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CHALLENGES TO SINGAPORE FROM THE GLOBAL FINANCIAL CRISIS: ACTUAL AND SUGGESTED LEGAL AND REGULATORY RESPONSES

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Securitisation, which involved shifting assets off balance sheets, inadvertently led to the creation of even greater risks that were packaged into toxic instruments that brought down a number of large financial institutions. In Singapore, however, the risks of the U.S. housing market collapse and consequent mortgage and financial institution default were largely moved out of the banking sector and sold to the public. In that sense, corporate/securities laws fulfilled the purpose of disintermediation. But while these insulated Singapore banks, the losses were largely borne by investors, whose confidence in the securities market has been eroded. The article discusses the legal and regulatory changes that have been made in response to the crisis, and suggests further trends and reforms dealing with its aftermath from financial and economic perspectives.

I. ROOTS OF THE GLOBAL FINANCIAL CRISIS: SECURITISATION

Securitisation was first facilitated by corporate and securities laws through the recognition of true sale arrangements (by accepting the primacy of form over substance) which allowed the shifting of assets off balance sheets. This was seen as a good thing in developed financial markets (at least until the sub-prime mortgage crisis,[1] with Enron quickly forgotten) as it facilitated the transfer of quality receivables to a special purpose vehicle ("SPV") which offers its own more highly rated securities to the public at a lower cost. Possibly because some assets may have been unassignable or difficult to assign, the next step was to take the risk of loss on such assets off the hands of an entity through synthetic arrangements which were not seen at law to create insurance contracts (again ignoring a functional test). This allowed more assets to be securitised so that, by 2002, it was thought that, at least in the U.S., everything had been.[2] This was not quite right as newer streams of payment were manufactured, and then securitised, ignoring warnings that "[j]ust because you can

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[1] Dov Solomon, "The Rise of a Giant: Securitization and the Global Financial Crisis" (2012) 49 Am. Bus. L.J. at 859.

[2] Mara Der Hovanesian & Michelle Conlin, "Wall Street's Broken Spirit" *Bloomberg Businessweek* (1 September 2002), online: Bloomberg Businessweek <http://www.businessweek.com/stories/2002-09-01/wall-streets-broken-spirit>.

turn some cash flow into a tradable asset doesn't mean you should".[3] This led to the creation and assumption of even greater risks on the part of corporates and banks, much of which were unrelated to real economic growth.

Initially, these risks stemmed from the possible (in fact, with the benefit of hindsight, likely) loss on assets like sub-prime mortgages in the U.S. Mortgage originators were willing to lend on the security of such mortgages as, unlike banks of old, they were never going to keep the mortgages on their books, and instead securitised them first into asset-backed securities and then credit default obligations ("CDO"s), and sold to investors, at the first instance, that were largely sophisticated. As financial institutions tried to insure against such risks, particularly when it became apparent how weak the underlying streams of repayments were, and some insurers tried to reinsure against those risks, they created further risks through credit default swaps ("CDS"s) that spread through the system. This brought down those banks and insurance companies that underpriced the risks and accumulated them due to some form of 'herding'.[4] The story has not been fully played out given the amount of ghost assets (CDOs and CDSs, as well as sovereign debt) still remaining on the books of some large financial institutions in the West.[5] The third round of quantitative easing may not include such derivatives which exposures in any case are much larger than can be covered by the US$40 billion per month purchases.

This "global trend of *financialization*: the reengineering of manufacturing firms as highly leveraged investment vehicles and, soon, the packaging of mortgages into risky asset backed securities for offloading into global markets"[6] best describes the new millennium from Enron to the global financial crisis. In Enron's case, a number of things occurred, some of which probably could not have happened outside the U.S. One involved the sale of Enron shares to closely-related SPVs in return for debt in the SPVs, thus boosting the balance sheets of both parties.[7] It may be that financial assistance rules, such as those found in s. 76(1)(a) of the Singapore *Companies Act*,[8] much maligned in modern corporate practice for hindering corporate reorganisation, would have prevented an Enron-type situation. In this regard, Singapore has seen a revival of the rule in *Wu Yang Construction Group Ltd v. Mao Yong Hui*[9] which was similar in effect to that of Arden L.J.'s judgment in the English Court of Appeal in *Chaston v. SWP Group Plc*,[10] in that it reversed what appeared a trend towards

[3] Richard Bookstaber, *A Demon of Our Own Design: Markets, Hedge Funds, and the Perils of Financial Innovation* (Hoboken N.J.: John Wiley & Sons, 2007) at 259.

[4] Claire A. Hill, "Why Didn't Subprime Investors Demand a (Much Larger) Lemons Premium?" (2011) 74:2 Law & Contemp. Probs. 47.

[5] LEAP/Europe 2020, Public Announcement, GEAB N° 59, (16 November 2011), online: Global Europe Anticipation Bulletin <http://www.leap2020.eu/Global-systemic-crisis-30000-billion-US-dollars-in-ghost-assets-will-disappear-by-early-2013-The-crisis-enters-a-phase_a8148.html>.

[6] Nicholas Shaxson, *Treasure Islands: Uncovering the Damage of Offshore Banking and Tax Havens* (New York: Palgrave Macmillan, 2011) at 84 [emphasis in original].

[7] William W. Bratton, "Enron and the Dark Side of Shareholder Value" (2002) 76 Tul. L. Rev. 1275 at 1314, 1315.

[8] Cap. 50, 2006 Rev. Ed. Sing.

[9] [2008] 2 S.L.R.(R.) 350 (C.A.), disapproving its earlier decision in *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1994] 3 S.L.R.(R.) 1064 (C.A.).

[10] [2003] 1 B.C.L.C. 675 [*Chaston*] where, according to Arden L.J. at para. 38, "it is clear… that the test is one of commercial substance and reality". The Australian position was more objective: *Darvall v. North*

reducing the relevant test to whether the transaction was in the commercial interest of the company. Both decisions signalled the need for legislative change, if that was what the regulators desired, in order to further relax the financial assistance rules, but the Ministry of Finance in Singapore recently decided to preserve the rule for public companies (as in the U.K.), when it had initially considered removing it altogether.[11]

What is still a problem are the off-balance sheet accounting and derivatives in Enron that helped conceal that what had started out as an industrial company had, without anyone really understanding it, become a financial trader.[12] In this they were abetted by some investment banks as seen in the settlement reached in mid-2003 by J.P. Morgan and Citibank with the U.S. Securities and Exchange Commission ("SEC") and the Manhattan district attorney, under which the former paid US$135 million and the latter US$120 million to avoid prosecution for their roles in entering into transactions with Enron that were in reality loans to the company that were dressed up as trading liabilities or even operating profits.[13] But this did not stop the use of off-balance sheet activities by Lehman Brothers in 2007 to shift risky or impaired assets off its own balance sheet (up to US$49 billion in one quarter) through the use of what were in effect repurchase contracts—Repo 105—which was arguably permitted under U.S. law though not by accounting standards.[14] To counter this, the first suggestion in Part IV is the need for more accurate characterisation of financial transactions.

This recent gilded age can be contrasted with the "Great Compression"; a label that has been provided by Paul Krugman as the reason for the steady real economic growth of the 1950s and 60s.[15] That we are headed someway back can be seen in banks focusing on their core business again and attempting to dispose of other assets.[16] Securitisation in general has recently come under renewed scrutiny from the Financial

Sydney Brick & Tile Co Ltd (1987) 12 A.C.L.R. 537 (N.S.W.S.C.), aff'd (1989) 15 A.C.L.R. 230 (N.S.W.C.A.).

11 The Ministry of Finance in October 2012 accepted the *Steering Committee Report*, *infra* note 119, Recommendation 3.27. The *Companies Act 2006* (U.K.), 2006, c. 46, s. 678 still covers the situation in *Chaston*, *ibid*., where a private subsidiary financed the acquisition of shares in its public parent. Where public companies are concerned, the recommendation in Singapore is to adopt the position in Australia under *Corporations Act 2001* (Cth.), s. 260A (which applies to all companies incorporated there) to allow a public company or its subsidiary to provide financial assistance for the acquisition of shares in the company or holding company, respectively, if the assistance does not materially prejudice the interest of the company or its shareholders or the company's ability to pay its creditors. This confirms that the financial assistance rule, and perhaps even capital maintenance generally, though largely for creditor protection, also takes into account the interests of shareholders. In this regard, R.P. Austin and I.M. Ramsay, *Ford's Principles of Corporations Law*, 14th ed. (Australia: LexisNexis Butterworths, 2010) at 24.670 has observed that the financial assistance prohibition is a manifestation of the general rule that a company's resources should be used for proper corporate purposes.

