were "established in due form by the signatories authorities during the period of transition".

(e) On 10 February 2016, the Prime Minister of the Government of Madagascar sent a letter to the Solicitor-General of Singapore stating that "all export or export licence approvals are invalid since the implementation of [the rosewood export ban] on [24 March 2010]" and that the applicants' documents "are in violation of CITES decisions and to national regulations". The Judge declined to decide whether the letter should be admitted as it was irrelevant to the charge.

(f) On 3 February 2017, after the hearings before the Judge had concluded, the Prosecution sought to adduce Madagascan government correspondence obtained in January 2017 that ostensibly would prove that the evidence that the applicants provided in court as to their authorization to export the rosewood from Madagascar was false. The Judge did not allow the evidence to be admitted.

26 Ultimately, the Madagascan documents have limited relevance to the s 4(1) charge that the Prosecution pursued against the applicants, which was the lack of an import permit from AVA. The applicants agree that they do not have such an import permit. They are therefore relevant only in so far as they shed light on whether the rosewood was in transit or was imported into Singapore.

Criminal proceedings

27 Subsequently, the applicants were charged for importing 29,434 logs of rosewood. Kong Hoo was charged under s 4(1) of the ESA, which makes it an offence to import any scheduled species without a permit. Mr Wong was charged under s 4(1) read with s 20(1)(*a*) of the ESA, which states that where an offence under the ESA is committed with the consent and connivance of an officer, that officer would also be guilty of the offence.

28 There are two sets of court proceedings for this matter. In the first set of proceedings, at the close of the Prosecution's case, the Defence submitted that there was no case to answer because the Prosecution had not adduced sufficient evidence to show that the rosewood was not in transit. The District Judge agreed and acquitted the applicants in *Public Prosecutor v Wong Wee Keong and Kong Hoo Pte Ltd* [2015] SGDC 300 ("*No Case GD (DC)*"). The Prosecution appealed and in Magistrate's Appeals Nos 9136 and 9137 of 2015 ("the first MA"), the Judge held that the Prosecution had adduced evidence which was not inherently incredible and which satisfied each and every element of the charge and remitted the case for the Defence to be called in *Public Prosecutor v Wong Wee Keong and another appeal* [2016] 3 SLR 965 ("*No Case GD (HC)*").

29 This led to the second set of court proceedings. When the Defence was called upon, the applicants elected to remain silent and offered no evidence in their defence. The District Judge found that the Prosecution had not proved its case and acquitted the applicants in *Public Prosecutor v Wong Wee Keong and Kong Hoo Pte Ltd* [2016] SGDC 222 ("*Acquittal GD (DC)*"). The Prosecution appealed again and in Magistrate's Appeals Nos 9192 and 9193 of 2016 ("the second MA"), the Judge convicted the applicants on the charges in *Public*

Prosecutor v Kong Hoo (Pte) Ltd and another appeal [2017] 4 SLR 421 ("*Conviction GD (HC)*").

First set of proceedings (No case to answer)

Evidence led by the Prosecution

30 All the evidence for this case was adduced by the Prosecution in the first set of criminal proceedings in the District Court. There were ten witnesses, namely:

(a) Mr Roy Tan Leng Kiong ("Mr Roy Tan") from Singapore Customs, who received the tip-off about the rosewood and did the investigations.

(b) Ms Lye from AVA, whose duties include implementing and enforcing the ESA and who received notice of the tip-off from Mr Roy Tan and carried out the investigation.

(c) Ms Ong Ai Khim ("Ms Ong") from AVA.

(d) Mr Tan Song Koon Alan ("Mr Alan Tan") from Jaguar Express, which was engaged by Kong Hoo to unload, containerise and truck the rosewood to PSA Port.

(e) Mr Leong Yew Chung ("Mr Leong"), Mr Raghbir Singh, Mr Kee Boon Hwei and Mr Vincent Cheong (collectively "the AVA Officers") from AVA, who inspected the vessel at Jurong Port and seized the shipment.

(f) Mr Wee, who managed the vessel and arranged for the vessel to carry the rosewood from Madagascar to Singapore.

(g) Capt Henry Heng ("Capt Heng") from MPA, who provided the vessel's port movements and pre-arrival notification to AVA.

31 We will discuss briefly the evidence adduced at trial. This can be classified broadly into two categories – the circumstances surrounding the arrival of the rosewood and the declarations and permits required from the various authorities for the rosewood's arrival and stay in Singapore.

(1) Arrival and seizure of the rosewood

32 Mr Roy Tan gave evidence that he received a tip-off from the Regional Intelligence Liaison Office Asia Pacific of the World Customs Organisation ("the tip-off") that the vessel was suspected to be carrying illegally exported timber from Madagascar and requested Singapore to monitor the vessel and to take any necessary action. Singapore Customs sought further information by obtaining the cargo manifest from the Jurong Port online system. Mr Roy Tan then informed AVA about the tip-off and the vessel's movements. On Ms Lye's instructions, the AVA Officers boarded the vessel and went to the yard where the unloaded rosewood was located and seized the entire shipment of rosewood.

33 Ms Lye handled AVA's investigations which included instructing the AVA Officers to detain and seize the rosewood, liaising with the applicants and the CITES Secretariat. When Mr Wong handed her the Madagascan export documents, she doubted their authenticity because of the existing zero export quota, the unusually large shipment and the tip-off. Pending the conclusion of the investigations, she asked Mr Wong to apply for a TradeNet permit (an electronic system managed by Customs for customs declarations) to bring the rosewood out of Jurong Port to be stored at Jaguar Express's warehouse.

34 Ms Ong affirmed Ms Lye's evidence as to AVA's receipt of the tip-off from Customs, the domestic regulation of rosewood from May 2013 and the lack of any CITES import permit for the shipment. The Defence chose not to cross-examine Ms Ong on her conditioned statement.

35 Mr Alan Tan took the stand next. He testified that he was engaged by Kong Hoo to unload the cargo to the landing area when the vessel reached Jurong Port and to re-stuff the logs into containers for transhipment. His job scope only included ensuring that the logs were discharged, containerised and transported to PSA Port. He was not responsible for the cargo's management after it reached PSA Port. He testified that because of the size and nature of the shipment, it would have taken two weeks from the date of berthing of the vessel for all the rosewood to be unloaded, as opposed to the two days that he had originally envisioned. The containerisation and transport of the rosewood and its onward journey from PSA Port was to be done in batches. For the rosewood's onward journey, Mr Alan Tan had made tentative bookings on vessels leaving for Hong Kong and had provided Kong Hoo with ocean freight charges from Singapore to Hong Kong and possible vessels for its selection in January 2014, two months before the rosewood arrived in Singapore.

36 The AVA Officers were responsible for seizing and detaining the rosewood on 14 March 2014. They testified that they arrived at Jurong Port, confirmed the vessel's presence and boarded it. They found many logs in the vessel, took photographs and collected samples. They were informed that some of the cargo had been unloaded already and this was confirmed by the vessel's manager, Mr Wee. The AVA Officers seized the entire shipment. Mr Wee gave evidence that his company had agreed to convey the rosewood on the vessel from Madagascar to Singapore and that its role ended when the logs were

discharged. He testified that he learnt from his interaction with Jaguar Express that the cargo was intended to be transhipped from Singapore.

(2) Declarations and permits required

37 Ms Lye described the types of declarations and permits that would be required for a trader to bring scheduled species into Singapore. If the scheduled species was imported, the trader would have to obtain two types of permits. The first is a CITES import permit issued by AVA through AVA's electronic system, the LicenceOne system. The importer would need to attach a valid CITES export permit. The second is a TradeNet declaration, which acts as an electronic declaration to Customs and AVA, for approval. If the TradeNet declaration is in order, the trader would receive a cargo clearance permit which allows him to ship the scheduled species in. If the scheduled species was in transit, the trader would not need to obtain a CITES import permit but was still required to submit a TradeNet declaration. AVA would check for the CITES export and import permits before approving the declaration.

38 We note that Ms Lye's evidence in this regard only consisted of her oral testimony and a factsheet prepared by the AVA, annexed to her conditioned statement. Samples of such declarations or permits were not submitted to the court. However, the accuracy of her evidence was not challenged by the applicants.

39 Mr Alan Tan similarly provided evidence on the declarations and permits required for the cargo's stay in Singapore. In relation to the cargo manifest, he stated that his stevedore was responsible for submitting it online to the Jurong Port system and its main purpose was to ensure that berthing and other service charges for using Jurong Port would be correctly billed to the account holder, in this case Jaguar Express, which was listed as the consignee.

His stevedore also applied to the MPA for the berthing of the vessel. He also testified that before the cargo could leave Jurong Port for PSA Port, a transhipment permit from Customs was required. To obtain this permit, Jaguar Express had to "declare to Singapore custom the permit of all the containers, whatever inside, and the cargoes inside before we can then out from Jurong Port".

40 On the MPA's part, Capt Heng gave evidence on a pre-arrival notification that was submitted to the MPA before the vessel berthed in Singapore. The notification was done by the agent on behalf of the master and listed the vessel's last port and the cargo being carried, which again was stated as "logs". When asked whether it was a requirement to declare the cargo in the notification, Capt Heng said yes but only information on the type of cargo being carried was required, not the details of the cargo.

41 Therefore, on the evidence adduced, the following declarations and permits would have been required for the rosewood's stay in Singapore:

(a) a cargo manifest submitted to Jurong Port before the vessel berthed in Singapore (Mr Alan Tan at [39] above);

(b) a pre-arrival notification submitted to the MPA before the vessel berthed in Singapore (Capt Heng at [40] above);

(c) if the rosewood was imported, a CITES import permit from the AVA's LicenceOne system (Ms Lye at [37] above);

(d) a TradeNet declaration for its import into or transit in Singapore (Ms Lye at [37] above);

(e) a TradeNet cargo clearance permit from Customs and AVA if the rosewood left Jurong Port (Ms Lye at [33] above); and

(f) a customs transhipment permit if the rosewood left Jurong Port for PSA Port (Mr Alan Tan at [39] above).

42 However, the terminology used by the main witnesses, Mr Alan Tan and Ms Lye, were not consistent and they were not asked about each other's evidence. It is therefore unclear whether some of the permits and declarations listed above are the same, in particular, the TradeNet declarations and permits from Customs. There was also no evidence led as to the various types of customs declarations that were required for the movement of cargo in Singapore. Therefore, after the hearing in Court, we directed the parties to make further submissions on this issue. They did so in late August 2018. We consider the applicants' legal obligations to obtain certain permits and/or to make certain declarations later in this judgment.

The decisions

43 At the close of the Prosecution's case, the District Judge held that there was no case to answer as the Prosecution had not led sufficient evidence to show that the rosewood was imported. For the sole purpose condition, the District Judge held that the evidence showed that the rosewood was brought into Singapore for the sole purpose of containerising them for shipment and to be transported from one port (Jurong Port) to another (PSA Port) (*No Case GD (DC)* at [53]). She relied on the evidence of Mr Alan Tan, who had been engaged to unload, repack and transport the rosewood, a process which he described as transhipment (*No Case GD (DC)* at [35] and [50]). Mr Alan Tan had also tentatively booked some vessels departing to Hong Kong. For the control condition, the District Judge held that the rosewood was under the control of an

authorised officer, namely a customs officer, because Jurong Port, where the vessel had berthed, was a free trade zone within customs control (*No Case GD (DC)* at [60]).

