

## Should penalties imposed under Prevention of Corruption Act cases take into account monies already repaid?

*Public Prosecutor v Takaaki Masui and another and other matters* [2022] 1 SLR 1033

### I. Executive summary

The Prevention of Corruption Act (Cap 241, 1993 Rev Ed) (“**PCA**”) aims to stamp out corruption in Singapore, in part by penalizing those who engage in such acts. Although it is directed mainly at corruption in the public services, it is applicable also to corruption by agents of private corporations.

If an employee of a company (the “**agent**”) corruptly obtains a sum of money in bribes (the “**gratification**”) as an inducement for doing acts in relation to his company’s (the “**principal**”) affairs, the court may impose penalties on the agent. For instance, section 13(1) of the PCA states that where a person is convicted of an offence under the PCA, “the court shall ... order him to pay as a penalty ... a sum which is equal to the amount of that gratification or is ... the value of that gratification, and any such penalty shall be recoverable as a fine”.

In deciding the penalty to be imposed under section 13(1) of the PCA, a further question is whether monies already returned, repaid (either voluntarily or otherwise), or disgorged by the authorities should be deducted from the penalty. In *Public Prosecutor v Takaaki Masui and another and other matters* [2021] SGCA 119, the Court of Appeal (“**CA**”) decided this in the affirmative, on the basis that section 13(1) of the PCA served a disgorgement function rather than a punitive function. This meant that section 13(1) simply sought to prevent corrupt recipients from *retaining* their ill-gotten gains.

### II. Material facts

Takaaki Masui (“**Masui**”) and Matsutoshi Ishibe (“**Ishibe**”) were Japanese nationals who were senior employees of a company incorporated in Japan (the “**Japanese Company**”). In the course of their employment, they were seconded to the Singaporean subsidiary of the Japanese Company (the “**Singaporean Company**”). The Japanese Company supplied edible and industrial flour through the Singaporean Company. A Singaporean flour distributor (the “**Distributor**”) was the sole distributor of edible flour for the Singaporean Company. Koh Pee Chiang (“**Koh**”), the owner of the Distributor, acceded to Ishibe’s request that he take over the industrial flour distributorship as he feared that the Distributor’s edible flour distributorship would be adversely affected.

Koh, Ishibe and Masui entered into an arrangement to share the profits earned by the Distributor from its industrial flour business (the “**Profit-sharing Arrangement**”). When the Distributor’s customer defaulted on payments, Masui transferred US\$240,000 via the Distributor to Koh in June 2005 (the “**Transferred Sum**”).

The Profit-sharing Arrangement was eventually discovered. The Corrupt Practices Investigation Bureau seized certain amounts of money (the “**Recovered Sum**”) from Masui’s frozen bank accounts. The Japanese Company also commenced a civil suit against Ishibe and Masui in Japan for breaching the company rules. Each of them paid \$100,000 to the Singaporean Company to settle the judgment sum awarded by the Japanese civil court against them (“**Judgment Sum**”). Subsequently, in Singapore, the District Court (“**DC**”) convicted them of charges under section 6(a) read with section 29(a) of the PCA, for conspiring with one another to corruptly obtain a gratification from Koh as an inducement for furthering the Distributor’s business interest with the Singaporean Company. In addition, the DC imposed a penalty under section 13(1) of the PCA.

Ishibe and Masui appealed against the amount of penalty imposed by the DC, arguing that the Judgment Sum, the Transferred Sum, and the Recovered Sum should be deducted from the penalty. Applying section 13(1) of the PCA, the High Court (“**HC**”) held that those monies should be

accounted for as a portion of the value of the gratification, and should therefore be included as part of the section 13(1) penalty.

However, in doing so, the HC departed from its previous decision made concerning an unrelated case (the “**Marzuki Decision**”). In the Marzuki Decision, the HC held that the underlying principle of section 13(1) of the PCA was that such a penalty order – i.e. for a sum equivalent to the sum of money received by the recipient – would not be appropriate where: (a) the recipient has returned or repaid the money to the giver, or (b) the money has been disgorged from the recipient, whether voluntarily or otherwise. This principle was held to apply to money gratification in the form of both loans and gifts. Conversely, the HC in the present case held that such principle was applicable only for cases involving gratification in the form of a *loan* of money, rather than a gift of money. Since the gratification here involved a gift of money, the HC held that those monies could not be deducted from the penalty sum.