12 Daniel Altman, "Contracts So Complex They Imperil The System" *The New York Times* (24 February 2002), online: The New York Times <http://www.nytimes.com/2002/02/24/business/contracts-so-complex-they-imperil-the-system.html?pagewanted=all&src=pm>.

13 Hillary A. Sale, "Banks: The Forgotten (?) Partners in Fraud" (2005) 73 U. Cin. L. Rev. 139.

14 David Kershaw & Richard Moorhead, "Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession" (2013) 76 Mod. L. Rev. 26.

15 Paul Krugman, *The Conscience of a Liberal* (New York: W. W. Norton, 2007).

16 Paul J. Davies, "Citi chief rejects call to split bank as focus shifts to emerging markets" *Financial Times* (21 August 2012).

Stability Board as part of its review of the shadow banking system.[17] The importance of this can be seen in the fact that the formal banking system in the U.S. today forms only one third of the market, with the shadow banking system, which includes hedge funds, the much larger cousin. As such, it is not enough to regulate just the safety and soundness of banks. Banking law alone cannot do the trick in controlling the spread of systemic risks,[18] which often result from the manufacture and sale of financial products coming under the purview of corporate and securities laws. This is evidenced by the fact the regulatory regime established by the *Financial Services Act 2012*,[19] from April 2013 has a prudential regulator, a subsidiary of the Bank of England, focusing on banks, insurance companies and major investment firms, and a financial conduct regulator looking at fair and transparent markets and the conduct of business in securities firms. In this it is similar to the 'twin peaks' regulatory structure first adopted in Australia in 1997 pursuant to the Wallis Report. While the Monetary Authority of Singapore ("MAS") has since inception in 1971 been an integrated regulator overseeing the banking, insurance and securities industry, it did, in the mid-2000s also organise itself exactly along these lines. While there has been some internal restructuring, financial supervision today is undertaken separately by the Banking and Insurance Group focusing on systemic risks and capital requirements, on the one hand, and the Capital Markets Group on the other, looking at market conduct and investors.

II. Securitisation in Singapore Worked from an Institutional Perspective

In Singapore, the risks of the U.S. housing market collapse and consequent mortgage and financial institution default were largely moved off the books of financial conglomerates and sold to the public as debentures, under a debenture issuance programme introduced through a new provision, s. 240A of the *Securities and Futures Act*, in 2005. The most egregious example was in the case of Lehman Minibonds. It was best described in a Singapore *Business Times* Editorial:[20]

> For banks, the Lehman Minibonds fiasco holds many instructive lessons. Here, investors were led to believe they were buying a bond-like instrument that paid a

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[17] Financial Stability Board, Press Release, "The Financial Stability Board's work on Shadow Banking: progress and the next steps" (1 September 2011). The Board now also scrutinises systemically important financial institutions.

[18] Lee U-Wen, "Shadow banking bugs Pandit no end" *Business Times [of Singapore]* (23 August 2012). There was a time where it was felt that securities firms did not pose systemic risks in the same way as banks and insurance companies. However, given the experience of the hedge fund Long Term Capital Management's failure over Russian bonds in 1998 (which required a U.S. government orchestrated bailout by the banks) and now the sub-prime crisis from 2008-2009 (which required the U.S. government to bail out those banks themselves in relation to their securities market activities), it is clear that failures of hedge funds and stockbroking institutions can create systemic risks, and the reduction of this is reflected in the third objective of securities regulation promulgated by the International Organisation of Securities Commissions ("IOSCO"), found in the Singapore *Securities and Futures Act* (Cap. 289, 2006 Rev. Ed. Sing.), s. 5(c) [*SFA*]. Indeed, IOSCO introduced eight new principles in June 2010, focusing on systemic risks in hedge funds, rating agencies and auditors: see Roberta S. Karmel, "IOSCO's Response to the Financial Crisis" (2012) 37 Iowa J. Corp. L. 849.

[19] (U.K.), 2012, c. 21.

[20] "Disclosure: quality counts, not just quantity" *Business Times [of Singapore]* (26 February 2010).

> regular, relatively riskless coupon when, in reality, they were providing Lehman with insurance for its exposure to the inflated US housing market. This insurance was via risky and complicated credit default swaps, instruments that are wholly unsuited to novice retail investors. Yet, the product was passed off as being retail investor-friendly. Worse, the true, substantive nature of the instruments was concealed under hundreds of pages of technical disclosures in order to maximise sales.

While this is what derivatives do, in many other countries these were structured for sale only to sophisticated investors. The only other countries in which such instruments were sold to the retail public (in tranches of S$5000 in Singapore) were Hong Kong, Taiwan and Germany, all countries where large sums of investor money were still kept in bank deposits and that was encouraged to only move out of them due to almost zero interest rates prevailing at that time.

In that sense, corporate/securities laws may have fulfilled the purpose of dis-intermediation. This insulated Singapore banks, which continue to be amongst the soundest in the world, a fact which is also explained by their more traditional lending models in relation to banks in the West. During the 2007-2009 crisis, Singapore and Hong Kong banks remained very well capitalised and more than satisfied the then Basel capital adequacy guidelines. In Singapore, for example, s. 10 of the *Banking Act* mandated a capital ratio of 12%,[21] compared to Basel II's 8%. Presently, according to the recent 2012 Global Finance survey, Singapore's three main commercial banks are ranked 13th to 15th worldwide in terms of safety and soundness. But the peculiar lessons for Singapore were that the sub-prime losses were largely borne by retail, not institutional, investors.

A. *Investor Response in Singapore*

Retail investors in Singapore claimed that they were misled into thinking they were purchasing investment products with the characteristics of fixed deposits or bonds. But their focus was less on the prospectus itself, than on the methods with which the products were sold by the distributors, such as the local banks, stockbrokers and finance companies. Yet many employees of these distributors did not know the nature of what they were selling, and some distributors classified these financial instruments as suitable for risk-averse investors even though their prospectuses stated that they "can involve a high degree of risk".[22] In Singapore, compensation was offered by distributors under a voluntary system set up in consultation with the MAS, and this was largely based on the 'suitability' rules in s. 27 of the *Financial Advisers Act*.[23]

There was just one 'class' action (which failed at first instance and on appeal) against a bank manufacturer of a note based on the fact that the prospectus was

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[21] Cap. 19, 2008 Rev. Ed. Sing.

[22] Tan Sin Liang, "MAS Investigation Report on the Sale and Marketing of Structured Notes Linked to Lehman Brothers: Where the Financial Institutions Went Wrong" *Singapore Law Gazette* (December 2009) at 24.

[23] Cap. 110, 2007 Rev. Ed. Sing. This rule forms the basis for the regulatory reforms discussed below. In England, however, it was held that process failures are unimportant if the product was, in substance, suitable: *Zaki v. Credit Suisse (UK) Ltd* [2013] EWCA Civ 14.

insufficiently certain to create a valid contract.[24] The successful defence was that the alleged mistake in the prospectus was so obvious that no one could have relied on it, and reference to extrinsic evidence in the product reference notes made it clear which was the correct pricing formula, and there was no conceptual uncertainty as such. What was not at issue was whether it is enough for a prospectus to say that an instrument is risky without explicitly saying why this was so, *i.e.*, the adequacy of disclosure as measured by the reasonable investor standard under s. 243 of the *SFA*. There is, however, an action filed in New York by a group of investors, including Singapore's oldest credit cooperative, against a bank manufacturer of a derivative product.[25] At the same time, a local distributor that voluntarily paid the highest compensation to retail investors commenced an action there in fraud and negligence against that same bank for the way it had structured the underlying basket or securities.[26] An *ex parte* interim injunction was obtained by the bank in Singapore against the second action, although it failed to make it permanent,[27] which was also the case with the first action.[28] Jurisdictional issues aside, however, it is not clear if U.S. law would govern the respective actions, which would mean that they would lose the availability of any procedural advantages that assist U.S. class actions.[29] In Australia, by contrast, a class action was successfully brought by unsophisticated investors, which characterisation included local councils, against Lehman Australia for, amongst other things, deceptive and misleading conduct in the manufacture and sale of synthetic CDOs.[30]

B. *Regulatory Responses*

The regulatory reforms introduced in Singapore since the crisis has resulted in some reduction in financial activity of the more egregious kinds. In 2010, financial services were brought under the ambit of the *Consumer Protection (Fair Trading) Act*.[31] This

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[24] *Soon Kok Tiang v. DBS Bank Ltd* [2011] 2 S.L.R. 716 (H.C.), aff'd [2012] 1 S.L.R. 397 (C.A.).

