Public Prosecutor *v* Teo Chu Ha
[2014] SGCA 45

Case Number	: Criminal Reference No 3 of 2013
Decision Date	: 27 August 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: David Chew, Alan Loh and Cheryl Lim (Attorney-General's Chambers) for the appellant; Bachoo Mohan Singh and Too Xing Ji (Veritas Law Corporation) for the respondent.
Parties	: Public Prosecutor — Teo Chu Ha

Criminal law – Statutory offences – Prevention of Corruption Act

[LawNet Editorial Note: The decision from which this criminal reference arose is reported at [2013] 4 SLR 869.]

27 August 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 It would be appropriate to commence the present judgment by considering the following scenario: An employee of company A ("the employee") agrees to a third party's offer that in exchange for shares in company B, a private company, the employee will perform certain acts in relation to his principal company A's affairs which will financially benefit company B. In fact, company B was formed precisely (and solely) in order that it might benefit financially in the manner just mentioned. The employee performs the agreed acts as a result of which company B benefits financially. The employee subsequently receives the shares in company B as promised. Company B remains profitable as a result of the employee's acts in relation to company A and the employee benefits from this *via* the receipt of *dividends* paid out by company B over time. In order to receive these dividends, the employee must of course own shares in company B (which, through the arrangement with the third party described above, he in fact now does). In the scenario just painted above, an honest and reasonable member of the public would not hesitate to conclude that the shares in company B and the dividends received represent the employee's ill-gotten gains from his acts of corruption.

2 Now assume that the *only* change to the scenario just described is that the shares in company B were not given for free; in other words, the employee had to *pay* for them. In this new scenario, in order to secure a conviction for corruption, does the Prosecution have the additional burden of proving that the amount which the employee paid for the shares did not reflect the true value of the shares in company B or that the share transaction was a "sham"? That is the central question before the court in this Criminal Reference.

3 The present Criminal Reference (Criminal Reference No 3 of 2013) arises from the decision of the High Court judge ("the Judge") in Magistrates Appeal No 279 of 2012 ("MA 279/2012") which was reported as *Teo Chu Ha v Public Prosecutor* [2013] 4 SLR 869 ("the HC Judgment"). MA 279/2012 was

an appeal against the decision of the district judge ("the DJ") in *Public Prosecutor v Teo Chu Ha @ Henry Teo* [2013] SGDC 61 ("the DJ's Judgment").

4 This criminal reference is timely and furnishes us a valuable opportunity to provide some practical guidance and clarity in this particular area of the law. We hope that the decision will serve to emphasise (and warn) all potential offenders that the courts will not hesitate to look at the *substance* of any given entire scheme and its context rather than only at the actual (and more specific) transactions which make up the scheme when determining if an offence under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the Act") has been committed.

The charges

5 The questions relate to 12 charges brought against the Accused. The First Charge read as follows:

> [Y]ou, on or about the 20th day of December 2004, in Singapore, being an agent, to wit, a Senior Director of Logistics in the employ of Seagate Technology International, did corruptly accept from one Koh Han Lee, a Director of Biforst Singapore Pte Ltd, through one Choo Ah Moi @ Winnie Choo, a *gratification in the form of 20,000 shares* in the said Biforst Singapore Pte Ltd, as a reward for doing an act in relation to your principal's affairs, to wit, assisting the said Biforst Singapore Pte Ltd to secure a Logistics Service Provider contract with Seagate Technology International, namely, the "Seagate Technology / Biforst Singapore Pte Ltd. Logistics Service Provider Agreement dated 1 November 2004", and you have thereby committed an offence punishable under Section 6(a) of the Prevention of Corruption Act, Chapter 241.
>
> [emphasis added]

We shall refer to the "Seagate Technology / Biforst Singapore Pte Ltd. Logistics Service Provider Agreement dated 1 November 2004" as "the 2004 Contract".

6 The Second Charge read as follows:

> [Y]ou, on a day in January 2006, in Singapore, being an agent, to wit, a Senior Director of Logistics in the employ of Seagate Technology International, did corruptly accept from one Koh Han Lee, a Director of Biforst Singapore Pte Ltd, through one Yap Chin Guan, a gratification of $81,000/- (Eighty-one Thousand Dollars), as a reward for doing acts in relation to your principal's affairs, to wit, assisting the said Biforst Singapore Pte Ltd to secure Logistics Service Provider contracts with Seagate Technology International, namely, the "Seagate Technology / Biforst Singapore Pte Ltd. Logistics Service Provider Agreement dated 1 November 2004" and the "Seagate Technology / Biforst Singapore Pte Ltd. Logistics Service Provider Agreement dated 17 June 2005", and you have thereby committed an offence punishable under Section 6(a) of the Prevention of Corruption Act, Chapter 241.

We shall refer to the "Seagate Technology / Biforst Singapore Pte Ltd. Logistics Service Provider Agreement dated 17 June 2005" as "the 2005 Contract".

7 The Third to the Twelfth Charges were framed along the same lines as the Second Charge. The only difference was the amounts of monies received by the Accused on different occasions from 2006 to 2010. In addition, for the Sixth to the Twelfth Charges, there was an additional contract included in the charge: the Logistics Service Provider Agreement for cross border trucking dated 15 November 2007, which we shall refer to as "the 2007 Contract".

