IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 155

Magistrate's Appeal No 139 of 2015

Between

Lee Chee Keet

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

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Introduction

1 This was an appeal against the sentence of six months' imprisonment imposed on the appellant for each of two counts of abetting a deceitful act in connection with dealings in securities, an offence under s 201(*b*) of the Securities and Futures Act (Cap 289, 2002 Rev Ed) ("the SFA") read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) ("the s 201(*b*) charges"). These charges arose from the appellant's deceptive use of nominees to circumvent a moratorium imposed by the Singapore Exchange Securities Trading Limited ("the SGX") on the transfer/disposal of his shareholdings in SNF Corporation Limited ("SNF"). The appellant had pleaded guilty before a District Judge to these as well as various other charges which related to offences dating from 2004 and 2005, when he was a director and substantial shareholder of SNF.

2 After the hearing of the appeal on 29 April 2016, I concluded that there were grounds to allow the appeal against sentence. Accordingly, I reduced the sentence of six months' imprisonment to four months' imprisonment for each of the s 201(*b*) charges and ordered the imprisonment terms to run concurrently. I delivered an oral judgment on 25 May 2016, and I informed the parties that I would provide full grounds for my decision, which are set out below. These grounds fully incorporate the observations I had made in my oral judgment.

Factual background

3 The relevant facts are set out in the Statement of Facts ("SOF") which the appellant had admitted to without qualification. The appellant became a director and shareholder of Gennex Solutions (S) Pte Ltd ("Gennex") on 3 February 2000. In late 2002, Gennex, together with a number of other firms in the electronics industry, was approached by one Ng Hock Ching ("Ng") and Chow Weng Fook ("Chow") for discussions relating to a proposed merger for the purpose of listing on SESDAQ, the secondary board of the SGX ("the IPO"). SESDAQ is now known as CATALIST.

The listing plans

4 Subsequently, SNF, represented by Ng and Chow, and the shareholders and directors of four interested companies entered into a Business Combination and Shareholders Agreement as well as a follow-up Supplemental Agreement. The four companies were: Gennex, CyberVisions (S) Pte Ltd, Micro Screen Production Pte Ltd and Max Quality (S) Pte Ltd (collectively "the subsidiaries"). Under these agreements, SNF agreed to acquire the subsidiaries and to allot ordinary shares in the capital of SNF to the subsidiaries' shareholders as consideration. The agreements were made

conditional upon SNF obtaining the eligibility-to-list ("ETL") letter and approval from SGX for admission to the official list of SESDAQ.

5 On 16 February 2004, SNF was granted a conditional ETL and the four subsidiaries were officially acquired by SNF the very next day. Following this acquisition, Ng and Chow were appointed as Chief Executive Officer and Chief Operating Officer of SNF respectively. The appellant was appointed as an executive director of SNF. Pursuant to the SGX listing requirements, the SNF directors (including the appellant) undertook that they would observe a moratorium on the transfer or disposal of their entire shareholdings in SNF for a period of one year after listing as well as 50% of their respective shareholdings in SNF for the subsequent one year ("the moratorium"). The purpose of the moratorium, as stated in SGX's Listing Manual, was to maintain the promoters' commitment to the listed issuer and align their interests with that of public shareholders.

The events leading up to the offending conduct

6 Investigations revealed that during one of the meetings held in preparation for SNF's IPO, Ng suggested to the SNF directors that they could place their shares in the subsidiaries with nominees to circumvent the moratorium. This arrangement would allow the directors to surreptitiously dispose of their SNF shareholdings (received as consideration for their shareholdings in the subsidiaries) through their nominees, right after the IPO if they so desired, without the need to observe the transfer/disposal restrictions imposed during the moratorium period.

7 The appellant approached five individuals ("the nominees") with the intention of placing his Gennex shares with them. On the appellant's instructions, each of the nominees signed a share transfer agreement with the

appellant on 21 May 2003. The agreement stipulated a transfer of 20,000 Gennex shares to each nominee in consideration for a sum of $20,000. No consideration was paid for the Gennex shares. The understanding was that the Gennex shares would subsequently be converted into SNF shares and sold after SNF's listing. Thereafter, the nominees were required to channel the proceeds from selling these SNF shares to the appellant. One of the nominees was tasked to receive sales proceeds from the other nominees before transferring the aggregate sums to the appellant.

8 Following SNF's acquisition of Gennex and the subsequent conversion of Gennex shares into SNF shares, a total of 15,931,900 SNF shares were held by the nominees on the appellant's behalf. Thus, even though the appellant was the beneficial owner of 25,491,040 SNF shares, his reported SNF shareholding was only 9,559,140 shares (representing only about 37.5% of his actual shareholding). The shareholding information was reported in the SNF IPO prospectus. In preparation for the sale of the nominee-held SNF shares, the appellant introduced his remisier to the nominees to facilitate the opening of their trading accounts with Philip Securities Pte Ltd.

