Monetary Authority of Singapore *v* Tan Chong Koay and another
[2010] SGHC 277

Case Number : Suit No 658 of 2008

Decision Date : 17 September 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Cavinder Bull SC, Yarni Loi, Gerui Lim and Wong Liang Wei (Drew & Napier LLC) for the plaintiff; Michael Hwang SC and Fong Lee Cheng (Chambers of Michael Hwang) for the first defendant; Foo Maw Shen, Melvin See and Mar Seow Hwei (Rodyk & Davidson LLP) for the second defendant.

Parties : Monetary Authority of Singapore — Tan Chong Koay and another

Financial and Securities Markets

17 September 2010 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 The Monetary Authority of Singapore ("MAS"), who is the plaintiff, is the Central Bank of Singapore. MAS is claiming the payment of a civil penalty from two parties, *viz*, Tan Chong Koay ("Dr Tan") who is the first defendant, and Pheim Asset Management Sdn Bhd ("Pheim Malaysia") which is the second defendant, for infringing s 232(3) read with s 197(1)(b), of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (the "SFA"). Hereinafter, both defendants will be referred to collectively as the "defendants". MAS alleged that the defendants created a false or misleading appearance with respect to the price of United EnviroTech ("UET") shares between 29 and 31 December 2004. For convenience, the period between 29 and 31 December 2004 will hereinafter be referred to as the "material time". I will first set out the salient facts.

Facts giving rise to the dispute

Dramatis Personae

2 Dr Tan is, by all accounts, a successful fund manager. He founded Pheim Malaysia and Pheim Asset Management (Asia) Pte Ltd ("Pheim Singapore") in the mid-1990s. Both companies are in the fund-management business. Pheim Malaysia is licensed by the Securities Commission of Malaysia ("SCM") while Pheim Singapore is licensed by MAS. The two companies (Pheim Malaysia and Pheim Singapore) will be referred to collectively as the "Pheim Group". According to Dr Tan, the Pheim Group currently manages about US$1 billion in assets and has consistently recorded profits each year since its inception, save for 1998 (when Pheim Singapore did not record a profit). At the material time, Dr Tan was the biggest shareholder, a member of the board of directors, the chief executive officer and the chairman of the investment committee for both companies in the Pheim Group.

3 At the material time, the fund managers for Pheim Malaysia were Peter Chong (who was also the associate director and head of investment) ("Chong"), Tan Keng Lin ("Ms Tan"), Ng Wai Leng ("Ng") and Akmal Hassan ("Hassan"). Tew Sow Hume ("Tew") was the senior manager and head of

compliance for Pheim Malaysia. Tew and Ms Tan gave evidence on behalf of the Defendants although Ms Tan came to become the Defendants' witness in controversial circumstances (to be elaborated later). Dr Tan and Ms Tan were (*inter alios*) authorised to trade for Pheim Malaysia at the material time. However, there is no evidence that Chong, who joined Pheim Malaysia in mid-2004 and obtained a licence in August 2004, was authorised to trade for Pheim Malaysia through the securities firm UOB Kay Hian Pte Ltd ("UOB Kay Hian"). Regular Investment Committee meetings were held on a weekly basis and chaired by Dr Tan. Ms Tan (amongst others) attended these meetings on a regular basis. It is not disputed that Dr Tan, given his experience, was a hands-on leader with a strong influence in the decision-making process at such meetings. As a result, his views must have carried much weight.

4 Mr Tang Boon Siah ("Tang") was, at the material time, a remisier working for UOB Kay Hian. He had known Dr Tan for more than a decade from his previous job. Dr Tan trusted Tang as a long-time friend. The Pheim Group had trading accounts managed by Tang. Tang had also received orders from Dr Tan personally to trade on Pheim Malaysia's accounts since its inception. In 2004, Dr Tan remained close to Tang, speaking to him on a near-daily basis to receive market updates. In this regard, it comes as little surprise that Tang was, according to Ms Tan, known internally within Pheim Malaysia as Dr Tan's "favourite broker". Tang was the broker who executed the trades for Pheim Malaysia at the material time and gave evidence on behalf of MAS.

The Accounts managed by Pheim Malaysia

5 Pheim Malaysia managed various accounts for its customers, including accounts named as Accounts 89, 90 and 91. The trading parameters for each account were set out in the prospectus for the accounts (the "Master Prospectus") and are as follows.

6 Account 89 was suitable for "conservative equity investors". Up to 60% of the assets had to be invested in equities and equity-linked securities. At least 40% of the assets were to be invested in fixed income instruments and liquid assets. The same limits applied for Account 90, except that the investments for Account 90 had to be in securities and instruments that complied with Syariah principles.

7 Account 91 was suitable for "risk adverse investors", with at least 80% of the assets to be invested in fixed income instruments and liquid assets, and up to 20% to be invested in equities and other high yielding instruments.

8 For all three accounts, the value of securities that were listed on a foreign stock exchange (such as Singapore Exchange Limited ("SGX")) could not exceed 10% of that account's net asset value ("NAV"), due to investment restrictions imposed by the SCM.

9 Apart from these three accounts, Pheim Malaysia managed at least two other accounts which held on UET shares, *viz*, Accounts F5 and 98. In addition, a number of other accounts managed by Pheim Singapore also held UET shares. One such account was Account 28, also known as the "Vittoria Fund". UET shares formed the second largest component of shares in the Vittoria Fund at the material time. Vittoria Fund was also mentioned in Pheim Group's marketing material as it consistently outperformed its benchmarks.

10 The funds managed by Pheim Group generally recorded stellar results over the years. It hired a consulting firm to verify its results, and the report stated that Pheim Malaysia's funds outperformed its benchmarks for ten consecutive years since its inception and Pheim Singapore's funds outperformed its benchmarks for nine consecutive years since its inception. Mention of the Pheim Group's outstanding record was placed in its marketing material together with that for the Vittoria

Fund. However, Dr Tan admitted that he was aware that 2004 was a challenging year and was concerned about the performance, especially given that 2003 was a "fantastic" year.

Pheim Malaysia's investments in UET and other companies

11 Before investing in UET, Pheim Malaysia invested in Hyflux Limited ("Hyflux"), a water treatment specialist company listed on the SGX. Pheim Malaysia recorded significant profits on its investment in Hyflux. Pheim Malaysia sold its last Hyflux shares by 4 March 2002. According to Dr Tan, after selling all its Hyflux shares, Pheim Malaysia was on the lookout for similar companies to invest in. UET fit the bill as it was involved in waste water treatment and was a reclamation solutions provider.

12 In March 2004, UET announced its intention to conduct an initial public offering of its shares (the "IPO") on the SGX. Pheim Malaysia was interested in investing in UET, given its favourable price to earnings ratio of 11.8 (compared to 19.48 for Hyflux). Pheim Malaysia subscribed to 2.3m UET shares at $0.47 each. Of these, 1.54m UET shares were purchased for Accounts 89, 90 and 91.

13 UET commenced trading on the SGX on 22 April 2004. Between the date of the IPO and the material time, Pheim Malaysia purchased UET shares on a number of occasions, as follows:

Date (2004)	Account	Purchase Price	Volume
23 April	89	$0.58940	900,000
23 April	91	$0.58940	100,000
29 April	F5	$0.47500	160,000
5 May	F5	$0.47500	250,000
7 June	98	$0.39975	100,000
5 July	F5	$0.43225	60,000
6 July	90	$0.44500	70,000
6 July	91	$0.44500	30,000
9 July	F5	$0.43000	125,000
13 July	89	$0.43000	100,000
26 July	F5	$0.38690	63,000
23 August	F5	$0.34161	93,000
13 September	90	$0.35635	48,000
13 September	F5	$0.34000	20,000
14 September	F5	$0.37730	159,000
14 September	F5	$0.37000	68,000
15 September	89	$0.37923	100,000
15 September	90	$0.37923	100,000

15 September	91	$0.37923	60,000
15 September	F5	$0.37500	114,000
16 September	F5	$0.38500	80,000
17 September	F5	$0.38457	35,000

According to Dr Tan, Pheim Malaysia purchased UET shares between April and May 2004 because it thought that UET had good prospects and potential. The purchases in July 2004 were the result of its Investment Committee's decision (on 7 July 2004) to increase exposure to UET shares in Accounts 89, 90, 91 and F5, "in view of [the] bright industry outlook [and] possible rising profit]". Similarly, purchases were made in September 2004 after the Investment Committee decided to increase its exposure to UET for Accounts 89, 90, 91 and F5 as it expected UET to see improving profits. All the purchases made after May 2004 were at prices below the IPO price.

