IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 230

Magistrate's Appeal No 2 of 2015

Between

Chua Hock Soon James

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 4 of 2015

Between

Harriet International Network Pte Ltd

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 5 of 2015

Between

Harriet Education Group Pte Ltd

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Multi-Level Marketing and Pyramid Selling (Prohibition) Act]

[Commercial Transactions] — [Multi-level marketing]

[Criminal Law] — [Statutory offences] — [Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order]

[Statutory Interpretation] — [Construction of statute] — [Purposive approach]

[Criminal Law] — [Elements of crime] — [*Mens rea*] — [Strict liability]

[Evidence] — [Proof of evidence] — [Onus of proof]

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Chua Hock Soon James
v
Public Prosecutor and other appeals

[2017] SGHC 230

High Court — Magistrate's Appeals Nos 2, 4 and 5 of 2015
Chan Seng Onn J
4 November 2016; 3, 10 April 2017

26 September 2017 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The origins of multi-level marketing can be traced back to as far as the 1920s. As its name suggests, it is a marketing mechanism which utilises multiple tiers of promoters, with each tier receiving a proportion of the proceeds of sales made to consumers by the salespersons under them. While there is nothing inherently illegitimate with this structure, a multi-level marketing business becomes repugnant if it is predicated on generating profits through the recruitment of new salespersons who pay significant upfront costs for rights under the scheme as well as the right to receive rewards for recruitment subsisting up to several layers downstream. These persons at the top tiers, whom I shall refer to as the uplines, can therefore earn income from the recruitment efforts of their team members, whom I shall refer to as the downlines. A business built on this model is unsustainable. As logic dictates, the pool of

potential recruits will eventually run out and the scheme will collapse upon itself, causing the new entrants to suffer significant losses. Underlying the prohibition against this form of multi-level marketing is the policy need to protect members of the public, who might be lured into joining these schemes as salespersons by the prospect of extraordinary financial gains, from such high-risk and unsustainable schemes. When such schemes are deceptively cloaked and packaged into various forms of innocuous marketing or sales programmes by the scheme promoters, it may sometimes be difficult to discern the legitimate from the illegitimate.

2 Against this backdrop, when is it permissible for a business to be built on a multi-level marketing or a pyramid selling scheme or arrangement? This is the central question that arises from the joint appeals before me. It requires the court to interpret the Multi-Level Marketing and Pyramid Selling (Prohibition) Act (Cap 190, 2000 Rev Ed) ("the Act") as well as the Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order (Cap 190, O 1, 2002 Rev Ed) ("the Exclusion Order").

3 The appeals are brought by the first appellant, Chua Hock Soon James ("Chua"), the second appellant, Harriet International Network Pte Ltd ("HIN") and the third appellant, Harriet Education Group Pte Ltd ("HEG") (hereinafter collectively referred to as "the Appellants"). The Appellants appeal against the orders of conviction ("the Appeals") recorded by the district judge ("the District Judge") in *PP v Chua Hock Soon James, Harriet International Network Pte Ltd & Harriet Education Group Pte Ltd* [2016] SGDC 71 ("the GD").

4 After a trial that spanned 16 days, the District Judge convicted the Appellants of the following charges ("the Charges"):

> **Chua's Charge**
>
> are charged that you, between December 2007 and September 2008 or around the same period, in Singapore, were the Managing Director of one Harriet Education Group Pte Ltd ("the company"), during which period the said company did promote a pyramid selling scheme or arrangement as defined in section 2 of [the Act], namely the Global Edupreneur Program scheme, which scheme is not an excluded scheme or arrangement as defined in Paragraph 2 of [the Exclusion Order], and you have thereby committed an offence punishable under Section 3(2) read with Section 6(1) of [the Act].
>
> **HIN's Charge**
>
> are charged that you, between December 2007 and September 2008 or around the same period, in Singapore, did promote a pyramid selling scheme or arrangement as defined in section 2 of [the Act], namely the Global Edupreneur Program scheme, which scheme is not an excluded scheme or arrangement as defined in Paragraph 2 of [the Exclusion Order], to wit, you allowed your UOB bank account No. [xxx] to be used to receive monies paid by participants of the said scheme and to pay out monies being commissions to participants of the said scheme, and you have thereby contravened Section 3(1) of [the Act] which is an offence punishable under Section 3(2) of [the Act].
>
> **HEG's Charge**
>
> are charged that you, between December 2007 and September 2008 or around the same period, in Singapore, did promote a pyramid selling scheme or arrangement as defined in section 2 of [the Act], namely the Global Edupreneur Program scheme, which scheme is not an excluded scheme or arrangement as defined in Paragraph 2 of [the Exclusion Order], and you have thereby contravened Section 3(1) of [the Act] which is an offence punishable under Section 3(2) of [the Act].

5 Chua was sentenced to a fine of $50,000 (in default three months' imprisonment). HIN and HEG were each sentenced to a fine of $20,000 and $50,000 respectively, with in default orders of attachment made against both. Since there is no appeal against sentence by the Appellants or the Prosecution

("the Parties"), I will only deal with the propriety of the Appellants' convictions in this judgment.

6 Having considered the GD, the Parties' submissions, and the evidence adduced at the trial below, I dismiss the Appeals and uphold the respective orders of conviction made by the District Judge.

Undisputed facts

7 Chua is the Managing Director of both HIN and HEG.[1] HIN held a bank account with United Overseas Bank Limited ("HIN's bank account") which was used to perform money transactions for HEG and its related businesses.[2]

8 The impugned scheme in question is the Global Edupreneur Program ("GEP"), which was administered and run by HEG. The GEP came into existence in 2006 and was terminated in late 2008.[3] The Parties agree on the following facts regarding the GEP:

(a) The GEP was accredited as an educational programme by the Lyles Centre for Innovation and Entrepreneurship of the California State University, Fresno.[4]

(b) Anyone interested in joining the GEP had to pass an interview conducted by Chua in order to be accepted into the GEP.[5]

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1 ROP, vol 3, p 411 at para 7.

2 ROP, vol 2, pp 245–246 and ROP, vol 3, pp 759–760.

3 ROP, vol 5, p 275 at para 14.

4 ROP, vol 3, p 411 at para 8.

5 ROP, vol 3, p 412 at para 11.

(c) Under the GEP, the participants ("GEP participants") entered into a licensing agreement ("Licensing Agreement") with HEG for a specified period. The GEP participants could choose from one or more of the following packages with different licensing periods:[6]

(i) a Consultant (10 months);

(ii) a Global Consultant (24 months);

(iii) a Senior Global Consultant (36 months); and

(iv) a Global Manager (60 months).

(d) GEP participants were required to pay a sum of fees in order to join the GEP, which included:[7]

(i) registration fees;

(ii) training fees;

(iii) licensing fees; and

(iv) miscellaneous fees.[8]

(e) GEP participants were licensed by HEG to use HEG's name to market HEG's various educational programmes ("HEG's educational programmes") as well as the GEP.[9]

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6 ROP, vol 3, pp 411–412 at para 10.

7 ROP, vol 3, p 412 at para 12.

8 See, *eg*, ROP, vol 3, p 459 at para 4.1.4.

9 ROP, vol 3, p 412 at para 13.

(f) GEP participants received commissions when they successfully enrolled new participants in HEG's educational programmes as well as the GEP ("direct commissions").[10]

(g) Global Managers: In addition to receiving commissions upon the recruitment of a new participant, a Global Manager was also entitled to a 15% overriding commission on the direct commissions earned by the GEP participants whom the said manager recruited into the GEP.[11]

(h) Country Managers: HEG introduced the position of "Country Manager" in or around December 2007. In addition to the benefits earned through their personal recruitment efforts, Country Managers were entitled to a 30% overriding commission on the direct commissions earned by the GEP participants under them. Existing GEP participants could become Country Managers after passing an interview and paying additional licensing fees to extend the period of their licence with HEG. Country Managers were required to provide training and coaching to the GEP participants in their team.[12]

The statutory provisions

9 At the outset, it is useful to set out the legislative framework which is the backdrop to the Appeals. Section 3 of the Act provides that it is an offence for a person to promote or participate in a multi-level marketing scheme or arrangement ("MLM scheme") or a pyramid selling scheme or arrangement ("pyramid selling scheme"). The Act makes no substantive distinction between

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10 ROP, vol 3, p 412 at para 14.

11 ROP, vol 3, p 412 at para 16.

12 ROP, vol 3, p 412 at paras 17–19.

a MLM scheme and a pyramid selling scheme and both these expressions bear the same meaning in the Act: see the definition of a MLM scheme in s 2(1) of the Act. As to what constitutes a pyramid selling scheme, s 2(1) of the Act provides as follows:

> "pyramid selling scheme or arrangement" means any scheme or arrangement for the distribution or the purported distribution of a commodity whereby —
>
> (*a*) a person may in any manner acquire a commodity or a right or a licence to acquire the commodity for sale, lease, licence or other distribution;
>
> (*b*) that person receives any benefit, directly or indirectly, as a result of —
>
> (i) the recruitment, acquisition, action or performance of one or more additional participants in the scheme or arrangement; or
>
> (ii) the sale, lease, licence or other distribution of the commodity by one or more additional participants in the scheme or arrangement; and
>
> (*c*) any benefit is or may be received by any other person who promotes, or participates in, the scheme or arrangement (other than a person referred to in paragraph (*a*) or an additional participant referred to in paragraph (*b*)).

10 Section 2(2) of the Act goes on to state that a pyramid selling scheme does not include schemes or arrangements excluded by the Minister ("excluded schemes"). These excluded schemes are the subject matter of the Exclusion Order. For present purposes, the following provisions of the Exclusion Order are central:

> **Excluded schemes and arrangements**
>
> **2.**—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> …
>
> (*b*) any master franchise scheme or arrangement, or any class of such scheme or arrangement, whereby a person

is given the right to sub-franchise a franchise, subject to the scheme or arrangement satisfying the terms and conditions in sub-paragraph (*c*)(ii), (iii), (iv) and (vi);

(*c*) any scheme or arrangement, or any class of such schemes or arrangements, which satisfies the following terms and conditions:

…

(ii) any benefit received —

(A) by any promoter of, or participant in, the scheme or arrangement accrues as a result of the sale, lease, licence or other distribution of a commodity to any other person; or

(B) by any promoter of the scheme or arrangement accrues as a result of the performance of one or more participants in relation to the sale, lease, licence or other distribution of a commodity to any other person;

(iii) subject to sub-paragraph (ii), no benefit shall be received by any person as a result of the introduction or recruitment of one or more persons to be participants in the scheme or arrangement;

(iv) a promoter of the scheme or arrangement shall not make, or cause to be made, any representation to any person that benefits will accrue under the scheme or arrangement in a manner other than as specified in sub-paragraph (ii);

…

(vi) a promoter of the scheme or arrangement shall not, and shall take reasonable steps to ensure that participants in the scheme or arrangement do not —

(A) knowingly make, or cause or permit to be made, any representation relating to the scheme or arrangement or to the commodity which is false or misleading;

(B) knowingly omit, or cause or permit to be omitted, any material particular

> relating to the scheme or arrangement or to the commodity;
>
> (C) knowingly engage in, or cause or permit, any conduct that is misleading or likely to mislead as to any material particular relating to the scheme or arrangement or to the commodity; or
>
> (D) in promoting the scheme or arrangement or the commodity, use, or cause or permit to be used, fraud, coercion, harassment, or unconscionable or unlawful means;
>
> …

11 Accordingly, an offence under s 3(2) of the Act is committed where a company promotes a pyramid selling scheme that is not an excluded scheme. When this offence is committed by a body corporate, s 6(1) of the Act further provides:

> **Offences by bodies corporate**
>
> **6.**—(1) If the person committing an offence under this Act is a company, every individual who at the time the offence was committed was a director, general manager, manager, secretary or other officer of the company concerned in the management of the company or who was purporting to act in any such capacity, as well as the company, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

12 However, there is a defence under s 6(2) of the Act ("the s 6(2) defence") which applies if the individual proves that the offence was committed without his consent or connivance and that he exercised sufficient due diligence to prevent the commission of the offence.

13 With this legislative framework in mind, I now turn to the proceedings at the trial below.

The trial below

The Prosecution's case

14 The Prosecution called nine witnesses, seven of whom were former GEP participants. All seven GEP participants testified that overriding commissions were payable to the Country Managers and Global Managers based on the commissions earned by their respective team members.

15 Two of the seven participants were Country Managers, namely Kelvin Lim ("PW1") and Jonathan Chan ("PW3"). Both PW1 and PW3 testified that they were entitled to receive a 30% overriding commission on the net income of their respective team members, which income included the direct commission each team member earned for recruiting other GEP participants.[13]

16 The Country Managers and their respective team members gave evidence of specific instances when the Country Managers received the 30% overriding commission when a team member recruited a new GEP participant.[14] For instance, when Lam Chian Poh ("PW2"), who was a Global Manager under the Country Manager PW1, recruited Ronald Quan ("PW9") as a new GEP participant and PW2 earned a gross commission of $10,000, the Country Manager PW1 earned a total overriding commission of $5,100 comprising the following two components:

> **(a)** 30% of $10,000 (PW2's gross commission, *ie*, $10,000) = $3,000 ("the first component"); and

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13 ROP, vol 4, p 599 at para 15.

14 ROP, vol 4, pp 599–600 at para 16.

(b) 30% of $7000 (PW2's net income, *ie*, $10,000 - $3,000) = $2,100 ("the second component").

17 According to PW1, the first component of $3,000 came from PW2 in that it was deducted from the direct commission payable to PW2 for his recruitment of PW9 (which explains why PW2's net income was only $7000), whilst the second component of $2,100 was directly paid to PW1 by HEG.[15]

18 A similar overriding commission was paid to Country Manager PW3 when Joseph Siew ("PW4"), a Global Manager under PW3, recruited Katherine Yew ("PW6") as a new GEP participant and PW4 earned a gross commission of $6,000. PW3 received a Commission Summary from HEG[16] setting out his entitlement to a total overriding commission of $3,060, comprising the same two components as the Country Manager PW1 (see [16] above):

(a) the first component: 30% of $6,000 (PW4's gross commission, *ie*, $6000) = $1,800; and

(b) the second component: 30% of $4,200 (PW4's net income, *ie*, $6,000 - $1,800) = $1,260.

19 PW2, PW4 and another Global Manager Paul Lim ("PW5") also gave evidence that they were entitled to receive a 15% overriding commission on the direct commissions earned by the GEP participants that they recruited.[17]

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15 ROP, vol 1, pp 120–122.

16 ROP, vol 3, p 620.

17 ROP, vol 4, p 600 at para 17.

20 The former General Manager of HEG, Eileen Tay ("PW7"), testified that she and her staff members were responsible for calculating and arranging for payment of the direct commissions and overriding commissions to the GEP participants, and these commissions were paid out from HIN's bank account.[18] PW7 also testified that she prepared a spreadsheet[19] that sets out the entire commission structure of the GEP, including the commission percentages that GEP participants of different levels earned for recruiting other participants.[20] PW7's explanation of this spreadsheet corroborated the testimonies of the abovementioned Country and Global Managers.[21] First, it showed that Country Managers were entitled to earn two types of overriding commissions: (1) the first component (payable by their team members) of 30% overriding commission based on the team members' gross commissions; and (2) the second component (payable by HEG) of 30% overriding commission based on the team member's net income. Second, it showed that Global Managers were entitled to earn 15% overriding commission based on the income of the GEP participants recruited by them.

The Appellants' defence

21 The Appellants' only witness was Chua. Chua's primary evidence was that HEG was a legitimate business that provided educational programmes and it was never meant to be a pyramid selling scheme.[22] He did not dispute the various positions that the GEP participants held within the GEP, but claimed that there was "no structure" or "multi-tier" among the GEP participants.[23]

18 ROP, vol 4, p 600 at para 18.

19 ROP, vol 3, p 758 (P46).

20 ROP, vol 4, p 601 at para 19.

21 ROP, vol 2, pp 248–251.

22 ROP, vol 2, pp 603–604.

22 According to Chua, there had been no instance in which a Global Manager had received a 15% overriding commission because no GEP participant had chosen to work under a Global Manager.[24] He did, however, confirm that there had been instances where Country Managers received 30% overriding commissions.[25] He emphasised that overriding commissions were only paid where there was a Memorandum of Agreement ("MOA"), which was a private agreement between the Country Managers and their team members.[26] Chua testified that the idea of having the GEP participants pay overriding commissions to their Country Managers came from some of the GEP participants and not from the Appellants. These participants had asked HEG to provide a formal framework, *ie*, the MOA, to formalise these agreements.[27]

23 Chua admitted to having either drafted or having oversight of some key documents in relation to the operation of the GEP, including:

(a) the sample MOA;[28]

(b) the slides used for the GEP preview seminars;[29] and

(c) the spreadsheet detailing the commission structure of the GEP.[30]

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23 ROP, vol 2, pp 558–559.

24 ROP, vol 3, p 89.

25 ROP, vol 2, pp 576–577.

26 ROP, vol 2, pp 600, 690 and 722.

27 ROP, vol 2, pp 566–568 and 698.

28 ROP, vol 2, p 697.

29 ROP, vol 2, p 785.

30 ROP, vol 2, pp 686–687.

District Judge's decision

24 The District Judge identified the following issues as relevant in her decision as to whether the Charges were made out against the Appellants:

(a) whether the GEP was a pyramid selling scheme;

(b) who bore the burden to show that the GEP was or was not an excluded scheme;

(c) whether the GEP was an excluded scheme;

(d) whether s 3(1) of the Act provided for a strict liability offence and if not, what was the *mens rea* for the offence under s 3(1);

(e) whether the Appellants had "promoted" the GEP; and

(f) whether the s 6(2) defence was available to Chua.

