25. SECURITIES AND FINANCIAL SERVICES REGULATION

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25.1 There were fewer cases in 2016 (as compared to 2015) which involved securities regulation broadly understood. The area not being clearly defined can be seen in the fact that it only came about when Prof Louis Loss put together the first book on the area (which he first termed) in 1951,[1] drawing strands from disparate areas of finance law.[2] In Singapore, this is also attested to by the fact that the most important case discussed here is that of *Vintage Bullion DMCC v Chan Fook Yuen*,[3] which was about whether certain financial assets were held by a financial institution on trust for its investors or fell for distribution to its unsecured investors. Yet, it falls within the rubric of the regulation of securities market intermediaries. As securities regulation also covers areas where private ordering interacts with formal regulation, there is also some discussion at the end of this review of both contractual arrangements made in the shadow of listing and business rules.

Licensing and conduct of business rules

Trust accounts

25.2 As the first instance decision, *MF Global Singapore Pte Ltd v Vintage Bullion DMCC*[4] ("*MF Global*"), was discussed in detail in a previous review,[5] only the salient facts of the case will be offered here. The legal issue was whether certain sums of money that had been left with a capital markets services licensee, MF Global Singapore Ltd ("MFGS"), which went into provisional liquidation after its ultimate parent, MF Global Holdings Ltd, filed a voluntary petition for relief under Bankruptcy Code 11,[6] were held on trust for Vintage, who brought an action on behalf of itself and a number of MFGS customers. These assets started out as customer margins that were not "onward-

1 Louis Loss, *Securities Regulation* (Little, Brown and Company, 1st Ed, 1951).
2 Stephen Labaton, "Profile: Louis Loss; For the Father of Securities Law, Yet Another Milestone" *The New York Times* (26 September 1993).
3 [2016] 4 SLR 1248.
4 [2015] 4 SLR 831.
5 (2015) 16 SAL Ann Rev.
6 USC (US) (1978).

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placed"[7] but kept in customer segregated accounts, pooled together (although MFGS accounted distinctly for each customer's fund) and in addition mixed with some of MFGS own funds (which MFGS was allowed to do, for example, under reg 21 of the Commodity Trading Regulations 2001[8] ("CTR") and reg 23 of the Securities and Futures (Licensing and Conduct of Business) Regulations[9] ("SFR")). Until the customer accounts were closed out, there was nothing due under the master trading agreement (except the initial margins) and they were considered "open" with either unrealised profits or unrealised losses. After close-out, sums owed to their customers were considered "forward value" but, under the terms of the account, MFGS's obligation to pay the quantified amounts only arose on the value date, which was usually two days after close-out. From this point on, it formed part of the ledger balance.

25.3 At first instance, Hoo Sheau Peng JC found that both the Securities and Futures Act[10] ("SFA", for leveraged foreign exchange ("FX") trading) and the Commodity Trading Act[11] (for spot bullion trading), while creating statutory trusts of "moneys" in a margin trading account, did not cover the unrealised profits and realised forward value but only the ledger balance. The judge said that the unrealised profits and realised forward value "do not fall within Parliament's intended scope of protection".[12]

25.4 The Court of Appeal agreed that the unrealised profit was not held on trust but reversed the High Court's decision and found that the amounts represented by the forward value were.[13] In examining both the requirements for the creation of statutory and express trusts in the corporate and financial context, Andrew Phang Boon Leong JA held that it was not disputed that the initial sums paid over as margin were held on trust as required by the CTR and SFR. Though, the dispute was over profits that arose pursuant to bullion and leveraged FX transactions. The Court of Appeal recognised that unrealised profits were those outstanding on transactions of differences that had not been closed. The client was still speculating at this stage. However, once the position was closed, any profit crystallised into a forward value. Phang JA also noted that there were sufficient funds kept at all times in customer segregated accounts to cover both the unrealised profits and forward value even though there had been some commingling with the company's own

7 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [12].
8 S 578/2001.
9 Cap 289, Rg 10, 2004 Rev Ed.
10 Cap 289, 2006 Rev Ed.
11 Cap 48A, 2009 Rev Ed.
12 *MF Global Singapore Pte Ltd v Vintage Bullion DMCC* [2015] 4 SLR 831 at [158].
13 *Vintage Bullion DMCC v Chan Fook Yuen* [2016] 4 SLR 1248.

