Public Prosecutor v Wang Ziyi Able
[2007] SGHC 204

Case Number : MA 226/2006

Decision Date : 29 November 2007

Tribunal/Court : High Court

Coram : V K Rajah JA

Counsel Name(s) : Alvin Koh and Janet Wang (Attorney-General's Chambers) for the appellant; Philip Fong and Evangeline Poh (Harry Elias Partnership) for the respondent

Parties : Public Prosecutor — Wang Ziyi Able

Criminal Law – Offences – Statutory offences – Disseminating false information that was likely to induce sale of securities by others where person disseminating information did not care whether information was true or false at time of dissemination – Whether requisite mens rea was present – Section 199(b)(i) Securities and Futures Act (Cap 289, 2006 Rev Ed)

Criminal Law – Offences – Statutory offences – Mental state of not caring whether statement or information was true or false – Whether mens rea was objective or subjective in nature – Whether requisite mens rea was present – Section 199(i) Securities and Futures Act (Cap 289, 2006 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Findings of fact – Appellate court's review of trial judge's finding of fact – Constraint where appellate court reviewed trial judge's finding of fact – Lack of constraint where appellate court reviewed inferences of fact – Lack of constraint where appellate court reviewed inferences of credibility drawn from evidence as opposed to demeanour of witnesses – Need for findings on credibility based on witness's demeanour to be coherently explained by trial judge in order for findings to retain their prima facie imperviousness to appellate scrutiny

Statutory Interpretation – Construction of statute – Purposive approach – Parliament's intention for mens rea of an offence – Section 199(ii) Securities and Futures Act (Cap 289, 2006 Rev Ed)

Words and Phrases – "Care" – Section 199(i) Securities and Futures Act (Cap 289, 2006 Rev Ed)

29 November 2007 Judgment reserved.

V K Rajah JA:

1 In recent years, Singapore's financial markets, after having been progressively liberalised, have evolved into a distinctive disclosure-based regime. Instead of placing the burden entirely on regulatory bodies to ensure the integrity and security of investments, the onus is now on investors to make *informed* decisions in relation to their investments. Such a disclosure-based regime can, however, only function effectively if it is underpinned by a strong regulatory framework to protect the *integrity* of the securities market. The challenge is, thus, to devise a flexible regulatory framework which, on the one hand, mitigates risk and maintains market stability and, on the other hand, fosters market innovation and growth. This challenge is amplified by the "explosive ease with which information can now be disseminated" (see Margaret Chew, "Reform of Financial Services: The Effect on the Regulator" (2001) 5 Sing JICL 569). Since a disclosure-based environment ultimately requires adequate corporate disclosure in order for investors to judge the merits of any securities transactions for themselves, the vast pool of information available in the market must be effectively policed. Indeed, as pointed out during the second reading of the Securities and Futures Bill 2001 (Bill 33 of 2001), the reality today is that price-sensitive information *per se* drives securities trading (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) at col 2148 (Mrs Lim Hwee Hwa,

Member of Parliament for Marine Parade)). As such, the unchecked dissemination of false or misleading information may distort market forces and significantly impede the maintenance of a level playing field, ultimately culminating in a loss of confidence by investors in the securities market. Concerns about the severe repercussions that will ensue from such loss of confidence were expressed during the second reading of the Securities Industry (Amendment) Bill 1999 (Bill 40 of 1999), where Deputy Prime Minister BG (NS) Lee Hsien Loong (as he then was) explained (see *Singapore Parliamentary Debates, Official Report* (17 January 2000) at col 670):

> If investors lose confidence in the integrity of our securities markets, we will enter a vicious cycle. Stock valuations will be poor because there is little secondary activity. Good companies will shun listings on the market, while doubtful ones embrace the opportunity.

For orderly and transparent markets to take root and flourish there must be an appropriate set of ground rules which impose and enforce obligations of responsible market conduct; *all* market players must understand and observe such rules.

2 Accordingly, the development of a vibrant financial sector must be supported by a legal system which places a strong emphasis on the integrity and the efficiency of our financial markets. It also goes without saying that a firm judicial stance must be taken against securities offences, and market misconduct proscribed, in accordance with the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA").

3 The present case is the first appeal to the High Court concerning an offence under s 199 of the SFA, and thus requires a careful appraisal of the statutory requirements necessary to establish such an offence. The respondent was charged under s 199(*b*)(i) of the SFA for having, on 16 February 2004, disseminated through an online forum at "shareinvestor.com" ("the SI forum") information that was false in material particulars and that was likely to induce the sale of shares in Datacraft Asia Limited ("Datatcraft") by other persons when, at the time he disseminated that information, he did not care whether it was true or false. The charge against him ("the Charge") read as follows:

> You,
> Wang
> Ziyi
> Able
> (Male/41 years),
>
> NRIC
> No:
> S1647820/B
>
> are charged that you, on or about 16 February 2004, in Singapore, using the nickname 'Zhongkui', disseminated information through an online forum at Shareinvestor.com that [was] false in material particulars and [was] likely to induce the sale of securities, namely, Datacraft Asia Limited shares by other persons, to wit,
>
> "*Heard CAD raided Datacraft office last Friday again.*"
>
> and in response to a posting by Papabull:
>
> "*ZK, as a frenly note, this was not carried in the local press nor reported in CNA. The word "raided" is serious. Remember giving anything unsubstantiated in a public forum is*

incriminating evidence to yourself as it is tantamount to giving false & misleading information. If the action was true subsequently one could be exonerated but yet again you may be brought to task for receiving illegitimate security leakage. Remember the OCBC dealer who gave a false report to induce price change? He had been brought to task. However, giving matters of opinion, even a wrong forecast inferring such is personal opinion, are matters of public opinion & in the grey area."

made a further statement, to wit,

"*PPB, thanks for your concern. I know what I am talking. Do you honestly think that the papers and CNA knows it all?*"

when at the time you disseminated the information, you did not care whether the information was true or false, and you have thereby committed an offence under Section 199(b)(i) and punishable under Section 204(1) of the Securities & Futures Act (Chapter 289).

The respondent claimed trial to the Charge and was acquitted by the district judge ("the trial judge"). Dissatisfied with the result, the Prosecution appealed against the order of acquittal. To facilitate the understanding of this judgment, I now set out the schematic arrangement I have adopted herein:

(A) The facts

(a) The events on 13 February 2004

(b) The telephone calls on 14 and 15 February 2004

(c) The events on 16 February 2004

(d) The effect of the respondent's forum postings on Datacraft's share price

(e) The CAD's investigations

(B) The Statement of Agreed Facts

(C) The parties' contentions at trial

(a) The Defence's case

(b) The Prosecution's case

(D) The trial judge's findings

(E) Additional evidence adduced during the appeal

(a) The contents of the Additional Statement

(F) The issues on appeal

(G) The applicable law

(a) General construction of s 199 of the SFA

(b) Rejection of the objective interpretation of the mens rea requirement

(c) Subjective interpretation of the mens rea requirement

(i) The case of Derry v Peek

(ii) Application of the Derry v Peek approach to s 199 of the SFA

(H) Appellate review of a trial judge's findings of facts

(I) Application of the law to the facts of the present case

(a) Whether there were reasonable grounds to believe in the truth of the first post and the second post

(i) The 13 February 2004 SMS and the respondent's telephone conversations with Sam Wong

(ii) The first OCBC report and the second OCBC report

(iii) The lack of verification from other sources

(b) Whether the respondent did believe in the truth of the information which he disseminated

(i) The respondent's detrimental reliance on the 13 February 2004 SMS

(ii) The respondent's attempts to seek verification of the news about the alleged CAD raid

(iii) The respondent's motive

(c) Evaluation of all the evidence

(J) The sentence

The facts

4 The respondent, aged 42, is currently the managing director of Hui Run Company Ltd, a private limited company incorporated in Shanghai. At the time of the alleged offence, the respondent was a full-time private equities trader. He had been engaged in this line of work for more than ten years, discontinuing it only in 2005.

5 The respondent testified that, as a full-time equities trader, he based his trading decisions on charts, and also received "analysts' reports, news and market news flow" (see the certified true copy of the notes of evidence for the trial ("NE") at p 38). He would wake up before the stock market in Singapore opened and digest e-mails from brokers, research analysts and friends which contained reports, news and market rumours. Then, after refreshing his memory from his charts, he would make his trading decisions. As the day progressed, he would continue to receive additional information via e-mails and wired news from Reuters, among other sources, and would also monitor business news updates on television.

6 "Shareinvestor.com" ("SI") is a financial portal which provides a website featuring real-time prices and information on stocks and shares. In addition, it maintains an online forum (*viz*, the SI forum) which serves as a platform for the exchange of information on share prices and movements. Before an individual can post an entry on the SI forum, he must first register with SI as a forum member and agree to the terms and conditions of use; thereafter, he has to log on to the SI forum using his registered user name. It is pertinent to emphasise that SI's website is widely accessed, and may be viewed by all and sundry via the Internet; viewing access is not restricted to members of the SI forum.

7 At the material time, the respondent (under the pseudonym "Zhongkui") was a member of the SI forum. In the course of his trading activities, he periodically logged on to the forum to view the postings therein. In addition, he often obtained news and information from brokers, friends and other personal contacts connected with the share trading community. One of the persons with whom the respondent periodically exchanged trading information and views was Samuel Wong Kok Piew ("Sam Wong"), an institutional sales dealer with OCBC Securities Pte Ltd ("OCBC Securities"). The respondent initially met Sam Wong through a mutual friend sometime in 2003. Subsequently, Sam Wong sent OCBC Securities' "Market Round-up" and "Morning News" reports to the respondent, and often provided him with updates on market news and the outlook for various stocks. In return, the respondent provided Sam Wong with market information to which he was privy. Sam Wong testified that he thought the respondent was "quite knowledgeable" (NE at p 4) about the workings of the stock market.

8 Some uncertainty prevails as to the precise nature of the respondent's relationship with Sam Wong. The latter testified that the respondent was a "casual friend" (NE at p 4) whom he would meet up with during drinking sessions organised by their mutual friend. In contrast, the respondent affirmed during cross-examination that he regarded Sam Wong as a close friend, and certainly more than an acquaintance. However, the respondent, in his statement to an investigating officer from the Commercial Affairs Department ("CAD") on 12 August 2004, merely referred to Sam Wong as an "acquaintance". When pressed by the Prosecution to explain this inconsistency, the respondent explained that at the time he made his statements to the CAD, he did not know what the investigation was about and "did not want to drag [his] friend in" (NE at p 82).

The events on 13 February 2004

9 On 13 February 2004, there was a sharp fall in Datacraft's share price. The respondent then owned 700,000 Datacraft shares which he had bought at an average price of US$1.6314 per share about a month earlier. Reacting to this fall, the respondent hastily sold all 700,000 shares at 4.59pm on that day at US$1.48 per share, incurring a substantial loss of US$105,980 for the trade.

10 The respondent testified that his sale of the above shares was prompted by news from Sam Wong that the CAD had raided Datacraft. (For ease of reference, this alleged raid on Datacraft, which purportedly took place on 13 February 2004, will be referred to hereafter in this judgment as "the alleged CAD raid".) The respondent claimed that prior to selling his Datacraft shares on 13 February 2004, he sent several messages to Sam Wong via short message service ("SMS") asking if the latter had heard anything in the market that could explain the rapid decline in Datacraft's share price. Late that afternoon, just before 4.00pm, Sam Wong allegedly sent the respondent a message via SMS with the words "CAD raided Datacraft's office" ("the 13 February 2004 SMS"), to which the respondent purportedly replied, querying if Sam Wong was certain of the reliability of the source of that information. Sam Wong purportedly assured the respondent that he was "[s]ure" (NE at p 41), after which the respondent waited for an hour before selling his 700,000 Datacraft shares just before the market closed for the day.

