Public Prosecutor *v* Ng Sae Kiat and other appeals
[2015] SGHC 191

Case Number : Magistrate's Appeals Nos 131-134 of 2014/01

Decision Date : 30 July 2015

Tribunal/Court : High Court

Coram : Sundaresh Menon CJ; Chao Hick Tin JA; See Kee Oon JC

Counsel Name(s) : Gillian Koh Tan, Lynn Tan and Loh Hui-min (Attorney-General's Chambers) for the appellant; Hamidul Haq, Thong Chee Kun, Istyana Ibrahim and Josephine Chee (Rajah & Tann Singapore LLP) for the respondents; Kek Meng Soon Kelvin (Allen & Gledhill LLP) as Young Amicus Curiae; Wee Pan Lee, Suresh Damodara and Tham Lijing (Criminal Practice Committee of the Law Society of Singapore) as Non-party.

Parties : Public Prosecutor — Ng Sae Kiat — Oh Chao Qun — Wong Siaw Seng — Tan Kian Ming, Joseph

Criminal Procedure and Sentencing – Sentencing

30 July 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 These are four related appeals brought by the Public Prosecutor ("the Prosecution") against the sentences which the District Judge ("the DJ") imposed on Ng Sae Kiat ("Ng"), Tan Kian Ming Joseph ("Tan"), Oh Chao Qun ("Oh") and Wong Siaw Seng ("Wong") (collectively "the Respondents") who pleaded guilty to charges under s 201(*b*) read with s 204(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA") on 17 April 2014. At the time of commission of the offences, the Respondents were employed as Contracts for Differences ("CFD") Hedgers by Phillip Securities Pte Ltd ("PSPL"). In that position they were accorded certain discretionary powers in relation to transactions involving CFDs, in particular, the power to act on behalf of PSPL in accepting or rejecting CFD trades. The offences were committed when each of them defrauded PSPL by accepting "out of market" CFD trades on behalf of PSPL. These trades were initiated using nominee CFD accounts belonging to their friends and relatives.

2 The charges brought against the Respondents and the sentences imposed on them by the DJ are set out in the table below:

Offender's name	No of charges preferred	No of charges taken into consideration for purpose of sentencing	Sentence
Ng	2	2	DAC 29124/2013 – $50,000 fine DAC 29126/2013 – $10,000 fine

Tan	5	5	DAC 29138/2013 – $10,000 fine DAC 29140/2013 – $50,000 fine DAC 29142/2013 – $10,000 fine DAC 29144/2013 – $20,000 fine DAC 29146/2013 – $50,000 fine
Wong	5	5	DAC 29148/2013 – $10,000 fine DAC 29150/2013 – $50,000 fine DAC 29152/2013 – $10,000 fine DAC 29154/2013 – $20,000 fine DAC 29156/2013 – $50,000 fine
Oh	5	5	DAC 29158/2013 – $10,000 fine DAC 29160/2013 – $20,000 fine DAC 29162/2013 – $20,000 fine DAC 29164/2013 – $50,000 fine DAC 29166/2013 – $10,000 fine

3 The Respondents committed the offences after Vincent Tan Wei Ren ("Vincent Tan"), a fellow CFD Hedger employed by PSPL, alerted them to the existence of a "loophole" in PSPL's CFD system. Vincent Tan was also prosecuted for perpetrating a similar fraud on PSPL. He pleaded guilty to three charges under s 201(*b*) of the SFA ("s 201(*b*)"). In that case ("Vincent Tan's case"), the Prosecution took the position that a fine would suffice. Vincent Tan was fined $1,000, $10,000 and $15,000 for the three charges by the District Court hearing the matter. No appeal was filed by the Prosecution against this sentence.

4 The Prosecution takes a different position for the Respondents in the present appeals. It submits that the Respondents should be given custodial sentences of varying lengths. In our judgment, the criminality of the Respondents' offending conduct is sufficiently serious to ordinarily warrant custodial sentences. However, given that the main perpetuator of the fraud, Vincent Tan, was punished with only a fine, what confronts us is the parity principle. Is there really anything which differentiates the criminality of the Respondents from that of Vincent Tan? Are the Respondents and Vincent Tan truly equally placed in terms of culpability? And if the parity principle is applicable, do the circumstances permit a custodial benchmark to give way to a fine in the interests of parity?

Appointment of *amicus curiae* and participation of the The Law Society of Singapore

5 We appointed Mr Kek Meng Soon Kelvin ("Mr Kek") as *amicus curiae* under the Young Amicus Curiae Scheme to assist the court. We also invited The Law Society of Singapore ("the Law Society") to participate as a non-party to provide inputs from the perspective of the criminal bar on the general considerations that the court should bear in mind when passing a sentence for a s 201(*b*) offence. We invited the Law Society to participate as a non-party so as to enable members of the criminal bar to provide practical inputs on the matter having regard to their wider collective experience as criminal practitioners. Both the Appellant and the Respondents had no objections to the Law Society participating in these appeal proceedings.

6 We asked Mr Kek and counsel for the Law Society to address us on the question as to the circumstances when the custodial threshold would be triggered for a s 201(*b*) offence. We also requested Mr Kek to address us on whether custodial sentences are warranted on the facts of the present case. We were ably assisted by all the counsel. We will refer to their submissions where appropriate.

Mechanics of the fraud

7 At the hearing below, the Respondents admitted to the Prosecution's Statement of Facts ("SOF") without qualification. Extracts of the SOF are set out at [4] of the DJ's grounds of decision. Part of the SOF provides basic information on how CFDs work. This information is necessary for an understanding as to how the Respondents perpetrated their fraud against PSPL. We now set out what a CFD is, how it works and how the Respondents perpetrated their fraudulent scheme.

8 CFDs are over-the-counter trading instruments offered by PSPL which allow an investor to make profits on price movements of securities listed on selected stock exchanges without having to own the underlying securities. Therefore, the instrument allows investors to invest with less capital than buying and owning the stock itself would have cost the investor (as PSPL still requires some capital upfront).

9 In CFD trades, the investor transacts with PSPL directly which is the counterparty to the trade. The investor does not make or receive payment at the point of purchase or sale. The obligation between the investor and PSPL is determined after the CFD is purchased and sold. The question of who owes whom will depend on the fluctuation of the price of the underlying security.

10 PSPL determines the price at which to purchase and sell CFDs. It buys CFDs from investors at the best prevailing "bid price" of the underlying security (*ie*, the highest price which purchasers offer to buy the security). It sells CFDs at the best prevailing "ask price" of the underlying security (*ie*, the lowest price at which sellers offer to sell the security). At any one time, the former would be lower than the latter but the prices fluctuate over time. In practice, the two prices never coincide because the bid (or ask) orders are taken out of the system once the transaction is completed.

11 Optimally, PSPL would earn two sets of fees in a CFD transaction: (1) a commission fee for each concluded CFD trade and; (2) a "market making profit" from buying at the lower "bid price" and selling at the higher "ask price". However, the market may fluctuate causing PSPL to incur losses. PSPL protects itself against market fluctuations by purchasing the underlying security as and when it considers appropriate. The decision whether to hedge in this manner is made by CFD Hedgers.

12 CFD Hedgers are responsible for making the following decisions: (1) whether to accept certain CFD trades (*ie*, those which are not automatically processed by the PSPL system because the order size exceeds a pre-set limit); (2) whether to hedge a CFD trade once it has been accepted; and (3) if hedging is appropriate, when such hedging should take place. It should also be noted that each CFD Hedger is assigned to manage a portfolio of securities so that he can closely monitor the securities he is in charge of.

13 PSPL prohibits all PSPL employees from opening personal CFD trading accounts with PSPL. This is to prevent a CFD Hedger from processing his own CFD trades as he may subordinate PSPL's interests to those of his own in doing so.

14 The Respondents abused their discretion to accept or reject CFD trades on behalf of PSPL by accepting "out of market" trades (*ie*, by buying CFDs above the best prevailing "bid price" (overpriced

CFDs) and selling CFDs below the best prevailing "ask price" (discounted CFDs)) thereby causing loss to PSPL. The Respondents initiated these selected trades using nominee accounts opened in the names of their friends and relatives. It is not clear if their friends and relatives knew that the accounts were being used for fraudulent purposes, but the friends and relatives were aware that the Respondents were carrying out trades using their accounts. The Respondents collaborated with each other to clear these "out of market" trades. They knew which securities to trade in because each of them managed a pre-assigned portfolio of securities.

15 Each concluded overpriced or discounted CFD trade results in two types of loss to PSPL: (1) definite loss; and (2) loss of "market making profit". This is best illustrated with an example which the Prosecution gave although we do not think that the margins would be so stark in the real market. Assuming that the best prevailing "bid price" and "ask price" is $1.00 and the $1.10 respectively and that a discounted CFD trade is transacted on behalf of PSPL at $0.80 (*ie*, PSPL sells the CFD to the investor at $0.80), PSPL would incur a definite loss of $0.20. This is because it will not be able to purchase the CFD at a price lower than $1.00 (the highest price which purchasers offer to buy the security). The difference between $1.10 and the price at which PSPL buys the CFD (this would be between $1.00 and $1.10) would represent the loss of market making profit which PSPL incurs.

