Published on e-First 23 April 2018

25. SECURITIES AND FINANCIAL SERVICES REGULATION

Hans **TJIO**
LLM (Harvard), MA (Cantab);
Advocate and Solicitor (Singapore); Barrister (Middle Temple);
Professor, Faculty of Law, National University of Singapore;
Co-Director, Centre for Banking & Finance Law.

Introduction

25.1 There were a number of significant decisions in 2017 in both the District and High Courts that will be discussed in this Chapter. In January 2017, the Securities and Futures (Amendment) Act 2017[1] ("SFAA 2017") was passed, which introduced a number of significant changes which will only come into force in various stages in 2018. These will be highlighted, where relevant, in the analysis of the cases below.

Regulation of intermediaries

Know your client rules and senior management liability

25.2 In *Public Prosecutor v Yeo Jiawei*,[2] Yeo, who was a wealth manager with the Singapore branch of BSI Bank, a Swiss private bank, failed in his appeal against the 30-month sentence imposed on him after he pleaded guilty to the charge of perverting the course of justice in relation to the money-laundering investigation linked to 1MDB.[3] This involved, amongst other things, tampering with court witnesses. Subsequently, he was sentenced to a further 54 months' imprisonment, to run concurrently with the remainder of the first 30-month sentence, when he pleaded guilty to one charge each for money laundering and cheating under the Penal Code.[4]

25.3 In contrast, Jens Sturzeneggar, who was in charge of Falcon Private Bank in Singapore was, in January 2017, sentenced to 28 weeks in jail after pleading guilty to six of 16 charges. This was in relation to the failure to comply with know-your-client rules with respect to 1MDB and also of lying to investigators about his connection

1 Act 4 of 2017.
2 [2017] SGDC 11.
3 "1MDB" stands for "1Malaysia Development Berhad".
4 Cap 224, 2008 Rev Ed; see further Grace Leong, "1MDB Probe: Former BSI Banker Yeo Jiawei Gets 54 Months' Jail for Money Laundering, Cheating" *The Straits Times* (12 July 2017).

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with Jho Low, who was one of the principle actors in the affair.[5] In 2016, both BSI Bank and Falcon Bank lost their merchant bank status in Singapore under the Monetary Authority of Singapore Act[6] for serious failures in anti-money-laundering controls and improper conduct by senior management both in Singapore as well as their head offices in Switzerland. A number of systemically important financial institutions (including those on the worldwide official list as well as two of the largest local Singapore commercial banks) were fined by the Monetary Authority of Singapore ("MAS") in connection with these cases.

Derivatives trading

25.4 Over-the-counter derivatives have had a bad press and some of them will increasingly come under exchange and clearing house regulation in addition to trade reporting. This will be implemented in various stages as the SFAA 2017 comes into force. One of them, what are termed accumulators, has been particularly notorious in Singapore and Hong Kong in private wealth circles, even though they are just a form of equity-linked note. The problem is that many investors see the limited upside in a low-interest rate environment without realising the unlimited downside. Steven Chong JA, in *First Asia Capital Investments Ltd v Société Générale Bank & Trust*,[7] acknowledged that they were seen as an "'I kill you later' contract". This is how his Honour described the instrument:[8]

> Pursuant to a share accumulator transaction (henceforth referred to as a 'share accumulator'), the issuer is obliged to sell shares of a company at a price known as the 'strike price' to the investor over an agreed period of time. The strike price is lower than the market price at the beginning of the agreed period. As long as the market price remains above the strike price but below what is known as a 'knock-out' price, the investor is obliged to purchase an agreed quantity of shares at the strike price, thus 'accumulating' shares in that company, but at a discount. If the market price rises above the knock-out price, the share accumulator is terminated. If it falls below the strike price, the investor is usually required to purchase in multiples of the agreed quantity of shares at set intervals. The knock-out price caps the issuer's loss, and thus the investor's gain, should the market price increase, but there is no corresponding limit to the investor's loss if the market price falls. The huge losses that can be caused by such unlimited downside risk

5 Katharina Bart, "Ex-Falcon Asia Head Back Home after jail sentence in Singapore" *finews.asia* (23 June 2017).

6 Cap 186, 1999 Rev Ed. The said status was not a licence as such but an approval granted under the Act to carry on business in Singapore as a merchant bank.

7 [2017] SGHC 78 at [1].

8 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [2].

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probably explains why many investors have brought actions against their banks seeking to disclaim such share accumulators.

