Lee Chiang Theng v Public Prosecutor and other matters [2011] SGHC 252

Suit No:	Magistrate's Appeal No 344 of 2010, Criminal Motion Nos 8 and 36 of 2011
Decision Date:	22 November 2011
Court:	High Court
Coram:	V K Rajah JA
Counsel:	Kirpal Singh (Kirpal & Associates) for the appellant in MA 344 of 2010, applicant in CM 8 of 2011 and respondent in CM 36 of 2011; Gillian Koh Tan, Han Ming Kwang, Kan Shuk Weng and Gail Wong (Attorney-General's Chambers) for the respondent in MA 344 of 2010 and CM 8 of 2011 and applicant in CM 36 of 2011.

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Criminal Procedure and Sentencing

EMPLOYMENT LAW

IMMIGRATION

Judgment

22 November 2011

V K Rajah JA:

Introduction

1 Some employers view the recruitment of unskilled workers as a purely commercial enterprise bereft of any serious responsibilities for these workers' well-being. This is altogether wrong. Foreign workers are unquestionably not chattel like the slaves of less enlightened times. Like any other employees, they have basic rights that must be strictly respected. A contract of employment with any employee, regardless of his origins, has at its core the creation of a sense of financial security, identity and self worth. Just as an employee must faithfully discharge his contractual responsibilities, an employer has to discharge his obligations to his employees in a timely and appropriate manner. Unskilled foreign workers, in particular, cannot ordinarily seek alternative employment, often have difficulties communicating, are reliant on their employers for appropriate accommodation, have no financial safety net and are therefore especially vulnerable. They are, in a nutshell, entirely dependent on their employers for both their financial security and welfare. A cavalier failure by an employer to appreciate the serious responsibilities concerning these workers' welfare can have profoundly unpleasant consequences.

2 Indeed, such an instance is exemplified in the lead up to the present proceedings – 60 aggrieved foreign workers had assembled *en masse* at the Ministry of Manpower (the "MOM") to air their grievances over being unpaid and were seeking redress from the MOM. Even more disturbing is the fact that these 60 foreign workers recruited by Mr Lee Chiang Theng (the "Appellant") had been also housed in unapproved and overcrowded accommodation without satisfactory sanitary facilities. Investigations revealed that there was a chicken pox outbreak that infected two of the Appellant's foreign workers. This outbreak was exacerbated by the severely deficient housing conditions. Tragically one of these two foreign workers passed away.

3 The present proceedings centred on the nature of some of the responsibilities of an employer and the obligations undertaken when foreign workers are brought into Singapore. The Appellant faced a total of 100 charges under the Employment of Foreign Manpower Act (Cap 91A (as amended by the Employment of Foreign Workers (Amendment) Act 2007 with effect from 1 July 2007)) (the "EFMA"). He pleaded guilty to 33 charges, *viz* two charges under s 22(1)(*a*) read with s 20 for failing to provide acceptable accommodation for foreign workers (the "accommodation charges"), 24 charges under s 22(1)(*a*) read with s 20 for failing to pay the salaries of foreign workers on time (the "salary charges") and seven charges under s 5(1) read with s 20 for employing foreign workers without valid work permits (the "work permit charges"). The Appellant, nevertheless, also consented to the other 67 charges being taken into consideration for the purposes of sentencing, *viz*, 49 salary charges, 13 work permit charges and five accommodation charges.

4 The Appellant was eventually sentenced by a district judge to a fine of $4,000, in default four weeks' imprisonment per charge for the accommodation charges and work permit charges. For the salary charges, the Appellant was sentenced to one weeks' imprisonment per charge with four charges (*ie*, District Arrest Case ("DAC") Nos 16480–16483 of 2009) to run consecutively. In total, the Appellant was sentenced to four weeks' imprisonment and a fine of $36,000, in default 36 weeks' imprisonment. The Appellant paid the fine in full for the accommodation and work permit charges and then appealed only in respect of the sentence arising from the salary charges on the ground that the sentence meted out by the district judge was manifestly excessive.

5 For the sake of completeness, it should be noted that Criminal Motion No 8 of 2011 was filed by the Appellant to adduce further documentary evidence regarding his conduct in managing the workers and Criminal Motion No 36 of 2011 was filed by the Prosecution to adduce additional evidence in the form of affidavits to answer the questions I posed at the first hearing for this appeal on 22 February 2011 (see [23] below). Both Criminal Motions were eventually allowed with the consent of the parties.

6 After hearing full submissions from both sides, I dismissed the appeal and now give my detailed grounds of decision.

The legislative framework

7 Before examining in greater detail the facts relevant to the present case, I pause to make some observations on the legislative framework governing the employment of foreign workers in Singapore.