9 After the IPO, the appellant began to dispose his SNF shares held in the nominees' names. The shares were sold in two tranches — one in the open market between March 2004 and July 2004 and the other through an off-market transaction in January 2005. It was undisputed that the open market sales of SNF shares were carried out on the instructions of the appellant. The proceeds of sale amounted to approximately $5.73m and were eventually channelled back to the appellant. Investigations also revealed that the appellant maintained a Microsoft Excel spreadsheet which recorded the nominees' securities trading account numbers and contained information such as their initial SNF shareholdings, the prices and quantum of the nominees'

SNF share sales and the balances of their SNF shareholdings after each sale between 18 March and 8 April 2004.

10 In carrying out his scheme, the appellant admitted to having: (a) concealed his beneficial ownership of his SNF shares and sold these during the moratorium and had operated a deception on SGX, thereby contravening s 201(*b*) of the SFA; (b) sold his SNF shares and failed to notify SNF and SGX as required under ss 165(1)(*b*) and 166(1) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act"); and (c) failed to notify SNF and SGX of changes in the percentage level of his interests in SNF as required under s 83(1) of the Companies Act and s 137(1) of the SFA.

11 On 24 January 2013, the appellant was charged with 43 offences under the Companies Act and the SFA. Among these charges were five charges under s 201(*b*) of the SFA which pertained to his deception of the SGX. Subsequently, the appellant accepted the prosecution's offer to proceed with 14 charges should he elect to enter a plea of guilt. These charges included two under s 201(*b*) of the SFA, and the remaining 29 charges were to be taken into consideration for the purpose of sentencing.

The Decision Below

12 On 3 March 2015, the appellant pleaded guilty to and was duly convicted of the 14 charges that were proceeded with. On 30 October 2015, the District Judge sentenced the appellant to six months' imprisonment for each of the two charges under s 201(*b*) of the SFA and ordered the sentences to run concurrently. The District Judge also imposed fines for each of the other 12 charges which totalled $118,000.

13 In reaching her decision that a custodial sentence was warranted for the s 201(*b*) charges, the District Judge took the following into account:

(a) The arrangement was complex and well thought-out to circumvent the SGX-imposed moratorium. The appellant's acts were blatant breaches and were intended to deceive SGX.

(b) SGX may not have suffered financial losses but would inevitably suffer loss in reputation and authority if persons who gave undertakings to SGX could then flout SGX's controls and conditions.

(c) As a director of SNF, the appellant had a duty of fidelity towards SNF and to the investing public.

(d) The public at large were the victims and the lack of evidence of victims and losses did not make it a less serious offence.

(e) The appellant's acts had undermined the aims of the SFA and given the enormous value involved in the scheme, a mere fine or nominal imprisonment term was insufficient deterrence.

I pause briefly to note that these factors are broadly in line with the sentencing factors laid down by the High Court in *Public Prosecutor v Ng Sae Kiat and other appeals* [2015] 5 SLR 167 ("*Ng Sae Kiat*") at [58].

14 As for the appropriate length of the custodial term in respect of the two s 201(*b*) charges, the District Judge calibrated the sentence by reference to the following cases.

(a) In *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 ("*Wang Ziyi Able*"), the offender was sentenced to six months'

imprisonment for a charge under s 199(*b*)(i) of the SFA for disseminating false information on an online forum. The District Judge commented that the essence of the appellant's offence was akin to that of the accused in *Wang Ziyi Able* but the conduct of the appellant was more impactful since the appellant was a highly successful businessman and the executive director of SNF (as contrasted with the accused in *Wang Ziyi Able* who was merely an individual dabbling in shares).

(b) In *Public Prosecutor v Loo Kiah Heng and another* [2010] SGDC 434 ("*Loo Kiah Heng*"), the offender conspired with another person to operate a fraud on the Singapore Anti-Tuberculosis Association ("SATA") through the use of married trades which allowed the offender to make "contra" profits amounting to $842,353.51. He was convicted on four charges under s 201(*b*) of the SFA read with s 109 of the Penal Code, and sentenced to four months' imprisonment on each charge with two sentences to run consecutively.

(c) In *Ng Sae Kiat*, the offenders took advantage of a "loophole" in the Contracts for Difference system to trade and used nominees' accounts to circumvent their employer's prohibition against personal trading by employees. They were convicted for offences under s 201(*b*) of the SFA and were fined sums ranging from $10,000 to $50,000 per charge.

15 In view of the above as well as in consideration of the fact that the appellant had already had this matter hanging over him since 2006, the District Judge eventually decided on six months' imprisonment for each s 201(*b*) charge and ordered these sentences to run concurrently.

Issues in the Appeal

16 The central issue in the appeal was whether custodial sentences were warranted for the s 201(*b*) charges. The gravamen of the appellant's case on appeal was that the District Judge had erred in considering the sentencing factors set out in *Ng Sae Kiat*. The underlying premise of the appellant's submission was that the decision in *Ng Sae Kiat* had changed the previous sentencing norm. According to the appellant, the pre-existing norm was that a custodial sentence was not warranted unless there was a clear abuse of position by professional securities traders at the expense of laymen investors or where innocent members of the investing public had been defrauded. In the alternative, the appellant contended that a custodial sentence was not warranted even if the *Ng Sae Kiat* sentencing factors were applicable.

