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THE EFFICACY OF SECURITIES INVESTORS' RIGHTS IN SINGAPORE

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Despite a steady trickle of enforcement actions taken against market misconduct by the Singapore regulators, no securities class actions have arisen out of these enforcement actions, which have ranged from misleading statements and market manipulation to the failure to comply with on-going disclosure obligations. This article examines whether the paucity of securities class actions might be attributable to the nature of the rights that securities investors possess. In doing so, the analysis reveals answers to an important theoretical question—the extent to which current rights protect the securities investor's interest in the fair and accurate pricing of securities.

I. INTRODUCTION

On 20 November 2004, China Aviation Oil ("CAO")[1] revealed that it had accumulated a loss of US$550 million from speculative trading in oil options. This amounted to more than fifteen times the company's net profit for 2003. Under instructions from the Singapore Exchange ("SGX"),[2] a special investigation was commissioned by CAO; it found that the audit committee had failed to monitor CAO's speculative trading in options, and that it had failed to ensure an effective system of internal controls and risk management.[3] The board of China Aviation Oil Holding Company ("CAOHC"), the holding company of CAO, knew that Chen Jiulin, the CEO of CAO, had incurred massive losses from trading in oil futures. Before the announcement of these losses, CAOHC had sold by private treaty a significant tranche of its holdings in CAO to Deutsche Bank Singapore. The sale proceeds amounted to some $185 million. They were to be used to help CAO meet its margin calls. In so far as CAOHC made the sale while in possession of inside information and without disclosing it to the counter-party, it infringed the insider trading provisions of the

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[1] China Aviation Oil was first listed for trading on the Singapore Exchange Securities Trading Limited ("SGX-ST") in 2001. The initial public offering ("IPO") raised S$76.6 million and was the largest public issue of the year.

[2] Under r. 704(12) of the SGX Listing Manual, online: <http://www.sgx.com/wps/portal/corporate/cp-en/listing_on_sgx/listing_manual> ("SGX Listing Manual").

[3] The fiasco was attributable to "the failure on the part of the audit committee in particular, and the board in general, to fulfil their respective duties in addition to risk management and controls applicable to the company's speculative derivatives trading.": Executive Summary to Price Waterhouse Coopers Report on CAO (May 2005) at para. 120.7. See also "CAO pre-trial hearing spotlights role of directors" *The Business Times* (Singapore) (23 June 2005).

Securities and Futures Act.[4] CAOHC agreed to pay S$8 million as civil penalty without court action.[5] Chen Jiulin was convicted of a number of offences, including failing to inform the SGX about CAO's losses (under section 203 of the *Securities and Futures Act*, for which he received 3 months' jail) and insider trading (4 months' jail).[6] Three non-executive directors were convicted of intentionally failing to inform the SGX of CAO's trading losses from derivatives trading suffered in 2004. Each was fined S$150,000 for the offence. One (Jia) was also charged with insider trading, for which he was fined S$250,000.[7] There was no investor class action in Singapore in the aftermath of the CAO saga.[8]

On 19 January 2006, Trek (a company listed on the main board of SGX-ST) revealed in an interview with Reuters that it expected its sales and earnings to grow by 20% to 25% over the next 3 to 5 years. This contravened the rule that material non-public information must be promptly announced to the market via SGXNET. The company made the required announcement after being alerted by SGX-ST on the morning of 20 January 2006. There had been sharp increases in the price and trading volume of the shares in the intervening period. Trek admitted to contravening section 203(2) of the *Securities and Futures Act* in negligently failing to notify SGX-ST of the earnings projection. A civil penalty of S$75,000 was paid without court action.[9]

> On 15 trading days between 23 November 2004 and 3 February 2005, Mr Pai purchased shares of China Merchants Holdings (Pacific) Limited ("CMH") just before the close of trading. MAS' investigations found that Mr Pai had intended to boost the closing price of CMH shares in order to maintain or increase the value of the CMH shares in his margin account to avoid margin calls. His purchases caused the price of CMH shares to close at between three and 15 bids, or between 3% and 12%, above prevailing market prices. On five days, Mr Pai's trades accounted for more than 50% of the market traded volume in CMH shares. Mr Pai … admitted to civil penalty liability for contravening section 197(1)(b) of the [*Securities and Futures Act*] and … paid a civil penalty of S$80,000 without court action.[10]

As of May 2009,[11] no securities class actions have been commenced in Singapore.[12] Yet, a search through the newspaper reports and the news archives of

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4 Cap. 289, 2006 Rev. Ed. Sing. [*Securities and Futures Act*].

5 Monetary Authority of Singapore ("MAS") Press Release: "MAS Takes Civil Penalty Enforcement Action Against China Aviation Oil Holding Company for Insider Trading" (19 August 2005).

6 "CAO's Chen gets 4 1/4 years' jail, $335k fine" *The Business Times* (Singapore) (22 March 2006).

7 "CAO Directors fined $700,000 for breaches" *The Business Times* (Singapore) (3 March 2006).

8 A class action suit was filed in the U.S.: Press Release by Schiffrin & Barroway, "Shareholder Class Action Filed Against China Aviation Oil (Singapore) Corporation Ltd. by the Law Firm of Schiffrin & Barroway" 4 February 2005, 5.33pm. ET, online: <http://findarticles.com/p/articles/mi_pwwi/is_200502/ai_n9482426/>. For a report on the Singapore reaction, see Wong Wei Kong, "Suit against CAO sparks debate" *The Business Times* (Singapore) (8 January 2005).

9 MAS News Archive 2007, "Trek 2000 International Ltd. Pays Civil Penalty for Continuous Disclosure Breach" (4 April 2006), online: <http://www.mas.gov.sg/news_room/press_releases/2006/Trek_2000_International_Ltd_Pays_Civil_Penalty_06.html>.

10 MAS News Archive 2007, "Mr Pai Keng Pheng Pays Civil Penalty for Contravening False Trading Provisions" (6 February 2007), online: < http://www.mas.gov.sg/news_room/press_releases/2007/Civil_Penalty_Enforcement_Action_for_False_Trading_on_6_Feb_2007.html >.

11 The final draft of this article was submitted on 3 June 2009.

12 At the time the final draft of this article was submitted, various investor groups were threatening action for losses relating to 'bonds' which had become valueless due to the failure of Lehman Brothers. See

the Monetary Authority of Singapore (MAS)[13] will reveal that there has been a steady trickle of market misconduct cases which impinge on the interests of securities investors in a fair and efficient securities market. The three cited above—CAO, Trek and Pai—are but a sampling of such cases. As at end March 2008, the Singapore equities market comprised 770 listed companies and had a total market capitalisation of S$671 billion.[14] In an equities market of this size, the occasional occurrence of market misconduct is only to be expected, whether these be by listed companies, their directors and officers, or by traders and investors. This presents us with a puzzle—why, despite the occasions of market misconduct which provide cause for investor action, has there been a paucity of civil compensation claims filed by securities investors?

The prospect of securities investors obtaining remedial relief for losses occasioned by market misconduct depends critically on (a) the efficacy of their rights of action; and (b) litigation funding. This article seeks to unravel one part of the puzzle by analysing the efficacy of the investors' rights of action, *viz*., whether investors may, without great difficulty, sue those who have impaired their interest in the fair pricing of the securities. The *efficacy* of the investors' right of action cannot be divorced from the issue of costs and funding. While it is beyond the scope of this article to deal with the issues of litigation funding, it is apposite to outline the linkage between the nature of the rights of action and their cost implications, and consequently, how the cost considerations impact on the efficacy of investors' rights.

It is in the nature of a public offering of securities that the securities come to be held in relatively small amounts by a large number of investors. Even if there is market misconduct for which investors are in theory entitled to seek recovery, the attendant litigation costs and the uncertain prospect of success may render it rational for the investor not to pursue his claim. Two simple examples serve to illustrate this in concrete terms. An investor who has suffered a loss of $10,000 will rationally choose not to incur costs of $8,000 even if he has a 75% chance of prevailing.[15] The matter is even more straightforward if the costs are large in comparison to the recovery sought; no investor would incur $50,000 to recover a loss of $10,000 even if the recovery is a certainty.[16] These are known as individually non-recoverable claims ("INR claims").[17]

Francis Chan, "High Notes 5 investors exploring legal recourse" *The Straits Times* (Singapore) (19 February 2009) and "Larger group of Minibond investors plans suit" *The Straits Times* (Singapore) (26 February 2009).

[13] See online: <http://www.mas.gov.sg/news_room/enforcement>.

[14] Monetary Authority of Singapore Annual Report 2007/2008, online: <http://www.mas.gov.sg/about_us/annual_reports/annual20072008/31_a.html#content> (last accessed 18 May 2009).

[15] The expected value is negative. More precisely, it is $-500[= -8{,}000 + (0.75)(10{,}000)]$. This simple example does not take into account the fee-shifting rule that operates in Singapore, *viz*., the rule that the losing party pay the costs (if not completely) of the prevailing party. Assessment of the expected value in light of this rule will have to take into account both the recovery of costs in the event of success and the liability for adverse-party costs should the suit fail. This increases the uncertainty of the potential costs, since the defendant who has more to lose from the precedential value of the suit can threaten the plaintiff with great adverse-party costs through expensive (if credible) defences. Whereas the defendant's investment has returns beyond the case at hand (*i.e*., it may potentially be spread over other potential litigation), the individual plaintiff enjoys no such cost spreading advantage.

[16] The expected value here being $-40,000[= -50,000 + 10,000]$.

[17] Ontario Law Reform Commission, *Report on Class Actions* (Ontario: Ministry of the Attorney-General, 1982) at 116; The Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*

Where the number of potential plaintiffs holding such INR claims is large, an obvious way for overcoming the cost barrier is to accumulate the claims. A crucial matter determining the viability of a class action lies in whether the cumulative expected recovery renders it rational to invest in the costs for realising the claims. This depends as much on the number of persons willing to participate in a class action, as on the maximum amount of recovery that is expected. Additionally, whether class action is indeed economical will depend on the number and nature of the common elements in their claims (for which cost-sharing is contemplated) and the number and nature of individual elements (which attendant cost the individual plaintiff is expected to bear). In other words, whether an INR claim resolves into an economically viable claim through participation in a class action depends on the *degree* to which the costs can be shared. In this regard, the prospect of a class action is greater where the number of individual elements in a cause of action is small and the burdens of establishing the individual elements not onerous.