8 Prior to the enactment of the EFMA in July 2007, the applicable legislation governing the employment of foreign workers was the Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed) (the "EFWA"). The EFWA was itself enacted to replace the Regulation of Employment Act (Cap 272, 1985 Rev Ed) (the "REA"). Both the REA (enacted in 1965) and EFWA (enacted in 1991) were enacted for the primary purpose of regulating the inflow of foreign workers (see, respectively, *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 478 (Jek Yeun Thong, Minister for Labour) and *Singapore Parliamentary Debates, Official Report* (4 October 1990) vol 56 at cols 448 and 456 (Lee Yock Suan, Minister for Labour)). In 2007, Parliament passed the Employment of Foreign Workers (Amendment) Act 2007, which took effect as of 1 July 2007. Pursuant to the said amendment, the EFWA was renamed to its present name (*viz*, "EFMA") to reflect the broader coverage of the amended legislation – *inter alia*, the EFMA consolidated the legislative authority for *all* work passes (which were previously regulated through different statutes), increased the penalties for selected offences involving foreign workers, introduced new offences and augmented the powers of Employment Inspectors to facilitate enforcement efforts.

9 For the purposes of the present case, however, it should be noted that the EFMA did not increase penalties for offences related to contravention of the conditions of foreign workers' work passes (see s 22(1)(*a*) of the EFWA, *cf* s 22(1)(*a*) of the EFMA). Nonetheless, the importance of regulating employers of foreign workers was clearly expressed in Hansard across the years. When moving the amendment bill in 2007, Dr Ng Eng Hen, then the Minister for Manpower, stated that (*Singapore Parliamentary Debates, Official Report* (22 May 2007) vol 83 at col 928):

> The ability of our companies to access foreign manpower is a comparative advantage. But our foreign worker policy cannot be based on a *laissez-faire* approach, which will be detrimental to our overall progress. **To protect the well-being of foreign workers, we have imposed conditions on employers for their housing, remuneration and medical coverage**. …
>
> Workers seeking better employment opportunities abroad is an integral feature of globalisation and benefits both sending and receiving countries. But we should also recognise that there are syndicates which exist in many countries that seek to exploit vulnerable foreign workers. **Many exact payment through empty promises of work, only to leave them hapless and stranded in dire straits**, especially in those countries which have porous systems or weak enforcement. And from time to time, it happens here and is picked up by the press. …
>
> [emphasis added in bold]

10 In a subsequent Parliamentary session, it was noted by Mr Gan Kim Yong ("Mr Gan"), then the acting Minister for Manpower that (*Singapore Parliamentary Debates, Official Report* (21 October 2008) vol 85 at col 499):

[T]he Ministry takes a serious view of employers who do not give their foreign workers work and those who do not pay their salaries. … Up to September this year, we have prosecuted and fined nine employers for non-payment of salaries, out of which two cases involved foreign workers. Members may recall that earlier in 2007, this House passed changes to the Employment of Foreign Manpower Act to increase the penalties for offences under the Act. …

…

… I would like to take this opportunity to remind employers that they should **ensure foreign workers they bring in are gainfully and productively employed**. When the services of the **workers are no longer required, the employers should terminate the contracts and facilitate the workers to return to their home countries**.

[emphasis added in bold]

11 Under the EFMA, employers owe heavy responsibilities to their foreign workers. The bulk of these responsibilities are set out in the First Schedule to the Employment of Foreign Manpower (Work Passes) Regulations (Cap 91A, Reg 2, 2009 Rev Ed). Pursuant to s 22(1)(a) of the EFMA, the contravention of any condition of a foreign worker's work pass attracts sanctions as specified in the EFMA. Part II of the said Schedule ("Part II") is of greatest relevance to the present case as the foreign workers concerned here are not domestic workers. In brief, under Part II, employers are responsible for, *inter alia*:

(a)
The foreign employee's upkeep and maintenance in Singapore, including the provision of medical treatment (subject to certain conditions) (para 3 of Part II);
(b)
Providing safe working conditions and taking measures that are necessary to ensure the safety and health of the foreign employee at work, as well as providing acceptable accommodation as prescribed by laws, regulations, directives, guidelines, circulars and other government instruments (*ibid*, at para 4);
(c)
Purchasing and maintaining medical insurance (*ibid*, at para 5); and
(d)
Paying the salary (including allowances) due to the foreign employee not later than seven days after the last day of the salary period (which must not exceed one month) (*ibid*, at para 6), regardless of whether there is actual work for the foreign employee (*ibid*, at para 7).

12 With this unambiguous and non-delegable legislative framework of employer responsibilities in mind, I turn next to examine the pertinent background facts of the present case.

Background facts

13 The Appellant is the sole registered director of M/s Goldrich Venture Pte Ltd (previously known as "P.A. San Venture") ("Goldrich") and M/s Gates Offshore Pte Ltd ("Gates Offshore"). The Appellant stated that he was invited by the Chief

Executive Officer ("CEO") of a marine engineering and construction company, Halcyon Offshore Pte Ltd ("Halcyon"), Mr Ong San Khon ("Mr Ong"), to incorporate a resident contractor ("Resident Contractor") for Halcyon in 2007 (see [24] below for elaboration on the concept of a Resident Contractor). Halcyon was successfully classified as a sponsoring shipyard ("Sponsoring Shipyard") on 3 March 2008 (see [24] below for elaboration on the concept of a Sponsoring Shipyard). The Appellant thus incorporated Goldrich and was granted the status of Halcyon's Resident Contractor by the MOM on 11 March 2008. Goldrich was given a quota of 200 foreign workers by Halcyon, its Sponsoring Shipyard. After the Appellant brought almost 200 workers into Singapore from Bangladesh, Halcyon's projects did not materialise. The Appellant submitted that he brought the foreign workers in the batches as follows:

Months in 2008	Total No of Workers
March	9
April	39
May	64
June	30
July	30
August	4
September	8
October	3
Total	**187**

14 As a consequence, the foreign workers had no work. In mitigation, the Appellant pointed out that Mr Ong constantly assured him that projects were on their way and that the workers should be retained pending the commencement of these projects.

