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2022. Securities and Financial Services Regulation

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Abstract

Jim Chanos has said that the time is ripe for fraud given the large valuation increases in financial assets, technology and now significant declines due to inflation and even more so the crypto winter. There are also extreme inequalities which provide the right conditions for some planning to take things from others. While the primary market has been less active given falls in market prices, the fact that the secondary markets have been so volatile has resulted in consequent problems as losses are not fully or properly disclosed or even acknowledged.

Market Abuse

As Jim Chanos has said, the time is ripe for fraud[1] given the large valuation increases in financial assets followed by significant declines due to inflation and even more so the crypto winter. There are also extreme inequalities which provide the right conditions for some wanting to take things from others[2]. While the primary market has been less active given falls in market prices, the fact that the secondary markets have been so volatile has resulted in consequent problems as losses are not fully or properly disclosed or even acknowledged. But this is a continuation of a story with derivatives[3], perpetual securities[4], commodity trading[5] and now crypto assets that will exist for a while more given the enormous asset inflation we previously witnessed in recent years.

But it can be more sinister than that in that there are clearly forms of market abuse more egregious than disclosure lapses. We saw this with the yet unreported case of market manipulation which has drawn much media attention in 2022 involving Catalist penny stocks Blumont, Asiaons and LionGold which wiped out nearly $8 billion in market capitalisation in October 2013. The main perpetrators were found guilty of the many criminal charges brought against them under the Securities and Futures Act ("SFA") but the written judgment has not been passed down yet. They have been sentenced[6] and we hope to be able to report on the case next year. One other reason why there were no other written judgments in the area of market manipulation may be because many involved guilty pleas and there had already been numerous judgments focusing on sentencing guidelines in relation to market fraud

[1] Jim Chanos" Transcript: Jim Chanos on the Tech Bust, Crypto, and Fraud" Bloomberg, 24 November 2022. Crypto has also resulted in new assets that have been the subject of family disputes: see *Enjin Pte Ltd v Pritchard Lilia* [2022] SGHC 20.

[2] As opposed to making things: Marianna Mazucatto, *The Value of Everything: Making and Taking in the Global Economy* (2018).

[3] It has not been easy regulating them: Henry Hu, "Governance and the Decoupling of Debt and Equity: The SEC Moves" (2022) 17(4) Capital Markets Law Journal (forthcoming), available at http://ssrn.com/abstract=4241269.

[4] In Singapore see the Hyflux litigation and continued issue of perpetual bonds by entities that do not appear to have a great deal of permanence.

[5] *Debenho Pte Ltd and another v Envy Global Trading Pte Ltd* [2022] SGHC 7 (nickel trading).

[6] Grace Leong, "Penny stock crash mastermind John Soh gets 36 years' jail, Quah Su-Ling sentenced to 20 years" Straits Times, 29 December 2022.

that were discussed in previous Annual Reviews which appears to have quietened the number of cases in the area.

Continuous Disclosure

Where disclosure was concerned, there were also very few decided cases in 2022 itself but many in the pipeline including alleged continuous disclosure breaches in Hyflux Ltd, the leading water-treatment company listed on the Singapore Exchange ("SGX"). There, details of a new energy project that was likely loss-making were not disclosed at the time of the issue of retail perpetual securities in 2016 (S$500 million at 6 per cent) which were later found to rank at the same level as a prior tranche of 2011 preference shares (S$400 million at 6 per cent)). Both issues required only offer information statements under s 277 of the SFA as Hyflux's shares were already listed on the Singapore Exchange, and this required less disclosure than in a prospectus. But there were alleged problems with disclosure even in the 2011 offer information statement which is under investigation.[7] An investor led pre-emptive lawsuit seems to be on hold[8], however, even though the relevant officers have been charged with offences under the SFA.[9] If the former were to proceed, interesting issues here would also involve matters dealt with in 2022 by the UK Supreme Court in *BTI 2014 LLC v Sequana SA*,[10] that is, non-insolvency fraudulent conveyance rules found in s 439 of the Insolvency, Restructuring and Dissolution Act 2018 and directors' duties to take into account creditor interests in the vicinity of insolvency (Hyflux was eventually wound up in mid-2021).

A recent case where a civil penalty action was settled with the Monetary Authority of Singapore ("MAS") for continuous disclosure breaches involved Noble Group Ltd, a commodity trading company listed on the SGX Mainboard. A civil penalty of $12.6 million was paid by the listed company for publishing misleading information in its financial statements for the fiscal years ended December 2012 to 2016. The company was eventually wound up in 2018. Unlike with Hyflux[11], however, officers of the company were not prosecuted as external auditors had signed off on the treatment of certain long-term marketing agreements with mine owners and coal producers as financial instruments instead of service contracts. This allowed them to be given different accounting treatment. Future fees from these agreements were also recognised before the services were rendered, thus inflating the group's profits and net assets from 2016 to 2018. The Accounting and Corporate Regulatory Authority ("ACRA") did, however, issue "stern warnings" to two former directors of a unit of Noble for failing to prepare and table annual financial statements in compliance with Singapore's accounting standards. The continuous disclosure problems with Hyflux and Noble have led to calls by journalists for a mechanism for investor compensation, as opposed to fines, either through class action lawsuits or regulatory action.[12]

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[7] https://www.police.gov.sg/Media-Room/News/20221117_former_ceo_cfo_and_independent_directors_of_hyflux_ltd_charged_w_offences

[8] Tan Peck Gek, "Hyflux's pre-emptive lawsuit against its founder Olivia Lum has been put on hold" Lianhe Zaobao, 23 May 2022.

[9] Grace Leong, "Ex-Hyflux CEO Olivia Lum, ex-CFO and four others charged with violations of Securities and Futures Act" Straits Times, 18 November 2022.

[10] [2022] UKSC 25.

[11] Hyflux is suing its auditors: Tan Peck Gek, "Hyflux seeks S$684.6 million from KPMG for alleged negligence" Business Times, 1 December 2022.