In analysing investors' rights, this article is interested in examining at a theoretical level, the extent to which present rights approximate to investors' interest in the fair or accurate pricing of the securities in which they invest. The answer to this question, however, is affected by the prospect of investors actualising their rights. From a doctrinal perspective, it will be seen that investors indubitably have rights which *touch on* their interest in a fair and efficient market. This article seeks to go beyond the formal identification of the rights of action that investors might have; it seeks to identify the doctrinal hurdles and statutory limitations which impede investors' pursuit of their interest in the fair or accurate price of securities.

From an analytical perspective, a distinction needs to be made between the rights of investors to information disclosed in a fund raising process on the one hand, and the right of investors in the integrity of the price formation process in the secondary market on the other. Part II analyses the rights of investors to sue for false or misleading disclosures in the prospectus leading up to the public issue of securities. It argues that investors in the Singapore securities market have readily enforceable rights to compensation for false or misleading statements, which now extend, importantly, to a right to all material information relevant to the price of the securities. There is one unresolved kink to more fully identifying the present right of action with the investor's interest in accurate pricing of the securities purchased—the requirement for reliance. This, it is submitted, can be resolved through a judicial interpretation of the present statutory right having in view first, the current price formation process and second, the nature of the interests which securities law should seek to protect.

Part III examines the investors' rights to compensation for market misconduct in the secondary market. It is well established that an efficient and well-functioning capital market requires a good disclosure regime,[18] so that the price of the securities

(Canberra: Australian Government Publishing Service, 1988) at para 17. Both Reports adopt the nomenclature earlier proposed in Note, "Developments in the Law: Class Action, (1976) 89 Harv. L. Rev. 1318. See also Garry Watson & Per Henrik Lindblom, "Complex Litigation—A Comparative Perspective" (1993) 12 C.J.Q. 33; Per Henrik Lindblom, "Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure" (1997) 45 Am. J. Comp. L. 805 at 821.

[18] *Report of the Corporate Finance Committee*, Chairman: Lim Yong Wah (28 October 1998) (Copy with National University of Singapore library). See also John C. Coffee, Jr., "Market Failure and the Economic Case for a Mandatory Disclosure System" (1984) 70 Va. L. Rev. 717; Merritt Fox, Randall

more fully reflects the risks and prospects of the securities in question. Moreover, the integrity of the prices formed on the securities market needs to be underpinned by rules against insider trading, dissemination of misleading information and attempts at manipulating the market. The measures to this end may be undertaken solely at the regulatory level, whether enforcement is carried out by the prosecutors, the regulators or the securities exchange. However, to the extent that it has been decided that investors should have a right against market misconduct, it is useful to examine the prospect that those rights will be realised, *i.e.*, the efficacy of those rights. In Part III, I argue that the current common law rights that investors have are of limited efficacy in protecting them from market misconduct and that section 234 of the *Securities and Futures Act*, too, is of limited efficacy. While the Singapore Legislature has made a conscious move to give investors a statutory right of action for the diverse forms of market misconduct found in Part XII of the *Securities and Futures Act*, the right of action is unlikely to have much impact on investors *realising* their interest in the integrity of the price of the securities in which they transact.

II. Investor Rights Against Misleading Disclosures Contained in a Prospectus

Derry v. Peek[19] is a useful starting point for a discussion on the investor's right of action for misleading disclosures contained in a prospectus—for it sets the context for the legislative reaction from which the contemporary statutory rights of action for defective prospectuses draw their inspiration. In setting a high bar to the concept of fraud—one centered on dishonest representations rather than unconscionable representations—*Derry v. Peek* placed upon investors the onerous burden of proving what went on in the minds of the defendants. Whereas equity was prepared to grant relief for mere misrepresentations, the common law did not countenance an action for damages absent fraud. Negligent misrepresentation did not qualify as fraud and could not sustain an action for damages. The upshot of *Derry v. Peek* was the *Directors Liability Act 1890* (U.K.),[20] a legislative reversal of the outcome of *Derry v. Peek* in the specific context of representations contained in a prospectus. By section 3 of the *Directors Liability Act 1890* (U.K.), a director who approves a prospectus is liable upon proof of the "untrue statement". The statutory right of action requires neither proof of fraud nor proof of negligence. Instead, the director is afforded a defence if he honestly believed in the statement and did have grounds for such belief.[21] The terms on which a director could be liable under section 3 of the *Directors Liability Act 1890* (U.K.) accentuated the need to verify the accuracy of

Morck, Bernard Yeung & Artyom Durnav, "Law, Share Price Accuracy and Economic Performance" (2003) 102 Mich. L. Rev. 331.

19 (1889) 14 App. Cas. 337 (H.L. (Eng.)) [*Derry v. Peek*]. For application of the definition of fraud in *Derry v. Peek* in Singapore, see *Blue Nile Co. Ltd. v. Emery Customs Brokers (S) Pte. Ltd.* [1990] S.L.R. 454 (H.C.) and *Raiffeisen Zentralbank Osterreich AG v. Archer Daniels Midland Co* [2007] 1 S.L.R. 196 (H.C.). See also *Public Prosecutor v. Wang Ziyi Able* [2008] 2 S.L.R. 61 (H.C.) which interprets the statutory formulation of the common law definition found in *Securities and Futures Act*, s. 199(i).

20 53 & 54 Vict., c. 64 [*Directors Liability Act 1890* (U.K.)].

21 See *Adams v. Thrift* [1915] 1 Ch. 557 for an interpretation of this clause.

statements.[22] The legacy of this statutory development is an enduring one—for the progeny of this provision can still be found today in Australia,[23] Canada,[24] India[25] and Malaysia.[26] Importantly, it endures in Singapore—in an expanded form—as section 254 of the *Securities and Futures Act*.

In Singapore, the contours of liability have been moved to confer a greater measure of protection on securities investors. The mandatory disclosure obligations have increased. Potential investors are furnished with a greater amount of information by which to make their investments. More than that, the interaction between the mandatory disclosure regime and the statutory right to damages for misleading prospectuses results in investors having a legally enforceable right to an increased range of information. Until 2000, the statutorily mandated disclosure regime for fund-raising consisted of the items set out in the Fifth Schedule of the *Companies Act*.[27] The amendments in 2000 required an issuer, additionally, to disclose:

> … all the information that investors and their professional advisers would reasonably require to make an informed assessment of …
>
> (a) the rights and liabilities attaching to the securities;
> (b) the assets and liabilities, profits and losses, financial position and performance, and prospects of the issuer …"[28]

Moreover, the mandatory disclosure obligation extends beyond the point when the prospectus is lodged to the close of applications.[29] The new disclosure obligations fundamentally alter the premises of the statutory right of action. While the concept of a misrepresentation at common law was broad enough to include a failure to update a continuing representation which had been falsified by subsequent events,[30] it did not extend to a duty to disclose all material facts necessary for an investor to make an informed decision. There was admittedly dicta to this effect—*New Brunswick & Canadian Railway v. Muggeridge*[31] and *Central Railway*

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22 *Ibid*. (An apt illustration of honest but passive directors who were held liable under the provision).
23 *Corporations Act 2001* (Cth.), ss. 728 and 729.
24 *E.g*., Ontario: *Securities Act* R.S.O. 1990, c. S-5, s. 130; British Columbia: *Securities Act* R.S.B.C. 1996, c. 418, s. 131
25 *Indian Companies Act 1956*, s. 62.
26 *Capital Markets and Services Act 2007* (Act 671), ss. 212 and 214.
27 Cap 50, 1994 Rev. Ed. Sing. [*Companies Act*].
28 *Companies Act*, s. 45(1)(a) read with s. 45(3). The old s. 45 was wholly repealed and a new s. 45 was inserted by the *Companies (Amendment) Act 2000* (No. 36 of 2000) [*Companies (Amendment) Act 2000*], s. 5. In 2001, the division in which s. 45 was contained was moved from the *Companies Act* to the *Securities and Futures Act* by the *Securities and Futures Act* 2001 (No. 42 of 2001) [*Securities and Futures Act 2001*] (w.e.f. 1 July 2002). Today, s. 243 of the *Securities and Futures Act* prescribes what a prospectus for fund-raising must contain.
29 *Securities and Futures Act*, s. 254(1)(c), reproduced at text after *infra* note 73.
30 *With v. O'Flanagan* [1936] Ch. 575 (EWCA Civ).
31 (1860) 1 Drew. & Sm. 363 (Ch.) at 381, *per* Kindersley V-C [*Muggeridge*]:

> Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.

Co of Venezuela v. Kisch[32] being two oft-cited cases in this regard. In context, however, the cases show that the so-called duty to disclose all material facts invariably involved statements actually made and which were misleading because they were insufficiently candid to reveal the whole truth.[33] Common law misrepresentation is underpinned by statements, not non-disclosures.[34] This, for better and for worse, carried through to the *Directors Liability Act 1890* (U.K.) and it is submitted, to section 55 of the *Companies Act* prior to the amendments in 2000.[35] In creating a general mandatory disclosure obligation and allowing a statutory right of action for its breach, the amendments in 2000 fundamentally changed the nature of the investor's entitlement. There is now statutory recognition of the investor's legal entitlement—in general terms—to the disclosure of material information. Thus, beyond the untrue *positive* statements which were the target of the *Directors Liability Act 1890* (U.K.), investors have now a right to sue for losses arising from omission to provide the wide ranging information which are statutorily mandated.

Amendments have also extended the range of potential defendants under section 254 of the *Securities and Futures Act*. They extend beyond the traditional targets covered in the *Directors Liability Act 1890* (U.K.): the directors of the issuer and persons who authorised the issue of the prospectus.[36] Amendments in 2000 added the underwriter to the list of potential defendants,[37] while the issue manager was added to the list in 2005.[38] The class of potential defendants has therefore been

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32 (1867) L.R. 2 H.L. 99 at 113 [*Kisch*]:

> … no mis-statement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements.

33 In *Muggeridge*, *supra* note 31, the prospectus held out to shareholders that each shareholder was entitled to a certain amount of land. The right was in fact a contingent one. The non-disclosure of this fact falsified the statement made. In *Kisch*, *supra* note 32, the prospectus stated that the company had capital of GBP500,000 for building a railway; it did not disclose that out of this, a payment of GBP50,000 had to be made as purchase price for the concession. The non-disclosure rendered false and misleading the statement relating to the available capital for constructing the railway line.

