Public Prosecutor *v* Ngiam Zee Moey and others
[2022] SGDC 115

Case Number : District Arrest Case No. 901901-2018, 901905-2018 & 901907-2018, Magistrate's Appeal No. MA-9224, 9225 & 9226-2021-01

Decision Date : 14 June 2022

Tribunal/Court : District Court

Coram : Shaiffudin Bin Saruwan

Counsel Name(s) : DPP Hon Yi, Genevieve Pang & Louis Ngia for the prosecution; Foo Maw Shen, Chua Hua Yi & John Cheong for Ngiam Zee Moey; Derek Kang & Lulla Ammar Khan for Tham Poh Weng; Jason Chan SC & Leong Yi-ming for Ong Tai Tiong Desmond.

Parties : Public Prosecutor — Ngiam Zee Moey — Tham Poh Weng — Ong Tai Tiong Desmond

Criminal law – Statutory offences – Securities and Futures Act – Negligence by an officer of a public listed company

[LawNet Editorial Note: The appeals in MA 9224/2021/01, MA 9225/2021/01 and MA 9226/2021/01 were withdrawn on 4 July 2022.]

14 June 2022

District Judge Shaiffudin Bin Saruwan:

Introduction

1 This is an appeal by the prosecution against the order of acquittal in relation to the three accused persons Ngiam Zee Moey ("Ngiam"), Tham Poh Weng ("Tham') and Ong Tai Tiong Desmond ("Ong"). Ngiam and Tham were independent directors, while Ong was a non-independent director of New Lakeside Holdings Limited ("NLHL"). NLHL was a public listed company in Singapore. The three accused persons were each charged with the offence under s 331(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed)("SFA") punishable under s 204(1) of the same Act.

The charge

2 The allegations against each accused person were as follows –

(a) NLHL was a public listed company.

(b) As a public listed company, its securities were listed on the Singapore Exchange Limited ("SGX") Catalist Board.

(c) Pursuant to Rule 703 of the SGX Catalist Listing Rules ("SGX Rules"), NLHL was required to disclose to SGX any information that was likely to materially affect the price or value of its securities.

(d) NLHL had failed to notify SGX of such information namely, that the Bank of China ("BOC") had called upon a corporate guarantee which a subsidiary of NLHL had given to BOC in respect of a banking facility granted to a former subsidiary of NLHL, and that BOC had subsequently taken legal action.

(e) The information in (d) above was information that was required to be disclosed under the SGX Rules.

(f) NLHL's intentional failure to notify SGX of the said information in 2009 was attributable to the neglect of the three accused persons.

The case for the prosecution

The players

3 NLHL was incorporated in Singapore on 27 September 2002. It was listed on the Stock Exchange of Singapore Dealing and Automated Quotation ("SESDAQ")[note: 1] of the SGX on 24 March 2004. It was in the business of producing and selling apple juice concentrate.

4 The executive directors of NLHL were –

(a) Go Twan Heng ("Go"). He was the Chief Executive Officer ("CEO") from August 2005 to November 2009 He was Executive Director from November 2009 to October 2012.

(b) Oh Gim Teck ("Oh"). He was the acting Chief Financial Officer ("CFO") from October 2004 to February 2007. He was appointed CFO from February 2007 to June 2010.

5 Ngiam was the Independent Director from October 2005 to January 2018. Tham was the Independent Director from June 2006 to October 2014. Ong was the Non-Independent Director from January 2009 to March 2010.

6 As at 31 December 2016, New Lakeside Fruit Juice (Xu Zhou) Co Ltd ("NLX") was a wholly-owned subsidiary of NLHL. As at 31 December 2016, Sanmenxia Lakeside Fruit Juice Co Ltd ("SFJ") was a former subsidiary of NLHL. SFJ was fully disposed of on 31 August 2006.

The information that was not disclosed

7 In 2006, SFJ obtained two loans from BOC. On 27 January 2006, it obtained a loan of RMB 15 million ("the January loan") which was to be repaid by 27 January 2007. On 17 February 2006, it obtained a loan for RMB 15.5 million which was to be repaid by 17 August 2006 ("the February loan"). SFJ eventually defaulted on the February loan. BOC then sent notices of repayment to SFJ and NLX dated 17 August 2006, stating that an outstanding amount of RMB 7.5 million was due.

8 On 30 August 2006, Sanmenxia Tianyu Investment Company Ltd ("Tianyu") agreed to indemnify NLX against its corporate guarantees in relation to the load that SFJ had obtained from BOC. The remaining amount outstanding from the loans was RMB 22.75 million (approximately SGD 4,495,400). This indemnity by Tianyu was documented in the counter guarantee contract between Tianyu and NLX ("Tianyu Contract"). The Tianyu Contract stipulated that, *inter alia*, Tianyu would pay NLX any amount NLX paid BOC on behalf of SFJ pursuant to its corporate guarantee for the loans that SFJ had obtained from BOC. The Tianyu Contract was valid for two years beginning from the day after NLX had repaid any loan amount to BOC.

9 On 31 August 2006, NLHL conducted a restructuring exercise to discharge their contingent liabilities from SFJ, thus fully disposing of SFJ as a subsidiary company.