16 PSPL did not have a system for monitoring the manual acceptance of CFD trades. Therefore, the Respondents' fraud only came to light because of a whistle-blower. Upon uncovering the scheme, PSPL froze funds contained in the relevant CFD accounts as well as funds contained in related trading accounts known as Cash Management Accounts ("CMAs") because the funds in CFD accounts could be transferred to CMAs.

Details of the offences

17 The SOF which the Respondents admitted to without qualification also discloses the following:

Offender's name	**No of nominee accounts used**	**No of "out of market" CFD trades transacted**	**Definite loss to PSPL**	**Amount PSPL lost in market making profits**	**Amount offender received for his role**	**Restitution made**	**Period over which fraud took place (no of months before detection)**
Ng	2	173	$113,025	$6,510	≈ $20,000	$7,000	12 July 2008 – 2 July 2009 (11 months)
Tan	5	370	$266,880	$10,860	> $9,000	$45,000	25 Feb 2008 – 30 July 2009 (17 months)
Wong	5	370	$266,880	$10,860	> $45,000	$42,500	25 Feb 2008 – 30 July 2009 (17 months)
Oh	4	301	$186,535	$9,475	> $40,000	$47,000	25 Feb 2008 – 16 July 2009 (17 months)

18 We would observe that the losses which PSPL incurred as stated in the table above are

calculated without taking into account any hedged positions which PSPL might have taken on those "out of market" trades. This is because the police investigators could not ascertain with certainty whether each "out of market" trade was hedged. Additionally, the alleged loss to PSPL attributed to each offender is the sum of all the losses incurred on all the CFD accounts they used to perpetrate the fraud. The losses are not apportioned as between the various persons who collaborated on each account. For example, we stated that Ng caused a definite loss of $113,025 to PSPL. This amount represents the total definite loss that was caused on the two accounts that Ng used to perpetrate the fraud against PSPL. As we explain below, Oh was involved in the use of one of these accounts (CFD account No 399743). The definite loss of $186,535 that Oh caused PSPL comprises the definite losses that were incurred on the four accounts he used, one of which is CFD account No 399743 which he used together with Ng. This means that the actual total loss to PSPL (before taking into account any hedged positions PSPL might have taken) cannot be ascertained by simply adding the various amounts which each offender caused PSPL to incur in losses because that would result in double-counting.

19 As mentioned above (at [3]), all the offences were committed after Vincent Tan alerted the Respondents to the existence of the "loophole" in PSPL's CFD system (*ie*, he informed them that they could manually accept out of market CFD trades). He told Oh, Tan and Wong about the "loophole" sometime in late February or early March 2008 and he proposed that they collaborate with him to exploit the "loophole". They proceeded to do so from February/March to May 2008. Vincent Tan told Ng about the "loophole" sometime in mid-2008.

20 Oh, Tan and Wong were not content with the gains they made through their collaboration with Vincent Tan. Separately, they approached their friends to open additional CFD accounts which they could use to perpetrate the same type of fraud. Since each CFD account had a trading limit, they managed to increase the overall volume of trades they could carry out by opening these additional accounts. They thus expanded the scope of the fraud.

21 It total, the Respondents used seven nominee accounts to perpetrate the fraud against PSPL. We now set out the details of these accounts.

22 One account, CFD account No 467620, was used only by Ng. This account belonged to Ng's father, Ng Sai Poh. Ng had used this account to conduct personal CFD trades since March 2008, even before he found out about the "loophole" in PSPL's CFD system from Vincent Tan sometime in mid-2008. He initially used this account just to circumvent PSPL's prohibition against personal trading by employees. From July 2008 to June 2009, Ng used this account to exploit the "loophole" to his benefit.

23 Another account, CFD account No 399743, was initially used just by Oh. This account was opened in March 2008 after Oh approached his friend, Tan Chee How, to open an account which he could use to conduct personal trades for his own benefit. Between April 2008 and June 2008, Oh used this account by himself to exploit the "loophole" in PSPL's CFD system. In July 2008, Oh switched from being a CFD Hedger to become proprietary trader in PSPL. Therefore he was not able to accept his own "out of market" trades anymore. Oh had a discussion with Ng in October 2008 whereby Oh proposed that this account be used to exploit the "loophole" in PSPL's CFD system. Ng contributed $3,000 to this account as capital. Together, they used this account to exploit the "loophole" from October 2008 to July 2009.

24 Oh, Tan and Wong jointly used three accounts:

(a) CFD account No 457121: Sometime in February/March 2008, Oh, Tan and Wong agreed

with Vincent Tan's proposal to use this account, which belonged to Vincent Tan's friend, Chua Keng How Lester, to exploit the "loophole" in PSPL's CFD system. Oh, Tan and Wong each contributed $2,000 as capital. The four CFD Hedgers used this account from March 2008 to May 2008. They ceased using this account due to a disagreement over losses of around $10,000 incurred on one of the market trades.

(b) CFD account No 463003: This account was opened in February 2008 after Tan approached his friend, Chee Seng You Paul, to open an account which he could use to conduct personal trades. Wong and Tan collaborated to conduct "out of market" trades using this account from April 2008 to July 2009. Oh joined the duo in November 2008. From July 2008, Tan was solely responsible for accepting "out of market" trades as the other two had switched from being CFD Hedgers to become proprietary traders in PSPL.

(c) CFD account No 475136: This account was opened in May 2008 after Oh approached his friend, Yang Zhi Rong Kevin, to open an account which he could use to conduct personal trades. Oh, Wong and Tan collaborated to conduct "out of market" trades using this account from November 2008 to July 2009. From July 2008, Tan was solely responsible for accepting "out of market" trades as the other two had switched from being CFD Hedgers to become proprietary traders in PSPL.

25 Tan and Wong jointly used two accounts:

(a) CFD account No 442135: This account was opened in August 2007 after Wong approached his friend, Huang Guorong, to open an account which he could use to conduct personal trades. Initially, Wong used this account to circumvent PSPL's prohibition against personal trading by employees. In June 2008, Wong approached Tan to collaborate with him to conduct "out of market" trades using this account. Tan and Wong collaborated to conduct "out of market" trades using this account from June 2008 to July 2009. From July 2008, Tan was solely responsible for accepting "out of market" trades as Wong had switched from being a CFD Hedger to become proprietary traders in PSPL.

(b) CFD account No 479711: This account was opened in December 2008 after Wong approached his friend, Ho Hong, to open an account which he could use to conduct personal trades. Wong and Tan collaborated to conduct "out of market" trades using this account from January 2009 to July 2009. Tan was solely responsible for accepting "out of market" trades as Wong had switched from being a CFD Hedger to become proprietary traders in PSPL by then.

26 In general, the Prosecution preferred one count of s 201(*b*) charge for each CFD account the Respondents used. That charge covers all the "out of market" trades that were conducted on the account over the entire period of offending. Ng used two CFD nominee accounts. Tan and Wong used five CFD nominee accounts. It is for this reason that Ng faced two charges whereas Tan and Wong faced five charges each. Oh faced five charges although he only used four CFD nominee accounts because the "out of market" trades conducted using CFD account No 399743 were divided into two time frames. The first related to the period between April 2008 and June 2008 when Oh used this account by himself to exploit the "loophole" in PSPL's CFD system (DAC 29166-2013). The second covered the period from October 2008 to July 2009 when Oh and Ng collaborated to conduct "out of market" trades using this account (DAC 2916-2013).

Details of Vincent Tan's case

27 The Prosecution did not place the SOF in Vincent Tan's case before us. We could only ascertain

the following details from the materials that were before us. Vincent Tan pleaded guilty to three charges under s 201(*b*) on 25 February 2104 and was sentenced on the same day. [note: 1] Three additional s 201(*b*) charges were taken into consideration for the purpose of sentencing. He used three nominee accounts and made 35 "out of market" trades. The "out of market" trades he carried out using CFD account No 457121 were the subject of one of the charges he faced. It will be recalled that this is the account belonging to Chua Keng How Lester. Vincent Tan collaborated with Oh, Tan and Wong to use this account to conduct "out of market" trades from March 2008 to May 2008. His offences were committed over seven months. His offending conduct resulted in PSPL sustaining $16,790 in losses.

28 In Vincent Tan's case, the Prosecution took the position that a fine would suffice. He was fined $1,000, $10,000 and $15,000 for the three charges. The $10,000 fine was imposed in respect of the charge involving the "out of market" trades he carried out using CFD account No 457121. At the hearing before us, the Prosecution explained that it had decided not to seek a custodial sentence in Vincent Tan's case because he voluntarily ceased his offending conduct in July 2008, several months before PSPL commenced investigations. It was further said that Vincent Tan had asked to be transferred out of the CFD team on his own volition because he felt guilty about what he had done. We would observe that, prior to the hearing before us, it was never explicitly made known to the Respondents that Vincent Tan had asked for the transfer.