Background facts

8 The facts may be briefly stated. The Accused was employed by Seagate Technology International ("Seagate") as its Senior Director of Logistics. One of Seagate's trucking contracts with a company known as "Richland" was expiring on 31 October 2004. A tender exercise was thus carried out before the expiry of this contract to award a new trucking contract to two companies ("the 2004 tender exercise").

9 Prior to this, one Yap Chin Guan ("Yap"), an ex-employee of Richland, met the Accused on several occasions through one Steven Lim ("Steven") who knew both Yap and the Accused. Initially, Yap wanted to use these meetings to sell some logistics software to Seagate but the Accused was not interested. Shortly after, however, discussions between the two of them gravitated towards the potential incorporation of a company to take over the trucking contracts from Richland.

10 Meanwhile, Biforst Singapore Pte Ltd ("Biforst") was incorporated on 10 September 2004 by one Mr Koh Han Lee ("Koh"), another ex-employee of Richland and an acquaintance of Yap. At that particular point in time, Koh did not know who the Accused was. In fact, Koh only discovered the identity of the Accused much later. However, Koh was informed by Yap that someone in Seagate wanted a stake in Biforst and Koh was prepared to give that someone a stake, provided that Biforst could obtain the Seagate business.

11 It was subsequently agreed between the Accused and Koh (through Yap) that the Accused could pay $6,000 for 20,000 shares in Biforst ("the Shares"). On 29 September 2004, the Accused paid for the Shares *via* a cheque for $6,000 handed to Steven.

12 The 2004 tender exercise closed on 7 October 2004. Biforst was one of the two successful bidders and was awarded the 2004 Contract which commenced on 1 November 2004. On 20 December 2004, the Shares, which were previously owned by Koh, were transferred to a nominee of the Accused (and not to the Accused directly).

13 It is not disputed that the Accused was in contravention of Seagate's conflict of interest policy by not disclosing his beneficial interest in Biforst to Seagate. It was also not in dispute that the Accused was in the Seagate tender committee which assessed the various tenders in the 2004 tender exercise. In this regard, both the DJ and the Judge found that the Accused had the power to influence – and did, in fact, influence – the tender process which led to the 2004 Contract.

14 In June 2005, an additional 2,500 Biforst shares were transferred to the Accused's nominee. These 2,500 shares eventually did not form the subject of any of the Charges.

15 Biforst subsequently submitted successful bids in three further tender exercises in 2005, 2007 and 2010 which cumulated in, *inter alia*, the 2005 Contract as well as the 2007 Contract. The contract which was awarded pursuant to the tender exercise conducted in 2010 did not form the subject of any of the Charges.

16 It is not disputed that between 2006 and 2010, the Accused received periodic pay outs from Biforst totalling $576,225 by way of dividend payments.

The Prosecution's Case

17 The Public Prosecutor's case theory is a straightforward one: that Biforst was incorporated specifically to secure the Seagate trucking contracts with the help of the Accused who would receive

a share of the profits from these contracts as a reward. Hence, the gratification which the Accused received as a reward for assisting Biforst in securing trucking contracts from Seagate consisted of:

(a) the Shares, and

(b) the portion of Biforst's profits by virtue of the Accused's shareholding in Biforst.

The Defence Case

18 The Accused did not deny the receipt of the Shares and cash. Instead, his case was that the Shares and the profits arising from the Accused's shareholding in Biforst did not constitute gratification and that he therefore had no corrupt intent. He maintained that he had obtained the Shares as part of a business opportunity. Since the Shares and the additional 2,500 Biforst shares were obtained as a business opportunity, the profits derived therefrom were dividends from the Accused's shareholding in Biforst and not bribes. The Accused also denied influencing the tender committees.

The decision at first instance

19 The DJ held that the Accused was guilty of all 12 Charges and sentenced him to a total of six months' imprisonment and ordered him to pay a penalty of $576,225. The DJ arrived at his decision after making the following three findings.

(a) First, the DJ found that it was Yap – and not the Accused – who mooted the idea of tendering for the Seagate contracts and that there was a plan between Yap and the Accused to obtain Seagate's business for Biforst in return for the Accused being given shares in Biforst. Whilst there was no direct evidence of this, the DJ inferred this from the following facts:

(i) Biforst was incorporated shortly before the tender process in 2004 (see the DJ's Judgment at [35]);

(ii) Koh was prepared to give a 20% stake in Biforst to a person whom he did not know personally so long as that person was able to obtain Seagate's business (see the DJ's Judgment at [36]);

(iii) The Accused had asked to invest in Biforst and wanted a 20% stake in it (see the DJ's Judgment at [36]);

(iv) The Accused was directly involved in the tender committees which awarded the trucking contracts (see the DJ's Judgment at [38]); and

(v) The transfer of 20,000 shares (*ie*, the Shares) to the nominee of the Accused was only executed *after* the 2004 Contract was entered into even though the Accused paid the $6,000 for the shares *before* the tender process (see the DJ's Judgment at [11] and [36]).

(b) Next, the DJ found that the Accused had the power to – and did in fact – influence the decisions of the tender committees to award the Seagate contracts to Biforst (see the DJ's Judgment at [40]).