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funds (which was authorised by the statute to prevent under-margining or under-funding) and, so, there was no transfer as such that was necessary when a position was closed. Further, the "Sec Fund Statements" that were prepared daily (and that were part of a prescribed form which the firm submitted to the Monetary Authority of Singapore, "MAS", quarterly) listed under "Amount to be Segregated" included not only the ledger balance but also the forward value and unrealised profits. Phang JA, thus, recognised that:[14]

> … The key question in these appeals is therefore whether the sums representing *Unrealised Profits* and *Forward Value* segregated by the Company and placed in the Customer Segregated Accounts constituted the residual financial interest of the Company (which were advanced merely to prevent under-margining of the Customers' accounts), *or* whether they were moneys segregated in recognition of the *beneficial ownership* of the Customers in these sums. [emphasis in original]

25.5 The Court of Appeal first disposed of the liquidator's argument that, as the subject matter of the trust was the chose in action requiring the customer to sue the company, having the company hold the chose as trustee was impossible as it would be required to sue itself to enforce the chose. It was the subject matter of the chose, that is, the money that was held on trust and that to think otherwise was to unnecessarily complicate the issue. Next, analysing both the CTR and SFR, Phang JA thought that it was quite clear that statutory trusts were intended to be created over money "accruing to the customer" or "received on account of its customer" (under reg 21(1)(*b*) of the CTR and reg 16(1)(*b*) of the SFR) or "belonging to that customer" (in reg 21(1)(*a*), reg 22(1) of the CTR and reg 16(1)(*a*) of the SFR). While unrealised profits constituted the "residual financial interest" of the company as they were still notional and uncertain, the Court of Appeal disagreed with the court below and found that the forward value fell under the statutory trust as the main idea captured in the statutory phrase "accruing" was similar to that of being "legally entitled" (following *Pinetree Resort Pte Ltd v Comptroller of Income Tax*[15] and *ABD Pte Ltd v Comptroller of Income Tax*).[16] Sums "received on account of its customer" under the SFR could also not arise before the customer was legally entitled to the money, and so the sole question really was whether the moneys had "accrued to" the customer. This, it had, as those numbers had been finalised once the positions were closed even though the customer had no right to

14 *Vintage Bullion DMCC v Chan Fook Yuen* [2016] 4 SLR 1248 at [14].
15 [2000] 3 SLR(R) 136.
16 [2010] 3 SLR 609.

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withdraw the sums till the value date. Phang JA thought that "the Judge *conflated* the concept of 'accrual' with that of 'payment'".[17]

25.6 The Court of Appeal also thought that a statutory trust does not have the same characteristics as a common law trust, and may well be in the nature of a purpose trust (which it would have been here if it came about at the time the moneys were received or accrued and before segregation) and so, it favoured the need for segregation without fully deciding the point.[18] In its consideration of the express trust, which the Court of Appeal thought relevant only for the unrealised profits given its finding that there was a statutory trust over the forward value, it was held that there was insufficient certainty of subject matter given its notional and fluctuating nature.[19] According to Phang JA, "segregation is a necessary but not a sufficient condition to give rise to an express trust over the Sums in favour of the Customers".

25.7 Perhaps because of the decision at first instance in *MF Global*, MAS issued a consultation paper.[20] One proposal was for a "customer's moneys" under the CTR and SFR to expressly include contractual rights arising from transactions entered into by a holder of a capital markets services licence on behalf of or with its customers. It is not clear whether the amendments are still necessary in light of the Court of Appeal decision, and whether it is intended to include those rights represented by the unrealised profits as it also states that it does not propose to change the definition of "customer's assets" given that "mark-to-market accruals and other contractual rights owed by the CMS licensee to the customer are typically met with cash instead of assets".[21]

Derivative-trading and security-lending and borrowing

25.8 The concern of this part is with the use of misleading labels, which are important as an organising tool due to the enormous amounts of information that are inserted in some modern-day financial instruments. The problem with this is that the volume, and complexity,

17 *Vintage Bullion DMCC v Chan Fook Yuen* [2016] 4 SLR 1248 at [46].

18 See Teo Keang Sood, *Developments in Singapore Law between 2001 and 2005* (Academy Publishing, 2006) ch 2, at p 50 for the argument that real estate investment trusts in Singapore are valid purpose trusts; *cf* Aaron Seah, "Conceptualising the Singapore Real Estate Investment Trust" (2010) 24(3) *Trust Law International* 155.

19 *Cf Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), whose decision was upheld in *Pearson v Lehman Brothers Finance SA* [2011] EWCA Civ 1544.

20 Monetary Authority of Singapore, *Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, 18 July 2016).

21 Monetary Authority of Singapore, *Enhancements to Regulatory Requirements on Protection of Customer's Moneys and Assets* (P008 – 2016, 18 July 2016) at para 3.3.

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of some of the information (much of which may be unnecessary as well – there are echoes here of tax schemes and artificial pre-ordained transactions)[22] is such that both investors and regulators end up having to utilise stereotypes in their decision-making. Where investors are concerned, labels may mask the inherent risks involved. Without any real standardisation in many over-the-counter financial products, in particular, attaching labels to them only serves to obfuscate terms within the documentation.

