

HONG KONG / JUDGMENT

HKSAR v. WONG KA WAH

COURT

Court of Appeal

DECIDED

21 September 2007

CASE / FILE NUMBER

CACC260/2006

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bjbj) Applicant

and CACC 261/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 261 OF 2006 (ON APPEAL FROM DCCC NOS. 481 OF 2005 and 484 OF 2005)

BETWEEN HKSAR Respondent and WONG KA WAH hTdW IPT^ jCQ

Hon Stock JA (giving the judgment of the Court): I. The trials

Introduction

AUTONUMOUT These appeals arise from two cases in the District Court. AUTONUMOUT The nature of the cases is well summarised by Deputy Judge R Chan in the first (DCCC 480 of 2005, which is CACC 260 of 2006 before us) as follows: it is alleged that the present charges involve the defendants, acting as applicants to register bonus companies with the Business Registration Office by using bogus office addresses and bogus residential addresses. In the meantime, they opened bank accounts with banks in the names of the bogus companies. Office addresses used were bogus as these premises were only rented by the culprits for a purpose other than genuine office addresses.

9. Then other defendants came into the picture to act as bogus employees of these bogus companies. These employees opened bank accounts with false employment documents and false residential addresses. Money was then transferred to the accounts of these bogus employees for two or three months in order to create a consistent pattern of salary payments. These payments would then be withdrawn and returned to the so-called employers. The residential addresses used by the employees were not genuine residential addresses. These employees had never actually lived in these addresses.

10. After a pattern of monthly salary payments had been established, these employees then applied to various banks or finance companies for either personal loans or credit cards with cash withdrawal limits. When making these applications to the banks or finance companies, bogus letters of employment and bank statements with the appearance of monthly salary payment pattern were submitted as supporting documents.
11. After the loans had been released or the maximum cash withdrawal had been made through the use of the credit cards, the so-called employees and the persons involved with the bogus companies then disappeared. Rental payments in respect of the office addresses and residential addresses fell into arrears after the initial deposit had been used up. The so-called tenants were nowhere to be found. All the loans and cash advances withdrawn remained outstanding and were never repaid. At the end, all the tenants, employees and employers became untraceable. The first case : CACC 260 of 2006 AUTONUMOUT The first case involved the first applicant Wong Ka Wah (who was D1) and a number of others with whom we are not concerned in the various applications now before us. D1 pleaded not guilty and was tried by Deputy Judge R Chan and convicted on 13 May 2006. He was sentenced to a total term of two years and two months imprisonment. He seeks leave to appeal against conviction upon the three charges of which he was convicted: that he and a number of others between 1 July and 10 October 2001 conspired to defraud banks and finance companies by inducing them to approve personal loans and credit cards in favour of one of their number by falsely representing that there was a company called Lipo Engineers and that that individual was employed by that company, and caused loss to those banks and finance companies in the sum of about \$97,000; that he and a number of others between 1 July and 14 November 2001 similarly conspired to defraud banks and finance companies, the false representation in this case relating to a bogus company called O-pro System and Engineers, and caused loss in the region of \$90,000; and that between 1 May 2001 and 24 August 2001 he similarly, with others, conspired to defraud banks and finance companies, this time using a bogus company called Onstar and caused loss in the order of \$339,900. AUTONUMOUT The case against this applicant depended at trial on the inferences to be drawn from documents as well as keys found in his possession upon his arrest on 14 November 2001, to the details of which we refer in paragraphs
^[10] to [16] below. The second case : CACC 261 of 2006 AUTONUMOUT The second of the cases before us (DCCC 481 and 484 of 2005 to which CACC 261 relates) was tried by Deputy Judge Dufton, who rendered his verdict on 8 June 2006. In this case, there were fifteen defendants and in these applications we are concerned with eight of those, including Wong Ka Wah, who was again D1. In this case there were three charges of conspiracy to defraud along precisely the same lines as in the first case: that D1, D2, [D3], D4 and [D5] between 1 May and 21 September 2001 conspired to defraud banks and finance companies to approve loans and credit cards to [D3], D4 and [D5] by making false representations in relation to a bogus company called Wilson Catering. The loss allegedly caused was about \$412,900; that D1, [D3], [D6], D7, D8, D10 and D12 were party to a similar conspiracy between 1 June 2001 and 1 November 2001 in relation to a bogus company called Gold Seal, causing loss in the region of

\$364,000; and that D1, D2, D9, D10 and [D11] similarly conspired between 1 May and 4 September 2001 in relation to a bogus company called Linford Carpet and Design Company, causing loss in the region of \$333,000. We are not in these applications concerned with the defendants whose numbered trial designations have been placed in parenthesis. D3 and D10 in the second case were D10 and D15 respectively in the first case, the only relevance of which will arise when we come to consider the evidence in both cases against D1.

