Ong Chow Hong (alias Ong Chaw Ping) *v* Public Prosecutor and another appeal [2011] SGHC 93

Case Number : Magistrate's Appeal Nos 260 of 2009 and 165 of 2010

Decision Date : 13 April 2011

Tribunal/Court : High Court

Coram : V K Rajah JA

Counsel Name(s) : Bernard Doray (Bernard & Rada Law Corporation) for the appellant in MA No 260 of 2009 and respondent in MA No 165 of 2010; Jeffrey Chan SC, Peter Koy, Melanie Ng, Ong Luan Tze and Sarah Lam (Attorney-General's Chambers) for the respondent in MA No 260 of 2009 and appellant in MA No 165 of 2010; Melanie Chng (Young Amicus Curiae).

Parties : Ong Chow Hong (alias Ong Chaw Ping) — Public Prosecutor

CRIMINAL PROCEDURE AND SENTENCING – Sentencing – principles

COMPANIES – Directors – duties

13 April 2011

V K Rajah JA:

Introduction

1 These proceedings began as an appeal by Mr Ong Chow Hong @ Ong Chaw Ping (the "Appellant") against a disqualification order barring him from taking part in the management of any company for a period of one year (the "Disqualification Order"). He was charged and convicted of failing to exercise reasonable diligence in the discharge of the duties of his office as a director of Airocean Group Limited ("Airocean"). However, after I intimated to counsel that the length of the Disqualification Order might, on the contrary, be manifestly inadequate, the Prosecution obtained leave and filed an appeal against sentence as well. After hearing full submissions, I decided to increase the disqualification period imposed on the Appellant to 24 months. In addition, I gave short written grounds and informed the parties that detailed reasons would follow at a later date. These are the full grounds of my decision.

2 It would be churlish of me if I do not, at the outset, record my debt to all Counsel (and, in particular, Ms Melanie Chng ("Ms Chng"), the *Amicus Curiae*) for their invaluable assistance in this matter. I found their submissions illuminating, comprehensive and, most importantly, useful in assisting me to arrive at my decision. Ms Chng's written submissions, in particular, were a model of clarity. Mr Jeffrey Chan SC, for the Prosecution, and Mr Bernard Doray, for the Appellant, ought to be also commended for the even-handed presentation of their submissions.

3 All things considered, the central considerations in these appeals were the seriousness of the Appellant's lapse of judgment and whether it warranted a disqualification from acting as a director. If disqualification was warranted, this court had to also determine the appropriate length of disqualification to impose. As for the legal issues, the fundamental enquiry was to ascertain if the statutory objective of Singapore's disqualification regime for directors was protective, punitive or an amalgam of both. Such an enquiry would take into account the history of the Companies Act (Cap 50,

2006 Rev Ed) ("CA") and the entire statutory scheme for directors' responsibilities and corporate governance.

Background and Facts

4 Airocean was a company listed on the Mainboard of the Singapore Exchange Securities Trading Limited. The Appellant was its non-executive Chairman and an independent director. At the material time, Airocean's Board of Directors (the "Board") consisted of six members:

(a) Thomas Tay Nguen Cheong ("Thomas Tay") – Chief Executive Officer and Executive Director;

(b) Chong Keng Ban @ Johnson Chong – Chief Operating Officer and Executive Director;

(c) Dunn Shio Chau Paul ("Dunn") – Executive Director;

(d) The Appellant – Non-Executive Chairman and Independent Director;

(e) Peter Madhavan ("Madhavan") – Independent Director; and

(f) Ong Seow Yong – Independent Director.

5 The catalyst for the charge against the Appellant occurred on 6 September 2005. That morning, officers from the Corrupt Practices Investigation Bureau ("CPIB") picked up Thomas Tay from his home and brought him to their office for questioning on allegations of corruption involving Airocean and two other companies in the airline industry. During the investigation, and on CPIB's instructions, Thomas Tay directed his staff at Airocean's premises to compile all his e-mails and business proposals connected to the corruption allegations. On 7 September 2005, Thomas Tay was released on bail but his passport was impounded by CPIB.