[25] Grace Leong, "S'pore investors sue in US over doomed Pinnacle Notes" *Business Times [of Singapore]* (9 September 2011). According to U.S. District Judge Leonard Sand, "[w]hile there is little doubt that the cautionary language warned plaintiffs that (Pinnacle) Notes carried some risk, it is inadequate to have put the reasonable investor on notice of the alleged fraud".

[26] "Hong Leong Finance sues Morgan Stanley over Pinnacle Notes" *[Singapore] Today* (7 August 2012).

[27] *Morgan Stanley Asia (Singapore) Pte v. Hong Leong Finance Ltd* [2013] SGHC 83.

[28] Grace Leong, "Morgan Stanley gets S'pore court order to suspend US lawsuit" *Business Times [of Singapore]* (12 October 2012).

[29] See the limits of U.S. laws in securities class action litigation expressed in *Morrison v. National Australia Bank Ltd*, 130 S. Ct. 2869 (2010), which was applied in *In re Vivendi Universal, S.A., Securities Litigation*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011). The cases limit the reach of the *Securities Exchange Act of 1934*, 15 U.S.C. §10(b) anti-fraud provisions to purchases and sales of securities listed on an American exchange, or any other security in the U.S. Recently, the same reasoning has been applied to negligence claims under the *Securities Act of 1933*, 15 U.S.C.: *In re Vivendi Universal, S.A., Securities Litigation*, 02 Civ. 5571 (RJH) (S.D.N.Y. 2012).

[30] *Wingecarribee Shire Council v. Lehman Brothers Australia Ltd (in Liq)* (2012) FCA 1028, Rares J. [*Wingecarribee*]. Recently, the rating agency Standard & Poor's was held liable in *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No. 5)* [2012] FCA 1200 for wrongly providing complex instruments issued by ABN Amro with a triple-A rating.

[31] Cap. 52A, 2009 Rev. Ed. Sing. Act 15 of 2008 (effective April 2010) removed a list of excluded transactions in para. 2 of the First Schedule of the Act. But see the further qualifications on unfair

Act does not encompass a general doctrine of misleading or deceptive conduct,[32] or unconscionability,[33] as is the case in some other jurisdictions, although recent cases in Singapore have looked to countries like Australia and Canada for guidance in interpreting the Act.[34] Instead, specific instances of unfair practices at point of sale are regulated, which may not have covered what transpired in those instances where a bank depositor was directed into buying a structured product. The second suggestion in Part IV is that wider notions of unconscionability are required to bring the securities markets back to a more even keel in that this focuses not only on selling methods of distributors but could also improve disclosure by issuers.

According to the MAS, the underlying philosophy in the financial markets for retail investors should be one of fair dealing.[35] The MAS set up a consumer division in 2009 and introduced measures that have heightened requirements for issuers, distributors and even investors themselves. Where issuer disclosure is concerned, they have, since 2010, been required to use a Product Highlights Sheet for all 'debentures' taking the form of asset-backed securities and structured notes which is a much simpler document than a prospectus.[36] A new provision, s. 309B, introduced by the *Securities and Futures (Amendment) Act 2012*, will, when it comes into effect, formalise the obligations of issuers in respect of the classification of specified investment products. Section 309C will also prohibit the use of the phrase "capital/principal protected" to reduce confusion in the marketplace.

Recognising though that disclosure is not the only thing issuers should have to comply with, s. 265A of the *SFA* will, when it comes into force, also require the borrowing entity to appoint a trustee for the debenture holders for the entire tenure of the debenture. In a sense, this revives a provision previously found in s. 262, that had been removed by the *Securities and Futures (Amendment) Act 2003*, as it was thought at that time that it should be left to the market (though the listing rules of a securities exchange)[37] to prescribe the need for a trustee and a trust deed (even if s. 266 continued to set out the duties of such a trustee, if appointed). Section 268A will also prescribe additional requirements in the case of such debentures which are not listed on a securities exchange (which in Singapore is a more common phenomenon that in the case of company shares).

Additional safeguards for the sale of more complex investment products to retail investors have been imposed on distributors and financial advisers by subsidiary legislation and MAS notices. In July 2011, a new regulation 18B was added to the

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practice in the context of the provision of financial services: *Consumer Protection (Fair Trading) (Regulated Financial Services and Products) Regulations 2009*.

[32] In *Wingecarribee*, *supra* note 30, the court discussed the overlap between the various statutes concerning such conduct.

[33] See text accompanying note 71 below.

[34] *Freely Pte Ltd v. Ong Kaili* [2010] 2 S.L.R. 1065 (H.C.), finding that an absence of a state of mind requirement on the part of the wrongdoer made the relevant provisions wider than common law misrepresentation, but that the test of unfair trading was in its effect on a reasonable consumer.

[35] MAS, Guidelines, FAA-G11, "Guidelines on Fair Dealing" (3 April 2009, revised 20 February 2013).

[36] MAS, Guidelines, SFA 13-G10, "Guidelines on the Product Highlights Sheet" (21 October 2010). This will be formalised when the *SFA* ss. 240A and 296A, introduced by the *Securities and Futures (Amendment) Act 2012*, comes into force.

[37] SGX Listing Manual, rule 308 requires a listed debt issue to have a trustee unless it is a prescribed corporation under the *SFA* or if it is only offered to sophisticated or institutional investors and the minimum board lot size is S$200,000.

Financial Advisers Regulations to require financial advisers and the senior management in advisory firms to conduct a comprehensive due diligence exercise in order to determine the suitability of a new product before selling it.[38] From January 2012, a Customer Knowledge Assessment was introduced for retail investors in the case of specified investment products,[39] which is effectively a knowledge test for purchasers of more unusual financial products which had been discussed almost immediately following the Minibond problem in Singapore.[40]

It is clear that a line has been drawn between retail and institutional investors, with the Singapore Exchange ("SGX") trying to woo the retail investor again, having recognised that there is no depth to a capital market otherwise.[41] Active retail participation in Singapore in the capital markets stands at 8% in contrast to 17% in Australia and 25% in Hong Kong.[42] The goal is to let retail investors see the capital markets as an alternative place (to banks) to put their savings as envisaged by forward looking thinkers like James Landis and William Douglas, the second and third chairmen of the SEC after Joseph Kennedy, who had advocated the creation of the SEC to protect investors and at the same time allocate capital efficiently.[43]

Less protection is given to the sophisticated investor as can be seen in the recent proliferation of 'perpetual securities', which were initially offered to such investors in tranches of S$250,000 (thereby avoiding full prospectus disclosure under the accredited investor exception in s. 275 of the *SFA*). But by mid-2012, some of such securities were being offered to the general body of retail investors and this is when the MAS stepped in to warn of the dangers that the labels did not fully explain the underlying characteristics of the securities and that such securities may well have been in the nature of debt or preference shares and where they may in fact be redeemable (usually only at the option of the issuer company), and where any returns may be deferred.[44] This clearly shows that the terms of any issue, as well as the corporate constitution of the company, must be closely examined to determine the precise incidents of either a debenture or a preference share. Unfortunately, Singapore investors often do not do this. The problem was that although a disclosure-based philosophy was embraced by the state, the lack of private enforcement, and perhaps cultural apathy towards transparency, alongside a pool of relatively unsophisticated, elderly investors, made this a dangerous mix.