Decision below

29 The DJ noted that it was Vincent Tan who had tipped off the Respondents as to the existence of the loophole. He was of the view that Vincent Tan "not only conjured the scheme" but also went on "to guide the [Respondents] to exploit the loophole in the system thus enabling them to commit the current offences". He considered Vincent Tan to be "the prime offender" and opined that the Respondents would not have been able to perpetuate the fraud without his assistance. [note: 2]

30 The DJ considered that the parity principle applied. According to that principle, offenders who are sentenced for participation in the same offence should be given the same sentence unless there is a relevant difference in their responsibility for the offence or their personal circumstances. [note: 3] He thought that the sentences imposed in Vincent Tan's case were not "unduly lenient". [note: 4] He was not persuaded that the aggravating factors which the Prosecution highlighted (*eg*, the Respondents' offences were committed over a longer period of time than Vincent Tan's; Vincent Tan stopped offending on his own volition after seven months) should "alter the type of sentence to be imposed". [note: 5] Therefore, he concluded that the imposition of significant fines for the Respondents would suffice. [note: 6]

Prosecution's case on appeal

31 The Prosecution's case on appeal is that the sentences which the DJ imposed on the Respondents are manifestly inadequate given the aggravating factors present in this case. It submits that custodial sentences are warranted. It asks for the following sentences to be imposed:

(a) For Ng: 1 month imprisonment;

(b) For Oh: 3 months imprisonment; and

(c) For Tan and Wong: 4 months imprisonment.

32 The Prosecution draws this court's attention to the following aggravating factors which it says the DJ had either neglected or failed to give adequate weight:

(a) The Respondents' fraud involved market misconduct. Such offences can damage public trust and confidence in our financial market.

(b) The Respondents had committed egregious white-collar crimes which should be punished with imprisonment.

(c) The Respondents' fraud exploited the high degree of trust that PSPL had reposed in its CFD Hedgers.

(d) The Respondents' fraud involved a high degree of premeditation.

(e) The Respondents' fraud involved hundreds of fraudulent trades that were conducted using multiple nominee accounts (especially in the case of Oh, Tan and Wong) over a long period of time.

(f) The Respondents' fraud was difficult to detect.

(g) The Respondents committed the offences in groups.

33 Even if the parity principle could apply, the Prosecution argues that the DJ ought not to have applied the parity principle across the board to all the charges brought against the Respondents. At most, the parity principle should only be applicable in relation to the charges that Oh, Wong and Tan faced in respect of the "out of market" trades carried out using CFD account No 457121 because Vincent Tan was a co-accused in respect of those offences. Furthermore, the Prosecution argues that the DJ erred in failing to distinguish Vincent Tan's from the Respondents' cases because the DJ failed to recognise that Vincent Tan was not in a comparable or higher state of moral culpability when compared to that of the Respondents.

34 Additionally, the Prosecution argues that the Respondents' offences are closely analogous to other financial crimes such as cheating (s 420 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code")) and criminal breach of trust ("CBT") by employees or agents (ss 408 and 409 of the Penal Code). The Prosecution points out that the High Court has upheld custodial sentences in respect of such offences on facts which are less aggravating than those found in the present case.

Respondents' case on appeal

35 The Respondents argue that the sentences which the DJ has imposed on them are appropriate and not manifestly inadequate. They highlight the fact that what they did had limited or no impact on the financial market or the investing public because CFDs are not exchange traded. The only counterparty to a CFD trade is PSPL itself. Therefore PSPL was the only victim which suffered any loss because of their fraud.

36 The Respondents also submit that Vincent Tan's case and theirs should be treated in a similar manner. This is because he was no less morally culpable than them. They point out that Vincent Tan only stopped his offending acts because he was transferred out of the CFD team and could no longer carry on the "out of market" trades. The Prosecution's assertion that Vincent Tan had voluntarily asked to be transferred out of the CFD team was not a fact that was made known to them prior to the hearing of these appeals. They only became aware of this assertion in the course of Prosecution's

oral submissions before us. Had they known of this fact, they would have pursued it in the court below. They also argue that the substantial difference in the quantum of fines imposed on them as compared to those imposed on Vincent Tan adequately addresses the difference in the scale and extent of their offences as compared to his.

37 The Respondents also argue that the court should take the following factors into consideration when determining the appropriate sentence:

(a) The Respondents made full restitution of the profits they held at the material time after the internal inquiry by PSPL and long before they were charged in court.

(b) The Respondents are first-time offenders who were young adults at the material time.

(c) The Respondents extended their fullest cooperation to the police investigators in the course of investigations.

(d) The lengthy investigation process and the delay in prosecution have caused the Respondents considerable mental anguish and financial hardship. This is punishment enough and there is really no justification to have their sentences enhanced. Their transgressions occurred between February 2008 and July 2009. Investigations commenced in August 2009. The Respondents were only charged in July 2013. *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019 at [20]–[23] suggests that an inordinate delay in prosecution is a factor which the court can take into account in giving a "discount" in sentence.

Question of when the custodial threshold is crossed in respect of a s 201(*b*) offence

38 It would be helpful to first set out s 201(*b*) and s 204(1) of the SFA before we proceed to consider in what circumstances would the custodial threshold be crossed in respect of a s 201(*b*) offence.

Employment of manipulative and deceptive devices

201. No person shall, directly or indirectly, in connection with the subscription, purchase or sale of any securities —

...

(*b*) engage in any act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, upon any person

Penalties under this Division

204.—(1) Any person who contravenes any of the provisions of this Division shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $250,000 or to imprisonment for a term not exceeding 7 years or to both.

Amicus curiae's submissions

39 Mr Kek argues that only market misconduct which defrauds innocent investors (as opposed to such conduct which defrauds securities firms) warrants a custodial sentence. [note: 7] He relies upon excerpts from parliamentary debates and the High Court decision in *Ng Geok Eng v Public Prosecutor*

[2007] 1 SLR (R) 913 ("*Ng Geok Eng*") to support his position. He argues that it is evident from the parliamentary debates concerning the SFA, and its predecessor Acts, that the overarching aim of criminalising market misconduct in the SFA is to protect public investors. The approach adopted in *Ng Geok Eng* was in line with this aim. We set out the excerpts of the parliamentary debates that Mr Kek relies upon before summarising the facts and holding in *Ng Geok Eng*.

40 First, Mr Kek relies upon the following remarks made by the Minister for Finance during the debates leading up to the Securities Industry Act 1970 (No 61 of 1970) (this Act was passed by Parliament on 30 December 1970, but was not brought into operation) which emphasised the need to afford protection to the investing public (*Singapore Parliamentary Debates, Official Report* (30 December 1970) vol 30 at cols 461–463 (Hon Sui Sen,)):

> I would like to place this Bill in its proper perspective by reminding Members that developments on the Stock Exchange have attracted both public comment and criticism since 1968. *In fact, there has been, in this House and outside it, considerable pressure put upon the Government from time to time to intervene in the public interest to* ***protect investors from unscrupulous manipulation and rigging on the Stock Exchange*** *.*
>
> *Recent developments on the Stock Exchange…have focused attention on the shortcomings and deficiencies of the Securities Market in Singapore and have raised the question as to what form of legislative intervention is needed to remedy these shortcomings and deficiencies, particularly as they affect the* ***protection to be afforded to the investing public*** *.* For there can be no doubt that some form of intervention is necessary to ensure that the Securities Market operates in a fair and open manner and to prevent, as far as possible, certain persons, especially those with "insider" knowledge, from manipulating the market by illegal means for their own profit.
>
> [emphasis added in italics and bold italics]

41 The Minister for Finance restated the need for a statute regulating the securities industry in the debates leading up to the Securities Industry Act 1973 (No 17 of 1973) (this statute preceded the SFA). He stated (*Singapore Parliamentary Debates, Official Report* (7 March 1973) vol 32 at col 549 (Hon Sui Sen)):

> In my Second Reading speech at the time that that legislation was before Members, I dealt in considerable detail with the background to and the reasons for bringing in legislation to control the securities industry and trading in securities. … I do not need to repeat at any great length what was said at that time for neither the reasons for, nor the background of, the proposed legislation have changed. *The need, however, for such legislation being made operative has, if anything, become more pressing with the passing of time. We are continually being made aware from happenings in the market that* ***investors need to be protected*** *, so far as is possible to do so, by legislative intervention from unscrupulous manipulation and share rigging on the Stock Exchange.* These are matters which stockbrokers with the best will in the world as a body are unable or not agreeable to control voluntarily.

