

HONG KONG / JUDGMENT

HKSAR v. HO KA KEUNG

COURT

Court of Appeal

DECIDED

31 October 2008

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bjbj [7_] efore: Hon Tang VP, Yuen JA and Wright J in Court Date of Hearing: 29 August 2008 Date of Judgment: 31 October 2008

JUDGMENT

macrobutton nomacro Hon Tang VP : The applicant was the chief executive officer of Sky Pacific Insurance Brokers Ltd (Sky Pacific), an insurance broker. Both the applicant and Sky Pacific were members of Professional Insurance Brokers Association (PIBA). The applicant was initially charged with three others with one count of conspiracy to defraud. The trial judge held that they had no case to answer. At the heart of the conspiracy charge is the allegation that the defendants conspired to take advantage of New York Life Insurance Worldwide Limited (New York Life s practice of paying a commission equal to 138% of the first year s premium in respect of certain life policies. It was the prosecution s case that the defendants agreed to pay the premiums for the proposers in order to earn the commission of 138%. The particulars of the 1st charge is self-explanatory:

- (1) representing to New York Life that premiums paid under policies brokered by Sky Pacific Insurance Brokers Ltd (Sky Pacific) were paid by the proposed policy holders;
- (2) representing to New York Life that the said proposed policy holders were genuine buyers of such insurance policies underwritten by New York Life;
- (3) inducing New York Life to offer policies to the said proposed policy holders; and
- (4) inducing New York Life to pay Sky Pacific commissions in advance in connection with the said policies. At the end of the prosecution s case a charge of fraud was laid against the applicant. The applicant was convicted and sentenced to imprisonment for 30 months. This is his application for leave to appeal against conviction and sentence. I have had the benefit of reading Wright J s judgment in draft, I agree with his conclusion on the 1st, 2nd and 4th grounds of appeal. The 3rd ground of appeal is that the judge applied the wrong test in

relation to dishonesty. Wright J said:

71. The judge delivered his reasons in an unfocused, repetitive manner which ran to some 49 pages. The alternative charge was a straightforward, simple fraud. The evidence that went to prove it, which was abundant, was neither complicated nor voluminous. The manner in which the reasons for verdict were delivered renders the determination of the basis of conviction a labour-intensive task.
94. It was however in respect of this ground that the judge's approach to the Reasons for Verdict occasioned the most & lows: Ho Ka-keung, on divers days between the 1st day of February and the 31st day of December, 2003, in Hong Kong, by deceit, namely by falsely representing to New York Life Insurance Worldwide Limited (New York Life) that:-
- (1) 41 applications for insurance submitted by Sky Pacific Insurance Brokers Ltd (Sky Pacific) to the said New York Life were genuine applications by the proposers concerned; and
 - (2) the premiums paid under the said 41 policies had been paid by the said proposers, and with intent to defraud, induced the said New York Life to commit an act to their prejudice, namely, by underwriting and issuing the said 41 insurance policies. The first particular is not very clear but the second particular is easy to understand. It alleges that the defendant has falsely represented to New York Life that the
 - (2) the premiums paid under the said 41 policies had been paid by the said proposers, The false representations were presumably to be found in the 41 application forms submitted to New York Life. nCQ had signed the 41 application forms and certified that the information therein was correct. It is not clear whether the judge proceeded on the basis that the applicant had represented by items 8 and 9 that the premiums had been paid by the proposers. It is noted that the form also provided under Important Note that:
 - (3) Any premium deposit payment should be paid by a crossed cheque made payable to New York Life Insurance Worldwide Ltd. Presumably, the premiums were indeed paid by cheques made payable to New York Life. I say presumably because it is not clear from the Reasons what was the prosecution case on this. But what is important for the present purpose is that the application forms do not in terms represent to New York Life that the proposers had paid the premiums themselves. It appeared that the payments were made by Sky Pacific to New York Life, exactly how they were paid is not clear from the Reasons. So the answers in items 8 and 9 are not literally untrue. Part of the background is that under the relevant PIBA regulations, insurance brokers were not supposed to rebate any part of the commission to the customer. The judge said:
50. New York Life looked at its broker agreement. One thing that it found was not in that agreement, although it covered many things, including how commission was to be paid, was the fact that no clause forbade the payment by any broker of any premium by the referring broker. No doubt those who advised New York Life as to the broker agreement considered, as lawyers often do, that the chain of requirement and indeed the framework that governed

insurance intermediaries in Hong Kong was sufficient to cover the situation and that there was no requirement for any specific prohibition on a broker paying any premium for the insured.

51. The reason for that is because both under the membership requirements of PIBA that existed at the time when Sky Pacific and the defendant made applications successfully for membership, and under the terms of the replacement membership regulations, there was a specific prohibition on the offer of any gift or inducement. Indeed, under the previous membership regulations which were those that applied at the time that Sky Pacific and the defendant made application, the regulations described misconduct under regulation 5 of the regulations. The regulations provided the following practices shall be construed as misconduct for the purpose of these regulations. Sub-regulation (d) is as follows: The offer of any payment, allowance or gift as an inducement to any prospective insured to insure through the offerer.
52. No doubt the person in the Legal Department or the solicitors or attorneys engaged by New York Life or would have considered that, as that was a requirement of the regulations, as the regulations applied to any successful applicant for membership of PIBA and as any person dealing with New York Life had to be a member either of PIBA or the other regulating body, there was no need to put in any clause mirroring the particular sub-regulation in regulation 5 of the membership regulations PIBA. In para. 125, the judge said in relation to such regulations that the applicant must be deemed to know these regulations. He said:
125. I beg to differ because as I have been at pains to point out at the start of this verdict, there is very much a legislative framework in which the Commissioner for Insurance delegates its responsibilities to, in this case, PIBA. As I posed to Mr Allan during the course to the trial, prior to the submission of final submissions, it was the same as a solicitor saying that although he might have transgressed the solicitors rules he did not know that that rules existed. Were any such defence to be advanced that he had transgressed the framework for solicitors, he would get very short shrift.
126. In this case, there is a legislative framework which is in two parts; firstly, the formal and tedious wording of the Insurance Companies Ordinance and then, secondly, the provisions which have been made in this case by PIBA. It does not lie in the mouth of anyone who knows that he has to apply to, in this case, PIBA to be an authorised broker to then say, Although I knew that I had to go through PIBA to be an authorised broker, I simply didn't know anything about the regulations. I might have signed to that effect, but I don't read English very well and I simply didn't know anything about the regulations.

