NUS Law Working Paper 2020/003

EW Barker Centre for Law & Business Working Paper 20/02

2019. Securities and Financial Services Regulation

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[January 2020]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: http://law.nus.edu.sg/wps/

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Citations of this electronic publication should be made in the following manner: Author, "Title," NUS Law Working Paper Series, "Paper Number", Month & Year of publication, http://law.nus.edu.sg/wps. For instance, Chan, Bala, "A Legal History of Asia," NUS Law Working Paper 2014/001, January 2014, www.law.nus.edu.sg/wps/

2019. Securities and Financial Services Regulation

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General

The over-financialisation of the world has come under serious attack since the Global Financial Crisis, perhaps justifiably so. We are increasingly reminded of Churchill's desire to make "finance less proud and industry more content".[1] Many of us in academia have attempted to do so in the only way we can, arguing for the importance of, amongst other things, SME funding. But technology has perhaps intervened to increase the challenges in this respect through its role in finance services, including P2P lending, cryptocurrency, tokenization and trading platforms etc. Banks and other traditional financial intermediaries like financial advisers have sometimes been side-lined. This may be of little loss to SMEs, however, given that banks have not been lending enough to them, preferring instead to lend to households and indirectly inflating property values. But even exchanges or platforms have been set up less to channel finance to SMEs but to facilitate even more financial activity, often trading in non-standard financial products rather than shares and bonds. Disputes in relation to these technology-related financial activities have increasingly been litigated in Singapore courts.[2]

Markets and exchange regulation

Cryptocurrency exchanges

In 2019, the Singapore International Commercial Court (the "SICC") gave the first substantive judgment of the Singapore courts in a cryptocurrency case involving its most widely known "Bitcoin". Bitcoin first started out as an alternative to fiat currency in 2008 as a means of exchange but appears to be traded as a commodity or store of value today with a great deal of speculation in what appears to be of little intrinsic value, which may explain its volatility and hence declining use as a means of exchange as opposed to a store of value. However, the regulators have settled on regulating it as a currency or payment system under the new Payment Services Act 2019[3] in Singapore (passed on 14 January 2019 but which came into force on 28 January 2020).[4] It would

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[1] Minute from Winston Churchill to Sir Otto Niemeyer, 22 February 1925, CHAR 18/12/A96-99.

[2] On the regulatory side, Loo Siew Yee, the head of the Securities and Futures Department has said that the Monetary Authority of Singapore will supervise and regulate cryptoassets more: Jamie Lee, "MAS to step up supervision of virtual assets" Business Times 17 October 2019.

[3] See further "Payment Services Bill" - Second Reading Speech by Mr Ong Ye Kung, Minister for Education, on behalf of Mr Tharman Shanmugaratnam, Deputy Prime Minister and Minister-In-Charge of The Monetary Authority of Singapore on 14 January 2019.

[4] See Gazette Notification S 808/2019. This excludes ss 111, 113 and 114, which concern the consequential amendments to the Credit Bureau Act 2016, Financial Holding Companies Act 2013 and Insolvency Act 2018 respectively.

be quite different with the Bitcoin futures contract now traded on the Chicago Board Options Exchange –which, if it had a presence in Singapore, would have been seen as a "derivatives contract" under the Securities and Futures Act[5] (the "SFA") following the taking effect of the Securities and Futures (Amendment) Act 2017 in October 2018 and prior to that, as a "futures contract".[6]

In 2017, in *B2C2 Ltd* v *Quoine Pte Ltd*[7] ("*B2C2*"), Simon Thorley IJ[8] dismissed B2C2's application for summary judgment pursuant to O 14 of the Rules of Court[9] for breach of contract and breach of trust against the defendant, Quoine. Quoine, a Singapore-incorporated company, operated a currency exchange platform which allowed third parties like the plaintiff (an electronic market maker incorporated in England) to trade Bitcoin and Ethereum for other virtual currencies or for fiat currencies such as the Singapore or US dollar. The trial was subsequently heard by Thorley IJ, who held in 2019 that Quoine was liable for the said breaches as it had unjustifiably reversed trades that were made at abnormal exchange rates.[10]

The plaintiff, B2C2, provided liquidity on the exchange platform by buying and selling virtual currencies at the prices it quoted for virtual currency pairs. It agreed to a set of terms and conditions available on the defendant exchange platform's website. On 19 April 2017, the plaintiff placed 12,617 Bitcoin and Ethereum orders, of which only 15 were filled. Eight of the filled orders were buy or sell orders transacted at the prevailing exchange rate, which was around 0.04 Bitcoin for one Ethereum. The other seven filled orders were sell orders that were effected at an exchange rate of around ten Bitcoin for one Ethereum, which was about 250 times higher than the prevailing exchange rate, due to an outage in the platform. Thorley IJ examined the trading system in some detail and found that because of a technical glitch on the defendant exchange (which was a market maker for 98% of the trades), it was unable to perform its market-price updates. Instead, the plaintiff's price was the only one available on the defendant's platform and this was matched by the computer system with Bitcoin held by the defendant's forced sale customers. The proceeds of sale of Bitcoin were automatically credited to, and corresponding amount of Ethereum debited from, the plaintiff's account. Hence, B2C2 stood to gain a large windfall if the trades stood.

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5 Cap 163A, 2006 Rev Ed. The UK Financial Conduct Authority has issued a consultation paper suggesting an outright ban on the sale of derivatives based on cryptoassets to retail investors: CP19/22: *Restricting the sale to retail clients of investment products that reference cryptoassets* (3 July 2019). See also FCA PS19/22: *Final Guidance on Cryptoassets* (July 2019).

6 In *TMT Asia Limited v BHP Billiton Marketing AG (Singapore Branch)* [2019] SGCA 60, the Court of Appeal said that the issues raised with respect to whether OTC platforms involving the trading of forward freight agreements could be considered futures exchanges in *TMT Asia v BHP Billiton* [2015] SGHC 21, [2015] 2 SLR 540 (noted (2015) 16 SAL Ann Rev 617) "were no longer relevant" in light of the amendments to the Securities and Futures Act "removing the terms "futures contract" and "futures market" and replacing them with differently-defined terms" (at [13]).

7 [2018] 4 SLR 1.

8 International Judge of the Singapore International Commercial Court.

9 Cap 322, R 5, 2014 Rev Ed.

10 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17.

The defendant exchange felt that the exchange trades were highly abnormal and cancelled the seven trades. The plaintiffs then sued on the basis that the defendant had no right to unilaterally reverse the transaction and this breached the terms and conditions of the trading relationship. There was also a breach of trust if the Bitcoin first credited to and subsequently removed from the plaintiff's account did belong to the plaintiff. Thorley IJ found that the plaintiff's founder had designed its own programme in this manner not to take advantage of a situation like this but to minimise the risk of unwarranted exposure.[11] Given that, the judge held that the terms of the contract did not entitle Quoine to reverse the transactions as they were "irreversible"[12]. None of the defences raised succeeded. A term could not be implied allowing for the trades to be reversed as this would contradict an express term in the agreement. Although there was a risk disclosure document which contained a term that could have allowed that, Thorley IJ thought that there was no reason why the risk disclosure statement and the agreement had to be read together in a way which permitted the agreement to be amended.[13]

The unilateral mistake defence is perhaps of greatest interest to technology lawyers. In C*hwee Kin Keong v Digilandmall.com Pte Ltd*[14] ("*Digilandmall*"), it was held that at common law, there needed to be a sufficiently important or fundamental mistake as to a term of the contract and the party seeking to enforce the contract must have had actual knowledge of the mistake. Identifying the person with the requisite knowledge posed a challenge in an algorithmic environment where the orders were placed by the plaintiff's programme and without human intervention. Thorley IJ thought that:[15]

> … the relevant mistake must be a mistake by a person on whose behalf the computer placed the order as to the terms on which the computer was programmed to form a Trading contract in relation to that order.