11 The existence and the contents of the 13 February 2004 SMS were hotly disputed. The Prosecution asserted that there was no such SMS message sent by Sam Wong and that, even if Sam Wong had sent the 13 February 2004 SMS to the respondent, it would have been clear from the message itself that the news of the alleged CAD raid was merely a market rumour. Sam Wong testified during examination-in-chief that he had "[m]ost likely" (NE at p 7) sent the respondent a SMS message about market rumours of the alleged CAD raid. Although Sam Wong also stated that he was "certain" that he had told the respondent that such news was "market rumours" (NE at p 7), he conceded when cross-examined that he could not remember precisely whether he had used those specific words in his SMS message to the respondent.

12 Sam Wong testified that the rumour about the alleged CAD raid was communicated to him by a remisier from his company. Apart from that, he did not hear of this news from anyone else. He sought to verify this piece of news with a few other potential sources, but none of them could confirm its accuracy. Subsequently, Sam Wong made a public address ("PA") announcement to alert OCBC Securities' remisiers that the market rumours about the alleged CAD raid could be a possible reason for Datacraft's falling stock price. Such updates were part of his daily work routine.

13 Sometime after 5.00pm on the same day (*ie*, 13 February 2004), the respondent received a report from OCBC Securities sent by Sam Wong via e-mail. That report, titled "13 February 04 – Market Round Up" ("the first OCBC report"), contained the following specific information in relation to Datacraft at p 4:

> **DATACRAFT:** See more downside. No buy story, weak holders being flushed. Still a sell after 1.85 peak, downside is 1.20. Pretty much hit our 1.45 tgt on this first downleg. *More rumours of CAD follow up action. Speculative.* [emphasis added]

Sam Wong testified that this end-of-day market commentary was prepared with his input by his immediate supervisor, Mr Yap Teong Keat ("TK Yap"). The commentary on Datacraft (as produced above) was summarised by TK Yap from the information that he had earlier gleaned from Sam Wong's PA announcement.

The telephone calls on 14 and 15 February 2004

14 On the evening of 14 February 2004, the respondent called a friend, Mr Ong Kah Chye ("Mr Ong"), a senior dealer at Kim Eng Securities Pte Ltd ("Kim Eng"), to inquire if Mr Ong had heard any news about the alleged CAD raid. Mr Ong replied that he had not heard any such news. The respondent claimed that he also called Sam Wong to ask for news of the alleged CAD raid and to find out why the incident had still not been announced by the media. He allegedly told Sam Wong that he had sold his Datacraft shares and that the latter's information "had better be right" (NE at p 42). Sam Wong allegedly assured the respondent that the news was still "good" (NE at p 42) up to that point. Still concerned about the truth of the news, the respondent then called his lawyer, Mr Phillip Fong ("Mr Fong"), who was also the respondent's counsel in the present proceedings, to ask if the latter had received any news about the alleged CAD raid. Like Mr Ong, Mr Fong said that he was not aware of such an occurrence.

15 The respondent called Sam Wong again on 15 February 2004. Once again, he asked Sam Wong why there had been no media reports on the alleged CAD raid, and also requested the latter to ascertain from his source if the news of the raid was still accurate. In response, Sam Wong supposedly told the respondent that he trusted his source, and asked the respondent to wait until the next day as the media announcement of the raid might have been delayed.

16 When queried about the calls allegedly made to him by the respondent, Sam Wong asserted that he could not recollect the precise telephone conversations and their contents. He did, however, confirm in re-examination that the respondent, over the weekend of 14 and 15 February 2004, called as well as sent him SMS messages repeatedly about Datacraft and about the reliability of his (Sam Wong's) source of the news on the alleged CAD raid.

The events on 16 February 2004

17 Sometime before 9.00am on Monday, 16 February 2004, the respondent received another report from OCBC Securities sent by Sam Wong via e-mail. The report was titled "16 February 2004 – Good Morning Singapore!" ("the second OCBC report"), and contained the following comments at p 4:

> **DATACRAFT:** See more downside. No buy story, weak holders being flushed. Still a sell after 1.85 peak, downside is 1.20. Pretty much hit our 1.45 tgt on this first downleg. *More rumours of CAD follow up action. Speculative.* [emphasis added]

The remarks about Datacraft in the second OCBC report were precisely the same as those made earlier in the first OCBC report: see [13] above. This was because, in the second OCBC report, Sam Wong merely repeated the information about Datacraft which was contained in the first OCBC report.

18 At 9.00am, immediately after the market opened, the respondent gave instructions to his dealer at Kim Eng to sell 200,000 Datacraft shares at US$1.48 per share. Those trades were what is known in market parlance as "naked shorts", that is, sales made without the seller actually owning any of the shares in question. Out of the 200,000 Datacraft shares offered, only 61,000 shares were sold by 9.02am. The remaining 139,000 shares remained unsold.

19 At 9.07am, the respondent placed orders to sell an additional 50,000 Datacraft shares at US$1.46 per share. Those were again "naked shorts". This order was fully fulfilled by 9.12am.

20 At 9.14 am, the respondent, using his pseudonym "Zhongkui", posted the following message on the SI forum ("the first post"):

> Heard CAD raided Datacraft office last Friday again.

21 Later at 9.16am, the respondent placed an order to buy 61,000 Datacraft shares at US$1.45 per share.

22 A few minutes later, at 9.32am, in response to the first post, Chan Soo Leng Eric, another member of the SI forum, who employed the moniker "Papabull", posted this message ("Papabull's post"):

> *ZK, as a frenly note, this was not carried in the local press nor reported in CNA. The word "raided" is serious.*
>
> *Remember giving anything unsubstantiated in a public forum is incriminating evidence to yourself, as it is tantamount to giving false & misleading information*. If the action was true subsequently one could be exonerated but yet again you may be brought to task for receiving illegitimate security leakage.
>
> Remember the OCBC dealer who gave a false report to induce price change? He had been brought to task.

However, giving matters of opinion, even a wrong forecast inferring such is personal opinion, are matters of public opinion & in the grey area.

Take care.

[emphasis added]

23 Responding to Papabull's post, the respondent posted, at 9.34am, this message on the SI forum ("the second post"):

PPB, thanks for your concern. *I know what I am talking* [sic].

Do you honestly think that the papers and CNA knows [*sic*] it all?

[emphasis added]

24 Thereafter, at 9.50am the respondent, apparently still not content with what he had posted on the SI forum thus far, made another entry in relation to the alleged CAD raid, this time purportedly in response to the comments of one "Aftan", another forum user:

Aftan, you were wrong in saying the CAD is completing their case. CAD didn't have to raid DC office [*sic*] case. Don't try to get credit when it's not due to you.

25 At 9.51am, the respondent's order to buy 61,000 Datacraft shares at US$1.45 per share (see [21] above) was fulfilled. The gross profit made as a result of this trade was US$1,830. At 9.52am, the respondent placed another order to buy 50,000 Datacraft shares at US$1.44 per share. The order was fully fulfilled less than a minute later, and the gross profit made for this trade was US$1,000.

26 At 12.36pm, after receiving numerous inquiries from the public and analysts about the alleged CAD raid, Datacraft made an announcement over MASNET, the financial network operated by the Monetary Authority of Singapore, clarifying that the rumours relating to such raid were totally unfounded ("the Datacraft announcement").

27 Immediately after the lunch break, at 2.00pm, the respondent bought 400,000 Datacraft shares at US$1.43 per share. He then sold those shares in a series of transactions at 3.03pm, 4.16pm, 4.48pm and 5.00pm at US$1.40, US$1.41, US$1.39 and US$1.37 respectively per share, incurring losses in all four transactions. The gross amount of loss that the respondent incurred as a result of this series of transactions was US$12,000.

28 The transacted share price of Datacraft finally closed at US$1.38 per share on 16 February 2004, having fallen US$0.10 from its opening price of US$1.48 per share on the same day.

29 It should be pointed out that the respondent did not call Sam Wong immediately upon learning that the rumours of the alleged CAD raid had been comprehensively refuted by the Datacraft announcement. It was not until 6.33pm, more than an hour after the market closed, that the respondent finally made a call to Sam Wong.

The effect of the respondent's forum postings on Datacraft's share price

30 It is common ground between the Prosecution and the respondent that there was a steep fall in Datacraft's share price on 16 February 2004. This was reported in an article by Wong Wei Kong,

"Datacraft denies rumours of CAD raid, Q1 shock", *The Business Times* (17 February 2004), which stated that rumours about Datacraft had "sent the [Datacraft] stock tumbling" the previous day. The following graph was included to illustrate the steep plunge in share price:

[LawNet Admin Note: Click on the link to the PDF above to see the graph]

31 A further article by Serena Ng, "OCBC Sec note may have dented Datacraft shares", *The Business Times* (18 February 2004) ("the 18 February 2004 BT article"), analysed the reason for the fall in Datacraft's share price as such:

> [T]he bigger impetus to sell may have been sparked by a Web posting on popular online forum ShareInvestor.com. The one-line posting, which appeared on the website on Monday at 9.14 am, read: 'Heard CAD raided Datacraft office last Friday again.'

It then went on to report:

> The two-day fall sent the market cap of the mainboard-listed networking and communications systems integrator nosediving to US$642.5 million from US$712.4 million.
>
> …
>
> The posting [on the SI forum about the CAD raid] was taken off at around noon on Monday, following which Datacraft issued a statement denying the CAD probe on Feb 13.
>
> …
>
> The price plunge that followed the Web posting on ShareInvestor.com brought back memories of how an Internet posting on a bogus takeover of Venture Corp over two years back sent its stock price soaring.
>
> …
>
> When contacted, ShareInvestor's founder and CEO Michael Leong said his firm is looking at how it can further tighten its procedures regarding forum postings.

32 In response to a query, the respondent clarified with *The Business Times* that he had made the first post on the SI forum "only after he read the OCBC comments on Friday evening and again on Monday morning" (see Serena Ng, "OCBC Sec: Memo did not cause Datacraft price dive", *The Business Times* (20 February 2004) ("the 20 February 2004 BT article")).

The CAD's investigations

33 Investigations by the CAD into the Datacraft share trading disturbance commenced on 12 August 2004. The investigating officer, Eric Chia Sueh Yuan ("IO Chia"), and some other officers visited the respondent at his home on that day. The respondent was then requested to accompany IO Chia back to the CAD's office. Three statements from him were subsequently recorded by IO Chia. Later, when the respondent returned home, he prepared a memorandum listing additional information that he had omitted to mention in his statements to the CAD earlier that day ("the Additional Statement"). In his evidence-in-chief, the respondent claimed that it was only after he had perused his records and his diary at home that he recalled those additional facts, including the 13 February 2004 SMS (see NE at p 45).

34 The next morning (13 August 2004), the respondent visited the CAD's office again and handed the Additional Statement to IO Chia, who allowed the document to be submitted as the respondent's fourth statement. On 18 August 2004, a further statement was recorded from the respondent by IO Chia. The next contact which the CAD had with the respondent was on 9 April 2006, when IO Chia called the respondent to inform him that he would be charged with having contravened s 199 of the SFA.

35 Only the first statement recorded by the CAD on 12 August 2004 was tendered in evidence before the trial court.

The Statement of Agreed Facts

36 Prior to the trial, a statement setting out the facts which were agreed between the Prosecution and the Defence ("the Statement of Agreed Facts") was drawn up. A number of annexes, including the articles from *The Business Times* referred to at [30]–[32] above, formed part of the Statement of Agreed Facts. Paragraph 33 of the Statement of Agreed Facts is particularly significant. It reads:

> The posting made by [the respondent] on the SI forum on 16 February 2004 as set out in the paragraphs above [referring to the first post and the second post at [20] and [23] above, respectively] contained material false particulars in that CAD did not raid Datacraft's office on 13 February 2004 (Friday). The posting was likely to induce the sale of Datacraft shares by other persons.