127. Because this is a legislative framework, I am content that the defendant is deemed to know that framework. He was the one who applied to PIBA and he is deemed to know that there is this framework with regulations. I am not sure why the judge referred to regulation 5 and found that the applicant is deemed to know this regulation. Does this go to the issue whether the answers to items 8 and 9 are untrue? Or that the applicant knew they were untrue, or he was reckless? I will not try to guess at the judge's meaning. Wright J concluded, however:
98. Under s.16A of the Ordinance, proof of recklessness is sufficient for the offence: *CHENG Po-yan v HKSAR* FAMC79/2005. The judge appreciated this as an overall reading of the reasons for verdict shows that the judge convicted on the basis of wilful blindness on the part of the applicant. Whilst I agree that recklessness is sufficient for the offence, I do not agree that the judge convicted the applicant on that basis. Counsel appearing for the respondent presented her case on the basis that the judge had convicted the defendant on deliberate as opposed to reckless deceit. The applicants submission also appeared to have been made on that basis. I accept that they might have misunderstood the judge. Speaking for myself, I am unsure on what basis the trial judge had convicted the applicant although I have read the Reasons several times. In paras. 139 or 140 of the Reasons, which Wright J quotes, the judge said in relation to the application form that: 139. He knew, when he sent the forms off to New York Life, that they were a fabrication. 140. he had put himself in a position where he knew that forms on their way to New York Life were fictitious, fake and made up. Wright J said in para. 103:
103. In my judgment where the judge used the word knew in these paragraphs he is simply talking in general terms: that because of the applicant's role in the operation as a whole he simply must have been aware of the fact that the proposal forms were false yet wilfully turned a blind eye to that fact. His use of the word knew was plainly used in the context of wilful blindness. I cannot read knew in a way which negates its meaning. I agree there is evidence, which, when properly understood and appreciated, might have formed the basis of a finding of recklessness. I cannot agree that the judge has demonstrated that he had properly understood or appreciated the evidence. This is a simple case. The issues are:
- (1) Were there representations that the premiums were paid by the proposers?
 - (2) if so were the representations false?
 - (3) whether the application knew that they were false or that he was reckless, not caring whether they were true or false. The trial judge delivered a 49-page Reasons. Nowhere had the judge made clear that those were the issues which he had to decide. Nor did he show that he had come to any conclusion in relation to them. The judge said in the concluding paragraphs in the Reasons:
159. I return to the present matter. I repeat this is not a case where I find fault on the part of the defendant because he merely twiddled his thumb and did nothing. In my judgment, he took positive decisions to take on the mantle of a company for which he then assumed stewardship particularly as it was an authorised insurance broker and he deliberately stood

aside to allow Irene Chiu to do whatever it was that she did. She operated the bank account and, at her behest, he merely signed cheques; as Mr Andrews has also pointed out, the defendant also authorised transfers between client and office accounts and drew small sums of cash.

160. Clearly, if he accepts that at the interview with the officers of PIBA he was told that client account was sacrosanct, the defendant can now not be heard to complain that I take the view that he was in complete dereliction of his duty to ensure that office and client accounts did remain apart. He has not been dealt with on the basis that he is a bad accountant; he has been dealt with on the basis that he clearly positively took steps to allow Irene Chiu the use, for whatever reason, of the vehicle for which he had responsibility and positive responsibility merely so that she could have the advantage of extraordinary and lucrative commissions.
161. On that basis, I find the defendant guilty of the offence in the charge and convict him thereof. I confess I am not sure what to make of these paragraphs. Para. 159 has no direct relevance to the two particulars with which we are concerned. Nor para. 160. So even if one could regard paras. 159 and 160 as consistent with a finding of recklessness on the part of the applicant, they are not recklessness as regards the deceptions with which he had been charged. In *Oriental Daily Publisher Ltd v. Commissioner For Television And Entertainment Licensing Authority* [1997-1998] 1 HKCFAR 279 the Chief Justice said at 290J:
39. Where there is a duty to give reasons, it must be discharged by giving adequate reasons. What would amount to adequate reasons for a decision would depend on the context in which the decision maker is operating and the circumstances of the case in question. In *Flannery and Anor v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, Henry LJ delivering the judgment of the court said at 381: We make the following general comments on the duty to give reasons. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
- (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter
- (4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword. (Emphasis added) The

applicant is entitled to due process and, of course, justice. If a judgment is not readily comprehensible and can only be reconciled by linguistic distortion, I cannot uphold the conviction. In the circumstances, I would grant leave to appeal and treating the hearing as the hearing of the appeal, I would allow the appeal. Yuen, JA:

34. I have had the benefit of reading the draft judgments of Tang V-P and Wright J. I agree for the reasons given in Wright J's judgment that there is no merit in the 1st, 2nd and 4th grounds of appeal.
35. As for the 3rd ground of appeal, I agree with Tang V-P and Wright J that regrettably the judge's way of writing his reasons for verdict did not make it easy for a reader to understand his analysis of the case. It would have been simpler for the reader if he had first set out the elements of the offence charged, secondly made such findings of relevant fact as were disputed, and thirdly applied the facts (whether admitted or found) to each of the elements of offence to see if the prosecution has discharged its burden of proof. That is not to say that all judgments must be written in a template style. What is important is that a methodical approach should underpin the intellectual exercise that has to be undertaken in every case. The more complex the case, the more important it is to apply that methodical approach to avoid any misunderstanding as to how the judge came to his decision. In the present case however in view of the way in which the judge chose to present his reasons for verdict, it has become necessary for us to ascertain from various parts of the Reasons for Verdict what are the facts the judge has found relating to each element of the offence in order to determine whether the conviction should be upheld.
36. To distinguish the Applicant from the persons applying for insurance, I shall refer to him as the Defendant. He was charged with fraud under s.16A Theft Ordinance Cap.210. Shorn of refinements, the elements of that offence are:
 - (1) a deceit practised by the defendant (whether by deliberate or reckless words or conduct)
 - (2) with intent to defraud
 - (3) which induced another person (V) to do or not do something
 - (4) resulting in benefit to someone other than V, or prejudice (or a risk of it) to someone other than the defendant. For element (2), by virtue of s.16A(2) a person is treated as having an intent to defraud if he intends that by practising the deceit, he would induce V to do or not do an act with the result set out in element (4).
37. It would be noted that the word dishonestly does not appear as a specific element in s.16A, unlike in s.2 (theft), s.17 (obtaining property by deception), s.18 (obtaining pecuniary advantage by deception), or s.18A (obtaining services by deception) and other offences. However, deceit incorporates the element of dishonesty and the judge was well aware of the requirement that the prosecution must prove that the Defendant had been dishonest (para. 86).

38. I shall now consider whether the judge had found that each of the elements of the offence has been proved in the present case. Element (1) - deceit practised by the Defendant
39. First, as to element (1), what is the Defendant's conduct by which the prosecution says he has practised a deceit? That conduct consisted of his signing insurance application forms as manager of Sky Pacific Insurance Brokers Ltd (the company) which stated (a) that the applicant was applying for insurance and (b) a premium had been paid with the application.
40. In respect of (a), the form contained a statement by the company for which the Defendant signed as manager that it had asked the applicant certain questions, had recorded the applicant's answers exactly as made, and had obtained the applicant's signature in its presence (the interview and attestation procedure). Therefore in signing the applications containing those statements, the Defendant was representing to New York Life that his company had undertaken the interview and attestation procedure which were essential to the verification of the applications.
41. The evidence before the judge was that some of the applicants did not even exist and some had signed the applications without knowing what they were. The evidence was that without exception, the witnesses who had given evidence said that they had never heard of [the company] and they did not know anything about it (para. 112).
42. Although the Defendant did not represent that he had personally undertaken the interview and attestation procedure, by signing the forms as manager of the company, he was vouching that his staff had done so. Was his conduct in making this representation deliberate or reckless? At para. 100, the judge held that there was no evidence that the Defendant knew of the exact situation or the exact circumstances in which the signatures and personal particulars of the applicants were obtained but the Defendant knew that as a whole, the forms were fake, faked and filled in by people at [the company] (para. 139). The judge found that the Defendant knew that the forms for New York Life were fictitious, fake and made up (para. 140, para. 145). Hence the Defendant's conduct in vouching that his staff had undertaken the interview and attestation procedure was a deliberate falsehood.
43. At the least the Defendant was reckless. In this respect the Defendant's personal attributes were obviously relevant. Unlike the other director D3 (later DW2), the Defendant was not a naive young man who was learning on the job. He was a professional insurance broker. At the time of the offence, he had had considerable background in the industry , having worked for a number of well-established insurance companies since 1996. He had attained specialist insurance qualifications under the Insurance Intermediaries Qualification Examination and was accepted for registration as a member of the Professional Insurance Brokers Association.
44. With practical experience in insurance companies and professional qualifications, he must have known that a CEO of a professional brokering company has responsibilities and it would be a derogation of those responsibilities for the CEO to be merely a figurehead. The judge referred to the legislative framework within which the Defendant operated the

company (para. 127) and as the judge noted, the Defendant was the only person at the company who was connected with it solely (para. 105). The judge rejected the Defendant's excuse of ignorance (para. 128) finding that he deliberately chose to be just a figurehead, simply signing on the space for the signature without exercising any quality control whatsoever (para. 112), that he clearly did not care in the slightest what he signed (para. 123), and that he simply signed the forms and either deliberately did not bother to read them or having read them, ignored them (para. 128). In fact the defence witness DW2 confirmed that the Defendant just sat around in the office and did nothing (para. 113).