(c) Finally, the DJ concluded that the Accused had a corrupt intent or guilty knowledge that what he was doing was corrupt. The DJ inferred this from the acts of the Accused and the surrounding circumstances, namely:

(i) The Accused knew that he was breach of Seagate's conflict of interest policy by not disclosing his interest in Biforst and this was so he could continue to be part of the tender committee;

(ii) The Accused had acted surreptitiously by, *inter alia*:

(A) holding the Shares through a nominee;

(B) receiving the profits of Biforst through cash payments in sealed envelopes.

(See the DJ's Judgment at [42]–[45]).

20 For completeness, the DJ also dealt with the 2,500 shares in Biforst received by the Accused through his nominee in June 2005. As mentioned above, these shares did not eventually form part of any charge (although the dividends derived from the Accused's shareholding of these 2,500 shares did). The DJ found (at [53] of the DJ's Judgment) that the 2,500 Biforst shares were also (corruptly) received by the Accused based on the same understanding and arrangement as the Shares (which constituted the subject matter of the First Charge) but were not included in the charges because of a technicality: the Public Prosecutor ("the PP") had originally included the 2,500 shares as part of the First Charge but had to remove them when it was pointed out during trial that these 2,500 shares were only transferred to the Accused's nominee in June 2005 and not in December 2004 (the date of transfer specified in the First Charge (see above at [5])). As a result, the PP was unable to frame another charge for the transaction involving these 2,500 shares so late in the proceedings.

The High Court's decision

21 On appeal, the Judge reversed the convictions and acquitted the Accused. The Judge saw as the main issue *the reason* for the issuance of the Shares to the Accused's nominees and the 11 payments made to him. He held that there was no corruption *unless* the reason for the gratification was as an inducement for the act done by the Accused in relation to Seagate (see the HC Judgment at [8]). The Judge then proceeded to analyse the First Charge before turning to the Second to the Twelfth Charges.

The First Charge

22 In relation to the First Charge which concerned the receipt of 20,000 (not 22,500) Biforst shares (*ie*, the Shares), the Judge observed that in a situation where an accused person had paid for the shares, the usual inference is that those shares were transferred to him because he had duly paid for them. At [9] and [10] of the HC Judgment, the Judge characterised such a share transaction as either:

(a) a sham such that the shares were intended as a reward for a corrupt act (in which case there would be corruption), *or*

(b) a purchase of the shares at its true market value, such market value to be determined from the evidence (in which case there would be no corruption).

The Judge then observed that, where the purported gratification consisted of shares which an accused person had paid for, "it is for the Prosecution to prove, beyond a reasonable doubt, that the payment [for the shares] was a sham …" (at [9]).

23 The Judge pointed out at [10] of the HC Judgment that the DJ must have found that the "buy-in" (*ie*, the consideration) for the Shares consisted of (a) the $6,000 paid and (b) the assistance given for the procurement of the Seagate contracts. However, the Judge pointed out that there was no evidence to show – and the DJ did not find – that the $6,000 was insufficient consideration for the Shares (*ie*, that the transaction was at an economic undervalue). The Judge then concluded that there was a reasonable doubt as to the true purpose of that share transfer and he was therefore not satisfied that the share transfer was for the purpose of inducing the Accused to secure the Seagate contracts and there was, accordingly, no objective corrupt element in relation to the transfer of the Shares.

The Second to Twelfth Charges

24 The Judge's decision in relation to the Second to the Twelfth Charges (which concerned the receipt of the 11 cash payments) must be read in the light of his finding in relation to the First Charge that the shares were not obtained by the Accused as a result of corruption. Having effectively rejected the PP's case theory, the Judge found (a) there was no correspondence in the timing between the 2005 and 2007 tender bids (which culminated in the 2005 Contract and the 2007 Contract) as well as the 2010 tender bid on the one hand and (b) the 11 cash payments on the other (see the HC Judgment at [11]). The Judge held that, in such a situation, the PP must at least provide a reason to show that these payments were given as an inducement to the Accused to assist Biforst in securing the Seagate contracts *in 2005, 2007 and 2010*. Since the PP did not do so, the 11 cash payments could not be said to be gratification for "the alleged corrupt acts" (see the HC Judgment at [15]).

25 At this juncture, we would like to make two observations with regard to the HC Judgment:

(a) First, the Judge did not overturn the DJ's findings that it was Yap and the Accused who had come up with the plan to incorporate Biforst and use Biforst to tender for the Seagate contracts with the instrumental involvement of Koh (see the HC Judgment at [4]), that the Accused had the power to and did in fact influence the 2004 tender process which culminated in the 2004 Contract (see the HC Judgment at [5]) or that 2,500 Biforst shares were obtained by the Accused in June 2005 based on the same understanding and arrangement as that for the Shares.

(b) Second, it was, with respect, curious that the Judge took into account the 2010 tender bid since any contract which was a result of that tender did not form part of any of the Charges brought against the Accused.

The two questions

26 In light of the above, the PP has referred the following two questions for our determination:

(a) For the purposes of s 6 of the Act, in determining if a transaction was objectively corrupt where consideration was paid for the gratification, must the Prosecution prove that the consideration was inadequate or that the transaction was a sham ("Question 1")?

(b) For the purposes of s 6 of the Act, in determining if a transaction was objectively corrupt, must the Prosecution prove that a reward to an agent corresponds in time with acts of assistance done or favours shown by the agent in relation to his principal's affairs ("Question 2")?