34 See statements inferred from conduct in *Spice Girls Limited v. Aprilia World Service BV* [2002] EWCA Civ 15, [2002] E.M.L.R. 510 [*Spice Girls Limited*].

35 It is true that the pre-2000 version of the *Companies Act*, s. 55 predicated liability for any loss or damage sustained "by reason of the willful non-disclosure therein of any matter of which he had knowledge and which he knew to be material …" However, there was then no general duty of disclosure, only specific disclosure obligations contained, for example, in the *Companies Act*, s. 45 and the Fifth Schedule; hence, it is likely that the liability for non-disclosure extended only to matters which the persons concerned were statutorily obliged to disclose. Even then, the investor's legal right to sue was only available when the non-disclosure was willful. In character, the entitlement retained the character of a right against fraud, not a *per se* entitlement to material information.

36 To be accurate, the potential defendants under s. 3 of the *Directors Liability Act 1890* (U.K.) also included promoters. This is no longer found in *Securities and Futures Act*, s. 254(3), presumably due to changes in the method of fund-raising.

37 *Companies (Amendment) Act 2000*, s. 5.

38 *Securities and Futures Act*, s. 254(3)(d), inserted by *Securities and Futures (Amendment) Act 2005*, No. 1 of 2005, s. 58. See MAS Consultation Paper 10-2003, *Policy Consultation on Amendments to the SFA and FAA* (Sep 2003) ch 2, issue 2.2 at 10 [*MAS Consultation Paper 10-2003*].

increasingly widened to include intermediaries who have critical responsibility as "gatekeepers" of securities offerings coming on the market.[39]

The modern statutory framework, as well as the institutional processes that support this framework, subjects the issuer's affairs to rigorous scrutiny. The due diligence process documents the person(s) responsible for each statement. The prospect of legal responsibility for errors—both criminal and civil—is a salient one, what with the involvement of lawyers to scrutinise the accuracy or basis of each statement and the attribution of responsibility to specified persons. Since the issue manager and the underwriter are exposed to presumptive liability for mere inaccuracies contained in a prospectus,[40] they have strong incentives to query the accuracy and completeness of the statements to be contained in a prospectus.[41] Although the criminal liability is premised on fairly onerous *mens rea* requirements, the distraction that attends a criminal investigation into their work processes—what their personnel knew and whether they were reckless—accentuates the unpalatable consequences of having overseen a problematic prospectus. Moreover, the zealousness with which the Singapore regulators police the integrity of the financial market renders the likelihood of such an investigation almost a certainty once a prospectus is discovered to be problematic.[42] All this, in addition to the damage to reputational capital from one's association with such a prospectus.

That there has not, to date, been enforcement actions involving defective prospectuses gives credence to the theory that the current legal regime affecting securities issue to the public is a fairly robust one.[43] This is not to say that there have not been "gatekeeper failures". In the IPO of eWorld of Sports, the underwriter (UOB Asia) made a misleading announcement in the Straits Times that "the offer to the

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[39] Under Singapore practice, it is the issue manager rather than the underwriter who assists in preparing the prospectus: *MAS Consultation Paper 10-2003*, *ibid.* at 7. This is recognised in the SGX Listing Manual, r. 111, which charges the issue manager with the responsibility for exercising due care and diligence, and for ensuring the completeness and accuracy of information found in the prospectus. On 'gatekeeping' in corporate governance, see John C. Coffee Jr., *Gatekeepers: The Professions and Corporate Governance* (Oxford: Oxford University Press, 2006).

[40] The liability is not strict as defences premised on due diligence are available under *Securities and Futures Act*, s. 255. Under *Securities and Futures Act*, s. 255(1), a potential defendant escapes liability for a false or misleading statement if he can prove that he: "… (a) made all inquiries … that were reasonable in the circumstances; and (b) after doing so, believed on reasonable grounds that the statement was not false or misleading." A similar defence applicable to omissions is found in *Securities and Futures Act*, s. 255(2).

[41] *Securities and Futures Act*, s. 254. Cf. Criminal liability of the issue manager and underwriter, which is not premised on strict liability; intention, knowledge or recklessness needs to be shown: *Securities and Futures Act*, s. 253(4)(d) and (e).

[42] See, for example, Financial System Stability Assessment on Singapore (IMF Country Report 04/104. April 2004) at 27 ("The framework for the oversight and regulation of securities markets, intermediaries, issuers, and collective investment schemes is well developed, sophisticated, and meets international standards"), online: <http://www.imf.org/External/pubs/ft/scr/2004/cr04104.pdf> (last accessed 25 February 2009).

[43] Note, however, the use of an expired prospectus by UOB Asset Management: MAS News Archive 2006, "MAS imposes a composition amount of $5,000 on UOB Asset Management Ltd. for use of an expired prospectus" (17 May 2006), online: <http://www.mas.gov.sg/news_room/enforcement/2006/Web_statement_UOBAM_s299.html>.

public is approximately 1.3 times subscribed."[44] In fact, the IPO was only 41.7% subscribed.[45] More recently during the takeover bid for Jade Technologies which subsequently collapsed for the lack of cash, the bidder had inaccurately represented its existing holdings in the target and that it had sufficient financial resources to fully satisfy all acceptance of the offer; in addition to the bidder, the financial advisers and the lawyers were sanctioned for their lapses which contributed towards the issue of the inaccurate statements.[46] Having a robust legal regime—and indeed, a reputation for strong enforcement—can only reduce the probability of contravention. It does not eliminate the possibility of contravention. The Jade Technologies episode provides an apt illustration of this—after all, the principles and rules contravened in Jade Technologies were well-established ones, and the jealousy with which the Securities Industry Council guards their compliance notorious. One does not have a guarantee that Singapore will not see misleading or defective prospectuses in the future.

The more pertinent question for the purposes of this article is whether securities investors have readily enforceable rights in the event that there is leakage in the institutional checks, and a misleading prospectus does issue. The statutory developments discussed so far expand the ambit of the investors' rights, first in the subject matter of disclosure, and second, in the class of potential defendants. In the matter of causation—which bears on the economic viability of a class action—it is not clear whether the traditional assumption that reliance is required continues to obtain in the current statutory right of action.

One of the premises of section 3 of the *Directors Liability Act 1890* (U.K.)—and by extension, the pre-2000 section 55 of the *Companies Act*—is that reliance is a necessary element in the cause of action. The director is liable to pay compensation to all subscribers for the "loss or damage they may have sustained *by reason of* any untrue statement …". In *McConnell v. Wright*,[47] Collins M.R. took this to mean "by reason of being induced to take shares by the untrue statement." Professor Gower said of its progeny, section 43 of the *Companies Act 1948* (U.K.):[48]

> … this section maintained most of the common law requirements but removed the need to prove fraud and altered the onus of proof in favour of the plaintiff … In other respects most that has been said previously applies to this statutory

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44 Reply to Parliamentary Question on eWorld of Sports (for Parliamentary Sitting on 25 August 2000), online: <http://www.mas.gov.sg/news_room/parliamentary_questions/2000/Reply_to_Parliamentary_Question_on_eWorldofSport_IPO__25_Aug_2000.html>

45 The inflated figure was obtained by the underwriter and its co-underwriter taking up a large portion of the public tranche. The statement gave the public the impression that investor demand for the shares was higher than it actually was. Indeed, investigations showed that the underwriter had similarly inflated an earlier IPO of Hua Kok International. Subsequently, the underwriter was charged for knowingly disseminating a misleading statement contrary to (what was then) s. 99(b) of the *Securities Industry Act* (Cap. 289, 1985 Rev. Ed. Sing.), and for creating a misleading appearance with respect to the market for securities under the *Securities Industry Act*, s. 97(1). It was fined a total of $400,000. See Sing., *Parliamentary Debates*, vol. 72, col. 685 at 685-688 (25 August 2000) (BG Lee Hsien Loong).

46 *In the matter of Jade Technologies Holdings Limited* (Grounds of Decision of the Hearing Committee appointed by the Securities Industry Council, 14 October 2008).

47 [1903] 1 Ch. 546 (EWCA Civ) at 550.

48 11 & 12 Geo. VI, c. 38 [*Companies Act 1948* (U.K.)].

> remedy; there must be a false statement of a fact which is material in the sense that it induced the subscription …[49]

What had been said previously included the common elements to an action in deceit and an action in negligent misrepresentation:

> Not only must the plaintiff have been intended to act on the misstatement, he must actually have done so. In other words, the falsehood must have influenced him; if he never read the prospectus, or did not believe it, or placed no weight on the matter misstated, or was not misled by an ambiguity, he has no remedy.[50]

The requirement for proof of individual reliance on the untrue statement in a prospectus poses at least two hurdles for an investor class action. First, as the prospectus tends to be a prolix document which only the few with the patience and financial knowledge are likely to read, the reliance element precludes action by those who have relied on the market to judge the fairness of the issue price. Second, the reduction in the number of persons who are entitled to sue affects the viability of group action when the claims are individually non-economical.

To be sure, once materiality had been established, the courts have been prepared to infer that the representee had been influenced by the statement.[51] In *Mayor and Burgesses of The London Borough of Waltham Forest v. Roberts*,[52] an applicant for council housing had falsely stated that she did not own any property; although the actual decision maker did not give evidence whether he was induced by the statement to grant the tenancy, the English Court of Appeal was prepared to infer that the misstatement had influenced the decision.[53] It is well established that the

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49 L.C.B. Gower, *Gower's Principles of Modern Company Law*, 4th ed. (London: Stevens & Sons. 1979) at 384 [*Gower*]. Citations are made to the 4th edition of *Gower* because it is the last edition to comment on s. 43 of the *Companies Act 1948* (U.K.). The provision was subsequently recast as s. 150 of the *Financial Services Act 1986* (U.K.), 1986, c. 60 [*Financial Services Act 1986* (U.K.)].

