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Business crimes

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PART II

Business Crimes and Business Torts

Chapter 4

Business Crimes

Introduction

4.1 There is no formal definition of a "business crime" or a "white-collar crime" in the context of Singapore legislation. Neither do any of these terms carry any legal significance. The term "white-collar crime" was popularised after the American sociologist, Edwin H Sutherland, delivered his presidential address "White-Collar Criminality" in 1939 to the American Sociological Society, where he compared crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, with that of the lower class, comprising persons of low socioeconomic status (E H Sutherland, "White-Collar Criminality" (1940) 5 *American Sociological Review* 1). The terms "business crimes" and "white-collar crimes" have been used as convenient shorthand to refer to crimes that do not involve acts committed by physical means, such as robbery or murder, and where deception or concealment is involved either to gain an advantage or to avoid a loss to the perpetrator. These would normally include, but are not limited to, offences involving fraud, theft, cheating, misappropriation, corruption and bribery, money laundering, counterfeiting, securities offences (eg, market manipulation and insider trading) and misrepresentation of financial statements. This chapter will focus on the following business crimes:

- misappropriation;
- criminal breach of trust;
- cheating;
- theft;
- counterfeiting, specifically relating to fake currency;
- forgery;
- bribery and corruption;
- money laundering; and
- insider trading.

4.2 The offences relating to the cybercrimes under the Computers Misuse Act (Cap 50A, 1998 Rev Ed) will be covered in Chapter 24. Space constraints dictate that only one form of securities offences will be covered in this chapter, namely, insider trading. However, other selected provisions of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA") will be used as illustrative examples.

4.3 In Singapore, white-collar crimes, with the exception of corruption offences, are primarily investigated by the Commercial Affairs Department ("CAD"), which is a department within the Singapore Police Force. Corruption offences under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA") are primarily investigated by the Corrupt Practices Investigations Bureau ("CPIB"), whose director is directly responsible to the Prime Minister.

4.4 By way of a brief historical overview of criminal law in Singapore generally, the first three pieces of legislation on criminal law and procedure enacted in Singapore were the Penal Code (original enactment Ordinance 4 of 1871 and currently Cap 224, 2008 Rev Ed) ("PC"), the Criminal Procedure Code (original enactment Criminal Procedure Ordinance 1870 and currently Act No. 15 of 2010) ("CPC") and the Evidence Act (original enactment Ordinance 3 of 1893 and currently Cap 97, 1997 Rev Ed). The latter two statutes dealt with criminal procedure and evidence in Singapore. The PC, as in the case of many other criminal statutes of former British colonies including Malaysia, was essentially a reenactment of the Indian Penal Code. It replaced the English criminal law that applied via the Second Charter of Justice 1826 (see s 2 PC). The PC contains a number of provisions in respect of offences which were later popularly known as business crimes, including cheating, misappropriation and counterfeiting of currency. Since its enactment, the PC has continued to be the main source of local criminal law today.

4.5 In addition to the PC, there are other specialised statutes that deal with the criminalisation of specific offences, including:

- the PCA (bribery and corruption);
- the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") (money laundering of the proceeds of corruption, drug trafficking and other serious offences);
- the Companies Act (Cap 50, 2006 Rev Ed) (eg, breach of directors' fiduciary duties and financial assistance);
- the SFA (securities offences such as insider trading, as discussed below, market manipulation and making of false or misleading statements to induce the purchase of securities); and

- the Computer Misuse Act (computer hacking and other forms of computer misuse).

4.6 At this juncture, it is apt to reiterate the significant differences between criminal law and civil law. The primary purpose of criminal law is to punish or deter prospective criminals from committing crimes whereas the primary purpose of civil law is to compensate the victim for damages or losses suffered. The punishment for committing the types of business crimes discussed in this chapter normally involves the imposition of a fine, imprisonment or both. In some instances, confiscation of benefits of the relevant criminal conduct may be imposed, as is stipulated under the CDSA. Other orders which a court may make include a probation order under the Probation of Offenders Act (Cap 252, 1985 Rev Ed) in suitable cases. In criminal proceedings, the court may, in certain circumstances, make an order for the person convicted of the crime to compensate the victim of a crime under s 359 of CPC. Further, the concept of notice is important as an accused person is protected from the application of statutes that operate retrospectively (Art 11 Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution")). The Attorney-General, who is also the Public Prosecutor, has the power to institute, conduct or discontinue proceedings for any offence (Art 35(8) of the Constitution and s 11 of the CPC). The burden of proof is on the prosecution to prove *beyond a reasonable doubt* that the accused has committed an offence. Civil law, on the other hand, is largely judge-made, develops through judicial decisions and usually operates retrospectively. The burden of proof in a civil case is on a *balance of probabilities*. A victim of a crime generally has to take out separate civil proceedings against the accused in respect of any losses resulting from business crimes, including injunctive relief, orders for discovery and tracing of assets.

4.7 It is perhaps necessary to caution that the distinction between criminal and civil law may not now be so clear-cut. In recent years, legislation has provided yet another possibility, namely, civil penalties, in order to strengthen the overall framework for enforcement of securities offences. For example, under s 232 SFA, a person who has contravened securities offences under Part XII SFA, including the offence of insider trading, is liable to civil penalties of a sum not exceeding three times the amount of profit gained or loss avoided as a result of the contravention, subject to a minimum of S$50,000 for individuals and S$100,000 for corporations. Where the contravention 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 S$50,000 and not more than S$2 million. The burden of proof for establishing a claim for civil penalties in such cases is on a balance of probabilities.