[12] Kenneth Lim, "It's fine to fine Noble, but maybe nobler to pass it on: Opinion class action litigation?" Business Times, 31 August 2022 and Ben Paul, "Singapore needs appropriate laws, enforcement mechanisms to handle debacles like Noble bust: Opinion" Business Times, 25 August 2022.

One decided case was heard in the District Courts in *Public Prosecutor v Ngiam Zee Moey*[13]. Here, three persons who were directors (2 independent and one non-independent) of New Lakeside Holdings Limited ("NLHL") a Catalist-listed company were charged for failing to fulfill their obligation under Rule 703 of the SGX Listing (SESDAQ) Rules read with Appendix 7 of the Listing Manual on Corporate Disclosure Policy. This provided that NLHL had to announce any information known to it which was necessary to avoid the establishment of a false market where information would, or would likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell the securities, was not made available.

The allegation was that the three defendants had failed to notify SGX of the fact that the Bank of China ("BOC") had called upon a corporate guarantee which a subsidiary of NLHL had given to BOC in respect of a banking facility granted to a former subsidiary of NLHL, and that BOC had subsequently taken legal action. While NLHL was the primary offender under s 203 of the SFA, liability could be attributed to the three individuals under s 331 of the SFA if they consented or connived in the primary offence or that offence was attributable to any neglect on the part of an officer of that body corporate. It was the latter limb of s 331 that was at issue here and this could be seen as a form of board oversight liability in that the question was whether the three defendants had been negligent in not ensuring that the company had satisfied SGX's continuous disclosure rules. In the first two drafts of the profit warning announcement that had been circulated to directors the BOC loan was mentioned. This, however, did not find its way into the final draft.

The judge held that NLHL's failure to disclose the information concerning the crystallisation of the corporate guarantee to SGX was intentional. Using the directing mind and will theory, he identified the CEO "Go" and CFO "Oh" as the persons whose knowledge or state of mind were to be attributed to NLHL.[14] Next, he asked if the offence was in turn attributable to the neglect of the three directors. Here the judge expressed some surprise that the defendants accepted that they had a duty to ensure proper continuous disclosure in accordance with Rule 703 which was based on their s 157 Companies Act director duty to act honestly and with reasonable diligence. This is possibly the first time we have seen some form of "stepping stone" liability of the kind witnessed in Australia and may be foundational for corporate sustainability and purpose. The judge said[15]:

> It was a surprise that the three accused persons accepted that they owed this general duty to NLHL. Ngiam and Tham had agreed that the whole board of directors of NLHL had to ensure that NLHL complied with the applicable rules and regulations, and that this included compliance with the SGX SESDAQ Rules which were applicable to NLHL at the material time. Ong had also agreed with the above but however added that his duty arose from the SGX Listing Rules and not from the CA. Therefore, each accused person owed various duties to NLHL. This included the duty to take reasonable diligence and to act in NLHL's best interest. These duties to NLHL were personal to them. They had the continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors. If they delegated certain functions in the discharge of their duties, they had the duty to supervise the discharge of these delegated functions: see *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] SGCA 41 at [130]("PlanAssure").

[13] [2022] SGDC 115.
[14] *Ibid* at para 24-25.
[15] *Ibid* at para 32.

"Stepping stone" liability in Australia is of this nature where directors can be sued, usually for breaches of the duty of care and to act in the best interests of the company in relation to the breach or non-compliance with other statutes by the company, often involving securities disclosure.[16] But this is an action brought by the company, and any compensation is made directly to the company for any loss the company suffers, whereas under s 157 here there are criminal sanctions. Unlike in Singapore, the ASIC can also obtain civil penalties for such breaches against those individuals. Seeing s 157 as encapsulating the duty to act bona fide in the company's best interest as well as a minimum baseline negligence standard, the judge held that the defendants were possibly guilty given their expertise and experience.[17] In particular, they had knowledge of corporate finance, corporate governance and the law. However, the judge's surprise at the defendant's concession hints that more work must be done in linking regulatory compliance with external requirements with duties of care and loyalty[18]. It may be that the proper purpose rule fits better with duties to comply.[19]

But liability ultimately founded on with whether the undisclosed information was material in the sense that the information would or would likely, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell the securities. The district judge was bound by *Madhavan Peter v Public Prosecutor*[20], where the previous Chief Justice, Chan Sek Keong CJ, in hearing an appeal from the Magistrates Court held that there was the difference between the trade-sensitivity required to prove a case of insider trading, and that of price-sensitivity required to prove a breach of the continuous disclosure rules in section 203 of the SFA. For the latter, District Judge Shaiffudin Bin Saruwan said:[21]

> Chan CJ held that it was essential to consider the evidence of the market impact after the announcement was released, and it was necessary to determine what information disclosed in the announcement caused the movements in the shares (at [97]).

Given this, he held that it could not be proven beyond a reasonable doubt that the undisclosed information was material in that sense and so acquitted the three directors.

There is a pending appeal and it is hoped that the difference between price- and trade-sensitivity will be further explored at that time. This is because it is also clear that the standards of continuous disclosure are now stricter, with the SGX amending its rules in February 2020[22] to affirm that what had to be disclosed was not just "price-sensitive" news (as suggested in *Madhavan Peter v PP*[23] which was based on the previous listing rules) but also "trade-sensitive" news (which *Madhavan Peter v PP*[24] held was applicable to insider trading but not continuous disclosure). At the same time, however, an academic has argued that information that would cause a reasonable investor to trade would also be information that would convince a sufficient number of investors to do so and this would naturally

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[16] *Cf* R Teele Langford, "'Dystopian Accessorial Liability' or the End of 'Stepping Stones' As We Know it" (2020) 37(5) Company and Securities Law Journal.
[17] [2022] SGDC 115 at paras 27 and 34.
[18] Andrew S Gold, "The Internal Limits on Fiduciary Loyalty" (2020) 65 American Journal of Jurisprudence 65.
[19] Hans Tjio, "Rethinking Share Repurchases" (2021) Capital Markets Law Journal 16.
[20] [2012] SGHC 153.
[21] *Supra* n 11 at [57].
[22] SGX Regco, Amendments to Practice Note 7.1 (Continuing Disclosure) of the Mainboard Rules and Practice Note 7A of the Catalist Rules, 7 February 2020.
[23] *Madhavan Peter v PP* [2012] 4 SLR 613.
[24] *Madhavan Peter v PP* [2012] 4 SLR 613.

have an effect on the market price.[25] As such, there is not necessarily a clear distinction between price- and trade- sensitivity.

