Auston International Group Ltd v Public Prosecutor
[2007] SGHC 219

Case Number : MA 38/2007

Decision Date : 12 December 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : N Sreenivasan (Straits Law Practice LLC) for the appellant; Leong Wing Tuck (Attorney-General's Chambers) for the respondent

Parties : Auston International Group Ltd — Public Prosecutor

Financial and Securities Markets – Regulatory requirements – Company's prospectus containing false and misleading information – Company giving free rein to director to run company – Whether fine was manifestly excessive – Factors to consider in sentencing – Sections 253 and 255 Securities and Futures Act (Cap 289, 2002 Rev Ed)

12 December 2007 Judgment reserved.

Lee Seiu Kin J

1 In the District Court on 27 February 2007, the appellant company pleaded guilty to the following charge under s 253(1) read with s 253(4)(a) of the Securities and Futures Act (Cap 289, 2002 Rev Ed) ("the Act"):

> You, Auston International Group Ltd, …, are charged that you, on or around 14 April 2003, in Singapore, made an invitation to the public to subscribe for or purchase your shares, accompanied by a prospectus which contained a false and misleading statement which was materially adverse from the point of an investor, to wit, your financial report for the financial year ended 31 July 2002 which stated that your profit before taxation was $2,467,000 when it was not, and which figure was an overstatement of the actual profit before taxation by $374,000, and you have thereby committed an offence under section 253(1) read with section 253(4)(a) of the Securities and Futures Act (Chapter 289, 2002 Revised Edition).

2 The company agreed to a second charge under the same provisions of the Act being taken into consideration for the purposes of sentencing under s 178 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). This charge read as follows:

> You, Auston International Group Ltd, …, are charged that you, on or around 14 April 2003, in Singapore, made an invitation to the public to subscribe for or purchase your shares, accompanied by a prospectus which contained a false and misleading statement which was materially adverse from the point of an investor, to wit, the following statement in the independent auditor's report contained in the said prospectus –
>
> > 'In our opinion, the abovementioned consolidated financial statements of the Group present fairly in all material respects, the financial positions of the Group as at 31 July 2000, 2001 and 2002 and of the results of operations, changes in equity and cash flows for each of the financial years ended 31 July 2000, 2001 and 2002 in accordance with Singapore Statements of Accounting Standard',

which statement was not true, and you have thereby committed an offence under section 253(1) read with section 253(4)(a) of the Securities and Futures Act (Chapter 289, 2002 Revised Edition).

3 The district judge convicted the company of the charge and imposed a fine of $90,000. The company appealed against the quantum of the fine on the ground that it is manifestly excessive.

Statement of Facts

4 The following statement of facts, to which the company agreed without reservation, was placed before the court:

1 The Accused is Auston International Group Ltd ("Auston"), a company listed on the SGX-SESDAQ.

2 Auston was incorporated in Singapore on 3 April 1998 as Auston International Pte Ltd. They changed their name to Auston on 24 March 2003 in connection with their conversion into a public company limited by shares. Auston is a holding company with several subsidiary education companies under its wings. Auston is in the education business. They provide amongst other courses, tertiary and post graduate education courses endorsed by their university partners.

3 Sometime in early 2002, Auston's holding company and majority shareholder Auston Technology Group Pte Ltd ("ATG") had wanted Austonto be listed on the SGX-SESDAQ. The IPO for Auston took place subsequently between 15 April 2003 and 23 April 2003. A total of 2,400,000 shares at $0.28 per share were offered by way of public offer. The underwriter for the exercise was UOB Asia Ltd. The auditors and reporting accountants was Ernst & Young. Auston was listed on SESDAQ on 25 April 2003.

COMPLAINT

4 On 8 December 2004, a legal representative acting for Austonlodged a report with the Commercial Affairs Department ('CAD') regarding irregularities in Auston's accounts. CAD then initiated investigations pursuant to the complaint.

5 Investigations revealed that there were accounting irregularities within Auston pertaining to the treatment of university fees payable by Auston to its university partners.