10 On 4 December 2006, BOC filed a suit in China against SFJ and NLX to recover the outstanding loan amount of RMB 22.5 million. It obtained judgment on 1 February 2007. The Chinese court adjudged SFJ and NLX liable to make repayment to BOC for the said amount ("the Judgment"). NLX's appeal was dismissed on 16 August 2007.

11 On 6 June 2007, NLHL announced that Zhonglu Fruit Juice Co Ltd ("Zhonglu"), a Chinese company listed on the Shanghai Stock Exchange, had made an acquisition proposal for Go's shares in NLHL. If this was completed, Zhonglu would become the controlling shareholder of NLHL.

12 Between 18 September 2007 and 21 March 2008, NLX paid BOC a total of RMB 3 million over six tranches in accordance with the Judgment. These payments were only recorded in NLX's accounting books on 30 June 2008. On 29 June 2008, NLX signed a repayment schedule with BOC for the repayment of the remaining sum of RMB 19.75 million.

13 On 26 January 2010, NLHL announced that BOC had taken action against NLX for the repayment of the RMB 22.75 million. As a result of the repayment, NLX's liabilities would exceed its assets. NLX would be considered insolvent after making full provisions for the claim. This was the first time that NLHL had announced its obligations under the corporate guarantees that NLX had made in relation to SFJ. NLX's liability on the corporate guarantees to SFJ had crystallised as early as August 2006. When SFJ defaulted on the repayment of the February loan to BOC and notices of repayment were sent to SFJ and NLX ("the Crystallisation").

14 Rule 703 of the SGX Listing (SESDAQ) Rules read with Appendix 7 of the Listing Manual on Corporate Disclosure Police, provided that NLHL must announce any information known to it concerning its subsidiaries (in this case NLX), which was necessary to avoid the establishment of a false market i.e. where information that would or would likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell the securities, was not made available.

15 At the time of the Crystallisation, NLHL was reporting a net loss of RMB 12 million. At the end of the financial year of December 2006, NLHL was in a net current liability position. The Crystallisation, which represented a liability of RMB 22.75 million to NLHL, constituted information necessary to be disclosed to avoid the establishment of a false market. The information was likely to materially affect the price or value of NLHL securities. By intentionally failing to notify SGX of information relating to the Crystallisation until some four years later in January 2010, NLHL had contravened s 203(2) of the SFA.

The negligence by the three accused persons

16 As directors of NLHL, the three accused persons had duties including, but not limited to, ensuring that NLHL complied with the SGX Listing (SESDAQ) Rules.

17 Sometime before 22 July 2009, two drafts of a profit warning announcement ("PWA") were circulated to the directors, including the three accused persons. In these two PWA, it was made known that NLX's corporate guarantees to SFJ had crystallised. After the directors had approved the second draft PWA, a final draft PWA was circulated. In the final draft, all references to the provision of NLX's corporate guarantees to SFJ were removed. This final draft was subsequently approved by the directors. This final draft was issued by NLHL on 22 July 2009.

18 Therefore, as at 22 July 2009, all the three accused persons were aware that NLX's corporate guarantees to SFJ had crystallised. Yet between July 2009 and 26 January 2010, NLHL had failed to notify SGX of information concerning the Crystallisation. This failure by NLHL was attributable to the neglect of the three accused persons.

The case for the defence

Ngiam's defence

19 Ngiam denied that he had knowledge or was aware about the Crystallisation as at 22 July 2009. He had no executive functions within NLHL, was not involved in the day-to-day operations of the company and was also not involved in the management decisions made by it. As an independent director, he had to rely solely on the information provided to him by the

management and/or the executive directors of NLHL. He averred that all information in respect of the crystallisation of the Corporate Guarantees had been consistently concealed from him. The concealment and suppression of this information even extended to the external auditors, who were misled in the course of their audit.

Tham's defence

20 Tham's defence substantially mirrored that of Ngiam in that he did not have the knowledge or was aware about the Crystallisation as at 22 July 2009. Like Ngiam, he had trusted that the management of NLHL would provide them with accurate financial information promptly. Tham averred that his ignorance about the Crystallisation was the result of a concerted effort by the management of NLHL – Goh and Oh - to conceal that information from the independent directors.

Ong's defence

21 Ong's defence was that he and the other accused persons did not know about the information concerning the Crystalliation. This was mainly because Goh and Oh had taken active steps to intentionally conceal from them and other parties about the Judgment. These were active since February 2007. The lack of knowledge was supported by the testimonies of the accused persons, and the contemporaneous emails sent by them in relation to the draft PWAs.

The issues

22 The material issues before me were –

(a) Whether NLHL had intentionally failed to notify SGX the information about the Crystallisation.

(b) Whether NLHL's intentional failure to disclose the information was attributable to the neglect of the three accused persons.

(c) Was the Crystallisation information that had to be disclosed under Rule 703 of the SGX Rules. In this case, I noted that the information that had to be disclosed under Rule 703 must be of the nature that would "likely to materially affect the price or value of NLHL's securities".

Analysis of the evidence

Was the failure to disclose the information to SGX intentional?

23 Parties agreed that NLHL had first known about the Crystallisation sometime in 2009. However, it had only announced that information on 26 January 2010. As such, NLHL had failed to disclose the information to SGX between 2009 to 26 January 2010.