14 On 28 October 2004, UET announced that it had secured a "long-term Transfer, Operate and Transfer contract to treat wastewater" in China ("the TOT contract"). The company clarified that the TOT contract was not expected to have any material impact on UET's performance for the financial year ending 31 December 2004. On 2 November 2004, the company also clarified that the TOT contract would be able to generate a steady stream of income for a period of 30 years. On 12 November 2004, UET announced that it had recorded a 125% increase in net profit for the third quarter of financial year 2004, as compared to the same period for financial year 2003. According to Dr Tan, these announcements only served to confirm Pheim Malaysia's positive outlook on UET's prospects.

15 On 15 December 2004, Pheim Malaysia's Investment Committee met and decided to increase its exposure to UET shares for Accounts 89, 90 and 91 "in anticipation of better results going forward". Dr Tan and Ms Tan were present at this meeting. In the minutes of the meeting, it was stated that follow-up action would be taken by Ms Tan and Ng.

16 On 21 December 2004, UET announced that its subsidiary had secured a S$4m contract with Tianjin TEDA Water Technology Co Ltd. However, the announcement warned that this contract was unlikely to have any material effect on its earnings per share for that financial year.

17 On 28 December 2004, Pheim Malaysia sold S$815,000 worth of shares in Azeus Systems Holdings Ltd ("Azeus"). Azeus was a company listed on the SGX. The shares were sold from Accounts 89, 90 and 91. According to Dr Tan and Tew, the Azeus shares were sold to lock in profits. Instructions to sell the Azeus shares came from both Dr Tan and Chong. According to Dr Tan, he gave Tang instructions to sell the Azeus shares as the Pheim Group had held on to those shares for some time and the major shareholder was interested in acquiring the same.

18 It would be useful for me to set out the prices at which UET shares traded from 15 December 2004 (the day Pheim Malaysia's Investment Committee decided to increase its exposure in UET shares) to the material time, in the following table:

Date (2004)	Last traded price	Intra-day high	Intra-day low	Volume
15 December	NIL			

16 December	NIL			
17 December	$0.375	$0.39	$0.375	2,000
20 December	$0.355	$0.355	$0.355	1,000
21 December	NIL			
22 December	$0.37	$0.37	$0.37	30,000
23 December	$0.36	$0.36	$0.36	145,000
24 December	$0.385	$0.385	$0.355	98,000
27 December	$0.38	$0.39	$0.37	50,000
28 December	NIL			

I should add that Pheim Singapore sold a total of 207,000 UET shares at an average price of $0.359 on or after 23 December 2004. According to Dr Tan, there was a practice of not allowing Pheim Malaysia to purchase shares sold by Pheim Singapore, although this rule was not reflected in its internal manual. Excluding the shares sold by Pheim Singapore, approximately 120,000 UET shares changed hands between $0.355 and $0.39.

19 I will now turn my focus to the events that took place between 29 and 31 December 2004.

Events of 29 December 2004

20 Dr Tan flew to Kuala Lumpur, Malaysia, on the morning of 29 December 2004 and returned to Singapore that evening. The chronology of telephone calls (in minutes ("m") and seconds ("s")) and trades that took place on 29 December 2004 is set out in the following table:

Time	Call From	Call To	Length of call (Remarks)	Purchase Price	Volume
0804	Dr Tan	Tang	39 s		
0914	Pheim Malaysia	Tang	1m 39 s		
0915			(Matched sell order placed at 0905 - Not by Pheim Malaysia)	$0.37	20,000
0937	Pheim Malaysia	Tang	1m 1s		
0950	Pheim Malaysia	Tang	24s		
1228	Pheim Malaysia	Tang	2m 20s		
1635			(Seller-initiated trade - Not by Pheim Malaysia)	$0.37	25,000
1641	Unknown	Dr Tan	3m 32s		

1644:49				$0.38	14,000
1650:18				$0.385	25,000
1654:53				$0.385	20,000
1658	Unknown	Dr Tan	2m 8s		
1658:23				$0.385	5,000
1659:32				$0.41	1,000
1708	Tang	Pheim Malaysia	1m 9s		

21 The UET shares purchased on 29 December 2004 were booked into Account 90.

30 December 2004

22 Dr Tan was in Singapore on 30 December 2004. The chronology of telephone calls and trades that took place on that day is as follows:

Time	Call From	Call To	Length of call (Remarks)	Purchase Price	Volume
0900	Tang	Pheim Malaysia	1m 43s		
0945	Tang	Dr Tan	(Message)		
0954	Dr Tan	Tang	1m 24s		
0956	Tang	Pheim Malaysia	1m 26s		
1003	Tang	Pheim Malaysia	2m		
1124	Dr Tan	Tang	28s		
1158	Dr Tan	Tang	1m 52s		
1423	Tang	Dr Tan	38s		
1423:47				$0.40	30,000
1428	Tang	Pheim Malaysia	1m 9s		
1433	Dr Tan	Tang	1m 58s		
1438	Tang	Pheim Malaysia	34s		
1623	Dr Tan	Tang	1m 33s		
1625:02				$0.405	12,000
1632:23				$0.42	10,000
1639:10				$0.42	9,000
1640:34				$0.425	20,000

1643:45				$0.425	5,000
1645:49				$0.43	25,000
1650	Tang	Dr Tan	1m 1s		
1650:24				$0.435	20,000
1651:26				$0.435	6,000
1652:50				$0.44	5,000
1653:29				$0.44	10,000
1656:29				$0.44	10,000
1657	Tang	Dr Tan	43s		
1657:05				$0.45	40,000
1659:56				$0.455	8,000
1721	Dr Tan	Tang	1m 19 s		
1723	Tang	Pheim Malaysia	1m 26s		
1724	Tang	Dr Tan	22 s		
1725	Tang	Pheim Malaysia	1m 26s		
1726	Tang	Dr Tan	24 s		
1727	Tang	Pheim Malaysia	34s		
1735	Pheim Malaysia	Tang	2m 34s		
1738	Tang	Pheim Malaysia	17s		

23 The shares that were purchased on 30 December 2004 were booked into Account 91.

31 December 2004

24 Dr Tan was also in Singapore on that day. The chronology of telephone calls and trades for 31 December 2004 is as follows:

Time	Call From	Call To	Length of call (Remarks)	Purchase Price	Volume
0859	Dr Tan	Tang	55s		
0905	Tang	Pheim Malaysia	17s		
0906:55			(Seller-initiated trade - Not by Pheim Malaysia)	$0.35	1,000
0922	Tang	Dr Tan	18s		

1016:55			(Seller-initiated trade - Not by Pheim Malaysia)	$0.39	1,000
1133	Tang	Dr Tan	12s		
1218	Tang	Dr Tan	1m 47s		
1220:41				$0.435	10,000
1222:18				$0.435	10,000
1225:11				$0.44	40,000
1228:19				$0.44	20,000
1229:57				$0.445	5,000
1237	Tang	Pheim Malaysia	51s		

25 Notably, in order to execute the trade at 12.20pm, Tang had to use the force-key function as the trade was at more than six bids above the last traded price. Subsequently, all the shares purchased on 31 December 2004 were booked into Account 89.

26 Between 29 and 31 December 2004, Pheim Malaysia bought a total of 360,000 UET shares costing $152,470.95, at a weighted average price of $0.424 per share.

Effect of the UET share purchases at the material time on accounts managed by the Pheim Group

27 It is not disputed that as a result of the rise in UET's share price at the material time, 15 funds within the Pheim Group recorded a $1,086,989 increase in their NAVs. It is also not disputed that three accounts, namely Accounts 28 (*ie*, the Vittoria Fund), 101 and 106 would not have outperformed their benchmark returns for 2004 but for the rise in UET's share price at the material time. As a consequence, Pheim Singapore earned an additional $50,000 in fees arising from the outperformance.

