THE STATUTORY CONTROL OF INSIDER TRADING — SECTION 103, SECURITIES INDUSTRY ACT 1986[1]

INSIDER trading is the process by which a person with access to corporate information that is not generally available to the investing public uses this information to make a profit in a dealing in securities. Although in other countries some people have sought to defend insider trading (or "insider dealing", as the English call it) on economic grounds,[2] in Singapore at least it is considered to be a cardinal sin.

The Scheme of Regulation

The provisions regulating insider trading are of two sorts: those directly prohibiting such trading, and those that indirectly inhibit insider trading by requiring disclosure of share dealings.[3] The first sort of provisions are to be found in the new Securities Industry Act.[4] The second sort of provisions are to be found in the Companies Act[5] as well as in the Securities Industry Act. For ease of reference, the Securities Industry Acts of 1973[6] and 1986 will be abbreviated as "S.I.A. 1973" and "S.I.A." respectively and the Companies Act as "C.A." in the rest of this legislation note.

The indirect regulation provisions are outside the scope of this note.[7] As for direct regulation, there are three provisions that may cover insider trading: firstly, s. 157(2) C.A. which prohibits an officer of a company from making improper use of any information acquired by virtue of his office to gain an advantage for himself or for any other person; secondly, s. 102 S.I.A., which prohibits the employment of manipulative and deceptive devices; thirdly, s. 103 S.I.A., which prohibits insider trading. The most important of these provisions is of course s. 103 S.I.A., which is an almost word-for-word copy of s. 128 of the Australian Securities Industry Act 1980.[8]

Commentary

1. *Corporate insiders*

Any person "connected" with a corporation is a potential insider. Section 103(9) S.I.A. defines which natural persons are "connected"

1 No. 15 of 1986.

2 The classic work being Manne, *Insider Trading and the Stock Market* (1966).

3 See Pillai, "Insider Trading in Singapore and Malaya" (1974) 16 Mal. L.R. 333. This remains the best general piece on insider trading in Singapore despite its age.

4 Although published in the Government Gazette on 2 May 1986, the Act was only brought into force on 15 August 1986, after the publication of the Securities Industry Regulations 1986, S.206/1986.

5 Cap. 185, 1970 (Rev. Ed.). The old insider trading section was s. 158 C.A. For a comment on the effect of this section see this author's "The Registrar's Shopping List — Some Problems Introduced by the Companies (Amendment) Act 1984" (1984) 26 Mal. L.R. 309.

6 No. 17 of 1973. This is the predecessor of the 1986 Act.

7 Pillai's article, cited *supra,* note 3, may be consulted for a discussion of these provisions. It should however be noted that the sections of the Companies Act referred to therein have been renumbered, and that the S.I.A. has modified the sections of the S.I.A. 1973 which were there discussed.

8 The main references in this note will be to the Commonwealth Act; the States each have their own Acts that are practically identical to the Commonwealth Act.

with a corporation. A body corporate may also be an insider by virtue of being a person "connected" with a corporation, but no definition of when this is deemed to be so is given in the Securities Industry Act. For ease of reference, all the persons listed will be referred to as "insiders". A person who has been connected with a corporation within the preceding six months is also deemed to be an insider.[9]

The following natural persons are potential corporate insiders:[10]

(a) a director[11] of the corporation or of a related corporation;

(b) a secretary of the corporation or of a related corporation;

(c) an executive officer[12] of the corporation or of a related corporation;

(d) an employee of the corporation or of a related corporation;

(e) a receiver, or receiver and manager, of the property of the corporation or of a related corporation;

(f) an official manager or deputy official manager[13] of the corporation or of a related corporation;

(g) the liquidator of the corporation or of a related corporation;

(h) a trustee or any person administering a compromise or arrangement made by the corporation or its related corporations;

(i) a substantial shareholder[14] of the corporation or of a related corporation;

(j) an officer of a substantial shareholder of the corporation or of a related corporation, if he occupies a position that may reasonably be expected to give him access to price-sensitive information;

(k) any person who occupies a position that may reasonably be expected to give him access to price-sensitive information by reason of any professional or business relationship between himself and the corporation or a related corporation.