42 Mr Kek also refers to remarks that were made in Parliament when amendments to the SFA or its predecessor statutes were debated which highlight the importance the legislature places on safeguarding the investing public. In 2000, a number of amendments were proposed to the Securities Industry Act 1986 (No 15 of 1986) ("1986 SIA"). The amendments concerned: (a) the insider trading rules contained in the 1986 SIA; and (b) the 1986 SIA's rules governing the provision of assistance to foreign regulators. In the course of the debates, then Deputy Prime Minister made the following comment (*Singapore Parliamentary Debates, Official Report* (17 January 2000) vol 71 at col 670–671

(BG Lee Hsien Loong)):

> Over the last two years, we have taken a series of measures to liberalise and allow freer play in the financial sector. Our aim is to create vibrant financial markets that fuel economic growth. This requires a regulatory framework that is sound, strong and in line with best practices. *Financial markets work freely only with an appropriate set of ground rules operating in the background which everyone knows and plays by. Regulators and enforcement agencies must be able to promptly detect and deal with actions that harm investors. If investors lose confidence in the integrity of our securities markets, we will enter a vicious cycle.*
>
> [emphasis added]

43 Lastly, Mr Kek relies upon a recent comment that was made when amendments were proposed to the SFA in 2012 following the 2008 global financial crisis. The amendments sought to: (a) strengthen the regulation of the "over-the-counter" derivatives market; and (b) strengthen the protection afforded to retail investors. Deputy Prime Minister and Minister for Finance stated (*Singapore Parliamentary Debates, Official Report* (15 November 2012) vol 89 at pp 29–30 (Mr Tharman Shanmugaratnam)):

> The 2008/2009 global financial crisis has led to significant reforms in the regulation of financial markets. This Bill seeks to amend the SFA in line with reforms being implemented in most other major financial centres. It concerns two key areas.
>
> First, Over-the-counter derivatives (OTC derivatives). These are derivatives that are not traded on exchanges. The events surrounding the collapse of major financial institutions such as Bear Sterns, Lehman Brothers and AIG exposed significant weaknesses in the structure of OTC derivatives markets. The Financial Stability Board (FSB) has after extensive deliberations issued recommendations *to strengthen regulation of OTC derivatives markets and improve their transparency, in order to mitigate risks to the broader financial system as well as to guard against market abuse.* Singapore, through the Monetary Authority of Singapore (MAS) is a member of the FSB and has contributed to formulating these global reforms.
>
> *Second, the crisis highlighted the need to* ***strengthen safeguards for retail investors*** *, particularly in light of the mis-selling of certain Lehman Brothers-related investment products.* There were other examples as well. From 2009 to 2010, MAS conducted a review of its regulatory regime for the sale and marketing of investment products, and put forward a number of proposals to protect the interests of retail investors. This Bill seeks to give legal effect to the proposals that require legislative changes. The Bill will also strengthen the protection of retail investors' monies that are placed with capital market services licensees.
>
> [emphasis added]

44 Mr Kek argues on the basis of all of the above that the overarching aim of criminalising market misconduct in the SFA is to protect public investors. We understand his submission to mean that where there is no or little impact on public investors, the public interest rationale for SFA offences is not fully engaged and hence more lenient sentences can be meted out.

45 We now turn to the other main authority that Mr Kek relies upon to support his submission that only market misconduct which defrauds innocent investors (as opposed to such conduct which defrauds securities firms) warrants a custodial sentence – *ie*, the High Court's decision in *Ng Geok Eng. Ng Geok Eng* involved offences under the SFA and the Securities Industry Act (Cap 289, 1985

Rev Ed) ("SIA") (the statute which preceded the SFA) relating to "unauthorised share trading" (s 201(*b*); s 102(*b*) of the SIA) as well as "market rigging"/"false trading" (s 197(1) of the SFA). The accused in that case used various trading accounts belonging to other individuals (with the account holders' permission) to illicitly manipulate the share price of a publicly listed company so as to avoid margin calls on a substantial number of his own shares in that company which he had pledged to obtain credit from various financial institutions. Tay Yong Kwang J ("Tay J") drew a distinction between unauthorised share trading which defrauds innocent investors (*eg*, a broker or remisier using an innocent investor's account without the latter's permission) and that which defrauds professional securities firms. Tay J was of the view that the former would cause public confidence in the market to be undermined and hence warrant a custodial sentence whereas the latter may be sanctioned by way of a "punishment of a lower order" (at [50]). He explained the point in the following manner:

> 49 … There would evidently be a greater detriment caused to public investors where the lack of authority extends to the account holder. In addition, the prejudicial effect of such unauthorised trading would be particularly pronounced where the offender is the broker or remisier of the innocent investor whose account has been used. *Apart from the detriment suffered by the particular investor, such events would clearly be inimical to the fair and open running of our securities market. Public confidence in the securities market would be severely undermined if the investing public is not able to trust the relevant industry professionals.* The need to ensure general deterrence is therefore sufficiently pressing to warrant the imposition of a custodial sentence in the general run of cases imbued with these characteristics.
>
> …
>
> 60 … To impose custodial sentences as a matter of course for all categories of unauthorised share trading, whether with or without the account holder's consent, would fail to advance the underlying sentencing objectives in this area of law. *A term of imprisonment should only be the norm where the inherent nature of the offence poses a sufficient threat to the interests of innocent layperson investors. …*
>
> [emphasis added]

46 Mr Kek submits that the distinction between fraud against public investors and fraud against securities firms with only the former type of market misconduct ordinarily warranting a custodial sentence should be maintained for a number of reasons. First, the distinction accords with the principle of proportionality. [note: 8] Second, it would be sensible to punish fraud against public investors more severely than fraud against securities firms because the latter are able to set their own internal policies to protect themselves whereas public investors cannot. In the present case, the Respondents were able to commit the offences because of a "loophole" in PSPL's CFD system. PSPL promptly remedied this problem upon discovery of the fraud to prevent recurrence of the same type of employee fraud. [note: 9] Third, the same distinction has been affirmed in the following cases which came after *Ng Geok Eng*: [note: 10]

> (a) *Public Prosecutor v Chui Siew Pun* [2009] SGDC 293: The offender in this case conspired with one "Desai" to conduct trades in the shares of Lindeteves-Jacoberg Ltd ("LJ") for Desai's benefit using trading accounts belonging to his wife and mother. Desai possessed non-public price sensitive information relating to LJ. The offenders' wife and mother were aware that he was trading using their accounts. However, they were unaware as to the details of the trades conducted by him. The District Judge applied the distinction drawn in *Ng Geok Eng* and decided that a custodial sentence would not be appropriate (at [9]).

(b) *Public Prosecutor v Fan Ying Kit & anor* [2011] SGDC 126 ("*Fan Ying Kit*"): This case involved two co-offenders. One offender ("Wong") was an Equities Electronic Execution Officer with UBS Securities Pte Ltd ("UBSS") and the other offender ("Fan") was an Assistant Manager with PSPL. They were charged with unauthorised share trading offences under s 201(*b*) and with "front-running" offences under the now repealed s 122(1)(*b*) of the SFA. They pleaded guilty. The offence of front-running involves the failure to give priority to a client's trade. Wong, as a representative of UBSS, could not enter into a transaction for the purchase or sale of shares which one of UBSS' institutional clients ("Clients") had instructed her to purchase or sell if she had not already complied with those instructions. Over a period of a month, Wong passed information on her Clients' trades to Fan. Fan then used two trading accounts belonging to Wong's mother, with her consent, to enter trades in the counters Wong's Clients had instructed her to purchase or sell ahead of trades that Wong would enter for her Clients. The District Judge applied the distinction drawn in *Ng Geok Eng* and held that the unauthorised share trading aspect of the offenders' criminal conduct was "not remarkable" and imposed non-custodial sentences in respect of those offences (at [28]).

(c) *Public Prosecutor v Loo Kiah Heng & anor* [2010] SGDC 434 ("*Loo Kiah Heng*"): In this case, two co-offenders, "Soh" and "Loo" pleaded guilty to offences under s 201(*b*). Soh was a fund manager at Investment Management Asia Pacific (Singapore) ("ING"). He was in charge of managing an institutional fund owned by the Singapore Anti-Tuberculosis Association ("SATA") and had full discretion over all investment decisions for all equities for that fund. Loo was self-employed at the material time. The co-offenders engaged in a conspiracy to perpetrate fraud on SATA through the use of "married trades" which were to SATA's disadvantage and to Loo's corresponding advantage. If SATA was the seller in a particular married trade with Loo, it would sell certain shares to Loo at a price lower than the prevailing market price; if it was the buyer, it would buy the shares from Loo at a price higher than the prevailing market price. The married trades were carried out by Soh using securities accounts opened by ING on behalf of SATA. The District Judge rejected Soh's argument that his offence fell within the category of cases involving unauthorised share trading with the consent of the account holder. She held that the mandate that Soh had to trade on SATA's behalf did not extend to him deliberately incurring losses on married trades. Those losses were incurred without SATA's consent (at [41]). Both offenders were given custodial sentences (at [57]).

Law Society's submissions

47 The Law Society also refers to the same excerpts of the parliamentary debates that are cited at [40]–[42] above and states that what has been criminalised in the SFA and its predecessor Acts is market misconduct that affects the investing public. The investing public is protected by ensuring that the integrity of the financial market is not artificially distorted. Therefore, the Law Society submits that actual proof of "real market impact" flowing from the accused person's market misconduct is a necessary (but not sufficient) condition for him to be given a custodial sentence. It defines "market impact" in the following manner:

> 67 … In the present context, "market impact" means a tangible and measurable interference with the free working of the financial market in question. Put differently, there must be an artificial distortion or manipulation of market prices, thereby interfering with the free forces of supply and demand. Market impact has to be real and not nominal or speculative.

48 The existence of such "real market impact" alone is not adequate. Rather, a custodial sentence should only be imposed when the accused person's fraud possesses a sufficient degree of sophistication.

49 Recognising the difficulties that the prosecution might face in producing actual proof of "real market impact", the Law Society suggests that market impact may be evidenced by the following:

(a) the prices of publicly listed securities have been affected (*eg*, artificial inflation of their value);

(b) securities have been traded outside the prevailing market spread;

(c) there has been an actual and measurable effect on the volume of trades;

(d) the investing public was fooled; and/or

(e) the investing public suffered losses.