6 On 8 September 2005, the Airocean directors (with the exception of Dunn) convened an urgent board meeting to discuss what the company should do following the investigation of Thomas Tay. The relevant minutes of the meeting showed that the Board was informed of the following:

(a) on 6 September 2005 at about 7.00am, CPIB officers had called upon Thomas Tay to assist the CPIB in an ongoing investigation;

(b) CPIB had requested for and obtained from Airocean all e-mails of Thomas Tay from 1 January 2005 to 6 September 2005;

(c) Thomas Tay had asked for certain documents relating to the corruption allegations;

(d) Thomas Tay's passport was impounded by CPIB;

(e) Thomas Tay was questioned for 36 hours by CPIB;

(f) Thomas Tay was questioned on whether he had offered any gratification to the staff of some companies in the airline industry;

(g) Thomas Tay had sought his own legal advice on the CPIB investigation; and

(h) Thomas Tay's counsel was of the opinion that the worst-case scenario was that Thomas Tay might be exposed to a criminal charge of offering gratification.

Unrecorded in the above minutes, was the additional and very significant fact that Thomas Tay informed the Board that he was released by CPIB on bail. (Thomas Tay subsequently confirmed with the Commercial Affairs Department ("CAD") that he *did* indeed do so.) At the conclusion of the meeting, the Board resolved that nothing further needed to be done at that time.

7 About more than two months after the 8 September 2005 meeting, events came to a head when the Thomas Tay investigation surfaced to the public *fora*. On the morning of 25 November 2005, the Straits Times published an article (see Azrin Asmani, "Airocean's chief executive Thomas Tay under CPIB probe" *The Straits Times* (25 November 2005)) ("the Article"). The Article, among other facts, included a quote from Thomas Tay denying that he was the subject of a CPIB investigation:

> I was called up by the CPIB for an interview months ago. I believe, to the best of my knowledge, that it concerns an investigation over some people in my industry and *it has nothing to do with me …* [emphasis added]

8 Later that morning, Singapore Exchange Limited ("SGX") contacted Airocean, requiring "Airocean to explain why the fact that [Thomas Tay] was under a CPIB probe was not made public" and "to confirm whether or not [Thomas Tay] was in fact a subject of CPIB investigations". [note: 1] Airocean eventually requested for SGX to suspend the trading of its shares pending an announcement. At 9.15am, Airocean's company secretary, Ms Ang Lay Hua ("Ms Ang"), e-mailed all the directors, informing them of the trading halt announcement and that SGX had requested Airocean to make a clarificatory statement responding to the Article.

9 Ms Ang later contacted the Appellant, who was also the non-executive Chairman of Airocean's Board by telephone, and updated him on the latest developments. According to the agreed Statement of Facts, the Appellant then informed Ms Ang that "*he would agree to any announcement issued by [Airocean] if [Madhavan] approved of it. [The Appellant] said that that was because he was going to play golf that day*" [note: 2] [emphasis added]. In fairness to the Appellant, I should also add that he tried to explain that the golfing event he attended was not a mere social affair. Apparently, it was organised by the Aljunied Town Council; the Appellant was the Chairman of its Audit Committee and had a prominent role to play in the event. [note: 3]

10 On account of what transpired, the Appellant was charged with contravening s 157(1) of the CA, in failing to use reasonable diligence in the discharge of his official duties as a director of Airocean. The relevant provisions of s 157 of the CA provide as follows:

> **157.** —(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> ...
>
> (3) An officer or agent who commits a breach of any of the provisions of this section shall be —
>
> ...
>
> (b) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.
>
> ...

Where a person has been convicted of an offence under s 157 of the CA, s 154(2) of the CA allows the court to make a disqualification order. The relevant provisions of s 154 are reproduced below:

> (2) Where a person is convicted in Singapore of —
>
> ...
>
> (b) any offence under section 157 or 339,
>
> the court may make a disqualification order in addition to any other sentence imposed.
>
> (3) A person who is disqualified under subsection (1) or who has had a disqualification order made against him under subsection (2) shall not act as a director of a company or of a foreign company to which Division 2 of Part XI applies nor shall he take part, whether directly or indirectly, in the management of such a company or foreign company.

In the District Court, the Appellant pleaded guilty and was fined $4,000, in default four weeks' imprisonment, and also disqualified from managing the affairs of any company for a period of 12 months (see *Public Prosecutor v Ong Chow Hong* [2009] SGDC 387 ("the GD")).

Nature of Disqualification of Directors

11 The District Judge ("DJ") proceeded on the basis that the objective of a disqualification order made under s 154(2)(*b*) of the CA was "*predominantly punitive in nature*" [emphasis added] (see [44] of the GD). It was on that basis that the DJ found a disqualification order appropriate. In fairness to him, he had good reasons to adopt such an approach.