17 The issues that arose for consideration in the appeal were as follows:

(a) Whether the sentencing factors that were laid down in *Ng Sae Kiat* had changed the prevailing sentencing norm for s 201(*b*) offences and if so whether the sentencing factors in *Ng Sae Kiat* should nonetheless apply in the present case; and

(b) Whether a custodial sentence would be appropriate in light of the applicable sentencing norm; and if so, whether the custodial sentence imposed by the District Judge was manifestly excessive.

18 Before turning to the merits of this appeal, it is perhaps appropriate at this juncture to address an issue that was raised on behalf of the appellant during the hearing before me. In essence, counsel for the appellant contended that the prosecution was not entitled to cite in support of their sentencing position particulars of the offence that were not stated in the SOF. More

specifically, the argument was that the prosecution could not have relied on unproven and unconceded factors such as "real harm to the confidence of the investing public" when they had not been stated in the SOF or admitted to by the appellant. The appellant's argument raised broader questions about the nature and objectives of the sentencing process which have been addressed in the decision of the Court of Appeal in *Public Prosecutor v Aniza bte Essa* [2009] 3 SLR(R) 327 ("*Aniza*"). The issue before the Court of Appeal was the extent to which the defence could assert unsubstantiated mitigating factors in order to influence the sentence of the court. In this context, the Court of Appeal endorsed at [60] of its judgment the following comments of District Judge Kow Keng Siong in *Public Prosecutor v Chan Yoke Ling Catherine* [2004] SGDC 108 ("*Chan Yoke Ling*") at [37]:

> a. Firstly, the sentencing process and a trial are materially different in terms of their objectives. The reasons for requiring strict proof by admissible evidence of all relevant facts – eg the presumption of innocence – do not apply during sentencing.
>
> b. Secondly, the usual limitations on evidentiary sources and standard of proof could potentially limit the information available to the Judge, information which is necessary for ensuring that a sentence will adequately and effectively protect, deter and rehabilitate: *PP v Tan Fook Sum* [1999] 2 SLR 523.
>
> c. Finally, a heightened burden of proof may also add to the time and resources spent in the sentencing process, and risk turning it into a second trial. Such a spectre is clearly undesirable, as it would result in an inefficient criminal justice process.

19 Just as courts have been prepared to allow the defence more latitude to assert mitigating factors, I do not think that it would be fair or in the interests of justice to confine the prosecution's sentencing submissions to merely restating what has been included in the SOF. As observed by the Court of Appeal, the role of the court is to ensure that the sentencing process is fair to both the prosecution and the defence, and some degree of flexibility is called

for (*Aniza* at [62]). In any case, it is ultimately the role of the sentencing court to distinguish the wheat from the chaff in giving appropriate weight to sentencing factors cited by both parties (*Aniza* at [60]). It was also open to counsel to advise the appellant to retract the plea or require a *Newton* hearing to be convened at any time before sentence was passed if there were serious disagreements with aspects of sentencing submissions which required proof of specific facts or information which had not been admitted.

20 I accept as a general rule that parties should not stray *too* far away from the SOF in making their submissions on sentence (see *Biplob Hossain Younus Akan and others v Public Prosecutor and another matter* [2011] 3 SLR 217 at [9]). Sentencing submissions by the prosecution following a plea of guilty should properly be circumscribed by the facts contained within the SOF and not attempt to introduce new facts or details which may potentially be contested and have not been admitted to by the accused. Nevertheless, it would be entirely in order to put forward appropriate submissions inviting the court to draw suitable inferences from the facts which have been set out in the SOF.

My decision

Whether Ng Sae Kiat *changed the law*

21 The mainstay of the appellant's case was that the decision in *Ng Sae Kiat* (which was rendered in 2015) had changed the then-prevailing sentencing norm which was that custodial sentences were only warranted for offences under s 201(*b*) of the SFA and s 102(*b*) of the Securities Industry Act (Cap 289, 1986 Rev Ed) ("the SIA") (the predecessor of s 201(*b*) of the SFA) when identifiable members of the investing public were defrauded and had suffered losses. I will consider the relevant precedents in chronological order.

However, it would suffice to state at the outset that while the appellant's argument seemed persuasive at first blush, I was not convinced, upon closer analysis, that the pre-*Ng Sae Kiat* sentencing norm was indeed what the appellant had characterised it to be.