Cryptoasset Problems

The crypto winter may be here and it is now clear that many of the problems in this space revolve around the platforms and exchanges that allow the trading of cryptocurrency and tokens without regulation. MAS has now proposed a regulatory regime for service providers that will come into force in 2023 and which seeks to regulate the key areas of consumer access, business conduct etc[26]. It is not clear what the final form of this will be as there are still those who argue that these intermediaries should not be overregulated despite the failure of one of the largest crypto exchanges in the world in November 2022, FTX.[27] This had followed the earlier failures of a stablecoin, Terra Luna, and a crypto fund, Three Arrows Capital, earlier in the year.

The problem is less with the creation of crypto assets than the funds, platforms and exchanges which magnify the risks through leverage, asset borrowing and lending, and even the manufacture of derivatives. If so, concerns with prospectus requirements may be misplaced, and we are fighting the last securities regulation war there when the problems are associated with the secondary market. Having said that, the primary market creation of crypto assets is likely the result of much legal and financial strategizing and planning, and confirms the argument raised by Katherine Pistor about how much capital is today (and in fact even historically) coded by lawyers. In an important decision, the High Court of Singapore in *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)*[28] has recognised that non-fungible[29] tokens are a form of property that could be the subject matter of a proprietary injunction against their transfer. The property aspects of crypto have also led to a marital dispute[30] and other civil lawsuits.[31]

The crypto asset in this case was an NFT known as the Bored Ape Yacht Club ID #2162 (with its own unique hash number on an Ethereum (“ETH”) blockchain, a decentralised digital ledger) which was part of a collection of 10,000 other pieces of artwork depicting apes with distinctly different attributes. The claimant acquired the Bored Ape NFT on 6 August 2021 when he purchased it for 15.99 ETH. He claimed that he had lost possession of it when he used it as collateral to raise financing on a community platform, NFTfi, set up for this purpose. He had done this successfully on previous occasions where the lenders had complied with the terms of the loan and did not foreclose on the NFT. In the present

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[25] Booth, Richard A, “The Two Faces of Materiality” (2013) 38(2) Delaware Journal of Corporate Law 517.

[26] https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/2022-Proposed-Regulatory-Measures-for-DPT-Services/Consultation-Paper-on-Proposed-Regulatory-Measures-for-Digital-Payment-Token-Services.pdf at [2.8].

[27] Carol R Goforth, "Critiquing the SEC’s On-Going Efforts to Regulate Crypto Exchanges" 14 William & Mary Business Law Review (Forthcoming 2022). In contrast, the EU MarketsinCryptoassets regulations covers the cryptoasset market itself more than in the UK: Manoj Mistry, “Innovate and protect: Why regulation is necessary in the cryptoasset investment market” (2022) 25 Financial Regulation International 31 October 2022; Neasa MacErlean, “Cryptoassets: a complex regulatory challenge” Compliance Monitor, 5 February 2020.

[28] [2022] SGHC 264.

[29] The reference to fungibility is likely to address the difficulties for the existence of proprietary interests in an undifferentiated bulk raised by *Re London Wine Shippers* [1986] PCC 121. Words used in the crypto world like mining, minting etc are also attempts to draw parallels with the physical world.

[30] *Enjin Pte Ltd v Pritchard Lilia* [2022] SGHC 201, where the disputed token involved a utility token that can be used to create other digital assets.

[31] Joyce Lim, “Singaporean entrepreneur sued over sale of Jim Thompson's first NFTs” Straits Times, 18 February 2022.

case, however, the claimant borrowed from one "chefpierre.eth". Refinancing was sought later and initially chefpierre agreed to it. It, however, later changed its mind and stated that it would not extend any refinancing loan and that it would exercise the "foreclose" option of the NFTfi's Smart Program if the loan was not repaid. The claimant was unable to redeem the loan in time, and chefpierre foreclosed on the security and refused to accept subsequent tender of part of the loan amount, returning that part payment to the claimant. The claimant sought an injunction to stop any potential sale and ownership transfer of the NFT by chefpierre. This came before Lee Seiu Kin J, who had earlier heard the case of *CLM v CLN*[32], where he had held that stolen cryptocurrency assets, specifically Bitcoin and Ethereum, could be the subject of a proprietary injunction.

Lee J first found that there was sufficient connection with Singapore for the court to have jurisdiction to hear the application - despite the decentralised nature of blockchains because the claimant was located in Singapore, and carried on his business here.[33] Further, the court had jurisdiction over chefpierre which was formally an unknown person to the court. Lee J held that the same issues were thrown up in this case as in the earlier cryptocurrency case, stating that the trend in these crypto cases was to fall back on *National Provincial Bank v Ainsworth*[34] where Lord Wilberforce said that "(b)efore a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability." Lee J, however, also thought that the *Ainsworth* test was somewhat circular but applied it by going through each of its elements.[35] In *obiter dicta*, however, whilst acknowledging that he had not heard full arguments on the matter given that chefpierre was not before the court, he also examined contemporary arguments as to whether whether crypto assets such as NFTs could be considered property, and in particular whether they were choses in action.

While the *Ainsworth* test was applied in *Armstrong GmBH v Winnington Networks*[36] to determine if EU carbon credits constituted property, it has been pointed out that it is perhaps not property in the fullest sense[37]. More recently it was reaffirmed again that information is not property.[38] Lee J,[39] however, thought that it was not correct to see crypto assets as just simply information. He also acknowledged, however, that there were difficulties in seeing crypto assets as choses in action. Here he contrasted the view of Kelvin Low,[40] which is that the modern way to look at a chose in action is that it does not require enforceability against another,[41] and that of Bryan J in *AA v Persons Unknown*[42]

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[32] [2022] SGHC 46, following *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809. See also Menon CJ in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 ("B2C2 (CA)") at [144] but Justice Lee observed that the CA did not decide that cryptocurrency was property and so the question is still open in the higher court (at [75]).