25.9 Characterisation is crucial when it pertains to the validity of a transaction. So, for example, the distinction between whether a contract creates an indemnity or guarantee could be determinative of a dispute because s 6 of the Civil Law Act[23] states that a guarantee must be in writing or evidenced in writing. However, where writing is not an issue, it can be argued that characterisation is not necessary. While it is true that an indemnity is harder to be discharged, that is an internal contractual issue. When this is not a major issue, it is submitted that the focus should be on the individual terms without characterising the transaction one way or another. A need to look closely at the terms of an indemnity can be seen in the one that was attached to the contract for differences' ("CFD") terms and conditions in *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong*.[24] There, the first respondent opened an account to trade in CFDs, a form of derivative, with the plaintiff, a securities broker. This was subject to domestic arbitration proceedings. The second respondent, who was the husband of the first respondent, and acted as her remisier, agreed to indemnify the plaintiff as "sole principal debtor" against losses that might arise from his client's trades and this was subject to the non-exclusive jurisdiction of the Singapore courts. Losses were incurred on the account which was closed out by the plaintiff. The second respondent argued for a stay of the court proceedings brought against him on the indemnity, on the basis that cl 1 of the indemnity *prima facie* indicated that, in order for liability to arise thereunder, the closing out of the CFD transactions had to have been expressly or impliedly authorised either by the second respondent himself and/or his client, the first respondent. The respondents disputed this as well as the quantum of trading losses.

25.10 The High Court confirmed the earlier Court of Appeal *dicta* in *Tomolugen Holdings Ltd v Silica Investors Ltd*[25] (which held that a dispute over minority oppression or unfair prejudice under s 216 of the

22 *WT Ramsay Ltd v IRC* [1981] STC 174.
23 Cap 43, 1999 Rev Ed.
24 [2016] 3 SLR 431.
25 [2016] 1 SLR 373.

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Companies Act[26] is arbitrable under the International Arbitration Act)[27] that the principles governing a stay of court proceedings in favour of arbitration are the same under the Arbitration Act[28] except that with the latter Act, which covers domestic arbitration, the courts have the discretion whether to grant or refuse a stay even if the underlying philosophy is to promote arbitration. In granting the stay despite the argument that the indemnity created an autonomous liability, Steven Chong J said that:[29]

> There is no doubt that this is an indemnity agreement under which the second respondent's liability is primary and not contingent on liability against the first respondent under the CFD Terms and Conditions being first established (*American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [41]; *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1 at [27]–[28]). This alone does not mean that the claim against the second respondent is factually and legally independent of the claim against the first respondent; it is necessary to examine when liability under the Indemnity arises. The key provision is cl 1 which provides that the second respondent's liability under the Indemnity only arises in relation to losses incurred by the appellant in relation to transactions 'dealt by or through [the second respondent] or accepted by [him] or allocated/designated under [his] code or under any of [his] … accounts'. This clause *prima facie* indicates that the closing out of the CFD transactions on 24 August 2015 must have been expressly or impliedly authorised either by the second respondent himself (*ie*, 'dealt by' or 'accepted by' him) and/or his client, the first respondent (*ie*, 'dealt … through' or 'allocated/designated under [his] code or under any of [his] … accounts') in order for the appellant to be able to rely on the Indemnity.

25.11 In *JES International Holdings Ltd v Yang Shushan*,[30] the issue was whether a moratorium on a transfer of shares had been breached by what ostensibly was a "Collateral Security Agreement" entered into by the defendant and a financier. The defendant had obtained a first tranche of the plaintiff's shares pursuant to a transaction in which the plaintiff, JES International Holdings Ltd ("JES"), a public company listed on the Singapore Exchange Securities Trading Limited ("SGX"), initially borrowed its shares from its principal shareholder, JES Overseas Investment Ltd ("JESOIL"), and then transferred it to the defendant in

26 Cap 50, 2006 Rev Ed.
27 Cap 143A, 2002 Rev Ed; see further Joseph Lee, "Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective" *Social Science Research Network* (23 February 2015) <https://ssrn.com/abstract=2736981> (accessed February 2017).
28 Cap 10, 2002 Rev Ed.
29 *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong* [2016] 3 SLR 431 at [28].
30 [2016] 3 SLR 193.

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exchange for shares in another company controlled by the defendant and his son. The defendant furnished a moratorium undertaking to the plaintiff which prohibited any act that could potentially impact or impair the defendant's ability to return the first tranche JES Shares if the transaction was unwound or if JESOIL demanded a return of the shares from the separate share-lending agreement that the plaintiff entered into with JESOIL.