Therefore, it is pertinent to note, from the outset, that it was *undisputed* that the first post and the second post contained material false particulars, and that these posts were likely to have induced the sale of Datacraft's shares by other persons.

The parties' contentions at trial

The Defence's case

37 In brief, the Defence's case was that the respondent honestly believed that the CAD had raided Datacraft's office when he posted the information contained in the first post and the second post on the SI forum.

38 According to the Defence, the respondent had relied heavily on the 13 February 2004 SMS when he sold his 700,000 shares in Datacraft on 13 February 2004. The price of Datacraft's shares had been falling rapidly that afternoon, and the respondent thought that the news of the alleged CAD raid was a possible explanation for that. Further, Sam Wong's reassurances about the reliability of the source of this news, as well as the first OCBC report and the second OCBC report that the respondent subsequently received, reinforced the respondent's belief in the veracity of the rumours about the alleged CAD raid. He thus posted this belief on the SI forum, intending to share what he knew with the "less privileged" (NE at p 43) so as to level the playing field. According to the respondent, he wanted to avoid a repeat of the situation in 2002, when Datacraft had indeed been raided by the CAD and many of the "not so privileged" (NE at p 45) people had been hurt as "they were the last to find out from the newspapers" (NE at p 43).

39 The respondent explained that he believed that the news of the alleged CAD raid, which he first received from Sam Wong on 13 February 2004, was still accurate on the morning of 16 February 2004 since, if it was not true, OCBC Securities would have retracted the first OCBC report. Further, he claimed that he did not realise that the first OCBC report and the second OCBC report were identical

as he did not place them side by side. As such, when he posted the information about the alleged CAD raid on the SI forum, he thought that the information was true. He was also of the view that, despite the differences in wording, his posts on the SI forum about the alleged CAD raid had the same meaning as the commentary on Datacraft in the first OCBC report and the second OCBC report, both of which spoke of "[m]ore rumours of CAD follow up action" (see [13] and [17] above).

40 The respondent attributed his initial omission to mention the 13 February 2004 SMS in his statements to the CAD on 12 August 2004 to the fact that he had made those statements a long time after the incident and there were many things which he could not recall. He had also been quite tired by the time he left the CAD's office. When he reached home that day (12 August 2004), he tried to recall the events leading up to his postings on the SI forum, and that was when he prepared the Additional Statement, which was subsequently submitted to the CAD as his fourth statement (see [33]–[34] above). He denied that his alleged reliance on the 13 February 2004 SMS was an afterthought.

The Prosecution's case

41 The broad thrust of the Prosecution's case was that the respondent had been driven by avarice in making the first post and the second post. He had intended to induce others to sell their shares in Datacraft, thereby causing the company's share price to plunge so that he could then buy back the company's shares at a lower price. The respondent knew that the news of the alleged CAD raid was likely to be false; consequently, the respondent, when making the first post and the second post, did not care whether the information which he disseminated was true or false.

42 The Prosecution submitted that the respondent had been untruthful when he stated that the 13 February 2004 SMS was the main reason why he sold his 700,000 Datacraft shares on 13 February 2004. It was highlighted that the respondent had not called Sam Wong to confirm the news set out in that SMS message *before* he sold the shares, but had instead tried to call the latter only after the sale. The very fact that the respondent subsequently sought verification of the news of the alleged CAD raid from Mr Ong and Mr Fong showed that he was unsure at the material time whether such news was reliable; this was likewise borne out by the respondent telling Sam Wong (on 14 February 2004) that the latter's news "had better be right" (see [14] above). The Prosecution further pointed out that after finding out from the Datacraft announcement that the company had not in fact been raided by the CAD on 13 February 2004, the respondent did not call Sam Wong immediately to seek clarification (see [29] above). It was submitted that this was not the normal reaction of an individual who had been given wrong information and who had relied on such information to his detriment.

43 In addition, the Prosecution argued that the respondent was fully aware that Sam Wong had the practice of repeating information in the reports which the latter prepared for OCBC Securities. In any case, the respondent, having read and retained possession of the first OCBC report, should have realised that the section therein on Datacraft was identical to the section on Datacraft in the second OCBC report; alternatively, he could have referred to the first OCBC report to confirm this. As such, the respondent's assertion that he thought the second OCBC report was an updated version of the first OCBC report, with the former serving to reinforce his belief in the rumours of the alleged CAD raid, should be firmly rejected.

44 The Prosecution also asserted that the respondent, in making the first post and the second post on 16 February 2004, had not intended to be altruistic and to share information which he was privy to with the "less privileged" (see [38] above). If that had truly been his objective, the respondent would have declared that he had – to use common market parlance – "shorted" the market just minutes before putting up the first post. Instead, the respondent had tried to make a

profit from short selling Datacraft's shares by inducing others to sell their shares in Datacraft. The Prosecution submitted that the respondent had no real basis to make the first post and the second post as he had not made the inquiries that any reasonable person would have made in the circumstances before lodging those two posts on the SI forum. Therefore, the respondent had been reckless in making the posts and had not cared whether the information which he disseminated was true or false.

The trial judge's findings

45 At the close of the case on 21 November 2006, the trial judge delivered a brief oral judgment acquitting the respondent of the Charge ("the oral judgment"). The grounds of decision subsequently issued by the trial judge (see *PP v Wang Ziyi Able* [2006] SGDC 282) reproduced the oral judgment in its entirety.

46 At [2] of the oral judgment, the trial judge stated the four elements which the Prosecution had to prove in order to secure a conviction on a charge under s 199(*b*)(i) of the SFA, namely:

(a) the accused disseminated information;

(b) the information was false;

(c) the dissemination of that information was likely to induce the sale of securities; and

(d) at the time the information was disseminated, the accused did not care whether the information was true or false.

47 The trial judge found that the first three elements were fulfilled on the basis of the Statement of Agreed Facts (see [36] above).

48 However, he accepted the Defence's evidence that the respondent had received the 13 February 2004 SMS before he made the first post and the second post on the SI forum (see the oral judgment at [3]). The trial judge based his decision on this particular point on the fact that there was no other material before the court to contradict what the respondent had stated in his defence. Sam Wong himself was not certain of the existence and the contents of the 13 February 2004 SMS, and it was not possible to verify from the relevant mobile telephone records whether that SMS message had indeed been sent and had contained the words "market rumours".

49 Further, the trial judge held (at [13] of the oral judgment) that the respondent's activities were *not* consistent with those of an individual who had intended to rig the stock market by disseminating false information. The respondent had covered the "naked shorts" sales which he had made early in the morning on 16 February 2004 within minutes of selling short, without giving members of the SI forum much time to read the first post and the second post and to react by selling their shares in Datacraft at lower prices. Accordingly, the trial judge found that the respondent's reasons for selling short were not connected to his intentions in making the first post and the second post. The trial judge also found that the respondent's activities in the afternoon on 16 February 2004 were not of much assistance in drawing an inference as to the respondent's intentions in making the first post and the second post as, by that time, Datacraft had already come out publicly to deny the rumours of the alleged CAD raid.

50 With respect to the fourth element listed above at [46], the trial judge noted that at the time the respondent lodged the first post and the second post on the SI forum, he was still monitoring the

price movements of Datacraft's shares very closely. The respondent had traded in Datacraft's shares that morning, and his intention was to buy back the shares which he had sold at a huge loss the previous week (see [9] above), as evidenced by his purchase of 400,000 Datacraft shares, immediately after the lunch break, by which time the Datacraft announcement had already been made. On that basis, the trial judge concluded (at [14] of the oral judgment) that the respondent "must have *cared a great deal* about whether the information given to him by [Sam Wong] was true or not" [emphasis added]. The trial judge thus held that the fourth ingredient of the Charge had not been sufficiently established and, in the circumstances, acquitted the respondent.

Additional evidence adduced during the appeal

51 The parties first appeared before me on 22 March 2007. During the hearing, I thought it might be helpful to peruse the Additional Statement (see [33] above). Accordingly, I suggested that the Additional Statement be tendered as additional evidence pursuant to s 257 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). The Prosecution then applied for the Additional Statement to be admitted as one of its exhibits. Counsel for the respondent did not object to this.

The contents of the Additional Statement

52 In the Additional Statement, the respondent claimed that he recalled receiving a message via SMS from Sam Wong (*ie*, the 13 February 2004 SMS) in the afternoon on 13 February 2004 informing him of the alleged CAD raid. He also set out three reasons for selling the 700,000 Datacraft shares on that same day, namely, the heavy selling of Datacraft's shares during the preceding three days, the "poor technicals" of such shares and the poor performance of the NASDAQ stock market at that time (see paragraph 3 of the Additional Statement). The respondent said that he had sold his Datacraft shares with the intention of later buying them back at a lower price.

53 Further, the respondent asserted that the first OCBC report confirmed the information which he had received earlier from Sam Wong via the 13 February 2004 SMS; *ie*, that report showed that "CAD was indeed in DC [Datacraft's] office that day" (paragraph 4 of the Additional Statement). He thus concluded that the first OCBC report was a reliable piece of information about the alleged CAD raid, reasoning that OCBC Securities' analysts, who were highly regarded in the market, would not have said that there were "rumours of CAD follow up action" (see p 4 of the first OCBC report) if, indeed, there were no such rumours. When the respondent received the second OCBC report on 16 February 2004, he saw what he described (at paragraph 7 of the Additional Statement) as an "updated" report with the same comments about the CAD's alleged follow-up action in respect of Datacraft. He took this to be further confirmation that the alleged CAD raid had indeed taken place on 13 February 2004.

54 The respondent averred in the Additional Statement (at paragraph 9) that he believed that many people would already have heard the rumours concerning Datacraft on the afternoon of 13 February 2004. As he was not a "good friend" of Sam Wong (paragraph 9 of the Additional Statement), he expected that the latter would have sent the 13 February 2004 SMS to others who were better acquainted with him (Sam Wong). The respondent claimed that when he made the first post at 9.14am on 16 February 2004, his only intention was to comment on what he believed to be true and to be already known to the market at large. He only wanted to inform people who might not have direct access to OCBC Securities' market reports of the rumours concerning Datacraft if they did not already know of the news. As far as the respondent was concerned, that information was generally known to the public already at that point in time.

The issues on appeal

55 The Prosecution's main contention was that the trial judge erred, both in fact and in law, in holding that the respondent did care whether the information which he disseminated via the first post and the second post was true and that, therefore, the fourth element of the Charge was not made out. The Prosecution asserted that the *mens rea* of the offence under s 199(*b*)(i) of the SFA ("the s 199(i) *mens rea*") was tied to an *objective* test of recklessness, which had been satisfied on the facts. In contrast, Mr Fong, counsel for the respondent, submitted that the trial judge was correct in his findings of fact. Mr Fong interpreted the s 199(i) *mens rea* as requiring a *subjective* type of recklessness, which turned on whether the person disseminating the statement had an *honest belief* in the truth of that statement.

56 Therefore, this appeal pivots on the interpretation of the s 199(i) *mens rea* and the application of that interpretation to the facts. At the outset, I must observe that the trial judge's assessment of the *mens rea* element was rather puzzling. The trial judge found that because the respondent had been watching the movement in Datacraft's share price very closely and had intended to re-purchase the 700,000 Datacraft shares which he had earlier sold at a huge loss, the respondent "must have cared a great deal about whether the information given to him by [Sam Wong] was true or not" (see the oral judgment at [14]). The trial judge appeared to have equated the concept of "caring" about the truth with that of "being concerned about" the truth. With respect, that cannot have been what Parliament intended. Section 199 of the SFA is targeted at individuals who disseminate information without believing in the truth of that information; it pertains directly to the state of mind of the accused *when he disseminated the information in question*. It does not matter whether the truth of that information *in itself* would be of *personal concern* to or *affect* the accused so long as he disseminated such information despite not having any real belief in its truth.

