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

[2022] SGHC 252

Magistrate's Appeal No 9042 of 2021

Between

Lim Jun Yao Clarence

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Statutory offences — Companies Act — Interpretation of ss 340(1) and 340(5) Companies Act]

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Lim Jun Yao Clarence
v
Public Prosecutor

[2022] SGHC 252

General Division of the High Court — Magistrate's Appeal No 9042 of 2021
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9, 17 February, 8 August 2022

10 October 2022 Judgment reserved.

Vincent Hoong J:

Introduction

1 The appellant and his co-accused, Terry Tan-Soo I-Hse ("Terry") were tried jointly in the court below for offences of fraudulent trading under s 340(1) read with s 340(5) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"). They faced three charges each, with each charge pertaining to the running of one of three Singapore-incorporated companies: (a) Asia Recruit Pte Ltd ("Asia Recruit"); (b) Asiajobmart Pte Ltd ("AJM"); and (c) UUBR International Pte Ltd ("UUBR").

2 After a trial, the district judge ("DJ") convicted the appellant and Terry on their respective charges. The DJ's grounds of decision may be found in *Public Prosecutor v Terry Tan-Soo I-Hse (Chenxu Yusi) and another* [2021] SGDC 171 ("GD"). Terry subsequently pleaded guilty to 258 charges

comprising 137 charges under the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA") and 121 charges under the Employment Agencies Act (Cap 92, 2012 Rev Ed) ("EMA") which were stood down pending the joint trial. The appellant faces outstanding charges under the EFMA, which were similarly stood down. For the CA charges, the DJ sentenced the appellant to a total of 66 months' imprisonment and imposed a compensation order of $174,835 (in default nine months' imprisonment). For the CA, EFMA and EMA charges, the DJ sentenced Terry to a total of 40 months' imprisonment, a fine of $121,000 and imposed a compensation order of $57,660.

3 In this appeal, the appellant challenges his conviction on all three CA charges. In the alternative, if his conviction is upheld, he appeals against the imprisonment term and compensation ordered imposed. Among the issues raised are whether the *ejusdem generis* principle applies in the interpretation of s 340(1) of the CA and whether the preconditions in s 340(1) of the CA concerned with the imposition of civil liability for fraudulent trading have to be satisfied before an offence of fraudulent trading in s 340(5) of the CA is made out.

Background facts

4 An agreed statement of facts ("SOAF") was tendered in the court below under s 267 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC").[1] This was comprehensively summarised by the DJ in his GD at [9(a)]–[9(i)]. I reproduce here some of the salient undisputed facts.

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1 ROA pp 17–23.

5 Asia Recruit was incorporated on 10 March 2015. The company changed its name to Alliance Recruit Pte Ltd with effect from 30 November 2015. For ease of reference, I will continue to refer to Asia Recruit by its original name at the time of incorporation, unless otherwise specified. From 10 March 2015 to 28 March 2016, Terry was the sole director and shareholder of Asia Recruit. Asia Recruit operated as an employment agency, and it held an Employment Agency Licence ("EA Licence") issued by the Ministry of Manpower ("MOM"). The EA Licence allowed Asia Recruit to deal with all types of workers and was originally valid for the period of 21 April 2015 to 21 April 2018. The EA Licence was suspended by the MOM on 28 December 2015. As Asia Recruit was licensed as an employment agency, it was able to submit work pass applications on behalf of other employers through a portal on the MOM's website known as "Employment Pass Online" ("EPOL"). This required Asia Recruit to first obtain proper authorisation from such employers, in a prescribed form. Between May and July 2015, Asia Recruit submitted 137 work pass applications where AJM was named as the employer, all of which were rejected by the MOM. Over the same period, Asia Recruit also submitted 139 work pass applications purportedly on behalf of a company known as Hangeun Doogeun Korean Restaurant Pte Ltd ("HDKR"), for employment at HDKR. Of these 139 applications, 136 were rejected by the MOM and three were withdrawn. It is undisputed that Terry would log into Asia Recruit's EPOL account using his SingPass details to submit the aforementioned work pass applications. Fees collected by Asia Recruit from foreign jobseekers between April to July 2015 amounted to $136,217.

6 AJM was incorporated on 7 December 2012. From 10 March 2015 to 28 March 2016, the appellant was the sole director and shareholder. As stated above, AJM was named as the employer on 137 work pass applications

submitted by Asia Recruit to the MOM, which were all rejected. Fees paid to AJM from August 2015 to March 2016 amounted to $301,084.

7 UUBR was incorporated on 3 July 2015. The company changed its name to Connectsia Pte Ltd ("Connectsia") on 3 December 2015. For ease of reference, I will continue to refer to UUBR by its original name at the time of incorporation, unless otherwise specified. From 3 July 2015 to 28 March 2016, the appellant was the sole director and shareholder of UUBR. Between August and November 2015, UUBR submitted 180 work pass applications through EPOL to the MOM, naming itself as the employer. Out of these 180 applications, two were for Letters of Consent ("LOCs"). Both applications for LOCs were successful. Out of the remaining 178 applications, 176 were rejected by the MOM and two were withdrawn. It is undisputed that the appellant would log into UUBR's EPOL account using his SingPass details to submit the aforementioned work pass applications. Fees paid to UUBR from July 2015 to March 2016 amounted to $190,750.

The parties' cases at trial

8 In essence, the Prosecution's case at trial was that over the course of more than a year, the appellant and Terry had used the three companies: Asia Recruit, AJM and UUBR to defraud approximately 1,317 foreign jobseekers, deceiving them into paying a total of approximately $831,049 in fees for non-existent employment and sham employment-related services.[2]

9 As a preliminary point, the Prosecution submitted that notwithstanding their respective appointments and shareholdings within the said companies, the

[2] Prosecution's submissions dated 31 January 2022 ("PS") at para 2.

appellant and Terry were *jointly* responsible for the businesses across all the companies.[3]

10 The Prosecution sought to establish two distinct iterations of fraud perpetrated by the appellant and Terry through the said companies. It is helpful to first briefly set out the particulars of each of these iterations.

11 The first iteration of the fraud[4] was operative from March 2015 to mid-July 2015, involving Asia Recruit and AJM. During this period, the appellant used Asia Recruit, a licensed EA, to induce foreign jobseekers into paying upfront fees for purported job-seeking services. This was done despite the fact that Asia Recruit had no intention of genuinely providing, and did not genuinely provide, any such service. Asia Recruit would then follow-up with these foreigners to falsely inform them that an employer (either AJM or HDKR) had agreed to offer them a job – when in fact no employer had done so – thereby fraudulently inducing the foreign jobseekers to pay additional fees for further services, which included the submission of work pass applications. Asia Recruit would then submit work pass applications to the MOM on behalf of these foreign jobseekers, knowing and expecting that the applications would fail. Crucially, the Prosecution submitted that AJM was entirely complicit in the scheme. During the relevant period, AJM had no business and merely served the fraudulent purpose of being named on the work pass applications as one of the purported employers of these foreign jobseekers. Meanwhile, without the knowledge of HDKR, Asia Recruit misused their name in some of the work pass applications that were submitted to the MOM.

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3 Prosecution's closing submissions ("PCS") at para 2, Record of Appeal (Amendment No. 2) ("ROA") p 3490.

4 PS at paras 5–6; PCS at paras 5–10, ROA pp 3491–3493.

12 The second iteration[5] of the fraud was operative from mid-July 2015 to March 2016. This was devised in response to a caution issued by the MOM to Asia Recruit to cease the collection of upfront fees from foreign jobseekers which followed a raid conducted on 16 July 2015. In the second iteration, AJM purported to run an online job portal, charging foreign jobseekers fees in exchange for the promise to secure them job interviews. While Asia Recruit continued to promote its EA "services", this time they did so together with promoting AJM's "services", which allowed Asia Recruit's staff to continue collecting upfront fees from foreign jobseekers by purporting that the fees belonged to AJM instead of Asia Recruit. The appellant then used the third company, UUBR, to invite every one of these foreigners to "job interviews". This created the illusion that AJM had fulfilled its side of the bargain. In reality, beneath this veneer of legitimacy, the UUBR interviews were nothing more than a further means to defraud these foreign jobseekers of additional sums of money. At the end of every interview, UUBR offered each foreigner a job. This was however conditional upon them first paying UUBR fees for compulsory "training". Unbeknownst to these foreign jobseekers, at no point did UUBR have business revenues or business contracts, revealing no genuine intention or ability to hire these foreign jobseekers. None of these foreigners eventually worked at UUBR. Additionally, as was done by Asia Recruit in the first iteration, the appellant on behalf of UUBR, submitted work pass applications to the MOM for the foreign jobseekers who paid the requisite fees and completed the "training". All of the applications were rejected. MOM suspended UUBR's EPOL account on 6 November 2015. This meant that UUBR was no longer able to submit any work pass applications after this date. Despite this, UUBR continued to purport to offer employment to foreign jobseekers. UUBR thus

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5 PS at paras 7–10; PCS at paras 11–18, ROA pp 3493–3496.

continued to collect fees from foreigners until the CAD intervened in March 2016.