The plaintiff's CEO was the programmer but did not have the knowledge required.[16] As for unilateral mistake in equity, which jurisdiction still exists in Singapore given *dicta* in the Singapore Court of Appeal's decision of *Digilandmall*[17], Thorley IJ examined whether a reasonable person in the plaintiff's CEO's position would have known that no other trader would have contemplated trades being executed at those prices. Also, there would have had to be some wrongdoing on the plaintiff's part, but Thorley IJ thought its behaviour was perhaps opportunistic but not wrong.[18]

Unfortunately for artificial intelligence ("AI") lawyers, the court, however, did not think that it was necessary to examine the situation "where the computer … is creating artificial intelligence

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11 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [118].
12 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [136].
13 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [176]-[177].
14 [2005] 1 SLR(R) 502.
15 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [210].
16 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [223].
17 See further *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5 at [165]. Compare in the UK *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2002] EWCA Civ 1407.
18 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [236].

and could therefore be said to have a mind of its own".[19] The law on mistake with respect to self-learning systems and programmes is still yet to be settled in Singapore.[20] It is possible, however, that any liability could reside with the platform hosting the programme.[21] In the end, however, some human may need to bear liability for imposing it on a computer or programme would create a black hole, in that the computer or programme could then serve as a liability-shielding device without substantial means itself to shoulder any real liability or responsibility.

Importantly, for trust and property lawyers, Thorley IJ held that the Bitcoin in B2C2's account was held on trust by Quoine and by removing the B2C2 funds, Quoine was in breach of trust. The judge held that cryptocurrency could form the subject matter of a trust even if "there may be some academic debate as to the precise nature of the property right"[22]. It satisfied the traditional test of being "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability"[23]. *B2C2* has been referred to with approval by the UK Jurisdictional Taskforce, which sees cryptoassets as property.[24] Kulms, has, however, asked if:

> In applying existing case law to the carbon allowances case, the court accepted that there has to be a statutory framework establishing an entitlement which has some market value. The *Quoine* decision of the Singapore court goes one step further. It applies Lord Wilberforce's test, but does not enquire about the statutory basis of a possible entitlement to virtual currencies or digital assets. The Singapore court appears to combine the liberal approach of U.S. courts with the contract-informed interpretation of the UK FCA. Digitally stored virtual currencies are capable of commodification with status of intangible property, depending on their identifiability, marketability, and the underlying network of contracts. Civil law

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19 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [206].

20 In the context of criminal law, see Ying Hu, "Robot Criminals" (2019) 52 University of Michigan Journal of Law Reform 487.

21 *Cf* Mark Fenwick, Joseph A McCahery and Erik PM Vermeulen, "The End of 'Corporate' Governance: Hello 'Platform' Governance" (2019) 20 EBOR 171.

22 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [142]. Hans Tjio and Ying Hu, 'Collective Investment: Land, Crypto and Coin Schemes - Regulatory "Property"' (forthcoming in the [2020] EBOR) suggest that these may be intermediate rights lying between contract and property which may be protected by disclosure or the standardization of rules.

23 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [142]; citing *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1247-8. This test was applied in *Armstrong GmBH v Winnington Networks* [2012] EWHC 10 to determine if EU carbon credits constituted property, although it has been pointed out that it is perhaps not property in the fullest sense: Kelvin FK Low and Ernie Teo, "Legal risks of owning cryptocurrencies" (2017) Handbook of Digital Finance and Financial Inclusion. Vol 1: Cryptocurrency, FinTech, InsurTech, and Regulation 225. More recently it was reaffirmed again that information is not property: *Your Response Limited v Datastream Media* [2014] EWCA Civ 281, but see Jeremiah Lau JJ, James Penner and Benjamin Wong, "The Basics of Private and Public Data Trusts" (forthcoming in [2020] Sing JLS). The test was said to be circular in *Lee Kien Meng v Cintamani Frank* [2015] SGHC 109.

24 UK Jurisdiction Taskforce, *Legal statement on cryptoassets and smart contracts* (November 2019) at paras 58, 70-86. It sees cryptoassets as containing more than just information or data.

> jurisdictions will have to choose a different regulatory path to recognise such commodification developments.[25]

The Singapore Court of Appeal reserved judgment on the appeal in *B2C2* at the end of October 2019 and its decision will be discussed in next year's Annual Review. It may be that part of the work needed to allow technological interests to become a form of "new property" would involve coming up with the necessary rules for "an intangible asset only exists because the law says it does"[26]. This cannot be done by governments alone trying to catch up with persons who try to avoid enforcement or supervision. The creators themselves must contribute to the process in order to justify their ownership or quasi-ownership. They cannot stand back and believe that rhetoric alone about a compelling story can create new, unregulated wealth. While the law may not matter as much as once thought, it still matters. This is important for cryptocurrency which now comes under the Payment Services Act. It has been pointed out that it is even more crucial for tokens and coins which, in order to work for SME financing, will require some form of regulation, either as a collective investment scheme or also a payment system.[27] They are not traditional property seen as a thing that easily excludes others from using it but an intermediate interest lying between contract and property.[28] As such, there has to be disclosure or standardization of rules in order for them to be acceptable to third parties expected to avoid or acquire them.

Even more importantly, technology companies must be regulated when they act as financial institutions.[29] They have been given too many exceptions in ways that may have damaged the real economy.[30] Where capital markets regulations are concerned, they have now borrowed money (for successful big tech firms at very low interest rates) to purchase higher-yield bonds in other corporates. They have also repurchased their own shares in the US on a very large scale. By acting as investment funds trading in the bonds of other companies and their own shares, they have created further problems for securities regulation that has been grabbling with difficulties in these two areas of law (which will be discussed below).

Primary markets and issuer regulation

***Locus standi* of bondholders in restructuring**

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[25] See further Rainer Kulms (forthcoming in (2020) Sing JLS).

[26] Richard Calnan, *Proprietary Rights and Insolvency* (OUP, 2016) at [1.30].

[27] Hans Tjio and Ying Hu, *supra* n 22. There are signs of revival in the ICO market: Aw Cheng Wei, "Digital tokens back in spotlight as bitcoin soars" Straits Times, 7 November 2019 although it is argued there that regulation has to keep pace with the token economy.

[28] See further "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law towards American Law", (2019) SJLS 235 [for the Singapore position on/acceptance of intermediate interests].

[29] Rana Foroohar, "How big tech is dragging us to the next financial crash" The Guardian 8 November 2019 describes the financial risks caused by technology companies avoiding regulation. They have become unregulated investment funds.

[30] See Richard Waters, "Tech's self-declared exceptionalism is coming to an end" Financial Times 19 September 2019 and so, for example, they cannot treat their workers as independent contractors instead of employees.

Disclosure is also the important theme in the restructuring of debt securities, which are seen as perhaps more proprietary (as a thing in action) than cryptocurrency and coins.[31] As shareholder and creditors rights are being varied and perhaps even expropriated in some restructurings, this is an area of concern given the number of companies both local and foreign that are undergoing restructuring in Singapore. At the same time, it shows the success of the new insolvency and restructuring regime introduced through changes to the scheme of arrangement provisions in May 2017 by the Companies (Amendment) Act 2017. The newly amended scheme of arrangement procedure was recognised in the UK in *H & CS Holdings Pte Ltd v Glencore International AG*[32] as the main foreign insolvency proceeding within the meaning of the UNCITRAL Model Law on Cross-Border Insolvency.[33]

Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd[34] provides instructive guidelines on a number of issues arising under the provisions of the Singapore Companies Act[35] (the "Companies Act") relating to schemes of arrangement, including the extent of disclosure of the applicant-company, the validity of third party releases, and the proper classification of creditors. Empire was a Singapore-incorporated investment holding company that was part of Berau, a large Indonesian global group in the coal mining business, which had been in financial difficulties since 2014. In April 2017, Empire sought leave to convene a creditors' meeting to consider and vote on a proposed scheme of arrangement, which was the fourth in Singapore for the Berau Group. The scheme sought to restructure two sets of notes issued by two other companies in the Berau Group respectively on behalf of the Berau Group (the "2015 Notes" and the "2017 Notes"). In essence, the scheme provided for the full and final release of all liabilities under both Notes. In consideration, PT Berau Coal ("Berau Coal"), the main operating entity of the Berau Group, would issue new notes on a dollar-for-dollar basis on certain terms. The Berau Group urged the creditors to vote in favour of the scheme as they purportedly stood to recover less in the event of a liquidation than under the scheme. Pathfinder Strategic Credit LP and BC Investment LLC, who together owned around 12.5% of the outstanding notes, opposed the leave application.