22 The first case is *Public Prosecutor v Cheong Hock Lai and other appeals* [2004] 3 SLR(R) 203 ("*Cheong Hock Lai*"). Three accused persons backdated their applications to purchase units in feeder funds so as to determine the movement of the feeder funds with considerable accuracy. They each pleaded guilty to a charge under s 102(*b*) of the SIA and had another charge under s 201(*b*) of the SFA taken into consideration for sentencing purposes. Further, two of them had an additional charge under s 102(*b*) of the SIA taken into consideration for sentencing purposes. The district judge sentenced the accused persons to pay fines ranging between $30,000 and $100,000. The prosecution appealed, arguing that a custodial sentence should have been imposed instead. In dismissing the appeal, Yong Pung How CJ reviewed the cases dealing with charges under s 102(*b*) of the SIA and noted that the common thread in all the cases in which custodial sentences were imposed for offences under s 102(*b*) of the SIA was "a clear abuse of position by professional securities dealers *vis-à-vis* laymen investors who came to them for assistance and advice on trading" (at [38]). Such aggravating facts were found to be absent on the facts of *Cheong Hock Lai* and the appeal was dismissed.

23 The second case is *Public Prosecutor v Sia Teck Mong and another* [2005] SGDC 249 ("*Sia Teck Mong*"). The accused persons were directors of ITE Electric Co Limited ("ITE"), a company which was undertaking a share placement under which 5m shares would be offered at a discounted price. The accused persons felt that it would be in ITE's interests if a friendly party were

to take up the 5m placement shares. The friendly party that was eventually identified was a substantial shareholder in ITE and the SGX rules prohibited a listed company from issuing shares through a placement to any of its substantial shareholders. To circumvent this prohibition, the accused persons, together with one Foo, arranged for an acquaintance to subscribe for the placement shares in his own name using funds provided by the friendly party, and to subsequently sell those shares to the friendly party. The friendly party was therefore able to subscribe for an additional 5m shares in ITE at a discount.

24 The accused persons pleaded guilty to one charge under s 102(*b*) of the SIA read with s 109 of the Penal Code. District Judge Aedit Abdullah (as he then was) ("District Judge Abdullah") found that the arrangement had resulted in a contravention of the SGX's rules which had been put in place to prevent share placements from entrenching, *inter alia*, the position of substantial shareholders of listed companies without prior approval from the company's shareholders and the SGX (at [11]). District Judge Abdullah also found that there was some level of organisation among the offenders, coupled with "a clear intent to mislead the securities house in question" (at [15]). However, he found that there was no indication that the securities house suffered any additional prejudice above being deceived or that there was any damage suffered by anyone else. District Judge Abdullah imposed fines between $100,000 and $150,000 on the accused persons, as he felt that a custodial sentence was not necessitated on the facts.

25 The third case is *Ng Geok Eng v Public Prosecutor* [2007] 1 SLR(R) 913 ("*Ng Geok Eng*") in which the accused pleaded guilty to and was convicted of three charges under ss 197(1) and 201(*b*) of the SFA as well as one charge under s 102(*b*) of the SIA. The appellant's offences stemmed from

his use of various trading accounts to illicitly manipulate the share price of a public-listed company. The share trading accounts that the appellant used were registered in his own name, as well as in the names of his wife and his friend. The appellant placed much emphasis on the High Court's reversal of the custodial sentences for s 201(*b*) offences and reiteration of the point made in *Cheong Hock Lai* that for such offences, it was necessary to prove that there was deception of an innocent member of the investing public who suffered losses (at [52]).

26 I pause here to note that the holding in *Ng Geok Eng* must be confined to its specific context. What the High Court was dealing with was a distinction between unauthorised trading carried out with and without the account holder's consent to the use of the account. The latter form of unauthorised trading was regarded to be more serious since detriment is caused also to innocent members of the public whose accounts are misused. Therefore, in the latter form of cases which involves the concordant abuse of investor confidence, a custodial sentence would be appropriate to reflect and befit the gravity of the offence. However, where the account holder consented to the use of the trading accounts, the consideration is less immediate. Given the context in which *Ng Geok Eng* was decided (where the use of the trading accounts had taken place with the account holders' consent (see [41] and [72])), I am unable to agree that the case stands for the proposition that a fine should invariably be imposed in all types of cases brought under s 201(*b*) of the SFA as long as the offence in question does not cause detriment to innocent investors.

27 In order to appreciate a more complete picture of the sentencing norm for market misconduct cases prior to 2015, it is important to also have regard to the decision of the High Court in *Wang Ziyi Able*. In *Wang Ziyi Able*, the

respondent was charged under s 199(*b*)(i) of the SFA with disseminating information that was false in material particulars on an online forum at shareinvestor.com, without caring whether this information was true or false. In allowing the appeal and sentencing the accused to six months' imprisonment, V K Rajah JA squarely rejected the argument that a custodial sentence would only be appropriate where innocent lay investors had suffered losses. He stated clearly that "it does not necessarily follow that in the absence of a fiduciary relationship or the offender's position of authority over those affected, there would not be equally serious consequences" (at [20]). This neatly debunks the appellant's argument that prior to *Ng Sae Kiat*, the prevailing sentencing norm for a s 201(*b*) offence was a fine unless identifiable, innocent members of the public had been defrauded and had suffered losses. It is also a salutary reminder that a period of incarceration may be appropriate even in cases where a fiduciary relationship or the offender's position of authority over those affected is absent on the facts.