BACKGROUND

6 Sometime in April 2003, Auston received several late invoices from one of its university partners, the University of Wollongong, for outstanding university fee expenses.

7 University fees are student enrolment fees due from Auston to its university partners. Auston would enrol students and run classes for the said tertiary and post graduate education courses conducted by these university partners. Auston would also collect course fees from students who had enrolled for the said courses. Auston's university partners would in turn invoice Auston for their fees based on the number of students enrolled.

8 Auston's main expense was the university fee expenses it was due to pay to these university partners. These university fees would have to be expensed off as a one-off amount in Auston's accounts for the relevant financial period.

9 Following receipt of the said late invoices from the University of Wollongong, Auston's Chief Financial Officer ('CFO') at that time, one Chua Peck Wee ('Chua') surfaced the matter to Auston's Chief Executive Officer ('CEO'), Yeo Poh Siah Ken ('Yeo'). It was eventually established that part of these invoices should have been accounted for as expenses incurred in FY2002 as they pertained to students enrolled during the relevant period. By the time of receipt of the invoices in April 2003, however, Auston's accounts for FY2002 had been closed.

10 Following discussions with Chua, Yeo then decided to resolve the problem by recognising the expense as academic cooperation fees (for FY2003) instead, which could then be amortised over a period of 3 to 5 years.

11 When there is an intangible asset with a finite useful life, and the company has paid for it upfront, the cost of the asset may be amortised over the time period the company enjoys the benefit. Development costs (ie academic cooperation fee) involved in the creating of new programmes or new relationships with other educational institutions, if legitimately paid, would have been amortised according to Auston's accounting policy. The university fees in issue here are, however, outright expenses and amortisation would not have been permissible under Auston's accounting policy and would have been fraudulent.

DISGUISE OF PAYMENT

12 In order to fraudulently disguise the expenses pursuant to the said late invoices from University of Wollongong as 'academic cooperation fees', fictitious documents were created by Yeo and subsequently forwarded by Chua with the relevant instructions to Auston's accounts department to record these expenses as 'academic cooperation fees' for another of Auston's university partner, the Upper Iowa University and amortised over 56 months at S$4,795/mth. These amortised payments were subsequently reflected in Auston's accounts from FP2003 onwards.

13 The above resulted in a false entry being made in the accounts of Auston. Yeo was fully aware of the circumstances of the matter and the true nature of the entry, and had acted wilfully and with intent to defraud in causing the false entry to be made.

FACTS RELATING TO PS 870 OF 2006

14 On or around 14 April 2003, pursuant to its IPO (*see paragraph 3 above*) Auston made an invitation to the public to subscribe for or purchase its shares, accompanied by a prospectus. The prospectus was lodged with the Monetary Authority of Singapore on 14 April 2003.

15 The prospectus contained, amongst other information, Auston's financial statement for FY2002 which stated that Auston's profit before taxation was $2,467,000. The said financial statement, however, did not include the expenses in the late invoices from University of Wollongong which Auston had received prior to 14 April 2003 and which should have been accounted for as expenses in the financial statement for FY2002 (*see paragraphs 6 to 13 above*). There were also no adequate provisions made in the financial statement for these expenses.

16 This resulted in an overstatement of Auston's pre-tax profits by $374,000 for FY2002.

17 The said financial statement for FY2002 contained in Auston's prospectus was thus false and misleading. The false and misleading financial statement was also materially adverse from the

point of view of the investor.

18 As the legal person making the offer of shares to the public, Auston is thus liable for an offence under section 253(1) of the Securities & Futures Act (Cap 289) by virtue of section 253(4)(a) of the said Act.

19 CAD's investigation revealed that Auston's board of directors at the material time had left it entirely to Yeo, who was the founder of Auston as well as its CEO at the material time, to manage and run Auston. Besides Yeo, none of the other directors of Auston at that time were involved in Auston's operations.

20 Yeo was also the only director involved, together with Auston's auditors, in the preparation of the financial statements for the IPO prospectus.