13 These facts formed the basis of the three CA charges preferred against the appellant, which read as follows:[6]

> **1st Charge (Amended)**
>
> You… are charged that you, between 10 March 2015 to 28 December 2015, were knowingly a party to the carrying on of the business of Asia Recruit Pte Ltd ("AR") (now known as Alliance Recruit Pte Ltd), for a fraudulent purpose, namely, to induce foreigners seeking employment in Singapore to pay AR fees for services related to securing employment in Singapore, including applying to the Ministry of Manpower ("MOM") for a work pass to allow the foreigners to take up purported employment positions at companies in Singapore, when such positions did not genuinely exist, and you have thereby committed an offence punishable under Section 340(1) read with Section 340(5) of the Companies Act (Chapter 50).
>
> **2nd Charge (Amended)**
>
> You… are charged that you, between 4 May 2015 to 28 March 2016, were knowingly a party to the carrying on of the business of Asiajobmart Pte Ltd ("AJM"), for a fraudulent purpose, namely, to induce foreigners seeking employment in Singapore to pay Alliance Recruit Pte Ltd (formerly known as Asia Recruit Pte Ltd), itself and Connectsia Pte Ltd (formerly known as UUBR International Pte Ltd) ("UUBR"), fees for purported services related to securing employment positions at AJM and UUBR, when such positions did not genuinely exist, and you have thereby committed an offence punishable under Section 340(1) read with Section 340(5) of the Companies Act (Chapter 50).
>
> **3rd Charge (Amended)**
>
> You… are charged that you, between 3 July 2015 to 28 March 2016, were knowingly a party to the carrying on of the business of Connectsia Pte Ltd (formerly known as UUBR International Pte Ltd) ("Connectsia"), for a fraudulent purpose, namely, to induce foreigners seeking employment in Singapore to pay UUBR fees purportedly necessary for securing employment in positions at UUBR, when such positions did not genuinely exist, and you have thereby committed an offence punishable

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6 ROA pp 10–14.

> under Section 340(1) read with Section 340(5) of the Companies Act (Chapter 50).

14 At the close of the Prosecution's case, the DJ found that there was clear *prima facie* evidence for the defence to be called on all three CA charges. The appellant and Terry elected to remain silent, and no witnesses were called to testify for the Defence.

15 The appellant's submissions at the conclusion of the trial centred around two main points: (a) that the Prosecution had failed to prove beyond reasonable doubt that the employment positions at AJM, HDKR and UUBR did not exist; and (b) that AJM and UUBR had genuine business plans, revenue and intention to hire the foreign jobseekers.

The decision below

16 The DJ found that there was "overwhelming evidence" presented at the trial to support the conviction of the appellant on all three CA charges.[7]

17 The DJ categorised the 23 Prosecution witnesses into three main groups. The first group consisted of the foreign jobseekers who were defrauded by the appellant and Terry. They testified as to how and why payments were made to the three companies. The second group comprised the employees of the three companies who were working under the appellant and Terry. The third group consisted of MOM officers. They testified as to how the work pass applications submitted by the appellant and Terry on behalf of Asia Recruit and UUBR were doomed to fail. The DJ comprehensively summarised the evidence of these witnesses in the GD at [14]–[37]. He observed that the evidence of these

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7 GD at [62], ROA p 2374.

Prosecution witnesses was largely unchallenged, and the testimonies of the foreign jobseekers were corroborated by the employees of the three companies.[8]

18 His key findings can be summarised as follows:[9]

(a) There were no genuine employment positions to be filled in the companies of AJM, HDKR and UUBR for which Asia Recruit and UUBR had collected moneys from the foreign jobseekers. AJM and UUBR were clearly bogus employers primarily used for the purpose of being named as employers in the work pass application forms to the MOM via EPOL. Moreover, evidence adduced from the company director of HDKR showed that the company was *not* looking to hire that many employees as indicated in the applications to the MOM.

(b) Asia Recruit induced foreign jobseekers to pay upfront fees for the purported service of helping them to find employment, when in fact it had no intention of providing, and did not genuinely provide, any such service. Asia Recruit then falsely told these foreign jobseekers that they had found them an employer who had agreed to give them a job, thereby fraudulently inducing the foreign jobseekers to pay further fees.

(c) The work pass applications submitted by Asia Recruit were doomed to fail as the submitted applications did not meet the eligibility criteria set by the MOM.

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8 GD at [44], ROA p 2369.

9 GD at [45]–[57], ROA pp 2369–2373.

(d) The work pass applications submitted by UUBR were bound to be rejected as there was insufficient information provided on the business of UUBR.

(e) The failure of Asia Recruit and UUBR to submit a single successful Employment Pass or Special Pass application was neither accident nor misfortune. The appellant and Terry knew that neither AJM nor HDKR would hire any of the foreign jobseekers. The inevitable failure to obtain a work pass from the MOM allowed Asia Recruit to blame the former for not approving the applications and claim that Asia Recruit had done whatever it could to fulfil its contractual obligations as an EA.

(f) Despite the suspension of UUBR's EPOL account on 6 November 2015 by the MOM, UUBR continued to "hire" foreign jobseekers and promise them employment, although UUBR had no means of obtaining any work pass application after this date.

(g) The interviews by UUBR were a façade. The sham interviews served two functions: (a) first, they allowed AJM to claim that it had fulfilled its guarantee of securing an interview for the jobseekers; and (b) second, they were a means for UUBR to extract an additional set of fees from the foreign jobseekers.

19 The DJ also drew an adverse inference against the appellant and Terry for remaining silent. He found that whether or not (a) AJM and UUBR had agreed to hire the candidates and (b) there were genuine job positions in these two companies for the purported employment of the foreign jobseekers was within the knowledge of the two of them. They would thus have been best

placed to provide answers as to what jobs were available and furnish the supporting details to substantiate those answers.[10]

20 Thus, at the conclusion of the trial, the DJ sentenced the appellant to 32 months' imprisonment for the charge concerning Asia Recruit, 33 months' imprisonment for the charge concerning AJM and 34 months' imprisonment for the charge concerning UUBR. He ordered the sentences in the charges concerning Asia Recruit and UUBR to run consecutively, resulting in a global sentence of 66 months' imprisonment.[11] Further, pursuant to s 359(1) of the CPC, the DJ ordered the appellant to pay $174,385 in compensation to the victims.[12]

The appeal

21 As stated above, the appellant presently appeals against both his conviction and sentence.

22 At the hearing before me, the appellant's counsel raised a preliminary point that the 2nd and 3rd charges as framed were defective. As this point was not canvassed in the appellant's written submissions, I directed parties to tender further written submissions.

23 In respect of the appellant's substantive appeal against his conviction, he advances two main, albeit limited, legal arguments. First, that the charges under s 340(1) read with s 340(5) of the CA are not made out as the Prosecution has failed to prove beyond reasonable doubt all the requisite elements. In

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10 GD at [59]–[61], ROA p 2374.

11 Notes of Evidence ("NE"), 18 February 2021, ROA pp 2351–2352.

12 GD at [4] and [94], ROA pp 2355 and 2385; PS at paras 1 and 116.

support of this, the appellant makes two points: (a) on the application of the *ejusdem generis* principle, the phrase "for any fraudulent purpose" in s 340(1) has to be restricted to a situation where creditors and persons with an interest in the assets of the company have been defrauded;[13] and (b) certain purported prerequisites contained in s 340(1) have not been satisfied, namely that the company either be in the course of winding up or have proceedings brought against it.[14] Therefore, the charges were defective and the appellant should be acquitted under s 390(1)(*b*)(i) of the CPC.[15]

24 Second, the appellant argues that the Prosecution has breached its common law disclosure obligation as set out in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*").[16] In this regard, the appellant alleges that the Prosecution's failure to disclose a two-page letter sent to the Commercial Affairs Division ("CAD") purportedly by one Mr Ahmad Aldaher ("the CAD's Letter") had unfairly prejudiced the appellant to the extent that his conviction was rendered unsafe.[17]

25 Notably, apart from these two main grounds of challenge to his conviction, the appellant does not seek to challenge any of the DJ's findings.