Further purchases in UET shares by Pheim Malaysia and its subsequent sale of its UET shareholdings

28 After the material time, until 19 January 2005 (the date that Pheim Malaysia next purchased UET shares), the price of UET shares fluctuated as follows:

Date (2005)	Last traded price	Intra-day high	Intra-day low	Volume
3 January	$0.415	$0.42	$0.415	100,000
4 January	$0.405	$0.415	$0.405	28,000
5 January	$0.39	$0.405	$0.39	70,000
6 January	Nil			

7 January	$0.395	$0.395	$0.395	79,000
10 January	$0.395	$0.395	$0.39	18,000
11 January	Nil			
12 January	$0.39	$0.39	$0.39	10,000
13 January	$0.38	$0.38	$0.38	10,000
14 January	$0.40	$0.40	$0.40	10,000
17 January	$0.42	$0.42	$0.40	130,000
18 January	$0.405	$0.405	$0.405	18,000

29 On 19 January 2005, Pheim Malaysia purchased 205,000 UET shares at a weighted price of $0.416 for Account F5. According to Dr Tan, the purpose of this purchase was to increase its exposure to UET shares and to average down the purchase price.

30 Pheim Malaysia first sold its UET shares on 18 March 2005, when it sold 87,000 UET shares from Account 91 at a weighted price of $0.379 per share to fund redemptions for that account. Subsequently, between October 2005 and February 2006, Pheim Malaysia sold a total of 2.835 million UET shares at a weighted average price of $0.53 per share. By 2007, Pheim Malaysia sold all its UET shares as it took the view that the company's prospects had dimmed.

The investigations into Pheim Malaysia

31 Dr Tan was interviewed by the MAS about the UET trades conducted at the material time on 28 March 2006. Thereafter, he conducted an investigation within Pheim Malaysia. In a subsequent interview, Dr Tan told the MAS that it was Ms Tan who had executed the UET trades at the material time. In April 2006, the SCM asked Pheim Malaysia to provide a report on the UET trades that took place at the material time. A report was duly provided on 19 April 2006. The report stated that on 29, 30 and 31 December 2004, Ms Tan had given Tang careful discretion orders ("CD order(s)") to purchase UET shares. Ms Tan gave evidence that she had seen the report before it was sent out and did not object to it. However, in court, Ms Tan testified that she had been influenced by Dr Tan to agree to the statement in the report that she had carried out the trades. She claimed that she was confused and therefore acted as instructed by her superiors. She said:

> Okay, when they got the letter from the [SCM], Mr Tew consulted Dr Tan on how to deal with this and the immediate reaction was to answer the [SCM] by saying that I did the trade, in a meeting -- in the investment committee meeting. At that time I was rather shocked and I was uncomfortable. Subsequently, Dr Tan asked me to go into his room to have some private conversations, and I was under the impression that, since I signed most of the trade slips, I had to be responsible for it and, therefore, I agreed that my name be submitted to [SCM] and, subsequently, when a letter was sent by [SCM] to ask us to attend the interview, I wasn't even consulted.
>
> The next thing I knew was Mr Peter Chong came out from Dr Tan's room and it was agreed that this should be presented to the [SCM] as how it was specified in the letter sent to the [SCM] earlier.

32 Some of Pheim Malaysia's staff was also interviewed by the SCM on 6, 7 and 8 June 2006. In particular, Ms Tan was interviewed by SCM on or about 7 June 2006. She reported the outcome of her interview to Dr Tan, Chong and Tew and was told by Dr Tan to prepare a note. Ms Tan prepared a note based on the notes she had taken during the interview. The note Ms Tan prepared for Dr Tan stated that she had given instructions to purchase the UET shares at the material time. However in court, Ms Tan recanted from the version of events she had given at the interview and said that she had never given any order to Tang to purchase UET shares at the material time.

The foreign equity limits

33 One of Pheim Malaysia's defences is that it purchased the UET shares at the material time for Accounts 89, 90 and 91 to replace the Azeus shares it sold on 28 December 2004, as it wanted to maintain exposure to foreign equities without contravening the foreign equities NAV limits for the accounts. During the course of the trial, Dr Tan gave evidence that another reason for doing that at the material time was so that it would not contravene the equities limit that was set for each of these accounts. Prior to the sale of Azeus shares, the foreign equities NAV percentages and equities percentages for Accounts 89, 90 and 91 were as follow:

	Account 89	**Account 90**	**Account 91**
Foreign Equities NAV	9.84%	7.71%	6.99%
Equities	56.60%	59.28%	14.24%

34 After the sale of Azeus shares, the foreign equities NAV for Accounts 89, 90 and 91 were as follow:

	Account 89	**Account 90**	**Account 91**
Foreign Equities NAV	8.29%	3.53%	5.02%
Equities	54.82%	55.20%	12.22%

The factual disputes

35 At this juncture, it would be useful for me to make some observations about the witnesses. The key witness of fact for MAS was Tang while the key witnesses of fact for the defendants were Dr Tang, Ms Tan and (to a smaller extent) Tew. Given that the events had transpired in 2004 and the fast-paced and fluid nature of the industry, it came as little surprise to the court that the witnesses of fact were unable to recall the key conversations that had taken place at the material time. Some allowance, therefore, has to be made for the real possibility that their recollection of events at the trial was less than accurate. Even so, Tang impressed me as an honest witness who spoke with remarkable candour. As I mentioned earlier, Ms Tan came as a witness under controversial circumstances, arriving in Singapore from Hong Kong (where she works) without prior warning in the midst of the trial and taking the defendants by surprise. It appeared that the MAS had managed to convince her to testify as a witness. The defendants and their counsel claimed that they had made (unsuccessful) attempts to contact Ms Tan. Given the circumstances, I was a little sceptical of the defendants' efforts to persuade Ms Tan to testify. As she gave unfavourable evidence, it is not surprising that the defendants subsequently applied to cross-examine Ms Tan under s 156 of the

Evidence Act (Cap 97, 1997 Rev Ed). As for Dr Tan, even giving due allowance for the effluxion of time, he did not impress me as a credible witness. He appeared defensive and on occasions when pressed with difficult questions, he was evasive.

36 Both MAS and the defendants also had an expert witness each. Christopher Chong ("Mr Chong") appeared on behalf of the MAS, while Nel Radley Freits ("Mr Freits") appeared on the defendants' behalf. Mr Chong is a financial and corporate consultant with finance and accounting background. He co-founded a specialist corporate advisory firm, is a director of numerous companies and funds and had assisted the local regulatory authorities on a number of occasions. Mr Freits is a retired stockbroker with considerable experience working with traders and salespersons. He is also actively involved with the SGX, serving on several committees including the Disciplinary Committee.

37 There were two key factual disputes that arose during the course of the trial, namely:

(a) Who had given the orders to Tang to execute the trades in UET shares at the material time?

(b) Were the UET share purchases for legitimate commercial purposes?

Whether Dr Tan had given the orders to Tang

38 MAS contended that Dr Tan gave the orders to Tang. The defendants strenuously denied this allegation, contending that it was Ms Tan who had done so, as she had admitted in her statement to the SCM (as recorded in her notes) and in Pheim Malaysia's letter to SCM. On the stand, Ms Tan resolutely denied having given Tang any orders to purchase UET shares and essentially said that she was cajoled into taking responsibility for the trade by (*inter alios*) Dr Tan before her interview with the SCM.

39 There is little evidence, apart from the telephone records, in this respect. Where calls were made to or from Pheim Malaysia's line, Tang could not recall who he had spoken to. Neither could Ms Tan recall if she had spoken to Tang at the material time, although she was adamant that even if she had spoken to Tang, she did not at any time give Tang the order to purchase UET shares. The same difficulties applied where Dr Tan conversed with Tang – neither could recall what had transpired in their numerous conversations.

40 Despite the lacuna in the witnesses' evidence, I think the telephone records, when considered together with the timing of the trades, leads to an irresistible inference that it was Dr Tan who had given Tang the orders to carry out the trades. I will start with the events that took place on 30 and 31 December 2004, before returning to consider the events that took place on 29 December 2004.

30 December 2004

41 On 30 December 2004, the first trade of the day by Pheim Malaysia through Tang took place at 2.23pm. Before the first trade, there were calls from Tang to Pheim Malaysia, and also, from Dr Tan to Tang. According to Tang, he would have updated Pheim Malaysia and Dr Tan about UET and the movements in its share price. To the best of Tang's recollection, it was Pheim Malaysia that gave him a CD order for UET shares. Dr Tan, during cross-examination, claimed he could not remember the conversations he had with Tang, but agreed that Tang's recollection was possible given that Tang had been unable to complete the order given by Pheim Malaysia the previous day.