25.5 Here, the plaintiff British Virgin Islands company claimed that although the 103 share accumulators were entered into from June 2006 to January 2008 with the written approval of one of the stipulated signatories, Lenny, there was an oral collateral agreement that the other signatory, who was her husband, Lucas, was the "main" signatory. The plaintiff, however, failed in its argument that no transaction could be entered into without his approval. Chong JA found that the company failed to prove a collateral contract due to: (a) the vagueness of its pleadings; (b) the inadmissibility of evidence to prove the alleged collateral contract; (c) its failure to provide any credible evidence of the agreement; and (d) that the existence of a collateral agreement was completely at odds with the contemporaneous objective evidence. Importantly, Chong JA reiterated the starting position in Singapore that a "bank does not ordinarily owe fiduciary duties to its customers given that the relationship between a bank and its customer is contractual".[9] His Honour confirmed that this was the case here as the accounts were execution-only accounts[10] and that the contractual documentation expressly stated that SocGen would not assume any fiduciary responsibility or liability.[11]

25.6 The plaintiff also failed in an action based on a similar factual matrix in *Asia-American Investments Group, Inc v UBS AG (Singapore Branch)*.[12] Here, the issue was again whether the accumulator transactions in question had been authorised by the plaintiff and whether the defendant bank's relationship manager had represented to the plaintiff, through her words and conduct during the opening of the account, that she would only act upon the prior written approval of the authorised representatives of the plaintiff. The account mandate, on the face of it, authorised the bank to act on oral or telephone instructions, as well as those through the use of electronic mail. It also obliged the

9 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [77].

10 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [79]; see also *Deustche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310.

11 This was following *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237; see also in the context of financial or corporate finance advisers: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, noted by Joshua Getzler in "Excluding Fiduciary Duties: The Problem of Investment Banks" (2008) 124 LQR 15 and discussed by Andrew F Tuch, "The Paradox of Financial Services Regulation: Preserving Client Expectations of Loyalty in an Industry Rife with Conflicts of Interest" in *The Regulation of Wealth Management* (Hans Tjio ed) (Centre for Commercial Law Studies, National University of Singapore, 2008) at p 53.

12 [2017] SGHC 113.

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plaintiff to check and verify the correctness of all confirmations and advices in relation to transactions carried out in the account as well as of statements of account, and to inform the bank of discrepancies within 14 days of the date of each confirmation or advice and within 90 days of each statement. Another clause authorised the defendant bank to treat all correspondence placed in the plaintiff's hold mail folder as having been duly delivered to and received by the plaintiff on the date of the relevant correspondence. Quentin Loh J found that one of the actions was in fact time-barred, but if it were not, along with the other transactions, it was in fact authorised by the plaintiff. He did not accept the plaintiff's evidence that the plaintiff had always dealt with the relationship manager on the basis that there had to be written authorisation for every transaction. One reason for this was the time-sensitivity of the transactions – Loh J accepted the defendant's expert evidence that in Singapore, "oral instructions are accepted for the purposes of execution of … accumulator contracts".[13] There was thus no breach of any duty owed to the plaintiffs by the bank or its relationship manager.

Markets and exchange regulation

Cryptocurrency exchanges

25.7 In 2017, the Singapore International Commercial Court[14] heard the first cryptocurrency case to come to the courts in Singapore involving its most widely known "Bitcoin". Bitcoin first started out as an alternative to fiat currency in 2008 as a means of exchange but appears to be traded as a commodity or store of value today with a great deal of speculation in what appears to be of little intrinsic value, which may explain its volatility. Regulations concerning cryptocurrency appear to be moving along the same lines, that is, from it being a form of currency to a kind of security. In *B2C2 Ltd v Quoine Pte Ltd*[15] ("*B2C2*"), Justice Simon Thorley QC[16] dismissed an application for summary judgment pursuant to O 14 of the Rules of Court[17] ("RoC") for breach of contract and breach of trust against a Singapore incorporated company operating a currency exchange platform which enabled third parties to trade

13 *Asia-American Investments Group, Inc v UBS AG (Singapore Branch)* [2017] SGHC 113 at [41].

14 Andrew Godwin, Ian Ramsay & Miranda Webster, "International Commercial Courts: The Singapore Experience" (2017) 18 MJIL (forthcoming) <https://ssrn.com/abstract=3095059> (accessed 15 March 2018).

15 [2017] SGHC(I) 11.

16 International Judge of the Singapore International Commercial Court.

17 Cap 322, R 5, 2014 Rev Ed.

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Bitcoin and Ethereum for other virtual currencies or for fiat currencies such as the Singapore or US dollar.

25.8 The plaintiff was an electronic market maker incorporated in England providing liquidity on the exchange platform by buying and selling virtual currencies at the prices it quoted for virtual currency pairs. It agreed to a set of terms and conditions available on the defendant exchange platform's website. On 19 April 2017, the plaintiff placed 12,617 Bitcoin and Ethereum orders of which only 15 were filled. Eight of the orders were buy or sell orders transacted at a price of around 0.04 Bitcoin for one Ethereum. Seven others were sell orders that were effected at an exchange rate of around ten Bitcoin for one Ethereum. These were filled after a technical glitch had hit the defendant exchange and it was unable to perform its market-price updates. All the orders on the relevant order book were not available so that no true market price could be set. However, because of the glitch, the plaintiff's price was the only one available on the defendant's platform and this was matched by the computer system with Bitcoin held by forced sale customers. This meant that the plaintiff was credited with a large number of Bitcoin with the exchanged amount of Ethereum debited. The forced sold customers had their accounts correspondingly debited and credited. The plaintiff stood to gain almost 250 times the amount of Bitcoin that the pre-glitch exchange rate of Bitcoin for Ethereum would have given them. The defendant exchange platform tried to unilaterally reverse the transaction on the following day. They contended that the risk disclosure document contained a term that allowed them to do that which Thorley J thought raised an arguable defence. He thus refused to grant summary judgment. Another reason for this was founded on the doctrine of unilateral mistake which the judge acknowledged was less developed where computers were concerned. In *Chwee Kin Keong v Digilandmall.com Pte Ltd*[18] ("*Digilandmall*"), it was held that there needed to be a sufficiently important or fundamental mistake as to a term of the contract and that the party seeking to enforce the contract must have had actual knowledge of the mistake. Here, Thorley J thought that a more thorough investigation of the facts behind the setting of the high offer price was needed in order to assess the state of the plaintiff's knowledge and so summary judgment was not apposite. He also thought that the law of unilateral mistake could properly be revisited at trial when all the facts had been fully established.