Actus Reus, Mens Rea and Strict Liability Offences

4.8 In determining whether the prosecution has proven the elements of the offence, it is usually convenient to break down the elements into the *actus reus* and the *mens rea*. *Actus reus* refers to the prohibited behaviour or conduct (including acts and omissions). *Mens rea* refers to the mental element of the crime, which is usually in the form of intention, knowledge, recklessness or negligence. There are certain offences which the prosecution is not required to show that the accused has the requisite *mens rea*. These are known as strict liability offences. However, recently, there is some muddying of waters as to what are properly regarded as strict liability offences. There are offences that prescribe liability without fault but the defence may avoid liability on proof of due diligence. For example, under s 253 SFA, where a prospectus for an offer of securities contains a false or misleading statement, certain specified persons (including the directors of the entity making the offer) would be guilty of an offence even if such persons were not involved in the making of the false or misleading statement. However, it is a defence if any such person proves that he has made all inquiries that are reasonable in the circumstances and after doing so, believes on reasonable grounds that the statement is not false or misleading (s 255 SFA). There is some debate as to whether such offences, which permit the defendants to raise the due diligence defence, amount to strict liability offences (eg, M Hor, "Strict Liability in Criminal Law: A Re-Examination" (1996) *Singapore Journal of Legal Studies* 312). It is submitted that instead of focusing on whether offences are properly labelled as strict liability offences, the central questions should be: (1) whether the prosecution is required to prove *mens rea* in respect of the offence. If so, what is the requisite *mens rea* that the prosecution is required to show; and (2) even if the prosecution is not required to prove *mens rea*, can the defendant avoid liability by showing that he has exercised due diligence or is not at fault?

4.9 On the first question, where the statute is silent on the requirement of *mens rea*, the English common law approach, as exemplified by *Sweet v Parsley* (1970), is that there is a presumption of *mens rea* in criminal statutes and the

presumption may be rebutted if it is in fact Parliament's intention that such offence is one of strict liability. This would be the case where the legislation is one of social concern or public safety and the imposition of strict liability will be effective to promote such objects. Parliamentary material will also be relevant in assisting the determination of Parliament's intention (s 9A Interpretation Act). However, the presumption is not lightly rebutted. For example, in *PP v Phua Keng Tong* (1986), a case of communicating confidential information under s 5(1) Official Secrets Act (Cap 213, 1985 Rev Ed), the presumption of *mens rea* in that provision was not rebutted and the prosecution was required to prove knowledge of the wrongfulness in committing the act complained of.

4.10 In respect of the second question, in situations where the legislature is silent as to *mens rea*, once the court determines that *mens rea* is in fact required, the common law approach under *Sweet v Parsley* is that a high degree of *mens rea*, either knowledge or recklessness, is required. It is not open to the courts to impose negligence as the requisite degree of *mens rea*. Recently, there appears to be a departure from this strict common law approach in Singapore in a case concerning the offence of hindrance of investigation under s 26(b) PCA. This section specifies the *actus reus* of the offence, that is, the Director of CPIB or one of his officers was executing a duty or power conferred by the PCA and that the accused did an act which in fact hindered the execution of that duty. Even though no *mens rea* is mentioned in s 26(b) PCA, the High Court in *Foo Siang Wah Frederick v PP* (2000) concluded that the offence is not one of strict liability. Drawing guidance from s 186 PC (the offence relating to the obstruction of public servants in the discharge of duties), the court held that the requisite *mens rea* for s 26(b) PCA is any one of the following:

- that the accused intended by his actions to hinder a police officer in the execution of his duty; or
- that the accused knew that he was by his actions likely to hinder a police officer whom he knew was in the execution of his duty; or
- the accused had reason to believe that he was by his actions likely to hinder a police officer whom he had reason to believe was in the execution of his duty.

4.11 Academic commentators have argued that there is no basis for strict liability offences in Singapore in view of the fact that s 40(2) PC prescribes that Chapter IV (general defences) applies to all offences not only under the PC

but also under any other law for the time being in force (see M Sornarajah, "Defences to Strict Liability Offences in Singapore and Malaysia" (1985) 27 *Mal L R* 1; see the discussion in paras 4.62–4.64 on general defences). The general defences in the PC include those that are based on the absence of *mens rea* (eg, unsoundness of mind) and acts done by a person who by reason of a mistake of fact (and not by reason of a mistake of law) in good faith believes to be justified by law. According to this argument, all offences prescribed under any statute in Singapore should be read subject to the general defences under the PC. However, it should be noted that the Singapore courts have not always considered the application of the general defences in the PC in determining the requisite *mens rea*, for example, *Tan Cheng Kwee v PP* (2002) but see *Comfort Management v PP* (2003).

Box 4.1

Reflecting on the law **Determining the *mens rea* of any offence**

The purpose of requiring *mens rea* in offences, other than the "absolute" strict liability offences (which impose criminal liability even where reasonable care is taken), is that criminal liability should be imposed only if the accused is at fault. In some instances, as shown in para 4.8, the relevant legislation may provide that instead of the prosecution proving the presence of *mens rea*, it is for the defendant to avoid liability by proving that he has exercised due diligence.

The difficulty often arises where the relevant legislation is silent on the *mens rea*. There is always a spectrum of fault to be considered, which ranges from negligence to intention. Between these two categories lie knowledge and recklessness. Further, *Foo Siang Wah Frederick v PP* has held that knowledge includes not only actual knowledge but also a form of constructive knowledge (as shown in para 4.10), which introduces an objective element.

Even if the offence is one which does not require the prosecution to prove *mens rea*, the issue remains as to whether and how the defendant may avoid liability. In *Tan Cheng Kwee v PP*, the High Court held, in a charge under s 79(1) Road Traffic Act, (then Cap 276, 1997 Rev Ed, now 2004 Rev Ed), that the defence of reasonable care was open to the accused, relying on certain decisions in Canada (but Chapter IV of the PC was not cited). In contrast, *Comfort Management v PP*, in a charge under s 5(3) of the then Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed) (now Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed)) which prohibited a person from employing a foreign worker other than in accordance with the conditions of the work permit, held that the accused could be acquitted if he could prove on a balance of probabilities that he had taken due care and attention to comply with the statutory requirements. It may be that in most cases, an inquiry on whether the accused had taken reasonable care or had taken due care and attention to comply with the statutory requirements will lead to the same results.