50 The Law Society further argues that its proposal is consonant with the approach adopted in a number of High Court cases including *Ng Geok Eng*. It states a fine was appropriate for the unauthorised share trading offence in *Ng Geok Eng* as that offence did not cause any market impact since the defrauded party was the securities firm. On the other hand, the market rigging/ false trading offence was rightly punished with a custodial sentence since the accused person's conduct had caused the price of a publicly listed company to be artificially propped up giving innocent layperson investors a false impression of the true value of the shares.

Prosecution's submissions

51 On the other hand, the Prosecution does not accept that market impact is a necessary precondition for a custodial sentence to be imposed in a respect of a s 201(*b*) offence. Nonetheless, it submits that there is market impact in the present case. However, it adopts a broader conception of market impact than that advocated by the Law Society (see [47] above). We understand its submission to mean that there would be market impact as long as the offences are capable of causing investor confidence in the financial market to be undermined. It argues that the financial market refers to "whole gamut of financial activities and products (including CFDs)" which makes up the financial industry. [note: 11] It says that the financial market encompasses all market participants as well. This last category includes financial institutions. It can be said that there is market impact if an offender's market misconduct is capable of causing investor confidence in any constituent part of the financial market to be undermined.

52 According to the Prosecution, a number of remarks made in Parliament support the conception of market impact which it advocates. The excerpts of parliamentary debates that it refers us to suggest that the legislature was keen to ensure that investor confidence in the financial market will not be undermined. The first of these is cited at [42] above. The second is an excerpt of the speech made by the Minister for Education in 2005 when he moved a Bill in parliament proposing amendments to the SFA. The amendments sought to *inter alia* strengthen the SFA's disclosure-based regulatory regime. The Minister stated (*Singapore Parliamentary Debates, Official Report* (25 January 2005) vol 79 at cols 480–481 (Mr Tharman Shanmugaratnam)):

> Sir, let me first set out the basic thinking behind the amendments. The Bill aims to strengthen the foundations underpinning our market and disclosure-based regulatory regime. It aims at sound standards without excessive costs.
>
> First, we seek to ensure high standards of transparency and fair dealing. These standards are pre-requisites for the continued growth and development of the markets. While they impose

> obligations on issuers of capital, market intermediaries and professionals, they ultimately benefit all participants in the capital markets. *They enhance investor confidence, leading to more liquid and vibrant markets, which in turn lowers the cost of capital.* A market-driven, disclosure-based approach also allows reputable market players to raise the bar over time, as they see competitive advantage in improving their standards of disclosure and fair dealing above the minimum standards prescribed.
>
> [emphasis added]

53 The Prosecution submits that the Respondents' offences did have an impact on the financial market (as per the conception of market impact which it advocates). The Respondents' fraud was committed while they were employees in an established financial institution (*ie*, PSPL) and in respect of a well-known financial product (*ie*, CFDs). Their offences could have caused the investing public to regard PSPL as having "lax controls", its employees as being "untrustworthy" and CFDs as being "unsecure and easily manipulated". [note: 12] Hence, the Respondents' offences did have an impact on the financial market since investor confidence in constituent parts of the market stood to be undermined as a result of their actions.

54 The Prosecution also submits that this type of market misconduct which undermines investor confidence in the financial market has the potential of causing substantial harm because the persons who stand to be affected extend beyond the immediate victim in an individual case to include all relevant market participants. Therefore a clear deterrent sentence is required. [note: 13] *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 ("*Wang Ziyi Able*") makes clear that fines are often ineffective to achieve "meaningful deterrence" in the context of white-collar crimes (at [29]). Given that the Respondents have committed "egregious" white-collar crimes, custodial sentences are needed to achieve meaningful deterrence in the present case. [note: 14]

Our decision

55 We do not accept the Prosecution's submission that it can be said that there is market impact whenever any market participant, or some other constituent part of the financial market, is adversely affected. This defines market impact too broadly. According to this definition, there would conceivably be market impact every time an offence takes place within the financial industry. If so, there would be limited utility to a finding that there is market impact. In our judgment, market impact should be understood to refer to 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. Such distortion should have the potential to mislead the general investing public. Market misconduct that results in such an outcome would be particularly deleterious for public investors given Singapore's regulatory shift to a disclosure-based regime, where pertinent information is required to be made publicly available, and investors are by and large left to safeguard their own interests when making decisions on how and when to invest. Distortion of market information could potentially cause public investors to be misled and hence incur losses.

56 Certain types of market misconduct (*eg*, market rigging (criminalised in s 197 of the SFA), market manipulation (criminalised in s 198 of the SFA), dissemination of false or misleading information (criminalised in s 199 of the SFA), *etc*) will adversely affect the integrity of the financial market by causing the information conveyed on the market to be distorted. Such offences will ordinarily warrant a custodial sentence. For example, in *Wang Ziyi Able*, V K Rajah JA noted that the dissemination of false information with dishonest intent to induce other persons to purchase or sell shares would almost inevitably attract a custodial sentence (at [29]). Additionally, in *Ng Geok Eng* Tay J opined

that market rigging offences should be dealt with harshly and would ordinarily warrant custodial sentences (at [66]).

57 Other forms of market misconduct may not necessarily distort the operation of the market. The present facts provide one such example. Here, the fraud was perpetrated against PSPL only. PSPL is the market maker for CFDs which are traded off-exchange. PSPL was the only counterparty to the "out of market" CFD trades carried out by the Respondents. It was also the only party which incurred any loss as a result of the Respondents' wrongdoings. There was no secondary market for CFDs. It is also not the Prosecution's case that trades in CFDs would affect the prices of the underlying securities. Hence there was no actual market impact as the operation of the market was not distorted in any way by the wrongs which the Respondents had committed.

58 However, we do not agree that the distortion of market information is a necessary condition for a custodial sentence to be imposed in respect of a s 201(*b*) offence. It is important to bear in mind that s 201(*b*) is broadly worded and it penalises a wide range of fraudulent conduct directly or indirectly linked with the purchase or sale of securities. Both s 201(*b*) and its predecessor, s 102(*b*) of the SIA, have been described as "catch-all" provisions (*Public Prosecutor v Cheong Hock Lai and Other Appeals* [2004] 3 SLR 203 at [41]; *Ng Geok Eng* at [34] and Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2nd ed, 2011) at p 597). Additionally, the excerpts of the parliamentary debates that we were referred to do not specifically deal with the public policy rationale for s 201(*b*). Rather, they set out the overarching aim of the SFA and its predecessor statutes in very general terms. Based on the material we were referred to, it appears to us that the SFA is intended to achieve at least the following ends: (a) protect investors; (b) protect public confidence in the market; and (c) ensure that the operation of the market is not distorted. These aims should undoubtedly be borne in mind when determining the appropriate sentence to be imposed in respect of a s 201(*b*) offence. However, given the broad scope of offences criminalised in s 201(*b*), the absence of direct contravention of one of these aims should not necessarily preclude the imposition of a custodial sentence in respect of an offence under that section. We do not think it is possible, nor desirable, to lay down a bright line rule as to when the custodial threshold would be crossed in respect of a s 201(*b*) offence. In our judgment, it is necessary to consider all the facts of the case to determine if the offending conduct in question warrants a custodial sentence. A non-exhaustive list of factors to consider would include the following:

(a) the extent of the loss/damage caused to victim(s);

(b) sophistication of the fraud;

(c) the frequency and duration of the offender's unauthorised use of the relevant account;

(d) extent of distortion, if any, to the operation of the financial market;

(e) the identity of the defrauded party (*ie*, whether the defrauded party is a public investor or a securities firm)

(f) relationship between the offender and the defrauded party; and

(g) the offender's breach of any duty of fidelity that may be owed to the defrauded party.

59 We note Mr Kek's submission, on the basis of *Ng Geok Eng*, that the identity of the defrauded party alone should be determinative of the question of whether a custodial sentence should be imposed – *ie*, a custodial sentence should only be imposed in respect of a s 201(*b*) offence when

public investors as opposed to securities firms are defrauded. In our judgment, the identity of the defrauded party is an important consideration to be taken into account when determining sentence. We agree with Tay J's observation in *Ng Geok Eng* that public confidence in the securities market would be severely undermined if public investors' trading accounts are used without their consent by middle-men in the financial industry (*eg*, their brokers and remisiers). There would be a sufficiently pressing need to impose custodial sentences in such circumstances to achieve the end of general deterrence (at [49]). The same point was made by the District Judge in *Loo Kiah Heng* when she noted that unauthorised trades carried out by persons in investment houses using client accounts should be dealt with harshly. She put the point across in the following manner (at [51]):

> … Investment funds involve persons or institutions placing their assets in the hands of a few to manage those funds. Such funds and their constituent parts are often complex and few understand how they are actually run. Lax oversight of such management can lead not only to the widespread misuse of the monies in such funds, but also to fund managers/asset managers attempting various methods of dealing with the funds to push the boundaries of acceptable conduct in the hope that if they are caught, leniency will be shown to them. It must be impressed upon persons placed in positions of trust in investment houses and the like that they cannot misuse the assets placed in their care and expect to get away lightly. …

60 However, while the identity of the defrauded party is an important consideration in determining whether a custodial sentence should be imposed, it cannot be the sole consideration. In our judgment, the approach suggested by Mr Kek would place far too much emphasis on one factor to the exclusion of other relevant factors. This was clearly not intended by Tay J in *Ng Geok Eng*. He stated at [51]:

> 51 Of course, this is not to say that sentences of imprisonment should never, or only very exceptionally, be imposed for unauthorised share trading offences which involve the consent of the account holder. What is instead meant is that a sentencing court faced with such an offence will retain a broader discretion to vary the appropriate form of sentence to suit the particular circumstances of the case. In contrast, where the facts involve acts of unauthorised share trading by a remisier without his client's consent, the public interest in ensuring general deterrence would generally apply strongly in favour of imposing a term of imprisonment.