24 It was trite law that if the defendant was a body corporate, the body corporate would be attributed with the state of mind of the person or persons who was or were its directing mind and will: *MKC Associates Co Ltd and another v Kabushiki Kaisha Honjin and others (Neo Lay Hiang Pamela and another, third parties; Honjin Singapore Pte Ltd and others, fourth parties)* [2017] SGHC 317 ("*MKC Associates*"). In the present case, I would have to determine who the directing mind and will of NLHL was. The High Court in *MKC Associates* had made the observation, *inter alia*, that a person might be the directing mind and will for all purposes, or only for the purpose of performing a particular function. Therefore, I had to identify the person or persons who has/have management and control over NLHL in relation to the act or omission in question i.e., NLHL's failure to notify SGX about the Crystallisation.

25 It was not in dispute that the events leading up to the Crystallisation were handled primarily by Goh and Oh. Goh was the one who had liaised with the other companies involved in the corporate guarantee. He was also the one who had handled the negotiations with the banks. Goh, who was the only executive director of NLHL, was the main person on the board who was in charge of the company's operational matters. As such, it was natural and obvious that the board had left everything to him.

They had not issued any instructions to him on any matter relating to the corporate guarantee, save that Goh was to report to them thereafter[note: 2]. The activities leading up to the Crystallisation were also handled as day-to-day affairs of NLHL, which was handled by Goh and to a lesser extent, Oh[note: 3]. The other directors had only met as and when required, and these were usually during Board meetings[note: 4]. As such I agreed with the prosecution's submissions that, at least implicitly, Goh was the directing mind and will of NLHL insofar as the matters relating to the corporate guarantee were concerned.

26 As Goh and to lesser extent, Oh, were the directing mind and will of NLHL, the question whether the failure to disclose was intentional or not would be dependent on and should be established in reference to the mental states of Goh and Oh in relation to the events of the Crystallisation. Their intention in not disclosing the information despite possessing the knowledge of the facts was key. In my view, the evidence before me pointed to the conclusion that Goh and Oh had intentionally failed to disclose the information to SGX -

(a) Goh and Oh were the two principal actors running NLHL on a day-to-day basis at the material time. As the only executive director of NLHL, Goh was the main person on the Board who was in charge of all operational matters concerning the company.

(b) Goh was the first person at NLHL who possessed the information that SFJ had defaulted on their loan repayments to BOC, and that as a result, SFJ had received a demand for payment from BOC. This was evidenced by the fact that Goh had informed Oh of this fact sometime between 2006 and 2007[note: 5].

(c) Goh was also aware about the Judgment[note: 6]. Further he had informed Oh about it[note: 7]. In any event, Oh would have become aware of the Judgment by April 2007, when the shareholders' circular was issued[note: 8].

(d) Despite having the knowledge or was aware about the Judgment, neither men disclosed the information to SGX[note: 9]. As such, NLHL had intentionally failed to disclose the information to SGX.

27 I noted that Ong did not dispute that the actions of both Goh and Oh could be attributed to NLHL such that NLHL could be found to have acted intentionally when it had failed to disclose the relevant information. In fact, Ong had conceded that NLH had intentionally failed to disclose the information[note: 10].On the other hand, Ngiam and Tham had argued that it was inherently inconsistent for the prosecution to assert that NLHL had acted intentionally while at the same time asserting that the intentional act was attributed to the neglect of the three accused persons. I respectfully disagreed and I accepted the prosecution's arguments on this point. The offence under s 331(1) of the SFA envisaged a spectrum of different mental elements in which the company could commit the offence namely, intentionally, recklessly or negligently, as compared to the officer's "neglect". The spectrum of mental elements made available was a recognition of the reality that multiple individuals could be on the board of directors of companies, and each individual could have played different roles in the offence.

28 The defence also advanced the argument that the prosecution should have adduced evidence to address NLHL's *mens rea* on the primary offence or that they should have secured NLHL's conviction on the primary offence first. In essence, NLHL should be first convicted of the primary offence under s 203(2) of the SFA, before the accused persons could be convicted under s 331(1) of the SFA. This same submission was rejected by the High Court in *Abdul Ghani bin Tahir v PP* [2017] 4 SLR 1153 ("*Abdul Ghani*"), albeit in the context of s 59(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)("CDSA"). The question before the High Court in *Abdul Ghani* was whether a conviction of the body corporate was a prerequisite to a conviction under s 59(1) of the CDSA. The relevant provision, which was s 59(1)(b), provided that where an offence under the CDSA committed by a body corporate ***was proved*** to be attributable to any neglect on the part of an officer of the body corporate, the officer as well as the body corporate was guilty of the offence. This was significant because s 331(1) of the SFA had used the same language and the same word "proved".

29 The High Court in *Abdul Ghani* had held that it was not necessary for the body corporate to be first convicted before its officers can be lawfully convicted under the section. The prosecution only needed to establish that the body corporate had committed an offence under the CDSA. The High Court also made the observation that "[i]f Parliament truly intended for the body corporate to be convicted first before its officers [could] be convicted, the provision would have used the word convicted instead of proved". The same reasoning applied to the present case. Analysing the evidence adduced on the state of mind of both Goh and Oh at the relevant time, I was satisfied that it was proved that NLHL's failure to disclose the information concerning the Crystallisation to SGX was intentional.