25 On the first definitional issue, the District Judge held that the GEP was a pyramid selling scheme as all three requirements under s 2(1) of the Act were satisfied. First, a potential GEP participant (A) could acquire a licence to market HEG's educational programmes and the GEP.[31] Second, A would receive benefits in the form of direct commissions as a result of recruiting additional participants into the GEP.[32] Third, as provided for in the Licensing Agreements, the Country Manager or Global Manager of A would be entitled to receive overriding commissions on the earned income of A.[33]

26 On the second issue of the burden of proof, the District Judge found that the defence, *ie*, the Appellants, and not the Prosecution, bore the burden of

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[31] GD at [132].

proving that the GEP fell within the Exclusion Order because many of the criteria therein pertained to facts which would be peculiarly within the Appellants' own knowledge.[34]

27 On the third issue concerning the Exclusion Order, the District Judge concluded that the GEP was a franchise because the GEP participants (*ie*, the franchisees) had been authorised to exercise the right to engage in the business of offering, selling or distributing HEG's educational programmes. There was no separate requirement that the franchisee had to set up a separate legal entity in order to carry on such a business.[35]

28 Nevertheless, she concluded that the GEP did not satisfy the conditions stated in paragraphs 2(1)(*c*)(iii) and 2(1)(*c*)(iv) of the Exclusion Order. In this connection, the primary issue in dispute at the trial below was the relationship and proper interpretation of paragraphs 2(1)(*c*)(ii) and 2(1)(*c*)(iii) of the Exclusion Order (see [10] above). Here, the District Judge disagreed with both the Appellants' and the Prosecution's interpretations and arrived at a different interpretation. In her view, the question to be asked is "whether the benefits in question have accrued predominantly or substantially as a result of the sale … or other distribution of a commodity to any other person" as opposed to "as a result of the introduction or recruitment of additional participants in the scheme".[36] If it were the latter, the scheme would run afoul of paragraph 2(1)(*c*)(iii) of the Exclusion Order. On the facts, she held that the benefits, *ie*,

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32 GD at [133].

33 GD at [134].

34 GD at [177].

35 GD at [186].

36 GD at [198].

the direct commissions and the overriding commissions, had accrued predominantly or substantially as a result of the introduction or recruitment of additional participants into the GEP. Thus, paragraph 2(1)(*c*)(iii) of the Exclusion Order was not met.[37] Additionally, paragraph 2(1)(*c*)(iv) of the Exclusion Order was also not satisfied because HEG had made representations to potential and actual GEP participants that overriding commissions would be payable to Country Managers and Global Managers as a result of their downlines' recruitment of additional GEP participants.[38]

29 On the fourth issue of the mental element, the District Judge held that s 3(1) of the Act did not create a strict liability offence because the presumption of *mens rea* was not displaced.[39] She determined that the *mens rea* for an offence under s 3(1) of the Act was "knowledge on the accused person's part that the scheme which he was promoting, or participating in, bore the features which would satisfy the three criteria" in s 2(1) of the Act. There was no additional requirement for the Prosecution to prove that the accused knew that the scheme he was promoting amounted in law to a pyramid selling scheme.[40]

30 On the penultimate issue of whether the Appellants had promoted the scheme, the District Judge held that Chua and HEG had "clearly promoted" the GEP by managing and operating it. As for HIN, the District Judge similarly found that it had promoted the GEP as it "had provided an essential service to the operation of the GEP scheme by managing its money flow".[41]

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37 GD at [211].

38 GD at [212].

39 GD at [169].

40 GD at [170].

41 GD at [217].

31 On the last issue of the s 6(2) defence, the District Judge concluded that the defence was inapplicable for two reasons. First, Chua's intimate involvement with the entire structure of the GEP militated against the conclusion that the offence by HEG was committed without his consent or connivance.[42] Second, Chua had failed to show that he had exercised such diligence to prevent the commission of the offence as he ought to have exercised, such as seeking legal advice on the legality of the GEP before introducing it.[43]

32 The District Judge accordingly convicted the Appellants on the respective charges they faced.

Summary of arguments on appeal

33 In appealing against the orders of conviction, the Appellants made the following arguments:

(a) The GEP did not entitle any Country Managers or Global Managers to overriding commissions. The payment of overriding commissions was only a private arrangement in the MOA between some of the Country Managers and GEP participants and the terms of the MOA were not incorporated into the GEP. In any event, none of the Country Managers, who had received overriding commissions, were entitled to receive them.

(b) The burden of proving that the GEP did not satisfy the conditions stipulated in the Exclusion Order fell on the Prosecution. Legislative

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42 GD at [220].

43 GD at [220].

intention indicates that the Exclusion Order forms part of the elements of the offence in s 3(1) of the Act, and as such, the burden of proof was on the Prosecution to show that the Appellants did not fall within the Exclusion Order. Since there was a reasonable doubt as to whether the GEP satisfied the Exclusion Order, the Appellants should be acquitted of the Charges against them.

(c) The District Judge's interpretation of paragraph 2(1)(*c*)(iii) of the Exclusion Order was contrary to both a plain reading and a purposive interpretation of that provision. Instead, the correct interpretation should be that as long as the requirements in paragraph 2(1)(*c*)(ii) are met, then it is irrelevant whether any benefits accrued as a result of recruitment under paragraph 2(1)(*c*)(iii) of the Exclusion Order. Since it was undisputed that the GEP fulfilled paragraph 2(1)(*c*)(ii), the GEP was not a pyramid selling scheme for the purposes of the Act.

(d) Even if the District Judge's interpretation of paragraph 2(1)(*c*)(iii) was correct, she erred in applying the test. The objective evidence did not show that the benefits earned by the GEP participants were predominantly or substantially from the recruitment of additional participants, but rather that it was from the sale, lease, licence or other distribution of commodity.

(e) In addition to the *mens rea* requirement laid down by the District Judge, the *mens rea* of an offence under s 3(1) of the Act also required the Prosecution to prove that the Appellants knew that the GEP amounted in law to a pyramid selling scheme as well as the fact that the GEP did not fall within the Exclusion Order.

(f) Lastly, Chua could avail himself of the s 6(2) defence – he did not consent to or connive in the offence and had also exercised sufficient due diligence. The structure for the payment of overriding commissions was originally a private arrangement between individual GEP students. These GEP students approached Chua to request that HEG assist by facilitating their private arrangement. Furthermore, Chua had taken steps to ensure that the overriding commissions were not gratuitous in that valuable consideration in the form of training and an earnings guarantee was given by the Country Managers to their team members.

34 Unsurprisingly, the Prosecution disagreed with all of the Appellants' submissions and instead sought to uphold the District Judge's decision in its entirety for broadly similar reasons.

35 The Young *Amicus Curiae*, Ms Lee Chia Ming ("Ms Lee") assisted the court on the following issues:

(a) whether the GEP was a pyramid selling scheme within the meaning of s 2(1) of the Act;

(b) whether s 3(1) of the Act provides for a strict liability offence and, if not, what is the requisite *mens rea* for the offence;

(c) whether the GEP was a franchise scheme or arrangement which fell within any of the exemptions in paragraph 2 of the Exclusion Order;

(d) which party bore the burden of proving that the GEP fell or did not fall within the exemptions in the Exclusion Order;

(e) whether the Appellants had promoted the GEP within the meaning of s 2(1) of the Act;

(f) whether the s 6(2) defence was available to Chua; and

(g) whether the defence of mistake applied to Chua.

36 Generally, Ms Lee agreed with the decision of the District Judge (albeit for different reasons on some of the issues). However, Ms Lee took a different view from the District Judge on two particular points. First, she submitted that the offence under s 3(1) of the Act ought to be construed as a strict liability offence because the Act deals with an issue of "serious social concern" and interpreting s 3(1) of the Act as a strict liability offence would promote the purpose of the Act, which is to eliminate rather than control pyramid selling schemes. Second, she submitted that the GEP did not constitute a franchise for the purposes of paragraph 2(1)(*b*) of the Exclusion Order because the GEP participants did not possess the right to engage in the business of offering, selling or distributing goods and services and the relationship between GEP participants and HEG was more akin to one of an agent rather than a franchisee.

Issues to be decided

37 In my judgment, the following issues arise for determination in the Appeals before me:

(a) whether the GEP is a pyramid selling scheme under s 2(1) of the Act;

(b) which party bears the burden of proving whether the GEP is an excluded scheme;

(c) whether the GEP is an excluded scheme;

(d) whether s 3(1) of the Act imports a *mens rea* requirement;

(e) whether the evidence shows that HIN had promoted the GEP; and

(f) whether the s 6(2) defence is available to Chua.

My decision

Whether the GEP is a pyramid selling scheme under s 2(1) of the Act

Definition of a pyramid selling scheme

38 To recapitulate, s 2(1) of the Act provides as follows:

> "pyramid selling scheme or arrangement" means any scheme or arrangement for the distribution or the purported distribution of a commodity whereby —
>
> > (*a*) a person may in any manner acquire a commodity or a right or a licence to acquire the commodity for sale, lease, licence or other distribution;
> >
> > (*b*) that person receives any benefit, directly or indirectly, as a result of —
> >
> > > (i) the recruitment, acquisition, action or performance of one or more additional participants in the scheme or arrangement; or
> > >
> > > (ii) the sale, lease, licence or other distribution of the commodity by one or more additional participants in the scheme or arrangement; and
> >
> > (*c*) any benefit is or may be received by any other person who promotes, or participates in, the scheme or arrangement (other than a person referred to in paragraph (*a*) or an additional participant referred to in paragraph (*b*)).

39 The term "commodity" is defined very widely in s 2(1) of the Act to mean "any goods, service, right or other property, whether tangible or intangible, capable of being the subject of a sale, lease or licence".

40 In the present case, it is not disputed that the GEP constitutes a pyramid selling scheme if it fulfils the following conjunctive requirements:

(a) A person (A) recruits another person (B) into the scheme, wherein B acquires a commodity or a right or a licence to acquire the commodity for sale, lease, licence or other distribution ("the first requirement").

(b) B receives any benefit, directly or indirectly, as a result of the recruitment, acquisition, action or performance of one or more additional participants (*ie*, C, D and onwards) in the scheme ("the second requirement"). (I only consider limb (i) of s 2(1)(*b*) because the Prosecution is not relying on s 2(1)(*b*)(ii) of the Act.)

(c) Any benefit is or may be received by any other person (other than B and the GEP participants recruited by B) who promotes, or participates in, the scheme, *eg*, A ("the third requirement").

41 Before I turn to analyse whether the requirements are met in this case, I shall make some preliminary observations. First, it is clear from the language of the definitions of pyramid selling scheme and commodity at [38] and [39] respectively that the net is cast very widely to catch as many schemes as possible for all kinds of commodities: consider the wide import of the words in the definitions such as "*purported* distribution", "*any* manner acquire", "directly or *indirectly*", "*any* benefit", "is or *may be* received" and "*any* goods, service, right or *other* property" [emphasis added]. It is evident from the legislative debates pertaining to the Act that this was in no way unintended – the definitions were deliberately crafted widely to achieve the desired purposes of the Act.

42 The Act was in its original form conceptualised as the Multi-Level Marketing and Pyramid Selling (Prohibition) Bill (Bill 45 of 1973) ("the 1973 Bill") and passed as the Multi-Level Marketing and Pyramid Selling (Prohibition) Act 1973 (Act 50 of 1973) ("the 1973 Act"). The objective of this enactment was to enshrine Singapore's zero tolerance approach to pyramid selling schemes, which have the potential to cause widespread financial ruin to their participants due to their unsustainable business model.

43 As expressed in the Explanatory Statement to the 1973 Bill:[44]

> This Bill seeks to *prohibit the registration of businesses and companies which intend to promote schemes and arrangements of multi-level marketing and pyramid selling* in relation to the distribution and sale of commodities as well as to make it unlawful for such schemes and arrangements to be promoted. The essential features of a pyramid selling (the expression "multi-level marketing" is really a euphemism for pyramid selling) are broadly speaking that it is a scheme or arrangement relating to the distribution and sale of goods or the provision of services *under which participants pay for their rights under the scheme or arrangement and receive a reward for recruiting new participants*. These two elements taken together lead to expansion of such schemes or arrangements on the *chainletter principle*. It is these essential elements which make these schemes and arrangements objectionable and *it is the purpose of the Bill to ban such schemes or arrangements from Singapore.*
>
> [emphasis added]

44 During the Second Reading of the 1973 Bill, the then-Minister for Finance Mr Hon Sui Sen made the following observations (see *Singapore Parliamentary Debates*, *Official Report* (28 August 1973) vol 32 at col 1287 (Mr Hon Sui Sen, Minister for Finance)):[45]

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44 ACBOA at Tab 6.

45 ACBOA at Tab 54.

> [C]ountless franchise holders in the countries I have mentioned have over the years suffered *considerable financial loss and hardship* by being lured into these "get-rich-quick" schemes. The Government is determined that this sort of situation should not be allowed to develop in Singapore. Thus, the decision to legislate to outlaw the practice before it becomes widespread and before members of the public here are *induced to part with their savings on a large scale.*
>
> The Government, after a close study of the operations of these pyramid selling schemes in Singapore and elsewhere, has come to the conclusion that *the undesirable features of pyramid selling are so clearly contrary to the public interest that* ***the objective should be to eliminate them rather than attempt to control them****.*
>
> [emphasis added in italics and bold italics]

45 Consistent with the intention to eliminate objectionable pyramid selling schemes from Singapore, as expressed in the Explanatory Statement to the 1973 Bill, the definitions in the 1973 Bill were widely drafted:[46]

> The scope of the proposed legislation is therefore to be determined by the definition of a pyramid selling scheme or arrangement that appears in clause 2 of the Bill taken in combination with the definition of "commodity" therein. ***These definitions which are widely drafted*** are *intended to deal with schemes or arrangements for the distribution and sale of commodities which are objectionable but at the same time are not designed to include schemes or arrangements which are not objectionable if they do not depend upon the* ***chain-letter principle for expansion of the business or enterprise****.* …
>
> [emphasis added in italics and bold italics]

46 The intention was therefore for the prohibition on pyramid selling schemes to have a *wide scope*, and then to carve out those schemes which did not rely on the chain-letter principle for expansion ("the chain-letter expansion model"). While there are multiple variations of chain letters, a typical chain letter consists of a message that is aimed at persuading recipients to make a

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[46] ACBOA at Tab 6.

number of copies of the letter and then pass it on to other recipients, which might either be a certain number of recipients or to as many people as possible, in return for some blessing or to avoid some unpleasant event. Transposed to the context of a pyramid selling scheme, the chain letter would request participants, upon receiving the chain letter, to transfer a fixed sum of money for distribution to other members already in the existing chain, which earns the participants the right to distribute the chain letter to multiple new recipients after adding themselves to the chain. In this way, once a participant adds his name to the chain, he will constantly be paid a portion of the fee by each new recipient of the chain letter subsequently added as a member to the chain, who pays the required fixed sum of money that entitles him to send out even more of such chain letters. As is obvious, this is an unsustainable business model because the "chain" is an exponentially growing pyramid that cannot be sustained indefinitely because the supply of new participants will eventually run out.

47 Notwithstanding the intention to legislate for a wide scope in the 1973 Act, at the Second Reading of the Multi-Level Marketing and Pyramid Selling (Prohibition) (Amendment) Bill (Bill 14 of 2000) ("the Amendment Bill 2000"), Parliament took the view that the definition of a pyramid selling scheme in the 1973 Act was *still* "too narrow" and amendments were necessary (see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at col 177 (Mr Lim Swee Say, Minister of State for Trade and Industry)):[47]

> The existing Act needs to be updated, Sir. The definition in the Act on multi-level marketing and pyramid selling is *too narrow*.
> …

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[47] ACBOA at Tab 55.

> … The thrust of the amendment in clause 2(a), 2(b) and 2(c) is to have a *general definition* of multi-level marketing and pyramid selling in the Act. This would *remove the rigidities in the current legislation*, such as a participant must be required to share his commission with another participant, before the scheme is deemed as pyramid selling.
>
> [emphasis added]

48 Consequently, the definition of pyramid selling scheme was further widened and simplified to its present form in order to "make the Act more effective in prohibiting multi-level marketing and pyramid selling schemes": see the Explanatory Statement to the Amendment Bill 2000.[48] The above demonstrates the clear intention of Parliament to promulgate a very wide definition of a pyramid selling scheme.

49 Second, it is evident from the definition that a scheme will only be considered a pyramid selling scheme if there are at least *three* tiers of participants, *ie*, persons A, B and C (see [40] above). One such situation would be where A recruits B and B in turn recruits C, and both A and B receive a benefit from B's recruitment of C. Another possible situation would be where both A and B receive a benefit as a result of C's sale of a commodity to end consumers.

50 However, if A is not entitled to receive any benefit from B's recruitment of C or C's sale of a commodity to end consumers, the scheme will not be considered a pyramid selling scheme even if B receives a benefit for recruiting C or for C's performance (provided also that B is the only recipient of such benefits in relation to C). This is because the third requirement would not have been met even though the first two requirements are met.

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[48] ACBOA at Tab 8.

51 Having considered the definition of a pyramid selling scheme, I now turn to analyse whether the GEP meets this definition.