44 The Judge disagreed with the District Judge on both counts. For the sole purpose condition, the Judge found that the District Judge erred in relying almost exclusively on Mr Alan Tan's evidence. He pointed out that the fact that (a) Kong Hoo was listed as the consignee on all the Madagascan export documents provided by the applicants and (b) the applicants did not provide any information about their Hong Kong buyer was evidence showing that the applicants might not have brought the rosewood solely for the purpose of taking it out (*No Case GD (HC)* at [59], [60], [71]). He declined to hold that if the export documents accompanying the shipment did not contain details of the ultimate destination of the shipment and a named consignee in that destination country, the shipment would be considered to have been imported, as he felt that this would rewrite the terms of the ESA (*No Case GD (HC)* at [70]).

45 For the control condition, the Judge held that the District Judge erred in law in treating the rosewood as being under the control of an authorised officer simply because the rosewood was in a free trade zone which was "deemed to be under customs control" by s 3(2) of the Customs Act (Cap 70, 2004 Rev Ed) ("Customs Act"). This was because, first, the deeming provision in the Customs Act was restricted to that Act and could not be expanded to the ESA. Second, the ESA was enacted for the conservation of endangered species and the interpretation of "control" in the ESA ought to be interpreted to guard against abuses of the transit exception. The Judge therefore interpreted "control" actively, in the sense that the officer (a) knows of the existence of the goods and (b) is in a position to determine how these goods should be used or moved (*No Case GD (HC)* at [94]). He also held that if the scheduled species were not in

the physical custody of the authorised officers, it must usually be shown that they had taken precautions to secure the integrity of the shipment (*No Case GD (HC)* at [95]). Applying this in the present case, there was no evidence that any authorised officer was aware that the rosewood was being unloaded, let alone controlling the rosewood or the process (*No Case GD (HC)* at [97]).

46 The Judge thus set aside the acquittals and remitted the case to the District Judge for the defence to be called.

Second set of proceedings (Conviction)

47 Accordingly, the District Judge called on the defence. However, the applicants chose to remain silent and to lead no evidence. The District Judge acquitted the applicants again. On appeal to the High Court, the Judge set aside the acquittals again and convicted the applicants.

The sole purpose condition

48 The District Judge held that the Prosecution had not proved that the sole purpose condition was not met, for the following reasons:

(a) It was not conclusive for the sole purpose condition that Kong Hoo was named the consignee in the shipping and commercial documents and that there was no named consignee in the destination country. AVA was itself unsure at the material time whether the shipment was for import or transhipment (*Acquittal GD (DC)* at [19]).

(b) It was not disputed that the rosewood was brought into Singapore in a break bulk cargo vessel and Mr Alan Tan's evidence, which was unchallenged, was that he was engaged for transhipment services and his job was to truck the containers with the rosewood to the PSA Port.

This was consistent with the quotation that he had provided to Kong Hoo. He had made only tentative bookings for vessels leaving Singapore because he was unable to estimate how many containers were needed, not because Kong Hoo had no real intention to ship the rosewood out of Singapore (*Acquittal GD (DC)* at [21]–[24]).

(c) No adverse inference ought to be drawn because there was nothing that the applicants were required to contradict or to explain. Mr Alan Tan's unchallenged evidence as to the nature of his job (*ie*, for transhipment) established beyond reasonable doubt that the rosewood was to be transported from Jurong Port to PSA Port for shipment to Hong Kong (*Acquittal GD (DC)* at [28]).

49 In the High Court, the Judge disagreed for the following reasons:

(a) All the export documents from the Madagascan Forestry Ministry listed Kong Hoo as the consignee without stating Hong Kong as the country of import or any other buyer. If the Madagascan Foreign Ministry had authorised the export, it would stand to reason that it would comply with standard CITES procedure in listing the ultimate destination of the shipment, *ie*, Hong Kong, in the document (*Conviction GD (HC)* at [41]). Ms Lye had testified that CITES permits were issued "back-to-back" meaning that the named consignee on the permit had to be the country of ultimate destination. The listing of Kong Hoo as the consignee was thus highly probative of Singapore being the country of import for the rosewood.

(b) There were no details as to what would happen to the rosewood after it left Singapore. There was no information about the Hong Kong buyer, no documentation of sale to a party in Hong Kong and no

confirmed bookings for the onward shipment of the rosewood (*Conviction GD (HC)* at [44]).

(c) Mr Alan Tan's evidence was that tentative bookings had been made for onward transport of the rosewood. Jaguar Express's main job was to transport the rosewood from Jurong Port to PSA Port. Once that was done, its job was completed. This therefore did not show that Kong Hoo had a "confirmed present intention" to ship the rosewood out of Singapore (*Conviction GD (HC)* at [48]). Even after the first batch of rosewood had been unloaded, the applicants did not confirm the booking of the containers and arrange containerisation for shipment out of Singapore (*Conviction GD (HC)* at [51]).

(d) An adverse inference should be drawn because the facts above clearly called for an explanation which the applicants would be in a position to give, such as the identity of the Hong Kong buyer and details of the plan to tranship the rosewood (*Conviction GD (HC)* at [54]).

50 On the evidence, the Judge held that the Prosecution had proved beyond a reasonable doubt that the applicants did not bring the rosewood in for the sole purpose of bringing it out of Singapore.

The control condition

51 The District Judge held that the legal and evidential burden was on the Prosecution to prove that the entirety of the rosewood was not kept under the control of an authorised officer while it was at Jurong Port (*Acquittal GD (DC)* at [30]) and the Prosecution had not fulfilled this burden. The Prosecution did not call any customs officer in charge of the free trade zone at Jurong Port to testify on the systems in place to regulate and to supervise the activities and

operations therein. The District Judge hence relied on the legal requirements for goods in free trade zones. She found that (a) the free trade zone at Jurong Port was a secured area for the storage of goods; (b) container stuffing and unstuffing had to be supervised by a customs officer; and (c) all containers would be sealed before leaving the free trade zone and it was an offence to break the seal before it reached its next destination (here, the PSA Port). There were thus controls in place to supervise the goods within Jurong Port which amounted to active control (*Acquittal GD (DC)* at [31]–[40]).

52 In the High Court, the Judge repeated that control by an authorised officer required the officer to have (a) knowledge of the goods and (b) the power to determine how the goods should be used and moved. The touchstone was conscious oversight (*Conviction GD (HC)* at [63]). On the facts, he found that (b) was fulfilled because it was not disputed that the Director-General of Customs (and by extension, the customs officers) had the power to control the movement of goods within the Jurong Port free trade zone (*Conviction GD (HC)* at [64]).

53 The only question was therefore (a) whether the officers were aware of the existence of the goods. The Judge held that the customs officers or AVA were clearly unaware of the presence of the rosewood or that it was being unloaded from the vessel for the following reasons. First, just because permission had been sought from Jurong Port to discharge the cargo from the vessel and Jurong Port had assigned an area for its discharge did not mean that Singapore Customs knew of the existence of the cargo. The two entities were different. Second, even if seeking permission from Jurong Port for the discharge of the cargo was sufficient, Jurong Port was itself unaware that the cargo was rosewood. The cargo manifest only stated that it contained logs. Third, the unchallenged evidence of the AVA officers was that they were unaware that

some of the rosewood had been unloaded until after they boarded the vessel (*Conviction GD (HC)* at [66]–[68]). The Judge also found that knowledge could not be inferred from the tip-off given to AVA because the fact that the cargo contained rosewood could not be confirmed until the officers boarded the vessel (*Conviction GD (HC)* at [71]).

54 The Judge therefore convicted the applicants. He sentenced Mr Wong to three months' imprisonment and the maximum fine of $500,000. The Judge imposed the same maximum fine on Kong Hoo. The applicants then filed this criminal reference.

The criminal reference

The questions

55 The two questions in the criminal reference are:

(a) Question 1: Whether, in determining if a scheduled species is considered in "transit" within the meaning of s 2(2) of the ESA, it is necessary to prove that, at the time of entry of the scheduled species into Singapore, the scheduled species will leave Singapore at a defined date?

(b) Question 2: Whether, in determining if a scheduled species – which was removed from the conveyance in or on which it was brought into Singapore – was kept under the control of an "authorised officer" as defined under s 2(2) of the ESA, it must be shown that the officer knew of the existence of the scheduled species and exercised conscious oversight over the scheduled species? In any event, who bears the applicable legal burden of proof?

56 The questions relate to the criteria in s 2(2) of the ESA for a scheduled species to be considered to be in transit. The provision is reproduced below:

> **Interpretation**
>
> …
>
> (2) For the purposes of this Act, a scheduled species shall be considered to be in transit if, and only if, it is brought into Singapore *solely for the purpose of taking it out of Singapore* and —
>
> > (*a*) it remains at all times in or on the conveyance in or on which it is brought into Singapore;
> >
> > (*b*) it is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched to a place outside Singapore, and is kept under the control of the Director-General or an authorised officer while being so removed, returned or transferred; or
> >
> > *(c) it is removed from the conveyance in or on which it was brought into Singapore and kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days, or such longer period as the Director-General may approve, pending despatch to a place outside Singapore.*
> >
> > [emphasis added]

57 There are thus two limbs in s 2(2) and Questions 1 and 2 correspond to them respectively. First, the scheduled species has to be "brought into Singapore solely for the purpose of taking it out of Singapore". Question 1 relates to this limb and essentially asks whether this sole purpose condition requires, at the date the scheduled species enters Singapore, proof of a definite date on which the scheduled species will leave Singapore.

58 Second, when the scheduled species is in Singapore, it has to fall within one of the situations in s 2(2). Either it (a) remains in its conveyance at all times, (b) is removed and returned to its conveyance or is transferred directly to another conveyance and is kept under the control of the Director-General or an

authorised officer during the removal, return and/or transfer, or (c) it is removed from its conveyance and kept under the control of the Director-General or an authorised officer for a period of not more than 14 days unless the Director-General approves a longer period pending despatch to a place outside Singapore. On the facts the applicable situation was (c) but Question 2, which relates to the scheduled species being under the control of an authorised officer, applies to (b) and (c) generally. It asks whether it is a requirement of such "control" that the Director-General or any other authorised officer knows about the existence of the scheduled species and exercises conscious oversight over the scheduled species. More generally, it also asks who bears the burden of proof for the control condition.

The Judge's decision

59 The Judge answered both questions affirmatively and gave detailed reasons for doing so.

Question 1

60 For the sole purpose condition, the Judge held that "there must be proof that the scheduled species is definitely to leave Singapore at some defined date(s)" as part of showing that there was a concrete present intention to bring the scheduled species out of Singapore at the time the scheduled species entered Singapore (*Conviction GD (HC)* at [57]).

61 His interpretation was intended to give effect to the objects of CITES (since that was the purpose for which the ESA was enacted). Based on the extraneous materials, he identified two potential avenues for abuse in transit cases. First, it would allow middlemen to keep scheduled species in regulatory limbo in a transit country while they shopped for a buyer in another state (*No*

Case GD (HC) at [67], [68] and [91]). Second, it would open the door for smugglers to circumvent CITES protections by disposing of their scheduled species *en route* (at [91]). Requiring proof of a definite date of departure would aid in ensuring that the scheduled species would not remain indefinitely in transit and/or not provide more opportunities for smugglers to dispose of their specimens during transit.