25.12 The plaintiff sued the defendant on the basis that the transfer of the collateral shares was a breach of the moratorium. One argument raised by the defendant was that he was allowed to use the First Tranche JES Shares as "security for mortgage". He argued that the collateral shares were mortgaged under the Collateral Security Agreement. Kannan Ramesh JC held, however, that the Collateral Security Agreement gave the lender freedom to deal with the shares once it was transferred. As with most forms of security for shares, it took the form of a sale and buyback rather than a pledge or mortgage. Upon the occurrence of an event of default, the financier was entitled to treat the collateral shares as its own without any obligation to account for the proceeds or to have recourse to the defendant for any shortfall. Significantly, the defendant had no obligation to repay the loan in such an event.

25.13 To be contrasted is the earlier case of *Pacrim Investments Pte Ltd v Tan Mui Keow Claire*[31] which involved the meaning of the words "assign" and "disposal" as part of a moratorium on a sale of shares that the then secondary board of SGX, SESDAQ, imposed on an allocation of shares. The Court of Appeal held that it depends on the context in which the words are used and declined to examine cases which have specifically dealt with their meaning in other situations.[32] It found that the words did not prevent the creation of a security interest, as the concern was with shares flooding the market and so, did not cover a share "pledge" which the court saw as, in substance, an equitable mortgage. Care must, however, be taken to see whether the transaction was properly characterised as a security or sale transaction.

25.14 *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited*[33] ("*Beconwood*"),[34] was an important Australian Federal Court decision which held that a securities-borrowing and lending arrangement effected a transfer of title, and was not a chattel loan in the traditional sense. Finkelstein J examined the purpose of the

31 [2008] 2 SLR(R) 898.
32 *Pacrim Investments Pte Ltd v Tan Mui Keow Claire* [2008] 2 SLR(R) 898 at [16].
33 [2008] FCA 594.
34 See also Hans Tjio, "Share Lending in Australia" [2009] LMCLQ 4.

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transaction, immediately after finding the terms of the share-lending agreement quite unequivocal, "which requires an understanding of the genesis of the transaction, its background, its context, and the market in which the parties are operating".[35] He found that share-lending documents are widely used in the market to give the share-borrower title to the shares as otherwise, it will not in turn be able to use those shares to obtain financing.

25.15 Still, while unequivocal, the judgment appears to accept that most of the market terminology associated with the transaction is somewhat inaccurate, yet securities-borrowing and lending is how it is referred to in the business context, as well as certain legislation.[36] Finkelstein J, in *Beconwood*, also thought that securities-lending, in its different variants, is a factually incorrect description in that title to the shares passes from the lender to the borrower. However, if title always passes and labels are required, then surely, the terminology should be closer to that of a share "repo", rather than a "loan".

Insider trading and market abuse

Takeovers

25.16 Perhaps the most egregious case involving the confusion that surrounds the use of security as opposed to sale language was the failed takeover of Jade Technologies Holdings Ltd ("Jade"), an SGX-listed company, which the Securities Industry Council ("SIC") consented to being aborted because the bidder, a special purpose entity controlled by the defendant, Soh Guan Cheow Anthony ("Soh") did not have sufficient financial resources to purchase all the Jade shares it did not already own. The bidder claimed, and this was disclosed in its offer documents, that it already controlled 46.54% of the Jade shares, but it was in fact only 16.06%. This was due to, amongst other things, share "pledge" arrangements which its controller had entered into with Opes Prime Stockbroking Ltd ("Opes") (an Australian stockbroking group) which found their way back to the Singapore market when Soh could not meet margin calls from Opes. SIC decided that the controller of the bidder, and his advisers, had made inaccurate shareholding disclosures as they should have known that title to the shares passed to Opes as the share "pledge" was a sale and repurchase transaction. Subsequently, civil proceedings were brought by the financial advisers, which had also been

35 *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* [2008] FCA 594 at [43].

36 See the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) Second Sched, para 2(*d*).

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disciplined by SIC, against the bidder. In *Oversea-Chinese Banking Corp Ltd v Asia Pacific Links Ltd*,[37] Lai Siu Chiu J found that the bidder and controller had misrepresented both their financial resources confirmation and level of shareholdings to their financial adviser, and had kept this hidden from the adviser.[38]

25.17 In *Soh Guan Cheow Anthony v Public Prosecutor*,[39] the High Court upheld the decision of the Magistrates Court and found the defendant guilty of breaching s 140(2) of the SFA, which makes it an offence for a person to publicly announce that he intends to make a takeover offer, or a person to give such notice or publicly announce such offer, if he has no reasonable or probable grounds for believing that he will be able to perform his obligations if the takeover offer is accepted or approved. Even taking his case at the highest, See Kee Oon JC (as he then was) could not see how Soh's impression that OCBC possibly funding the takeover alone could constitute reasonable grounds for believing that he would have sufficient resources to complete the takeover when he had been told by OCBC to provide a letter from another bank to expressly confirm that he had requisite funds to satisfy full acceptances under the bid. See JC also thought that there was no need to fetter the courts' discretion in terms of sentencing even though the *mens rea* requirements in s 140(2) were different from that in s 140(1), where the focus is on a person announcing a takeover when it has no intention to do so (which is, arguably, more serious).