50 *Gower*, *ibid.* at 375-376, citing *Smith v. Chadwick* (1884) 9 App. Cas. 187 (H.L. (Eng.)) [*Smith*]

51 "I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." *Smith*, *ibid.* at 196 (per Lord Blackburn). For application of this in Singapore, see *Hill Samuel Merchant Bank Asia Ltd. v. Resources Development Corp Ltd.* [1992] 2 S.L.R. 967 (C.A.) (letter of credit); *Global Accent Trading Pte. Ltd. v. Forum Development Pte. Ltd.* [1994] SGHC 91 (lease agreement); *Ng Kong Teck v. Sia Kiok Kok* [1997] 1 S.L.R. 296 (H.C.) (sale of land); *Lim Bio Hiong Roger v. City Developments Ltd.* [1999] 4 S.L.R. 451 (sale of land).

52 [2004] EWCA Civ 940. See also *Spice Girls Limited*, *supra* note 34, where the Court of Appeal was prepared to infer from the evidence that the plaintiffs had relied on an implied representation (the content of which was the subject of dispute).

53 Not having heard evidence from the decision maker at trial, the Recorder felt that he could not come to a conclusion that the Council's decision to grant the housing application had been influenced by the misstatement. The Court of Appeal took the view that the question whether an applicant owned property at the point of application for subsidised housing was obviously material; given the finding that the applicant had made the misrepresentation to avoid queries that disclosure of the truth would have engendered, there was "ample evidence upon which the court could have concluded that the Authority was induced." (*Ibid.* at para. 42) It should be noted that the facts of this case fit within Lord Blackburn's dictum in *Smith*, *supra* note 51, *viz.*, the misrepresented matter was material and made with a view to induce the representee. More problematic is where there is a mere misrepresentation or mere non-compliance with a mandatory disclosure obligation.

inference is one of fact, not an inference of law.[54] As pointed out by Lord Blackburn in *Smith*:

> [T]he tribunal which has to decide the fact should remember that … the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one.[55]

Indeed, the requirement for inducement (reliance) has proved to be a stumbling block for the investors' claims for defective prospectuses.[56] The less sophisticated investor who had not specifically relied on the misstatement in question would be precluded from suing. The prospect of group action by investors is diminished to the extent that the exclusion of such investors affects the economic viability of prosecuting the group action.

Until 2000, the Singapore provision on civil liability for a misleading prospectus—section 55 of the *Companies Act*—followed closely the wording of section 43 of the *Companies Act 1948* (U.K.). In 2000, section 55 of the *Companies Act* (what is now section 254 of the *Securities and Futures Act*) was substantially amended to cover omission to disclose information subject to mandatory disclosure and a failure to update. Although the inspiration for the present section 254 is stated as section 728 of the Australian *Corporations Act 2001* (Cth.) [*Corporations Act 2001* (Aust.)],[57] the present formulation of the causal link found in section 254 of the *Securities and Futures Act* ("as a result of") is the same as that found in section 150 of the *Financial Services Act 1986* (U.K.) and section 90 of the *Financial Services and Markets Act 2000* (U.K.).[58] One of the leading commentators on U.K. company and securities law, Eilis Ferran, posits that the U.K. provisions do not contemplate proof of inducement or reliance:

> The Investor must show that there is a causal link between the inaccurate prospectus and the loss suffered; this means that an investor must establish that the price at which he acquired the shares was a price which reflected the wrong information. *However there is no further requirement that the investor should have been specifically aware of the false information and have relied upon it in making an investment decision*.[59]

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[54] *Smith*, *supra* note 50 at 196, correcting Jessel M.R.'s statement in *Redgrave v. Hurd* (1881) 29 Ch. D. 21 (EWCA Civ) that the inference is one of law.

[55] *Smith*, *ibid.* at 196-197. See also *Scott v. Dixon* (1959) 29 L.J. Ex. 62n; *Andrews v. Mockford* [1896] 1 Q.B. 372.

[56] *Nash v. Calthorpe* [1905] 2 Ch. 237 (EWCA Civ) [*Nash*]. The cause of action was based upon s. 38 of the *Companies Act, 1867* (U.K.), 30 & 31 Vict., c. 131 [*Companies Act 1867* (U.K.)] which required a prospectus to state contracts that the company had entered into.

[57] See end reference in *Securities and Futures Act*, s. 254.

[58] 2000, c. 8 [*Financial Services and Markets Act 2000* (U.K.)].

[59] Eilis Ferran, *Company Law and Corporate Finance* (Oxford: Oxford University Press, 1999) at 601 (emphasis added) (in the context of *Financial Services and Markets Act 2000* (U.K.) s. 150). She repeats these views for the current provision, s. 90 of the *Financial Services and Markets Act 2000* (U.K.): Eilis Ferran, *Principles of Corporate Finance Law* (Oxford: Oxford University Press, 2008) at 456.

See, however, section 2(1) of the *Misrepresentation Act* where "as a result thereof" is used. It has not been suggested that inducement is unnecessary for this statutory action, though the requirement to prove inducement might be predicated on the first limb of the provision—"*Where a person has entered*

The limits of textual analysis should be borne in mind.[60] The earliest versions of companies legislation prescribing prospectus requirements did not contain statutory language directing that inducement was an essential ingredient of the causal link between the non-disclosure of certain contracts and the loss.[61] The plaintiffs were nonetheless required to prove that they had been "misled by ….the omission to disclose some document which ought to have been disclosed."[62] The current equivalent Australian provision creating civil liability for misleading disclosures in a prospectus is section 729 of the *Corporations Act 2001* (Aust.):

> A person who suffers loss or damage *because* of [a contravention of section 728] may recover the amount of the loss or damage [set out in the table appended to the section].

In Baxt's *Securities and Financial Services Law*, the author takes the view that the causation element represented by "because" in section 729 of the *Corporations Act 2001* (Aust.) serves the same function as "by" in section 52 of the Australian *Trade Practices Act 1974* (Cth.) [*Trade Practices Act 1974* (Aust.)].[63] To the extent that "causation" in section 52 of the *Trade Practices Act 1974* (Aust.) is said by case-law[64] not to be necessarily limited by the common law concept of inducement, the same might be true of section 729 of the *Corporations Act 2001* (Aust.). In *Janssen-Cilag*

into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss …".

60 *Quare*: whether the absence of a provision equivalent to *Securities and Futures Act*, s. 253(3) in *Securities and Futures Act*, s. 254 impacts on individual reliance? The author's view is that the substance of s. 253 is found in the requirement to prove damage on the part of the plaintiff-investor. This leads us back to the critical question—what is the nature of the interest that the civil right of action seeks to protect? See *infra* note 73 and accompanying text.

61 See, for example, s. 38 of the *Companies Act 1867* (U.K.).

62 *Macleay v. Tait* [1906] A.C. 24 (H.L. (Eng.)) at 31, *per* Lord Lindley [*Macleay*]. The provision in question was s. 38 of the *Companies Act 1867* (U.K.), which deemed the non-disclosure of certain matters fraudulent and conferred a right to sue on investors who took shares in the company "on the faith of such prospectus". The inducement requirement was not predicated on this last phrase, for Lord Lindley said:

> Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by s. 38, and that he obtained them and paid for them and lost his money, is prima facie evidence, but only prima facie evidence, of damage by fraud on himself. … if the plaintiff is challenged on this point, he must go a step further and prove that he was misled by what makes the prospectus fraudulent, *i.e.*, the omission to disclose some document which ought to have been disclosed.

Macleay affirmed the proposition in *Nash*, *supra* note 56, that the investor had to show that he would not have contracted were the omitted items known. See also *Cackett v. Keswick* [1902] 2 Ch. 456 (EWCA Civ).

In the context of insurance law, the courts have similarly read into the *Marine Insurance Act, 1906* (U.K.), 6 Edw. VII, c. 41 a requirement that the insurer must show that he was induced into the agreement by the non-disclosure: *Pan Atlantic Insurance Ltd. v. Pine Top Ltd.* [1995] 1 A.C. 501 (H.L. (Eng.)). See also *St Paul Fire and Marine Insurance Co. (U.K.) Ltd. v. McConnell Dowell Constructors Ltd.* [1996] 1 All E.R. 96, [1995] 2 Lloyd's Rep. 116 (Where inducement was inferred for the 4th underwriter, who had not been called to give evidence. The inference was available largely because the evidence of the other three underwriters showed that they would in all probability have either refused the risk, or accepted it on different terms).

63 Robert Baxt, Ashley Black & Pamela F. Hanrahan, *Securities and Financial Services Law*, 7th ed. (Chatswood, NSW: LexisNexis/ Butterworths, 2008) at para. 8.33.

64 *Argy v. Blunts & Lane Cove Real Estate Pty. Ltd.* (1990) 94 A.L.R. 719 (F.C.A.) at 741, citing *Kabwand Pty. Ltd. v. National Australia Bank* (1989) A.T.P.R. 40-950 (F.C.A.).

Pty. Ltd. v. Pfizer Pty. Ltd.,[65] the causation element in an action based on section 52 of the *Trade Practices Act 1974* (Aust.) was established by showing that someone other than the plaintiff relied on the misleading statement. The plaintiff was a competitor who claimed that he suffered a loss in market share by the misleading advertisements of his competitor. While the context is different, the flexible approach adopted by *Janssen-Cilag* counsels interpreting the nature of the causal link in a fashion which gives effect to the purposes behind the statutory right of action.

In *Ingot Capital Investments Pty. Ltd. v. Macquarie Equity Capital Markets (No. 6)*,[66] however, MacDougall J. of the Supreme Court of New South Wales held the plaintiff's indirect causation argument bad in law. The plaintiffs, which included investors and two sub-underwriters, alleged that the head-underwriter (Macquarie) had engaged in misleading or deceptive conduct in respect in its statements to the due diligence committee,[67] and that but for Macquarie's conduct, "[the issuer] would not have issued the prospectus, [and] the plaintiffs would not have agreed to sub-underwrite or acquire rights or other securities ...".[68] In so far as the allegation was that "misrepresentation induced entry into a transaction",[69] MacDougall J. held that *Janssen-Cilag* was not authority for the proposition that indirect causation was applicable in this context.[70] The holding in *Ingot Capital* on this issue would appear to be correct. As MacDougall J. pointed out, the argument confuses effective cause with what is a necessary precondition;[71] causation involves "normative analysis, requiring attention to be paid to the purpose of the legal norm that has been breached."[72] The legal norm contained in the general provision proscribing misleading and deceptive conduct may very well be materially different from the legal norm undergirding civil liability for a defective prospectus.[73]

The key, I would suggest, lies in characterising appropriately the nature of the investor's protected interest. Compared to the general provisions against misleading or deceptive conduct which were the subject matter of discussion in *Ingot Capital*,

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[65] (1992) 109 A.L.R. 638 (F.C.A.) [*Janssen-Cilag*].

