Ghazali bin Mohamed Rasul
v
Public Prosecutor

[2014] SGHC 150

High Court — Magistrate's Appeal No 321 of 2013
See Kee Oon JC
18 June; 25 July 2014

Criminal Procedure and Sentencing *— Sentencing — Estate agent introduced client to licensed moneylender — Estate agent received referral fee from moneylender for that introduction — Whether sentence manifestly excessive — Regulations 6(1)(*a*) and 6(1)(*b*) Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010)*

Facts

The appellant was a registered estate agent who pleaded guilty to two charges under the Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010) ("the EAR 2010"): the first under reg 6(1)(*a*) for introducing a client to a moneylender, and the second under reg 6(1)(*b*) for receiving a sum of $150 from the moneylender as a referral fee in respect of that introduction. A further four charges for similar offences were taken into consideration.

At first instance he was sentenced to a fine of $10,000 for the introduction charge and $8,000 for the referral fee charge. The appellant appealed on the basis that the sentences were manifestly excessive and that there were two errors in the district judge's grounds of decision that suggested that he had not properly appreciated the material before him.

Held, allowing the appeal:

(1) The two errors were immaterial as in neither case could it be said that the appellant had suffered any prejudice. The first error, a misstatement in the number of charges taken into consideration for the purposes of sentencing, was so minor that it could not be said that this error had any substantive effect. The second error, stating that the appellant had a criminal antecedent when he had a clean record, was immaterial because it was not apparent that the district judge laboured under this misapprehension at the time the sentence was passed: at [39] to [41].

(2) This was the first offence prosecuted under reg 6(1) of the EAR 2010. Rather than benchmarking the sentences against those meted out for offences under s 29(1)(*a*) of the Estate Agents Act (Cap 95A, 2011 Rev Ed), it would be more appropriate to take reference from offences analogous in terms of criminality. The essence of offences under reg 6(1) was the potential conflict of interest that arose when a property agent was involved in moneylending: there was a risk in such cases that he would prefer his interest to the detriment of that of his clients. Cases of corruption involving private sector agents and relatively modest amounts of gratification were therefore the closest comparator: at [50], [53], [54] and [63].

(3) It would be a factor in mitigation that a person was charged under reg 6(1)(*a*) for introducing a client to a moneylender but there was no corresponding charge under reg 6(1)(*b*), *ie*, the accused was not charged for receiving a benefit in respect of that moneylending transaction. But if there was a corresponding charge for receiving a benefit, the presence of such benefit could not be taken to aggravate an offence under reg 6(1)(*a*); similarly and conversely, the fact that the agent made an introduction or referral could not aggravate an offence under reg 6(1)(*b*). On the other hand, if there was an introduction or referral and a corresponding reward, fee or benefit was given, but no charge under reg 6(1)(*b*) was laid, the fact that such benefit was given might be viewed as an aggravating factor for the offence charged under reg 6(1)(*a*): at [57].

(4) The principles relevant to sentencing were: (a) whether the clients were vulnerable; (b) the extent of the accused estate agent's involvement with the moneylender; (c) whether and to what extent the clients were materially prejudiced due to the agent's actions; (d) the amount received by the agent as a benefit; and (e) the extent to which it might be said the agent preferred his own interest to that of his clients. Where the accused person had not exploited vulnerable clients systematically, had no formal or standing arrangements to refer clients to moneylenders, had not caused substantial loss to his clients, and did not prefer his own interest to any significant extent, the appropriate starting point was a fine of $3,000 to $5,000 for each offence where the accused was charged under both reg 6(1)(*a*) and reg 6(1)(*b*): at [61], [63] and [65].

(5) A sentence substantially higher than the starting point was not merited on the facts. First, there was no evidence that the interests of the client were materially prejudiced as a result of the appellant's actions. Second, the nature of the arrangement between the appellant and the moneylender was *ad hoc* and informal rather than systematic and formal. Third, the amount of benefit received by the appellant was modest both as an absolute sum as well as in comparison with the amount of fees he would have earned as an estate agent in commission. Fourth, it was not the case that the appellant had exploited vulnerable or poorly educated clients. A fine greater than the starting point for the introduction charge was appropriate because there were a total of four such reg 6(1)(*a*) charges, with one proceeded with. Accordingly the fine for the reg 6(1)(*a*) charge was reduced from $10,000 to $5,000. In respect of the referral fee charge brought under reg 6(1)(*b*), there was nothing to justify a sentence higher than the starting point, and the fine was thus reduced from $8,000 to $3,000: at [67], [68], [70] to [72], [79] and [80].

[Observation: Unless the estate agent had actively instigated his clients to borrow from moneylenders, it would be substantively unfair to view any unhappy outcomes on the part of the clients as aggravating a reg 6(1) offence especially where the offender's involvement was minor and limited. While the executive had seen fit to fix estate agents with particular duties with respect to their relationships with moneylenders, it did not follow that estate agents had to bear the full criminal responsibility for whatever consequential troubles befell their clients who borrowed money from licensed moneylenders. It bore repeating that the Prosecution, no less than defence counsel, stood as officers of the court, and had an obligation to make submissions that were fair, measured

and in the public interest, but always with due regard to the circumstances of the case: at [77] and [78].]