Question 2

62 For the control condition, the Judge explained what would amount to being under the control of an authorised officer (*Conviction GD (HC)* at [63], citing the *No Case GD (HC)*):

> As is clear from the above, in order for a scheduled species to be under the "control" of an "authorised officer", two conditions must be satisfied: (a) the authorised officer must *know* of the existence of the goods and (b) the authorised officer must have the *power* to determine how those goods should be used and moved. The touchstone is that of "conscious oversight" – "actual steps" must be taken to secure the integrity of the shipment and it would not suffice if the goods were merely placed within a zone over which the authorised officer exercised general control. If the goods are not in the physical custody of the authorised officer then it must "usually be shown that [the authorised officers] had taken precautions to secure the integrity of the shipment" (at [95]).

The parties' positions

63 Question 1 is no longer in issue before the court as the parties have agreed that the answer is no, *ie*, it is not necessary to prove, at the time of the entry of the scheduled species into Singapore, that it will leave Singapore on a definite date. Both parties also agree that in relation to the second part of Question 2, the Prosecution bears the applicable legal burden of proof.

64 Therefore, the only issue disputed by the parties is whether, for control to be present under s 2(2)(*b*) and (*c*) of the ESA, the authorised officer needs to (a) know of the existence of the scheduled species and (b) exercise conscious oversight over the scheduled species.

Question 1

65 Both parties disagree with the Judge's views on Question 1. They submit that although a firm intention to bring the goods out of Singapore is required, proof of a definite date of departure is not necessary to fulfil the sole purpose condition. The applicants contend that this is because:

(a) Reading in this requirement is inconsistent with the plain wording of s 2(2) of the ESA and constitutes impermissible judicial amendment. It is also inconsistent with the scheme of s 2(2), where the only time limit imposed is in s 2(2)(*c*).

(b) The purpose of the ESA is to comply with CITES and there are no requirements in CITES that there must be a definite date of departure.

(c) The extraneous materials relied on by the Judge, namely the CITES resolutions, are non-binding documents that shed no light on the obligations envisaged when CITES was prepared and are thus of limited interpretive use.

(d) Parliament has already addressed the potential for abuse, not by modifying the criteria for transit but by enacting s 5 of the ESA and conferring greater powers of enforcement on the authorities.

(e) The Judge's requirement poses enormous practical difficulties for traders, who are often unable to confirm a date of departure until the

cargo has landed and has been assessed by a local consignee in Singapore.

66 The Prosecution agrees with the applicants that proof of a definite date of departure is not necessary, although the presence of such a date would be relevant for the purpose of demonstrating intention. It submits that the appropriate test should be that of a "concrete present intention" and there must be clear and unequivocal evidence of such an intention. The Prosecution contends that a concrete present intention can be proved by the following scenarios:

(a) proof of a definite departure date from Singapore;

(b) proof of a named consignee outside Singapore;

(c) proof of valid import documentation (such as a CITES import permit) from the destination country; and/or

(d) proof of an obligation to deliver the species outside Singapore, such as a signed contract.

Question 2

67 The parties agree that the Prosecution bears the burden of proving beyond a reasonable doubt that the scheduled species was not under the control of the authorised officer under s 2(2)(*b*) and (*c*). The Judge held the same (*No Case GD (HC)* at [41]).

68 On the question of control, the Prosecution submits that the Judge was correct in interpreting "control" as requiring active physical and legal control, in that the authorised officer needs to (a) know of the existence of the scheduled

species and (b) exercise conscious oversight over the scheduled species. The practical implication is that a trader is required to declare to or to seek permission from an authorised officer for the transit of scheduled species in Singapore. The Prosecution contends that this definition of control promotes the objects of CITES and the ESA by targeting two problems in the illegal trade of endangered species. First, specimens would be smuggled into and out of non-customs zones without having to comply with CITES requirements. Second, a trader could keep specimens in transit while seeking a buyer in another country. Such abuse can be curbed only if the authorities know that a scheduled species is to be brought within their territorial domain and know the details of its arrival. It would be meaningless to speak of control over something that one does not know exists. Further, the disclosure obligation is consistent with the practice in other CITES signatories.

69 In response, the applicants submit that "control" should be understood with reference to the Customs Act. This is because an authorised officer under the ESA includes a customs officer under the Customs Act: s 2 of the ESA. The reference to the Customs Act means that Parliament intended for the two Acts to be read together. Section 3(2) of the Customs Act, in turn, states that goods shall be deemed to be under customs control when they are held in any free trade zone, among other matters. The notion of control should therefore be interpreted in line with "customs" control in the Customs Act, meaning that goods placed within a free trade zone or any other zone listed in s 3(2) of the Customs Act would be treated as being controlled by customs for the purposes of the ESA. This is supported by the following:

(a) Art VII of CITES refers to the "transit or transhipment of specimens through or in the territory of a Party while the specimens

remain in Customs control" and "customs control" is the exact phrase used in our Customs Act.

(b) Parliament intended to harmonise the terms, definitions and provisions used in CITES, the ESA and "other relevant legislation" and the most relevant legislation is the Customs Act.

(c) Acts relating to the same subject-matter should be construed together and Customs plays a dominant operational role in the ESA.

70 The applicants contend further that the Prosecution's submissions and the Judge's holding of "active" control is inappropriate for the following reasons:

(a) there is no specific requirement of knowledge in the ESA and no requirement for an authorised officer to be informed of scheduled species in transit. This can be contrasted with other legislation such as the Wholesome Meat and Fish Act (Cap 349A, 2000 Rev Ed) ("the Wholesome Meat and Fish Act"), where permits are required when meat and fish products are transhipped.

(b) there is no specific mechanism for traders to provide information to the authorities about when scheduled species are in transit. This was a factual finding by the District Judge that was not overturned on appeal. The trader is therefore being asked to ensure that the authorised officers have specific knowledge where no mechanism or scheme exists for him to make the specific declarations to comply with his purported disclosure obligations.

(c) the requirement is additionally unfair as the trader's criminal liability turns on the mental state and the acts of a third party unrelated

to him. This would also impact Singapore's status as a transhipment hub since the trader will not be able to ascertain at the outset whether or not the scheduled species is in transit.

(d) Parliament had chosen to comply with CITES requirements not by changing the ESA's criteria for transit but by enhancing AVA's enforcement powers. Further, the scheduled species would also be under control requirements in the Customs Act and Free Trade Zones Act (Cap 114, 2014 Rev Ed) ("Free Trade Zones Act"), which allow Customs to have real physical control over the scheduled species.

(e) the principle of doubtful penalisation should apply, *ie*, if there are two reasonable constructions of a penal provision, the benefit of the more lenient one should be given to the accused.

Our decision and the structure of our analysis

71 The core question is therefore how s 2(2) of the ESA should be interpreted. The Judge and the parties have approached this question by interpreting the sole purpose condition and the control condition separately. In our view, the interplay between the two conditions is important in reaching a correct understanding of the meaning of s 2(2) of the ESA.

The meaning of s 2(2) of the ESA

72 The principles of statutory interpretation are well-established. The court should first ascertain the possible interpretations of the text, next ascertain the legislative purpose or object of the statute and finally compare the possible interpretations of the text against the legislative purpose: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37] and *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 ("*Lam Leng Hung*")

at [67]. Extraneous materials can be referred to in (a) confirming the ordinary meaning of the provision (taking into account its context and purpose); (b) ascertaining the meaning of the provision where it is ambiguous or obscure; or when (c) the ordinary meaning leads to a manifestly absurd or unreasonable result: s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act").

Ordinary meaning

73 Section 2(2) of the ESA defines what it means for a scheduled species to be in transit. It states that a scheduled species shall be considered to be in transit "if, and only if" the requirements in the section are met. The emphatic words mean that the twin requirements in the section, namely the sole purpose condition and the control condition, are to be construed strictly.

Sole purpose condition

74 The sole purpose condition states that the scheduled species must be "brought into Singapore solely for the purpose of taking it out of Singapore". This can be broken down into two related aspects.

75 A "purpose" refers to a state of mind and can be explained as an intention or an object which one knows will probably be achieved by an act: *Chandler v Director of Public Prosecutions* [1964] 1 AC 763 at 805 (*per* Lord Devlin), cited with approval in *Public Prosecutor v Sharikat Perusahan Makanan Haiwan Berkerjasama* [1969] 2 MLJ 250. The purpose must be the only object intended by the act of bringing the scheduled species into Singapore and precludes any subsidiary or incidental purposes.

76 The second relates to the time at which the sole purpose must exist. The purpose must already be present at the time the scheduled species is brought into Singapore. It must not be formed only after the scheduled species has been brought in. This accords with what the Judge said when he referred to a "concrete present intention" (*Conviction GD (HC)* at [57]):

> In order to show that a scheduled species had been "brought into Singapore solely for the purpose of taking it out of Singapore", what is required is a concrete present intention, at the time of entry of the scheduled species into Singapore, for it to be brought out; a contingent future intention is not sufficient. …

77 We agree that the trader must possess, at the time of arrival of the scheduled species into Singapore, a "concrete present intention" to bring it out of Singapore. What this means is that the trader cannot intend to keep the scheduled species indefinitely in Singapore or make its departure from Singapore contingent on certain events, such as the presence of a buyer. This was referred to by the Judge as a "contingent future intention". This is consonant with a strict construction of the sole purpose condition. To bring the scheduled species into Singapore without knowing with reasonable certainty whether the species will leave Singapore leads to the inference that the trader does not intend to bring the species out of Singapore at all or has brought it into Singapore with some other purpose in mind. Both these situations would contravene the sole purpose condition.

78 The purpose must also be continuing, meaning that it must not exist only at the time of arrival of the scheduled species but must continue until the time the scheduled species leaves Singapore. This means that if a trader brings the scheduled species into Singapore with the sole purpose of bringing it out but subsequently finds a buyer in Singapore for delivery in Singapore while the species is in transit in Singapore, the sole purpose test would not be satisfied

and the scheduled species would no longer be considered to be in transit. This is consonant with the statutory context, in particular the ordinary meaning of "transit", which is a continuous state and, as the Prosecution submits, conveys the meaning that the goods are merely passing through Singapore without entering.

79 Whether such a sole purpose exists is a question of fact to be determined by the trial judge. This was accepted by the Judge who went on to hold that the presence of some definite date of departure was necessary to prove such an intention (*Conviction GD (HC)* at [57]):

> … What I mean by this is that there must be proof that the scheduled species is definitely to leave Singapore at some defined date(s); it will not be enough to show – as I have found to be the case here – that the departure remains tentative and subject to the satisfaction of a condition (in this case, the successful sourcing of a buyer in Hong Kong) which might or might not be fulfilled.