25.18 In addition, Soh was found guilty of insider trading under s 218(2) of the SFA as he had procured the sale of the Jade shares though a company, Faitheagle, in which he was sole director and shareholder when he knew that the above information was not generally available, and if it were generally available, it might have a material effect on the price of the company's shares. As he was a director of Jade, he was also guilty of the provisions then applicable to directors under ss 165(1)(*b*) and 166(1) of the Companies Act (which are now in the SFA, since the commencement of the Securities and Futures (Amendment) Act 2009)[40] to disclose any changes to his interest in securities to both Jade and SGX (which he had failed to do).

25.19 The defendant was also guilty of the s 197(1) SFA offence of false trading and market rigging with respect to the market for, or the price of, securities. See JC did not accept Soh's "commercial reasons" for

37 [2011] 1 SLR 906.
38 *Oversea-Chinese Banking Corp Ltd v Asia Pacific Links Ltd* [2011] 1 SLR 906 at [23].
39 [2017] 3 SLR 147.
40 Act 2 of 2009.

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his trades in terms of his belief in the value of Jade shares and desire to secure majority control of Jade. The large secret sales of Jade by Faitheagle during the offer was, in See JC's view, "an extremely cogent indicator that his ultimate aim was to secretly profit from an anticipated inflation in the share price after the VGO was announced, as opposed to genuinely seeking to secure majority control of Jade".[41] Those profits were used to pay off outstanding loans owed by Soh on other share and property deals.

25.20 While Soh's sentences with respect to the earlier charges discussed above were enhanced, See JC agreed with the district judge below for both the conviction and sentence in respect of the s 330 SFA offences, where Soh breached the duty not to furnish false statements to a securities exchange, futures exchange, designated clearing house, and SIC.

25.21 Although this did not involve the use of misleading labels, it shows the difficulties sometimes in internalising what labels mean. In November 2016, SIC censured a bidder, its financial and legal advisers for a breach of Note 3 of r 20.1 of the Singapore Code on Take-overs and Mergers ("Takeover Code") (regarding no-increase statements). This involved a voluntary unconditional cash offer to privatise OSIM, a company listed on SGX. On 31 March 2016, OSIM shareholders approved a final dividend of S$0.02 per share. On 5 April 2016, the bidder made a revised offer (along with a no-increase statement) at S$1.39 cum dividend and S$1.37 ex-dividend (which means that the declared dividend belongs to the seller rather than the buyer). The advisors agreed that they would continue to make market purchases at prices not higher than that from 5 April 2016. However, the relevant ex-dividend date was 4 April but the parties thought it was 6 April, which was the book closure date (the ex-dividend date is typically set for two business days before the record date). By buying on the market at S$1.39 on 5 April 2016, which the advisers said it could do, the bidder had to increase the offer price to S$1.41 cum dividend after SIC refused the waiver of r 21.1 (to match purchases above the offer price). There was, thus, a breach of no-increase statement. SIC said that while the Takeover Code duties rest "primarily on Offeror", the advisers had "shared collective responsibility". SIC found that they did not consider the implications of the shares trading ex-dividend. However, SIC decided not to take further action against the advisers as the shareholders were fully compensated. In addition, the advisers took prompt action after the event to approach SIC and they also took steps to improve "internal processes and controls" to prevent a similar incident from occurring again.

41 *Soh Guan Cheow Anthony v Public Prosecutor* [2017] 3 SLR 147 at [145].

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Fraudulent or deceptive conduct: Sentencing

25.22 The next two cases involved the use of nominees or quasi-nominees to circumvent certain restrictions put on the defendant where custodial sentences were imposed under the general fraud and deceptive conduct provisions in s 201 of the SFA. This prohibits a person from, "directly or indirectly, in connection with the subscription, purchase or sale of any securities … engage[ment] in any act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, upon any person".

