Monetary Authority of Singapore
v
Wang Boon Heng and another

[2017] SGHC 268

High Court — District Court Appeal No 6 of 2017
See Kee Oon J
11 September 2017

Courts and jurisdiction — Appeals — Standard of review

Financial and securities markets — Civil penalties — Quantum

31 October 2017 Judgment reserved.

See Kee Oon J:

Introduction

1 This is an appeal by the Monetary Authority of Singapore ("the Appellant" or "the MAS") against the decision of the District Judge to impose civil penalties of $75,000 and $50,000 respectively on Mr Wang Boon Heng and Ms Foo Jee Chin ("the 1st Respondent" and "the 2nd Respondent" respectively and "the Respondents" collectively) in relation to numerous instances of unauthorised share trading, each of which was an alleged breach of s 201(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"). The Appellant's primary submission is that the District Judge had erred in ordering civil penalties that were inadequate in the circumstances of the case

because he had (a) applied the wrong principles of the law; (b) failed to appreciate the material placed before him and (c) for these or other reasons arrived at a wholly erroneous quantification of the civil penalties.

2 After hearing the parties, I reserved judgment. I now furnish my decision, beginning with the background facts.

Background facts

3 As the Respondents are not contesting the District Judge's finding of liability under s 201(*b*) of the SFA, I will set out only the salient background facts.

4 The 1st and 2nd Respondents are a divorced couple. The 1st Respondent was a shareholder and project manager in a company known as Natius 1989 Pte Ltd ("Natius"). The 2nd Respondent was the company secretary at Natius. At the time of the violations, the 1st Respondent was an undischarged bankrupt. Nonetheless, he carried out a total of 573 instances of share trading on four trading accounts which were opened in the name of the 2nd Respondent and one Mr Tay Ah Thiam ("Mr Tay"), who was employed as a driver at Natius. These accounts were:

(a) An account in the name of Mr Tay opened with DMG Partners & Securities Pte Ltd ("DMG");

(b) An account in the name of Mr Tay opened with UOB Kay Hian Pte Ltd ("UOBKH");

(c) An account in the name of the 2nd Respondent opened with DMG; and

(d) An account in the name of the 2nd Respondent opened with UOBKH.

5 The Appellant's case was that the 1st Respondent's trades were unauthorised in the sense that they were done without the consent of the respective brokerage firms, and he had thereby defrauded or deceived them. The 2nd Respondent had consented and/or acquiesced to the 1st Respondent carrying out 407 trades on the two accounts opened in her name, and in so doing, defrauded or deceived the brokerage firms as well.

6 The Respondents' main defence was originally that Mr Tay had himself operated the two accounts opened in his name. They put the Appellant to strict proof in relation to the allegations regarding the 2nd Respondent's accounts. On the first day of the trial, however, the Respondents applied to amend their pleadings, running a new defence that it was the 1st Respondent's deceased brother, Mr Wang Hwee Kim, who had conducted the trades on the four trading accounts. While this appeared to a material departure from their initial defence, the Respondents insisted that they had informed their former solicitors about the new defence from the outset but this was not included in the original pleadings. In a subsequent letter to the Respondents' present solicitors, the Respondents' former solicitors confirmed that they had indeed been informed about the new defence from the beginning, but that after discussions with the Respondents, it was agreed "as a matter of strategy" that a skeletal defence devoid of details was to be filed initially.

The District Judge's decision

7 The District Judge found that on a balance of probabilities, the Respondents had contravened s 201(*b*) of the SFA and were liable to pay civil

penalties under s 232(3) of the SFA. His decision on liability is recorded in *Monetary Authority of Singapore v Wang Boon Heng and another* [2016] SGDC 345. In a separate judgment on the quantum of civil penalties (*Monetary Authority of Singapore v Wang Boon Heng and another* [2017] SGDC 61 ("the GD")), the District Judge imposed a penalty of $75,000 on the 1st Respondent and $50,000 on the 2nd Respondent.

8 In relation to the decision on quantum, the District Judge first considered the Court of Appeal decision of *Tan Chong Koay and another v Monetary Authority of Singapore* [2011] 4 SLR 348 ("*Tan Chong Koay*") in which a civil penalty of $250,000 was imposed on each of the appellants for an offence under s 197(1)(*b*) of the SFA (creating a false or misleading market appearance with respect to the price of a security). He concluded that the appellants in *Tan Chong Koay* were significantly more culpable than the Respondents in the present case. This was because the case at hand involved trading without the consent of two securities firms, where the Respondents obtained no tangible benefits from the unauthorised trades and were two individuals trading in stocks. In contrast, *Tan Chong Koay* involved an asset management entity. He thus held that a civil penalty of $250,000 imposed in *Tan Chong Koay* provided an "anchor for the upper limit of the quantum" that could be imposed in the present case (at [7] of the GD).

9 The District Judge then applied a three-step framework outlined in a paper published in the *Singapore Law Gazette* in November 2004: see James Leong et al, "A Practical Guide to Quantifying Civil Penalties under the Securities and Futures Act", *Singapore Law Gazette* (November 2004) at 28–35 ("the *Guide*"). The first step was to determine a starting point. The District Judge held that under s 232(3) of the SFA, the starting point was $50,000 (at [9]

of the GD) which is the statutory minimum under the section. I note in passing that this is also the view of the learned authors of the *Guide* (at p 34). The second step was to apply seven factors to the facts and circumstances of the case. These included:

(a) *Adverse effect on markets and the seriousness of that effect.* The District Judge considered that this was "a major if not the most important factor" in the analysis. In the present case, he held that there was no question of any adverse effect on the markets and this was therefore a "major mitigating factor" (at [10] of the GD).

(b) *The extent to which the behaviour was deliberate or reckless.* The District Judge stated that the actions of the Respondents were obviously deliberate in nature as the 1st Respondent had used the accounts of others because he was not able to open a trading account of his own (at [10] of the GD).

(c) *Whether the person on whom the penalty is to be imposed is an individual*. In the present case, the Respondents were individuals and a severe pecuniary penalty would cause financial hardship to the Respondents (at [11] of the GD).

(d) *The amount of profits accrued or loss avoided*. The District Judge found that there was no evidence that the unauthorised trades were for the purpose of or in fact resulted in an accrual of profits or avoidance of loss on the part of the Respondents. While he noted that a loss of $136,000 was suffered by a remisier at UOBKH, he concluded that this was "not directly related to the unauthorised nature of the trading" and

was in any event a loss that "a remisier [was] liable to suffer … when the client fails to pay up on trading losses" (at [12] of the GD).

(e) *Conduct following the behaviour of concern*. The District Judge noted that the Respondents displayed a lack of cooperation and honesty with the authorities, demonstrated a lack of remorse and mounted an "artful defence" in court (at [13] of the GD).

(f) *Difficulty of detecting or enforcing the activity in question*. The District Judge agreed with the Appellant that the conduct was difficult to detect (at [13] of the GD).

(g) *Prior conduct of the offender*. The District Judge noted that the Respondents did not have any antecedents (at [13] of the GD).

Taking into account all the factors above, the District Judge imposed a civil penalty of $75,000 on the 1st Respondent. While appreciating that the 1st Respondent's actions had no adverse effect on the market, his lack of remorse shown in his subsequent conduct was taken against him (at [14] of the GD). As for the 2nd Respondent, the District Judge found that her culpability was "plainly far less" than that of the 1st Respondent. He thus imposed a statutory minimum penalty of $50,000 on her (at [14]–[15] of the GD).

10 Applying the third step of the framework, the District Judge tested the figures to consider whether (a) there was a deterrent effect in the civil penalty imposed; (b) the civil penalty imposed was arbitrary or capricious and (c) whether the civil penalty imposed would offend the totality and/or parity principles. He concluded that there were no such concerns and did not adjust the civil penalty further (at [16] of the GD).

11 The Appellant appealed against the District Judge's decision on the quantum of civil penalties imposed on the Respondents. The Respondents did not bring a cross-appeal on the finding of liability for breaching s 201(*b*) of the SFA.