12 Pronouncements from different Singapore courts to date had, with varying emphasis, sought to justify like orders on the basis of either "punishment" or "protection". In *Lim Teck Cheng v Attorney-General* [1995] 3 SLR(R) 223 ("*Lim Teck Cheng*") at [13], Amarjeet Singh JC held that the disqualification provision was essentially protective in nature. However, in the subsequent case of *Lee Huay Kok v Attorney-General* [2001] 3 SLR(R) 287 ("*Lee Huay Kok*") at [10], Choo Han Teck JC

disagreed and held that the disqualification order was essentially punitive in nature. Simply on precedent alone, the DJ was not entirely incorrect to follow the "punitive" line of authorities. This distinction was crucial as the statutory objective informed the court on the applicable relevant considerations when assessing the appropriateness and extent of a disqualification order. The punitive rationale assumes that disqualification is the law's response to wrongdoing and ought to incorporate classical sentencing principles such as retribution and proportionality. On the other hand, the protective rationale focusses on prospective considerations that may well be divorced from past culpability. With these conflicting authorities in mind, the central issue was to clarify whether the subject disqualification was pre-dominantly punitive or protective in nature. To resolve this, it would first be useful to consider the history of the regime on the disqualification of directors in Singapore.

13 The genesis of the judicial power to disqualify company directors was the United Kingdom ("the UK") companies' legislation first enacted in 1928 (Companies Act 1928). Although the statutory power to disqualify originated from the UK, the architecture of the current scheme outlining the statutory duty of honesty and reasonable diligence, as well as the automatic disqualification regime, was sired by the 1961 Victorian Companies Act (No 6839 of 1961) in Australia. This automatic disqualification regime was the primary influence of Singapore's initial disqualification regime when our Companies Act (Act 42 of 1967) was enacted in 1967 ("the 1967 CA"). In so far as the early provisions of the three jurisdictions were concerned, it was not disputed that "protection" was the overarching object embedded in the power to disqualify. Since the introduction of the 1967 CA, all three jurisdictions have embarked on different regulatory paths. The question now was whether "protection" was still the be all and end all of the present disqualification regime. It seemed to me that the statutory developments in the UK and Australian jurisdictions caused a move away from the original conception of protection as the *predominant* consideration for disqualification orders (in varying degrees). Some legal archaeology is necessary to explain this.

14 Parliament in the UK replaced the old disqualification regime in their general companies' legislation with a specialised regime known as the Company Directors Disqualification Act 1986 (c 46) (UK) ("CDDA"). The CDDA had a mandatory disqualification provision under s 6 and discretionary disqualification provisions such as ss 2 and 5. Section 6 of the CDDA was the UK version of s 149 of our CA (disqualification of "unfit" directors of insolvent companies). Most of the cases cited by the parties were cases relating to s 6 of the CDDA as it was the most frequently invoked avenue for disqualification in the UK. The UK cases interpreting s 6 of the CDDA had expanded the considerations for disqualification orders beyond protective purposes to include deterrence and punitive considerations. In *In re Grayan Building Services Ltd. (In Liquidation)* [1995] Ch 241 ("*Re Grayan*"), disqualification of "unfit" directors of insolvent companies was imposed on the basis of past misconduct, even in the face of present suitability. Lord Hoffman in *Re Grayan* (at 253), expressed objectives of general deterrence, in his view that:

> The purpose of making disqualification mandatory was to ensure that everyone whose conduct had fallen below the appropriate standard was disqualified for at least two years, whether in the individual case the court thought that this was necessary in the public interest or not.

Therefore, even when there was no need for protection, disqualification was imposed for deterrent purposes. Lord Woolf MR in *Secretary of State for Trade and Industry v Griffiths & Ors (No 2), Re Westmid Packaging Services Ltd (No 3)* [1998] B.C.C. 836 at 843 also expressed punitive considerations for disqualification under s 6, stating that:

> Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements.