The court found that, provisionally, holders of the 2015 and the 2017 Notes could properly be classed together for the purposes of considering and voting on the Proposed Scheme, as the differences between their relative positions under the Proposed Scheme and in an insolvent liquidation did not appear material. This is consistent with cases in Singapore focusing on the quality of disclosure rather that class separation, although most of those cases concerned disclosure at the later stage where the court is asked to approve the scheme.[36]

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[31] UK Jurisdiction Taskforce, *Legal statement on cryptoassets and smart contracts* (November 2019) at para 68. But there are some who believe that debts as choses in action may not be fully proprietary: see CH Tham, *Understanding the Law of Assignments* (CUP, 2019).

[32] [2019] EWHC 1459 (Ch).

[33] As a consequence, the English Courts will recognise the extra-territorial effect of a moratorium order granted by Singapore courts under the Companies Act (Cap 50, 2006 Rev Ed).

[34] [2019] 2 SLR 77.

[35] Cap 50, 2006 Rev Ed.

[36] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29 at [90]-[91]. See *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629. This case shows that the quality of disclosure has become critical in assessing schemes. Another

The Court of Appeal discussed the disclosure requirements at the application for convening of meetings stage in great detail and thought that these requirements were lower than that required to approve the scheme at the later stage. However, there remained a minimal standard of disclosure that a company had to satisfy before leave would be granted under s 210(1) of the Companies Act.[37] At the leave stage, the company bore a duty of unreserved disclosure to assist the court in determining whether and how the creditors' meeting was to be conducted. This had to be taken to require at least such disclosure as would enable the court to determine the issues that it had to properly consider at this stage, such as the classification of creditors, the realistic prospects of success of the proposal, and any allegation of abuse of process. It follows the decision of Snowden J in *Indah Kiat International Finance Company BV*[38] by stating that by the leave stage, the company had to provide such financial disclosure in such manner and to such extent as would be reasonably necessary for the court to be satisfied that fair conduct of the creditors' meeting would be possible. This would be quite different an inquiry from whether the scheme was doomed to fail or whether there was an inference of abuse of process. Rather, the focus is on the question of fairness in the conduct of the creditors' meeting and what was important was the sufficiency of the financial disclosure, as that underpinned the integrity of the scheme regime and provided a safeguard to this exercise in creditor democracy.

On the facts, Empire Capital had failed to provide the scheme creditors with the minimal level of financial disclosure reasonably necessary to satisfy the court that fair conduct of the creditors' meeting was possible. The Court of Appeal held this even though it was aware that scheme procedures could be abused by minorities holding out.[39] This could thwart genuine attempts at restructuring in times of financial crisis, especially by smaller companies with fewer resources. It reaffirms the balancing exercise that a court has to undertake as the disclosure obligations and procedures themselves may be oppressive.[40]

Prospectus requirements for gold buy-back schemes

example of the Singapore courts declining to approve a scheme on the grounds that the scheme lacked transparency and that there was a lack of information provided to members and creditors is *Re Econ Corp Ltd* [2004] 1 SLR(R) 273. See also *Re Horizon Knowledge Solutions Pte Ltd* [2004] SGHC 270, *Re Ng Huet Foundations Pte Ltd* [2005] SGHC 112, and *Re TT International Ltd* [2010] SGHC 177. The Court of Appeal in the latter case [2012] SGCA 9 at [73], however, reiterated the need for strict compliance with s 210 of the Companies Act (Cap 50, 2006 Rev Ed) and the need to respect and safeguard the integrity of voting outcomes in the context of debt restructuring.

[37] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 at [48] and [50].

[38] [2016] EWHC 246 (Ch); cited in *Pathfinder* at [55]. This was left open earlier in *Re Attilan Group Ltd* [2018] 3 SLR 898 where it was also held that there was no need for separate classes of creditors.

[39] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 at [57].

[40] Debenture holders have standing under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) to argue that they have been oppressed. There are no reported cases on this area: Chi-Ling, Seah, "Bondholder Rights and the Section 216 Oppression Remedy" (2011) Sing JLS 432. Here, the concern is only with disclosure and the composition of classes.

In *Public Prosecutor v Tan Seo Whatt Albert*,[41] the accused was convicted of consenting to the limited liability partnership he was a manager of (as acting Chief Executive Officer) in issuing securities generally to the investing public without compliance with the prospectus requirements in s 240 of the SFA. At first instance, he was convicted of 20 charges and fined $600,000 under s 331 of the SFA, which extends corporate criminal liability to individuals who assisted with the entity's breach,[42] for selling gold memberships that were seen as debentures secured by the gold bars as collateral. 49 other charges were taken into consideration in sentencing him. The district judge, however, did not feel that the accused deserved imprisonment as she saw the strict liability prospectus provisions as more regulatory rather than criminal in nature.[43] Further, it was not clear at the relevant time that these gold buy-backs were widely seen in the market as securities.[44]

On appeal,[45] Hoo Sheau Peng J disagreed with such an approach and imposed a sentence of 12 weeks imprisonment with the fine ordered to be refunded. The prosecution argued, as it did in the lower court, that the custodial threshold had been crossed, and that a global imprisonment term of 12 to 16 weeks was appropriate. Defence counsel argued to the contrary, and contended that the fines imposed were manifestly excessive. Hoo J agreed with the prosecution's proposed factors to be considered in sentencing, as this was the first time the provision had been invoked in court and they were not specifically challenged by defence counsel.

Hoo J thought that it was clear from s 331(3A) of the SFA that there were 3 alternate limbs under which the "secondary liability" of a person involved in an offence under the SFA could be established. These were based on the person's (a) consent, (b) connivance or (c) negligence in the corporate wrong.[46] The consent limb was the most serious and this was the relevant limb in this case. However, the defendant argued that a custodial sentence was not appropriate because the Singapore High Court in *Auston International Group Ltd v PP*[47] only imposed fines on the CEO and CFO in respect of an offence under s 253(1) of the SFA, *viz*, for prospectuses containing false and misleading information. This was despite the court thinking that the CEO and CFO were more culpable than the company itself in overstating the company's profits. The defendant argued that since "a prospectus containing a false and misleading statement is a lot worse than no prospectus", s 253(1) offences were more severe than s 240(1) offences. Accordingly, the sentence for the defendant's s 240(1) offence should not be custodial, as it would be more severe than that for a s 253(1) offence. This was rejected by Hoo J, because the prescribed punishments were the same

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[41] [2018] SGDC 247, [2019] SGHC 156 (on appeal).

[42] Section 331 of the SFA was amended in 2005 to include limited liability partnerships with the coming into force of the Limited Liability Partnerships Act (Cap 163A, 2006 Rev Ed).

[43] *Public Prosecutor v Tan Seo Whatt Albert* [2018] SGDC 247 at [18].

[44] This has been confirmed by amendments to the definition of "debentures" by the Securities and Futures (Amendment) Act 2017, which came into effect in October 2018, to include gold buyback schemes, along with the necessary changes to the definition of "collective investment scheme" to cover land-banking.

[45] *Public Prosecutor v Tan Seo Whatt Albert* [2019] SGHC 156.

[46] *Public Prosecutor v Tan Seo Whatt Albert* [2019] SGHC 156 at [45]–[47]. The meaning of these three limbs in the context of s 59(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") were discussed in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153.