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[38] Low Kee Yang, "Product Suitability, Due Diligence and Management Responsibility: The New Regime of Regulation 18B of the Financial Advisers Regulations" (2012) 24 Sing. Ac. L.J. 298.

[39] MAS, Notice, FAA-N16, "Notice on Recommendations on Investment Products" (28 July 2011, amended December 2012) and MAS, Notice, SFA 04-N12, "Notice on Sale of Investment Products" (28 July 2011, amended 11 December 2012). Both took effect from 1 January 2012.

[40] MAS, Consultation Paper, P003-2010, "Regulatory Regime for Listed and Unlisted Investment Products" (January 2010). Also see Stephen Choi, "Regulating Investors Not Issuers: A Market-Based Proposal" (2000) 88 Cal. L. Rev. 279.

[41] Lynn Kan, "SGX proposals widen access to IPOs for retail investors" *Business Times [of Singapore]* (1 October 2012). The SGX is proposing to impose a requirement that there be a minimum initial allocation of shares offered under an IPO to the public subscription tranche.

[42] Andrea Soh, "SGX tries to win back wary retail investors" *Business Times [of Singapore]* (11 September 2012).

[43] Robert J. Shiller, "Outlaw Selective Disclosure? Yes, Markets Must be Fair" *Wall Street Journal* (10 August 2000).

[44] Magdalen Ng, "Note key risks in perpetual securities, MAS cautions" *The Straits Times* (17 May 2012).

III. Institutional Focus of Earlier Corporate/Securities Laws

The disclosure-based regime for corporate fundraising was intended to encourage entrepreneurship in Singapore (and so the focus was more on the institution than the investor). The move away from merit regulation, where prospectuses were scrutinised carefully by regulators, from 1999 was thought necessary to permit companies with more innovative means of production, like technology companies, to obtain financing (which is also why the SGX introduced a standalone market capitalisation criterion for a listing at that time). The problem before the move to a system where the markets are allowed to judge the disclosure of issuers was that some industrial concerns had been kept out of the public finance domain because of a more paternalistic approach. The Singapore story related to Creative Technology (of Sound Blaster fame) which was rejected by the SGX and listed on NASDAQ before it finally came back to list in Singapore (and where it is now solely listed). But as with all good concepts, this eventually permitted the structuring of purely financial instruments that provided returns based on manufactured risks as seen in the off-exchange Lehman Minibond problem.

Ideally, securities laws should be able to distinguish industrial-based entities requiring fundraising from financial ones. Where the former may have sound economic reasons for a hands-off or purely disclosure-based approach, the latter requires more merit regulation as it creates less real economic benefit given the amount of externalised systemic risk created. In addition, a company running a business has to be in existence for a while before it can raise funds from the public, largely because the latter can be reached only through a listing on a securities exchange, which would usually have requirements for operating and profit track records. Financial instruments can, however, be sold without much prior structure in place, and the banks and financial institutions can easily reach the public directly and off exchanges. Put differently, regulation could operate on a risk-adjusted basis. Even in Australia, a country which Singapore modelled its reasonable investor prospectus disclosure standard from 1999 on, it was held in *Exeter Group Limited v. Australian Securities Commission*[45] that it was not enough for there to be full disclosure regarding the absence of any detailed plans on the part of the management of an investment fund which sought to raise funds from the public (in AUD2000 tranches) as to the types of companies it would invest in. There was nothing misleading in, or omitted from, the prospectus. Despite this, the Australian Securities Commission refused registration on the basis that a higher, not lower, standard of disclosure applied where a prospectus was targeted at small or retail investors.[46] In fact, disclosure alone has never been enough in the case of unit trusts that are regulated as collective investment schemes, as these are seen as largely off-exchange financial instruments targeted at

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[45] (1998) AATA 369 (Administrative Appeals Tribunal of Australia). It is unlikely that the common law imposed a duty to disclose; although some cases supported the position that if anything is said it cannot be misleading: *New Brunswick and Canada Railway and Land Co. v. Muggeridge* (1860) 1 Drew. & Sm. 363, 62 E.R. 418. There were also judicial statements that refer to the duty of "utmost candour and honesty" on the part of promoters who invite members of the public to invest in a company: *Central Railway Co of Venezuela v. Kisch* (1867) L.R. 2 H.L. 99 at 113 (Lord Chelmsford). This could be seen as the "Golden Rule" that was not further developed: editorial note on *R. v. Kylsant*, "A New Golden Rule for Prospectuses", Editorial Comment, (1932) 45 Harv. L. Rev. 1078.

[46] See also *Fraser v. NRMA Holdings Ltd* (1995) 55 F.C.R. 452.

retail investors, which in Singapore also requires the MAS to approve the scheme and trustee.

There are instances where greater regulation has been imposed in some sectors. Where listing rules are concerned, the SGX in August 2012 reverted to the need for profit and revenue track record, as opposed to an alternative criteria looking only at market capitalisation, for a listing.[47] At the same time, it retained more liberal listing rules for Life Science companies which still contain a pure market capitalisation criterion, amongst others.[48] This shows that some form of industrial policy can work even in the financial markets. Although investment in biomedical companies may be highly risky for investors, it does not create the kinds of systemic risks associated with financial engineering. The benefits resulting from the success of such companies are likely also more tangible and widespread. The SGX has proposed a pure market capitalisation criterion for mineral, oil and gas companies as well.

The other problem experienced in Singapore from 2005 was the numerous corporate governance scandals involving listed companies like China Aviation Oil. Many of these involved the failure to disclose corporate losses, which prejudiced outside shareholders in favour of insiders (such as its holding company selling shares in China Aviation Oil before the trading losses were disclosed, for which it paid a civil penalty of S$8 million),[49] and pitted different generations of outside shareholders against each other in terms of the impact of false or delayed disclosures. It has been suggested that some form of proper purpose rule creating a duty of impartiality on the part of the directors may help alleviate this inter-generational problem created by the timing of disclosure.[50] This will be taken up in the conclusion below.

While the Singapore authorities have recently reiterated that it will enforce disclosure rules strictly, it also noted the difficulties it has had since 2006 with Chinese companies listed on the SGX where cross-border enforcement has been a challenge.[51] A comprehensive study was carried out which has shown the much lower valuations of foreign companies listed in Singapore against whom enforcement has been difficult.[52] Another unintended consequence of facilitating Internet business (which itself was seen by some as buying an option on the future) has been the listing of poorer quality foreign companies, largely Chinese. Today, the SGX has the highest percentage of foreign issuers amongst established stock exchanges, at near 40%. However, its real economic value to Singapore in terms of employment, for example, as opposed to the financial markets, is harder to ascertain.

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47 SGX Listing Manual, rule 210(2).

48 SGX Listing Manual, rule 210(8).

49 MAS, Press Release, "Publication of Regulatory Actions for Market Conduct Breaches: 2005" (1 February 2006), online: MAS <http://www.mas.gov.sg/News-and-Publications/Press-Releases/2006/Publication-of-Regulatory-Actions-Breaches-2005.aspx>.

50 Hans Tjio, "The Rationalisation of Directors' Duties in Singapore" (2005) 17 Sing. Ac. L.J. 52.

51 Ravi Menon, "Singapore's Approach to the Regulation of Capital Markets" (Keynote Address at Thomson Reuters 2nd Pan-Asian Regulatory Summit, Singapore, 28 September 2011), online: MAS <http://www.mas.gov.sg/news-and-publications/speeches-and-monetary-policy-statements/2011/sg-approach-to-the-regulation-of-capital-markets.aspx>.

52 Mak Yuen Teen, Vincent Chen & Emily Sim, "SGX should not punch above its weight" *Business Times [of Singapore]* (2 August 2012), discussing Emily Sim, "Impact of Regulatory Enforcement on Valuation of Foreign Firms" (2012) [unpublished, archived at the National University of Singapore Business School].