52 The Appellants do not dispute that the first and second requirements are satisfied in the present case;[49] they only contest the third requirement.[50]

Whether the third requirement is satisfied

53 The District Judge held that the third requirement was established because, when a GEP participant (B) recruited a new GEP participant (C), the persons at the "A" level, *ie*, the Country Managers and/or Global Managers of B, were entitled to receive overriding commissions on the earned income of B, which earned income included the payments to B for having recruited C. These overriding commissions qualified as the potential "benefit" to A, arising from B's recruitment of C.

54 However, the Appellants argue that the third requirement is not satisfied citing several reasons. I disagree with the Appellants' submissions on this issue.

55 First, the Appellants argue that the MOA between a Country Manager and his team member was the sole basis for overriding commissions to be paid. The terms of the MOA were not incorporated into the GEP and the payment of overriding commissions was only a private arrangement between GEP participants that HEG was not a party to.[51] This argument was considered and rejected by the District Judge. While the District Judge accepted that the obligation for a team member to pay overriding commissions had originated

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49 GD at [132]–[133].

50 Appellants' Submissions at para 114.

51 Appellants' Submissions at paras 74c and 118–119.

from the MOA, the District Judge found that this practice had become part of the GEP scheme for the following reasons:[52]

(a) Chua drafted the standard MOA;

(b) the standard MOA was disseminated by HEG to all the Country Managers, instead of the select few GEP participants who came up with the idea for such an arrangement;

(c) in order to formalise this arrangement, HEG created the position of a Country Manager in January 2008; and

(d) by August 2008, the contractual provisions in the MOA relating to payment of overriding commissions had been expressly incorporated into the re-worded licensing agreements between HEG and the new GEP participants.

56 The evidence also reveals that HEG was responsible for calculating and paying out the commissions, including the overriding commission payable by each GEP participant to the Country Manager.[53] Based on the evidence adduced, the District Judge can in no way be faulted for finding that the payment of overriding commission "had in time become an important feature of the GEP scheme which could affect the commission structure of all commissions payable by HEG to all GEP participants".[54]

57 In any event, even if the overriding commission paid by each team member is not considered on account of it arising out of a private agreement

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52 GD at [144]–[145].

53 GD at [92].

54 GD at [146].

between GEP participants, which HEG was not privy to, I find that the second component of the overriding commission is sufficient for me to conclude that the third requirement is satisfied. As referenced above at [16]–[18] and [20], the Prosecution adduced evidence that the Country Managers were entitled to two types of overriding commissions: one from the team members ("the first overriding commission") and the other *from HEG* ("the second overriding commission"). This was accepted by the District Judge.[55] These findings are further supported by the documentary evidence in the form of written agreements between HEG and the Country Managers as well as HEG and the Global Managers:[56]

(a) Under cl 2.1 of the "Renewal of Licensing Agreement" entered into between HEG and the two Country Managers, PW1[57] and PW3[58], the Country Managers were entitled to receive 30% overriding commission on the earned income of the GEP participants recruited by them. This is also reflected in the Letters of Appointments of PW1[59] and PW3,[60] which they received when they became Country Managers.

(b) Under cl 8.2.4 of the Licensing Agreements entered into between HEG and two Global Managers, PW2 and PW5, and cl 9.2.4 of the Licensing Agreement entered into between HEG and PW4, the Global Managers were entitled to receive 15% overriding commission on the income earned by the GEP participants recruited by them.[61]

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55 GD at [126] and [147].

56 GD at [134].

57 ROP, vol 3, p 435.

58 ROP, vol 3, p 609.

59 ROP, vol 3, p 444, cl 1.

60 ROP, vol 3, p 618, cl 1.

58 Most crucially, the District Judge found that HEG's obligation to pay the second overriding commission to the Country Managers and Global Managers, arose from *the Licensing Agreements* and was "a separate obligation" from the obligation of the team members to pay the first overriding commission:

> 128 The prosecution … submitted that, by virtue of the provisions in the licensing agreements signed between the Country Manager or (Global Manager) and HEG, HEG was already obliged to pay the former a 30% (or 15%) overriding commission based on the earned income of the [GEP participant] recruited by him. I agreed with the prosecution that this obligation by HEG to pay overriding commissions to the Country Manager and Global Manager, arising from the licensing agreements, was a *separate obligation which would continue to exist, even if the Country Manager or Global Manager and his team members entered into another agreement for additional overriding commissions to be paid to the Country Manager or Global Manager by the GEP [participant] (as opposed to HEG) when the latter recruited a new GEP participant.*
>
> [emphasis added]

59 The Appellants do not dispute this finding other than to state that the second overriding commission was only paid where there was a MOA between the GEP participants. They also point out that GEP participants could choose not to work with any Country Manager or Global Manager, in which case no overriding commission would be paid.[62] In my judgment, these arguments are non-starters. No matter what additional conditions were imposed on the payment of overriding commissions, the fact that this is an agreement that HEG was a party to, and an arrangement which it undertook to carry out personally, means that the payment of the second overriding commission was part of the GEP. The payment of the second overriding commission is clearly a relevant

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61 ROP, vol 3, p 545, cl 8.2.4; ROP, vol 3, p 640, cl 9.2.4 and ROP, vol 3, p 693, cl 8.2.4.

62 Appellants' Submissions at para 116.

benefit that falls under the third requirement because it is a pecuniary reward received by A (a Country Manager/Global Manager) on account of B (a team member under A) recruiting C (a new GEP participant).

60 Second, the Appellants allege that overriding commissions were rarely paid out, no Global Managers were paid overriding commissions and none of the Country Managers, who received overriding commissions, were entitled to receive them.[63] In my judgment, this submission is simply a misguided attempt by the Appellants to downplay the presence of overriding commissions in the GEP. Even if I accept the Appellants' premises in this submission, these are entirely irrelevant considerations. As is evident from the clear language of the third requirement in s 2(1), *ie*, "any benefit is or *may be* received" [emphasis added], a scheme will be caught by the Act as long as the scheme *potentially* entitles any third person to a benefit, even if no such benefits are *actually* paid out. Thus, even if it is difficult for such benefits to be paid out such that not many receive the benefit, the fact that it is *possible* for such benefits to be received is sufficient basis to find that the third requirement is satisfied. This makes sense as, if it were otherwise, an artful promoter could temporarily circumvent the law by deferring the payment of benefits. The scheme would then not fall within the scope of the prohibition in the Act despite the fact that many members of the public are joining the scheme with substantial upfront costs. That would be a nonsensical outcome.

61 Third, the Appellants submit that the payment of overriding commission was for the training and the earnings guarantee provided by the Country Managers to their downlines, and was thus not a benefit derived from the recruitment of GEP participants.[64] I disagree. There is nothing on the face of the

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[63] Appellants' Submissions at paras 118, 120–129 and 131–132.

MOA that suggests that it was the GEP participants' as well as the Country Managers' intention that the 30% overriding commission was consideration for the training and earnings guarantee. Even if such an intention existed, it cannot explain away the second overriding commission that was paid directly by HEG. It also cannot distinguish the overriding commission that Global Managers stood to receive.

62 Accordingly, I find that the third requirement of the definition of a pyramid selling scheme under s 2(1) of the Act is met and the GEP is a pyramid selling scheme. The next critical issue is whether the GEP is an excluded scheme under s 2(2) of the Act. On this point, there is a preliminary dispute between the Parties as to who bears the burden of proving whether the GEP qualifies as an excluded scheme which I will first address.

Which party bears the burden of proving whether the GEP is an excluded scheme

63 Section 2(2) of the Act provides as follows:

> In this Act, "pyramid selling scheme or arrangement" shall be taken not to include such schemes or arrangements for the sale, lease, licence or other distribution of a commodity, or any class of such schemes or arrangements, as the Minister may by order prescribe, subject to such terms or conditions as may be specified in the order.

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64 Appellants' Submissions at paras 115 and 117.

64 Pursuant to s 2(2) of the Act, the Exclusion Order was enacted to exclude prescribed schemes and arrangements that meet the conditions stated therein. The District Judge held that the Appellants bore the burden of proving that the GEP comes within the terms of the Exclusion Order.[65]

65 In disagreeing with the District Judge, the Appellants submit that the burden of proof is instead on the Prosecution. Based on a plain reading of s 2 of the Act, they submit that a pyramid selling scheme is one that (a) falls within the definition of s 2(1); and (b) falls *outside* the Exclusion Order as envisioned in s 2(2). Section 2(2) is thus a continuation of the definition of a proscribed pyramid selling scheme as stated in s 2(1) of the Act. Since the Exclusion Order forms part of the elements of the offence under s 3(1) of the Act, the burden is on the Prosecution to show that the Appellants do not fall within the Exclusion Order.[66]

66 Both the Prosecution[67] and Ms Lee[68] take the contrary view and argue that the burden lies with the Appellants to show that the GEP satisfies the conditions in the Exclusion Order. On an application of the principles stated in ss 107 and 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), they both submit that the purpose of the Act as well as the relative ease of burden of proof militate in favour of the conclusion that the burden lies with the defence and not the Prosecution. I agree with the Prosecution and Ms Lee on this issue. Before I give my reasons, it will be helpful to first set out the law on this area.

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65 GD at [177].

66 Appellants' Submissions at paras 88–98.

67 Respondent's Submissions at paras 63–68.

68 Young *Amicus Curiae*'s Submissions at paras 51–70.

Where the statute is silent on burden of proof

67 In a criminal case, whilst the general starting point is that the Prosecution has to prove all the essential ingredients of the offence, there is an important exception to this principle (see *Tan Ah Tee v PP* [1979–1980] SLR(R) 311 at [13]):

> It is a fundamental rule of our criminal law that the Prosecution must prove every element of the offence charged. This is a common law rule which is not embodied in any legislative enactment but is English in origin. In England the Court of Appeal in *R v Edwards* [1975] QB 27 held that *if an enactment under which a charge is laid, on its true construction, prohibits the doing of acts, subject to provisos, exemptions and the like, then the Prosecution can rely upon the exception to the fundamental rule of the common law of England that the Prosecution must prove every element of the offence charged. …*
>
> [emphasis added]

68 Where the legislation expressly states that the burden of proving a fact lies on a certain party, there is little difficulty as to whom the burden falls on. However, most provisions do not use clear language to designate the burden of proof. In such cases, the position in Singapore has been set out by the Court of Appeal in *PP v Kum Chee Cheong* [1993] 3 SLR(R) 737 ("*Kum Chee Cheong*"), where it was held at [25] that:

> … Where an enactment prohibits the doing of an act *save in specified circumstances* or by persons of specified class or *with specified qualifications* or with licence or permission of specified authorities, it is **a *matter of construction whether the burden*** *of proving the circumstances, qualification, licence or the like* ***shifts to the defendant,*** and if on the true construction of the enactment, the burden shifts to the defendant it is for him to show that he is entitled to do the prohibited act and *that burden is not an evidential burden but a legal burden.* It follows therefore that in such case there is no necessity for the Prosecution to establish *prima facie* evidence of the specified circumstances, qualification or licence or the like as provided in the enactment entitling the defendant to do the prohibited act.

> [emphasis added in italics and bold italics]

69 In doing so, the court referred to the principles stated in the English decisions of *R v Edwards* [1975] QB 27 ("*Edwards*") and *R v Hunt (Richard)* [1987] AC 352 ("*Hunt*"). In the earlier English Court of Appeal decision of *Edwards*, it was decided that where a statute may be construed as prohibiting acts "save in specified circumstances or by persons of specific classes or with special qualifications or with the license or permission of specified authorities" ("the *Edwards* formulation"), the burden of proof will be on the accused to prove that he falls within one of these situations (at 39–40). The approach in *Edwards* determines the incidence of burden of proof based on whether the language of the statute falls within any of the limbs in the *Edwards* formulation. Subsequently, in the House of Lords decision of *Hunt*, a different approach was adopted. It was held that "… the court is not confined to the language of the statute. It must look at the substance and the effect of the enactment." (at 380). Whilst *Edwards* was considered to be correctly decided on the facts, the House of Lords in *Hunt* preferred to refer to the rule in *Edwards* as a "guide to construction" rather than as an immutable rule – there might be other situations (not falling within the *Edwards* formulation) where the statute ought to be construed as imposing the burden of proof on the accused (at 375). In particular, the following oft-cited passage from Lord Griffiths in *Hunt* (at 374), which was referred to in *Kum Chee Cheong* at [38], is worth reproducing here:

> … [I]f the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations *to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden.* I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a

> criminal case, and a court should be very slow to draw any such inference from the language of a statute.
>
> [emphasis added]

70 It is evident from the foregoing that *Edwards* and *Hunt* (and *Kum Chee Cheong*) adopt different approaches. The *Edwards* formulation is often referred to as the "syntax" approach, which determines the incidence of the burden of proof based on the language of the enactment. In contrast, *Hunt* and *Kum Chee Cheong* adopt a "construction of statute" approach to determine on whom Parliament placed the burden of proof.

71 What is however unclear is the relationship between these common law principles and the statutory principle stated in s 107 of the EA (not considered in *Kum Chee Cheong*), which provides as follows:

> **Burden of proving that case of accused comes within exceptions**
>
> **107.** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap. 224), or within any special exception or proviso contained in any other part of the Penal Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

72 In some sense, s 107 of the EA codifies the position in *Edwards*, which places the burden of proof on the accused where it is an exception or proviso in the law defining the offence. The question that then arises is what role the rules of construction (stated in *Hunt* and *Kum Chee Cheong*) play in relation to s 107 of the EA. How do the statutory principle in s 107 and the common law principles interact? As described by Professor Pinsler, the relationship between the two turns on whether the court will construe s 107 as being solely concerned with the form of the provision (the "syntax" approach) or with its substance (the

"construction of statute" approach) (see Jeffery Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 12.029):[69]

> … The issue here is whether the court will construe the exception or proviso to determine whether it is one of substance or form. It would be one of substance if, despite its form, it is concerned with the elements of the offence. If the court, in applying the *Hunt* principles, interprets the legislation governing the offence as creating an exception or qualification in substance so that it is for the prosecution to prove that the exception or qualification does not apply, then the accused would merely have an evidential burden with regard to that exception or qualification. For example, if the provision states: 'A person may not sell any fish except *ikan merah'*, the court might conclude that it is for the prosecution to prove that the fish sold by the accused was not *ikan merah* rather than for the accused to prove that he sold *ikan merah*. In this situation, the accused would only have to adduce evidence which raises a reasonable doubt as to whether he had sold *ikan merah* (even though the exception appears in form). Such an interpretation (which would be based on the substantive effect of the provision) might be justified on the assumption that it would be relatively easy for the prosecution to prove the type of fish which was sold, as the prosecution would not have a case unless it had evidence of what the accused had been selling. Alternatively, the court may conclude that s 107 is solely concerned with form so that the word 'except' imposes the burden of proof on the accused notwithstanding any other considerations (including the *Hunt* principles).

73 The learned authors in Tan Yock Lin and S Chandra Mohan, *Criminal Procedure in Singapore and Malaysia* (LexisNexis, Looseleaf Ed, 2015) also identify that the difficulty lies in determining what is an exception or proviso within the meaning of s 107, and advocate the application of a substance over form approach to this problem (at paras 1055–1102).[70] In a similar vein, the preference for form has been criticised by Glanville Williams in Glanville Williams, "The Logic of Exceptions" (1988) 47 CLJ 261 on the basis that there

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69 ACBOA at Tab 47.

70 ACBOA at Tab 59.

is "no assurance that the order of words represent a considered legislative judgment as to the burden of proof" (at p 272).

74 I agree with these academic commentaries that substance should be favoured over form. The particular words used in a statutory provision (unless there is clear indication as to their implications for burden of proof) might just be completely fortuitous. Why should it matter if the provision reads "a person shall not do X *except* when it is Y" or "a person shall not do X *provided* Y is met" as opposed to "a person shall not do X *unless* it is Y"? Does Parliament invariably intend that it is only when the words "provided" or "except" (corresponding to the words "exception" or "proviso" in s 107 of the EA) are used, as opposed to "unless", that the accused bears the burden of proof? That clearly cannot be right.

75 It is important to note here that the rule in *Edwards* was based on its predecessor, *R v Turner* (1816) 5 M & S 206 ("*Turner*"), which also decided that the burden of proving an exception lies with the accused. However, the position adopted by the Court of King's Bench in *Turner* is justifiable on two unique grounds (see Chin Tet Yung, "Burden of Proof on the Accused: An Unacceptable Exception" (1981) 23 Mal LR 267 at pp 270–271). First, it concerned a minor offence, which made it easier to place the burden on the accused. Second, there were about ten different exceptions in the statute creating the offence such that placing the burden instead on the prosecution would have given rise to a "moral impossibility of ever convicting" an offender for the offence (*Turner* at 210). The rationale for the rule was explained as follows by Lord Ellenborough CJ in *Turner* (at 210):

> ... If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common

> sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? …

The burden was thus rightly placed on the accused in *Turner* to show that he was within one qualification and not within any other. There were thus good reasons why the rule in *Edwards* evolved the way it did. However, it cannot be the general rule for the determination of burden of proof. Even if there is only one exception which is in *substance* an element of the offence, *eg*, Professor Pinsler's example (see [72] above) of selling any fish except *ikan merah*, the burden of proving that exception would be placed on the accused under the "form" approach. This is patently an undesirable and unintended outcome given that it is in substance an element of the offence, for which the Prosecution should bear the burden. But that is the conclusion that is reached if a simplistic and formalistic approach is adopted in applying s 107 of the EA. From a policy point of view, this is indefensible and a "substance" approach is thus preferred.

