Tan Chong Koay and another *v* Monetary Authority of Singapore [2011] SGCA 36

Case Number	: Civil Appeal No 186 of 2010
Decision Date	: 22 July 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Vinodh Coomaraswamy SC, Edmund Eng, Stephanie Wee and Victoria Ho (Shook Lin & Bok LLP) for the appellants; Cavinder Bull SC, Yarni Loi, Gerui Lim and Wong Liang Wei (Drew & Napier LLC) for the respondent.
Parties	: Tan Chong Koay and another — Monetary Authority of Singapore

Financial and Securities Markets – Fund management

Financial and Securities Markets – Regulatory requirements – Market conduct

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 1 SLR 348.]

22 July 2011 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Dr Tan Chong Koay ("Dr Tan") and Pheim Asset Management Sdn Bhd ("Pheim Malaysia") (collectively, "the Appellants") against the judgment of the High Court judge ("the Judge") in *Monetary Authority of Singapore v Tan Chong Koay and another* [2011] 1 SLR 348 ("the Judgment") ordering each of them to pay to the respondent, *viz*, the Monetary Authority of Singapore ("MAS"), a civil penalty of $250,000 for infringing s 197(1)(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA").

Background facts

2 Dr Tan founded Pheim Malaysia and Pheim Asset Management (Asia) Pte Ltd ("Pheim Singapore"), which are licensed to carry on fund management business in Malaysia and Singapore respectively. We shall refer to these companies collectively as "the Pheim Group". At all material times, Dr Tan was the largest shareholder, chief executive officer and chairman of the investment committees for Pheim Malaysia and Pheim Singapore. Dr Tan was managing very successfully the business of the Pheim Group, which, during the relevant period, had assets of about US$560m (about S$1bn). As at 2004, the Pheim Group had consistently recorded profits each year since it was established, except for 1998, when Pheim Singapore did not record a profit.

3 At all material times, the Pheim Group had 15 accounts holding United Envirotech Ltd ("UET") shares – five managed by Pheim Malaysia (*viz*, Accounts 89, 90, 91, F5 and 98 (collectively, "the Malaysian Accounts")) and ten managed by Pheim Singapore ("the Singapore Accounts"), which included Accounts 28, 101 and 106. At the close of trading on 27 December 2004, the Malaysian Accounts held 5,135,000 UET shares and the Singapore Accounts held 11,469,000 UET shares.

4 Pheim Malaysia started investing in UET shares in April 2004 when it acquired 2,300,000 UET shares in an initial public offering ("IPO") by UET at $0.47 each. Trading in UET shares listed on the Singapore Exchange Limited ("SGX") commenced on 22 April 2004. On 23 April 2004, Pheim Malaysia bought one million UET shares at $0.589 each (900,000 for Account 89 and 100,000 for Account 91). On 5 May 2004, the price had dropped to $0.475 per share when Pheim Malaysia bought another 250,000 UET shares for Account F5. On 7 June 2004, the price had dropped to $0.40 per share when Pheim Malaysia bought another 100,000 UET shares for Account 98. Pheim Malaysia continued to buy UET shares in various quantities for its accounts until 17 September 2004 (at which point the price had dropped to $0.385 per share) when it bought another 35,000 UET shares for Account F5. The lowest price at which Pheim Malaysia bought UET shares during this period was on 13 September 2004, when it bought 20,000 shares for Account F5 at $0.34 each. As can be seen, all the purchases made after May 2004 were at prices below the IPO price.

5 On 15 December 2004, Pheim Malaysia's investment committee held a meeting (at which Dr Tan was present) and decided to increase Pheim Malaysia's investment in UET shares for Accounts 89, 90 and 91 "in anticipation of better results going forward". [note: 1] One Tan Keng Lin ("Ms Tan") and one Ng Wai Ling (who were two of Pheim Malaysia's fund managers) were authorised to implement the decision. However, no purchases of UET shares were made from the time of this meeting until the last three trading days of the year, *viz*, 29 to 31 December 2004 ("the Relevant Period"), even though UET shares were traded on the SGX (albeit in low volumes) from 17 December 2004 until 27 December 2004. The volume of UET shares traded on the SGX from 15 December 2004 to 28 December 2004 and the prices at which they were traded during this period were as follows:

Date (in 2004)	Last traded price per share	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			

Included among these market trades was a sale by Pheim Singapore of 207,000 UET shares on or after 23 December 2004 at an average price of $0.359 per share in order to liquidate an account that was being terminated.

6 On 29 December 2004, Dr Tan and Pheim Malaysia initiated a series of telephone conversations with one Tang Boon Siah ("Tang"). Tang was a remisier working for UOB Kay Hian Pte Ltd who was known as Dr Tan's favourite broker. These telephone conversations resulted in Tang buying a total of

360,000 UET shares for Pheim Malaysia during the Relevant Period costing a total of $152,470.95 at a weighted average price of $0.424 per share. It may be noted that Tang did not post any "buy" bids on the SGX's board. All his purchases were acceptances of "sell" bids made by independent sellers. The full particulars of these trades are tabulated at [20]–[26] of the Judgment. As found by the Judge, all (except one) of the purchases made by Tang during the Relevant Period were made between three seconds and 35 minutes from the close of each trading day even though many of the telephone calls by Dr Tan or Pheim Malaysia to Tang were made early in the morning of the trading day. For example:

(a) On 29 December 2004, Dr Tan telephoned Tang at 8.04am. This was followed by a call from Pheim Malaysia to Tang at 9.14am and then by three more calls between 9.37am and 12.28pm. All these were short calls lasting between 24 seconds and 2 min 20 sec. As at 12.28pm, Tang had not purchased any UET shares for Pheim Malaysia. But, at 4.44.49pm, Tang, after talking to Dr Tan, bought 14,000 UET shares at $0.38 each. Between 4.50pm and 4.59pm, he made three more purchases of 25,000, 20,000 and 5,000 UET shares respectively, all at the price of $0.385 per share, and made a final purchase of 1,000 UET shares at $0.41 each at 4.59.32pm.

(b) On 30 December 2004, Tang telephoned Pheim Malaysia at 9.00am. This was followed by a series of telephone calls between Tang and Pheim Malaysia and between Tang and Dr Tan from 9.45am to 2.23pm. Tang made a single purchase of 30,000 UET shares at $0.40 each at 2.23pm. During the day, there were a few more telephone calls between the three parties. At 4.23pm, Dr Tan telephoned Tang in a call lasting 1 min 33 sec. About 30 seconds after the end of this call, at 4.25pm, Tang made the first of six purchases of UET shares, starting with 12,000 UET shares at $0.405 each and then at successively higher prices, ending with the purchase of 25,000 UET shares at $0.43 each. Tang then called Dr Tan at 4.50pm, and during this call (which lasted 1 min 1 sec), Tang bought a further 20,000 UET shares at $0.435 each. This was followed by four more purchases, the last three of which were at the price of $0.44 per share. Tang then called Dr Tan again at 4.57pm, and during this 43-second conversation, Tang bought another 40,000 UET shares at $0.45 each. Tang then made his final purchase of the day of 8,000 UET shares at $0.455 each at 4.59.56pm, four seconds before trading closed for the day.

(c) On 31 December 2004, Dr Tan telephoned Tang at 8.59am, who in turn telephoned Pheim Malaysia at 9.05am. This was followed by three telephone calls from Tang to Dr Tan between 9.22am and 11.33am. At 12.18pm, 12 minutes before the close of trading for that day, Tang telephoned Dr Tan. At 12.20pm, Tang bought 10,000 UET shares at $0.435 each (by resorting to the "force key" function as the price of $0.435 was more than six bids away from the last traded price of UET shares that day, which was $0.39 per share). Following this, Tang made four more purchases of UET shares, starting with 10,000 UET shares at $0.435 each, then 40,000 UET shares and 20,000 UET shares, both at $0.44 per share, ending with a final purchase of the day of 5,000 UET shares at $0.445 each at 12.29.57pm, just three seconds before trading closed for the day.

7 Following these purchases, the closing price of UET shares rose from $0.38 per share on 27 December 2004 to $0.445 per share on 31 December 2004, a rise of about 17%. This increase in price resulted in: (a) the net asset value ("NAV") of the Malaysian Accounts and the Singapore Accounts increasing by a total of $1,086,989; (b) three of Pheim Singapore's accounts (namely, Accounts 28, 101 and 106) outperforming their benchmark returns for 2004 (which would not otherwise have occurred); and (c) Pheim Singapore earning an additional $50,000 in fees arising from the outperformance.