Case(s) referred to

Angliss Singapore Pte Ltd v PP [2006] 4 SLR(R) 653; [2006] 4 SLR 653 (refd)
Chua Tiong Tiong v PP [2001] 2 SLR(R) 515; [2001] 3 SLR 425 (refd)
JS Metal Pte Ltd v PP [2011] 4 SLR 671 (refd)
Kua Hui Li v Prosper Credit Pte Ltd [2014] 3 SLR 1007 (refd)
Kwang Boon Keong Peter v PP [1998] 2 SLR(R) 211; [1998] 2 SLR 592 (refd)
Law Society of Singapore v Wan Hui Hong James [2013] 3 SLR 221 (refd)
Ong Chee Eng v PP [2012] 3 SLR 776 (refd)
PP v ACI [2009] SGHC 246 (refd)
PP v Teng Cheow Hing [2005] SGDC 38 (refd)
PP v UI [2008] 4 SLR(R) 500; [2008] 4 SLR 500 (refd)
Tan Tze Chye v PP [1996] 3 SLR(R) 357; [1997] 1 SLR 134 (refd)
Teo Chu Ha v PP [2013] 4 SLR 869 (refd)
Yap Ah Lai v PP [2014] 3 SLR 180 (refd)

Legislation referred to

Estate Agents Act (Cap 95A, 2011 Rev Ed) ss 29(1)(*a*), 30, 31, 32, 33, 34, 42, 44, 72
Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010) reg 6 (consd);
regs 6(1)(*a*), 6(1)(*b*)
Gas Act (Cap 116A, 2002 Rev Ed) s 32A(2)
Housing and Development Act (Cap 129, 2004 Rev Ed) s 51
Housing and Development (Amendment) Act 2010 (Act 18 of 2010) s 5
Prevention of Corruption Act (Cap 241, 1993 Rev Ed) s 6(*a*)

Derek Kang and Andrea Gan (Rodyk & Davidson LLP) for the appellant;
Sanjna Rai (Attorney-General's Chambers) for the respondent.

[Editorial note: This was an appeal from the decision of the District Court in [2014] SGDC 59.]

25 July 2014

See Kee Oon JC:

Introduction

1 This was an appeal against the decision of the district judge ("the District Judge") in *PP v Ghazali bin Mohamed Rasul* [2014] SGDC 59 ("GD"). The appellant was a property agent who pleaded guilty to two charges under the Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010) ("the EAR 2010"). The first charge, under reg 6(1)(*a*), was for introducing his client to a licensed moneylender; and the second, under

reg 6(1)(*b*), was for receiving a sum of $150 from the moneylender in return for that introduction. A further four charges for similar offences were taken into consideration. For convenience I will refer to the first charge as the "introduction charge" and the second charge as the "referral fee charge".

2 The maximum punishment prescribed under the EAR 2010 in respect of each of the proceeded charges is a fine of $25,000, or one year's imprisonment, or both. On 11 December 2013, the appellant was sentenced to a fine of $10,000 in respect of the introduction charge, and a fine of $8,000 in respect of the referral fee charge. He appealed on the basis that the sentences were manifestly excessive.

3 On 18 June 2014, I allowed the appeal to the extent that the fines were reduced to $5,000 for the introduction charge, or 20 days' imprisonment in default, and $3,000 for the referral fee charge, or 12 days' imprisonment in default. In allowing the appeal, I observed that the District Judge ought not to have taken as his starting point for reference sentencing precedents relating to offences committed under s 29(1)(*a*) of the Estate Agents Act (Cap 95A, 2011 Rev Ed) ("the EAA"). This provision made it an offence for unregistered persons to masquerade as or perform the work of registered estate agents. In my opinion, this offence was not analogous in terms of criminality to the offences committed by the appellant.

4 As this appears to be the first time that a person has been prosecuted for breaching reg 6(1) of the EAR 2010, I now provide the detailed reasons for my decision.

Facts and the decision below

5 At the time of the offences, the appellant was a registered salesperson with PropNex Realty Pte Ltd. Some time in May 2011, one Mohammad Redzuwan bin Ibrahim ("Redzuwan"), a relief taxi driver, engaged the appellant to help him sell his four-bedroom HDB flat and to purchase another cheaper one. Redzuwan told the appellant he was in financial trouble and also in arrears with his HDB loan. He asked the appellant to introduce him to a moneylender.

6 In June 2011, the appellant brought Redzuwan to the offices of a licensed moneylender, AM Credit, in Sultan Plaza and introduced him to one Partippan s/o Sivasanjaran ("Partippan"). The appellant assured Partippan that Redzuwan was good for a loan as the latter would be selling his flat and that he, the appellant, was in fact handling the sale. This formed the basis for the introduction charge.

7 As a result, Redzuwan obtained a loan of $7,000 at 10% interest a month and an upfront fee of $700. Of the upfront fee, $150 was paid to the appellant by Partippan. This transaction was the subject of the referral fee charge.

8 Redzuwan subsequently took up additional loans from AM Credit between July and September 2011. Redzuwan's flat was later sold for $441,000 and he was able to repay AM Credit for the loans.

9 In March 2012, the Council for Estate Agencies ("CEA") investigated a report that a registered salesperson had referred a HDB flat owner to a moneylender. The appellant was identified and on 5 December 2012 he was charged with six offences under the EAR 2010.

10 On 11 September 2013, the appellant pleaded guilty to the following two charges:

(a) CEA-19-DSC-2012, the introduction charge, was for introducing Redzuwan to Partippan of AM Credit, a licensed moneylender, which was an offence under reg 6(1)(*a*) of the EAR 2010 punishable under reg 6(2) of the same.

(b) CEA-21-DSC-2012, the referral fee charge, was for receiving $150 from Partippan in return for the introduction, which was an offence under reg 6(1)(*b*) of the EAR 2010 punishable under reg 6(2) of the same.

11 The appellant consented to having the remaining four charges taken into consideration for the purposes of sentencing:

(a) CEA-17-DSC-2012 was for introducing another of his clients, one Affendi bin Mohamad Noor, to the same Partippan of AM Credit, an offence under reg 6(1)(*a*).

(b) CEA-18-DSC-2012 was for suggesting the use of the services of a moneylender to another client, one Mohamad Yunos bin Abdul Rahim, which moneylender was the same Partippan of AM Credit, an offence under reg 6(1)(*a*).

(c) CEA-20-DSC-2012 was for introducing another client, one Muhammed Fazil bin Hashim, to Partippan of AM Credit, an offence under reg 6(1)(*a*).

(d) CEA-22-DSC-2012 was for receiving $150 from Partippan of AM Credit for referring Affendi bin Mohamad Noor (see CEA-17-DSC-2012 above), an offence under reg 6(1)(*b*).

12 The matter was adjourned three times before sentence was finally passed on 11 December 2013 and, as mentioned, fines totalling $18,000 were imposed for the two charges.