26 Finally, the appellant is also appealing against the global sentence imposed and the compensation order ordered by the DJ.[18]

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13 Appellant's submissions dated 28 January 2022 ("AS") at para 16.

14 AS at para 28.

15 AS at paras 10 and 56.

16 AS at para 63.

17 AS at paras at 61–63 and 68.

18 AS at paras 75, 80 and 83.

Issues to be determined

27 Based on the foregoing, the following issues arise for my determination:

(a) whether the 2nd and 3rd charges are defective;

(b) whether the *ejusdem generis* principle applies in the interpretation of s 340(1) of the CA;

(c) whether the preconditions in s 340(1) have to be satisfied before the offence of fraudulent trading in s 340(5) of the CA is made out; and

(d) whether the Prosecution is in breach of its common law disclosure obligation ("*Kadar* disclosure obligation").

My decision

Preliminary issue: Whether the 2nd and 3rd charges are defective

28 I deal first with the appellant's preliminary point alleging that the 2nd and 3rd charges (see [13] above) are defective.

29 In respect of the 2nd charge, the appellant points to two purported deficiencies, which I summarise as follows:

(a) First, although the material offending period particularised in the charge was between 4 May 2015 and 28 March 2016, UUBR was only incorporated on 3 July 2015 and its named changed to Connectsia on 3 December 2015. Accordingly, it was improper to refer to Connectsia as one of the relevant companies involved in the offence over the entire offending period as though it had

been in existence since 4 May 2015 (the "Non-existence Deficiency");[19]

(b) Second, the charge failed to properly particularise the dates on which UUBR had first been incorporated and when its name was subsequently changed to Connectsia (the "Name Change Deficiency").[20]

30 In respect of the 3rd charge, the appellant repeats the Name Change Deficiency and submits that the charge is defective as it incorrectly refers to the appellant "carrying on the business of Connectsia" for the period of 3 July 2015 to 28 March 2016 when it should have properly indicated that Connectsia was initially known as UUBR prior to 3 December 2015.[21]

31 Accordingly, the appellant claims that the 2nd and 3rd charges are insufficiently particularised and fall foul of the requirements prescribed in s 124 of the CPC.[22] Section 124(1) provides as follows:

> The charge must contain details of the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed, *as are reasonably sufficient to give the accused notice of what he is charged with.* [emphasis added]

32 I also note that whether an error or omission concerning the particulars stated in a charge is material is dependent on whether the accused was in fact misled by that error or omission. This is provided for in s 127 of the CPC which states:

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19 Appellant's further submissions dated 17 February 2022 ("AFS1") at paras 3.1–3.2.

20 AFS1 at para 4.

21 AFS1 at para 5.

22 AFS1 at para 6.

> *No error* in stating either the offence or the particulars that must be stated in the charge, and no omission to state the offence or those details *shall be regarded at any stage of the case as material unless the accused was in fact mislead by that error or omission.* [emphasis added]

33 In my view, the purported Name Change Deficiency in the 2nd and 3rd charges do not impinge on the requirement for sufficient notice in s 124(1) of the CPC. I agree with the Prosecution that it was sufficient to identify Connectsia in both charges as a company involved in the alleged offences during the material offending periods as that was the company's registered name at the time the charges were framed.[23] It is undisputed that UUBR, incorporated on 3 July 2015, is the same company as Connectsia, despite the name change on 3 December 2015.[24] Stating the company's registered name at the time the charges were framed was plainly sufficient to allow the appellant to identify UUBR/Connectsia as a relevant company involved in the 2nd and 3rd charges.[25] Importantly, the charge *does* in fact specifically refer to Connectsia as having been formerly known as UUBR, although the particular date of the name change was not stated.[26]

34 In relation to the purported Non-existence Deficiency in the 2nd charge, I too am of the view that it does not undermine the requirement for sufficient notice in s 124(1) of the CPC. The appellant adopts a pedantic view of the manner in which the particulars ought to be presented in the charge. However, it is important to bear in mind that s 124(1) of the CPC simply prescribes that the charge ought to contain particulars as are *reasonably sufficient* to give the

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23 Prosecution's further submissions dated 17 February 2022 ("PFS1") at para 15.

24 PFS1 at para 7.

25 PFS1 at para 15.

26 PFS1 at para 19.

appellant notice of what he has been charged with. During the material offending period between 4 May 2015 and 28 March 2016, two other companies as set out in the charge were involved in the alleged offence, namely, Asia Recruit and AJM. Both of these companies were in existence throughout the material period specified in the charge.[27] The charge should not be read in the narrow manner as suggested by the appellant such that all three companies had to be in existence throughout the entire material offending period. It is sufficient for the purposes of satisfying s 124(1) of the CPC to name the relevant companies involved in the offence and the general offending period without particularising in painstaking detail the specific periods of time each company was involved in the offence. Such particulars being reasonably sufficient to give the appellant notice of what he had been charged with and the relevant information associated with the charge.

35 For the reasons given above, I am of the view that the purported deficiencies identified in the 2nd and 3rd charges were not errors. In any event, even if they were errors, they certainly were not material for the purpose of s 127 of the CPC as it cannot be gainsaid that the appellant was in any way misled. In *Lim Chuan Huat and another v Public Prosecutor* [2002] 1 SLR(R) 1 (in respect of s 162 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which is *in pari materia* with s 127 of the CPC), the court explained the object of the provision as follows (at [22]):

> The object behind the concern of whether an accused is misled by errors in his charge is to *safeguard the accused from being prejudiced in his defence*. It is only in situations where the accused have been so misled, that the errors are considered material and go towards the validity of the charge.
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> [emphasis added]

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27 PFS1 at para 25.

36 In my view, the alleged Name Change Deficiency and Non-existence Deficiency in the 2nd and 3rd charges were inconsequential and could not be said to have misled the appellant. Indeed, at no point has the appellant suggested that he had been misled by the purported deficiencies identified.[28] In relation to the Name Change Deficiency, although the charges did not specifically state the date on which UUBR was renamed to Connectsia, the appellant clearly did not labour under any misapprehension that they were one and the same entity. It is undisputed that the appellant was the sole director and shareholder of UUBR/Connectsia (see [7] above). Moreover, at paragraph 4 of the SOAF and in exhibit SOAF-4, the company's detailed particulars were set out and thus the appellant could not have been misled as to the relevant company involved in the charges. In respect of the Non-existence Deficiency, the Prosecution's case at trial explicitly referred to two distinct iterations of fraud – with the first iteration running from March 2015 to July 2015 involving only AR and AJM and the second iteration running from July 2015 to March 2016 involving AR, AJM and UUBR.[29] The appellant would thus have been more than adequately informed that the 2nd charge involved UUBR after its incorporation in relation to the second iteration of fraud.

37 In sum, I am of the view that the 2nd and 3rd charges are not defective. In any event, even if they were, I am satisfied that the appellant nonetheless did not suffer any prejudice arising from these deficiencies in the trial below.

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28 PFS1 at para 38.

29 PFS1 at para 31.

Appeal against conviction

38 I now turn to the appellant's substantive appeal against his conviction. I begin by setting out in brief the relevant grounds of the appeal, which will be elaborated below.

39 As stated above at [23], the appellant's appeal against conviction is brought on two main grounds. The first ground is premised on the interpretation of ss 340(1) and 340(5) of the CA. The appellant's argument that the offences of fraudulent trading under s 340(5) are not made out is two-fold: (a) the appellant has not defrauded any creditors of the companies involved as required by s 340(1); and (b) certain preconditions contained in s 340(1) have not been satisfied.

40 The second ground concerns the Prosecution's alleged breach of its *Kadar* disclosure obligation in failing to disclose the 2-page CAD's Letter purportedly by one Mr Ahmad Aldaher ("Mr Aldaher").

Ground 1: Elements of fraudulent trading under 340(5) of the CA are not made out

41 In support of his first ground of appeal, the appellant advances two arguments concerning the statutory interpretation of ss 340(1) and 340(5) of the CA. The appellant submits that the offence of fraudulent trading under s 340(5) are not made out across all three charges as:

(a) First, that the application of the *ejusdem generis* principle of statutory construction requires that the "fraudulent purpose" in s 340(1)

of the CA be perpetrated against *creditors*. Accordingly, as there were no creditors involved in the present case, the charges were deficient.[30]

(b) Second, certain preconditions contained in s 340(1) of the CA have to be satisfied, namely that the company either: (i) has to be in the course of winding-up; or (ii) have proceedings brought against it. As neither of these preconditions were satisfied in the present case, the charges were deficient.[31]

42 Should either of the two arguments succeed, the necessary consequence would be that the appellant's convictions on all three charges are unsustainable and should be overturned.