To improve enforcement, the SGX introduced in 2008 a watch list for Main Board companies that were not performing well (three years of losses and with a market capitalisation of less than S$40 million over the last 120 trading days).[53] Quarterly reviews are carried out on issuers on the list to see if they meet the minimum continuing criteria, and those that do may be delisted.[54] In an ironic twist, however, Creative Technology, which had difficulties listing in Singapore and was one of the reasons for the move away from merit regulation in 1999, announced in August 2012 that, after three consecutive years of pre-tax losses, it might be put on that list when reviewed by the SGX. But the watch list could be industry- or country-specific. The argument that will be followed up below is that enhanced regulation may be required for certain companies like asset holding ones and those incorporated and operating overseas. It is perhaps for this reason that there has been disappointment recently expressed at the decision of the SGX to reject additional safeguards for foreign listings (other than just extant disclosure requirements) that had been proposed by the Securities Investors Association of Singapore.[55] Industrial/service companies creating jobs in Singapore should be treated on a different footing where possible, especially in the case of soft laws such as the listing rules of an exchange.

IV. Suggested Corporate/Securities Law Responses

Any response should not just be to rebuild investor trust, but to aim higher in order to prevent another global financial crisis and, where possible, even promote sustainable economic growth. A number of areas are worth considering, the first two of which have been alluded to above: reverting to the primary of substance over form; conscience over caveat emptor; more liberal causation and insolvency rules; and perhaps even some form of rule promoting companies operating a business as opposed to those simply set up to hold assets. The last requires more involved state intervention, and is linked to a different aspiration that is captured by the *Kay Review of UK Equity Markets and Long-Term Decision Making*, which Final Report was published in July 2012.[56] There, Professor Kay chartered the decline of Imperial Chemical Industries from a leading chemical and pharmaceutical company to one which sold off its core business and focused on its short-term share price to the ultimate detriment of the shareholders. Professor Kay sought to distinguish longer-term investors from short-term traders in such companies. Here, the argument will be that even asset management companies with longer-term time horizons should be distinguished from the industrial/service companies they invest in.

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53 SGX Listing Manual Part V of Chapter 13.

54 SGX, "Companies in the Watchlist" (17 July 2013), online: SGX <http://info.sgx.com/weblist.nsf/73e958167365740648257561002c6945/4825654e0028b59a4825773700078b03?OpenDocument>.

55 Jonathan Kwok, "Singapore market 'not ready for light disclosure regime'" *The Straits Times* (4 March 2013).

56 U.K., Department for Business, Innovation and Skills, *The Kay Review of UK Equity Markets and Long-Term Decision Making* (Final Report) by John Kay *et al.* (London, 2012), online: Department for Business, Innovation and Skills <http://www.bis.gov.uk/assets/biscore/business-law/docs/k/12-917-kay-review-of-equity-markets-final-report.pdf> [*Kay Review*].

A. *Substance Over Form*

Although it is said that the substance of the transaction will determine its nature, this is often reflected in the form of the documentation itself, and so careful drafting may obviate the need for compliance with a regulatory regime, such as charge registration under the *Companies Act*.[57] In other words, courts would usually not look beyond the intentions of the parties as expressed in the document when deciding whether any or what form of security has been created. The Singapore Court of Appeal in *Thai Chee Ken (Liquidators of Pan-Electric Industries Ltd) v. Banque Paribas*[58] held, for example, that a genuine sale and leaseback transaction did not create a security interest over shares even though it functioned in much the same way.[59]

Thus, unlike the case with §9 of the U.S. Uniform Commercial Code (1995), the focus was perhaps more on the legal nature of the transaction, rather than its economic function. Very recently, however, the Singapore Court of Appeal in *E C Investment Holding Pte Ltd v. Ridout Residence Pte Ltd*[60] reiterated the importance of substance in categorising the transaction there. The issue there was whether the relevant transaction created a genuine agreement for the sale of property so that the buyer should be granted the remedy of specific performance. Through a series of complex transactions, the buyer was given an unusual option to purchase the property at a high option price but low market price for the property which the seller could cancel by paying a settlement sum within a 60-day period. The Court acknowledged that the buyer wanted to buy the property at the best possible price but that the seller, which held the property on trust for its sole shareholder and director who wanted financing, had that knowledge attributed to it, and so was not really entering into the transaction with a desire to sell the property.[61] The Court recognised that it "is not prohibited from evaluating evidence *other than* the transaction documents… in determining whether the real agreement between the parties was that expressed in those instruments."[62]

Here, the court thought that the documentation was created by the buyer, and that it took the form it did to accommodate the differing wishes of both parties. After examining both the pre- and post-contractual conduct of the parties, the Court of Appeal reversed the finding of the lower court that the transaction created a secured loan and held that an agreement for the sale of property came into being upon failure of the seller to pay the settlement sum to cancel the option within the 60-day period, and upon the buyer's exercise of the option.[63]

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57 *Welsh Development Agency v. Export Finance Co Ltd* [1992] B.C.L.C. 148 (C.A.), applied in *Nissho Iwai International (Singapore) Pte Ltd v. Kohinoor Impex Pte Ltd* [1995] 2 S.L.R.(R.) 170 (H.C.).

58 [1993] 2 S.L.R. 609.

59 *Ibid*. at 614. This was said in the course of holding a sale and repurchase agreement between a company and a bank to be a genuine transaction and not an unregistered charge, even though the bank initially recorded the transaction as a loan in its internal documentation.

60 [2012] 1 S.L.R. 32.

61 *Ibid*. at para. 62.

62 *Ibid*. at para. 30 [emphasis in original].

63 Specific performance was, however, not granted in the exercise of the court's equitable jurisdiction as damages was seen as an adequate remedy. See also *New Dennis Arthur v. Greesh Ghai Monty* [2012] 3 S.L.R. 908, where specific performance of a contract for the sale of land was not granted where a purchaser fails to complete if the vendor's interest is largely financial and damages would be adequate in such instance.

Characterisation as a matter of law is only really necessary where there are third-party effects or where it is for the purposes of the application of a statute in which the interest of the state in seeing to the enforcement of its provisions is quite intense.[64] In the absence of such (such as is often the case with charge registration, unless preferential creditors are claiming against a floating chargeholder under s. 328 of the *Companies Act*), one should only look at the language of the document, aided by the wider objective or purposive approach to contractual interpretation found in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*[65] (Singapore's version of *Investor Compensation Scheme Ltd. v. West Bromwich Building Society*,[66] but possibly even wider in allowing evidence of pre-contractual negotiations and subsequent conduct of the parties).[67]

Both modern forms of construction and characterisation can, in those senses, be seen as a way of discerning the substance of the transaction, but this could be for different purposes, and can thus be context specific in the sense that a transaction could be seen as registrable security for certain purposes and not others.[68] Put differently, how much 'substance' is delved into depends on the circumstances, and also on the intensity of the various policy considerations at hand. In other words, if it appears that a court is upholding the primacy of form in a transaction, it is because given the issue at hand, the true substance of the agreement is sufficiently captured in the documentation. However, the fact that courts can recharacterise transactions in most situations today is a powerful tool for reining in the most egregious forms of financial engineering seen in the recent financial crisis by, for example, not recognising certain transactions as taking assets off a balance sheet,[69] or seeing CDSs as insurance in some circumstances. The possibility of such an occurrence suffices.

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64 Hans Tjio, "Form or Substance: Construction or Characterisation" in Yeo Tiong Min, Tang Hang Wu & Hans Tjio, eds., *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010—Trends and Perspectives* (Singapore: Academy Publishing, 2011) at 814 [*Trends and Perspectives*]. See further Lord Millett, "The *Quistclose* trust—a reply" (2011) 17 Trust & Trustees 7, seeing characterisation as a two-stage process.

65 [2008] 3 S.L.R.(R.) 1029 (C.A.), V.K. Rajah J.A.

66 [1998] 1 W.L.R. 896 (H.L.).

67 *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2012] 3 S.L.R. 801 at para. 62 (H.C.), but see now on appeal [2013] SGCA 43, Menon C.J. at para. 75 warning about the admissibility of prior negotiations. Recently, V.K. Rajah J.A. in *Master Maine AS v. Labroy Offshore Ltd* [2012] 3 S.L.R. 125 at para. 42 (C.A.) reiterated that "a contextual approach is certainly not a *carte blanche* for 'creative interpretation' (as coined by Lord Lloyd in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*…" [emphasis in original].