[47] [2008] 1 SLR(R) 882. For a case discussing the meaning "materially prejudicial to the interests of bondholders", see *Law Debenture Trust Corporation plc v Acciona SA* [2004] EWHC 270.

for both offences and there was no hierarchy between the underlying primary offences, because "[t]he legislative intent is … for both offences to, all things being equal, be viewed with equal severity."[48] Although Hoo J thought that the secondary offence under the consent limb of s 331 did not *per se* attract a custodial sentence, she held that it was appropriate in this case after applying the relevant sentencing considerations of culpability and harm.[49]

Secondary markets

Market abuse – Share buybacks

In the previous Annual Review, it was suggested that share repurchases, although ostensibly a company law matter, should, when abused in the context of publicly listed companies be considered possible market manipulation.[50] The experience in the US is that it has maintained high stock prices even as overall market capitalisation has fallen. Since 2009, more than US$8 trillion has been used to repurchase stock in US listed companies.[51] Much of this is fuelled by borrowings, and at a time when stock prices are high but real earnings are faltering. Prior to 1982, share buybacks were considered market manipulation. Today, US companies do not shy away from admitting that share repurchases are brought forward at times like these to maintain share prices, which in most other countries would amount to a form of market rigging.[52] They are like investment companies trading primarily in their own securities with the risk that the insiders like directors are selling their own shares whilst making the decision for the company, the principal to whom they owe fiduciary duties, to repurchase the shares at high prices.[53] The danger of the abuse of share buybacks, or even capital reduction generally, is minimised in Singapore because most forms of permitted capital reduction would require a solvency statement[54] as well as various forms of shareholder approval. Creditors are also permitted to challenge the buyback or reduction.

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[48] *Public Prosecutor v Tan Seo Whatt Albert* [2019] SGHC 156 at [52].

[49] *Public Prosecutor v Tan Seo Whatt Albert* [2019] SGHC 156 at [93].

[50] Hoo Sheau Peng J, this time at first instance, held that the mischief of the prohibition against share buybacks includes both the protection of creditors against capital reduction and the protection of the investing public against market manipulation of the company's share price through the use of the company's money: *International Healthway Corp Ltd v The Enterprise Fund III Ltd* [2018] SGHC 246 at [59].

[51] Robin Wigglesworth, "US investor cash return bonanza breaks records" Financial Times 6 March 2019.

[52] Rana Foroohar, "Corporate America is over-caffeinated" Financial Times 8 September 2019.

[53] Gary Putka, "Company insiders are selling stock during buyback programs and making additional profits when stock prices jump. And it's legal." Washington Post 7 November 2019.

[54] The solvency test was recently applied by the Privy Council in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36 in the context of the use of the share premium account to redeem the premium on redemption of shares in an open-ended investment company. The provisions in the Cayman Companies Law (2007 Revision) s 37 were similar to the former provisions on redemption of preference shares here (Cayman introduced amendments in 1987 to allow redeemable equity shares) in s 70 Companies Act (Cap 50 1994 Rev Ed) (fundamentally amended in 2005 along with the removal of par value and share premium accounts). A majority in the PC saw the use of the share premium account as that of capital which was then subject to a solvency test (the minority thought otherwise which shows the difficulties that we previously had with the use of the share premium account to redeem the premium on

Although not seen in the context of market manipulation, the case of *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)*[55] ("*The Enterprise Fund III Ltd*") is important for its stricter interpretation of the share repurchase prohibition in s 76(1A)(*a*) of the Companies Act, which has otherwise been slowly liberalised since 1998. There, IHC, a Catalist-listed company, arranged to have the standby facility from the Crest funds, which included the appellant, in order to defend itself against a short-selling attack.[56] It was then suggested that instead of disbursing the funds to IHC, that the Crest funds themselves could purchase shares on IHC's behalf through its own brokers, which the Crest funds did.[57] On SGX's announcement that connected persons were trading IHC's shares, the share price plummeted and the relevant controllers of IHC became bankrupt.[58] IHC defaulted and its management was changed. Due to the prohibition against IHC buying back its own shares, the Singapore Court of Appeal held that the Crest funds were the legal and beneficial owner of the IHC shares it acquired through the open market acquisitions and that IHC owed no contractual obligations or liability to the Crest Funds under the purported loan agreements. Commenting on Hoo J's first instance decision *International Healthway Corp Ltd v The Enterprise Fund III Ltd*[59], Menon CJ said:[60]

> The result was that the trust arrangement by which EFIII held the IHC shares purchased on the open market on trust for IHC was held to be void; the open market acquisitions were held to be valid; and the loan agreements were held to be voidable and to have been avoided by IHC by way of its written notice of 8 March 2017.

The Court of Appeal identified two separate reasons for the general rule prohibiting share repurchases: to (a) maintain capital and (b) preserve assets. It looked through the various law reform proposals to liberalise both the share buy-back rules as well as the prohibition against financial assistance, and thought that the former reason was still relevant today. Capital maintenance, or capital lock-in, has been identified by Lynn Stout as a characteristic of a company.[61] Citing his previous judgment in *Public Prosecutor v Lew Syn Pau*[62] as well as that of

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redemption of preference shares as an allowable capital leak under the previous s 70(4)). See now section 78A(5A), introduced by the Companies (Amendment) Act 2014.

[55] [2019] SGCA 48.

[56] *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [12]. With the coming into effect of the Securities and Futures (Amendment) Act 2017 (Act 4 of 2017) in October 2018, short-sell orders not only have to be marked/disclosed to an approved exchange but short positions beyond a certain threshold (0.2% of total issue shares or $2m) have to be reported to the Monetary Authority of Singapore. Short-selling is not per se prohibited under the Securities and Futures Act (Cap 289, 2006 Rev Ed). In some other jurisdictions it may be seen as a form of market abuse.

[57] *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [16]-[17].

[58] The share prices had, however, collapsed from $0.31 to $0.10 after the Singapore Exchange issued a warning that 60% of the trades in the plaintiff company shares appeared to be by connected persons).

[59] [2018] SGHC 246.

[60] *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [36].

[61] Lynn A Stout, "On the Nature of Corporations" (2005) University of Illinois Law Review 253

[62] [2006] SGHC 146 at [92]; where Menon JC (as he then was) introduced a depletion of assets test for financial assistance. See further Michael Ewing-Chow and Hans Tjio "Providing Assistance for

Arden LJ in *Chaston v SWP Group Plc*[63], Menon CJ also thought that asset preservation remained an important consideration. This an important point as both the financial assistance and share repurchase (and reduction of capital) rules are there not just to protect creditors but also to ensure fairness between shareholders. Selective share repurchases, for example, under section 76D could discriminate against minorities when used to either effect a takeover by the majority in a successful company or an exit by the majority in a declining company. Menon CJ thought that the rationale for the rule helped inform the inquiry into the commercial substance of the transaction, given the width of the prohibition (which included indirect acquisitions or transactions) as well as the desire at the same time not to have a "bright-line [rule]" in this context.

Unlike Hoo J, however, the Court of Appeal thought all the transactions were related and inter-linked and so not only was the trust arrangement caught but so were the loan transactions. Section 76A(1)(a) then rendered the entire transaction void, and the loss lay where it fell. As to the savings for book-entry securities provided by s 76A(1A), the Court of Appeal went through the history and rationale for this exemption, which is that the system of freely tradable securities of publicly-listed companies needed security of title in order to function properly.[64] However, the Court of Appeal found that the word "disposition" within the meaning of s 76A(1A) had to involve the transfer of the legal title to the IHC shares which the appellants purchased on the open market. Consequently, it could not apply to the trust arrangement since that did not give IHC any legal title to the shares. Unlike other parts of s 76A, here the reference was to "shares" and not "unit",[65] consequently ruling out a broader meaning of disposition. It only saved the open market acquisitions.

This is consistent with how the word "disposition" was recently interpreted by the UK Supreme Court in the context of the UK's equivalent of s 259 of the Companies Act, which renders void any disposition of company property made after commencement of winding up of the company. In *Akers v Samba Financial Group*[66], the UK Supreme Court unanimously held that the transfer of a trust asset by the trustee to a bona fide purchaser without notice does not constitute a "disposition" under s 127 of the Insolvency Act 1986[67]. Rather, this resulted in the extinction of the beneficiary company's interest under the trust. As such, the transfer of such assets was not void and the assets did not form part of the insolvency estate of the liquidated company.

Financial Assistance" [2006] Sing JLS 465 arguing that the rule was for both the protection of creditors and shareholders.

63 [2002] EWCA Civ 1999.

64 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [95].

65 At first instance in *International Healthway Corp Ltd v The Enterprise Fund III Ltd* [2018] SGHC 246, Hoo J thought that the trust arrangement were caught as an indirect acquisition by the plaintiff of its own shares, because the equitable interests they obtained under the trust were "units" as described in s 76A(1) of the Companies Act.

