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# 2023. Securities and Financial Services Regulation

Hans Tjio

Professor, Faculty of Law, National University of Singapore

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**2023. Securities and Financial Services Regulation**

**Introduction**

As has been the case for a number of years now, there were few reported court cases in 2023 that one would see as directly implicating securities and financial regulation. Nevertheless, there were court decisions which had an impact on the overall development of securities law and financial regulation with regard to market manipulation, the rights of beneficial owners of listed companies, and the interplay between private law and public regulation in the context of bank regulation, secured transactions, and cryptocurrency.

Further to the above, the main reason for the relative lack of court cases is that most of the enforcement in the securities and financial regulation sector is public in nature. Further, the use of civil penalty and administrative sanctions mean that those cases could be settled with the Monetary Authority of Singapore ("MAS") and not find their way to the courts. From the beginning of 2022 to mid-2023, for example, MAS took 455 enforcement actions, the vast majority of which were settled out of court.[1] While it makes sense in a small jurisdiction for public enforcement to be the primary mode of enforcing financial rules, there should be room also for private litigation given the different incentives involved. It has also been argued that the availability of private rights of action has added liquidity and market value to the UK stock market.[2] In Singapore, however, private enforcement is perhaps hampered by the lack of class action procedures and the restricted use of conditional fee arrangements and third-party litigation funding. While all of this has been reviewed in Singapore and certain changes have been made to facilitate cross-border litigation and arbitration, restricting private actions may not be a bad thing given what some would see as inefficient securities litigation in places like the US. There, it was said recently by Gevurtz[3]:

> For observers from other nations, the result is to provide an object lesson in how to create an irrational system by not stepping back from the more obvious issues to ask deeper questions about what the system is or is not achieving.

In the UK, private actions were introduced by s 90A of the Financial Services and Markets Act ("FSMA") in 2000 (which came into effect in November 2006 pursuant to the *EU Transparency Directive 2004*). However, this allows purchasers of shares statutory civil claims against issuers only for *fraudulent*, though not negligent, corporate misstatements. It may be that investor recovery there has been facilitated not by private litigation (which still requires proof of individual reliance given the absence of a US "fraud on the market" theory) but by the Financial Conduct Authority ("FCA"). Sections 382 and 383 FSMA gives the court the power to order "restitution" to investors on the application of the FCA or Prudential Regulatory Authority ("PRA") to compensate them for their losses.[4] This is, however, a court process initiated by the FCA or PRA which does not differ substantially from regulator led class action litigation in Australia, Taiwan and China. In a litigious society, this could still have problems with successful enforcement (due to difficulties in forming the

[1] Yong Hui Ting, "MAS reports S$20.8 million in penalties, 39 convictions from 2022 to mid-2023" Business Times 19 September 2023.
[2] Fernan Restrepo, "The capital-market effects of introducing private rights of action in securities regulation: Evidence from the United Kingdom" (2023) 66:1 Journal of Law & Economics 183.
[3] Franklin A Gevurtz, "United States: The Protection of Minority Investors and Compensation of Their Losses" in Pierre-Henri Conac and Martin Gelter eds, *Global securities litigation and enforcement* (CUP, 2019), 112.
[4] It has been held that this does not give private rights of action to investors: *Hall v Cable & Wireless Plc* [2011] BCC 543.

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class, showing fraud or negligence, and proving loss and causation).[5] More important, therefore, is section 384 FSMA which empowers the FCA or PRA itself to order restitution (either of the profit made by the wrongdoer or the loss suffered by the investors without linking the two as is currently the case under s 203 or 234 of the SFA here).[6] The FCA has published guidance on the exercise of its power under s 384 FSMA in Chapter 11 of its Enforcement Guide.

Even if private litigation is absent, however, it does not mean that private law is also absent as we shall see as it may be needed to support formal regulation. First, however, we will examine what the prosecution called the "most serious case" of stock market manipulation in Singapore which absorbed almost 200 days of court time.

**Market Manipulation**

This was the case of *Public Prosecutor v Soh Chee Wen*[7] where Hoo J in the High Court found both Soh and Quah Su Ling guilty of all the 10 market manipulation charges brought under s 197(1)(b) of the Securities and Futures Act (Cap 289, 2006 Rev Ed)[8] ("SFA"),along with the 153 deception charges under s 201(b)[9] SFA and 6 cheating charges under s 420 of the Penal Code 1871. The accused persons were charged with abetting, by conspiracy, the substantive offences above and not for criminal conspiracy under s 120B of the Penal Code 1871. Hoo J found that the accused persons were also guilty of the substantive offences and this had consequences in terms of their sentences[10] but that the conspiracy narrative was a "useful framework for organising the various strands of the case." Soh and Quah were given 36- and 20-years' imprisonment, respectively. The focus below will be on market manipulation.

Between August 2012 and October 2013, Soh and Quah used 187 trading accounts held with 20 financial institutions (nine local brokerages, as well as 11 foreign brokerages and private banks) belonging to 58 individuals and corporate nominees that were linked to the two accused to make thousands of trades in shares of Blumont, Asiasons and LionGold, companies listed on the Singapore Exchange. These trades created a false market in these shares by creating the appearance of active trading, and also rigged their prices to rise over time so that the three companies had price-earnings ratios between 95 and 113 in that period. The companies were then estimated to have lost more

[5] In Singapore ss 324 and 325 of the Securities and Futures Act 2001 allows the MAS to obtain certain orders but these are more injunctive in nature.

[6] The first time the FCA used its s 384 FSMA 2000 power was in the Tesco plc and Tesco Stores Ltd case of 28 March 2017: available at: <https://www.fca.org.uk/publication/final-notices/tesco-2017.pdf>.

[7] [2023] SGHC 299. A similar case in which the accused pleaded guilty *was Public Prosecutor v Lee Wan Sing* [2023] SGDC 279 which adopted the sentencing principles in *Lau Wan Heng v Public Prosecutor* [2021] SGHC 240. An interesting point raised there at [70] was that:

> Responding to the Defence's submission that the accused had been acting in OGL's best interests and not for profit (summarized at [73] and [74] below), the Prosecution highlighted that the accused's actions had caused direct and substantial harm to the company as it deprived OGL of over $1 million in working capital and set-up the share price of the company for an inevitable crash. Furthermore, the accused had failed to prove that the company needed saving, or show that he was forced to resort to the Scheme as there were no other legitimate means of saving the company.

[8] This is now referred to as the Securities and Futures Act 2001 (2020 Rev Ed).

[9] Section 201(b) of the Securities and Futures Act 2001 is *in pari materia* with the anti-fraud provisions in rule 10-b promulgated under the US Securities Exchange Act 1934. In Singapore, it is used where other specific insider trading or market abuse provisions are not available, largely in connection with the unauthorized use of trading accounts belonging to other people.