18 [2005] 1 SLR(R) 502.

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Monetary Authority of Singapore statement on tokens

25.9 While the financial products that were exchanged in *B2C2* involved cryptocurrency rather than capital markets products, many in fact overlap, particularly later incarnations of these financial instruments. In November 2017, MAS issued a Guide to Digital Token Offerings.[19] This stated that "digital tokens that constitute capital markets products" will have to comply with the offering requirements of the Securities and Futures Act[20] ("SFA"), including the need to prepare a prospectus, although the offerors can avail themselves of the exclusions and exemptions there. This statement concerned offers of digital tokens in the primary market that represent underlying securities or derivatives contracts, for which a great deal of concern has been voiced recently in terms of their financial risks,[21] as well as link to illegal activity.[22]

25.10 If the secondary market rules had applied to the defendant exchange in *B2C2*, however, it would have been seen as a person providing a platform on which digital tokens are traded and may have been seen as operating an organised market. A person who establishes or operates an organised market, or holds himself out as operating an organised market, must be approved by MAS as an approved exchange or recognised by MAS as a recognised market operator, unless otherwise exempted. The plaintiff, being a market maker, may then have required a capital markets services licence to deal in securities, which is a regulated activity under the SFA. Again, however, it is unlikely that Bitcoin and Ethereum, unlike more recent generations of cryptocurrency, would have been seen as a capital market's product as opposed to a currency or payment system. It would be quite different with the Bitcoin futures contract now traded on the Chicago Board Options Exchange which, if it had a presence in Singapore, would currently be seen as a "futures contract" under the SFA, and with the coming into effect of the SFAA 2017, a "derivatives contract".

25.11 MAS is currently conducting public consultation on a proposed Payment Services Bill that will empower it to impose anti-money laundering or combating the financing of terrorism requirements on

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19 Monetary Authority of Singapore, *A Guide to Digital Token Offerings* (14 November 2017).

20 Cap 289, 2006 Rev Ed.

21 See, *eg*, Dirk A Zetzsche, Ross P Buckley, Douglas W Arner & Linus Föhr, *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators* (University of Luxembourg Law Working Paper Series No 11/2017, 9 January 2018).

22 See Sean Foley, Jonathan R Karlsen & Tālis J Putniņš, "Sex, Drugs, and Bitcoin: How Much Illegal Activity Is Financed through Cryptocurrencies?" (15 January 2018) <https://ssrn.com/abstract=3102645> (accessed 31 March 2018).

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such intermediaries.[23] This will be based on the idea that at some stage, fiat currency will have to be exchanged for virtual currency, or *vice versa*, at intermediaries that buy, sell or exchange virtual currency. More recently MAS confirmed that "[the] key risks MAS is monitoring in the crypto world are in the areas of financial stability, money laundering, investor protection and market functioning".[24]

Primary markets

Contractual dispute involving a listing

25.12 The doctrine of unilateral mistake that was discussed in *B2C2* also surfaced in *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd*,[25] which involved the recovery of money as a result of a default on a series of loans structured as convertible bond subscription agreements. The bonds were issued by a special purpose vehicle which defaulted. The subscriber then brought an action on an indemnity given by the initial shareholders of the company to keep the subscriber "harmless against loss". After examining the extrinsic evidence, including pre-contractual negotiations, Audrey Lim JC held that the clause did not impose a personal obligation on the initial shareholders to indemnify the convertible bond subscriber for all the sums owing by the borrower/issuer. There was, however, no unilateral mistake as, following *Digilandmall*, there was no indication that the subscribers knew of the initial shareholders' mistake with respect to the indemnity clause at the time of contract. Where common mistake was concerned, Lim JC did not think that the mistake met the high common law threshold requiring that it "renders the subject matter of the contract essentially and radically different from that which both parties believed to exist at the time the contract was executed".[26] Lim JC recognised that the position in equity was, however, different from that in the UK, where the equitable jurisdiction in common mistake does not appear to have survived the English Court of Appeal decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*.[27] She held that rectification in equity was arguable but thought that it was unnecessary to decide the point as she had found in favour of the initial shareholders on the

23 See Monetary Authority of Singapore, *Proposed Payment Services Bill* (Consultation Paper No P021 – 2017, November 2017).