80 In our judgment, it is not necessary to have a definite date of departure in order to prove the sole purpose. The sole purpose required by the section does not relate to time. A definite date of departure is relevant of course to show what the trader's purpose is. Equally, the fact that a person has not arranged for transport out of Singapore can lead to the inference that he has no intention of bringing the species out of Singapore. A person could have the sole purpose of bringing the species out of Singapore but be unable to confirm a departure date because he is looking for the best transportation rates or is waiting for his confirmed buyer to state a suitable date for delivery. Such uncertainty as to the precise date of departure does not compromise the trader's intention that the scheduled species was brought into Singapore solely for the purpose of taking it out of Singapore.

81 We therefore agree with the parties that a definite date of departure is not a necessary element of the sole purpose condition although it may be relevant evidence of purpose or intention. The factors that may be considered as pointing to such a sole purpose depend partly on the purpose of the ESA in general and of s 2(2) in particular and we consider this in detail later in this judgment.

Control condition

82 We now discuss the control condition. The core question is whether control in s 2(2) of the ESA requires knowledge and conscious oversight of the scheduled species. The Prosecution submits that this is required and the applicants disagree. There is a further question as to who bears the legal burden of proof in relation to this condition but both parties agreed in their submissions that the Prosecution bears this burden.

83 The preliminary issue is the relevance of the deeming provision in s 3(2) of the Customs Act to our interpretation of control in s 2(2) of the ESA. Section 3(2) of the Customs Act states that all goods located in free trade zones (among others) are deemed to be under customs control:

> For the purposes of this Act, goods shall be deemed to be under customs control while they are deposited or held in any free trade zone, Government warehouse, licensed warehouse, or bottling warehouse or post office or in any vessel, train, vehicle or aircraft or any place from which they may not be removed except with the permission of the proper officer of customs.

84 As a result, the applicants contend that all scheduled species arriving in free trade zones such as Jurong Port are deemed to be under the control of customs officers, who are authorised officers under s 2 of the ESA, and there is no need to engage in further interpretation of this condition.

85 The applicants argue that the ESA was amended to harmonise its definitions with relevant legislation such as the Customs Act and the definition of control is one of them. In our judgment, on a textual analysis, it is apparent that s 3(2) of the Customs Act is not determinative of the requirement of control in the ESA for the reasons given by the Judge (*No Case GD (HC)* at [77]–[84]), which we summarise here. First, s 3(2) of the Customs Act states explicitly that the deeming provision is for "the purposes of [the Customs Act]". The plain wording of the provision limits its reach to the parameters of the Customs Act. Second, the use of the phrase "customs control" in the Customs Act is specific and indicates areas where goods are not to be removed without payment of duties. It does not address the particular concerns that the ESA was enacted to guard against and does not provide for the control of the movement of goods beyond the primary interest of whether the goods are dutiable or not. The composite expression "customs control" also has a different meaning from "control" even in the Customs Act itself (*No Case GD (HC)* at [80]–[81]).

86 The question of what "control" in the ESA entails therefore has to be decided independently of s 3(2) of the Customs Act. We reproduce s 2(2) of the ESA again for easy reference:

> (2) For the purposes of this Act, a scheduled species shall be considered to be in transit if, and only if, it is brought into Singapore solely for the purpose of taking it out of Singapore and —
>
> (*a*) it remains at all times in or on the conveyance in or on which it is brought into Singapore;
>
> (*b*) it is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched to a place outside Singapore, and is kept under the control of the Director-General or an authorised officer while being so removed, returned or transferred; or

> (*c*) it is removed from the conveyance in or on which it was brought into Singapore and kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days, or such longer period as the Director-General may approve, pending despatch to a place outside Singapore.

87 We make a few broad points on the plain wording of this section. First, the control requirement appears in only s 2(2)(*b*) and (*c*), where the scheduled species is removed from the conveyance and not (*a*), where the scheduled species remains in or on the conveyance. It is therefore reasonable to assume that the control condition is targeted at some problem or mischief that arises when the scheduled species is removed from the conveyance.

88 Second, we agree with the Judge that the meaning of control is flexible and must be derived from the context in which it is used. In relation to goods, it can mean anything ranging from physical possessory control to abstract legal control in the sense of a legal authority directing the manner in which the goods are to be dealt with depending on the context (*No Case GD (HC)* at [85]).

89 The meaning of control therefore takes its flavour from the statutory context and purpose. As this is a case involving the ESA, the requirement of control is used in a regulatory context in the sense of an authorised officer supervising endangered species. The Prosecution's submissions on the "ordinary" meaning of control as active control were derived from statutes imposing criminal liability for control of substances such as dangerous fireworks and arms and explosives. The purpose of imposing criminal liability in certain factual situations may justify a more active form of control.

90 In our view, the essence of control, in its ordinary meaning, is the power to determine whether, when and how to move or otherwise deal with the

scheduled species. However, the concept of control can also be interpreted to require the following:

(a) actual physical custody of the scheduled species;

(b) the authorised officer's knowledge of the arrival and the whereabouts of the scheduled species; and/or

(c) actual steps taken by the authorised officer to secure the scheduled species or an active exercise of the power to determine use and movement (which is implicit in the Judge's touchstone of "conscious oversight").

These possible permutations of the meaning of control in s 2(2) of the ESA should be looked at in the light of the statutory purpose.

Purpose of the statute

The relevance of CITES

91 The ESA was enacted to give effect to CITES by controlling the import and export of certain endangered species. The long title of the ESA declares that it is "an Act to give effect to [CITES] by controlling the importation, exportation … of certain animals and plants…". Dr Lee Boon Yang, then-Senior Minister of State for National Development's statement at the Second Reading of the Endangered Species (Import and Export) Bill (Bill 4 of 1989), stated that "the aim of CITES is the long-term protection of wild fauna and flora" (see *Singapore Parliamentary Debates, Official Report* (26 January 1989) vol 52 at col 561).

92 CITES is therefore relevant in determining the purpose of the ESA. It is a function of our dualist system that international treaties and law do not give rise to rights and obligations until transposed into domestic legislation. Within the limits of statutory interpretation, domestic law should be interpreted harmoniously with and to give effect to our international obligations: *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [59]. This is especially so when domestic legislation is enacted specifically for the purpose of complying with our international obligations, as was the case for the ESA. The court should adopt an interpretation that would promote such a purpose. In doing so, the court may refer to any treaty or other international agreement referred to in the written law to ascertain the meaning of a provision in certain circumstances: s 9A(3)(*e*) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act") and the principles in *Tan Cheng Bock*.

93 The framework of the regulatory regime spelt out in CITES is relevant to our interpretation of the ESA's purpose and the meaning of its provisions. The *travaux préparatoires* may also be useful but they were not adduced by either party. The Judge relied on two main sources in considering the purpose of CITES. The first was the recommendations in the resolutions passed by the Conference of the Parties. In particular, he relied on Conf 9.7. This resolution has its roots in Conf 4.10, which was adopted in 1983. In Conf 4.10, the parties recognised the "potential for abuse of [the transit] provision by the keeping of specimens in the territory of a Party while seeking a buyer in another country". It hence recommended, among other things, that the phrase "transit or transhipment of specimens" be interpreted narrowly and to cover only specimens in the process of shipment (a) to a named consignee and (b) with the ultimate destination of the shipment clearly listed. Conf 4.10 was later amalgamated with Conf 7.4 and currently finds expression in Conf 9.7, which

was adopted in 1994 and updated subsequently without any material changes. Conf 9.7 reads:

> RECOGNIZING that… the Convention allows the transit or transhipment of specimens through or in the territory of a Party without the need for application of [the permit-requiring provisions];
>
> RECOGNIZING also that there is *potential for the abuse of this provision by the keeping of specimens in the territory of a Party while seeking a buyer in another country;*
>
> RECOMMENDS that:
>
> a) for the purpose of Article VII, paragraph 1, of the Convention, the phrase 'transit or transhipment of specimens' be interpreted to refer only to:
>
> i) specimens that remain in Customs control and are in the process of shipment to a *named consignee* when any interruption in the movement arises only from the arrangements necessitated by this form of traffic; and
>
> ii) …
>
> b) Parties inspect, to the extent possible under their national legislation, specimens in transit or being transhipped, to verify the presence of a valid CITES permit or certificate as required under the Convention or to obtain satisfactory proof of its existence;
>
> c) to be considered as valid, any such permit or certificate *must clearly show the ultimate destination of the shipment*, which, in the case of a sample collection, must be the country of issuance;
>
> [emphasis added]

94 The Prosecution contends that an interpretation of CITES is relevant to an interpretation of the ESA and Conf 9.7 is useful in understanding what the terms "transit" and "transhipment" mean in Art VII of CITES. This is because they constitute some form of subsequent agreement or practice among the convention parties that establishes consensus as to the interpretation of the treaty, as per Art 31(3)(a) and (b) of the Vienna Convention on the Law of

Treaties (23 May 1969), 1155 UNTS 331 (entered into force 27 January 1980), which read:

> *Article 31*
>
> *General rule of interpretation*
>
> …
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> …

95 "Transit" is defined in the ESA and this would be the starting point for interpretation by the court. Given the statutory criteria set out in the definition of "transit", the CITES materials shed little light on whether Parliament intended to implement these recommendations in the ESA or made a conscious decision not to do so. Conf 9.7 itself is a good example. As explained above, the recommendations in Conf 9.7 appeared first in Conf 4.10, which was adopted in 1983 and which pre-dated the ESA 1989. Singapore acceded to CITES in 1986 and was not present at the Conference of the Parties when Conf 4.10 was adopted. Even if Parliament had considered Conf 4.10 in enacting the ESA 1989, it appears that it had chosen not to adopt the narrower criteria of transit. The requirement of sole purpose adopted in s 2(2) of the ESA is similar to that in other local legislation such as the Animals and Birds Act (Cap 7, 2002 Rev Ed) and the Wholesome Meat and Fish Act. This is in contrast to foreign legislation referred to us by the Prosecution, which expressly provides for Conf 9.7's recommendations. For example, *Council Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein,* EC Regulation 338/97, [1997] OJ L 61 at Art 2(v)

defines "transit" to mean "the transport of specimens between two points outside the Community through the territory of the Community which are shipped to a *named consignee* and during which *any interruption in the movement arises only from the arrangements necessitated by this form of traffic*" [emphasis added]. This tracks the wording of Conf 9.7 and reflects a clear legislative intention to adopt the recommendations therein. The same cannot be said of s 2(2) of the ESA.

96 This is not to say that the resolutions and the recommendations contained in them are irrelevant. To the extent that the resolutions reflect the concern of the convention parties that the purpose and object of CITES could be undermined through certain acts such as keeping the specimens in transit indefinitely, this may be relevant in determining the purpose of CITES and the ESA's role in giving effect to CITES. However, if the resolutions are contrary to the wording in the ESA, then the ESA must take precedence over the resolutions.

97 The second source the Judge relied on was secondary materials on CITES. In particular, he relied on an extract from David S Favre, *International Trade in Endangered Species: A Guide to CITES* (Martinus Nijhoff Publishers, 1989) ("*A Guide to CITES*"), which reads (at p 170):

> A second example of illegal actions by our nefarious trader would be the exchange of specimens while in transit. Presume the trader with his skins arrives in Vancouver, Canada. He declares that he is proceeding by train or bus across Canada to Quebec where he is going to fly to Italy. Once in route, he meets with another and exchanges illegal skins for the ones on the permit. This exchange could even happen at an airport waiting lounge once the trader is out of sight at [*sic*] the custom officials. Since the specimens are in transit, and no re-export certificate is required, the specimens might not be compared with the issued permits. Additionally, once out of sight of the customs official, the specimens might be sold and disappear entirely.