Section 158 C.A. specifically refers to bankers, solicitors, auditors, accountants and stockbrokers of the corporation.[15] Although these persons are not specifically mentioned in s. 103 S.I.A., they may nevertheless be insiders under category (k) above. Regarding category (a) above, s. 158 C.A. also deemed a person who had been a director of a corporation within the preceding 12 months to be an insider; under s. 103 S.I.A., a person who ceased to be a director more than six months previous to a dealing would not be an insider unless he fell within some

9 S.103(1) S.I.A.

10 See s. 103(9) and (12) S.I.A.

11 This has the same meaning as in the C.A.: s. 2 S.I.A. The C.A. defines the word "director" to include a shadow director whose instructions the directors of a corporation are accustomed to follow: s.4 C.A.

12 That is, any person by whatever name called who is concerned in or who takes part in the management of the corporation: s. 2 S.I.A.

13 This terminology is the result of copying the Australian statute word for word. There is no such thing as an "official manager" in Singapore. The Companies Amendment Bill 1986 (No. 9/86) seeks to introduce the concept of judicial management into Singapore: see clause 46, proposed ss. 227A-227W. The officer in question is referred to as a "judicial manager", and there is no provision for a deputy.

14 See s. 81 C.A. for the definition of "substantial shareholders".

15 See s. 158(4) C.A.

other category. Of the list of potential insiders, categories (f), (h) and (j) are new; such persons were not caught by s. 158 C.A.

2. *The relevant information*

Section 103 S.I.A. generally applies where an insider has access to "information that is not generally available, but, if it were, would be likely to materially affect the price of those securities". Thus to be within the scope of s. 103 S.I.A. the information must fulfil two criteria. Firstly, it must be likely to materially affect the price of the corporation's securities (for ease of reference, such information will be referred to as "price-sensitive information"). Secondly, it must be not generally available. The term designating the type of information that an insider must possess has undergone an interesting metamorphosis. The term originally used in s. 132A C.A.[16] was "specific confidential information".[17] The 1984 Companies (Amendment) Act[18] changed the term to "special confidential information". This was defined [19] to mean "any confidential fact or circumstance of whatever nature that would affect the price of the securities of the corporation".

It should be noted that unlike under s. 158 C.A. the information need not be "confidential"; it need only be "not generally available". This presumably means not generally available to the investing public. By what test is one to gauge whether information is "not generally available"? If a few investors know of the information but it is not yet disseminated throughout the market, is such information nevertheless "not generally available"? The vagueness of the phrase means that persons in possession of any information in their capacity as corporate insiders should be extremely circumspect when dealing in securities.

The second difference between s. 158 C.A. and s. 103 S.I.A. is that the information need not be "specific" or "special". As long as the insider is in possession of any information in his capacity as an insider, s. 103 S.I.A. is brought into play. The question is, what is "information"? Would an intelligent insider who sees the writing on the wall before others do be precluded from dealing by s. 103 S.I.A.? In relation to the phrase "specific confidential information", it was said by Lee J. in *Ryan* v. *Triguboff*[20] that "specific information" meant information which had "an existence of its own quite apart from the operation of any process of deduction". It is suggested that the same would be true of "information" within s. 103 S.I.A. The omission of the adjective "specific" is, it is suggested, immaterial. Specificity for the purposes of the section simply meant that the information was precisely definable, and that it was capable of being pointed to, identified and expressed unequivocally.[21] Specificity is however not a re-

[16] This was the original insider trading provision introduced by the Companies (Amendment) Act 1973 (No. 49 of 1973). It was modelled on s. 124A of the equivalent Australian companies legislation.
[17] This phrase was interpreted in *P.P.* v. *Choudhury* [1981] 1 M.L.J. 76 (Court of Appeal, Singapore).
[18] No. 15 of 1984.
[19] In s. 158(6) C.A.
[20] [1976] 1 N.S.W.L.R. 588, 597 (Supreme Court of New South Wales).
[21] *Ibid.* These dicta were quoted with approval by the Singapore Court of Appeal in the case of *P.P.* v. *Choudhury* [1981] 1 M.L.J. 76.

quirement any more under s. 103 S.I.A.[22] and it should no longer be necessary to be able to pinpoint any specific bit of information. However, a conclusion reached through the process of deduction would not be "information". Be that as it may, an insider should still be careful that he does not base his deductions on information that is not generally available.