13 The District Judge noted that the Prosecution sought a custodial sentence of two weeks and a fine of $15,000 per charge on the basis that general deterrence was the applicable sentencing principle. The defence counsel submitted, however, that it could at best be said that the appellant had corruptly received a total of $300 for introducing his clients to a

moneylender and there was no need to impose a custodial sentence; this case was analogous to corruption cases where the fines imposed were generally commensurate with the moneys received as gratification or inducement.

14 The District Judge disagreed with both the Prosecution and the defence submissions. He considered that a custodial sentence was not warranted on the facts of the case, particularly as this was a regulatory offence. A fine was sufficient to deter would-be offenders but the fine of $15,000 sought by the Prosecution for each charge appeared disproportionately high in relation to the total amount the appellant had received in benefits.

15 Regarding the appropriate benchmarks, the District Judge did not accept that cases of corruption were useful comparators. Instead he took the view that the starting point for sentences for offences under reg 6(1)(*a*) and reg 6(1)(*b*) of the EAR 2010 should be a fine of between $6,000 and $8,000. This was the range established by sentencing precedents in relation to offences committed under s 29(1)(*a*) of the EAA and the reason the District Judge adopted the same starting point was that the punishments prescribed for the latter offences were the same as those in the present case: a fine of up to $25,000, or imprisonment of up to 12 months, or both.

16 The Prosecution had cited a number of aggravating factors but these were rejected by the District Judge.

17 First, Redzuwan was admittedly in financial difficulties but these were not caused principally or solely by the appellant's act of introducing him to a moneylender; he was already in difficulties and therefore resorted to moneylenders.

18 Second, the Prosecution appeared to allege that the appellant had taken advantage of Redzuwan's troubles to charge a high commission rate for his services, but the commission rate of 2% amounting to over $9,000 that was in fact charged was the standard rate stipulated by the agency through which the appellant was registered to practice as an estate agent.

19 Third, while the appellant had indeed profited from introducing Redzuwan to the moneylender in the sum of $150, this was a relatively small sum which did not warrant a high fine, let alone a custodial sentence.

20 Accordingly, the District Judge fined the appellant $10,000 for the introduction offence and $8,000 for the referral fee charge. The higher fine imposed for the first offence was due to the fact that there were *four* other charges under the same regulation taken into consideration for the purposes of sentencing. In fact there were only three other such charges to be taken into consideration; it appears the District Judge miscounted the number of reg 6(1)(*a*) charges. I discuss this in more detail at [28] below.

The submissions on appeal

21 The appellant had four main arguments on appeal.

22 First, he argued that the District Judge had erred in using cases decided under s 29 of the EAA as a starting point for sentencing; the correct benchmarks should have been corruption cases of similarly low gravity. The appellant said that the correct approach where an offence-creating provision was being invoked for the first time was to refer in the first instance to sentencing precedents of analogous offences and not to defer to the similarity in the prescribed punishments. The fact that the maximum sentences were the same in s 29 of the EAA and reg 6(2) of the EAR 2010 was not determinative of the issue; it was at most one input in the ultimate exercise of calibrating the identified starting point to fit the nature and criminality of the offence in question.

23 In this regard, the appellant said that the most closely analogous offence was that of corruption as an agent under s 6(*a*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the PCA") and in particular corruption by an agent in the private sector. The appellant relied on three cases: *Kwang Boon Keong Peter v PP* [1998] 2 SLR(R) 211 ("*Peter Kwang*"), *Tan Tze Chye v PP* [1996] 3 SLR(R) 357 ("*Tan Tze Chye*"), and *PP v Teng Cheow Hing* [2005] SGDC 38 ("*Teng Cheow Hing*"). These involved gratification in the following sums:

Case	Gratification	Fine imposed
Peter Kwang	$5,000	$12,000
	$1,000	$6,000
	$1,000	$6,000
Tan Tze Chye	$383	$5,000
Teng Cheow Hing	$600 (loan); loans totalling $2,500 taken into consideration for sentencing	$8,000

24 Based on these cases, the appellant said that the appropriate starting point where the amount of gratification given was low was therefore a fine of between $5,000 and $8,000.

25 The appellant's next two arguments related to the question of how the sentences in the present case should be calibrated in relation to the benchmark. The first was that the present type of offences was not as serious as an offence under s 6(*a*) of the PCA because of the substantial dissimilarity in the prescribed punishments: $25,000 and 12 months' imprisonment against $100,000 and five years respectively. Furthermore, the present offences were regulatory in nature while corruption offences were criminal in nature.

26 The second argument in relation to calibration was that, within the spectrum of offences committed under reg 6(1), the appellant's culpability was on the less serious end due to a number of mitigating factors. In particular, the appellant placed reliance on the following facts:

(a) It was the appellant's clients who had actively sought him out for introductions to moneylenders. It was not the case that the appellant had actively instigated his clients to do so.

(b) The appellant never had any permanent or formal payment or commission arrangements with the moneylender as evidenced by a statutory declaration from the moneylender.

(c) The amounts involved were very modest: a total of $300 in two transactions.

(d) The appellant had been charged for introducing rather than referring or recommending his client, which was a less serious offence.

(e) None of the appellant's clients suffered from his actions; in Redzuwan's case his financial troubles could not be laid at the feet of the appellant.

(f) The appellant was contrite and remorseful and had co-operated fully with investigations to the extent that the authorities were able to uncover further offences, entirely through his voluntary disclosures.

(g) Finally the appellant had suffered personally as a result and lost his livelihood as a property agent.

27 The appellant's last argument centred on two errors made by the District Judge in his GD ([1] *supra*). The appellant argued that the District Judge's mischaracterisation of the appellant's antecedents – stating that he had served a sentence of 30 months' imprisonment for criminal breach of trust when in fact he had a clean record (see the GD at [12]) – was so striking as to raise serious doubts as to whether the District Judge had properly considered the material before him, which was a ground for appellate intervention: *Yap Ah Lai* v *PP* [2014] 3 SLR 180 ("*Yap Ah Lai*") at [69].