28 While the appellant made an attempt to distinguish *Wang Ziyi Able* on the basis that it concerned a charge under s 199(*b*)(i) of the SFA as opposed to s 201(*b*) which was what the appellant had been charged with, I was not persuaded that a bright line should be drawn between s 201(*b*) offences and other market misconduct offences. In *Cheong Hock Lai*, Yong Pung How CJ emphasised that s 102(*b*) of the SIA (the predecessor of s 201(*b*) of the SFA) was a catch-all provision intended to cover any other form of securities fraud not specifically dealt with by other provisions in the SIA (at [41]). Indeed, the above cases illustrate the variety of offences and factual matrices that could be brought under s 201(*b*) of the SFA. Therefore, it may, in appropriate cases, be useful to have regard to sentences imposed for offences under other provisions of the SFA when determining an appropriate sentence for s 201(*b*) offences. It stands to reason that one should not readily assume that a sentence imposed in

another s 201(*b*) case would invariably serve as a useful reference point simply because it also involved another offence for which a charge was preferred under s 201(*b*). It also follows that greater care must be taken when making reference to precedents involving s 201(*b*) as a guide to calibrating sentences. To illustrate my point, a case involving the abuse of clients' accounts to trade for personal benefit would be a rather unhelpful guide for the present case which concerned a deception perpetrated on the securities exchange and which had resulted in the dissemination of false information in the securities market.

29 It is evident from the judgment in *Ng Sae Kiat* that the court did not set out to change the law. The court merely confined the decision in *Ng Geok Eng* to its context and made it clear that it would be wrong to infer from the relevant case law that the identity of the defrauded party will be determinative of the sentence to be imposed for a s 201(*b*) charge no matter how aggravating the other circumstances may be (at [61]). In the court's view, crucial aspects of criminality would be passed over without being taken into account for the purposes of sentencing if the focus were to be confined to the identity of the defrauded party.

30 In the circumstances, it would be incorrect to say that the judgment in *Ng Sae Kiat* had changed the pre-existing sentencing norm. I agreed with the prosecution that *Ng Sae Kiat* merely consolidated existing principles and did not purport to create new law. Further, given the broad range of s 201(*b*) offences and the differing degrees of culpability of offenders, I was not convinced that a common and uniform "sentencing norm" should or can be established across all types of s 201(*b*) offences save for factors that could assist in assessing the public interest at stake which would in turn determine

the type of sentence to be imposed. I turn now to explain why I thought a custodial sentence was warranted in the present case.

Whether a custodial sentence was warranted

31 To determine whether a custodial sentence is warranted, the High Court in *Ng Sae Kiat* set out (at [58]) a *non-exhaustive* list of factors to consider: (a) the extent of the loss/damage caused to victim(s); (b) sophistication of the fraud; (c) the frequency and duration of the offender's unauthorised use of the relevant account; (d) extent of distortion, if any, to the operation of the financial market; (e) the identity of the defrauded party (*ie*, whether the defrauded party is a public investor or a securities firm); (f) relationship between the offender and the defrauded party; and (g) the offender's breach of any duty of fidelity that may be owed to the defrauded party. I reiterate that these factors were distilled from relevant precedents and are therefore not new to this area of the law.

32 As noted in *Ng Sae Kiat*, it is necessary to consider all the facts of the case to determine if the offending conduct in question warrants a custodial sentence. Not all the factors enumerated in *Ng Sae Kiat* might be relevant or applicable in every case and in determining the appropriate weight to be given to the pertinent factors, much would ultimately turn on the individual circumstances before the court.

Evidence of loss

33 The s 201(*b*) offences centred on the appellant's deception of the SGX through deliberate concealment of his beneficial ownership in the SNF shares. Through his nominees, he circumvented his undertaking as a promoter to observe a moratorium on the sale of his shares. The purpose of the moratorium

was to maintain the promoters' commitment to the listed issuer and to align their interest with that of public shareholders. The District Judge found that the SGX (the victim of the deception) suffered loss in reputation and authority. In this appeal, the appellant contended that the District Judge had erred in so finding since there was no evidence to support the finding that the SGX suffered loss in reputation and authority.

34 In so far as SGX was concerned, I accepted the appellant's point that concealment of such information from the SGX did not necessarily mean that the SGX would inevitably suffer loss of reputation or authority. There was no evidence of any erosion of confidence in the role of SGX as a regulator or any adverse impact on its detection or enforcement mechanisms. On the contrary, the facts suggested otherwise. The offences though not easy to detect were eventually uncovered and consequent enforcement action was taken against the appellant for flouting SGX's authority and actively concealing information.

35 In so far as the investing public was concerned, there was no material showing any loss suffered. Had there been any evidence of loss, the prosecution would (and should) have brought it before the court. The natural and inescapable inference from the absence of any such evidence was that there was no actual quantifiable loss caused to the investing public. As said in *Wang Ziyi Able*, "the burden rests entirely on the Prosecution to lead evidence relating to the actual loss to the investing public if it intends to rely on that as an aggravating sentencing consideration" (at [32]).