[33] *Janesh* at [30]

[34] [1965] AC 1175 at 1247-8, *Janesh* at [69] et al.

[35] *Lee Kien Meng v Cintamani Frank* [2015] SGHC 109 at [70]-[74].

[36] [2012] EWHC 10.

[37] 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.

[38] *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" [2020] Sing JLS 90.

[39] *Supra* n 23 at [57].

[40] "Bitcoins as Property: Welcome Clarity?" (2020) 136 LQR 345.

[41] *Supra* n 23 at [63] *et seq*.

[42] *AA v Persons Unknown who demanded bitcoin on 10thand 11thOctober 2019* [2019] EWHC 3556 (Comm) following the 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.

which is that bitcoin and cryptocurrency could be property without being choses in actions (it clearly cannot be possessed).[43] The latter approach would go against the decision of Fry LJ in *Colonial Bank v Whinney*.[44] This old case has for a long time been taken to stand for the proposition that property had to either be in the form of a chose in possession or a chose in action.

However, just because something is property does not mean that it is valuable in pecuniary terms, as many physical things in this world will attest to. The dangers with the property label, as well as the Government saying that the technology behind some of these crypto assets is extremely valuable, allows middlemen to package all that information together to induce investors to subscribe, purchase and trade them. While the MAS has since 2017 been steadfast in warning that crypto assets are not suitable for retail investors due to their high volatility and riskiness,[45] the MAS has not outright banned its access to retail investors because such a ban is "unlikely to work" given the borderless nature of crypto-assets and how investors can gain access to them through numerous global exchanges.[46] Furthermore, they may even construct the argument that cryptoassets as a potentially valuable new property will then be acquired by institutions and sophisticated investors (who already own most of the existing traditional property given the inequalities acknowledged today). Consequently, the admonition to retail investors not to invest becomes the "inside" information that will in fact do the opposite of what the regulators intend. This is why s 199 of the SFA, for example, proscribes the making of any false statements to induce investors to deal in securities and s 203 prescribes continuous disclosure on the part of listed issuers. But those involve securities which would also have required prospectus disclosure under s 240 when they first came to the attention of investors generally. But many crypto assets and crypto intermediaries have managed to avoid securities regulation, which was crucial to their development, and as pointed out recently, also any governance through private ordering.[47] Consequently, there is neither regulation nor governance of something that requires far more of both than property as a physical thing[48].

Older court cases always had a lot of common sensical values and economics built into them. In 1877, in *Twycross v Grant*[49], Coleridge CJ warned of intangible assets (then of a share in a joint stock company that was slowly being reified as property (which as *Whinney* shows took more time than with debts) helped partly by the requirement of a prospectus) that:

> All purchasers equally run the risk of buying a comparatively worthless article, and of being misled by untrue representations as to its nature and value; and from risks of this kind so

[43] *Supra* n 23 at [62].
[44] 30 Ch. D. 261. This decision also shows that corporate debt was initially more accepted than shares, as the HL in 11 App.Cas. 426 reversed the CA and found that the share was a thing in action. The Judicature Act 1873 (36 & 37 Vict c 66) s. 25 sub-s. 6 referred to "all debts and other legal choses in action" and the HL thought that shares were akin to debt securities which are quite clearly proprietary in nature: 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).
[45] https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/2022-Proposed-Regulatory-Measures-for-DPT-Services/Consultation-Paper-on-Proposed-Regulatory-Measures-for-Digital-Payment-Token-Services.pdf at 2.4(a).
[46]https://www.mas.gov.sg/news/speeches/2022/yes-to-digital-asset-innovation-no-to-cryptocurrency-speculation
[47] Umakanth Varottil and Hans Tjio, "FTX: Lessons for governance of crypto startups" The Business Times, 22 November 2022.
[48] James Penner, *The Idea of Property in Law* (Clarendon, 2000).
[49] (1887) 2 CPD 469 at 483.

> special legislation was necessary to protect shareholders. The value of a share in a company, however, depends not only on those circumstances which regulate the value of all saleable commodities, but also on persons by whom and the mode in which the capital of the company is to be dealt with. It is utterly immaterial to an ordinary purchaser to know what the vendor will do with the purchase money when he gets it: the purchaser has no further interest in it. But an applicant for shares in a company is in a totally different position. This money become part of the capital of the company; and to him it is all important to know what sort of persons are to have control of his money where he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps with lavish extravagance, those who have brought the company to its existence.

Caution is warranted as it has been said that "an intangible asset only exists because the law says it does".[50] And it may be that an intangible asset on one's balance sheet should also entail a liability on someone else's balance sheet.[51] This will prevent those situations where an intangible asset appears on an entity's balance sheet and also as a liability on that same balance sheet which was once a *Re Charge Card*[52] problem in relation to banks taking security over their customer accounts. While both the UK and Singapore have since 2003 and 2005 respectively permitted treasury shares, for example, they cannot be treated as an asset on the balance sheet. Interestingly, while the US may have liberal repurchase laws, some US states still do not allow treasury shares (nor does the Revised Model Business Corporations Act s 6.31 which provides that it becomes part of authorized but unissued capital after repurchase unless the articles provide otherwise) and none at the moment allow it to be treated as an asset on the balance sheet.[53] Strangely, only Europe (which still has more corporate law buyback restrictions than the US) seems to allow it to be accounted for as an asset, and this has been the case since the old Second Council Directive 77/91/EEC, Article 22(1)(b).[54] The danger with this is that it allows an issuer of an intangible asset involving a claim on itself to create assets out of thin air, and seem to be infinitely rich. This appears to be the case with FTX which transferred its own token FTT to its associated proprietary trading arm Alameda Research. This in turn allowed the latter to use FTT as collateral to cover up losses in Alameda Research by borrowing "unlimited funds"[55] from FTX, which continued to raise funds from outside investors. This goes on so long as the prices of those assets can be propped up, which the former CEO of Alameda Research has pleaded guilty to in the

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

[51] Evariest Callens, "Financial Instruments Entail Liabilities: Ether, Bitcoin, and Litecoin Do Not" European Banking Institute Working Paper Series – No. 66.