8 Pheim Malaysia stopped buying UET shares immediately after the Relevant Period. On 3 January

2005, the first trading day of the new year, the closing price of UET shares was $0.415 each. The closing price dropped to $0.38 per share on 13 January 2005 and rose to $0.405 per share on 18 January 2005, with the trading volume per day during this period ranging from 10,000 to 130,000 UET shares. A total volume of 473,000 UET shares were traded between 3 and 18 January 2005. The next time Pheim Malaysia bought UET shares was on 19 January 2005, when it bought 205,000 UET shares at a weighted average price of $0.416 per share for Account F5. Dr Tan gave evidence that this purchase was done to average down the book value of the UET shares in that account.

9 Pheim Malaysia began selling 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 2,835,000 UET shares at a weighted average price of $0.53 per share. By 2007, Pheim Malaysia had sold all its UET shares as it took the view that UET's prospects had dimmed.

MAS's pleaded claim

10 On the basis of the facts set out at [6]–[7] above, MAS commenced proceedings under s 197(1)(*b*) of the SFA for a civil penalty to be imposed on the Appellants on the following grounds:

(a) Pheim Malaysia's purchases of UET shares during the Relevant Period on the instructions of Dr Tan created a false and/or misleading appearance with respect to the market for and/or the price of UET shares during the Relevant Period;

(b) further, and in the alternative, the said purchases were intended to create a false and/or misleading appearance with respect to the market for and/or the price of UET shares during the Relevant Period; and

(c) further, and in the alternative, the said purchases were likely to create a false and/or misleading appearance with respect to the market for and/or the price of UET shares during the Relevant Period.

The Appellants' defences

11 Dr Tan's defence at the trial consisted of bare denials that he had given any specific instructions to Tang to buy the UET shares in question at the volumes and prices pleaded by MAS and that such purchases had the effect pleaded by MAS as outlined at [10] above. Pheim Malaysia's defence was that its fund manager, Ms Tan, had instructed Tang to buy UET shares during the Relevant Period. This followed a decision made on 7 July 2004 by Pheim Malaysia's investment committee that Pheim Malaysia should consider increasing its investment in UET because of the bright industry outlook and possible rising profit. This view was maintained at meetings of Pheim Malaysia's investment committee on 2 September 2004 and 15 December 2004. Also, on 2 November 2004, 12 November 2004 and 21 December 2004, UET had made positive announcements about its future business. Hence, Pheim Malaysia argued that its purchases of UET shares during the Relevant Period were for the purpose of legitimate investment and not for the purpose alleged by MAS. Pheim Malaysia also pleaded that after selling its shares in another SGX-listed company, *viz*, Azeus Systems Holdings Ltd ("Azeus"), for $815,000 on 28 December 2004, it wished to replace its shareholding in Azeus with another non-Malaysian security, and UET was an obvious replacement.

The prohibitions in s 197(1) of the SFA

12 Section 197(1) of the SFA provides as follows:

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.

Section 197(1) creates two offences – one relating to active trading in any securities, and the other relating to the market for or the price of such securities. The two offences can be committed in three ways: (a) by creating a false or misleading appearance of active trading in, the market for or the price of securities; (b) by doing anything that is intended to create such a false or misleading appearance; or (c) by doing anything that is likely to create such a false or misleading appearance. The second prohibited act expressly requires the presence of an intention to create a false or misleading appearance before liability can be imposed. There is no clear authority as to whether the other two prohibited acts require proof of intention or some other kind of *mens rea* in order to establish liability under s 197(1).

The decision of the Judge

13 The Judge held, on the facts, that MAS had proved its claim only in so far as the Appellants' purchases of UET shares during the Relevant Period were done with the intention of creating a false or misleading appearance with respect to the price of UET shares (*ie*, the Judge based her decision on the second limb of s 197(1)(*b*) alone). She did not decide whether the said purchases in fact created such an appearance or whether they were likely to create such an appearance (*vis-à-vis* the first and third limbs respectively of s 197(1)). The Judge declined to consider the Appellants' liability with respect to those two limbs of s 197(1) because it was not clear whether, as a matter of statutory construction, liability under those limbs required an element of *mens rea* (see [89]–[93] of the Judgment).

14 The Judge rejected the Appellants' arguments that their actions were not intended to create a false or misleading appearance as to the market price of UET shares. In this regard, the Appellants had submitted that: (a) the purchases of UET shares during the Relevant Period were effected through their broker, Tang, who had full discretion to buy UET shares at such prices as he thought fit; (b) the purchases were genuine and were based on legitimate investment purposes as UET shares were undervalued at that time; (c) the UET shares in question were bought to average down the cost of Pheim Malaysia's holdings; and (d) the fact that the relevant accounts of Pheim Singapore (*viz*, Accounts 28, 101 and 106) outperformed the company's internal benchmarks was an incidental consequence of the purchases.

15 The Judge also rejected the Appellants' explanation that Pheim Malaysia did not make purchases of UET shares before the Relevant Period (*ie*, before the last three trading days of 2004) because Accounts 89, 90 and 91 had reached their foreign equity limits of 10% and their equity limits (for both foreign and Malaysian equities) of 60% (for Accounts 89 and 90) and 20% (for Account 91) respectively, and Pheim Malaysia therefore had to wait until after it sold its Azeus shares on 28 December 2004 before it could purchase UET shares during the Relevant Period. The Judge found on the evidence that Pheim Malaysia could have purchased UET shares before 29 December 2004 for some or all of the relevant accounts without breaching those regulatory limits (see [55]–[56] of the Judgment).

The parties' arguments on appeal

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16 Before us, the Appellants argued that the Judge's decision was wrong on the following grounds (which were substantially a reiteration of the grounds that the Judge had rejected):

(a) the purchases of UET shares during the Relevant Period were made for legitimate commercial reasons as part of Pheim Malaysia's strategy of investing in undervalued shares generally and of increasing its investment in UET shares specifically;

(b) the purchases were genuine as they were made by Tang at his discretion at the lowest available prices;

(c) the sellers of the UET shares in question were genuine sellers who independently offered to sell their UET shares in the market's "sell" queue at the prices which they posted; and

(d) the Appellants had no motive to trade with the intention of creating a false or misleading appearance with respect to the price of UET shares and their primary purpose was not to set the market price of those shares.

In short, the Appellants contended that the evidence was insufficient to justify the Judge inferring that the primary purpose of the Appellants in effecting the said purchases of UET shares was to create a false or misleading appearance in relation to the price of UET shares.

17 MAS's response to the Appellants' arguments was likewise a reiteration of the grounds which the Judge had accepted. However, MAS further contended that the Appellants were also liable under its alternative claims based on the first and third limbs of s 197(1)(*b*) of the SFA, *ie*, it contended that the Appellants had created a false or misleading appearance with respect to the price of UET shares (*vis-à-vis* the first limb of s 197(1)(*b*)) and that their actions had also been likely to create such an appearance (*vis-à-vis* the third limb of s 197(1)(*b*)).

Our decision

The Judge's findings of fact

18 We are unable to agree with the Appellants' argument that the Judge's inferential findings of fact were wrong. We accept her finding that the pattern of the Appellants' trades in UET shares during the Relevant Period showed that the purpose of those trades was to set the price of UET shares for the end of the trading year in 2004. The Appellants' pattern of trading was not consistent with either the actions of an investor who genuinely believed that UET shares were undervalued or those of a "contrarian" investor (as contended by the Appellants). Pheim Malaysia stopped buying UET shares in September 2004 after acquiring a total of 5,135,000 UET shares for its funds (the last purchase being the purchase on 17 September 2004 of 35,000 UET shares at the price of $0.385 each), and did not resume buying UET shares again until 29 December 2004. From 17 to 28 December 2004, UET shares were traded (thinly) at prices of between $0.355 and $0.39 per share. Notably, during this period, Pheim Singapore sold a total of 207,000 UET shares in the market at an average price of $0.359 per share on or after 23 December 2004 in order to liquidate one of its accounts. Pheim Malaysia could have purchased those UET shares from Pheim Singapore, but did not do so. The Judge rejected Dr Tan's explanation that Pheim Malaysia did not buy the 207,000 UET shares sold by Pheim Singapore because the Pheim Group had an internal practice of not allowing one company to buy from the other. We agree with the Judge that this explanation was not credible. Pheim Malaysia's omission to acquire the 207,000 UET shares sold by Pheim Singapore is also inconsistent with its argument that it bought UET shares a week later at *higher* prices to average down the cost of the

UET shares in its books.