Misappropriation, Criminal Breach of Trust, Cheating, Theft, Counterfeiting and Forgery

4.12 The primary source of legislation in respect of the offences for misappropriation, criminal breach of trust, cheating, theft, counterfeiting and forgery is found in the PC.

Misappropriation and Criminal Breach of Trust

4.13 The offence of misappropriation of property is set out in s 403 PC. Under s 403, a person who dishonestly misappropriates or converts to his own use movable property has committed misappropriation and is punishable with a maximum term of two years' imprisonment and/or a fine. "Movable property", as defined in s 22 PC, includes corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth. By this definition, intangible property, such as choses in action (eg, rights under an agreement) would not be regarded as "movable property". The *mens rea* for an offence under s 403 is "dishonestly". Section 24 PC provides that "dishonestly" requires an intention to cause wrongful gain or wrongful loss. Section 23 PC defines "wrongful gain" and "wrongful loss" as gain by unlawful means of property to which the person gaining it is not legally entitled, and loss by unlawful means of property to which the person losing it is legally entitled.

4.14 Criminal breach of trust is a more aggravated form of criminal misappropriation. Section 405 PC provides that whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits "criminal breach of trust". Unlike s 403, s 405 is not confined to movable property.

4.15 The offence of criminal breach of trust by a public servant or an agent is more serious than a simple criminal breach of trust. Under s 409 PC, it is an offence for a person who is entrusted with property or with any dominion over property, in his capacity as a public servant, or in the way of his

business as a banker, merchant, factor, broker, attorney or agent, to commit a breach of trust in respect of that property and the offence is punishable with an imprisonment for life, or a maximum term of ten years' imprisonment and a fine. The reference to "agent" in s 409 is not restricted only to professional mercantile agents; for example, a director of a company can be entrusted with the assets of the company and is an agent of the company (*Tay Choo Wah v PP* (1976)).

4.16 The *actus reus* of the offence for criminal breach of trust is that the accused must be entrusted with property or with dominion over property and the accused has used the entrusted property in violation of a direction of law prescribing the mode in which such trust is to be discharged. A general degree of control over the property amounts to dominion over the property and sole dominion over property is not required; hence it is possible to convict even if more than one person has dominion over the same property (*Hon Chi Wan Colman v PP* (2002)).

4.17 It has been held in *Cheam Tat Pang v PP* (1996) that there must be a degree of specificity in the direction of law in question. Hence where it is alleged that the director has breached his fiduciary duties under s 157 Companies Act, the general exhortation that the director must act honestly and use reasonable diligence in the discharge of their duties cannot constitute a direction of law for the purpose of s 405 PC (*Cheam Tat Pang v PP*). The *mens rea* for the offence of criminal breach of trust is one of dishonesty and it is not sufficient to show that a director had taken risks with the funds of the company which were not in the company's best interests or that he placed himself in a conflict of interest (*Cheam Tat Pang v PP*).

4.18 For a charge under ss 405 and 409 PC, the prosecution must, *inter alia*, show that the accused is entrusted with the property or dominion over property. Identification of the relevant property in question is important. The property that is misappropriated must be the same property that is entrusted to the accused, and hence, the charge for breach of trust under s 405 will be flawed if it alleges that the property entrusted is the shares but the misappropriation relates to the proceeds of the sale of the shares (*Carl Elias Moses v PP* (1995); *Viswanathan Ramachandran v PP* (2003)). In the context of cheques, signed blank cheques entrusted to an employee of a company were held to be equivalent to the entire value of the funds to which the cheques were capable of having access to (*Gopalakrishnan Vanitha v PP* (1999)). Directors

and shareholders of the company would commit an offence under s 405 PC if they withdraw monies from the company otherwise than in the proper way in compliance with the Companies Act, and had acted dishonestly, notwithstanding that such directors and shareholders controlled the company (*Lai Ah Kau and another v PP* (1988)).

Cheating

4.19 The offence of cheating is found in s 415 PC. Under that provision, there are essentially two levels of criminality: the first is the deception by fraudulently or dishonestly inducing a person so deceived to deliver any property to any person, or to consent that any person shall retain any property. The second is deception by intentionally inducing the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The amendment to s 415 in 2008 made it clear that the offence of cheating would be committed whether or not the deception was the sole or main inducement. The punishment for cheating under s 415 is imprisonment for up to three years and/or a fine. In *PP v Knight* (1992), it was held that the second limb of s 415 is less serious than the first limb and hence the fact that the accused was charged under the second limb would be relevant in considering the sentence to be imposed.

4.20 In view of the broad phrase "any property", there is no requirement under s 415 (or s 420) that the victim must own the property in question (*PP v Kalpanath Singh* (1995)). In that case, it was alleged that the accused had deceived L, who was the director and shareholder of a company G, by representing to L that certain monies were required for court proceedings. L caused G to issue cheques for certain sums of money to the accused. The defence was that the victim was G and not L as the money that was handed over to the accused belonged to G. The High Court rejected the defence and held that there was no reason to construe "any property" to refer to property that was owned by the victim.

4.21 Unlike the offence of misappropriation under s 403 or criminal breach of trust under s 405, the *mens rea* for the offence of cheating under the first limb of s 415 refers not only to "dishonestly" but also to "fraudulently" and

deception. Section 25 PC defines "fraudulently" as to require an intention to defraud. "Dishonestly" is defined in s 24 PC (see para 4.13), though it is difficult to see how "fraudulently" is distinguishable from "dishonestly". However, deception is different from dishonesty in that the victim must have been deceived (*Tan Peng Ann v PP* (1949)).