[10] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [1319]–[1339] and [1352]–[1390].

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than $8 billion in market capitalization when first the media and then the exchange queried the overvaluation of those stocks given its actual earnings.

While Hoo J did not agree or disagree with the prosecution's statement that this was the "most serious case"[11] of stock market manipulation in Singapore, and thought that the deception charges were somewhat broad and were not strictly supported by the definition of "unauthorised share trading"[12] laid down in *Ng Geok Eng v PP*[13], she found that, for each of the 169 conspiracy charges successfully proven, the underlying offences had been carried out.

There are a few important takeaways from the case. First, Hoo J drew a clear differentiation between artificially creating the appearance of market trading and the rigging of prices. 6 of the s 197(1)(b) SFA charges were with respect to the former, which was facilitated by the use of *contra* buying and the rolling over of trades which allowed the accused to purchase securities on credit. At that time, settlement was on a T+5 basis so it gave a lot of time for buyers to sell before they had to pay for the shares. Although this was not, by itself, an illegitimate trading technique, Hoo J recognised that the accused abused this by deploying other illegitimate trading techniques to inflate the liquidity of the manipulated stock. This included, predominantly, "wash trading" and "pre-arranged trading", which are specifically addressed by s 197(3)(a) and (b)/(c) of the SFA respectively.[14] The two accused acted in concert by coordinating the trading in the relevant accounts they controlled through their nominees.

Where market rigging was concerned, while the evidence above was relevant, Hoo J also agreed with one of the prosecution's experts that the accused had traded very aggressively in pushing prices up with their bids instead of doing what a normal buyer does, which is to "test the market's interest by leaving a buy order at the best bid price [or lower] for a period of time"[15]. Instead of doing that, there were aggressive trades above the best bid price on 19 out of 190 total trading days for Blumont (with there being no information to account for those increases on 15 days), 17 out of 292 for Asiasons (with no price-sensitive information on 14 days) and 30 out of 293 for LionGold (with no price-sensitive information on 17 days). Hoo J relied less on the other prosecution's expert whose argument was that the shares were "massively overvalu[ed]"[16] and so there had to have been manipulation of them. While she generally thought that the shares were likely overvalued as of 1 October 2013[17], just as important was the evidence that the accused's motive in pushing the share prices up was so that the shares could be used as currency for further corporate acquisitions by way of securities exchange offers.[18] This shows the importance of an ancillary or separate motive for a share trade in s 197 cases.

One difficulty with the case was that s 197(1) of the SFA was amended with effect from 5 December 2012 which was roughly one-third the way through the relevant period where the offences took place. The major change was the introduction into sections 197(1) and (1A) via the Securities and

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[11] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [1492].
[12] In this case, Hoo J found that a case had not been made out with respect to 8 trading accounts.
[13] [2007] 1 SLR(R) 913.
[14] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [86]. Subsection (3) has been amended to provide situations such as wash sales where it is presumed that the purpose, or one of the purposes, for carrying out the prescribed act is to create a false or misleading appearance of active trading in capital markets products on an organised market. Subsection (4) allows the presumption to be rebutted upon proof of actual purpose.
[15] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [89], [802].
[16] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [827].
[17] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [841].
[18] *Public Prosecutor v Soh Chee Wen* [2023] SGHC 299 at [96].

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Futures (Amendment) Act 2012[19] of the respective requirements of purpose in the former, and knowledge or recklessness in the latter (it had previously been silent on the *mens rea* requirement although earlier cases had required some form of intention[20]). It is likely that, unlike some other situations like financial assistance by a company for the acquisition of its own shares, purpose here is subjective in nature, and so is really an inquiry into the reasons or motive for which the defendant carried out the relevant acts or transactions.[21] But too much should not be placed on semantics - Hoo J addressed this issue (at [177]):

> Although I appreciated that the word "purpose" may, in common parlance, connote a stronger sense of "motive" (or "conscious desire" as the First Accused put it) than "intent", this in my view, was an extremely technical argument. As stated at [168] above, a finding that someone has acted with "intent" was a matter of inference, and, so too was the finding that he acted with a particular "purpose". Where such inferences were to be drawn from the state of affairs, ie, false appearances as to the market or price of shares, it was rather contrived to suggest that there was an analytical difference in assessing the existence of these two ostensibly different states of mind. Indeed, if it was found that a false appearance as to the market was created intentionally, it could scarcely be maintained that the creator(s) of such false appearance did not purposefully bring about such appearance. As such, the elements to be proven in respect of the False Trading Charges for periods after the SFA Amendments, as well as the Price Manipulation Charges (all of which concerned periods after the amendments) were simply those stated at [174] above.

One other important issue that has arisen quite frequently is with whether an accused must have the sole or dominant intention to have created an offence or whether it is enough that it is one of the triggers and if that needs to satisfy a "but-for" test. With respect to s 197, there had been some suggestion at first instance by Lai Siu Chiu J in *Tan Chong Koay v MAS*[22] that the prosecution had to show that the accused had the sole or dominant intent to create or do something that was likely to create an artificial market or rig market prices. Hoo J thought, however, (at [171]) that:

> Given that the Court of Appeal did not address this point, I did not regard myself as being bound by Lai J's statement. Respectfully, I disagreed with her suggestion. In my view, neither *North* nor *Fame Decorators* purported to lay down the general proposition that s 998(1) required proof that the wrongdoer had the sole or dominant intention to create a false appearance as to the market or price of the shares in question. Instead, the courts there appeared simply to be finding, *as a matter of fact*, that the cases before them involved acts carried out with such sole or dominant intent. In my view, s 197(1)(*b*) of the SFA simply required "intention" in the ordinary sense, understandable by reference to the usual authorities (see, *eg*, *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119 at [88] and *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [36]–[37]). There was nothing about the text of the provision which required that such intention be "sole" or "dominant".

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[19] Act 34 of 2012.

[20] *MAS v Tan Chong Koay* [2011] 4 SLR 348*; Chua Li Hoon Matilda v Public Prosecutor* [2009] SGHC 116.

[21] This would be similar to the treatment of purpose in the context of the proper purpose rule that is applicable to trustees and directors: *Eclairs Group Ltd v JKX Oil and Gas Plc* [2015] UKSC 71, noted H Tjio [2016] LMCLQ 176, and different from what Chan CJ said in the context of financial assistance under Companies Act 1967 s 76 in *Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR(R) 350, which was that purpose is not to be equated with the reason why the purpose is formed.

[22] *Monetary Authority of Singapore v Tan Chong Koay* [2011] 1 SLR 348 at [67].