28 The appellant argued that the District Judge's mistake in relation to the number of charges taken into consideration was also consequential. In his GD, it was wrongly stated that the appellant had consented to having four charges under reg 6(1)(*a*) taken into consideration when in actual fact there were only three such charges, the fourth charge being under reg 6(1)(*b*) (see the GD at [3] and [23]). While it was not possible to know how the sentence would have been recalibrated if the District Judge had not made this mistake, the appellant as the accused person was entitled to the benefit of the doubt; and in any case this mistake, like the one relating to his

antecedents, also raised a serious doubt as to whether the District Judge had correctly appreciated the facts before him.

29 The respondent said that the District Judge had not erred either in his characterisation of the offence or in his appreciation of the material before him to justify appellate intervention. The respondent put forward six arguments.

30 First, the appellant had committed offences specifically targeted by Parliament: that of introducing clients to moneylenders and receiving payment as a reward. The reason for criminalising such acts was to avoid the possible conflict of interest arising from agents being involved in moneylending. In such circumstances, the agent in effect stands as a surety that the borrower would come into funds directly from the sale of his property and therefore would be able to repay the loan. The receiving of referral fees was a separate offence reflecting its added seriousness and was not merely to be regarded as an aggravating factor.

31 Second, the offences were not motivated by altruism: the appellant had acted entirely from self-interest and but for his assurances to AM Credit his client would likely not have obtained a loan.

32 Third, general deterrence was the predominant sentencing consideration. There were many complaints against estate agents which resulted in the enactment of the EAA and the EAR 2010. Such offences were hard to detect.

33 Fourth, the District Judge's starting point of a fine of between $6,000 and $8,000 was appropriate. Offences under s 29(1)(*a*) of the EAA were useful comparators justified on the basis of the need for general deterrence, to regulate the real estate industry, and to ensure that property owners were adequately protected.

34 Fifth, the District Judge's error in relation to the number of charges taken into consideration was inconsequential and the error in stating the appellant's antecedents was not given much weight in the sentencing equation because the District Judge had not explicitly said he was calibrating the sentence to take the antecedents into account.

35 Finally, the mitigating factors raised by the appellant should not be given too much weight. The appellant's misdeeds would have come to light with or without his disclosures as they were not so complex that they would have remained undiscovered. The appellant had lost his livelihood but that was to be expected given that estate agency was a regulated profession. He was technically a first offender in that he had no prior antecedents, but he had nonetheless committed multiple offences for which he was charged.

Issues on appeal

36 Broadly speaking the various submissions made coalesced into three issues. The first was whether the two factual errors made by the District Judge (in relation to the charges taken into consideration and the appellant's antecedents) justified appellate intervention.

37 The second issue was whether the District Judge had correctly identified the appropriate starting point for sentencing.

38 The third issue was whether, on the facts of the case, the offences committed by the appellant stood on the less serious end of the scale of offences of this type; in other words, whether the District Judge had correctly appreciated the circumstances of the case.

The District Judge's errors

39 In my judgment, the District Judge's error in relation to the number of charges under reg 6(1)(*a*) that the appellant consented to have taken into consideration for the purposes of sentencing was immaterial and did not result in any substantial prejudice to the appellant. In general, the effect of having further charges taken into consideration would be to increase the sentence that would otherwise have been imposed: see *PP v UI* [2008] 4 SLR(R) 500 at [38]. However, although in the present case the District Judge imposed a marginally higher fine for the introduction charge as compared to the referral fee charge ($10,000 against $8,000) on the ground that there were four reg 6(1)(*a*) charges to be taken into consideration (at [23] of the GD ([1] *supra*)), it was not possible to infer how or even if the sentence would have been moderated had the District Judge correctly appreciated that there were only three charges under reg 6(1)(*a*) to take into consideration for the purposes of sentencing. Put simply, the difference was too small for me to come to any definite conclusion that this error had any substantive effect. In all the circumstances, therefore, I could not find that the appellant had suffered any prejudice or injustice as a result.

40 The second error complained of was that the District Judge had wrongly thought that the appellant had a past criminal record (see the GD at [12]). The respondent accepted this was an error but argued that the District Judge had not placed any weight on this factor at all in coming to his decision.

41 I agreed that it was clear that this error was immaterial. The main reason was that it was not apparent that *at the time the sentence was passed* the District Judge was labouring under the misapprehension that the appellant had a prior conviction for criminal breach of trust. From the record it was clear that the appellant's "antecedents" were never raised in the course of proceedings, or even at any time until the District Judge came to a decision on the sentence. There was therefore nothing on the record to suggest that the sentence imposed on the appellant had been enhanced to

take into account the "antecedents". More likely, it was a clerical error that had crept into the GD when it was written sometime after the sentence was handed down.

42 The appellant said that the error was so far off the mark that it was not an oversight or a typographical error, but should instead be attributable to the District Judge having worked off a document prepared for some other case. Citing *Yap Ah Lai* ([27] *supra*) at [69], the appellant argued that this raised serious doubts as to whether the District Judge had properly appreciated the material before him.

43 I did not accept this submission because it was not at all reasonable in the circumstances to draw such a conclusion.

44 In the present case, I did not think that the error in the GD could present such an impression to any reasonably fair-minded observer. It was apparent to me that the error complained of in the present case was substantially and qualitatively different from that identified by the High Court in *Yap Ah Lai*.

The appropriate starting point

45 I begin with a brief review of the genesis of the present offences to set the context in which they should be appreciated. Regulation 6 of the EAR 2010 took effect on 15 November 2010 and was promulgated by the CEA in exercise of powers conferred on it under ss 42, 44 and 72 of the EAA. Regulation 6 reads:

> **No referrals to moneylenders**
>
> **6.**—(1) No estate agent or salesperson shall —
>
> (*a*) introduce, refer or recommend a client to any moneylender or otherwise suggest the use of the services of any moneylender; or
>
> (*b*) receive any commission, reward, fee, payment or other benefit whatsoever from any moneylender in respect of any moneylending transaction.
>
> (2) Any person who contravenes paragraph (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $25,000 or to imprisonment for a term not exceeding 12 months or to both.