98 Such secondary materials are less helpful in ascertaining the convention parties' intentions and Parliament's intention in enacting the ESA because they are international and comparative in focus and do not shed light on the ESA in the domestic context. For example, *A Guide to CITES* goes on to say (at p 171):

> … Some provide for free ports where goods arrive and depart without the knowledge and control of custom officials. Without knowledge of the items arriving and departing from these areas, assuring compliance with CITES is almost impossible.

This extract was also reproduced by the Prosecution in its submissions. What this shows is that the problems involved in enforcing CITES also depend on the customs and trade practices in each convention country. It is therefore difficult to use such materials to ascertain Parliament's intention in respect of the ESA. Reference to secondary materials must be grounded in the text of CITES or the ESA. With these principles in mind, we now proceed to examine the purpose of the ESA and s 2(2) in particular, with reference to the CITES materials.

The purpose of the ESA and s 2(2)

99 The general purpose of the ESA is to give effect to CITES by regulating the trade and movement of certain endangered species. This is done through a permit system established by CITES for the export and/or import of scheduled species. Export permits from the country of export are required for CITES-regulated species. The issuance of such permits is determined by, among other things, whether the export of the scheduled species would be detrimental to its survival and whether living specimens would be prepared and shipped properly: Arts III(2), IV(2), V(2) of CITES. Similarly, the ESA requires a permit to be obtained from AVA before a scheduled species can be exported: s 4(1) of the ESA. Although CITES only requires import permits from the country of import for Appendix I species, the ESA goes one step further by also requiring an

import permit from AVA for all scheduled species before they can be imported into Singapore: s 4(1) of the ESA.

100 The need for certainty in the trade and movement of regulated species can be seen in the requirements for CITES export permits. Art VI(2) of CITES states that an export permit shall contain the information specified in the template set out in Appendix IV, which includes information such as the names of the importer and the exporter and the scientific name of the species. These export permits are valid for only six months upon issuance: Art VI(2) of CITES. Similarly, Ms Lye testified in court that CITES permits are issued "back-to-back", including those issued by AVA, meaning that the consignee on the permit would be the company in the final destination or the country of import. Therefore, at the time of export, the import destination would be known and there is a time limit within which the species must be exported.

101 We turn to the specific purpose of s 2(2) of the ESA, bearing in mind that the court should read the purpose of any specific provision consistently with its general purpose (*Tan Cheng Bock* at [40]–[41]). Section 2(2) defines when a scheduled species is in transit and its purpose has to be understood with reference to the other provisions, namely ss 4 and 5 of the ESA, which govern import, export, re-export and introduction from the sea of scheduled species and transit of scheduled species respectively:

> **Restriction on import, export, etc. of scheduled species**
>
> **4**.—(1) Any person who imports, exports, re-exports or introduces from the sea any scheduled species without a permit shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $50,000 for each such scheduled species (but not to exceed in the aggregate $500,000) or to imprisonment for a term not exceeding 2 years or to both.
>
> …
>
> **Control of scheduled species in transit**

> **5**.—(1) Every scheduled species in transit in Singapore shall be accompanied by —
>
> (a) a valid CITES export or re-export permit, licence, certificate or written permission issued by the competent authority of the country of export or re-export, as the case may be, of the scheduled species; and
>
> (b) where required by the country of import or final destination of the scheduled species, a valid CITES import permit, licence, certificate or written permission issued by the competent authority of that country or destination.
>
> (2) Any owner, importer, exporter or re-exporter who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $50,000 for each scheduled species in transit in Singapore in contravention of that subsection (but not to exceed in the aggregate $500,000) or to imprisonment for a term not exceeding 2 years or to both.

102 Scheduled species in transit under the ESA do not require a permit from AVA under s 4(1) of the ESA, although the shipment must be accompanied by the relevant export documentation from the country of export and import documentation from the country of import (if required by the latter) under s 5(1) of the ESA. By demarcating the two regulatory regimes, s 2(2) of the ESA effectively implements the transit exception in CITES Art VII, which states that the permit-requiring provisions "shall not apply to the transit or transhipment of specimens through or in the territory of a Party while the specimens remain in Customs control". This exception in the ESA is worded strictly – a scheduled species is considered to be in transit "if, and only if" the stipulated requirements are met. The requirements are equally strict – the trader must not possess any purpose other than to bring the scheduled species out of Singapore and during the scheduled species' stay in Singapore, it must fall into one of the three situations in s 2(2)(*a*) to (*c*) of the ESA. In our judgment, this reflects Parliament's intent to exclude only scheduled species that are genuinely passing through Singapore to be shipped to another country.

103 A further question arises as to how the two conditions interact and whether they serve different purposes. When evaluated against the CITES exception, the sole purpose condition caters to the "transit or transhipment" limb, whereas the control condition caters to the requirement that the specimens "remain in Customs control". The sole purpose condition is straightforward in that it is targeted directly at a scheduled species that is only passing through Singapore, with another country as its final destination. On the other hand, the control condition is part of a set of criteria of transit and its purpose and intended effect is not explicit in the text of CITES. In our view, taking into account the statutory context and purpose, the control condition serves the following functions.

104 First, it complements and furthers the sole purpose condition in that having the scheduled species under the control of customs (or other authorised) officers ensures that the shipment is genuinely intended to be shipped to another country and not imported into Singapore surreptitiously. This is supported by the fact that control of an authorised officer is only required when the scheduled species is removed from the conveyance. Under s 2(2)(*a*) of the ESA, any scheduled species remaining on the conveyance during the period of transit does not have to be under the control of an authorised officer. When the scheduled species remains on board a vessel without being unloaded, it is clearly meant for an onward journey to another country. It is very unlikely that it would be imported into Singapore. There is therefore no need for the control condition to operate as a safeguard in such a situation. As mentioned earlier, the control condition appears only in s 2(2)(*b*) and (*c*) where the removal of the scheduled species from the conveyance presents a potential danger that the scheduled species could be imported into Singapore or be otherwise disposed of without leaving Singapore.

105 Further, when the scheduled species remains in Singapore beyond 14 days, any extension of its stay must be approved by the Director-General under s 2(2)(*c*). No approval needs to be sought for a shorter stay or when the scheduled species is removed from the conveyance to be transferred to another conveyance. The requirement for the Director-General's approval, in our view, is another safeguard against the indefinite stay of the scheduled species or any act incompatible with the sole purpose condition. This is supported by Conf 9.7, which recognises the potential abuse of the CITES transit exception when traders keep the specimens in a country's territory while seeking a buyer in another country. It is also axiomatic that for the Director-General to grant approval for extension of stay in Singapore, he must know that the shipment involves scheduled species and that the scheduled species is here.

106 The control condition also furthers the object of CITES and the ESA by ensuring that endangered species are properly transported and managed, even while in transit. Article VIII(3) of CITES states:

> As far as possible, the Parties shall ensure that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit and ports of entry at which specimens must be presented for clearance. The Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.

Convention parties are expected to ensure that all specimens pass through formalities required for trade with a minimum of delay and that living specimens in transit are properly cared for and treated. Keeping the scheduled species under the control of an authorised officer enables the authorities to direct, where necessary, that the scheduled species be stored, treated and transported appropriately while in transit.

107 We summarise the relevant statutory purposes as follows:

(a) The ESA is aimed generally at protecting endangered species through the regulation of the movement and trade of such species. This is done through a permit system where the movement of species from one country to another is approved by the countries of export and, where required, also by the countries of import.

(b) Section 2(2) in particular implements the transit exception in CITES by prescribing strict statutory criteria for determining when a scheduled species is in transit. This ensures that the scheduled species is truly merely passing through Singapore for another country and has no other reason for being in Singapore.

(c) The control condition in s 2(2) of the ESA complements the sole purpose condition by ensuring that the scheduled species is not imported into Singapore or disposed of without leaving Singapore, but additionally enables the authorised officer to ensure the appropriate storage, treatment and transportation of the scheduled species.

The proper interpretation

108 With the statutory purposes and framework in mind, we now consider the proper interpretation of s 2(2) of the ESA. Given that our interpretation is informed by the statutory context and purpose of the ESA, it should not be taken to be conclusive of the interpretation of similar phrases in other legislation, in particular the sole purpose condition, which appears in other Acts.

Sole purpose condition

109 In our judgment, the phrase "brought into Singapore solely for the purpose of taking it out of Singapore" requires (a) a sole purpose to bring the goods in only to take them out of Singapore and (b) such a purpose to be present from the time the scheduled species is brought into Singapore to the time it is brought out. The ordinary meaning of the provision, that the sole purpose be a continuing one, is supported by the purpose of s 2(2), which is to ensure that the scheduled species is truly merely passing through Singapore for another country. Both requirements are to be construed strictly, given the wording of the provision and the ESA's purpose of regulating the trade and movement of endangered species.

110 Whether the sole purpose exists in any particular case is a question of fact for the trial judge. To this end, the trader's acts relating to the scheduled species will usually give the best indication of his purpose and intention for the scheduled species. The sole purpose may be proved by any relevant evidence or documentation, such as import/export permits, container and vessel bookings or the engagement of transhipment services. The available evidence must point towards the two factors of (a) some final destination outside Singapore for the scheduled species and (b) existing plans to ship the scheduled species to its final destination within a reasonable time.

111 The presence of a final destination indicates the trader's genuine intention to bring the scheduled species out of Singapore. It is generally not enough for the trader to claim that his sole purpose is to bring the scheduled species out of Singapore without knowing its final destination. The absence of a final destination points to the trader's lack of intention to bring the scheduled species out of Singapore. Alternatively, it shows that the trader may have some

other purpose for bringing the scheduled species into Singapore, such as to store it here pending his search for a foreign buyer or even to market it in Singapore (to local or foreign buyers). This would contravene the requirement that at the time the goods are brought into Singapore, the trader must already have a concrete present intention to bring them out to some other destination. The requirement of a final destination also promotes the purpose of CITES and the ESA, which is to regulate the trade and movement of scheduled species with some level of certainty. The framework of CITES is structured such that at the time the export permit is issued, the final destination of the scheduled species is known (see [100] above). Similarly, we think that the requirement in s 5(1)(*b*) of the ESA that a scheduled species in transit be accompanied by any relevant permits from the country of import or final destination implies that there is a country of import or final destination. It should not be open to the trader to claim that he does not have to show any import permit during his transit in Singapore because he does not know yet where the scheduled species is to be brought to.

112 Evidence of plans to ship the scheduled species to its final destination within a reasonable time is also important in showing that the trader possesses the sole intention of bringing the goods out of Singapore. We have held that the Judge's requirement that there be a definite date of departure is not supported by the ordinary meaning of s 2(2) of the ESA, as a trader may intend solely to bring the scheduled species out of Singapore but has not finalised the transport arrangements yet. However, in our judgment, the trader should at least have set plans in motion to ship the scheduled species to its final destination within a reasonable period of time. The absence of such plans or even of tentative transport arrangements would indicate that the trader did not intend to bring the scheduled species in merely to ship it out of Singapore. The reasonableness of the period of time depends on the size and the nature of the shipment. A large

shipment of logs would conceivably take a longer time to unload, containerise and tranship as compared to a shipment involving smaller, less bulky items.