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This is consistent with the developments in other parts of corporate or securities laws. With respect to directors' duties and the proper purpose rule we know from the UK Supreme Court decision in *Eclairs v JKX Oil and Gas Plc*[23] that the courts have not settled fully on either a dominant purpose test or one based on a purpose with causative links to the decision in question.[24] In the case of undervalued conveyances to defraud creditors, however, it has been held that defrauding creditors has to be a purpose and not the sole or dominant purpose of the transaction: *JSC BTA Bank v Ablyazov*[25] (UK Insolvency Act 1986 s 423). Under older versions of that provision in s 172 of the UK Law of Property Act 1925, it was held that prejudicing creditors need not be the sole purpose of the transaction, so long as it was the dominant purpose: *Midland Bank Plc v Wyatt*[26]. Prakash J (as she then was) may also have adopted this position in *Wong Ser Wan v Ng Bok Eng*[27] where she referred to a dominant reason under the former s 73B of the Conveyancing and Law of Property Act 1886 which was worded like the older English provision. Section 428 of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA") is, however, now similar to the present UK provision and it may be that there is no need to show that the wrongdoer had the sole or dominant purpose to defraud creditors. For unfair preferences under IRDA, it is also enough if the debtor is partly influenced by a desire to prefer the creditor. The desire to prefer need not be the sole or even a decisive factor.[28]

**Beneficial ownership of shares in listed companies**

In *Tanoto Sau Ian v USP Group Limited*[29] it was held that beneficial owners of shares in a listed company could not requisition an EGM under s 176(1) of the Companies Act 1967 as they were not "members" of the company. They held their interests under sub-accounts with nominees (which were brokerage houses) who were the ones that had direct accounts with the Central Depository Pte Ltd ("CDP"). Section 81SJ read with s 81SF of the SFA only deemed those nominees as members of the company. Nor was the company estopped by its conduct from denying the right of the beneficial shareholders from requisitioning the meeting as "members".

The Court also observed that (a) the company's constitution did not enable the nominee brokerage houses to nominate the shareholders to exercise membership rights in order to requisition an EGM under s 176(1)[30]; and (b) the shareholders would need to open a CDP account to hold the shares as direct account holders (instead of as sub-account holders) and only then would they be deemed members of the company by virtue of s 81SJ.[31]

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[23] *Eclairs Group Ltd v JKX Oil and Gas Plc* [2015] UKSC 71.
[24] As observed by the Court of Appeal in *BTI LLC 2014 v Sequana* [2019] EWCA Civ 112 at [233].
[25] [2018] EWCA Civ 1176.
[26] [1995] 1 FLR 696.
[27] [2004] SGHC 181. Section 73B of the Conveyancing and Law of Property Act 1886 was considered in detail in *Envy Asset Management Pte Ltd (in liquidation) v CH Biovest Pte Ltd* [2024] SGHC 46, and this will be discussed in next year's Annual Review.
[28] *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA v Jurong Technologies Industrial Corp Ltd* [2011] 4 SLR 977.
[29] *Tanoto Sau Ian v USP Group Limited* [2023] SGHC 106.
[30] *Tanoto Sau Ian v USP Group Limited* [2023] SGHC 106 at [35]. This requirement that a member of the company (and not shareholder) call for a general meeting is the position in Singapore (s 176(1) CA), United Kingdom (s 303(1) UK Companies Act 2006), Australia (s 249D(1) Australian Corporations Act 2001), Hong Kong (s 566(1) Hong Kong Companies Ordinance) and Malaysia (s 310(b) Malaysian Companies Act 2016). New Zealand is the exception which allows a person who is in its register of shareholders to convene a special meeting of shareholders (ss 96 and 121(b) New Zealand Companies Act 1993 respectively).
[31] *Tanoto Sau Ian v USP Group Limited* [2023] SGHC 106 at paras [27] and [88].

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Despite finding that beneficial shareholders could not requisition an EGM as they were not "members" of the company" Goh JC (as he then was) thought that they had *locus standi* to bring a derivative action under s 216A (although the case ultimately failed for other reasons). This was because that provision provides that other than members, the action can be initiated by "any other person who, in the discretion of the Court, is a proper person to make an application under this section".[32] The court, however, referred to the Ministry of Finance's Steering Committee Report which specifically recommended that sections 145 to 153 of the English Companies Act 2006,[33] which allow indirect investors to enjoy or exercise memberships rights more generally, not be adopted.[34] The Steering Committee had recommended that indirect investors only be given the right to participate in general meetings through the use of multiple proxies (under a new section 181) by relevant intermediaries like banks or holders of a capital markets services licence that are in effect holding shares as nominees, or the Central Provident Fund Board.

While the court did not refer to this, a few years earlier, it was held in *Goldilocks Investment Co Ltd v Noble Group Ltd*[35] that the SFA was arguably a "forum mandatory statute, displacing the application of foreign law".[36] The judge acknowledged that the plaintiff's position as sub-account holder there did not fall within the literal scope of s 81SJ, but held that:[37]

> … the equities of the situation did not require immediate strict compliance with s 81SJ and that the injunction application should not be dismissed on the basis that Goldilocks did not fall squarely within the wording of s 81SJ. I found that it was within Goldilocks's rights to so register itself as the depositor in respect of its shares in Noble in the CDP register. Following the discussion at the hearing, I directed that Goldilocks, at least, begins the process of such registration by 3 May 2018.

The balance of convenience lay in favour of granting the interim injunction, as the plaintiff could move its shares from their sub-account with DBS Nominees to a direct account with the CDP and would then clearly fall within the deemed membership protection of s 81SJ. However, the injunction was limited to the holding of the annual general meeting only and not other company general meetings.

The issue of the rights of beneficial shareholders is a difficult one and will continue to challenge courts and regulators. Our appellate courts will have to decide on how and when beneficial owners may be deemed members of publicly listed companies due to s 81SJ of the SFA**.** Ultimately, however, in *Tanoto*, a result not dissimilar to *Goldilocks* was reached as the beneficial shareholders were granted liberty by the High Court for the relevant orders to compel the company to furnish them with the relevant documentation that would enable them to set up the accounts to hold the shares in question. This was to allow them to become "members" for the purposes of s 176(1) as soon as practicable. However, we have to be careful how far we go in recognising the interest of beneficial owners of shares as there can be multiple layers with private arrangements reached by sub-account holders under further sub-trusts with other beneficiaries. These trusts are often just more

[32] Companies Act 1967 s 216A(1)(*c*).
[33] c 46.
[34] *Tanoto Sau Ian v USP Group Limited* [2023] SGHC 106 at [31]-[35] referring to the Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) Recommendation 2.13.
[35] *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425, discussed in (2018) 19 SAL Ann Rev 738.
[36] *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425 at [10].
[37] *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425 at [13].

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complicated forms of gratuitous gifts. Again, private law can play a part in the operation of financial regulation.