Whether NLHL's intentional failure to disclose the information was attributable to the neglect of the three accused persons.

30 In answering the question above, there must have been a duty imposed on the three accused persons as directors to ensure that NLHL complied with the applicable laws and regulations, specifically its disclosure obligations under Rule 703(1) of the SGX Listing Rules. I accepted the prosecution's submission that as directors, they have the duty to ensure that NLHL complied with the disclosure requirements under the SGX Listing Rules. My reasons were set out below.

31 In s 157 of the Companies Act (Cap 50)("CA"), a director has the general duty to act *bona fide* in the best interest of the company. In this regard, I agreed with the prosecution's submission that ensuring that NLHL's disclosure obligations under Rule 703(1) of the SGX Listing Rules were complied with was an extension of that general duty: see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329. As a public listed company, it was in the interest of NLHL's shareholders that they be kept abreast of the true position of the company. In addition, compliance with the disclosure obligations under the SGX Listing Rules was also necessary to avoid the risk of subjecting NLHL to various liabilities. One of the liabilities was the possibility of the company being delisted from the SGX: see Rule 1305(1) of the Catalist Rules.

32 It was a surprise that the three accused persons accepted that they owed this general duty to NLHL. Ngiam and Tham had agreed that the whole board of directors of NLHL had to ensure that NLHL complied with the applicable rules and regulations, and that this included compliance with the SGX SESDAQ Rules which were applicable to NLHL at the material time[note: 11]. Ong had also agreed with the above but however added that his duty arose from the SGX Listing Rules and not from the CA. Therefore, each accused person owed various duties to NLHL. This included the duty to take reasonable diligence and to act in NLHL's best interest. These duties to NLHL were personal to them. They had the continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors. If they delegated certain functions in the discharge of their duties, they had the duty to supervise the discharge of these delegated functions: see *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] SGCA 41 at [130]("PlanAssure").

33 Having established that the three accused persons owed this duty, I had to determine whether they had been negligent in discharging this duty, and that the failure to disclose the Crystallisation by NLHL was attributed to their neglect. Something would be attributed to an officer's neglect when it was shown that the officer knew or ought to have known of the existence of facts requiring him to take steps which fell within the scope of the functions of his role to prevent the commission of the offence by the company, and he had failed to take such steps. Any degree of attribution would be sufficient to make out the charge. What mattered was whether the officer could and should have taken steps to prevent the offence, and not whether any steps if taken by the officer would more likely than not or most definitely have prevented the commission of the offence: *Abdul Ghani* at [63] and [76].

34 In analysing the question, the starting point would be s 157(1) of the CA. The provision required a director to act at all times honestly and to use reasonable diligence when discharging the duties of his office. In the present case, the relevant phrase would be "reasonable diligence". In *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 ("*Lim Weng Kee*"), the High Court held that the standard in relation to criminal breaches of s 157(1) of the CA was the same as the civil standard (at [30]). The test was whether the director had exercised the same degree of care and diligence as a reasonable director found in his position. If the director possessed some special knowledge or experience, then a higher standard of diligence would be expected of him (*Lim Weng Kee* at [28]). In the present case, I agreed with the prosecution that the three accused persons possessed special knowledge or experience by virtue of their professional qualifications and experience in corporate governance.

(a) Ngiam had a wealth of experience and knowledge of corporate financial matters. He had been a qualified chartered accountant for about 27 years at the material time. He had been the chairman of NLHL's audit committee from 2005. Tham and Ong had testified that Ngiam was recognised by the other members on the board of directors as a person with great professionalism and expertise, and that they trusted him. When Ngiam became the non-executive chairman of NLHL's board of directors from 2008, he was also a director in other listed companies, including the Hosen Group (a Singapore listed company) and Courage Marine (a Hong Kong listed company)[note: 12].

(b) Tham also was also very experienced in corporate governance. From 2006 to 2010, he was the Chief Operating Officer ("COO") of Novatera Capital Private Limited, a hedge fund company. As COO, he was in charge of corporate governance and back-office operations. And as an independent director of NLHL from 2006, he had sat as the renumeration committee, nomination committee and the audit committee[note: 13].

(c) Ong had held various positions in the legal industry, including the managing partner of DLA LLP from 2003 and Eversheds Singapore from 2009. Concurrently with his directorship of NLHL, he was also the director of various other listed companies and the Singapore Dance Theatre. Therefore, he possessed a wealth of knowledge about the duties of a director. H was also very experienced in corporate governance. As a legally trained lawyer, he would have a better appreciation of legal duties and compliance matters in relation to companies[note: 14].

35 The prosecution's case was premised on what they described as clear "red flags" present in the case, which they submitted, would have put the three accused persons on notice and gave them reason, as directors exercising reasonable care and diligence, to make further enquiries. These red flags arose from the process of drafting the three PWAs (see [17]) which were circulated to the board of directors, as well as the attendant exchange of communications concerning them. The prosecution's case was that despite these red flags, none of the accused persons had made further enquiries. Instead, they were content to rely on vague and bare assurances from Goh and Oh. In doing this, they had failed to exercise reasonable care and diligence. As such, they had been neglect in their duty. And it was this neglect that led to the failure by NLHL to disclose information concerning the Crystallisation.