66 [2017] UKSC 6. See further Richard C Nolan, "Dispositions and Equitable Property" (2017) 133 LQR 353.

67 C 45, UK.

In *The Enterprise Fund III Ltd*, the Court of Appeal[68] also dismissed an argument with respect to estoppel in defiance of a statute as that might work where the statute rendered a relevant transaction voidable[69] such as in the case of the prohibition against financial assistance, as opposed to what was a totally void transaction in this case[70] due to the prohibition against share repurchases. It rejected the argument, based on some form of "indoor management rule" that the Crest fund was entitled to believe that IHC had whitewashed the transactions under some of the provisions from ss 76C to 76G of the Companies Act, that would allow a share repurchase under stipulated conditions and with the necessary shareholder/creditor approvals. This is in line with the Privy Council's decision in *East Asia Company Ltd v PT Satria Tirtatama Energindo*[71], which recently held that the indoor management rule was not so powerful as to obviate the need to satisfy some form of apparent authority argument before it could be invoked.[72] So not only would it not work if the third party were put on inquiry, where inquiries expected of a reasonable as opposed to a rational man are needed[73], but it would not even *prima facie* operate if there was nothing (or not enough) for the third party to rely on in the first place. This is the opposite of being put on inquiry in that the third party must have something to pin its belief on before a presumption of regularity can arise. This would be a representation as to an agent's authority by the principal in the archetypal case of apparent authority, or something like evidence that an organ of the company had complied with necessary formalities for decision making in the case of the indoor management rule.[74] Similarly, Menon CJ thought that:[75]

> If these widely-framed generic representations and warranties could be read as a clear and unequivocal representation by a company that it would not exercise its legal right to rely on the voiding provision in s 76A(1)(*a*), then that right loses much of its force and the significance of the statutory prohibition in s 76(1A)(*a*)(i) on a company acquiring its own shares would in turn be significantly diluted. This would in effect allow a company to easily sidestep the carefully structured "whitewash" procedures in ss 76B to 76K.

This is an example of the balance that has to be struck when the internal governance structures of an institution, which are and should be flexible, come up against the need to protect external parties

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68 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [123].

69 As in *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd* [2014] 2 SLR 156.

70 Analogous to *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 403.

71 [2019] UKPC 30, noted Hans Tjio and Daniel Ang, "No magic to the Indoor Management Rule" (forthcoming in [2020] LMCLQ).

72 See *OBG Ltd v Allan* [2007] UKHL 21 at [92] where Lord Hoffmann said that: "As Lord Simonds went on to point out in Morris v Kanssen [1946] AC 460, such a person can rely on the principle of ostensible authority which in company law goes under the name of the rule in Turquand"

73 *Cf Thanakharn Kasikorn Thai Chamkat v Akai Holdings Ltd* [2011] 1 HKC 357; [2010] HKEC 1692 (hereinafter "*Akai*") at [62] (noted JL Yap (2011) 127 LQR 350) *per* Lord Neuberger.

74 *Morris v Kanssen* [1946] AC 460. In *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 at [103], the court held that it had first to be "informed that the HOA had been ratified and the Share Transfer approved" and that "there was no scope for the indoor management rule to operate so as to entitle PT Satria to rely on the regularity of those purported acts, because there was no point in time at which it could possibly have done so without having been put on inquiry".

75 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [131].

dealing with that institution in order to facilitate any such dealing in the first place.[76] The Court of Appeal held that it did not have to decide the question whether the Crest Funds did in fact rely on the representations as even if there were such reliance it would not lead to the estoppels argued for.[77] Menon CJ stated, however, that:[78]

> The Crest Funds, however, may have an avenue of recourse. As the Judge noted in her GD at [5], it was not disputed by IHC that the Crest Funds have recourse to s 76A(4) of the CA, and may apply to the court for any order or orders as the court thinks just and equitable against IHC or any other person in respect of any loss or damage they have suffered or are likely to suffer as a result of being party to the Transaction. The Crest Funds have yet to avail themselves of s 76A(4), and this provision was therefore not applied or analysed by the Judge. In these circumstances, we express no view on s 76A(4) and leave the question of its applicability instead to a future occasion should it come before us.

The prequel to what happened in this case, which involved issues of licensing, is discussed below (*The Enterprise Fund II Ltd v Jong Hee Sen*[79]).

Securities Lending and Borrowing characterised as a loan

In *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[80] ("*Anan*"), Anan and VTB entered into a global master repurchase agreement under which Anan would sell VTB global depository receipts ("GDRs") of shares in EN+ Group PLC and then repurchase the GDRs from VTB at a later date at pre-agreed rates. The pre-agreed rates that Anan would need to pay VTB at the date of repurchase amounted in essence to the original purchase price paid by VTB plus interest and other costs. Thus, it was clear that despite the structure of the transaction as a sale and repurchase, this was in substance a loan from VTB to Anan. As a result of sanctions imposed by the United States Treasury's Office of Foreign Assets Control, the value of the GDRs plummeted and Anan was given notice to top up the cash margin, which it failed to do. The Singapore High Court ordered Anan to be wound up.[81] On appeal,[82] the two substantive issues with respect to the quantum of debt were: (a) the applicable standard of proof where a debt governed by an arbitration agreement is disputed; (b) whether this standard of proof is met in the case given the dispute over the quantum of debt owed by Anan to VTB. The discussion below focuses on the procedural hearing for new evidence to be admitted in the appeal.

Anan tried to adduce fresh evidence found in a report by Deloitte that was not available at trial to show that the value of the GDRs was much higher than had been estimated by VTB and so the valuation had been unreasonable. Steven Chong JA lays down various situations and principles to

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[76] UK Trust Law Committee, *Report: Rights of Creditors against Trustees and Trust Funds* (June 1999), [3.7].

[77] See further CH Tan, "Estoppel in the Law of Agency" (forthcoming in (2020) LQR).

[78] *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] SGCA 48 at [137].

[79] [2019] SGHC 87.

[80] [2019] 2 SLR 341.

[81] *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 at [2].

[82] Civil Appeal No 174 of 2018 (Summons No 33 of 2019).

guide the relaxation of rule in *Ladd v Marshall*[83], which is that a final judgment that has been rendered in a litigant's favour should not be disturbed unless there are good reasons to do so. A court would conduct a balancing exercise between the interests of finality and the right of an applicant to put forth relevant and credible evidence, having regard to the considerations of proportionality and prejudice. Here the Court of Appeal held that a winding up was a serious event, and so proportionality dictated that the fresh evidence could be introduced as there was no real prejudice to VTB in terms of the substantive appeal since any "lack of commercial finality" that it complained of could be remedied with an appropriate costs order.[84]

For securities regulation, it is interesting that the decision confirms that Singapore courts have moved away from a more formalistic approach to characterising transactions that was seen in *Thai Chee Ken v Banque Paribas*[85], which held that a genuine sale and leaseback transaction did not create a security interest over shares even though it functioned in a very similar way.[86] It confirms the move in *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd*[87] towards looking to the substance of the transaction, although the inquiry is still contextual. A transaction may still be considered a sale and repurchase in terms of property analysis or for some regulatory purposes, but perhaps not so in other areas of private law (see the next part for discussion of the private/public law divide). Much depends on the transaction's effect on third parties, as well as any state interest in characterising the transaction in one form of another. While the language used by the courts is still related to the substance of the transaction in these instances where there is internal contractual flexibility, it is only if there are proprietary implications affecting third parties that characterisation becomes important. It is another example of the balance that has to be struck between the internal and external perspectives of an institution or relationship described above.[88] By contrast, it was held in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited*[89] that a securities borrowing and lending arrangement effected a transfer of title, and was not a loan in the traditional sense. Yet, the judge there also noted that thought that securities lending, in its different variants, was a factually incorrect description in that title to the shares passes from lender to borrower.

Regulation of intermediaries

Capital markets services licence

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83 [1954] 1 WLR 1489

84 *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [66].

85 [1993] 1 SLR(R) 871.

86 This was said in the course of holding a sale and repurchase agreement between a company and a bank to be a genuine transaction and not an unregistered charge, even though the bank initially recorded the transaction as a loan in its internal documentation.