24 Ravi Menon, Managing Director of the Monetary Authority of Singapore, "Crypto Tokens: The Good, The Bad, and The Ugly", speech at Money20/20 (15 March 2018).

25 [2017] SGHC 22.

26 This was following *Associated Japanese Bank (International) Ltd v Credit Du Nord SA* [1989] 1 WLR 255.

27 [2003] QB 679.

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interpretation of the indemnity clause.[28] Goh Yihan *et al*, in *The Law of Contract in Singapore*,[29] also argue for the retention of the flexibility provided by the equitable jurisdiction in common mistake cases. They drew support for this from *dicta* in the Singapore Court of Appeal decision of *Digilandmall*[30] although it was strictly a case on unilateral and not common mistake.

25.13 In last year's review, we examined the case of *ACTAtek, Inc v Tembusu Growth Fund Ltd*,[31] in which two convertible loan agreements ("CLAs") were entered into between ACTAtek and Tembusu under which Tembusu was to lend certain amounts of money to ACTAtek. This was then to be repaid by the issuance of shares in ACTAtek upon its intended listing on the New Zealand Stock Exchange ("NZSE"), which failed. The Court of Appeal allowed ACTAtek's appeal on the basis that it did not misapply the loan proceeds and that Tembusu had improperly declared an event of default. ACTAtek had also counterclaimed for damages on the grounds that Tembusu's actions resulted in the planned listing on the NZSE being aborted. The Court of Appeal remitted the matter to the High Court judge for an assessment of damages. This was heard in 2017 by Vinodh Coomaraswamy J,[32] who awarded only nominal damages to ACTAtek as ACTAtek did not suffer any loss in relation to the failed listing, and the other claims were by persons, including the chief executive officer, who claimed for the loss of opportunity to be shareholders in the listed entity that were not party to the CLA. In the event, he also found that Tembusu's breach did not cause the failed listing.

Insider trading and market abuse

Fraudulent or deceptive conduct

25.14 An important case in this area involved the quantum of civil penalty imposed where the High Court heard an appeal from the District Court (where most cases involving market abuse first appear) in *Monetary Authority of Singapore v Wang Boon Heng*.[33] This was after the defendants had been found liable under s 201(*b*) for unauthorised share

28 *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2017] SGHC 22 at [122].
29 Andrew Phang Boon Leong & Goh Yihan, "Mistake" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 10.133 and 10.266.
30 See further *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5 at [165].
31 [2016] 5 SLR 335.
32 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251.
33 [2017] SGDC 61.

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trading using the securities account of another person.[34] In the earlier decision on liability, District Judge Chiah Kok Khun held that MAS did not have to prove the elements of the tort of deceit and fraudulent misrepresentation in order to obtain a civil penalty under s 201(*b*) read with s 232(3) of the SFA, recognising that s 201, which is similar to r 10b-5 in the US,[35] is a "catch-all" form of liability. There was no appeal from the earlier decision on liability. The High Court,[36] however, allowed the appeal on quantum where See Kee Oon J proposed a framework for both the standard for reviewing a lower courts' decision in such cases as well as the applicable principles for deciding on the quantum of civil penalty awarded against a defendant.

25.15 Where the former was concerned, See J applied a slightly modified standard for review drawn largely from appeals against general exercises of discretion,[37] as opposed to the standard in appeals against sentence in criminal cases and in civil damages cases. His Honour listed these as situations:

> (a) where the judge took into account an improper factor and/or failed to take into account a material factor, or erred in the weighing of the factors;
>
> (b) where the judge acted on wrong principles;
>
> (c) where the judge erred with respect to the proper factual basis or misapprehended the facts before him; and
>
> (d) where, for the above or other reasons, the quantum of civil penalty imposed by the judge was 'plainly wrong', such as a decision that was 'clearly outside what could be justified by correct reasoning': *Costa v Public Trustee of New South Wales* [2008] NSWCA 223 at [18(1)].

25.16 Based on these principles, his Honour allowed the appeal and raised the civil penalty imposed on the first respondent from $75,000 to $150,000 and on the second respondent from $50,000 to $75,000. Here, the first respondent, an undischarged bankrupt, carried out a total of 573 unauthorised share trades using four accounts of the second respondent, his former spouse, and a Mr Tay, with different stockbrokers. The transactions were unauthorised in the sense that the stockbrokers thought that the trades were effected by the account holder

34 See *Monetary Authority of Singapore v Wang Boon Heng* [2016] SGDC 345. As this decision was only handed down at the end of December 2016, it was not noted in (2016) 17 SAL Ann Rev 639.

35 See Municipal Securities Rulemaking Board, "Glossary of Municipal Securities – Rule 10b-5", available at http://www.msrb.org/Glossary/Definition/RULE-10B-5.aspx (accessed 15 March 2018).

36 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582.

37 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [39].