Control condition

113 We now consider the control condition. The Prosecution contends that the Judge was correct in holding that control requires (a) knowledge of the existence and nature of the scheduled species and the (b) ability to exercise the power to manage or otherwise deal with it. The applicants contend that control should be interpreted in the light of the deeming provision in s 3(2) of the Customs Act (meaning that all free trade zones would be deemed to be under customs control and therefore under the control of an authorised customs officer). We have already explained why this interpretation is not supported upon a proper consideration of both the ESA and the Customs Act. In the alternative, the applicants contend that control should be interpreted to mean physical control over the goods without requiring the customs officer or any other authorised officer to know specifically that the goods are scheduled species under the ESA.

114 We will now examine the Prosecution's proposed approach and then the applicants' proposed alternative approach that it is only physical control which is required.

(1) The Prosecution's proposed approach

115 We first set out what this approach requires. On this approach, which we shall term "conscious control", a scheduled species is under the control of an authorised officer under s 2(2)(*b*) and (*c*) of the ESA if he:

(a) knows of the arrival and location of the scheduled species; and

(b) is in a position to exercise control over it in the situations set out in s 2(2)(*b*) or (*c*) of the ESA.

116 For (a), which concerns the mental element, the authorised officer must know that the trader is bringing the scheduled species into an area where the authorised officer can supervise and direct the management of the scheduled species. The most obvious method of achieving this is for the trader to declare, personally or through his agent, the presence of the scheduled species to an authorised officer upon its arrival in Singapore and at any rate before it is removed from its conveyance. This can be done through a routine declaration or some other form of communication to the relevant authorities.

117 For (b), which concerns the physical element, it is up to the authorised officer to determine whether and how he wishes to deal with the scheduled species within his powers. This may be done, for instance, by securing the scheduled species in a restricted zone and supervising its movement or by ensuring the integrity of the shipment by placing it under lock and seal. Generally speaking, as long as the scheduled species is brought into an area where the movement of goods is restricted and regulated by the relevant authority, with the knowledge of that authority, the physical control required in (b) is made out. Actual physical custody is not essential. Similarly, if the authorised officer sees no need to make any directions because he is satisfied with what the trader is doing, that does not mean the scheduled species is not under his control.

118 This is substantively similar to the Judge's twin requirements of knowledge and physical control. In our judgment, there is support in s 2(2) of the ESA, as purposively interpreted, for the Prosecution's approach that there be "conscious control" exercised over the goods.

PURPOSE OF THE ESA AND CITES

119 The most compelling reason in favour of the interpretation of the control element as requiring "conscious control" is the statutory context and purpose of s 2(2) of the ESA. We mentioned earlier that the purpose of the ESA is to regulate the trade and movement of endangered species and that the control condition in s 2(2) facilitates that purpose by performing two particular functions. First, it complements the sole purpose condition, in so far as it ensures that shipments of scheduled species which are purportedly in transit are really meant to and do leave Singapore. Second, it ensures that authorised officers are able to direct and supervise the appropriate storage, treatment and transportation of the scheduled species during its stay in Singapore, in compliance with Singapore's CITES obligations. It would follow from these two functions that an authorised officer is best positioned to ensure that the scheduled species is (a) truly only in Singapore because it is in transit; and (b) treated in a manner that comports with the ESA's objectives, if he knows that such scheduled species is presently within his zone of control.

120 There is additional support for the requirement of "conscious control" from the fact that Parliament chose to increase the AVA's enforcement powers when it re-enacted the ESA in 2006. For those enforcement powers to have any teeth, the AVA must first know when a scheduled species enters Singapore. Their additional powers to seize and detain species in transit are dependent on and complemented by their knowledge of the entry and movement of these scheduled species in Singapore.

121 In contrast, it may be argued that the applicants' position that mere physical control or jurisdictional control would suffice does not go far enough in attaining the objectives of the ESA. Where the authorised officer has no

knowledge that scheduled species or other controlled goods have entered his zone of control and the authorised officer in this context is a customs officer, that officer's primary interest will be a revenue interest. That interest is not one that would necessarily support the control and protection of scheduled species. This therefore means that the applicants' approach does not advance the interests of the ESA to the same extent as the Prosecution's would.

122 The applicants make the additional argument that control must mean only "physical control" because control is referred to in only s 2(2)(*b*) and (*c*) but not in s 2(2)(*a*). Control is not specified as a requirement in the latter where the scheduled species remains on the conveyance and is not discharged from it, even though the authorised officer does not know of its existence. This argument, however, does not take the applicants very far. In our view, the need for control only when the scheduled species leaves the conveyance is better explained by the desire to safeguard against the uncertainties and potential for abuse in such situations. Where the scheduled species remains on the conveyance, there is little chance that it will be disposed of or held indefinitely within Singapore. Conversely, when the scheduled species is removed from the conveyance, the opportunity for illegal disposal increases and so does the chance of inappropriate treatment during such removal. Sections 2(2)(*b*) and (*c*) are therefore put in place to ensure that such removal situations are managed properly and this would entail the authorised officer knowing about the existence of the scheduled species.

UNFAIRNESS TO THE TRADER

123 The applicants argue that adopting the Prosecution's reading of the ESA would be unfair as the trader's criminal liability would depend upon the mental state and the acts of a third party unrelated to him, namely the authorised officer.

A trader might bring goods into Singapore with the sole intention of bringing them out of Singapore, only to discover that because the customs officer or some other authorised officer has not been properly informed of their entry into Singapore, the goods are now considered to have been imported into Singapore without the valid permits, thus exposing the trader to criminal liability. From a policy perspective, this would also impact Singapore's status as a transhipment hub, since a trader will not be able to ascertain at the outset whether or not the scheduled species is in transit.

124 We consider that this complaint of unfairness might be somewhat overstated. The requirements imposed on the trader in this context are not onerous. All that is required is that the authorised officer be made aware of the entry and location of the scheduled species in Singapore. To ensure such awareness, all that the trader needs to do is to inform the relevant authorities, either through the customs office or other forms of contact, about the presence of the scheduled species in Singapore. If he misrepresents the nature of the scheduled species by stating a description that would take it out of CITES, then he has not complied with his obligation. If he has complied with his obligation to inform, then whether or not the authorised officer decides to exercise his powers of control has no bearing on the trader's liability.

125 Further, there are multiple opportunities for the trader to make known to the authorities the fact that he is bringing in a scheduled species. It appears that the trader in the applicants' situation is already under an obligation to apply for an import permit before or when the goods enter Singapore under the Regulation of Imports and Exports Regulations (Cap 272A, Rg 1, 1999 Rev Ed) ("RIER"). Reg 3(1) states that no goods shall be imported into Singapore except with a permit from Customs. "Import" is defined under the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed) ("RIEA") as including anything brought

into Singapore unless it never leaves the conveyance or is never transhipped in Singapore: s 2(1). Therefore, any goods intended to be transhipped and/or are removed from the conveyance require an import permit anyway.

126 Under s 37 of the Customs Act, the trader is also under an obligation to disclose goods in transit that are discharged from the conveyance. This provision reads:

> **Declaration**
>
> **37.** Every importer or exporter of dutiable goods and every person transhipping goods of a class dutiable on import shall, before removing any such goods or any part thereof from customs control or from any of the following places (whether or not the goods are under customs control):
>
> (*a*) the vessel on which the goods arrived;
>
> …
>
> make personally or by his agent to the proper officer of customs a declaration, in accordance with section 96, of the particulars of the goods imported or exported or to be transhipped.

Section 37 of the Customs Act imposes an obligation on a person transhipping goods dutiable on import to declare the particulars of the goods before removing them from its vessel. This is another opportunity for the trader to inform Customs of the existence of the scheduled species on board the vessel. A customs officer would be an authorised officer under s 2(1) of the ESA. The applicants contend that the rosewood would not be caught under this section because it is not a dutiable good. It is unclear to us why this is so and the applicants do not explain their position. Goods that are transhipped are required to be declared if they are "dutiable on import". The rosewood would conceivably be subject to at least the goods and services tax if imported.

127 In our view, therefore, it would not be so onerous such that it would be unfair to require the trader to declare the existence of the scheduled species to

an authorised officer before or at the time of its arrival in Singapore. This is not a strong point militating against the requirement of "conscious control".

128 It ought to be apparent from the above analysis that the Prosecution's case is rather compelling. However, the applicants' case also has its merits.

(2) The applicants' approach

129 The applicants propose that mere physical control of the goods by Customs officers at the free trade zone would suffice. Physical control in this sense is synonymous with jurisdictional control. It refers to the fact that the goods were discharged in a specific zone subject to an authorised officer's control, in this case, the free trade zone of Jurong Port. As the applicants have put it in their written submissions, a free trade zone is a "locality within which the [Director-General] or an authorised officer exercise[s] passive dominion or jurisdiction by virtue of the Singapore Customs' 'power to take enforcement action over the goods that are stored in the Free Trade Zone'". It is unnecessary for the authorised officer to have specific knowledge that a shipment containing scheduled species has entered the Port; once the shipment enters the port, it automatically becomes subject to the authorised officer's control as he has the power to prevent it leaving if he so chooses.

PURPOSE OF THE ESA AND CITES

130 We consider that it is also possible, on the applicants' case, for the purpose and objectives of the ESA to be achieved. The particular purpose of s 2(2) ESA is to demarcate clearly the distinction between the "import" and "transit" scenarios. The control condition assists by performing two functions and "physical control" could achieve both of these functions.

131 The first function we identified (see [104] above) is that the control condition complements and furthers the sole purpose condition in that having the scheduled species under the control of customs (or other authorised) officers would ensure that the shipment of goods is genuinely intended to be shipped to another country and not to be imported into Singapore surreptitiously. We consider that "physical control" is sufficient to achieve this objective. In our view, physical control entails that an authorised officer has the authority and power to regulate the entry, exit and movement of a shipment within the zone over which he has authority or jurisdiction and also to restrict access to that zone or to the particular shipment in question. The fact that the zone is a restricted area is a strong factor in favour of finding that the officer does have such powers. For example, the zone may be fenced in or otherwise made physically inaccessible to unauthorised persons, or there may be checkpoints at entry points to the zone to prevent unauthorised persons or goods from entering or leaving. The authorised officer should have the power to prevent the shipment from leaving the zone for there to be "physical control" and if such "physical control" is present, it is sufficient to support the objectives of s 2(2) in ensuring that the shipment is genuinely in Singapore for the purposes of transit and will not be surreptitiously imported into Singapore (see [104]). This also accords with the general purpose of the ESA in regulating the trade and movement of certain endangered species (see [99] above).

132 The second function of the control condition in s 2(2) of the ESA is that it helps to ensure that scheduled species are properly transported and managed, even while in transit: see [106] above. In our view, physical control is also sufficient to achieve this objective. As we have just observed, physical control entails the authorised officer having the power to control the movement of goods in the zone and in so doing, he can also ensure that the species are properly transported and managed, even while they are in transit.