15 The Appellant claimed that in May 2008, Mr Ong proposed that he (the Appellant) incorporate yet another company to serve as a Resident Contractor for Halcyon because Halcyon needed more workers for huge ship repair projects in the future. To this end, the Appellant incorporated Gates Offshore in May 2008 and Gates Offshore was granted the status of Halcyon's Resident Contractor by the MOM on 30 June 2008. Gates Offshore was given a quota of "400 plus" foreign workers by Halcyon. These "400 plus" workers were brought from Bangladesh in the batches as follows:

Months in 2008	Total No of Workers
July	17
August	62
September	100
October	68
November	173
December	11
Total	**431**

Unfortunately, once again, the marine projects promised by Halcyon were delayed and these "400 plus" foreign workers brought in had no work too.

16 As the case below proceeded on the basis that the Appellant brought in 610 workers through Goldrich and Gates Offshore, I shall adopt this figure notwithstanding that a summation of the numbers in the tables reproduced at [13] and [15] suggest a total of 618 foreign workers had actually been affected. After Halcyon's projects failed to take off as planned, the Appellant could not pay the salaries of his 610 foreign workers. Fortunately, when the MOM investigated the failure to pay the salaries of the foreign workers after the assembly of the 60 foreign workers at the MOM for redress, the Appellant was able, with the assistance of his insurers, *ie*, EQ Insurance Co Ltd, Maybank General Assurance Bhd and Liberty Insurance Pte Ltd (the "Insurers"), to pay all the salaries, the transport cost of the repatriation and an additional cash allowance of $500 per worker. The Appellant is now indebted to the Insurers in the sum of $544,695.00 for the payments made on behalf of Gates Offshore and $282,879.00 for the payments made on behalf of Goldrich. The Appellant has given a personal undertaking to pay $617,626.66 to EQ Insurance Co Ltd in monthly instalments of $15,000.

17 Although the Appellant had failed to pay salaries to most of his 610 workers, the Prosecution only charged the Appellant with regard to 73 workers with the Appellant pleading guilty to 24 of the salary charges and the other 49 salary charges taken into consideration for the purposes of sentencing. The details for the 23 salary charges involving 23 workers in relation to Goldrich are tabulated as follows (see also the district judge's grounds of decision in *Public Prosecutor v Lee Chiang Theng* [2010] SGDC 446 ("GD") at [4]):

DAC No	Period of Non-Payment of Salary	Amount Unpaid
16480–16488/2009	8 July 2008 to 8 January 2009	$26,697.24
16489–16498/2009	8 August 2008 to 8 January 2009	$27, 318.33
16499/2009	8 September 2008 to 8 January 2009	$2194.32
16500–502/2009	8 October 2008 to 8 January 2009	$5301.90

18 The details for the salary charge involving one worker in relation to Gates Offshore is tabulated as follows (see GD at [5]):

DAC No	Period of Non-Payment of Salary	Amount Unpaid
16503/2009	8 December 2008 to 8 January 2009	$504.90

19 After MOM completed its investigation, on 2 January 2009 Halcyon and its Resident Contractors (including Gates Offshore and Goldrich) were removed from the sponsorship scheme. Simultaneously, the MOM also revoked the work permits for workers employed by Gates Offshore and Goldrich. Halcyon was re-classified as a non-sponsoring shipyard. It has not, to date, regained its status as a Sponsoring

Shipyard. Gates Offshore and Goldrich were then re-classified as common contractors, *ie*, free to deploy their workers at any of the Sponsoring Shipyards in Singapore.

20 In relation to the accommodation charges, the Appellant had breached a condition of the work pass of two foreign workers by failing to provide acceptable accommodation for them (*viz*, Mr Md Mahmudul Hassan Md Abu Rayhan for a period of two months and 28 days and Mr Md Abbas Molla Md Hemayet Molla for a period of three months and 20 days). They were housed in an industrial/factory unit not designated as workers' accommodation and did not have the Urban Redevelopment Authority's approval to convert the unit into a dormitory. This particular accommodation was flagrantly overpopulated with 1,182 foreign workers from 19 companies being housed together in the same premises. Photographs taken of the overcrowded workers' accommodation showed that space was grossly over congested; many workers were forced to occupy the same room and it appeared that some workers were not provided beds. In short, the standards of accommodation were entirely unacceptable when measured by any civilised standards.