68 *Beconwood Securities Pty Ltd v. Australia and New Zealand Banking Group Limited* [2008] FCA 594 at para. 70 discusses the U.S. position. There is some support for this in Singapore in *Low Gim Har v. Lim Gim Siah* [1992] 1 S.L.R.(R.) 970 at para. 35 (H.C.) where Chan J. (as he was then) said [emphasis in original]:

> In a dispute between revenue and the company/shareholders as to liability for stamp duty, income tax and other duties, it will be necessary to differentiate between the legal and equitable ownership of the company's assets *because the operation of the relevant statute requires such a differentiation*. It is not the law that the dualism of estates or rights in property is applicable or should be applied or recognised in every case. A person who owns the legal estate also has the beneficial ownership unless it is vested or may vest in someone else. He does not have to distinguish between such rights in the property.

69 See the debates over creating a safe harbor for true sales in the U.S.: Solomon, *supra* note 1 at 865.

B. *Unconscionability*

Being largely a banking centre, Singapore, like England, has not had much experience with unconscionability as a cause of action or even a standard. No statute utilises it, and there is only one reported first instance decision that accepts it as a cause of action, as opposed to an underlying rationale.[70] In contrast, those financial centres whose traditional strengths lie more in the capital markets, such as New York, accommodate the doctrine of unconscionability. Their securities disclosure regime emanates from them, and this is also seen in Australia where many specific disclosure provisions in their corporations laws find their roots in fair trading laws.[71] In a recent case involving financial services, an Australian court stated that unconscionable conduct is "doing what should not be done in good conscience".[72]

In this context, it pays to recall that the disclosure philosophy, which permeates the U.S. *Securities Act of 1933*, was seen at that time as a step up from the regulatory free-for-all that existed in inter-state securities transactions in the U.S. The underlying philosophy there is that "sunshine is said to be the best of disinfectants; electric light the most efficient policeman",[73] which stresses the disclosure regime over a different form of regulation, one in which the regulators appears to sanction and approve certain companies even though they are incapable or have no intention of doing so.

But the difference in Singapore is that the disclosure-based regime was and is associated with regulatory loosening, and a clear *caveat emptor* rule. This probably explains why "[t]he protection of investors", the first objective of securities regulations promulgated by the International Organisation of Securities Commissions, is not found in the *SFA* s. 5, and has in its place the facilitation of "efficient markets for the allocation of capital and the transfer of risks". As we saw in the previous section, the debates concerning the correct balance are still ongoing. The position in banking law appears to be different, with the deposit insurance scheme introduced in 2006 in Singapore being explicitly for consumer protection, whereas the focus of the equivalent U.S. scheme is on preventing systemic risk.[74]

It may be that investor protection is in fact still at the forefront of securities regulatory concerns, but that the rhetoric is avoided for fear of moral hazard. It is, however, in any case, not clear that extant law alone solves what may be a cultural problem as Hong Kong has had an *Unconscionable Contracts Ordinance* since 1995,[75] and yet suffered the same problem with the misselling of derivatives in the recent sub-prime

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[70] *Fong Whye Koon v. Chan Ah Thong* [1996] 1 S.L.R.(R.) 801 (H.C.), but compare *Chua Chian Ya v. Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)* [2010] 1 S.L.R. 607 (C.A.).

[71] See now Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth.) which deals with unconscionable conduct and consumer protection in relation to financial services and s. 991A(1) of the *Corporations Act 2001* (Cth.) which prohibits a financial services licensee from engaging in unconscionable conduct in relation to the provision of a financial service. However, ss. 51AA and 52 of the *Trade Practices Act 1974* (Cth.) no longer apply to financial services by virtue of ss. 51AAB and 51AF of that same Act respectively.

[72] *ASIC v. National Exchange Ltd* (2005) 148 F.C.R. 132 at para. 33 (F.C.A.).

[73] Louis Dembitz Brandeis, *Other People's Money And How the Bankers Use It* (New York: Frederick A. Stokes, 1932) at 92, recently cited in Menon, *supra* note 51.

[74] Sandra A. Booysen, "Deposit Insurance in Singapore: Why Have It, Who Gets It, How Does It Work?" [2013] Sing J.L.S. 50.

[75] Cap. 458.

crisis. But from the next part, we will see that there is no magic bullet which solves many modern day complexities, which create unquantifiable uncertainty. Instead, proscribing unconscionable conduct may be one of a number of necessary but not sufficient causes that will bring about more self-reflection on the part of participants in the capital markets. There is otherwise no extant duty to advise on the part of financial institutions that do not stand as fiduciaries.[76] While good faith may be contractually implied as a matter of fact, that comes up against comprehensive entire agreement clauses.[77] In any case, it may impose an even higher standard.[78]

C. *Causation*

Some consideration should also be given to how losses are allocated in the financial markets where accepted notions of fault and causation like the 'but-for' test in negligence may not serve as well as alternative conceptions of shared risks and responsibility. In the Lehman Minibond situation in Singapore, for example, a crude, but perhaps fairer, way of apportioning losses would have been to start at equal shares for the bank manufacturer, rating agency, regulator, distributor and investor itself. That also serves the function of preserving the long term viability of the respective institutions or individuals involved, which will be taken up in the next part. While such an approach may alter incentives somewhat, it does not do so completely and recognises that causal connection is more multifaceted than we sometimes believe or comprehend.

It is true that such an approach will cause us to relook also our approach to proof of damage, with the House of Lords in *Gregg v. Scott*[79] having reaffirmed by a bare majority that a loss of chance to avoid death or injury is not usually actionable in medical negligence cases, and that the plaintiff needs to show that a particular loss would have occurred on a balance of probabilities. But it may be that while forensic evidence is not clear enough to sufficiently link a breach to the damage suffered, some form of soft harm has been caused by that breach. Lord Nicholls, who dissented, thought there had been a clear breach of duty there reducing the chances of the plaintiff surviving 10 years from 42% to 25%, and "[i]n such cases the law should therefore put aside this approach when considering what would have happened had there been no negligence."[80]

However, even in a breach of contract case, the Singapore Court of Appeal in *Auston International Group Ltd v. Ng Swee Hua*[81] held that it was necessary for the plaintiff to show what it would have done on a balance of probabilities had there been no breach by the defendants. The cases which accepted loss of chance as the basis of assessment were those that involved the intervention of an independent third party, and the difficulty of proof in that respect, following *Allied Maples Group Ltd*

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[76] *Go Dante Yap v. Bank Austria Creditanstalt AG* [2011] 4 S.L.R. 559 (C.A.).

[77] *Ng Giap Hon v. Westcomb Securities Pte Ltd* [2009] 3 S.L.R.(R.) 518 (C.A.).

[78] See, in the context of a rent review case, *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 S.L.R. 738 at para. 68.

[79] [2005] 2 A.C. 176.

[80] *Ibid*. at para. 43.

[81] [2009] 4 S.L.R.(R.) 628.

v. Simmons and Simmons (a firm).[82] But the Lehman Minibond problem did involve other independent parties and although the *Chaplin v. Hicks*[83] loss of chance principle was also drawn from contract, there is no reason why it cannot be extended to extant fraud or negligence cases in appropriate cases, as was accepted in *Allied Maples*.[84] The chance must be "real and substantial",[85] however, rather than speculative, and this was why in *Lee Chang-Rung v. Leonard Loo LLP*[86] sophisticated investors failed in their claim against a Singapore lawyer for negligence in advising them of their discovery obligations in a way which caused them to lose their chance of succeeding in a suit for misrepresentation against a distributor of a structured product issued by Lehman Brothers (it was struck out for failure to disclose certain documents). The object of the agreement breached must likely be the chance being claimed for,[87] although the chance can be rated at below 50%.[88]

In cases of actual harm, the door was opened in terms of relaxing the 'but-for' test of causation in modern tort law with the *Fairchild v. Glenhaven Funeral Services Ltd*[89] approach to multiple potential causes of loss. Here, courts have accepted an increase in risk of loss as actionable, even if it cannot be sure that each cause was sufficient in itself. Although strictly dealing with mesothelioma cases caused by asbestos poisoning, a gap was left for its wider application. In Canada, a recent decision accepted that the 'but-for' test is the starting point but was willing to equate material contribution to risk with injury where there are two or more tortfeasors and the plaintiff through no fault of his own cannot show which was at fault.[90] Such an approach has now been applied in a single defendant mesothelioma case in the U.K., with seemingly more precise statistical proof rejected.[91]

Malcolm Gladwell has asked, "[w]hat level of proof do we need about the harmfulness of some activities before we act?"[92] Damages should sometimes be payable where the wrongdoer creates an unacceptable risk for which he should be liable,[93] where evidential difficulties make it impossible to prove the chain of causation connecting the wrong to the harm. Although such an approach has not fully taken root

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[82] [1995] 1 W.L.R. 1602 (C.A.) [*Allied Maples*], approved in *Asia Hotels Investments Ltd v. Starwood Asia Pacific Management Pte Ltd* [2005] 1 S.L.R.(R.) 661 (C.A.).