[66] (2007) 63 A.C.S.R 1 (N.S.W.S.C.) at paras. 495-511 [*Ingot Capital*]. See also *Digi-Tech (Australia) Ltd. v. Brand* (2004) 62 I.P.R. 184; (2004) A.T.P.R. 46-248 (N.S.W.C.A.).

[67] Liability for misleading and deceptive conduct could be predicated on the *Trade Practices Act 1974* (Aust.), ss. 52 and 82; the Corporations Law ss. 995 and 1005; the *Fair Trading Act 1987* (N.S.W.), ss. 42 and 62; or the *Australian Securities and Investments Commission Act 1989* (Cth.), s. 12DA and 12G: see para. 101.

[68] *Ingot Capital, supra* note 66 at para. 494.

[69] *Ibid.* at para. 495.

[70] *Ibid.*

[71] *Ibid.* at para. 495.

[72] *Ibid.* at para. 497.

[73] The Explanatory Memorandum to Bill which introduced *Corporations Act 2001* (Aust.), ss. 728 and 729 hints—if obliquely—that the causal link between contravention and loss is established by showing how the omission or inaccurate information resulted in a mispricing:

> As a primary source of information for retail investors, the profile statement *attracts liability for any failure* to adequately address matters required to be disclosed in it (proposed section 728). However, *to ensure that issuers continue to provide full disclosure in the associated prospectus, issuers will be liable to investors in relation to the prospectus regardless of whether an investor actually received a copy of the prospectus* (proposed subsection 729(2))

Explanatory Memorandum to Corporate Law Economic Reform Bill 1998, at para. 8.12, online: <http://law.ato.gov.au/atolaw/view.htm?DocID=NEM%2FEM199959%2FNAT%2FATO%2F00008> (last accessed 27 November 2008).

section 254 of the *Securities and Futures Act* is much more focused in its application. As such, the characterisation of the legal norm and protected interest in that section is a much more tractable exercise. I would argue that the current section 254 of the *Securities and Futures Act* does disclose an additional protected interest of a significantly different character compared to its predecessor. It is apposite, at this juncture, to set out the text of the statutory right of action:

> 254. —(1) Where an offer of securities is made in or accompanied by a prospectus or profile statement, or, in the case of an offer referred to in section 280, where a prospectus or profile statement is prepared and issued in relation to the offer, and—
>
> (a) a false or misleading statement is contained in —
> (i) the prospectus or the profile statement; or
> (ii) any application form for the securities;
>
> (b) there is an omission to state any information required to be included in the prospectus under section 243 or there is an omission to state any information required to be included in the profile statement under section 246, as the case may be; or
>
> (c) there is an omission to state a new circumstance that —
> (i) has arisen since the prospectus or the profile statement was lodged with the Authority; and
> (ii) would have been required by section 243 to be included in the prospectus, or required to be included in the profile statement under section 246, as the case may be, if it had arisen before the prospectus or the profile statement was lodged with the Authority,
>
> the persons referred to in subsection (3) shall be liable to compensate any person who suffers loss or damage as a result of the false or misleading statement in or omission from the prospectus or the profile statement, even if such persons, unless otherwise specified, were not involved in the making of the false or misleading statement or the omission.

The common law action for misrepresentation, whether fraudulent or negligent, promises a remedy only when one has been misled. The protected interest can therefore be said to consist of an interest against being *misled* by misrepresentations. Accordingly where no inducement is proved, the action fails. And on the premise that one might have embarked upon a different course of action—a different trajectory, as it were—it would seem indubitably correct. If the plaintiff had not been influenced by the misrepresentation, he could not legitimately complain. In holding that inducement was an essential causal element in the nineteenth century prospectus liability provisions, the premises of the law on misrepresentation were accordingly imported into the statutory provisions.

The law and practice of corporate finance has been much transformed since. Given the role played by intermediaries in securing a price reflective of the risks revealed in the prospectus and the implicit reliance that investors place on the market institutions, it is worthwhile questioning whether these premises should continue to obtain. To import these premises without qualification into the context of a modern securities offering would, I contend, portend too narrow a conception of the interests for which an investor deserves protection.

There is no question that the investor should have a right against being misled. In a securities offering, however, an investor's decision whether to subscribe for an offering is not merely a matter of judgment based on the prospectus (or other disclosure document). The decision is inter-mediated by the market and the institutions which uphold the reliability of the price-formation process. In "The Mechanisms of Market Efficiency",[74] Gilson and Kraakman sketched the process by which price-formation takes place on the securities market, as well as the institutions and conditions that underpin market efficiency. In the context of an initial public offering, the offer price is set by the issuer in consultation with its advisors. This does not, of course, occur *in vacuo*—for the underwriters and the issue manager play a decisive role in gauging the price which the market will find acceptable. Their role requires a heightened sensitivity to relevant information which affects the security offered, whether it pertains to the risks and the price, or indeed, to the very viability of the offering. Importantly, the offering is then exposed to the market for comment by financial analysts, the business press and the investing community. It may be that an investor decides, after a review of the information in the prospectus and the prevailing market conditions, that the security suits his risks appetite and that the price is right. More likely, however, is the case of the unsophisticated investor who relies on the market institutions to determine the fairness of the price, *viz*., whether it accurately reflects the risks which the investor is asked to assume. In so far as investor relies on the market institutions to determine a fair price, he relies—if indirectly—on the disclosed information. If one accords to the investor an expectancy in the accurate pricing of the security by reason of the market institutions processing the often complex information, the inadequacy of a legal cause of action premised on protecting him against being misled becomes obvious. Its premise—protecting the investor against being *induced* by untrue statements—fails to recognise the extent to which modern investor relies on intermediaries in processing price sensitive information and in influencing the offer price.

What is the nature of the interest which the statutory right of action found in section 254 of the *Securities and Futures Act* seeks to protect? What it adds to the traditional emphasis on untrue statements is significant. By section 254(1)(b), it confers an entitlement to relevant information by which investors and their professional advisors may make an informed assessment of "the assets and liabilities, profits and losses, financial position and performance, and prospects of the issuer"; together with an entitlement to information on "the rights and liabilities attaching to the securities", it might be said that, at the theoretical level, the compensatory claim found in s. 254(1) confers an entitlement to accurate pricing of the security. Section 254 of the *Securities and Futures Act* is materially different from the pre-2000 section 55 of the *Companies Act* not just in the specifics of disclosure, but also in the protected interest it seeks to secure. Whereas the latter pegs the entitlement at truth in statements, the former changes the entitlement to all virtually price-relevant information. The information mandated by section 254(1)(b) critically impacts on the valuation of the entity to which the security relates.

[74] Ronald J. Gilson & Reinier H. Kraakman, "The Mechanisms of Market Efficiency" (1984) 70 Va. L. Rev. 549. See also their revisiting the topic in Ronald J. Gilson & Reinier H. Kraakman, "The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias" (2003) 28 J. Corp. L. 715.

The information mandated by s. 254(1)(a) bears a direct relationship to the worth of the claim on the entity represented by the security. Section 254(1)(c)—which extends the mandatory disclosure obligations to the close of the offer—provides further support for the argument that section 254 contemplates a protected interest in the nature of a right to accurate price. The notion that inducement continues to determine the availability of the statutory cause of action is at odds with the presumption in section 254(4)—that the investor who bought against a profile statement is presumed to rely on statements in the prospectus of which he does not have knowledge. It would seem rather strange for the law to require reliance in the scenario of a purchase against a prospectus, when the law effectively dispenses with the requirement in a scenario where the investor could not have relied on the prospectus.

Yet, does not the employment of the concept of "reliance" in section 254(4) portend the persistence of reliance as a requirement for the statutory cause of action?

> [Section 254(4)] A person who acquires securities as a result of an offer that was made in or accompanied by a profile statement is taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer.

Section 254(4) may be seen as furthering the investor's right to accurate pricing found in section 254(1). Accurate pricing requires the impounding of all relevant information. In so far as the prospectus contains more or fuller information compared to the profile statement, presuming that the investor acquired the securities in reliance on both documents furthers the right to accurate pricing. Without section 254(4), only the information found in the profile statement is impounded in the price where the investor purchased pursuant to a profile statement. The reliance concept is used here as a bridge, by which the investor who bought against a profile statement has the benefit of arguing that the accurate price to which he is entitled impounds also the fuller information found in the prospectus.

Moreover, interpreting section 254(1) as requiring proof of specific reliance when section 254(4) has no application creates a rather odd result. If the condition in section 254(4) is satisfied—"a person … acquires securities as a result of an offer that was made in or accompanied by a profile statement"—he is "taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer." He would *ex facie* be able to claim as damages the difference between the price paid (which presumably reflects the value with the incomplete or misleading disclosures) and the true value of the security. His protected interest here consists of a right to an accurate price. However, if the fund-raising did not involve a profile statement, he would have to show reliance upon the misleading statement or omission. Such a right possesses the character of protecting an investor's interest against being induced into a particular course of action by misleading statements or omissions. It is protected interest of a different character from the scenario where section 254(4) applies. Accordingly, such a reading of section 254 creates a dichotomy in the interests being protected when a profile statement is used in addition to a prospectus, and when only a prospectus is used. It is unlikely that such a result was intended. There is no sound reason for creating such a dichotomy.

The view I have propounded here has the merit of theoretical coherence. It is also has the merit of recognising the reality that only the financially sophisticated are likely to comment on the fairness of the price, and that unsophisticated investors do rely—if indirectly—on prospectuses fully and accurately disclosing relevant information.

From a practical perspective, removing the requirement to prove reliance smoothens the path for class action suits. The elements that investors have to prove in order to sustain an action for damages are common to all. With the removal of the need to prove matters specific to each investor, the cost of prosecuting the claim declines. By eliminating the cost of proving matters peculiar to each plaintiff, there is a better chance of aggregating individually non-economical claims for a group action. Group action is thereby rendered more viable. More importantly, whereas individual reliance effectively precludes claims by unsophisticated investors, the suggested interpretation gives efficacy to the investor's interest in the fair and accurate pricing of the securities. The prospect of class action based on section 254 will depend, in great measure, on whether or not specific reliance is a necessary element of the cause of action.