21 In relation to the work permit charges, M/s S1 Engineering Pte Ltd ("S1 Engineering"), of which the Appellant was the director, employed seven foreign workers without valid work permits for the period from 19 March 2008 to 1 October 2008, a total of seven months and 12 days. The said workers had valid permits to work for M/s Tipper Corporation Ltd ("Tipper") but instead were assigned to work for S1 Engineering. The director of Tipper, Mr Lok Siew Fai @ Loke Siew Fai ("Lok"), had approached the Appellant to supply some foreign workers to work for S1 Engineering. The Appellant agreed to Lok's proposal. These workers carried out cleaning jobs and insulation of pipes, working from 8.00am to 5.30pm daily with a salary of $17 per day. There were no allegations, however, that the foreign workers were improperly treated in the course of that particular engagement.

The Appellant's case on appeal

22 On appeal, the Appellant argued that he never profited from the workers, but in fact, suffered heavy financial burdens in paying for the workers' lodging, food and allowances. He claimed that the workers were not paid salaries because there were no jobs for the workers and this was, he alleged, a factor beyond his control. The main thrust of his appeal was that the district judge failed to give sufficient weight to Halcyon's involvement as the Sponsoring Shipyard, especially in light of the MOM's guidelines for Sponsoring Shipyards that placed the duty on the Sponsoring Shipyard to assign projects to the Resident Contractors. The Appellant argued that the foreign workers of Goldrich and Gates Offshore were *exclusively* tied to Halcyon, their Sponsoring Shipyard, and that these workers could not be assigned to projects undertaken by other shipyards. The Appellant thus argued that the district judge did not give sufficient weight to the fact that it was Halcyon who largely contributed to the unhappy situation by failing to live up to its side of the bargain to provide employment for the workers. This, his counsel submitted, was the true cause of the predicament.

Relationship between Sponsoring Shipyard and Resident Contractor

23 Following from the above, it was important to clearly establish the responsibilities of the Sponsoring Shipyard and the Resident Contractor with regard to the foreign workers. To this end, at the first hearing on 1 February 2011, I asked parties to provide further information as to, *inter alia*, the exact division of roles and responsibilities between Halcyon and its Resident Contractors (*ie*, Goldrich and Gates Offshore). In this regard, the Prosecution adduced four affidavits from:

(a)
Mr Then Yee Thong ("Then"), controller of Work Passes, Work Pass Division ("WPD"), MOM, on general work pass procedures in the marine sector;
(b)
Mr Chai Jian Yi ("Chai"), WPD officer;
(c)
Mr Ong, the CEO of Halcyon; and
(d)
Mr Choo Swee Leng Michael ("Michael Choo"), a consultant for Halcyon who assisted with the processing of the work permit applications for the Appellant's workers.

24 From Then's affidavit, it was clarified that the MOM divided the marine companies in Singapore into two broad groups, *viz* (a) shipyards and (b) contractors. These groups were further sub-divided into: (a) Sponsoring Shipyards and non-sponsoring shipyards and (b) Resident Contractors and common contractors. The work permit requirements and controls for foreign worker allocation would vary depending on which group the company fell into. The MOM had a pooled quota system which allowed a Sponsoring Shipyard to combine with Resident Contractors in the hiring of foreign work permit holders. From the perspective of the Sponsoring Shipyard, the benefits of this system are first, that the number of local workers for the Sponsoring Shipyard is consolidated and the number of foreign work permits allowed is a percentage of this combined figure, and second, that no further proof of contracts is required before the MOM issues the work permits. This allowed the Sponsoring Shipyard and its respective Resident Contractors great flexibility in using the same pool of foreign work permit holders for different projects with a fast turn-around time. The Resident Contractor can only be registered with one Sponsoring Shipyard and its foreign workers can only be deployed to that Sponsoring Shipyard. It is noted from Then's affidavit that the criteria to be classified as a Sponsoring Shipyard became stricter in January 2009 as part of an ongoing process of review and feedback from the industry. The previous requirements relating to the size of the local workforce and paid up capital was raised significantly and new requirements such as financial and employment records as well as the need to demonstrate a pipeline of marine projects were added. There is also currently newly enhanced supervision with increased site visits to ensure Sponsoring Shipyards and their contractors are complying with the work permit requirements.

25 Then's affidavit also emphasised the MOM's position that it was the Resident Contractor who was regarded as the *employer* of the foreign workers and was, pursuant to the work permit conditions, responsible for paying the monthly salaries to the foreign workers. The Sponsoring Shipyard had no legal obligation to take responsibility for the wages of the foreign workers apart from s 65 of the Employment Act (Cap 65, 1997 Rev Ed), which provides for the principal to be responsible for no

more than one month of salary due to the workers for work done by the contractor if the contractor is unable to pay said salaries.

26 The contracts entered into between the Appellant's companies and Halcyon as adduced in Mr Ong's affidavit clarified the division of responsibilities between Halcyon and the Appellant's companies. They consisted of: (a) a labour supply agreement between Halcyon and Goldrich on 13 March 2008 ("Goldrich labour supply agreement"), (b) a labour supply agreement between Halcyon and Gates Offshore on 2 July 2008 ("Gates Offshore labour supply agreement") and (c) a $4m fabrication, assembly and installation service agreement between Halcyon and Gates Offshore on 1 December 2008 ("Gates Offshore fabrication agreement"). The terms and conditions in the Goldrich labour supply agreement and Gates Offshore labour supply agreement were largely identical. Of particular importance were clauses 3 and 7:

3PURPOSE OF AGREEMENT

3.1The Contractor [referring to the Resident Contractor] shall expeditiously provide labour to the Company [referring to Halcyon] in accordance with the terms herein stated at the rates specified in Appendix One (I) hereto for a period of twelve (12) calendar months commencing from the date this Agreement is executed.