19 The evidence supports the Judge's finding that the primary purpose of the Appellants' purchases of UET shares during the Relevant Period was to increase the year-end valuation of the investments held in the various funds managed by the Pheim Group. The *modus operandi* was to increase the last traded price of UET shares for each day over a period of three days. This is borne out by the pattern of Pheim Malaysia's purchases of UET shares. It bought 1,000 UET shares at $0.41 each at 4.59.32pm (*ie*, 28 seconds before the close of trading) on 29 December 2004 *after* it had earlier bought on the same day 64,000 UET shares at the lower average price of approximately $0.333 per share between 4.44pm and 4.59pm. Dr Tan explained that Tang had exercised his discretion to round off the purchases for the day to 65,000 UET shares. We do not find this explanation credible as no commercial purpose was served by the final purchase of 1,000 UET shares at 4.59.32pm – by then, Pheim Singapore and Pheim Malaysia were already holding, respectively, 11,469,000 and 5,135,000 UET shares (not counting the UET shares Tang purchased for Pheim Malaysia earlier that day). In our view, the purchase of 1,000 UET shares at $0.41 each at 4.59.32pm was wholly consistent with the purpose of increasing the closing price of UET shares for that trading day as a precursor to the next day's trading. On the next day (30 December 2004), two trades of UET shares were done by other parties at $0.37 per share, but, at 2.23pm, Tang purchased 30,000 UET shares at the price of $0.40 per share. At 4.59.56pm, just before the close of trading, Tang's trades had set the closing price for the day at $0.455 per share, up by about 11% from the previous day's close. The same thing happened on 31 December 2004: at 12.29.57pm that day, just 3 seconds before the close of trading, Tang made the last purchase of 5,000 UET shares at $0.445 each. Equally telling is the fact that Pheim Malaysia did not buy any UET shares in the new trading year until 19 January 2005, when it bought 205,000 UET shares at a weighted average price of $0.416 per share. There was no reason for Pheim Malaysia to suspend buying UET shares between 3 January 2005 (the first trading day in 2005) and 18 January 2005 if it really believed that UET shares had investment value at the price of $0.445 each.

20 On these facts, we are of the view that the Appellants intended to, and did, set the price of UET shares at the end of the trading year of 2004 at $0.445 each. The question that arises from this conclusion is whether the Appellants thereby violated any of the limbs of s 197(1)(*b*) of the SFA.

21 With reference to this question, we accept the Appellants' argument that the sellers of UET shares during the Relevant Period were genuine sellers. They were independent investors in UET shares who merely wanted to realise their investments by posting their "sell" offers on the SGX's queue system. However, it does not necessarily follow that because those "sell" offers were genuine offers, the Appellants' acceptances of those offers were also genuine "buys" in the sense of reflecting a genuine demand by the Appellants for the shares in question. A finding of a genuine demand on the Appellants' part would require a finding that the Appellants' purchases of UET shares during the Relevant Period were made as a genuine investment and not for some other extraneous or illegitimate purpose, as will be seen below. We shall address the issue of whether the Appellants' demand for UET shares during the Relevant Period was genuine, *ie*, whether the Appellants' purchases of these shares were or were not made for an extraneous purpose. However, because this issue is intrinsically linked with the interpretation of the second limb of s 197(1) of the SFA, the scope of liability under that limb will be examined first as a preliminary point.

Liability under the second limb of s 197(1) of the SFA

22 Section 197(1) of the SFA is derived from Australian legislation and is identical to the now-superseded s 998(1) of the Corporations Law (Cth) ("ACL"). As s 998(1) of the ACL has been discussed and interpreted by the Australian courts, we now examine their decisions to guide us in

determining the scope of the second limb of s 197(1) of the SFA.

23 We start with *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd and others* (1998) 28 ACSR 58 ("*Fame Decorator*"), although it is not the first decision on s 998(1) of the ACL. In that case, the appellant, Fame Decorator Agencies Pty Ltd ("Fame"), held both ordinary and convertible preference shares in Jeffries Industries Ltd ("Jeffries"), a listed public company. Fame became entitled to convert its preference shares in Jeffries into ordinary shares on a particular date. The applicable formula for conversion was such that the lower the average sale price of ordinary shares in Jeffries during the 20 trading days before the conversion date ("the applicable 20-day period"), the greater the number of ordinary shares that would be allotted upon conversion. Shortly before the close of trading on the last trading day of the applicable 20-day period, Fame sold a number of ordinary shares in Jeffries which had the effect of bringing the market price for Jeffries shares down substantially (by 63% from midday to the end of that trading day). The trial judge held that Fame had acted in contravention of s 995 (which corresponds to s 201(*b*) of the SFA) and/or s 998 of the ACL. Fame appealed.

24 The New South Wales Court of Appeal (by a majority) dismissed the appeal. In relation to s 998(1) of the ACL, Gleeson CJ (with whom Powell JA agreed) said at 62–63:

> This provision [s 998(1)] is the current Australian counterpart of ... s 70 of the Securities Industry Act 1970 (NSW) ... In *North v Marra Developments Ltd* (1981) 148 CLR 42 [("*North*")] …, a case concerning s 70 of the Securities Industry Act 1970 (NSW) Mason J said, at CLR 58–9:
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> > In terms the statutory prohibition is directed against activity which is designed to give the market for securities or the price for securities a false or misleading appearance … It is not altogether easy to translate the generality of this language into a specific prohibition against injurious activity, whilst at the same time leaving people free to engage in legitimate commercial activity which will have an effect on the market and on the price of securities. *Purchases or sales are often made for indirect or collateral motives, in circumstances where the transactions will, to the knowledge of the participants, have an effect on the market for, or the price of, shares. Plainly enough, it is not the object of the section to outlaw all such transactions*.
> >
> > *It seems to me that 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*.
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> The concluding sentence is directly in point in this case.
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> Mason J went on to reject the suggestion that s 70 struck only at fictitious or colourable transactions.
>
> This approach accords with United States authority on similar legislation, where a price reflecting basic forces of supply and demand working in an open, efficient and well-informed market, is contrasted with an artificial price resulting from manipulative conduct: see eg, *Cargill Inc v Hardin* 452 F 2d 1154 (1971); *Freeman v Laventhol & Horwath* 915 F 2d 193 (1990).
>
> 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*.

There is a difference between the market and the individual buyers who had current bids immediately before the close of trading on 28 April 1995 [*ie*, the last trading day of the applicable 20-day period]. *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 [the trial judge] 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]

25 In relation to s 995 of the ACL (corresponding to s 201(*b*) of the SFA, which is not relevant in the present appeal), the majority judges held (at 63) that although the purchasers of the Jeffries shares sold by Fame on the last trading day of the applicable 20-day period were not misled by Fame's acceptance of their offers to buy those shares, Fame's conduct infringed s 995 in that it was likely to mislead or deceive third parties who were interested in Jeffries shares into believing that the market prices reflected the genuine interaction of the forces of supply and demand. Those third parties would not have expected that Fame (the seller on the last day of the applicable 20-day period) was seeking to sell to the lowest (rather than the highest) bidders in such a way as to eliminate the possibility of a higher bidder emerging.

26 Priestley JA dissented. He opined at 64–65 of *Fame Decorator*:

The appellant [*ie*, Fame] is a company whose actions were decided on and carried out by Mr O'Halloran. For simplicity, I will refer to him as the appellant.

…

The appellant did nothing in that market beyond selling shares in a way and for prices publicly on offer to any holder of those shares who wished to sell at those prices. His sales began after 3.52pm on Friday 28 April 1995 and ended by 4pm. At the close of trading the market price had fallen. On Monday 1 May 1995, the next day of market trading, the price rose. An observer of the events of the last eight minutes of trading on the Friday who understood the full publicly available facts relevant to Jeffries' shares would not have been deceived about the market price of those shares by what happened during those eight minutes.