76 A "substance" approach would also rationalise any perceived inconsistencies between *Kum Chee Cheong* and s 107 of the EA. In my judgment, the "construction of statute" approach in *Kum Chee Cheong* must first be applied to determine whether the positive or negative facts are intended, when established, to constitute a true exception or proviso within the meaning of s 107 of the EA. If so, the accused is to bear the burden of proof.

77 In this vein, as alluded to above at [69], a key consideration is also the relative ease of proof. This is also statutorily reflected in s 108 of the EA as follows:

> **Burden of proving fact especially within knowledge**
>
> **108.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

78 I will now turn to consider a few cases which have applied these principles. In *Kum Chee Cheong*, the Court of Appeal had to determine the proper construction of s 3(1) of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 1985 Rev Ed) ("the MVA"), which read as follows (it has now been amended):

> … it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle *unless* there is in force in relation to the use of the motor vehicle by that person or that other person, as the case may be, such *a policy of insurance*…
>
> [emphasis added]

79 Unlike the present case, it was common ground in *Kum Chee Cheong* that the accused bore the legal burden of proof in relation to showing that he had a valid policy of insurance (at [14]) (*ie*, a positive fact). However, the court was asked to decide whether the Prosecution had to adduce *prima facie* evidence that the accused did *not* have such insurance (*ie*, a negative fact) before the accused was called upon to discharge his legal burden. The court decided in the negative. This was because the purpose of the MVA is to provide for compulsory insurance to cover the risks of injury or damage to third parties arising from the use of motor vehicles (at [39]). Additionally, the fact that there was in force at the material time an insurance policy (*ie*, a positive fact) was fully within the knowledge of the accused. In the court's view, it was significantly easier for a user of a motor vehicle to prove the existence of such a policy as he could simply produce it, whereas "it would be impossible or disproportionately difficult for the Prosecution to prove that [the user] did not have in force at the material time such policy of insurance" (at [39]). Therefore, there was no necessity for the Prosecution to adduce any *prima facie* evidence of the *absence* of such insurance (at [39]).

80 Similarly, in *PP v R Sekhar s/o R G Van* [2003] 2 SLR(R) 456, an undischarged bankrupt was charged with an offence under s 141(1)(*a*) of the Bankruptcy Act (Cap 20, 1996 Rev Ed) of obtaining credit without informing the lender that he was an undischarged bankrupt. The High Court held that the burden was squarely on the undischarged bankrupt to show that he had informed the proposed lender of his status before obtaining credit, having regard to the object of the provision to protect innocent people and businesses from being misled by a bankrupt's appearance of solvency, and the impracticality of the Prosecution having to prove the fact of non-disclosure by the undischarged bankrupt (at [23]–[26]).

Application to the facts – the Appellants bear the burden

(1) Objective and structure of the Act

81 In the present case, the objective of the Act is to prevent the risk of financial loss and hardship posed to persons who may be lured into objectionable pyramid selling schemes in Singapore. Given Parliament's view as to the gravity of the mischief, the Act aims to "eliminate" such objectionable schemes (see [44] above) while making provision for orders to be made to exclude non-objectionable schemes and arrangements. The Exclusion Order was seen to be necessary to allow legitimate businesses to continue (see [117] below). Nonetheless, the primary evil of the Act was not ignored. Parliament intended to promulgate a wide definition of "pyramid selling scheme" to remove the previous rigidities in the Act and to render the Act more effective in its prohibitory function (see [41]–[48] above). In this connection, an *additional* requirement for the Prosecution to prove beyond a reasonable doubt in each case that an accused person does not fall within any of the exceptions within the Exclusion Order would be inconsistent with Parliament's express intent behind legislating for a wide definition of "pyramid selling scheme".

82 The structure of the Act also fortifies the conclusion that Parliament intended the legal burden of proof to be placed on the accused person who seeks to rely on the Exclusion Order. The Act states a broad definition of "pyramid selling scheme" with provision for orders to be made to exclude specific classes of non-objectionable schemes. This is different from the legislation in other Commonwealth jurisdictions, where there are either no such carve-outs or the definition of a pyramid selling scheme is itself substantially qualified. For instance, the Australian Competition and Consumer Act 2010 (Act No 51 of 1974) (Australia)[71] and the Hong Kong Pyramid Schemes Prohibition Ordinance (Cap 617) (HK)[72] require the courts, in deciding whether a scheme is a pyramid scheme, to have regard to certain criteria in determining whether an element of the definition (that participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments) is satisfied. These enactments are thus structured so as to clearly place the primary burden on the prosecution to prove as part of its case that the accused is engaged in a pyramid scheme rather than a *legitimate* business driven by the sale of products and services. In contrast, such an inquiry is not relevant in determining whether a scheme is a pyramid selling scheme as defined under the Act. This suggests that the Act creates a *sui generis* scheme which is different from its counterparts in other Commonwealth jurisdictions.

83 From the consideration above of the objective and structure of the Act, the Exclusion Order is in *substance* more akin to an exception to the offence of promoting a pyramid selling scheme rather than an element of the offence (as the Appellants argue).

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71 ACBOA at Tab 1.

72 ACBOA at Tab 12.

(2) Practical considerations and relative ease of proof

84 In addition to the purpose and structure of the Act, the practical considerations on proof militate in favour of the conclusion that the Appellants bear the burden of proof in this case. The criteria which the Appellants have to satisfy in order to come within any of the excluded schemes under the Exclusion Order pertain to facts which are peculiarly within the Appellants' own knowledge. For this reason, I agree with the District Judge that placing the burden on the Prosecution to show that the GEP was *not* exempted by the Exclusion Order would mean that the Prosecution:[73]

> … must shoulder a virtually impossible or disproportionately difficult task of establishing that the accused did not fall within any of the three exemptions or that he failed to comply with all the criteria laid down in the Exclusion Order for each exemption, when it would be a matter of comparative ease for the accused to establish that he had the necessary registration, licence or approval etc or that he satisfied the relevant criteria to fall within an exemption.

85 The present case thus significantly differs from the factual scenario in *Hunt*, where the House of Lords held that the Prosecution had to prove that the accused possessed a specified substance in the prohibited form (rather than the accused having to prove that he possessed the non-prohibited form of the substance). The House of Lords expressly noted that this did not place an undue burden on the Prosecution as it would be extremely rare for a prosecution to be brought without the substance in question having been analysed. On the other hand, the accused could face real practical difficulties in discharging the burden as the suspected substance is usually seized by the authorities without entitling the accused to a proportion of it (at 377–378).

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[73] GD at [177].

86 In a similar vein, as pointed out by the Prosecution[74] and Ms Lee,[75] if the Appellants' contention that the Prosecution bears the burden of proving that the scheme in question does *not* fall within any of the excluded schemes in the Exclusion Order is accepted, the Prosecution will have to prove the negatives associated with all the exemptions, including paragraph 2(1)(*a*), which reads as follows:

> **Excluded schemes and arrangements**
>
> **2.**—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> (*a*) any scheme or arrangement comprising —
>
> (i) the provision of any financial advisory service; or
>
> (ii) insurance business,
>
> or any class of such schemes or arrangements, *so long as* ***every person*** *participating in the scheme or arrangement is registered, licensed, approved or otherwise so entitled to act* under the Financial Advisers Act 2001 (Act 43 of 2001) or the Insurance Act (Cap. 142), as the case may be;
>
> [emphasis added in italics and bold italics]

87 With regard to this exclusion, it is foreseeable that the Prosecution may have significant difficulty identifying *all* the persons participating in a scheme like an insurance business and subsequently verifying that all such persons are registered, licensed, approved, or otherwise so entitled to act. It is *comparatively* much simpler for the defence to prove that each of their insurance agents is validly licensed. On this issue of proving a *licence*, the Appellants' interpretation is directly at odds with the decision in *Kum Chee Cheong*, which

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74 Respondent's Submissions at para 68.

75 Young *Amicus Curiae*'s Submissions at para 60.

placed the burden of adducing a valid *insurance policy* on the accused (see also the decision in *Tan Khee Wan Iris v PP* [1995] 1 SLR(R) 723, which similarly placed the burden of adducing a valid *licence* on the accused (at [11] and [13])).

88 For completeness, some observations ought to be made regarding a potential comparison with the burden of proof under the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the MLA") because of the similar manner in which a "moneylender" is defined therein. Section 2(1) of the MLA defines "moneylender" as a person by reference to certain conditions, but clarifies that this category of persons "*does not include* any excluded moneylender" [emphasis added]. It is thus similarly worded to the Act which defines a pyramid selling scheme as one that is "taken *not to include*" the excluded schemes [emphasis added] (see [63] above).

89 In the Court of Appeal decision of *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*"), the Court of Appeal dealt with the burden of proof under the Moneylenders Act (Cap 188, Act 31 of 2008), an earlier version of the MLA, which does not materially differ from the MLA in relation to this issue. In *Sheagar*, the borrower alleged that the lender was an unlicensed moneylender such that, pursuant to s 14(2) of the MLA, the contract for the loan granted by the lender was unenforceable. This provision would not have applied to the lender if he was an excluded moneylender; and the issue was whether the lender or the borrower bore the burden of proving that the lender was an excluded moneylender under s 2(1) of the MLA. The Court of Appeal held that the burden fell on the borrower to prove that the lender was *not* an excluded moneylender. At [75], the Court of Appeal summarised the principles to be adopted in relation to s 14(2) of the MLA as follows:

(a) To rely on s 14(2) of the MLA, the borrower must prove that the lender was an "unlicensed moneylender".

(b) If the borrower can establish that the lender has lent money in consideration for a higher sum being repaid, he may rely on the presumption contained in s 3 of the MLA to discharge this burden.

(c) The burden then shifts to the lender to prove that he either does not carry on the business of moneylending or possesses a moneylending licence or is an "exempted moneylender".

(d) However, *if there is an issue as to whether the lender is an excluded moneylender, the legal burden of proving that he is not will fall on the borrower*.

90 At first blush, the principle stated in [89(d)] above lends support to the Appellants' interpretation that the Prosecution (likened to the borrower in *Sheagar*) as opposed to the Appellants (likened to the lender in *Sheagar*) bears the relevant burden of proof.

91 However, the specific reasons that motivated the Court of Appeal in *Sheagar* to arrive at this conclusion do not apply in the present case. After extensively discussing the legislative history of the MLA (at [57]–[67]), the Court of Appeal concluded that the MLA "simply does not apply to lenders who fall within the definition of 'excluded moneylender'". Most pertinently, the Court reasoned that the MLA provided for a benefit of a presumption as to who is a "moneylender" under s 3 of the MLA and this had a "*material bearing* on the burden of proof" [emphasis added] (at [69]–[73]). The specific decision is thus distinguishable from the present Appeals because it turned on the

interpretation and effect of a unique presumption provision in the MLA. In contrast, the Act provides no such presumption.

92 Accordingly, I find that the burden of proof to demonstrate that the GEP is an excluded scheme falls on the Appellants. Even if I am wrong on this point, and the Prosecution bears the burden instead, for the reasons stated below, I am of the view that the Prosecution has proven beyond a reasonable doubt that the GEP is not an excluded scheme.

Whether the GEP is an excluded scheme

93 I turn now to the primary issue in dispute in the Appeals, which is whether the GEP qualifies as an excluded scheme for the purposes of the Exclusion Order. The Appellants, during the Appeals as well as the trial below, focused on the applicability of paragraph 2(1)(*b*) of the Exclusion Order, *ie*, whether the GEP is a master franchise scheme or arrangement ("franchise scheme") that satisfies conjunctively all the terms and conditions in sub-paragraphs 2(1)(*c*)(ii), (iii), (iv) and (vi) of the Exclusion Order.

94 To recapitulate, the relevant provisions read as follows:

> **Excluded schemes and arrangements**
>
> **2.**—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> …
>
> (*b*) any master franchise scheme or arrangement, or any class of such scheme or arrangement, whereby a person is given the right to sub-franchise a franchise, subject to the scheme or arrangement satisfying the terms and conditions in sub-paragraph (*c*)(ii), (iii), (iv) and (vi);
>
> (*c*) any scheme or arrangement, or any class of such schemes or arrangements, which satisfies the following terms and conditions:

…

(ii) any benefit received —

(A) by any promoter of, or participant in, the scheme or arrangement accrues as a result of the sale, lease, licence or other distribution of a commodity to any other person; or

(B) by any promoter of the scheme or arrangement accrues as a result of the performance of one or more participants in relation to the sale, lease, licence or other distribution of a commodity to any other person;

(iii) subject to sub-paragraph (ii), no benefit shall be received by any person as a result of the introduction or recruitment of one or more persons to be participants in the scheme or arrangement;

(iv) a promoter of the scheme or arrangement shall not make, or cause to be made, any representation to any person that benefits will accrue under the scheme or arrangement in a manner other than as specified in sub-paragraph (ii);

…

(vi) a promoter of the scheme or arrangement shall not, and shall take reasonable steps to ensure that participants in the scheme or arrangement do not —

(A) knowingly make, or cause or permit to be made, any representation relating to the scheme or arrangement or to the commodity which is false or misleading;

(B) knowingly omit, or cause or permit to be omitted, any material particular relating to the scheme or arrangement or to the commodity;

(C) knowingly engage in, or cause or permit, any conduct that is misleading or likely to mislead as to any material particular relating to the scheme or arrangement or to the commodity; or

> (D) in promoting the scheme or arrangement or the commodity, use, or cause or permit to be used, fraud, coercion, harassment, or unconscionable or unlawful means;...

95 Under paragraph 2(1)(*b*) of the Exclusion Order, two broad categories of requirements need to be fulfilled for a scheme to qualify as a franchise scheme that is excluded from the ambit of the Act:

(a) the scheme must be a franchise scheme wherein the franchisee is given the right to sub-franchise the franchise; and

(b) the scheme must satisfy paragraphs 2(1)(*c*)(ii), (iii), (iv) and (vi) of the Exclusion Order.

96 Since the Appeals primarily centred on the latter requirement, I propose to deal with that first before dealing with the issue of whether the GEP is a franchise scheme.

97 In the Appeals, it is common ground between the Parties that paragraphs 2(1)(*c*)(ii) and 2(1)(*c*)(vi) of the Exclusion Order are met. Accordingly, my decision will analyse whether the other two conditions, namely, paragraphs 2(1)(c)(iii) and 2(1)(*c*)(iv), are satisfied in turn.

Whether the GEP satisfies paragraph 2(1)(c)(iii) of the Exclusion Order

(1) Overview of issue and submissions

98 In deciding whether the GEP satisfies paragraph 2(1)(*c*)(iii) of the Exclusion Order, the crux of the issue is the interpretation to be accorded to this paragraph, in light of paragraph 2(1)(*c*)(ii).

99 These provisions read as follows:

> **Excluded schemes and arrangements**
>
> **2.**—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> …
>
> (*c*) any scheme or arrangement, or any class of such schemes or arrangements, which satisfies the following terms and conditions:
>
> …
>
> (ii) *any benefit received —*
>
> (A) *by any promoter of, or participant in, the scheme or arrangement accrues as a result of the sale, lease, licence or other distribution of a commodity to any other person*; or
>
> (B) by any promoter of the scheme or arrangement accrues as a result of the performance of one or more participants in relation to the sale, lease, licence or other distribution of a commodity to any other person;
>
> (iii) ***subject to sub-paragraph (ii)****, no benefit shall be received by any person as a result of the introduction or recruitment of one or more persons to be participants in the scheme or arrangement*;
>
> [emphasis added in italics and bold italics]

100 As is evident from the preceding emphasis in bold, paragraph 2(1)(*c*)(iii) cannot be read in isolation from paragraph 2(1)(*c*)(ii) of the Exclusion Order. The difficulty, however, is that the proper interpretation of the phrase "subject to sub-paragraph (ii)" in paragraph 2(1)(*c*)(iii) of the Exclusion Order is not immediately clear – it requires one to determine the relationship between paragraphs 2(1)(*c*)(ii) and 2(1)(*c*)(iii). In this vein, three possible interpretations have been canvassed at the trial below and during the Appeals. These possible interpretations are premised on paragraph 2(1)(*c*)(ii)(A) of the Exclusion Order

(as opposed to the alternative limb 2(1)(*c*)(ii)(B)) because that is the limb which the Appellants claim the GEP satisfies. Nevertheless, the determination on the proper interpretation will equally be applicable to paragraph 2(1)(*c*)(ii)(B) of the Exclusion Order.

101 The first interpretation is that paragraph 2(1)(*c*)(ii) is the *controlling* paragraph such that as long as "any benefit received" accrues as a result of the conditions stated therein, it is irrelevant if paragraph 2(1)(*c*)(iii) is not met. This means that a scheme is excluded where the benefit to be received arises from the sale, lease, licence or other distribution of a commodity ***even if*** that benefit is received "as a result of the introduction or recruitment of one or more persons to be participants in the scheme or arrangement". In other words, it does not matter if the benefit received by a Country Manager/Global Manager arises as a result of the introduction or recruitment of a new GEP participant, provided that the benefit can be said to have also been received as a result of the sale of a place in the GEP scheme to the new GEP participant, *ie*, the commodity. This is the interpretation the Appellants suggest.[76]

102 The second interpretation is that both paragraphs are *conjunctive* requirements such that both conditions must be independently met. In other words, any benefit received by a GEP participant must have accrued as a result of the sale, lease, licence or other distribution of a commodity to any other person ***and*** no benefit is received by a GEP participant as a result of the "introduction or recruitment of one or more persons" to be GEP participants. This is the interpretation that Ms Lee adopts, based on an analysis of the legislative intention and foreign case law on the interpretation of the phrase "subject to".[77]

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[76] Appellants' Submissions at para 31.