45. The evidence that, within the industry, brokers sometimes referred proposals to other brokers, and that proposal forms may have been completed and witnessed on separate occasions, is neither here nor there. Applicants may be referred by other brokers, and the interview and attestation procedures may take place on separate occasions as long as the verifying agent ascertained that they were in fact done. In the present case that was not done. As the Defendant was the CEO, the persons who should have interviewed the applicants and attested their signatures were staff. DW2's evidence was that Miss Ko (D4), who signed the forms stating that she had interviewed the applicants and attested their signatures, only sat in the company's office filling in forms. The judge described the company's operations as being run like a boilerplate factory. The Defendant must have been aware that D4 could not have undertaken the interview and attestation procedure, and yet he consistently vouched for the fact that his staff had undertaken those procedures which were essential for the verification of the applications for insurance. That conduct was at least reckless and his misrepresentation constituted a deceit practised on New York Life, the recipient of the application forms.
46. As for (b) the payment of premiums, the application forms did not say in so many words that the premiums must be paid by the applicants, but the judge found that it was implicit, because there was no one else who could have made payment on the applicants behalf. There were only three parties to an application - the applicant, the agent (broker) and the insurer. The agent's professional rules (regulation 5(d) of PIBA) prohibited him from offering any payment to the applicant, so that left only the applicant himself to pay the premium. As such, when the form referred to premium paid with the application, it could only mean paid the applicant.
47. As for whose cheque was used for payment, that is mere mechanics. An applicant can pay the agent in cash and the agent can then issue a cheque to New York Life. Or an agent can accumulate a number of cheques drawn in its favour by different applicants, and itself write out a single cheque to New York Life aggregating a number of payments. Where there is no problem of liquidity, it makes no difference whose cheque was used. That is merely the method of payment, as distinct from the source of payment. As far as the source of payment was concerned, as the agent was not permitted to pay for the applicant, it was clearly intended to be the applicant himself.

48. Therefore in signing the application forms the Defendant was vouching also that the applicants had provided the money for the premiums. The evidence was clear that not one of the applicants had done so (paragraph 137). Therefore the Defendant's representation that the applicants had provided the premiums was false.
49. Was it a deliberate or reckless representation? It is not suggested that the Defendant considered at the time that his company had a right to pay the premiums for the applicants, nor that it came as a surprise to him that his company had in fact been paying the premiums. Therefore the Defendant must have known that those payments were prohibited and yet his company had been making them for the applicants. Accordingly when he signed the application forms stating that the premiums had been provided by the applicants, he must have known that it was false and it was a deliberate misrepresentation. If anything, the Defendant's payment of his creditor Mr Chow's premium to set-off a debt reinforces the prosecution's case that he (the Defendant) knew that the premium must be being provided by the applicant.
50. In fact at one point in his testimony the Defendant claimed that as part of his work he would ensure that the premium had been paid but he finally admitted that he had no way whatsoever of knowing whether the premium had been made or even if there was any premium (para. 110) and he had no idea about the premiums at all (para. 136). That is a clear admission of recklessness. As the judge put it, quite how he [the Defendant] was able to contemplate discharging those [director's] responsibilities when he had no access to any of the documents or books of account or anything else is something that I simply cannot fathom (para. 130). Element (2) - with intent to defraud
51. As for element (2) the intent to defraud, as I have mentioned s.16A(2) provides that a person is treated as having an intent to defraud if he intends that by practising the deceit, he would induce V to do or not do an act, with the result set out in element (4). That has been clearly found by the judge (para. 141) when he said the Defendant knew that commission was to be paid ... at a very attractive level and, quite clearly, he knew that the whole purpose ... was churning through insurance forms without any attempt ... to ensure that they were honest, truthful and complete. The Defendant intended - when vouching that the applications were submitted only after his staff had undertaken the interview and attestation procedure and that the applicants had paid the premiums - that New York Life would act on the forms, issue policies to the applicants and pay substantial commissions to his company. Element (3) - inducing New York Life to issue policies
52. As for element (3), the evidence showed that New York Life issued a policy on the strength of each application form the subject matter of the charge, believing that the form showed a genuine intention on the part of the applicant to enter into a policy of insurance according to its terms. Element (4) - resulting in prejudice to New York Life

53. As for element (4), the evidence showed that New York Life clearly suffered prejudice. It issued insurance policies pursuant to the purported applications. Indeed there was not only exposure of New York Life's proprietary interest to risk (para. 144), there was actual loss suffered by it.
54. For the non-existent applicants, a commission of 138% of the premium was paid by New York Life, resulting in the loss of the difference between commission and premium.
55. For those applicants who actually existed, some had signed the applications thinking they were documents of some other nature and these persons would obviously not have kept up payment of the premiums after the first year. That caused loss to New York Life as the evidence was that New York Life would not break even on a policy until the applicant had kept up the policy for 3 years.
56. Even for those applicants who knew they were signing insurance applications, they had applied on the representation that they had one year's free insurance and could decide whether to carry on after that year. New York Life made a loss in respect of those policies when they did not pay the next year's premium. Of the 791 policies issued by New York Life through the Defendant's company (or at least the 41 the subject of the charge), only 1 survived its first anniversary.
57. Therefore even though New York Life was not actually required to pay out on the premiums, they still suffered a loss. Order
58. For the reasons I have set out above, I agree with Wright J that the appeal against conviction should be dismissed. That leaves the appeal in respect of sentence which should be listed for hearing if the Defendant's counsel wishes to make oral submissions to supplement his written submissions. Hon Wright J: The applicant seeks leave to appeal his conviction, after trial by Deputy Judge D I Thomas, on a single charge of fraud contrary to s. 16A of the Theft Ordinance, Cap.210, as well as the sentence of 30 months imprisonment subsequently imposed upon him. The applicant was initially charged with three other persons with a single charge of conspiracy to defraud. The charge arose as a consequence of the submission by a company, Sky Pacific, acting as an insurance broker, to an insurance company, New York Life Insurance Worldwide Ltd of proposal forms in respect of life insurance. The essence of the prosecution case was that the four had conspired together to defraud New York Life by submitting the forms which contained material misrepresentations thus causing it to issue policies of insurance. By issuing the policies the proprietary interests of New York Life were placed at substantial risk. The motive for this conduct was said to be that, after the policies had been issued, Sky Pacific would receive a commission equivalent to 138% of the first annual premium payable upon each policy. The applicant had been approached by a third party, one Irene Chiu, herself already operating an insurance brokerage, to become a director and shareholder of Sky Pacific. He did so in return for a monthly reward of \$12,000. Although he apparently was a signatory to various bank accounts operated by Sky Pacific, his evidence which the judge accepted was that Chiu