The applicable law

57 Section 199 of the SFA states as follows:

> No person shall make a statement, or disseminate information, that is false or misleading in a material particular and is likely —
>
> (*a*) to induce other persons to subscribe for securities;
>
> (*b*) to induce the sale or purchase of securities by other persons; or
>
> (*c*) to have the effect of raising, lowering, maintaining or stabilising the market price of securities,
>
> if, when he makes the statement or disseminates the information —
>
> (i) he does not care whether the statement or information is true or false; or
>
> (ii) he knows or ought reasonably to have known the statement or information is false or misleading in a material particular.
>
> [emphasis added]

For the purposes of the s 199(i) *mens rea*, what is pertinent is the phrase "does not care whether the statement or information is true or false".

58 The progenitor of s 199 of the SFA is s 99 of the Securities Industry Act (Cap 289, 1985 Rev

Ed) ("SIA"), which was similar in wording to the former. (The SIA has since been repealed.) To date, there has been no authoritative judicial interpretation in Singapore of the *mens rea* required under either s 99 of the SIA or s 199 of the SFA. It is thus helpful to refer to similarly worded statutory provisions in other jurisdictions for guidance.

59 Section 199 of the SFA is similar to s 999 of Australia's Corporations Law (Cth) ("the Australian s 999"), which has now been repealed by the Corporations Act 2001 (Cth). Significantly, subsection (c) of the Australian s 999 likewise uses the words "does not care whether the statement or information is true or false". As such, the authorities on that statutory provision are relevant in ascertaining the proper interpretation to be accorded to the s 199(i) *mens rea*. A review of these authorities appears to confirm that a *subjective* interpretation has been uniformly accorded to the *mens rea* set out in subsection (c) of the Australian s 999. In contrast, there does not seem to be any concrete support for the Prosecution's contention that the requisite *mens rea* is purely objective in nature.

General construction of s 199 of the SFA

60 Given that (as noted earlier at [3] above) this is the first time that a prosecution under s 199 of the SFA has come for scrutiny before the High Court , I find it appropriate to first set out the *general* construction of that section before moving on to consider the proper interpretation of the s 199(i) *mens rea*.

61 The trial judge correctly identified the bare elements that must be established by the Prosecution in respect of a charge under s 199(*b*)(i) of the SFA specifically (see [46] above). A more general overview of the constituent elements of the various offences under s 199 of the SFA has been set out in *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell Asia, 3rd Ed, 2005) ("*Walter Woon*") at para 15.126, as follows:

> 1. [T]he accused made a statement or disseminated information;
>
> 2. [T]he statement or information was false or misleading in a material particular;
>
> 3. [T]he statement or information was likely to—
>
> (a) induce the subscription, sale or purchase of securities by other persons; or
>
> (b) have the effect of raising, lowering, maintaining or stabilizing the market price of securities;
>
> 4. [A]t the time the accused made the statement or disseminated the information—
>
> (a) he *knew* that the statement or information was false or misleading in a material particular; or
>
> (b) he *did not care* whether the statement or information was true or false; or
>
> (c) he *ought reasonably to have known* that the statement or information was false or misleading in a material particular.
>
> [emphasis added]

62 It has also been noted in *Walter Woon* that s 199 of the SFA essentially focuses on individuals

who try to "talk up" or "talk down" the market by spreading false rumours. The commentary elaborates at para 15.127:

> Thus, a short-seller who spreads rumours to depress the market would be caught. So too would a person who made statements that are likely to raise the market price of securities.

Indeed, the prohibition contained in s 199 of the SFA is targeted at statements or information about securities in general, particular securities, a class of securities or any combination of those categories (see H A J Ford & R P Austin, *Ford's Principles of Corporations Law* (Butterworths, 6th Ed, 1992) ("*Ford*") at p 910 with respect to the Australian s 999). The statement or information in question need not be confined to information on securities. The dissemination of *any* market-sensitive information affecting, for example, currency or interest rate movements has also been regarded as properly falling within the Australian s 999 (see *Australian Corporation Law: Principles and Practice* (Butterworths, 1991) vol 2 ("*Australian Corporation Law*") at para 7.3.0055).

63 With regard to whether the statement or information in question is *likely* to induce a sale or purchase of securities by other persons, the test to be applied is an *objective* one – it is a question of fact whether a *reasonable* person, on receiving the statement or information concerned, would have been induced to sell or buy any securities. To constitute an offence, it is not essential to show that someone was in fact induced to sell or buy securities; it is enough to show the potential to induce such an outcome. It also does not seem to be necessary to show that the statement concerned actually affected the market price of securities. The question is whether that statement, *judged in the light of facts known to and/or reasonably foreseeable by a reasonable addressee of the statement*, would have been likely to affect the price at which that person would have been prepared to deal in securities: see, generally, *Ford* at p 910. Such a determination is a matter on which opinion evidence may be received (see *R v Wright* [1980] VR 593). The authors of *Ford* suggest that one situation in which a statement that is potentially caught by the Australian s 999 may in fact fall outside the ambit of this provision would be where the statement was made at a time when there was some simultaneous but independent cause which brought about a change in the market price that was much greater than any change attributable to the statement (see *Ford* at pp 910-911).

64 As for the *mens rea* requirement under the Australian s 999, the authors of *Ford* seem to suggest (at p 911) that it may be satisfied by any one of three distinct mental elements, as follows:

> When the prosecution relies on proving that the maker of the statement knew that it was false or misleading it must be shown that the maker *knew not only that the statement was false or misleading but that it was false and misleading in a material particular*. …
>
> Presumably, the test of whether the maker of the statement *ought reasonably to have known* that it was false or misleading in a material particular is to be applied in the light of the general knowledge and experience of the maker in relation to the matters stated, the maker being regarded as a reasonable person. In this respect the measure imposes penal liability for *negligence*.
>
> *The other mental element, namely, not caring whether the statement or information is true or false*, owes something to *Derry v Peek* (1889) 14 App Cas 337. To make a statement not caring whether it is true or false is to make that statement dishonestly.
>
> [emphasis added]

Indeed, in another authoritative Austalian treatise, Robert Baxt, H A J Ford & Ashley Black, *Securities*

Industry Law (Butterworths, 5th Ed,1996) ("*Baxt et al*"), reference is made (at p 122) to the same three distinct mental elements in the context of the Australian s 999 (see also Robert Baxt, Ashley Black & Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, Australia, 6th Ed, 2003) at pp 127–128 on the identical *mens rea* requirement in s 1041E(1)(c) of the Australian Corporations Act 2001, which replaced the Australian s 999).These views are persuasive as they are consistent with both the letter and the spirit and, in turn, the objective of the subject provision. In my estimation, one of these three mental elements must likewise be established by the Prosecution in our local context to secure a conviction pursuant to s 199 of the SFA. Section 199(i) contemplates dishonesty in the sense of the disseminator of the statement *not caring* whether the statement is true or false (this will be further elaborated upon later); the first limb of s 199(ii) contemplates *actual knowledge* of the false or misleading nature of the statement being disseminated; and the second limb of s 199(ii) contemplates either *negligence* as to the veracity and accuracy of the information in question or constructive knowledge that such information is false or misleading.

65 A final point to note about s 199 of the SFA is that in order to secure a conviction under this provision (and, likewise, the Australian s 999), the Prosecution must show that the maker of the statement knew or should have known or did not care not only that the statement was false or misleading, but that it was false or misleading *in a material particular*. Materiality is presumably to be tested in relation to the potential impact which the statement may have in terms of inducing the sale or purchase of securities or in terms of its effect on the market price of shares. In order to be material, the particular aspect of the information which is false or misleading must be either a factor to which a reasonable person would attach importance in deciding whether to sell or buy securities, or a factor influencing the price at which such a person would deal in securities: see, generally, *Ford* ([62] *supra*) at p 911.

66 Having established the relevant considerations in assessing whether an offence under s 199 of the SFA has been committed, I turn now to consider the s 199(i) *mens rea* proper.

Rejection of the objective interpretation of the mens rea requirement

67 The Prosecution advocated an objective interpretation of the s 199(i) *mens rea* and contended that s 199(i) of the SFA required some form of *objective recklessness* on the part of the maker of the statement as to the truth of the statement. For that proposition, the learned deputy public prosecutor, Mr Alvin Koh ("Mr Koh"), pointed first to para 15.128 of *Walter Woon* ([61] *supra*), where it is stated:

> This section [referring to s 199 of the SFA] is not confined to the case of deliberate falsehood; it also covers the *reckless* or negligent making of misleading statements. [emphasis added by the Prosecution]

68 Mr Koh then referred to *SM Summit Holdings v PP* [1997] 3 SLR 922, submitting that the court's observations at [53] (as reproduced below) equated the concept of "does not care" with that of "recklessness":

> It is one thing to say that one is *reckless* or *does not care* whether he is reproducing infringing copies of CD-ROMs, and it is another to say that he is engaged in the business of counterfeiting CD-ROMs ... [emphasis added by the Prosecution]

On that basis, Mr Koh asserted that the phrase "does not care" in s 199(i) of the SFA was equivalent to "reckless".

69 Finally, Mr Koh relied on a number of English authorities which held that where the *mens rea* of an offence was that of recklessness, the test to be applied was an objective one. He submitted that in order to prove that an accused made a false or misleading statement recklessly, the Prosecution must show that: (a) the accused did indeed make the statement; (b) accused acted rashly in making the statement; and (c) the accused, at the time he made the statement, *had no real basis of facts* which could support the statement (applying *Regina v Grunwald* [1963] 1 QB 935).

70 I note that the Prosecution, rather surprisingly, did not refer to any authorities directly touching on statutory provisions which adopt the language of s 199(i). Instead, Mr Koh relied on various penumbral authorities to glean support for his contention that the s 199(i) *mens rea* should be an objective one. With respect, the circuitous route taken by Mr Koh in his submissions is misconceived.

71 It appears, however, that a more pertinent authority directly supporting the Prosecution's submissions may be found in the text of *Halsbury's Laws of Singapore* vol 17 (LexisNexis, 2006 Reissue). There, the prohibition on the making of false or misleading statements as laid down by s 199 of the SFA is discussed, and it is then stated at para 210.651 that:

> It appears that an *objective standard* regarding knowledge of an infringement is applied to the provision which prohibits false and misleading statements. [emphasis added]

At first blush, the above passage seems to accord with the Prosecution's interpretation of the s 199(i) *mens rea*. However, on a more careful reading, one will note that the above proposition is made on the basis of two authorities, namely, *Macleod v Australian Securities Commission* [1999] WASCA 35 ("*Macleod*") and *PP v Teo Ai Nee* [1995] 2 SLR 69 ("*Teo Ai Nee*"). A closer consideration of both cases reveals that the mental element discussed therein was the one set out in s 199(ii) of the SFA, and not s 199(i); specifically, the requisite *mens rea* in those two cases entailed that the maker of the statement *ought reasonably to have known* that the statement or information was false or misleading.

72 In *Macleod*, the Supreme Court of Western Australia stated at [105]:

> The essential contention of this ground was that it was necessary to prove a fraudulent and dishonest intent in a contravention of s 999(a) Corporations Law, to the effect that persons would probably be induced to purchase shares. But that submission is inconsistent with the express words of s 999 which clearly uses the phrase in subparagraph (d) thereof "The person… *ought reasonably to have known*". *Such words clearly impose an objective standard concerning knowledge of infringement*, see *ASC v Nomura International* (1998) 29 ACSR 473 at 561. [emphasis added]

Similarly, in *Teo Ai Nee* at 87, [49], Yong Pung How CJ specifically referred to the formulation "knows or ought reasonably to have known" in s 99 of the SIA, and stated that it was "beyond doubt that it [referred] to an objective state of knowledge".