Preliminary objections

27 This court recently affirmed in *Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393 at [15], that there are four cumulative requirements before the court will exercise its substantive jurisdiction to answer questions raised in a criminal reference:

(a) the determination by the High Court of a criminal matter must have been in the exercise of its appellate or revisionary jurisdiction;

(b) the question of law must be a question of law of public interest;

(c) the question must have arisen in the matter; and,

(d) the determination by the High Court must have affected the outcome of the case.

28 Counsel for the Accused, Mr Bachoo Mohan Singh ("Mr Singh"), spent the bulk of his submissions advancing four distinct arguments directed at the second, third and fourth requirements in order to persuade us that both Question 1 and Question 2 fell outside the scope of the criminal reference procedure under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC 2010"). We consider each of these objections now in turn.

Objection 1: The questions raised by the PP are not questions of law

29 Mr Singh relied on numerous local cases to demonstrate that the issue of whether or not a transaction is corrupt is quintessentially a question of fact. Mr Singh argued that the adequacy of consideration, genuineness of the underlying transaction and/or lack of correspondence in time were just some of the many factors that a court will look at in determining if the transaction is objectively corrupt and likened the questions raised by the PP here to one of the questions raised by the applicants in *Phang Wah v Public Prosecutor and another matter* [2012] SGCA 60 ("*Phang Wah*"):

> Whether the sustainability of a company is to be taken as a factor in deciding whether there was fraud from the initial stages of the company's business.

30 Mr Singh pointed out that this court in *Phang Wah* at [31] held that the question set out in the preceding paragraph was "by [its] *very nature, necessarily [a question] of fact – and fact alone*" and invited us to reach the same conclusion about the questions in this criminal reference. This was because, he submits, the questions in this criminal reference in substance amount to asking whether the adequacy of consideration, the genuineness of transactions and the lack of correspondence in time were to be taken as factors in deciding whether a transaction was objectively corrupt within the meaning of the Act.

31 We do not, however, think that *Phang Wah* was of any assistance to the Accused. As a matter of principle, the courts must determine whether there is sufficient generality embedded within a proposition posed by the question which is more than just descriptive but also contains normative force for it to qualify as a question of law; a question which has, at its heart, a proposition which is descriptive and specific to the case at hand is merely a question of fact. To this end, the question posed in *Phang Wah* was narrowly directed at the way that the High Court Judge had *applied* settled law to *the specific facts* of that case; in substance, the proposition of the question there was that the High Court Judge had taken into account an irrelevant factual consideration in concluding that the legal test for fraudulent intentions was satisfied.

32 In our view, the nature of the questions in this reference was completely different compared to the question in *Phang Wah* set out above. The PP does not deny that the elements stated may be

relevant factors in the equation. The key word in both questions, however, is the imperative "must". The questions seek to test the proposition that the elements stated are iron-clad requirements such that the PP can *never* secure a conviction if these three elements are not shown. In this regard, regardless of the manner in which the question is couched, one useful way of testing the substance of the question is to consider the arguments in support of an answer to the proposition posed in a particular question. In our view, the arguments in support of the proposition are not targeted at the specific facts of the case but as to *the essential ingredients* before a charge of corruption can be established under the Act.

Objection 2: The questions have no public interest element

33 Next, Mr Singh contended that the questions raised by the PP concerned the sort of evidence that the PP ought to lead in order to secure a conviction. Hence, by their very nature, questions on the relevance and materiality of different types of evidence are by their nature case specific and are incapable of being settled conclusively such that they can apply to future cases. For this reason, even if these questions were questions of law, they were so intrinsically tied to the facts of the case that they are of interest only to the parties of the case; they are therefore not questions of public interest.

34 As we have mentioned above, we are satisfied that the questions were framed to address the general proposition that it was a necessary condition that the PP had to prove the existence of certain elements in order to secure a conviction under s 6 of the Act. It was difficult to see how the answers given by this court to the questions posed would not apply to and affect the outcome of future cases.

35 More specifically, in relation to Question 1, we are satisfied that there is public interest in ensuring that the principles of law relating to corruption, a huge social evil, are correctly and authoritatively decided for future cases (see, for example, the Singapore High Court decision of *Public Prosecutor v Bridges Christopher* [1997] 1 SLR(R) 681 at [13]). In fact, Mr Singh expressly accepted this in his oral submissions. Further, as we shall see below, the answer to the Question 1 has far reaching policy consequences.

36 In relation to Question 2, we agree with the PP that the legal proposition which is the crux of Question 2 (as framed) is at odds with previous case law on this issue. Therefore, *assuming* Question 2 did arise in the decision below, the short answer to Mr Singh's contention *on this narrow point* would be that such a question is statutorily deemed under s 397(6) of CPC 2010 to be one of public interest. Nevertheless, we shall see below that on further scrutiny (at [43]–[52]), the Judge was, in the final analysis, *not* expounding a *new* legal proposition which was at odds with previous case law on this particular issue and so Question 2 did not arise in the decision below and accordingly did not need to be answered. On a practical level, however, it would seem to us that, where a conflict of judicial authority is alleged by either party, this court would need – as a necessary threshold step – to ascertain whether or not there was, in fact, such a conflict in the first place. In the context of the present proceedings, we are satisfied that Question 2 crossed this threshold since, as just noted, it embodied a legal proposition that, on its face, was at odds with previous case law on this particular issue (notwithstanding the fact that it did not ultimately arise in the decision below).