In the context of private trust arrangements, it was recently held in *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem*[38] that objective intentions could be used to determine the ownership of shares in a company when applying a resulting trust analysis.[39] This may be based on an agreement or understanding which did not succeed there as the person purportedly declaring the trust did not have beneficial ownership of the shares at the relevant time. He already held those shares for another due to the presumption of resulting trust that had arisen in favour of that other person based on earlier monetary contributions.[40] Coomaraswamy J said[41]:

> To my mind, even on the plaintiff's best case, the 2015 Trust Deed is nothing more than an imperfect gift by the first defendant to the plaintiff. Equity will not assist the plaintiff, being a volunteer, to perfect the imperfect gift (*Personal Property Law* at paras 10.074–10.075).

Perfecting a gift requires compliance with the right method for doing so. This requires both the intention to make and the fact that the gift was properly made to coincide. So, for example, we know from the famous case of *Milroy v Lord*[42] that "there is no equity in this Court to perfect an imperfect gift". There, an out and out gift failed and the Court of Appeal refused to recharacterize it as a self-declaration of trust. One reason for this is that there are third party effects in this, as there always are with proprietary findings.

A variation of this would be the recent decision concerning whether the creation of an express or resulting trust in favour of a borrower is compatible with security interests created over shares given to a lender. In *Acute Result Holdings Ltd v CGS-CIMB Securities (Singapore) Pte Ltd (formerly known as CIMB Securities (Singapore) Pte Ltd)*][43] the court had to deal with an appeal from the High Court which had found that an intention to confer a factual benefit by, for example, creating or improving a security interest precluded a resulting trust from arising with respect to shares of a HK listed company that were kept in a brokerage account here. The borrower sued the broker for knowing receipt and assistance (for a first tranche of shares) as well as for breaches of contract for transferring a second tranche shares out of its account and failing to recognise that the shares in the account continued to belong to the borrower even though it had granted security to the lender.

The Appellate Division of the High Court thought that the lower court judge had stated the point too widely, and that:[44]

> The more specific point for our purposes, was that an intention to create a security interest in a particular property in favour of the transferee of the property was incompatible with that transferee holding the property on trust for the transferor when there are otherwise no express words or circumstances to support the finding of a trust.

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[38] *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem* [2023] SGHC 6.
[39] *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem* [2023] SGHC 6 at [77].
[40] *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem* [2023] SGHC 6 at [118]. See also *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16, discussed by Hans Tjio and Clare Tung, "Reverse Veil-Piercing in Singapore and Its Consequences" (2018) 30 SAcLJ 1133.
[41] *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem* [2023] SGHC 6 at [118]
[42] *Milroy v Lord* (1862) 2 GF & J 264 per Turner LJ, reversing Stuart VC who found that a trust had been created.
[43] *Acute Result Holdings Ltd v CGS-CIMB Securities (Singapore) Pte Ltd* [2023] SGHC(A) 27.
[44] *Acute Result Holdings Ltd v CGS-CIMB Securities (Singapore) Pte Ltd* [2023] SGHC(A) 27 at [35]

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There being no such trust, the broker could not be liable for participating in a breach of such. Nor was it liable in breach of contract as it was clear that the lender had been given actual authority by the terms of the secured loan to operate the brokerage account. In addition, the borrower had not objected to the lender's instructions given to the broker to transfer the shares out of the account and were precluded by a conclusive evidence clause from challenging it after the stipulated time period. That clause applied even in respect of unauthorised transactions or negligent breaches and was not unreasonable under the Unfair Contract Terms Act 1977[45].

Issues of agency law and estoppel arise frequently in securities regulation which in fact is a mix of disparate areas of law first put together and organised as such by Professor Louis Loss[46]. It is part of the larger story that we cannot escape from private law in the area of financial regulation. This is because regulations often create categorisations but how judges apply them to the facts still depend very much on matters like the burden of proof. And statutes are often not exhaustive of a particular context and so there is room for private law to operate.

**Private Law and Financial Regulation**

There are at least 5 areas in which we presently see some interface between private law and financial regulation. First is with respect to bank regulation and liability in respect of external fraud practiced on its customers and how much private law can look to external guidance in determining the incidents of liability. Related to this is the amount of deference shown by courts to regulators in its decision-making process. Third is the fact that legislation may directly refer to private law concepts and needs to be interpreted accordingly. Fourth is the recharacterization of transactions by courts due to externalities. Finally, we will examine how financial regulation and its goals can only be achieved with the help of private law adjudication in the specific area of cryptocurrency.

The starting point is the recent warning by Lord Leggatt in *Philipp v Barclays Bank*[47] that private law should not overreach into areas of regulation. There, the UK Supreme Court held that a victim who is the direct author of her own loss, as with authorized push payment fraud practiced on her by external parties, could not sue her bank based on the *Quincecare*[48] duty of care. Following *PT Asuransi Tugu v Citibank*[49] the Supreme Court held that the basis of that duty was a bank being put on notice that an agent of its customer acted fraudulently in authorizing payments from the account. Consequently, it could not be used to make a bank liable for external fraud practiced on its customer. To do so would be inconsistent with the banker-customer relationship under which the bank is contractually bound to observe its client's mandate. It is only if those instructions are vitiated when given fraudulently by someone otherwise authorized by the client and the bank is put on notice of this that liability arises.

This shows that the right language regarding liability must be attached to the wrongs that are seen today[50]. In this context it is agency law that applies within a certain regulatory framework. While this properly occupied the space with internal fraud, Lord Leggatt thought with external fraud that banks will be required to reimburse customers through regulations introduced by the Financial Services and

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[45] *Acute Result Holdings Ltd v CGS-CIMB Securities (Singapore) Pte Ltd* [2023] SGHC(A) 27 at [39] to [42].
[46] Louis Loss, *Securities Regulation* (Little, Brown and Company, 1st Ed, 1951).
[47] *Philipp v Barclays Bank* [2023] UKSC 25 at [22]-[24].
[48] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.
[49] [2023] HKCFA 3 (noted by Jeremiah Lau, 'Limitation in Bank Fraud Claims: Effect of Account Closure' (2023) 82(2) Cambridge Law Journal 224),
[50] Chua Rui Yuan, 'The *Quincecare* duty: an unnecessary gloss' [2023] JBL 161, cited by Lord Leggatt) who also argued for breach of fiduciary duty in the case of external fraud.