effectively retained control of those accounts. One of the other persons charged as a co-conspirator was Chiu's nephew. Chiu was not charged. The prosecution case was, and this was the evidence before the judge, that two of the misrepresentations made were that the proposer who had signed the proposal form, first, was a genuine buyer of life insurance and, secondly, himself or herself had paid the premium due when that was not so. Each proposer who testified supported the prosecution allegations: two proposers denied even having signed the proposal form or having heard of Sky Pacific. The judge was not satisfied that the prosecution was able to establish that there had been a conspiracy. He took the view, and rightly so on the evidence, that Chiu - who had recruited the applicant as well as her nephew - may well simply have seen a business opportunity and set out to exploit it to the maximum. He was not nor could he have been satisfied on the evidence that there was initially an agreement between the four persons charged to act dishonestly. However, at the close of the prosecution case it appeared to the judge that the evidence may establish that, whatever the initial position, the applicant had been fully aware of the submission of forms to New York Life containing false information. He could hardly have arrived at any other conclusion given inter alia that the applicant's signature appeared on each of the 41 proposal forms which formed the subject matter of the charge and the evidence. The judge consequently took the view that the prosecution should consider laying an alternative charge against the applicant alone. He invited the prosecutor to take that course and, after discussion with the Department of Justice, the prosecutor sought leave to reopen the prosecution case to prefer an additional charge, in the alternative, against the applicant alone. It must be said that this course was opposed by Mr Allan, who appeared for the applicant in the court below as well as in this appeal. Notwithstanding, the judge granted leave. The additional charge was put to the applicant who indicated that he understood it and entered a plea of not guilty. The judge offered the applicant the opportunity of having recalled any of the prosecution witnesses: two were recalled and further cross-examined. After the prosecution again closed its case a submission was made in respect of the conspiracy charge that there was no prima facie case to answer. The judge agreed: all four accused were discharged on the first charge. The applicant then elected to give evidence on his own behalf in respect of the alternative charge. He called as a witness the person who had been the third accused cited in the first charge. In the event the judge found the applicant guilty on the alternative charge. In due course the applicant was sentenced to serve a period of 30 months imprisonment. He subsequently applied for and was granted bail pending the hearing of this appeal.

THE APPEAL AGAINST CONVICTION There are four grounds of appeal against conviction. The first submits that the judge erred in law in various respects by allowing the prosecution to lay the additional alternative charge; improperly intervening in the trial in regard to the laying of that charge; omitting to require the prosecution to elect whether to proceed on the conspiracy charge or the substantive charge; refusing to sever the alternative charge for trial before a different judge. The second ground complains that the judge failed to deal with the issue of the applicant's lack of previous criminal convictions in the Reasons for Verdict and further wrongly, irregularly and unfairly made reference to the fact when sentencing. The third claims that the judge misdirected himself in law in regard to the issue of dishonesty

and the fourth that the judge failed to "consider properly or at all" the evidence of the defence witness who had testified. Grounds 1 and 2 were pursued on behalf of the applicant in this court by Mr Allan whilst grounds 3 and 4 were advanced by Mr Poon who had appeared in the court below on behalf of the former second accused on the first charge. The reasons for verdict It is apposite to say something about the reasons for verdict before dealing with the individual grounds of appeal. Justifiable criticism has been directed at them. They were hardly a model. Those reasons included inappropriate comment 157. I should be grateful, however, that if whoever used the phrase "divers days" was taken into a corner and made to stand there with a dunce's cap for a considerable number of hours. speculation

52. No doubt the person in the legal department or the solicitors or attorneys engaged by New York Life or [sic] would have considered that, as that was a requirement of the regulations, as the regulations applied to any successful applicant for membership of PIBA and as any person dealing with New York life had to be a member either of PIBA or the other regulating body, there was no need to put in any clause mirroring the particular subregulation... florid language
99. It is clear that there was this collection of agents, hangers-on, persons who knew other persons and so on, and quite clearly, there was revolving, as it were, around the sun of Sky Pacific this cloud of intergalactic dust composed of the various people who were trying to sign on gullible members of the public. In turn, Sky Pacific itself revolved around the supernova of New York Life. 143. I accept that there was no lavish entertainment. I accept there were no fast cars or even fast women. asides and observations
67. The forms themselves are the usual wearisome, if I may put it that way, requirements for life assurance. which would better have remained unsaid in this, and in any other, matter. The judge delivered his reasons in an unfocused, repetitive manner which ran to some 49 pages. The alternative charge was a straightforward, simple fraud. The evidence that went to prove it, which was abundant, was neither complicated nor voluminous. The manner in which the reasons for verdict were delivered renders the determination of the basis of conviction a labour-intensive task. That said, to allow an appeal, where there is otherwise clear and sufficient evidence of guilt, simply on the basis that the judge has not slavishly followed a formulaic approach or some perceived stylistic preference is contrary to the interests of justice. As Lord Bingham observed in *Singh v The State* [2005] UKPC 35, a judgment which is of further interest in view of the second ground below: The omission of a good character direction on credibility is not necessarily fatal to the fairness of a trial or the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated. [Emphasis supplied]
- Ground 1: the laying of the alternative charge. The procedure adopted by the judge was entirely proper. The judge indicated in his Reasons for Verdict that as the case proceeded it had become clear to him that the prosecution had misconceived the effect of the evidence as