Due to the conflicting HC authorities, the Public Prosecutor (“**Prosecution**”) filed a criminal reference<sup>1</sup> under section 397(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“**CPC**”) to the CA, raising a question as to the proper interpretation of section 13(1) of the PCA. Similarly, the offenders filed two criminal motions to the CA to seek leave (i.e. permission) to refer several purported questions of law of public interest to the CA.

### **III. Issues**

Under section 397(2) of the CPC, only questions of law of public interest may be referred to the CA. As the questions raised involved a conflict of judicial authority and was referred by the Prosecution, the CA deemed it to be a question of “public interest” under sections 397(6)(a) and 397(6)(b) of the CPC. Accordingly, the CA held that the conditions in section 397(1) of the CPC were satisfied, and the questions raised should be answered.

Conversely, the CA dismissed the criminal motions filed by the offenders because their questions sought to challenge the HC’s factual findings. Unlike questions of law, which concerned the scope of a statutory finding, those referred questions were questions of fact and could not be referred under s 397(1) of the CPC.

The CA reframed the Prosecution’s referred question as follows (the “**Referred Question**”):

Where the gratification is *a sum of money*, must the court order the recipient to pay a penalty under s[ection] 13 of the [PCA] of a sum equivalent to the amount of money received by him, if (a) he has returned or repaid *all or part of the sum of money*; and/or (b) *all or part of the sum of money* has been disgorged from him, whether voluntarily or otherwise?

In answering the Referred Question, the court made three findings:

- A. The CA interpreted section 13(1) of the PCA to mean that the penalty must reflect the value of the gratification retained by the recipient, and explained why its interpretation furthered the purpose for which the PCA was enacted.
- B. In light of its interpretation of section 13(1) of the PCA, the CA answered the Referred Question in the negative, although the quantification of the penalty imposed under section 13(1) of the PCA would depend on the way in which the gratification sum was repaid (or returned, or disgorged, whether in whole or in part).

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<sup>1</sup> Generally, a criminal reference to the Court of Appeal is a request to the Court of Appeal to determine a question of law of public interest. A question of law of public interest usually concerns difficult or controversial points of law that directly or substantially affect the parties’ rights.

- C. Applying its answer to the Referred Question to this case, the court held that only the Judgment Sum and the Recovered Sum would be deducted from the penalty/taken into account.

**A. *The proper interpretation of section 13(1) of the PCA***

The CA held that the ordinary meaning of section 13(1) of the PCA was as follows: as long as the gratification is a sum of money or of a value that can be assessed, the court shall order the recipient to pay a penalty of a sum equal to the amount of that gratification *or* a sum that is, in its opinion, the value of that gratification. The corollary of this interpretation was that where the gratification was a sum of money, but all or part of it had been repaid or disgorged, the court should impose a penalty of a sum that reflected the value of the gratification *retained* by the recipient.

The CA highlighted that while section 13(1) distinguished between monetary and non-monetary gratification, that distinction merely made it clear that even if the gratification was non-monetary, a penalty might be imposed by reference to the value of that gratification. For example, if the non-monetary gratification took the form of a car or a valuable security that was nonetheless of a value that might be assessed, a penalty could be imposed by reference to the value of that gratification. However, if the gratification did not readily admit of a monetary value, such as the protection of the recipient from disciplinary proceedings or the promise of a favour, section 13(1) of the PCA was inapplicable because such gratification was unquantifiable.

The CA stressed that this ordinary meaning of section 13(1) was unambiguous: where the gratification was a sum of money that had been repaid or disgorged, whether in part or in full, the court need not (and should not) impose a penalty of a sum equivalent to the amount of money received by the recipient. As such, any extraneous material (meaning material that is not part of the statutory text) could only be used to confirm but not to alter this ordinary meaning.

The CA thus compared this meaning against the legislative purpose of section 13(1). The legislative purpose was to prevent corrupt recipients from *retaining* their ill-gotten gains, and to disgorge the gratification sum from the corrupt recipient. Section 13(1) only targeted the recipient and not the giver in a corrupt transaction, even though both parties would have committed an offence under sections 6(a) and 6(b) of the PCA respectively. Given that the recipient and the giver were equally culpable in most cases involving a corrupt transaction, the fact that section 13(1) was directed solely at the recipient suggested that its underlying rationale was disgorgement, not punishment.