73 In my judgment, there is force in the contrary argument made by the respondent's counsel, Mr Fong, that s 199 of the SFA makes reference to at least two *separate and distinct* types of *mens rea*, with the second limb of s 199(ii) clearly contemplating constructive knowledge tested against an objective standard. It follows that s 199(i) should refer to a subjective (and, therefore, different) mental element. Indeed, it should be noted that the word "or" separates s 199(i) and s 199(ii). This is significant because "[i]n ordinary usage, 'and' is conjunctive and 'or' is disjunctive" (see P St J Langan, *Maxwell on the Interpretation of Statutes* (N M Tripathi Private Ltd, 12th Ed, 1969) at p 232; see also *id* at pp 233–234). Although I commented in *PP v Low Kok Heng* [2007] 4 SLR 183 at

[69]–[72] that the use of the word "or" may not produce a disjunctive result in *every* case and that, depending on the relevant parliamentary intent, a conjunctive meaning may have to be given to this word, I am of the view that, in the present case, there is no reason for the word "or" in s 199 of the SFA to be accorded anything other than its ordinary disjunctive meaning.

74 I also note the observation in K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Malayan Law Journal Pte Ltd, 1989) at p 61, where it is stated (in relation to the objective test of recklessness laid down by the House of Lords in *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341, which replaced the previous subjective test):

> Although some theoretical distinctions remain … the practical effect of these developments [*ie*, the shift from a subjective test of recklessness to an objective one] is that *the test of recklessness is virtually synonymous with that of negligence* … [emphasis added]

Given that the words used in s 199(ii) of the SFA (*viz*, "ought reasonably to have known") are oft-equated with negligence, the adoption of the objective test of recklessness for the purposes of the s 199(i) *mens rea* would result in both subsections (i) and (ii) of s 199 of the SFA being "virtually synonymous". This plainly could not have been Parliament's intention. Indeed, the presumption against tautology (as summarised by Viscount Simons in *Hill v William Hill (Park Lane) Ltd* [1949] AC 530) does not seem to be sufficiently rebutted here to warrant a reading of ss 199(i) and 199(ii) whereby both subsections would, in effect, be saying the same thing. At this point, I should add that, to my mind, ss 199(i) and 199(ii) of the SFA in fact provide for *three* separate and distinct mental elements for the offences under s 199, namely: (a) actual knowledge (the first limb of s 199(ii); (b) objective constructive knowledge directed against negligence (the second limb of s 199(ii)) as well as (c) the mental state of not caring whether the statement or information is true or false (*ie*, the s 199(i) *mens rea*): see [64] above.

75 In the light of the above considerations, it appears to me that an objective standard for the s 199(i) *mens rea* should be rejected. Indeed, the authorities persuasively show that the s 199(i) *mens rea* requires some subjective dishonesty on the part of the accused. *Derry v Peek* (1889) 14 App Cas 337 is invariably referred to as the authority from which this proposition is derived (see, for example, the passage quoted at [64] above). It is thus necessary to examine what a subjective standard of the s 199(i) *mens rea* entails.

Subjective interpretation of the mens rea requirement

76 In his submissions, Mr Fong referred the court to *Australian Corporation Law* ([62] *supra*), where the authors (at para 7.3.0055) noted that *Derry v Peek* should be referred to in the interpretation of the Australian equivalent of s 199(i) of the SFA.

77 Reference was also made to *Derry v Peek* (in the context of the *mens rea* set out in the Australian s 999) by the authors of *Baxt et al* ([64] *supra*), where it was explained at p 122:

> In using the formula of not caring whether the statement is true or false, Parliament has adopted a concept accepted in *Derry v Peek* (1889) 14 App Cas 337 ... *To make a statement not caring whether the statement is true or false is to make that statement dishonestly*. One is dishonest if one makes a statement without believing in its truth. [emphasis added]

78 There are, therefore, highly persuasive academic authorities on the Australian s 999 which support a *subjective* interpretation of the *mens rea* set out therein, all of which authorities allude to *Derry v Peek* specifically. Further, it appears to be settled case law that ever since *Derry v Peek* was

decided, the word "reckless", when used in relation to the making of false statements, embraces a statement which is made with the maker *not caring whether the statement is true or false*; that is, it denotes a dishonest or fraudulent statement, as distinct from one which is made with an honest belief in its truth (see *Regina v Mackinnon* [1959] 1 QB 150 ("*Mackinnon*") at 153). As such, the phrase "does not care whether the statement or information is true or false" in s 199(i) of the SFA equally points towards a *Derry v Peek*-type of subjective recklessness which requires dishonesty. Indeed, as astutely observed in *Baxt et al* ([64] *supra*) at p 122 (see the passage quoted in the preceding paragraph), the use of the specific phrase "does not care whether the statement or information is true or false" by Parliament suggests a *deliberate* reference to the making of false statements in circumstances akin to those in *Derry v Peek*. A quick examination of *Derry v Peek* is, therefore, warranted at this juncture.

The case of Derry v Peek

79 The facts of the case are, briefly, as follows. The Tramways Act 1870 (c 78) (UK), which was a special Act incorporating a tramway company, provided that carriages on tramways might be moved by animal power or, with the consent of the Board of Trade, by steam power. The directors of the tramway company issued a prospectus containing a statement that, by the above Act, the company had the right to use steam power instead of horses on tramways. The plaintiff subscribed for shares in the company on the faith of this statement. The Board of Trade, however, refused to grant its consent to the use of steam power, and the company subsequently had to be wound up. The plaintiff brought an action of deceit against the directors founded upon the false statement in the company's prospectus.

80 In order to determine the requisite mental element for an action of deceit, Lord Herschell drew a distinction between not caring whether a statement was true or false and being *negligent* in making a false statement. He stated at 361:

> To make a statement *careless whether it be true or false, and therefore without any real belief in its truth*, appears to me to be an essentially different thing from making, through *want of care*, a false statement, which is *nevertheless honestly believed to be true*. [emphasis added]

He then explained at 368 that when a person made a statement not caring whether it was true or false, there would be some element of dishonesty or fraud involved:

> [A] person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. ***And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.*** [original emphasis in italics; emphasis added in bold italics]

81 Admittedly, Lord Herschell equated the concept of not caring whether the statement made was true or false (as in the s 199(i) *mens rea*) with that of *recklessness*. However, such recklessness involves a probe into the subjective mental state of the accused, in particular, whether the accused had an *honest belief* in the truth of what he stated. This was clearly brought out by Lord Herschell's comments at 374, as follows:

> [F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) *recklessly*, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the

second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth*. [emphasis added]

82 To sum up, *Derry v Peek* ([75] *supra*) stands for the proposition that the mental element of not caring whether a statement is true or false requires the absence of an honest belief, on the part of the maker of the statement, in the truth of the statement, and, consequently, *subjective* dishonesty in the dissemination of that statement. When logically extrapolated and applied to offences concerning the making or dissemination of false statements, an *honest* belief in the truth of a statement, however unreasonably held, would exculpate an accused person from conviction where the offence in question is tied to a *Derry v Peek*-type of (subjective) *mens rea*.

Application of the Derry v Peek approach to s 199 of the SFA

83 Given the similarity between s 199 of the SFA and the Australian s 999, the interpretation of the latter by Australian academics (as outlined at [62]–[65] above) is, to my mind, highly relevant and persuasive. Further, having examined the genesis of the *Derry v Peek* approach, from which the *mens rea* requirement in s 199 of the SFA appears to be derived, I am persuaded that the application of the *Derry v Peek* approach to the s 199(i) *mens rea* is both sensible and compelling. In order to determine whether such mental element exists, one must look at whether the maker of the false statement had an *honest belief* in the truth of the statement. The requisite dishonesty under the subjective *Derry v Peek* approach would be present if a statement which is likely to induce others to act upon it is disseminated despite the maker's lack of belief in it, since the maker, by the very act of dissemination, would be warranting his belief in the truth of the statement. As such, in disseminating the statement without believing in its truth, the maker obviously *did not care* whether that statement was true or false. At this juncture, the crucial question arises as to how a court should assess, for the purposes of the s 199(i) *mens rea*, whether a person had an honest belief in the statement or information which he disseminated where that statement or information is subsequently found to be false or misleading.

8 4 *Derry v Peek* ([75] *supra*) gives little guidance on this issue, save for the comments of Lord Herschell on the relevance of the motive of the maker of the statement (at 374):

[I]f fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

It may be legitimately distilled from the above remarks that a person's motive in making a false or misleading statement *will not be a conclusive* factor in a court's determination of whether that person in fact had an honest belief in the truth of the statement.

85 More significantly, in *Mackinnon* ([78] *supra*), Salmon J cogently explained how one can prove dishonesty arising from subjective recklessness as formulated in *Derry v Peek*. He stated at 155:

In any event, *once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused who made the forecast for some purpose of his own either must have known it was untrue or had no real belief in its truth*. ***Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statements. In my experience, juries are not slow in a proper case to draw the inference of fraud*.** [emphasis added in italics and bold italics]

86 It is immediately apparent from Salmon J's remarks that the *objective* interpretation of the s 199(i) *mens rea*, as proposed by Mr Koh – namely, that of having no real factual basis to support the statement or information at the time it is disseminated (see [69] above) – has *some* relevance in the application of the subjective *Derry v Peek* approach, albeit only from an *evidential* viewpoint. The fact that there were no reasonable grounds for the maker of a statement (which is later found to be false) to believe in the truth of that statement when he made it constitutes strong *evidence* of his lack of honest belief in the truth of the statement, and supports an *inference* of dishonesty, which is required under the subjective *Derry v Peek* approach *vis-à-vis* the s 199(i) *mens rea*. Notwithstanding that, I must emphasise that the test for establishing the s 199(i) *mens rea* is primarily subjective; evidence of a lack of honest belief may be outweighed and inferences of dishonesty rebutted.

87 I should also add at this point that the question of whether reasonable grounds exist to support a belief in the truth of a statement should be analysed from the perspective of a reasonable person *calibrated against the relevant qualities and characteristics of the accused person*. In other words, the qualification, profession, intellect, experience and skills, amongst other personal attributes, of the accused should be considered in assessing whether there were indeed reasonable grounds for him to believe that the statement or information which he disseminated was true. This would accord with the ultimately subjective nature of the s 199(i) *mens rea*, since it infuses the subjective qualities of the accused with an objective analysis of the relevant facts.

88 To summarise, a subjective interpretation should be accorded to the s 199(i) *mens rea*. Such mental element requires some dishonesty on the part of the maker of the statement in question, which may be manifested by his endorsement of the veracity of the statement or information when disseminating it despite not having an honest belief in the truth of the statement or information. Dishonesty in this context may be established regardless of the accused's motive in making or disseminating the statement. In determining whether the accused had the requisite subjective honest belief in the truth of the statement at the material time, one may consider whether there were grounds on which a *reasonable person infused with the attributes of the accused* would have believed in the truth of the statement. However, this objective analysis can only constitute *evidence*, albeit often relatively strong evidence, for the purposes of the s 199(i) *mens rea*; the test is ultimately a subjective one.

89 A further observation on the s 199(i) *mens rea* is perhaps necessary. The word "care" may be understood in many different senses. Indeed, *The Oxford English Dictionary* (prepared by J A Simpson and E S C Weiner) (Clarendon Press, 2nd Ed, 1989) vol II ("*The Oxford Dictionary*") attributes (at p 894) the verb "care" with several different meanings. As mentioned above at [56], the trial judge appears to have understood the word "care" in the following manner: "[t]o feel concern (great or little), be concerned, trouble oneself, *feel interest*" [emphasis added] (see p 894 of *The Oxford Dictionary*). With respect, I am unable to fathom any compelling reason for Parliament to have specifically enacted legislation directed at persons who disseminate statements or information that they are not *personally interested in* or *concerned with*. In my view, "care" as stated in s 199(i) of the SFA refers, instead, to the *prudence* or *diligence* to be exercised in determining the veracity of the information or statement which one disseminates; this accords with *The Oxford Dictionary*'s description of "care" (at p 894) as "[t]o be careful, to take care". This must be the only basis upon which the above discussion on the interpretation of the s 199(i) *mens rea* is predicated.