103 The third interpretation is that if a benefit can be said to accrue both as a result of the sale, lease, licence or other distribution of a commodity (paragraph 2(1)(*c*)(ii)(A)) and as a result of the introduction or recruitment of one or more persons to be participants in the scheme (paragraph 2(1)(*c*)(iii)), the court has to examine the facts to assess which is the *predominant* or *substantial* cause of benefit. In other words, if both conditions are engaged, the failure to meet paragraph 2(1)(*c*)(iii) will disqualify the scheme only if the predominant or substantial cause of the benefit comes from recruitment and not from the sale, lease, licence or other distribution of a commodity. This is the interpretation adopted by the District Judge,[78] which the Prosecution accepts in the Appeals.[79] Ms Lee submits that the third interpretation is "more appropriately characterised not as a freestanding interpretation" but as a possible method of applying the second interpretation in situations where the benefit can be said to have accrued from both sources.[80]

104 I turn now to determine the proper interpretation of paragraph 2(1)(*c*)(iii) of the Exclusion Order.

(2) Proper interpretation of paragraph 2(1)(*c*)(iii)

(A) MODIFIED SECOND INTERPRETATION

105 After much careful consideration, I am of the view that the second interpretation is the proper interpretation to adopt, *ie*, paragraphs 2(1)(*c*)(ii) and (iii) must be independently fulfilled as conjunctive requirements, and neither is

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77 Young *Amicus Curiae*'s submissions at paras 101–110.

78 GD at [198].

79 Respondent's Submissions at para 71.

80 Young *Amicus Curiae*'s submissions at para 100.

to override the other. In my judgment, however, the second interpretation must be modified to cohere with Parliament's intention and the structure of the Act (see [113]–[118] below).

106 The primary factor that militates in favour of the second interpretation is the purpose of the Act, as gleaned from its legislative history.

107 At the Second Reading of the Amendment Bill 2000, the then-Minister of State for Trade and Industry, Mr Lim Swee Say, made the following observations, in respect of the conditions relating to excluded franchise schemes (see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at col 178 (Mr Lim Swee Say, Minister of State for Trade and Industry)):[81]

> First, the benefit received by any promoter or participant is as a result of the sale, lease, licence or other distribution of a commodity ***and not*** as a result of the recruitment of additional participants …
>
> [emphasis added]

108 This intention for the two requirements to be conjunctive was directly reflected in the Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order 2000 (S 248/2000) ("the Exclusion Order 2000"). In the Exclusion Order 2000, the precursor to the present paragraphs 2(1)(*c*)(ii) and (iii) was paragraph 2(1)(*c*)(i), which read as follows:[82]

> [A]ny benefit received by any promoter or participant accrues as a result of sale, lease, licence or other distribution of a commodity to any other person, ***and not*** as a result of the recruitment of one or more persons to be additional participants in the scheme or arrangement.
>
> [emphasis added]

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81 ACBOA at Tab 55.

82 ACBOA at Tab 14.

109 Subsequently the Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) (Amendment) Order 2001 (S 617/2001) ("the Amendment Order 2001") came into force to amend the Exclusion Order 2000. As a result, the wording of the relevant provision was amended to its current form. The Ministry of Trade and Industry, to which Parliament had delegated authority to make the Exclusion Order, issued a press release in relation to the Amendment Order 2001. It was clarified therein that the purpose behind the amendment to paragraph 2(1)(*c*)(i) was as follows:[83]

> Sharing of commission – It is all right for a salesperson to share commissions from several layers of salespersons recruited by him. However, such commissions must be generated by the sale of the product or service in question, ***and not*** through the recruitment of additional participants into the scheme.
>
> [emphasis in original in underline; emphasis added in bold italics]

110 These materials make it clear that the second interpretation is the correct approach to adopt. They do not disclose Parliament's intention for any other interpretation to be accorded to these paragraphs. In my view, the change in the phraseology of the provision, from "and not" in the Exclusion Order 2000 to "subject to" in the Exclusion Order, was merely a linguistic revision to ensure consistency with the multi-tiered structure of the present provision. It is unlikely that Parliament intended to depart from its original intention, *ie*, the second interpretation. In the absence of clear evidence of such an intention, I conclude that the change in the wording of the provision was not intended to mark a departure from the original intention, which was for both paragraphs to be read as conjunctive requirements.

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83 ACBOA at Tab 53.

111 In fact, this intention existed as early as 1973. As stated in the Explanatory Statement to the 1973 Bill:[84]

> … In clause 11 provision is made for the Minister by regulations to lay down the elements of a scheme or an arrangement which are not objectionable, for example, schemes or arrangements concerned with franchise trading ***not involving the recruitment of others*** and certain schemes or arrangements concerned with direct selling to participants or consumers.
>
> [emphasis added]

112 Overall, given its express foundation in legislative intention, the second interpretation is clearly preferable to the first and third interpretations.

113 However, as I alluded to earlier, the second interpretation is not perfect and needs to be modified in two ways. First, as presently formulated, the second interpretation might disqualify every pyramid selling scheme as there is typically at least one participant in such a scheme who can be said to have received a benefit as a result of the recruitment of one or more additional participants, *ie*, the person who personally recruits an additional participant ("the immediate recruiter"). Whilst this is the logical consequence of the second interpretation, it is not the intended outcome – as long as the immediate recruiter is the only person to receive a benefit for recruiting another, such a business model does not rely on the chain-letter expansion model (see [46] above) as the right to receive benefits for recruitment does not subsist past one level. To prevent the second interpretation from disallowing such schemes, it should be construed to prohibit only schemes where benefits arising from recruitment accrue to someone other than the *immediate* recruiter, *eg*, the other uplines.

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[84] ACBOA at Tab 6.

114 I am fortified in this restrictive reading of the second interpretation by the structure of the Act and the Exclusion Order. Returning back to the definition of a pyramid selling scheme, in the same scenario where B acquires a licence through A, B in turn recruits C and B receives a benefit as a result of the recruitment of C, there are four possible situations (see [38] above):

(a) A receives no benefit;

(b) A receives a benefit as a result of the recruitment by B of C;

(c) A receives a benefit as a result of the performance of C; or

(d) A receives a benefit *both* as a result of the recruitment by B of C and as a result of the performance of C.

It is clear that situation (a) would not amount to a pyramid selling scheme because the third requirement would not be satisfied. In contrast, situations (b)–(d) would constitute a pyramid selling scheme. Now, applying the original second interpretation, all of the situations (b)–(d) would not qualify for exclusion. It is clear why situations (b) and (d) would not qualify because A receives a benefit from recruitment in both situations. Situation (c) would also not qualify because *B* receives a benefit from recruitment. The fact that none of the situations which constitute a pyramid selling scheme qualify for exemption would mean that the Exclusion Order is meaningless and Parliament would then have acted in vain in enacting it. That is a very unlikely result (see *Tan Cheng Bock v Attorney-General* [2017] SGCA 50 at [38]). More pertinently, it would be odd for situation (c) to not qualify for exemption because the only person to receive a benefit from recruitment is C's immediate recruiter, *ie*, B. The same fact is present in situation (a), but situation (a) is not even considered a pyramid selling scheme in the very first place. The only additional fact in situation (c),

as compared to situation (a), is that A receives a benefit from C's performance, which is perfectly legitimate given that the benefit arises from the sale of a commodity. Situation (c) must thus qualify for exemption and constitute a legitimate scheme. This analysis makes it plain that Parliament did not intend that a scheme be disqualified from exclusion merely on account of the fact that the *immediate recruiter* receives a benefit for his recruitment efforts (as opposed to another upline or someone else receiving such a benefit).

115 On the face of it, allowing benefits to be received from recruitment by the immediate recruiter might be inconsistent with paragraph 2(1)(*c*)(i) of the Exclusion Order, which reads as follows:

> **Excluded schemes and arrangements**
>
> **2.**—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> …
>
> (*c*) any scheme or arrangement, or any class of such schemes or arrangements, which satisfies the following terms and conditions:
>
> (i) a person shall not be required to provide any benefit or acquire any commodity in order to participate in the scheme or arrangement, other than the purchase of sales demonstration equipment or materials at a price not exceeding their cost which are not for resale and *for which no commission, bonus or any other advantage will be given to any person*;
>
> [emphasis added]

116 Paragraph 2(1)(*c*)(i) of the Exclusion Order is clear on its face: no benefit can accrue to *any person* from the recruitment of a participant into the scheme. However, this is a condition that only non-franchise schemes have to satisfy. In contrast, a franchise scheme only has to satisfy paragraphs 2(1)(*c*)(ii), (iii), (iv) and (vi) of the Exclusion Order (see paragraph 2(1)(*b*) of the Exclusion

Order). This means that, while a franchise scheme allows benefits to be received by an immediate recruiter, a non-franchise scheme does not. In other words, a non-franchise scheme has, *inter alia*, an additional condition (in addition to paragraph 2(1)(*c*)(iii)) to be satisfied in paragraph 2(1)(*c*)(i), which prohibits all forms of benefits from recruitment. Seen in this light, there is no inconsistency between the first modification made to the second interpretation and paragraph 2(1)(*c*)(i) of the Exclusion Order.

117 The second modification stems from the question as to whether a literal interpretation of the words "as a result of the introduction or recruitment" in paragraph 2(1)(*c*)(iii) should be adopted. Consider the same scenario where overriding commissions are paid to a person, A for the sale of *products* made by C in a scheme where C is recruited by B and B is recruited by A. On a strict interpretation of "as a result", the scheme should be outlawed because A would not have received the benefit in question if A had not *recruited* B in the first place (and if B had not *recruited* C). In my judgment, this would lead to an unintended outcome because the *direct* source of the benefit received by A would be the sale of a product by C to end customers and not the recruitment of a participant. In other words, the benefit would arise as a direct result of the sale and not as a *direct* result of recruitment. Such a scheme would not rely on the chain-letter expansion model (see [46] above) and thus would not involve the attendant high risks of collapsing. Further, taking the literal interpretation of "as a result" to encompass any indirect mode of causation would mean that no pyramid selling schemes could conceivably fall within paragraphs 2(1)(*b*) and 2(1)(*c*) of the Exclusion Order because most of the benefits received can ultimately be traced to a recruitment effort. This was *not*, however, the intention of Parliament in enacting the Exclusion Order, which was designed to "give assurances to legitimate businesses" that they would not be "unwittingly caught

by the Act" (see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at col 178 (Mr Lim Swee Say, Minister of State for Trade and Industry)).[85] In line with this intention, a purposive interpretation of paragraph 2(1)(*c*)(iii) requires a scheme to be outlawed only where the *direct* or *immediate* source of the benefit in question was from the recruitment itself.

118 In the light of the foregoing, the proper interpretation to adopt is as follows: any benefit received by a participant (A) must have accrued as a result of the sale or other distribution of a commodity to any other person ***and*** no benefit is received by A as a *direct* result of the recruitment of an additional participant unless the additional participant is recruited by A ("the modified second interpretation").

119 I will now turn to briefly explain why I decline to adopt the first and third interpretations.

(B) FIRST INTERPRETATION

120 In relation to the first interpretation advanced by the Appellants, *ie*, that paragraph 2(1)(*c*)(ii) is the *controlling* paragraph, there are three main difficulties with this interpretation. First and most glaringly, it is directly contrary to the legislative intention, which as canvassed above, is for both paragraphs 2(1)(*c*)(ii) and (iii) to operate conjunctively (see [106]–[112] above).

121 Second, as found by the District Judge, the first interpretation renders paragraph 2(1)(*c*)(iii) of the Exclusion Order otiose.[86] In every case where

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85 ACBOA at Tab 55.

86 GD at [193].

paragraph 2(1)(*c*)(ii) is *satisfied* (assuming all the other conditions *except* paragraph 2(1)(*c*)(iii) is satisfied), the scheme *will* be an excluded scheme. The converse is also true. Where paragraph 2(1)(*c*)(ii) is *not satisfied*, the scheme *will not* be an excluded scheme even if it satisfies paragraph 2(1)(*c*)(iii). In other words, it is irrelevant whether paragraph 2(1)(*c*)(iii) is satisfied or not. Thus, reading paragraph 2(1)(*c*)(iii) in the way the Appellants do will give it no meaning whatsoever. Instead, reading the paragraphs in their context, paragraph 2(1)(*c*)(iii) is to be read as adding on to the requirement stipulated in paragraph 2(1)(*c*)(ii). Otherwise, it will have no independent meaning and be as good as non-existent.

122 Third, the first interpretation will exclude many pyramid selling schemes which Parliament clearly intended to prohibit. A case in point is the scheme designed by S888.com (S) Pte Ltd ("S888"), which was referred to during the Second Reading of the Amendment Bill 2000 as an example of a pyramid selling scheme that "will ultimately collapse" (see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at cols 176–177 (Mr Lim Swee Say, Minister of State for Trade and Industry)).[87] S888 was a company involved in e-commerce and had, as part of its business model, adopted a franchise scheme. Each participant had to pay an upfront fee of $27,000 for website space to sell products over the Internet. The participants could use this space to recoup their investments through online sales. Each participant also earned a fixed commission of $3000 from S888 for every additional member they recruited and any subsequent additional member in turn recruited by such additional members (this right to receive the commission subsisted to five levels of uplines for each participant). As is evident from the above, the S888 scheme would satisfy paragraph 2(1)(*c*)(ii) of the Exclusion

87 ACBOA at Tab 55.

Order because any benefit received by a participant could be said to have accrued from the sale of a "commodity", *ie*, the website space to new participants. If the first interpretation is adopted, the S888 scheme would thus have been an excluded pyramid selling scheme. This result would be directly at odds with Parliament's intent for such schemes to *not* be excluded under the Exclusion Order.

123 For these reasons, the first interpretation is untenable.

(C) THIRD INTERPRETATION

124 Although the third interpretation fashioned by the District Judge and Ms Lee (which looks at the predominant source of the benefit) is not as implausible as the first interpretation, it is not without difficulties. First and foremost, this interpretation is not borne out by the words of paragraph 2(1)(*c*) of the Exclusion Order. In fact, the third interpretation requires a fair amount of judicial legislation and requires the court to read into paragraph 2(1)(*c*) an additional provision which reads (there could be other similar variations):

> Where the benefit can be said to accrue as a result of any of the events stipulated in paragraph 2(1)(*c*)(ii) as well as a result of the prohibited source of benefit in paragraph 2(1)(*c*)(iii), the scheme will be an excluded scheme only if the benefits in question accrue predominantly or substantially as a result of the sale or other distribution of a commodity to any other person.

In the absence of such a statutory provision and/or cogent parliamentary intention to that effect, I am not inclined to adopt the third interpretation.

125 Second, the third interpretation might potentially be difficult or even impossible to apply in practice. Whether a scheme predominantly generates benefits through recruitment or through the sale of commodities might not be

immediately apparent in every case. If the third interpretation is to be adopted, the court has to determine, in each and every case, which is the predominant source of benefit for the uplines. This can potentially create evidential difficulties. In most pyramid selling schemes, participants can earn commissions by either recruiting additional participants and/or by selling a product or service. It is conceivable that some downlines may exclusively go about chalking up commissions through recruiting more participants while others may exclusively earn commissions by selling the product or service. Which group of participants is the court supposed to consider in determining the predominant source of benefits for the uplines? Is it principled for the determination of whether a pyramid selling scheme is an outlawed scheme to turn on facts as to how the scheme was carried out as opposed to the design of the scheme from the very outset? These questions demonstrate the difficulty with the potential application of the third interpretation which depends on the subsequent relative outcome of the sales performance and success in recruitment (over which the scheme promoters have no control) to determine whether a pyramid selling scheme is not illegal. If in one year, the predominant source of the benefits comes from sales but in a subsequent year, the predominant source of the benefit comes from recruitment, is the scheme in the first year legitimate as an excluded scheme but illegitimate in the second year because it is no longer an excluded scheme due to the fact that the predominant source of the benefit comes now from recruitment instead? This approach is thus patently unsatisfactory and engenders unwarranted uncertainty for scheme promoters and participants.

126 Lastly, the third interpretation creates potential loopholes and requires the court to exercise value judgments on commercial matters to prevent abuse. For instance, one can easily conceive of a scheme where the commodity in

question is said to be training in business and entrepreneurship. Whenever a new participant enters the scheme, he pays a large fee for this training, which is beyond the typical market value of the training offered. The large fee paid ostensibly for training is meant by the scheme promoter to cover or hide the new participant's fees to join the scheme to enable him to participate in its benefits, *ie*, where he is entitled to also receive commissions from all his subsequent downlines. In other words, the total benefit to all the uplines from having a new participant recruited is hidden within the large fee charged to each new recruit effectively for both his training and his membership or participation in the scheme. In such a situation, if the court were to "pierce the veil" and find that there is in substance a recruitment or membership fee embedded within the large training fee paid by the new participant, how is the court to determine whether the predominant source of commissions paid to the uplines is effectively from the recruitment of the participant into the scheme or the payment for the real value of the training that is being offered to the participant? The court will be required to make "value" judgments in the literal sense, by putting a dollar value on the worth of the training in determining the predominant source of the benefit. This is an undesirable position, which is an additional reason that weighs against the adoption of the third interpretation. Instead, if the modified second interpretation is adopted, the existence of an element of benefit from the recruitment of the scheme participant to all the uplines (excluding the immediate recruiter), the quantum of which is irrelevant, will be sufficient. There is no need for the court to determine its quantum relative to the dollar value of the benefit that should in reality be attributed to the element of training in order to establish whether the predominant source of the benefit arises out of recruitment or the training provided to the participants.