[52] But see *Re Bank of Credit and Commerce International SA* (No 8) [1998] AC 214, viewing a debt as autonomous property.

[53] *Cf Cox & Hazen Corporations Including Unincorporated Forms of Business* (Aspen, 2nd edn, 2003) at 1268 who point out that some US state courts previously did.

[54] See now Article 63(1)(b) of the present Directive (EU) 2017/1132.

[55] Nikou Asgari, "FTX allowed trading affiliate Alameda to borrow unlimited funds" Financial Times, 13 December 2022. See further https://www.sec.gov/litigation/complaints/2022/comp-pr2022-219.pdf (SEC Report) at [64].

case of FTT.[56] When the music stops because no new money is forthcoming to further the zero-sum Ponzi scheme,[57] no one sees them as assets, and then you have absolutely nothing.

Unfortunately, we have also seen the same story played out with crypto as it was with the CDO problem linked to US subprime mortgages. While many institutional investors lost money on these instruments, retail losses were largest in those countries where there are large retiree savings. With the Lehman-caused event leading to the Global Financial Crisis (really a US sub-prime one that affected the whole world), it was retail investors in Singapore, Hong Kong, Taiwan and Germany that suffered the most losses buying directly or indirectly into those CDOs. With crypto, retail investors in Singapore, Korea and Japan have lost significant sums of money, not through investing in FTX, which reputation was boosted by having institutional investors like Temasek, but using FTX as an exchange/custodian for their crypto assets.[58] Unbeknown to them, FTX acted like an unregulated bank - allegedly breaching its contractual obligations to segregate customer assets from its own, and loaning customer assets to Alameda Research which subsequently mismanaged and lost these assets.

Takeovers and Compulsory Acquisitions

Section 215 of the Companies Act provides for the compulsory acquisition of the shares of dissenting shareholders in a takeover bid; but which also allows such dissenting shareholders to compel the bidder to acquire the shares from them. A compulsory acquisition by way of a takeover offer requires 90% acceptances before the remaining shares can be acquired. In contrast, a section 210 Companies Act scheme of arrangement only needs to be approved by a simple majority in number representing three-quarters in value of the members who are present and voting. The difficulty for a scheme in the case of a company is that an interested shareholder cannot vote at the scheme meeting by virtue of the need for separate class voting as well as under the Takeover Code, which states that the Code provisions (which as we shall see below usually applies to listed companies but can apply to some unlisted public companies) would otherwise apply to the scheme[59]. In Singapore, where listed companies are concerned, there is another variant of this called a delisting offer where under rule 1307 of the SGX-ST Listing Rules, SGX may agree to an application by an issuer to delist if the resolution to delist has been approved by a majority of at least 75% of the total number of issued shares excluding treasury shares and subsidiary holdings held by the shareholders present and voting, on a poll, either in person or by proxy at the meeting. The offeror and its concert parties must abstain from voting on the resolution, and there has to be a "fair and reasonable" exit offer made to dissenting shareholders.

Section 215 was used liberally in the past to privatize both listed and unlisted companies. The issue with compulsory acquisitions under section 215 of the Companies Act is that they can be challenged

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[56] Guardian staff, "Two associates of Sam Bankman-Fried plead guilty to fraud charges in FTX fall" The Guardian, 22 December 2022. This artificial inflation was allegedly achieved by: (1) Alameda Research and FTX collectively owning the majority of FTT's supply, with only a small portion of the supply in circulation (SEC Report at [63]); and (2) Alameda Research purchasing large quantities of FTT on the open market to prop up its price (according to Alameda Research CEO Caroline Ellison who pleaded guilty to charges of market manipulation) (https://www.sec.gov/news/press-release/2022-234).

[57] Opinion, "Why bitcoin is worse than a Madoff-style Ponzi scheme" Financial Times, 22 December 2021, which sees Bitcoin as worse in that it is a negative sum game as value is constantly being extracted by middlemen and operators in the system.

[58] Kelly Chan, "Singapore unique FTX users average 240,000 a month to form second-highest group of visitors" Business Times, 22 November 2022.

[59] Under the Singapore Code on Takeovers and Mergers, it is stated that the Securities Industry Council, the Singapore equivalent of the UK Takeover Panel, would usually exempt a scheme from the Code provisions if the common substantial shareholders of the scheme companies abstain from voting on the scheme of arrangement

by minority shareholders within one month of the notice of compulsory acquisition (which itself must be sent 2 months after the 90% threshold is reached). Section 215 has been changed quite a few times in the recent past in an attempt to keep a fair balance between the bidder and the rights of target shareholders. It was amended by the Companies (Amendment) Act 2003 so that what is now discounted in calculating the 90% threshold, aside from the offeror's shares, are also the shares of its nominees, and those of a related corporation or nominees of its related corporation[60]. This was to prevent major shareholders that wanted to privatize a company from setting up a special purpose vehicle to make a takeover bid, and in the process tendering its own shares to that vehicle. As the previous section 215 only disregarded shares of the special purpose vehicle itself, its subsidiaries, as well as its nominees and any nominees of its subsidiaries, it became quite common to set up a structure where the relationship between the major shareholder and special purpose vehicle did not fall within those categories.