The CA also noted that section 13(1) only applied where the recipient had actually accepted or obtained gratification. Any agent who corruptly agreed to accept or corruptly attempted to obtain gratification would have committed an offence under s 6(a), but nonetheless the court might not impose a penalty under section 13(1). This strongly suggested that the legislative purpose of section 13(1) was the disgorgement of corrupt gains, and that that provision was not intended to provide for an additional layer of punishment.

Further, section 13(1) was not framed as a fine. Although section 13(1) provided that any penalty imposed thereunder would be recoverable as a fine, it did not provide that an offender who unlawfully accepted any gratification shall be liable to pay a fine equivalent to the amount of that gratification. It was the recipient who voluntarily returned or surrendered the gratification who would be punished with a fine. In contrast, where a recipient retained the gratification and a penalty was subsequently imposed, the penalty did *not* act as a fine; it merely served to disgorge the gratification. The CA stressed that it would be grossly unprincipled for section 13(1) to punish a recipient who voluntarily returns or surrenders the gratification but not a recipient who does not do so, when it was plainly the former who was less blameworthy.

The CA observed that the state’s primary interest in section 13(1) was not to seek to earn a revenue, but it was to prevent the corrupt recipient from profiteering from his offences. It was the principal’s (i.e. the offender’s employer’s) interest in recovery that assumed primacy. He was the innocent party against whom the wrongs have been committed. Given that he had the most compelling claim to the gratification sum, repayment to the principal was a policy that the law should incentivise. The CA also noted that the deterrent effect of section 13(1) was not inconsistent with the legislative purpose of disgorgement because potential offenders knew that they will not be able to retain their corrupt gains if they are caught.

The CA also rejected the HC’s interpretation of section 13(1) (the “**HC’s Interpretation**”). Under the HC’s Interpretation, it was only if a court found that the gratification did not take the form of a sum of money (e.g. a loan or a service), that the court looked into the question of whether the “value of the gratification can be assessed”, and was also subsequently given the limited discretion to determine the value of that gratification. Further, under the HC’s Interpretation, the recipient who voluntarily returns or surrenders the gratification was subjected to a penalty for the full amount of the gratification.

However, the CA noted that the disgorgement function of section 13(1) strongly militated against the HC’s Interpretation because that interpretation jeopardised the principal’s interest. The HC’s Interpretation not only discouraged a recipient who wished to purge his wrongdoing by voluntarily returning the gratification sum to the principal, but it would also penalise such a recipient by rendering him liable to pay a penalty for the full amount of the gratification nonetheless. Furthermore, under the HC’s Interpretation, the deterrent effect of section 13(1) of the PCA was, rather counter-intuitively, amplified in cases where the recipient voluntarily returned the gratification and was thus out of pocket.

Instead, the CA stressed that the penalty under section 13(1) of the PCA should reflect the value of the gratification retained by the recipient. This interpretation furthered the specific purpose of section 13(1) of the PCA – which was to prevent the recipient of the gratification from retaining its benefit – by incentivising him to repay the principal promptly.

***B. The court’s answer to the Referred Question***

Given the above, the CA answered the Referred Question in the negative: in cases where all or part of the money gratification has been repaid or disgorged, the quantification of the penalty imposed under section 13(1) of the PCA will depend on the way in which the gratification sum has been repaid, returned, or disgorged, whether in whole or in part.

The CA noted that its answer to the Referred Question was the fairest outcome that best took into account the interests of the State, the principal, the giver and the recipient, without detracting from the general purpose of Part III of the PCA (titled “Offences and Penalties”, and in which section 13(1) of the PCA is situated) – namely, the deterrence of corrupt practices. Its answer also furthered the specific purpose of section 13(1), i.e. to prevent the recipient of the gratification from retaining its benefit by incentivising him to repay the principal promptly.

The CA also considered the various ways in which the gratification sum could be repaid, returned or disgorged, whether in whole or in part.

Circumstance 1: The gratification sum was disgorged by the authorities, either because the recipient voluntarily surrendered that sum or because his assets were seized.

Here, the penalty was ultimately paid to the State and was recoverable as a fine. There was no basis for the court to impose a penalty for the entire gratification sum on top of ordering that the disgorged amount be forfeited to the State. However, the court should additionally impose a penalty equivalent to the value of the recipient’s ability to use the gratification sum from the time of receipt to the time

of disgorgement. For example, the benefit enjoyed by the recipient could be quantified by treating the gratification sum as though it was placed in a fixed deposit for 12 months and calculating the interest payable for the relevant period based on a suitable per annum interest rate. This would account for the benefit that the recipient would have had – namely, the use of the gratification sum from the time of receipt to the time of disgorgement.