127 For the reasons given above, the proper interpretation of paragraph 2(1)(*c*)(iii) of the Exclusion Order is the modified second interpretation. The overall effect of the modified second interpretation is the following. Using the same scenario where A recruits B and B in turn recruits C, A *cannot* receive benefits arising from the recruitment of C into the scheme by B but A can receive benefits arising from both B and C's performance (not involving recruitment efforts) in relation to the sale, lease, licence or other distribution of the commodity offered. In my view, this is precisely the outcome Parliament intended to achieve. There is nothing inherently objectionable in A receiving benefits connected with the supply of a commodity, as provided in paragraph 2(1)(*c*)(ii) of the Exclusion Order, because the underlying benefit in question is received as a result of the sale of a good or service. In contrast, the danger with pyramid selling schemes is when overriding benefits are received as a direct result of recruitment because here the motive to earn more commissions leads to the aggressive push by the uplines for their downlines to aggressively recruit until a point where there are no more willing recruits, at which point the scheme collapses.

128 Using the facts of the Appeals as an example of how the modified second interpretation is to be applied, the GEP will not be an excluded scheme for non-satisfaction of paragraph 2(1)(*c*)(iii) if A gets any overriding commission from the licence fee paid by C to join the GEP. In contrast, where A gets overriding commissions only as a result of B and/or C's sale of HEG's educational programmes to students, the GEP will satisfy paragraph 2(1)(*c*)(iii).

(3) Application to the facts

129 Applying the modified second interpretation, it is clear in the present case that the GEP flouts paragraph 2(1)(*c*)(iii) of the Exclusion Order. This is a

fact that even the Appellants do not and cannot disagree with. It is an undisputed fact in the present case that where C, a new GEP participant, is recruited by B (an existing GEP participant), overriding commissions are payable to A (the Country Manager of B), based on B's earned income, which earned income included B's commission for recruiting C: see [8(h)] above. This is a benefit that accrues to A (the non-immediate recruiter of C) as a direct result of the recruitment of C into the GEP and thus contravenes paragraph 2(1)(*c*)(iii) of the Exclusion Order.

130 Even if the proper interpretation is the third interpretation, I agree with the District Judge and Ms Lee that the GEP would not be an excluded scheme. The Appellants submit that the commodity in HEG is the licence to sell HEG's educational programmes as well as the training and earnings guarantee provided by the Country Managers to GEP participants, such that the predominant source of the overriding commissions is the sale or other distribution of a commodity and not the recruitment of GEP participants.[88] I disagree with the Appellants' characterisation as it is inconsistent with the following findings of fact made by the District Judge (which I have no reason to disturb):

> **(a)** First, whilst it is true that the GEP provided some training, the study component consisted only of a three-day master class and ten training sessions, with a total duration of 38 hours. In contrast, the duration of the licence to recruit additional GEP participants was between ten months and 60 months.[89] The duration of the licence "depended on how much the GEP recruit was willing to pay for his licensing period, rather than on a decision by HEG on what would

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88 Appellants' Submissions at paras 65–81.

89 GD at [201].

constitute the optimal or appropriate duration of the work component of the course".[90]

(b) Second, there was only one clause in the entire Licensing Agreement for a GEP participant which dealt with HEG's obligation to provide "education" or training for the course. In contrast, "the bulk of the provisions dealt extensively with the GEP [participant's] marketing responsibilities and the commission structure which would govern his remuneration".[91]

(c) Third, there was a marked emphasis on the recruitment of GEP participants as opposed to the recruitment of students for other educational programmes run by HEG. This was evident from the slides presented by Chua during the preview seminars[92] as well as the earning records of a typical GEP participant.[93]

131 The Appellants also submit that the GEP is not a pyramid selling scheme because it is a legitimate business, drawing comparisons with "typical pyramid selling schemes".[94] In particular, the Appellants submit that a scheme only constitutes a non-excluded pyramid selling scheme if it has some or all of the following objectionable features associated with "typical" pyramid selling schemes:[95]

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90 GD at [202].

91 GD at [203].

92 GD at [208].

93 GD at [206]–[207].

94 Appellants' Submissions at paras 47–59.

95 Appellants' Submissions at para 48.

(a) the goods and services are rarely advertised, hard to sell and the commission structure of the pyramid selling scheme makes the goods expensive by the time they reach the customer;

(b) the terms of the pyramid selling scheme are such that it is impossible for participants to recoup any part of their investments upon termination of their participation in the scheme;

(c) high pressure salesmanship by the scheme representatives who gloss over or conceal its inherent disadvantages; and

(d) little or no opportunity is granted to recruits to "rescind or reflect on whether they should join the … scheme".

132 In response, the Prosecution submits that this is an entirely irrelevant inquiry.[96] I agree that these considerations are entirely extraneous and immaterial. While I can appreciate that most pyramid selling schemes will have some of the objectionable elements referred to by the Appellants, this does not elevate these "typical" features into statutory requirements that must be met.

133 The legislative framework for deciding which schemes are outlawed is entirely comprehensive and objective:

(a) The Act starts with a broad definition of what a pyramid selling scheme is, with an *exhaustive* set of requirements (*ie*, the three definitional criteria under s 2(1) of the Act).

(b) This broad definition is then subject to certain specified exclusions in an *exhaustive* list of exemptions in the Exclusion Order.

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96 Respondent's Submissions at paras 46–48.

134 This comprehensive and exhaustive framework cannot be distorted by the arbitrary introduction of a non-existent and uncertain set of criteria, which the Appellants have sought to rely on.[97] The Appellants are thus seeking judicial usurpation of the legislative function by asking the court to read this set of amorphous criteria into the Act, a step I am not inclined to take.

135 In relation to the definition of a pyramid selling scheme, a similar view was expressed by Yong Pung How CJ in *Tan Un Tian v PP* [1994] 2 SLR(R) 729 ("*Tan Un Tian*"), which is the only reported case of prosecution under the previous version of the Act:

> 31 Be that as it may, it was necessary for Parliament to define what would, in law, constitute a pyramid selling scheme which was to be outlawed following the introduction of the Bill. In my view, the terms of the definition are unambiguous. It does not seek to incorporate all the objectionable features. Neither, in my judgment, would it have been desirable to do so, as the purpose would then be too easily defeated by cleverly avoiding any one of the features. One must not therefore simply proceed by way of comparison between the features found in an archetypical scheme and a scheme in any particular case. Otherwise, whether a scheme constitutes a pyramid selling arrangement would depend on the number of objectionable features present in it or the percentage of semblance the scheme bears to the prototype. The law cannot be reduced to a simple mathematical exercise. *Given all the material facts, one must be able to say with confidence whether something constitutes a pyramid selling scheme, instead of being left to second guess how many objectionable features there need to be before a trial judge is convinced that the requirements in the statutory definition are satisfied.* In arguing for a purposive approach to interpretation, one must also bear in mind the policy considerations so clearly stated in s 9A(4) of the IA, namely, the desirability of the public being able to rely on the ordinary meaning conveyed by the statutory provision and the need to avoid prolonged and wasteful litigation. *Using the method of counting the number of objectionable features in order to decide whether there is in any particular case a pyramid selling scheme would only serve to usher in a state of*

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97 GD at [153].

> *uncertainty. The test must not therefore turn on numbers and percentages.*
>
> [emphasis added]

In my judgment, these comments are equally applicable to the question of whether a scheme qualifies as an excluded scheme in the Exclusion Order.

136 In any event, reliance on these so-called "typical features" does not bring the Appellants very far. Parliament has seen it fit to elevate most of these objectionable features into negative conditions that must be met. For instance, paragraph 2(1)(*c*)(vi) of the Exclusion Order provides that a promoter of the scheme must not make any *misleading* representations. Further, as explained above, there is also a catalogue of other conditions to be satisfied. For these reasons, the Appellants' argument, that the GEP is an excluded scheme because it does not possess the "typical" features of a pyramid selling scheme, is untenable.

Whether the GEP satisfies paragraph 2(1)(c)(iv) of the Exclusion Order

137 Additionally, I find that the GEP also contravenes paragraph 2(1)(*c*)(iv) of the Exclusion Order. For ease of reference, paragraph 2(1)(*c*)(iv) reads as follows:

> a promoter of the scheme or arrangement shall not make, or cause to be made, any representation to any person that benefits will accrue under the scheme or arrangement in a manner other than as specified in sub-paragraph (ii);

138 The District Judge found that HEG had made, or caused to be made, representations to potential and actual GEP participants that overriding commissions, *ie*, benefits, would be payable to the Country and Global Managers as a result of the recruitment of new GEP participants.[98] This finding

is amply substantiated from the slides used in the preview seminars organised by HEG. For instance, in the August 2008 Preview Seminar conducted by Chua, it was represented that one can "earn more than S$1,000,000 just by *recruiting* four managers" [emphasis added].[99] When asked to explain what this statement meant during cross-examination, Chua testified as follows:

> Q: Isn't it right that [it] shows us that $1 million can be earned by recruiting 4 Managers every month and that each of the Managers under that Manager go on to recruit another 4 Managers?
>
> A: Yes, it shows the potential.
>
> Q: And there's no factoring in of the recruitment of students, i.e. non-GEPs.
>
> A: This---this example shows the GEPs.
>
> Q: So no---no student recruitment at all, in this example?
>
> A: Yes, Your Honour.
>
> Q: And so the 1 million that is potentially earned by this Manager, comprises entirely of direct commissions that he earns for recruiting GEP Consult---for G---for recruiting Managers and ***the overriding commissions that he earns form the Managers that he's recruited.*** Isn't that right?
>
> A: ***Yes***, it shows that if the [GEP participant] chooses to work under the Manager.
>
> [emphasis added]

139 From the above, it is clear that HEG (through Chua) had made representations that benefits (*ie*, overriding commissions) can accrue under the GEP in a manner other than as specified in paragraph 2(1)(*c*)(ii) of the Exclusion Order, *ie*, through recruitment of additional GEP participants. Accordingly, even if the other conditions in paragraph 2(1)(*c*) are satisfied, the GEP is not an

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98 GD at [212].

99 ROP, vol 4, pp 453–454.

excluded scheme because it contravenes paragraph 2(1)(*c*)(iv) of the Exclusion Order.

140 I now turn briefly to the question of whether the GEP is a franchise scheme.

Whether the GEP is a franchise scheme

141 As stated earlier at [95(a)], in order for a scheme to benefit from exemption under paragraph 2(1)(*b*) of the Exclusion Order, the scheme must qualify as a franchise scheme. In the Appeals, the Parties do not dispute this requirement – the Prosecution is content to accept (despite making contrary arguments at the trial below) that the GEP is a franchise scheme. However, Ms Lee argues otherwise – she submits that the GEP is not a franchise scheme. I shall briefly summarise her arguments.

(1) Ms Lee's submission that the GEP is not a franchise scheme

142 Paragraph 2(2) of the Exclusion Order specifies that "franchise" under paragraph 2(1)(*b*) of the Exclusion Order has the same meaning as in s 2(1) of the Securities and Futures Act 2001 (Act 42 of 2001), which provides that ("the franchise definition"):[100]

> "franchise" means a written agreement or arrangement between 2 or more persons by which —
>
> > (*a*) *a party (referred to in this definition as the franchisor) to the agreement or arrangement authorises or permits another party (referred to in this definition as the franchisee), or a person associated with the franchisee, to exercise the right to engage in the business of offering, selling or distributing goods or services in Singapore*

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100 ACBOA at Tab 13.

> *under a plan or system controlled by the franchisor or a person associated with the franchisor*;
>
> (*b*) the business carried on by the franchisee or the person associated with the franchisee, as the case may be, is capable of being identified by the public as being substantially associated with a trade or service mark, logo, symbol or name identifying, commonly connected with or controlled by the franchisor or a person associated with the franchisor;
>
> (*c*) *the franchisor exerts, or has authority to exert, a significant degree of control over the method or manner of operation of the franchisee's business*;
>
> (*d*) the franchisee or a person associated with the franchisee is required under the agreement or arrangement to make payment or give some other form of consideration to the franchisor or a person associated with the franchisor; and
>
> (*e*) the franchisor agrees to communicate to the franchisee, or a person associated with the franchisee, knowledge, experience, expertise, know-how, trade secrets or other information whether or not it is proprietary or confidential;
>
> [emphasis added]

143 Ms Lee queries whether the GEP satisfies limb (*a*) of the franchise definition; she takes no issues with the other limbs in respect of the GEP.[101] Her primary contention is that limb (*a*) of the franchise definition is not satisfied because the GEP participants do not have "the right to engage in the business of offering, selling or distributing goods or services".[102] Relying on decisions from the United States, she submits that limb (*a*) fails for two reasons. First, the GEP participants do not have the "right to sell" a place in the GEP because they cannot commit HEG to a binding contract. Whilst the GEP participants have the right to recruit potential GEP participants, the potential participants are required to pass an interview conducted by Chua before they can be accepted into the

101 Young *Amicus Curiae*'s Submissions at para 75.

102 Young *Amicus Curiae*'s Submissions at paras 81–82.

GEP. Since they cannot sell a place in the GEP without Chua's approval, they do not have the right to engage in the business of selling HEG's services.[103]

144 Second, Ms Lee submits that there are no sufficiently independent functions played by the GEP participants in the marketing arrangement to create a franchise scheme. The relationship between a GEP participant and HEG is more akin to one of an agent than a franchisee for the following reasons:[104]

(a) Before marketing HEG's educational programmes to other persons, a GEP participant neither buys the educational services from HEG, nor is required to do so. HEG owns the educational programmes.

(b) HEG is the sole recipient of all incomes from the sales of places in HEG's educational programmes and a GEP participant is only compensated by way of commissions.

(c) A GEP participant enters into a licensing agreement with HEG (and not the GEP participant recruiting him) in order to obtain rights under the GEP.

(2) My decision

145 Whilst Ms Lee has made cogent arguments as to why the GEP is not a franchise scheme, given the dearth of contrary arguments as to why the GEP is a franchise scheme (since this is the Parties' agreed position), it is not prudent for me to express a concluded view on the position in law as to whether or not the GEP is a franchise scheme.

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103 Young *Amicus Curiae*'s Submissions at paras 83–84.

104 Young *Amicus Curiae*'s Submissions at paras 85–89.

146 In any event, it is unnecessary for me to categorically decide this issue. This is because, *regardless* of whether the GEP is or is not a franchise scheme, the GEP will not benefit from the Exclusion Order. I will explain the respective positions, starting first with the situation where the GEP is not considered a franchise scheme.

147 Paragraph 2(1) of the Exclusion Order exhaustively provides for the exclusion of only three types of schemes:

> **Excluded schemes and arrangements**
>
> **2**.—(1) The definition of "pyramid selling scheme or arrangement" in section 2 of the Act shall be taken not to include any of the following schemes or arrangements:
>
> (*a*) any scheme or arrangement comprising —
>
> (i) the provision of any financial advisory service; or
>
> (ii) insurance business,
>
> or any class of such schemes or arrangements, so long as every person participating in the scheme or arrangement is registered, licensed, approved or otherwise so entitled *to act* under the Financial Advisers Act 2001 (Act 43 of 2001) or the Insurance Act (Cap. 142), as the case may be;
>
> (*b*) any master franchise scheme or arrangement, or any class of such scheme or arrangement, whereby a person is given the right to sub-franchise a franchise, subject to the scheme or arrangement satisfying the terms and conditions in sub-paragraph (*c*)(ii), (iii), (iv) and (vi);
>
> (*c*) any scheme or arrangement, or any class of such schemes or arrangements, which satisfies the following terms and conditions….

The three categories of schemes are: (a) any financial advisory service or insurance business, (b) any franchise scheme with the right of sub-franchise and the satisfaction of certain conditions and (c) any other scheme that satisfies a set of predetermined conditions.

148 It is apparent from the above that if the GEP is not a franchise scheme (*ie*, not falling under paragraph 2(1)(*b*) of the Exclusion Order), there is only one available route for it to qualify as an excluded scheme, *ie*, paragraph 2(1)(*c*) of the Exclusion Order – it goes without saying that paragraph 2(1)(*a*) is not an option since the GEP is not in any way a financial advisory service or an insurance business.

149 Under paragraph 2(1)(*c*) of the Exclusion Order, there is a catalogue of conditions to be satisfied. Amongst others, paragraph 2(1)(*c*)(i) is clearly not satisfied (see [115] above). The relevant provision reads as follows:

> (i) *a person shall not be required to provide any benefit or acquire any commodity in order to participate in the scheme or arrangement*, other than the purchase of sales demonstration equipment or materials at a price not exceeding their cost which are not for resale and for which no commission, bonus or any other advantage will be given to any person;
>
> [emphasis added]

150 It is evident that the GEP does not satisfy this condition. A GEP participant has to pay a licence fee (*ie*, provide a benefit) in order to recruit more participants into the GEP as well as to market HEG's educational programmes to potential students (*ie*, in order to participate in the GEP scheme). This licence fee does not qualify as "purchase of sales demonstration equipment or materials". Even if it does, the fact that commissions are paid to the immediate recruiter and/or to the other uplines means that this condition is not satisfied (see [116] above). Since the GEP plainly contravenes paragraph 2(1)(*c*)(i) of the Exclusion Order, it comes as no surprise that the Appellants' case is founded instead on the premise that the GEP is a franchise.

151 Turning now to the position where the GEP is a franchise scheme, it would still not qualify for exemption because, as explained above, it fails to

fulfil paragraphs 2(1)(*c*)(iii) and (iv) of the Exclusion Order. Since the Appeals centred on the latter and I did not have the benefit of full arguments on the former, I prefer to rest my decision that the GEP is not an excluded scheme on its failure to fulfil paragraphs 2(1)(*c*)(iii) and (iv) of the Exclusion Order as opposed to its not being a franchise scheme in the first place.