Is the investor entitled to sue *the issuer*? The pre-2000 statutory cause of action for misleading prospectuses—in common with the *Directors Liability Act 1890*—did not include the issuer within the class of defendants. At common law, *Houldsworth v. City of Glasgow Bank*[75] held that the subscriber could not sue the issuer for fraud unless the allotment of shares is first rescinded. If a subscriber is able to rescind the contract, he would obtain the return of the purchase price; the action in fraud would be rendered unnecessary. If any of the bars to rescission applied, therefore, he would be without a remedy. One of the premises underlying the rule in *Houldsworth* was that allowing the subscriber to sue would be inconsistent with the nature of the statutory contract entered into between the member, the company and the other members.[76] Such was the hold of the rule in *Houldsworth* that the High Court of Australia in *Webb Distributors v. Victoria*[77] held that it qualified the statutory cause of action for false or misleading conduct found in section 52 of the *Trade Practice Act 1974*, absent a clear intent on the part of the legislature to abolish the rule, the court did not see the provision as "eliminating, 'by a side-wind' … the detailed provisions established for more than a hundred years to govern the winding up of a company."[78]

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75 (1880) 5 App. Cas. 317 (H.L. (Eng.)) [*Houldsworth*].

76 *Ibid.* at 325, *per* Earl Cairns, Lord Chancellor. The rule is also justified by the notion that the capital contributed by the shareholder is first to be applied toward the debts of the company; allowing a fraud claim by a shareholder against the company would, therefore, be tantamount to a return of capital and a subversion of the precept that shareholder claims should not claim in priority to creditors' claims. See *Soden v. British Commonwealth Holdings plc* [1998] A.C. 298 (H.L. (Eng.)).

77 (1993) 179 C.L.R. 15 (H.C.A.).

78 *Ibid.* at 37. The Full Court of the Supreme Court of Victoria had earlier taken the same position in *Victoria v. Hodgson* [1992] 2 V.R. 613 (Vic. S.C.). In deciding that the rule in *Houldsworth* continued to apply, Tagdell J. at 630 said: "To hold otherwise would be to regard the [*Trade Practices Act* 1974] as intending to overturn by implication a cardinal tenet of limited liability which has prevailed for 130 years".

Although commentators in the U.K.[79] and Singapore[80] context are more sanguine about another provision of general application—section 2(1) of the *Misrepresentation Act*[81]—circumventing the rule in *Houldsworth*, there was nonetheless reason to query if a reasoning similar to *Webb Distributors v. Victoria*[82] might not be adopted *viz*., section 2(1) of the *Misrepresentation Act* does not exclude the application of the *Houldsworth* rule.

The 2000 amendment reformulated the class of potential defendants, including "the person making the offer or invitation to the public." The revised text does not indicate clearly whether the reformulated statutory cause of action intended to abrogate the rule in *Houldsworth*. The "person making the offer or invitation to the public" might, on a narrow interpretation accommodating the rule, be taken to mean a vendor rather than an issuer. And indeed, whether the issuer could be sued under the equivalent Australian provision was argued before the Federal Court of Australia in *Cadence Asset Management Pty. Ltd. v. Concept Sports*.[83] At first instance, Justice Finkelstein of the Australian Federal Court held that the rule had not been abrogated by the revised prospectus liability provision.[84] The Full Federal Court considered the text, the history of the provision, as well as the purposes sought to be achieved by the enactment. Referring to paragraph 8.12[85] of the Explanatory Memorandum to the Bill introducing the prospectus liability provision, in which express reference was made to issuer liability, the Full Court held that the revised formulation did abrogate the rule in *Houldsworth*. Further,

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79 The rule in *Houldsworth* was reversed by the *Companies Act 1985* (U.K.), 1985, c. 6 [*Companies Act 1985* (U.K.)], s. 111A, which was inserted by the *Companies Act 1989* (U.K.), 1989, c. 40 [*Companies Act 1989* (U.K.)]. The following quotation from Gower, *supra* note 49 at 373-74 predates the statutory reversal:

> "There is no express provision in the *Misrepresentation Act* which reverses the rule in *Houldsworth v. City of Glasgow Bank*. On the other hand section 2(2) of the Act appears to assume that there is no such rule since it provides, without stating any exception, that the court can award damages in lieu of rescission. If the result is that damages can be awarded where rescission is possible but not granted, whereas they cannot be awarded if it is too late to rescind or rescission is not asked for, the result is highly anomalous and inconsistent with the policy of the Act. Perhaps the Act will encourage the House of Lords to exercise its lately declared freedom to reverse itself and to rule that the *Houldsworth* case was wrongly decided."

With respect, this passage does not give adequate regard to the purpose of *Misrepresentation Act*, s. 2(2). The provision was intended for the benefit of the representor. The court is given discretion to substitute damages for rescission where the latter is deemed too harsh a remedy for the (minor) misrepresentation in question. See 10th Report of the Law Reform Committee, Cmnd 1782 (1962) at paras. 11, 12 and 27. Its application is found in *William Sindall plc v. Cambridgeshire CC* [1994] 1 W.L.R. 1016 (EWCA Civ).

80 Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2004) at para 6.36: "Under section 2(1) of the *Misrepresentation Act*, liability only attaches where the representor was a party to the contract. In the public offer situation, it provides a remedy to investors against the issuer where the statements was made by or attributable to the issuer".

81 U.K.: (U.K.), 1967, c. 7; Singapore: (Cap. 390, 1994 Rev. Ed. Sing.).

82 (1993) 179 C.L.R. 15 (H.C.A.).

83 (2005) 56 A.C.S.R. 309, (2005) 147 F.C.R. 434 (F.C.A.).

84 (2005) 55 A.C.S.R. 145 (F.C.A.).

85 The judgment (at para. 30) refers to paragraph 8.1. This is a typographical error; it should be paragraph 8.12. The passage was earlier quoted in the article: see *supra* note 73.

the existence of a legislative provision subordinating shareholder claims to creditor claims addresses the concern of the *Houldsworth* rule that shareholders were getting back their contribution to the company and defeating the interests of creditors.[86] Given the Australian inspiration for the current section 254 of the *Securities and Futures Act*, it is likely that shareholders will now be able to sue the issuer for damages occasioned by misleading statements and breach of the mandatory disclosure obligations.

III. The Investor's Right to On-going Disclosures and Rights Against Market Misconduct Generally

Until the *Securities and Futures Act 2001* came into effect, the prospectus marked the high point of the investor's right to information. Prior to the overhaul effected by the *Securities and Futures Act 2001*, the only on-going disclosure obligation backed by statutory sanctions was the requirement that a company lay its annual accounts before its members.[87] It was, however, very difficult to assert private law rights based on the statutory information that the company was required to disseminate to its members. The regulatory requirement did not carry with it a statutory right of action should the information prove misleading. Accordingly, any claim for damages by one who had relied on the annual financial statements had to be based on the common law.

If it is alleged that the financial statements are fraudulent, the plaintiff is required to prove that the false statement was made either: "(1) knowingly, (2) without belief in its truth or (3) recklessly, careless whether it be true or false."[88] Moreover, particulars of the fraud must be specifically pleaded.[89] In the absence of the claimant having reliable evidence that the information was dishonestly put out, the claim is not viable—for "a higher standard of proof is required … than that required for ordinary

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86 *Corporations Act 2001* (Aust.), s. 563A. The equivalent provision in the Singapore context is *Companies Act* s. 250(1)(f), which is *in pari materia* with *Companies (Victoria) Code* (Vic.), s. 360(1)(k), the predecessor provision to *Corporations Act 2001* (Aust.), s. 563A. The wording for s. 563A is substantially similar to its predecessor. The difference lies in this—whereas s. 360 was located within a provision that relates to the member's liability to make contribution, *Corporations Act 2001* (Aust.), s. 563A locates the provision within "priorities". See *Cadence v. Concept Sports* (2005) 56 A.C.S.R. 309 at 312.

87 *Companies Act*, s. 201(1).

88 *Derry v. Peek*, *supra* note 19 at 374. Lord Herschell went on to say:

> … Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

More recently, see *Barings plc v. Coopers & Lybrands and others (No. 2)* [2002] EWHC 461, [2002] 2 B.C.L.C. 410 at para. 61 where Evans-Lombe J. added the following rider, "The inquiry is not limited to 'did he believe this statement to be false when he made it?' The court should also ask '*must* he have believed it to be false?"'.

89 Under *Rules of Court* (Cap. 322, O. 18, 2007 Rev. Ed. Sing.), r. 12(1)(b), the necessary particulars of fraudulent intent relied on must be pleaded. See also *Khoo Kheng Sim v. Khoo Chooi Leong* [2002] 5 M.L.J. 345 (H.C.); *Ting Ling Kiew v. Tang Eng Iron Works Co. Ltd.* [1992] 2 M.L.J. 217 (C.A.); *Tan Boon Hock v. Aero Supplies Systems Engrg Pte. Ltd.* [1993] SGHC 237.

matters in a civil action."[90] Sans reliable evidence of fraud, the investor is more likely to rely upon negligent misrepresentation. Even if fraudulent misrepresentation can be made out, the plaintiff must go on to show that the makers of the statement intended that the plaintiff should act upon it in the manner which resulted in damage to the representee[91] and further, that the plaintiff was induced to act upon it.[92] We have earlier discussed in the context of the prospectus the difficulties that the requirement for inducement would pose to the unsophisticated investor who relies on the market to impound the information. Whether those responsible for the financial statements intended investors to act upon them is very much a question of fact. In modern capital markets, securities analysts, investment advisers and investors will predictably use the financial statements for the purpose of making further investment or divestment decisions. It might very well be that the fraudulent accounts were intended to mislead the investing community, notwithstanding the fact that they were prepared to comply with a statutory duty. This is nonetheless a factual question. It stands in contrast with the duty of care owed when accounts have been negligently prepared, which is a legal question.