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Markets Act 2023 s 72, which will amend regulation 90 of the UK Payment Services Regulation.[51] The position is perhaps less clear in Singapore although even without new specific regulation there had previously been some form of ad hoc public enforcement. One example of this was with the bank "phishing" scam in December 2021 where 790 people were convinced by fake emails purportedly from a Singapore bank to provide their details to fraudsters who emptied their bank accounts of almost S$14 million. While an independent review showed that there was no cyberattack on the bank's IT systems, the regulators found the relevant bank to have been slow in reacting to the "phishing" attacks and it was required to make goodwill payments to its account holders and increase its regulatory capital.[52]

According to Lord Leggatt, it is not the role of private law or that of the courts to provide a 'fair balance'[53], but one for legislators and regulators. Although in the context of the constitutionalism of s 377A of the Penal Code 1871, Menon CJ also said[54]:

> The single biggest advantage of the political process – in fact, its *raison d'être* – is its ability to accommodate divergent interests and opinions (see likewise *Trials of the State* at p 65). However sub-optimally some may think politics performs that function, the courts can *never* discharge that function simply because it is not their constitutional role to mediate such differences in society. And this is so for good reason, because litigation is a zero-sum, adversarial process with win-lose outcomes. The political process, in contrast, seeks to mediate – it strives for compromises and consensus in which no one side has to lose all.

But statutes still have to be interpreted in the courtroom particularly because financial legislation often uses private law concepts. The most well-known presently is the Regulation Best Interest in the US which the SEC adopted in 2019, which requires broker-dealers when giving securities advice to reach a client's "best interest" standard of conduct. While this is certainly more exacting than the "suitability" rule, it has been stated that it does not reach a "fiduciary" standard applicable to investment advisers[55]. Presumably in the US this will require more given that there is a fiduciary duty of care there. But the use of such language means that understanding where private law stands is unavoidable. If translated into Commonwealth terms, we would have to deal with the fact that the duty of care is clearly not fiduciary[56] but also Flannigan's arguments that the duty to act in good faith

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[51] *Philipp v Barclays Bank* [2023] UKSC 25 at [21]. This will come into effect in 2024.

[52] See "OCBC ordered to hold additional $330 million in regulatory capital" Straits Times 26 May 2022 at <https://www.mas.gov.sg/news/media-releases/2022/mas-imposes-additional-capital-requirement-on-ocbc-bank-for-deficiencies-in-response-to-spoofed-sms-phishing-scams>.

[53] *Philipp v Barclays Bank* [2023] UKSC 25 at [67].

[54] *Tan Seng Kee v Attorney General* [2022] 1 SLR 1347; [2022] SGCA 16 at [4]. CJ Menon may have relied on a private law idea of estoppel when he found that the court did not have to decide on the issue as the Attorney-General had said that s 377A would not be enforced.

[55] SEC Chairman Jay Clayton, *Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors* (8 July 2019).

[56] *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] 1 SLR 1648; [2023] SGCA 17:

> (9) Nonetheless, Mr Wee was not in breach of his fiduciary duties as the evidence did not show that he was consulted before the Payments were made or that he had the opportunity to consider the interests of BIT Baltic during the payment process. Moreover, Mr Wee did not put his personal interests before the interests of BIT Baltic. He did not make a profit from his position nor was he dishonest in relation to the making of the Payments: at [55].
>
> (10) However, Mr Wee was in breach of his duty to act with due care, skill and diligence as he failed to make the necessary inquiries about the Payments and attempt corrective action when he became aware of them and of BIT Baltic's insolvent state: at [58].

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in the best interest of a principal is also not a fiduciary duty but a nominate one[57]. This has been accepted by some courts in Singapore.[58] In other words, quite often private law language can be intertwined with public regulation but how they interface must be handled judiciously. And that linkage quite often can depend on how much a court takes into account the view of regulators who play an important role in the administrative state.

The issue of deference is perhaps most important in the US given their politicised judicial system. A recent book[59], describes how the US Supreme Court initially refused to defer to the SEC's views post the New Deal, then did from around the mid-1940s and then refused again from around the early 1970s. Circa 1987, however, it has been more a "random walk"[60] where the litigation outcome is less predictable. This is to be seen in light of Menon CJ's discussion of objective principles that are to be applied by neutral judges which he discussed extrajudicially[61] and also his predecessor Chan SK CJ's statement that the court prefers to be "solution-oriented rather than doctrine-oriented"[62] in its approach. In his speech Menon CJ also referred to the US Chief Justice Roberts's point that the judge's role is just "to call balls and strikes"[63]. Good lawyers can, however, frame things in a way that helps their clients. The example from the bank negligence cases discussed above is how the *Quincecare*[64] doctrine seemed to move from a third party notice case to two party negligence (*Singularis*[65]) and now back to agency again (*Philipp*[66]), which rules out its application in cases where the external fraud impinges on the banker-customer relationship without the involvement of an authorised intermediary.[67] In Singapore, however, the position at end 2023 appeared to still focus on third party notice and negligence. *Quincecare* in its earlier guise was applied in *Hsu Ann Mei Amy v Overseas Chinese Banking Corporation*[68] to a case where a bank was dealing with an individual customer that may have lacked the mental capacity to give it instructions and was also subject to some form of undue pressure from her daughter. Ultimately, even though the bank was put on notice of these possible irregularities, it satisfied its duty of reasonable care (it actually refused to follow the customer's instructions and was sued for that breach of mandate). But it does show that, in Singapore at least, *Quincecare* can operate outside the confines of agency law and may yet be used to cover external fraud practiced on its customer even if legislation moves into this space.

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[57] Robert Flannigan, "The Adulteration of Fiduciary Doctrine in Corporate Law" (2006) 122 LQR 449.
[58] See eg *Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) v Ho Kang Peng and another* - [2013] SGHC 34 at [94].
[59] AC Pritchard and Robert Thompson, *A History of Securities law in the United States* (OUP, 2023).
[60] *Ibid*, Introduction, Part 5.
[61] "Executive Power: Rethinking the Modalities of Control" (2019) 29 Duke Journal of International and Comparative Law at 277 at 295.
62 "Opening Address by Chief Justice Chan Sek Keong" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (T M Yeo, H Tjio & H W Tang gen eds) (Academy Publishing, 2011) at p ix.
[63] Opening Statement before Senate Panel [transcript], N.Y. TIMES (Sept. 12, 2005). Available at <https://www.nytimes.com/2005/09/12/politics/politicsspecial/robertss-opening-statement-before-senatepanel.html>.
[64] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.
[65] *Singularis Holdings Limited (in liquidation) v Daiwa Capital Markets Europe Limited* [2019] UKSC 50.
[66] *Philipp v Barclays Bank* [2023] UKSC 25.
[67] Hans Tjio, "Adjudicating Intermediary-Related Losses" in P Davies and Tan CH eds, *Intermediaries in Commercial Law* (Hart Publishing, 2022).
[68] [2011] 2 SLR 178. *Quincecare* was considered *in Envy Asset Management Pte Ltd (in liquidation) v CH Biovest Pte Ltd* [2024] SGHC 46, where Goh J acknowledged that it had been extensively reexamined by the UK Supreme Court (at [77]) and this will be discussed in next year's Annual Review.