37 We are also unable to accept Mr Singh's contention that the questions were aimed at curing the gaps in the PP's case due to a poorly conducted investigation which meant that the PP (a) had failed to establish the correspondence between the cash payments and the acts of corruption and (b) was not even aware until the start of the trial that the Accused had paid $6,000 for the Shares (and therefore led no evidence as to the true market value of the shares). In our view, this argument

is misconceived as it simply begs the question as to what the requisite elements to conviction under s 6 of the Act are. Put another way, if these elements are not prerequisites to the securing of a conviction under s 6 of the Act, then it could not be said that the PP ought to be penalised for failing to adduce evidence of those elements. Viewed in that light, the so-called evidential questions are in reality questions of law.

Objection 3: The PP's questions do not arise in the dispute

38 Next, Mr Singh argued that the PP's questions were based on a misreading of the HC Judgment. According to him, the Judge concluded at [20] of the HC Judgment that there was no causal link between the assistance rendered by the Accused on the one hand and (i) the Shares transferred or (ii) the 11 cash payments on the other. In arriving at this conclusion, Mr Singh argued that the Judge did not raise the matters identified in the questions as necessary requirements before the PP could secure a conviction under s 6 of the Act and, hence, the questions referred therefore did not arise from the HC Judgment.

Question 1

39 In so far as Question 1 is concerned, it was clear from [2] of the HC Judgment (as set out below) that the Judge thought that the situation in the present case (where the alleged gratification constituted a transaction for value) belonged to a unique subset of corruption cases:

> The usual case of corruption involves a taking of gratification by the accused. This was an unusual case; instead of a straightforward taking of Biforst shares (the subject of the first charge), the appellant paid $6,000 for these shares. The appellant was then given 22.5% of the profits in regular payouts from 2006 to 2010 which the defence alleges represented dividends for his share in Biforst. These 11 payments are now also the subject of scrutiny in the second to 12th charges. Because of the unusual nature of this case, I directed that the parties file and exchange further submissions on whether it was normal for gratification to take the form of shares in a company which the accused person pays for and what the significance was of the transfer of shares to an unknown nominee of the appellant's. …
>
> …

40 In this context, the main obstacle to Mr Singh's contention is to be found at [8] and [9] of the HC Judgment. Incidentally, this was a part of the HC Judgment which Mr Singh attempted to rely on in his favour. The relevant parts of these paragraphs read as follows:

> 8 To my mind, the main issue in this appeal is the reason for the issue of shares and the 11 payments made. It is not corruption unless the purpose of or reason for the gratification was as a reward or as an inducement for the act done by the appellant in relation to his principal, Seagate. In other words, there must be a direct causal link between the alleged gratification and the alleged acts looked at from both the receiver's and the giver's perspectives. … so long as the recipient can show that there was a reasonable doubt that the payment was not received with any ulterior motive, then the Prosecution has failed to prove its case.
>
> 9 This applies *a fortiori* where the case involves not a gift, but a transaction for value. Where there has been a payment for shares, the usual inference is that those shares were transferred because they had been duly paid for and not for some other reason. It might be that where an accused had paid for shares, the transfer of those shares was intended as a reward for a corrupt act; and it might be that the purported payment was simply a sham to hide the true purpose of

the transaction. However, it is for the Prosecution to prove, beyond a reasonable doubt, that the payment was a sham and that the true purpose of the transaction was as a reward or inducement for the accused to act in the way he did. A court should be slow to find that a payment for shares was a sham or cover up, not only because of the Prosecution's heavy burden of proof, but also because this requires the court to assess the value of the consideration given for the transfer of shares, a task that it cannot do without evidence.

41 Here, the Judge was stating as a proposition of law that so long as an accused had paid for what was alleged to be the gratification, it was incumbent upon the PP to lead evidence to discharge its burden of showing that the share transaction for value was a "smokescreen". The Judge had thought this necessary because there was a need to assess the value of the consideration given for the transfer of the shares and it was incumbent on the PP to lead evidence in such cases as to how much the shares were truly worth.

42 Thus, in so far as Question 1 was concerned, we are satisfied that the PP's question was not based on a misreading of the HC Judgment. Indeed, the opposite is true: Question 1 is directed squarely at the proposition advanced by the Judge. Further, as we observed earlier in this judgment (at [25]), the Judge did not overturn any of the crucial findings of fact by the DJ. It was therefore his application of this new proposition to the undisputed facts (or lack thereof) that led him to conclude that the First Charge was not made out.

Question 2

43 Mr Singh's argument in relation to Question 2 had more force to it. He contended that the HC Judgment did *not* impose a burden on the PP to provide a correspondence in time in *every case* in order to secure a conviction. Instead, what the Judge established as critical was a causal link between the reward and the favour. Having carefully considered the HC Judgment, we agree with Mr Singh.

44 It is true that the analysis of the Judge was focused very much on the question of congruence in time between the acts of gratification and the acts of assistance. For example:

(a) At [12] of the HC Judgment, the Judge pointed out that the 2005 Contract was awarded almost half a year before the first cash payment to the Accused in January 2006 and that although no bids were submitted in 2006, a payment was still made in September 2006 to the Accused.

(b) At [14] of the HC Judgment the Judge pointed out that five other payments were made between January 2007 and January 2010 but that since no tenders were submitted during this period, these five payments "could not possibly have been made as an inducement or a reward for the appellant's procuring a successful tender".