What happened in the market happened because of the market's own mechanism. The appellant did nothing to that mechanism other than accept offers, made in accordance with market rules, to buy shares in Jeffries at set prices. The appellant had nothing to do with those offers being on foot. Anyone who knew how to find out what offers were on foot could get the information in a moment. Similarly, knowledge of the situation Jeffries had created, quite independently of the

> appellant, concerning its converting preference shares was publicly available. In doing what he did, the appellant was acting upon his own view of what would be to his advantage, on publicly available information, by selling shares in accordance with known market procedures, in circumstances which he had had no part in producing. This is the mainspring of ordinary market behaviour.
>
> In acting for his own advantage the appellant's purpose was not to create a false or misleading appearance with respect to the market for, or the price of, Jeffries shares; nor in my opinion did he in fact do so. His purpose was to bring about a close of market price which would be to his advantage when Jeffries did the calculation required by its conversion formula. On the same facts he in my opinion engaged in no conduct which was misleading or deceptive, or likely to mislead or deceive any person aware of the publicly available facts. The absence of any misleading effect of his conduct seems to me to be demonstrated by what actually happened in the market. There were no sales at the close-of-market price of 28 April, other than the appellant's. The next market day, sales were at higher prices.
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> …
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> I do not see how the appellant, doing nothing more than sell shares in accordance with market procedures, without collusion, connivance, prearrangement or even communication with any other person than his agent fell within the words either of ss 995 or 998 of the [ACL].

Did the Appellants violate the second limb of s 197(1)(b) of the SFA?

27 The present case is the converse of *Fame Decorator* in that the Appellants' purpose was to set a price sufficiently *high* at the end of the trading year in 2004 so as to increase by a certain amount the value of the UET shares held by funds managed by the Pheim Group. The ultimate aim was to meet the internal annual performance benchmark set by the Pheim Group for those funds as a measure of their performance for the trading year.

28 The reasoning of the majority judges in *Fame Decorator* applies to the present case. Here, Pheim Malaysia's purchases of UET shares during the Relevant Period were made not because the Appellants genuinely believed that UET shares were undervalued at that time (significantly, Pheim Malaysia did not purchase all the UET shares that were offered for sale during the Relevant Period), but because the Appellants wanted to raise the valuation of those of the Pheim Group's funds which held UET shares. Although the sellers of UET shares during the Relevant Period were genuine sellers at the prices which they posted, the dominant buyer of UET shares then was Pheim Malaysia (it bought about 88% of all traded shares in UET during the Relevant Period), which was not a genuine buyer. The prices at which Pheim Malaysia purchased UET shares during the Relevant Period were not genuine prices in that they were not chosen as part of a legitimate investment strategy, but were instead chosen for the extraneous purpose of "setting or maintaining the market price" (as stated in *Fame Decorator* at 62, quoting *North v Marra Developments Ltd* (1981) 148 CLR 42 ("*North*") at 59). The market for UET shares during the Relevant Period did not reflect the forces of genuine supply and demand – the supply was genuine, but not the demand. Pheim Malaysia manipulated the price of UET shares by creating its own demand for such shares for an illegitimate purpose; its demand was an artificial demand created for a primary purpose other than for investment.

29 The Appellants' scheme to improve the nominal value of the Pheim Group's funds (by $1,086,989) and thereby meet the performance benchmark (of 5% growth) of several of its funds for the year ending 31 December 2004 was carried out with some skill, very little additional risk and small expenditure. Pheim Malaysia's outlay for the 360,000 UET shares purchased during the Relevant Period

was a mere $152,470.95, and, numerically, those 360,000 UET shares represented only an increase of 2.2% in the Pheim Group's pre-existing holdings of UET shares. However, those purchases increased the end-of-year value of the Pheim Group's funds by $1,086,989 and also caused the performance benchmarks of some of its funds to be met.

30 For these reasons, we agree with the Judge that the manner in which the Appellants' purchases of UET shares were carried out showed that those purchases were intended to create a false or misleading appearance with respect to the price of UET shares during the Relevant Period, and that the Appellants had therefore violated the second limb of s 197(1)(*b*) of the SFA.

31 Since we agree with the Judge on this finding, it is not necessary for us to consider whether the Appellants' purchases created or were likely to create a false or misleading appearance under, respectively, the first and third limbs of s 197(1)(*b*) of the SFA. However, MAS has also relied on these two limbs in this appeal and has submitted that proof of *mens rea* is not needed to establish liability under these two limbs. As such, we will, for the sake of completeness, state our views on MAS's submissions, although (as stated at [44] and [53] below) we shall not express any concluded opinion on this issue of interpretation in this judgment.

Does liability under the first and/or third limbs of s 197(1)(b) of the SFA require mens rea?

32 MAS has made two arguments as to why liability under the first and third limbs of s 197(1) of the SFA should not require proof of *mens rea*. The first argument is that since the second limb is expressed to be intention-based while the other two limbs are not, to impose a requirement of intention on the first and third limbs would be to contradict the statutory framework. The second argument is that to impose such a requirement would be to create a redundancy issue between, on the one hand, the first and third limbs and, on the other hand, the second limb. This is because in any case where the "primary purpose" test (*vis-à-vis* the intention to create a false or misleading appearance) is satisfied, liability under the second limb will always be established. Parliament, therefore, cannot have intended to import a requirement of intention into the first and third limbs as well, which would render them redundant. Accordingly, the court should give effect to the natural and ordinary meaning of the "create" and the "likely to create" limbs of s 197(1) (*ie*, the first and third limbs respectively). Counsel for MAS referred to the statements of some Australian courts (interpreting s 998(1) of the ACL) to the effect that liability for doing any act likely to create a false or misleading appearance should be based only on establishing the requisite *actus reus* on an objective test, with neither intention nor knowledge being a required ingredient of such liability. We shall now discuss the relevant Australian cases.

The Australian decisions

33 In *North*, Mason J (at 58–59) interpreted the former s 70 of the Securities Industry Act 1970 (NSW) ("the 1970 NSW Act"), which corresponded to s 97 of our Securities Industry Act (Cap 289, 1985 Rev Ed) ("the SIA") (itself repealed in 2002 by the Securities and Futures Act 2001 (Act 42 of 2001) and replaced by s 197(1) of the SFA), as follows:

> The relevant prohibition in the section is against creating, or causing to create, or doing anything which is calculated to create, "a false or misleading appearance with respect to the market for, or the price of, any securities".
>
> In terms the statutory prohibition is directed against activity which is designed to give the market for securities or the price of securities a false or misleading appearance. In this setting, "calculated" means "designed" or "intended" rather than "adapted" or "suited". It is not

> altogether easy to translate the generality of this language into a specific prohibition against injurious activity, whilst at the same time leaving people free to engage in legitimate commercial activity which will have an effect on the market and on the price of securities. *Purchases or sales are often made for indirect or collateral motives, in circumstances where the transactions will, to the knowledge of the participants, have an effect on the market for, or the price of, shares. Plainly enough it is not the object of the section to outlaw all such transactions*.
>
> [emphasis added]

It is not clear from this passage whether Mason J intended to say that liability for the prohibited act of creating a false or misleading appearance requires proof of an intention to create such an appearance. However, in Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2nd Ed, 2011) ("*Securities Regulation in Singapore*") at p 585, Prof Hans Tjio commented on *North* as follows:

> … Mason J … expressed the view that the provision, which referred to persons that 'create, or cause to be created, or do anything that is calculated to create …', required proof of intention. Such an interpretation would have ignored the first and second limbs of the offence, even as they were worded at that time.

Be that as it may, Mason J's statement in *North* (italicised above) would suggest that intention was a necessary element of liability under s 70 of the 1970 NSW Act because the object of the section was *not* to outlaw *all* purchases and sales which would, *to the knowledge* of the buyers and/or sellers, have an effect on the market for or the price of shares. Instead, the section was only intended to prohibit transactions whose primary purpose was to manipulate the ordinary forces of supply and demand in the market.

34 Section 70 of the 1970 NSW Act was subsequently repealed and replaced by s 998(1) of the ACL, which provided that "[n]o person shall create, or do anything that is intended or *likely* to create a false or misleading appearance" [emphasis added]. This new formulation of the prohibited acts gave rise to the question of whether the newly-introduced liability for doing anything "likely to create" a false or misleading appearance required proof of some form of *mens rea*.