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Mark Leeming JA[69] may recently have described best the interaction between public regulation and private law:

> Karl Llewellyn pointed this out nearly a century ago to his German audience, under the insightful heading 'Desirable Interaction of Precedent and Statute', when he wrote 'Once a statute is adopted, though, there is room again for the case law method, for only through it can legislative insight be elaborated, corrected, and perfected in light of the subsequent, unforeseen cases.' A standard work on the Uniform Commercial Code commences with the proposition that 'In our system of law statutory law tends to be transformed into case law'. But perhaps Michael Kirby best captured this point, when he said of advocates in the High Court, 'Lawyers love the common law; they hate statutes.'[70]

Theorists like Tan Zhong Xing have written at the highest levels about the relationship between private law and public rules and policy.[71] How it plays out in court has also been the focus of many recent academic conferences. Two things are identified here with respect to financial regulation. First, courts can intervene to determine if an instrument created or recognised by regulation is indeed what it is. The starting point in financial centres is the sanctity of contract. This, however, may come up against regulatory policy. What that policy is, however, may not always be clear. It may depend on how much third parties are affected by a transaction.[72] There are proprietary consequences when third parties are affected by private ordering and so "property" or "mandatory" type rules may come into play.[73] Much also depends on whether one sees a statute as largely one providing relaxed default provisions, or at the other extreme, strict mandatory ones. In other words, many statutes may not be exhaustive of a particular position, and so good lawyers still have room to manoeuvre. The former will be discussed in the context of company charges, and the latter with digital assets.

***Recharacterisation of security: the burden of proof?***

An area in which Singapore has led caselaw development around the world is with security transactions and, in particular, the fixed versus floating charge divide. Despite the Companies Act 1967 and now the Insolvency, Restructuring and Dissolution Act 2018 respectively providing that only certain fixed charges are registrable but that all floating charges are, with the latter also subject to subordination to certain preferential unsecured creditors, courts in the UK and HK continue to allow parties contractual freedom in designing their security as fixed rather than floating. In contrast, Singapore has been very strict since its cases after the Pan-El crisis in 1985-6[74] in requiring the

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[69] "Trusts and Trustees: Their Successes and Successors" (2023) 53 Australian Bar Review 97 at 104.
[70] *Vigolo v Bostin* [2004] HCATrans 107 (2 April 2004).
[71] Tan Zhong Xing, "Rethinking relational architecture: Interpersonal justice beyond private law" (2023) 73:3 University of Toronto Law Journal 293 and "The Enigma of Interpersonal Justice in Private Law Theory" (2023) 43:4 Oxford Journal of Legal Studies 699.
[72] Hans Tjio, "Form or Substance: Construction or Characterisation" in *Developments in Singapore Law between 2006 and 2010: Trends and* Perspectives (T M Yeo, H Tjio & H W Tang eds) (Singapore Academy of Law, 2011) at p 814. See further Lord Millett, "The *Quistclose* Trust – A Reply" (2011) 17 T&T 7, seeing characterisation as a two-stage process and echoing what he had said in *Re Cosslett (Contractors) Ltd* [1998] Ch 495 (discussed below).
[73] This is not about private ordering with quasi-judicial effects as in the case of SGX rules, for which see Jonathan Chan, 'The Relevance of Public Law to Private Ordering: The Consequences of Uncertain Judicial Review for Stock Exchange Self-Regulation' (2021) 21 JCLS 219.
[74] *Eg Re Lin Securities (Pte) Ltd* [1988] 1 SLR(R) 220; *Re City Securities Pte Ltd* [1990] 1 SLR(R) 413; *Chase Manhattan Bank NA v Wong Tui Sun* [1992] 3 SLR(R) 436; *Dresdner Bank AG and others v Ho Mun-Tuke Don* [1992] 3 SLR(R) 307.

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chargee to retain actual control of the underlying collateral before it has a fixed charge, and the absence of cases for almost 30 years since then is testament to the stability of this area of law.

On the face of some transactions though there is no clear delineation between a fixed or floating charge. Andrew Burrows (now Lord Burrows), points out "(s)ome restriction on the chargor's liberty to deal with the asset is consistent with the existence of a floating charge. On the other hand, some liberty on the part of the chargor to deal with the charged asset is consistent with the existence of a fixed charge"[75] This suggests that there are overlaps between various forms of security which make labelling them too precisely sometimes misleading.[76] And yet a "hierarchy of interests"[77] has been created by regulation and so what security one has cannot be simply a matter of choice. Underlying all of this is the fact that preferential unsecured creditors may be claiming against a floating charge holder under the previous section 328 of the Companies Act 1967 now section 203 of the IRDA. The incentives therefore are clearly to structure something that in fact gives a fair amount of licence to the chargor to use the collateral and to label it as a fixed charge. If so, however, and drawing an analogy with equity's darling, who is required to prove that it is a purchaser of legal estate without notice[78], the burden should be on the one asking for something higher up the value chain to prove that is what it is. In other words, it should be for the chargee to prove that it has a fixed charge.

The problem is that Romer LJ in *Re Yorkshire Woolcombers Association Ltd*[79] provided instead the 3 *probanda* of what constitutes a floating charge. A charge would only be characterized as floating: (a) if it is a charge on a class of assets both present and future; (b) if that class is one which in the ordinary course of the business of the company would be changing from time to time[80]; (c) until some future step is taken by or on behalf of the mortgagee, the company may carry on business in the ordinary way. Later decisions have shown that it is likely that the first and second criteria in *Re Yorkshire* are neither sufficient nor necessary.[81] The problem with the third criteria was that it suggested that a fixed charge is usually created so long as certain contractual restrictions were imposed on the company in dealing with the collateral, even if no control was actually exercised by

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[75] *Principles of English Commercial Law* (OUP, 2016) at 8.94.

[76] This would be an example of what Jeremy Bentham called "imposter-terms" in his *Handbook of (Political) Fallacies* (1824).

[77] Colin Bamford, *Principles of International Financial Law* (OUP, 3rd ed, 2019) at 5.113.

[78] *Re Nisbet and Potts Contract* [1905] 1 Ch 391 (Ch). Some conflicting authorities are set out in JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity Doctrine and Remedies*, 5th edn (Chatswood, LexisNexis Butterworths, 2015) [8-300], although they conclude that the burden should lie with equity's darling. Compare *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 (CA), where a claimant had to prove third-party notice even with a proprietary claim at the end of a tracing exercise. In *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 at [33], Lord Sumption thought that that the 'notice' in equity's darling and knowing receipt were the same. He set it at a lower level than an investigative duty and saw it perhaps more like an inference of knowledge. Such an inference was also drawn in *Kay Hian & Co (Pte) v Phua Ooi Yong Jon* [1988] 2 SLR(R) 439, where it was held in the context of a negative pledge attached to a prior floating charge that since the later pledgees had made no assertion that they "had made no search in the Registry of Companies or otherwise was not aware of the debenture and the registered particulars" (at [32]), its interest was subordinated to the prior floating charge.