The information in question must have been obtained by the insider by reason of his connection with the corporation. Is an insider who obtains information from an independent source precluded from dealing in the corporation's securities? For instance, supposing a director of a corporation was told that the corporation's assets were undervalued by his friend who happened to be the auditor of the corporation. Would the director be within the prohibition imposed by s. 103 S.I.A.? On a strict interpretation of the section, it would appear that the director would not be caught as the information was not obtained by reason of his connection with the corporation. As the section imposes criminal liability, a strict interpretation is necessary. The requirement for information to have been obtained by the insider *qua* insider also exists under s. 158 C.A. This is made clear by a case decided in the District Court in 1979, P.P. v. *Yong Teck Lian*.[23] In this case the accused was the stockbroker of Hong Leong Finance Ltd. (HLFL). HLFL made a takeover bid for Singapore Finance Ltd. (SFL). The accused bought some 296,000 shares in SFL in the period before the bid. The District Judge held that the accused probably had information that a takeover bid was in the offing. However, the prosecution was obliged to prove that it was because of the accused's position as a stockbroker of HLFL that he had acquired the information. The prosecution did not show this, and the accused was accordingly acquitted. It would therefore seem that mere possession of price-sensitive information by an insider is not enough; it must be shown that the information was obtained by the insider by virtue of his position.

3. *The prohibited acts*

An insider may not deal in any securities of the corporation of which he is an insider if he is in possession of price-sensitive information which is not generally available by virtue of his being an insider.[24] There are four elements to the offence:

(a) the person in question was an insider at the material time;
(b) he was in possession of price-sensitive information by virtue of his position as an insider;
(c) the information was not generally available; and
(d) he dealt in the securities of the corporation.

An insider may not deal in the securities of any other body corporate if he is in possession of price-sensitive information regarding

[22] It was suggested in Paterson, Ednie & Ford's *Australian Company Law* (3rd Ed.) that the removal of the word "specific" from the Australian equivalent of s. 103 S.L.A. was the result of *Ryan's* case. See the annotations to s. 229 in that work.

[23] Unreported. The case is reproduced in Pillai, *Sourcebook of Singapore and Malaysian Company Law* (2nd Ed., 1986) at pp. 966-978.

[24] 8.103(1) S.LA.

transactions (actual or expected) involving the corporation of which he is an insider and that other body corporate, or regarding dealings by his corporation in the securities of that other body corporate, by virtue of his being an insider.[25] The elements of this offence are almost the same as for s. 103(1) S.I.A.:

(a) the person in question was an insider at the material time;
(b) he was in possession of price-sensitive information by virtue of his position as an insider;
(c) the information related to transactions (actual or proposed) between his corporation and another corporation, or to dealings by his corporation in another corporation's securities;
(d) the information was not generally available; and
(e) he dealt in the securities of the other corporation.

The difference between this new, wider provision and s. 158(5) C.A. should be noted. Under s. 158(5) C.A., an insider was prohibited from dealing in the securities of another corporation only if there was the possibility of a take-over bid or of a "substantial commercial transaction" between the insider's corporation and that other corporation. Under the new provision an insider is precluded from dealing in the securities of any other corporation if he has price-sensitive information relating to any transactions between his corporation and that other corporation, or any transactions involving his corporation and the securities of that other corporation. The requirement that the information must be price-sensitive will however probably mean that only information regarding substantial transactions will be within the scope of the section.

A person who acquires price-sensitive information from an insider is colloquially referred to as a "tippee". In order for a tippee to be guilty of an offence under s. 103(3) S.I.A. three things must be shown:

(a) he obtained price-sensitive information from an insider;
(b) he was aware, or ought reasonably to have been aware, that the insider was precluded from dealing in the securities in question; and
(c) he was associated with the insider at the time or had an arrangement with him for the communication of price-sensitive information. (A person is deemed to be associated with another if they act in concert for a particular purpose[26]).