(1) Application of the *ejusdem generis* principle in the interpretation of s 340(1) of the CA

43 The issue for determination here is whether the *ejusdem generis* principle of statutory construction applies such that for an offence of fraudulent trading in s 340(5) of the CA to be made out, the fraudulent purpose stated in s 340(1) of the CA has to necessarily be perpetrated in respect of *creditors*.

44 For ease of reference, I reproduce the relevant statutory provisions. The offence of fraudulent trading is found at s 340(5) of the CA and reads as follows:

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

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30 AS at para 16.

31 AS at paras 28–30.

45 As can be seen from the above, s 340(5) of the CA has to be read together with s 340(1), which provides as follows:

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

46 The appellant's submission is simply that the *ejusdem generis* principle of statutory construction applies such that the wider phrase "or for any fraudulent purpose" in s 340(1) must be restricted by, and implied from, the preceding narrower phrase "intent to defraud creditors of the company or creditors of any other person". To this end, the appellant argues that the narrower phrase contains the genus-defining terms, with the common and dominant feature being their reference to "creditors". Following from this, the wider phrase "or for any fraudulent purpose" must necessarily be restricted to a fraudulent purpose being carried out in respect of *creditors*, to the exclusion of non-creditors.[32] Therefore, in the present case, although Asia Recruit, AJM and UUBR were found to have had collected fees from foreign jobseekers, these foreign jobseekers were not creditors of either of the three companies, as such, the appellant cannot be held criminally liable under s 340(5) of the CA.[33]

47 Before I begin my analysis, I find it helpful to set out briefly the key aspects concerning the application of the *ejusdem generis* principle.

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32 AS at para 22.

33 AS at para 25.

48 In Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") at section 23.2, the *ejusdem generis* principle is described in the following terms:

> (1) The *ejusdem generis* principle is a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character.

49 However, for the *ejusdem generis* principle to apply, there must be a sufficient "genus" or common thread that runs through all the items in the list (or "genetic string") that includes the disputed term: see *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 ("*Lam Leng Hung*") at [114]. As explained in *Bennion* at section 23.3:

> (1) For the *ejusdem generis* principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore, the genus must be narrower than the general words it is said to regulate.
>
> (2) The nature of the genus is gathered by implication from the express words which suggest it. Usually these consist of a list or string of substantives or adjectives.

50 The centrality of the importance of identifying a proper genus was expressed in Ruth Sullivan, *Driedger on the Construction of Statutes* (Butterworths, 3rd Ed, 1994) ("*Driedger*") at p 206:

> The limited class rule cannot be invoked if the class inferred from the list of specific items has nothing, apart from those items, to apply to. Otherwise the general words would add nothing to the provision, contrary to the presumption against tautology. … an interpretation must be rejected if it narrows the scope of the general words so that there is nothing to which they can apply.

51 In my judgment, the primary difficulty with the appellant's identification of "creditors" as the genus of the provision is that the narrower

phrase "intent to defraud creditors of the company or creditors of any other person" would operate such as to exhaust this said genus. This observation was made by the English Court of Appeal in *Regina v Kemp* [1988] QB 645 ("*Kemp*") at 654G. In particular, "creditors of any other person" is broad enough to cover *all* other creditors who are not creditors of the company. If the provision is read in this manner, the wider phrase would cover all situations where fraud is perpetrated on creditors, rendering the narrower phrase entirely otiose. As observed in *Driedger* (see [50] above), "if a class can be found but the specific words exhaust the class, then rejection of the rule may be favoured because its adoption would make the general words unnecessary". If the provision is read in the manner suggested by the appellant, this would certainly offend the rule of statutory construction that Parliament shuns tautology and does not legislate in vain: see *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [43].

52 My view is fortified by the recent decision of the English Court of Appeal in *R v Hunter and another* [2021] EWCA Crim 1785 ("*Hunter*") and the decision of the Singapore High Court in *Phang Wah and others v Public Prosecutor* [2012] 1 SLR 646 ("*Phang Wah (HC)*"). In *Hunter*, the English Court of Appeal dealt with the appeals of two offenders against their convictions of, *inter alia*, fraudulent trading under s 993(1) of the Companies Act 2006 (c 46) (UK) ("UK Companies Act 2006"), which is almost identical to s 340(5) of the CA (with the "purpose mentioned in subsection (1)" incorporated). Section 993(1) of the UK Companies Act 2006 thus reads as follows:

> (1) If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence.

One of the issues that the English court had to determine was what the components of the offence under s 993(1) of the UK Companies Act 2006 were (at [17]). The English court held at [111] that "[s]ection 993, by its terms, creates two offences… The first limb relates to businesses carried on with an intention to defraud creditors. The second limb [relates to businesses carried on for any fraudulent purpose]". In particular, they observed at [122] that "[i]t might be stating the obvious but where the offence of carrying on a business for any fraudulent purpose is charged (the second limb offence) it is unnecessary to establish the existence of creditors".

53 Similarly, in *Phang Wah (HC)*, Tay Yong Kwang J (as he then was) noted at [24], that the appellants in that case were "charged under the second limb of s 340, *viz*, for carrying on a business for any fraudulent purpose". This was a clear acknowledgment that the offence in s 340(5) comprises two *separate limbs*: (a) carrying on a business with intent to defraud creditors (of the company or any other person); *or* (b) carrying on a business for any fraudulent purpose, which constituted two separate offences. The three charges that the appellant faces in the present case were clearly brought under the latter limb and were plainly not deficient.

54 In any event, in *Lam Leng Hung* at [121], the Court of Appeal provided a salutary reminder that the *ejusdem generis* principle was simply a tool to ascertain the ordinary meaning of a disputed term or phrase as part of the purposive approach to interpretation laid down in s 9A of the Interpretation Act 1965 (2020 Rev Ed). It has no independent purpose from this and should not be allowed to override or veer away from legislative intent. Assuming *arguendo* that the genus of the provision could reasonably be identified as "creditors", I am of the view that this would not be consistent with the legislative intent of the provision. In *Kemp* at 654F, having broadly reviewed

the legislative history of the corresponding provision in s 993(1) of the UK Companies Act 2006, the English court observed that "the mischief aimed at [was] fraudulent trading and not fraudulent trading just in so far as it affects creditors". In the Singapore context, Vinodh Coomaraswamy J in *Marina Towage Pte Ltd v Chin Kwek Chong and another* [2021] SGHC 81 at [37], observed that the immediate purpose of s 340(1) of the CA is to bring home personal liability for a company's debts to those who are knowingly a party to the company's fraudulent trading. Indeed, its ultimate purpose is to set and maintain standards of commercial morality by deterring natural persons from using the corporate form to trade fraudulently. It would be contrary to this purpose and in fact, rather arbitrary, to limit the ambit of civil liability in s 340(1) and consequently criminal liability in s 340(5), to fraudulent trading just in so far as it affects *creditors*. It may be that a majority of the cases concerning ss 340(1) and 340(5) involve the defrauding of creditors, but these cases certainly do not exhaust the scope of these provisions.

55 For the reasons stated above, I am unable to agree with the appellant's submission that the *ejusdem generis* principle applies in the construction of s 340(1) of the CA with the consequence that a business has to be carried on for "any fraudulent purpose" in respect of *creditors* only in order for criminal liability to arise under s 340(5) of the CA. I find that the Prosecution needed only to prove beyond a reasonable doubt that the appellant had carried on the businesses of Asia Recruit, AJM and UUBR with the intend to defraud. As the appellant did not challenge the DJ's finding on this, there is thus no basis to set aside the appellant's convictions on the three charges under s 340(5) of the CA.

(2) Whether the preconditions in s 340(1) have to be satisfied before the offence of fraudulent trading in s 340(5) of the CA is made out

56 The appellant's second argument is that certain preconditions for criminal liability under s 340(5) of the CA contained in s 340(1) of the CA have not been satisfied, namely that the companies in question be either: (a) in the course of winding up; or (ii) have proceedings brought against them ("the Prerequisites") at the material time.[34]

57 Should the Prerequisites contained in s 340(1), a provision concerned with the imposition of civil liability for fraudulent trading, be read into the requirements for the imposition of criminal liability in s 340(5)? Having considered the parties' submissions, I am of the view that this question should be answered in the negative. Before I provide my reasons, I first trace the genesis and development of the provisions dealing with fraudulent trading.