61 We think it would be wrong to hold that the identity of the defrauded party will be determinative of the sentence to be imposed for a s 201(b) charge no matter how aggravating the other circumstances may be. *Ng Geok Eng* and *Fan Ying Kit* must be viewed in their context. There non-custodial sentences were imposed in respect of the s 201(*b*) offences because in those cases, the gravamen of the offenders' criminal acts did not relate to the s 201(*b*) charges but to the market rigging charges in *Ng Geok Eng* and the front running charges in *Fan Ying Kit*. Certain aggravating aspects of the offenders' criminal acts could be considered under those other charges (*eg*, see *Ng Geok Eng* at [70]). The same option is not available in the present cases. Crucial aspects of the Respondents' criminality will be passed over without being taken into account for the purposes of sentencing if the focus is confined to the identity of the defrauded party.

62 We now turn to consider all the facts of the Respondents' offending conduct to determine if custodial sentences are warranted.

The nature of the Respondents' offending conduct

63 The Prosecution highlights the following aspects of the Respondents' offending conduct which it submits as sufficiently aggravating, such as to warrant a custodial sentence:

(a) The Respondents collaborated and shared the use of various nominee accounts. They shared the user IDs and passwords of the nominee accounts with one another so that they could all initiate CFD trades using the various nominee accounts. They also coordinated with each other to take turns in entering and manually accepting "out of market" trades. [note: 15]

(b) The Respondents widened the pool of CFDs they could utilise to perpetrate their fraud by collaborating with each other since each CFD Hedger was assigned to manage a particular portfolio of securities. [note: 16]

(c) Each offender contributed capital and they consolidated their contributions in particular nominee accounts so that they would have more money to carry out the CFD trades. [note: 17]

(d) They set up additional nominee accounts to increase their trading limit, so that they could conduct even more trades. [note: 18]

(e) The offences were committed over a long period of time (11 months in the case of Ng and 17 months in the case of Oh, Wong and Tan). [note: 19]

(f) They withdrew/shared profits made from the nominee accounts. [note: 20]

(g) They each accepted hundreds of "out of market" CFD trades. [note: 21]

(h) PSPL eventually suffered no loss only because it acted promptly in freezing the funds in the relevant CFD nominee accounts and CMAs. *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [49] establishes (in relation to cheating offences) that the fact that no or minimal loss actually accrues as a result of external intervention (*eg*, because the offender is apprehended and items and proceeds of the crime are subsequently recovered) is a relevant but not decisive factor in assessing the appropriate sentence. [note: 22]

(i) The Respondents' fraud was hard to detect. The fraud was only uncovered when a whistle-blower brought the matter to PSPL's attention. The difficulty of detecting commercial crimes has been held to be a factor which justifies imposing a heavy sentence when such crimes are uncovered and prosecuted (*Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [25(d)]). [note: 23]

(j) The Respondents exploited the high degree of trust that PSPL reposed in them to perpetrate their fraud. Their fraud comprised two parts. First they got around PSPL's prohibition on its employees opening CFD trading accounts by using nominee accounts to initiate "out of market" CFD trades. Next, they abused their discretion as CFD Hedgers to accept those trades even though it was not in PSPL's interest to enter into such trades. Therefore, this is not a simple case of unauthorised trading but includes the element of the Respondents' abuse of the trust that PSPL had reposed in them as its employees. The Prosecution submits that the integrity of the financial system is dependent upon the employees of financial institutions acting in the interests of their employers. It states that a custodial sentence is needed not only to deter the Respondents from reoffending, but also to warn other employees in financial institutions placed in similar or greater positions of trust against committing similar acts in the future. [note: 24]

64 We broadly agree that the aggravating factors highlighted by the Prosecution warrants a

custodial sentence. In our judgment, custodial sentences would ordinarily be warranted where employees in a financial institution abuse the duty of fidelity they owe their employer in a premeditated and brazen manner, over a period of time, for personal gains. The Respondents' actions disclose a high degree of moral culpability. They opened multiple nominee accounts, shared account details with each other and collaborated to initiate and accept hundreds of "out of market" CFD trades over a protracted period of time. Their offences were not the result of momentary slips in judgment. They did not commit the offences on the spur of the moment because they were unable to resist the lure of illicit gains. Rather, the offences reveal profound and sustained moral failings on their parts. Such offences committed by employees in financial institutions who exploit their knowledge of financial instruments and their unique positions as insiders to make illicit gains will often be hard to detect. Such offences, when brought to light and prosecuted, should be dealt with sternly so as to deter other similarly situated persons from committing similar crimes. Therefore, ordinarily it would be appropriate to impose custodial sentences on an offender whose offences are of the same type, scale and gravity as that of the Respondents' offences.

Relevance of benchmark sentences for other Penal Code offences

65 As mentioned at [34] above, the Prosecution urges us to take into account benchmark sentences for other Penal Code offences in determining the appropriate sentence in this case. We do not think those benchmark sentences are relevant and we did not take them into account in reaching our decision set out in the preceding paragraph. We now briefly set out our reasons for rejecting the Prosecution's submissions on this point.

66 The Prosecution argues that the Respondents' offences are closely analogous to other crimes in the Penal Code such as cheating and CBT. The Respondents' offences are akin to cheating offences because they deceived PSPL into accepting CFD trades. They are similar to CBT by employees or agents because of the high degree of trust that was reposed in the Respondents by PSPL. The Respondents breached that trust in pursuit of personal gains at the expense of PSPL.

67 The Prosecution points out that in respect of cheating offences under s 417 of the Penal Code, the High Court has stated that a custodial sentence will "generally be appropriate as long as the offence in question causes a victim to part with property that has more than negligible value" (*Idya Nurhazlyn binte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756 at [47]). In that case, a one month jail term was imposed for an offence involving a sum of $1,800 which the accused person's aunt had transferred to her based on her promise that she could purchase Apple products at a low price. The accused did not deliver the promised products.

68 The Prosecution also points out that the High Court has upheld custodial sentences for CBT offences under s 406 of the Penal Code on facts which are less aggravated that those found in the present case. For example in *Yaw Kee Shen v PP* (Magistrate's Appeal No 49 of 2010), the offender pleaded guilty to one charge under s 406 of the Penal Code for dishonestly misappropriating cash amounting to $21,739 from the management office of a condominium over a period of 10 months. Another charge under s 406 of the Penal Code for misappropriating a laptop was taken into consideration for the purpose of sentencing. The High Court dismissed the offender's appeal against his four months' imprisonment sentence.

69 The Prosecution submits that the present case is more aggravated than the abovementioned ones. The quantum of loss caused to PSPL is much higher than the losses suffered by the victims in those cases. A custodial sentence is warranted here given that the High Court considered it appropriate to impose custodial sentences in those cases.

70 We are unable to accept the Prosecution's submissions because, as Mr Kek points out, it is not permissible for the court to take into account sentencing benchmarks for other offences in deciding the appropriate sentence to be imposed on the Respondents. The onus lies on the Prosecution to frame an appropriate charge in light of the available evidence. Once an accused has pleaded guilty, the court should not consider the possibility that "an alternative – and graver – charge might have been brought and treat him as though he had been found guilty of the graver charge" (*Sim Gek Yong v PP* [1995] 1 SLR(R) 185 at [15]). [note: 25] Parenthetically, we doubt whether a CBT offence can even be made out on the present facts given that there is no entrustment of any property.

71 Additionally, the Law Society has helpfully traced the legislative history of what is now s 204 of the SFA to illustrate that Parliament has always intended SFA offences to operate alongside Penal Code offences. It points out that when concerns were raised in Parliament about the adequacy of the penalties prescribed in a provision in the then existing version of the SIA, which preceded the current s 204 of the SFA, the Finance Minister responded as follows (*Singapore Parliamentary Debates, Official Report* (31 March 1986) vol 47 at cols 1465 (Dr Hu Tsu Tau, Minister for Finance)):

> The Member for Whampoa has said that the penalties appear small relative to the millions of dollars which might be involved. *I have the opinion of the Attorney-General's Chambers that the penalties are adequate for the size of crimes envisaged. In any case, where a stock manipulator engages in malpractices, often these infringe on areas involving criminal breach of trust in which case the penalties are far more severe under the existing laws.*
>
> [emphasis added]

At that point market misconduct was liable to be punished with a fine not exceeding $50,000 or imprisonment of up to 7 years. While the maximum fine has been now been increased to $250,000 under s 204(1) of the SFA, Prosecution still retains the discretion to and indeed should prefer suitable charges under the Penal Code if it is of the view that the criminal act deserves a more severe sanction. However, the Prosecution did not do so. Could it be that all the required ingredients to prove a Penal Code offence were not present? As the Prosecution did not proceed with the Penal Code offences, we say no more about this.