This subsection differs from s. 158(10) C.A. in that there is now a requirement for some sort of nexus between the tippee and the insider. Under s. 158 C.A. it was enough that the tippee obtained price-sensitive information from an insider knowing him to be such; under s. 103 S.I.A. it must be shown that the two were associated or had some sort of arrangement for the communication of price-sensitive information.[27]

Section 103 S.I.A. applies to dealings in both listed and non-listed securities. The term used in the section is "securities". The definition

[25] S. 103(2) S.I.A.
[26] S.3(1)(c) S.I.A.
[27] This takes care of the problem of the "garrulous insider" pointed out by this author, *loc. cit. supra* note 5.

of "securities" given in s. 2 S.I.A. is *(inter alia)* "debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate or unincorporated This should be contrasted to the definition of "securities" in s. 2 S.I.A. 1973, which only covered debentures, stocks and shares in a public company. No mention is made in the current definition of public companies. Section 158 C.A. originally only applied to listed securities; this was because the section prohibited dealings in securities "on a stock exchange". However, the 1984 amendments to the Companies Act removed the words "on a stock exchange", thus implying that trading in securities whether on a stock exchange or not was caught by the section. Thus, reading s. 103 S.I.A. as it now stands, it appears that insider trading in non-listed securities, even of private companies, is prohibited. This is not entirely without precedent. In *Pelling* v. *Pelling*[28] it was submitted to the British Columbia Supreme Court that s. 152 of the Companies Act (B.C.) (which is similar in material respects to s. 158 C.A.) was to be confined only to dealings in the securities of public companies. The court refused to so limit the section. In deciding as he did, Berger J. said "I dp not think that these words should be used as a justification for holding that there is such a limitation of the application of s. 152, a limitation that the Legislature could have imposed by the use of explicit language". In Singapore, Parliament has thought fit to remove the words limiting the operation of s. 158 C.A. to listed securities. This being so, the reasoning of Berger J. can be applied *a fortiori* to s. 103 S.I.A.

Secondly, it should also be noted that insider trading is an offence even if the securities are issued by a non-Singapore-incorporated company. This is because the section refers to a "body corporate", rather than to a "company". This is significant because the word "company" means a company incorporated under the Companies Act or its predecessor legislation.[29] The use of the term "body corporate" therefore probably covers something other than Singapore-incorporated companies. Curiously, the drafters of the S.I.A. chose the term "body corporate" (which is not defined) over the word "corporation" (which was defined in s. 2 of the S.I.A. 1973 as meaning the same thing as in s. 4 C.A.). It is suggested that the two terms are probably synonymous. The term "corporation" means any body corporate whether formed in Singapore or elsewhere and includes a foreign company.[30]

Thirdly, it is not possible to circumvent the prohibitions imposed by sub-sections (1), (2) and (3) of s. 103 S.I.A. by getting someone else to trade, whether this third party does so on behalf of the insider or for his own benefit. Section 103(4) S.I.A. states that a person who is precluded from dealing in any securities may not cause or procure any other person to deal in those securities.

Fourthly, a corporation cannot deal in securities if any of its officers is precluded by sub-sections (1), (2) or (3) of s. 103 S.I.A. from dealing in those securities.[31] However, there are exceptions to this. A corporation is exempted from s. 103(6) S.I.A. if all the following conditions are met:[32]

[28] (1981) 130 D.L.R. (3d) 761 (Supreme Court of British Columbia).
[29] S. 2 S.I.A. read with s. 4 C.A.
[30] S. 4 C.A.
[31] S. 103(6) S.I.A.
[32] S. 103(7) S.I.A.

(a) the decision to deal in securities must have been taken by someone other than the officer who is precluded;

(b) there must be arrangements to ensure that the person making the decision to deal in the securities in question does not have access to the price-sensitive information and is not advised by the officer who is precluded from dealing (in other words, a "Chinese wall" has to be set up);

(c) it must be shown that the price-sensitive information was in fact not communicated and no advice was given by the officer who is precluded from dealing.