AUTONUMOUT In this, the second case, D1 seeks leave to appeal against conviction and sentence, whilst all the others before us seek leave to appeal against sentence alone. In the course of the hearing before us, D9 abandoned his application for leave to appeal against conviction and that application was therefore dismissed. AUTONUMOUT In this case, on Charge 1, the evidence was that D2 registered a bogus company called Wilson Catering as a business carried on by her and, for that purpose, she rented an office in Hung Hom and opened a current account for the company. D3, D4 and D5 were the bogus employees and D2 rented accommodation premises for them; one at Yau Ma Tei and the other at To Kwa Wan. Bogus letters of employment were then used by the employees to open bank accounts and to obtain credit cards and they falsely represented these rented addresses as theirs.

AUTONUMOUT In the case of Charge 2, it was D6 who registered the bogus company Gold Seal as his rented office premises at Kwai Chung. The bogus employees were D7, D8 and D12 and premises were rented by D3 in Mong Kok, as a residential address to be given by D12; and at a place called Dragon Pearl as an address to be given by D7 and D8. AUTONUMOUT In respect of Charge 3, D9 was the person who registered the company called Linford and opened a bank account for the company; D10 and D11 were the employees who obtained the loans and credit facilities; and D2 rented premises at Yau Ma Tei to be provided as a residential address by D11; and premises at To Kwa Wan to be provided as an address by D10. II. Wong Ka-wah [D1] The case against D1 AUTONUMOUT The prosecution case against D1, in both cases before us, depended entirely on the inferences to be drawn from items found in his personal possession and in a van that he was driving on 14 November 2001.

AUTONUMOUT In the afternoon of that day, he was the driver of that van, and its sole occupant. In that vehicle was a brown envelope containing three letters, and a white envelope containing name cards, bank cards, credit cards and two keys. In a wallet that this applicant carried was a laminated card (the existence and location of which was volunteered by him to the police) on which was written geographical names, personal names, and code numbers. By the driver's seat was found a bunch of six keys. AUTONUMOUT The brown envelope was in the pocket of the driver's door. In it were three letters, each one of which was addressed to the Yau Ma Tei address rented by D2 for the use of D3 and D5 (Charge

- 1) and D11 (Charge
- 3) in the second case. D3 was D10 in the first case. The letters were issued by a number of banks granting approval for loans or, in one case, a credit limit. One of the letters, dated 17 September 2001 and issued by HSBC to D3, granting him a credit limit, bore the right thumbprint of D1. AUTONUMOUT A typewriter and a white envelope were found in a box behind the passenger seat in the van. The white envelope contained 43 name cards of staff

members of various banks and financial institutions as well as 51 bank cards and credit cards that had been issued to various individuals including the person who was D3 in the first case, and to D7, D8 and D12 in the second. Each of these cards had been cut in half. Also found in the white envelope were two keys. AUTONUMOUT The laminated card is important for it was in this applicant's wallet. On this card were written the names of various areas in Hong Kong including Tuen Mun, Yau Ma Tei, Causeway Bay, Dragon Pearl, To Kwa Wan and Mongkok. Underneath each area name was a list of personal names and certain code numbers. The areas noted on the card matched the areas that had been used in the six conspiracies with which the two cases were concerned. The personal names under each area name included the names of some of those in both cases - who had either themselves rented addresses for use in the frauds, or the names of those who posed as employees living at those addresses. Under To Kwa Wan was a code number which was the access code to the gate of the building in To Kwa Wan used as an address by D4 (Charge