The Appellant's case

12 The Appellant first considers, as a preliminary question, the applicable standard of review in an appeal against the quantum of civil penalty ordered. According to the Appellant, an appellate court should interfere with the decision of a first instance court where the latter had (a) acted on the wrong principles; (b) erred with respect to the proper factual basis or misapprehended the facts; (c) ignored a material factor deserving weight, relied on an improper factor or made a serious mistake in weighing the factors or (d) had for these or other reasons come to an entirely erroneous quantum of the civil penalties to be imposed. In the present case, the Appellant submits that grounds (a), (b) and (d) apply to justify the appellate court's intervention.

13 The Appellant's substantive case is that the District Judge had erred in imposing civil penalties that were inadequate in all the circumstances and the quantum ought to be increased. After analysing the authorities in Singapore, Australia and the United States ("the US") with regards to the framework to be applied in determining the quantum of civil penalties, the Appellant makes the following key submissions:

> (a) First, the District Judge applied the wrong principles of law in adopting $50,000 as the starting point and $250,000 as the "upper limit" of civil penalties that can be imposed. This amounted to "judicial legislation" by prescribing a *sub-range* of penalties for the offence of

unauthorised share trading. Instead, the District Judge should have considered the facts of the present case and determined where along the legislatively prescribed $50,000 to $2m range (see s 232(3) of the SFA) the present case laid.

(b) Second, the District Judge failed to appreciate material before him and ignored material factors demonstrative of the Respondents' culpability which were deserving of significant weight. This included the loss caused to a third party (namely, a remisier at UOBKH, Mr Chean Ah Loo ("Mr Chean")), the number of deceptions committed and the number of victims deceived. He also erred in holding that the lack of any adverse market impact was a "major mitigating factor".

(c) Third, on a consideration of all the facts, the District Judge arrived at an erroneous quantification of civil penalties. In particular, the 2nd Respondent's culpability was not a "bare minimum" because there were significant aggravating factors that should have increased the quantum of civil penalty imposed on her. These included the difficulty in detecting the contraventions, her lack of cooperation with the authorities, her lack of remorse, and the mounting of an artful defence at trial. In fact, the Respondents' attempts to conceal their wrongdoing were persistent from the commission of the offence, to investigations and trial. Further, the modest difference of $25,000 between the civil penalties ordered against the 1st and 2nd Respondents did not adequately reflect the difference in the Respondents' relative culpability. The 1st Respondent was far more culpable than the 2nd Respondent. This was a factor which the District Judge himself recognised.

(d) Fourth, the Respondents' professed inability to pay the penalties as well as their claims of financial hardship are irrelevant to the quantum of civil penalties that should be imposed.

14 In the round, the Appellant submits that the quantum of civil penalties that should be imposed is $200,000 on the 1st Respondent and $100,000 on the 2nd Respondent.

The Respondents' case

15 As a preliminary matter, the Respondents assert that the appropriate standard of review is whether the first instance court "took into account all relevant considerations" in arriving at the quantum of civil penalty that it did. This is essentially a narrower formulation of the Appellant's suggested standard of review at [12] above.

16 The Respondents' substantive case in essence comprises of rebuttals to the arguments raised by the Appellant. After considering the authorities in Singapore, Australia and the US, the Respondents conclude that the three main factors that should be taken into consideration in determining the quantum of civil penalties to be imposed are: (a) the extent of loss or damage caused by the conduct; (b) the distortion of the market caused by the conduct and (c) the level of knowledge of wrongdoing in relation to the conduct.

17 The Respondents contend that:

(a) The District Judge did not err in treating the statutory minimum of $50,000 under s 232(3) of the SFA as the starting point and the civil penalty of $250,000 imposed in *Tan Chong Koay* as the upper limit.

(b) The Appellant's suggestion that the District Judge should have considered where along the legislatively prescribed range the present case laid is misconceived, unworkable and fails to provide any guidance to the courts.

(c) The District Judge had given due weight to all the factors. With regard to the loss suffered by the UOBKH remisier, Mr Chean, the Respondents contend that (a) the trade was unauthorised due to the lack of consent on the part of the *securities firm*. Thus, any relevant loss or damage to be considered should be that suffered by these firms; however, they did not suffer any loss; and (b) Mr Chean's loss was one that he had to bear in any event whenever his client does not pay up on contra losses; otherwise, his commission would be withheld and he would possibly be charged interest on the contra losses. The District Judge had also given due regard to the need for general and specific deterrence. In the present case, there was less of a need for general deterrence because it was not a case of unauthorised trading by a remisier or broker (involving lack of consent on the part of the account holder, rather than the securities firm). The District Judge had also given due weight to the number of trading accounts involved. At the hearing of this appeal, counsel for the Respondents further argued that the purpose of the civil penalties regime was to protect the market and investors. Thus, the absence of any market impact was correctly considered a mitigating factor.

(d) The 2nd Respondent's culpability was nominal because she did not conduct any of the unauthorised trades herself. It was also true that she had instructed her solicitors about the trades being carried out by the

1st Respondent's deceased brother from the outset, but the solicitors deliberately chose not to include it in the defence initially, and instead opted to run a skeletal defence.

(e) Finally, the quantum of civil penalties sought by the Appellant is excessive, oppressive and not in line with the case precedents from Australia and the US. In this regard, the Respondents' lack of capacity to pay the penalties and the hardship that would be caused by the imposition of the penalties are relevant considerations.

The *amicus curiae*'s submissions

18 This appeal raises novel issues for which there is a dearth of local case law. Mr Kenneth Chua ("Mr Chua") was appointed as *amicus curiae* to assist the court on two issues arising in the present appeal:

(a) As a preliminary matter, the applicable standard of review on appeal against the quantum of civil penalty ordered; and

(b) The appropriate framework or relevant principles to be considered and applied by the court in determining the appropriate civil penalty to be paid.

19 In relation to the first question, which relates to the applicable standard of review, Mr Chua examined the case law in Australia and the US and submits that an appellate court ought to interfere with the lower court's determination of the quantum of civil penalties when (a) the lower court acted on the wrong principles; (b) the lower court misapprehended the facts; or (c) the quantum of civil penalties ordered was manifestly excessive or manifestly inadequate. He advocates a standard of review that is similar to that during an appeal on the

assessment of damages ("the Damages Standard") for the reason that the court in a civil penalties appeal would also be grappling with matters of "impression and common sense" with "room for individual [judicial] choice". However, he argues that the last ground of the Damages Standard (where the judge made a "wholly erroneous" estimate) should be modified to a consideration of whether the civil penalties imposed were "manifestly excessive or manifestly inadequate" to reflect that civil penalties, like fines, are intended to punish or deter.

20 In relation to the second question, Mr Chua examined the approach to quantifying civil penalties in other jurisdictions (Australia, the US, the United Kingdom, New Zealand and Hong Kong) and submits that the principles of disgorgement, punishment and deterrence should underpin the quantum of civil penalties determined. The following framework is recommended:

(a) The ultimate quantum of penalties assessed should be proportionate to the seriousness of the offence and serve as sufficient deterrence, but be no higher than is necessary for that purpose.

(b) The starting point in assessing the appropriate penalty should be to ascertain the statutory *maximum* applicable as that determines what Parliament has identified as the most serious kind of contraventions.

(c) The appropriate penalty should ensure that the defendant is not left better off as a result of his breach.

(d) It will usually be appropriate to include a further sum in order to achieve the aims of deterrence and punishment. The quantum of this sum depends on the culpability of the defendant and the severity of the contravention. The following non-exhaustive list of factors (modified

from the seven factors considered in the *Guide*) should be taken into account:

(i) Adverse effect on the markets and the seriousness of that effect or the risk of adverse effect on the markets;

(ii) The extent to which the behaviour was deliberate or reckless;

(iii) Whether the person on whom the penalty is to be imposed is an individual;

(iv) The amount of profit accrued or loss avoided;

(v) Conduct following the behaviour of concern, including:

(A) whether the defendant sought to conceal his breach;

(B) whether he voluntarily admitted to the breach;

(C) whether the defendant took steps to remedy the breach;

(D) whether the defendant cooperated with the authorities; and

(E) whether the defendant arranged his recourses in such a way as to allow or avoid payment of the civil penalty.