42 Interestingly, the trades that took place on 30 December 2004 coincided with calls that took

place between Dr Tan and Tang. The first trade was executed at 2.23:47pm; Tang had called Dr Tan at 2.23pm in a conversation lasting 38 seconds. The next trade occurred at 4.25pm; Dr Tan had called Tan just a couple of minutes earlier at 4.23pm, in a conversation lasting 1 minute 33 seconds. This was followed by a number of trades executed between 4.32pm and 4.45pm. Thereafter, Tang executed a series of trades at 4.50pm, 4.51pm, 4.52pm, 4.53pm and 4.56pm; this was just after Tang called Dr Tan at 4.50pm in a conversation lasting just slightly over a minute. Next, Tang executed another two trades at 4.57pm and 4.59pm (just minutes before 5pm); Tang was on the line with Dr Tan at 4.57pm for 43 seconds.

43 According to Tang, during the 2.23pm conversation, he told Dr Tan that UET shares were available and Dr Tan told him to purchase them carefully. Dr Tan suggested that he would have told Tang to consult the person who had originally given him the order and follow that person's instructions instead. I reject Dr Tan's evidence. If Dr Tan's evidence was correct, Tang would not have executed the trade during or shortly after the 2.23pm conversation, as he would have had to call Pheim Malaysia to check with the fund manager concerned. The fact that a trade was executed contemporaneously, in my view, strongly suggests that Dr Tan was the one who had given instructions for the trade at 2.23pm.

44 The same scenario played out again at 4.23pm. According to Tang, Dr Tan gave him permission to purchase UET shares at a higher price if necessary, as he (Tang) was having trouble fulfilling the order due to the counter's illiquidity. Dr Tan claimed he could not remember this conversation but admitted it was possible. According to Tang, he called Dr Tan at 4.50pm and 4.57pm to update him on the trades that were made. Dr Tan agreed that it was very likely that Tang talked to him about the UET trades. He could not recall if Tang had asked him for permission to buy more shares. Dr Tan further claimed that if Tang had checked if he (Dr Tan) wanted Tang to continue buying UET shares, he would have told Tang "to do so carefully or try your best". In my view, the timing of these calls was a strong indicator that Dr Tan had personally given Tang instructions to trade and permission to buy at a higher price. First, the trades were executed contemporaneously with conversations between Dr Tan and Tang. Second, the telephone conversations coincided with purchases that were executed at higher prices. The fact that trades were executed at higher prices during or immediately after the calls with Dr Tan suggests that Dr Tan had given Tang permission to purchase UET shares at higher prices. Given the overly coincidental pattern of calls between Tang and Dr Tan that were contemporaneous with trades at higher prices, it is eminently clear that Dr Tan must have been the one who had given Tang instructions to trade.

31 December 2004

45 Again, the sequence of events which took place on 31 December 2004 strongly resembled that which had taken place on the previous day. There was a call from Dr Tan to Tang in the morning, which was followed by a short call from Tang to Pheim Malaysia. Tang's evidence was that he gave Dr Tan an update and was told that Pheim Malaysia was still interested in purchasing UET shares. Dr Tan agreed this was possible. Tang then called Pheim Malaysia to update one of its fund managers, and recalled being given a CD Order to purchase UET shares that was likely to be of $100,000 in value.

46 It is noteworthy that when other parties had purchased UET shares at lower prices, Tang would call Dr Tan directly instead of updating the fund managers at Pheim Malaysia. Tang's evidence was that he updated Dr Tan on such trades, as he was told to continue monitoring the counter. Dr Tan tried to argue that it was unlikely that Tang was updating him on the UET counter due to the short duration of the calls. Dr Tan suggested that when he was busy, he would hold the line when he received calls. Dr Tan later claimed he could not remember. The timing of the calls (which took place

after each trade) suggests that the calls were indeed updates. I reject Dr Tan's suggestion that the duration of these calls was too short to be meaningful – 12 (and certainly 18) seconds is ample time to inform a person about the last transacted price and volume, together with the usual niceties. I find it significant that Tang chose to update Dr Tan regularly instead of a fund manager at Pheim Malaysia. A broker would logically provide regular updates to the person in a position to give instructions and to provide further business. In the present case, it would have been the person giving regular orders to purchase shares on previous days. As such, the fact that Tang chose to call Dr Tan to provide updates gives rise to the strong inference that Dr Tan had given Tang instructions to execute the trades in UET shares on previous days.

47 At 12.18pm, Tang called Dr Tan and the call lasted nearly two minutes. Shortly after that conversation, Tang executed a series of trades which pushed the price of UET shares up from the last transacted price of $0.39 to $0.445. The last purchase was made just three seconds before the close of the trading year. Again, the close proximity between the call and the trades suggests that it was Dr Tan who had given Tang instructions to purchase the UET shares. Significantly, Tang would have had to use the force-key to execute the first trade as it was more than six spreads above the last transacted price of $0.39. According to Tang, Dr Tan had asked him to purchase UET shares carefully. He used the force-key to transact at the best offer available and believed that the last transacted price of $0.39 was not representative of the market when compared to the previous day's closing price. On the other hand, Dr Tan claimed he could not remember what happened but that it was likely that Tang had given him an update and that he told Tang to purchase carefully "if you've got the instruction", but disagreed having told Tang to carry out the order given. The sequence of events suggests that Tang's version, that Dr Tan had given him instructions to purchase UET shares during the 12.18pm conversation, was correct. If all that Dr Tan told Tang to do was to purchase UET shares carefully according to instructions and that he did not give any instructions to purchase, Tang would have called the fund manager at Pheim Malaysia at least once to provide updates. However, Tang did not. Instead, he continued to update only Dr Tan. This suggests that on 30 and 31 December 2004, it was Dr Tan who had given Tang instructions to purchase UET shares at higher prices. In this regard, whether instructions from a fund manager had been given to Mr Tang in the morning is irrelevant – if is clear that the puppet-master orchestrating the trades at the crucial times was Dr Tan alone.

29 December 2004

48 I will now turn to consider the events on 29 December 2004. There were a series of telephone calls. Tang's best recollection was that Pheim Malaysia had indicated its interest in buying UET shares. However, the CD order to purchase UET shares came from Dr Tan during the conversation at around 4.44pm. Dr Tan disagreed and claimed he could not recall whether he had spoken to Tang and/or given Tang the order, holding the view that Tang received the order in the morning instead. Dr Tan received a call from an unknown person at 4.41pm, and the conversation lasted about 3.5 minutes. The first trade by Tang occurred at 4.49pm. In my view, it was very likely that the person on the other end of the phone was Tang, given how the trade was contemporaneous with the telephone call. There were relatively large volumes of UET shares available at $0.385 per share during the day, which differed from the closing price on 27 December 2007 by a mere half cent – even under a CD order, there would have been nothing to stop Tang from buying those shares for Pheim Malaysia. As such, it must have been that the order to purchase came after 4.35pm. If so, it must have been Dr Tan who had given Tang instructions to proceed with the trade.

Conclusion on the trades

49 In the light of the pattern of telephone calls by Dr Tan to Tang before trades were executed at

higher prices, I agree with MAS that on a balance of probabilities, it was Dr Tan who had given Tang instructions to purchase the UET shares on each of the three days at the material time. In my view, whether a fund manager from Pheim Malaysia might have given Tang instructions earlier in the day is irrelevant, as the evidence shows that Tang looked to Dr Tan for permission to trade at higher prices, and that Dr Tan had authorised the trades. Significantly, Dr Tan was the last person that Tang spoke to before he executed the trades on all three days. It was also clear that updates were provided by Tang to Dr Tan primarily. Even where calls were made by Tang to Pheim Malaysia, it was followed by a call from Dr Tan to Tang. The objective evidence leads me to conclude with little hesitation that it was Dr Tan who had given Tang instructions at the material time to purchase the UET shares.

Whether the UET share purchases were for legitimate commercial purpose

50 The defendants contended that the UET share purchases at the material time were pursuant to a legitimate investment strategy and objective. There were three parts to its argument. First, they highlighted that Pheim Malaysia was interested in investing in UET for the long-term, as evidenced by its Investment Committee's decisions on 7 July 2004, 2 September 2004 and 15 December 2004 to increase its exposure to UET shares. In addition, they continued to purchase UET shares after its IPO and even after the material time, allowing it to average down the cost of purchasing those UET shares. Furthermore, Pheim Malaysia managed to make a profit some nine months after the material time from selling the UET shares. They also argued that Pheim Malaysia regarded UET shares as being undervalued, under-researched and overlooked. Second, they contended that the UET shares were purchased to replace the Azeus shares that were sold on 28 December 2004.