Market impact

36 In the present factual matrix, it appeared to me that the appellant's actions were motivated predominantly if not entirely by self-interest and the

prospect of personal gain. I did not see a conscious intent or attempt to influence the workings of the market. Rather, it seemed to me that the appellant was indifferent to how public investors might react to the launch of the IPO. As noted earlier, there was no evidence of loss suffered by the investing public or complaints of the public being misled or any tangible adverse effect on investor confidence.

37 I accepted that it was difficult to estimate, let alone quantify, the extent of market impact. The investing public's choices and decisions are neither uniform, predictable nor always rational; often there are simply too many variables at work. The investing public chose to subscribe for SNF shares despite the appellant having only disclosed that he held 9.5m shares (about a third of his actual shareholding of over 25m shares). The fact that SNF's post-IPO share prices apparently rose was actually neither here nor there. There could easily have been numerous other considerations. It was not possible to discern any clear correlation and it would be inappropriate to link share price movements to the state of disclosure (or non-disclosure) of the appellant's shares.

38 In the present case, notwithstanding the lack of evidence of actual quantifiable loss, the investing public was fed misleading information which had the potential to affect their investment decisions. It could be said that the integrity of the market was thus affected by the circulation of the misleading information and the appellant's misconduct could have had potentially deleterious consequences for the financial market. It was astutely observed in *Wang Ziyi Able* that the dissemination of false information can equally disrupt order in the securities market even if it may appear to be less devious and reprehensible than rigging the market (which would in appropriate cases attract sentences of imprisonment (see *Ng Geok Eng* at [42])). That having

been said, there was no evidence about the materiality of such misleading information or its actual impact on the market. This in no way excuses or mitigates the appellant's misconduct but I did not consider it appropriate to deem this an aggravating factor in the circumstances.

39 I noted also the prosecution's concession in the court below that they were "unable to prove … any actual impact in this particular case". Hence, I could see no cogent basis for their submission that the appellant's breach of the moratorium "thus had significant implications on the decisions of the investing public regarding any purchase of SNF shares". The investing public at large could perhaps be regarded as "victims" but only in the broad sense of having been misinformed, but this *per se* does not justify a custodial sentence.

40 Further, I did not think that the appellant had owed a duty of fidelity to the investing public in his capacity as SNF's director and shareholder. The duty of fidelity is most commonly (if not exclusively) discussed in the context of employment law. In *Ng Sae Kiat*, it was held that "custodial sentences would ordinarily be warranted where employees in a financial institution abuse the duty of fidelity they owe their employer in a premeditated and brazen manner, over a period of time, for personal gains" (at [64]). In the present case, it was accepted by the prosecution that the appellant did not have a legal duty of fidelity to the investing public though he may have had a moral duty that he ought to have observed. In my view, neither can it be said that the appellant owed a legal duty of fidelity to the SGX, the primary victim of the appellant's deception. The relationship between a director of a listed firm and the SGX is distinct from and cannot be approximated to the relationship between an employee (or ex-employee) and his/her employer. The only duty of fidelity that the appellant could be said to have owed was in respect of SNF (his employer at the material time), the breach of which was not legally

relevant to the charges faced by the appellant. Therefore, while the offences revealed grave moral failings on the appellant's part, I did not think that his duty of fidelity to SNF was a factor that pointed in favour of a custodial sentence.

41 It was not at all surprising that the appellant made much of the lack of evidence of actual market impact. However, before leaving the issue on market impact, it is pertinent to bear in mind that the seriousness of a crime is not only a function of *the degree of harmfulness* of the conduct, for one must also consider *the extent of the actor's culpability* in committing the offence: *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [33]. As will be elaborated on later in this decision, I found the appellant's culpability to be demonstrably high considering his motive for personal gain as well as his sustained and painstakingly planned efforts to secure for himself an advantageous position in the market while avoiding detection.

Personal gain

42 I turn to the motivation behind the appellant's dishonest conduct. It was plain from what transpired that he was motivated primarily if not solely by the prospect of personal gain. The facts revealed that he wanted to place himself in the most favourable position possible to dispose of a sizable majority of his shares as and when he wished. This led him to conceal his actual shareholding from the SGX and appoint nominees with a view to circumventing the moratorium. He may not have known with any certitude how the post-IPO market would move but he was banking on being able to profit. He was both opportunistic and optimistic.