45 However, we do not think that the proposition which is the subject of Question 2 actually arose from the HC Judgment. Put another way, the Judge did not suggest that the PP must always prove that a reward to an agent corresponds in time with acts of assistance done or favours shown by the agent in relation to his principal's affairs before the court will determine that a transaction was objectively corrupt.

46 As we mentioned above, the Judge's findings in relation to the Second Charge to the Twelfth Charge had to be read in light of his rejection of the PP's case (based on the proposition of law which is now the subject of Question 1) that the Accused had received the shares corruptly. Much of his

decision in relation to the Second Charge to the Twelfth Charge hinged on the following sentence at [12] of the HC Judgment: "The Prosecution gave no explanation as to why there was a delay and the [DJ] did not make any finding on this. The defence, on the other hand, had a simple explanation: the regular payments over the period 2006 to 2010 represented dividends for the appellant's share of Biforst's profits." We understood the Judge here to be saying that, having rejected the PP's case in relation to the First Charge (*ie*, that the shares were received corruptly by the Accused who had effectively been "bought over"), the PP could offer no other plausible explanation which linked the payments to the acts of assistance stated in the Second Charge to the Twelfth Charge.

47 It was in this context that the Judge went on to find at [15] of the HC Judgment that: "Given that there was no correspondence of time between these payments and the awarding of the Seagate tenders to Biforst, the Prosecution must point to something else or, at least, provide a reason to show that these payments were given as a reward for or an inducement to the appellant to assist them in securing the Seagate contracts in those years".

48 In our view, the Judge was not, as the PP sought to argue, attempting to state a new proposition of law (which was the subject of Question 2). He was merely stating that having failed to show that the Accused was bought over and that the Shares (and presumably also the 2,500 Biforst shares which did not form the subject of any charge) were obtained corruptly, he could not find a causal link between the payments and the assistance rendered especially in light of the lack of any correspondence. In arriving at this conclusion, the we agree with Mr Singh that the Judge's reasoning was entirely consistent with the Singapore High Court decision of *Public Prosecutor v Tang Eng Peng Alan* [1995] 2 SLR(R) 672 ("*Alan Tang*").

49 In *Alan Tang*, the accused was the chairman of a canteen committee of an army camp. In October or November 1993, around the time of a public tender for a canteen stall, the accused provided information to a third party relating to the tender for the drinks stall. Shortly thereafter, the tender was awarded to the third party who signed the contract on 4 January 1994. A few days after the third party had signed the contract, the accused received a loan from this third party. The trial judge acquitted the accused but Yong Pung How CJ overturned the acquittal on appeal and held that the accused had obtained the loan corruptly. In doing so, Yong CJ observed (at [16]), as follows:

> Counsel for the respondent argued that there was a considerable lapse in time of about two months from the provision of the information to the request for the loan. Therefore, the two matters were completely unrelated. I was unable to agree with this view. The provision of the information, the signing of the contract and the request for the loan were dealings between the parties which happened in quick succession. In my opinion, their proximity in time was highly suspicious and suggested that the events were inextricably linked.

50 We do not think that the Judge in these proceedings meant that the PP still needed to prove correspondence in time if there was an understanding or arrangement to the effect that gratification would be furnished in return for the acts of assistance concerned and the gratification was actually paid *either* before *or* after the acts of assistance had been rendered in accordance with that understanding or arrangement (this is not unlike the "exception" to past consideration under the law of contract (which was recently applied in the decision of this court in *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713)).

51 More importantly, we do not think that the Judge was suggesting that the PP still needed to prove correspondence in time between the acts of assistance and the receipt of gratification where he has already proved that an agent has been "bought over" by a third party: see, for example, the two related Singapore High Court decisions in *Hassan bin Ahmad v Public Prosecutor* [2000] 2 SLR(R)

567 and *Fong Ser Joo William v Public Prosecutor* [2000] 3 SLR(R) 12, which we endorse. In our view, this principle is *both clear as well as established*.

52 It bears reiterating that it was, instead, the rejection of the PP's case that the Shares were obtained corruptly (based on the proposition of law put forward by the Judge which is now the subject of Question 1) that caused the Judge to analyse the receipt of the Shares (and presumably the other 2,500 Biforst shares) separately from the receipt of the payments and to place more emphasis on the lack of correspondence in time between the acts of gratification and the receipt of the monies. We were therefore satisfied that, despite meeting the threshold objection raised by Mr Singh (see above, especially at [36]), Question 2 did not require to be answered for the reasons just set out.

Our decision on Question 1

53 Turning then to Question 1, the Accused's main argument appears to be attractive at first blush. It is, in essence, a simple one: How can the Shares be considered as gratification within the meaning of the Act if the Accused paid a fair consideration for it? It is, at most, the appropriation of a corporate opportunity, the remedy for which lies, if at all, in the civil sphere and (if it chooses) at the behest of Seagate.

The definition of gratification in the Act is broad and non-exhaustive

54 It is our view that, notwithstanding the consideration the Accused paid for the Shares, they still constituted gratification within the meaning of the Act. It is clear that Parliament intended the Act to be of wide application. The definition of gratification in s 2 of the Act is not exhaustive. It reads as follows:

> "gratification" *includes* —
>
> (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
>
> (b) any office, employment or contract;
>
> (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
>
> (d) *any other service, favour or advantage of any description whatsoever*, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
>
> (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d);
>
> [emphasis added]

55 In fact, as the PP points out, the idea that consideration is given by the agent is *inherent* in some of the examples of gratification in s 2 of the Act. For example, if a loan is given as a form of gratification (see (a) in the definition of gratification set out in the preceding paragraph), this would mean that the receiver had to repay the amount of money paid to him (perhaps even with interest).