21 Yeo, therefore, represented the mind and will of Auston in respect of the false and misleading financial statement for FY2002 contained in the said IPO prospectus.

22 The defences set out in section 255 of the Securities & Futures Act (Cap 289) are, as such, not applicable to Auston in the present case by virtue of the fact that Yeo had wilfully and with intent to defraud caused the expenses in the said late invoices from University of Wollongong to be omitted from Auston's financial statement for FY2002, which he knew would be contained in Auston's prospectus for the IPO in April 2003. Yeo also knew that by omitting the said expenses, it would result in Auston's financial statement for FY2002 being false and misleading.

23 Auston is hereby charged accordingly.

Mitigation plea

5 The following mitigation plea was made by counsel for the company on its behalf:

Brief Facts

1 Auston International Group Limited initially faced two charges. The Prosecution is proceeding on the First Charge, PS 870 of 2006. The Second Charge, PS 871 of 2006 is being taken into consideration. Both charges relate to a false or misleading statement, that is, overstatement of profit and thus relate to exactly the same information given, in two different parts of the same prospectus. Insofar as the Second Charge is concerned, the statement made relates to the statement made by independent auditors. In the premises, it is respectfully submitted that the sentence should be awarded on the basis of the First Charge only, without any "add-on" for the Second Charge, as there is no additional culpability.

2 The false or misleading statement related to the profit that was stated to be $2,467,000, an overstatement by a sum of $374,000.

Circumstances in which the offence arose

3 Auston was incorporated in 1998. In 2003, permission was obtained from the Singapore Exchange for listing on SESDAQ. As required, the Prospectus was prepared and lodged. Auston consulted various merchant bankers, lawyers and an audit firm in respect of the Prospectus. The audit firm was Auston's (then) auditors. The profit figure in the Prospectus was taken from the

annual audited accounts and had been certified by the auditors.

4 The auditors had acted on figures and representations given by the then CEO, Yeo Poh Sian and the then CFO Chua Peck Wee. However, the auditors did not, in the course of their independent verification, discover the overstatement of profit.

The true culprits

5 The true culprits are Yeo and Chua. Both have been charged and have been dealt with, for offences under section 477A of the Penal Code and the SFA. In terms of the punitive and deterrent objectives of conviction and sentencing, the courts have dealt with the guilty parties. Auston is a company and acts through its officers. A heavy fine on Auston will punish the company and the current shareholders, who will bear the burden of the fine although they were not in control at the material time and were not the true culprits.

6 In this regard, it is apposite to note that before the public offer, Auston Technology Group Pte Ltd held 100% of the company. After the IPO, Auston Technology Group Pte Ltd held 82.4% and the public held 17.6%. In January 2006, M2B Game World Pte Ltd injected its business into Auston, in return for 26.01% of Auston. The other current major shareholders are all also parties who were not involved in the IPO.

7 The board of directors has also totally changed, save for one independent director.

8 In the premises, it is respectfully submitted that any heavy fine would punish current shareholders, who are blameless. The current board is also blameless. It is not disputed that Auston is a separate legal entity and can be punished; the point being made is that having punished the true culprits, this Honourable Court should bear in mind that it should not add to the burden of those who currently own and run the company.

How matters came to light and

9 It was Auston itself which made a report to the CAD in December 2004, in relation to irregularities in the financial statements of prior years. Auston's (new) audit committee commissioned M/s Deloitte & Touche to look into the accounts of previous years. Their findings were issued in February 2005 and made available to the CAD. Auston paid $139,975.00 for the services of Delloitte & Touche. If it were not for the efforts of the current board and the almost $140,000 and management time and effort spent by them, the record would not have been set straight.

10 The pertinent facts have been put to the Prosecution, notwithstanding which, in exercise of its discretion, it has decided to proceed against Auston. That decision and the plea of guilt relates to whether there is an offence and whether any of the statutory defences can be raised. However, when the extent of culpability is concerned, it is respectfully submitted that the culpability of Auston, as a company, is of the lowest order. It is respectfully submitted that the facts of this case, in relation to the company, are quite unique and only a nominal fine should be imposed.