- 1) and D10 (Charge
- 3) in the second case. There were also the access codes to buildings that featured as bogus addresses in the first case: for example, below the characters for Tuen Mun were found the names of D12, D13 and D14 who were defendants in the first case, as well as code numbers that permitted access to the Tuen Mun address provided by them when applying for credit facilities. AUTONUMOUT Of the eight keys that were found two in the white envelope and six by the driver's seat Judge Dufton found the evidence far from satisfactory in that only six keys were produced to the court and it was not possible to distinguish which had been found in the envelope and which by the driver's seat. However, that said, one of the keys could open the letterbox at the Yau Ma Tei address, which had been used by D3, D5 and D11 as their address for the purpose of opening bank accounts and applying for loans and credit cards. AUTONUMOUT The applicant did not give evidence at either of his trials. Instead, he relied on the contents of an interview given after his arrest as well as the testimony of one witness. The interview AUTONUMOUT When arrested, he was told that the police suspected that he had conspired with others to defraud HSBC. He said that he did not know what it was all about. The van that he drove belonged to his father. He used it, as well as his own van, to carry goods and, occasionally, people, in return for payment. He would receive orders to do so from a service centre to which he subscribed. That morning he had picked up a person called Ah Sai to whom he had given transport on previous occasions as well as two other males and one female acquaintance of Ah Sai whom he had not previously encountered. He had first met Ah Sai in July 2001 and had driven him and two women to an address in Tuen Mun. He had met him a week after that and again driven him to Tuen Mun. He was unable to provide any contact details for Ah Sai or for any of the others. AUTONUMOUT That morning, he had picked up Ah Sai at Hung Hom Railway Station and had driven the four of them around to various places as directed. At one stage he left Ah Sai's company to take breakfast. Ah Sai did not explain what business he was about that day, a fact that the applicant found strange. He carried these people about for approximately four hours and eventually found himself in Central where all of a sudden Ah Sai, who had expressed some concern that he

was being dogged, alighted from the vehicle and gave the applicant \$500; the others also left. He was not able to say why they had hired his van instead of hiring a taxi.

AUTONUMOUT As for the various items in which the police were interested, the applicant provided the following explanations: the brown envelope with the letters from the bank on one of which, it is to be remembered, was a fingerprint belonging to the applicant: the applicant said that this had been left behind by a young lady in September or October that year (2001) a lady who was not, so far as he was aware, an acquaintance of Ah Sai and that he, the applicant, had placed it for safe-keeping in the pocket next to the driver's seat so that he could return it to her if she called again. She had also left behind a name card. He knew that there were bank letters in the envelope because he had looked into it and read one of the letters; a typewriter: he said that he had tidied the vehicle the previous day but had not seen this. He assumed, now that the matter was put to him, that it had been brought into the vehicle by Ah Sai at a stage when the applicant had stepped out; the laminated card found in his wallet: he said that this was left behind by the same young lady who had left the brown envelope. He had placed it in the wallet because he hoped that when she contacted him the next time he would be reminded of what she had left behind when he opened his wallet to give her change; and the white envelope: he accepted that it was strange that this envelope containing credit cards was in the van. There had been a time, at the end of October, when he was searching the van for documents that he needed for vehicle inspection purposes in relation to his own van when he saw this white envelope and hurriedly put his hand in it to feel what was inside and noticed that there were cards there with sharp points. He paid no further attention to the matter because he was in a hurry. The witness AUTONUMOUT The witness called on behalf of the applicant was the person who operated the call centre and he testified that the applicant was one of the drivers who took calls in 2001. He said that it was common for customers to leave objects behind in the vehicles and that customers who booked services did not always provide contact numbers. The Reasons for Verdict (1) CACC 260 of 2006 (Judge Chan) AUTONUMOUT The judge noted that the applicant was of previous good character. He concluded that the testimony of the witness did not advance the applicant's case, a conclusion with which one is bound to agree. He noted that the applicant had failed to testify, a matter from which he drew no adverse inference, though noting that what he had said in his interview had not been subjected to cross-examination. He found the account given by the applicant in the interview not credible. The suggested convoluted journey with Ah Sai had no apparent purpose; and the story as to why he kept the laminated card in his wallet and the brown envelope separately in the pocket of the car door also rang untrue. The applicant's connection with the charges was his possession of bank cards belonging to the person who was D3 in that case and the entries on the laminated card, including code numbers that correlated with the entry code for the address in Tuen Mun, the address that had been claimed as the residential address for several of the defendants in that case. The judge concluded that there could be no innocent explanation for the possession of these various incriminating articles other than that D1 was himself party to the conspiracies. (2) CACC 261 of 2006 (Judge Dufton) AUTONUMOUT The judge noted the items in the possession of this applicant on 14 November 2001 and their connection, of