(vi) Difficulty of detecting or enforcing the activity in question;

(vii) Prior conduct, including:

(A) prior convictions under the SFA; or

(B) earlier enforcement proceedings taken under the SFA, etc.

(viii) Adverse impact on third parties or the risk of such impact and the seriousness of that impact or potential impact;

(ix) Whether there was dishonesty or fraud involved and its sophistication; and

(x) The extent, including frequency and duration, of the contravening conduct.

Significant weight should be given to factors (d)(i), (d)(viii) and (d)(ix); when more than one of these factors are present, a significant penalty would usually be warranted.

21 The resulting figure should be adjusted if (a) there is a need for greater specific or general deterrence in the instant case; (b) the penalty would cause serious financial hardship to the defendant; or (c) there are sanctions or disqualifications which have previously been imposed in respect of the same conduct.

22 As a guide, Mr Chua suggests the following bands of civil penalties for different levels of severity of violations (beginning with the lowest at Band 1):

Band	**Range of penalty (S$)- Individuals**	**Range of penalty (S$)- Companies**
1	50,000–200,000	50,000–400,000

2	200,000–400,000	400,000–800,000
3	400,000–600,000	800,000–1,200,000
4	600,000–800,000	1,200,000–1,600,000
5	> 800,000	1,600,000–2,000,000

23 At the hearing of the appeal, Mr Chua tendered a further set of submissions where he outlined how this banded framework might practically apply.

Issues on appeal

24 In the light of the above, the issues on appeal are as follows:

(a) What is the appropriate standard of review on an appeal against the quantum of civil penalties imposed?

(b) What is the appropriate framework to be applied by the court in determining the quantum of civil penalties to be imposed under s 232(3) of the SFA?

(c) Applying that framework, did the District Judge err in his quantification of the civil penalties?

(d) If so, what is the quantum of civil penalties that should be imposed on the Respondents in the present case?

What is the appropriate standard of review on an appeal against the quantum of civil penalty imposed?

25 The preliminary issue that needs to be determined is the standard of review that is applicable in an appeal against the quantum of civil penalties imposed by a lower court. As all the parties conceded, there is no local authority on the issue. This is perhaps unsurprising given the dearth of civil penalty cases that have come before the Courts in the first place.

The foreign case law

26 I first consider the standard of review espoused by foreign jurisdictions with regimes similar to our civil penalties framework under the SFA. The most relevant case is the decision of the US Court of Appeal for the First Circuit in *Securities and Exchange Commission v Michael G. Sargent* 329 F 3d 34 (1st Cir, 2003) ("*Sargent*"). *Sargent* concerned an appeal by the Securities and Exchange Commission against the district court's decision which, *inter alia*, declined to impose civil penalties on the defendants. The standard of review propounded by the court was whether there was an "abuse of discretion" by the district court, which would occur when (at 38):

> (a) A material factor deserving significant weight is ignored and an improper factor is relied upon;
>
> (b) All proper and no improper factors are assessed, but the court makes a serious mistake in weighing them; or
>
> (c) The district court incorrectly applies the law to particular facts.

It should be noted that *Sargent* was an appeal against the district court *declining* to impose any civil penalty at all, rather than an appeal against the *quantum* of

civil penalty imposed. However, there is no reason why these factors could not be equally applicable in the latter case. For example, in *Securities and Exchange Commission v Ed Johnson* 174 Fed Appx 111 (3rd Cir, 2006) ("*Johnson*") at 116, the Court of Appeal for the Third Circuit declined to intervene with the quantum of penalty imposed by the district court because it considered that the district court had "considered the relevant factors" (see factor (a) above) and properly concluded that the civil penalty imposed was justified.

Standard of review in appeals involving assessment of damages

27 I turn to consider three standards of review for appeals in other contexts which may provide a guide to the applicable standard in the present case. The first of these is the Damages Standard.

28 Both the Appellant and Mr Chua submit that there are some parallels between the Damages Standard and that which can be applied in appeals against the quantum of civil penalties imposed. In this regard, an appellate court may vary the quantum of damages awarded by the trial judge if it is shown that

(a) the judge acted on the wrong principles;

(b) the judge misapprehended the facts; or

(c) the judge had for these or other reasons made a wholly erroneous estimate of the damages.

See *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718 ("*Tan Boon Heng*") at [7].

29 The Damages Standard was articulated in *Davis v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616:

> An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that ***it is generally much more a matter of speculation and estimate.*** No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the findings as to the amount of damages differs little from any findings of fact, and can equally be reviewed if there is an error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are ***almost entirely matters of impression and of common sense, and are only subject to review in very special cases***…Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally ***so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages***. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint v Lovell*. In effect, the court, before it interferes with an award of damages, should be satisfied that ***the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference.***
>
> [emphasis added in bold italics]

30 This extract is helpful because it articulates the rationale behind the Damages Standard: an assessment of damages often involves "entirely matters of impression and of common sense". For this reason, there is "much room for individual choice" and two people can reasonably come to different but defensible conclusions. This justification applies equally in the context of civil penalties. In *Doyle v Australian Securities & Investments Commission* [2005]

WASCA 17 ("*Doyle*"), the Supreme Court of Western Australia stated (at [109]) that the appellate court is not entitled to intervene on a penalty imposed merely because it would have exercised the discretion in a manner different from that of the trial judge. The imposition of a civil penalty, like the quantification of damages, is not a "mechanical exercise" but inherently an exercise of discretion (see *Australian Securities and Investments Commission v Adler and others* [2002] 42 ACSR 80 ("*Adler*") at [126(vi)]; *Securities and Exchange Commission v Lybrand* 281 F Supp 2d 726 (SDNY, 2003) ("*Lybrand*") at 729). There is therefore good reason for the Damages Standard to apply in the context of the imposition of civil penalties as well.

Standard of review in appeals against the exercise of discretion

31 The Court of Appeal in *Tan Boon Heng* suggested (at [7]) that the principles relevant to the Damages Standard are "really quite similar" to those which apply in the contexts of appeals against the exercise of discretion by a judge generally ("the General Standard"). This is the second standard under consideration. In these cases, the appellate court can intervene where:

(a) The judge was misguided with regard to the principles under which his discretion was to be exercised;

(b) The judge took into account matters which he ought not to have; or

(c) The judge's decision was plainly wrong.

32 Mr Chua opines that the language used in *Tan Boon Heng* suggests that these principles are of general application to all decisions involving an exercise of discretion. I agree. For the reasons outlined at [30] above, I am of the view

that the General Standard, which is similar to the Damages Standard, is also a suitable comparator to the present circumstances.

Standard of review in appeals against sentence in criminal cases

33 In an appeal against sentence imposed in criminal cases, the appellate court will not ordinarily disturb the sentence imposed by the trial court except where it is satisfied that:

(a) The judge erred with respect to the proper factual basis for sentencing;

(b) The judge failed to appreciate the materials placed before him;

(c) The sentence was wrong in principle; or

(d) The sentence was manifestly excessive or manifestly inadequate.

See *Public Prosecutor v UI* [2008] 4 SLR(R) 500 ("*PP v UI*") at [12], citing *Tan Koon Swan v Public Prosecutor* [1985–1986] SLR(R) 976 ("*Tan Koon Swan*") at [2]–[5], [8] and [9]. I shall refer to this as the "Sentencing Standard" and this is the third standard under consideration.