[83] (1911) 2 K.B. 786 (C.A.).

[84] See *JSI Shipping (S) Pte Ltd v. Teofoongwonglcloong (a firm)* [2007] 4 S.L.R.(R.) 460 (C.A.); *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 at 575, 576 (C.A.).

[85] *Allied Maples, supra* note 82 at 1614, Stuart Smith L.J.

[86] [2012] SGHC 174.

[87] *Cf. Straits Engineering Contracting Pte Ltd v. Merteks Pte Ltd* [1995] 3 S.L.R.(R.) 864 (C.A.).

[88] *MK Distripark Pte Ltd v. Pedder Warehousing & Logistics (S) Pte Ltd* [2013] SGHC 84 at para. 58.

[89] [2003] 1 A.C. 32 (H.L.).

[90] *Clements v. Clements* [2012] 2 S.C.R. 181; *cf. Resurfice Corp. v. Hanke* [2007] 1 S.C.R. 333; David Cheifetz, "The *Resurfice* Exception: Causation in Negligence Without Probability" (2012) [unpublished, archived at University of Toronto Faculty of Law Library], online: SSRN <http://ssrn.com/abstract=2129615>.

[91] *Sienkiewicz v. Greif (UK) Ltd; Willmore v. Knowsley Metropolitan Borough Council* [2011] 2 W.L.R. 523 (S.C.); see Jane Stapleton, "Factual Causation, Mesothelioma and Statistical Validity" (2012) 128 Law Q. Rev. 221.

[92] This was in the context of the dangers of head injuries in American football: Christine Huang, "Gladwell's condemnation of football raises eyebrows" *The Daily Pennsylvanian* (15 February 2013).

[93] Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law* (Portland, Oregon: Hart Publishing, 2007) 467.

in the context of negligence in the modern post-industrial world, the Singapore decision in *Surender Singh s/o Jagdish Singh v. Li Man Kay*[94] applied the "formerly discredited approach"[95] in *McGhee v. National Coal Board*[96] in finding that there was a sufficient causal connection where the defendants' medical negligence "made the risk of death to the Deceased more probable."[97]

Outside of the medical arena and personal injury cases, and also involving solicitor negligence and investor loss, Loh J.C. (as he then was), in an unreported Singapore decision, *Satinder Singh Garcha v. Uthayasurian Sidambaram*[98] thought that:[99]

> In the well-known words of Lord Reid in *McGhee v National Coal Board* [1973] 1 WLR 1 at 5: "[I]t has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life." This was cited with approval in *Sunny Metal & Engineering Ptd Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at 802.

Loh J.C. accepted that there were two effective causes causing loss on a property investment even though he thought that the plaintiff would have proceeded with the same course of action had the defendant solicitor not been in breach of his professional duties. He stated what he thought an equitable and just distribution would have been (two thirds of the loss borne by the plaintiff and one third by the defendant) and then went back to apply more traditional causation tests and found that the losses were apportioned roughly in that direction. In the English Court of Appeal in *Rubenstein v. HSBC Bank Plc*,[100] Rix L.J. thought that an investment adviser who had been negligent in recommending an investment "may well be responsible if some flaw in the investment turns out materially to contribute to some investment loss".[101]

There is consequently enough in the cases that will allow further development of proportionate liability as opposed to an all-or-nothing approach.[102] This might cause financiers to rethink a business model which consciously embeds undisclosed risks and leverage in products that they create and/or sell, particularly to retail investors.

D. *Insolvency Rules*

There is something to be said about liberalising insolvency laws although the danger with this is that it could result in excessive risk taking of the sort that we are seeking to prevent here. There is no doubt, however, that companies may require some

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94 [2010] 1 S.L.R. 428 (H.C.) [*Surender Singh*].

95 Amirthalingam, *supra* note 93 at 470.

96 [1973] 1 W.L.R. 1 (H.L.).

97 *Surender Singh, supra* note 94 at para. 240.

98 [2009] SGHC 240.

99 *Ibid*. at para. 101.

100 [2012] EWCA Civ 1184 [*Rubenstein*].

101 *Ibid.* at para. 103. Low Kee Yang, "Causation, Remoteness, Scope of Duty and the *Rubenstein* Decision" *Singapore Law Gazette* (February 2013) argues, however, that such an approach towards causation may not be applicable outside the line of medical cases discussed here, and that the focus of *Rubenstein* was on remoteness and the scope of duty, not causation.

102 This was confirmed in another decision on asbestos poisoning, *Barker v. Corus* [2006] 2 A.C. 572 (H.L.), although the effect of this was later reversed by the *Compensation Act 2006* (U.K.), 2006, c. 29.

leeway because of the problems created by a financial crisis, and we have to live with the moral hazard that entails. Unlike the first three suggestions or trends identified above, which deal mainly with the negative effects of extreme financial engineering, this part, as well as the others below, focus on what has or can be done in respect of corporate and securities laws to help the real economy. While financial institutions appear to have recovered somewhat by early 2013 in terms of profitability, real growth and employment in many parts of the world were still suffering from the effects of the financial crisis that had started six years previously. Many small and medium enterprises are struggling with liquidity problems, and in Singapore this has been exacerbated by a restriction on foreign labour due to political pressures. As firms adjust to a new paradigm of slower growth and higher wages, bankruptcy is a real concern. Possibly because of her experience with the earlier Asian Financial Crisis, directors have, however, been less worried when trying to trade a company out of insolvency in Singapore even though s. 339(3) of the *Companies Act* states that:

> If, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time of the company being able to pay the debt, the officer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 months.

This is a relatively weak provision as a civil claim can only be made against the directors under s. 340(2) only if there has been a criminal prosecution under s. 339(3), and the test is whether there was a "reasonable or probable ground of expectation… at the time of the company being able to pay the debt". By contrast, those countries which generally permit capital reduction (which given the changes to its *Companies Act* now, in effect, include Singapore) subject to a declaration of solvency usually have provisions that are worded more stringently. These include equivalent provisions in Australia's *Corporations Act 2001*[103] and the *Insolvency Act 1986*,[104] where a duty is imposed to prevent insolvent trading and wrongful trading respectively.[105]

But the general concept of insolvency may have to be revisited in any case given developments in England seeing insolvency more as a liquidity or cash flow problem. Partly due to the difficulties of taking contingent and prospective liabilities into account, it was held, in a case where a trustee of longer dated notes was asked to declare a contractual event of default mirrored on the tests of insolvency in s. 123 of the *Insolvency Act 1986* by the English Court of Appeal in *BNY Corporate Trustee Services Ltd v. Eurosail-UK 2007-3BL plc*,[106] that a company could not be said to be

[103] (Cth.), s. 588G.

[104] (U.K.), 1986, c. 45, s. 214.

[105] Both the *Company Legislation and Regulatory Framework Committee* (October 2002) and *Steering Committee for Review of the Companies Act* (June 2011) made no recommendations to amend the *Companies Act* (Singapore) ss. 339/340. See also Andrew Keay, "The Duty of Directors to Take Account of Creditors' Interests: Has it Any Role to Play?" [2002] J. Bus. L. 379.