which we have provided some detail, with other defendants and with addresses utilised by them for the purpose of the charged frauds. He concluded in relation to each charge that the only inference from the evidence that could reasonably be drawn was that the applicant was a party to the conspiracy. AUTONUMOUT In relation to the statement of interview produced at trial, he classified this as a mixed statement and said that he had considered it, both the inculpatory and exculpatory parts, in accordance with the principles in *R v Sharp* [1998] 1 WLR 7. AUTONUMOUT At paragraph 72 of his Reasons for Verdict the judge said: I have considered the content of the interview in accordance with the decision in *Sharp*. I am satisfied no weight is to be attached to D1's explanations, which explanations were not made on oath, have not been repeated on oath and have not been tested by cross-examination. He went on to say, in the paragraphs that immediately followed, that he did not find credible the applicant's explanation for his possession of the laminated card and the other documents. It was, he said, inherently improbable that these items were left behind and he noted the extraordinary and, in his view, unbelievable coincidence if the applicant's account were correct that both the brown and the white envelopes contained exhibits, left by different and apparently unconnected persons, if the applicant's account were true, that were inextricably linked. AUTONUMOUT He accepted the potential force of the point that in the search of this applicant's residence which was conducted by the police, nothing incriminating was found. Nonetheless he, too, was satisfied that the only inference to be drawn was that D1 was party to the conspiracy alleged in each charge. The grounds of appeal against conviction AUTONUMOUT The grounds of appeal are, with one or two exceptions, common to both cases. AUTONUMOUT In relation to both cases, it is first said that the convictions were against the weight of the evidence in that no reasonable tribunal of fact properly instructed as to law could have convicted. It is said on this applicant's behalf that there was no direct evidence implicating him in the conspiracies, no evidence of any accomplice pointing to him, no suggestion that he registered any of the companies or leased any of the premises or opened any of the accounts or applied for any loans or credit facilities. None of the proceeds of the frauds is said to have found their way to this applicant. To this ground the sufficiency of evidence we shall return. AUTONUMOUT It is then said, again in relation to both cases, that the judges adopted an inappropriate approach to mixed statements. It is suggested that both judges intimated that simply because the applicant had failed to offer his account to the test of cross-examination, no weight could be afforded that account. This, it is said, clearly contravenes the approach dictated by *Sharp*. In relation to the first case, what Mr Egan takes us to is a passage in which the judge comments on the fact that what was said in the interview had not been put to any cross-examination or test in Court. This was a mere statement of fact and comes nowhere near any suggestion that simply for that reason no weight was to be given to the exculpatory parts of the interview. The judge expressly went on to find that the account given in the interview was incredible and he provided copious reasons for that conclusion. As for the second case, Mr Egan relies on the passage to which we have referred at paragraph 27 above. We do not read the judge as misinterpreting *Sharp*. He was simply stating the fact that the explanations had not been tested by cross-examination and he explained, again in some detail, why it was that he did not find those

explanations credible. Had he misinterpreted Sharp, there would have been no cause for him to provide reasons for according no weight to the exculpatory parts of the statement. This point has no merit. AUTONUMOUT In relation to the first case (Judge Chan), it is said: that the judge failed to ask himself whether this applicant was party to the conspiracies or to remind himself that there was no direct evidence of any discussion or agreement actually reached between him and the co-accused. There is nothing in this ground. It is perfectly plain on any sensible reading of the Reasons for Verdict that the judge addressed the correct question. He was well aware that guilt could only be established as against this applicant if the circumstantial evidence irresistibly so dictated; that the judge concluded in relation to one of the charges that there is only one irresistible inference to be drawn that D1 was closely connected with the conspiracy framed Closely connected is said to be inadequate. This again is to misread the plain sense of the Reasons for Verdict. It is perfectly clear that the judge addressed his mind to the question whether applicant was actually party to the conspiracy and, indeed, we see at paragraphs 109 and 154 of the Reasons for Verdict that he uses the more precise word party in concluding guilt on Charges 2 and 3. Closely connected merely reflects this judge's conclusion that this applicant was near the centre of the conspiracy. AUTONUMOUT In relation to the second case (Judge Dufton), it is said that the trial judge erred in law in his approach to the evidence as to the keys because, so the argument runs, having found the evidence of the keys to be far from satisfactory he nonetheless made findings about the keys detrimental to the applicant. There is nothing in this point. The only aspect of the evidence which the judge found unsatisfactory was that the officers were unable to distinguish which of the eight keys had been found in the white envelope and which next to the defendant in the vehicle. That hardly stopped him from being satisfied that amongst the keys found was a key that opened the letterbox at the Yau Ma Tei address. There are other arguments advanced in relation to the judge's approach to the evidence about keys but there is nothing of merit in them. AUTONUMOUT The sole ground that could carry any arguability at all in either case is whether the evidence sufficed upon which to conclude beyond reasonable doubt, by reason of the matters found in his possession on 14 November 2001, that the applicant was party to the conspiracies charged. AUTONUMOUT The point is well made that there are factors that distinguish this applicant from the other defendants at trial. He was at the date of these offences younger than the others aged only about 23 years and was a person of good character. That is not to say that he was just a person of no previous convictions but his character profile, as revealed by reports presented to the courts, did not fit the profile of one likely to fall into criminal ways; though it has to be said that this report was not before the courts below until sentence. Be that as it may, he was at the time of the conspiracies employed in his own business, so it could not be suggested that he was in obvious need of funds and none of the stolen funds was traced to him, nor did any other defendant mention him in their statements as someone with whom they had come into contact. Indeed, the police investigators never put his name to them. AUTONUMOUT It is obvious to us, as it was to the judges, that the account given by the applicant as to the circumstances in which he came by the documents, the cards and the keys, was untrue. It just makes no sense for the conspirators to leave these documents, cards