Appellate review of a trial judge's findings of facts

90 Before proceeding to determine if the s 199(i) *mens rea*, as interpreted above, has been established by the facts before the court in the present proceedings, it is necessary, first, to consider the extent of appellate review permissible in the present case.

91 It is trite law that an appellate court has a limited power of review over a trial judge's findings of fact. Indeed, this familiar proposition was set out with acuity by Yong CJ in *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 ("*Terence Yap*") at [24], as follows:

> It is trite law that an appellate court should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of the evidence.

92 In the present case, it is clear that the trial judge made no findings as to the credibility and veracity of the witnesses in the oral judgment. Instead, he simply stated that he accepted the respondent's evidence on the existence and the contents of the 13 February 2004 SMS (see the oral judgment at [3]). Further, in drawing the inference that the respondent must have cared whether the information given to him by Sam Wong was true, the trial judge seemed to have regard purely to the evidence borne out by the witnesses' testimonies and the objective facts. In such a situation, two principles should be highlighted: first, the limited nature of appellate review does not apply to *inferences* of fact; and, second, appellate review is generally constrained because the trial judge is presumed to have had the benefit of viewing and observing the witnesses in court. As such, where inferences of credibility are drawn from the contents of the witnesses' evidence and extrinsic evidence, as opposed to the demeanour of the witnesses, this supposed advantage of the trial judge is no longer critical and the appellate court is in a position to review those inferences.

93 The first of the two principles set out above (at [92]) stems from the observations of Yong CJ in *Terence Yap* ([91] *supra*) at [24]:

> [W]hen it comes to inferences of facts to be drawn from the actual findings which have been ascertained, a different approach will be taken. *In such cases, it is again trite law that an appellate court is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case.* [emphasis added]

I endorsed these observations in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45 ("*Jagatheesan*") at [37]–[38], and added the following (*id* at [38]):

> In short, intervention by an appellate court is justified when the inferences drawn by a trial district judge *are not supported by the primary or objective evidence on record*: see *Bala Murugan* at [21]; *Sahadevan s/o Gundan v PP* [2003] 1 SLR 145 at [17]; see also s 261 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") that stipulates that the appellate court should not intervene unless "it is shown … that the judgment … was either wrong in law or against the weight of evidence".

This applies with equal force in the present case.

94 The second principle stated in [92] above may also be distilled from *Jagatheesan*, where I set out the judicial approach in respect of appellate review of a trial judge's assessment of a witness's credibility. I noted at [40] as follows:

> The same restraint governing appellate review in respect of findings of fact applies in relation to a trial judge's assessment of a witness's credibility. Indeed, an appellate court should be even more restrained in such circumstances. The trial judge has had the benefit of viewing and observing the witnesses in court: *Lim Ah Poh v PP* [1992] 1 SLR 713. There is, however, a difference between an assessment of a witness's credibility where it is based on his demeanour and where it is based on inferences drawn from the internal consistency in the content of the witness's

testimony or the external consistency between the content of the witness's evidence and the extrinsic evidence. *In the latter two situations, the supposed advantage of the trial judge in having studied the witness is not critical because the appellate court has access to the same material as the trial judge. Accordingly, an appellate court is in as good a position as the trial court in such an instance to assess the veracity of the witness's evidence*: see *PP v Choo Thiam Hock* [1994] 3 SLR 248 at 253, [12]. An apparent lack of appreciation of inconsistencies, contradictions and improbabilities can undermine the basis for any proper finding of credibility: see *Kuek Ah Lek v PP* [1995] 3 SLR 252 at 266, [60]. The real tests are how consistent the story is within itself, how it stands the test of cross-examination and how it fits in with the rest of the evidence and the circumstances of the case; *per* Lord Roche in *Bhojraj v Sita Ram* AIR (1936) PC 60 at 62. [emphasis added]

95 Finally, it is relevant to note the rather apposite observations on this aspect of appellate practice by Prof Tan Yock Lin in *Criminal Procedure* (LexisNexis, 2007) vol 2 at para 1052:

> Where the magistrate does not also give reasons for his belief that a witness is a witness of truth, the appellate court will be readier to disregard his findings. *If he rejects the evidence of the accused, he must not simply state that he does that because he does not believe the accused. If he merely refers generally to [the] demeanour of the witnesses, without condescending to particulars, he may invite suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities and which could not be supported on a detailed examination of the evidence*. [emphasis added]

96 In the present case, even though terse reasons were given by the trial judge for his acceptance of the respondent's evidence and his finding on *mens rea* in favour of the respondent, those reasons were based exclusively on the evidence before him and not on any express finding on the witnesses' demeanour. Mr Fong argued, on behalf of the respondent, that the trial judge might have made implicit findings on demeanour that were not expressed in the oral judgment. Prof Tan's observation in the preceding paragraph squarely answers this: Any findings on credibility based on a witness's demeanour must be coherently explained by the trial judge in order for these findings to retain their *prima facie* imperviousness to appellate scrutiny. It follows that, in the present case, it is open to the High Court, sitting as an appellate court, to review and evaluate the trial judge's findings. Further, it appears that the trial judge did not assess the evidence of either the respondent or Sam Wong with reference to any "primary or objective evidence on the record" (see the passage from *Jagatheesan* quoted at [93] above). In my judgment, therefore, the rationale for the usual fetter on appellate review does not apply in this instance. In any event, it is regrettable that the trial judge did not sufficiently analyse either the evidence or the law in coming to his determination. His grounds of decision, given the fact that this is a rather significant decision, are, regrettably, only conspicuous for their brevity and lack of rigorous analysis.

Application of the law to the facts of the present case

97 I turn now to analyse the facts of the present appeal proper in order to determine whether the s 199(i) *mens rea* was made out in this case. To reiterate, for the Charge to be proved, the Prosecution must show that the respondent did not have an honest belief in the information set out in the first post and the second post (namely, the news of the alleged CAD raid) when he disseminated that information. I will assess the relevant aspects of evidence and objective facts as follows: first, whether there were reasonable grounds to believe in the truth of the statements made by the respondent on the SI forum; and, second, whether the respondent *did in fact believe* in the truth of those statements.

Whether there were reasonable grounds to believe in the truth of the first post and the second post

The 13 February 2004 SMS and the respondent's telephone conversations with Sam Wong

98 Given that Sam Wong was unable to testify with any certitude about the existence of the 13 February 2004 SMS, I am minded to give the respondent the benefit of the doubt and assume that this SMS message was indeed sent. The doubt as to the exact contents of the 13 February 2004 SMS, on the other hand, may not be as easily resolved in favour of the respondent. The respondent stated firmly in the court below that the 13 February 2004 SMS contained the words "CAD raided Datacraft's office" (see NE at p 41). However, this certainty was absent from the respondent's initial statements to the CAD. In fact, in his first three statements to the CAD on 12 August 2004 (see [33] above), there was no mention whatsoever of the 13 February 2004 SMS.

99 In the Additional Statement, the respondent stated at paragraph 2:

> I recall that in the afternoon of 13th February 2004, I received a SMS from Sam Wong on [late] Friday afternoon. *The SMS stated something like "CAD raid on DC" or "CAD in DC office"*. It is well known in the market that DC stands for Datacraft. [emphasis added]

I note that the two phrases "CAD raid on DC" and "CAD in DC office" carry quite different implications and negative connotations. In common parlance, the word "raid", when used in such a context, connotes a definite investigation, which is likely to take place only when the CAD has sufficient evidence of commercial misdemeanour to justify such a drastic step. In contrast, the presence of the CAD's officers *in* Datacraft's premises does not necessarily mean that there was a raid on the company on 13 February 2004; it may simply indicate the onset of an inquiry or the seeking of information by the CAD.

100 The respondent made specific reference to the alleged CAD *raid* in the first post (see [20] above). He claimed that the word "raid" was used by Sam Wong in the 13 February 2004 SMS and in their telephone conversations on 14 and 15 February 2004, and that he had merely posted on the SI forum what he had been told. The contents of the alleged telephone conversations rested on a bare assertion on the part of the respondent, unsupported by either the testimonies of other witnesses or objective facts. I am of the view that little weight, if at all, should be placed on this bare assertion, especially in the light of the respondent's own inconsistent subsequent statements. As for the 13 February 2004 SMS, Sam Wong testified that even if he had sent this message to the respondent, he could not remember the exact words used therein. Likewise, the respondent's uncertainty as to the exact phrase used in that SMS message (despite his unequivocal testimony in court, some two years later, as to the words used) is apparent from paragraph 2 of the Additional Statement (see the passage quoted at [98] above). As such, I am unable to unqualifiedly accept the respondent's assertion that he derived the word "raid" from Sam Wong and merely posted on the SI forum what he had been told.

101 The respondent asserted that he had also relied on the reassurances given by Sam Wong during the telephone conversations which they had on 14 and 15 February 2004. The relevant telephone records show that there were indeed telephone conversations on those dates between the respondent and Sam Wong, and Sam Wong himself testified that the respondent had called him repeatedly during this period (see [16] above). Additionally, the respondent claimed that Sam Wong had assured him over the telephone on 14 and 15 February 2004 that the news of the alleged CAD raid was still good and that the source of his (Sam Wong's) information could be trusted. However, this aspect of the respondent's testimony must be tested against Sam Wong's evidence in court. Sam

Wong stated that he was aware that the information about the alleged CAD raid was merely a market rumour and that he was not satisfied with the quality of the information, especially since the rumour originated from only one person. Indeed, given that both the first OCBC report and the second OCBC report, which were prepared by Sam Wong himself, unequivocally characterised the information about the CAD's follow-up action in respect of Datacraft as "rumours" and expressly stressed that the rumours were "[s]peculative" (see [13] and [17] above), I am of the view that it is most implausible that Sam Wong would have stated anything more definitive in the 13 February 2004 SMS or reassured the respondent as the latter alleged. In any event, given that this is an instance of one person's word against another's, I am reluctant to attach any decisive evidential value to either of the main protagonists' testimony on this particular issue.

The first OCBC report and the second OCBC report

102 The respondent testified that the first OCBC report and the second OCBC report which he received on 13 February 2004 and 16 February 2004 respectively confirmed the rumour about the alleged CAD raid, and, therefore, he had good reason to believe in the truth of the information which he disseminated on the SI forum via the first post and the second post. This is a rather glib assertion that requires a suspension of disbelief. The first OCBC report and the second OCBC report simply stated (as set out earlier at [13] and [17]): "*More rumours of CAD follow up action. Speculative.*" [emphasis added] These reports specifically and deliberately *qualified* the information about the CAD's action against Datacraft by highlighting to readers that the accuracy of the information was as yet *unverified*, and that the respective reports could not be taken as *confirming* that information or, indeed, anything else. Plainly, the first OCBC report and the second OCBC report cannot constitute *reasonable grounds* on which a person could believe in the *truth or accuracy* of the information set out therein. Indeed, a reasonable person reading those two reports would have been put on immediate inquiry that the information in them was premised on rather questionable foundations that needed further verification, at the very least.

103 Moreover, the first OCBC report and the second OCBC report stated that there were rumours of "CAD follow up action". This appears to be something quite different from what the respondent stated in the first post, *viz*, "CAD raided Datacraft office" (see [20] above). In fact, the Defence's own witness, Mr Chir Chor Pang ("Mr Chir"), another trader and user of the SI forum, took a similar view. He acknowledged during cross-examination (see NE at pp 90–91):

> If Datacraft was still under investigation, normally CAD's visits would be follow-up actions, but if it was a raid, it could possibly mean that there was another investigation on top of what they were already investigating.