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who should have been solely responsible for the trades as provided by the terms of the account. The second respondent acquiesced in the 407 trades carried out in her name and had also been found liable under s 201(*b*) of the SFA in the earlier District Court decision. In the later District Court decision from which the appeal was heard, the judge had applied the factors below in determining the quantum of liability for unauthorised trading. This was to first compute the starting point (which the judge thought was the statutory minimum of $50,000 under s 232(2) of the SFA), and then to use the following factors to adjust accordingly:[38]

(a) adverse effect on markets and the seriousness of that effect;

(b) the extent to which the behaviour was deliberate or reckless;

(c) whether the person on whom the penalty is to be imposed is an individual;

(d) the amount of profits accrued or loss avoided;

(e) conduct following the behaviour of concern;

(f) difficulty of detecting or enforcing the activity in question; and

(g) prior conduct of the offender.

25.17 One main factor taken into account in the District Court was that the more egregious case of false trading – *Tan Chong Koay v Monetary Authority of Singapore*[39] ("*Tan Chong Koay*"), which was acknowledged to be the only case that had proceeded to trial on this type of sanction, had only resulted in a civil penalty of $250,000, which the judge took to be the upper limit in the case before him. In contrast, the maximum sum specified for a civil penalty under s 232(3) of the SFA is $2m where the defendant neither makes a profit nor avoids a loss, which was the case here. See J did not think, however, that the judge was wrong *per se* to have started examining the issue with the statutory minimum of $50,000 and was also not wrong, given the dearth of authority, to see $250,000 as the upper limit in the case before him.[40] For the same reason, See J also did not agree with the five bands between $50,000 and $2m suggested by the *amicus curiae* although he did not

38 This had been suggested by James Leong *et al*, "A Practical Guide to Quantifying Civil Penalties under the Securities and Futures Act" *Singapore Law Gazette* (November 2004).

39 [2011] 4 SLR 348; false-trading prohibitions are created under s 197(1)(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed).

40 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [59].

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rule that out in the future.[41] As to the function of civil penalties, See J said:[42]

> While civil penalties are distinct from fines, they fulfil a similar policy function of *punishing* and *deterring* malpractice in the securities market so as to protect the market's integrity and investors who invest in securities traded on the stock exchange[43] … [emphasis in original]

25.18 Given the link with fines, See J drew analogies from the criminal law. He observed that *Tan Chong Koay* did not lay down any exhaustive list of factors, and found some guidance from s 21A of the US Securities Exchange Act of 1934,[44] which deals with civil penalties for insider trading,[45] and Australian cases on s 1317G of the Australian Corporations Act 2001,[46] which created their civil penalty regime. His Honour agreed with the *amicus curiae* that the analysis should focus separately on the severity of the violation and the culpability of the defendant before considering any aggravating or mitigating factors.[47] In this context, See J pointed out that while market impact was an aggravating factor, following the three-judge High Court decision in *Public Prosecutor v Ng Sae Kiat*[48] ("*Ng Sae Kiat*"), the lack of that was not a mitigating factor.[49] His Honour allowed the appeal mainly for this reason because the District Court judge had thought that there being no market impact was a mitigating factor. That was a fundamental mistake alongside the fact that he did not take into account the loss caused to the remisier operating Mr Tay's account as moneys remained due and payable to the stockbroking firm after the forced sale of securities that were the subject of the first respondent's unauthorised trades. See J also thought that there should be a final adjustment for proportionality, parity, totality, and the aims of punishment and deterrence that formed the basis for civil penalties. His Honour found that the judge below had placed insufficient weight on the scale, number and frequency of the trades by the respondents; that he had wrongly taking into account the

41 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [69].

42 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [45].

43 *Tan Chong Koay v Monetary Authority of Singapore* [2011] 4 SLR 348 at [57].

44 15 USC § 78u-1.

45 The US introduced a treble damages penalty regime into s 21(d)(2) of the US Securities Exchange Act of 1934 (15 USC (US) § 78u(d)(2)) through the Insider Trading Sanctions Act of 1984 (PL 98-376), codified in a number of provisions of 15 USC §§ 78a–78qq. In the US, the damages are payable to the Treasury.

46 Cth.

47 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [57].

48 [2015] 5 SLR 167.

49 *Monetary Authority of Singapore v Wang Boon Heng* [2018] 3 SLR 582 at [64]. He also confirmed previous decisions that held that the lack of evidence of market impact was not a necessary condition for custodial sentences to be imposed in respect of offences under s 201(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed).

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alleged financial hardship to the respondents; and that he had failed to adequately take into account the difference in relative culpability between the respondents.