87 [2012] 1 SLR 32, noted Timothy Liau, "Characterisation and shams following contextual contractual interpretation: A view from Singapore" [2014] LMCLQ 13.

88 *Supra* n 76.

89 [2008] FCA 594, noted Hans Tjio, "Share Lending in Australia" [2009] LMCLQ 4.

Before the events which transpired in *The Enterprise Fund III Ltd* (discussed above), in *The Enterprise Fund II Ltd v Jong Hee Sen*[90] a listed fund, EFII, agreed to purchase 20,833,000 ordinary shares of IHC for $0.48 shortly prior to its listing, from HMC (a listed healthcare company). Jong was a director of HMC who later resigned to become a director of IHC. Jong and some others including a predecessor company of IHC before its restructuring for listing) (collectively known as "the Warrantors") executed a deed of undertaking ("DOU"), on a joint and several basis, in favour of EFII. This warranted that they would use their best endeavours to procure the sale of the IHC shares owned by EFII at a higher price (a minimum of $0.576) 9 months from the initial sale. Further, should the sale be insufficient to raise the targeted sales proceeds, the Warrantors undertook to effect the purchase of the remaining shares such that EFII received, in aggregate, the targeted sales proceeds. To secure the Warrantors obligations, Jong assigned his shares in HMC to EFII as security. Both the warranty and security were called upon when the Warrantors could not effect a sale within the 9 month period. The shares were eventually sold by EFII at a sum far below the targeted sales proceeds. The case focused on the interpretation of the DOU, which was found by Hoo J to impose an obligation on the Warrantors to purchase the shares even if no sale of any shares were effected in the 9 month period, and EFII did not receive the targeted sales proceeds. Jong, however, also argued that EFII had breached the Securities and Futures Act as it did not have a capital markets services licence for dealing in securities when it entered into the various agreements with a view to acquiring and disposing of securities. Hoo J dismissed these arguments by confirming that section 82 of the Securities and Futures Act read with Part I of the Second Schedule required a person to carry on the business of dealing in securities before a licence was required. Following cases interpreting the meaning of "carrying on a business" in the context of moneylending, Hoo J held that the same test requiring "system and continuity" was needed and this excluded "activity which is simply incident to the person's core business"[91]. Given the present state of the law, Hoo J did not accept Jong's submission that even one-off transactions may be caught if there was "an intention to repeat such transactions in the dealing of securities"[92]. This decision should assist many unlicensed retail investors and fund managers holding a capital markets services licence to provide fund management who might otherwise be said to be dealing in securities (given the width of its definition) when they do so not as broking intermediaries but persons who trade on their own account or manage funds for others.

Duties to customers and know your client rules: Private law versus public regulation

AL Shams Global Ltd v BNP Paribas[93] ("*AL Shams*") involved a bank's refusal to accept payments that were sent to a customer's account, which in this case was AL Shams, a BVI-incorporated company. AL Shams had not given BNP all the documents it required and BNP was in the process of closing the account when an attempt was made to deposit a large sum of money arising from property transactions within the AL Shams group. When this was refused due to the bank's internal

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[90] [2019] SGHC 87. The appellant's appeal in Civil Appeal No 91 of 2019 was dismissed by the Court of Appeal on 16 January 2020 with no written grounds of decision rendered.

[91] *The Enterprise Fund II Ltd v Jong Hee Sen* [2019] SGHC 87 at [77].

[92] *The Enterprise Fund II Ltd v Jong Hee Sen* [2019] SGHC 87 at [68] and [77]. Jong relied on the Australian decision of *Yolarno Pty Ltd v Transglobal Capital Pty Ltd & Ors (No 2)* [2003] NSWSC 1004.

[93] [2019] 3 SLR 1189.

policies, AL Shams sought a declaration that the bank had breached various duties that were owed to it.

The court in *AL Shams* held that there was no fiduciary relationship between the banker and customer here as the general rule with respect to the banker-customer relationships applied. No additional services were provided by the bank that may have altered that relationship in a manner described in the 2018 Annual Review.[94] For example, in *Zhou Weidong v Liew Kai Lung*[95] it was held that financial advisers can, depending on the factual circumstances, be fiduciaries with respect to their clients, even if the intermediaries do not fall within a traditional category of fiduciaries.

The bank's duties in *AL Shams* were only contractual in nature, and the 2010 edition of the terms and conditions that were incorporated at the time the AL Shams account was opened contained a clause, Cl 3.5(D), which allowed the bank to refuse to accept any deposit at its discretion. This was only subject to the Bank exercising such discretion in good faith and not in an arbitrary, capricious or perverse manner, and there was no evidence of such.[96] Such a limitation is likely to be an implied term in the contract between banker and customer, as was held by the English Court of Appeal in *Paragon Finance plc v Nash*[97]. *AL Shams* is an example of how public law is seeping into private law considerations where appropriate to prevent "commercial absurdity" in the exercise of discretionary powers conferred by contracts.[98] Another example is the consideration of proportionality (though perhaps not its stricter public law conception) in *Anan*, as seen above.[99]

In any case, arguing for a fiduciary relationship here did not add anything to existing contractual and tortious duties, as the former is essentially about conflicts of interest and the dispute here was about the bank's mandate. Kannan Ramesh J further noted that a contract between a bank and a customer was not a recognised class of contracts in which the doctrine of good faith applied.[100] Nor was negligence at issue – the bank deliberately chose not to accept the payment and not to give the customer reasons for doing so. Thus, the argument was really one of the bank's capriciousness only, and only in terms of it not accepting payment as opposed to not giving reasons for its decision. The judge quite clearly saw that many of the arguments with respect to the content of banks' duties simply did not fit the factual matrix of the case.

This was also the case in *Koh Kim Teck v Credit Suisse AG Singapore Branch*[101], where Aedit Abdullah J held that Credit Suisse did not owe a duty of care to its customer at all because the

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94 Hans Tjio, "Securities and Financial Services Regulation" (2018) 19 SAL Ann Rev 738 at paras 25.16 to 25.23.

95 [2018] 3 SLR 1236.

96 *AL Shams* at [42].

97 [2002] 1 WLR 685 at [36].

98 *Watson v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm).

99 See above at text accompanying fn 84. See further ZX Tan, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (forthcoming in (2020) Canadian Journal of Law and Jurisprudence).

100 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [49].

101 [2019] SGHC 82, following *Deustche Bank AG v Chang Tse Wen* [2013] 4 SLR 886. See Kelry Loi & Kelvin Low, "Non-reliance clauses and the Unfair Contract Terms Act: Welcome Clarity from Singapore" [2014] JBL 155. Reverse veil piercing had been seen to be possible by Aedit Abdullah JC (as

customer's account was execution-only and non-discretionary in nature, not involving an advisory or management relationship. Even if there had been a duty of care owed by the bank to its customer, there had been no breach of that duty. This case involved a plaintiff who sued his bank for losses incurred by him investing in knock-out discount accumulators and dual currency investments that he purchased from the bank. He alleged breaches of the tortious duty of care owed to him personally both for his losses as well as in the bank's treatment of the collateral shortfall and closing out of his account at the height of the 2008 Global Financial Crisis. The plaintiff's appeal in Civil Appeal No 176 of 2018 was dismissed by the Court of Appeal on 23 October 2019 with no written grounds of decision rendered, which is highly instructive. Here, the plaintiff was clearly a sophisticated investor, having been a stockbroker for many years (reaching the position of general managing of a large stockbroking firm in Malaysia before retiring).

These cases were Singapore decisions relating to a financial institution's possible breach of duty in terms of its relationship dealing with a customer. This is to be contrasted with the recent UK case of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*[102] which was about the breach of the *Quincecare*[103] duty of care to protect bank customers when a bank is put on inquiry and has reasonable grounds for believing that an instruction is an attempt to misappropriate a customer's funds. There, the English Court of Appeal, which judgment was affirmed by the UK Supreme Court, thought that it involved possibly the first case where a court found against a bank for breach of that duty. But there are different considerations for a financial institution, whether a fiduciary or not, when it comes to protecting its customers from threats from third party criminal activity as opposed to where it deals in a transaction with the client or carries out its clients mandate (where it may be concerned also about criminal activity on the part of the customer).