3.2*For the avoidance of doubt, the Workers shall at all times and for all purposes be and remain as employees of the Contractor*.

…

7.CONTRACTOR'S OBLIGATIONS

...

7.4 The Contractor shall comply with, and ensure that its Workers comply with, all occupational safety and health laws, rules, codes of practice and regulations and any other applicable laws, rules, codes of practice and regulations.

…

7.7 *The Contractor shall be fully and directly responsible for the remuneration, income, wages and all other related payments in connection with its Workers* including but not limited to overtime payments, all contributions payable under the Central Provident Fund Act, Cap. 121, all sums payable under the Skills Development Levy Act 1979, all payroll tax payable under the Finance Act, Cap. 139 (including any statutory modification or re-enactment of such statutes) and any other contribution, imposition, payments or other obligations which may now or hereafter have to be paid or met by an employer in respect of its employees.

[underlined text in original, emphasis added in italics]

27 On an examination of the contracts between Halcyon and the Appellant's companies, I found that the district judge did not err in rejecting the Appellant's

submission that the Sponsoring Shipyard's role (in the bringing in of the foreign workers) was an important mitigating consideration. It was clear from the contracts that the heavy legal responsibilities of an employer of foreign workers fell on the Appellant's companies (*ie*, the Resident Contractors) and the fact that he had a back-to-back contractual arrangement with Halcyon to provide jobs for these workers was not a legitimate excuse for his failure to pay the workers when the jobs failed to materialise (and see [11(d)] above, referring to para 7 of Part II). While it appeared from the evidence before me that Halcyon had failed to perform its side of the bargain or had given assurances to the Appellant about projects that should not have been given, that was a commercial risk that the Appellant had accepted with open eyes. The Appellant contended that Halcyon, which had five Resident Contractors and a quota of 1,300 foreign workers in all, should not have imprudently promised jobs to all its Resident Contractors if its existing book orders were incapable of supporting 1,300 foreign workers. The Appellant also highlighted the fact that the accused in one of the sentencing precedents tendered by the Prosecution for the salary charges, *viz*, *Public Prosecutor v Yip Si Wei Julian* (DAC No 30733/2009 and others) ("*Yip Si Wei Julian*") (see [29] below), had also been a Resident Contractor for Halcyon. Therefore, it appears that the Appellant was not the only one who suffered from dealing with Halcyon. However, Halcyon's apparent lack of commercial rectitude in its commercial dealings with its Resident Contractors and whatever possible recourse the Resident Contractors may have towards Halcyon is to be adjudged in a different forum; it *was entirely irrelevant vis-à-vis any consideration of the Appellant's criminal liability under the EFMA apropos the breach of his obligations qua employer.* I therefore rejected the misguided attempt to attribute the blame to Halcyon and downplay the Appellant's serious personal responsibilities towards the workers he had brought in.

28 I agreed with the district judge that the Appellant should have acted promptly to cut his losses and repatriate the workers and his "unwillingness to accept that Halcyon was never going to come good with its promises of mega projects had aggravated an already bad state of affairs" (see GD at [19]). Despite the fact that Halcyon had failed previously to provide jobs for Goldrich's 200 foreign workers who were brought in earlier in the year after Goldrich was granted Resident Contractor status on 11 March 2008, the Appellant blindly relied on Halcyon's assurances and brought in more than 400 additional foreign workers under Gates Offshore once it was granted Resident Contractor status on 30 June 2008. The Appellant had, on his own volition, decided to bring in a large number of foreign workers within a short amount of time without ironclad reasons to believe that work would be found for all the workers he had recruited. He cannot now disclaim responsibility for his actions, especially given that he was *legally* bound to pay the salaries of the workers that he brought into Singapore *regardless* of whether Halcyon actually provided jobs for them. The Prosecution highlighted that the Appellant had the prerogative to determine *when* to bring in the foreign workers as the in-principle approval granted by the MOM for the work permits was valid for a period of three months. In other words, he could have brought the foreign workers in smaller and more manageable batches. He should also have monitored the situation on a monthly basis, and stopped bringing in more workers when it was clear that jobs had not been provided as promised for the workers already brought in. Instead, the Appellant continued to bring in more and more workers until he had utilised the full foreign worker quotas allotted to Goldrich and Gates Offshore. It is noted from Chai's affidavit that because of the sudden spikes of work permit