As s 6 placed greater emphasis on the director's *past conduct*, this may have led to an increase in importance in *punitive* considerations rather than the historically predominant consideration of protection (which takes a more prospective perspective) (see the application of retributive considerations in *Re Crestjoy Products Ltd* [1990] BCC 677 and disqualification as a means of deterrence in *Re Morija plc* [2008] 2 BCLC 313 at 323). However, while there may have been a shift towards greater consideration of *deterrence* and *punitive* considerations, it was expressed in Adrian Walters and Malcolm Davis-White, *Directors' Disqualification & Insolvency Restrictions* (Sweet & Maxwell, 3rd Ed, 2010) at p 45 that "*the authorities (and in particular, those on CDDA ss.6 and 8) suggest there is a judicial consensus in favour of the view that disqualification is primarily protective rather than penal*" [emphasis added]. This protective view was expressed in *In Re Sevenoaks Stationers (Retail) Ltd*. [1991] Ch 164, the first appeal against a disqualification order under s 6 of the CDDA. The Court of Appeal held (at 176) that it was "beyond dispute that the purpose of section 6 is to *protect the public"* [emphasis added]. Therefore, while the disqualification regime in UK expanded its considerations to include *deterrent* and *punitive* considerations, it had not shifted entirely from its historically protective objective. The shift in Australia as described below has been more pronounced.

15 Under the current Australian Corporations Act 2001, besides the established statutory grounds for disqualification (*eg*, persistent breaches of statutory requirements), disqualification is used uniquely in Australia as a civil penalty. This "civil penalty" regime was implemented under the Corporate Law Reform Act 1992 (No 210 of 1992) as a way to sanction misconduct of directors even where the conduct fell short of a criminal offence (see Australian Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties – Report on the Social and Fiduciary Duties and Obligations of Company Directors* (November 1989)). Thus in Australia, the introduction of civil penalty provisions had notably infused into its disqualification regime some degree of punitive considerations. The High Court of Australia in *Rich and Another v Australian Securities and Investments Commission* (2004) 50 ACSR 242 ("*Rich v ASIC")* broadly equated the applicable considerations for disqualification in the civil penalty regime with those in the criminal sentencing context. *Rich v ASIC* recognised that the disqualification regime was *not purely protective* (at [52]), and that retribution was as much a factor as the protection of the public (at [56]). However, one must be cautious in importing the Australian cases under the "civil penalty" regime which places more emphasis on punitive considerations such as retribution and deterrence *entirely* into our local context. As a statutory replacement for criminal sanctions, civil penalty disqualifications were accordingly intended to provide a reduced form of "punishment" – hence it was natural for the Australian courts to articulate punitive objects underlying disqualification orders (see *Australian Securities & Investments Commission v White* [2006] VSC 239 at 265 and 272).

16 It therefore appears that while protective considerations remained relevant in Australia and the UK, the power to disqualify directors had expanded to accommodate various additional policy interests since 1928. While Singapore's disqualification regime may have originated from Australia and was influenced by developments in the UK, it is clear that the modern statutory developments in Australia and the UK have led to a difference in emphasis in the considerations underlying their respective disqualification regimes. I have mentioned some of these developments in Australia and the UK to underscore and explain why our courts should be slow to apply, without qualification, case law from these jurisdictions. While I accepted that the experience in those jurisdictions were helpful, they now have to be evaluated with reference to the structure of the disqualification provisions and the context of corporate governance in Singapore.

17 In Singapore, the amendments in 1993 via Companies (Amendment) Act (Act 22 of 1993) (the "1993 amendments") remodelled the earlier rigid automatic disqualification regime into our present discretionary regime. Pre-1993, a director was automatically disqualified when he was either found

guilty of breaching his statutory duty or committing an offence touching upon fraud or dishonesty. That changed in 1993 when the legislature adopted a bifurcated approach of having a discretionary disqualification regime for breaches of statutory duties, and an automatic disqualification regime for offences concerning fraud and dishonesty. Notwithstanding this change, the judicial pronouncements in pre-1993 cases remain instructive where the broader nature and purpose of disqualification is concerned. In other words, the general judicial policy pertaining to disqualification has not changed after the 1993 amendments since the factors used in arriving at the decision of whether to grant leave to manage a company after the automatic disqualification (pre-1993) are generally similar to those used in arriving at the decision to disqualify (post-1993). In my view, the 1993 amendments which introduced a discretionary element in the disqualification regime were not intended to detract from the predominantly protective purpose of s 154 as it was originally enacted in 1967.

18 In the case of *Huang Sheng Chang and others v Attorney-General* [1983–1984] SLR(R) 182 at [38], Wee Chong Jin CJ stated that the court, in exercising its discretion whether to grant leave to manage a company after the automatic disqualification, ought to consider:

(a) the nature of the offence of which the applicant has been convicted;

(b) the nature of the applicant's involvement;

(c) the applicant's general character;

(d) the structure and the nature of the business of each of the companies which the applicant seeks the leave of the court to become a director of or to take part in its management; and

(e) the interests of the general public, the shareholders, creditors and employees of these companies and the risks to the public and to those persons should the applicant be permitted to be a director or to take part in management.