133 There is an intuitive appeal to the argument that the transportation and management of the scheduled species would be better achieved if the authorised officer knows that such scheduled species has been brought into the controlled zone. However, the Prosecution was unable to refer us to any evidence that Customs or AVA, if they had been duly informed that the scheduled species had been brought into the free trade zone, would have done anything differently regarding its transportation and management.

134 The Prosecution adverts to the possibility that impermissible dealings or transactions in respect of the shipment of the scheduled species might occur if the customs officers or other authorised officers are not sufficiently apprised of the entry of this shipment into the controlled zone. There is a risk that traders could use the period of "transit" while the shipment was in the controlled zone to exhibit the goods to potential buyers, thereby transforming the controlled zone into a showroom of sorts. We make two comments on this. First, in the absence of evidence that Customs or the AVA, had they been informed, would have taken a specific interest in the scheduled species and taken specific steps to protect it in a different manner from other goods, we consider that the evidential basis for this submission is lacking. Second, the Free Trade Zones Act itself at s 15 provides that "[n]o person shall enter or reside within a free trade zone without the permission of the authority". It appears to us unlikely, therefore, that this possibility would materialise since persons without legitimate business in the free trade zone would be prevented from entering by the relevant authority. There is also nothing to suggest that this scenario arose on our facts.

135 As the particular functions of the control condition in s 2(2) of the ESA are satisfied even by the applicants' approach of physical control, we consider

that this too is a plausible interpretation that can be given to the control condition contained in that provision.

ABILITY TO DECLARE THE SCHEDULED SPECIES

136 Additional support for the applicants' position can also be discerned from the absence of evidence as to a regulatory scheme in place that would allow traders to declare that they were bringing in scheduled species. The applicants make the point this way. There is no specific obligation under the ESA or in the existing administrative framework for traders to declare the existence of a scheduled species in transit. Unlike in import or export scenarios, where permits are required from AVA, permits are not required for scheduled species in transit. Further, the ESA, unlike other legislation, does not impose a specific requirement that an authorised officer be informed that a scheduled species has been brought into Singapore in order to qualify as being in transit. This therefore implies that Parliament did not intend to impose such an obligation. For example, s 5 of the Wholesome Meat and Fish Act makes it an offence to tranship a meat or fish product without a licence, thus imposing a substantive obligation on the trader to obtain such a licence. A similar requirement also exists for fresh fruits and vegetables under s 7(1) of the Control of Plants Act (Cap 57A, 2000 Rev Ed). To read in a requirement of knowledge now would unfairly oblige the trader to ensure that the authorised officers have the requisite knowledge when no mechanism or scheme exists for the trader to make the specific declarations to comply with his purported disclosure obligation.

137 In particular, the applicants point out that there is nothing to show that AVA specifically, through its LicenceOne system or otherwise, provides any mechanism for such a declaration. The Prosecution does not appear to dispute

this. What it contends instead, relying on Ms Lye's evidence (see [37] above), is that the applicants are required to declare any cargo in transit to Customs (and AVA) through the TradeNet system and this would have covered scheduled species such as the rosewood. AVA or Customs would then check whether the relevant CITES permits have been obtained before approving the TradeNet declaration. Ms Lye's evidence was unchallenged at trial. However, the applicants point out that there was no evidence that the TradeNet declaration had to be made before discharge of the cargo and it was likely that Ms Lye was referring to the declaration required only when the cargo left the Jurong Port for the PSA Port. The only declaration which was consistently referred to by Ms Lye in her oral evidence was a "cargo clearance permit", which was required when the rosewood left the free trade zone and not when it entered.

138 We agree with the District Judge that there is "no clear evidence as to the stage at which the declaration is made and how it is processed" (*Acquittal GD (DC)* at [38]). This is relevant because any such declaration would need to be made before or at the time the scheduled species is removed from its conveyance, since that is when the requirement for control applies under s 2(2)(*b*) and (*c*). The Prosecution also did not clarify which regulation or statute such a declaration would be made under.

139 There is therefore no regulatory scheme in place for a trader to declare that he is bringing in a scheduled species. We have already observed in analysing the Prosecution's approach that this is not an insurmountable obstacle for the honest trader desiring to make a truthful declaration of his activity in bringing in such a shipment. However, we are also mindful of the fact that a trader who could not identify the appropriate regulatory avenue to declare such activity even after applying reasonable effort might reasonably be misled into believing that there was no such obligation and reasonably believe instead that

there was no requirement that the authorised officer be made aware of the shipment. This point is therefore in the applicants' favour.

(3) The principle against doubtful penalisation

140 The above analysis shows that both the Prosecution's and the applicants' respective approaches would promote the purposes of the ESA in general and the functions of the control condition in s 2(2) in particular. It therefore becomes necessary to consider whether the principle against doubtful penalisation applies. This rule is brought into play where penal consequences attach to a person's liability under a provision of a statute and there are two plausible ways of interpreting the provision even after it has been purposively interpreted. The effect of applying the principle against doubtful penalisation is to adopt a strict construction of the provision in question and typically to construe it in a way that is in favour of leniency to the accused: *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [31].

141 We summarised the operation of this principle in our decision in *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 as follows (at [28(b)]):

> The strict construction rule is a 'tool of last resort' to which recourse may be had only if there is genuine ambiguity in the meaning of the provision even after the courts have attempted to interpret the statute purposively. If the meaning of the provision is sufficiently clear after the ordinary rules of construction have been applied, there is no room for the application of the strict construction rule…

142 It should be apparent from this summary that it is only after a purposive interpretation of the ESA that reference to the principle can be had. As we said in *Lam Leng Hung* at [235], the court's first duty is to interpret the statutory provision purposively as a means to give effect to Parliament's intention.

143 In our analysis above, we have found that control as set out in s 2(2) of the ESA does not have a clear ordinary meaning. Instead, we have identified three possible ways it might be interpreted: at [90]. We then considered the purpose of the ESA in general and s 2(2) in particular. We identified the general purpose of the ESA as to give effect to CITES by regulating the trade and movement of certain endangered species: at [99]. The particular purpose of s 2(2) ESA was to clearly demarcate the difference between "transit" and "import" scenarios, which CITES intended to be governed differently. We considered that the control condition in s 2(2) specifically assisted in the achievement of these purposes by performing two functions. First, by subjecting the scheduled species to the control of authorised officers to ensure it is truly in Singapore only to be shipped out to another country and not imported into Singapore surreptitiously: at [104]. Second, by ensuring that the scheduled species is properly transported and managed even while in transit: at [106].

144 We have examined both the Prosecution's and the applicants' approaches in light of these general and specific purposes. We consider that either approach would accord with those purposes and promote the objects and purposes of the ESA. We are thus left in a position of genuine ambiguity. It is therefore proper now to have resort to the principle of doubtful penalisation.

145 Applying this principle, we prefer the applicants' interpretation of the control condition over the Prosecution's. The applicants are liable to suffer criminal punishment should the Prosecution's approach be adopted, as they will be found to have brought the rosewood into Singapore without causing the relevant authorised officers to be aware of this, with the result that the rosewood was not in transit but was imported. Section 4(1) of the ESA requires that such importation be accompanied by a valid permit and the applicants do not have such a permit. The control condition is susceptible to both the Prosecution's and

the applicants' proposed interpretations but because penal consequences will attach if the Prosecution's interpretation is preferred, it is right for us to adopt the applicants' interpretation here.

146 For the above reasons, we consider that the applicants are correct that the control condition in s 2(2) of the ESA requires only "physical control" and not "conscious control". The question whether such control exists is to be determined on the facts on a case-by-case basis.

Burden and standard of proof

147 We now consider briefly the question of burden and standard of proof under s 2(2) of the ESA. The only question in the criminal reference as to burden of proof relates to the applicable legal burden of proof for the control condition. The Judge held that:

> (a) For the sole purpose condition, the Prosecution had to prove a *prima facie* case that the trader had other purposes for bringing the scheduled species into Singapore beyond bringing it out of Singapore. If the Prosecution did so, the burden was on the applicants to raise a reasonable doubt, although this burden was evidential and not legal (*Conviction GD (HC)* at [37]).
>
> (b) For the control condition, the Prosecution bore the burden of proving beyond a reasonable doubt that the scheduled species was not under the control of an authorised officer (*No Case GD (HC)* at [48]).

148 During the hearing, the applicants contended and the Prosecution accepted that for the sole purpose condition, the Prosecution has the burden of proving a *prima facie* case that the goods were brought into Singapore and that

there was no evidence of any transhipment or transit. Upon the Prosecution showing this, the applicants must then raise a reasonable doubt that the goods were indeed in transit. For the control condition, the parties agreed that the Prosecution bears the burden of proof, as is the case in criminal law generally. Given the parties' agreement, this is no longer a live issue before the court for the purposes of this criminal reference.

Summary of the applicable tests

149 In summary, for a scheduled species to be in transit, s 2(2) of the ESA requires that the trader bring the scheduled species in for the sole purpose of bringing it out of Singapore and one of the circumstances in s 2(2)(*a*) to (*c*) must be fulfilled. Both conditions are necessary and the failure to fulfil either would mean that the scheduled species would not be considered to be in transit.

150 To satisfy the sole purpose condition, the trader must possess the sole intention of bringing the scheduled species out of Singapore at the time the scheduled species arrives in Singapore. This is a question of fact to be determined by the trial judge. However, the evidence should show that the trader has identified a final destination outside Singapore for the scheduled species and plans to ship the scheduled species to its final destination within a reasonable time.

151 The control condition requires physical control, in the sense that the shipment be brought into a location where an authorised officer, as defined in the ESA, has the authority and power to restrict the entry, exit and movement of the shipment and access to the shipment within that space. The authorised officer is not required to take physical custody of the shipment. It is sufficient that he has the power to prevent the shipment from leaving the controlled zone without his permission and to restrict unauthorised persons from accessing the

shipment, for example by sealing the container holding the shipment. In addition, it is not a requirement that the trader make the authorised officer aware that a scheduled species is contained within the shipment.

The present case

The applicants satisfy the control condition

152 Having held that the control condition requires only physical control, we now consider whether the necessary indicia of such control were present here. In our judgment, there was physical control and the control condition in s 2(2) of the ESA is satisfied.

153 The District Judge found that the Jurong Port free trade zone was a "secured area" for the temporary storage of goods and Customs officers could and did exercise broad supervisory and enforcement powers in the free trade zone: *Acquittal GD (DC)* at [36]. Her reasoning was substantiated by reference to the Free Trade Zone Regulations (Cap 114, Rg 1, 2014 Rev Ed), in particular reg 2 which makes it clear that the authority of a free trade zone must erect a perimeter fence or wall along the boundary of the zone and that the authority is empowered to prevent unauthorised persons or goods from entering or leaving the zone. Similarly, it was not disputed before the High Court that Customs officers have the power to control the movement of goods in the free trade zone: *Conviction GD (HC)* at [64]. In short, a shipment could not leave a free trade zone, even to be transhipped to another port or free trade zone in Singapore, without Customs having the authority and power to prevent it leaving the zone.

154 We are satisfied that the above is sufficient to constitute the requisite physical control. The key point is that entry into Singapore beyond the free trade

zone is controlled by Customs and this addresses the risk of the goods being imported surreptitiously into Singapore.