51 The defendants' arguments were unconvincing. First, although decisions were made in earlier Investment Committee meetings to purchase UET shares and UET shares were purchased before and after the material time, those factors were negated by the peculiar circumstances that were present at the time of the purchase. For reasons explained in greater detail below (at [79]–[83]), those factors suggested that Pheim Malaysia had purchased the UET shares for other purposes. In particular, Pheim Malaysia could have but did not purchase UET shares at lower prices before and after the material time. The strategy that it employed was also inconsistent with that of an investor seeking to purchase at the lowest possible price. The fact that the trades at the material time were executed below UET's IPO price was also inconclusive – the reasonableness of the share purchases at the material time could not be measured against the price at which the shares were traded more than eight months earlier.

52 Mr Chong disputed the grounds on which Dr Tan reasoned that the UET shares were undervalued. I now turn to consider the reasons. The TOT contract (at [14]) which Dr Tan referred to stated that there would be no material impact on profits or earnings per share for 2004. Dr Tan also did not consider the fact that there were significant profits in the fourth quarter of financial year 2003 ("FY03") which were unlikely to be repeated in 2004, raising questions as to whether UET's earnings for 2004 would match those of FY03 despite the comparatively better results in the third quarter of FY04. Although Dr Tan asserted that a price to earnings ratio of 12 to 15 times would value UET shares at between $0.55 and $0.69, there was no evidence that any valuation report had been done in this regard. Mr Chong also showed that the UET trades at the material time were at more than 12 times the earnings for 2003 (and 2004's annualised profits) and raised the valid point that an investor would unlikely purchase a stock at a price to earnings ratio of 12 if his or her valuation target for that stock was between 12 and 15. Significantly, the defendants did not challenge these points during cross-examination. As for the choice of comparable companies, Mr Chong rightly pointed out that there were other risk factors which Dr Tan had not accounted for, such as the difference in sovereign risk and target markets.

53 After considering the evidence as a whole, I agree with Mr Chong's view that Dr Tan had no basis for saying that UET shares were undervalued. Instead, Dr Tan's reasoning appeared to be an afterthought, especially in the absence of any contemporaneous documentary evidence to show that he had genuinely considered the price-earnings ratio to be between 12 and 15 and/or valued UET shares at $0.55 to $0.69. In addition, I do not think the fact that UET shares were under-researched or overlooked takes the defendants' case any further. There are many possible reasons for a stock to be under-researched or overlooked, and this fact alone does not suggest that a stock is a good pick. Similarly, the fact that the purchases at the material time were at prices below its IPO or were subsequently sold for a profit does not assist the defendants' case. The mere fact that a profit was eventually made more than eight months down the road does not mean that no market rigging could have taken place.

Whether the foreign equities limit or equities limit prevented Pheim Malaysia from purchasing UET shares before the material time

54 The defendants also contended that Pheim Malaysia had positioned itself as having wider Asian competency and therefore would invest in foreign securities if permitted by the accounts in question. Accounts 89, 90 and 91 were such accounts that permitted investments in foreign equities, although it was subject to a foreign equity limit of 10% and an equity limit of 60% (for Accounts 89 and 90) and 20% (for Account 91). This was especially so given the sale of Azeus shares on 28 December 2004.

55 As for the defendants' case that they had to wait for the Azeus shares to be sold before purchasing the UET shares, I do not think that this reason operated on their minds. For the 10% foreign equities limit, Accounts 90 and 91 would not have been close to breaching the limit even if the UET shares were purchased between 15 and 28 December 2004. If one assumes that the UET shares purchased for Account 89 on 31 December were purchased on either 27 or 28 December 2004, Account 89 would have been close to or exceeded the 10% foreign equities limit. However, this assumes that Pheim Malaysia would have bought the same number of UET shares at the high prices it paid ($0.435 to $0.445), and UET shares were transacting at significantly lower prices between 15 and 28 December 2004. In any case, if the defendants genuinely held the belief that UET shares were undervalued and wanted to show its competency in foreign markets, Pheim Malaysia could easily have bought more shares for Accounts 90 and 91 without infringing the foreign equity limits.

56 As for the equities limit, I would first observe that this line of argument was not pleaded by the defendants and emerged late in the day, when Dr Tan took the stand. In any case, the equities limit would not have been breached if the Defendants had purchased the UET shares before selling the Azeus shares. Accounts 89 and 91 were significantly below their respective equities limits between 15 and 28 December 2004, even taking into account any purchase of UET shares. Account 90 was closer to the limit, and if the UET shares purchased were considered, its equities limit would have hovered between 59.37% and 59.93% between 15 and 28 December 2004. Dr Tan, during cross-examination, claimed that he would have been concerned about leaving a buffer. I do not think the buffer operated in the defendants' minds at the material time. First, the foreign exchange rate risk was lowered because both the Hong Kong dollar and the Malaysian ringgit were pegged to the US dollar. Second, and more importantly, the evidence showed that Pheim Malaysia was actively purchasing shares during that period of time for Account 90. Third, if UET shares had been purchased at lower prices, there would have been a bigger buffer. Even taking both the equity limits and foreign equity limits into account, Pheim Malaysia was well-placed to purchase more UET shares for Account 91 and (to a smaller extent) Accounts 89 and 90 at lower prices, if it thought that UET was undervalued, but it did not do so. Consequently, I do not accept that Pheim Malaysia or Dr Tan had considered either limit as factors preventing them from purchasing more UET shares before the Azeus shares were sold.

The parties' pleaded case and arguments before this court

57 Having dealt with the key disputes of facts, I will now turn to the parties' pleaded case and arguments.

58 MAS argued that based on the facts of the case, the only inference that could be drawn was that the defendants' sole or primary purpose in giving the orders and purchasing UET shares was to window dress, by moving up and setting the market price for UET shares on the last trading day of 2004 to improve the valuations of those accounts which held on to UET shares. It highlighted that the UET counter was illiquid and that the trades took place on the last three market days for 2004, when volumes were traditionally thin. On each day, the trades took place shortly before the market closed. In addition, year-end prices were particularly important for determining portfolio performance. The defendants were the dominant buyer of an illiquid stock which resulted in a 17% increase in UET's share price, above what would otherwise have been its likely market price. MAS also highlighted that the defendants' actions enabled the Pheim Group to increase the NAV of its accounts by more than $1m and allowed three of its accounts to outperform their benchmarks. As a consequence, MAS argued that both the defendants had infringed s 197(1)(b) of the SFA. It sought a civil penalty of $1m per defendant to achieve a deterrent effect.

59 Dr Tan's defence was essentially a bare denial or non-admittance of MAS' case. He also pleaded that it was Ms Tan who had given Tang CD orders to purchase the UET shares at the material time. Pheim Malaysia's case was that that the purchases of UET shares by Pheim Malaysia were *bona fide* commercial transactions because the defendants thought UET shares were trading at an undervalue. In addition, Pheim Malaysia had sold Azeus shares on 28 December 2004. Since Pheim Malaysia wanted to purchase other SGX-listed stocks to replace those Azeus shares without breaching the 10% foreign equity limit, it was therefore natural and obvious for them to purchase the UET shares. The defendants, in their submissions, highlighted that Pheim Malaysia would not have continued to hold on to the UET shares after 31 December 2004 if they had purchased the UET shares at the material time for the purpose of portfolio pumping. Instead, Pheim Malaysia purchased more UET shares and continued to hold on to those shares until October 2005, when they were sold for a profit. The defendants also argued that the way Tang executed the trades enabled Pheim Malaysia to purchase UET shares at the lowest possible price, which allowed it to lower its average cost of purchasing UET shares since its IPO. They contended that the fact that Accounts 28, 101 and 106 exceeded their benchmarks was an "incidental consequence" of the trades executed *bona fide* by Tang, and that if they had wanted to achieve the aim of portfolio pumping, they would have done so for *all* the accounts managed by Pheim Singapore.

The decision

Section 197 of the Securities and Futures Act Cap 289

60 Section 197(1) of the SFA provides that:

> **False trading and market rigging transactions**
>
> 197 —(1) No person shall create, or do anything that is intended or likely to create a false or misleading appearance —
>
> (a) of active trading in any securities on a securities market; or
>
> (b) with respect to the market for, or the price of, such securities.