[79] [1903] 2 Ch 284.

[80] This is quite different from the idea of a "floating" trust, where the assets themselves have not been fully identified: see now *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914, which decision was upheld in [2011] EWCA Civ 1544 (*Cf* in the case of the fixed/floating charge divide: *Re Lin Securities* [1988] SLR 340 where the Singapore High Court said that for there to be a fixed charge over shares, the shares had to be separately identifiable).

[81] *National Westminster Bank plc* v *Spectrum Plus Ltd* [2005] 2 AC 680, [106]-[107] *per* Lord Scott.

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the creditor over the company's assets. This has been challenged at various times and even said to be wrong but perhaps not as definitively as in Singapore.

In *Re Cosslett Contractors Ltd*,[82] for example, the English Court of Appeal held that it was possible that a floating charge had been created even though the parties never contemplated that this might result from their dealings between each other and thus never thought to register (rendering it void for non-registration). There, Millett LJ (with whom the other judges agreed) also pointed out that while the chargor's unfettered freedom to deal was inconsistent with there being a fixed charge, the opposite did not hold true so that a floating charge could (and usually does) carry with it restrictions (such as negative pledge clauses). Despite strong arguments that this would disrupt banking practice, the House of Lords in *National Westminster Bank plc* v *Spectrum Plus Ltd*[83] decided that a fixed charge could not be created simply by placing contractual restrictions on the freedom of the charger to use the proceeds of the books debts if the charger did not in fact have to, or did not,[84] pay those proceeds into a designated bank account. The court leaned towards finding a floating charge (which loses out in priority to the unsecured claims of certain preferential creditors) because "there was a public interest which overrides the unrestrained freedom of contract…ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have."[85]

Even so in 2023, first instance decisions in both the UK[86] and Hong Kong[87] recognised that parties had successfully created fixed charges, largely because *Spectrum* did not specify how much control the chargee required, and the case may have been restricted to book debts and not other forms of collateral. In these cases, the courts felt that the chargor's control of and ability to use the underlying assets was limited, and so fixed charges were created. This, though, suggests again that the court's focus was on the proof of what constitutes a floating charge. The decisions may have been different had one been clearly required to prove that it was a fixed charge rather than that it is not a floating charge. We cannot be totally neutral as to the kinds of charges created, but unfortunately policy considerations have sometimes taken the backseat to more formalistic reasoning.[88] Private law needs to work out its burden of proof where there is a "hierarchy of interests", much as we have with the presumption of innocence in criminal cases, in a way that best supports regulatory policy.[89] This is

[82] [1998] Ch 495.
[83] *National Westminster Bank plc* v *Spectrum Plus Ltd* [2005] 2 AC 680.
[84] *National Westminster Bank plc* v *Spectrum Plus Ltd* [2005] 2 AC 680, [160], where Lord Walker said:

> It is also necessary to bear in mind Lord Millett's warning in *Agnew* [2001] 2 AC 710, 730, para 48, that formal provision for a blocked account is not enough "if it is not operated as one in fact." Lord Millett did not expand on this point, which may raise difficult questions as to what Staughton LJ, in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, 186-7, referred to as "external" and "internal" routes to the construction of commercial documents. This point is discussed in an article by Stephen Atherton and Rizwaan Jameel Mokal in (2005) 26 Company Lawyer 10, 16-18.

[85] *National Westminster Bank plc* v *Spectrum Plus Ltd* [2005] 2 AC 680, [141] *per* Lord Walker.
[86] *Avanti Communications Ltd, Re* [2023] EWHC 940 (Ch).
[87] *Bei Ni Ltd v Cornwell (Hong Kong) Ltd* (13/07/2023, HCA923/2022) [2023] HKCFI 1799.
[88] Lee Pey Woan, "Form, Substance and Recharacterisation" in Andrew *Robertson* and James Goudkemp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) sees it as a form of contracting out of a regulatory regime.
[89] Compare the area of fraudulent conveyance in the US which may require proof of insolvency and return of capital rules in Singapore which requires proof of solvency see further Tjio, "Rethinking Share Repurchases" (2021) 16:2 Capital Markets Law Journal 141 at Part 5.

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because recharacterisation allows a judge greater use of pre-contractual evidence and evidence of subsequent conduct that even wider modern day notions of interpretation may not. [90]

***Digital assets and Cryptocurrency: working with a blank canvas?***

The other point is that statutes, even if mandatory, may not be exhaustive of a particular area of law, especially where there are technological developments that are said to be novel. An example is with corporate fundraising, where the Companies Act 1967 envisages the use of shares and debentures (which are themselves sometimes difficult to distinguish e.g., in the case of subordinated loans and preferred equity[91]), and the wider forms of securities in the SFA including business trusts and collective investment schemes. But this has not prevented the use of some other instruments that do not fall within those parameters. Digital assets such as coins and tokens issued by businesses fall outside traditional fundraising instruments and how they are accounted for on balance sheets is still not fully worked out.[92] They are, however, actively traded on platforms on an unregulated basis in many parts of the world. It has been estimated that of the 23,000 digital assets traded in the US that only 5 have been registered as securities.[93]

But investors have been willing to purchase these digital assets (and their derivatives or ETFs based on them) only if they are seen as property. And the involvement of courts is inevitable here as there is no legislation in the world that defines property. There is the *numerus clausus* principle but that is not writ in stone. While there are no decisions yet in Singapore on whether coins issued by businesses are property alongside shares and bonds, in the previous Annual Review 2002 it was described how non fungible tokens (NFTs) had been seen as property in *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")*[94]. That case, however, analogised Bored Ape Yacht Club NFTs with art and they were not simply information on a blockchain. The question is whether business-related coins and tokens will be seen as choses in action akin to shares and debentures and accounted for as liabilities on a company's balance sheet.

In the case of cryptocurrency, however, it was held in *ByBit Fintech Ltd v Ho Kai Xin*[95] that the stablecoin Tether (USTD) was a chose or thing in action and a trust could be created over it.[96] A

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[90] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2012] 3 SLR 801 at [62], but see now on appeal *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [75], *per* Sundaresh Menon CJ, warning about the admissibility of prior negotiations. Recently, V K Rajah JA in *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [42] reiterated that "a contextual approach is certainly not a *carte blanche* for creative interpretation (as coined by Lord Lloyd in *Investors* Compensation *Scheme Ltd v West Bromwich Building Society*)". See also *Bridgeman Pte Ltd v Dukim International Pte Ltd* [2013] SGHC 220, believing that subsequent conduct should not be used to determine the terms of a contract. Compare now *Tembusu Growth Fund II Ltd v Yee Fook Khong* [2020] SGHC 104*.* Perhaps "[s]ubsequent conduct cannot be used to support an interpretation that is in direct contradiction to the express terms": *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [86]. For a recent example of the use of pre-contractual evidence in a secured loan, see *MKY Capital Pte Ltd v MDR Ltd* [2022] SGHC 152.