4.22 In the case where cheating is also accompanied by the dishonest inducement of the person deceived to deliver any property to any person, he shall be liable under s 420 PC, which is punishable with imprisonment for up to ten years and a fine. There appears to be some overlap between ss 415 and 420 PC. Section 420 refers to "whoever cheats" and "thereby dishonestly induces" which appear to mean that the ingredients of the cheating offence must be satisfied under s 415. However, the ingredients of s 415 also refer to "dishonestly" and "fraudulently", which overlap with s 420. In order to reconcile such overlap between the two provisions, the High Court in *PP v Chua Kian Kok* (1999) held that s 420 should be read as if the words "cheats and thereby" were omitted. As the intention behind s 420 is to penalise, in particular, cheating by dishonest inducement of delivery of property more severely than the other forms of cheating as contained in s 415, the ingredients of s 420 are (1) the victim must be deceived, (2) the victim must have been induced to deliver property to any person and (3) there must be dishonest intention on the part of the deceiving person to induce the victim to deliver the property.

Theft

4.23 The offence of theft is set out in s 378 PC, where any person intending to take dishonestly any movable property out of the possession of any person without his consent, moves that property in order to effect such taking. Simple theft is punishable with imprisonment of up to three years and/or a fine. The PC also prescribes for theft committed in more serious circumstances where the punishment is more severe. Where theft is committed in any building, tent or vessel, where such building, tent or vessel is used as a dwelling or for the custody of property, the offence is punishable with imprisonment of up to seven years and a fine (s 380 PC). Where theft is committed by a clerk or servant or employed as such of property belonging to the master or employer, the offence is punishable with imprisonment for up to seven years and a fine (s 381 PC).

Counterfeiting and Forgery

4.24 Counterfeiting is a form of fraud where the perpetrator attempts to pass off goods as original in order to deceive the victim. Sections 230–263 PC contain offences relating to the counterfeiting of coins and stamps issued by the Singapore Government. Sections 489A–489E PC contain offences relating to the counterfeiting of currency notes and bank notes.

4.25 Closely connected to counterfeiting is forgery, which is essentially a form of fraud in documentary form. Section 463 PC provides that whoever makes any false document or electronic record with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. Section 464 provides what amounts to making a false document or electronic record. The *mens rea* specified in s 464 is that of "fraudulently" or "dishonestly". In addition, the requisite intention or knowledge is also required, depending on the circumstances in which the forgery takes place.

4.26 The offence for forgery is punishable with imprisonment of up to four years and/or a fine (s 465). Where there is forgery of a document or electronic record which *inter alia* purports to be a record or proceeding of a court of justice, a register of birth or a register kept by a public servant as such, or a power of attorney, the offence is punishable with up to ten years' imprisonment and a fine (s 466). Forgery of a document that *inter alia* purports to be a valuable security or a will is punishable with imprisonment for life, or with imprisonment of up to 15 years and a fine (s 467).

4.27 Where forgery is committed for the purpose of cheating, which is an aggravated form of forgery, the offence is punishable with up to ten years' imprisonment and a fine (s 468). A person who fraudulently or dishonestly uses as genuine any document or electronic document which he knows or has reason to believe to be a forged document or electronic record is punished in the same manner as if he had forged such document or electronic record (s 471).

4.28 The making or counterfeiting of a seal, plate or other instrument to make an impression, intending that the same shall be used for the purpose of committing any forgery punishable under s 467 (forgery of a valuable security or will), or with such intent has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, is an offence, punishable with imprisonment for life, or with imprisonment of up to 15 years and a fine (s 472). In respect of the offence of the making or counterfeiting of a seal, plate or other instrument for the purpose of committing of forgery, which is punishable under any section other than section 467, the punishment is up to ten years' imprisonment and a fine (s 473).

4.29 Possession of a document falling within s 466 (including a record or proceeding of a court of justice, a register of birth or a register kept by a public servant as such, or a power of attorney) or s 467 (including a valuable security or will), knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, is an offence under s 474. Such an offence is punishable with imprisonment of up to ten years and a fine (where the document is one falling within s 466), and imprisonment for life or with imprisonment of up to 15 years and a fine (where the document is one that falls within s 467).

4.30 The counterfeiting upon or in the substance of any material any device or mark used for the purpose of authenticating any document that falls within s 467, intending that such device or mark be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged or who with such intent has in his possession any material upon or in the substance of which such device or mark has been counterfeited, is an offence under s 475. Such an offence is punishable with imprisonment for life or up to 15 years and a fine. A similar provision (s 476) exists for the counterfeiting upon or in the substance of any material any device or mark used for the purpose of authenticating any document other than a document that falls within s 467. In such a case, the offence is punishable with imprisonment of up to ten years and a fine.

Bribery and Corruption

4.31 The main offences relating to bribery and corruption are located in the PCA and ss 161–165 PC. There are also other statutes which contain specific

provisions on corruption in certain sectors (eg, s 138 Customs Act (Cap 70, 2004 Rev Ed)). The PCA was first promulgated in 1960 with the objective to provide for more effectual prevention of corruption. The PCA relates to corruption by all persons, whether public servants or not. In contrast, ss 161–165 PC relate to corruption by public servants and the sentences under ss 161–165 are less severe than those under the PCA. This chapter will focus on the PCA.

4.32 Under the PCA, the main offences for bribery and corruption are set out in ss 5 and 6. Under these provisions, it is an offence for both the giver and the recipient of the bribe. Section 5 of the PCA makes it an offence for a person who "corruptly" solicits or receives or gives, promises or offers to any person any gratification as an inducement to or reward for any person doing or forbearing to do anything in respect of any matter or transaction. It is also an offence to "corruptly" solicit or receive or give, promise or offer any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction in which such public body is concerned. Breach of s 5 constitutes an offence which is punishable on conviction by a fine not exceeding S$100,000 and/or imprisonment for a term not exceeding five years.