In 2019, to address the continued avoidance of the provisions, the Ministry of Finance's Companies Act Working Group ("CAWG") then recommended (Recommendation 4.6) that shares held or acquired by the following persons should also be excluded from the computation of the 90% threshold for compulsory acquisition under section 215: (a) a person who is accustomed or is under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the transferee in respect of the transferor company; (b) a body corporate controlled by the transferee; (c) a person who is, or is a nominee of, a party to a share acquisition agreement with the transferee; (d) the transferee's close relatives (i.e. spouse; children, including adopted children and step-children; parents; and siblings); (e) a person whose directions, instructions or wishes the transferee is accustomed or is under an obligation whether formal or informal to act in accordance with, in respect of the transferor company; and (f) a body corporate controlled by a person described in (e). These changes have not yet been introduced although the Ministry of Finance announced that they agreed with the proposals except for (c).[61]

The last set of amendments implemented with respect to section 215 were made by the Companies (Amendment) Act 2014 to make it clear that it also applied to individual bidders and was not just a corporate restructuring provision. Another change brought about at that time was a new s 215(1C) which has recently been discussed in *Portcom Pte Ltd v Verrency Group Ltd*,[62] where Jeyaratnam J said that it "made clear what was already implicitly the case as a matter of legal principle, that shares

[60] Under section 6 of the Companies Act, a related corporation is a holding company of another corporation; a subsidiary of another corporation; or a subsidiary of the holding company of another corporation but this is not as wide a concept as an "associate" under the relevant UK provision, which includes persons acting in concert with the offeror, even where they are not related companies (see L Rabinowitz, *Weinberg & Blank on Takeovers and Mergers* (5th ed, 1989) at para 5-2009). In 2011, the Steering Committee recommended that s 215 be widened to exclude shares held by associates but this was rejected by the Ministry of Finance at that time. It said that "[a]lthough it is conceptually sound to exclude parties not independent of the offeror in calculating the 90% acceptances, the present provisions have not given rise to any particular concerns. Thus, there is no compelling reason to change the position at this time. Moreover, [the recommendation] will make it more difficult for an offeror to obtain full ownership, especially if the offeror already has a substantial shareholding when the offer is made. For a healthy functioning financial market, it is important to ensure that our requirements are not overly stringent or make it difficult for companies to restructure. In case of unfairness, dissenting minority shareholders can apply to court under section 215."

[61] Tay Peck Gek, "MOF, Acra accept proposals that make it harder to buy out minority shareholders in an offer" Business Times, 16 February 2023.

[62] [2022] SGHC 97, commenting on the effects of s 215(1C) Companies Act 1967.

issued after the date of the offer are to be disregarded." Section 215 was also amended in 2014[63] to include the compulsory acquisition through offers to acquire not just shares but also from "holders of units of shares": see now ss 215(8A) and 215(8B) of the Companies Act. The judge held that only "an option for a price that is either fixed in advance or determinable by a formula or by reference to a benchmark"[64] would fall within the meaning of a unit and this did not include convertible notes with an unpriced right of conversion.

But when is an offer made for the purposes of s 215, which timetable for compulsory acquisition is that the 90% threshold must be reached "4 months after the making of the offer"? This was the main issue dealt with in *Portcom*. Here Portcom and some others held 14.589% of the shares in Verrency Holdings Ltd, a Singapore public (but unlisted) company ("Verrency Singapore"). Norwood held 45.855% of Verrency Singapore. As part of a takeover by Verrency Group, an Australian company ("Verrency Australia"), of Verrency Singapore, the shareholding structure was changed on 29 July 2021. This was done by powers of attorney given to Verrency Singapore's directors to effect a massive conversion of convertible notes issued in the prior 2 years or so to fully paid up shares, which diluted Portcom and others to 0.51%, with the former convertible noteholders then holding 96.51% of Verrency Singapore. This was then followed on 4 August 2021 by the swapping of shares held by those former convertible noteholders and Norwood in Verrency Singapore for Verrency Australia, on a one for one basis, which resulted in Verrency Australia holding 98.11% of Verrency Singapore.

On 6 August 2021, Portcom and the others received a letter from Verrency Australia titled "Notice to Dissenting Shareholder" sent pursuant to s 215(1) which was later reissued, first on 23 August 2021 and then again on 28 September 2021, to correct various errors. That 28 September notice[65] was the one that was relied upon to state that on the 6 August 2021, Verrency Australia had reached the 90% threshold to compulsorily acquire Portcom and the others remaining shares. The question for the court was whether the section had been complied with and, if so, whether it would be unfair to permit the Australian company to proceed with compulsory acquisition. Specifically, the issue was whether an offer had been made to purchase their shares in the prior 4 months. The notice stated that offers to purchase Verrency Singapore shares had commenced from 8 June 2021 with the letter to purchase shares from Portcom and the others allegedly sent on the 22 June 2021. These dates were comfortably within the 4 month look-back period.

Jeyaratnam J held that the 22 June letter was not an offer as Verrency Australia was not even incorporated at that time and that it was only Verrency Singapore seeking approval on certain matters from its shareholders – this clearly could not be an offer from Verrency Australia to acquire their shares. In any case, Jeyaratnam J pointed out that:

> 38 (c) At that date, the convertible noteholders had not converted, and as I have accepted at [30] above, they could not be described at that time as holding "units of shares". Thus, the applicants alone held more than 10% of the shares at that time, and their non-assent meant that 90% approval could not be achieved. In fact, the respondents accept that the 22 June

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[63] As was s 210 of the Companies Act (Cap 50, 2006 Rev Ed) by the Companies (Amendment) Act 2014 (Act 36 of 2014). This was to clarify that holders, for example, of share options or convertibles, can be parties to a scheme of arrangement of a company: sub-s (11) expressly excludes "a person who holds units of shares only beneficially".

[64] *Portcom Pte Ltd v Verrency Group Ltd* [2022] SGHC 97 at [30]-[31].

[65] Under s 215, the notice had to be sent within 2 months of the 90% threshold being reached which in this case was 6 August 2021. In turn that 90% threshold had to be reached within 4 months after the making of the offer which in this case meant that any offer had to be made by 6 April 2021.

> Shareholder Letter at no point garnered even a majority of support from the shareholders as of that date.

Verrency Australia then argued that it was the 4 August 2021 share swap offer that was the relevant offer for the purposes of s 215. The judge said, however, that:

> 42 The respondents accepted that an essential feature of an "offer" is that it is communicated to the offeree. They contended that while the 4 August 2021 Resolution had not been sent to the applicants, it had been communicated to them via the 22 June Shareholder Letter which indicated that such an offer was to be made at some point in the future. I cannot accept this contention. Informing someone that an offer will be made to them in future is not in itself communication of the future offer. What must be communicated is something capable of being accepted by the shareholders so as to give rise to a contract, whether absolute or conditional (see [34] above).