These factors were later cited with approval by the Privy Council in *Quek Leng Chye and another v Attorney-General* [1985–1986] SLR(R) 282, and followed (after the 1993 amendments) in *Lim Teck Cheng*. In all three cases, it was rather clear from the considerations set out that our regime was pre-dominantly protective in nature. In my view, the above factors remain relevant in the present regime.

19 However, in a later case of *Lee Huay Kok*, there was a departure from this protective aspect of disqualification. Pausing, it bears mention that while both *Lim Teck Cheng* and *Lee Huay Kok* involved automatic disqualification of persons convicted of any offence involving fraud or dishonesty, the principles were equally applicable to the discretionary regime under s 154(2)(*b*). In *Lee Huay Kok*, Choo Han Teck JC ("the JC") dismissed the application, and in doing so, found that the disqualification regime under s 154 was punitive in nature. The JC stated (at [10]):

> There are some who are of the view that disqualification under s 154 is not a punitive provision but a "protective" measure. I must respectfully disagree. I think that there is a strong, if not predominant, punitive element in the disqualification provision. Whether it is punitive or protective is relevant when the issue of reducing the period comes before the court. If it were a "protective" provision, then in principle, a reduction of the disqualification period would be justified when it can be shown that the protection objective is met or has been satisfied, but it is not entirely clear what interest is being protected here. In this case, for example, the company in which the applicant wishes to participate as a director and manager is his own personal company. It is virtually a sole proprietorship. What needs protection here? When will protection cease to be

required, and why? It cannot be at an arbitrary fixed period whether at five years, or three, or ten. Similarly, if it was intended to protect those who may have to deal with the convicted person, in principle, there may be adequate protection if the court is satisfied that there is a layer of supervision overseeing the acts of that person. If that were so, it requires a more explicit expression in the wording of s 154. *In my view, the context of this section implies that the intention of Parliament was to inflict a period of disqualification as part of the punishment on such an offender*. That there may be a measure of protection to the public or shareholders of the company is but a natural corollary to the disqualification. [emphasis added]

With respect, the learned JC departed from the original protective basis, and in my view, this departure sits uneasily with the statutory structure of the disqualification regime.

20 An analysis of the statutory structure fortifies the view that our disqualification regime is predominantly protective in nature. Section 154 of the CA is only one of several provisions that address the issue of disqualification. The other provisions includes ss 148, 149, 149A, 155 and 155A of the CA. Certain key features of s 154(2) of the CA strongly suggest that it was not intended to be essentially punitive. First, its sister provision, s 154(1), quite evidently was not intended as a means to impose criminal sanctions for the underlying criminal conduct. That provision imposes an automatic 5-year disqualification period for offences concerning fraud or dishonesty, regardless of the circumstances attending the offence or, significantly, the location of the offence. The inclusion of foreign convictions militated against disqualification being intended as a form of criminal punishment for the underlying offence. The rationale behind s 154(1) ought logically be that the individual's fraudulent or dishonest conduct was *prima facie* evidence of his or her suitability of being a director, thereby justifying the automatic restraint. Second, the available alternative of securing s 154(2) orders through subsequent *civil* proceedings (see s 154(6)) indicated that such orders were not inherently punitive in nature. These applications, which are to be heard in a civil court, suggest that s 154(2) orders were not intended to form part of the criminal sanctions imposed for the underlying offences stated in ss 154(2)(*a*) and (*b*). The availability of analogue civil procedures is a cogent reason to support the view that s 154(2) orders are *collateral protective orders* independent of the punishment imposed for the primary offence. The statutory policy therefore appears to be that disqualification orders ought to be generally imposed to protect the public from individuals who are shown to be unworthy of being privileged with the protective shield of corporate autonomy. In other words, the disqualification regime serves to protect the public from abuses of the limited liability privilege.

21 Given the above local jurisprudence up until *Lee Huay Kok* and the statutory structure of the disqualification regime, I am therefore of the opinion that the disqualification regime in Singapore remains essentially protective in nature.