Likewise, if a contract was given as a form of gratification (see (b) in the definition of gratification set out in the preceding paragraph), the receiver would also undertake obligations and liabilities in relation to the giver of the contract. At the end of the day, one has to look at the *substance* of the entire scheme and its context rather than only at the actual (and more specific) transaction involving payment for the shares themselves.

The gratification lay not merely in the shares per se

56 The proposition of law put forward by the Judge was premised on the notion that the gratification which was the subject matter of the First Charge consisted only of the shares *per se* and nothing else. This, we think, led in turn to the manner in which the Judge assessed what constituted the "buy in" for the shares. With respect, we do not agree that such a narrow and technical approach was justified. Let us elaborate.

The opportunity to obtain the shares could in itself be a form of gratification

57 In the present case, it bears noting that the Accused would have been unable to purchase the shares in the open market as Biforst is a private company. As importantly, Biforst was formed precisely in order to receive the benefit of the trucking contracts from Seagate as a result of the Accused's influence within Seagate itself.

58 A pair of related Subordinate Court (as it then was) decisions neatly illustrates (correctly, in our view) the point that in the appropriate case it is the *opportunity* to purchase the shares and/or the *assistance* rendered in purchasing the shares which, together with the shares, constitutes the gratification. We turn first to *Public Prosecutor v Fong Kit Sum* [2008] SGDC 58 ("*Fong Kit Sum*"). In this case, two of the five corruption charges faced by the accused read as follows:

> 2nd Charge
>
> [Y]ou… being the General Manager (Customer & Market Operations) of Nokia Pte Ltd (Nokia), did corruptly accept a gratification in the form of an assistance from… the CEO of Accord Customer Care Solutions Ltd (ACCS), to acquire 200,000 ACCS IPO shares through your husband … as an inducement for doing an act in relation to your principal's affairs, to wit, helping ACCS to further its business interest with Nokia, and you have thereby committed an offence punishable under Section 6(a) of the Prevention of Corruption Act, Cap 241.
>
> 3rd Charge
>
> [Y]ou… being the General Manager (Customer & Market Operations) of Nokia Pte Ltd (Nokia), did corruptly accept a gratification in the form of an assistance from… the CEO of Accord Customer Care Solutions Ltd (ACCS), to acquire 50,000 CAM International shares which resulted in a profit of $4,414.98, as an inducement for doing an act in relation to your principal's affairs, to wit, helping ACCS to further its business interest with Nokia, and you have thereby committed an offence punishable under Section 6(a) of the Prevention of Corruption Act, Cap 241.

59 The shares which were the subject of the second charge in this decision were being sold by private placement under the instructions of the CEO of ACCS. The CEO had reserved some of these shares for his customers, including the accused. The accused purchased them at a slightly discounted price from the true market value of the shares. The shares which were the subject of the third charge were allocated to the CEO of ACCS by a broker by way of private placement. The CEO offered these shares to the accused. The accused then purchased these shares at *a price slightly above the*

private placement sale price.

60 As part of her defence to the second charge, the accused said that according to her understanding, being responsible for paying up for her own shares could never be a form of corruption (see *Fong Kit Sum* at [32]). Although not explicitly stated, this defence presumably applied to the third charge with equal force.

61 The trial judge convicted the accused of these two charges. First, he characterised the gratifications in the both charges as "the assistance" provided by the CEO of ACCS in obtaining the shares as opposed to the shares *per se*. Next, the trial judge found that there had been an inducement since he inferred that the CEO of ACCS's motive in rendering the assistance to the accused could only be that he wanted favours from her and the accused must have known that. In other words, the accused had allowed herself to be "bought over". This compromised her integrity in business dealings between ACCS and Nokia and trial judge accordingly found the transactions to be objectively corrupt.

62 In our view, the trial judge's correct characterisation of the gratification in *Fong Kit Sum* led him to identify the real substantive arrangement between the accused and the CEO of ACCS which was objectionable. The question was not whether the accused had paid for her own shares since she could not have obtained the shares *regardless of the amount she was willing to pay* but for the assistance of the CEO. Rather, the question was whether the accused allowed herself to be "bought over" by the person who assisted her in acquiring the shares.

63 The next case is *Public Prosecutor v Henry Hsu Yen Shuenn* [2012] SGDC 56 ("*Hsu Yen Shuenn*"). Here, the PP contended that the accused had corruptly accepted placement IPO shares (which were purchased at the placement price) as an inducement for showing favor to ACCS in relation to his employer's affairs. The accused obtained the opportunity to make the private placement through the CEO of ACCS. The trial judge expressly held that the opportunity to acquire the placement shares constituted gratification since it was something he would not have otherwise had (see *Hsu Yen Shuenn* at [17] and [18]). However, the trial judge in *Hsu Yen Shuenn* acquitted the accused, mainly because he was satisfied on the evidence that the CEO had given the accused the opportunity to purchase the shares on account of their close friendship and nothing more.