As there was never any formal offer capable of acceptance that had been communicated, the judge held that there was no offer made by the bidder to the target shareholders to kickstart the compulsory acquisition timetable in s 215. To the same effect is *Re Chez Nico (Restaurants) Ltd*[66] where a letter sent by the offeror to all the shareholders of the target inviting them to offer their shares to the offeror was held not to amount to a takeover offer under section 428 of the UK Companies Act 1985. Sir Nicholas Browne-Wilkinson said that:[67]

> In my judgment the whole of Pt XIIIA shows that the bidder, i.e. 'the Offeror', must specify the terms which are capable of being accepted by the shareholders so as to give rise to a contract (whether absolute or conditional)….The "offer" must have been made by the "offeror"….

What then is an offer that can be accepted by the target shareholders? In *Portcom*, Jeyaratnam J said:[68]

> When a shareholder receives an offer to acquire his shares intended to be relied on under CA s 215, it must be made clear that it is part of a general bid to acquire all the shares in the company.

With unlisted public companies, this is likely to be more informal as the Takeover Code may not apply to them as its concern is mainly with Singapore-listed companies. The Code, however, previously applied to, amongst others, unlisted public companies incorporated in Singapore with more than 50 shareholders and net tangible assets of S$5 million or more. In the past, such companies had to apply to the Council to waive the application of the Code on a case by case basis (usually when a takeover was planned). But on 22 October 2022, Securities Industry Council ("SIC") published a Practice Statement that set out the regime for an unlisted public company to obtain a Code Waiver as a general position. The list of unlisted public companies that have obtained a Code Waiver will be published on the SIC's website.

For listed companies, however, it is likely that a s 215 compulsory acquisition will have to be commenced by an offer that complies with the Takeover Code. This could be a mandatory general offer or voluntary offer, whether conditional or unconditional. When does this occur? The leading academic and practitioner text *Weinberg and Blank on Takeovers and Mergers* (5th ed, loose-leaf) at 4-2024 provides an offer timetable that makes it clear that the last possible date for achieving the 90

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[66] [1991] BCC 736 (Ch D).
[67] *Ibid*, at 746.
[68] *Portcom Pte Ltd v Verrency Group Ltd* [2022] SGHC 97 at [43].

per cent acceptance level necessary for the compulsory acquisition of minority shareholders is P + 4 months, with P being the Publication Date of the Offer Document, which in the UK must occur within 28 days (but not less than 14 days without the consent of the target company board) of the offer announcement. To the same effect is the timetable provided by *Halsbury's Laws of Singapore on Securities Regulation*[69] although here in Singapore the offer document must be sent between 14 and 21 days of the offer announcement. It is quite clear therefore that no offer is made at the time of an offer announcement even if that kickstarts the "offer period" under the Takeover Code and which has other regulatory consequences. The "making of the offer" for the purposes of a Code governed section 215 compulsory acquisition would be the date of dispatch of the offer document. As with winding-up, therefore, care must be taken to separate when commencement starts and when the actual winding up or takeover offer occurs.

Anti-Moneylaundering Rules and Beneficial Ownership

In *Tang You Liang Andruew v Public Prosecutor*[70] Kannan Ramesh J heard a Magistrates Appeal in the High Court and upheld the appellants conviction of three charges of abetment by conspiracy under s 417 read with s 109 of the Penal Code 1871 ("the Penal Code") to cheat two banks.[71] This was through the act of concealing the ultimate beneficial owners of bank accounts opened individually by three companies that were incorporated by the appellants.

MEA Business Solutions Pte Ltd ("MEA") was a corporate secretarial company that was owned and operated by Vadim, a Russian businessman. Its primary business was to assist its foreign clients to incorporate companies and open bank accounts in Singapore. Vadim also provided Singapore nominee directors for the companies that MEA incorporated for its clients, and his pool of nominee directors included Andruew. Between 2014 and 2016, Andruew acted as a nominee director for more than 50 companies incorporated by MEA. The bank accounts of the three companies relevant here were opened with Andruew as its sole shareholder and director. The two banks followed a similar due diligence process for the opening of the bank accounts and this was in accordance with the due diligence process put in place to comply with Notice 626 dated 30 November 2015 ("the Notice") issued by the MAS. The Notice was a direction to banks issued pursuant to s 27B of the Monetary Authority of Singapore Act 1970 ("MAS Act") to prevent money laundering and terrorism financing. The two banks were required by the Notice to ask Andruew to complete and submit several documents before opening the bank accounts as part of their "Know-Your-Client" ("KYC") measures. One of the crucial pieces of specific information that Andruew was required to disclose was a declaration of the ultimate beneficial owners of each of the bank accounts. In turn, the two banks were under the rules "entitled to rely on [the] declaration above on the identity(ies) of and information relating to the Beneficial Owner(s) of the Account".[72]

Andrew declared to two banks that he was the ultimate beneficial of the three companies when the real ultimate beneficial owners of the companies were MEA's foreign clients who were not disclosed to the banks at the time the bank accounts were opened or subsequently. On the strength of the declarations and supporting documents, the banks' checks were concluded with no adverse report on the three companies or Andruew. Andruew then handed over to Vadim the bank tokens issued by the banks in relation to the bank accounts, and was not involved in any subsequent transactions.

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[69] Vol 17 (2018 Reissue) at 325-6.
[70] [2022] SGHC 113.
[71] *Ibid* at [12]
[72] *Ibid* at [3].