Impact of Vincent Tan's case

72 At [64] we say that ordinarily the Respondents' offences are such as to warrant the imposition of a custodial sentence. What stands in the way of us altering the sentences imposed on the Respondents is the parity principle. Can we really say that the culpability of the Respondents is significantly greater than that of Vincent Tan such as to warrant the imposition of custodial sentences on them? As mentioned at [19], it was Vincent Tan who came up with this fraudulent scheme to defraud his employer, PSPL, and he shared his ideas with the Respondents and collaborated with some of them to carry out the fraud. He was the brain behind the fraud. But for the lack of will to resist the temptation, the Respondents would probably not have to face the charges that have been brought against them. Essentially, the Respondents and Vincent Tan are equally placed in terms of moral culpability – they did the same wrong. While it is true that the Respondents carried out more such improper transactions and over a longer period than Vincent Tan, and for that heavier fines were imposed on the Respondents, nevertheless Vincent Tan was the real villain of the piece. It seems to us that the parity principle is applicable in the present case and that the Respondents are entitled to expect to be treated in a like manner as Vincent Tan. To impose more severe punishments on the Respondents when the mastermind, Vincent Tan, got only a fine for what he did would be unfair to the Respondents. In the circumstances, we decline to interfere with the sentences imposed by the DJ.

Scope of Parity principle

73 The Prosecution argues that the parity principle is of limited applicability in this case. It argues that it is only applicable as between Vincent Tan on the one hand and Oh, Wong and Tan on the other and only in relation to the charges that Oh, Wong and Tan faced in respect of the "out of market" trades carried out using CFD account no 457121 because Vincent Tan was a co-accused together with the three of them only for the purposes of those charges.

74 The oft-cited pronouncement on the scope and effect of the parity principle as it applies in Singapore is found in *Public Prosecutor v Ramlee* [1998] 3 SLR(R) 95. In that case Yong Pung How CJ stated at [7]:

> Where two or more offenders are to be sentenced for participation in the *same offence*, *the sentences passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances*… An offender who has received a sentence that is significantly more severe than has been imposed on his accomplice, and there being no reason for the differentiation, is a ground of appeal if the disparity is serious. This is even where the sentences viewed in isolation are not considered manifestly excessive: see *R v Walsh* (1980) 2 Cr App R (S) 224. In *R v Fawcett* (1983) 5 Cr App R (S) 158, Lawton LJ held that the test was whether "right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?" …
>
> [emphasis added]

This statement of principle seems to confine the operation of the parity principle to cases where co-offenders are charged with the same offence arising from the same transaction or events, but are dealt with in separate criminal proceedings. This is a *par excellence* situation where there ought to be parity in the sentences which are meted out to the co-offenders except where there are relevant differences in "their responsibility for the offence or [in] their personal circumstances".

75 But we do not think that parity should only apply to cases where the co-offenders were involved in the same transaction and they are charged for the same offence. The parity principle has a wider scope than that. The recent High Court decision in *Lim Bee Ngan Karen v Public Prosecutor* [2015] SGHC 183 at [27]–[46] discusses the scope of the parity principle more extensively. We only set out what is necessary to dispose of the present appeals here.

76 The High Court of Australia's decision in *Green v R* (2011) 283 ALR 1 ("*Green*") is instructive in explaining the scope of the parity principle. In that case, the court stated that there is a difference between the principle of parity in sentencing and the general objective of "'reasonable consistency' in sentencing". It stated that the latter concept applies as between "persons charged with similar offences arising out of unrelated events" whereas the former applies to the punishment of "co-offenders". It opined that the limits of who can be regarded as "co-offenders" for the purposes of the application of the parity principle had not been defined with precision (at [29]). It did not go on to stipulate precise limits to the application of the parity principle. However, it stated that the substance of the parity principle is the norm of equality before the law and that its application should be governed by "consideration of substance rather than form". Therefore, "formal identity of charges against the offenders whose sentences are compared is not a necessary condition" for its application (at [30]).

77 The High Court of Australia's decision in *Green* is in effect an endorsement of the approach adopted by Campbell JA in *Jimmy v R* (2010) 269 ALR 115 ("*Jimmy*"), a decision of the New South Wales Court of Criminal Appeal, where he held that the parity principle would apply as between participants in a "common criminal enterprise" who might have committed different crimes (at [202]). Howie J and Rothman J agreed with this general statement of principle ([245] and [262]–[263]). There, Campbell JA held that parity applied to the sentencing of persons who had pled guilty to similar money laundering offences. Each offender had, on several occasions, deposited sums of cash into various Hong Kong bank accounts, acting on the instructions of a man named Chen. The appellant and one of the alleged co-offenders ("Siu") were charged under the same offence creating provision. The third alleged co-offender ("Huang") was charged under a different but comparable offence creating provision which dealt with similar offences involving larger sums of money. Campbell JA stated at [204]:

> There is no basis in the agreed facts for concluding that the applicant knew of the existence of Huang or Siu. There is no basis in the agreed facts for concluding that the applicant knew that Mr Chen had ever engaged another person to take money to the bank for remission to Hong Kong in parcels of less than $10,000. The period when the applicant was taking money to the bank for Mr Chen did not coincide, or even overlap, with the periods when Siu and Huang were taking money to the bank for Mr Chen. The sums of money that the applicant remitted to Hong Kong are different to the sums of money that each of Huang and Siu remitted to Hong Kong. *Thus, the applicant, Siu and Huang, did not commit the same crime. However, it is clear that the applicant, Siu and Huang were all being used by Mr Chen as part of an enterprise involving the repeated commission of crimes of a similar character. That suffices, in my view, to make them participants in a common criminal enterprise.* The Crown's submission that the parity principle cannot apply because they are not co-offenders in the relevant sense fails. [emphasis added]

78 We agree that the parity principle can apply for the purposes of sentencing offenders who do not participate in the same act constituting the offence but who, as a matter of substance, can be said to be participants in a "common criminal enterprise".

Were Vincent Tan and the Respondents participants in a "common criminal enterprise"?

79 While the facts in the present case are not identical to those in *Jimmy*, there are considerable similarities. In *Jimmy* all three offenders received their instructions from Chen who directed them to carry out substantively identical but distinct criminal acts. Their connection with Chen made them part of the criminal enterprise that Chen was running although they were not aware of each other. On the facts of the present case, it cannot be said that Vincent Tan played the role that Chen played in *Jimmy* because there was no hierarchical structure whereby the Respondents took their lead and cue from him. Vincent Tan was the progenitor of the fraudulent scheme. He shared his ideas with the Respondents and effectively taught them how to put those ideas into effect. In the case of Oh, Wong and Tan, Vincent Tan went even further by inviting them to collaborate with him to use CFD account no 457121 to exploit the "loophole". Subsequently Oh, Wong and Tan continued the fraud against PSPL. It is true that Vincent Tan's role in respect of Ng is more limited. However we think it probable that Ng would not have committed the offences if not for Vincent Tan's prompting. We find it telling that Ng had been conducting personal CFD trades using his father's CFD account from as early as March 2008. However, he only started carrying out the fraudulent "out of market" trades after Vincent Tan alerted him to the existence of the "loophole" in PSPL's CFD system. In our judgment, the fact that all the Respondents employed the fraudulent scheme which Vincent Tan had instructed them in and had used himself is sufficient to make all of them participants in a "common criminal enterprise". Therefore, so long as there are no factors or personal circumstances which can distinguish Vincent Tan's level of moral guilt from that of the Respondents', there ought to be parity in

their respective sentences.

Moral culpability of Vincent Tan as compared to that of the Respondents

80 The Prosecution seeks to distinguish the present case from Vincent Tan's case based only on the fact that Vincent Tan was not as morally culpable as the Respondents. It makes no submissions on whether Vincent Tan's personal circumstances set his case apart from the Respondents'. The Prosecution highlights the following to contend that the moral culpability of Vincent Tan is not of the same level as that of the Respondents:

(a) Vincent Tan voluntarily ceased his offending conduct in July 2008 because he felt guilty about what he had done, several months before PSPL commenced investigations; the Respondents continued theirs until they were found out. [note: 26] The Prosecution submits that this was the crucial factor which it took into consideration in seeking a non-custodial sentence in Vincent Tan's case. [note: 27]

(b) It is true that Vincent Tan revealed the "loophole" to the Respondents and invited Oh, Wong and Tan to collaborate with him in perpetrating the fraud. However Oh, Wong and Tan's collaboration with Vincent Tan ended in May 2008. Thereafter, the Respondents continued the fraud on a larger scale without Vincent Tan's involvement. They were not simply taking their lead and cue from Vincent Tan. Rather they took active steps to extend the fraud. Oh, Wong and Tan each approached their friends to open CFD accounts which they (*ie*, the offenders) could use to carry out "out of market" CFD trades. The DJ should not have regarded Vincent Tan as the "prime offender" just because he initiated the scheme. [note: 28] In fact, Vincent Tan cannot even be said to have initiated Ng's offending conduct because all he did was to inform him of the existence of the "loophole" whereas he invited the others to collaborate with him in perpetrating the fraud. [note: 29]