34 Mr Chua postulates that the Sentencing Standard was intended to be aligned with the relevant provisions of the Criminal Procedure Code ("CPC") at the material time. This would be s 261 of the CPC (Cap 68, 1985 Rev Ed) ("CPC 1985") which was the relevant version of the CPC at the time *PP v UI* was decided. Section 261 of the CPC 1985 states:

> **Grounds for reversal of judgment, etc., of District Court or Magistrate's Court**

> **261.** No judgment, sentence or order of a District Court or Magistrate's Court shall be reversed or set aside unless it is shown to the satisfaction of the High Court that the judgment, acquittal, sentence or order was *either wrong in law or against the weight of the evidence, or, in the case of a sentence, manifestly excessive or inadequate in the circumstances of the case.*
>
> [emphasis added]

While not formulated in precisely the same terms, the overarching concepts in *PP v UI* and s 261 of the CPC 1985 are arguably the same. For this reason, Mr Chua submits that the Sentencing Standard is *inapplicable* in the civil penalties context, since civil penalties are not criminal in nature. The problem, however, is that no reference to s 261 of the CPC was made at all in the cases where the Sentencing Standard was articulated. Instead, in *Tan Koon Swan* at [3], Wee Chong Jin CJ referred to a passage in *Archbold* (presumably Archbold, *Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell, 42nd Ed, 1985)) as the basis for the Sentencing Standard. The references in *Archbold* were distilled from the English case law, rather than the CPC 1985. I accept that more recent cases (such as *Ang Lilian v Public Prosecutor* [2017] 4 SLR 1072 at [67]–[68]) have referred to both the Sentencing Standard and s 394 of the CPC (Cap 68, 2012 Rev Ed) (the successor to s 261 of the CPC 1985) in determining the standard of review. But while the Sentencing Standard may have been *influenced* by statute, I see no basis why the *general principles* articulated in the Sentencing Standard should not be applicable to appeals against the quantification of a civil penalty. In my judgment, the court, in deciding on sentence, is similarly exercising judicial discretion which requires the fine balancing of a myriad of considerations (see *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [81]).

35 I am however hesitant to adopt the last factor in the Sentencing Standard (*ie*, whether the sentence is "manifestly excessive or manifestly inadequate"), as urged by Mr Chua. In my view, because these terms (which are used in the CPC) have come to take on specific meanings in the case law, caution ought to be applied in applying them in other contexts. I will return to this point shortly (at [38] below).

Proposed standard of review in appeals against quantification of civil penalties

36 In my view, the underlying thread in all the standards of review examined is that the appellate court is faced with a decision that resulted from a lower court's *exercise of discretion*. The exercise of discretion is incapable of mathematical formulation but is inherently a matter of judgment; two people examining the same set of facts may reasonably differ in their conclusions. In such cases, the appellate court cannot simply substitute its judgment because it would have reached a different conclusion; something more is required before intervention can be justified.

37 A closer examination of each of the standards of review reveals that while the principles are articulated in slightly different terms in each context, they are in fact similar and can broadly be divided into the following categories:

	Sargent	**Damages Standard**	**General Standard**	**Sentencing Standard**
Improper considerations or improper weighing of considerations	A material factor deserving significant weight ignored, an improper factor relied		Took into account matters which he ought not to have.	Failed to appreciate the materials placed before him.

	upon or serious mistake in weighing of factors.			
Wrong in principle		Acted on the wrong principles.	Misguided with regard to the principles under which his discretion was to be exercised.	The sentence was wrong in principle.
Factual errors		Mis-apprehension of the facts.		Erred with respect to the proper factual basis for sentencing.
Plainly wrong	Incorrect application of the law to particular facts.	The estimation of damages was wholly erroneous.	The decision was plainly wrong.	The sentence was manifestly excessive or manifestly inadequate (subject to my observations at [38] below).

38 With respect, as alluded to earlier, I have some reservations about Mr Chua's suggestion that the last ground of the Damages Standard (whether there was a "wholly erroneous" estimate) should be modified to whether the quantum of penalties imposed was "manifestly excessive or manifestly inadequate". This is because the latter phrase has come to acquire a precise, specialised meaning in the criminal context. In *Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22], Yong Pung How CJ stated that a sentence is said to be

manifestly inadequate or manifestly excessive when it is unjustly lenient or severe, as the case may be, and requires "substantial alterations rather than minute corrections to remedy the injustice". Unlike what Mr Chua suggests, these phrases can be seen as "terms of art". In this regard, I am unable to agree that a quantification that is "wholly erroneous" is equivalent to it being "manifestly excessive" or "manifestly inadequate" and that these represent "a mere difference in language". The latter two expressions are high bars to meet, and it is in my view preferable to leave the door open to the possibility that a quantification of civil penalty may be "wholly erroneous" or "plainly wrong", even if it does not require a "substantial alteration" by the court.

39 In my judgment, the following principles distilled from the case law should govern the standard of review in an appeal against the quantum of civil penalties imposed:

(a) Where the judge took into account an improper factor and/or failed to take into account a material factor, or erred in the weighing of the factors;

(b) Where the judge acted on wrong principles;

(c) Where the judge erred with respect to the proper factual basis or misapprehended the facts before him; and

(d) Where, for the above or other reasons, the quantum of civil penalty imposed by the judge was "plainly wrong", such as a decision that was "clearly outside what could be justified by correct reasoning": *Costa v Public Trustee of New South Wales* [2008] NSWCA 223 at [18(1)].

40 The above approach is very similar to the Appellant's suggested formulation (see [12] above) and incorporates the Respondent's narrower approach (which essentially encompasses [39(a)] above). It also broadly mirrors Mr Chua's formulation except that, as explained above, the terms "manifestly inadequate" and "manifestly excessive" are omitted because they may unduly circumscribe the ambit of appellate intervention.

What is the appropriate framework to be applied in determining the quantum of civil penalty to be imposed?

41 Before determining whether this court ought to intervene in the District Judge's decision, I will first consider the general framework that should be applied by a court in the quantification of civil penalties under s 232(3) of the SFA.

The legal principles

42 Section 232 of the SFA provides:

> **Civil penalty**
>
> **232.**—(1) Whenever it appears to the Authority that any person has contravened any provision in this Part, the Authority may, with the consent of the Public Prosecutor, bring an action in a court against him to seek an order for a civil penalty in respect of that contravention.
>
> …
>
> (3) If the court is satisfied on a balance of probabilities that the person has contravened a provision in this Part which *did not result in his gaining a profit or avoiding a loss*, the court may make an order against him for the payment of a civil penalty of *a sum not less than $50,000 and not more than $2 million.*
>
> [emphasis added]

43 Section 232(3) of the SFA legislatively prescribes the range of civil penalties that may be imposed; it sets out the statutory maximum and minimum penalties, but does not prescribe how the court is to determine the precise quantum that should be imposed in a particular case.

44 It is helpful to begin with a consideration of the *nature* of a civil penalty. Civil penalties, like fines, are essentially financial sanctions, but civil penalties are imposed by a court during *civil proceedings* initiated by the regulatory authority (the MAS) against a person for breach of the laws administered by it. They have been used to *complement* criminal sanctions in instances where the high standard of proof required for a criminal conviction (beyond reasonable doubt) has frustrated successful prosecutions, thereby rendering the criminal law ineffective in deterring wrongful behaviour: see the *Guide* at p 28.

45 It is also crucial to bear in mind the *function* of civil penalties. While civil penalties are distinct from fines, they fulfil a similar policy function of *punishing* and *deterring* malpractice in the securities market so as to protect the market's integrity and investors who invest in securities traded on the stock exchange: *Tan Chong Koay* at [57]. Insofar as they are punitive in nature, this is not dissimilar to fines imposed for criminal offences. The imposition of civil penalties is also a means of general and specific deterrence against repetition of like conduct by the offender himself or others: *Adler* at [125]; see also *Lybrand* at 729. When civil penalties are imposed under s 232(3) of the SFA, in which no profits are gained or losses avoided by the defendant, he can nonetheless be made to pay a penalty of at least $50,000. This makes him financially worse off than if he had not violated the law and thereby aims to disincentivise future breaches of the law (see *Lybrand* at 729–730). Given the nature and function of a civil penalty, I am of the view that appropriate analogies may be drawn from

criminal law in order to elucidate the framework that should be applied to civil penalty cases.