35 In *Fame Decorator* (which we discussed earlier at [23]–[26] above), the majority of the Court of Appeal of New South Wales, in holding that there was a breach of s 998(1) of the ACL, merely adopted Mason J's observation in *North* that transactions undertaken for the sole or primary purpose of setting or maintaining the market price of shares would not be taken as reflecting a "genuine supply and demand" for those shares. The majority judges upheld (at 63) the trial judge's decision that "both the purpose and the effect of Fame's conduct was to create an artificial market price for shares in Jeffries and … such conduct contravened s 998". Thus, it would appear that both the first limb and the third limb of s 998(1) (even if intention were required under those limbs) were satisfied on the facts of that case.

36 The scope of s 998(1) of the ACL was subsequently considered by Sackville J in the Federal Court of Australia case of *Australian Securities Commission v Nomura International PLC* (1998) 160 ALR 246 ("*Nomura*"). In that case, Sackville J proceeded on the following basis (at 333):

> It was common ground that [the three limbs] of the prohibition in s 998(1) of the [ACL] are alternatives. Thus, in order to establish a contravention of s 998(1), it is enough to show that the alleged contravener did something that was intended or was likely to create a false or misleading appearance in one of the three respects specified in the subsection. If that is

established, it is not necessary also to show that the alleged contravener *actually* created a false or misleading appearance. … [emphasis in original]

At 337, he continued:

... It must be remembered that s 998(1) is not limited to conduct actually creating the relevant misleading appearance (in which case it will be known which securities are in fact the subject of a false or misleading appearance). The subsection applies to conduct intended or likely to have the proscribed effect, regardless of whether the proscribed appearance was in fact created.

…

This construction of s 998(1) seems to me to accord with the object of the section. As Mason J said in [*North*], in relation to [s 70] of the [1970 NSW Act], the object "is to protect the market for securities against activities which will result in artificial or managed manipulation". His Honour did not refer to the market for a *particular* security. Mason CJ [*sic*] also emphasised that s 998 seeks to ensure that "the market" reflects the forces of genuine supply and demand.

As the present case illustrates, a trader may engage in conduct intended or likely to bring about an artificial or managed manipulation of the market (in the form of misleading appearances of the kind identified in s 998(1)), yet it may not be possible to identify precisely which securities within a broader class will be the subject of the manipulation. ***This is not a reason for giving a prohibition a wider meaning than its language suggests. But it is a reason for giving effect to the ordinary meaning of the language in s 998(1). The fact that s 998(1) creates a criminal offence does not warrant a narrower construction than the ordinary meaning of the language suggests, especially where that meaning accords with the evident object of the provision. Unless this construction is adopted, the subsection may be unavailable in the case of large-scale market manipulation spreading across many securities, not all of which can be identified in advance*** .

[emphasis in original in italics; emphasis added in bold italics]

37 In relation to the meaning of the words "likely to create" and whether they included a requirement of *mens rea*, Sackville J opined (at 348):

… The introduction of the expression "likely to create" in s 998(1) of the [ACL] was clearly designed to cover conduct other than conduct intended to create any misleading appearance. By the words "likely to create", the drafter sought to prohibit conduct which, *objectively assessed*, was likely to create a false or misleading appearance and thus be likely to detract from the operation of the ordinary forces of supply and demand. The severity of the consequences attaching to a breach of s 998(1) are sufficiently recognised by construing "likely" to mean more probable than not.

This does not mean, of course, that the third limb of s 998(1) involves no mental element. *Doubtless, it is necessary to show that the alleged contravener intended to carry out the conduct relied on as creating the likelihood of a misleading or deceptive appearance. But I do not think it is necessary to prove that the alleged contravener was aware that the conduct would be likely to have a false or misleading appearance of the kind specified in s 998(1)*. However, as I have already indicated, it is not necessary to express a final view on this issue.

[emphasis added]

38 In *Nomura*, the court did not have to consider the scope of the first limb of s 998(1) of the ACL and, in particular, whether it required *mens rea* of some sort. For two of the impugned transactions, the first limb was deemed (at 339) to have been engaged due to the existence of a "wash trade" (also known as a "wash sale", as at [49] below) via s 998(5) of the ACL (similar to s 197(3)(*a*) of the SFA). As discussed below at [48]–[49], intention and knowledge are integral parts of such transactions. As a result, the *mens rea* requirement (if any) of the first limb (taken alone, without deeming provisions) was not considered. For the other transactions under examination in *Nomura* (at 343 and onwards), the court proceeded to examine liability under the third limb (see, *inter alia*, 348 (reproduced at [37] above)). We observe that in interpreting the third limb as not requiring knowledge or intention that an act was likely to create a false or misleading appearance to establish liability (the objective effect of the offender's conduct being of the essence), the result was (in our view) to render the first limb redundant as a basis for a prosecution or a claim for a civil penalty for breach of s 998(1). If an act has *actually created* a false or misleading appearance of the market for or the price of securities, it must perforce have been an act likely to do so. Hence, based on the approach adopted in *Nomura*, it would, for all practical purposes, be easier to prove a case of breach of s 998(1) by relying on a contravention of the third limb.

39 In *Donald v Australian Securities and Investments Commission* [2000] FCA 1142 ("*Donald*") at [25] and [27], the Federal Court of Australia also considered the scope of s 998 of the ACL. At [23]–[27] of *Donald*, Heerey J said:

> 23 A contravention of s 998 … is a criminal offence: s 1311 and Sch 3. Whether contravention requires mens rea is a question of statutory construction. The leading authority on the principles to be applied is the decision of the High Court in *He Kaw Teh v [The Queen]* (1985) 157 CLR 523; 60 ALR 449. Although mens rea means, literally, a guilty mind, it may take the form of different states of mind or indeed different states of mind in respect of different elements of the same offence (at 568 per Brennan J). Amongst other things the subject matter or character of the legislation must be looked at. As Dawson J said (at 595):
>
> > Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders.
>
> 24 In *Nomura* Sackville J was also concerned with the third limb of s 998(1) as identified above. His Honour found the contravener in fact knew that its conduct was likely to create a false and misleading appearance of active trading and as to the market for the price of securities. However his Honour went on to note his view that s 998(1) does not require proof of knowledge, at the time of the allegedly contravening conduct, that a false and misleading appearance was likely to be created by that conduct. After referring to *He Kaw Teh* his Honour said … [Here, Heerey J cited the passage from Sackville J's judgment reproduced at [37] above.]
>
> 25 I respectfully agree with his Honour's obiter view. It is also supported by an examination of other provisions of Div 2 of Pt 7.11 where the statute specifically provides for carefully differentiated states of minds, and in some cases no state of mind at all. Section 995(2) prohibits misleading or deceptive conduct in relation to dealings in securities. No mental element is specified. The section corresponds to s 52 of the Trade Practices Act 1974 (Cth) where it has long been established that proof of intention to engage in misleading or deceptive conduct is not required to establish a contravention. By contrast, s 997 prohibits carrying out two or more

transactions in securities which are likely to have the effect of increasing the price of those securities with a particular defined intent; namely an "intent to induce other persons to buy or subscribe for securities of the body corporate". A specific intention is also prescribed in s 998 itself. Subsections (5) and (6) are concerned with that part of s 998(1) which prohibits creating etc a false or misleading appearance of active trading in any securities. Subsection (5) stipulates certain forms of conduct which are deemed to create such an appearance, eg a transaction for the sale of securities which does not involve any change in beneficial ownership: s 998(5)(a). However if any of the deeming provisions are relied on s 998(6) provides a defence if it is proved that the purposes for which the person did the act did not include the purpose of creating a false or misleading appearance of active trading. Section 999 prohibits the making of a statement that is false in a material particular or materially misleading and is likely to induce other persons to subscribe for securities if the person making the statement "does not care whether the statement or information is true or false" or "knows or ought reasonably to have known" that statement or information is false in a material particular or materially misleading. Section 1001A(2) prohibits a "disclosing entity" contravening the provisions of the listing rules of a securities exchange by "intentionally, recklessly or negligently" failing to notify the securities exchange of certain information.