It may be safely surmised, even from the Defence's case, that a raid by the CAD is viewed differently from follow-up action by the CAD. A "raid" connotes something more egregious since it hints at *another* investigation over and above ongoing investigations already in existence. Indeed, the use of the word "again" by the respondent in the first post, where he stated, "Heard CAD raided Datacraft office last Friday *again*" [emphasis added], adds to the impression that the alleged CAD raid was a new investigation and was more serious than mere "follow up action". The relevance of such a connotation has particular significance in the present context as Datacraft had previously been raided in 2002 and was still under investigation by the CAD at the material time. A *second* investigation of Datacraft, *in addition* to the ongoing one, might be more egregious and more critical to the market value of the company's shares, as compared to mere "follow up action" pursuant to the first investigation.

104 It is also noteworthy that the second OCBC report was purportedly the final information on the

alleged CAD raid that the respondent was aware of before he made the first post. As such, this report would have registered more prominently in his mind at the material time, particularly in comparison to the 13 February 2004 SMS (which he received almost three days before he made the first post). Despite that, the respondent did not, in either the first post or the second post, use the conspicuously qualified and measured phraseology of the first OCBC report and the second OCBC report. The respondent not only stated absolutely that there was news of a *raid* (as opposed to "follow up action") by the CAD on Datacraft, but also rather brazenly retorted in the second post, in response to a caution from another user of the SI forum as to the veracity of his information, that he knew what he was talking about (see [23] above). Hence, the reality was that the information contained in the first OCBC report and the second OCBC report had in fact been *substantially embellished* by the respondent in the two posts which he made on the SI forum. Why did he do this? Can it be credibly asserted that he had a benevolent reason for *distorting* the information he had received?

105 Accordingly, I have considerable difficulty in accepting that the first OCBC report and the second OCBC report could have served in any way to reinforce the respondent's belief in the absolute truth of the information set out in the first post and the second post. The difference between the phraseology of those reports and that of the respondent's posts on the SI forum is simply too stark for any contrary credible assertion.

The lack of verification from other sources

106 Even assuming that Sam Wong had sent the 13 February 2004 SMS to the respondent, and assuming *arguendo* that Sam Wong had reassured the respondent over the telephone that the news about the alleged CAD raid was still good and that his (Sam Wong's) source of this news could be trusted, it must nevertheless be noted that that this was information emanating from just *one* source – *viz*, Sam Wong alone. In addition, Sam Wong was also, in effect, the person who generated the first OCBC report and the second OCBC report. Indeed, the respondent testified in his examination-in-chief that he was aware that Sam Wong was responsible for the contents of the reports emanating from OCBC Securities (see NE at p 39). Therefore, the respondent's purported reliance on the 13 February 2004 SMS, his telephone conversations with Sam Wong as well as the first OCBC report and the second OCBC report in support of his belief in the truth of the information which he posted on the SI forum was, in fact, reliance on a *single* source.

107 All other attempts by the respondent to verify the information in question with others proved to be futile. As mentioned earlier (at [14]), although the respondent communicated with various other people, none of them were able to verify the news of the alleged CAD raid. Both Mr Ong and Mr Fong, whom the respondent contacted specifically to verify the news, informed the respondent that they were completely unaware of any raid by the CAD on Datacraft. On the respondent's own evidence, he would typically receive and read 50 to 100 reports on each trading day; significantly, *none* of the other reports (aside from the first OCBC report and the second OCBC report) which the respondent received on the material dates, *ie*, 13–16 February 2004, even *mentioned* anything about the alleged CAD raid. It appears that there was a *patent* lack of verification by the respondent of the information on the alleged CAD raid. In the circumstances, given the factual matrix in the present case, I am of the view that information from a single source that remained unverifiable despite futile confirmatory efforts could not constitute *reasonable grounds* for believing in the truth of the information, especially since the original source of the information was not itself unimpeachable. This is especially so given the serious ramifications and market sensitive nature of an assertion that there had been a "raid" on Datacraft by the CAD. The fact that the respondent himself found it necessary to seek verification of the alleged CAD raid but was unable to receive any satisfactory assurance from his other sources speaks volumes. Despite this lack of even a scintilla of corroboration which he felt compelled to seek

(see [112] below), the respondent had the temerity to curtly inform Papabull (and all others who accessed the SI forum), after being cautioned to "[t]ake care", that (see [23] above) "*I know what I am talking* [sic]*. Do you honestly think that the papers and CNA knows* [sic] *it all?*" [emphasis added]

Whether the respondent did believe in the truth of the information which he disseminated

108 Having considered the circumstances, I am not satisfied that there existed any reasonable grounds for the respondent's belief in the truth of his assertion that the CAD had conducted a raid on Datacraft on 13 February 2004. This constitutes powerful evidence that the respondent, in fact, had no real and honest belief in such information. Nevertheless, if the respondent did in fact *honestly believe* in the truth of the first post and the second post, the s 199(i) *mens rea* would not be established. It is with these considerations in mind that I turn now to examine all the evidence that shows the respondent's alleged subjective honest belief in the truth of the above posts.

The respondent's detrimental reliance on the 13 February 2004 SMS

109 The respondent attempted to rely on the substantial loss which he had suffered on 13 February 2004 when he sold his 700,000 Datacraft shares to demonstrate his honest subjective belief in the information contained in the first post and the second post. However, it bears emphasising that in the Additional Statement, he gave three reasons for selling those shares, none of which embraced the information contained in the 13 February 2004 SMS (see [52] above). He stated at paragraph 3 of the Additional Statement:

> I decided to sell my holding of DC because of 1) the heavy sell down in the past 3 days, 2) the poor technicals (10MA cutting down 20MA) and 3) poor Nasdaq futures.

Not only does this inconsistency severely undermine the respondent's credibility, it also substantially attenuates his contention that the information on the alleged CAD raid (as set out in the 13 February 2004 SMS) featured prominently in his decision to sell the above shares.

110 In addition, the conduct of the respondent after selling his 700,000 Datacraft shares is rather telling. If he had indeed received and relied on information from Sam Wong about the alleged CAD raid, and if he had honestly believed in the truth of that information, there would arguably have been little point for him to make a series of attempted telephone calls to Sam Wong on 13 February 2004 in the evening (see NE at p 41). Those calls were evidenced in the telephone records and were also confirmed by the respondent. Further, on 14 February 2004, the respondent had a telephone conversation with Sam Wong during which, by the respondent's own admission, he told Sam Wong that the news on the alleged CAD raid "had better be right" (see NE at p 42). This appears to contradict the respondent's argument that he had *truly* held an honest belief in the truth of the information about such raid.

111 The respondent's reaction to the Datacraft announcement (see [29] above) should also be noted. If the respondent had, as he claimed, relied on the information about the alleged CAD raid as contained in the 13 February 2004 SMS and had consequentially suffered a substantial loss, one would have expected the respondent to remonstrate with Sam Wong either immediately or shortly after finding out that the rumours of that raid were false. Instead, it was only at 6.33pm on the evening of 16 February 2004 that the respondent called Sam Wong, even though the Datacraft announcement, which exposed the spurious nature of the information on the alleged CAD raid, was made much earlier that day at 12.36pm. Mr Fong pointed to records showing a series of SMS messages from the respondent to Sam Wong between 12.36pm and 6.33pm on 16 February 2004. However, as there is no evidence of the *contents* of these SMS messages, the fact that they were

exchanged between the respondent and Sam Wong, although relevant to negate the perceived lack of remonstration by the respondent after the Datacraft announcement, cannot be said to be sufficient *per se* to show the respondent's reliance on the 13 February 2004 SMS and, correspondingly, the respondent's alleged honest belief in the truth of the information contained therein.

The respondent's attempts to seek verification of the news about the alleged CAD raid

112 The fact that the respondent tried to seek verification from Mr Ong and Mr Fong of the news about the alleged CAD raid leads to the inference that the respondent harboured doubts as to the veracity of such information. The sequence of the telephone calls made by the respondent specifically to ask about the alleged CAD raid is significant. He called Mr Ong on the evening of 14 February 2004 after receiving the 13 February 2004 SMS and the first OCBC report from Sam Wong. In my view, this confirms that the respondent had at least *some* doubt about the reliability of the information on the alleged CAD raid even after receiving the SMS message and the report just mentioned. After Mr Ong told the respondent that he had not heard anything about the alleged CAD raid, the respondent called Sam Wong to clarify the news which the latter had given him earlier. Sam Wong apparently reassured the respondent then that the news was "still good up to that point" (see NE at p 42). The respondent acknowledged in his testimony (see NE at p 42) that he was "*still concerned about the truth of the news*" [emphasis added] after that telephone conversation with Sam Wong. He thus called Mr Fong to verify the news of the alleged raid. Mr Fong likewise informed the respondent that he was unaware of any such news.

113 These unsuccessful attempts by the respondent to verify the news about the alleged CAD raid mortally undermine his argument that he honestly believed in the truth of such news when he posted it on the SI forum via the first post and the second post. If the respondent did indeed *honestly* believe in the information given to him by Sam Wong, and if the first OCBC report did indeed reinforce such belief, the respondent would not have found it necessary to call Mr Ong to verify the information. Further, if, as the respondent claimed, the telephone conversation with Sam Wong had convinced him of the truth of the alleged CAD raid, he would not have been "still concerned about the truth of the news" (see NE at p 42) and would not have called Mr Fong for additional confirmation. Given these circumstances, it plainly flies in the face of logic and common sense that, despite the inability of both Mr Ong and Mr Fong to verify the news of the alleged CAD raid, the respondent's doubts about this news as at 14 February 2004 simply evaporated by 16 February 2004 merely because of a *further* telephone conversation with Sam Wong on 15 February 2004 and because of the second OCBC report emanating from the same source (*viz*, Sam Wong). I am wholly unconvinced that at the time the respondent made the first post and the second post on the SI forum, he had resolved all doubts as to the truth of the alleged CAD raid and held an honest belief in the information which he disseminated.

The respondent's motive

114 The Prosecution submitted that the respondent had posted news of the alleged CAD raid on the SI forum in order to induce sales of Datacraft's shares, depress the price of those shares and thereby make a profit through the short selling of the shares. The respondent denied having such a motive and, instead, claimed that he had made the first post and the second post out of altruism, intending to share the information therein with others who might not have been as fortunate to receive such timely news. He had simply wanted, in his own words, to "create a more level playing field" (see NE at p 53).

115 It appears to me that the trial judge mistakenly placed *too much* emphasis on the respondent's

intentions in making the first post and the second post (see the oral judgment at [13]). I should reiterate that a maker of a false statement may be found not to have an honest belief in the truth of that statement *even where he had a benign motive in making the statement* (see [84] above). The converse may also be true – *ie*, even if the maker of the statement had an improper motive in making the statement, *he may nevertheless have had an honest belief in the truth of the statement*. In this respect, the motive of the maker of the statement is relevant only in so far as if an improper motive is proved, it is likely to be more difficult for the maker of the statement to persuade the court that he could have had an honest belief in the truth of the statement, especially where the statement was ultimately found to be false or misleading. Therefore, if the respondent had the intention of benefiting himself by posting news of the alleged CAD raid on the SI forum, this factor will not *in itself* negate a finding that the respondent had an honest belief in the truth of the information and thus fell outside the scope of s 199(i) of the SFA. It is merely further *evidence* from which it may be *inferred* that there was a lack of such an honest belief on his part. In a similar vein, even if the respondent can prove definitively that he had an altruistic motive when he posted the statements in question on the SI forum, it does not inexorably follow that he must therefore be found to have had an honest belief in the truth of the statements. As such, it is not necessary for me in this matter to make any positive findings about the respondent's motive in the present case.