establishing a conspiracy. This does not mean, of course, that the judge had arrived at any final decision but demonstrates that he was attentive to the evidence and considering its impact on the case pleaded as it developed during the witnesses testimony. Modern case management techniques require that judges perform their function in this manner. The concept of fairness is not one-sided. It is not one that is confined to benefit an accused person: it is as much the judge's function to be fair to the prosecution in the conduct of its case as it is his function to ensure that an accused person receives a fair trial. In view of the submissions that have been made in this matter it appears necessary to repeat, once more, that judges are not required simply to sit on their hands and meekly watch a case go awry. Whatever the position may have been in times past, judges today are expected to play a more active role in the management of the proceedings before them. If authority be needed for this proposition, which by now may be thought to be well-established, it is to be found succinctly stated in *R v Saville* Cr App Rep 4189/1991, quoted with approval in *HKSAR v LUI Kin-hong*, Jerry CACC378/1988 unreported, as follows: If the presiding judge perceives the risk of a case going off on a wholly wrong basis, whether because of some legal technicality which has been overlooked or because of some lacuna in the evidence, it is not incumbent on him to grit his teeth, remain silent and watched justice miscarry, which is no less a miscarriage of justice when an accused person escapes conviction through inefficiency or carelessness on the part of the Crown than when he is convicted as a result of a comparable error on the part of the defence. Rather it is the duty of the judge to ensure that criminal proceedings are tried fairly and efficiently and to intervene, if necessary, to ensure that that goal is achieved. That is not to suggest that a judge should ever descend into the arena. There may be instances where that is a fine line to walk: this was not one of them. It was clear to the judge that the prosecution's case as pleaded was not consistent with the evidence but that there was sufficient evidence before him that may be thought to have demonstrated the commission of an offence by the applicant alone. After satisfying himself that the applicant would not be prejudiced in the conduct of his defence the judge allowed the prosecution to lay the additional charge. The judge did no more than is to be expected of a judge in such a situation: to describe his conduct as "overzealous" is a distortion. The submission by the applicant that the application was made after the completion of submissions of no case to answer on the conspiracy charge is wrong. In the circumstances of this matter, with the alternative charge being laid only at the end of the prosecution case when the applicant was well aware of the nature and extent of the evidence against him and then being afforded a further opportunity of revisiting such sections of that evidence as he saw fit, there is no merit in the complaint that the judge should have called upon the prosecution to elect whether to proceed on the conspiracy or the substantive charge: moreover, the alternative charge was only against the applicant. Such an application would have been wholly artificial. Similarly, an application for severance. Ground 2: failure to mention the applicant's lack of previous criminal convictions. In providing Reasons for Verdict, a judge is expected to set out sufficient of his reasoning process as will permit an accused person to know why he has been convicted or, conversely, the prosecution why it has failed, why the judge has reached a particular conclusion or decision. It is also

important that a court hearing any subsequent proceedings is in a position to ensure the safety of the conviction. (R v LAM King Ming Crim. App. 601/1979; and [2000] 4 HKC 168; HKSAR v Li Chi Shing HKSAR v POON Chun-kit and Ors [2007] 4 HKLRD 12) What will amount to adequate reasons will depend upon the circumstances of the case in question. (Oriental Daily Publisher Ltd v Commissioner for Television & Entertainment Licensing Authority (1997-8) 1 HKCFAR 279. One thing which these Reasons for Verdict did not contain was any reference to the fact that the applicant had no previous criminal convictions: there was no evidence of positive good character. This omission forms the basis of the second ground of appeal. It is self-evident that, given the nature of the charge and the defence offered by the applicant, effectively that he was an innocent dupe, it certainly would have been preferable for the judge to have recorded the fact but the mere failure to do so is not fatal, of itself, to the conviction: it is only where there is a clear indication that a professional judge sitting alone has failed to consider the effect of the lack of previous criminal convictions that it may be appropriate to allow the appeal. (R v Wong Chi Wei and another [1994] 1 HKCLR 94, R v Fok Tin Yau [1995] 1 HKCLR 351, HKSAR v. Li Yun Cheung CACC 307/1997) The applicant appears singularly to fail to appreciate the distinction between what is required of a judge when directing jurors as triers of fact and when a professional judge sits alone. Two decisions of this court, differently constituted, reflect the current approach: in HKSAR v LAU Yuk-kwan CACC656/1997, Mayo, JA, said:

29. Ground 5 complains that: "The Learned Judge failed to direct himself as to the Appellant's previous good character."
30. Again the simple answer to this complaint is that there is ample authority for the proposition that a professionally qualified District Judge is not required in his Reasons for Verdict to state that he has given himself a direction concerning the Applicant's previous good character.
31. Mr. McGowan argued that the present case was an exceptional one as the credibility of the Applicant was of crucial importance. He also argued that the Applicant was himself a victim as he had believed that the notes he had acquired were genuine. Clearly the Judge was fully aware of the Applicant's clear record and would have given him appropriate credit for this. In HKSAR v TSANG Chi-hung CACC440/2002 Ma, JA, giving the judgment of the Court said:
12. As to the second ground: The learned Judge did not mention the fact that the Applicant had a clear record. However, this fact was mentioned to him during the defence's closing. Mr Oderberg accepts this. The Judge therefore must have been aware of this fact. Mr Zervos drew our attention in his written submissions to R v. Fok Tin-yau (unreported), 26 May 1995, Court of Appeal, where Power VP said at page 7 that whether or not a direction needed to be given in relation to an accused's good character depended entirely on the circumstances of each case. It may be particularly relevant to do so where, say, the credibility of the accused is in issue. Where this factor is relevant, in the case of a judge sitting alone, Power VP said this at page 8: "As Penlington JA made it clear in R v. WONG Chi-wei (1994) 1 HKCLR 94, CHAN Wu-nam's case is not authority for the proposition that in all cases where credibility is

in issue, the Judge must set out the manner in which he considered the accused's good character in deciding that issue. Where a judge is sitting alone and evidence of good character has been given, this court will, even if he makes no mention of it, unless there be some express or implied indication otherwise, act upon the basis that he was aware of the character evidence and that he gave it the weight which he thought it deserved."