25.23 This provision had been the subject of guidance proffered by a three-judge High Court last year in *Public Prosecutor v Ng Sae Kiat*[42] ("*Ng Sae Kiat*"). Chao Hick Tin JA stated that they "do not agree that the distortion of market information is a necessary condition for a custodial sentence to be imposed in respect of a s 201(*b*) offence".[43] Instead, a non-exhaustive list of factors to consider include the:[44]

> (a) the extent of the loss/damage caused to victim(s);
>
> (b) sophistication of the fraud;
>
> (c) the frequency and duration of the offender's unauthorised use of the relevant account;
>
> (d) extent of distortion, if any, to the operation of the financial market;
>
> (e) identity of the defrauded party (*ie*, whether the defrauded party is a public investor or a securities firm);
>
> (f) relationship between the offender and the defrauded party; and
>
> (g) the offender's breach of any duty of fidelity that may be owed to the defrauded party …

25.24 The problems in *Lee Chee Keet v Public Prosecutor*[45] arose from the appellant's deceptive use of nominees to circumvent the usual one-year moratorium imposed by SGX on the transfer and/or disposal of his shareholdings in SNF Corporation Limited, which was a newly listed company. The defendant had pleaded guilty and the Magistrate's Court imposed six months' imprisonment (to run concurrently) on him for each of two counts of abetting a deceitful act in connection with dealings in securities, an offence under s 201(*b*) of the SFA read with

42 [2015] 5 SLR 167.

43 *Public Prosecutor v Ng Sae Kiat* [2015] 5 SLR 167 at [58].

44 *Public Prosecutor v Ng Sae Kiat* [2015] 5 SLR 167 at [58].

45 [2016] 4 SLR 1316.

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s 109 of the Penal Code.[46] On appeal, the defendant argued that the district judge had erred in applying the new sentencing norm in imposing a custodial sentence. See JC held that *Ng Sae Kiat* has not changed the pre-existing sentencing norm but consolidated existing principles. Further, given the broad range of s 201(*b*) offences and the differing degrees of culpability of offenders, the court was not convinced that a common and uniform "sentencing norm" shall or can be established across all types of s 201(*b*) offences, save for factors that can assist in assessing the public interest at stake, which will in turn determine the type of sentence to be imposed.[47] See JC stressed that the High Court in *Ng Sae Kiat* had set out a *non-exhaustive* list of factors to consider, and thought that the custodial threshold had been crossed here even though there was a lack of evidence of loss suffered by the investing public as well as actual market impact (which had been said by Chao JA in *Ng Sae Kiat* to require the distortion of market information and not just the fact that a participant had been adversely affected). However, See JC accorded greater weight to the mitigating factors such as the appellant's co-operation with the authorities, including his willingness to testify against his fellow director.[48] Consequently, the sentences were reduced to four month's imprisonment to run concurrently.

25.25 The fact that the list of factors in *Ng Sae Kiat* is non-exhaustive was subsequently confirmed in *Public Prosecutor v Prem Hirubalan*.[49] The relevant charge that resulted in Tay Yong Kwang JA reversing the district judge's imposition of a fine there related to unauthorised trading using a client's account without the consent of the securities company (the consent of the client was not the issue although she did not know of the specific trades). In *Ng Geok Eng v Public Prosecutor*[50] ("*Ng Geok Eng*"), Tay Yong Kwang J (as he then was) held that for unauthorised share trades prosecuted under s 201(*b*), a distinction should be drawn between cases where this is unknown to the account holder as opposed to the situation where the securities firm has not consented to the trades. The former usually requires a custodial sentence but in the latter situation, the appropriate sentence depends on the circumstances of the case.

25.26 In increasing the custodial sentences for other offences and imposing one for the relevant charge above (in place of a fine), Tay JA thought that the respondent's actions in the present case were more

46 Cap 224, 1985 Rev Ed.
47 *Lee Chee Keet v Public Prosecutor* [2016] 4 SLR 1316 at [30].
48 *Lee Chee Keet v Public Prosecutor* [2016] 4 SLR 1316 at [53].
49 [2016] SGHC 156.
50 [2007] 1 SLR(R) 913.

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aggravating than in *Ng Geok Eng* as he was working as a financial professional and had a duty of fidelity to the securities company which employed him. This was so even though the respondent's mother remedied the losses in the client's account, for which there had been 46 trades made by the respondent amounting to slightly more than S$1.2m worth of shares over a period of about ten weeks.