Sub-section (6) of s. 103 S.I.A. will be of particular significance to corporations like banks, which may have access to price-sensitive information regarding clients. It is essential that the investment and broking arms of such corporations are insulated from such price-sensitive information by a series of Chinese walls. The same is largely true of corporations that share common directors.[33]

The fifth point that should be noted is that it is no longer necessary that the insider should "make use of" the information, unlike under s. 158 C.A. This phrase has been interpreted in Canadian cases to mean that the information must be a factor in the decision of the insider to trade.[34] Must the inside information be a factor in an insider's decision to trade in order for s. 103 S.I.A. to apply? The only requirement under s. 103 S.I.A. is that the insider be in possession of price-sensitive information that is not generally available. Reading the section literally, it seems that if an insider, being in possession of such information, deals in securities he would be in contravention of the section, even though the information in question was not a factor in his decision. One wonders if a court will read s. 103 S.I.A. so literally. Suppose that an insider has information regarding the anticipated losses of his company. Suppose that despite this information (which might be expected to depress the price of the company's securities), the insider buys more shares instead of selling the ones that he already has. Could it be said that he is within the mischief of the section? It is suggested that even under s, 103 S.I.A. as presently worded it should be proven that the inside information was a factor in the insider's decision to deal in the corporation's securities. This is not as onerous a burden as it sounds. Often the implication that it was a factor can be drawn from the circumstances of the dealing. Once it is shown that an insider had inside information and that he entered into a transaction with a shareholder who did not have such information, it will be for the insider to show that the information was not a factor in his decision.[35] It was suggested in *Green* v. *Charterhouse Group Canada Ltd.*[36] that the burden of proof shifted in such a situation to the insider, and that this burden had to be discharged on a balance of probabilities.

33 See for example Kinwat Holdings Pty. Ltd. v. Platform Pty. Ltd. (1982) 6 A.C.L.C. 398 (Supreme Court of Queensland).

34 See Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592, 619 (Court of Appeal, Ontario); Nir Oil Ltd. v. Bodrug (1985) 18 D.L.R. (4th) 608, 612 (Court of Appeal, Alberta).

35 Green v. Charterhouse Group Canada Ltd., supra note 34.

36 Ibid.

The 1986 Regulations[37] provide for several exemptions from the operation of s. 103 S.I.A.[38] The exemptions are as follows:

(a) a director who is required to obtain a share qualification under s. 147 C.A. may do so, notwithstanding s. 103(1) and (3) S.I.A.;

(b) where a superannuation scheme, pension fund or other scheme is set up for the benefit of the employees of a corporation and/or its related corporations, the trustee of the scheme may subscribe for and acquire the securities of the corporation, notwithstanding s. 103(1), (3) and (6) S.I.A.;

(c) an underwriter may fulfil his obligations under an underwriting agreement, notwithstanding s. 103(1), (3) and (6) S.I.A.;

(d) the manager of an issue of securities[39] may enter into transactions in accordance with his obligations as a manager under an agreement with the issuer or the corporation, notwithstanding s. 103(1), (3) and (6) S.I.A.;

(e) a market-maker's transactions are exempted from s. 103(1), (3) and (6) S.I.A.;

(f) the Official Assignee, a liquidator of a corporation and the personal representative of a deceased person may enter into transactions concerning securities in the performance in good faith of the duties of their office, notwithstanding s. 103(1), (2), (3) and (6) S.I.A.;

(g) any transaction by way of mortgage or charge of securities, or arising out of such a mortgage or charge, or by way of mortgage, charge, pledge or lien of documents of title to securities is exempted from s. 103(1), (2), (3) and (6) S.I.A.;

(h) a person may legally acquire securities under a will or upon the intestacy of another person notwithstanding s. 103(1), (2). (3) and (6) S.I.A.;

(i) a trustee may transfer the bare legal estate in securities to another trustee, notwithstanding s. 103(1), (2), (3) and (6) S.I.A.

4. *When can an insider deal in securities?*

It is a defence to any prosecution under s. 103 S.I.A. to show that the other party to the transaction knew or ought reasonably to have known of the information before entering into the transaction.[40] In other words, using price-sensitive information when dealing in shares is an offence only when the other party does not have that information.