4.33 Section 6 PCA relates to corrupt transactions in respect of agents. An agent is widely defined *inter alia* as a person employed by or acting for another, including a trustee, administrator and executor and any person serving the Government or under any corporation or public body. A principal is defined *inter alia* as including an employer, a beneficiary under a trust and a trust estate as though it were a person, and any person beneficially interested in the estate of a deceased person and the estate of a deceased person as though the estate were a person, and in the case of a person serving the Government or a public body includes the Government or the public body, as the case may be.

4.34 Section 6(a) provides, *inter alia*, that it is an offence for an agent to corruptly accept or obtain from any person any gratification as an inducement or reward for doing something or forbearing to do, any act in relation to his principal's affairs or business. Pursuant to s 6(b), it is also an offence for a person to corruptly give or offer to an agent any such gratification. Further, under s 6(c), any person who knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt,

account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, has committed an offence. It should be noted that s 6(c) only requires an intention to deceive, unlike the cheating offence under s 415 PC which requires actual deception (*Ong Beng Leong v PP* (2005)). Accordingly it is not a defence under s 6(c) PCA that no one was actually deceived by the accused. Breach of s 6 constitutes an offence which is punishable on conviction by a fine not exceeding S$100,000 and/or imprisonment for a term not exceeding five years.

4.35 In the event of a conviction of an offence under s 5 or s 6, if the offence relates to a contract or proposal for a contract with the Government or any department thereof or with any public body or a sub-contract to execute any work comprised in such a contract, the guilty party will be liable to the same fine (not exceeding S$100,000) but is liable to a longer term of imprisonment not exceeding seven years (s 7 PCA).

4.36 In relation to the *mens rea* for the offence under s 5 or s 6 PCA, "corruptly" is not defined in the PCA. However, there is an established line of cases on its interpretation starting from *PP v Chan Wing Seng* (1997), *PP v Low Tiong Choon* (1998) and *Yap Giau Beng Terence v PP* (1998). The High Court in *PP v Chan Wing Seng,* following *PP v Khoo Yong Hak* (1995), has held that for the giving to be made corruptly, there must be (1) a corrupt element in the transaction according to the ordinary and objective standard, followed by (2) the accused's guilty knowledge that what he was doing was, by that standard, in fact corrupt. As to the first limb, it is an objective inquiry based on the standard of a reasonable man. There are two parts to establishing such a corrupt element: the first is to establish (or infer) the intention of the giver or recipient (as the case may be) behind the transaction at the material time; and the second is to ask whether such an intention tainted the transaction with an objectively corrupt element, given the factual matrix.

4.37 To determine the intention of the giver or recipient in relation to the first part of the first limb, the circumstances of the case would be relevant, such as the surreptitiousness and furtiveness of the transaction, the size of the gratification and whether rules or code applicable to the accused are breached (*PP v Low Tiong Choon*). However, the absence of any such factors is not decisive. For example, an act of solicitation that is not done secretly or

furtively but openly can still constitute a corrupt element (*Narindar Singh v PP* (1996)). In *Yap Giau Beng Terence v PP*, there was a corrupt element in the transaction according to the ordinary and objective standard where the accused offered a bribe to two witnesses to an accident, which the accused was involved in, for not reporting to the police.

4.38 Finally, to determine whether the guilty knowledge exists, an important distinction must be drawn between intention and knowledge. It was held that the PCA is not designed to punish persons who intend to do certain acts which are later deemed to be corrupt although they do not subjectively know that such an intention would be considered corrupt and wrongful by ordinary standard (*PP v Low Tiong Choon*).

4.39 Where a public officer breaches the rules or code applicable to his office in accepting a gratification to do acts which are only collateral to his official duties, is he guilty of committing an offence under ss 5 or 6 PCA? In such a case, the public officer is not asked to compromise his official duties. This issue was considered in *PP v Low Tiong Choon*, where the accused, a police officer, was alleged to have introduced a certain client to an advocate and solicitor, in return for certain sums of money to be paid to the accused as a reward. The accused was charged under s 5(a)(i) PCA.

4.40 The High Court held that the corruption offence under s 5(a)(i) PCA was not made out because the deal, that was struck in relation to the introduction of clients, was collateral to the duties of the accused as a police officer and he did not compromise the performance of his work. The acceptance of the reward was a breach of the rules or code which was applicable to the accused (which also prohibited the receipt of such payments) but such acceptance was not corrupt. The High Court took the view that the accused's intention to receive the reward was really one of an introduction fee and was not corrupt by the ordinary and objective standard. The fact that such payment could potentially lead to corruption through the abuse of office was not sufficient as the relevant receipt must be corrupt. It should be noted that subsequent cases after *PP v Low Tiong Choon* have held that the decision was confined to its own special facts and it would not apply where the accused had accepted gratification to do acts which would compromise his official duties (eg, *Yusof bin Samad v PP* (2000) and *Hassan bin Hamad v PP* (2000); see para 4.42).

4.41 An issue that often arises is whether the prosecution must prove a nexus between the payment of the gratification and the favour or assistance in question. The courts have taken a pragmatic approach in holding that the prosecution does not need to show a close nexus between the receipt of money and the inducement for the corrupt acts in question.

4.42 In *Hassan bin Hamad v PP*, it was held that s 6(a) PCA did not require the prosecution to show that there was a particular nexus between the payment of the money and the particular contravening acts in question. In that case, the accused was a police officer who, prior to joining the police force, periodically received money from C and continued to receive money from C after he joined the police force. Subsequently, in his capacity as a police officer, he made inquiries into the status of investigations which C was interested in. It was argued that the prosecution failed to prove a correlation between the receipt and the contravening acts. This argument was rejected by the High Court, which held that for a corrupt element, it was sufficient to show that the payment was made to "purchase the recipient's servitude" (at p 797).