152 As is clear from the foregoing analysis, the question of whether the GEP is a franchise scheme is not central in the Appeals because the Appellants' convictions stand either way, regardless of that determination.

Whether s 3(1) of the Act imports a mens rea requirement

153 The next issue to be determined is whether the offence under s 3(1) of the Act imports a *mens rea* requirement and if so, whether the Appellants satisfy this element of the offence. The relevant section reads as follows:

> **Unlawful to promote or participate in, or hold out that person is promoting or participating in, pyramid selling scheme or arrangement**
>
> **3.**—(1) It shall be unlawful for any person to promote or participate in a multi-level marketing scheme or arrangement or a pyramid selling scheme or arrangement or to hold out that he is promoting or participating in such a scheme or arrangement.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 5 years or to both.

154 It is undisputed that there is no express *mens rea* requirement in s 3(1) of the Act. This, however, is not the end of the matter, for there is a common law presumption that *mens rea* is an essential ingredient of an offence, albeit one that may be displaced expressly or by necessary implication (see *PP v Koh Peng Kiat* [2016] 1 SLR 753 ("*Koh Peng Kiat*") at [58]).

155 In this vein, the District Judge held that the presumption of *mens rea* was not displaced as the offence under s 3(1) of the Act is "not a regulatory provision dealing with an issue of social concern such as public safety or public welfare" and it had "also not been shown that the imposition of strict liability is necessary in order for the provision to be effective in prohibiting pyramid selling schemes or arrangements".[105] She determined that the *mens rea* for an offence under s 3(1) of the Act was knowledge that the scheme being promoted bore features which would satisfy the three definitional criteria of a pyramid selling scheme under s 2(1) of the Act.[106]

156 The Parties do not dispute that s 3(1) of the Act imports a *mens rea* requirement; they only differ as to the requisite *mens rea*. The Appellants submit that the *mens rea* of the offence is knowledge that the scheme amounted in law to a pyramid selling scheme.[107] The Prosecution submits the relevant *mens rea* is that as found by the District Judge.[108]

157 However, Ms Lee disagrees with the District Judge and the Parties that the offence under s 3(1) of the Act has a mental element.[109] She cites two reasons. First, the Act and, in particular, s 3(1) of the Act was enacted to deal with an issue of "serious social concern". Second, construing 3(1) of the Act as a strict liability offence will promote the intended purpose of the Act to eliminate such schemes rather than simply attempting to control them. The effectiveness of the Act would be weakened if accused persons were permitted

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105 GD at [169].

106 GD at [170].

107 Appellants' Submissions at paras 134–140.

108 Respondent's Submissions at paras 51–61.

109 Young *Amicus Curiae*'s Submissions at paras 28–39.

to escape liability for their involvement in promoting such schemes on the basis that they lacked *mens rea*. In the event that s 3(1) is found to import a *mens rea*, Ms Lee agrees with the *mens rea* identified by the District Judge and Prosecution.[110]

158 Before I begin my analysis, as a preliminary point, I should point out that there are conceptual and practical difficulties with categorising offences as "strict liability" or otherwise, as highlighted by the Court of Appeal in *Koh Peng Kiat*. The issue in *Koh Peng Kiat* was whether an offence under s 16(1)(*b*) of the Health Products Act (Cap 122D, 2008 Rev Ed) ("the Health Products Act"), which provides that no person "shall supply, or procure or arrange for the supply of, any health product which is … a counterfeit health product", was a strict liability offence. The court articulated two main difficulties with the concept of "strict liability". First, "strict liability" is a somewhat protean concept, given that there are different degrees of "strictness" in terms of the degree to which the Prosecution is spared from its burden of proving a mental element in respect of every physical element of the offence (at [52]–[53]). Second, the physical and mental elements of a crime may overlap where there is an implied state of mind in respect of a physical element of the offence. For these reasons, just as was done in *Koh Peng Kiat*, it is more accurate and conceptually clearer to characterise the inquiry as one of whether the Prosecution bears the legal burden of proving a mental element in respect of every physical element stated in the offence, rather than simply whether the offence is one of "strict liability": see also *Chinpo Shipping Co (Pte) Ltd v PP* [2017] SGHC 108 at [49].

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110 Young *Amicus Curiae*'s Submissions at paras 40–46.

159 With this background in mind, I turn now to consider the offence under s 3(1) of the Act. There are two primary physical elements that must be proven by the Prosecution:

(a) the act of promoting, participating or holding out that one is promoting or participating ("the first physical element"); and

(b) this act must be in connection with a MLM scheme or a pyramid selling scheme ("the second physical element").

160 The question is whether any of these physical elements imports a *mens rea* requirement. In respect of the first physical element, the mere fact of promotion or participation implies that the accused must have knowledge of the scheme as one cannot possibly promote or participate in something that one does not know anything about. This is consistent with the Court of Appeal's observation in *Koh Peng Kiat* that "a person can only 'procure or arrange for the supply' of something if he has a certain state of mind. He must at least know that he was procuring, or arranging the supply of that something" (at [54]). Separately, the notion of promotion or participation also means that there is some mental element on the part of the accused, as both involve an intention by the accused to be part of the scheme. This much was accepted by the Prosecution during the trial, when it acknowledged that the terms of s 3(1) of the Act imply that the accused must have some knowledge or intention that he is promoting or participating in the scheme.[111] The Appellants, however, do not contest this mental element. There is thus no dispute between the Parties with respect to the *mens rea* borne out of the first physical element.

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111 ROP, vol 5, pp 5 and 12; Prosecution's Further Submissions (P56) at paras 5–6 and 34.

161 The more controversial question concerns the second physical element: is there any mental element with respect to the physical element of the existence of a pyramid selling scheme? Here, I agree with Ms Lee that the presumption of *mens rea* is displaced. As referenced by the High Court in *PP v Yue Mun Yew Gary* [2013] 1 SLR 39 at [15], the question to be asked is whether "the weight of the public interest" protected by the offence is sufficient to displace the presumption of *mens rea*. In my judgment, the weight of the public interest protected by the Act is sufficient to outweigh the need for a mental element in respect of the physical element of the existence of a pyramid selling scheme.

162 The weight of the public interest protected by s 3(1) of the Act is evident from a perusal of the parliamentary debates. The genesis of the Act is rooted in Parliament's aim to prevent financial loss and hardship in Singapore, similar to that suffered by persons in other countries who had been lured into pyramid selling schemes (see [44] above). Identifying these schemes as "so clearly contrary to the public interest that the objective should be to *eliminate them rather than* attempt to *control them*", Parliament made the decision to "*outlaw* the practice before it becomes widespread and before members of the public here are induced to part with their savings on a large scale" [emphasis added] (see *Singapore Parliamentary Debates*, *Official Report* (28 August 1973) vol 32 at col 1287 (Mr Hon Sui Sen, Minister for Finance)).[112] The above conveys the gravity of the harmful effects that pyramid selling schemes can cause to the public and Parliament's determination to stymie the practice entirely.

163 Seen in this light, reading the second physical element as importing no mental element would "rigorously promote the intention of Parliament" (*Tan Cheng Kwee v PP* [2002] 2 SLR(R) 122 at [21]) by absolutely prohibiting any

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112 ACBOA at Tab 54.

persons from promoting or participating in a pyramid selling scheme, thereby ensuring that the practice is stymied, with an aim to completely eliminating it altogether rather than simply attempting to control them. In this respect, the intention or knowledge of the person promoting or participating in the pyramid selling scheme (whether held in good faith, or tainted with *mala fides*) is not a matter which affects the public, who would still be vulnerable to falling prey to objectionable pyramid selling schemes as long as they subsist. There can be no room for argument that offenders did not intend to create such schemes, or had honestly believed that they were not promoting a pyramid selling scheme (when they were in fact doing so). Support for this can also be drawn from *Tan Un Tian* where Yong CJ noted at [44]:

> 44 … As the Legislature intended the Act to be prohibitory and not regulatory, it was inevitable that the net had to be so widely cast as to prevent such activities from even coming into existence. The blanket prohibition is, however, *based not on moral culpability but public policy. A person may be guilty of an offence under s 3 of the Act without any intention to defraud anyone.*
>
> [emphasis added]

164 Similar observations were made during the parliamentary debates when the Act was first introduced in 1973 (see *Singapore Parliamentary Debates*, *Official Report* (28 August 1973) vol 32 at col 1287 (Mr Hon Sui Sen, Minister for Finance)):[113]

> We have no doubt in our minds that the objectionable features of a pyramid selling scheme to which I have referred are tainted with dishonesty and are potentially fraudulent in intent. But having said that, I should add that it would be extremely difficult to prove dishonesty or fraud in relation to these pyramid selling schemes under the existing general principles of our criminal and civil law. New provisions are, therefore, essential to deal specifically with this practice.

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113 ACBOA at Tab 54.

165 In order for the presumption of *mens rea* to be displaced, this result must not only promote Parliament's intent; it must also be shown that accused persons can do something to avoid committing the offence. As stated by the House of Lords in *Sweet v Parsley* [1970] AC 132 at 163 (quoted with approval by the Court of Appeal in *Koh Peng Kiat* at [64]; see also *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1 at 13–14):

> [W]here the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate *and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act*... But such an inference is not lightly to be drawn, nor is there any room for it *unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation* (see Lim Chin Aik v. The Queen [1963] A.C. 160 , 174).
>
> [emphasis added]

166 This requirement is met here. Persons who may potentially fall within s 3(1) of the Act can exercise greater vigilance to scrutinise pyramid selling schemes and be wary of involvement in them, to ensure that they do not inadvertently promote or participate in potentially illegal schemes or hold themselves out to do so. In particular, the persons who are best placed to ensure that such schemes comply with the law are those who organise and manage the schemes and they can do so by seeking legal advice and implementing a system of appropriate checks.

167 In addition, the Act's effectiveness in eradicating pyramid selling schemes would be weakened if accused persons were permitted to escape criminal liability on the basis that they lacked *mens rea* in relation to the

existence of a pyramid selling scheme. Here, there exists a risk identified in *Koh Peng Kiat*, that accused persons (at [65]):

> … are unlikely to be cooperative and requiring the Prosecution to prove knowledge would lead to fewer prosecutions, to the detriment of society, given how easy it is for any one trader [accused person] to deny his state of knowledge.

168 Although this observation was made in the context of the Health Products Act, it applies squarely here as there can conceivably be difficulties in proving that each and every participant in a pyramid selling scheme knows about all the features in the scheme. In particular, it may be unduly onerous to require the Prosecution to prove in every case that a promoter of or a participant in a pyramid selling scheme knew that someone other than his immediate recruiter would receive benefits from the scheme, *ie*, for C to know that A would receive benefits for B's recruitment of C. But this is what the District Judge's analysis implies by requiring the Prosecution to prove knowledge of the third requirement (see [29] above).

169 Even if there is a mental element in respect of the second physical element of the offence under s 3(1) of the Act, I do not accept the Appellants' contention that the Prosecution must prove that the Appellants knew that the GEP amounted *in law* to a pyramid selling scheme. This is for two reasons.

170 First, such a *mens rea* requirement would be expressly at odds with parliamentary intention. During the Second Reading of the Amendment Bill 2000, the following exchange was recorded (see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at cols 180–182):[114]

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114 ACBOA at Tab 55.

> Ms Lim Hwee Hwa: … In this context, and against clause 2, which seeks to broaden and simplify the definition of "pyramid selling scheme or arrangement", the incidence of unwitting participation could in fact be raised. This really boils down to ignorance of the technical definition on the part of an increasingly Netsavvy population.
>
> …
>
> Mr Lim Swee Say: … I would like to respond to Mrs Lim Hwee Hua's second point, ie, is there a danger that Singaporeans may unwittingly take part in such a scheme that originates from overseas. *Sir, if Singaporeans take part in such a scheme and perpetuate the scheme in Singapore, they will be covered under the law. Therefore, it is very important that Singaporeans are fully aware of such a law and do not get themselves involved in such a scheme.*
>
> [emphasis added]

171 As evident from Mr Lim Swee Say's response, Parliament had intended that persons who unwittingly take part in a pyramid selling scheme, *ie*, without awareness that the scheme falls within the legal definition of "pyramid selling scheme" in the Act, would still run afoul of the Act. This is in line with Parliament's overall intention to completely eradicate such schemes from Singapore.

172 Second, introducing the additional *mens rea* element will open a blatant backdoor to pleading ignorance of the law as a defence. It is trite that ignorance of the law is no excuse, even for laypersons (*Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [33]). To this end, if a person is acquainted with the facts amounting to an offence, but does not know that these facts constitute an offence, he is not excused. Otherwise, that would allow him to set up ignorance of the law as a defence (see Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th Ed, 2013) at p 22).[115]

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115 ACBOA at Tab 50.

173 In *Chee Soon Juan and others v PP* [2012] 3 SLR 648 ("*Chee Soon Juan*"), the appellant was charged with the offence of participating in an assembly when he ought reasonably to have known that the assembly was held without a permit under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) read with s 5(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed). The appellant argued that he was operating under the belief that he did not need a permit for the assembly, due to the police's response that no permit was required for a similar event conducted by him just three days earlier. Quentin Loh J upheld the finding made by the trial judge that the appellant was essentially raising a defence of "mistake of law" which could not stand. The issue was whether a permit was required for the assembly conducted by the appellant, and this was a question of law. Loh J held that the codification of defences in the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") does not allow such a defence to be accepted. Section 79 of the Penal Code draws an express distinction between mistakes of fact and mistakes of law, and expressly excludes the latter from being a defence to criminal offences (*Chee Soon Juan* at [50]–[51] and [57]). The fact that mistake of law is not a valid defence must mean that ignorance of the law is also not a valid defence. In a similar vein, it has been pointed out that the Penal Code framers most likely intended ignorance of law to be "subsumed" under the concept of mistake of law (Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015) ("Yeo, Morgan and Chan") at p 531).[116]

174 Loh J also made the following observation in *Chee Soon Juan* at [52]:

> 52 The Latin maxim, *ignorantia juris quod quisque scire tenetur non excusat*, (ignorance of the law which everybody is

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116 RBA at Tab F.

> supposed to know does not afford excuse), also abbreviated as *ignorantia juris non excusat*, (Coke, 2 Co Rep 3b) has been attacked by some academics… However, in spite of these learned misgivings, the existence of the legal maxim ignorance of the law is no excuse has now been too well established and entrenched to be ignored, much less discarded.

175 I agree with Loh J's observations. This approach is consistent with the pragmatic and utilitarian underpinnings for not recognising a defence of mistake of law – if ignorance of law is admitted as a ground of exemption, the courts would be involved in questions which are almost impossible to solve (such as whether the party involved is really ignorant of the law, and is so ignorant that he has no surmise of its provisions) and which can scarcely be determined by any evidence accessible to the Prosecution. This will render the administration of justice next to impracticable. Further, recognising mistake of law as a defence would encourage ignorance despite the law-makers' determination to make men know and obey the relevant laws. Any concerns relating to the individual justice is rightly outweighed by the larger interests of society (see Yeo, Morgan and Chan at p 516).[117]

176 In the more analogous context of a pyramid selling scheme, as pointed out by the District Judge,[118] the same outcome has been adopted in Canada. Section 206(1)(e) of the Criminal Code (RSC 1985, c C-46) (Canada) provides that:[119]

> **Offence in relation to lotteries and games of chance**
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> **206 (1)** Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
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> …

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117 RBA at Tab F.

118 GD at [171].

119 ACBOA at Tab 3.

> **(e)** conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation.

177 The *mens rea* requirement of this provision was tested in the Canadian decision of *R v McNulty* [1995] 167 AR 37.[120] The accused had contended that mistake or ignorance of the law in their particular circumstances was an excuse. The Alberta Provincial Court specifically rejected this argument and held that as long as it was proven that the accused conducted, managed or was a party to the scheme, and knew what the scheme was and how it operated, no other proof was necessary to show any other type of intention or mental element (at [35]–[36]).

178 From these authorities, it is clear that the Appellants' contention that the Prosecution must prove that they knew the GEP amounted in law to a pyramid selling scheme is untenable. At most, the Prosecution would be required to prove that the Appellants knew that the GEP bore features which satisfied the three definitional criteria of a pyramid selling scheme under s 2(1) of the Act. In the present case, I have no reason to disturb the District Judge's findings that, at all material times, the Appellants knew what the GEP was, knew how it operated and thus knew of the three requirements which rendered the GEP a pyramid selling scheme.[121]

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120 ACBOA at Tab 37.

179 Accordingly, I find that the Prosecution has proven beyond a reasonable doubt that the *mens rea* for the respective offences faced by the Appellants are met.

Whether the evidence shows that HIN had promoted the GEP

180 The penultimate issue concerns the issue of whether HIN had promoted the GEP, *ie*, whether the first physical element of "promoting" under s 3(1) of the Act is satisfied. This issue concerns only HIN because the Appellants do not make any arguments with respect to this element in relation to HEG. The issue does not even arise with respect to Chua because Chua's charge is for secondary liability under s 6(1) of the Act, *ie*, he is deemed to be guilty of the offence committed by HEG by virtue of the fact that he was its Managing Director (see [4] above). He is thus not considered a primary offender under s 3(1) of the Act.