This brings into focus the problem of disclosure and dissemination of the information. For this purpose a distinction must be made between listed and non-listed securities.

In the case of listed securities, a person who is in possession of price-sensitive information may not communicate that information to

[37] *Supra,* note 4. See Regulations 45 and 46.
[38] The power to exempt certain persons or classes of persons from particular provisions of the S.I.A. arises under s. 2(2) S.I.A.
[39] This means a person who was party to the preparation of the prospectus or the introductory circular required for the purpose of listing the securities: Regulation 45(2).
[40] S.103(11) S.I.A.

any other person if he knows (or reasonably ought to know) that that other person will make use of the information to deal in the securities on a securities exchange whether within or outside Singapore.[41] Therefore, in the case of listed securities, an insider will have to wait until disclosure and dissemination of the price-sensitive information has occurred through the market in accordance with the particular exchange's mode of disseminating information. The Stock Exchange of Singapore's Corporate Disclosure Policy recommends that insiders should wait at least 24 hours after general publication of a press release, and 48 hours if publication is not so widespread. An insider who tries to jump the gun may find himself on the wrong side of the law. For instance in *SEC* v. *Texas Gulf Sulphur*[42] a corporate insider placed an order with his broker barely half an hour after the company released material information. The U.S. Court of Appeals held that he was guilty of insider trading notwithstanding that the information had already been released. The reason was that there was insufficient time for the information to be disseminated to the market.

A more difficult problem arises in transactions in non-listed securities. Where a person buys or sells such securities, he must do so face to face (whether personally or through an agent) rather than through the anonymous mechanism of the securities market. An insider who tries to deal in non-listed securities is in a dangerous position. If he does not disclose what he knows to the other party, he may be guilty of an offence under s. 103 S.I.A. If he does, he may lose the deal, as by definition the information that he possesses will affect the price of the securities. Moreover, if the information is confidential, an insider who discloses such information to another person may very well be sued by the corporation in certain circumstances.[43] The corporation's primary remedy in such a case is to obtain an injunction to prevent the disclosure of such information. In certain cases damages might be awarded for breach of confidence. In *Seager* v. *Copydex Ltd.*[44] Lord Denning M.R. said:

> "The law on this subject... depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it He must not make use of it to the prejudice of him who gives it without obtaining his consent."

In most cases the consent of the corporation to the disclosure of the confidential information will not be forthcoming. That being so, the insider will be precluded from dealing in the corporation's securities as he cannot acquaint the other party to the transaction with the material facts.

Even where the information in question is not confidential, but merely "not generally available", problems exist. Unlike in the case of listed securities, there is no mechanism for the disclosure of price-sensitive information regarding non-listed securities. The insider would have to make disclosure himself. Has a contract to deal in securities become a contract *uberrimae fidei?* How much must an insider disclose to a potential seller or buyer? Presumably, the insider must

[41] S.103(5) S.I.A.
[42] 401 F 2d 833 (1968) (U.S. Court of Appeals).
[43] An analogy may be made to cases regarding the protection of confidentiality. See generally, Goff & Jones, *The Law of Restitution* (2nd Ed., 1978), chapter 35.
[44] [1967] 1 W.L.R. 923.

disclose information material to the transaction; that is, those considerations which can reasonably be said, in the particular case, to be likely materially to affect the mind of a vendor or of a purchaser.[45] The failure to do so will render the insider open to sanctions, both civil and criminal. In this respect, a contract to purchase or sell shares by an insider would resemble a contract *uberrimae fidei.*

5. The penalty.

The penalty for a breach of s. 103 S.I.A. is the same as for the breach of any other provisions of Part IX of the Act. In the case of a natural person, a fine of up to $50,000 or imprisonment for up to 7 years may be ordered. In the case of a corporation, a fine of up to $100,000 may be imposed. If a corporation is guilty of an offence under the S.I.A., any director, executive officer, secretary or employee of the corporation who was in any way knowingly concerned in the commission of the offence is also guilty of that offence.[46] Section 158 C.A. made no distinction between corporations and natural persons. A fine of up to $100,000 or imprisonment for up to 5 years was prescribed. In the case of tippees, the maximum fine was $50,000 and the maximum term of imprisonment was 3 years. Thus, the power of a court to imprison an offender has been enhanced, while the power to fine has, in some cases, been reduced.