61 Section 197 of the SFA seeks to ensure that the market reflects the forces of genuine supply and demand: see the observations in *North v Marra Developments Ltd* (1981) 148 CLR 42 ("*North*") at 59 in relation to s 70 of the New South Wales Security Industry Act 1970, which is the predecessor to the Australian equivalent of s 197(1) of the SFA. There is a need to uphold the general investing public's confidence in the market's integrity, as investors trade on the basis that the price reflects the operation of market forces and not the outcome of the manipulative practices by other traders: see also Black, *Regulating Market Manipulation: Sections 997-999 Corporations Law* (1996) 70 ALJ 987 ("*Black on Market Manipulation*") at 988. Section 197(1) is borrowed from Australian legislation (see s 998 of the Australian Corporations Act (No 50, 2001)) and there are three distinct limbs in this provision. The first limb is where a person in fact *creates* a false or misleading appearance. The second limb is where a person does anything that is *intended to create* a false or misleading appearance. The third limb is where a person does anything that is *likely to create* a false or misleading appearance. For convenience, I will deal with the second limb first.

The law on what constitutes an intention to create a false or misleading appearance

62 Given that s 197 is borrowed from Australia, the Australian cases are therefore persuasive and I will turn to consider them. In *North*, the defendant-respondent company ("Marra") engaged the appellant-plaintiff stockbroker ("North") for advice as it (Marra) felt undervalued by the market and vulnerable to a takeover. North advised Marra to (*inter alia*) take over or merge with another company ("Scottish") to become a less attractive takeover target. Marra accepted this advice. Thereafter, Marra reached an agreement with Scottish. Under this agreement, it was important for Marra's share price to rise to approximately $16.50 so that Scottish shareholders would consider the deal favourably. Before the takeover was announced, North purchased Marra shares at $16.50, which was above its historical prices. North continued to purchase Marra shares at that price for nearly one and a half months. Subsequently, Marra argued that it did not have to pay for North's services because their contract was illegal for infringing s 70 of the New South Wales Security Industry Act 1970, which states:

> A person shall not create or cause to be created or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities.

63 The High Court of Australia dismissed North's appeal, holding that North's conduct in purchasing the Marra shares was illegal. Mason J found that the substance of the agreement was to purchase Marra shares at approximately $16.50 in order to attain a particular goal, and agreed with Mahoney JA's view that (*North* at 56):

> ... it was not the purpose of the plaintiffs to buy the shares that they did at the lowest price reasonably obtainable; that *the reason why they bought shares as they did was so that the Stock Exchange price of Marra shares would appear publicly to be $16.50 per share or of that general order*; and that they did this so that that price could be used to advantage in connection with, at least, the takeover [of Scottish shares].

64 North argued that it could not have misled anyone because the market was not concerned with the identity of purchasers or with their motivations, so long as the purchases were genuine by satisfying a legitimate market activity of the purchaser. Mason J dismissed North's argument, observing that (at 58-59):

> ... the object of the section is to *protect the market for securities against activities which will*

result in artificial or managed manipulation. The section seeks to ensure that the *market reflects the forces of genuine supply and demand*. By "genuine supply and demand" I exclude buyers and sellers whose *transactions are undertaken for the sole or primary purpose of setting or maintaining the market price*. It is in the interests of the community that the market for securities should be real and genuine, free from manipulation. The section is a legislative measure designed to ensure such a market and it should be interpreted accordingly.

I agree with Hope and Samuels JJ.A. in rejecting the suggestion that the section strikes only at fictitious or colourable transactions. Transactions which are real and genuine but only in the sense that they are intended to operate according to their terms, like fictitious or colourable transactions, are capable of creating quite a false or misleading impression as to the market or the price. *This is because they would not have been entered into but for the object on the part of the buyer or of the seller of setting and maintaining the price, yet in the absence of revelation of their true character they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market*.

65 Likewise, in *Fame Decorators Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58, Gleeson CJ (delivering the judgment of the majority) considered the purpose of entering into the transaction and found on the facts of the case that the central object was to influence the market price. In that case, Fame held shares in Jeffries, a listed company. Jeffries was a thinly traded counter. Fame also held convertible preference shares in Jeffries. Fame's director became aware that the accelerated conversion provisions would be triggered. The formula for the conversion was such that the lower the average price over 20 trading days, the greater the number of shares that would be allotted. Midday on 28 April, Fame's director was informed that there were various offers to buy shares at prices ranging from 13 cents to 35 cents. It was agreed that if in the afternoon there was no change in the market, Fame's director would instruct the broker to sell enough shares to bring the Jeffries share price down to 13 cents, and that the sales would be left until as late as possible just before the close of the market. These instructions came at 3.52pm, eight minutes before the close of trading. The price of Jeffries shares was brought down to 13 cents. Fame's offer to sell came just three minutes before the close of trading. The Fame director initially explained that he needed to obtain quick cash, but the court rejected that excuse and concluded that the shares were sold to create an artificially low price to aid the conversion calculation.

66 The court had little hesitation finding that Fame had contravened the relevant rules, holding that (at 62-63):

Section 998 aims to preserve the integrity of the share market. Markets, in reflecting the interaction of forces of supply and demand, may suffer from a variety of imperfections, including mismatches of information, without such imperfections destroying their integrity. *However, the conduct of a seller of thinly traded shares, calculated to effect sales at the lowest, rather than the highest, obtainable price, and timed so as to deflect the possibility of some purchasers bidding up the price, had* ***both the purpose and effect*** *of creating, temporarily, an artificial market and price*.

... The effect of Fame's conduct upon the market for shares in Jeffries, and the market price, was not merely incidental. ***The central object of such conduct was to influence the market price*** .

As Mason J acknowledged in North, in individual cases there may be difficulty in determining whether the conduct of a buyer or a seller, unless fully disclosed, falsifies the assumptions upon which a market operates, and damages the integrity of the market. In the present case,

however, Cohen J was right to conclude that both the purpose and the effect of Fame's conduct was to create an artificial market price for shares in Jeffries and that such conduct contravened s 998.

[Emphasis added in italics and bold italics]

67 As such, in order to establish the second limb, it would be necessary to show that the sole or dominant intention of the party charged or sued was to set or maintain a certain price of a security.

68 The defendants, in their submissions, sought to argue that where there was legitimate commercial reasons tor entering into the transaction, they could not be held liable under s 197(1) of the SFA. In particular, they said:

> It is submitted that this makes it clear that the mischief targeted by section 197(1) is where the transactions/instructions are for the purpose of creating a "false or misleading appearance" *and that where there is **a** legitimate commercial reason for a transaction (i.e. there was no purpose of creating a false or misleading appearance), the transaction does not fall within the mischief of section 197(1); and thus does not fall foul of the provision*. [Emphasis added in italics and bold italics]

69 It is not immediately clear whether the defendants are advocating that it is necessary to simply establish one legitimate commercial purpose to defeat a charge or suit brought under s 197(1) of the SFA, or that they must establish that the primary purpose was a legitimate commercial purpose. Insofar as they propose that one legitimate commercial purpose (whether primary or otherwise) is suggested, I reject that submission as it would be contrary to the purpose and intent of the section. It was also not supported by s 197(4) of the SFA, which provides a defence only to the acts deemed under s 197(3) as creating false or misleading appearances. Section 197(4) of the SFA simply provides that in relation to a contravention of s 197(3):

> it is a defence if the defendant establishes that the purpose or purposes for which he did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a securities market.

70 Section 197(4) of the SFA clearly does not suggest that the defence would be made out if one legitimate commercial purpose (which need not be the primary purpose) can be established; to the contrary, it requires the defendant to establish that the purposes for entering into the transaction did not include that of raising or setting the price of the security. For this reason, the court in *Braysich v R* (2009) 74 ACSR 387, in considering s 998(6) of the Corporations Law (in *pari materia* with s 197(4) of the SFA), held that (at [95]–[97]):

> As I have mentioned, an accused who seeks to rely on the defence under s 998(6) must prove, on the balance of probabilities, that the purpose or purposes for which he or she engaged in the relevant activity (that is, the activity the subject of the relevant deeming provision in s 998(5)) were not, or did not include, the purpose of creating a false or misleading appearance of active trading in the securities in question on a stock market.
>
> The accused will not establish the defence if he or she merely proves that he or she entered into or carried out the relevant transaction or transactions for a permissible or non-proscribed purpose. *The accused must prove that none of his or her purposes, for entering into or carrying out the transaction or transactions, included the purpose of creating a false or misleading appearance of active trading in the relevant securities on a stock market*.