and keys in the hands of an innocent third party who upon their discovery bank documents and over fifty credit or bank cards belonging to a host of different persons might very well take them to the police, or to the banks and describe the persons who had accidentally left them in his van. And it defies sense to suggest that two different persons would by some happenstance leave in a vehicle that they separately hired, paraphernalia that turned out to be connected not only with crime but with the self-same crime. AUTONUMOUT So one proceeds safely on the footing that the exculpatory part of the account given to the police was untrue. One is then left with the fact of the applicant's possession of bank letters, at least one of which was handled by the applicant; a key to premises connected to the frauds; possession of a large number of cards that had been used in the frauds; and possession in his wallet of the laminated card with names, areas, and access codes all at the heart of the conspiracies. Is there an explanation albeit not one advanced consistent with innocence that might reasonably be attributed to those facts? AUTONUMOUT We note that one of the judges (Judge Chan), in his Reasons for Sentence attributed to this applicant the role of a co-ordinator or a supervisor. That is possible, but not the only reasonable conclusion at which to arrive. It is also possible that he was a driver to whom was given various tasks such as collecting mail, which would explain his possession of mail, and of access codes and keys. We recognise that it would be unlikely for a mere collector of mail to retain the mail so long after the dates on it, still less to open it, or to retain the cards after collection; and we note too the presence of a typewriter, for which instrument the applicant would have had no use in the normal course of his legitimate work. It may be that it is facts such as these that drove Judge Chan to reject the notion that the applicant's role was that of a mere driver. Nonetheless, it is to be remembered that this applicant's usual, legitimate, job was that of a driver and his character profile sits more readily with some such role than with a more central role in the scheme. In that we nurture some doubt about the more central role attributed by the judges to D1, we are bound to make the assumption, in this regard, that is the more favourable to the applicant. It is not, we think, a far fetched assumption and in this connection, our attention has been drawn to the fact that in his closing submissions before Judge Dufton, counsel who was then prosecuting said, as to the role to be attributed to D1, that: It may well be that the job of D1, who had transport, was the postman i.e. who was needed to go round to the various addresses to collect the Bank letters etc. which of course, it would be directed to these addresses by the Banks. Hence the aide memoire and keys and codes and names in his possession. This aide memoire would be an important note for him to use, probably on a daily basis, when checking mail and picking up letters. Hence lamination. That was the role that the prosecution after a lengthy hearing thought appropriate to attribute to the applicant on the evidence that had been adduced, and although the tribunal was not bound to accept that assessment, we think that we should proceed on that factual basis. AUTONUMOUT If one therefore puts to one side the role of co-ordination or supervision and we think it right to do so, especially since there must be doubt about it the role of collector of documents and, perhaps, transport of conspirators, is the only realistic one left. That being so, the relevant question is this: is one driven then to the conclusion that in that role the applicant must necessarily have known what enterprise he