4.43 In *Pandiyan Thanaraju Rogers v PP* (2001), it was held that the gratification that was given to purchase the accused's goodwill was sufficient and there was no requirement for an express request for a bribe or even the precise request for assistance. Further, in *PP v Tan Liang Ann* (1998), a process server with the Small Claims Tribunal was given a cash sum contained in a red packet by the defendant, a shopkeeper, who was served with a summons in respect of a claim by a tourist for over-charging. His conviction for corruption under s 6(b) PCA was upheld and it was held that the gratification could influence the process server to persuade the foreign tourists to settle the claim or future claims, which was sufficient to render the payment corrupt.

4.44 The PCA has a number of provisions which enhance the ability of the prosecution to secure a conviction. In the case of a prosecution under s 6(a), it is not necessary to prove the act showing favour is in fact carried out or even that the agent did not have power to carry out the act so long as it can be shown that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that the gratification is offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to

show any favour or disfavour to any person in relation to his principal's affairs or business (s 9(1)). A similar provision exists in relation to a prosecution under s 6(b) in respect of the giver who corruptly gives, agrees to give or offers any gratification to any agent as an inducement (s 9(2)). It is not clear why s 9 does not apply to general corruption under s 5.

4.45 There is an important presumption of corruption in relation to payments made to Government servants. In any proceedings against a person under s 5 or 6, if it is proved that any gratification is paid or given to or received by a person in the employment of the Government or any department thereof or of a public body or from a person who has or seeks to have any dealing with the Government or any department thereof of any public body, that gratification is deemed to have been paid or given and received corruptly as an inducement or reward unless the contrary is proved (s 8). In such a case, the burden is then on the accused, on a balance of probabilities, to rebut the presumption. In a rare case, in *Yuen Chun Yii v PP* (1997), the accused rebutted the presumption by showing the closeness of the relationship between the giver and recipient, and viewed the payment of the sum of money to the accused in this context was not unusual.

4.46 A further point to note is that the PCA, unlike many offences under the PC, has extra-territorial application to Singapore citizens. Section 37(1) PCA provides that the PCA has effect, in relation to citizens of Singapore, outside as well as within Singapore and where an offence under the PCA is committed by a citizen of Singapore outside Singapore, he may be dealt with in respect of that offence as if it had been committed in Singapore. Notwithstanding that s 37(1) PCA clearly differentiates between Singapore citizens and non-Singapore citizens, the provision was held to be consistent with Art 12(1) of the Constitution (all persons are equal before the law and are entitled to equal protection of the law): *PP v Taw Cheng Kong* (1998). It is noted that in the case of the Penal Code offences, s 4 Penal Code provides that every public servant who, being a Singapore citizen or permanent resident, when acting in the course of his employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force in Singapore, is deemed to have committed that act or omission in Singapore.

Money Laundering

4.47 The CDSA has its roots in the Drug Trafficking (Confiscation of Benefits) Act (Act 29 of 1992) ("DTA"), which was enacted in 1993, to criminalise the laundering of proceeds from drug trafficking and to provide for the confiscation of such proceeds. Since 1993, the Financial Action Task Force on Money Laundering, which is an inter-governmental body set up to combat money laundering and terrorist financing globally and of which Singapore is a member, has required its members to criminalise not only the laundering of proceeds from drug trafficking but also a number of other serious offences. In 1999, the DTA was amended so as to criminalise the laundering of not only the proceeds from drug trafficking but also a number of "serious offences".

4.48 "Serious offences" are offences specified in the Second Schedule of the CDSA, which include conspiracy to, inciting others to or attempting to, commit any of those offences, as well as the aiding, abetting, counselling or procuring the commission of any of those offences. The offences specified in the Second Schedule include a number of business crimes under the PC (including cheating and dishonestly inducing the delivery of property, misappropriation, criminal breach of trust, theft, counterfeiting and forgery). At the same time, the Corruption (Confiscation of Benefits) Act was repealed and corruption offences were included in the Second Schedule of the CDSA. Other serious offences were subsequently added to the Second Schedule to the CDSA by way of amendments, including the offences under the SFA for market manipulation and insider trading.

4.49 Section 43 CDSA makes it an offence for a person to enter into or be otherwise concerned in an arrangement, knowing or having reasonable grounds to believe that by the arrangement, *inter alia*, (i) the retention or control by or on behalf of another ("that other person") of that other person's benefits of drug trafficking is facilitated, or (ii) that other person's benefits of drug trafficking (a) are used to secure funds that are placed at that other person's disposal, or (b) are used for that other person's benefit to acquire property by way of investment, and knowing or having reasonable grounds to believe that that other person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking. Similarly, s 44 CDSA, which is worded similarly to s 43, makes it an offence to enter into

or be otherwise concerned in an arrangement in respect of the benefits of "criminal conduct", that is,

- doing or being concerned in, whether in Singapore or elsewhere, any act ("relevant act") constituting a serious offence (save for certain exceptions) or a foreign serious offence;
- entering into or being otherwise concerned in, whether in Singapore or elsewhere, an arrangement whereby (1) the retention or control by or on behalf of another person of that other person's benefits from a relevant act; (2) the benefits from a relevant act by another person are used to secure funds that are placed at that other person's disposal, directly or indirectly, or are used for that other person's benefit to acquire property by way of investment or otherwise;
- the concealing or disguising by a person of any property which is or, in part, directly or indirectly, represents, his benefits from a relevant act; or
- the conversion or transfer, by a person of any property which is or, in part, directly or indirectly, represents, his benefits from a relevant act, or the removal of such property from the jurisdiction.

4.50 It should be noted that under ss 43 and 44 CDSA, the prosecution does not need to show that the accused has actual knowledge of the relevant facts; the accused can be convicted of having reasonable grounds to believe the relevant facts. In *Ang Jeanette v PP* (2011), the High Court has held that for a conviction under s 43 or s 44 of the CDSA, the prosecution must also show that the property in question actually represents the proceeds of criminal conduct. However, the prosecution does not need to show beyond reasonable doubt that the crime is committed and can lead evidence of the circumstances in which the property had been handled which were such as to give rise to the irresistible inference that it can only be derived from crime.