43 A dispute arose as to how the appellant's personal gain should be quantified. The prosecution (as well as the District Judge) appeared to have

pegged the quantum of the appellant's gain at $5.73m, being the proceeds of sale of the SNF shares. The defence submitted, in the proceedings below, that the appellant only enjoyed a gain of $573,548.40, being the difference between the price at which he sold the SNF shares in breach of the moratorium, and the price at which the SNF shares would have been sold had he complied with the moratorium.[1] On appeal, counsel for the appellant submitted that the appellant merely converted assets that he had rightfully owned into cash earlier than when he was allowed to do so and proffered an alternative measure of the appellant's gain — the interest that he would have earned on the proceeds of sale which counsel calculated to be $12,437.98.[2]

44 I did not think it appropriate as a matter of principle to peg the quantum of the appellant's gain to the interest he would have gained on the sales proceeds. The appellant had hoped to gain by selling the shares during the period of the moratorium and he certainly did gain handsomely, even having regard only to the amount of $573,548.40 that was quantified by the defence in their submissions below. This gain far exceeds the gains made by several of the respondents in *Cheong Hock Lai* and *Ng Sae Kiat*. In *Cheong Hock Lai*, the respondents each made total profits ranging from $16,162.32 to $107,925.29. In *Ng Sae Kiat*, the respondents made profits ranging from $9,000 to $45,000. I note further that the appellant's gains were not wholly fortuitous. They were not some unexpected windfall for the appellant; they did not flow to him purely by circumstance. To begin with, he was not even entitled to them but for his deliberate contravention of the moratorium. If the post-IPO share prices had fallen, presumably he would have simply bided his

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1 Appellant's Plea In Mitigation, Record of Proceedings (Vol II), p 37 at [98].

2 Appellant's written submissions, at Annex A.

time until he felt the time was right to sell, and he would have done so if he deemed it expedient to reduce his exposure and minimise losses.

45 I also recognised that the shares in question belonged to the appellant and he had not wrongfully enriched himself to the tune of $5.73m at someone else's expense. But he had gained from having engineered for himself the flexibility of cashing out within the period of the moratorium and at opportune times when he was not supposed to have done so. He had the benefit of the sales proceeds in hand while maintaining the impression that he was fully committed to SNF's shareholders. These were acts of deliberate deception in blatant disregard of the moratorium. I saw no merit in the suggestion that by merely converting shares which he had owned earlier than when he was allowed to do so, this was akin to a mere technical breach. All of his gains were the result of deliberate and calculated manoeuvres, executed with much careful premeditation and planning. These were significant aggravating factors reflecting a serious want of probity.

46 For the sake of completeness, while I considered the appellant's motive for personal gain to be relevant to sentencing, it was neither useful nor relevant to apply the technical definition of dishonesty in s 24 of the Penal Code in coming to my decision since I considered it established beyond peradventure that the motive for and the quantum of gain were relevant aggravating factors in market misconduct cases. In *Wang Ziyi Able*, V K Rajah JA stressed that the fact that the offender stood to gain from the gamble of making a false statement was an additional aggravating feature (at [24]). The same point was reiterated in *Ng Sae Kiat* where the High Court agreed that personal gain was an aggravating factor that warranted a custodial sentence (at [64]).

47 It is settled law that the commission of an offence for personal gain is generally an aggravating sentencing consideration. My observations are consistent with those made by Yong Pung How CJ in *Abu Syeed Chowdhury v Public Prosecutor* [2002] 1 SLR(R) 182 at [33] and more recently by Sundaresh Menon CJ in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [51]. I conclude my observations on this issue by reiterating the importance of examining and making sense of the offender's motives particularly in the sentencing of property-related offences. This would enable the court to appreciate the relative blameworthiness of individuals who, though convicted of the same criminal offence, might be deserving of different sentences to reflect their differing levels of culpability.

Premeditation and difficulty of detection

48 In my view, the high degree of premeditation and careful planning that went into creating the very elaborate scheme to secure the opportunity for gain while at the same time avoiding detection was a significant aggravating factor in favour of a custodial sentence. It bears noting also that the offences were committed over a rather lengthy period between 2003 and 2005. The appellant had approached the nominees on separate occasions with the intention of placing his Gennex shares with them. The cumulative use of nominee trading accounts, sham share sale agreements as well as the transactions to channel the sale proceeds back to him made the offences difficult to detect. According to the prosecution, the extent of investigations involved 13 financial institutions and eight securities firms and investigators had to go through a large number of electronic materials. There was also a total of 47 suspects; several persons were eventually charged. In these circumstances, I considered the appellant's offences to reside at the higher end of the spectrum of culpability in market misconduct cases. For deterrence to operate in both the specific and general

sense, a clear and unequivocal signal had to be conveyed that such offenders must and would be sternly dealt with.

49 Before moving on to consider whether the District Judge had accorded sufficient weight to the mitigating factors, it would be useful to take stock of what has been discussed above. In essence, I found that the appellant's offences, in terms of its scale and gravity, were far more serious than those of the accused persons in the precedents that were cited where fines had been imposed. The appellant's conduct was egregious and should not be lightly papered over. This was not a case where the appellant had merely borrowed his friends' accounts to trade in shares. He had orchestrated the entire arrangement behind the scenes with a view to circumvent the moratorium which was put in place to protect IPO investors and he had made a handsome gain from his wrongdoing. His deception had also resulted in the dissemination of false information into the market. While there was no evidence of the materiality or impact of the false information, there was nonetheless a strong public interest in deterring market misconduct which distorts the information available to public investors, especially in view of the shift towards a disclosure-based market regime which empowers investors to make informed decisions and to look out for their own interests (see *Singapore Parliamentary Debates*, *Official Report* (5 October 2001) vol 73 at col 2128).