46 As alluded to earlier, there is no "simple mechanical process" for quantifying the appropriate penalty: *Adler* at [126]. Taking a leaf from sentencing in criminal cases, the observations of V K Rajah J in *Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR(R) 1 at [24] are apposite:

> Sentencing is *neither a science nor an administrative exercise.* Sentences *cannot be determined with mathematical certainty. Nor should they be arbitrary… Every sentence reflects a complex amalgam of numerous and various factors and imponderables and requires the very careful evaluation of matters such as public interest, the nature and circumstances of the offence and the identity of the offender.* Most crucially, it calls for the embodiment of individualised justice. This in turn warrants the *application of sound discretion.*
>
> [emphasis added]

Applied to the present context, the size of the civil penalty to be imposed is "a question of discretion" and "[t]he circumstances of one case should not dictate the size of the penalty on another case": *Adler* at [126(vi)]; see also *Lybrand* at 729. At the same time, the quantification of civil penalties must not be arbitrary or capricious. Some form of certainty and predictability taking into consideration the facts and circumstances of each case would always be critical: see the *Guide* at p 34. For this reason, it is unsurprising that in every jurisdiction, the court considers a range of factors in order to determine what the appropriate quantum of civil penalty ought to be in the light of the particular circumstances of the case. It is to these cases that I now turn.

The position in Singapore

47 The only reported local case of an appeal against the quantum of civil penalties imposed is *Tan Chong Koay*. In that case, the first appellant was the founder of two companies, Pheim Asset Management Sdn Bhd ("Pheim Malaysia", the second appellant) and Pheim Asset Management (Asia) Pte Ltd ("Pheim Singapore") (collectively, the "Pheim Group") which were licensed to carry on fund management business in Malaysia and Singapore respectively. In April 2004, Pheim Malaysia started investing in shares in United Envirotech Ltd ("UET") and increased its investment in UET shares on 15 December 2004. In the last three trading days of 2004, the first appellant instructed a remisier to make purchases of a total of 360,000 UET shares (costing $152,470.95) minutes before the close of each trading day. Following the purchases, the closing price of UET shares rose about 17% in the relevant period, which resulted in (a) increases in the net asset value of the accounts managed by the Pheim Group holding UET shares by $1,086,989; (b) three of Pheim Singapore's accounts outperforming their year-end benchmark returns for 2004 (which would not otherwise have happened) and (c) Pheim Singapore earning an additional $50,000 in fees arising from the outperformance. The MAS commenced proceedings under s 197(1)(*b*) of the SFA against the appellants for creating a false or misleading appearance with respect to the price of the UET shares. The High Court judge found that the appellants were liable under s 197(1)(*b*) of the SFA and imposed a civil penalty of $250,000 on each of them. The appellants challenged both her finding of liability and the quantum of civil penalty imposed.

48 The Court of Appeal first noted that the financial gain made by the appellants in *Tan Chong Koay* was negligible, hence the applicable provision in

determining the amount of the civil penalty they should pay was s 232(3) of the SFA, like in the present case. In affirming the civil penalty imposed by the High Court judge, the Court of Appeal had regard to the factors raised by the MAS, which were as follows:

(a) The appellants' conduct was a deliberate breach of the SFA;

(b) The Pheim Group obtained significant reputational benefits to its fund management businesses;

(c) There was an overall increase in the net asset value of the Pheim Group's funds;

(d) Pheim Singapore earned additional performance fees;

(e) Pheim Malaysia continued to be a significant participant in the financial markets;

(f) The Pheim Group managed over US$1bn on behalf of its clients; and

(g) During the relevant period, the Pheim Group had a significant level of earnings against which the combined civil penalty imposed on the two appellants was not manifestly disproportionate or unreasonable.

49 From the above enumerations, it appears that the possible factors considered by the Court of Appeal included: (a) whether the appellants' conduct was deliberate; (b) whether there were gains made by third parties other than the appellants (given that under s 232(3), the *appellants themselves* had not gained any profits); (c) the size of the entity used in the contravention and (d) the proportionality or reasonableness of the quantum of civil penalty imposed

compared to the financial position of that entity. There is no indication, however, that these were intended to be authoritative or exhaustive; indeed, the Court of Appeal did not itself lay down the framework to be applied but only said it had regard to the factors raised by the MAS. The question of the appropriate framework to be applied in Singapore is therefore still a live issue.

The position in the US

50 Section 21A of the US Securities Exchange Act 1934 deals with civil penalties for insider trading. Section 21A(2) provides that the amount of penalty that can be imposed on the defendant "shall be determined by the court in light of the facts and circumstances" but "shall not exceed three times the profit gained or loss avoided as a result of such unlawful … sale". This provision was a congressional response to prominent insider trading cases in the US, and aimed to enhance *deterrence* against insider trading and to augment detection and *punishment* of these violations: *Securities and Exchange Commission v Brethen* Fed Sec L Rep 97 (SD Ohio, 1992) ("*Brethen*") at 25; *Securities and Exchange Commission v Yun* 148 F Supp 2d 1287 (MD Florida, 2001) ("*Yun*") at 1294. These are the same objectives as civil penalties under the Singapore SFA (see [45] above), although the ambit of the imposition of civil penalties in Singapore extends beyond offences of insider trading.

51 I note in passing that under the US law, it is possible for the regulator to apply for a host of other reliefs, such as an injunction to prevent future violations of the securities laws, a disgorgement of illicit profits as well as pre-judgment interest on the defendant (see *Sargent*, *Brethen*, *Lybrand* and *Yun*). As explained above, civil penalties may be imposed over and above all the other reliefs because they are punitive in character and exceed the amount of profits gained from the contravention. The deterrent effect that has already been achieved

through the imposition of other penalties however may play a role in determining the quantum of civil penalties to be imposed: see *Yun* at 1294.

52 In *Sargent* itself, the district court decided not to impose any civil penalties at all. On appeal, the Court of Appeal held (at 42) that in evaluating whether to assess civil penalties, a court may take factors such as the following into account:

(a) The egregiousness of the violations;

(b) The isolated or repeated nature of the violations;

(c) The defendant's financial worth;

(d) Whether the defendant concealed his trading;

(e) What other penalties arise as the result of the defendant's conduct; and

(f) Whether the defendant is employed in the securities industry.

53 In *Lybrand*, the Securities and Exchange Commission brought a civil enforcement action seeking monetary and injunctive reliefs against individuals who actively participated in a fraudulent scheme to manipulate stock prices. Some of the defendants in that case were bankrupt. The District Court of the Southern District of New York held (at 730) that general factors that courts look to in imposing civil penalties include:

(a) The egregiousness of the violations at issue;

(b) The defendant's scienter;

(c) The repeated nature of the violations;

(d) The defendant's failure to admit to their wrongdoing;

(e) Whether the defendant's conduct created substantial losses or risk of substantial losses to other persons;

(f) The defendant's lack of cooperation and honesty with authorities, if any;

(g) Whether the penalty that would otherwise be appropriate should be reduced due to the defendants' demonstrated current and future financial condition; and

(h) Evidence of the defendants' financial deception, such as violating asset freeze orders, hiding assets from creditors etc.

54 The district court in *Brethen* focused on only the first three factors in *Lybrand* because in the district judge's mind, looking at the congressional purpose of deterrence and punishment in enacting s 21A of the Securities and Futures Act, these three factors assess "both the *severity of the violations* and a *defendant's culpability*, thus indicating the degree of punishment warranted and the extent to which future violations must be deterred" (at 25) [emphasis added]. In my judgment, the twin considerations of the severity of the violations and the culpability of the defendant are helpful and principled classifications of the range of factors that are to be considered in the quantification of civil penalties. I will elaborate on this later in this judgment.

The position in Australia

55 Section 1317G of the Australian Corporations Act 2001 (Cth) provides for the payment of "pecuniary penalties" (similar to civil penalties). The maximum pecuniary penalty that can be imposed is $200,000 (see s 1317G(1)). *Adler* is the seminal Australian case setting out the general principles applicable to the quantification of pecuniary penalties. The court first stated that a pecuniary penalty has a punitive character, but it is principally a personal and general deterrent in nature. The penalty should be no greater than is necessary to achieve these objectives. It then held that the following factors should be taken into consideration (at 114–116):

> (a) To determine whether compensation is to be paid and in what amount, it is necessary to consider the prospect of the defendant paying such compensation and the hardship to the defendant from such payment. Compensation has been ordered for an amount less than that lost even though there was little prospect of any of it being recovered.
>
> (b) The capacity of the defendant to pay is a relevant consideration in determining a pecuniary penalty.
>
> (c) In assessing a pecuniary penalty it is important to consider the consequences of an associated disqualification order for the defendant. Where the making of such an order has significant consequences, they may operate as a factor in favour of a lesser penalty. Where the disqualification order does not have significant consequences for the defendant, the prohibition order is likely to be only marginally relevant.
>
> (d) It is important to assess whether the order will prejudice the rehabilitation of the defendant.