> Also, the defence will not be made out if the accused merely raises a reasonable doubt as to whether he or she had the proscribed purpose, or merely establishes that there is a reasonable and rational inference, available on the evidence, that he or she did not have the proscribed purpose.
>
> [Emphasis added]

For the reasons stated, I hold that MAS, in order to succeed, must establish under s 197(1) of the SFA, that the primary purpose was to set or maintain the market price.

Whether the Defendants had the intention to create a false or misleading appearance

71 I will now turn to consider whether MAS has made out its case based on the second limb of s 197(1). The key question in this regard is: what were the defendants' objectives in purchasing the UET shares at the material time? Was it purely or primarily for commercial reasons (as the defendants contended) or was it for window-dressing (as MAS contended)?

72 I find it more convenient to deal with the defendants' arguments first. Their argument was threefold. First, they argued that their purchases were for legitimate commercial reasons. I have already dealt with this argument above and found that their purchases were not for legitimate commercial reasons (at [50] to [53]). Second, they argued that there was no benefit to the Pheim Group arising from the UET trades and that it would have been practically impossible to increase account valuations in that manner. They also argued that there was nothing in the manner in which the trades were carried out which could be criticised and that the purchases were at the best price for the volumes desired.

73 I do not accept that there was no benefit to the Pheim Group arising from the UET trades. The monetary gains that the Pheim Group earned from such outperformance were not significant, but that was beside the point. The defendants' aim was to maintain the Pheim Group's near-perfect record of outperforming its benchmarks, especially for its key fund (the Vittoria fund) which was featured on its promotional material. The gain sought by the defendants was in relation to its standing and reputation. In any case, the increase in UET's share price caused Pheim Group's funds to rise by more than $1million over the short span of three days, and this would by no means be an insignificant monetary gain, even though the money theoretically belonged to their clients.

74 The defendants also argued that if they had illegitimate intentions, they would have used different and more aggressive trading strategies, participate in the pre-close routine or use the force key indiscriminately. In my view, such arguments do not assist their case either. As MAS pointed out, the alternative methods suggested were blatant means of creating a false appearance in the market, which would have attracted the regulators' attention. There are other ways of manipulating the market without being so blatant. Therefore, the fact that the defendants did not engage in these blatant strategies did not assist their case.

75 Next, the defendants argued that their purchase price for those UET shares was reasonable and that they had obtained the best possible price. I reject these arguments. First, the defendants relied on the weighted average price of the daily trades for comparison, but even Mr Freits conceded that this was not a useful gauge when, as Pheim Malaysia did here, one party was responsible for the majority or all the trades in the day. The defendants asked the court to recognise that the price was equally determined by the sellers of the shares, who were not related to Pheim Malaysia. That did not matter, because there would always be opportunistic sellers placing bids that they do not expect to be matched. The fact that Tang lifted the lowest sell orders in the queue also does not assist the

defendants. UET was an illiquid counter – bids to sell were unlikely to be readily forthcoming within a short span of time. The bulk of the trades took place within a relatively short span of ten to thirty minutes before the end of the trading day. The strategy of continuously lifting the lowest sell orders within a short span of time could only result in an increase in UET's share price. If anything, the strategy of repeatedly lifting the lowest sell orders towards the end of the day for an illiquid counter would have been most effective in driving up the price of that counter.

76 The defendants also highlighted that a decision was reached on 15 December 2004 to purchase UET shares. They contended that CD orders had been given to Tang in the morning, and the manner in which the CD orders were executed could not be criticised. In addition, they argued that there was no evidence that the defendants told Tang to manipulate the market or to purchase UET shares towards the end of the trading day. I accept that a decision was reached on 15 December 2004 to purchase UET shares. However, I do not think that the decision weighed heavily in the minds of the defendants at the material time.

77 As I held earlier, the limits did not prevent Pheim Malaysia from purchasing some UET shares before the sale of Azeus shares. There were active trades for UET shares at prices below those which Pheim Malaysia paid, both before and after the material time. As such, Pheim Malaysia could have bought UET shares before and after the material time at a cheaper price. However, it chose not to do so, even though: (a) the accounts could comfortably accommodate further purchases of UET shares; (b) there were unfulfilled orders for UET shares at the material time; and (c) Dr Tan was keen to show his expertise in overseas markets. When these factors are considered in totality, it becomes clear that the defendants' primary purpose in buying the UET shares at the material time was not, as they claimed, to increase Pheim Malaysia's exposure to UET shares or to show its expertise in the overseas market. In addition, I did not find the defendants' arguments that CD orders had been given to Tang to be convincing. As Mr Chong testified, it was little use giving a CD order for a large number of shares to a broker if that stock was illiquid and the volume was weak as the broker, in such circumstances, would end up moving the price of that stock. In any case, as I have found earlier, it was Dr Tan who had given Tang instructions to purchase those UET shares just before the trades were executed.

78 I will now turn to consider the factors that lead to the conclusion that the trades were for the primary purpose of raising and setting UET's share price at the end of 2004.

79 First, it is noteworthy that UET was an illiquid counter. One would expect less (or even no) trading to take place on each day as compared to a liquid counter. As such, it would be easier to manipulate an illiquid counter as a manipulator can raise or set the share price without having to worry too much about any interference from other parties, who may place bids to sell at a price lower than the next asking price available or at the last traded price. The presence of such other investors would make it a lot more difficult and expensive for a party to manipulate the share price.

80 Second, the trades took place during the last three trading days of the year. This factor is significant for two reasons. First, year-end closing prices are traditionally used by funds to determine their portfolio performance. This was the case for the Pheim Group. In addition, the evidence showed that trading volumes towards the end of the year tended to be thin, making it even easier for the Defendants to manipulate UET's share price.

81 Third, most of Pheim Malaysia's trades were executed within the last half an hour of trading each day. Indeed, I would observe that Pheim Malaysia's last purchases for each day took place, were entered and filled during the last minute of trading. Pheim Malaysia's trades were significant as it accounted for 88% of all trades carried out over those three days for UET shares and, in so doing,

caused UET's share price to rise by 17%. Mr Friets himself conceded that Pheim Malaysia never had such a strong influence over UET's traded volume as compared to the material time.

82 Fourth, Pheim Malaysia had numerous opportunities to purchase UET shares before and after the material time at more attractive prices, but curiously chose not to do so. If (as the defendants claimed) Pheim Malaysia had intended to purchase UET shares because they thought UET was undervalued, they would have done so at cheaper prices before or after the material time. There was no need for them to do so on the last three trading days of the year and there was likewise no need for them to purchase UET shares at increasingly higher prices. Mr Chong's evidence was that a genuine buyer would have spread its purchases of an illiquid security over a longer period of time to enable it to purchase at the lowest possible price and to minimise any price volatility. I agree, and it is evident that Pheim Malaysia did none of that despite the available opportunities. It did the opposite instead by buying shares of an illiquid counter at a time when trading volumes were thin and within a short span of time close to the end of the trading day (and year) by filling up the available sell orders.

83 Fifth, I observe the prices at which Pheim Malaysia purchased the UET shares at the material period were not seen again for the next six months. More significantly, on the first three trading days for 2005, UET's share price fell to $0.415, $0.405 and $0.39, prices similar to that before the material period. This suggested that the market also regarded the spike in UET's share price as an aberration. The defendants made much about the fact that Pheim Malaysia had managed to average down through its UET purchases at the relevant time, but the comparison with prices transacted more than eight months was not, *per se*, probative of genuine commercial demand for those shares.

84 In addition, the defendants had reasons for raising and setting the price of UET shares, which was to enable certain funds managed by the Pheim Group to outperform their respective benchmarks. I had pointed out earlier at [73] that the monetary gains from such outperformance were not significant, but that was beside the point. The defendants wanted to maintain their record of outperforming their benchmarks over the past years, especially that of their key fund which was featured in their promotional material. The gain that the defendants sought was reputational, and not monetary, in nature. In any case, the increase in UET's share price caused Pheim Group's funds to rise by more than $1million over the short span of three days, and this would by no means be an insignificant monetary gain, even if the money theoretically belonged to the clients.

85 When all the above factors are considered cumulatively, I am left with little doubt that the defendants' primary purpose behind the UET trades at the material time was to raise and set the UET share price at the desired level, even taking into account the fact that more cogent evidence was necessary to establish the serious charges levelled against the defendants here. I would also note that Rule 13.8.2(4) of the SGX's Practice Note states that:

> A fund manager's quarterly performance will improve if the valuation of his portfolio at the end of the quarter in question is higher. By placing a large order to buy relatively illiquid shares, which are also components of his portfolio, to be executed at or just before the close, his purpose might be to distort the price in his favour.