[91] Robert Flannigan, "The Debt-Equity Distinction" (2011) 26 Banking and Finance Law Review 451 argues that the distinction lies between fixed and contingent participation in the firm's fortunes. There are practical problems in distinguishing debt from equity and so the burden of proof should be on the person seeking to benefit from the classification to prove what instrument it is and not simply that it is not the other.

[92] https://medium.com/coinmonks/the-relationship-between-shares-and-tokens-in-private-companies-3e5a115e97f

[93] Hal Scott, 'Investors at risk in absence of adequate US crypto regulatory regime' *Financial Times* (London, 23 June 2023.

[94] [2022] SGHC 264.

[95] [2023] SGHC 199.

[96] *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [4].

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stablecoin is a crypto asset whose holder has the right to redeem it for the equivalent value of fiat currency with the issuer. In the case of TerraLuna, a stablecoin which failed in 2022, however, it seems quite clear now that it was not properly backed by the issue of an equivalent value in fiat currency or other reserves. Still the fact that there is a claim against the issuer allows it to be seen as a chose in action[97]. Bitcoin, the foremost and most widely accepted cryptocurrency creates no such claim however. Yet it is also the most widely seen by Commonwealth courts as property. It may be that we have to rethink our definition of a chose in action[98] or to accept that there are forms of property that are neither choses in action nor choses in possession[99]. Things that are classified as novel will first encounter private law instead of regulation as it struggles for legitimacy in a blank space. With Bitcoin, the regulators characterised it as a form of payment under the Payment Services Act 2019. In 2023, the Payment Services Regulations 2019 promulgated under that Act covering the service providers of digital payment tokens ("DPTs") like Bitcoin were further enhanced[100]. This will come into force in various stages from mid-2024 and cover the borrowing and lending of DPTs and the custodial function of the service providers. The aim is to increase retail investor protection and future amendments will also "prevent market abuse and unfair trading practices"[101] by DPT service providers. These are likely to be similar to the market abuse provisions for securities and derivatives contracts in Part 12 of the SFA. It would appear that regulators have decided that using traditional prospectus disclosure for securities for most of the digital assets today is to fight the last war and what is important is to regulate the secondary market activities on platforms of these financial instruments.[102]

Yet what is considered money in economic terms serves not just as a means of exchange but also as a store of value and unit of account. Bitcoin or other cryptocurrencies may be a form of property and a DPT but it might still not be money in a particular setting. This was the finding of Vinod Coomaraswamy J in relation to a winding up petition by Algorand Foundation, a blockchain company, under s 125(2)(*a*) of the IRDA against the Singapore entity of failed crypto fund Three Arrows Capital, with a claim denominated not in fiat currency but 53.5 million USD Coin ("USDC")[103]. While he held that Algorand had standing to bring about a winding-up application, he did not accept that cryptocurrency is money without more and the claim failed under s 125(2)(a) which requires a written demand made against a person "indebted in a sum". Coomaraswamy J said:

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[97] *Cf* Tan Yock Lin, "Choses in Action: Still More Contract than Property?" (2007) JCL 57.
[98] Kelvin F K Low & Ernie Teo, "Legal Risks of Owning Cryptocurrencies" in *Handbook of Digital Finance and Financial Inclusion* vol 1: *Cryptocurrency, FinTech, InsurTech, and Regulation* (David Lee Kuo Chen & Robert Deng eds) (Academic Press, 2017) at p 225. Compare Colin Bamford, *Principles of International Financial Law* (OUP, 3rd ed, 2019) at 134.
[99] Bryan J in *AA v Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2019] EWHC 3556 (Comm), following United Kingdom, UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (November 2019) at paras 58 and 70–86. It sees crypto assets as containing more than just information or data.
[100] Monetary Authority of Singapore, 'MAS Strengthens Regulatory Measures for Digital Payment Token Services' (23 November 2023) https://www.mas.gov.sg/news/media-releases/2023/mas-strengthens-regulatory-measures-for-digital-payment-token-services (accessed 6 February 2024).
[101] 'MAS Publishes Investor Protection Measures for Digital Payment Token Services' (Press Release, 3 July 2023) https://www.mas.gov.sg/news/media-releases/2023/mas-publishes-investor-protection-measures-for-digital-payment-token-services.
[102] Hans Tjio, "Prospectus Liability: HK and Singapore" in Danny Busch and Matthias Lehmann, *Prospectus Liability Rules in Europe and Beyond: Towards Uniformity* (OUP, forthcoming).
[103] *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd* (HC/CWU 246/2022) (30 March 2023).

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> The word indebtedness, in my view, must require a debt which is in fiat currency… Determining whether or not a particular intangible, such as cryptocurrency, is money would require a detailed examination of evidence which is not appropriate in the context of insolvency,

Subsequently, however, in *Loh Cheng Lee Aaron v Hodlnaut Pte Ltd*[104] Aedit Abduallah J held that sums owed in cryptocurrency could be considered debts within the meaning of s 125(1)(*e*) read with s 125(2)(*c*) of IRDA, and he found that the company was cash flow insolvent ("unable to pay its debts") and ordered its winding up. However, Abdullah J said:

> For completeness, I should add that nothing in my decision suggests that cryptocurrency should be treated as money in the general sense, a question which I do not have to decide in the present case. In this regard, the applicant's reference to the treatment of cryptocurrency in other jurisdictions is irrelevant to its treatment in ours, and in any event, I do not find that there has been any acceptance in any major commercial jurisdiction of cryptocurrency as being equivalent to a daily medium of exchange, which would call for similar treatment in Singapore.

There is therefore much work required of private law and of judges in order that regulatory policy can properly be carried out. For that to happen, some form of administrative deference is required even if we do not see independent administrative agencies as a fourth branch of Government. In turn, however, the legislature and regulators must make it clear what it is they hope to achieve given that statutory language always runs out. It is for both private law and public regulation to come together to find the right balance.[105]

[104] [2023] SGHC 323.

[105] Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) and compare Guido Calabresi, "Being Honest About Being Honest Agents" (2010) Harvard Journal of Law & Public Policy 907 at 910: "There are people like the critical legal theorists, and people like Judge Richard Posner—who is simply a critical legal theorist of the Right—who say that courts can do anything they want because language does not tell us anything. That is non-sense. Language is important; it limits courts a great deal. To say either that language does not mean anything, or that it tells us exactly what everything means, is baloney. The truth lies somewhere in between. Text means language in context."

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