Circumstance 2: The recipient repaid the gratification sum to the principal in whole or in part.

Where the recipient had returned the sum before a penalty was imposed in the criminal proceedings, the court should deduct the repaid amount from the sum of the penalty imposed under section 13(1). The CA held that criminal courts should not and will not take into account any restitution that is made after the imposition of the penalty. Conversely, where the penalty under section 13(1) had been imposed before the principal recovered the gratification sum, section 14 of the PCA allowed the principal to recover the gratification sum from either the recipient or the giver as a civil debt, irrespective of the recipient's conviction and the attendant penalty imposed. This approach incentivised the recipient to repay the principal promptly and was thus in keeping with the policy of the law. Prompt repayment to the principal benefited the recipient because the amount of the repaid gratification was deducted from the penalty sum.

Circumstance 3: The recipient returned the gratification sum to the giver.

Here, the court would consider whether the gratification sum was a gift or a loan; and whether the benefit of the gratification had been genuinely disgorged. *First*, the issue of whether the value of gratification had been repaid depended on whether the gratification sum was a gift or a loan. Unlike in cases where the gratification sum was a gift, where money gratification was given as a loan that was subsequently repaid by the recipient, the value of the gratification could not be equated with the amount of money received. Rather, the value of the money gratification should be quantified by reference to the value of the recipient's benefit in having had the use of that sum of money from the time of receipt to the time of repayment. The court should consider the surrounding facts carefully to determine if the money gratification was indeed a loan. Relevant considerations include whether there was any expectation of repayment and whether there was an agreed interest rate.

*Second*, the court would consider whether the benefit of the gratification had been genuinely disgorged. Where repayments to the giver amounted to collusion between the giver and the recipient to perpetuate a mutually beneficial corrupt scheme, the recipient effectively retained the benefit of the gratification, thereby subverting the disgorgement purpose of section 13(1). Such repayments should therefore not be deducted when the court quantifies the penalty under section 13(1). If the court was satisfied that the repayments to the giver were genuine, it should impose a penalty in respect of the value of the recipient's ability to use the gratification sum from the time of receipt to the time of disgorgement, and any amount of the gratification that has yet to be repaid.

**C. Conclusion**

The CA held that the bribe amount that had already been repaid to the employer (to settle the judgment sum awarded by the Japanese courts) would be deducted from the penalty, because the amount had been disgorged from the offenders who no longer retained its benefit. Similarly, the Recovered Sum was taken into account. In the absence of any evidence as to how the benefit enjoyed from the use of that sum from the time of receipt to the time of repayment should be valued, the CA did not take this benefit into account for the purposes of section 13(1).

Conversely, the CA held that the US\$240,000 that had been paid by Masui to Koh in June 2005 should not be deducted from the penalties imposed. This was because the purpose of the payment was to prop the Distributor up to ensure the continuation of the Profit-sharing Arrangement, and hence the payment was not a form of payment for the giver's loss but an application of Masui's and Ishibe's ill-gotten gains.

The default sentence was calibrated on the basis of one month's imprisonment for roughly every \$100,000 unpaid. Taking into account the reduced penalty, the CA reduced the default sentence accordingly.

#### **IV. Lessons Learnt**

This case will have a practical impact on how the Prosecution should frame charges under section 6(a) of the PCA. The relevant gratification should be particularized with precision as this will affect the value of the gratification and, in turn, the amount of the penalty imposed under section 13(1) of the PCA. In particular, gratification in the form of a loan of money should be distinguished from gratification in the form of a gift of money; gratification that has been repaid genuinely should also be distinguished from gratification that has been fully retained by the recipient.

Lawyers should also advise their client to repay the principal promptly to avoid double disgorgement under section 14 of the PCA. A recipient who delays in making repayment assumes the risk that the court may impose a penalty before the principal recovers the gratification sum and, therefore, the risk of double disgorgement.

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Written by: An Yeqi, 3rd-Year LLB student, Singapore Management University Yong Pung How School of Law.  
Edited by: Ong Ee Ing, Senior Lecturer, Singapore Management University Yong Pung How School of Law.