1 1 Auston has pleaded guilty to save time and the costs of a trial. The Prosecution has taken the position Auston is a "person making the offer" and that the defences under section 255 of the SFA is not open to it as the guilty minds, Yeo and Chua, were officers of Auston. Auston has chosen not to challenge this interpretation and has pleaded guilty at the first possible

opportunity, after the true culprits have been dealt with. The current management is keen to put the issues of the past behind and to focus on the business of the company, for the benefit of Auston's shareholders.

Degree of culpability under the SFA

12 It is respectfully submitted that the highest degree of culpability will rest on the officers and directors who are responsible for the misleading or false statement; in this case, Yeo and Chua. Where the true culprits continue to maintain an interest in the company, any fine imposed on the company would have an impact on the true culprits. However, where the company has relied on audited accounts audited by reputable auditors, it is submitted that the degree of culpability would be the lowest.

13 It is respectfully submitted that where the true culprits have been identified and dealt with, as in this case, the company should be viewed as being in technical breach of the SFA. This is more so in the present case where it was Auston's new officers and directors who discovered and brought to light the misleading statements, when their previous auditors did not.

14 The maximum fine provided for is $150,000. This fine should be reserved for cases where the company concerned is large, the misleading statements caused great damage to members of the public, where discovery was occasioned by pain staking investigation and where the company did not come clean. In the present case:

(a) Auston blew the whistle itself, and corrected the misleading statement.

(b) The overstatement involved $374,000 out of profits of $2,467,000. It arose because an expense of $374,000 was not taken in. Total expenses for the relevant period was $9,339,000, that is an understatement by about 4%.

(c) There has been no complaint from any member of the public.

(d) Chua, the CFO, was sentenced to 7 months' imprisonment, clearly sending a salutary signal to officers of such companies.

(e) Yeo, the CEO, has been convicted, with sentence pending, making it clear that the true culprits have been dealt with.

(f) A heavy fine will only punish current shareholders and damage the company. The purpose of the SFA is to protect investors and the public shareholders, not to penalize them for the sins of past directors and officers.

(g) Considerable time and costs have been saved, even though the legal position is not clear.

(h) Auston has already expended the sum of $139,975.00 in terms of the Delloitte & Touche investigation, and saved the CAD the corresponding effort.

(i) The current officers and directors would like to focus on giving their shareholders returns for their investment.

6 In his grounds of decision ("GD") the district judge took into consideration the mitigation plea in the following manner:

3. The focus of the mitigation was that the real culprits in this case were the ex-Chief Financial Officer and Chief Executive Officer as the company acts through these officers. The submission was that the company should be at the lowest level of culpability. The current board of directors are different except for one independent director and any punishment on the company would affect the current shareholders and damage the company. The company had lodged a report when its new auditors discovered irregularities in the financial statements of previous years. The overstatement involved $374,000 out of profits of $2,467,000. It arose because an expense of $374,000 was not taken in. Total expenses for the relevant period was $9,339,000 which is an understatement of about 4%. The company had expended a sum of $139,975.00 to engage auditors who had saved the CAD considerable time. The company had also pleaded guilty without wasting time and costs.

Grounds of appeal

7 In its petition of appeal the company submitted that the district judge had erred in imposing the fine of $90,000:

(a) In that the Learned District Judge did not consider or gave inadequate consideration to the following:

(i) That the principal offenders were the Chief Executive Officer and the Chief Financial Officer, who had also been dealt with;

(ii) That the overstatement of profit arose from the manner in which the Chief Executive Officer and the Chief Financial Officer dealt with certain expenditure items, which were matters that were not normally dealt with by the board of directors or shareholders;

(iii) That Your Petitioner was in fact the complainant in this matter and that the offences would not have come to light were it not for the efforts of Your Petitioner;

(iv) That Your Petitioner had engaged independent accountants and paid fees in the sum of $139,975.00 to investigate the matter and that the CAD investigation was based mainly on the report of the independent accountants;

(v) That the overstated expenses were about 4% of the total expenses and the overstated profit was $374,000 out of reported profit of $2,467,000;

(vi) That Your Petitioner's independent auditors (at the material time) did not discover the misreporting by the Chief Executive Officer and Chief Financial Officer; and

(vii) That there has been almost a complete change in directors (save for one independent director) and a change in major shareholders since the offence was committed and that a heavy fine would punish the current shareholders and damage Your Petitioner for the wrong doing, if any, of previous directors.