36 Between June to July 2009, three versions of the draft PWA were circulated via email to the three accused persons in their capacity as directors of NLHL. At this time, the three accused persons were also sitting on the Audit Committee of NLHL.

37 The prosecution's case was that the first and second PWA drafts had contained sufficient information to indicate that the Crystallisation of the corporate guarantee had taken place: The first draft[note: 15] had expressly stated that a full provision has been made by the Group for liability under a guarantee given by NLHL's subsidiary, NLX in respect of banking facilities granted to SFJ. The amount of the full provision was also stated (RMB22,750,000). The second draft[note: 16] had also added that notwithstanding that the Group had already made a full provision for the corporate guarantee, the Group would also be discussing with BOC for a staggered repayment schedule for NLX to pay its liability under the said corporate guarantee. I agreed with the prosecution that on the plain reading of these two draft PWAs, the three accused persons would have been put on notice about the presence of a corporate guarantee given by NLHL's subsidiary, NLX for RMB 22,750,000, and that the Group had decided to make full provision for that amount. In addition, the Group would be negotiating with BOC for a staggered repayment schedule for the amount.

38 Ngiam's email responses pursuant to these two draft PWAs showed that he was aware about the corporate guarantee for RMB 22, 750,000. In his email in response to the first draft PWA, he had asked Oh whether NLHL had been served with the writ or notice from BOC, and NLHL's counteraction if any. Ngiam confirmed that the email was sent to find out the basis for making the full provision ie, whether BOC had started a lawsuit or had made a demand[note: 17]. However, Ngiam's queries were left unanswered. Instead, Oh had replied that the PWA was in the process of being re-drafted. Shortly after that, the second draft PWA was circulated to the three accused persons. In response to the second draft, Ngiam had sent an email stating that NLHL would need to prepare answers for the expected queries from SGX concerning the claims and counterclaims[note: 18] because *inter alia*, the amount was a significant one[note: 19]. The reference in the second draft PWA to a staggered repayment schedule clearly pointed to the possibility that BOC had issued a write or had demanded for payment. Ngiam's mention of claims and counterclaims in his email response showed that he was acutely aware of this possibility.

39 I therefore found that the three accused persons would have been in possession of information that pointed to or was highly suggestive of the fact that the Crystallisation had occurred. At the very least, the information would have provided more than sufficient basis for them to make further enquiries or checks to confirm if the Crystallisation had indeed occurred. They should have made further enquiries especially in light of the fact that Oh had not answered any of the queries raised by Ngiam in his emails.

40 After Ngiam had sent the email in response to the second draft PWA, the third draft PWA was circulated[note: 20]. Interestingly, this third draft had omitted any mention about the corporate guarantee, or the full provision that was made, or the negotiations for a staggered repayment. Ngiam himself had considered this omission to be a significant change given that the amount involved was huge[note: 21]. He had immediately called Oh about it. Ngiam testified that Oh had informed him that

Go would be settling the matter with the bank directly, and therefore the provision was no longer needed[note: 22]. Tham confirmed that Ngiam had conveyed to him what Oh had said[note: 23]. Ong on the other hand, was not able to recall if he had spoken to Ngiam after he had received the third draft PWA[note: 24]. What was noteworthy about the conversation between Ngiam and Oh was that, pursuant to that conversation, nothing else was done by the three accused persons.

41 I found that given the red flags, and the lack of clarity over the status of the corporate guarantee, the accused persons had the duty to conduct further inquiries. Ngiam himself had admitted that although he understood that Go was going to settle the liability, there was no confirmation whether the liability had been settled, or when Go would settle it[note: 25]. There were also many possibilities as to how Go would settle the corporate guarantee[note: 26], and each of these possibilities might affect NLHL's financial position in different ways. For example, it might be have to be reflected in the company's books. The time it was settled would also affect whether the liability had to be included in the PWA[note: 27].

42 Ngiam and Tham had simply relied on Oh's bare assurance that Go would settle the matter. Ong, on the other hand, had taken a backseat role and had relied wholly on Ngiam to do the necessary checks. In essence, Ong had merely rubber-stamped Ngiam's decisions on the matter. As directors, having been made aware of the relevant facts as set out in the paragraphs above, and having knowledge that it was not uncommon for unauthorised guarantees to have been given in China[note: 28], which bound companies there like SFJ, it was imperative for them to conduct further checks and inquiries into the information emanating from China. As Ong had acknowledged, one could not simply take information at face value.

43 Yet, this was what the three accused persons had done. Ngiam had stated that he did not press Oh for answers when Oh had not given any because he had trusted Oh. He had also believed that he could rely on the auditors to ascertain if there were any writ or notice issued by the bank and management[note: 29]. Tham had stated that there was no reason for them to have not trusted the information furnished by Oh when he said the full provision was a proactive act by the management, and that Go was settling the matter with Zhonglu. Tham trust in Go was premised on the fact that Go had never failed them before. Second, being CFO, Oh would have been forthright and therefore would have said so if there was indeed a writ or notice[note: 30]. The three accused persons also pointed to the fact that the auditors had not detected any fraud in the preparation of the audited statements, so therefore there should be no fraud. It would then not make any sense for the directors to say that the auditors were not doing their job[note: 31]. Ong had also been very happy to rely on Ngiam, Tham and to some extent, Go on the matters at hand. In fact, he had laid bare the high level of deference and respect that he had for Ngiam. This deference explained his readiness to always agree with Ngiam's decisions. He went so far as to admit that he would not have taken steps to make further inquiries on his own even if he was not happy with Ngiam's decisions, because he would have been satisfied that it had been sorted. Ong had also stated that he was reasonably satisfied that the matters had received proper consideration by the relevant and appropriate people[note: 32].