(A) LEGISLATIVE HISTORY OF THE FRAUDULENT TRADING PROVISIONS

58 The fraudulent trading provisions find their origins in the UK. These provisions were first introduced by s 75 of the Companies Act 1928 (c 45) (UK) ("UK Companies Act 1928") following the recommendations in the United Kingdom, *Report of the Company Law Committee* (Cmnd 2657, 1926) (Chairman: Mr Wilfrid Greene K.C.). The relevant provision provided as follows:

> **75.— Provisions with respect to fraudulent trading.**
>
> (1) If in the course of a winding-up it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver or the liquidator, or any creditor or contributory

[34] AS at paras 28–30.

> of the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
>
> …
>
> (3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1) of this section, every director of the company who was knowingly a party to the carrying on of the business in manner aforesaid, shall be liable on conviction on indictment to imprisonment for a term not exceeding one year.

59 Section 75 of the UK Companies Act 1928 was re-enacted substantially unchanged in s 275 of the consolidating Companies Act 1929 (c 23) (UK) and s 332 of the Companies Act 1948 (c 38) (UK) ("UK Companies Act 1948"). Save that in the UK Companies Act 1948, the section was widened to extend liability from directors to anyone knowingly a party to the business being carried out in a fraudulent manner. This change was reflected as follows:

> **332.—** Responsibility for fraudulent trading of persons concerned.
>
> (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that *any persons who were knowingly parties to the carrying on of the business in manner aforesaid* shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. On the hearing of an application under this subsection the official receiver or the liquidator, as the case may be, may himself give evidence or call witnesses. [emphasis added]

60 Subsequently, in Australia, the UK fraudulent trading provisions were adopted in s 304 of the Companies Act 1961 (Victoria).

61 The fraudulent trading provisions in the UK and Australian legislation referred to above were largely adopted in Malaysia and enacted in s 304 of the Companies Act 1965 (Act 125 of 1965) (M'sia) ("M'sia Companies Act 1965"), with one notable modification. In s 304(1) of the M'sia Companies Act 1965, the breadth of the provision providing for civil liability for fraudulent trading was expanded such that liability may be attracted not only where fraudulent trading has been discovered in the course of the winding up of a company, but also where it has been discovered in the course of any proceedings against the company. Section 304(1) of the M'sia Companies Act 1965 is thus *in pari materia* with s 340(1) of the CA. The inspiration for this amendment is likely attributable to recommendation made in the report prepared by the Company Law Committee chaired by Lord Jenkins in 1962 ("Jenkins Committee Report"): see Malaysia, Senate, *Parliamentary Debates* (16 August 1965), vol 2 at col 769 (Lim Swee Aun, Minister of Commerce and Industry). In the Jenkins Committee Report at para 503(c), it was recommended that the legislation should make clear that the criminal penalty for fraudulent trading in s 332(3) of the UK Companies Act 1948 may be attracted where the facts are "discovered in other circumstances than in the course of winding up". It should be noted that this recommendation was not in fact taken up by the UK Parliament in its subsequent amendments to the UK Companies Act 1948.

62 As it was considered that Singapore's new law relating to companies should not be different from the legislation in force in Malaysia in order to facilitate trade and commercial intercourse, the Companies Act enacted in 1967 (see Companies Act 1967 (Act 42 of 1967)) (the "first CA") followed closely the provisions contained in the M'sia Companies Act 1965: see *Singapore Parliamentary Debates, Official Report* (21 December 1967) vol 26 at col 1035 (E.W. Barker, Minister for Law and National Development). In particular, the

fraudulent trading provisions were ported over without amendment in s 304 of the first CA (presently s 340 of the CA).

63 This concludes the first phase of the adoption and development of the fraudulent trading provisions in the UK, Australia, Malaysia and Singapore. The second phase of development began with the House of Lords decision in *Director of Public Prosecutions v Schildkamp* [1971] AC 1 ("*Schildkamp*").

64 In *Schildkamp*, the House of Lords was confronted squarely with the question of whether the scope of s 332(3) of the UK Companies Act 1948 imposing criminal liability should be limited to acts done in the course of a winding up, mirroring the scope of s 332(1) governing the imposition of civil liability. Eventually, the House of Lords found by a majority of three to two that no criminal proceedings under s 332(3) of the UK Companies Act 1948 could be brought until the company was being wound up. The views of the majority were expressed by Lord Hodson and Lord Upjohn, with Lord Reid concurring with the reasons provided by Lord Upjohn. In arriving at their decision, the majority emphasised three points: (a) although the words "winding up" are not mentioned in subsection (3), there is a specific reference to subsection (1) where winding up is specifically mentioned; (b) it would be anomalous if the criminal remedy were wider in its scope than the civil remedy; and (c) assuming that the scope of subsection (3) was not so limited, Parliament would not have "tucked away" this subsection creating this vague but serious offence in this part of the Act dealing with the consequences of winding up: see *Schildkamp* at pp 11, 12 and 25.

65 Conversely, the minority comprising Viscount Dilhorne and Lord Guest found that s 332(3) of the UK Companies Act 1948 should not be limited by the

precondition of winding up contained in s 332(1). Their views are aptly summarised by Lord Guest at pp 14–15:

> *If the words of section 332(3) are read in isolation they are as plain as can be: the offence is absolute and there is no requirement of a winding-up order previous to the prosecution.* If subsection (3) is considered along with subsection (1) the matter is plainer still. *The only part of subsection (1) which Parliament has thought fit to incorporate in subsection (3) is the intention and purpose for which the offence is committed. But Parliament has deliberately refrained from incorporating any other words of subsection (1) or limiting subsection (3) to a case where winding up has taken place.* … I can see no reason why a provision dealing with fraudulent trading by *directors of the company cannot conveniently be found in a fasciculus of sections otherwise dealing with winding up, having regard to the fact that fraudulent trading by directors is not uncommonly connected with winding up.* If one asks the question, what is the common object governing subsections (1) and (3) of section 332, the answer is responsibility for fraudulent trading by persons connected with companies. This has certain civil consequences which are dealt with by subsection (1) and certain criminal consequences which are dealt with by subsection (3). In subsection (1) a winding-up order is necessary for the operation of the subsection because it is the court in the winding up which makes the declaration referred to in the subsection. In subsection (3) there is no need to provide for a winding up as the subsection establishes a criminal offence. …
>
> Where the words of a statute are clear and unambiguous, then effect must be given to them unless they lead either to injustice or absurdity. I can see nothing either absurd or unjust in a reading of subsection (3) which makes fraudulent trading an offence unconnected with the winding up of a company. …
>
> [emphasis added]

66 The legislative response to the decision in *Schildkamp* came by way of s 96 of the Companies Act 1981 (c 62) (UK) ("UK Companies Act 1981"). Section 96 read as follows:

> **96.** Criminal liability in case of fraudulent trading by company.
>
> Section 332(3) of the 1948 Act (criminal liability of persons concerned in fraudulent trading by company) shall apply whether or not the company has been or is in the course of being wound up.

This amendment unequivocally demonstrated Parliament's intention that criminal proceedings could be brought before winding up proceedings had commenced.

67 Likewise, in Singapore, by way of cl 54 of the Companies (Amendment) Bill (Bill No 16/1983), s 304(5A) of the first CA was introduced, which read as follows:

> (5A) Subsection (5) shall apply to a company whether or not it has been, or is in the course of being, wound up.

This additional provision is now reflected as s 340(6) of the CA, which mirrors s 96 of the UK Companies Act 1981.

68 Having charted the origins of the fraudulent trading provisions in Singapore and its developments, I now turn to address the parties' submissions on the proper scope governing the imposition of criminal liability in s 340(5) of the CA.

(B) PROPER INTERPRETATION OF THE REQUIREMENTS IN S 340(5) OF THE CA

69 First, on a plain reading of s 340(5) of the CA, it is difficult to see how the Prerequisites in s 340(1) of the CA should be read into it. As the Prosecution observes, s 340(5) conspicuously lacks any reference to the Prerequisites.[35] I find that Lord Guest's comments in *Schildkamp* (see [65] above) have much to commend them. On the face of s 340(5), it is obvious that the Prerequisites contained in s 340(1) have not been explicitly incorporated into the former provision. Indeed, the only part of s 340(1) which has been expressly incorporated by Parliament into s 340(5) is that the business of a company must

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[35] PS at para 27.

be "carried on with the intent or for the purpose mentioned in subsection (1)"; this being that the company has been carried on with the intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. Had Parliament intended to limit the scope of the imposition of criminal liability in s 340(5) by reference to the Prerequisites in s 340(1), it could have easily done so. In my view, there is no benefit in speculating as to Parliament's intentions where the plain wording of the provision is clear and unambiguous and can bear no other interpretation. There is simply no reason to artificially work the Prerequisites into s 340(5) in order to limit its wide ambit.