25.19 In *Public Prosecutor v Ng Hock Ching*,[50] s 201(*b*) of the SFA was not used in the context of the secondary market but the primary market. This was also a criminal case and not a claim for civil penalties, although we have seen that there is some correlation between them. Here, the defendants conspired to obtain placement shares in SNF Corporation Ltd ("SNF"), which was about to be listed on SESDAQ[51] (now Catalist), by deceiving the placement agent which also acted as underwriter in the initial public offering ("IPO"). In the share application forms, the applicants declared that they were not nominees of a director in SNF when the shares were in fact to be beneficially owned by Ng, who was the executive director of SNF. The reason for this was that as part of the listing application for the IPO imposed by SGX, the SNF directors, including Ng, gave an undertaking that they would observe a moratorium on the transfer or disposal of their entire shareholdings in SNF for a period of one year after listing and 50% of their shareholdings in SNF for the subsequent one year. Ten months after the IPO, a foreign investment holding company acquired a large block of shares from 11 existing shareholders, which included the placement shares of Ng that were sold through the accounts of the applicants without complying with director disclosure requirements in ss 165 and 166 of the Companies Act[52] as well as the substantial shareholder disclosure requirements in s 83 of the Companies Act (which have largely been moved to the SFA by the Securities and Futures (Amendment) Act 2009,[53] which came into effect in 2012). District Judge Lim Tse Haw found that the subscription moneys were provided by Ng not as a loan and he consequently owned the SNF shares. He found both Ng and the share applicants guilty of the respective charges. Following the "helpful reference point"[54] provided by *Public Prosecutor v Sia Teck Mong*,[55] Ng was fined $150,000 and the share applicants $30,000 each for breaches of s 201(*b*) of the SFA.[56] The sentences for the non-disclosure offences ranged from $1,000 to $10,000.

50 [2017] SGDC 142.
51 "SESDAQ" stands for "Stock Exchange of Singapore Dealing and Automated Quotation System".
52 Cap 50, 1994 Rev Ed.
53 Act 2 of 2009.
54 *Public Prosecutor v Ng Hock Ching* [2017] SGDC 142 at [120].
55 [2005] SGDC 249.
56 Securities and Futures Act (Cap 289, 2002 Rev Ed).

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25.20 In *Public Prosecutor v Tey Thean Yang, Dennis*,[57] however, s 201 of the SFA was used not only in the context of unauthorised trading or subscription[58] but also market manipulation.[59] Here, a trading representative of a stockbroker was accused of manipulating the price of contracts of differences ("CFDs") offered by two CFD providers by influencing the price of the underlying securities. This was done by entering fraudulent orders to artificially increase the best bid price and to decrease the best offer price of the underlying securities in order to induce the CFD providers to react to the deceptive market information. His intention was to cancel the bid or offer before execution. This allowed him to purchase CFDs at lower prices and to sell at higher prices and he profited at the expense of the CFD providers. The defendant trading representative used three securities and two CFD accounts opened in the names of his parents and clients in entering 465 orders in respect of 17 underlying SGX-listed securities. He was found guilty both under s 201(*b*) as well as s 201(*a*) of the SFA. For the latter, District Judge Kaur Jasvender followed the non-exhaustive list of factors set out by the three-judge High Court in *Ng Sae Kiat*[60] and the fact that a custodial sentence would ordinarily be imposed where the defendant's conduct had a market impact, which was "some form of distortion of the true forces of supply and demand in the financial market which causes the information that is conveyed on the market to be distorted".[61] But the judge also cited *Lee Chee Keet v Public Prosecutor*[62] and thought that "the lack of identifiable market impact by itself does not mean that a custodial sentence would therefore be inappropriate".[63] She therefore imposed a sentence of imprisonment of 12 weeks on each of the six charges under s 201(*a*) of the SFA. For s 201(*b*), the unauthorised trading consisted of the defendant's use of his parents and clients' accounts. However, the judge accepted that the parties on whom the deceit was practised were really the market makers and not the account holders who did not suffer a loss. Following *Ng Sae Kiat*, this was a relevant factor in sentencing. However, the judge said that this matter alone was not determinative and all the factors in that case had to be examined on a case-by-case basis. She imposed a

57 [2017] SGDC 120.
58 See s 201(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed).
59 See s 201(*a*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed).
60 *Public Prosecutor v Ng Sae Kiat* [2015] 5 SLR 167 at [58], noted in (2015) 16 SAL Ann Rev 615 at 629–630, paras 25.31–25.32.
61 *Public Prosecutor v Tey Thean Yang, Dennis* [2017] SGDC 120 at [42], referring to *Public Prosecutor v Ng Sae Kiat* [2015] 5 SLR 167 at [55]–[56].
62 [2016] 4 SLR 1316 at [30], discussed in (2016) 17 SAL Ann Rev 639 at 649–650, para 25.24, also involved breaches of a moratorium in the SNF initial public offering.
63 *Public Prosecutor v Tey Thean Yang, Dennis* [2017] SGDC 120 at [44].

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custodial sentence of four weeks on one charge and eight weeks on another for the s 201(*b*) offence.

25.21 What we can discern from these cases, which largely dealt with the quantum of civil penalty as well as criminal sanctions, is that courts prefer to retain some measure of discretion whilst providing and using non-exhaustive guidelines. This is necessary particularly where s 201 of the SFA is concerned given the open-endedness of such a "catch-all" provision. However, that discretion must be bounded in order to provide some certainty to the marketplace.