In respect of a suit against a company, the rule in *Houldsworth*[93] can be expected to pose an obstacle. Unlike the U.K.,[94] Singapore has not statutorily abrogated the rule. *Houldsworth* involved subscribers who had been induced to take up shares in a company. It might very well be that the rule is confined to that context; that is, it does not extend to a scenario where an investor purchases shares on the secondary market. This indeed was how *Houldsworth* was distinguished in *Sons of Gwalia*[95] by the Australian Federal Court at first instance and by the Full Federal Court. It suffices for present purposes to point out the likelihood that the point will be tested. Therefore, the first Singapore shareholder-investor action against the issuer, whether in deceit or negligent misrepresentation, might have to bear the burden—and the cost—of settling this legal point.

While negligent misrepresentation does not involve proof that those who prepared the accounts were dishonest, the plaintiff must show that the defendant owed him a duty of care when the defendant made the statement. This is the principal doctrinal device by which Commonwealth courts control the potential liability of a person

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90 *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 M.L.J. 193; *Netherlands Trading Society v. Koh Kim Guan* [1959] M.L.J. 173 (Sing. H.C.); *Hornal v. Newbuerger Products Ltd.* [1957] 1 Q.B. 247 at 258 (An allegation of fraud requires proof with "a high degree of probability").

91 *Bradford Third Equitable Benefit Building Society v. Borders* [1941] 2 All E.R. 205 (H.L.) at 211; *Barton v. County NatWest Ltd.* [1999] Lloyd's Rep. Bank. 408 (EWCA Civ) at 419-420. For an instance where the requirement defeated the claim, see *Tackey v. McBain* [1912] A.C. 186 (P.C.) (Director communicated to the broker a false statement relating to whether additional oil had been discovered. The director was not liable to the shareholder as the communication was for the purpose of protecting the company's interest, and not for onward transmission to potential investors).

92 *Horsfall v. Thomas* (1862) 1 H. & C. 90 (Ex.); *Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459 (EWCA Civ.) at 483.

93 *Supra* note 75.

94 *Companies Act 2006* (U.K.), 2006, c. 46, s. 655 (formerly *Companies Act 1985* (U.K.), s. 111A), inserted by *Companies Act 1989* (U.K.).

95 *Sons of Gwalia v. Margaretic* (2005) 55 A.C.S.R. 265 (F.C.A.) (First Instance) and (2006) 149 F.C.R. 227 (F.C.A.) (Full Federal Court).

whose acts cause harm.[96] In England,[97] as in Singapore,[98] it is established that the annual financial statements prepared for the purpose of fulfilling a statutory obligation is intended to make the management account to shareholders (as a whole) for their stewardship of the company. That is, it is to enable shareholders to exercise informed control over the company. The obligation does not give rise to a common law duty of care toward the individual shareholder who chooses to rely on the annual report for making further investments.[99] Neither does it give rise to a duty of care toward lenders who rely on it for deciding whether to extend a loan.[100] By this reasoning, auditors have escaped liability for negligent audits—unless it is clear that the financial statements are prepared for the special use of the investor.[101] Under English law, a touchstone for determining whether or not the requisite proximity has been demonstrated to give rise to a duty of care lies in whether the maker of the statement has assumed a responsibility toward the plaintiff.[102] The Singapore Court of Appeal, in *Spandeck Engineering v. Defence Science & Technology Agency*,[103] articulated a nuanced two stage test for determining (in all negligence cases) whether a duty of care exists. Proximity, the first of the two-stage test, connotes sufficient legal proximity. Proximity includes physical, circumstantial and causal proximity; it is underpinned by the "twin criteria of voluntary assumption of responsibility and reliance."[104] The approach is intended to be an incremental one; hence, to the extent that *Caparo*[105] has determined that the preparation and laying of the statutory

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96 As was pointed out by Lord Nicholls of Birkenhead in *Stovin v. Wise* [1996] A.C. 923 (H.L. (Eng.)) at 932:

> "Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care. This is only another way of saying that when assessing the requirements of fairness and reasonableness regard must be had to the relationship of the parties."

See also Simon Deakin, Angus Johnston & Sir Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 2008) at 116-118 and 125-132.

97 *Caparo v. Dickman* [1990] 2 A.C. 605 (H.L. (Eng.)) [*Caparo*]. See also *Hercules Management Ltd. v. Ernst & Young* (1997) 146 D.L.R. (4th) 577 (S.C.C.).

98 *Standard Chartered Bank v. Coopers & Lybrand* [1993] 3 S.L.R. 712 (H.C.) [*Standard Chartered Bank*] (Bank which made loans relying on the annual financial statement mandated by *Companies Act*, s. 201 failed in suit against auditors); *Ikumene Singapore Pte. Ltd. v. Leong Chee Leng* [1993] 3 S.L.R. 24 (C.A.) (guarantor of a company's indebtedness failed in suit against auditors).

99 *Caparo*, *supra* note 97.

100 *Standard Chartered Bank, supra* note 98.

101 *Morgan Crucible Co plc v. Hill Samuel Bank Ltd.* [1991] Ch. 295 (EWCA Civ).

102 *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145 (H.L. (Eng.)); *White v. Jones* [1995] 2 A.C. 207 (H.L. (Eng.)); *Spring v. Guardian Assurance plc* [1995] 2 A.C. 296 (H.L. (Eng.)).

103 [2007] 4 S.L.R. 100 (C.A.) [*Spandeck*]. See further, case comments by Amirthalingam Kumaralingam, "Lord Atkin and the Philosopher's Stone", Case Comment, [2007] Sing. J.L.S. 350 and by the same commentator "Refining the Duty of Care in Singapore" (2008) 124 L.Q.R. 42. *Spandeck* adapted the two-stage test found in *Anns v. Merton LBC* [1978] A.C. 728 (H.L. (Eng.)). This has since been extended to psychiatric injury arising from negligence: *Ngiam Kong Seng v. Lim Chiew Hock* [2008] 3 S.L.R. 674 (C.A.). See case comment by Goh Yihan, "Duty of Care in Psychiatric Harm Cases in Singapore", Case Comment, (2008) 124 L.Q.R. 539. See also Andrew Phang, Cheng Lim Saw & Gary Chan , "Of Precedent, Theory and Practice—The Case for a Return to Anns" [2006] Sing. J.L.S. 1, which was written prior to the first author's elevation to the bench.

104 *Spandeck, ibid.* at para. 81. See application in paras. 99-102.

105 *Supra* note 97.

accounts before members is intended for accountability purposes and not for further investment decisions, the Singapore courts are likely to require an assumption of responsibility before the necessary degree of proximity is satisfied.[106] Given the clear concerns with imposing indeterminate liability on an indeterminate class of tortfeasors[107]—albeit balanced against the desire to achieve fair and just results—the court is likely to move very cautiously in determining whether a duty of care is owed at common law.

Apart from statutorily mandated annual accounts, the stock exchange listing manual imposed on listed companies continuing obligations to disclose material events.[108] Before 2001, these were little more than contractual obligations between the listed company and the exchange;[109] compliance was predicated on the exchange's monopoly over quotations and listings as well as the goodwill that listed companies presumably craved. Yet, listed companies have at times chosen to ignore those obligations, whether because the stock exchange had little investigative power or because the managers saw it in their greater interest not to comply.[110]

At common law, it is not clear whether investors have a right to sue for breach of continuing obligations imposed by the listing rules. In *Chase Manhattan Equities v. Goodman*,[111] the director of a listed company transferred his shares in the listed company to a Mrs. F who later sold the shares to Chase Manhattan Equities for the director's benefit. The director's share dealing was notifiable to the chairman of the board under the *Model Code for Securities' Transactions by Directors of Listed Companies* ("the model code"). The model code contained rules governing dealings by directors in the company's listed securities, which were mandatory minimum standards that the London Stock Exchange required listed companies to adopt for circumscribing the conduct of its directors. Chase Manhattan Equities argued that by reason of G's positive obligation to notify the board prior to any dealings in the securities of the company and the prohibition against his trading while in possession of price sensitive information, G owed them a duty to disclose all facts material to the making of the sale agreement. Knox J. rejected this argument. The Model Code imposed on the director a duty of disclosure toward the board. In his view, it would be too long and tenuous a chain of legal obligation if this duty was used to justify a finding that the director thereby also owed a duty of disclosure to the

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[106] This assumption of responsibility test has been adopted in Singapore in *Man B&W Diesel S E Asia v. PT Bumi international Tankers* [2004] 2 S.L.R. 300 (C.A.) (economic loss arising from negligent acts).

[107] *Spandeck, supra* note 103 at paras. 29 and 30.

[108] The earliest continuous disclosure obligation for the Stock Exchange of Singapore dates back to 1973: Stock Exchange of Singapore, *Corporate Disclosure Policy* (Singapore: SES Ltd., 1973).

[109] Admittedly, the *Securities Industry Act* (the predecessor of the *Securities and Futures Act*) did provide that the regulatory authority, the stock exchange and any "person aggrieved by the failure (to comply with the listing rules)" may apply to court for an order directing compliance with the listing rules (*Securities Industry Act*, ss. 13 and 20). These were directed at the specific enforcement of the listing obligations and did not extend to provide compensation for persons aggrieved by the non-compliance.

[110] This was borne out in the Scotts Holding incident in 1997, in which the controlling shareholders entered into numerous related party transactions between 1993 and 1996 without complying with the disclosure and shareholder approval obligations imposed by the listing rules. "SES censures three in feuding Jumabhoy clan" *The Straits Times* (Singapore) (20 March 1997). The Stock Exchange later banned the directors involved from acting as directors on boards of Singapore listed companies: "SES ban 3 Jumabhoys from directorships in other listed firms" *The Business Times* (Singapore) (4 July 1997).

[111] [1991] B.C.L.C. 897, [1991] B.C.C. 308 (Ch.).

purchaser. It is an interesting question whether stock exchange listing requirements which impose disclosure obligations for the purpose of efficient price-formation—which, in turn, is premised on traders and advisers impounding the information in the bid and ask prices—brings potential users of the information within the requisite degree of proximity so as to result in the obligor owing a duty of care at common law to the potential users of the information. If the assumption of responsibility is premised on a free consent, it is a good question whether a duty which goes toward fulfilling what was a quasi-regulatory obligation (and what is now a statutory obligation) undermines the voluntariness that is assumed in the assumption of responsibility.