was assisting? If it may be otherwise, then it would follow that the culpable inference was not the only inference reasonably to be drawn. AUTONUMOUT Against this attempt to find a reasonable inference consistent with innocence based on an account not advanced, of course, by the applicant lie a number of facts which, in our judgment, leave, at the end of the day, no room for doubt as to the applicant's culpability: If the applicant was but a mere collector of mail from the banks, there was no need for him to open letters, as clearly on any view he did. If the applicant was but a mere collector of mail, it sits oddly for him to remain in possession of a large number of name cards of members of banks and institutions and of bank cards and credit cards, and, it might be added, for him to be in possession of a typewriter for which he had no use. It is difficult to envisage why conspirators engaged in an exercise as complex as the present would entrust an innocent third party with collection and retention of highly incriminating documents, central to any potential investigation. On the applicant's own account, he knew that he had in his van letters from banks to individuals, including at least one notice of arrears; and he knew that he had a mass of cut-up credit cards. Yet he made no attempt to trace the persons who he says had left them in his van or the persons to whom the letters were addressed or in whose names the credit cards were, and made no approach to the banks or to the police; and the account given by him to the police was in its exculpatory parts a lie, for which it is difficult to see any innocent reason. Although the lie of itself is not evidence of guilt, the fact of it supports the prosecution case. AUTONUMOUT We are driven in the circumstances to conclude that there was no error in law by either of the judges or in the reasoning that each applied in concluding that the applicant was party to these conspiracies. Accordingly, D1's application for leave to appeal against conviction is in both cases dismissed. III. Sentences AUTONUMOUT There is no application for leave to appeal against sentence in CACC 260, in respect of which offences D1 was sentenced to a term of two years and two months imprisonment on each charge, to run concurrently. AUTONUMOUT In case 261 of 2006, each of the applicants before us seeks leave to appeal against sentence. AUTONUMOUT The judge noted, generally, that the applicants had been engaged in a well-planned and organised scam to defraud various banks and finance companies of over \$1.1 million, which scam involved deceiving the Business Registration Office, renting business and residential premises with no intention of occupying the premises or fulfilling the terms of the tenancy agreements and the submission to the banks and finance companies of forged documents as to employment. The sentences imposed were as follows: D1: a person of no previous convictions, aged 23 years at the date of the offences, was sentenced to a term of four years imprisonment in relation to each charge, those terms ordered to run concurrently, and two years and ten months of which was ordered to run consecutively to the total of two years and two months imprisonment imposed in the earlier case; making a total of five years imprisonment. The judge said that this applicant was instrumental in the operation of the scam and that he was clearly more involved than any other defendant. The judge took a starting point of four years imprisonment for each charge and that is the sentence that he imposed in relation to each. D2: this applicant had falsely applied to the Business Registration Office for the renting of the business premises the subject of the first charge and opened bank accounts for that

company. In respect of the first and third charges, she rented two residential addresses for use in fraudulent applications by bogus employees. She was convicted after trial. The judge took a starting point of two years and six months imprisonment which is the sentence that he imposed in relation to Charges 1 and 3 and ordered six months of the sentence imposed on Charge 3 to run consecutively to that imposed on Charge 1, the remainder concurrently, making a total of three years imprisonment. She was aged 33 years at the date of the offences and had seven previous convictions, though none of a type similar to the present. D4: this applicant was convicted after trial on the first charge. He had acted as a bogus employee and applied for three loans and one credit card and as a result obtained \$170,000, none of which has been repaid. The judge sentenced him to a term of two years six months imprisonment. He was aged 38 years at the time of the offence and had fifteen previous convictions including convictions for theft. D7: this applicant pleaded guilty to Charge