Contractual disputes involving unauthorised trading

25.27 The dispute in *AmFraser Securities Pte Ltd v Goh Chengyu*[51] centred over what the defendant claimed were four unauthorised trades in the shares of SGX-listed companies including Asiasons Capital and Blumont Group, which resulted in large losses when their share prices collapsed (the unrelated criminal prosecution for the alleged market manipulation in relation to these "penny" stocks will be discussed in a future review).[52]

25.28 George Wei J rejected the defendant's evidence that the trades were done without his knowledge or approval, given that there were 96 other undisputed trades which were carried out on behalf by his cousin and another person and which were within their scope of authority. There was detailed discussion of the business rules of SGX which governed the relationship between the parties but it was held that these were either complied with or did not form implied terms in the trading agreement between the defendant client and the plaintiff stockbroker. As the judge noted:[53]

> … Rule 1.1.1 expressly provides that the Rules operate as a binding contract *only* between the Singapore Stock Exchange and *each Trading Member*, such as the Plaintiff. Rule 1.1.2 then states that a person who is not a party to the Rules, such as the Defendant, 'has *no rights* under the Contracts (Rights of Third Parties) Act (Cap 53B, [2002 Rev Ed]) *to enforce the Rules* …' [emphasis by the High Court in *AmFraser Securities Pte Ltd v Goh Chengyu*][54]

There was, thus, nothing that contradicted the relevant terms and conditions for operation of the securities trade account signed between the parties in 2012 that required the defendant to meet its obligation to cover the trading losses.

51 [2016] SGHC 278.

52 Jamie Lee, "Masterminds of 2013's penny stock crash charged in court" *The Business Times* (26 November 2016).

53 *AmFraser Securities Pte Ltd v Goh Chengyu* [2016] SGHC 278 at [222].

54 [2016] SGHC 278.

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Issuer regulation and security offerings

Contractual disputes involving a listing

25.29 While there were no cases directly in the area of securities offerings in 2016, an interesting contractual dispute arose in the context of a loan that was made in anticipation of a listing of a company. In *ACTAtek Inc v Tembusu Growth Fund Ltd*,[55] two convertible loan agreements ("CLAs") were entered into between the first appellant and the respondent, under which the respondent was to lend certain amounts of money to the first appellant, which were then to be repaid by the issuance of shares in the first appellant upon its intended listing on the New Zealand Stock Exchange ("NZSE"). When the plan did not come about, the respondent declared an event of default under the second CLA in that the appellant had misapplied the loan proceeds, and that a cross-default under the first CLA had been triggered. The appellant, in turn, argued that they did not misapply the loan proceeds and that the respondents had improperly declared an event of default and counterclaimed for damages on the basis that this resulted in the planned listing on NZSE being aborted. The judge at first instance found in favour of the respondents. The Court of Appeal reversed and allowed the appellant's counterclaim. The interesting contractual issue concerned the legal consequences that flowed from an event of default that is found to have been wrongly declared. The Court of Appeal remitted the matter to the judge for an assessment of damages.

Listing rules

25.30 SGX was also active in the area of the enforcement of its continuous disclosure rules. On 15 July 2016, it issued a public reprimand to YuuZoo Corporation Limited ("YuuZoo"), a social network company on its Mainboard, for breaches of SGX Listing Rule 703(4) read with Appendix 7.1, para 25(c).[56] This requires: a company's announcement to be balanced and fair; to avoid, among other things, the presentation of favourable possibilities from appearing certain or more probable than is actually the case; and the presentation of projections without sufficient qualification or without sufficient factual basis. YuuZoo had made an SGXNet announcement in May 2015 entitled, "New Edison Investment Research report on YuuZoo sees

55 [2016] 5 SLR 335.

56 Singapore Exchange, "SGX reprimands YuuZoo Corporation Limited on a May 2015 announcement regarding a research report" *Singapore Exchange News & Updates* (15 July 2016) <http://www.sgx.com/wps/wcm/connect/sgx_en /home/higlights/news_releases/SGX_reprimands_YuuZoo_Corporation_Limited> (accessed 28 October 2016).

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significant upside on share price", which carried an attachment containing a news release from YuuZoo with the headline, "New Edison Investment Research report on YuuZoo sees significant upside on share price, puts fair value at up to 1.83S$ in view of new signed agreements".

25.31 YuuZoo was reprimanded on the basis that the announcement and news release were not balanced and fair as the company presented the most optimistic scenario of a fair value of up to S$1.83 without sufficient qualification or explanation. Edison's report showed a range of valuation from S$0.26 to S$1.83 based on a weighted average cost of capital ("WACC") of 10%, 11%, 12.5%, and 15% and under various scenarios of slow, mid-case, and faster evolution. The report qualified that the value of S$1.83 was based on a WACC of 10%, which would only be appropriate when YuuZoo's business matured. Edison had, in fact, recommended that a WACC of 12.5% be assumed, given the early stage and emerging market focus of YuuZoo's B2C initiatives.