26 An example of different states of mind being required for different elements of the same offence is *Alphacell Ltd v Woodward* [1972] AC 824 where a statute made it an offence if a person "causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter". The House of Lords held there was no reason to read "knowingly" into the provision before "causes" and the concept of mens rea was inapplicable.

27 *I conclude therefore that the tribunal was not required to find the applicant knew or had in mind at the time of the contravening conduct that a false and misleading appearance were likely to be created by that conduct*. In any event, his statement already referred to indicates that he clearly intended a price to be set which would be different from that resulting from the operation of genuine supply and demand.

[original emphasis omitted; emphasis added in italics]

40 The reasoning of Heerey J in *Donald* was discussed and accepted by the Australian Administrative Appeals Tribunal in *JTMJ v Australian Securities and Investments Commission* [2010] AATA 350 ("*JTMJ*") at [125]–[127] *per* Dy President S A Forgie in relation to s 1041A of the Corporations Act 2001 (Act 50 of 2001) (Cth) ("the ACA 2001"). Section 1041A of the ACA 2001 prohibits market manipulation and provides as follows:

A person must not take part in, or carry out (whether directly or indirectly …):

(a) a transaction that has or is likely to have …

…

the effect of …

(c) creating an artificial price for trading in financial products on a financial market …

In *JTMJ*, Dy President Forgie expressed the view (at [127]) that Heerey J's construction of s 998(1) of the ACL in *Donald*, in so far as it referred to a person not creating or doing anything likely to have the proscribed effect, was equally applicable to the construction of s 1041A of the ACA 2001. He

further stated at [127]:

> … In its wider sense, s 998(1) [of the ACL] does not refer to mens rea by that name or by reference to purpose, intent or calculation and nor does s 1041A. Neither refers to a reason. Both exist in legislation in which reference is made to a mental element of some sort in other provisions. Section 1041A is directed to an effect as is s 998(1) although s 998(1) is wider in that it also draws in an intended effect. Both provisions are directed to the regulation of activity in circumstances in which proof of intent is likely to be difficult and the requirement that those engaged in that activity had to have a particular intent would represent a real impediment to the effectiveness of the regulatory scheme. These matters lead me to the view that a breach of s 1041A will be established if each of its criterion is met and *without any reference to a mental element on the part of the person whose actions are under consideration*. [emphasis added]

It should, of course, be borne in mind that the Deputy President's interpretation of s 1041A of the ACA 2001 is, strictly speaking, irrelevant to the scope of s 998(1) of the ACL. Nevertheless, both provisions have the same objective. As was aptly said by Goldberg J in *Australian Securities and Investments Commission v Soust* (2010) 77 ACSR 98 ("*Soust*") at [91] in relation to ss 1041A and 1041B(1)(b) of the ACA 2001, the latter of which replaced s 998(1) of the ACL and is analogous to s 197(1)(*b*) of the SFA:

> It is fundamental to the working of the free market forces of securities exchanges such as the [Australian Securities Exchange] that buyers are concerned to buy securities at the lowest possible price and sellers are concerned to achieve the highest possible price. Any different approach to the price for which securities are traded is a distortion of the interplay of the open market forces of supply and demand.

This observation applies equally to what MAS seeks to achieve in the SGX through Pt XII of the SFA.

41 Our examination of the Australian cases shows that the Australian courts and tribunals reached a general consensus that the third limb of s 998(1) of the ACL was concerned only with the likely effect of the alleged contravener's conduct, and not with his intention or knowledge. In relation to the second limb of s 998(1), they reached a broad consensus that liability for an intention to create a false appearance would be established if it could be shown that the primary purpose of an act was to create an artificial or unnatural market for or price of the relevant shares. In other words, the Australian courts and tribunals have taken the view that the second limb of s 998(1) covers situations where the acts of the alleged contravener, on account of their primary purpose, do not reflect the genuine forces of demand and supply for the shares concerned.

42 However, there has, to date, been no consensus on whether liability under the first limb of s 998(1) of the ACL (or its successor, s 1041B(1)(b) of the ACA 2001) requires any form of *mens rea*. In *North*, the finding of the High Court of Australia was that the impugned transactions were "calculated", *ie*, designed or intended, to create a false or misleading appearance. In *Fame Decorator*, the majority decision of the Court of Appeal of New South Wales (at 63) was that Fame's conduct had the *purpose* and the *effect* of creating an artificial market price for the shares in question. In *Nomura*, the question of *mens rea* in relation to the first limb of s 998(1) was avoided altogether (as discussed at [38] above). Furthermore, the court found (at 342–343) that the defendant in fact had the intention to create a false or misleading appearance. In *Soust*, Goldberg J (at [99]) found that the defendant had breached s 1041B(1)(b) of the ACA 2001 because his act had the *effect* of creating a false or misleading appearance: however, he also found (at [95]–[96]) that the defendant had the *purpose* of increasing and setting the market price for the relevant shares in that case.

The first and third limbs of s 197(1) of the SFA

43 We now turn to consider the scope of the first and third limbs of s 197(1) of the SFA. Thus far, there has been no authoritative judicial statement on this issue in our local jurisprudence. In *Chua Li Hoon Matilda and Others v Public Prosecutor* [2009] SGHC 116 ("*Chua Li Hoon Matilda*"), Choo Han Teck J interpreted s 97(1) of the SIA at [5]–[6] thus:

> 5 Turning first, to the offence of creating a false or misleading appearance of the price of securities, s 97(1) of the [SIA] states:
>
> > A person shall not create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a securities exchange in Singapore or a false or misleading appearance with respect to the market for, or the price of, any such securities.
>
> 6 For the offence to be made out, two elements can be derived from the clear wording of the provision. First, there must be a creation of a false or misleading appearance in regards to either the active trading in any securities on the stock exchange, or the market for, or the price, of securities. Second, it must be proved that the offender had the intention to create the false or misleading appearance.

In this passage, Choo J appeared to hold that the offence of creating a false or misleading appearance of the price of securities required proof of an intention to do so. It is not clear how he arrived at this interpretation. Although he made no reference to Mason J's judgment in *North*, his interpretation of s 97(1) of the SIA was consistent with Mason J's approach (see [33] above). Section 97(1) of the SIA has now been replaced by s 197(1) of the SFA, which includes a new prohibited act in the form of the third limb. The substitution of the words "intended to create" in the second limb of s 197(1) of the SFA for the words "calculated to create" in s 97(1) of the SIA does not change the meaning of the provision: as Mason J said in *North* (at 58 (reproduced at [33] above)), the word "calculated" in s 97(1) of the SIA means the same thing as the word "intended" in s 197(1) of the SFA.

44 How then should we interpret s 197(1) of the SFA? There is no difficulty with the second limb of this provision as it is expressed to be intention-based. With respect to the third limb of s 998(1) of the ACL, two Australian judges (namely, Sackville J in *Nomura* and Heerey J in *Donald*) have expressed (*obiter*) views that the offender need not have any awareness that his actions are likely to create a false or misleading appearance. As s 197(1) of the SFA is worded in the same terms as s 998(1) of the ACL, it is arguably reasonable for our courts to interpret the third limb of s 197(1) of the SFA in the same way as the Australian courts have interpreted the third limb of s 998(1) of the ACL. However, for the reasons stated at [51] below, we have reservations about adopting such an interpretation, although it is not necessary for us to express a final view on the interpretation of the third limb of s 197(1) of the SFA in this judgment.

45 With respect to whether liability under the first limb of s 197(1) of the SFA requires the presence of *mens rea*, Choo J's judgment in *Chua Li Hoon Matilda* (*vis-à-vis* the then-equivalent of that limb, *ie*, the first limb of s 97(1) of the SIA) remains an authority for its interpretation until and unless it is overruled. Should it be overruled? Except for Mason J's *dicta* concerning the scope of s 70 of the 1970 NSW Act (which corresponded to s 97 of the SIA), we do not find the Australian cases decided after *North* particularly helpful as none of them has addressed this issue directly (see [42] above). It would seem that the Australian prosecutors and regulatory authorities were content to adopt the practical approach of pursuing market manipulators by relying on the second and/or third

limbs of s 998(1) of the ACL according to their assessment of the strength of the available evidence. It has not been necessary for the Australian prosecuting and regulatory authorities to invoke the first limb of s 998(1), nor has it been necessary for the Australian courts to pronounce on its scope in cases where the evidence was sufficient to prove a case under the second and/or third limbs (which seemed to be the situation in the reported cases). In cases where the first limb of s 998(1) (or the analogous s 1041B(1)(b) of the ACA 2001) was referred to such as *Fame Decorator* at 63, *Nomura* at 342–343 and *Soust* at [95]–[96], the courts found that, on the evidence, *both* the *purpose* of the offenders' conduct and their *effect* was to create a false or misleading appearance in respect of the market for and/or the price of the shares in question.