46 The Parliamentary debates on the Housing and Development (Amendment) Bill 2010 (No 14 of 2010) (see *Singapore Parliamentary Debates, Official Report* (19 July 2010) vol 87 at col 723) and the Estate Agents Bill 2010 (No 19 of 2010) (see *Singapore Parliamentary Debates, Official Report* (15 September 2010) vol 87 at col 1079) are instructive on the reasons behind the creation of the reg 6(1) offences. These two pieces of legislation are linked in that both have to do with moneylenders lending money on the expectation that they would be repaid from the proceeds of sold property. One of the purposes of the former legislation, which, *inter*

alia, amended s 51 of the Housing and Development Act (Cap 129, 2004 Rev Ed), was to prohibit moneylenders from lodging caveats to claim an interest in the sale proceeds of HDB property; while the latter, which was enacted as the EAA, made it an offence for estate agents or salespersons to refer clients to moneylenders, or themselves to be employed by or be otherwise involved in the business of moneylending.

47 In the second reading of the Housing and Development (Amendment) Bill 2010 (No 14 of 2010), the then Minister for National Development said (*Singapore Parliamentary Debates, Official Report* (19 July 2010) vol 87 at col 750):

> Estate agents have, in fact, a very critical role to play because many of the buyers and sellers are not sophisticated buyers and sellers. They need the estate agents to protect and promote their interests and to service them professionally and ethically. *So clearly, there is a conflict of interests if we allow estate agents to be involved in moneylending because they will, then, not be able to fulfil their obligations to their clients when they also profit from moneylending activities.* Under the new regime, we are going to prohibit estate agencies and agents from becoming licensed moneylenders or becoming their employees. … [emphasis added]

48 About two months later, at the second reading of the Estate Agents Bill (No 19 of 2010), the then Minister explained in more detail the rationale for the new offences (at cols 1080–1087):

> The property sector in Singapore is a significant part of our economy, property transactions amounting to many tens of billions of dollars a year. One special characteristic of our property sector is the high home ownership rate, possibly the highest in the world, due primarily to our comprehensive public housing programme.
>
> Hence, unlike other countries where property transactions involve only the well-to-do, lower income households in Singapore also buy and sell properties. Many of them do so through estate agents, even though the Housing and Development Board (HDB) is encouraging do-it-yourself (DIY) transactions. For many Singaporeans, their home is the largest single investment they will ever make. *Therefore, it is important that they be given the best possible advice and service in making such an investment.*
>
> …
>
> Estate agents and salespersons are engaged as intermediaries in the sale, purchase and lease of properties, and play an important role in helping their clients to get the best value for their property transactions. *To perform this function well, it is essential that they do their work professionally and ethically, and act in the best interest of their customers.* They must be well acquainted with Government rules and procedures, help clients through the whole buying and selling process, give them correct and proper advice, and generally ensure that their property transactions are as smooth as possible. Most estate agents and salespersons are doing a good job.

> Unfortunately, complaints against real estate agents and salespersons have risen in recent years. In 2005, the Consumers Association of Singapore received 670 complaints. In 2009, the number had increased by nearly 60% to over 1,070. With over 70,000 transactions in 2009, this translates to about one-and-a-half complaints in 100. The most common complaints are that the salespersons provided unsatisfactory service, were unprofessional in their conduct, misrepresented information, gave wrong advice or used pressure tactics.
>
> …
>
> *However, there were indeed cases of unethical practices and misconduct, where errant agents and salespersons took advantage of their clients. The actions of errant agents and salespersons could have serious consequences, especially for the lower income and the less educated.* I have personally come across many cases in my meet-the-people sessions, and I am sure so have Members, where salespersons provided wrong or misleading advice, especially for HDB transactions, and got their clients in serious financial situations. …
>
> …
>
> Sir, in the recent Urgent Reading of the Housing and Development (Amendment) Bill. *I have highlighted the conflict of interests that may arise if we allow salespersons to be involved in moneylending because they will not be able to fulfil their obligations to their clients when they also profit from moneylending activities.* Clauses 31 and 32, therefore, prohibit estate agents and salespersons from simultaneously holding a moneylender's licence, or be an employee, director or partner of a licensed moneylender.
>
> [emphasis added]

49 It was thus clear from the Parliamentary debates that offences under reg 6 of the EAR 2010 have very little to do with s 29 of the EAA, which reads:

> **Salespersons to be registered**
>
> **29.**—(1) Subject to this Act —
>
> (*a*) a person shall not be or act as a salesperson for any licensed estate agent, nor shall he hold himself out to the public as being a salesperson unless he is a registered salesperson; and
>
> (*b*) a person shall neither accept employment or an appointment as a salesperson from, nor act as a salesperson for, any other person who is required by this Act to hold, but is not the holder of, an estate agent's licence.
>
> (2) Subsection (1) shall not be construed as —
>
> (*a*) requiring any registered salesperson, by reason only of the fact that he does estate agency work solely as a salesperson, to hold an estate agent's licence; or
>
> (*b*) requiring any licensed estate agent to be registered as a salesperson.

> (3) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $25,000 or to imprisonment for a term not exceeding 12 months or to both.
>
> (4) No fee, commission or reward in relation to anything done by a person in respect of an offence under this section shall be recoverable in any action, suit or matter by any person whomsoever.

50 I agreed with the appellant that the similarity in the maximum sentences provided for under this section and reg 6(2) could not be a decisive factor. It is well-settled that the punishment for the offence should be calibrated to fit the crime: see *Ong Chee Eng v PP* [2012] 3 SLR 776 at [23]. Where an offence is being prosecuted for the first time, the correct approach in ascertaining the appropriate sentencing benchmark is to consider offences which are analogous in terms of criminality. In *JS Metal Pte Ltd v PP* [2011] 4 SLR 671, Chan Sek Keong CJ had to consider the appropriate sentence for an offence of damaging a gas pipe under s 32A(2) of the Gas Act (Cap 116A, 2002 Rev Ed) which was being prosecuted for the first time. Chan CJ considered the most appropriate analogous offence was that involving damage to electricity cables and in the result allowed the appeal and reduced the fine payable from $100,000 to $5,000.