44 The defences above necessarily failed on account of the case of *PlanAssure* (see [33]). In other words, the accused persons could not fall back on the defence that they had relied on Go, or Oh or the external auditors, or the other directors, and that they had trusted the information from these sources as accurate. Bare reliance on the representations made by other parties were insufficient to satisfy the discharge of their duty as directors. In doing so, they had fallen short of the standard of diligence expected of a director in their position and with their experience. In the case of Ong, he was entitled to rely on the professional advice of his fellow directors, like Ngiam. However, he may do so only if he made proper inquiry where the need for inquiry is indicated by the circumstances: see s 157C(1) read with s 157C(2) of the CA. In this case, the circumstances were such that there was a need for a proper inquiry. This was because the email thread between Ngiam and the management of NLHL, of which Ong was privy to, had lacked clarity concerning the corporate guarantee. He should have made his own inquiry with Oh or Go to clear the ambiguity. He was not entitled to rely wholly on Ngiam's advice.

45 The reliance on the auditors were also insufficient to discharge their duties as directors. This was because the auditor's report did not give any details as to why NLX was no longer providing the corporate guarantee, other than to state that it had been removed. The three accused persons also admitted that this issue was not discussed during the audit committee meeting. Despite acknowledging that the corporate guarantee was an important point in the company's accounts, they had not even asked to see the relevant documents that would have been provided to the auditors. Having failed to exercise their supervisory function over the auditors, they could not now say that they had relied on the report and therefore they had discharged their duty.

46 In conclusion, I found that the three accused persons had been neglect in their duties as directors of NLHL.

Was the Crystallisation information that required disclosure?

47 The answer to the above question turned on the phrase which was contained in the charges against the accused persons, which was, "likely to have a material effect on the price or value of NLHL's securities". The Court in *Madhavan Peter v PP and other appeals* [2012] 4 SLR 613 ("Airocean case"), had clarified that this phrase referred to information which was likely to have a significant change in the price or value of the securities of the company.

48 The prosecution's case was that the present situation fell within two of the categories of events in Appendix 7A of the SGX Catalist Rules, that were "likely to require immediate disclosure". The two categories of events were –

(a) The occurrence of an event of default under debt or other securities or financing or sale agreements; and

(b) Significant litigation.

49 I agreed with the prosecution that SFJ's default on the loan to BOC which led to NLX being liable to BOC under the corporate guarantee was an event of default under a debt or financing or sale agreement. I also agreed that the resulting suit and judgment obtained by BOC against SFJ and NLX constituted significant litigation. This was because the loss making NLHL group had been sued by BOC for enforcement of a large sum, and there was already partial repayment made.

50 The prosecution submitted that, in considering whether the test in the *Airocean case* was satisfied, I should take into account the various scenarios set out in Appendix 7A to the SGX Catalist Rules. This was because these were specific events that SGX, as the regulator of all SGX listings in Singapore, considered as that which would likely have a material effect on the price or value of the securities of the company, and therefore required immediate disclosure. This, the prosecution submitted, added weight to the conclusion that the said information would likely have had a significant change in the price or value of NLHL's securities, if it had been announced to the public. That conclusion was further supported by the evidence of the relevant prosecution witnesses namely, Oh, Go, Gladys Tay Hui Fang ("Gladys Tay") and Chai Chon Fatt ("Chai"). Gladys Tay was the vice president of SGX Regulation, Listing Compliance Unit from 2008 to-date. Chan was the engagement partner of LTC LLP, an external auditing firm, which was charged with auditing NLHL in 2010.

51 Oh and Go had pleaded guilty to the offence under s203(2) of the SFA for failing to disclose the Crystallisation of the corporate guarantee and the subsequent judgment obtained by BOC. They had admitted to the statements of facts which, *inter alia*, stated that the Crystallisation constituted information necessary to be disclosed to avoid the establishment of a false market i.e., information which was likely to materially affect the price or value of NLHL's securities. Oh had also confirmed this fact in court. He had explained that if the Crystallisation appeared in the balance sheet of the company, then it would affect NLHL's financial position, as it would be reflected as a big loss to NLHL[note: 33].

52 Gladys Tay testified that the information required disclosure for the following reasons –

(a) There was a default on the loan on 17 August 2006 and the notice of repayment was received by NLX on 19 August 2006.

(b) There was significant litigation, in that, BOC had commenced proceedings against NLX, and obtained the Judgment in February 2007.

(c) The quantum of the debt obligation that resulted was large (RMB 22.75 million). It threatened NLHL's viability as a going concern, especially when NLHL was in a loss-making position as of 2005 and 2006. If the liability from the Crystallisation was taken into account in NLHL's books, NLHL would be in a net liability position. Accordingly, the information would affect the investment decision of investors[note: 34].