(e) An amount may be ordered which is lower than the losses to the company concerned. It may also be ordered, even though it is unlikely that the amount would ever be paid; for example, if the respondent is bankrupt. Under such circumstances, precision in the amount is unnecessary.

(f) Factors leading to the order of a penalty in the range of $20,000–$40,000 include: (i) defendant was aware of impropriety of actions; (ii) no intention to deprive company permanently of funds; (iii) amounts in question not large; (iv) no deliberate falsification of accounts; (v) cases classed as being serious misconduct, but not worst cases.

(g) Factors leading to the order of lower range penalties in the range of $4,000–$5,000 include: (i) remorse and contrition shown; (ii) efforts to repay misappropriated funds; (iii) acting upon the advice of professionals; (iv) not contesting the proceedings, or seeking to save costs in proceedings; (v) tendency not to involve dishonesty, but negligence or carelessness; (vi) previous unblemished character; and (vii) further contraventions unlikely.

56 As is evident from the list of considerations set out in *Adler*, the capacity of the defendant to pay the pecuniary penalty imposed on him and the hardship or disqualifications that may result from such a penalty weighed heavily on the court's mind in *Adler* (see factors (a)–(e)). This also appeared to be a concern of the US court in *Lybrand* (see [53(g)] above). I have doubts about the correctness of this approach and will elaborate on this at [68] of the judgment.

Proposed framework for Singapore

57 Having examined the authorities set out above, I am in broad agreement with the range of factors to be considered in determining the quantum of civil penalties as espoused by Mr Chua and set out at [20] above. Going a step further and taking a leaf from the US District Court decision of *Brethen* (see [54] above), it is in my view useful to classify the list of factors into two broad categories: factors relating to the *severity of the violation* and factors going towards the *culpability of the defendant*. Other general aggravating and mitigating factors that do not fall within these two classes can then be considered. Thereafter, the court should determine the preliminary quantum of civil penalty to be imposed. This quantum can then be adjusted upwards or downwards (if necessary) to ensure adherence to the principles of proportionality, parity with precedents, totality and the overarching aims of punishment and deterrence.

58 Before elaborating on this suggested framework, I first address a preliminary issue as to whether the District Judge erred in stipulating that the "starting point" in assessing the appropriate quantum of penalty was $50,000, and that the $250,000 penalty imposed in *Tan Chong Koay* was an "anchor" for the upper limit of the quantum in the present case. As earlier explained, the District Judge stated (at [9] of the GD) that the relevant starting point was the statutory minimum penalty under s 232(3) of the SFA, *ie*, $50,000. The Appellant and Mr Chua reject this approach. Mr Chua argues that the starting point in assessing the appropriate penalty should instead be the statutory *maximum* penalty, since this determines what Parliament has identified as the most serious kinds of contraventions. In my assessment, the District Judge did not err in principle in taking the statutory minimum penalty as a starting point.

All that he intended by his reference to a "starting point" was to posit that one must begin from the prescribed minimum of $50,000 *and no less*. In other words, even if there are strong mitigating factors in a particular case, the statutory minimum precludes any discretion to impose a penalty of less than $50,000. This holding does not, in my view, permit an inference that the District Judge had disregarded the full range of the available spectrum of penalties that can be imposed under s 232(3) of the SFA.

59 As for the arguments against the use of the $250,000 penalty imposed in *Tan Chong Koay* as the upper limit in the present case, they are neither here nor there. To be fair to the District Judge, given the dearth of case law on this issue, there was no other case that he could draw guidance from. It is therefore not plainly wrong for him to look towards the Court of Appeal decision in *Tan Chong Koay*. I do not believe that the District Judge intended to impose a rigid upper limit, thereby artificially creating a "sub-range" of civil penalties, as the Appellant argues. Instead, he was simply articulating the fact that the penalty imposed in the present case should not be as high as that in *Tan Chong Koay* because a holistic consideration of the circumstances of that case rendered it more egregious (see [7] of the GD). The Appellant evidently does not dispute this, because even its suggested revised civil penalties for the 1st and 2nd Respondents amount to $200,000 and $100,000 respectively, both of which are lower than that imposed in *Tan Chong Koay*.

The severity of the violation

60 I turn then to consider the factors that the court should evaluate in determining a suitable quantum of civil penalties to be imposed. The first broad category of factors encompasses those that relate to the *severity of the violation in question*. The following non-exhaustive factors can be taken into account:

(a) The mechanics and degree of sophistication of the defendant's conduct;

(b) The actual or potential impact of the defendant's conduct on the market;

(c) The amount of money involved in the offending transactions;

(d) The scale, frequency and duration of the violations;

(e) The number of third parties affected by conduct;

(f) The actual or potential impact on third parties; and

(g) The severity of the impact on third parties.

The culpability of the defendant

61 Next, the court should consider factors relating to the *culpability of the defendant.* Culpability is the measure of "the degree of relative blameworthiness disclosed by an offender's actions" (see *Public Prosecutor v Koh Thiam Huat* [2017] SGHC 123 at [41]). These factors are in my view *offence-specific* and may include:

(a) Whether the defendant's conduct is a deliberate or flagrant disregard of the law (as opposed to mere carelessness);

(b) Whether there is evidence of dishonesty on the part of the defendant, such as the deliberate concealment of his conduct aimed at avoiding detection, or the destruction of incriminating evidence;

(c) The extent of the defendant's involvement in the violation; and

(d) Whether the violation amounted to an abuse of a position of trust or authority (for example, if the defendant were a remisier).

General aggravating and mitigating factors

62 Thereafter, the court should consider other general aggravating and mitigating factors which are not offence-specific, including, but not limited to the following:

(a) Whether the defendant showed remorse or contrition, evidenced for example by a voluntary admission of wrongdoing, a sincere apology, not contesting proceedings on liability leading to savings of time or cost, or voluntary restitution of losses caused to third parties;

(b) Whether the defendant had relevant antecedents; and

(c) Whether the defendant cooperated with the authorities.

63 With regard to the above-mentioned factors, I make three observations. The first is that the factors are only provided as guidance and are non-exhaustive. In other words, they are intended to be *descriptive* of the type of considerations the court should bear in mind, but are not *prescriptive* in nature. Indeed, as earlier explained, the appropriate civil penalty to be imposed is the product of a "fact-sensitive exercise of discretion" (see, by analogy, *Stansilas Fabian Kester v Public Prosecutor* [2017] SGHC 185 at [73]); by its very definition, such exercises of discretion are not capable of being definitively or exhaustively articulated as rigid principles.

64 Second, the purposes of the SFA are to (a) protect investors; (b) protect public confidence in the market and (c) ensure that the operation of the market

is not distorted: *Public Prosecutor v Ng Sae Kiat and other appeals* [2015] 5 SLR 167 ("*Ng Sae Kiat*") at [58]. Thus, if there is proof of *actual* distortion of the true forces of supply and demand in the market and/or an adverse impact on third parties, these would be significant aggravating factors that justify higher civil penalties being imposed. The *potential* impact of the defendant's conduct on the market is also relevant. Where there is evidence that the conduct is *capable of* affecting the market or third parties, the fact that the impact did not eventuate is purely fortuitous and cannot be credited to the defendant. The lack of market impact is a neutral factor at best; it is *not*, as the Respondents argue, a *mitigating* factor. In this regard, it is trite that the absence of an aggravating factor should not be viewed as a mitigating factor: see *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [56(b)]; see also Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 15.003. This is consistent with the position in relation to criminal offences under the SFA, which suggest that the lack of evidence of market impact does not amount to a mitigating factor. For example, in *Ng Sae Kiat* (at [58]), the High Court held that the lack of evidence of market impact was not a necessary condition for custodial sentences to be imposed in respect of offences under s 201(*b*) of the SFA. A similar approach was adopted in *Lee Chee Keet v Public Prosecutor* [2016] 4 SLR 1316 at [38].