51 In the context of the present case, the similarity in the punishments provided for in reg 6(2) of the EAR 2010 and s 29 of the EAA was, in my judgment, of very little significance, in particular because s 72(3)(*d*) of the EAA states that such regulations as made by the CEA may provide for penalties:

> … not exceeding a fine of $25,000 or imprisonment for a term not exceeding 12 months or both for each offence and, in the case of a continuing offence, a further penalty not exceeding a fine of $1,000 for that offence for every day or part thereof during which the offence continues after conviction

52 The sentences laid down in reg 6(2) are therefore the *maximum* permissible sentences which the CEA may prescribe for regulatory offences and therefore were of very limited use in the context of the present exercise.

53 Therefore, I agreed with the appellant that the proper approach would be to analyse the present offence in relation to analogous offences in terms of criminality. In my judgment the essence of offences under reg 6(1) is the potential conflict of interest that arises when a property agent is involved in moneylending: there is a risk in such cases that he will prefer his interest to the detriment of that of his clients. It was clear from the Minister's use of the language of vulnerability and reliance that it was thought that in many important aspects the property agent-client relationship was akin to a fiduciary relationship, for it is trite that fiduciary obligations arise where the agent assumes a position of ascendancy and influence over the client who correspondingly relies on and trusts him: see *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [8]. I would not however go so far

as to say that property agents owe, *ex officio*, fiduciary obligations to their clients, the breach of which would always give rise to a civil cause of action. I would however say that reg 6(1) offences, in this respect, are somewhat akin to corruption offences: in each case, the essence of the offence is the conflict on the part of the accused person between what I will loosely call his principal's interests and his own interest: see *Teo Chu Ha v PP* [2013] 4 SLR 869 ("*Teo Chu Ha*") at [19].

54 However, while corruption may be the closest analogous offence it should be appreciated that there are a number of significant differences. The first is that while all cases of corruption involve a conflict of interests, not all cases of conflict of interest are corruption cases: *Teo Chu Ha* at [19]. There is a gradient of criminality in all cases of conflict of interest. At one end there is only a civil cause of action and, even within the different classes of conflicts of interest that are criminal in nature, the present offences are substantially less serious than the PCA offences since the punishments prescribed under the EAR 2010 are much less severe: for corruption the maximum sentence is up to $100,000 in fines and five years' imprisonment, as compared to $25,000 and one year's imprisonment for the present offences. Furthermore, as the appellant correctly points out, the spectrum of corruption offences includes offences committed by public sector officers, which are more serious than those committed by *private sector* agents (see *Chua Tiong Tiong v PP* [2001] 2 SLR(R) 515 at [17]); however, offences under the EAR 2010 can only by definition be committed by private sector agents. Another indicator is that the present offences are regulatory offences provided for by way of subsidiary legislation as opposed to being criminalised in a main statute. The sentences meted out should therefore be correspondingly lighter.

55 The second significant distinction is that the elements of each offence differ materially. In corruption cases the fact that gratification was given is one of the elements of the offence. That is not the case under reg 6(1). The introduction, referral or recommendation of clients to moneylenders is an offence by itself; the receiving of a benefit, reward, payment, fee or commission from a moneylender in respect of any moneylending transaction is a further and separate offence and is not an element of the offence in the former case. In principle therefore the fact that some benefit was given cannot be factored in as a sentencing consideration in respect of a reg 6(1)(*a*) offence where the person has *also* been charged under reg 6(1)(*b*). However, because corruption precedents involve, in a sense, the amalgamation of the two actions, there is a potential difficulty in analogising the two types of offences.

56 A third and related difference is that the element of corrupt intent is not present in reg 6(1) offences. There is no requirement that an estate agent receiving a benefit offered in respect of a moneylending transaction (see reg 6(1)(*b*)) must do so with corrupt intent. Nor is there any

requirement that the Prosecution must show that a corrupt element runs through and links the introduction or referral of clients with the benefit received in respect of a moneylending transaction.

57 These distinctions loosen the analogy between the offences but do not destroy it entirely. In my judgment, corruption remains the closest analogous offence and therefore corruption cases provide appropriate starting points for reference. But the distinctions alluded to above suggest some calibration is required. It seems that in principle, it would be a factor *in mitigation* that a person was charged under reg 6(1)(*a*) but there was no corresponding charge under reg 6(1)(*b*); in other words, that an introduction, referral or recommendation was made without any corresponding commission, reward, fee, payment or other benefit. But if there was a corresponding charge, the presence of such benefit cannot be taken to aggravate an offence under reg 6(1)(*a*); similarly and conversely, the fact that the agent made an introduction or referral cannot aggravate an offence under reg 6(1)(*b*). On the other hand, if there was an introduction or referral and a corresponding reward, fee or benefit was given, but no charge under reg 6(1)(*b*) was laid, the fact that such benefit was given may be viewed as an aggravating factor for the offence charged under reg 6(1)(*a*).

58 These would preserve what seems to be the essence of the similarity between reg 6(1) cases and corruption cases, which is the agent's conflict of interests. Intuitively, it would appear that the extent to which reg 6(1) offences differ in seriousness rests in large part on the extent to which the offending agent preferred his own interest. This seems to depend on two linked factors: first, whether and to what extent the client was injured; and second, to what extent the agent benefitted *as a result*. Both factors scale well with the amount of benefit offered and received, which is itself one of the chief sentencing parameters in corruption cases (involving private sector agents, at least).

59 A further conclusion that may be drawn from the Parliamentary debates (see [47]–[48] above) is that the reg 6(1) offences are part of a larger family of laws that regulate the relationship between property agents and moneylenders. As the debates make clear, the reason why both professions find it profitable to co-operate is that moneylenders need to be assured that loans made will be repaid and one way to do so would be to seize the proceeds of property sales. Previously, a caveat gave them a legal entitlement, but when the Housing and Development (Amendment) Act 2010 (Act 18 of 2010) (see s 5 amending s 51 of the principal Act) closed this avenue, the next best way was to co-operate with property agents who could, in a sense, vouch for the fact that the property would be sold and therefore cash made available for the repayment of the loan. Sections 30 to 32 of the EAA prevent a person who holds or is an employee, partner, or director of a person who holds a moneylenders license from being a

registered estate agent or salesperson; these sections therefore shut off the *formal* or legal connections between property agents and moneylenders. The effect of reg 6(1) is to close the remaining loophole: the *informal* means by which moneylenders and property agents could co-operate to the detriment of the clients. Therefore the various rules are complementary and cannot be viewed in isolation.