- (3) In the present case, even if it was relevant to consider the Applicant's clear record, the learned Judge was aware of it and must, in our view, be taken to have duly considered it. [Emphasis supplied] Whether or not he mentioned it in the Reasons for Verdict it is plain that the fact that the applicant had no previous criminal convictions was before the judge in stark and unequivocal terms: first, it was an admitted fact in respect of the first charge that "all the defendants are of clear record"; secondly, the judge referred to the application signed by the applicant for membership by Sky Pacific of the Professional Insurance Brokers Association, Exhibit P6, in which the applicant asserts that he has no criminal convictions; thirdly, there were repeated references to the applicant's lack of previous convictions made by Mr Allan to the judge, and in some instances responses by the judge, in the submission of no case to answer made at the close of the prosecution case, in the course of an application for leave to withdraw admissions made pursuant to section 65C of the Criminal Procedure Ordinance and in the closing submission on behalf of the applicant. There is nothing in the Reasons for Verdict which indicates that the judge disregarded the applicant's lack of previous convictions. The judge must be taken to have considered it in the applicant's favour on the appropriate basis. Criticism is made of the fact that when sentencing the applicant the judge did refer to the lack of previous convictions, it being suggested that he was seeking to make good the omission from the Reasons for Verdict. The judge said: Although I did not specifically mention your good character in convicting you, I took into account that lack of previous convictions both as to what lawyers call credibility - that is your right to be believed - and, secondly, as to what lawyers call propensity - that is your unlikelihood of committing an offence at the age that you have now reached, not having trouble with the courts before. The applicant chooses to ignore the rest of that paragraph which sets the context in which this observation was passed. It reads However, the conviction that I entered stemmed mainly from the fact that out of your own mouth and that of your witness, the evidence turned against you. It is clear that the claims of a clear record simply cannot stand against the findings that I was able to draw from such evidence. The criticism is entirely unfounded. To suggest in effect that the judge had recognized and was there attempting to remedy a defect in the Reasons for Verdict flies in the face of any sensible reading of the paragraph as a whole. It does not avail the applicant to rely upon the observations made during the course of granting bail to him pending appeal: those observations were made necessarily without the benefit of a full knowledge of the facts and circumstances of the case or the opportunity of hearing detailed argument. Ground 3: the judge applied the wrong test in relation to dishonesty. This ground appears, with respect, to be based upon a misunderstanding by those advising the applicant of what the judge said. This appears particularly from the "Supplemental written submissions" lodged on the evening before the hearing of this appeal

which deal at length with issues concerning a conspiracy to defraud - the charge of which the applicant and his then co-accused were all acquitted. It largely relies upon the concept that Chiu establish Sky Pacific for the purpose of carrying out a fraud: this is exactly what the judge found had not been proved in respect of the first charge. It also complains that the judge placed "undue weight" on the applicant's claimed previous experience in the insurance industry: the point that the judge simply was making was that the applicant's experience was sufficient so as to render his professions of ignorance improbable in the extreme. It was however in respect of this ground that the judge's approach to the Reasons for Verdict occasioned the most difficulty. By the assertion on behalf of the applicant that the judge had misdirected himself in regard to the issue of dishonesty, the applicant drew attention to the fact that at no stage had the judge actually dealt in terms with the application of the appropriate test for dishonesty in accordance with the well-known decision in *R v Ghosh* 75 Cr App R 154. The applicant had indicated during his testimony that he did not think that he was doing anything wrong or which was illegal or unlawful: to quote the judge, "... everyone else was doing it... and that there was therefore nothing wrong with him doing it either." The judge rightly recognized that that defence would have a bearing on the applicant's state of mind as to whether he was dishonest or not and is a clear indicator, in my view, that the judge was alive to the Ghosh test. The judge did not convict the applicant on the basis that the applicant knew either of the circumstances in which the proposal forms were signed or of the position in regard to payments of premia. The judge indicates, in terms, in regard to the first particular of the offence that:

100. It is quite clear that the defendant did not know or there is simply no evidence that he knew that these people, who had given evidence, were being accosted by their friends, by friends of relatives, or relatives of friends, employers in some cases and so on and so forth. There is no evidence that he knew about these matters. In regard to the second particular of the offence the judge referred to the applicant's evidence:
110. ... he also said something curious when he was giving evidence: he would ensure that the form had been correctly filled in and that he would ensure that the premium had been paid. However, when he was asked about that, he had to admit that he had no way whatsoever of knowing whether the premium had been made [sic] or even if there was any premium. and The defendant... at one time tried to say that the role he fulfilled was checking that the premiums had been paid. Only very slight questioning forced him to accept that he had no idea about premiums at all. That must be right because all these forms originated in [Chiu's brokerage]. Under s.16A of the Ordinance, proof of recklessness is sufficient for the offence: *CHENG Po-yan v HKSAR* FAMC79/2005. The judge appreciated this as an overall reading of the reasons for verdict shows that the judge convicted on the basis of wilful blindness on the part of the applicant. He detailed that the applicant was a shareholder and director of Sky Pacific; that the applicant was a signatory to the two bank accounts operated by Sky Pacific, albeit that he appears to have accepted the applicant's evidence that the bank statements were forwarded to Chiu's address and not to that of Sky Pacific; that it was the applicant who had negotiated the original brokerage agreement between New York Life and Sky Pacific;

that it was the applicant who, on behalf of Sky Pacific, later met with representatives of New York Life to renegotiate that very agreement when New York Life sought to vary its terms; that the proposal forms would be completed by D4 and simply signed by the applicant, in his capacity as "manager", after completing one section of the form himself; that the applicant's own witness had testified that he had only ever seen the applicant "sitting there doing nothing"; that the forms, already signed by the proposer, were completed in the offices of Sky Pacific and signed by the applicant in the absence of the proposer. The judge further indicated that he convicted the applicant on this basis thus:

102. However, even if I accept that the defendant was not aware of the exact situation or the exact circumstances in which forms were being thrust at members of the public, in which signatures were obtained and, in some instances, in which personal particulars were being obtained, that is not an end of the matter.
103. It is quite clear that what is being alleged is this: this was a device which, if not an engine of fraud at its inception, was a mere device to translate false insurance proposals into policies and into commissions... then further 112.... The details were being filled in by D4 and the defendant was simply signing on the space for the signature without exercising any quality control whatsoever.
123. ... the defendant clearly did not care in the slightest what he signed, what he did or who he went to meet.... it is clear that he was there to do whatever it was that... Chiu wanted him to do. 128.... He simply signed the [proposal] forms and either deliberately did not bother to read them or, having read them, ignored them.... for whatever reason, [he] either deliberately or by simply not bothering to read, he ignored the contents of the form.
130. I take the view that the evidence is not that the defendant merely sat back and did nothing but that he did very positive, very definite things. This conduct of the applicant, which the judge was fully entitled to find on the evidence, must be considered in the light of the particular finding expressed as follows:
132. The reality of what was happening at Sky Pacific was that it was boilerplate factory. D3 [the applicant's witness] would be given forms which had been directed not to Sky Pacific but [Chiu's brokerage]. He would bring those forms down to Sky Pacific where they were filled in by D4, signed by [the applicant] and then taken by D4 to New York Life. I am satisfied that there was no contact with anyone whose name appeared on any of the forms... it is quite clear that the forms were filled in independent of any proposer.
145. ... the defendant... positively stood aside... knowing that what was happening was fake, false and incomplete forms were being sent... to New York Life for the purpose of policies being issued with the insurance company being put at risk. In dealing with his specific finding concerning deceit the judge said: He knew, when he sent the forms off to New York Life, that they were a fabrication. There may have been some factual parts that were correct. There even may have been genuine signatures, but taken as a whole, the forms were fake, faked and filled in by people at Sky Pacific. 140.... he had put himself in a position where... he

knew that forms on their way to New York Life through D4 were fictitious, fake and made up. 141.... the defendant knew that commission was to be paid... at a very attractive level and, quite clearly, he knew that the whole purpose... was churning through insurance forms without any attempt... to ensure that they were honest, truthful and complete. In my judgment where the judge used the word knew in these paragraphs he is simply talking in general terms: that because of the applicant's role in the operation as a whole he simply must have been aware of the fact that the proposal forms were false yet wilfully turned a blind eye to that fact. This is supportive of his finding that the applicant deliberately chose not to read the forms or, if he read them, to ignore the content, in order that he would later be able to deny knowledge of specific falsity. The judge was not indicating knowledge, in the legal sense, of the particularised falsity, but rather an awareness of what was happening which he actively took steps to avoid converting into knowledge. His use of the word knew was plainly used in the context of wilful blindness. There is a further aspect to the extent of the applicant's awareness of the falsity of the proposal forms, again, consistent with the finding of wilful blindness by the judge. It was the applicant's own evidence that, in respect of each of the 41 proposal forms submitted to New York Life, he had completed that section of the form headed "Agents statement" without meeting any of the proposers. This despite the fact that the first question asked of the agent by the form is: Did you ask each question exactly as set forth in the parts of this application for which you are responsible, were the answers recorded exactly as made to you, and were all required signatures obtained in your presence? If "no", please give details in Q.19 It was further the applicant's evidence that he had answered, falsely, this question in the affirmative in each instance. The judge dealt adequately with the issues of deceit, intention to defraud and exposure of New York Life's proprietary interest to risk. Ground 4: failure to deal with the defence case. It is, of course, correct that the judge did not compartmentalise the prosecution case and the defence case by reciting them separately. That is one method of dealing with the evidence, but by no means the only method. What the judge did was to deal with various aspects of the evidence covering what was said by the prosecution on the one hand and the applicant on the other. By way of example, one can see that as early as paragraph 20 of the 161 paragraphs long Reasons for Verdict the judge is already referring to evidence given by the applicant. In many instances, in a matter of this nature that is a more helpful approach which has the effect of putting the evidence as a whole into context. It is certainly not an approach which is open to sensible criticism in this matter. There is no merit in any of the grounds of appeal against conviction. Consequently, I would refuse that application. APPEAL AGAINST SENTENCE That leaves the appeal in respect of sentence which, if the applicant wishes to pursue it, should now be listed for hearing.

CONCLUSION

Hon Tang VP: By a majority, the application for leave to appeal against conviction is dismissed. The court will hear oral submission on the application for leave to appeal against sentence on a date to be fixed. (Robert Tang) (Maria Yuen) (A R Wright) Vice-President Justice of Appeal Judge

of the Court of First Instance Ms Wong Kam-hing, Senior Public Prosecutor, Department of Justice, for Respondent Mr William Allan and Mr Albert Poon inst d by M/s Tam, Pun & Yipp for the Applicant PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q 1udk 1udk d 8 d 8 d 0 0 0 0 i\$&8 EnS< EnS< HCMA.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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