In *AL Shams*, there was a further public law element in the plaintiff's argument seeking a declaration that the bank ought to have referred the payment (presumably as opposed to refusing to accept it) to a Suspicious Transaction Reporting Officer under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[104] or the Commissioner of Police under the Terrorism (Suppression of Financing) Act[105]. Ramesh J held that AL Shams had no *locus standi* to do so, as it was not conferred a personal right to the bank's reporting obligations that was enforceable against an adverse party to the litigation like BNP. The judge said that:[106]

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he then was) when refusing to strike out the plaintiff's claim in *Koh Kim Teck v Credit Suisse AG Singapore Branch* [2015] SGHC 52. But this was expressly rejected in *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] SGHC 24.

102 [2019] UKSC 50, noted Rachel Leow (forthcoming in (2020) LQR). The other important point in the case was that whether attribution of an agent's knowledge is made to a company (even a one-person company) depends on its context and purpose, *eg* whether the company's responsibility is being apportioned with an agent or with a third party.

103 *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 36, where it was held that there is an implied term of the contract between a banker and its customer that the bank would use reasonable skill and care in executing the customer's orders; but this was balanced by a duty to execute those orders promptly. However, a bank should not execute an order if it was put on inquiry in having reasonable grounds for believing that the order was an attempt to misappropriate the customers' funds.

104 Cap 65A, 2000 Rev Ed.

105 Cap 325, 2003 Rev Ed.

106 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [80]–[81].

> While the CDSA and the TFSA might have imposed obligations on the Bank to report certain transactions to the relevant authorities, these obligations were owed to the relevant authorities and not to ASGL. Nothing in either the CDSA or the TSFA indicated that customers of a bank had a statutory right or claim against the bank for breach of such reporting obligations. Instead, both statutes prescribed offences for failure to make disclosures in stipulated circumstances … It was apparent that ASGL did not have a right against the Bank in respect of any obligation the Bank might have had to report the Payment …
>
> Separately … even if there was such a right, ASGL had no factual basis to found its application for [such a declaration] … [t]here was no evidence that the Bank had *not* in fact referred the matter of the Payment to the relevant authorities … Further, there was also no evidence to show that the Payment was a transaction that ought to have been referred to the relevant authorities under either [the TSFA or the CDSA]. [emphasis original]

The judgment clearly demarcates the respective spheres of public and private law, which is increasingly of great interest. *AL Shams* was really about a private law payment obligation but with an overlay of financial regulations largely to do with money-laundering now involved. It is clear, however, that such regulations do not give rise to a private right of action or defence. Another recent case showing the interrelationship between the two is *Malayan Banking Bhd v Barclays Bank PLC*[107]. Here, Barclays Bank failed to make payment to Malayan Banking after having sent a SWIFT message asking Malayan Banking to credit a beneficiary customer's account. The reason why Barclays Bank instructed its correspondent bank not to pay the monies to Malayan Banking was that Barclays Bank received information that the funds to be transferred had been received by its customer "in questionable circumstances".[108] The problem was that Malayan Banking had already credited the sum to the beneficiary, who refused to allow the funds to be debited on the grounds that the payment was made for a genuine business transaction. Malayan Banking argued that Barclays Bank had breached an implied contract based on the payment instruction. Barclays Bank argued, however, that it was customary practice not to pay out until funds had been received and that in any case if it had transferred the funds over to Malayan Banking it would have fallen foul of para 5.5 of the SWIFT General Terms and Conditions. This required compliance with good industry practice and all relevant laws, regulations and third-party rights.

The SICC held that an implied contract was formed between the bank sending a SWIFT instruction and the bank receiving it, which was close to an irrevocable agency relationship.[109] That instruction could only be withdrawn before it was acted upon, and Barclays Bank failed to discharge the burden of proof of showing that there was an established banking practice which constituted a usage or custom that was notorious, certain and reasonable that receiving banks did not pay out on SWIFT instructions until a cover payment was received.[110] Jeremy Cooke IJ also held that Barclays Bank would not have fallen foul of para 5.5 of the SWIFT General Terms and Conditions

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107 [2019] SGHC(I) 4. The appeal was heard on 28 November 2019.

108 *Ibid* at [7].

109 *Ibid* at [25].

110 *Ibid* at [89].

had it had made payment to Malayan Banking at the time, or after investigation. Barclays Bank had other options available, such as making payment from its own funds, without running the risk of any liability under various UK provisions including s 327 of the Proceeds of Crime Act 2002[111], or under the money laundering regulations, including regs 19, 20 of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017[112]. Again, this shows the limited scope for the invocation of public law in order to avoid or disrupt private law obligations. The same holds true for attempts to use public documents and stock exchange regulations to found a duty of care. In *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc*[113] it was said that:

> ... even if passages in public documents that state the policies of a group of companies could be construed as being sufficient to establish the presumption of a duty of care on the part of a parent for the acts of its subsidiary, then the words which appear in the Shell documents effectively disclaiming that interpretation would negate that presumption ... [moreover] I do not consider that such a presumption would operate in any event on the basis of such statements. The London Stock Exchange is a Recognised Investment Exchange under UK law, and operates a regulated market. The Exchange must ensure that all securities admitted to trading on its markets, and the dealing in those securities, are conducted in accordance with the relevant legislation (both primary and secondary). That includes complying with certain disclosure standards. It is highly unlikely in my judgment that compliance with such disclosure standards could of itself be characterised as an assumption of a duty of care by a parent company over the subsidiary companies referred to in those statements. There is certainly no authority to this effect and in the absence of any, I would hold that such compliance cannot in itself be a sufficient factor to found a duty of care on the part of a parent holding company."

Fraud and recklessness in private and public law

In *Liu Yanzhe v Tan Eu Jin*[114] ("*Liu Yanzhe*") the Singapore High Court dismissed a claim for fraudulent misrepresentation against a Credit Suisse private banker andsenior relationship manager. He was the 4th defendant and the only defendant to have defended the case to trial, the other three having disappeared or become bankrupt/insolvent. The 4th defendant had acted in his personal capacity and not on behalf of the bank in getting the plaintiffs to make a $1 million "Autostyle" investment with the 3rd defendant, JE Capital Pte Ltd, a company incorporated in

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111 c 29, UK.

112 SI 2017 No 692, UK. Barclays would still have been in compliance with industry practice, relevant laws, regulations and third-party rights had it made payment from its own or other funds: *Malayan Banking Bhd v Barclays Bank PLC* [2019] SGHC(I) 4 at [98], [101], [103] to [105], [109] and [110].

113 [2017] EWHC 89 at [95] and [96], on appeal *Okpabi & Ors v. Royal Dutch Shell Plc* [2018] EWCA Civ 191, noted Penelope A Berkamp, "Parent Company Liability After Okpabi v. Shell" [2018] 15 European Company Law Journal 112. This is one of a series of preliminary hearings attempting to impose parent liabilities for torts committed by subsidiaries against its employees and third parties. See now *Vedanta Resources plc v. Lungowe* [2019] UKSC 20, noted Penelope A Berkamp, "Models of Corporate Supply Chain Liability: Are the Foundations Being Laid for A New Type of Vicarious Liability Regime?" [2018] 16 European Company Law Journal 155.

114 [2019] SGHC 67.

Singapore.[115] JE Capital was run by the first 2 defendants as its only directors and major shareholders, the 2nd of whom was the rogue behind the transaction who dealt with the plaintiff and then subsequently disappeared. Autostyle Car Limited was a purported car company in which the fund was to invest in, although the judge thought[116] that the entire structure was vague as there were other parties, real or fictitious, that were brought into the picture. The investment was in the nature of a note which was to provide a 15% per annum return in 2 biannual tranches. The company failed to repay the principal after having paid the interest on the note. After some promises to be repaid in instalments, the plaintiff only received a part-payment of around SGD 103,740. It was alleged that the 2nd defendant had such a close relationship with the 4th defendant that it invited suspicion. This was dismissed by the judge as a relationship manager of a bank was expected to develop close ties with his clients.[117] There were, however, some payments from the 2nd to 4th defendant, which the judge found to be unconnected to the Autostyle investment. These were held not to be commissions but reimbursement of expenses generally. Instead, the relationship manager was seen as an intermediary acting as a messenger between the plaintiff and third defendant.