4.51 It is an offence for a person to conceal or disguise any property which, in whole or in part, directly or indirectly, represents his benefits of drug trafficking or criminal conduct or to convert or transfer that property or remove it from the jurisdiction (ss 46 and 47 CDSA). Further, it is an offence for a person who knows or has reasonable grounds to suspect that an authorised officer is acting, or is proposing to act, in connection with an investigation under the CDSA and discloses to any other person

information which is likely to prejudice that investigation or proposed investigation (s 48).

4.52 The confiscation provisions are contained in ss 4 and 5 CDSA. Where a defendant is convicted of one or more drug trafficking offences or serious offences, the court shall, on the application of the Public Prosecutor, make a confiscation order against the defendant in respect of the benefits derived by him from drug trafficking or from the serious offence (as the case may be) where the court is satisfied that such benefits are so derived (ss 4 and 5).

Insider Trading

4.53 The insider trading rules are currently found in Part XII SFA. The policy objective of the current insider trading rules is to promote market fairness; all participants in the securities market should have equal access to material price-sensitive information. Sections 218 and 219 SFA (the main provisions on insider trading) utilise the "information-connected approach" towards the regulation of insider trading. In the information-connected approach, insider trading liability is not dependent on whether the person trading on the non-public price-sensitive information is connected with the relevant company. Instead the provisions focus on whether a person is in possession of non-public price-sensitive information, irrespective of his connection with the company. The basic principle is that it is unlawful for a person in possession of non-public price-sensitive information (an "insider") to trade in securities.

4.54 Sections 218(2) and 219(2) SFA contain the "dealing offence". In the case of an insider who is a "connected person", s 218(2) provides that it is an offence for anyone to deal or procure another person to deal in securities of a corporation if he (the connected person): (1) is in possession of information concerning that corporation that is not generally available but, if such information is generally available, a reasonable person would expect it to have a material effect on the price or value of the securities ("inside information"); and (2) knows or ought to know that the information is inside information. A "connected person" is an officer of the corporation including a director, secretary or employee of the company or its related corporation, a substantial shareholder or if he occupies a position that may reasonably be expected to provide access to inside information concerning that corporation.

Pursuant to s 218(1A), the insider trading provisions by connected persons are also extended to a person connected to a trustee manager or operator of business trusts or listed real estate investment trusts.

4.55 The prohibition on dealing or procuring another person to deal in securities also applies to an insider who is an unconnected person if he is in possession of inside information and he knows that the information is inside information (s 219 SFA). It should be noted that under s 218, where it is proved that an accused is in possession of information concerning the corporation to which he is connected and that the information is not generally available, he is presumed to know that the information is inside information. Further, a connected person is liable for insider trading if he had traded in securities of a company while he knew or ought reasonably to have known that the information in his possession is inside information in relation to those securities. In contrast, an unconnected person is only liable for insider trading if he traded in those securities while he knew that the information was inside information.

4.56 Sections 218(3) and 219(3) SFA contain the "communications offence". They provide that where the securities are traded on the Singapore Exchange or a futures market of a futures exchange, the insider must not, directly or indirectly, communicate the inside information to another person if such insider knows or ought reasonably to know that the other person would be likely to trade in the securities or procure a third person to trade in the securities. The punishment for breach of ss 218 and 219 is a maximum fine of S$250,000 and/or up to seven years' imprisonment (in the case of individuals) and a maximum fine of S$500,000 (in the case of corporations). As set out in para 4.7, under s 232 SFA, the Monetary Authority of Singapore may, with the consent of the Public Prosecutor, bring a civil action in court to seek an order for civil penalty against a person for contravention of any provision of Part XII SFA (which includes ss 218 and 219). The SFA contains certain safeguards in ss 221 and 233 to address the issue of double jeopardy, that is, the rule against punishing a person twice for the same act (also found in Art 11(2) Constitution).

4.57 The issue relating to whether information is "generally available" and hence, not price-sensitive, was considered in *Monetory Authority of Singapore v Lew Chee Fai Kevin* (2010), though it was not a case involving criminal prosecution but rather a civil penalty claim pursuant to s 232(2), read with

s 218, of the SFA, for insider trading. In *Kevin Lew*, L was, at the material time, the Group General Manager for Enterprise Risk Management of WBL, a company listed on the Singapore Exchange. This was a senior management position, and L was clearly a "connected person" within the SFA. L sold his WBL shares while in possession of inside information that WBL would incur a substantial loss for the third quarter of financial year 2007 (Q3 FY 2007). The sale took place after the end of Q3 FY 2007 but prior to the announcement of the results for that quarter. Prior to the sale, L obtained information from a management meeting held two days after the end of Q3 FY 2007, that WBL forecasted a loss for that quarter and a significant impairment charge would be taken on one of its loss-making subsidiaries. The forecast was made based on WBL's most updated internal forecasts and discussions at that meeting.

4.58 L argued that the information he possessed was not inside information because it was in fact "generally available". Under s 215(c) SFA, information is taken to be "generally available" if, *inter alia*, it consists of deductions, conclusions or inferences made or drawn from generally available information (such as press releases and public announcements). He argued that the forecasted loss and impairment could be deduced, concluded or inferred based on WBL's past results and forward-looking statements in the last six quarters, which were made publicly available. Alternatively, he argued that the information he possessed was not material because the forecasted loss was small compared to WBL's size and performance, and the impairment charge was an accounting adjustment and had no real effect on WBL's performance.