One significant problem is whether or not a breach of s. 103 S.I.A. is an offence in connection with the "promotion, formation or management" of a corporation for the purposes of s. 154 C.A. If it is, the guilty party is precluded for five years from promoting, directing or taking part in the management of companies. This would be relevant where the insider was an officer of the corporation, but not in the case of substantial shareholders or agents of the corporation.

6. *Civil Liability*

If there has been a breach of any of the provisions of Part IX of the S.I.A., civil liability is imposed upon the offender if he is convicted of an offence.[47] Unlike under s. 158 C.A., this can include tippees as well. The offender will be liable to pay compensation to any person who suffers loss by reason of the offender's activities. The amount of compensation to be paid is the amount of the loss.

Although superficially it appears that the S.I.A. provides for civil recovery, in fact several serious problems exist that will probably render s. 105 S.I.A. a dead letter.

Firstly, it is necessary before there can be civil recovery for a prosecution to be instituted and for the offender to be convicted. This is not something that a private individual can control. It is for the Attorney-General as Public Prosecutor to initiate a prosecution. In fact, it is specifically provided that proceedings for an offence against any provision of Part IX of the S.I.A. may only be taken with the consent of the Attorney-General.[48] Theoretically, this might allow a

45 Per Cooke J. in Coleman v. Myers [1977] 2 N.Z.L.R. 225, 334 (New Zealand Court of Appeal).
46 S.111 S.I.A.
47 S. 105 S.I.A.
48 S.117(1) S.I.A.

private prosecution; but such things are rare almost to the point of non-existence in Singapore.

Secondly, there is a limitation period for a civil claim. No action for recovery of loss under s. 105 S.I.A. may be commenced after the expiration of two years after the date of completion of the transaction in which the loss occurred.[49] This is a very serious constraint upon civil recovery, especially when read with the requirement for a conviction. If criminal proceedings are not completed within two years of the date of the transaction, civil proceedings will be time-barred. It will not be possible to commence civil proceedings within the limitation period, as a conviction is a pre-requisite for recovery. A litigant who attempted to commence a civil action before the conviction might very well find his writ struck out as disclosing no cause of action.[50] No doubt a limitation period must be specifically pleaded.[51] Thus, theoretically, it might be possible to maintain an action for recovery outside the limitation period if the defendant did not raise the issue of limitation. However, one should not count upon the defendant or his advisers to be so cooperative.

The third problem relates to proof of causation. There are two situations: where there was a face-to-face transaction and where the transaction in question took place through the Stock Exchange. In the following discussion, let 5 be the person who suffers loss and *I* the insider.

If *I* approaches 5 and initiates the transaction, *S* will have no difficulty in proving that his loss was caused by *I*'s activities. But supposing that 5 approached *I* and asked *I* to buy or sell securities. Has S's loss been caused by *I*'s omission to reveal the inside information that he possesses? This is a more difficult case, but it seems fairly clear that *I* must reveal what he knows or run the risk of being called to account for insider trading. A contract for the sale or purchase of securities under such circumstances will become almost a contract *uberrimae fidei* as far as *I* is concerned.

However, assume that the transaction takes place through the Stock Exchange. In the normal run of things, *I* would instruct his broker to buy *X* number of shares in Alpha Ltd. The broker would then fulfil the order through the mechanism of the market. As far as the actual buyer and seller are concerned, they are completely unknown to one another. 5, the seller, presumably instructed his broker to sell *X* number of shares in Alpha Ltd. at the best price available. Can it be said that *S* has suffered any loss from *I*'s activities? *S* does not even know that *I* bought his shares. To discover whether one's shares were taken by an insider would involve some fairly complicated matching of contract notes and lot numbers. In any case, *ex hypothesi*

[49] Parenthetically, this new provision removes the ambiguity that existed in s. 158 C.A. The Companies (Amendment) Act 1984, *supra* note 18, amended s. 158(3) C.A. so that the limitation period was two years after the date of completion of the transaction in which the loss was suffered OR 6 months after the discovery of the relevant facts by the person who suffered the loss. Unfortunately, it was not stipulated whether this meant "whichever is sooner;" or "whichever is later". The provision could have been interpreted either way and there was no indication which was the correct interpretation,

[50] By virtue of Rules of the Supreme Court 1970, Ord. 18 s. 19.