Interestingly, Vinodh Coomaraswamy J re-examined *Derry v Peek*[118] ("*Derry v Peek*") fraud in detail, where Lord Hershell said that for there to be deceit or fraud (which is the same) it must be shown that a defendant (i) knows a statement is untrue, or (ii) has no belief in its truth, or (iii) is reckless as to whether it is true or false.[119] Coomaraswamy J held that gross negligence is not fraud. But he also states that recklessness is not fraud:[120]

> Therefore, Lord Herschell's reference in *Derry v Peek* to the representor being "reckless, careless whether it be true or false" does not allow gross negligence or recklessness to suffice to establish fraud … Dishonesty is an essential aspect of fraud. Dishonesty in this connection is a state of mind to be determined subjectively. Negligence is conduct which demonstrates a failure to take reasonable care. Dishonesty must not be conflated with negligence (see *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 at [117]). Conduct which demonstrates a failure to take reasonable care may be evidence from which one can infer dishonesty as a subjective state of mind. But negligence, however gross, is not fraud (see Anna Wee at [35]) …

This is consistent with *Medforth v Blake*[121], a case on receivers' duties, where in discussing bad faith and negligence, Scott VC said when extending the equitable duty of receivers beyond good faith to one of care:[122]

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115 *Liu Yanzhe v Tan Eu Jin* at [8].
116 *Liu Yanzhe v Tan Eu Jin* [2019] SGHC 67 at [50].
117 *Liu Yanzhe v Tan Eu Jin* at [89].
118 (1889) 14 App Cas 337.
119 *Derry v Peek* (1889) 14 App Cas 337 at 374.
120 *Liu Yanzhe v Tan Eu Jin* [2019] SGHC 67 at [82]-[83]
121 *Medforth v Blake* [2000] 1 Ch 86.
122 *Medforth v Blake* [2000] 1 Ch 86 at 101. This concerned an equitable duty of care and not a fiduciary duty which was seen to be quite different in *Aljunied-Hougang Town Council v Lim Swee Lian Sylvia* [2019] SGHC 241; *Bristol and West Building Society v Mothew* [1998] Ch 1. The equitable duty of care is similar to the tortious duty of care in terms of the need to show causation.

> (ii) I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart. Equity has not always done so. The equitable doctrine of "fraud on a power" has little, if anything, to do with fraud. Lord Herschell in *Kennedy v. De Trafford* [1897] A.C. 180 gave an explanation of a lack of good faith that would have allowed conduct that was grossly negligent to have qualified notwithstanding that the consequences of the conduct were not intended. In my judgment, the breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established.

Both cases referred to separate statements of Lord Herschell when things were less clear and there may have been a doctrine of gross negligence in English law.[123] This may have tied in with the idea of a fiduciary duty of care that was created in *Nocton v Lord Ashburton*[124], at a time when a non-fiduciary could not be liable for pure economic losses based on negligence. This is no longer the case following *Hedley Bryne & Co Ltd v Heller & Partners Ltd*[125] and there is very little discussion of a fiduciary duty of care today except in the US. In any case, that purported higher standard in the US, which may be the reason why people argue that Regulation Best Interest applicable to financial advisers there creates a less than fiduciary standard, may only be theoretical at best in the case of directors, as boards there can rely on a business judgment rule.

In terms of recklessness and fraud, however, Commonwealth cases show that general recklessness *per se* is not fraud in many parts of private law, although when one is reckless as to the truth that may be the strongest evidence possible that one has the necessary intent to be considered fraudulent. Similarly, in *Clydesdale Bank plc v John Workman*[126] it was held that recklessness was just evidence of dishonesty and not dishonesty itself, which had to be determined on firm findings of fact. This was an unsuccessful case brought for dishonest assistance by solicitors in a breach of trust.[127]

In Singapore, it was confirmed in *Liu Yanzhe* that "establishing fraud on the balance of probabilities requires cogent evidence."[128] There, the six alleged misrepresentations did not satisfy

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123 See Sandra Frisby "Making a Silk Purse out of a Pig's Ear - Medforth v Blake & Ors" (2000) 63 MLR 413 arguing that we previously mixed good faith and negligence which Claire Hill points out has also been mistakenly done with directors duties in the US: Claire Hill and Brett McDonnell, "Stone v. Ritter and the Expanding Duty of Loyalty" (2007) 76 Fordham L Rev 1769.

124 [1914] AC 932.

125 [1964] AC 465.

126 [2016] EWCA Civ 73 at [48]-[51].

127 Where dishonesty may have a very strong or sole objective element: *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589; *Ivey v Genting Casino* [2017] UKSC 67.

128 *Liu Yanzhe v Tan Eu Jin* [2019] SGHC 67 at [84], citing *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [161].

the subjective test of fraud. The plaintiffs' appeal was dismissed by the Court of Appeal[129] with no written grounds of decision rendered. The Court of Appeal agreed with the court below that the plaintiffs' claim in fraudulent misrepresentation against the fourth defendant was not established. It was of the view that the trial judge had not erred in finding that the evidence showed that the fourth defendant was not complicit in the fraud and was instead merely an intermediary relaying information between the other defendants and the plaintiffs.

Things may be different in the public space but it really depends on how words are used in the relevant legislation. Section 199 of the SFA prohibits a person from recklessly or knowingly making or disseminating information that is false or misleading in a material particular and is likely to induce (a) other persons to subscribe for; (b) induce the sale or purchase of; or (c) affect the market price of, securities, securities-based derivatives contracts or CIS units. The difficulty with this provision is that there are three limbs to the *actus reus* (limbs (a)-(c) above),[130] alongside two limbs for the *mens rea*, which are that the person when he makes or disseminates the information either (i) "does not care whether the statement or information is true or false" or (ii) "knows or ought reasonably to have known that the statement or information is false or misleading in a material particular."[131]

It was held in *Public Prosecutor v Wang Ziyi Able*[132] ("*Wang Ziyi Able*") that given the construction of s 199 of the SFA, whereas the second limb of *mens rea* (in s 199(ii)) created an objective test, the first limb (in s 199(i)) required some form of recklessness of the type in *Derry v Peek*, which was ascertained on a subjective standard. However, it was said in *Wang Ziyi Able* that "objective analysis can only constitute *evidence*, albeit often relatively strong evidence, for the purposes of the s 199(i) *mens rea*" [emphasis original].[133] This again shows the dangers of translating private law concepts in the public regulatory sphere and vice versa. Here it seems that objective evidence is used to prove recklessness, which is different from a negligence standard. This suggests that gross negligence may exist as a standard of behavior or state of mind where certain statutes are concerned. This is because the judge noted the difference in mental states – in s 199(i), the words "does not care" reflected a *recklessness* standard; in s 199(ii), the reference to the word "knows" was about *dishonest intention*, whereas a *negligence* standard was found in the words "ought reasonably to have known".[134] Intention as a state of mind is more relevant to wrongs by conduct. In this context recklessness is useful more as evidence of that intention. Recklessness as a state of mind is, however, also relevant to wrongs that consist of a circumstance or consequence and it may be that the two limbs in ss 199(i) and (ii) reflect those differences.[135] Here, however, recklessness could by itself be a qualifying test for liability. But the distinctions are far

[129] Civil Appeal No 91 of 2018, dismissed on 26 September 2019.
[130] SFA, ss 199(*a*)-(*c*).
[131] SFA, ss 199(i)-(ii).
[132] [2008] 2 SLR(R) 61, discussed by YC Toh, 'Knowing, Not Knowing and Almost Knowing' (2008) 20 SAcLJ 677.
[133] *PP v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [88] *per* VK Rajah JA. See also *Wu Yang Construction Ltd v Zhejiang Jinyi* [2006] 4 SLR(R) 451.
[134] *PP v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [17].
[135] See Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis, 7th ed, 2008) at para 17.18 referring to section 5.6 of the Australian Criminal Code.

from clear and so the various conceptions of recklessness will continue to trouble us in private law, criminal law and financial regulation.