70 Second, and relatedly, and perhaps stating the obvious, civil liability under s 340(1) is *separate and independent* from criminal liability under s 340(5) of the CA. This is underscored by the enactment of s 340(6) of the CA. In enacting s 340(6), Parliament followed the UK's lead in clarifying in no uncertain terms that the Prerequisites which applied in the context of civil liability were not incorporated into s 340(5) such as to limit the scope of its application in the context of criminal liability. The enactment of s 340(6) would be incongruous with s 340(5) if the latter was indeed meant to incorporate the Prerequisites. It is also for this reason that I am unable to accept the appellant's reliance on *Schildkamp*[36] as it was decided before the UK equivalent of s 340(6) of the CA was introduced. To my mind, in enacting s 340(6), Parliament clearly evinced its intention for criminal liability under s 340(5) of the CA not to be circumscribed by the Prerequisites in s 340(1) of the CA. My view is fortified by the Court of Appeal's observations, albeit *obiter*, in *Phang Wah v Public Prosecutor and another matter* [2012] SGCA 60 ("*Phang Wah (CA)*") at [19], where it was held that the effect of s 340(5) of the CA was to "create separate

[36] AS at paras 52–53.

criminal liability independent of the civil liability embodied in s 340(1) of the [CA]". The Court of Appeal noted that this separation was all the more apparent when read together with s 340(6) of the CA.

71 Third, the appellant suggests that the legislative intention behind the fraudulent trading provisions in s 340 of the CA was to protect creditors of a company on the verge of liquidation, and consequently, the Prerequisites should apply to criminal liability under s 340(5) of the CA.[37] In support of this argument, the appellant notes that s 340 of the CA has since been repealed and re-enacted largely unchanged in s 238 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"). For the present purposes, it is unnecessary to address the differences between s 340 of the CA and s 238 of the IRDA. In particular, however, the appellant points to the speech of Senior Minister of State for Law, Mr Edwin Tong, during the second reading of the Insolvency, Restructuring and Dissolution Bill on 1 October 2018, where he referred to s 238 of the IRDA as being one of the provisions concerned with liquidation: see *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law). It is undisputed that s 340 of the CA and s 238 of the IRDA are situated amidst provisions concerning the liquidation or winding up of companies. However, this does not take the appellant's argument very far. Just because the fraudulent trading provisions are located where they are does not necessarily mean that they are meant to apply solely in circumstances of liquidation. In fact, as Lord Guest in *Schildkamp* noted (see [65] above), there is nothing unusual about provisions dealing with persons who are knowingly a party to the carrying on of a business fraudulently being found in a fasciculus of sections otherwise

[37] AS at paras 31 and 48.

dealing with winding up, seeing as fraudulent trading is not uncommonly connected with winding up.

72 In sum, I am of the view that the Prerequisites for the imposition of civil liability under s 340(1) of the CA do not have to be satisfied before criminal liability under s 340(5) of the CA can arise. For criminal liability to arise in this case, only two requirements have to be satisfied: (a) the business must have been carried on with any fraudulent purpose; and (b) the appellant must have knowingly been a party to the carrying on of that business with that fraudulent purpose.[38] As the appellant has not challenged the DJ's findings concerning these two requirements, and the Prosecution is not required to prove the existence of the circumstances in the Prerequisites, I find that there is no reason to set aside the appellant's conviction.

Ground 2: Breach of Prosecution's Kadar disclosure obligation

73 The appellant's second ground of appeal relates to the Prosecution's alleged breach of its *Kadar* disclosure obligation. In essence, the appellant submits that the Prosecution's failure to disclose a two-page letter sent to the CAD purportedly by one Mr Aldaher amounts to a breach of its *Kadar* disclosure obligation, which thus renders the appellant's conviction unsafe.

74 I find it helpful to first provide some background as to what transpired in the course of the trial in the court below. In April 2019, after the Prosecution closed its case, the trial was adjourned at the Defence's application, *inter alia*, to allow the appellant time to "procure a witness from the company known as Al Qabas".[39] This witness was purported to be Mr Aldaher who was the

38 PS at para 27.

39 NE, 10 April 2019, p 3:3–8, ROA p 2241.

chairman and/or owner of a company known as "Al Qabas Labour Supply" ("Al Qabas"). Subsequently, on 21 May 2019, the Defence received a letter allegedly from Mr Aldaher via courier ("the Defence's Letter").[40] The Defence's Letter comprised three pages and contained 17 pages worth of annexures. On the same date, the CAD received a similar letter, comprising two pages with no annexures ("the CAD's Letter").

75 On 19 September 2019, before the trial was scheduled to resume, the Defence served the Prosecution a notice to admit the Defence's Letter under the hearsay exception in s 32(1)(*j*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA").[41] When the trial resumed on 23 September 2019, the Defence applied to admit into evidence the Defence's Letter under s 32(1)(*j*)(iv) of the EA.[42] According to the Defence, Mr Aldaher was unable to travel to Singapore to testify due to his ill health.[43] In the course of that application, the Defence sought to confirm with the Prosecution that they had received "a similar statement or otherwise".[44] Initially, the Prosecution denied having received such a statement, however, it later clarified that the CAD had indeed received the CAD's Letter.[45] The DJ ruled that an ancillary hearing under s 279 of the CPC should be convened to determine the admissibility of the Defence's Letter. At this juncture, the Defence then opted to withdraw its application and closed its case without calling any witnesses to testify.[46]

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40 NE, 23 September 2019, p 4:19–20, ROA p 2277.

41 PS at para 52.

42 NE, 23 September 2019, p 1:19–30, ROA p 2274.

43 NE, 23 September 2019, p 14:19–20, ROA p 2287.

44 NE, 23 September 2019, p 4:19–20, ROA p 2277.

45 NE, 23 September 2019, p 11:21–22 and p 12:27–29, ROA pp 2284–2285.

46 NE, 23 September 2019, p 26:1–4;14–20, ROA p 2299.

76 It was only during the Defence's closing submissions that the appellant's defence was first advanced in court. One aspect of the appellant's defence was that he had not carried on the business of UUBR for a fraudulent purpose as UUBR was otherwise engaged in genuine business dealings with Al Qabas based in Dubai. The appellant alleged that his plan was to use UUBR to hire foreign jobseekers in Singapore in order to leverage on their respective personal networks in their home countries to source for potential candidates to be referred for employment by Al Qabas.[47] The appellant thus submits that the CAD's Letter was unused material that ought to have been disclosed pursuant to the Prosecution's *Kadar* disclosure obligation as it would have given the appellant a chance to pursue a line of inquiry that would lead to evidence that is admissible that might reasonably be regarded as credible or relevant to the guilt or innocence of the appellant.[48] In particular, the CAD's Letter would have strengthened the appellant's case in showing that there were legitimate business discussions surrounding the appellant's recruitment/employment business and its operations.[49]

77 At the beginning of an appeal, there is a presumption that the Prosecution has complied with its *Kadar* disclosure obligation. This presumption of regularity will only be displaced if the court has sufficient reason to doubt that the Prosecution has so complied with its obligations: see *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 ("*Winston Lee*") at [184(a)]–[184(b)]. At the hearing before me, the Prosecution continued to resist disclosure of the CAD's Letter. After hearing the parties' submissions,

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47 Defence's closing submissions, p 11 at para 18(h)(iv), ROA p 4578 and pp 28–29 at paras 35(r)–(w), ROA pp 4595–4596.

48 AS at para 66.1.

49 AS at paras 66.3–66.4.

I was of the view that the appellant had raised reasonable grounds for belief that the Prosecution had failed to comply with its *Kadar* disclosure obligation. Given that one aspect of the appellant's defence – albeit raised only during closing submissions – was that UUBR was involved in legitimate business dealings with Mr Aldaher and/or Al Qabas, and the Prosecution had confirmed that the CAD's Letter concerned information regarding these purported business dealings, I had some doubt as to the Prosecution's compliance with its *Kadar* disclosure obligation. Although the Prosecution submitted that the Defence's Letter contained more material than the CAD's Letter,[50] it was unclear to me whether there was any material overlap between the content in both letters and crucially, whether there was any information in the CAD's Letter which could have met the preliminary thresholds for disclosure as set out in *Kadar* at [113]. Therefore, I ordered the Prosecution to disclose the CAD's Letter to the court in order to establish that it had fulfilled its disclosure obligation.

78 In *Kadar*, the Court of Appeal considered the scope of the Prosecution's common law duty of disclosure which has over time come to be referred as the "*Kadar* disclosure obligation". The core aspect of the Prosecution's *Kadar* disclosure obligation is set out in *Kadar* at [113], where the court held that the Prosecution had to disclose to the Defence material which takes the form of:

(a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and

(b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might

[50] PS at para 53.

> reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

79 This disclosure obligation does not extend to include material which is either neutral or adverse to the accused; it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case: see *Kadar* at [113].

80 In articulating the Prosecution's *Kadar* disclosure obligation, the Court of Appeal emphasised that the rationale and general principles which underpin this obligation include the "elementary right of every defendant to a fair trial" as well as the rules of natural justice including "open justice": see *Kadar* at [98]. This was again reiterated in *Soh Guan Cheow Anthony v Public Prosecutor and another appeal* [2017] 3 SLR 147 at [93], where See Kee Oon JC (as he then was) observed that, "the *Kadar* obligation to disclose unused material is a limited one, and the required extent of disclosure has to be calibrated with the ultimate purpose of disclosure in mind, that is, to ensure a fair trial and prevent miscarriages of justice".

81 I now turn to consider whether the Prosecution is in fact in breach of its *Kadar* disclosure obligation by failing to disclose the CAD's Letter to the appellant. I make the following observations with the benefit of having before me both the Defence's Letter and the CAD's Letter which were disclosed to me.

82 In my assessment, on the facts of this case, the CAD's Letter did not fall within the realm of material required to be disclosed under the Prosecution's *Kadar* disclosure obligation. Without going into the precise content of both the Defence's Letter and the CAD's Letter which have not been admitted into evidence, I note that the content of the latter is found entirely in the former in

practically *identical* terms. It suffices to say that the CAD's Letter does not contain any additional information not already contained within the Defence's Letter. In fact, as pointed out by the Prosecution, the Defence's Letter contained further uncanvassed material as well as a number of annexures which were also absent from the CAD's Letter.[51] It bears repeating that the Defence's Letter was at all material times in the possession of the appellant since 21 May 2019.[52] Nevertheless, the appellant elected at trial not to give evidence and not to call witnesses in support of his defence. Indeed, the appellant had not even called Mr Aldaher to buttress the contents of the Defence's Letter, although it appears that the appellant had contact with him at the material time (see [75] above). Further, at the trial below, the appellant's then-counsel informed the court that Al Qabas was listed as the sender of the Defence's Letter which they received by courier, which was sent pursuant to the correspondence between Al Qabas and/or Mr Aldaher over e-mail. Importantly, the appellant's then-counsel also highlighted that the e-mail address used for that correspondence was the *same* e-mail address through which the CAD received the CAD's Letter.[53] Therefore, not only did the appellant have access to the Defence's Letter with substantially the same content as the CAD's Letter, but he also had access and means to communicate with the sender of the CAD's Letter. It bears repeating also that the appellant had chosen at the trial below to withdraw his application to admit the Defence's Letter into evidence (see [75] above).

83 The Prosecution did not breach its *Kadar* disclosure obligation to disclose the CAD's Letter seeing as it crucially did not provide any further information to the appellant that he did not already possess in the form of the

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51 Prosecution's further submissions dated 25 July 2022 ("PFS2") at para 25.

52 PFS2 at paras 32–33.

53 NE, 23 September 2019, pp 4:18–5:5, ROA pp 2278–2279.

Defence's Letter. In this regard, the ultimate purpose of disclosure as highlighted above (at [80]) must be borne in mind – *ie*, to ensure a fair trial and prevent miscarriages of justice. Thus, animating the *Kadar* disclosure obligation is the idea that in the interests of justice, the Prosecution should be required to disclose material that it has in its possession to the *exclusion* of the accused. The Prosecution's failure to disclose the CAD's Letter to the appellant did not in any way compromise the fairness of the trial in the court below or the present appeal. This was not the case where the Prosecution was in possession of unused material the contents of which the appellant was not privy to which may have prejudiced the conduct of his case at trial and on appeal. Indeed, during the course of the trial below, the Prosecution confirmed with the appellant that the CAD's Letter was in their possession and "a few paragraphs of the [CAD's Letter bore] some similarities" with the Defence's Letter although the latter was longer and contained enclosures which were absent from the former.[54] Having been in possession of the more comprehensive Defence's Letter, the appellant should not now be permitted to allege that the Prosecution has breached its *Kadar* disclosure obligation. However, I should stress that my finding above is arrived at on the particular facts of the case and should be confined accordingly. In particular, what is relevant is that both parties had access to the Defence's Letter at all material times and the contents of the CAD's Letter in the possession of the Prosecution was contained entirely within the Defence's Letter.

84 For completeness, even if I am wrong and the Prosecution is in breach of its *Kadar* disclosure obligation, for the reasons stated at [82]–[83] above, I am satisfied that no prejudice has been caused to the appellant in the conduct of

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[54] NE, 23 September 2019, p 12:26–32 and p 13:1–7, ROA pp 2286–2287.

his defence below and in this appeal and the appellant's conviction is nonetheless safe.

Appeal against sentence

85 As I am satisfied that there is no merit to the appellant's appeal against conviction, I now turn to consider his appeal against sentence. To recapitulate, the appellant was sentenced to a global sentence of 66 months' imprisonment and ordered to pay a sum of $174,385 as compensation to the victims ($57,600 in respect of the charge concerning AJM and $116,785 in respect of the charge concerning UUBR).[55] In this appeal, the appellant challenges both the length of his imprisonment term and the compensation order imposed pursuant to s 359(1) of the CPC. The appellant submits that individual sentences of between 12 and 15 months' imprisonment per charge and a global sentence of between 32 and 34 months' imprisonment with no compensation order would be more appropriate.[56]

86 In the court below, the DJ found that the cases of *Phang Wah (HC)* and *Rahj Kamal bin Abdullah v Public Prosecutor* [1997] 3 SLR(R) 227 ("*Rahj Kamal*") were good reference points in determining the appropriate sentence to impose. While I agree that these decisions serve as relevant starting points, it is important to bear in mind that the sentence to be imposed in each case ultimately turns on the unique factual matrix at hand. To this end, I find the High Court's observations in *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [218], instructive:

> [Sentencing] in a given case [should not be] arrived at *merely* by a resort to a prior precedent or precedents unless the facts as

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55 NE, 18 February 2021, ROA p 2352.

56 AS at para 75.

> well as context in that case are wholly coincident with those in the prior case or cases… The sentencing process is a complex one where the precise factual matrix is all-important and where the court is tasked with the delicate process of balancing a number of important factors centring on both individual (in particular, in relation to the accused) and societal concerns. [emphasis in original]

87 In *Phang Wah (HC)*, the first and second offenders ("Phang" and "Hoo" respectively) were parties to a multi-level marketing scheme run by Sunshine Empire Pte Ltd ("Sunshine Empire"). Phang was the consultant of the business and Hoo was the director of Sunshine Empire. The business of Sunshine Empire involved selling several types of "lifestyle" packages to participants who were members of the public. These packages included call-back services from EM-Call ("EM-Call talk time"), e-points, mall points and access to an online platform, e-Mall. There were two categories of packages, namely the Merchant packages and the Prime packages. The Prime packages were more expensive, offered more EM-Call talk time and the possibility of receiving Consumer Rebate Privileges ("CRP"). These CRP payouts were only available to Prime package participants. The CRP payouts were intended as incentives to participants and were funded from the sale of the lifestyle packages. Between August 2006 and October 2007, a total of 25,733 lifestyle packages were sold. The total revenue generated during that period was about $175m, and the total CRP payouts amounted to about $107m. Arising from these facts, Phang and Hoo were, *inter alia*, each convicted of one charge under s 340(5) read with s 340(1) of the CA for knowingly carrying on the business of Sunshine Empire for a fraudulent purpose. For this s 340(5) charge, Phang was sentenced to four years and six months' imprisonment (about 54 months' imprisonment), while Hoo was sentenced to three years and six months' imprisonment (about 42 months' imprisonment).

88 The DJ gave due regard to the significantly higher amounts involved in *Phang Wah (HC)*, by imposing lower individual sentences on the appellant than the offenders in *Phang Wah (HC)*.[57] I cannot accept the appellant's submission that his culpability was so significantly lower than the offenders in *Phang Wah (HC)* to merit a reduction in the sentence imposed. There were a number of serious aggravating factors in the present case which distinguish it from *Phang Wah (HC)*. The fraud in the present case was particularly egregious. The appellant and Terry had exploited the anxiety of foreign jobseekers, seeking to secure employment in Singapore. Moreover, in the course of perpetrating their fraud, they had abused the MOM's work pass application system, adversely impacting its functions as a public institution and undermining public confidence. To this end, I also agree with the Prosecution that their fraud would have negatively impacted Singapore's international standing as a reputable place of business and employment.[58] Finally, I note that the High Court in *Phang Wah (HC)* (at [73]) observed that no participant in that scheme appeared to have had been adversely affected in any way despite the large amounts transacted, however, the same cannot be said in the present case.