applications submitted and approved for Gates Offshore from August to October 2008, the WPD had taken administrative action in late November 2008 to block the e-issuance for work permit applications of the workers who had entered Singapore. On 26 November 2008, Chai contacted the Appellant to "withhold"[note: 1] the bringing in of foreign workers for whom he had submitted work permit applications but had not yet travelled to Singapore. Chai also requested the Appellant to submit the contracts between Gates Offshore and Halcyon to prove the existence of works. In a letter to Chai from the Appellant dated 15 December 2008, the Appellant insisted that Gates Offshore would bring in the outstanding in-principle approved workers in the first quarter of 2009 and hoped "to be able to recruit another 200 to 300 additional workers for training". From his actions, the Appellant plainly did not appear to see the need for exercising restraint. The Appellant, as an experienced business man, should have been conscious that there was always a commercial risk that Halcyon would default on its obligations, and he only had himself to blame for repeatedly and stubbornly believing in Halcyon's hollow promises notwithstanding that they did not materialise from the outset. The Appellant's calculated decision to bring in 610 foreign workers cannot be readily excused as a poor business decision. The consequences of his decision had very real ramifications on the livelihoods of the hundreds of foreign workers brought into Singapore. Their well-being which was *entirely* dependent on him had been severely prejudiced.

The sentencing norm for the charges under the EFMA

29 The Prosecution relied on two sentencing precedents to justify a custodial sentence in this case: *Yip Si Wei Julian* and *Public Prosecutor v Lee Heng* (DAC No 7211–7213/2010 and others) ("*Lee Heng*"). In *Yip Si Wei Julian*, the accused faced 100 charges under s 22(1)(*a*) of the EFMA for failing to pay the salaries of 100 foreign workers. The Prosecution proceeded with 50 charges and the remaining 50 charges were taken into consideration. The accused failed to pay the salaries for the period from 8 January 2009 to 24 February 2009 and the total salaries owed was $768 per worker or $38,400 in total for the proceeded charges. Similar to the facts of the present case, the accused in *Yip Si Wei Julian* was a sole proprietor of companies in the marine sector which had run out of work for his foreign workers but decided to retain them in Singapore instead of repatriating them. Also akin to the present case (see [16] above), the payment of the workers' salaries was subsequently made by the insurance company. The district judge sentenced the accused to three months' imprisonment in respect of each of the charges with three of the sentences to run consecutively, totalling a sentence of nine months' imprisonment.

30 In *Lee Heng*, the accused was a project manager of a company dealing in the business of barge, tugboat and sampan services. He was charged, *inter alia*, with three charges of failing to pay the salaries of three foreign workers for a period of six months from 24 February 2009 to 15 August 2009. The unpaid salaries totalled $5,263.28. The accused in *Lee Heng* had an antecedent; he was previously convicted of four charges under s 22(1)(*a*) read with s 20 of the EFMA and sentenced to one week's imprisonment on each charge for an aggregate sentence of four weeks' imprisonment. The district judge sentenced the accused in *Lee Heng* to between two to three weeks' imprisonment on each charge. The sentence totalled 13 weeks' imprisonment (although the exact breakdown of this total sentence was not provided).

31 Counsel for Appellant relied on two other sentencing precedents to justify the imposition of a mere fine in the present case, *viz Public Prosecutor v The Soup Spoon Pte Ltd and Another* [2008] SGDC 278 ("*The Soup Spoon*") and *Public Prosecutor v Enilia Donohue* [2004] SGMC 9 ("*Enilia Donohue*"). I did not find *The Soup Spoon* relevant because although the accused also faced eight charges under s 22(1)(*a*) of the EFMA for failing to comply with the conditions of the work permits, the condition breached in *The Soup Spoon*, *ie*, that the eight workers were working in occupations different from the occupation stated in their work permits, was substantially different from the condition breached in the present appeal. The condition breached in *The Soup Spoon* did not adversely impact the welfare of the foreign workers to the same degree as the breach in the present matter. Plainly, the sentencing considerations at play in *The Soup Spoon* were quite different from those in the present case.

32 In *Enilia*, the accused pleaded guilty to one charge of employing a foreign worker without permit and one charge of failing to pay the salary of that foreign worker. The salaries were unpaid for a period from 7 September 2001 to 9 August 2003, totalling a sum of $4,630. The presiding magistrate found that the fact that the employer defaulted in the payment of the worker's levy to the MOM, resulting in the MOM revoking the worker's work permit, was an aggravating factor. In the circumstances, the magistrate imposed a fine equivalent to 35 months of the levy at the rate of $345 per month for the charge of employing a foreign worker without permit, and a fine of $3,000 for the charge of failing to pay the salary of that foreign worker. I did not find *Enilia* instructive because it is unclear whether the court had properly appraised the applicable policy considerations. Given the length of the defaulting period, it seems to me that a short custodial sentence as well as a fine would have been appropriate on the facts of that case. I do not think that the decision in that case can be relied on as signalling that custodial sentences are not proper even if there is a flagrant refusal by an employer to discharge his legal responsibilities towards a foreign worker.