(b) In that the learned District Judge considered or gave undue consideration to the following:

(i) That the board of directors of Your Petitioner, at the material time, allowed a single director have free rein of the company without any proper system in place; and

(ii) That it was in the public interest in this case that a deterrent sentence should be imposed to deter the defendant company and others from committing such offences.

(c) In that the learned District Judge entirely failed to consider that a deterrent sentence was not in the public interest, on the facts of this case, for the following reasons:

(i) The management of listed companies will be deterred from investigating and reporting possible wrong doing by previous management if the result will be that the company itself will face charges and a deterrent sentence.

(ii) If deterrent sentences were called for, such sentences should be directed at the human agents of the company who are responsible for such offences and who should be deterred from committing them.

(iii) The Prosecution did not address the learned District Judge on sentence.

Decision below

8 At [6] of his GD the district judge considered - rightly in my view - that the failing on the part of the company was to allow a single director, *viz*, the CEO Yeo Poh Siah ("Yeo"), free rein of the company without any proper system in place. Yeo was the only director involved in the management of the company and the preparation of the financial statements for the IPO prospectus. The judge then cited the following passage from the speech of Lord Diplock in *Tesco Supermarkets Ltd v Nattrass* [1971] 2 ALL ER 155:

> In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

9 He concluded that Yeo "represented the mind and will of Auston in respect of the false and misleading financial statement … contained in the … prospectus". I agree with the district judge that the company is liable for the acts of Yeo resulting in the publication of the false prospectus. However, in his consideration of the sentence the judge imputed the motives of Yeo to that of the company, stating at [7] of the GD that, as Yeo was the only director involved in the preparation of the financial statements, he "therefore, represented the mind and will of Auston in respect of the false and misleading financial statement for FY2002 contained in the … prospectus". Following from this conclusion the judge then considered that a deterrent sentence was necessary in this case as (at [9] of his GD):

> … the defendant company had deliberately overstated its profits in the prospectus knowing very well that it would have an impact on the subscribing public for its shares. The public must be protected from such malpractices.

10 With respect, while it is valid in the present case to attribute the acts of a director to that of the company in order to impose criminal liability, it does not necessarily follow that, in sentencing the company, the motives or benefits derived by that director would also be attributed to the company. As I have noted, the judge had correctly identified that the failing on the part of the company was to vest so much power on Yeo without an effective system of checks and balance. However, the judge

went on to consider that a heavy sentence was necessary to deter such criminal activity without considering the range of culpability and the different effects that a heavy sentence in this case would have on an individual, such as Yeo, as opposed to a company which depends on individuals to carry out its acts.

My decision

11 The starting point in any consideration of the sentence in the present case is the object of the legislation. The charge in question is one under s 253(1) read with s 253(4)(a) of the Act. I set out below s 253 in full:

> 253. —(1) Where an offer of securities is made in or accompanied by a prospectus or profile statement, or, in the case of an offer referred to in section 280, where a prospectus or profile statement is prepared and issued in relation to the offer, and —
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> (a) a false or misleading statement is contained in —
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> (i) the prospectus or the profile statement; or
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> (ii) any application form for the securities;
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> (b) there is an omission to state any information required to be included in the prospectus under section 243 or there is an omission to state any information required to be included in the profile statement under section 246, as the case may be; or
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> (c) there is an omission to state a new circumstance that —
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> (i) has arisen since the prospectus or the profile statement was lodged with the Authority; and
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> (ii) would have been required to be included in the prospectus under section 243, or required to be included in the profile statement under section 246, as the case may be, if it had arisen before the prospectus or the profile statement was lodged with the Authority,
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> the persons referred to in subsection (4) shall be guilty of an offence even if such persons, unless otherwise specified, were not involved in the making of the false or misleading statement or the omission, and shall be liable on conviction to a fine not exceeding $150,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a continuing offence, to a further fine not exceeding $15,000 for every day or part thereof during which the offence continues after conviction.
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> (2) For the purposes of subsection (1), a false or misleading statement about a future matter (including the doing of, or the refusal to do, an act) is taken to have been made if a person made the statement without having reasonable grounds for making the statement.
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> (3) A person shall not be taken to have contravened subsection (1) if the false or misleading statement, or the omission to state any information or new circumstance, is not materially adverse from the point of view of the investor.
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> (4) The persons guilty of the offence are —

(a) the person making the offer;

(b) where the person making the offer is an entity —

(i) each director or equivalent person of the entity; and

(ii) if the entity is also the issuer, each person who is, and who has consented to be, named in the prospectus or profile statement as a proposed director or an equivalent person of the entity;

(c) where the issuer is controlled by the person making the offer, one or more of the related parties of the person making the offer, or the person making the offer and one or more of his related parties —

(i) the issuer;

(ii) each director or equivalent person of the issuer; and

(iii) each person who is, and who has consented to be, named in the prospectus or profile statement as a proposed director or an equivalent person of the issuer;

(d) an issue manager to the offer of the securities who is, and who has consented to be, named in the prospectus or profile statement, if —

(i) he intentionally or recklessly makes the false or misleading statement or omits to state the information or circumstance;

(ii) knowing that the statement in the prospectus or profile statement is false or misleading or that the information or circumstance has been omitted, he fails to take such remedial action as is appropriate in the circumstances without delay; or

(iii) he is reckless as to whether the statement is false or misleading or whether the information or circumstance has been included;

(e) an underwriter (but not a sub-underwriter) to the issue or sale of the securities who is, and who has consented to be, named in the prospectus or profile statement, if —

(i) he intentionally or recklessly makes the false or misleading statement or omits to state the information or circumstance;

(ii) knowing that the statement is false or misleading or that the information or circumstance has been omitted, he fails to take such remedial action as is appropriate in the circumstances without delay; or

(iii) he is reckless as to whether the statement is false or misleading or whether the information or circumstance has been included;

(f) a person named in the prospectus or the profile statement with his consent as having made —

(i) the statement that is false or misleading, if he intentionally or recklessly makes that statement; or

(ii) a statement on which the false or misleading statement is based, if he knows that the second-mentioned statement is false or misleading and fails to take immediate steps to withdraw his consent,

but only in respect of the inclusion of the false or misleading statement; and

(g) any other person who intentionally or recklessly makes the false or misleading statement, or omits to state the information or circumstance, as the case may be, but only in respect of the inclusion of the statement or the omission to state the information or circumstance, as the case may be.

(5) For the purposes of subsection (4) and this subsection —

(a) remedial action includes any of the following:

(i) preventing the statement from being included, or having the information or circumstance included, in the prospectus or profile statement, as the case may be;

(ii) procuring the lodgment of a supplementary or replacement prospectus under section 241; and

(b) a person is reckless as to the matter referred to in subsection (4) (*d*) (iii) or (*e*) (iii) if, having been put upon inquiry that the statement to be, or which has been, included in the prospectus or profile statement is likely to be false or misleading, that the information or circumstance is likely to be required to be included in that document, or that there is likely to be an omission to state the information or circumstance in that document, he fails to —

(i) make all inquiries as are reasonable in the circumstances to verify this; and

(ii) take such remedial action as is appropriate in the circumstances without delay, if such action is warranted by the outcome of the inquiries.

(6) For the purposes of this section, any reference to a statement shall include a reference to any information presented, regardless of whether such information is in text or otherwise.