65 Third, the list of factors set out above consciously excludes "the amount of profit accrued or loss avoided", except insofar as losses are suffered by *third parties* which translate to an adverse impact on them (see [60(f)] above). The reason is that when civil penalties are assessed under *s 232(3)* of the SFA, the pre-condition is that the contravention "*did not* result in [the defendant's] gaining a profit or avoiding a loss" [emphasis added]. Therefore, it would be unproductive to consider the amount of profit accrued or loss avoided on the

part of the *defendant himself*. Such a consideration may however be relevant in the context of s 232(2) of the SFA.

66 After considering the above factors (and any other factor which the court considers relevant in the circumstances of the case at hand), the court should then identify a *preliminary* quantum of civil penalty that should be imposed. In so doing, the court should consider "the range of conduct that may be captured at either end of the [penalty] range", and then determine where in that spectrum the conduct that is before the court falls (see, by analogy, *Mehra Radhika v Public Prosecutor* [2015] 1 SLR 96 at [29]).

Final adjustment for proportionality, parity, totality, and the aims of punishment and deterrence

67 In the final analysis, the court may make adjustments (if necessary) to the preliminary quantum of civil penalty decided upon to ensure adherence with the following principles:

(a) *Proportionality* of the quantum of civil penalty imposed in light of the severity of the violation and the culpability of the defendant;

(b) *Parity* of the quantum of penalty imposed with comparable precedents;

(c) The *totality principle*; and

(d) Whether the penalty imposed is sufficient to achieve the objectives of *punishment* of the defendant as well as *general and specific deterrence.*

68 The consideration of whether the aims of *specific deterrence* and *punishment* are achieved by the penalty requires some elaboration. As I have earlier noted, the Australian and US courts have placed significant emphasis on the capacity of the defendant to pay the penalty imposed and the hardship caused to the defendant by the imposition of the penalty. The courts have held that such financial hardship could be a ground for reducing the penalty imposed (see *Adler* at 114 and [56] above). With respect, I am unable to agree with this approach. Drawing from sentencing principles in criminal law, personal financial hardship may not be relied on in mitigation except in the most exceptional cases: *Public Prosecutor v Ong Ker Seng* [2001] 3 SLR(R) 134 at [30]. Such circumstances will be "very rare, if indeed they ever occur". The reason is that the "whole purpose of the law is to maintain order and discipline, and that is most necessary *precisely when the citizen might be inclined to act to the prejudice of good order*" [emphasis added]: see *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 at [10].

69 As a final note, I should add that I have chosen not to adopt Mr Chua's proposed "banded" framework (see [21] above) because I am hesitant, at least at this point in time, to specify suggested bands with granularity given the absence of sufficient precedents. As I pointed out at the hearing of this appeal, this is unlike other scenarios where the court, in seeking to lay down benchmarks or outline a sentencing matrix, has the benefit of reviewing a body of case precedents. In the present context, the only relevant local case is *Tan Chong Koay*. To be clear, I am not closed in principle to the future possibility of adopting a banded framework in the context of civil penalties; I am cognisant that it may well prove useful in ensuring some measure of consistency and parity across various cases of this nature. But I prefer to leave this task to a court which has had the benefit of reviewing the case precedents after a sufficient body of

jurisprudence in this area has built up over the years. For the present moment, I am of the view that the key considerations outlined at [60]–[68] above suffice as guidance to courts dealing with future cases of this nature.

Applying that framework, did the District Judge err in his quantification of the civil penalties?

70 Bearing in mind the framework outlined above, I turn to consider whether the District Judge had made any of the alleged "errors" pointed out by the Appellant which warrant appellate intervention.

Did the District Judge act on the wrong principles or err in his consideration of the relevant factors?

The starting point and upper limit of civil penalties

71 According to the Appellant, the District Judge acted on the wrong principles when he considered that (a) the "starting point" for determining the quantum of civil penalties was $50,000; and (b) the $250,000 civil penalty imposed in *Tan Chong Koay* represented the "upper limit" that could be imposed, thereby limiting the range of penalties to between $50,000 and $250,000. But for the reasons I have set out earlier (at [58]–[59] above), I do not agree that the District Judge had erred in this regard.

The loss caused to the UOBKH remisier

72 The Appellant further argues that the District Judge failed to consider that the 1st Respondent's acts caused a loss of $136,000 to the UOBKH remisier, Mr Chean. Mr Chean's evidence was that after December 2007, monies remained due and owing to UOBKH in the account opened under Mr Tay's name. Mr Chean then effected a forced sale of the securities deposited in

this account, and proceeds were applied towards partial settlement of the monies owing on the account, leaving a total of about $136,000 outstanding. Mr Chean tried to contact Mr Tay, who said the trades were not his concern and to look for the 1st Respondent. Mr Chean duly called the 1st Respondent, who conversely told Mr Chean to look to Mr Tay for reimbursement. Mr Chean then engaged a debt collector to recover the monies, but was unable to do so. It then became clear to him he was not going to receive payment of the said amount, so he used his own money to settle the outstanding amount with UOBKH.

73 In view of [60(f)] and [64] above, the impact on Mr Chean, a third party, is a relevant and important factor in determining the quantum of civil penalties to be imposed. In response, the District Judge and the Respondents argue that the loss of $136,000 suffered by Mr Chean was "not directly related to the unauthorised nature of the trading". Instead, it was a loss that Mr Chean would have been liable to suffer in any event, whenever the client fails to pay up on trading losses (at [12] of the GD). This was presumably based on Mr Chean's evidence during cross-examination that he decided to make repayment of the losses with his own money because UOBKH would otherwise withhold his commissions and possibly charge him interest on the losses. With respect, I am unable to agree with this submission. The District Judge found that the 1st Respondent effectively operated Mr Tay's account on his behalf. It was therefore the 1st Respondent's actions (*ie*, unauthorised trading on Mr Tay's account) that led directly to the loss suffered by Mr Chean. Mr Chean was not liable to make payment of his client's losses in every case, but only when his client did not make good the losses themselves as they should. Mr Tay did not do so because the 1st Defendant was the one operating his account, and the 1st Defendant could not do so presumably because he was an undischarged bankrupt at the material time and did not have the funds to settle the losses. Mr

Chean was kept in the dark about all of these circumstances, which resulted in him suffering an *avoidable* loss.

74 The second argument put forward by the Respondents was that the trading was unauthorised due to a lack of consent from UOBKH. As such, it is only loss or damage suffered *by UOBKH* that is relevant in the assessment. But UOBKH did not suffer any loss. Again, I disagree with this contention. The Respondent does not cite any authority for the proposition that it is only the loss on the part of the securities firm on which the unauthorised trading was perpetrated that should be taken into account. Rather, I note that the purpose of civil penalties is to protect the market and market players *in general*. There is no good justification for circumscribing the losses suffered in the manner advocated by the Respondents.

75 For these reasons, although the District Judge did consider the loss suffered by Mr Chean (at [12] of the GD), he erred in not giving this factor sufficient weight in his analysis. This stemmed from his specious conclusion that the loss was not directly related to the unauthorised nature of the trading.

Policy reasons and the need to deter unauthorised trading

76 The Appellant also argues that the District Judge had erred in holding (at [10] of the GD) that the lack of adverse market impact was a "major mitigating factor". In light of my analysis at [64] above, I agree with this submission. The District Judge's treatment of the lack of market impact as a *mitigating* factor is unsupported by the authorities and goes against the grain of s 201(*b*), which essentially aims to curb deceptive or manipulative market conduct. In adopting the approach that the District Judge did, he was led to take a more lenient view of the Respondents' conduct than warranted.