155 Before us, the applicants argue that because only a small percentage of the rosewood shipment had been unloaded from the vessel, the bulk of the rosewood remaining on the vessel should be taken to be in transit under s 2(2)(*a*) of the ESA, which states that a scheduled species is in transit if it remains on the conveyance (and if the sole purpose condition is fulfilled). This means that only the unloaded rosewood falls to be considered under s 2(2)(*c*), which contains the control condition, unlike s 2(2)(*a*). In our judgment, it is not necessary to draw this distinction between the two groups of logs now that the control condition has been decided in the applicants' favour. In any event, we agree with the Judge that because it was not disputed that all of the rosewood was intended to be unloaded in the same manner, *ie*, to the yard without informing any authorised officer, it is immaterial that not all the rosewood was unloaded. The trader's intention was clear. It was the quick action of the authorities that thwarted that clear intention. No distinction was drawn by the District Judge or the Judge between the unloaded rosewood and the rosewood that still remained on board the conveyance and we think that that was the correct position to take.

156 As the applicants satisfy the control condition, it becomes necessary for us also to decide whether the applicants satisfy the sole purpose condition. This is because both the sole purpose condition and the control condition must be satisfied before the rosewood can be determined to have been in transit.

The applicants satisfy the sole purpose condition

157 The Judge held that the sole purpose condition was not satisfied: *Conviction GD (HC)* at [61]. He considered that it was necessary for the

applicants to show that they had a concrete present intention, at the time the rosewood entered Singapore, for the rosewood to be brought out. He made clear that what he meant by this was that there had to be proof that the "scheduled species is definitely to leave Singapore at some defined date(s)" and that it was insufficient that the departure remained tentative and subject to the satisfaction of a condition which might or might not be fulfilled: at [57].

158 He held that the applicants had not proved that they had this concrete present intention: at [61]. First, the Judge was troubled by the fact that the applicants had not committed to a definite departure date for the rosewood. Mr Tan's evidence, which the applicants relied on, only showed that "tentative bookings" had been made for the rosewood to be shipped to Hong Kong: at [47]. The documentary evidence, taken at its highest, only suggested that Jaguar Express would act as the applicants' agent to secure them a vessel to transport 120 containers to Hong Kong "on request" and at an "as yet unconfirmed" date: at [48]. Second, there was no indication from the shipping or export documents that the rosewood was bound for any destination other than Singapore, which strongly suggested that Singapore must be its final destination: at [50(a)]. That could only mean that the rosewood was brought into Singapore for the purpose of import and not transit. Third, the Judge also noted that there was no evidence of a foreign consignee who would receive the rosewood and no identification of a foreign buyer to whom the applicants owed a contractual obligation to deliver the rosewood by a specified time: at [50(c)]. Fourth, the Judge drew an adverse inference against the applicants for Mr Wong's failure to take the stand. Mr Wong could have attested to the name of the alleged Hong Kong buyer, which would have strongly buttressed the applicants' case: at [56].

159 For the reasons above, we agree with the Judge's framing of the requisite intention as requiring a "concrete present intention". However, we differ as to

how this intention should be proved. We have held that it is not necessary for the trader to have settled on a definite date of departure for the goods at the time he brings them into Singapore: see [80] above. Instead, the evidence should show that the trader has identified a final destination outside Singapore for the scheduled species and has made plans to ship the scheduled species to its final destination within a reasonable time: see [110]–[112] above.

160 In addition, the parties have agreed that the Prosecution has the burden of proving a *prima facie* case that the goods were brought into Singapore and that there was no evidence of any transhipment or transit. Only upon the Prosecution showing this would the applicants have to raise a reasonable doubt about importation by showing evidence that the goods were actually in transit.

161 We consider that the Prosecution has failed to make out a *prima facie* case of importation.

162 It is clear that the rosewood was brought into Singapore and in saying this, we mean the entire cargo of the rosewood, including the bulk not discharged from the vessels, for the reasons given above at [155]. Further, the Prosecution has also adduced evidence suggesting that the rosewood was to be imported and was not merely in transit, most notably the evidence of Ms Lye as to the significance of the first applicant being named as the consignee on the shipping and export documents.

163 However, other evidence put forward by the Prosecution also raises a reasonable doubt that the rosewood was imported and in fact contradicts the Prosecution's own case. Once we put aside the focus on a definite date of departure, which the parties have agreed and we have accepted is not necessary, the question is whether the evidence shows that the applicants had identified a

final destination outside Singapore for the rosewood and had made plans to ship the rosewood to that destination before the rosewood was brought into Singapore.

164 At this point, the evidence of Mr Alan Tan, the Managing Director of Jaguar Express, becomes important. Mr Alan Tan's evidence was that well before the rosewood arrived in Singapore, the applicants had already communicated to him their intention for the rosewood to be shipped out to Hong Kong. It was for that reason that Jaguar Express had prepared quotations for transhipment of cargo from Jurong Port to PSA Port and also quotations for ocean freight charges from Singapore to Hong Kong (see [21] above) some two months before the vessel entered Singapore.

165 Mr Alan Tan also gave evidence that Jaguar Express had made a tentative booking for 30 containers on a vessel which was bound for Hong Kong on 16 March 2014: *Conviction GD (HC*) at [46]. Although 30 containers may sound like a small amount of containers, Mr Alan Tan's evidence was that they could contain approximately 6,000 logs. In other words, the tentative booking was made for approximately a fifth of the entire shipment, which we consider significant in percentage terms. Further, there is nothing sinister in the fact that only a tentative booking was made; Mr Alan Tan's explanation was that Jaguar Express needed to have sight of the shipment when it arrived to determine how long it would take to stuff the rosewood and tranship it to PSA Port. We consider this explanation to be reasonable.

166 The Judge and the District Judge both considered Mr Alan Tan's evidence to have gone largely unchallenged and the Judge also found no reason to disagree with the District Judge's finding that he was a candid witness:

Conviction GD (HC) at [47]. Mr Alan Tan's evidence therefore supports the applicants' case and correspondingly detracts from the Prosecution's case.

167 Mr Alan Tan's evidence was also buttressed by documentary evidence. The quotation for the ocean freight charges for shipment of the rosewood from Singapore to Hong Kong was in evidence, as was the quotation for transhipping the rosewood from Jurong Port to PSA Port. Both quotations were signed and accepted by the first applicant. These documents appear to be evidence of the applicants having entered into binding contractual arrangements to transport the rosewood from Jurong Port to PSA Port and then to Hong Kong thereafter. The quotation for the ocean freight charges has, as its title, "Ocean Freight charges from Singapore to Hong Kong (CY to CY)". Further, that quotation also states that "120 container[s]" would be involved over four vessels, which was a fairly substantial commercial undertaking: going by Mr Tan's evidence, this would have been sufficient to transport about 24,000 logs. Although no particular date was identified on the quotations for the rosewood to be shipped out of Singapore, which was a point that troubled the Judge, having a definite departure date is not necessary. These quotations support the applicants' case that their intention was always to ship the rosewood out to Hong Kong. It would not have made commercial sense for the applicants to have made legally binding arrangements to containerise the vast majority of the logs if their intention was only to import the rosewood into Singapore.

168 We consider that the above evidence justifies a finding that there was a reasonable doubt as to the rosewood being imported.

169 It is also important to note that Mr Tan gave evidence as a witness for the Prosecution. Thus, by the time the Prosecution completed its case in the District Court, Mr Alan Tan's evidence would have raised a reasonable doubt

as to whether the rosewood had been imported. The Prosecution's case was thus infected with a reasonable doubt as to importation, and the Prosecution thus had not cleared the threshold for establishing even a *prima facie* case that the rosewood was imported.

170 We acknowledge that the fact that the first applicant was named as the consignee on the shipping and export documents could be construed against the applicants. It also does not assist the applicants that there was no information as to the identity of the buyer in Hong Kong. However, the evidence before us is that prior to the rosewood entering Singapore, the applicants had identified a final destination for the rosewood, Hong Kong, and made plans for the rosewood to be shipped from Singapore to Hong Kong. This is sufficient to raise a reasonable doubt that the rosewood was intended to be imported.

171 Following from the conclusions set out above, the applicants satisfy both the sole purpose condition and the control condition in s 2(2) of the ESA. The result is that the rosewood was in transit for the purposes of the ESA. The rosewood was therefore not imported. Accordingly, the charge of importation without a valid permit under s 4(1) of the ESA is not made out. Accordingly, we quash the applicants' convictions.

172 We appreciate that on the tests we have just propounded and applied, the rosewood was in transit, with the result that a charge could have been brought under s 5(1) of the ESA which provides for liability where goods are in transit without the requisite export and import permits. We also note, however, that the Prosecution's application to amend the charge from one under s 4(1) of the ESA to one under s 5(1) of the ESA was rejected by the District Judge, largely on the grounds that the s 4(1) charge had itself been amended from a charge brought under s 5(1) of the ESA: *No Case GD (DC)* at [63]. The Judge did not see it

necessary to address the Prosecution's application to amend the charge from s 4(1) to s 5(1) of the ESA, because he convicted the applicants on the s 4(1) charge: *Conviction GD (HC)* at [75]. The question whether the Prosecution's application to amend the charge should have been allowed is not before us in this reference and therefore we will not express any views on that issue.

Answers to the criminal reference

173 Our answers to the criminal reference are therefore as follows (see also [7] above):

(a) Question 1: **No**. In determining if a scheduled species is considered to be in "transit" within the meaning of s 2(2) of the ESA, it is not necessary to prove that, at the time of entry of the scheduled species into Singapore, the scheduled species will leave Singapore at a definite date, although it is a relevant consideration. (This was not disputed.)

(b) Question 2: **No**. In determining if a scheduled species – which was removed from the conveyance in or on which it was brought into Singapore – was kept under the control of an "authorised officer" as defined under s 2(2) of the ESA, it is not necessary to show that the authorised officer knew about the arrival and the location of the scheduled species and was in a position to exercise conscious oversight over it.

(c) Both parties agree that the Prosecution bears the burden of proof in respect of the control condition, in that the Prosecution has to show that there was no control over the scheduled species by any authorised

officer. Given the parties' agreement, we need say no more about this issue.

174 The Judge imposed a fine of $500,000 on Kong Hoo and sentenced Mr Wong to three months' imprisonment and a fine of $500,000, in default of payment of which he will have to serve an additional 12 months' imprisonment. The Judge also made ancillary orders relating to forfeiture of the rosewood and related expenses. As a result of our determination of the questions posed in this criminal reference, we quash the applicants' convictions and consequently set aside their sentences. We also order that the rosewood be released to the applicants as soon as is practicable and in such manner as may be arranged between them and the relevant authorities.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

K Muralidharan Pillai, Paul Tan, Jonathan Lai (Rajah & Tann Singapore LLP) (instructed), Haridass Ajaib, Mohammed Haireez bin Mohameed Jufferie, Kannan s/o Balakrishnan (Haridass Ho &

Partners) (instructed), Choo Zheng Xi, Jason Lee Hong Jet and Priscilla Chia Wen Qi (Peter Low & Choo LLC) for the applicants; Kwek Mean Luck SC, Tan Wen Hsien, Tan Zhongshan, Zhuo Wenzhao and Sarah Shi (Attorney-General's Chambers) for the respondent.