Mitigating considerations

(1) The delay in prosecution

50 There was a substantial delay between the commencement of investigations and the eventual prosecution of the appellant. Investigations began in 2006 and he was only charged in 2013. The appellant argued that "the learned [District Judge] did not accord any mitigating weight to the fact

that during the inordinate period of delay from the time that investigations into his case commenced in 2006, to 2013 when the Appellant was first charged, he had fully rehabilitated".[3]

51 I had no difficulty in accepting the general proposition that where there has been an inordinate delay in prosecution, the sentence should in appropriate cases reflect the fact that the matter has been held in abeyance for some time, possibly inflicting undue agony, suspense and uncertainty on the offender: *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019 at [23]. However, it is clear from the District Judge's grounds of decision that the substantial delay had been taken into account. The sentence was below what the District Judge might otherwise have imposed since she was clearly of the view that the appellant's misconduct was more egregious than that of the accused in *Wang Ziyi Able* (at [30]) but did not choose to impose a sentence that went beyond the six months' imprisonment term that was imposed there. Accordingly, there was no cogent basis to say that the District Judge had attached insufficient weight to the delay in prosecution. In any case, I would observe in passing that the degree of leniency that should be shown to the appellant to account for the delay in prosecution should be decided with the countervailing public interest in punishing and deterring serious market misconduct in mind.

(2) The appellant's cooperation with the authorities

52 The appellant also submitted that the District Judge had failed to consider the "substantial and invaluable cooperation that the Appellant had rendered to the authorities that went well beyond his own confession".[4] In this

3 Appellant's written submissions, at [47].

4 Appellant's written submissions, at [48].

connection, the appellant applied by way of Criminal Motion No 31 of 2016 to adduce fresh evidence of his cooperation with the authorities as a further mitigating factor. In essence, the fresh evidence pertained to the appellant's agreement to testify against his fellow director, Ng, which was scheduled to take place sometime after the hearing of this appeal. The prosecution did not object to the application and it was accordingly allowed but it was also pointed out that the appellant's cooperation would not substantially assist the authorities beyond the statements he had given on previous occasions to the Commercial Affairs Department.

53 I agreed that the appellant's cooperation with the authorities including his willingness to testify against his fellow director, Ng, was a relevant consideration. While there was no assurance of the quality of assistance that the appellant may render to the prosecution in dealing with the other connected cases, his willingness to cooperate would be advantageous to the prosecution in dealing with the other connected cases. This did not weigh very heavily in favour of a substantially reduced sentence but it was nevertheless considered in the appellant's favour.

Conclusion

54 In *Ng Sae Kiat*, it was observed at [58] that the SFA was intended to achieve *at least* the following ends: (a) protect investors; (b) protect public confidence in the market; and (c) ensure that the operation of the market is not distorted. To meet those aims, the SFA must seek to deter an offender from enriching himself (or avoiding losses) at the expense of the market or investors. It must also seek to deter an offender from embarking on a quest for personal gains through fraudulent or deceitful means even where there is no

conclusive evidence of significant market distortion or quantifiable impact on market participants.

55 In the present case, the appellant's motive was personal gain, and his substantial gain was obtained dishonestly through his deliberate contravention of the moratorium and his premeditated scheme to avail himself of the opportunities to sell almost two-thirds of his entire shareholding when conditions were favourable for him to do so. He had deceived the SGX in furtherance of his own self-serving objectives. He had fed misleading information of the extent of his shareholding into the market although I should reiterate that the materiality of such misleading information or its actual market impact remains unclear.

56 I agreed that the imposition of custodial sentences in appropriate cases was necessary to deter potential offenders who might otherwise be willing to risk a monetary slap on the wrist if and when they were apprehended (*Wang Ziyi Able* at [30]). In the present case, I took the view that there was a need for effective deterrence and that the material before the court amply justified the imposition of a custodial sentence. Had there additionally been evidence of significant market impact and/or actual loss suffered by the investing public, I would venture to suggest that the sentence of six months' imprisonment was manifestly inadequate as an even greater measure of deterrence would have been warranted.

57 However, having considered the matter in the round, I was of the view that the District Judge had accorded undue weight to certain considerations in sentencing and had thus calibrated the sentence at a level which was inappropriately high. Accordingly, I allowed the appeal against the custodial sentences in respect of the two s 201(*b*) charges. The sentences of six months'

imprisonment were reduced to four months' imprisonment and I ordered the imprisonment terms to run concurrently.

See Kee Oon
Judicial Commissioner

Davinder Singh SC, Pardeep Singh Khosa and Navin S Thevar (Drew & Napier LLC) for the appellant;
Christopher Ong Siu Jin and Haniza Abnass (Attorney-General's Chambers) for the respondent.