(d) A repayment scheme had been entered into by NLHL and BOC on 29 June 2008.

53 Chai testified that the sum involved in the Crystallisation was a material sum, which if it was reflected in NLHL's balance sheet, it would render NLHL insolvent. For this reason, the information should be disclosed to SGX. In the report by LTC LLP to the Minister of Finance, it was stated that enforcement action by BOC on the corporate guarantee constituted an event of default and/or significant litigation because the amount involved constituted 37% of the Group's bet tangible assets as at 31 December 2006[note: 35].

54 Lastly, the prosecution also highlighted that all three accused persons were also of the view that the information had to be disclosed. Ngiam and Tham had agreed that the information concerning the claim and judgment should be disclosed. Ngiam had said that this was stipulated in the relevant Rules, and that this obligation to disclose remained even though there was still no clarity about the information[note: 36]. Ong also agreed that his understanding of the Rules was that the said information was required to be disclosed. He also agreed that the liability of RMB 22.75 million would affect not just NLX's balance sheet, but also that of the Group[note: 37]. Their knowledge was consistent with the explanation given by them on why they thought Go had concealed the information from them. Ngiam and Tham had said speculated that this could have been because Go had wanted to ensure that the sale of his shares to Zhonglu was not affected. They believed that the information could affect the value of NLHL or its shares, which would adversely affect the negotiations with Zhonglu.

55 The defence argued that all the prosecution had managed to show was that there would be a material impact on NLHL's accounts if the actual loss of RMB 22.75 million was recorded in its accounts. This was not the same thing as evidence that there would be a material impact on the price or trading volume of NLHL's shares. Also, the evidence led by the prosecution was not sufficient to establish beyond reasonable doubt that the non-disclosure had a material impact on the price or trading volume of NLHL's shares. The defence cast doubt on Gladys Tay's credentials as an expert because she had only compared NLHL's financial position in 2009 and 2010, and not at the time when the primary offence was committed in August 2006 and February 2007.

56 Establishing the materiality of the information was an essential ingredient to the offence under s 203 of the SFA. In the Airocean case, Chan Sek Keong CJ (as he then was) held that the prosecution had to show materiality of the information that was relevant to "*the subject matter concerned*", by establishing that the information "*must have some significant effect either on the behaviour of investors in subscribing for, buying or selling securities, or on the price or value of securities*". In the Airocean case, the directors of Airocean were charged with consenting to the reckless non-disclosure of certain material information, which was, that between 8 September and 1 December 2005, Airocean's CEO had been questioned by the Corrupt Practices Investigation Bureau (CPIB) in relation to two transactions involving Airocean's two subsidiaries, and that Airocean had not announced that its CEO had been released on bail and that his passport had been impounded.

57 Chan CJ stated that the word "*material*" must necessarily refer to the information that was likely to effect a significant change in the price or value of NLHL's securities (at [43] of the judgment), and not *merely be likely to affect* the price or value of its securities (at [60] of the judgment). He cautioned that the question whether the information in question was likely to materially affect the price or value of NLHL's shares was a question of mixed law and fact for the court, and not for the expert, to decide (at [68] of the judgment). Chan CJ held that it was essential to consider the evidence of the market impact after the announcement was released, and it was necessary to determine what information disclosed in the announcement caused the movements in the shares (at [97]).

58 The High Court in the Airocean case determined that the market impact evidence that should be considered were –

(a) The announcement on 25 November 2005 which a reasonable reader would have understood as stating that the Airocean's CEO was being investigated by CPIB in connection to Airocean's affairs.

(b) The announcement on 2 December 2005 which had disclosed the relevant two transactions involving the subsidiaries.

59 The High Court held that the contents of the 25 November 2005 announcement were really significant, while the two transactions were mere detail (at [96] of the judgment). It also found that over a period of two weeks, Airocean's share prices had "fluctuated within a relatively small band of prices and at times reached the same price as that around 23-24 November 2005". This gave rise to a reasonable doubt as to whether the two announcements had a material effect on the share price within that time period (at [98] and [99] of the judgment). The High Court noted that the above was the best available market

impact evidence for determining whether the information was likely to have a material effect on the price of Airocean's shares, and while it was not conclusive, it gave rise to a reasonable doubt "*in the absence of any other material contributory factor*" (at [100] of the judgment).

60 Of more critical importance was the guidance laid down by the High Court on how evidence of materiality of the information in relation to the share prices of the company should be presented to the court (at [101 of the judgment) –

(a) The expert witnesses were expected to clearly explain the basis for their conclusions by referring to the facts. They should refer to any relevant material, for example, literature and market behaviour studies in similar circumstances, which might support or detract from their views.

(b) In the context of an expert opinion on the materiality of information in relation to a company's share price, for example, it would be useful for the expert to refer to reports by financial analysts.

(c) A careful study of the actual market impact of the relevant information would be useful. In this context, it would be prudent for the expert to consider and draw the court's attention specifically to the possibility of other macroeconomic or sector-specific factors which might have contributed to the change in share prices.