116 I am, however, deeply troubled by the respondent's conduct, and, in particular, his blatant attempts to "short" the market. The respondent's "shorting" of the market immediately prior to lodging the first post on the SI forum apropos of the alleged CAD raid was, in fact, distinctly contrary to his alleged intention to create a level playing field. There was no mention whatsoever by the respondent in either the first post or the second post of his interest in the very same shares that formed the subject matter of those two posts despite the explicit stipulation in SI's rules that users of the SI forum must state if they own the stocks under discussion. Admittedly, the respondent did not, in the literal sense of the word, *own* Datacraft's shares at the time he made the first post and the second post. However, a common-sense interpretation of the SI forum's rules would surely and logically extend the stipulation just mentioned so as to require a forum user to place on record any *interest* which he has in the shares being referred to. The respondent was, however, inexplicably coy about his interest arising from his "shorting" the market just a few minutes before he made the first post and the second post on the SI forum. It appears to me that there was, in reality, a more disturbing hue to the picture of the Good Samaritan that the respondent attempted to paint of himself.

117 At this point, I must also respectfully and categorically disagree with the trial judge's finding that the respondent's reasons for selling short were not connected to his intentions in making the first post and the second post. The trial judge placed considerable emphasis on the fact that the respondent had covered his short positions without giving members of the SI forum much time to read his postings and to react by selling Datacraft's shares at lower prices (see [49] above). It must, however, be remembered that the securities market is a rapid and volatile one. Given the prevalence of modern technology which facilitates the almost instantaneous transmission of market information and the spontaneity of market transactions, I have no doubts that the few minutes' gap between the respondent's posts on the SI forum and his purchase of Datacraft's shares to fulfil his short sales was all that was needed for the market to react. Further, the fact that the respondent ultimately made a loss from his dealings with the Datacraft shares should *not* be taken to indicate the existence of a benign intention on his part in making the postings in question on the SI forum. Such loss may have been, and, indeed, was *likely* to have been, a result of the respondent's erroneous reading of the consequences that would flow from, *inter alia*, the Datacraft announcement dispelling the rumours about the alleged CAD raid.

118 Finally, I must make one further observation regarding the rules governing the use of the SI forum. The following caution was specifically highlighted on SI's website to the forum's members (of

whom the respondent was one):

> *Our mission is to build a trustworthy and lawful community of sophisticated investors by leveraging the power of internet technologies to provide a platform for the sharing of financial news, data & information.* We will not tolerate and strictly prohibit the posting or disclosure of the following types of information on this Website and we will not hesitate to take swift and strong action, including legal action, against any user who chooses to go against such prohibition:
>
> a. unreliable or untrue statements;
>
> …
>
> c. price sensitive information protected by insider-dealing rules, business trade secrets, proprietary information and *information that may embarrass or harm others, financially or otherwise* ...
>
> [emphasis added]

As a forum member who had agreed to the terms and conditions of the SI forum (see [6]–[7] above), the respondent should have been well aware of the severe repercussions of breaching the prohibition contained in the caution above. Nevertheless, he proceeded to post on the SI forum information that was *both* unreliable and untrue. He must have appreciated that this information could harm many others financially if and when they acted on what was in reality nothing more than, as stated in the first OCBC report and the second OCBC report, "[s]peculative" information. Indeed, I am highly sceptical that such irresponsible behaviour could ever have been born out of altruism. I am more inclined to take the view that it was the respondent's misguided anxiety to recoup his heavy losses from his sale of Datacraft's shares on 13 February 2004 (see [9] above) that drove him to make the first post and the second post on the SI forum, thereby breaching, at the very least, the terms and conditions regulating participation in the forum. As I stated earlier (at [115] above), there is no need for me to conclude one way or the other on the respondent's motives; in any event, the facts speak loudly for themselves.

Evaluation of all the evidence

119 As stated at [87] above, the assessment of whether there were reasonable grounds to believe in the truth of the alleged CAD raid must necessarily be conducted against the background of the respondent's relevant attributes. The respondent was a full-time and seasoned private equities trader at the material time; he also had a Bachelor of Science degree in accounting and finance from the New York University. He was, therefore, not by any stretch of the imagination an amateur dabbling in the securities market. Further, one of the Defence's witnesses, Mr Chir, confirmed that the respondent was "*very careful about usage of words*" [emphasis added] (see NE at p 88). Sam Wong also stated in his examination-in-chief that the respondent was "quite knowledgeable about the stock market" (see NE at p 4). It is in this context that we must consider whether there were reasonable grounds for a person like the respondent to have believed in the truth of the information which he disseminated on the SI forum – *viz*, the news of the alleged CAD raid.

120 In my view, an individual in the respondent's position could *not* reasonably (or, indeed, even conceivably) have believed in the truth of the information about the alleged CAD raid, given all the circumstances of the present case. A single piece of unverified information from a friend with whom one has no obvious business relations does not, in the prevailing circumstances, constitute reasonable

grounds for such belief. The first OCBC report and the second OCBC report might have been more reliable, given that they emanated from and carried the imprimatur of a financial institution. However, it must be borne in mind that the respondent was *well aware* that the reports were generated by Sam Wong, the very source from which he had first received the news of the alleged CAD raid. It also bears particular emphasis that the OCBC reports, meant for internal circulation, contained an express caveat stipulating that a recipient "*should not act on it without first independently verifying its contents*". Further, the first OCBC report and the second OCBC report never used the specific word "raid" to describe the CAD's action in respect of Datacraft. Instead, those reports merely stated that there were *rumours* of "CAD follow up action", and they both cautioned that these rumours were "*[s]peculative*". A person with the respondent's qualifications and experience would therefore have been very unlikely to have relied entirely on the first OCBC report and the second OCBC report as the grounds for his belief in the truth of the information that the CAD had raided Datacraft on 13 February 2004. It then remains to be considered whether the respondent had indeed honestly believed in such information, despite the absence of reasonable grounds for him to do so.

121 From the analysis of the evidence, it would strain all notions of credibility (and, indeed, require a suspension of disbelief) to accept that the respondent had an honest belief in the statements which he made in the first post and the second post on 16 February 2004. It is pertinent that the 20 February 2004 BT article stated that "*the person who put up the posting on ShareInvestor told BT that he had done so only after he read the OCBC comments on Friday evening and again on Monday morning*" [emphasis added] (see [32] above). Given that the respondent claimed that he had based the first post, in particular, the words "CAD *raided* Datacraft office" [emphasis added], on the 13 February 2004 SMS, and given that the first OCBC report and the second OCBC report did not use the word "raid" at all (see the discussion above at [98]–[101]), this statement attributed to the respondent (without being challenged) in *The Business Times* article only serves to further undermine the respondent's assertion that he *did* have an honest belief in the truth of what he posted on the SI forum.

122 There is another serious obstacle to finding in favour of the respondent on the issue of *mens rea*, *viz*, his purported *certainty* of the truth of the information which he posted on the SI forum. Not only did the respondent assert without qualification in the first post that "Heard CAD raided Datacraft office last Friday again", he also asserted his purported absolute conviction in the truth of that raid by audaciously stating in the second post (in reply to Papabull's post cautioning him about the veracity of the first post and warning him against posting misleading information), "*I know what I am talking*" [emphasis added] (see [22]–[23] above). In so doing, the respondent warranted his belief in the truth of the alleged CAD raid despite there being no genuine basis, whether objective *or* subjective, for honestly believing that there had been such a raid. Indeed, the objective *impact* of the absolute statements set out in the first post and the second post may be deduced from the remarks in the 18 February 2004 BT article, where it was stated that the respondent's first post on the SI forum was a "*bigger impetus* to sell [Datacraft's shares]" [emphasis added] than the first OCBC report and the second OCBC report (see [31] above). Further, I should note, at this point, that the respondent had in fact breached yet another of the SI forum's rules, *viz*, the prohibition against posting information which is not publicly available. *Even if* one contends that the first OCBC report and the second OCBC report may be deemed to have been publicly available despite being intended for internal circulation amongst OCBC Securities' traders, the information that was actually posted by the respondent on the SI forum (*viz*, that there had been a raid by the CAD on Datacraft) was, as I emphasised earlier, *distinctly different* from the measuredly qualified and tentative statements in the above two OCBC reports (*viz*, that there were market *rumours* of "CAD *follow up action*", and that such rumours were "*[s]peculative*" [emphasis added]). In my view, the respondent's dissemination of the information in question on the SI forum was precisely the sort of conduct that s 199(i) of the SFA is meant to proscribe. Responsible communication with the community of traders in the market is the

foremost concern underpinning such securities offences.

123 Finally, the various inconsistencies in the respondent's evidence should be mentioned. First, there was the fact that he neglected to mention the 13 February 2004 SMS in his first three statements to the CAD on 12 August 2004, despite that SMS message purportedly being the main source from which he received the information about the alleged CAD raid. Second, the respondent was inconsistent about his relationship with Sam Wong, stating, first, that the latter was an "acquaintance" in his first statement to the CAD, then stating that he was "not Sam's good friend" in the Additional Statement and, finally, stating that he and Sam Wong were "close friends" in his testimony in court (see NE at p 50). Third, the respondent gave the impression during his testimony that he was very certain of the exact words which Sam Wong used in the 13 February 2004 SMS. However, this certainty was absent from the Additional Statement, where, as noted above at [98], the respondent was equivocal about the words used, giving two possible permutations of that SMS message. Fourth, the respondent testified that he had relied primarily on the 13 February 2004 SMS in deciding to sell his 700,000 Datacraft shares; yet, in the Additional Statement, he did not mention that SMS message at all when he listed the three main reasons for his sale of the shares. Fifth, from the respondent's testimony in court, his telephone conversations with Sam Wong seemed to be important to him in confirming the information about the alleged CAD raid; yet no mention was made of these calls in the Additional Statement. In my view, these inconsistencies, *inter alia*, serve to wholly undermine the respondent's credibility. This is significant since many of the respondent's submissions on his honest belief in the truth of the information which he disseminated in the SI forum were largely unsubstantiated by the objective evidence. It is simply unbelievable that Sam Wong would have given him any iron-clad assurances about his certainty of a CAD raid having occurred when he (Sam Wong) had so plainly and carefully qualified all his communications with his colleagues vide the OCBC reports.

124 In the result, I find that the respondent did *not* have any honest belief in the contents of the first post and the second post when he lodged those entries on the SI forum on 16 February 2004. There were no reasonable or even plausible grounds on which he could have believed in the truth of the information. More importantly, in the light of the inconsistencies both internally within the respondent's own evidence and externally between the respondent's evidence and the extrinsic objective evidence, I am satisfied beyond any reasonable doubt that the respondent did not have an honest belief in what he posted on the SI forum on the material date and, therefore, that the s 199(i) *mens rea* has been made out on the facts of this case. Indeed, the respondent is even likely to have satisfied *all* of the *three* distinct mental elements encompassed by s 199 of the SFA (see [64] above). In my view, the respondent went beyond mere subjective recklessness in asserting the truth of the information which he disseminated. I am inclined to find, on the evidence before me, that the respondent must have *known* that the information about the alleged CAD raid was *false and misleading* when he disseminated it. *A fortiori*, the respondent also falls squarely within the negligence limb of s 199 of the SFA (*ie*, the second limb of s 199(ii)), in that he *ought reasonably to have known* that the information was false and misleading. Indeed, given the present facts, it is rather puzzling why the Prosecution deemed it appropriate to charge him under s 199(*b*)(i) of the SFA alone (rather than as an alternative to a charge under s 199(ii)), as subsection (i) of s 199 sets the requisite *mens rea* at a somewhat higher threshold than penal negligence. In any event, for the reasons given above, I allow the Prosecution's appeal and convict the respondent on the Charge.

The sentence

125 I will hear on another date the submissions on sentencing. This will give the parties sufficient time to digest the contents of this judgment.

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