(c) Vincent Tan caused less loss to PSPL than the Respondents. Unlike the Respondents, Vincent Tan did not carry out most of his "out of market" trades in groups. He only collaborated with the Respondents in respect of one of the nominee accounts. [note: 30]

81 However, the Respondents contend that Vincent Tan was no less morally culpable. They point out that he only stopped his offending conduct because he was transferred out of the CFD team and therefore he was no longer on the inside to accept "out of market" trades thereafter. [note: 31] They also argue that the substantial difference in the quantum of fines imposed on them as compared to Vincent Tan adequately addresses the difference in the scale and extent of their offences. [note: 32]

82 We are of the view that the moral culpability of the Respondents is not significantly greater than that of Vincent Tan as to warrant the imposition of custodial sentences on them contrary to the parity principle. As mentioned at [72], the greater number of improper trades carried out by the Respondents was reckoned in the higher fines imposed. While it is true that the Respondents did not take their lead and cue every step of the way from Vincent Tan, it seems to us irrefutable that he supplied the Respondents with the *modus operandi* they used to defraud PSPL. Additionally, too much should not be made of the fact that Vincent Tan carried out fewer "out of market" trades, that he used fewer nominee accounts, and that his offences were committed over a shorter period of time. These were all a result of him having been transferred out of the CFD team in July 2008.

83 We decline to accept that Vincent Tan had asked for the transfer on his own accord because

he felt guilty about what he had done. At no time, either before or after his transfer out of the CFD team, did he indicate to any of the Respondents that he felt guilty of what he did (being the mastermind); neither did he advise any of them to discontinue their criminal acts. As mentioned above, it was never explicitly made known to the Respondents prior to the hearing before us that Vincent Tan had voluntarily asked for the transfer. Prosecution argues that it had pointed out on at least three occasions that Vincent Tan stopped the offending conduct on his own accord. First, in the course of making submissions on sentence, the Prosecution told the court that

> Vincent Tan stopped [the offending conduct] at a very early stage on his own. … We are drawing a distinction between Vincent and the rest. [note: 33]

The Prosecution reiterated the same point at a later date, again in the course of making submissions on sentence, in the following manner:

> There is a relevant difference in responsibility that would justify departure from parity. Vincent ended the trades earlier on his own. [note: 34]

Lastly, Prosecution referred to a table which it had tendered to the court below which compared Vincent Tan and the Respondents' offences ("the Comparison Table"). Therein it was stated that Vincent Tan

> stopped the illegitimate trades on his own accord as he *claimed* he felt guilty. [note: 35] [emphasis added]

84 None of the abovementioned three instances explicitly make it known that Vincent Tan had voluntarily asked for the transfer. The Prosecution should have forcefully brought this point to the attention of the DJ and the Respondents if it indeed regarded this as a "unique mitigating factor" which clearly distinguished the present case from Vincent Tan's case. The Respondents might have proceeded differently had they known the Prosecution's position. Additionally, the Comparison Table suggests that the Prosecution itself did not fully accept Vincent Tan's contention that he asked for the transfer because he felt guilty about what he had done. This must be the reason why the Prosecution thought it appropriate to add the caveat that Vincent Tan "claimed" he felt guilty. It bears noting that he had never told any of the Respondents, the people whom he had corrupted, that he felt that what he had schemed was wrong and that they should stop it. In the circumstances, we decline to accept that Vincent Tan had asked for the transfer on his own accord because he felt guilty.

85 Moreover, we do not think that the quantum of loss that the Prosecution argues PSPL purportedly sustained should be given much weight for the purposes of differentiating the culpability of the Respondents from that of Vincent Tan. These losses were calculated without taking into account any hedged positions PSPL held in the open market and therefore do not accurately reflect the loss that PSPL actually suffered. *Wang Ziyi Able* makes clear that the Prosecution bears the burden of proving actual loss if it intends to rely on that for the purposes of sentencing.

86 In the result, we are of the view that the degree of the Respondents' moral culpability is not significantly different from that of Vincent Tan's moral culpability. There ought to be parity in the sentences which are to be passed on the Respondents and that given to Vincent Tan.

Effect of parity principle in this case: should this court interfere with the sentences imposed by the DJ?

87 Given that we consider that the parity principle applies as between the Respondents and Vincent Tan and further that they are equally placed in terms of moral culpability, there ought to be parity in the sentences passed on them as compared to that imposed on Vincent Tan. However we accept there is a countervailing consideration in this case: it is trite law that this court has the discretion to enhance a sentence which it considers manifestly inadequate (*Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [12(d)]) and the court's discretion in this respect will not be fettered by an erroneously lenient sentence given to a co-offender or imposed in past cases involving identical offences. This is because although parity and consistency in sentencing are desirable goals, they are not necessarily overriding considerations (*Yong Siew Soon and another v Public Prosecutor* [1992] 2 SLR(R) 261 at [11] and *Meeran bin Mydin v Public Prosecutor* [1998] 1 SLR(R) 522 at [14]). We bear these countervailing considerations in mind but it is also important for us to note that ultimately, the circumstances of each case are of paramount importance in determining the appropriate sentence (*Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR 1 at [24]).

88 In the present case, while at [64] we indicated that in our view custodial sentences are warranted, we also noted that there have been no relevant sentencing precedents involving the commission of an offence of the same nature as that committed by the Respondents apart from that passed on Vincent Tan. The sentence imposed in Vincent Tan's case did not depart from any relevant precedent; indeed the court there accepted the stance indicated by the Prosecution that a sufficient fine should suffice. Up till Vincent Tan's case, there was no indication of how offences of this nature would be punished. The Respondents pleaded guilty to the offences on 17 April 2014. [note: 36] They were eventually sentenced on 11 June 2014. [note: 37] This was well after Vincent Tan had pleaded guilty and had been sentenced on 25 February 2014. [note: 38] It is not unlikely that the Respondents had factored in the sentence passed on Vincent Tan in deciding to plead guilty. Following Vincent Tan's case, the Respondents would have been perfectly justified in expecting themselves to be treated in a like manner when they agreed to plead guilty. It is important to bear in mind that they not only perpetrated exactly the same type of fraud he had (except that theirs was on a larger scale) but also that their offences were not completely unrelated to Vincent Tan's. We emphasise our finding that we regard the Respondents and Vincent Tan to have been participants in a common criminal enterprise (see above at [79]). We also note that with this judgment future courts will be appropriately guided as to the sentence that ought to be imposed in cases involving offences of the same nature as that committed by the Respondents. Therefore, the aim of general deterrence will be achieved. We are not minded in the circumstances to interfere with the sentences imposed on the Respondents in the interest of parity.

Conclusion

89 In the premises, we dismiss the Prosecution's appeals against the sentences imposed on the Respondents. We would like to place on record our appreciation to the Amicus Curiae and the representative of the Law Society for their assistance to the court.

[note: 1] ROP II at p 9; ROP I at p 181.

[note: 2] Grounds of Decision at [14].

[note: 3] Grounds of Decision at [13].

[note: 4] Grounds of Decision at [14].

[note: 5] Grounds of Decision at [14].

[note: 6] Grounds of Decision at [15].

[note: 7] Written Submissions for the *Amicus Curiae* at para 44.

[note: 8] Written Submissions for the *Amicus Curiae* at paras 49–50.

[note: 9] Written Submissions for the *Amicus Curiae* at paras 48.

[note: 10] Written Submissions for the *Amicus Curiae* at paras 53.

[note: 11] Appellant's Submissions para 60.

[note: 12] Appellant's Submissions para 68.

[note: 13] Appellant's Submissions paras 68 and 71.

[note: 14] Appellant's Submissions paras 80–82.

[note: 15] Appellant's Submissions at para 48(a), (d) and (f).

[note: 16] Appellant's Submissions at para 75(b).

[note: 17] Appellant's Submissions at paras 48(c) and 75(a).

[note: 18] Appellant's Submissions at para 48(h).

[note: 19] Appellant's Submissions at para 52.

[note: 20] Appellant's Submissions at para 48(g).

[note: 21] Appellant's Submissions at para 52.

[note: 22] Appellant's Submissions at para 56.

[note: 23] Appellant's Submissions at paras 72–73.

[note: 24] Appellant's Submissions at paras 44–46

[note: 25] Written Submissions for the *Amicus Curiae* at para 76.

[note: 26] Appellant's Submissions at para 90.

[note: 27] Appellant's Submissions at para 102.

[note: 28] Appellant’s Submissions at paras 91–95.

[note: 29] Appellant’s Submissions at para 96.

[note: 30] Appellant’s Submissions at para 105.

[note: 31] Respondents’ Joint Skeletal Submissions at para 77.

[note: 32] Respondents’ Joint Skeletal Submissions at para 79.

[note: 33] ROP I at p 179.

[note: 34] ROP I at p 185.

[note: 35] ROP I at p 330.

[note: 36] ROP I at p 172–177.

[note: 37] ROP I at pp 185–188.

[note: 38] ROP II at p 9; ROP I at p 181.