60 While there are no direct penalties for contravening ss 30 to 32 of the EAA, ss 33 and 34 of the same provide that any person who submits false documents or makes a statement which is false or misleading in any material particular in applying for a license as an estate agent or salesperson is guilty of an offence and shall be liable on conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 3 years or to both. As these penalties are more severe than that provided for in reg 6(1)(*b*) and are provided for in the primary Act (the EAA) rather than in subsidiary legislation, the inference may be properly drawn that these are more serious offences than those in reg 6(1).

61 In my judgment, drawing the relevant threads together, the principles applicable to sentencing for offences under reg 6(1) of the EAR 2010 are:

(a) whether the clients were vulnerable (*eg*, elderly persons, of low income and/or low education, or of low mental capacity, *etc*);

(b) the extent of the estate agent's involvement with the moneylender which would include the number of wrongful transactions or referrals and the closeness of the relationship with the moneylender;

(c) whether and to what extent the clients were materially prejudiced due to the agent's actions;

(d) the amount received by the agent in relation to moneylending transactions and the number of occasions this occurred; and

(e) the extent to which it may be said that the agent preferred his own interest over that of his client.

62 These factors are similar to those that have been established in the case authorities as affecting sentencing in corruption cases (see *Sentencing Practice in the Subordinate Courts* vol II (LexisNexis, 3rd Ed, 2013) at p 1358):

Seriousness indicators (+)	Seriousness indicators (–)
Large amount	Low amount
Public servant	Minor, no adverse consequences
Position of trust	
Multiple offences	
Offence committed over a lengthy period	
Serious consequences (e.g. undermined prison or immigration system, undermined workings of criminal justice system, imperilled liberty or safety of others)	
Tournament rigging	

63 It follows from the preceding that the District Judge erred in principle in referring to sentences imposed under s 29 of the EAA (at [18] of the GD ([1] *supra*)) as possible benchmarks for offences under reg 6(1) of the EAR 2010. With respect, apart from the similarity in maximum permissible sentences and the fact that both deal with offences committed by estate agents, there is nothing to link such offences together. Therefore appellate intervention was justified (see *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 at [13]) and in my judgment, taking as a reference point cases of corruption involving private sector agents and modest amounts of gratification, the appropriate starting point for reg 6(1) offences is a fine of between $3,000 and $5,000 for each offence in cases where the offender:

(a) had not exploited vulnerable clients systematically;

(b) had no formal or standing arrangement with moneylenders to refer clients;

(c) had not acted so as to be the cause of substantial loss to the client;

(d) had received relatively small amounts in benefits; and

(e) could not be said to have preferred his own interest over that of his client to any significant extent.

64 Such a sentence would be less than that imposed in respect of corruption offences involving similar amounts of gratification, thus reflecting its relatively lesser criminality; the present offences were after all regulatory offences where the maximum sentences prescribed provided guidance as to their severity (see *PP v ACI* [2009] SGHC 246 at [5]).

65 I should add that the above framework applies to cases where the accused person has been charged under *both* reg 6(1)(*a*) and reg 6(1)(*b*) in

relation to the same transaction: that is, the charge for receiving a benefit was in respect of the same moneylending transaction that was the subject of a charge for introducing or referring a client to a moneylender. The appropriate global sentence for each such pair of offences would therefore be a fine in the range of $6,000 to $10,000.

66 It follows that where an accused person has been charged under either one or the other of the provisions, but not both, the sentencing judge should be careful to ensure that only the considerations peculiar to the charge are taken into account.

Whether the District Judge had correctly appreciated the circumstances of the case

67 Turning to the facts of the case, in my judgment, the offences committed by the appellant could not be said to be so serious as to merit sentences substantially higher than the starting point. To my mind, there were four indications of this.

68 First, there was no evidence that the interests of the client were materially prejudiced as a direct result of the appellant's actions. It was not disputed that Redzuwan was in serious financial trouble even before he approached the appellant for an introduction to a moneylender. There was no evidence that the appellant had of his own accord encouraged or instigated Redzuwan to borrow money from a moneylender. Much was said below about Redzuwan's subsequent troubles, for instance, that he was unable to buy a replacement flat, but I could not see how blame for any of these could fall on the appellant's head.

69 It was clear from the record that Redzuwan's misfortunes were due to his own pre-existing impecuniosity and the fact that, of his own accord, he subsequently returned to AM Credit alone and without the presence of the appellant to secure more loans. In terms of *moral* culpability a case could be made for saying that as between AM Credit and the appellant the former was clearly the more responsible, but there was never any suggestion that AM Credit or Partippan had committed any offence. It followed that there was no basis for visiting a heavier sentence on the appellant on account of Redzuwan's troubles. As for the other clients named in the charges not proceeded with, there was also no evidence that the appellant was directly to blame for any misfortunes they had suffered, if any. Mere *access* to a licensed moneylender is not illegal and the borrower must bear his share of the responsibility if he borrows too much.

70 Second, the fact that there were in total four charges brought under reg 6(1)(*a*), with one charge proceeded with, showed that the appellant had been systematically recommending clients who sought moneylending services to the same moneylender, AM Credit. However, as against this, there was no established pattern of remuneration: there was no evidence

that for each and every such client introduced, the appellant had received some benefit in return. In my judgment this tended somewhat to mitigate the seriousness of the appellant's offence as it was clear that the nature of the arrangement between the appellant and the moneylender was *ad hoc* and informal, rather than systematic and formal.