2. He was one of the bogus employees and applied for a loan and two credit cards as a result of which \$130,000 was obtained. The judge sentenced him to a term of one year seven months imprisonment. This reflected a starting point of two years six months imprisonment, a one-third discount for the plea of guilty, and a further discount of one month in recognition of the fact that during the currency of the trial he had apprehended a robber. He was aged 34 years at the date of the offence and had nineteen previous convictions for offences that included theft and attempted robbery. D8: this applicant pleaded guilty to Charge
2. He had posed as an employee and applied for a loan and credit cards as a result of which almost \$115,000 was obtained and not repaid. He was sentenced to one year eight months imprisonment. He was aged 24 years at the date of the offence and was a person of no previous criminal convictions. D9: he was convicted after trial on Charge
3. He had applied for registration of one of the businesses, provided an address as its business premises which that company never occupied and provided also a residential address that was not his, and he opened a bank account for the company. He was sentenced to two years six months imprisonment in relation to Charge
3. He was aged 40 years at the date of conviction and had three previous convictions. D10: he pleaded guilty at the close of the prosecution case to Charge 3 and not guilty in respect of Charge 2 but was convicted. In relation to Charge 2 he had rented residential premises for use as the bogus addresses for D7 and D8; and in relation to Charge 3 he himself posed as an employee and applied for three loans as a result of which \$150,000 was obtained and not repaid. The judge sentenced him to a term of two years six months imprisonment in relation to Charge 2, and two years imprisonment in relation to Charge 3; and ordered two months of the latter sentence to run consecutively to, the remainder concurrently with, the sentence imposed upon Charge 2, making a total of two years eight months imprisonment. He was aged 42 years at the time of the offences and had no fewer than thirty previous convictions. D12: he pleaded guilty to Charge 1, in respect of which he had posed as an employee and applied for two loans and a credit card as a result of which \$120,000 was obtained and not repaid. He was sentenced to one year eight months imprisonment. He was aged 34 years at

the date of the offence and had nine previous convictions. AUTONUMOUT All applicants, save the first, restrict their grounds of application in relation to sentence to the issue of delay between arrest and trial. D1 includes that as a ground of appeal but deploys additional grounds. We shall address first the issue raised by all applicants delay and then the discrete grounds raised by D1. The applications of D2, D4, D7, D8, D9, D10 and D12 AUTONUMOUT Delay is advanced as a ground of appeal on the basis of a suggested unfairness arising from the fact that in the first case Judge Chan gave a significant discount on the basis of delay, whereas in this, the second case, Judge Dufton did not. That in itself is not a valid ground of appeal since that approach was adopted by a different judge and if Judge Chan erred in favour of the applicants in that case, then that cannot enure to the benefit of these applicants in this. More particularly Judge Chan was not, as was Judge Dufton, presented with reasons for the delay. AUTONUMOUT So the first question is whether the refusal to accord a discount on account of delay was appropriate. AUTONUMOUT In his Reasons for Sentence, Judge Dufton noted the size of the investigation in these cases and that 37 persons had been arrested between November 2001 and June 2004. He was satisfied that in the delay between those arrests and the charges in April and May 2005, the prosecution had not been at fault. Although some of the defendants had admitted their involvement when arrested, there were no indications when trial dates were first fixed in September 2005, of any pleas of guilty to be offered: the first such indication was given at the pre-trial review in December 2005. For these reasons, he declined to treat the delay as a factor warranting any discount. AUTONUMOUT Whether delay can amount to mitigation is a case sensitive issue. A case of this complexity, that involves many transactions, many suspects (in this operation 37 arrests), a large number of banks and credit card companies, and landlords who had to be interviewed, investigations will necessarily take a long time and those who engage in criminal conduct of this kind can hardly complain when faced with the delay that such investigations entail. If, however, it can be shown that there has been undue delay, or where a particular co-operative defendant has been kept waiting for years simply because others have decided to fight the case, delay might well sound in mitigation. AUTONUMOUT In this case, only D8 and D12, of those before us, admitted their culpability upon arrest yet neither in their case nor the case of any of the others was there any intimation of a plea of guilty when the matter first came before the courts, either upon committal at the magistracy or when trial dates were fixed. AUTONUMOUT We have been provided by Mr Lee for the respondent with a helpful chronology of the investigation, arrests and charges. On the information before us it does appear, despite the complexity of the case, that there was considerable delay between about December 2002 and May 2005 when the applicants were charged. This is not to say that nothing happened during that period. There were a few arrests and a number of case conferences but, on the information before us it does, on the face of things, seem that the matter could reasonably have been brought to fruition somewhat sooner than it was. Of course we are not in a position to inquire into the history in fine detail, so that this may well be too harsh a view of matters and the point has been made that the trial judge had a better feel of the case and its complexities than can this court upon an appeal; but we are prepared to proceed on the assumption that some credit ought to have