61 Applying the guidance above, I agreed with the defence that Gladys Tay's evidence for concluding that the information concerning the Crystallisation and Judgment would have a material impact of the price of NLHL' shares fell short of the requisite requirement of proving the materiality of the information beyond reasonable doubt. In her testimony, she did not address the materiality of the information to investors with reference to NLHL's financial condition from 2009 to 26 January 2010, which was the period specified in the charge. She had only addressed the period up to 2008, after the repayment scheme had been agreed upon. She had admitted that she had not referred to the financial statements for 2009 and 2010. She had determined the significance and materiality of the information with reference to NLHL's financial condition from 2005 to 2007. She stated that in her view the balance sheet and profit and loss of NLHL would be affected if the RMB 22.75 million was reflected as an additional loss in the balance sheet. However, she had not provided an explanation why this would impact investors' behaviour given that the investors would have already known that NLHL was technically in an insolvent position as reflected in their accounts for the financial year 2005 and the unaudited accounts up to June 2006. The fact that the sum was large or significant did not automatically lead to the conclusion that therefore the information was material, in that, it would result in a significant change on the price or value of NLHL's shares. At most, it would be a highly persuasive factor in that general direction. However, it was still necessary for the prosecution to adduce evidence that the information would have an impact on an investor's behaviour and therefore on the company's share price.

62 Chai's explanations on the materiality of the information were in substance similar to that of Gladys Tay. In the same vein, his evidence fell short of proving the materiality issue beyond reasonable doubt.

63 Lastly, the accused persons' subjective views on what information would be material and therefore required disclosure under the Rules was irrelevant. The prosecution held the burden of proving their case beyond reasonable doubt. They could not rely on gaps or weaknesses in the defence's case to plug the inadequacies in their own case.

64 I therefore acquitted the three accused persons on their respective charges.

Conclusion

65 The prosecution has lodged an appeal against the order of acquittal.

[note: 1]The SESDAQ was replaced with the Catalist listing platform on 26 November 2007.

[note: 2]NE Day 2, page 20 line 14 to page 22 line 14; NE Day 9, page 47 lines 26-32; NE Day 10, page 104 line 1 to page 105 line 6; page 105 lines 14-28; NE Day 12, page 92 lines 15-26; NE Day 13, page 101 lines 1-4.

[note: 3]NE Day 1, page 26 lines 5-10; NE Day 9, page 9 line 29 to page 10 line 13; page 12 line 5 to page 13 line 6.

[note: 4]NE Day 9, page 5 line 18 to page 6 line 4; NE Day 11, page 87 line 25 to page 88 line 32; page 91 lines 16-19;

[note: 5]NE Day 1, page 29 line 32 to page 30 line 8.

[note: 6]Annex R of the Statement of Agreed Facts (pages 235-236); Goh's Statement of Facts, at [19].

[note: 7]NE Day 3, page 7 lines 13-16.

[note: 8]Annex D of the Statement of Agreed Facts; NE Day 1, page 37 lines 5-12.

[note: 9]NE Day 2, page 4 line 27 to page 5 line 17; NE Day 2, page 5 line 5 to page 6 line 7; page 36 line 2 to page 37 line 17.

[note: 10]Ong's Closing Submissions at [130-131] and [133-135].

[note: 11]NE Day 9, page 102 lines 10-30; Day 11, page 120 lines 11-21.

[note: 12]NE Day 9, page 76 lines 5-26, page 84 line 32 to page 87 line 24; Day 11 page 5 line 29 to page 6 line 8; Day 13, page 114 lines 7-19, page 115 line 28 to page 116 line 2.

[note: 13]NE Day 11, page 2 lines 25-30, page 86 line 13 to page 87 line 18.

[note: 14]NE Day 12, page 176 line 26 to page 177 line 30.

[note: 15]Exhibit P12.

[note: 16]Exhibit P13.

[note: 17]NE Day 9, page 33 lines 2-9.

[note: 18]Exhibit P11, email dated 13 July 2009 (2.46 am).

[note: 19]NE Day 10, page 67 line 30 to page 68 line 4; page 80 line 22 to page 81 line 3.

[note: 20]Exhibit P14.

[note: 21]NE Day 9, page 46 lines 17-20; Day 10, page 104 line 1 to page 105 line 6.

[note: 22]NE Day 9, page 46 line 17 to page 47 line 32.

[note: 23]NE Day 12, page 92 lines 15-26.

[note: 24]NE Day 13, page 91 lines 12-22.

[note: 25]NE Day 10, page 105 line 32 to page 106 line 4; page 111 lines 20-23.

[note: 26]NE Day 10, page 107 line 4 to page 108 line 7.

[note: 27]NE Day 10, page 109 lines 2-26.

[note: 28]NE Day 12, page 116 lines 8-21.

[note: 29]NE Day 9, page 49 line 32 to page 50 line 13; Day 10, page 140 line 21 to page 141 line 6.

[note: 30]NE Day 11, page 50 line 23 to page 51 line 11.

[note: 31]NE Day 11, page 81 line 3 to page 82 line 5.

[note: 32]NE Day 12, page 165, lines 20-27; page 169 lines 9-22.

[note: 33]NE Day 1, page 45 lines 27-29.

[note: 34]NE 16 Nov 20, page 14 line 12 to page 16 line 32; page 29 lines 7-18.

[note: 35]NE Day 6, page 7 line 19 to page 8 line 8.

[note: 36]NE Day 10, page 9 lines 2-28.

[note: 37]NE Day 13, page 153 line 13 to page 154 line 26.

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