46 In *Nomura* (at 337), the court discussed the issue of whether, given that s 998(1) of the ACL created a criminal offence as well as a civil prohibition subject to a civil penalty, the provision should be construed narrowly. Sackville J expressed the view that the dual nature of s 998(1) did not warrant giving it a narrower construction than what the ordinary meaning of the language of that provision suggested, especially where that meaning accorded with the evident object of the provision. He was concerned that, having regard to the facts before him, unless a construction based on the ordinary meaning of the language used in s 998(1) was adopted, s 998(1) might be unavailable in the case of large-scale market manipulation spreading across many securities, not all of which could be identified in advance (see *Nomura* at 337 (reproduced at [36] above)).

47 What should our approach in interpreting s 197(1) of the SFA be? In the realm of criminal law, it is *prima facie* objectionable to penalise a person for doing a criminal act which he did not intend to do or did not know would be a criminal act. The criminal law punishes or penalises persons with guilty minds. If the law makes it an offence to do a negligent, rash or reckless act (which causes harm to the interests protected by criminal law, namely, life, liberty and property), it should say so expressly. However, regulatory laws are an exception to this principle as such laws are meant to protect the public interest rather than to condemn individual behaviour (see *He Kaw Teh v The Queen* (1985) 157 CLR 523 ("*He Kaw Teh*") *per* Dawson J at 595, which was quoted in *Donald* at [23] (reproduced at [39] above)). Most regulatory offences are strict liability offences and are expressed to be so.

48 In our view, s 197(1) of the SFA seems to incorporate both of the aforesaid elements of criminal jurisprudence. It is both a regulatory provision aimed at protecting the public interest as well as a prohibition designed to condemn manipulative market behaviour. Rigging the market is both an individually dishonest act and detrimental to the public interest in a clean securities market. Under the previous regulatory regime set out in s 97 of the SIA, it is possible that a mental element was implied, as Mason J indicated in *North* in relation to s 70 of the 1970 NSW Act, the New South Wales equivalent of s 97 of the SIA (see [33] above). In expressing that view, Mason J also stated that s 70 of the 1970 NSW Act was not intended to proscribe all transactions that would have an effect on the market for or the price of shares. Section 197(1) of the SFA has not changed this understanding. Section 197 of the SFA (excluding s 197(1)) provides as follows:

> **False trading and market rigging transactions**
>
> **197**. …
>
> (2) No person shall, by means of any purchase or sale of any securities that do not involve a change in the beneficial ownership of those securities, or by any fictitious transaction or device, maintain, inflate, depress, or cause fluctuations in, the market price of any securities.
>
> (3) Without prejudice to the generality of subsection (1), a person who —

(*a*) effects, takes part in, is concerned in or carries out, directly or indirectly, any transaction of purchase or sale of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;

(*b*) makes or causes to be made an offer to sell any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to purchase the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price; or

(*c*) makes or causes to be made an offer to purchase any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to sell the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price,

shall be deemed to have created a false or misleading appearance of active trading in securities on a securities market.

(4) In any proceedings against a person for a contravention of subsection (1) because of an act referred to in subsection (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.

(5) For the purposes of this section, a purchase or sale of securities does not involve a change in the beneficial ownership if a person who had an interest in the securities before the purchase or sale, or a person associated with the first-mentioned person in relation to those securities, has an interest in the securities after the purchase or sale.

(6) In any proceedings against a person for a contravention of subsection (2) in relation to a purchase or sale of securities that did not involve a change in the beneficial ownership of those securities, it is a defence if the defendant establishes that the purpose or purposes for which he purchased or sold the securities was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.

(7) The reference in subsection (3)(*a*) to a transaction of purchase or sale of securities includes —

(*a*) a reference to the making of an offer to purchase or sell securities; and

(*b*) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to purchase or sell securities.

49 Section 197(2) of the SFA applies to what are known as "wash sales", which are trades where the beneficial ownership of the shares traded does not change. Such transactions invariably create a false or misleading impression of the market for or the price of the shares being traded. This subsection does not expressly refer to intention or knowledge as the presence of both kinds of *mens rea* is an inherent feature of such kinds of transactions. Section 197(3) deems certain types of transactions to be prohibited by s 197(1)(*a*) (which relates to a false or misleading appearance of active trading in securities). But, where s 197(1)(*a*) is applicable by virtue of s 197(3), s 197(4) provides a defence to the defendant if he can prove that his purpose was not to create a false or

misleading appearance of active trading in securities. Section 197(6) provides a defence to a "wash sale" proceeding under s 197(2) if the defendant can show that his purpose was not to create a false or misleading appearance with respect to the market for or the price of securities (mirroring the language of s 197(1)(*b*)). Subsections (4) and (6) of s 197, in providing such defences, suggest that the first limb of s 197(1) is directed at the "purpose" of the defendant's sale or purchase of securities. It seems to us that, as a matter of language, if a defendant does an act with the purpose of creating a false or misleading appearance of the market for or the price of securities, his actions must necessarily be intentional. A purpose is a desired goal or objective, and a person cannot effectuate a purpose without doing an intentional act to achieve it. To prove the absence of a specific "purpose" must therefore be equivalent to proving the absence of a specific "intention".

50 The legislative commandment, "[n]o person shall create …" in s 197(1) of the SFA is a straightforward prohibition framed in the same absolute terms as the Biblical sixth commandment, "Thou shalt not kill". But, the common law's approach is to excuse or reduce the culpability or responsibility of a person even for as serious an act as the killing of another if he does not have a guilty mind, *eg*, if he had no intention to kill or no knowledge that his acts would cause death. This approach is well put by Brennan J in the High Court of Australia's decision in *He Kaw Teh* at 567–568:

> … The penalties of criminal law cannot provide a deterrent against prohibited conduct to a person who is unable to choose whether to engage in that conduct or not, or who does not know the nature of the conduct which he may choose to engage in or who cannot foresee the results which may follow from that conduct (where those results are at least part of the mischief at which the statute is aimed). It requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and to make him criminally liable if his conduct turns out to be prohibited because of circumstances that that person did not know or because of results that he could not foresee. *However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur*. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the external elements of the offence. In *Lim Chin Aik* [*v The Queen* [1963] AC 160 at 174], Lord Evershed speaking for the Judicial Committee said:
>
> > "But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."
>
> The requirement of mens rea is at once a reflection of the purpose of the statute and a human protection for persons who unwittingly engage in prohibited conduct.
>
> [emphasis added]

Brennan J's statement of principle is well established in criminal jurisprudence, as can be seen from *Lim Chin Aik v The Queen* [1963] AC 160 at 174 and also *Gammon (Hong Kong) Ltd v Attorney-*

General of Hong Kong [1985] AC 1 at 14, both of which he referred to. A similar statement of principle by this court can be found in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [55].

51 The question, therefore, is whether there is anything in s 197(1) of the SFA to displace the common law presumption that a statute does not impose criminal liability without *mens rea* unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. It is arguable that there is nothing to displace such a presumption except for the existence of the second limb of s 197(1), which is expressly intention-based. It must be recognised that if s 197(1) proscribes the effects of an investor's activities in the securities market without considering his intention or knowledge regarding those effects, there would be nothing he could do in advance to prevent himself from incurring liability, short of not trading at all. In other words, he would be trading at his peril. This is arguably not the policy intention of s 197(1).