Takeovers and exits

Business trust restructuring and acquisition

25.22 Business trusts are financial instruments that have arisen with the growth of securitisation in Singapore. Where they are offered to the investing public, they have to comply with Pt XIII of the SFA.[64] These business trusts also have to be registered under a separate Business Trusts Act 2004[65] ("BTA"). At the start of 2017, there were 22 registered business trusts, but concerns continued to be raised about their governance and sustainability, particularly as to the independence of their directors given that they are usually still nominated by the sponsor.[66] But the more immediate concern seems to be with the restructuring and acquisition of such entities given their troubled underlying assets, which are often in the shipping and real estate sectors.

64 The Securities and Futures (Amendment) Act 2017 (Act 4 of 2017) (not yet in force) has assimilated this division with the securities offering regime in Div 1 of Pt XIII of the Securities and Futures Act (Cap 289, 2006 Rev Ed) and not the one governing collective investment schemes in Div 2. The duration of a business trust prospectus is also six months, which is similar to that for securities offerings. Note, though, that the one unit one vote requirement in s 58 of the Business Trust Act (Cap 31A, 2005 Rev Ed) has not been removed even though the one-share-one-vote requirement for public companies in s 64 of the Companies Act (Cap 50, 2006 Rev Ed) was deleted by the Companies (Amendment) Act 2014 (Act 36 of 2014), which came into effect in January 2016.

65 Cap 31A, 2005 Rev Ed; see also Monetary Authority of Singapore, *Regulation of Business Trusts* (Consultation Paper No 15 – 2003, December 2003).

66 Mak Yuen Teen, "Governance Risks in Business Trust Model" *Business Times* (16 July 2013); see further Monetary Authority of Singapore, "List of Registered Business Trusts", available at http://www.mas.gov.sg/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Business-Trusts/List-of-Registered-Business-Trusts.aspx (accessed 15 March 2018).

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25.23 In October 2016, Rickmers Maritime Trust, a business trust listed on SGX, tried to obtain unitholder approval for 1.32 billion new units in the trust in partial redemption of $60m of the principal amount of notes, with the remaining $40m to be payable in November 2023 rather than May 2017. This was part of a precondition required by their bank lenders to reschedule their loans to 2021. Rickmers' bondholders were unhappy as other companies in difficulties which had listed their bonds on the SGX wholesale market had pledged full redemption of their notes in exchange for payment extensions. They refused to provide the required majority and Rickmers was wound up in April 2017. One problem is that it is not fully clear what the restructuring rules are as the BTA only provides for winding up but not schemes of arrangement or judicial management. The Securities Industry Council Practice Statement on Trust Schemes in Respect of Mergers and Privatisations[67] highlighted the need to utilise the general court powers over the administration of trusts under O 80 of the RoC and this would be applicable to any winding-up or scheme in relation to real estate investment trusts and business trusts. It was thought that a court is likely to be guided by s 210 of the Companies Act.[68]

25.24 The parallels drawn from s 210 with corporate schemes was confirmed in *Re Croesus Retail Asset Management Pte Ltd*.[69] Croesus is the asset manager of Croesus Retail Trust ("CRT"), which is an SGX-listed business trust that invested mainly in retail real estate in the Asia-Pacific region. In June 2017, Blackstone, a large private equity group, announced an offer to acquire all the units in CRT and to privatise it via a trust scheme in compliance with The Singapore Code on Take-Overs and Mergers ("Takeovers Code")[70] using a special purpose vehicle, Cyrus Bidco Pte Ltd. The *ex parte* matter came before Aedit Abdullah J under O 80 r 2 of the RoC after the Securities Industry Council indicated that the trust scheme was exempt from various provisions of the Takeovers Code subject to unitholder and court approvals being obtained that were similar to that required of shareholders in a corporate scheme.[71] This required, amongst other things, the approval, by a majority in number representing three-fourths in value of CRT's

67 3 October 2008.

68 Further, the jurisdiction under s 210(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) is over an "unregistered company" under s 350 of the Companies Act (Cap 50, 1994 Rev Ed), which includes any *partnership* or *association* of more than five people. While this could include overseas associations, it does not include international organisations: see *Re International Tin Council* [1987] 2 WLR 1229.

69 [2017] 5 SLR 811.

70 Securities Industry Council, *The Singapore Code on Take-Overs and Mergers* (25 March 2016).

71 The Securities Industry Council also required that an independent financial adviser be appointed to advise the unitholders.

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unitholders, of the scheme and various amendments to the trust deed (to implement the scheme). The judge said that it was "apparent that the proposed orders largely paralleled that in an application for a scheme or arrangement under section 210".[72] This could mean that the recent changes to those provisions in the Companies Act to facilitate Singapore's role as an international debt restructuring centre with chapter 11[73] characteristics may also be followed in future.[74] Abdullah J ordered that the scheme meeting be called within three months of the date of the order and that a further hearing be held for the scheme to be approved and effected. However, his Honour noted some differences between a corporate scheme and the trust scheme before him:[75]

> In an O 80 r 2 application, the main focus is on the interest of the beneficiaries and the terms of the trust … uppermost in the court's consideration would be adequate protection in the circumstances for unit holders as putative beneficiaries in an investment vehicle …

25.25 His Honour also provided interesting comments for trust lawyers to consider when he noted:[76]

> Croesus differs from an orthodox and traditional trust since the unit holders are expressly stated not to have any equitable proprietary interest in the trust property but only a right to compel due performance by the trustee …

25.26 This should be slightly contrasted with Abdullah JC's (as his Honour then was) earlier judgment in *Zhao Hui Fang v Commissioner of Stamp Duties*[77] ("*Zhao Hui Fang*"), where he referred to both the High Court and Court of Appeal decisions in *Koh Lau Keow v Attorney-General*,[78] which rejected the possibility of the existence of non-charitable purpose trusts as they violate the beneficiary principle. This is where Tay Yong Kwang J said:

> In *In re Endacott, Corpe* (deceased) *v Endacott* [1960] Ch 232 at 246, Lord Evershed MR held that:
>
>> No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English

72 *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [6].