89 Next, in *Rahj Kamal*, the offender claimed trial to and was convicted on three counts of fraudulent trading under s 340(5) read with s 340(1) of the Companies Act (Cap 50, 1990 Rev Ed) and three counts of cheating under s 420 of the Penal Code (Cap 224, 1985 Rev Ed). The offender was a director at CDA International Pte Ltd ("CDA International"). He devised a scheme surrounding a "Directorship Programme" designed by him. The essence of the scheme involved participants extending either a $25,000 or $30,000 "interest free personal collateral loan" to CDA International in exchange for guaranteed

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57 GD at [86].

58 GD at [85].

"good faith gifts" of $3,000 per month for an indefinite period of time. The participants were also assured that their original loan sum or a large part of it would be returned within two years. The company did not have any profit-generating business or trade. The only source of funds which CDA International could use for the payment of the good faith gifts and the refunds were the funds collected from subsequent participants. Notably, each s 340(5) charge related to a single victim. The total losses as stated in the s 340(5) charges amounted to $85,000. In the District Court, the offender was sentenced to two years' imprisonment per charge, with the sentences of two charges ordered to run consecutively resulting in a global sentence of four years' imprisonment. On appeal, the High Court enhanced the global sentence to eight years' imprisonment, ordering the sentences in four charges to run consecutively.

90 In relation to *Rahj Kamal*, I agree with the DJ that the harm caused, and culpability of the appellant's offending is higher. Although the offender in *Rahj Kamal* had exploited the ignorance and trust in his victims, even projecting himself as the economic saviour of the Malay community and using religion to back up his promises, it cannot be ignored that scale of the offender's offending pales in comparison to the present case. In *Rahj Kamal*, the three s 340(5) charges pertained to only a single victim per charge. This stands in stark contrast to the present case, where the three s 340(5) charges concerned *at least* 1,317 victims. Moreover, the losses in *Rahj Kamal* were significantly lower than the total losses occasioned by the victims here.

91 In addition to these two decisions, the appellant submits that the court should also give due consideration to the case of *Tan Hung Yeoh v Public Prosecutor* [1999] 2 SLR(R) 262 ("*Tan Hung Yeoh*"). In *Tan Hung Yeoh*, the offender was convicted after trial on one charge under s 340(5) of the Companies Act (Cap 50, 1994 Rev Ed) for knowingly being a party to the

carrying on of the business of Hong Siong Motor Credit Trading Pte Ltd ("Hong Siong") with the intent to defraud one of Hong Siong's creditors, Chuan Petroleum Pte Ltd ("Chuan Petroleum"). The offender had conspired with the directors of Hong Song for Hong Siong to place four orders with Chuan Petroleum for the delivery of marine gas oil and marine fuel oil, incurring a debt of $643,153.93 (of which $428,233.14 remained outstanding at the time of the appeal), which Hong Siong had no intention of repaying at the time the debt was incurred. The oil purchased was resold at a loss to Hong Siong, while the conspirators (including the offender) shared the profits from the re-sale. The appellant was fined $15,000 and a compensation order of $150,000 was imposed.

92 In my view, *Tan Hung Yeoh* is of little precedential value. The reported High Court judgment addressed only the grounds for the appellant's appeal against conviction; no reasoning was provided for the sentence imposed for the s 340(5) offence. The rationale behind the judicial reluctance to rely on unreported decisions applies with the same effect here. As I previously observed in *Toh Suat Leng Jennifer v Public Prosecutor* [2022] SGHC 146 at [51], "[t]he lack of detailed reasoning behind the sentences imposed … undermines the utility of such [unreported] cases as relevant comparators". The reasons behind the imposition of a fine (as opposed to a custodial sentence) in *Tan Hung Yeoh* are unclear. As was cautioned by the Court of Appeal in *Abdul Mutalib bin Aziman v Public Prosecutor and other appeals* [2021] 4 SLR 1220 at [99], "absent a reasoned judgment explaining a particular sentencing decision, bare reference to outcomes in other cases will seldom be useful". For this reason, I find it inappropriate to rely on the sentence imposed in *Tan Hung Yeoh* to guide my decision on the appropriate sentence.

93 Further, I am also of the view that the DJ rightly considered that the sentencing principles of deterrence and retribution were particularly apposite in this case.[59] The individual sentences and the global sentence imposed adequately took into consideration the harm caused and the culpability of the appellant. These factors included the large number of victims defrauded, the vulnerability of the victims and the sums involved. The appellant and Terry's fraudulent scheme involving the three companies: Asia Recruit, AJM and UUBR was premeditated and sophisticated. They were also persistent and undeterrable in perpetrating the fraud as seen by the development of the second iteration in response to the MOM's caution to Asia Recruit to cease the collection of upfront fees from foreign jobseekers following a raid in July 2015 (see [12] above).[60] Moreover, as mentioned above, the sentence imposed appropriately took into account the flagrant abuse of the MOM's work pass application system and the undermining of the trust in its processes.

94 In my judgment, there is thus no reason to interfere with the term of imprisonment imposed by the DJ in the court below.

95 Lastly, I turn to the appellant's appeal against the compensation order imposed. Contrary to the appellant's submissions,[61] I find that it matters little that no compensation order was ordered in *Phang Wah (HC)* or *Rahj Kamal*. Whether a compensation order is warranted depends on the facts of each case and if the court is of the view that it is appropriate to make such an order, it must do so pursuant to s 359(2) of the CPC.

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59 GD at [81], ROA p 2381.

60 PS at para 78(5).

61 AS at para 81.

96 The general principles underpinning criminal compensation were set out in *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 5 SLR 438 at [7]–[10]. I summarise the relevant points:

(a) First, a compensation order does not form part of the sentence imposed on the offender, nor is it an alternative to a sentence, and its purpose is not to punish. The purpose of compensation is to allow an injured victim or his representative to recover compensation where a civil suit is an *inadequate or impractical remedy*. The paradigmatic example being where the victim is impecunious.

(b) Second, compensation ought only to be ordered in clear cases where the fact and extent of damage are either agreed or readily and easily ascertainable on the evidence.

(c) Third, the amount of compensation ordered should not exceed what would be reasonably obtainable in civil proceedings. Thus, the court may make a compensation order only in respect of the injury or loss which results from the offence for which the accused is convicted.

(d) Fourth, the order must not be oppressive. It must be realistic, and the court must be satisfied that the accused will have the means to pay the compensation within a reasonable time.

97 I agree with the DJ that the present case is an appropriate one to impose a compensation order. I accept the Prosecution's submission that it would be unrealistic and impracticable for the foreign victims to seek redress through a civil suit in Singapore.[62] The victims each paid only between $290 and $1,030

62 PS at para 109.

to Asia Recruit, AJM and UUBR such that it would not be cost-effective for the victims to seek legal advice and/or to commence civil proceedings. Further, the victims are foreigners with limited to no knowledge of or familiarity with Singapore's legal infrastructure. They are also likely to be of limited financial means. As emphasised by Chan Sek Keong CJ in *Public Prosecutor v AOB* [2011] 2 SLR 793 at [23]:

> [c]ompensation orders are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender. Although a custodial sentence… may be appropriate as punishment for the offender, such punishments are cold comfort to a victim who has experienced pain and suffering as a result of the offender's actions…

98 I should note that the compensation order imposed comprises only the sums collected by AJM and UUBR and paid by victims who were still in Singapore at the time of sentencing, or who were abroad but able to make arrangements to receive the moneys.[63] This was in recognition of the practical difficulties in returning moneys to victims who had returned to their home countries and/or may no longer be contactable.[64]

99 I find that the extent of losses suffered by each victim in respect of whom compensation was ordered is sufficiently supported by the agreed facts or are readily ascertainable based on objective records which were uncontested by the appellant.[65] The DJ was right to disregard the appellant's suggestion that refunds may have been made to some of the victims when they asked for it as no evidence was forthcoming to support this claim.[66]

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63 PS at para 115.

64 Prosecution's sentencing submissions at para 97, ROA p 3898.

65 PS at para 112.

66 GD at [96].

Conclusion

100 For these reasons, I dismiss the appellant's appeal against conviction, sentence and compensation order and affirm the sentence imposed by the DJ of 66 months' imprisonment and the compensation order of $174,385 (in default nine months' imprisonment).

Vincent Hoong
Judge of the High Court

Hamidul Haq, Thong Chee Kun, Lee Sze Min Michelle and Wan Zahrah bte Ahmad Alif Lim (Rajah & Tann Singapore LLP) for the appellant;
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