22 This shield of protection, however, has two sides to it. On one hand, the public ought to be protected from an individual who has failed to discharge his obligations *qua* director. This side of protection may be viewed as specific protection, or what I would prefer to term as the "*thin*" definition of protection. To date, case law in Singapore appeared to have been largely focused on this narrower aspect of protection as being the *only* appropriate consideration.

23 On the other hand, there is another side of protection that has been overlooked. This side is equally, if not even more, significant in some matters, particularly those involving listed companies. This is the need to generally protect the public from all errant directors by an uncompromising reaffirmation of the expected exemplary standards of corporate governance. As the then Deputy Prime Minister, Mr Lee Hsien Loong, highlighted during the second reading of the Securities and Futures Bill, the domestic shift from merit-based regulation to a disclosure-based regime "demands an

effective market enforcement regime" which ensured that "[a]ny transgressions must be swiftly and firmly dealt with, in order to preserve investor confidence in Singapore's capital markets" (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2135 (BG Lee Hsien Loong, Deputy Prime Minister)).

24 Therefore, given the disclosure-based regime, there is a corollary need for the courts to ensure the accuracy of market disclosures to the public. In *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 at [1], I remarked:

> Like a delicately-balanced spinning gyroscope, the equilibrium of the financial market is pivoted upon the reliability and integrity of market communications. Further, given the disclosure-based nature of our securities market regime ..., the burden of maintaining market integrity by monitoring and ensuring the security of investments no longer rests on regulatory bodies; instead it has substantially shifted to market participants who are expected to follow the rules of responsible market conduct and communications so that other interested participants may access and act confidently on all available information. It is therefore imperative that all market players comply with requirements relating to both the quality and quantity of information disclosed - not only must such information be adequate, it must also be *accurate*. [emphasis in original]

This form of protection of the public is expressed through the appropriate calibration of disqualification orders assessed to be sufficient to deter serious lapses in corporate behaviour. I would characterise this as the "*thick*" definition of protection.

25 These two notions of specific and general protection are therefore not mutually exclusive and, indeed, are often intertwined. Accordingly, precedents on disqualification orders of directors that do not acknowledge these Janus-like considerations of protection ought to be viewed warily.

26 With the objective of disqualification orders clarified, I now turn back to the appeals before me. Given my views, it therefore followed that the DJ erred as a matter of law when he proceeded on the wrong footing that the disqualification scheme is essentially punitive and failed to consider the wider public interests that ought to be taken into account. Consequently, he had given undue consideration to the standing of the Appellant since, in the context of the protective objective of the disqualification regime, the Appellant's good standing had only a penumbral significance.

Appropriate sentence

27 It must have been obvious to any competent director that the response required by SGX was of grave importance to Airocean. All directors had to discharge an obligation of utmost candour to the shareholders and other stakeholders of Airocean. It was perhaps important to note that the gravamen of the charge was that the Appellant consciously abdicated from his responsibilities; he never asked to see the draft announcement before it was released to the public, and he was quite content to delegate his responsibilities to another director. Moreover, he was either indifferent to his wider responsibilities or failed to appreciate them.

28 The Appellant, I note, had sought to downplay his role and knowledge of the material facts. He argued that he did not have sufficient knowledge or understanding of the gravity of the investigations against Thomas Tay and subsequently asserted that he did not want to cause "unnecessary delay" to the making of the announcement. The Prosecution, on the other hand, maintained that the Appellant knew about the gravity of the matter, but deliberately chose to "cop out" when it most mattered. I was inclined to think that in the final analysis, while it may be an overstatement to say that the Appellant intentionally "copped out", this difference in characterising the facts was of slight

consequence. The Appellant, it cannot be gainsaid, had committed nothing short of a serious lapse in entirely abdicating his corporate responsibilities. My reasons were as follows.

29 First, I did not accept that the Appellant failed to grasp the reality of the difficult decisions faced by Airocean on 8 September 2005. The minutes recorded during the Board meeting were as striking for what they stated, as much as for what they did not state. The Appellant was informed unambiguously that Thomas Tay, the Chief Executive Officer of Airocean, was under investigation for corruption. If the investigation was trivial or did not involve Thomas Tay as suggested by the Appellant, why would Thomas Tay's passport be impounded and why did he have to spend 36 hours being probed? He surely had not been invited for a friendly business discussion over afternoon tea.