77 The Appellant further contends that the District Judge erred in over-emphasising "market impact" as "a major if not the most important factor". I do not think that this is necessarily wrong. As indicated at [64] above, the policy rationale of civil penalties supports the position that the impact of the defendant's actions on the market is the one of the most important factors to be considered.

78 The Appellant also contends that the District Judge disproportionately downplayed the culpability of the Respondents by concluding that offences involving the creation of false market appearances (under s 197(1)(*b*) of the SFA, such as in *Tan Chong Koay*) and the present offence of trading without the consent of securities firms (under s 201(*b*) of the SFA) are different and that the defendants in the former case had "significantly higher" culpability. However, reading the GD (at [7]) in context, the District Judge concluded that the culpability of the defendants in the former type of cases was significantly higher based on a myriad of considerations and not simply by virtue of the nature of the offences.

The scale and frequency of the Respondents' trades

79 Next, the Appellant asserts that the District Judge failed to take into account the fact that the 1st Respondent's contraventions covered 573 individual transactions over four months using four separate accounts, while the 2nd Respondent's contraventions were in respect of 407 individual transactions involving two accounts. The Respondents argue that the District Judge had been cognisant of the number of trading accounts used (at [14] of the GD). While that may be true, it is apparent that the District Judge did not take into account or at least failed to give sufficient weight to the sheer scale and frequency of the unauthorised transactions (see [60(d)] above). The penalties imposed are

inordinately modest and disproportionate to the Respondents' culpability given the magnitude of the offending conduct. Coupled with the difficulty of detecting such contraventions, the deterrent effect of the penalties imposed is marginal at best.

The alleged financial hardship of the Respondents

80 Finally, the Appellant argues that the Respondents' professed inability to pay the penalties as well as their claims of financial hardship are irrelevant to the question of quantum of civil penalties imposed. Thus, the District Judge erred in taking into account the financial hardship that would result from the imposition of a severe pecuniary penalty. Given the principles outlined at [68] above, I agree with this submission. I highlight that in the present case, the breach in question concerns s 201(*b*) of the SFA, *ie*, unauthorised trading. This was done when the 1st Respondent was an undischarged bankrupt. The share trading must therefore have been executed with a self-serving profit motive and was designed to circumvent the restrictions placed on him as a bankrupt. I recognise that in the present case, there was no evidence of any profits gained by the 1st Respondent, but that alone is not a mitigating factor. Equally, I fail to see how the fact that the 1st Respondent is now a *discharged* bankrupt could be a valid reason for leniency.

Was the District Judge's decision plainly wrong?

81 Other than the factors listed above, the Appellant contends that the District Judge's decision was plainly wrong for the following reasons.

The 2nd Respondent's culpability

82 First, the Appellant argues that that the 2nd Respondent's culpability was more than a "bare minimum" because of various aggravating factors such as lack of cooperation with the authorities and a lack of remorse. The District Judge was cognisant of these (at [13] of the GD). Further, I observe that the District Judge considered that the Respondents mounted an "artful defence" in court (see [13] of the GD). While it was generally only if the defence was patently untenable, extravagant or frivolous that lack of cooperation or lack of remorse could be considered to be an aggravating factor, the manner in which the defence was put forward in the present case demonstrates that both Respondents were intent on deliberately concealing or obfuscating their involvement in the unauthorised trading.

The difference in culpability between the 1st and 2nd Respondents

83 The Appellant further argues that the penalties imposed by the District Judge on the Respondents, with a difference of a modest $25,000 between the 1st and 2nd Respondents, fail to adequately take into account the far higher level of culpability on the part of the 1st Respondent. I agree with this contention. The 1st Respondent was clearly the mastermind behind the scheme who deliberately and actively carried out the unauthorised transactions on the four accounts. For this reason, he was far more involved in the violations than the 2nd Respondent (see [61(c)] above), whose role in the transactions is nominal. The 2nd Respondent only passively acquiesced to the unauthorised use of her accounts. I agree with the Appellant that the quantum of civil penalty that should be imposed on the 1st Respondent should therefore be much higher than the 2nd Respondent.

84 For the reasons outlined above, I am satisfied that the court can and should intervene with the District Judge's quantification of civil penalties, primarily because the Appellant has demonstrated that the District Judge had made certain fundamental errors in (a) treating the lack of market impact as a "major mitigating factor"; (b) not giving sufficient weight to the loss caused to Mr Chean; (c) placing insufficient weight on the scale, number and frequency of the trades by the Respondents; (d) wrongly taking into account the alleged financial hardship to the Respondents; and (e) failing to adequately take into account the difference in relative culpability between the Respondents.

What is the quantum of civil penalties that should be imposed on the Respondents in the present case?

85 The final question is how, applying the suggested framework, the quantification of civil penalties should be done in the present case. I first consider the severity of the violations in question. The mechanics of the contraventions are unsophisticated, and involved the 1st Respondent using the accounts opened in the names of two other people to carry out trades without the consent of the securities firms. This is much less sophisticated than the market manipulation carried out in *Tan Chong Koay*. There was also no known impact on the market (as compared to *Tan Chong Koay*, where the prices of the UET shares increased by 17%), which removes a significant aggravating factor and results in the case falling within the lower end of the spectrum of possible penalties under s 232(3) of the SFA. Thus, a penalty higher than the $250,000 imposed in *Tan Chong Koay* is certainly not warranted. However, the total amount of money involved in the transactions was not insignificant, with each transaction generally being a sale or purchase of hundreds of thousands of shares worth up to several hundred thousand dollars. There were 573 such transactions on four accounts with two securities firms. The transactions took

place almost every trading day over four months. The transactions also caused a loss of $136,000 to UOBKH's remisier, Mr Chean, a third party, who had to make good the losses that were not settled by the 1st Respondent (or Mr Tay).

86 I next consider the Respondents' culpability. It is clear that the Respondents' conduct was deliberate, as the District Judge also found (at [10] of the GD). There was however no evidence of an abuse of a position of trust. In terms of relative culpability, it cannot seriously be disputed that the 1st Respondent is far more culpable than the 2nd Respondent, as explained above, by virtue of his active involvement in trading using each of these accounts which circumvented the restrictions imposed on him as an undischarged bankrupt.

87 I turn to the general aggravating and mitigating factors. While the Respondents have no relevant antecedents, they have not been forthright or cooperative with the authorities. They have also not demonstrated any remorse or contrition. As noted at [82] above, both Respondents were intent on deliberately concealing or obfuscating their involvement. Further, they have not made any voluntary restitution of losses to Mr Chean but instead maintained even on appeal that he would have suffered those losses in any event. On balance, therefore, the aggravating considerations far outweigh any mitigating ones.

88 In light of the 1st Respondent's deliberate conduct, his far more involved role in the violations as well as the scale and frequency of the transactions, the quantum of civil penalty imposed on him should be increased to $150,000 to adequately reflect the severity of the violations and his culpability. As for the 2nd Respondent, while it is true that her involvement was in the nature of passive acquiescence, the number of transactions that she was a party to (407 in

total) cannot be ignored. Further, she chose to align herself with the 1st Respondent's defence. I find it difficult to conclude that her conduct can be considered among the least serious infractions falling within the prohibition so that the statutory minimum penalty would suffice. In my assessment, the quantum of civil penalty imposed on her should be adjusted upwards to $75,000.

89 Finally, these preliminary figures need not be modified further as I am satisfied that they adhere to the totality, parity and proportionality principles. The quantum of penalties imposed would be sufficient, in my judgment, to achieve the aims of punishment as well as specific and general deterrence against future offences of this nature by the Respondents and other like-minded individuals.

Conclusion

90 For the foregoing reasons, the appeal is allowed. The civil penalty imposed against the 1st Respondent is increased from $75,000 to $150,000 and that against the 2nd Respondent is increased from $50,000 to $75,000. Having heard submissions on costs from the parties, costs of the appeal were fixed at $7,000 to be paid by the Respondents to the Appellant, with reasonable disbursements in addition.

91 This leaves me to record my appreciation to the learned counsel and the *amicus curiae*, Mr Chua, for their research and submissions from which I derived considerable assistance.

See Kee Oon
Judge

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