73 See ch 11 of Bankruptcy Code 11 USC §§ 1101–1174.

74 See Meng Seng Wee, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017), a paper which was prepared for "The Scheme of Arrangement as a Debt Restructuring Tool" Conference (12 January 2017) and discusses the Companies (Amendment) Act 2017 (Act 15 of 2017).

75 *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [13]–[16].

76 *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [11].

77 [2017] 4 SLR 945.

78 [2013] 4 SLR 491 at [18].

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> law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.
>
> …

25.27 In the Court of Appeal,[79] Chao Hick Tin JA, who delivered the judgment of the court, said:

> The following propositions are undisputed by the parties:
>
> (a) The Trust must be a charitable trust to be valid. This is because (i) the Trust is stated to be 'in perpetuity' and would be void for offending the rule against perpetuities (which does not apply to charitable trusts); and (ii) the Trust is a purpose trust with no definite beneficiaries and is void unless charitable.
>
> …

25.28 Perhaps the best way to rationalise the cases is that there is a difference between equitable ownership (which Richard Nolan has persuasively argued is essentially a negative concept, and involves largely a primary exclusionary right and a secondary right of recovery for misapplication)[80] and factual beneficiaries who actually enjoy the property presently. Abdullah JC suggested such a distinction in *Zhao Hui Fang*, where he said:[81]

> Furthermore, there is no suggestion that such factual beneficiaries have rights of alienation or exclusion against others, lacking thus the crucial hallmarks of ownership.

This argument has effectively been accepted by the UK Supreme Court in *Akers v Samba Financial Group*,[82] where Lord Mance, with whom the other justices agreed, said:

> [The] beneficiary has only the right to have the trust assets restored to the original trustee, or, if the trust was a bare trust to which the rule in *Saunders v Vautier* (1841) 4 Beav 115, applies, to himself …

25.29 Just recently, Phang JA stated in *Ernest Ferdinand Perez De La Sala v Compañia De Navegaçión Palomar, SA*:[83]

> It is for this reason that beneficial 'ownership' has been described as 'a right against a right', *ie*, a right to constrain or control the way

79 *Koh Lau Keow v Attorney-General* [2014] 2 SLR 1165 at [18].
80 Richard Nolan, "Equitable Property" (2006) 122 LQR 232, which was cited with approval in *Akers v Samba Financial Group* [2017] AC 424 at [15] and [46].
81 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [62].
82 [2017] AC 424 at [46].
83 [2018] SGCA 16 at [145].

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another person exercises *his* right to deal with a thing, rather than a right against the thing itself: see Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

25.30 Even in a fixed interest trust, the beneficiary would usually not have a right to present enjoyment of the trust property, which may be deferred by the terms of the trust.[84] However, its beneficial and equitable ownership interest is manifested in its right to protect the trust fund. There must be an owner of property as it has been held in Singapore in the context of unincorporated associations, which has characteristics of both trust and contract, that "[like] nature, the law abhors a vacuum in ownership".[85]

25.31 In October 2017, Indiabulls Properties Investment Trust ("IPIT"), which was an SGX-listed business trust, became the subject of a cash offer by Indiabulls Real Estate Limited ("IBREL"), an Indian listed company. IBREL sought to acquire all IPIT units it did not already own and obtained an irrevocable undertaking to accept the offer from a large unitholder, a US-based private equity firm – Farallon Capital Management (for which it would be partly paid in cash within seven business days of the units being tendered and be given a promissory note for the balance). This would take IBREL above the 90% compulsory acquisition threshold in s 40A(1) of the BTA (which is *in pari materia* with the squeeze-out provisions in s 215 of the Companies Act), which would in turn result in IPIT's delisting. The Securities Industry Council ruled that the irrevocable undertaking and the promissory note did not constitute special deals for the purposes of r 10 of the Takeovers Code. However, because of these arrangements, the Council ruled that the offeror and parties acting in concert with them and the Farallon Group would be regarded as parties acting in concert with respect to the acquisition of shares in IPIT.

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84 See in the context of discretionary trusts, Jessica Palmer & Charles Rickett, "The Revolution and Legacy of the Discretionary Trust" (2017) 11 *Journal of Equity* 157.

85 *Lee Chuen Li v Singapore Island Country Club* [1992] 2 SLR(R) 266 at [48], *per* Michael Hwang JC.

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