30 The seriousness of the corruption allegations provided the important context in which the Appellant breached his statutory duty on 25 November 2005. In my view, the minutes recorded during the Board meeting should have put him on heightened vigilance, and on the facts of this case, the Appellant was thoroughly informed of the gravity of the circumstances. To suggest any ignorance or any perception that the events were of minute importance, were to me, at the very least, divorced from reality. The urgency in convening the Board meeting on 8 September 2005 was a palpable indication of the dark clouds encircling the company. Furthermore, even if I were to accept that the Appellant was under a mistaken apprehension of the severity of the circumstances (which I did not), such a fact in my view would be a contention that worked against the Appellant. If he could not even perceive the severity in such palpable circumstances, it seemed to me that he should all the more be kept away from such directorship positions where perceptive judgments are fundamental.

31 Second, even if the Appellant was immediately engaged and/or could not assist in the substantive drafting of the announcement, he ought to have insisted on having sight of the final draft of the public announcement. At the very minimum, he could have vetted and approved the final announcement after the conclusion of his golf flight, before it was released. It bore mention that the announcement was eventually only released at 8.00 pm that night. Furthermore, the length of the draft announcement was extremely short and it would have at most taken him about ten minutes to read, comment or approve the announcement. Even if he did not have a mobile device that allowed him to personally read the draft, the company secretary could very well have read the announcement to him. Considering the circumstances, there was an abundance of time and opportunity for the Appellant to take a proactive involvement in the release of the announcement.

32 What aggravated the breach was the Appellant's clear knowledge of the circumstances leading up to the announcement. The Appellant knew of the investigations against Thomas Tay when he was briefed in the urgent Board meeting of 8 September 2005. With that at the back of the mind, any doubts pertaining to the severity of the matter would have been extinguished when the Straits Times ran a story on the investigation and SGX thereafter sought clarification on that issue. It seemed to me that the Appellant had unambiguously failed to appreciate the seriousness of his corporate responsibilities when he adopted such a cavalier view of his duties as a director. It was not an insignificant consideration that the clarification was sought by no less than SGX, the body having supervisory responsibilities over listed companies in Singapore. One would have thought that any competent director would immediately comprehend the pressing urgency and significance of such a query and the critical need to respond accurately and promptly.

33 Thirdly, it would have been imprudent to accept the Appellant's contention that he relied on another director's responsibility of handling the public announcement. In the appeal, the Appellant contended that his breach of statutory duty could be mitigated by the fact that the making of the public announcement was a legal issue to be handled by the lawyers sitting on the Board. As a preliminary point, I must be clear to point out that the court was not (in the appeal) looking at the

accuracy of the substantive content of the announcement. Obviously, if a false or misleading announcement was made and if the Appellant had a hand in its dissemination, he could have faced a more severe charge that the present one. While I accept that there are of course limits to the extent of knowledge and expertise a director may be expected to have, and that some reliance may be placed on the advice given by professionals, each director of a listed company has a solemn and non-delegable duty of due diligence to ensure compliance with market rules and practices.

34 Directors of listed companies in Singapore have to appreciate that our present disclosure based regime requires accurate and prompt disclosure to function effectively. It would never be sufficient or acceptable for a director to say that he expected his co-directors to do "right" by the company. Every director has to ensure that he discharges his responsibilities with due diligence in *all* pertinent matters. Therefore, any reliance on professionals or any reliance placed on "specialised" directors must be balanced against the responsibility that the law placed upon every individual director to bring to bear their own judgment in evaluating the advice received. Directors cannot adopt a silo approach and invariably seek shelter behind other "specialised" directors on the notion of reliance. How this responsibility ought to be discharged in any particular case would be a question of fact.

Conclusion

35 On the above grounds, I was satisfied that the one-year disqualification order imposed by the DJ was manifestly inadequate. While I acknowledged that the Appellant may be viewed as a valuable professional to the community and the companies he had been involved in *qua* director, and I was even prepared to accept that this may well be a one-off incident, the court must also appropriately calibrate the punishment in order to deter similar irresponsible conduct. It ought to be made plain that the courts will not be slow to disqualify directors for substantial periods of time if and when it is established that there have been serious lapses in the discharge of their responsibilities. The Appellant's baffling decision to bury his head in the sand was simply unacceptable. It was therefore my judgment that the disqualification order be enhanced to 24 months. It followed that the Appellant's appeal had to be dismissed and the Prosecution's appeal allowed.

[note: 1] Agreed Statement of Facts at para 22.

[note: 2] Agreed Statement of Facts at para 23.

[note: 3] Appellant's Plea in Mitigation at para 28 and 33.