12 In his second reading speech in moving the Bill in Parliament on 5 October 2001, the Minister made the following comments:

… It is important that we create a sound and transparent legal framework within which players can operate. The framework must balance prudential concerns with market development. Moreover it should be sufficiently flexible to allow, even facilitate innovation.

… MAS has, since 1997, … moved from a merit-based regulation, where the regulator decides what comes to the market to a disclosure-based regime which empowers investors to make informed decisions. We have also instituted a fundamental shift in emphasis away from "one-size-fits-all" regulation of institutions to risk-focused supervision.

… First amongst [the reforms put in place] are the refinements made to the prospectus regime. To deter inadequate or misleading disclosures and material omissions from prospectuses, issuers and their advisers will be subject to greater accountability for prospectus disclosure.

13 From this, it can be seen that the object of s 253 is to ensure that persons responsible for the publication of a prospectus ensure that it does not contain any false or misleading statements or omissions that are materially adverse from the point of view of the investor. There is no question that the public has been misled by the false statement, a state of affairs that the Act seeks to prevent. The Public Prosecutor has, in his discretion, chosen to prosecute Yeo as well as the company. Yeo has been dealt with separately. The question of the degree of punishment that the company ought to receive is a question for determination by the court. The legislature has provided for a maximum punishment of a fine of $150,000 in the case of a company (an individual is liable in addition to imprisonment of up to two years). Therefore in the most egregious case, the court would impose the maximum fine of $150,000. I turn to examine the factors relevant to this decision.

14 One factor would be the degree of the contravention. A case in which there is a gross exaggeration of the profits or projected profits of the company would result in greater harm to the public than one in which the degree of falsity is much lower. In the present case, counsel for the company argues that it was an expense of $374,000 out of $9,339,000, an understatement of the actual expense by 4%. But in my view the more relevant factor is profit rather than expense as that is what investors would be more concerned with. Profit was reported as $2,467,000 and had the $374,000 been deducted it would have been $2,092,000. This meant that the profit was reported as 18% higher that it was. This is a significant percentage, although there is no evidence of the effect on investors had the correct figure been reported. If the company had derived substantial benefit from the breach, this could go towards aggravating the offence.

15 Another factor is the intention or motivation of the offender. I note that there is no requirement for *mens rea* to constitute the offence. This is clear from the last part of s 253(1) of the Act which states that "*the persons referred to in subsection (4) shall be guilty of an offence even if such person, unless otherwise specified, were not involved in the making of the false or misleading statements or omission*". However a number of defences are available to the company under s 255 of the Act, the relevant parts of which are as follows:

> **255.** —(1) A person referred to in section 253 (4) (*a*), (*b*) or (*c*) is not liable under section 253 (1) … only because of a false or misleading statement in a prospectus or a profile statement if the person proves that he —
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> (a) made all inquiries (if any) that were reasonable in the circumstances; and
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> (b) after doing so, believed on reasonable grounds that the statement was not false or misleading.
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> (2) A person referred to in section 253 (4) (*a*), (*b*) or (*c*) is not liable under section 253 (1) … only because of an omission from a prospectus or a profile statement in relation to a particular matter if the person proves that he —
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> (a) made all inquiries (if any) that were reasonable in the circumstances; and
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> (b) after doing so, believed on reasonable grounds that there was no omission from the prospectus or profile statement in relation to that matter.
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> (3) A person is not liable under section 253 (1) or 254 (1) only because of a false or misleading statement in, or an omission from, a prospectus or a profile statement if the person proves that he placed reasonable reliance on information given to him by —

(a) if the person is an entity, someone other than —

(i) a director or an equivalent person; or

(ii) an employee or agent, of the entity; or

(b) if the person is an individual, someone other than an employee or agent of the individual.

(6) A person is not liable under section 253 (1) or 254 (1) only because of a new circumstance that has arisen since the prospectus or the profile statement was lodged with the Authority if the person proves that he was not aware of the matter.