33 As there is a lack of clear precedents regarding the consequences arising from the commission of the offences under the EFMA, *it is important to emphasise that employers who persistently fail to discharge their legal responsibilities towards foreign workers will ordinarily have custodial sentences imposed on them.* I ought to also emphasise that a single serious transgression in relation to this genre of offences might also attract a custodial sentence. When precisely the custody threshold is crossed will necessarily have to be fact centric. The seriousness of the offence will of course be exacerbated when a large number of foreign workers are brought in and the employer fails to fulfil his legal responsibilities towards them. Other possible aggravating considerations are, *inter alia*: (a) a persistent failure by an employer to discharge his responsibilities, *eg*, the employer has been in continuous breach for an extensive period of time with no efforts of rectification, (b) an employer's failure to discharge its responsibility that renders the employee susceptible to physical harm or otherwise results in a situation that compromises the worker's overall welfare or well being, and (c) an employer's cumulative commission of various offences under the EFMA or different conditions in the work permit with regard to the same worker (*eg*, failing to pay the salary *and* housing the worker in unacceptable conditions). Such breaches by the employer of his responsibilities show clear disregard of the importance and purpose of the statutory scheme. The wider consequences of such flagrant breaches were exemplified in this case: as mentioned in [2] above, the

aggrieved workers had assembled *en masse* at the MOM to air their grievances and to seek redress. Ironically, it was the Appellant who arranged transportation for the foreign workers to the MOM for the purposes of seeking redress for their unpaid salaries, presumably because he believed the real responsibility for the unpaid salaries lay with Halcyon and not himself. While he might have been well-meaning in arranging for his workers to publicise their unhappy predicament, ultimately, the Appellant – as the employer and, accordingly, the person responsible for the foreign workers – could not shift his criminal liability to Halcyon (as emphasised in [27] above).

34 Parliament has shown concern about the seriousness with which an employer's failure to pay the salaries of his foreign workers ought to be viewed. In early 2009, Mr Gan, when responding to questions about the problem of salary arrears for foreign workers, said (*Singapore Parliamentary Debates, Official Report* (22 January 2009) vol 85 at cols 1227–1229):

While we can understand that some employers may be facing business difficulties under the current economic environment, this does not absolve them from their basic responsibilities towards their foreign workers. These include paying salaries and providing workers with proper accommodation, food and medical care. MOM will not hesitate to take action under the Employment Act (EA) or the Employment of Foreign Manpower Act (EFMA) against errant employers who fail to pay salaries on time. The penalty for non-payment of salaries under the Employment Act has been increased to $5,000 per charge for first-time offenders since January this year.

…

… We must also recognise that in a volatile business environment, some employers may find that the projects they had earlier planned for are delayed or even cancelled. In such situations, companies may not have work for some of their foreign workers. If so, the work permit conditions require the employer to terminate the contracts and facilitate the repatriation of their workers to their home country after ensuring that all outstanding employment issues have been resolved. MOM will continue to monitor the situation closely, and we will step up enforcement and tighten checks, if necessary.

…

I also mentioned in my previous answer that *for companies which are facing difficulties and which have insufficient work, these companies should release their foreign workers so that they can return home*. To keep these foreign workers here without adequate work will not be beneficial for them.

[emphasis added]

The accountability of an employer was re-emphasised by Mr Gan in response to a question on freelance employment of foreign workers (*Singapore Parliamentary Debates*, (23 November 2010) vol 87 at col 1660):

Sir, primarily, as we allow a foreign worker to come into Singapore, we would require an employer to be responsible for the stay and the work of that foreign worker. *In the event that this particular foreign worker gets into difficulty, we would need to be able to hold a certain employer accountable and responsible for the well-being of this foreign worker*. It will be very difficult for us to open the gate and allow foreign workers to come in without an employer to be responsible for them. [emphasis added]

As evinced by the numerous Parliamentary speeches (including the excerpts cited in [9] and [10] above), there is clearly enormous public interest in holding employers, as the persons with the greatest control over the stay and work of foreign workers, fully accountable for the welfare of those workers. *It is a legal responsibility that cannot be shirked or excused by a deteriorating economic climate or by defaulting business partners. This legal responsibility is even more significant when the foreign workers are of particular vulnerability, ie, where they are unskilled workers with little bargaining power and unable to fend for themselves*.

35 The district judge was therefore correct to take the view that the main sentencing consideration to be applied was that of general deterrence, and that this case required a custodial sentence (see GD at [19]). While it is necessary to be sensitive to the specific factual matrix of every case, the general principle must be that employers who persistently fail to pay the salaries of their foreign workers will ordinarily face custodial sentences. With regard to the accommodation charges and work permit charges, the district judge was of the opinion that a fine of an appropriate amount would constitute sufficient deterrence (see GD at [16]–[17]).

36 I turn first to consider the work permit charges. The prescribed punishment for the work permit charges is heavier than the salary and accommodation charges – a fine not exceeding $15,000, or imprisonment not exceeding 12 months, or both (see s 5(6)(*a*) of the EFMA). The district judge considered the number of charges involved (seven convicted and 13 taken into consideration), the fact that the period of time the workers were employed without valid work permits were not short (*ie*, about eight months) and the fact that the Appellant was a first offender (see GD at [17]). In my opinion, as the welfare of the foreign workers in question did not seem to be compromised in this case, a fine may have served as sufficient deterrence but in light of the eight months of cheap and unlicensed labour the Appellant was able to economically enjoy, the quantum of $4,000 fine per charge was on the low side and ought to have been calibrated higher.