52 On the other hand, it is arguable that ss 197(4) and 197(6) of the SFA, in expressly providing certain defences to a defendant, indicate that s 197(1) is intended to be a strict liability offence except where a defence is expressly provided. Under ss 197(4) and 197(6), a defendant can rebut any charge against him under s 197(1) by showing that his actions were not done for the purpose of creating a false or misleading appearance of the relevant kind. It is common knowledge that no person who trades in the securities market does so without a purpose, whether he is a genuine investor, a speculator, a manipulator or an insider trader. The purpose is always to make a gain at the expense of someone else. A stock market performs a critical capital-raising or capitalisation function in the economy. But, it is also an institution through which investors with funds at their disposal or surplus capital (or, for some, borrowed funds) may invest their money for future gains. No one trades in securities without a purpose, even if he trades in a seemingly irrational manner. Most of the time, if not all the time, there is a method in a person's trades (unless his trades are done accidentally or inadvertently, such as when a person buys or sells at the wrong price or trades in the wrong volume by mistake). Hence, in the specific situations where ss 197(4) and 197(6) apply, if an innocent defendant's trades fall within the prohibited *actus reus* definitions in ss 197(2) or 197(3), it should not be difficult for him to explain his actions if called upon to do so.

53 All this having been said and the conceptual difficulties having been pointed out, we do not propose, in this judgment, to express a final view on Choo J's interpretation (in *Chua Li Hoon Matilda*) of the first limb of s 97(1) of the SIA or on the scope of the first limb of s 197(1) of the SFA, which replaced it. Similarly, it is not necessary for us to express a conclusive view on the scope of the third limb of s 197(1) of the SFA in this judgment. It may be that the *mens rea* of knowledge is invariably present, or even inherent, in any securities transaction that is likely to create a false or misleading appearance with respect to the market for or the price of the relevant securities. However, since s 197(1) of the SFA creates both a criminal offence as well as a civil prohibition subject to a civil penalty, we would not, in this case, wish to interpret, without hearing full arguments, the third limb to create a strict liability offence under which liability for the specified act can never be avoided even if the false or misleading appearance were created accidentally. MAS might wish to amend s 197(1) to make it clear whether and what kind of *mens rea* is required for liability under the first and third limbs of s 197(1). It may also wish to consider whether or not to distinguish between the *mens rea* requirements of the various limbs of s 197(1) according to whether the prohibited acts are prosecuted as criminal offences or pursued as civil penalty claims, as is done under the Australian legislation (see *JTMJ* at [89]–[91] and [127]–[129] and *Securities Regulation in Singapore* at p 587, note 119).

The quantum of civil penalty imposed on the Appellants

54 The Appellants have also appealed against the civil penalty of $250,000 imposed on each of them on the ground that it was excessive and disproportionate to the gravity of the infringement. Their arguments are as follows:

(a) Pheim Malaysia did not earn any outperformance fee, but, notionally, only an additional fee of $115 as a result of the UET share transactions;

(b) Pheim Malaysia's annual profit for 2004 was only $1.2m and the aggregate penalty imposed on the Appellants (*viz*, $500,000) represents about 40% of that profit;

(c) the increase in the NAVs of Pheim Malaysia's and Pheim Singapore's funds did not benefit the Appellants as the increased values belonged to their clients, and constituted an increase only in an ephemeral and notional sense;

(d) Dr Tan personally did not earn a profit or avoid any loss as a result of the purchases of the 360,000 UET shares during the Relevant Period; and

(e) the Appellants had incurred legal fees in defending the claims against them.

55 MAS's response to these arguments is that the Judge, in imposing the civil penalty which she did, had taken into account the relevant aggravating factors, including the deliberate and calculated nature of the Appellants' conduct. She had also recognised the need to deter such conduct. On the other hand, she had given allowance for the mitigating factors in this case, such as the lack of significant financial benefits to the Appellants, the adverse publicity and the possibility of other regulatory actions. Finally, she had weighed these factors against the reputational gain for fund managers associated with the ability to meet their internal performance benchmarks when inviting potential subscribers to their funds.

56 The power to award civil penalties for breaches of the provisions in Pt XII of the SFA is found in sub-ss (2) and (3) of s 232, which read as follows:

(2) If the court is satisfied on a balance of probabilities that [a] person has contravened a provision in this Part which resulted in his gaining a profit or avoiding a loss, the court may make an order against him for the payment of a civil penalty of a sum —

(*a*) not exceeding 3 times —

(i) the amount of the profit that the person gained; or

(ii) the amount of the loss that he avoided,

as a result of the contravention; or

(*b*) equal to $50,000 if the person is not a corporation, or $100,000 if the person is a corporation,

whichever is the greater.

(3) If the court is satisfied on a balance of probabilities that [a] person has contravened a provision in this Part which did not result in his gaining a profit or avoiding a loss, the court may make an order against him for the payment of a civil penalty of a sum not less than $50,000 and

not more than $2 million.

As the financial gain made by the Appellants in this case was negligible, the Appellants have not disputed that the applicable provision to determine the amount of the civil penalty which they should pay is s 232(3).

57 While civil penalties are distinct from fines, they fulfil a similar policy function of punishing and deterring malpractice in the securities market so as to protect the market's integrity and investors who invest in securities traded on the stock exchange. In its supplementary submissions on the civil penalty, MAS referred this court to a final notice dated 1 August 2006 issued by the United Kingdom Financial Service Authority ("the UK FSA") to Philippe Jabre and his firm, GLG Partners LP <http://www.fsa.gov.uk/pubs/final/jabre.pdf> (1 August 2006) ("the Final Notice"), in which the UK FSA imposed a civil penalty of £750,000 each on Philippe Jabre and his firm, GLG Partners LP ("GLG"). Both parties had committed market abuse contrary to s 118(2)(a) of the Financial Services and Markets Act 2000 (c 8) (UK), which has no direct equivalent in the SFA but which is broadly analogous to the provisions on misuse of insider information in Pt XII, Div 3 of the SFA. The parties had also breached the UK FSA's regulatory requirements for the conduct of persons and firms operating in the financial industry (analogous to ch 13 of the SGX-ST Rules concerning trading practices and conduct). In assessing the seriousness of the breaches being penalised, the UK FSA took into account three considerations at paras 3.9–3.10 and 5.7–5.10 of the Final Notice, *viz*: (a) market abuse was a serious matter; (b) GLG had benefitted by about US$92,000 (about £50,215) as a result of the managed funds' increased profits of US$500,000 (about £310,000); and (c) GLG was a very active participant in the financial markets. It managed about US$11.5bn on behalf of its clients and was one of the largest hedge fund managers in Europe. Philippe Jabre, on his part, occupied a senior position within GLG and had a high profile in the industry generally.

58 By way of comparison, it has been pointed out in this case that: (a) the Appellants' conduct was a deliberate breach of the SFA; (b) the Pheim Group obtained significant reputational benefits to its fund management businesses; (c) there was an overall increase of $1,086,989 in the NAV of the Pheim Group's funds; (d) Pheim Singapore earned an additional $50,000 in performance fees; (e) Pheim Malaysia continues to be a significant participant in the financial markets; (f) the Pheim Group (as at 2009) managed over US$1bn on behalf of its clients; and (g) during the Relevant Period, the Pheim Group had a significant level of earnings ($6.1m in combined revenue and $2.5m in combined profits after tax), against which the combined civil penalty of $500,000 imposed on the Appellants is not manifestly disproportionate or unreasonable.

59 Having regard to the factors listed above by MAS, we affirm the Judge's decision on the quantum of civil penalty imposed on the Appellants.

60 After we reserved judgment in this appeal, we requested further arguments from the parties as to whether it was proper for both of the Appellants to be penalised since it would appear that all the purchases of UET shares at the end of the trading days during the Relevant Period were made on the instructions of Dr Tan. Having considered MAS's supplementary submissions on this issue to the effect that Pheim Malaysia was equally culpable as Dr Tan in setting the price of UET shares at the end of the trading year 2004 (which we accept), we are satisfied that, in the present case, the imposition of the civil penalty on both of the Appellants was justified as well as consistent with the legislative framework, which seeks to deter the sort of practices engaged in by the Appellants. In this connection, MAS submitted that post-Madoff, major financial regulators all over the world have taken steps to restore investors' trust in the fund management industry, and that a reduction in the quantum of the civil penalty imposed on the Appellants would set back MAS's efforts and objective to promote Singapore as a well-regulated and trusted fund management hub. We agree with this

argument.

Conclusion

61 For the above reasons, the appeal is dismissed with costs and the usual consequential orders.

[note: 1] Minutes of Meeting of Pheim Malaysia Investment Committee (Appellants' Core Bundle vol II, p 177).