In the context of Singapore, the matter is probably now overtaken by statutory developments. Under section 203 of the *Securities and Futures Act 2001*, non-compliance with continuous disclosure obligations under the listing rules now attracts legal sanctions—both criminal and civil.[112] Thus, section 203 gives statutory force to rules which are at base contractual obligations. As the stock exchange adds to the content of the disclosure obligations, the statutory obligation to make disclosures increases accordingly. These include: quarterly reporting which was instituted in 2003 under the listing rules of the SGX,[113] announcements of interested persons transactions,[114] and material changes within the ambit of rule 703 of the SGX Listing Manual.[115]

Investors may claim compensation under section 234 of the *Securities and Futures Act* for breach of section 203—though only where the corporation has committed the breach intentionally, recklessly or negligently.[116] Might section 203, by increasing the amount of disclosure investors can expect, also increase the investors' rights to sue for misrepresentation at common law?[117] As section 203 has provided for the conditions under which its breach gives rise to civil liability, it is likely that the civil consequences for its breach is seen as exhaustively set out in section 234.

A false or misleading statement contained in a periodic report—or for that matter, an announcement—may also contravene section 199 of the *Securities and Futures Act*. Amongst other things, section 199 prohibits the making of a statement that is false or misleading in a material particular and that is likely to have an effect upon the market price of the securities. The *mens rea* required to sustain a charge under section 199 may be proved in a number of ways, including a demonstration that a person ought reasonably to have known that the statement or information was false or misleading in a material particular.[118] Under section 234 of the *Securities and Finances Act*, an investor who has suffered a loss as a result of conduct contravening section 199

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[112] *Securities and Futures Act*, s. 204 (crime), s. 232 (civil penalty) and s. 234 (civil liability).

[113] SGX Listing Manual, r. 705(2). Currently, only issuers whose market capitalisation exceed S$75 million are subject to quarterly reporting.

[114] Chapter 9 of SGX Listing Manual.

[115] Chapter 7 of SGX Listing Manual

[116] *Securities and Futures Act*, s. 203(3).

[117] *Chase Manhattan Equities v. Goodman*, *supra* note 111, indicates that courts make a clear distinction between disclosure duties owed by the issuer to the (*de facto*) regulator, and duties owed to the investors.

[118] See *Public Prosecutor v. Wang Ziyi Able* [2008] 2 S.L.R. 61 (H.C.) where the accused was charged under s. 199(b)(i) for disseminating false information that was likely to induce the sale of securities by others in circumstances where the person disseminating the information did not care whether the information was true or false at the time of dissemination. The appeal concerned what "did not care" means. V.K. Rajah J.A. affirmed that it involved the accused's subjective state of mind, and more specifically, that the accused must be shown to have been dishonest.

has a right of compensation against the maker of the statement. Indeed, section 234 extends to all offences found in Part XII of the *Securities and Finances Act*, ranging from market manipulation (section 198), to false or misleading statements (section 199), to failure to comply with the continuous disclosure obligations imposed by the securities exchange (section 203).[119]

The problem with section 234 of the *Securities and Futures Act* lies in the cap on the amount of damages that can be claimed. Although it allows investors to claim compensation for (what may generally be termed) market misconduct,[120] investors can claim no more than the benefit obtained by the defendant by reason of his misconduct.[121] From the perspective of the investor's protected interest, they have no more than a collective right to share in the disgorgement of benefits obtained by the defendant. Accordingly, a company that does not comply with the disclosure obligations for strategic rather than pecuniary reasons might very well argue that its gain is zero. Where the defendant obtains a gain which is small in proportion to the total loss suffered by the investors, the investors stand only to recover a portion of their loss. The viability of a suit under section 234 very much depends on the amount of pecuniary gain the defendant has received. Hence to the extent that the cap diminishes the economic viability of an action under section 234, the prospect of such an action is also diminished.

Instead of taking the initiative of private action, the investors who are injured by market misconduct might instead hope for the chance to piggy-back on a regulatory action.[122] Upon conviction or a judgment for civil penalty, the court is empowered under section 236 of the *Securities and Futures Act* to fix a date for filing of all compensation claims. Claimants prove their claims to the satisfaction of the

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[119] I have in earlier articles explored the conceptual issues which relate to civil claims for insider trading and for market manipulation. See Alexander Loke, "The Protected Interests in the Private Right of Action for Insider Trading: A Comparative Perspective" (2007) 7 J.C.L.S. 307 and Alexander Loke, "The Investors' Protected Interest against Market Manipulation in the U.K., Australia and Singapore" (2007) 21 Austl. J. Corp. L. 22.

[120] The title given to Part XII of the Securities and Futures Act is "Market Conduct". Cf. the U.K., where the term 'market abuse' is used instead. See *Financial Services and Markets Act 2000* (U.K.), Part VIII, in particular s. 118. See generally, Emilios E. Avgouleas, *The Mechanics and Regulation of Market Abuse* (Oxford: Oxford University Press, 2005), ch. 7.

[121] *Securities and Futures Act*, s. 234(2) and (4).

[122] There is a stark difference between the maximum criminal and civil penalties on the one hand, and the maximum civil compensation claimable by investors on the other. A person who is convicted upon a criminal charge based on a provision in Part XII of the *Securities and Futures Act* faces a maximum penalty of a fine not exceeding $250,000 or to a term of imprisonment not exceeding 7 years (s. 204). In a civil penalty action, the maximum penalty depends on whether the defendant has obtained a benefit from the contravention. If no benefit is derived from the contravention, the minimum penalty is $50,000 while the maximum penalty is $2 million (s. 232(2)(b)). This contrasts with the civil compensation claim where, as mentioned earlier, the sum recoverable is capped by the enrichment obtained as a result of the breach. Moreover, whereas the civil compensation claim is capped at the amount of the enrichment, the ceiling for a civil penalty order is three times the amount of the benefit obtained—with a minimum amount of $50,000 (s. 232(2)(a)). Even if there is a legitimate desire to insulate a defendant against an overwhelming claim, might not the ceiling on civil damages recoverable be pegged at that for a civil penalty? Alternatively, might not the statute have directed that the amount recovered in a civil penalty should be shared with investors if the cap results in their under-compensation? These contrasts serve to indicate that at present, a relatively low weight is given to investor compensation for market misconduct, even as it should be recognised that the statutory right of action is a step toward greater recognition of investors' compensable interests.

court, which will then order payment according to the formula found in section 234. Investors, however, take the risk that the defendant will compromise his claim with the regulator—for by doing so, the defendant will avoid triggering the court's power to invite the filing of compensation claims.[123]

To the present author, then, the provisions governing civil claims for market misconduct conspire to render private litigation based on section 234 an unlikely event. First the cap on damages fixed by reference to the defendant's gain is likely to render many claims economically non-viable. And this, even before taking into account the problems with collective action by the mass of small investors. Second, one who commences a civil compensation claim premised on breach of provisions in Part XII of the *Securities and Futures Act* risks a mandatory stay of his action, which triggers upon the commencement of a civil penalty action or criminal prosecution.[124] Rather than incurring litigation costs to commence a lawsuit that might be stayed, the investors may prefer to stay on the sidelines, to await the resolution of regulatory action before deciding what to do. This further chills the willingness of investors to participate in a class action. Third—though this is a boon for investors' realising their rights—the court's power to order compensation upon conviction or a judgment for civil penalty affords to investors an effectively costless remedy. The incentive to initiate private litigation is, accordingly diminished.

IV. Whither Investors' Rights?

Investors' compensatory rights are strongest where there is an offer of securities requiring preparation of a prospectus. Here, section 254 of the *Securities and Futures Act* casts a wide net around the principal persons involved in the fund-raising process. More importantly, the investor's burden of establishing his claim is much reduced compared to misrepresentation at common law. The investor merely has to prove the inaccuracy of the statement. There is no need to prove the quality of the statement, whether it is fraudulent or negligent. And whereas negligent misstatement requires convincing the court that there is an assumption of responsibility to justify imposing a duty of care, section 254 makes that a non-issue as regards persons listed as potential defendants. At common law, the investors have to prove that the maker of the statement intended for the victims to rely on the statement, and that the victims did rely on the statement. While courts have been ready to make an inference of reliance from the materiality of the statements, the defendant is entitled to put each plaintiff to strict proof that he has relied on the misstatements. To the extent that unsophisticated investors rely on market institutions to price the issue from the information disclosed, their reliance would be indirect; accordingly, they would in reality be precluded from suing by the requirement for individual reliance. In this article, I argue that section 254 of the *Securities and Futures Act*, in mandating the disclosure of all price-relevant information, gives the investor a protected interest in the integrity of the price. The right of action is thus not necessarily predicated on individual reliance of the specific pieces of misstatements or non-disclosures, but on the investor's indirect reliance on

[123] *Securities and Futures Act*, s. 236(1)(b). The MAS is empowered to enter into an agreement for payment of civil penalty, with or without the defendant admitting liability: s. 232(5). Whether or not the defendant admits liability, the agreement does not trigger the court's powers under s. 236.

[124] *Securities and Futures Act*, s. 235(2).

the market institutions which do rely on the information to form the offer price. If the argument is accepted, section 254 will be readily available to investors who have bought securities which have been wrongly priced because of misrepresentations or non-disclosures.

After IPO, investors have no less need for accurate information—not least because the price at which the securities are traded on the secondary market continue to depend on the prospects of the issuer. Unfortunately, the common law has been less than adequate in securing the investor's right to timely and accurate information. *Derry v. Peek*,[125] in setting a high threshold for the concept of fraud at common law, protects investors only if there is good evidence of dishonesty on the part of the defendants. Negligent misrepresentation is also difficult because of the conservative approach the common law adopts toward the legal requirement for a duty of care. Moreover, non-disclosure of material developments ordinarily falls outside the ambit of misrepresentation unless half-truths and continuing representations can be invoked. While the civil right of action premised on sections 203 and 234 of the *Securities and Futures Act* should be welcomed for conferring on investors a right against breach of the on-going disclosure obligations, the cap on the amount of damages claimable effectively undermines the prospect of investors pursuing their entitlement. The cap also goes a long way toward explaining why there have been no investor class actions for market misconduct generally in Singapore. If the right of action predicated by section 234 of the *Securities and Futures Act* is to be efficacious, the cap will have to be revised if not eliminated.

[125] *Supra* note 19.