4.59 The trial judge rejected both arguments. In relation to the issue of whether the information was "generally available", the court held that for information to be "generally available", any deduction, conclusion or inference drawn must be of the same "quality and character" as the information possessed by the defendant. Here, the forecasted loss by WBL for the quarter was based on actual results for two months and was clearly more reliable and more certain than the information an outsider has based on any inference from WBL's past results. Likewise, in respect of the impairment charge, L knew that it was very likely that a significant impairment would be made; in contrast, the investing public would, at best, make only speculative inferences that impairment is possible because of repeated poor

performance of WBL's subsidiary. The forecasted loss was material because WBL was to record its first loss in six quarters for Q3 FY 2007 and none of WBL's previous announcements suggested that a loss was imminent. The impairment charge was also material information due to its size.

4.60 Given that L was in possession of inside information concerning WBL that was not generally available, under s 218(4) SFA, it was presumed that L knew, at the material time, that the information was not generally available and that if generally available, it might have a material effect on the price or value of WBL shares. L failed to rebut the presumption and was found to be liable for insider trading at the conclusion of the trial, and at a subsequent hearing, was ordered to pay $67,500 as civil penalty. His appeal to the Court of Appeal was dismissed.

4.61 One further point to note is that s 220 SFA has overruled the position in *PP v Ng Chee Kheong* (1999) by providing that it is not necessary to show that the accused intended to use the inside information. The insider trading regulation under the SFA has extra-territorial application in certain circumstances (s 213). There are a number of specific exceptions and defences to insider trading found in the SFA and the Securities and Futures (Market Conduct) (Exemptions) Regulations 2006. The defences under the SFA include the Chinese Walls defence for corporations, partnerships and limited liability partnerships under s 226 and the parity of information defence under s 231.

General Defences

4.62 Section 40(2) PC provides for the application of general defences in Chapter IV to offences not only under the PC but also under any written law. However, as pointed out in para 4.11, it should be noted that the courts have, in certain instances, not considered the application of Chapter IV to offences which are outside the PC. Within the PC, there are special exceptions which apply to specific offences (eg, murder in s 300 PC). Other than the PC, specific legislation prescribing the offences may contain defences that are applicable to the particular offence. For example, as pointed out above, the SFA provides for specific defences and exceptions to a charge of insider trading.

4.63 The general defences under the PC can be broadly divided into:

- defences relaing to lack of capacity by reason of age (ss 82 and 83 PC) and unsoundness of mind (s 84);
- intoxication (ss 85 and 86);
- duress (s 94) and necessity (s 81);
- acts done under lawful authority (ss 76–79);
- acts done by a person who is by reason of a mistake of fact believes himself to be bound by law or who is by reason of mistake of fact believes himself to be justified by law (ss 76–79);
- right of private defence (ss 96–106); and
- consent (ss 87–89).

There are other defences which are prescribed, such as defence of accident in doing a lawful act (s 80), slight harm (s 95) and acts done in good faith (ss 92 and 93).

4.64 The burden of proving the existence of the circumstances bringing the case within any of the general or special exceptions in the PC is on the accused (s 107 Evidence Act) and he has to do so on a balance of probabilities (*Jayasena v The Queen* (1970).

Corporate Criminal Liability

4.65 It is axiomatic that a company is a separate legal entity from its shareholders (*Saloman v A Saloman & Co Ltd* (1897)). Historically, criminal liability is concerned with individual defendants. However, with the rise of the use of companies as vehicles for the conduct of businesses, Parliament has taken cognisance of this trend and in many instances, enacted legislation that clearly envisages that companies (as distinct from its individual shareholders or officers) may commit offences, such as the offences created under the CDSA and SFA. In such instances, the relevant legislation also prescribes how the acts of the officers are to be attributed to the corporations in question. For example, under s 52(2) CDSA, the conduct engaged by a director, employee or agent of the body corporate within the scope of his actual or apparent authority is deemed to have

been engaged in by the body corporate. Further, in establishing the state of mind of the body corporate, it is sufficient to show that a director, employee or agent of the body corporate, who is acting within the scope of his actual or apparent authority, had that state of mind (s 52(1) CDSA).

Box 4.2

Reflecting on the law **When can a company be liable for any criminal offence?**

In the case of offence capable of being committed by a company, and where *mens rea* and *actus reus* are required to impose criminal liability, many statutes specify whose acts and intentions (or knowledge) are, for this purpose, to be attributed to the company. Such acts and intentions (or knowledge) are usually attributed by reference to the activities which the natural person conducts on behalf of the company. However, there are difficulties where the relevant statute does not expressly provide for the relevant acts to be attributed to companies. The English common law approach, as shown in *Tesco Supermarkets v Nattrass* (1972), is that criminal liability of a corporation lies in identifying the particular natural persons whose actions and intentions are treated as that of the corporation. It would normally be determined by reference to the constitution of the company and implied by company law. In *Tesco Supermarkets*, the class of relevant persons was the board of directors of the company and such class did not include a junior employee who has some degree of (but not full) autonomy. *Tesco Supermarkets* was applied in Singapore in *Tom-Reck Security Services Pte Ltd v PP* (2001).

Tesco Supermarkets may be criticised on the ground that it represents an unduly narrow approach towards prescribing the circumstances for corporate liability in respect of acts of employees. In *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995), the Privy Council rejected the view that only the acts of the board of directors can be attributed to the company. It was held that it was a question of construction in each case as to whether the particular rule required that the knowledge that an act had been done or the state of mind with which it was done, should be attributed to the company. It was submitted that this approach was more persuasive as the result in *Tesco Supermarkets* would otherwise encourage senior management not to be vigilant in monitoring the actions of junior employees of a corporation. For a discussion in the context of insider trading, see A Loke, "Sending the Right Signals on Corporate Liability for Employee Insider Trading" (2005) *Singapore Journal of Legal Studies* 137.

Conclusion

4.66 This chapter gives an overview of the common types of business crimes that are provided for in Singapore legislation. As can be seen, they are not found only in a single statute but in a number of statutes. The more modern statutes, such as the SFA, have provided for civil penalties to strengthen the enforcement of securities offences. It remains to be seen whether civil penalties will be introduced for a wider variety of conduct where previously, only criminal liability would have been imposed.