181 It is convenient to start with the role played by HIN in the GEP. HIN's bank account was used, *inter alia*, to conduct all the money transactions relating to the GEP. As testified by PW7, who was the former General Manager of HEG, the fees paid by a new GEP participant were paid into HIN's bank account.[122] In addition, the cheques for commission payments were also issued from HIN's bank account.[123]

182 Based on these facts, the District Judge found that HIN had promoted the GEP as it "had provided an essential service to the operation of the GEP scheme by managing its money flow".[124]

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121 GD at [172].

122 ROP, vol 3, p 759 at para 4.

123 ROP, vol 3, p 759 at para 9.

183 In HIN's Petition of Appeal, HIN argues that the District Judge erred in finding that HIN had promoted the GEP for four main reasons.[125] First, HIN had conducted financial transactions for HEG and its related businesses, and not solely for the GEP. Second, HIN did not do any positive act to promote the GEP. Third, HIN did not do anything for GEP which was over and above its usual duties of handling the finances of HEG and related companies. Fourth, and in any event, HIN's mere provision of financial services did not constitute an act to "promote" a pyramid selling scheme within the meaning of s 2(1) of the Act.

184 The Prosecution submits that there is no basis to disturb the District Judge's conclusion that HIN had promoted the GEP because HIN had integrally supported the GEP by using its bank account for two vital aspects of the scheme, namely (1) the collection of the fees paid by the GEP participants, and (2) the paying out of direct and overriding commissions to GEP participants for the recruitment of other GEP participants. Without this service offered by HIN, the GEP would not have been "logistically possible".[126] Ms Lee agrees with the Prosecution and proposes a wide reading of the word "promote", citing, *inter alia*, the definitions stated in legal dictionaries as well as Australian case law.[127]

185 For the reasons given by Ms Lee and the Prosecution, I disagree with HIN's contention and agree with the District Judge that HIN's involvement amounted to promotion of the GEP.

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124 GD at [217].

125 ROP, vol 1, pp 27–28 (HIN's Petition of Appeal).

126 Respondent's Submissions at para 84.

127 Young *Amicus Curiae*'s Submissions at paras 125–131.

186 Section 2(1) of the Act defines "promote" as follows:

> "promote", with its grammatical variations and cognate expressions, ***includes*** to manage, form, operate, carry on, engage in or otherwise to organise;
>
> [emphasis added]

187 Two observations can be made with regards to this definition. First, as is evident from the word "includes", s 2(1) of the Act only provides for a non-exhaustive definition of "promote" such that acts not stated in the definition may also constitute an act of promotion within the meaning of the Act. Second, in *Tan Un Tian*, the only previously decided local case which has discussed the meaning of "promote" in s 2 of the Act, Yong CJ recognised that the word "promote" is "almost all-encompassing" (at [42]).

188 With these observations in mind, it becomes apparent that HIN had "promoted" the GEP. Its provision of financial services through its bank account amounts to, at the very least, an act of *engaging* in the GEP. One legal dictionary defines the verb "engage" as "to employ or *involve* oneself…" [emphasis added] (see Bryan A Garner (ed in chief), *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) at p 646).[128] A similar definition is found in the Merriam-Webster Dictionary where "engage in" is stated as either "to do (something)" or "to cause (someone) to take part in (something)" (<https://www.merriam-webster.com/dictionary/engage%20in> (accessed 10 July 2017)). Stripped to its basic form, the act of engaging in the scheme basically requires the doing of an act related to the scheme. There is no additional requirement for there to be a positive act or conduct as opposed to a merely passive action.

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128 ACBOA at Tab 46.

189 This interpretation is also consistent with the Australian case of *Hawkins v Price* [2004] WASCA 95 ("*Hawkins*"), cited by Ms Lee.[129] In *Hawkins*, the Supreme Court of Western Australia had to interpret s 24(4) of the Fair Trading Act 1987 (WA) ("the Fair Trading Act"), a provision in *pari materia* to s 3(1) of the Act, presently superseded by the Australian Competition and Consumer Act 2010 (Act No 51 of 1974) (Australia), the relevant part of which provided as follows:

> **24. Pyramid selling etc.**
>
> ....
>
> (4) A person also contravenes this section if he promotes, or takes part in the promotion of, a scheme...

190 In contrast to the Act, the term "promote" was not defined in the Fair Trading Act. Nevertheless, the court adopted a wide definition, in line with the statutory purpose of s 24(4) to stamp out pyramid trading schemes (*Hawkins* at [15]). It becomes immediately apparent that the Act in Singapore shares a common statutory purpose with that of s 24(4) of the Fair Trading Act.

191 The facts in *Hawkins* concerned a pyramid trading scheme which involved a set of records being maintained by the accused persons, who were collectively called the board master, to enable participants in the scheme to keep track of their statuses. The Supreme Court of Western Australia expressly disagreed with the lower court's narrow construction of "promote" as requiring encouragement of the scheme in the sense of drawing in participants and excluding a merely "reactionary role" as that of board master. Thus, using first principles, the Supreme Court favoured a very broad interpretation, which did not require the restriction of promotion to advertising or similar activity, save

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[129] ACBOA at Tab 23.

that this should not include ministerial or advisory acts which in ordinary language would not be called "promotion" or "taking part in promotion". Some of the examples of conduct falling short of being considered promoting included anonymous recording of details and mailing of details to participants without any *meaningful* role in the design or origination of the recording system or responsibility for a meaningful part of scheme activity that might be represented by such recording system of mail-out (*Hawkins* at [17]).

192 Applying the guidelines stated in *Hawkins*, even if HIN's role in the GEP is likened to that of a passive "reactionary role", that does not in and of itself mean that HIN's conduct did not come within the meaning of "promote". More importantly, HIN's involvement was not mere ministerial or advisory acts falling within the narrow examples raised in *Hawkins*. HIN had played a very *meaningful* role in GEP's design. Without the payment service offered by HIN, the GEP would not have been able to operate – the existence of a functional payment stream is an indispensable feature of any pyramid selling scheme.[130]

193 The last strand in HIN's contention is that it had conducted financial transactions for HEG and its related businesses, and not solely for the GEP. In my judgment, this is a completely irrelevant inquiry. Just because a person does a criminal act coupled with several non-criminal actions, does not make him any less guilty of the offence as someone who only does the criminal act. The offence under s 3(1) of the Act is triggered once there is promotion of a pyramid selling scheme by a person, even if the act of promoting the pyramid selling scheme formed only a small part of his business activities. Thus, the inquiry as to whether there was "promotion" concerns the role played by one relative to

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130 Respondent's Submissions at para 84.

the scheme, as opposed to how significant or major these efforts were in relation to one's overall activities.

194 For these reasons, I have no reason to disturb the District Judge's conclusion that HIN promoted the GEP.

195 For completeness, although the Appellants do not expressly dispute this, I find that it is also proven beyond a reasonable doubt that HEG promoted the GEP. HEG had been "carrying on" (see [186] above for the definition of "promote") the GEP as it administered and ran the scheme.

Whether the s 6(2) defence is available to Chua

196 The final issue is only in respect of Chua's conviction and whether he can avail himself of the statutory defence provided in s 6(2) of the Act, *ie*, the s 6(2) defence. This flows from the secondary liability faced by Chua as a director of HEG for the offence committed by HEG under s 3(1) of the Act.

197 Section 6 of the Act provides as follows:

> **Offences by bodies corporate**
>
> **6.**—(1) If the person committing an offence under this Act is a company, every individual who at the time the offence was committed was a director, general manager, manager, secretary or other officer of the company concerned in the management of the company or who was purporting to act in any such capacity, as well as the company, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> (2) It shall be a defence for the individual referred to in subsection (1) if he proves that the offence was *committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions and to all other circumstances.*
>
> …
>
> [emphasis added]

198 In order for Chua to successfully invoke the s 6(2) defence, he has to prove the following *conjunctive* requirements:

> **(a)** the offence by HEG must have been committed without his consent or connivance; and
>
> **(b)** he must have exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions and to all other circumstances.

199 The District Judge found that the s 6(2) defence was inapplicable for two reasons. First, at all material times, Chua was intimately aware of the structure for the payment of overriding commissions within the GEP and he intended for it to operate in that manner.[131] Second, Chua had failed to show that he had exercised such diligence to prevent the commission of the offence as he ought to have exercised, such as seeking advice on the legality of the GEP before launching it.[132]

200 Chua contends that the s 6(2) defence is available to him because he did not intend for the GEP to be a pyramid selling scheme prohibited by the Act. Chua also had no knowledge that the GEP would amount to a pyramid selling scheme, and his belief was entirely reasonable, given the differences between the GEP and a "typical" pyramid selling scheme.[133] If Chua did not possess the knowledge that the GEP could possibly constitute a pyramid selling scheme nor any intention that the GEP would operate as a pyramid selling scheme, it cannot be said that he consented or connived in the offence. This is evident from the fact that Chua had provided significant financial support even after HEG's educational partners stopped working with HEG – besides Chua's initial investment of more than $300,000, Chua contributed a further $60,000 from his personal savings to ensure that all the existing HEG students could graduate.

201 In response, the Prosecution submits,[134] and Ms Lee agrees,[135] that the s 6(2) defence is not available to Chua because Chua intended the GEP to

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131 GD at [220].

132 GD at [220].

133 Appellant's Submissions at paras 147–153.

134 Respondent's Submissions at paras 79–82.

135 Young *Amicus Curiae*'s Submissions at paras 134–138.

provide benefits to GEP participants for recruiting additional participants through the payment of overriding commissions. The fact that Chua did not know that the GEP is illegal is not a defence, and that the fact that Chua did not intend the GEP to be a "typical" multi-level marketing scheme is entirely irrelevant. The GEP, with its particular feature of payment of overriding commissions to the Country Managers and Global Managers, is exactly how Chua intended the GEP to be.

202 I propose to deal with the s 6(2) defence in its two constituent parts.

Whether Chua consented or connived to HEG's offence

203 The interpretation to be accorded to the words "consent" and "connivance" was recently considered, albeit in *obiter dicta*, by the High Court in *Abdul Ghani Bin Tahir v PP* [2017] SGHC 125 ("*Abdul Ghani*") at [99]–[100]:

> 99 … there is also a fine difference in culpability between "consent" and "connivance" under English law – consent requires more explicit an agreement for the illegal conduct to take place. In *Huckerby v Elliot* [1970] 1 All ER 189, although the Divisional Court was essentially concerned with whether the appellant had committed an offence by reason of her neglect, Ashworth J noted that a fellow director of the company had pleaded guilty to a charge under the "consent" limb. In this connection, he expressed his approval for the following remarks which had featured in the magistrate's judgment from whose decision the appeal arose (at 194):
>
> > It would seem that where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it … Where he connives at the offence committed by the company he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.
>
> 100 In *Attorney General's Reference No 1 of 1995* [1996] 1 WLR 970, the English Court of Appeal was asked to answer the question as to what was required to be proved against a director

> to show "consent". Lord Taylor of Gosforth CJ concluded that a director must be shown to have known the material facts that constituted the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts (at 981). Subsequently, Lord Hope in *Chargot* endorsed this test, adding that consent can be established by either inference or proof of an express agreement (at [34]).

204 In the absence of any other local decisions from the Supreme Court in Singapore, I adopt the above-mentioned interpretation accorded to the words "consent" and "connive" in English law. As is clear from the survey of English law in *Abdul Ghani*, "consent" carries the connotation that the person consenting is aware of the facts constituting the offence and agrees to it. In contrast, "connive" has the connotation that the person is aware of what is going on and being in a position to do something about it, turns a blind eye and does nothing, *ie*, he acquiesces to it.

205 Applying these principles, it is clear to me that HEG's offence of promoting a pyramid selling scheme cannot be said to have been carried out without Chua's consent. The evidence reveals that the activities of HEG were under the full direction and control of Chua. Seen in this light, he not only consented, as the Managing Director of HEG, he was the *mastermind* behind the scheme promoted by HEG. Chua was more than intimately involved in the GEP. This much is evident from the following documentary evidence, that was helpfully outlined by the Prosecution:[136]

Document	**Significant content**
Email exchange between Chua	In his email, Chua informs the Country Managers that "*Each Country Manager will*

136 Respondent's Submissions at para 79.

and Shannah Teo dated 31 March 2008[137]	*earn 30% paid by GEP Team member for project marketing.* Each Country Manager must ask the Team Member to agree to the 30% preferably in writing. Please submit the agreement to [*Chua*]" [emphasis added].
Email exchange between Chua and Global Manager PW5 dated 8 and 9 April 2008[138]	In his response to PW5's questions on the structure of overriding commissions, Chua informs PW5 that the following benefits are available: "…2) *15% overriding commission for Manager* … 5) Enjoy up to *60% overriding by Country Manager*…" [emphasis added]. Chua also says that he "*strongly recommend* every new GEP to *join a Country Manager*" [emphasis added].
Email from Chua to Country Managers dated 18 September 2008[139]	In his email sent, Chua informs the Country Managers that "[w]e will *implement the commission payment* for those with Earning Guarantee as shown below*"* and sets out how "*the 30% due to Country Manager*" will be calculated and paid in various situations [emphasis added].
Terms &	Question 5 of the questionnaire states "A

137 ROP, vol 4, p 227 (D15).

138 ROP, vol 3, pp 707–709 (P40).

139 ROP, vol 3, pp 449–450 (P7).

Conditions on Admission Interview form filled by PW6[140]	Country Manager *will be assigned* to you and coach you so as to enable you to succeed in the shortest time possible. *From your commission earned, Harriet Educational Group will deduct 30% and paid* [*sic*] *to your Country Manager*… You will be required to sign a Memorandum of Agreement (MOA) with your Country Manager. Are you willing to sign the MOA with your Country Manager?" [emphasis added].
Licensing Agreement between HEG and GEP participants, PW6 and PW9, who were Senior Consultants[141]	Clause 5.14 of the Licensing Agreement states that "The Senior Consultant *will be assigned a Country Manager*. The Senior Consultant must work exclusively with a Country Manager (assigned by HEG) at ALL times until the expiry date of this agreement or when the Senior Consultant is promoted to become a Country Manager…" [emphasis added]. Clause 5.16 of the Licensing Agreement states that "*The Senior Consultant is required to pay 30% commission to the Country Manager* from his/her TOTAL GROSS EARNINGS until the expiry date of this agreement or when the Senior Consultant is promoted to become a Country

140 ROP, vol 4, p 252 (D29).

141 ROP, vol 3, pp 741–742 (P44) and ROP, vol 3, pp 771–772 (P47).

	Manager." [emphasis added].

206 These extracts put the matter beyond doubt that the use of multiple-levels and overriding commissions was in fact actively promoted by Chua. Given that the presence of these features is what rendered HEG criminally liable under s 3(1) of the Act, and Chua knew of these features, there is no basis at all for any claim that Chua did not consent to the offences committed by HEG.

207 Chua's additional contention that he could not have consented to HEG's offence without an intention or knowledge to promote an illegal scheme is again a misguided attempt to plead ignorance of the law as a defence (see [172]–[178] above). In the analogous context of a director's secondary liability for consenting to an offence committed by his company, the English Court of Appeal in *Attorney General's Reference (No 1 of 1995)* [1996] 1 WLR 970 found that the director's ignorance as to the legality of the company's actions is not a valid defence (at 980):

> ... A director who knows that acts which can only be performed by the company if it is licensed by the bank, are being performed when in fact no licence exists and who consents to that performance is guilty of the offence charged. The fact that he does not know it is an offence to perform them without a licence, i.e., ignorance of the law, is no defence.

At best, Chua's lack of a dishonest intention is a mitigating factor in sentencing. It is not relevant for the purposes of conviction (see also *Tan Un Tian* at [44]).

Whether Chua exercised sufficient diligence

208 Given my finding that HEG's offence of promoting a pyramid selling scheme cannot be said to have been carried out without Chua's consent, the question of sufficient diligence exercised by him does not even arise. One

cannot possibly claim to have exercised diligence to prevent an offence when one consents to the commission of the offence in the first place.

209 Even if I am wrong on my conclusion that Chua had consented to the offence, I am not at all convinced that Chua exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions as a Managing Director of HEG and to all other circumstances. The fact that the schools in HEG received accreditation from CaseTrust and the fact that the GEP was accredited by a reputable international institution do not specifically address Chua's due diligence obligation to ensure that the GEP does not run afoul of the law prohibiting pyramid selling schemes in Singapore. There is also no evidence that Chua had sought legal advice on the legality of the GEP before launching it.

210 The argument that Chua was unaware that what HEG did amounted to an offence similarly cuts no ice. As the learned authors of Amanda Pinto QC & Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 3rd Ed, 2013) put it: "[w]hat constitutes due diligence is an objective fact; ignorance of the law is no excuse" (at para 20-23).[142]

Conclusion

211 For these reasons, I dismiss the Appeals and uphold the District Judge's respective orders of conviction. It remains for me to record my deepest gratitude to the Young *Amicus Curiae*, Ms Lee, for her thorough written and oral submissions, from which I derived substantial assistance. I unreservedly commend her industry and care in assisting me in deciding this case.

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142 ACBOA at Tab 44.

212 I close with a note of caution. It is an offence to join a MLM or pyramid selling scheme as a mere participant, just as much as it is an offence to promote such a scheme, as the Appellants have done. Any prospective participant who is keen on joining such schemes should be prudent to check whether the scheme he seeks to join confers any financial benefit on an upline as a result of his downline's recruitment of new participants. If that is the *modus operandi* of the scheme, then joining it is likely to violate the law. Lucrative promises of reward with minimal effort, merely through the recruitment efforts of downlines, is a tell-tale sign of illegality. Such is the case with schemes like the one before us today. In the end, the old adage is vindicated: if it sounds too good to be true, it probably is.

Chan Seng Onn
Judge

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