been accorded for delay. AUTONUMOUT In the event we are satisfied that proceeding on that assumption should not result in a reduction of any of the sentences in respect of these applicants. That is because they were the beneficiaries of a starting point in respect of each offence that was decidedly low and to accord a further reduction would be effectively to endorse sentences that are noticeably too light. If the applicants other than D1 were not themselves applying for business registration and opening bank accounts, knowing, as they must have known, that they were triggering an indefinite number of fraudulent transactions, they were themselves making fraudulent applications for credit cards and loans and obtaining sizeable amounts of money. The starting points should have been higher in each case. AUTONUMOUT It may be that Judge Dufton felt himself constrained by the starting points adopted in the first case. We have to say that in that case discounts afforded for the suggested delay were (six months) far too large as were discounts for good character. We do not think that it would be appropriate in the circumstances now to accord a further discount. AUTONUMOUT Accordingly, in the case of all the applicants, save D1, whilst we grant them leave to appeal against sentence (in the case of D2, out of time) and treat the hearing of the applications as the appeals, their appeals against sentence are dismissed. D1's sentence AUTONUMOUT In addition to the issue of delay, it is said in D1's case that: given all the circumstances of the case, including the amounts of money involved, the starting point of four years imprisonment in each case was too high; the judge erred in ignoring D1's previous good character; and the judge failed to take into account that the applicant had been made to endure two separate trials out of one set of facts. AUTONUMOUT The scams at which the various defendants conspired were sophisticated and involved considerable planning. Businesses were registered, premises were rented, false addresses and employment records created, bank accounts opened and large numbers of persons were engaged in taking considerable funds by deception. It is difficult to see how anyone taking an active role in these conspiracies let alone a supervisory or co-ordinating role could complain of the individual sentences imposed in the second case upon this applicant, even taking into account his previous good character. AUTONUMOUT The problem however, as we see it, is the disparity between the sentences imposed on this applicant and those imposed on the other applicants in this case, given the fact that we have determined that the fair approach in his case is to eschew the conclusion that he played a supervising or co-ordinating role. If, as we are prepared to assume, he was an employed rather than a guiding player in the events in question, then it seems to us that there can be no justification the issue of totality apart in conferring upon him sentences after trial on individual charges greater than the sentences imposed on the other applicants. Indeed it might be said that given the stark difference between his personal record or rather the absence of one and that of the others, his sentence ought to be less; though the length of time over which these offences were committed makes the question of good character carry less weight. The fact that the other applicants were the beneficiaries of sentences that in our judgment were too low is for present purposes beside the point, for the question is whether there is an unjustifiable disparity between the two sets of sentence. We think that there is. AUTONUMOUT Accordingly we grant the applicant D1 leave to appeal against the sentences

imposed in the second case, treat the hearing of the application as the appeal, set aside the sentences imposed in that case and substitute sentences as follows: In relation to each of the charges in the second case (261 of 2006) we impose a sentence of two and half years imprisonment. All sentences are to run concurrently save that six months in respect of the third charge shall run consecutively to the sentence imposed on the second, making a total in that case of three years imprisonment. AUTONUMOUT He was sentenced to a term totalling two years and two months imprisonment in the first case (260 of 2006), against which sentence there is, not surprisingly, no appeal. The question of totality for the two cases is a little problematic. On the one hand this applicant was convicted of a total of six charges in the two trials, a significantly greater number than in the case of the other applicants and his involvement spanned the full length of the conspiracies, whereas that of the others did not. On the other hand, the nature of his employment as we have decided to characterise it happened to dictate activity over a longer period whereas by role definition the others were required to move in, as it were, on banks for short fraudulent forays. We think that a totality of three-and-a-half years is appropriate for the two cases and we emphasise that the word appropriate is used by reason only of the disparity that has concerned us. Accordingly, we order that the sentence imposed in the second case shall run concurrently with that imposed in the first, save as to six months which we order to run consecutively. To that extent, his appeal against sentence is allowed. (Frank Stock) Justice of Appeal (W Yeung) Justice of Appeal (C-M Beeson) Judge of the Court of First Instance Kevin Egan instructed by M/s C.K. Mok & Co. for D1 (for both CACC 260 & 261/06) Mr Duncan Percy instructed by DLA for D2, D4, D7, D8, D9 (for sentence only), D10 and D12 D9 in person for leave to appeal against conviction Mr Ronald Mayne, on fiat, for the Respondent (for CACC 260/01) Mr Robert S.K. Lee, SADPP and Ms Teresa Kam, GC of the Department of Justice for the Respondent (for CACC 261/06) PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U 1udk 1udk G H I J K L M N O P Q R S T U V & `#\$ & `#\$ % ^,X v?_. J[6 vx@n .l^L k1B[p i'H["E)` r c@sH <~j6 f8&s J[ 6 .l^L k1B[ v?\_. "E)` f8&s i'H[& 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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