37 I turn next to examine the accommodation and salary charges. Both charges deal with contraventions of the conditions under the foreign workers' work permits and arguably embody two of the more serious responsibilities of an employer in ensuring the adequate welfare and health of their foreign workers. In my view, the aggravating considerations identified above are all clearly present in this case. Not only did the Appellant persistently disregard his responsibilities under the EFMA, he cumulatively breached both his obligations to pay salaries and provide acceptable accommodation to some of his workers. His actions were undoubtedly severely deleterious to their welfare. Most pernicious is the fact that his breaches resulted in his foreign workers living in unsafe conditions in which a life was lost.

38 The prescribed punishment for the accommodation and salary charges was a fine not exceeding $5,000 or imprisonment for a term not exceeding six months or both (see s 22(1)(*i*) of the EFMA). Under the conditions of the work permit, the employer shall be responsible for and bear the cost of the employee's upkeep and maintenance in Singapore. It is also a breach of the Security Bond that an employer undertakes with the MOM to provide acceptable accommodation for their employees who are work permit holders.

39 In respect of the accommodation charges, the district judge considered the number of charges (two convicted and five taken into consideration), the fact that the period of unacceptable accommodation was not short (*ie*, about four months), the fact that the Appellant had arranged alternative accommodations without delay for the affected foreign workers when he knew about the unacceptable dormitory conditions and that he was a first offender (see [16] of GD). The district judge therefore felt a fine of $4,000 (*ie* at the higher end of the spectrum) would be an appropriate sentence. On the contrary, as stated earlier at [34] and [37], I viewed the Appellant's failure to discharge his obligation in providing acceptable accommodation much more seriously – such breaches that expose and cause physical harm to one's employees deserve a custodial sentence to reflect the abhorrence towards such offences. In my opinion, had the Prosecution appealed, the accommodation charges would have attracted a custodial sentence in order to be commensurate with the severity of the harm caused and the level of general deterrence required. The Appellant ought to therefore consider himself fortunate that he is not facing a more substantial aggregate custodial sentence for the totality of his offending conduct in this sorry episode.

40 For the salary charges, the Appellant was required under the terms of the workers' work permits to pay them their salaries before the expiry of the seventh day after the last day of their salary periods. The Appellant admitted that he had failed to do so and defaulted on payments for extensive periods from one to six months (as tabulated above at [17]–[18]). The exact amount of salaries paid back to all the 610 foreign workers was not provided, but the total amount involved in the 24 proceeded salary charges was $62,016.69. The Appellant also had 49 other salary charges which were taken into consideration for the purposes of sentencing. The district judge had correctly given mitigating weight to the fact that the Appellant was a first offender and had paid all the salaries of the foreign workers with the assistance of the Insurers (see GD at [20]). The Appellant also submitted that he spent more than $350,000 monthly to maintain the 610 workers, and this was also an important mitigating consideration. In my opinion, the district judge had taken into account all the relevant factors of the case and I am satisfied that the district judge did not err in principle. In fact, the facts of this appeal are comparable with *Yip Si Wei Julian* – although the number of charges was greater in *Yip Si Wei Julian*, the workers in this appeal were owed salaries for a longer period and the salary arrears was of a higher amount. Although the Appellant stated that he had offered repatriation to all his foreign workers at his own expense and only 50 out of the 610 workers elected to return home, it would be simplistic to believe that the rest of the foreign workers were truly happy and willing to stay on without proper employment. After all, these foreign workers had taken great pains and efforts to travel to Singapore for better job prospects and yet each of them was deprived of a job opportunity and a chance to earn wages to send home. The simmering dissatisfaction of the foreign workers inevitably culminated into an *en masse* protest at the MOM and it must have been a highly

taxing undertaking by the MOM and the Insurers to ensure the adequate and safe repatriation of all the affected foreign workers.

41 Therefore, it could not be said that a sentence of one weeks' imprisonment per charge with four charges to run consecutively was manifestly excessive. Indeed, given the number of workers involved here the sentence ought to have been heavier.

Conclusion

42 It must be re-emphasised that employers are in a position of considerable authority over their foreign workers. But this authority over the workers for their duration of their stay in Singapore carries with it serious responsibilities that have to be scrupulously observed. A serious failure to discharge these responsibilities, *ie*, in relation to the payment of salaries; the statutory levies due; or the provision of suitable accommodation will ordinarily attract a custodial sentence (see [33] above).

43 For the reasons enunciated above, I dismissed the appeal on sentence *vis-à-vis* the salary charges. Perhaps I should also make plain that the custodial sentence given in these proceedings should not be viewed as the benchmark for similar offending conduct. Had there been an appeal to enhance the sentences, I would have been inclined to significantly increase the term of imprisonment (see [36]–[41] above). The totality of the Appellant's offending conduct was entirely unacceptable. He cannot shield himself from the consequences of his offending conduct by pointing to Halcyon's lack of commercial rectitude. That deficiency needs to be resolved elsewhere.

[note: 1]Prosecution's Further submissions and bundle of documents, Chai Jian Yi's affidavit affirmed on 16 May 2011, para 9