16 It can be seen that the Act imposes a duty of due diligence on the company not only to not make false or misleading statements or omissions in a prospectus, but to do all it reasonably can to ensure that none is made. If that duty is not complied with, then liability is imposed for the existence of such statements or omissions in the prospectus. Nevertheless, while the absence of *mens rea* is not relevant for the purpose of liability, it is important for the determination of the sentence. It is self evident that there is a world of difference between a person who fixes the books, so to speak, in order to derive a benefit from a rosy prospectus and one who is merely negligent in not performing a thorough check. In the present case, it was Yeo who was responsible for the breach of the Act. Although his act is attributable to the company for the purpose of liability, in terms of intention, the failure on the part of the company, as the district judge had correctly recognised (at [6] of his GD), "*the mischief on the part of Auston was to allow a single director free rein of the company without any proper system*". If it were a situation where the board of directors had made a decision to refrain from correcting the prospectus when they came to know of it, then a more severe punishment would be justified.

17 I should add that, even considering Yeo's motivation, it was not the extreme case where the company had received invoices early, but in preparation of accounts for IPO had deliberately taken the decision to make the wrong accounting treatment in order to show a better profit figure and by so doing intending to deceive the investing public into believing that the company was doing better than it actually was. Yeo's decision was made under pressure of time; the accounts for FY2002, which were affected by the late invoices, were already closed and he made the decision to resolve the problem by way of a false accounting treatment to ensure a smooth IPO.

18 A third factor is the steps taken by the company upon discovery of the breach, or the degree of "remorse" shown by the offender. In this respect, counsel for the company submitted that the company was in fact the complainant of the matter and had engaged an independent accountant to investigate the matter as soon as it came to the attention of the new board. The company had spent about $140,000 on this. It had cooperated with the CAD investigation and had pleaded guilty to the charge. Yeo and the chief financial officer had been prosecuted and convictions secured.

19 The district judge placed much emphasis on this case on the need for a deterrent sentence. By this, I presume he means a sentence that is harsher than one that is determined solely on the principles of retribution so that it may deter other persons from committing this offence. To the extent that he is saying that it is difficult to detect cases of this nature and therefore a deterrent sentence would be called for, I agree fully with him. However, a deterrent sentence would mean that the company would be punished beyond what retribution would justify. Therefore it would be incumbent upon the court to consider whether the cost of inflicting a heavier punishment on the offender would bring about a greater good in that it would cause persons in similar situations to

refrain from committing such offences. A deterrent sentence has effect only on individuals, be they persons who commit the act and are liable for it, or managers responsible for steering the companies. A harsh sentence meted to an individual who commits this offence could have the effect of general deterrence in that other individuals would calculate the potential risk and cost against the returns for the criminal act. However it is not clear to me how imposing a severe punishment on the company would deter individuals who manage companies. The courts must be careful not to impose overly onerous conditions on the corporate world simply to ensure compliance with regulatory provisions in a situation where the law can effectively be applied to deter individuals from committing such acts. Indeed, as counsel for the company had argued, imposing a deterrent sentence could well deter other companies from reporting such incidents or reporting early. There is every reason to promote early reporting as this enables a complete investigation to be carried out and perpetrators to be apprehended before they abscond. Also markets may have the benefit of early information and thereby avoid potentially greater losses.

20 For these reasons, I disagree with the district judge that a deterrent sentence is called for in the circumstances of this case as it will not be effective. However the contravention has been committed by the company, the investing public have been affected and it is in the public interest that the company be punished for its breach. Considering the aggravating and mitigating factors of the case, I am of the view that this is not an such an egregious breach of s 253(1) of the Act. The company had shown "remorse" in that it had carried out its investigation and reported the matter early. It had cooperated fully with the CAD and had pleaded guilty immediately. In the circumstances of the case, I allow the appeal against sentence and reduce the fine to $10,000. There will be an order for the company to pay this sum, or if it had paid the fine of $90,000 imposed below, there will be an order for the refund to the company of the excess of $80,000.