86 I agree with the MAS that the facts of the present case are on all fours with the example provided by the SGX in its Practice Note. Mr Friets himself admitted during cross-examination that if this SGX rule was applicable, the present facts would have raised concerns. Similarly, in *Black on Market Manipulation*, the learned author helpfully listed out some of the circumstantial indicators of a manipulative intent, as follow (at p 997):

> … consistent increases in a trader's bid to acquire shares from the previous sale price

("upticking"); *the making of purchases and sales at successfully higher prices ("ramping"); allowing a trader to dominate the market and artificially set market prices; and placing actual bids at or near the close of trading, causing the stock to close at a higher price than the previous sale price*. However, these factors do not necessarily indicate a manipulative intention. For example, trading towards the close of the trading day, which leads to an increase in the closing prices of listed securities on market, may involve a manipulative intention. Equally, that trading may involve legitimate purchases to top up acquisitions made during the course of the day, after a buyer knows the number of shares purchased in earlier transactions. It is more likely that such trading is manipulative if it *occurs in small parcel of shares*, or if the buyer *regularly places orders late in the day* even if he or she does not have unfilled earlier orders; and if the buyer *has a benefit to be obtained* from a higher closing price…

[Emphasis added]

87 The above factors also cast doubt on the defendants' contention that they purchased those UET shares because it was undervalued. Even if the defendants regarded the UET shares as being undervalued, they would have sought to purchase UET shares at the lowest possible price. However, they failed to purchase UET shares at lower prices before and after the material time. Instead, the Defendants adopted the strategy of purchasing shares of an illiquid counter on the last three trading days of the year and within the last half an hour of trading on each day, by lifting the available sell orders, which served only to increase the cost of purchasing those shares. Given how Dr Tan was in control of both Pheim Malaysia and Pheim Singapore and was (as I have found) the person who gave Tang permission to execute the trades at the material time, there was ample reason for Pheim Malaysia to help Pheim Singapore in that sense. I therefore find that the purpose of entering into the UET trades at the material time was solely or primarily for the purpose of window dressing and was not the result of legitimate commercial demand, as the defendants claimed.

88 As a consequence, I find that both the defendants entered into (or gave instructions to carry out) the UET trades with the primary purpose of raising and then setting UET's share price. As such, MAS has succeeded in establishing its case based on the second limb to s 197(1)(b) of the SFA.

The law on creating a false and misleading appearance or doing anything likely to create a false appearance

89 Given my finding that the MAS has established its case under the second limb to s 197(b) of the SFA, there is no need for me to consider whether a false or misleading appearance was created or likely created.

90 I should, however, point out that these two limbs are not without their difficulties. Ostensibly, neither limb requires the prosecution or the MAS to prove the offender's *mens rea*: see also Tjio, Principles and Practice of Securities Regulation in Singapore (LexisNexis, 2004) at para 8.26 and *Securities Regulation in Australia and New Zealand* (Walker gen ed) (LBC Information Services, 2nd Ed, 1998) at 532-533.

91 However, every transaction that takes place on the market will inevitably have an impact on the price of the security traded: see Huang, *Redefining market manipulation in Australia: The role of an implied intention element* (2009) 27 CSLJ 8 at 16. As such, the fact that the trade has (or may have) a material effect on the share price should not, on its own, render that trader liable to prosecution under s 197 of the SFA. As A/Prof Loke observed in *The investors' protected interest against market manipulation in the United Kingdom, Australia and Singapore* (2007) 21 AJCL 11 ("*Investors' Protected Interest against Market Manipulation*") at 55:

> Significant price movements resulting from one's trade may not support the inference of a false market or a misleading price. Suppose CD Ltd purchases a very large bloc of shares through a succession of orders. This necessarily moves the prices upwards. *The trading, however, is not necessarily manipulation -- for one may have very legitimate reasons for making the purchase. One may be building up a beachhead by which to make a takeover bid. Such stake-building prior to reaching the point where a mandatory offer is triggered is very much a feature of the takeover regimes in the United Kingdom, Australia and Singapore*. Thus, unless there are good reasons for prohibiting all manners of stake-building, anti-manipulation laws should not prevent such an activity.
>
> [Emphasis added]

92 I recognise that there may be a strong argument in favour of looking beyond the effects of the trade and assessing the trader's intentions and motives in determining whether a false or misleading appearance was created or likely to be created. To hold otherwise may be detrimental to the efficient operation of the capital markets as it could discourage traders from trading actively. As such, in Baxt on Securities Law, the learned authors postulated that (at para 1407):

> In order to determine whether s 1041B has been contravened, it will be necessary to determine whether the appearance created by the relevant act ... is false or misleading. For example, a sale of a large parcel of shares over a short time may lead to a reduction in the price of securities on-market, by satisfying demand for the securities at the then market price. However, the mere fact that the sale gives rise to an appearance as to the price of securities which differs from that which might exist in the absence of that sale does not give rise to a contravention of s 1041B(1). Equally, the fact that the price of securities may increase where an on-market bidder is standing in the market to acquire securities does not give rise to a contravention of s 1041B(1), even if the price of the securities would have been lower had that bid not been made. On the other hand, acquisitions of shares in a target company during a takeover bid are likely to contravene s 1041B(1), if *the real purpose* of the acquirer is to support the market price of shares in the company so as to either frustrate the takeover bid or force the bidder to increase its offer price. *A contravention of s 1041B(1) would not be established merely because the sale or purchase of financial products on a financial market leads to a change in price at which those products are traded on that market, if the trader's purpose in undertaking that transaction is a legitimate one*.
>
> [Emphasis added]

93 However, such an approach would effectively compress the three limbs in s 197(1) of the SFA into one limb, which is to be assessed with reference to the intention or primary purpose behind the transaction. It is not necessary for me to express a concluded view on this topic, but I would align myself with A/Prof Loke's views that (*Investors' Protected Interest against Market Manipulation* at pp 57-58):

> It is certainly true that the statutory formulation admits of an objective test that permits conviction based on conduct that is likely to create a false or artificial market. None the less, the issue of whether a price is artificial cannot be solely determined by the new equilibrium brought about by one's orders. There must be something wrongful about these orders that result in a false or artificial market. *At best, the false or artificial market is linked to one's motivations for giving the orders. The quality of the market -- whether it is false or artificial -- is often informed by one's motivation*.

[Emphasis added]

Conclusion on s 197 of the SFA

94 For all the reasons set out above, I find that MAS has established its case on a balance of probabilities, that the defendants had, by entering into the UET trades at the material time, intended to create a false or misleading appearance to the market for and price of UET shares, under s 197(1) of the SFA.

Payment of Civil Penalty

95 Under s 232 of the SFA, both defendants are liable to pay a civil penalty. As I mentioned earlier, MAS sought a significant civil penalty amounting to $1m from each of the defendants, primarily on grounds of deterrence, the seriousness, deliberateness and impact of the breach and the conduct following the breach. On the other hand, the defendants sought the minimum penalty, arguing that there was no major impact on the market and the contravention was not the most severe. They highlighted that Pheim Malaysia only earned $115 in additional management fees and that Dr Tan did not make any profit or avoid any loss from the trades. The penalty suggested by the MAS was disproportionate since Pheim Malaysia made an annual profit of only $1.2m in 2004. The increase in value of the funds also did not benefit the defendants as the money belonged to its clients.

96 Under s 232(3) of the SFA, if the court is satisfied on a balance of probabilities that the person contravened a provision [regarding market conduct] which did not result in his gaining a profit or avoiding a loss, the minimum and maximum penalties that the court can impose are $50,000 and $2m respectively. On the one hand, I accept that there is a need for deterrence since such offences undermine the effectiveness and efficiency of the securities market, and are often insidious and difficult to detect. I also accept that the defendants' conduct here was deliberate, calculated and intentional. Although Dr Tan is an individual, his involvement in the UET trades was significant as he was a key figure within the Pheim Group and had given the orders to execute the trades at the relevant time. However, the civil penalty to be imposed on the defendants cannot be disproportionate. The financial advantages obtained by the defendants were not significant. The adverse publicity and possible regulatory actions that the defendants may face would also affect the defendants' reputation as a fund manager.

97 Taking all these factors into consideration, I am of the view that a fine of $250,000 each for Pheim Malaysia and Dr Tan would serve as a sufficient deterrence and be proportionate in the circumstances and I so order.

98 I also award costs in favour of MAS to be taxed on a standard basis unless otherwise agreed.