25.32 In November 2016, Swiber Holdings ("Swiber"), an SGX listed company was formally censured by SGX for "failing to provide a balanced and fair announcement" on a US$710m project award in West Africa that had been announced in December 2014. The contract price was actually only indicative, pending an engineering design study and finalisation of a field development plan. Swiber's next update on the project was in July 2016 when it announced a delay of the project but it still failed to provide details of the preliminary requirements of the transaction. SGX intervened after examining the letter of intent which Swiber had signed and that was given to SGX in response to its query.[57] It appears that some of its directors are under investigation for possible breaches of s 199 of the SFA (covering the making of false and misleading disclosures).[58] Swiber had also defaulted on payments due on its US$551m worth of listed bonds and issued mainly to high-net-worth individuals (thereby avoiding prospectus requirements).[59] This has thrown up complex issues of corporate debt restructuring. These problems have since spread to the shipping industry. For example, in October 2016, Rickmers Maritime Trust ("Rickmers"), a business trust listed on SGX, tried to obtain unitholder approval for 1.32 billion new units in the trust in partial redemption of S$60m of the principal amount of notes, with the remaining S$40m to be payable in November 2023 rather than May 2017. This was part of a precondition

57 Cai Haoxiang, "SGX raps Swiber for misleading investors on US$710m project" *The Business Times* (1 November 2016).
58 Kenneth Lim, "Current, ex-Swiber directors questioned by CAD" *The Business Times* (7 December 2016).
59 Goh Eng Yeow, "Review of SGX's bond framework needed" *The Straits Times* (17 October 2016).

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required by their bank lenders to reschedule their loans to 2021. Rickmers' bondholders were unhappy as other companies in difficulties which had listed their bonds on the SGX wholesale market had pledged full redemption of their notes in exchange for payment extensions.[60]

25.33 In November 2016, Foreland Fabrictech Holdings Limited was also reprimanded for breaches of Listing Rule 703(1) (failure to promptly announce material information) and Listing Rule 719(1) (failure to put in place a robust internal control to address financial, operational, and compliance risks).[61] Its directors were also reprimanded for causing the company to breach its obligations under the Listing Rules and for not demonstrating the character and integrity expected of directors and management of SGX-listed companies, as required under Listing Rule 210(5)(b) read with Listing Rule 720(1), in failing to act in the interests of shareholders as a whole. SGX concluded that Listing Rule 703(1) was breached as the company waited one month before disclosing that it had received a significant customer claim. Listing Rule 719(1) was breached for various reasons (the company rushed to settle the customer claim without properly instructing solicitors to assess the claim, and the company failed to keep written records relating to the claim). One of the directors, although a non-executive director and not involved in the day-to-day operations of the company, was also reprimanded together with the other executive directors. SGX took the view that he voted for the settlement of the claim without any due diligence. Another director who resigned because he was not happy with the handling of the customer dispute was not reprimanded.

25.34 The YuuZoo announcement was made in May 2015, the Swiber announcement in December 2014, and Foreland Fabritech's in December 2013, at a time when SGX's power with respect to listed companies was confined to a public reprimand. This was all changed in late 2015 when the new listing disciplinary committees and listing appeals committees were given the following powers:

(a) imposing fines not exceeding S$250,000;

(b) imposing restrictions on activities undertaken by issuers (for example, denial of market facilities for a specified period or restrictions on activities that issuers can undertake for

60 Tan Hwee Hwee, "Noteholders issue direct demand to Rickmers Maritime" *The Business Times* (10 October 2016).

61 Singapore Exchange, "SGX reprimands Foreland Fabrictech Holdings Limited, former Executive Chairman Tsoi Kin Chit, former Executive Director Zhang Hong Lai and former Non-Executive Director Chen Chao Ying" *Singapore Exchange News & Updates* (11 November 2016) <http://www.sgx.com/wps/wcm/connect/sgx_en/home/higlights/news_releases/SGX_reprimands_Foreland_Fabrictech_Holdings_Limited> (accessed 18 November 2016).

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breaches of the listing rules, including failing to make adequate and timely disclosure of information);

(c) discretion to make an offer of composition in relation to minor breaches of listing rules that do not constitute breaches of the SFA; and

(d) making additional requirements on issuers to manage their internal corporate governance.

Further changes may be in store in the second half of 2017 when SGX-ST hives off all its regulatory functions with respect to listings to a separate entity with its own board of directors.

25.35 Where reform of its listing rules are concerned, SGX has announced that it is considering allowing exceptions for dual-class share listings following the repeal of the one-share-one-vote requirement for public companies in s 64 of the Companies Act in January 2016. A public consultation paper on this matter following a public roundtable discussion on 14 November 2016 was issued on 16 February 2017.[62]

62 Singapore Exchange, "Possible Listing Framework for Dual Class Share Structures" (16 February 2017) <http://www.sgx.com/wps/wcm/connect/sgx_en/home/regulation_v2/consultations_and_publications/PC/Consultation+Paper+on+Possible+Listing+Framework+for+Dual+Class+Share+Structures> (accessed February 2017).

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