Andruew and Valim argued that there was lack of a causal connection between the deception caused by the declarations and the likelihood of harm to the reputation of the banks. Accordingly, he argued that it was not punishable under s 417 of the Penal Code for the crime of cheating, which under s 415, requires the alleged's act of deception to "cause or [be] likely to cause damage or harm to any person in body, mind, reputation or property". Ramesh J emphasised, however, that s 415 of the Penal Code required proof that the deception was likely to cause damage or harm, and not to show actual harm.[73] He then said:

> 33 From the extracts in [32] above, it is clear that the specific aim of s 27B was to address the dangers posed to global markets by money laundering and terrorism financing, and to safeguard the reputation and integrity of Singapore as a global financial hub and that of its financial institutions. Left unchecked, such illicit activity would "injure the reputations of financial institutions, erode the integrity of financial markets, and weaken the resilience of the global economy"
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> ….
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> 42 It is evident from the extract of the speech made in Parliament reproduced at [32] above that failure by financial institutions to detect and deter money laundering and terrorism financing carries the distinct likelihood of, inter alia, injury to their reputation. It is axiomatic that if the measures that financial institutions introduced pursuant to the Notice were circumvented, the likelihood of the financial institutions suffering reputational damage would be heightened.

Any deviation from AML rules would thus be likely in itself to damage a banks' reputation.[74] Ramesh J also dismissed the argument was that there was no specific or direct evidence of a conspiracy between the appellants. He held that a conspiracy need not be proven by direct evidence of an agreement between conspirators and can be inferred, following *Public Prosecutor v Yeo Choon Poh*[75]. Ramesh J upheld the convictions and also found that the Magistrate had not erred in imposing global sentences of two weeks' and four weeks' imprisonment on Andruew and Vadim respectively.

While the above disclosure requirements are specific to AML in respect of financial institutions (KYC rules separately also apply to solicitors etc), there are now general requirements that apply to companies in relation to the disclosure of their beneficial owners. Many jurisdictions are now introducing registers of persons with significant control in the case of private or unlisted companies.[76]

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[73] *Ibid* at [29].

[74] It may do more and put a bank on inquiry and lead to a duty of care with respect to any fraud perpetrated on a customer's bank account: see *Phillip v Barclays Bank* [2022] EWCA Civ 318; [2022] 2 WLR 872 noted by Sandra Booysen [2022] LMCLQ 349, although more recently in in the trial of *Federal Republic of Nigeria v JPMorgan Chase Bank NA* [2022] EWHC 1447 it was held that it had to be more specific forms of fraud that would put a bank on inquiry and simply because a bank has set up money laundering controls and there were issues with previous transactions did not mean that they were put on notice of possible wrongdoing on this occasion.

[75] [1993] 3 SLR(R) 302 at [20].

[76] D Milman, *The Company Share* (Edward Elgar, 2020) at 93, 149. The EU Fourth Money Laundering Directive also required Member States to introduce new rules by June 2017 to establish registers providing information on beneficial ownership in relation to trusts. In March 2022, the UK fast-tracked an Economic Crime (Transparency and Enforcement) Bill, which, *inter alia*, establishes a beneficial ownership register of foreign entities that own UK property. This was introduced in the wake of Russia's invasion of Ukraine having been considered for 4 years. See also *Corporate Transparency and Register Reform White Paper* (CP 638) (February

This would cover beneficial shareholdings that do not appear on share registers.[77] This has been largely due to the efforts of the Financial Action Taskforce (FATF) to make the ownership and control of corporate entities more transparent and reduce opportunities for the misuse of corporate entities for illicit purposes. In Singapore, from 31 March 2017, companies and foreign companies under the new Part XIA of the Companies Act 1967 (unless exempted, such as in the case of publicly listed companies) and LLPs under the new Part VIX of the Limited Liability Partnerships Act 2005, are required to maintain beneficial ownership information in the form of a register of registrable controllers, and to make the information available to public agencies upon request. A controller is defined as an individual or a legal entity that has a "significant interest" in or "significant control" over the company. In the case of a company with share capital, a "significant interest" would mean an individual who has (a) an interest in more than 25% of the shares[78] or (b) shares with more than 25% of total voting power in the company. In the case of a company without share capital, a "significant interest" is a right to share in more than 25% of the capital or profits of the company. For "significant control", this is a person who (i) holds the right to appoint or remove directors who hold a majority of the voting rights at directors' meetings; or (ii) holds more than 25% of the rights to vote on matters that are to be decided upon by a vote of the members of the company; or (iii) exercises or has the right to exercise significant influence or control over the company. In the case where there are no persons with significant interest or control, amendments in January 2022 now require that persons with executive control be identified as registerable controllers. This includes the chief executive officer, and directors and partners who exercise executive control over the affairs of the company or LLP through a senior management position.[79] The amendments also require local and foreign companies to keep a non-public register of its nominee and nominator (beneficial) shareholders and to update the register within 7 days of being informed by the nominee who in turn has 30 days to inform the company of any changes.

Newly-incorporated companies and newly registered LLPs are required to maintain a register of registrable controllers within 30 days from date of incorporation.[80] Companies are required to enter information into their registers of registrable controllers within 2 business days after receiving replies from controllers to notices sent by companies.[81] The register of controllers should be maintained at either the company's registered office, or the registered filing agent's registered office.[82] To avoid duplicative reporting, companies can stop the tracing of the controllers once the identification process reaches a locally incorporated/registered company or LLP that will also be maintaining registers in their registered offices.

28, 2022). The UK register of overseas entities took effect from 1 August 2022 via the Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 3) Regulations 2022 (SI 2022/876 (c 54)).

[77] As to the creation of beneficial ownership of company shares, which can be through a unilateral declaration of trust without a contract, see *Pleshakov v Sky Stream* [2021] UKPC 15.

[78] Contrast the interest in share provisions in s 7 of the Companies Act 1967 where the threshold is set at 20% of the votes attached to the voting shares in the body corporate.

[79] Corporate Registers (Miscellaneous Amendments) Act was passed on 10 January 2022.

[80] S 47(1)-(3), Limited Liability Partnerships Act 2005 and s 386AF (1)-(5), Companies Act 1967.

[81] Second Schedule, (Register of Controllers and Nominee Directors) Regulations 2017, https://www.acra.gov.sg/how-to-guides/setting-up-and-maintaining-register-of-registrable-controllers-(rorc).

[82] S 3(4)(a)-(b), (Register of Controllers and Nominee Directors) Regulations 2017, https://www.acra.gov.sg/compliance/register-of-registrable-controllers.