[51] R.S.C. Ord. 18 r.8(1).

S would have sold at the price no matter who the buyer was. The fact that the buyer turned out to have been an insider would have been purely fortuitous. Is *I* to be liable to everyone who sold shares at a lower price at the material time? This would be an astounding result, for it would mean a completely unjustified benefit to many speculators who read the market wrongly.

If the above analysis is correct, it seems likely that civil recovery for insider trading will be obtainable more often in a face-to-face transaction than in the case of trading on the Stock Exchange.

The fourth problem is again one of proof. Assume that a conviction is obtained. All the evidence will have been amassed, collated and assessed by the trial court. One would think therefore that it would be an easy thing for the claimant in the civil proceedings to prove his case (other than causation). However, this is not so. Section 44 of the Evidence Act[52] provides that a judgment or order made by one court may be relevant, but is not conclusive proof of the facts. This means that although one court has found the defendant guilty of insider trading, that conviction is not conclusive proof and the whole laborious process of proving the illegal act must be gone over again. A ridiculous rule no doubt; but this is the law.

The difficulties stated above will probably make a civil claim for compensation very rare indeed. Indeed, in the thirteen years since the enactment of the S.I.A. 1973 (which is similar in material respects to the present S.I.A.) there has been no reported case in which compensation was awarded. Ironically, it would have been easier to get compensation under s. 158 C.A. although again there do not seem to have been any reported cases in which this occurred.

The only ray of hope lies in s. 400 of the Criminal Procedure Code.[53] This provides that the court before which a person is convicted of an offence may order that he pay compensation to any person injured by the offence. This would allow the court that tried the criminal proceedings to give a remedy to the victims of insider trading. Such a course would be far more expeditious and economical than a full-dress civil action, especially one in which the whole of the evidence would have to be gone over again. Unfortunately, a survey by a member of the Law Faculty[54] showed that orders under s. 400 C.P.C. are rarely made. One problem is that the victim does not have any *locus standi* to appear in criminal proceedings to ask for compensation; compensation is in the discretion of the court, and that discretion is very seldom exercised. Also, the problem of proof of causation in the case of Stock Exchange transactions would still remain. Nevertheless, s. 400 C.P.C. offers more hope to the victims of insider trading than any other course of action. What is required is an amendment to s. 103 S.I.A. to allow the trial court to grant compensation to the victims of insider trading. Otherwise it is likely that civil recovery will be almost impossible, even where an offence has been disclosed.

[52] Cap. 5, 1970 (Rev. Ed.).
[53] Cap. 113, 1970 (Rev. Ed.).
[54] See Yeo, "Compensating Victims of Crime in Singapore" (1984) 26 Mal. L.R. 219.

Conclusion

Insider trading is treated in Singapore as a heinous crime. If severity of punishment can be taken as a guide, it would appear that insider trading is a cardinal sin.

One wonders however how effective s. 103 S.I.A. will be in practice. In the thirteen years since the first introduction of legislation prohibiting insider trading, there has been only one reported prosecution. It is hard to believe that this is so because no insider trading takes place. The record on civil compensation is even worse. There have been no reported instances in the last decade and a half in which a claim for civil compensation in respect of insider trading has succeeded. Indeed, one wonders whether such a claim has yet been made. This fact illustrates graphically the difficulty involved in proving the offence and in claiming compensation.

However, it is unfair to gauge the effectiveness of the section by the number of reported prosecutions. It is like the small Irish village that boasted three constables and a sergeant. A stranger asked, "Is it really necessary to have so many policemen here?" The sergeant replied, "Not now, but it would be if they weren't here." Perhaps the same could be said of s. 103 S.I.A.

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