64 Returning to the present case, it was plausible that the Judge took the narrow approach that he did as a result of the wording of the First Charge (see above at [5]) which referred to "gratification in the form of 20,000 shares" (*cf*, *Fong Kit Sum*, where the charge referred to "gratification in the form of an assistance … to acquire 30,000 ACCS IPO shares"). To this end, even the PP had candidly conceded that the First Charge could have been drafted in a clearer manner in order to reflect the nature of the gratification received. However, while we strongly hope that this will be the case in the future, we are satisfied that this would merely make absolutely certain what was already clear from a reasonable construction of the charge. In so construing the Charge, we took into account the fact that the opportunity to obtain a gratification was (and had to be) inherent in the examples of gratification which we discussed at [55] above.

Shares could also unlock the opportunity to further gratification

65 It also seems to us possible that the gratification lay not merely in the Shares *per se* but, rather, in what they represented. In the present case, the shares constituted, in our view, the necessary "key" that "unlocked" the many "doors of opportunity" for the subsequent material gratification that in fact constituted the subject matter of the Second to Twelfth Charges. Indeed, as already pointed out, without the shares, the Accused would have been unable to receive the

subsequent kickbacks which were camouflaged and sanitised through the Accused's shareholding in Biforst and which took the form of the Accused's "share of profits" resulting from his shareholding in Biforst itself.

66 Looked at in this light, the consideration (of $6,000) paid by the Accused for the Shares is a *legal red herring* in the context of the present proceedings. In short, as a result of his acquisition of the Shares, the Accused was able to effect a complex scheme which achieved the same result as the more "traditional" (as well as direct and cruder or blatant) forms or methods of corruption, albeit with the intention of avoiding detection which the more blatant forms or methods of corruption would not permit.

67 This puts in sharp focus an important point of principle: if the Accused has allowed himself to be "bought over" by a third party who gave him an opportunity to acquire the Shares and the Shares unlocked the door to subsequent material gratification, then whether he paid the full consideration for the shares cannot by itself be decisive. In fact it is entirely possible in such a situation for the agent to have paid an amount in excess of the market value for the shares and still be corrupt.

Consideration paid by an accused may be a factor which the court can take into account

68 That is not to say that the fact that shares were purchased at full value will always be completely irrelevant. It is trite that the PP must prove all of the corruption elements beyond a reasonable doubt (see, for example, the Singapore High Court decision of *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR(R) 211 at [32]). It is not inconceivable for an accused to maintain (as the Accused did here) that the purchase of the shares was not corrupt because there was never any understanding that the accused would use his position to show anyone favour and to contend (as the Accused did here) that the purchase of the shares was the result of a purely commercial transaction. In support, an accused may point to two facts, *viz*, (a) there was a purchase price paid for the shares and (b) the amount paid was the fair market value (or that he believed he was paying fair market value for the shares).

69 In the present case, the Accused did not prove that $6,000 was the true market value of the shares. However, even assuming that he had proved this, the plausibility of his defence would need to be evaluated in light of all other established facts to see if it raises a reasonable doubt. In the present case, this includes the fact that the Biforst shares were only transferred to him after Biforst signed the 2004 Contract even though he had already paid for the shares before the 2004 tender exercise commenced.

70 Further, it should be borne in mind that an appellate court's power of review in respect of findings of fact based on the veracity and credibility of witnesses is very limited (see, for example, the decision of this court in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]). To that end, in the present case, the DJ dismissed the Accused's version as to how he came to be involved in Biforst as an afterthought because it (a) contained obvious lies, (b) was not put to other witnesses to the events, and (c) contradicted the testimony of the other witnesses. We also note, once again, that the Judge did not overturn any of the DJ's findings of fact (see also above at [25]).

Requiring the PP to prove that the share transaction was a sham or that inadequate consideration was paid would be contrary to the policy of the Act

71 That it is not necessary for the PP to prove that the share transaction was a sham or that inadequate consideration was paid is also consistent with the broader spirit and policy behind the Act

itself – which is to prevent corruption in its various forms and all the more so with regard to deliberate and involved as well as sophisticated schemes such as that devised by the Accused in the present case. Indeed, to answer Question 1 in the affirmative would be to effectively undermine the pith and marrow of the Act itself by permitting it to be circumvented by sophisticated as well as disingenuous schemes such as the present.

72 It could hardly have been the purpose of the Act to exclude from its scope schemes which were no different from the more "traditional" (or blatant) forms or methods of corruption – except that they were cleverer and more sophisticated as well as devious. On the contrary, in our view, it is even more important that the Act cover these last-mentioned forms of corruption as well, especially now that the world (and the concomitant schemes of corruption) has become more complex and sophisticated since the Act was first passed. An invariable requirement on the part of the PP to prove that the share transaction is a sham or that the shares were purchased at an undervalue would be counter-productive in this fight against corruption.

Conclusion

73 For the reasons set out above, the answer to Question 1 in this Criminal Reference is follows:

> Question: For the purposes of s 6 of the Act, in determining if a transaction was objectively corrupt where consideration was paid for the gratification, must the Prosecution prove that the consideration was inadequate or that the transaction was a sham?
>
> Answer: No. While the consideration paid by an accused is a factor which the court can take into account, it is not necessary for the Prosecution to prove that the consideration was inadequate or that the transaction was a sham before an offence under s 6 of the Act is made out.

74 In light of our decision above, the parties are to address us on the appropriate order that this court should make in relation to the decision of the Judge in MA 279/2012.