71 Third, the amount of gratification given in the present case was extremely modest. The referral fee charge involved just $150; CEA-22-DSC-2012 which was taken into consideration for the purposes of sentencing involved the same amount. The total benefit received by the appellant was therefore only $300. This was not only modest as an absolute sum; it was also modest in comparison with the amount of fees the appellant would have earned from his clients for acting as their property agent ($9,437 in the case of Redzuwan). There was therefore no suggestion that Redzuwan's interests were sacrificed, for instance, by the appellant pushing through a transaction at fire sale prices simply so that the moneylender could be repaid, or by the appellant delaying the sale so that the moneylender could charge more interest. By all accounts the appellant's conduct of the sale of Redzuwan's flat was beyond reproach. The record therefore rather militated against any positive finding that the appellant had actively preferred the interest of the moneylender instead of that of his client.

72 Fourth, there was no evidence that the appellant had exploited vulnerable or poorly educated clients to take up loans at usurious rates. There was no evidence that he had targeted his poorer clients to take up loans, which, but for his (in effect) standing as their surety before the moneylender they never could have obtained; there was no evidence that Redzuwan, despite his financial straits, was otherwise a vulnerable person. It was true that Redzuwan's occupation was given as a relief taxi driver but this fact by itself was no sure indication of his level of financial sophistication or vulnerability.

73 For completeness, I should add that I am troubled by some aspects of the way the prosecution was handled before the District Judge. My first concern is that it was evident that the CEA, which had conduct of the prosecution at first instance, had not consulted the Attorney-General's Chambers ("the AGC") before pressing for a deterrent custodial sentence below. I share the following concerns expressed by the District Judge at [25] and [27] of the GD ([1] *supra*):

> 25 I end with some concluding thoughts on this matter, in particular the submission of a deterrent sentence(s). In many cases prosecuted before this court by CEA, in particular where the offence is being prosecuted for the first time, CEA has submitted for deterrent sentences to be imposed. Very often, this would include the submission for a short custodial term to be imposed. When questioned further, the decision to submit for a deterrent sentence to be imposed is usually attributed to 'senior management', to which I would

> presume refers to the senior management of CEA. There are, of course, certain cases in which the aggravated facts of that case would warrant such a submission and the onus would be on CEA to make such a submission to the court if it were warranted. But it appears that no such thought has been put into this.
>
> …
>
> 27 I would suggest that CEA carefully considers when a case would warrant a submission of a deterrent sentence (whether or not such a sentence would include a custodial term) and consider their submission(s) carefully before making them in court.

74 I agree with the District Judge's observations. Had the AGC been brought into the picture earlier in the process, the submissions at first instance might have been calibrated more precisely to meet the nature of the offence, in particular because this was the first prosecution for such offences. Furthermore, the failure to consult the AGC left the AGC in the potentially invidious position of having to defend on appeal a position that it perhaps would not have taken at all. Indeed, to her credit, Ms Sanjna Rai, the Deputy Public Prosecutor appearing for the respondent on appeal, correctly did not attempt to justify the CEA's submissions for a deterrent custodial sentence.

75 My second concern relates to the inordinately harsh approach taken by CEA in their submission on sentence below. For instance, the CEA sought to bolster their argument for a deterrent sentence on the ground that the present offences were *more* serious than corruption offences because a vulnerable owner of a HDB flat *might* take loans from a moneylender and *might* end up losing his home. This submission was plainly without merit. In the first place, homeowners could well approach moneylenders under their own steam. In the second place, the CEA evidently failed to appreciate that this was a case involving a *licensed* moneylender. No doubt, there may be licensed moneylenders that levy interest rates that are usurious or even grossly unfair (see for instance *Kua Hui Li v Prosper Credit Pte Ltd* [2014] 3 SLR 1007 at [14]), and as a result borrowers may find themselves falling into a debt spiral and thereby lose their homes. This would, no doubt, be a sad and tragic outcome, but unless the rates charged were improperly excessive, or the moneylender was unlicensed, the law as it stands can do very little to interfere.

76 More importantly, as I have pointed out above at [72], the facts in the present case plainly did not involve such a scenario because Redzuwan was not such a vulnerable homeowner although he was indisputably in financial difficulty.

77 All these point to the conclusion that unless the estate agent had actively instigated his clients to borrow from moneylenders, it would be substantively unfair to view any unhappy outcomes on the part of the clients as *aggravating* a reg 6(1) offence especially where the offender's

involvement was minor and limited. While the Executive has seen fit to fix estate agents with particular duties with respect to their relationships with moneylenders, it does not follow that estate agents must bear the full *criminal* responsibility for whatever consequential troubles befall their clients who borrow money from licensed moneylenders. It bears repeating that the Prosecution, no less than defence counsel, stand as officers of the court, and have an obligation to make submissions that are fair, measured and in the public interest, but always with due regard to the circumstances of the case.

78 In this regard I should also add that in the appellant's reply submissions dated 17 June 2014, it was forcefully submitted that there was a "concerted attempt by the Respondent to demonise the licensed moneylender, [the appellant] and the loan obtained by Redzuwan". With respect, to say that there had been a "concerted attempt" to "demonise" these persons was an overstatement and needlessly pejorative. The respondent was, after all, only attempting to defend the lower court's decision on appeal. I did not agree that such a characterisation of the respondent's efforts was appropriate. While I was minded to allow the appeal, I was not impressed by the tenor of the appellant's submission in this regard.

Conclusion

79 In respect of the introduction charge, because there were a total of four charges brought under reg 6(1)(*a*), with one charge proceeded with, a fine greater than the benchmark was justified. However, the fine imposed by the District Judge was, for the reasons above, wrong in principle as it was based on the incorrect benchmark and was in any case manifestly excessive in relation to the actual criminality of the offence. The fine was therefore reduced from $10,000 to $5,000 (or 20 days' imprisonment in default) which was the upper end of the starting point of $3,000 to $5,000 identified above at [63] and which in my judgment was proportionate to the criminality of the appellant.

80 In respect of the referral fee charge, I was of the view that there was nothing in the record to justify imposing a fine substantially higher than the starting point and I therefore reduced the sentence to a $3,000 fine, in default 12 days' imprisonment. In total, the fines for both charges came to $8,000. As the original fine of $18,000 had already been paid in full, I ordered that the amount paid in excess of the $8,000 fine was to be refunded to the appellant.

Reported by Chew Xiang.