[106] [2011] 1 W.L.R. 2524 [*BNY Corporate Trustee*]. In contrast, Grimberg J.C. in *Re Great Eastern Hotel (Pte) Ltd* [1988] S.L.R.(R.) 276 (H.C.) held that the Singapore test for insolvency is, first, whether there is a proper and unsatisfied demand for a debt already due which the company is unable to pay out of its present liquid resources and, second, whether there is a deficit in terms of the company's assets and

insolvent simply because its liabilities appeared to exceed its assets. The insolvency provisions were meant to identify companies that could not pay its debts, and this would be so only if there was an incurable deficiency in its assets, where a "point of no return" had been reached.[107] The Supreme Court rejected the need for the last point, but thought that the cash flow test worked for the reasonably near future only. A balance sheet test was more sensible when looking forward but the Court thought that this was an imprecise test that depended on the party asserting it to prove. On the facts, given that the final redemption of the notes was only in 2045, the Court felt it had to proceed with caution. Eurosail could pay its debts presently and the Court could not be sure that it would eventually be unable to do so until a time closer to 2045.

One reason for perhaps recognising a more flexible test is that many Western banks are today possibly balance sheet insolvent due to the 'toxic' assets (CDOs and CDSs, as well as sovereign debt) remaining on the balance sheet (if marked to market). Consequently, the concern today is not with the traditional bank run that made a balance sheet solvent bank appear to be cash flow insolvent, but the converse situation. However, what was said by Neuberger L.J. (as he then was) in *BNY Corporate Trustee* is quite consistent with the position in Singapore allowing directors to trade in the vicinity of insolvency:[108]

> As Toulson LJ's researches have established, the notion that section 123(2) was not intended to introduce a wholly new basis for winding up a company, based on assets and liabilities rather than on inability to meet debts is supported by what was said in *Report of the Review Committee—Insolvency Law and Practice* (1982) (Cmnd 8558) (better known as the Cork Report), which led to a White Paper upon which the Insolvency Acts 1985 and 1986 Act were founded. After stating in para 205, that "In practical terms, insolvency arises at the moment when debts cannot be met as they fall due", there is a passage in para 216 of the report, which reflects the view expressed by Professor Goode:
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>> "A balance has to be drawn between the right of an honest and prudent businessman, who is prepared to work hard, to continue to trade out of his difficulties if he can genuinely see a light at the end of the tunnel, and the corresponding obligation to 'put up the shutters', when, by continuing to trade, he would be doing so at the expense of his creditors and in disregard of those business considerations which a reasonable businessman is expected to observe."

Those who argue that laws should not be used to set goals will point to a similar situation in the U.S. savings and loans crisis in the 1980s, where many of its financial institutions were permitted to attempt to trade themselves out of what could have been

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liabilities. The inter-relationships between the various tests were recently discussed by the Court of Appeal in *BNP Paribas v. Jurong Shipyard Pte Ltd* [2009] 2 S.L.R.(R.) 949 [*BNP Paribas*]. *Cf.* Peter Walton, "'Inability to pay debts'—beyond the point of no return?" [2013] J. Bus. L. 212, pointing out that the meaning in s. 123 went beyond winding up and affected other ancillary areas.

[107] *BNY Corporate Trustee*, *ibid.* at para. 52, Neuberger M.R., and para. 114, Toulson L.J., referring to Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. (London: Sweet & Maxwell, 2011) at [4-06].

[108] *Ibid.* at para. 54.

seen as insolvent positions, sometimes with disastrous consequences.[109] This may, in fact, explain why a number of banks have recently had problems with 'rogue traders', which could be due more to structural problems created by the need to take greater risks in an end-game situation.[110] It does suggest that we should be careful in terms of preserving companies, or some types of companies at least, through relaxing insolvency laws.

It is pragmatism that should prevail—if banks are to be given a break as debtors, and they have and will be—they should show more accommodation to debtors when they are the creditors. Understanding that there are other corporate constituents even in vicinity of possible insolvency helps to explain *dicta* in the recent Singapore Court of Appeal decision in *BNP Paribas*[111] where the recently retired Chan C.J. thought that a court had the discretion not to grant a winding-up application against a company even where the company has refused to pay out on an undisputed debt, which appears to be a somewhat anti-creditor approach. While the area has been the subject of some discussion amongst insolvency academics in Singapore,[112] it does show the context specificity of a decision that from a policy perspective could be seen as being sensitive to other competing interests, such as those of employees at a time of economic crisis. Chan C.J. has also, extra-judicially, discussed the recent Court of Appeal decision in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) v. TT International Ltd*[113] where he suggested that the scheme of arrangement provisions in the Singapore *Companies Act* had been interpreted in a fashion which allowed a Chapter 11-type re-organisation, which is generally seen as a pro-debtor device.[114] He also thought that Singapore courts were "solution-oriented rather than doctrine-oriented".[115]

E. *Calibrating the Regulation of Different Kinds of Companies*

It is clear that excessive risk was at the heart of the recent crisis, and there is concern in Singapore and Hong Kong with the hedge funds, for example, that they are trying to attract. Still, the underlying assumption in these financial centres is that they want

[109] Jonathan R. Macey and Geoffrey P. Miller, *Banking Law and Regulation*, 2nd ed. (New York: Aspen Law & Business, 1997) at pp. 35, 36. This was caused in part by the thrifts borrowing from depositors at flexible interest rates, and lending to homeowners at fixed rates, and they were subsequently caught in a rising interest rate environment.

[110] George Gilligan, "Jérôme Kerviel the 'Rogue Trader' of Société Générale: Bad Luck, Bad Apple, Bad Tree or Bad Orchard?" (2011) 32 The Company Lawyer 355.

[111] *Supra* note 106, *cf. Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd* [2007] 2 S.L.R.(R.) 268 at para. 61 (C.A.); *Angel Group Limited v. British Gas Trading Limited* [2012] EWHC 2702 (Ch).

[112] Suet Lin Joyce Lee, "The Court's Jurisdiction to Restrain a Creditor From Presenting a Winding Up Petition Where a Cross-Claim Exists" (2010) 69 Cambridge L.J. 113; Wee Meng Seng, "Taking Stock of the Insolvency Tests in Section 254 of the *Companies Act*" [2011] Sing. J.L.S. 486.

[113] [2012] 2 S.L.R. 213 [*TT International*]. See now *The Royal Bank of Scotland NV (formerly known ABN Amro Bank NV) v. TT International Ltd* [2012] 4 S.L.R. 1182 (C.A.).

[114] The Honourable The Chief Justice Chan Sek Keong, (Opening Address, Singapore Academy of Law Conference 2011, Supreme Court Auditorium, 24 February 2011), *Trends and Perspectives*, *supra* note 64 at ix [SAL Opening Address]. The government had considered formally introducing Chapter 11 as part of standalone insolvency legislation. See further Raymond Chan and John Ho, "Debtor-in-Possession: Not Appropriate for Hong Kong and Singapore" (2011) 32 The Company Lawyer 304.

[115] SAL Opening Address, *ibid*.

more of such business,[116] and so, despite all the good work in trying to regulate such entities it has been questioned whether competition between financial centres will allow proper regulation of systemic risks, particularly in the shadow banking sector.[117] The fundamental question regarding whether the risks created by hedge funds are appropriate is not at issue; rather, the goal is in preventing its aggregation in a financially important institution.

The U.K. *Kay Review* believes in that regard that asset managers are better in that they invest with longer-term time horizons than hedge funds. The E.U. is seriously considering giving extra voting rights and more dividends to long-term shareholders.[118] But to deal with the disease and not just its symptoms may require more encouragement of the underlying businesses in which funds invest in. Ideally, the risks that companies should undertake are those that lead to real economic growth. We should attempt in law to distinguish industrial/service companies from asset holding ones, whether long or short term. The latest company law reform proposals in Singapore have again recommended a small companies regime with lower regulatory costs in order to spur entrepreneurial activity. This exempts from audit a private company satisfying two of these three criteria: total annual revenue below S$10 million; gross assets below S$10 million or fewer than 50 employees.[119] This may not, however, recognise that there will be holding companies falling within that 'small' category owning large assets but with low, or no, declared revenue, as opposed to the vision of thriving small businesses creating employment. More specific differentiation should be the aspiration, and cases on lifting the corporate veil and the court's equitable winding-up jurisdiction in Singapore are instructive in this regard.

In *Tjong Very Sumito v. Chan Sing En*[120] Chong J. (now Attorney-General of Singapore) accepted that there are really only two justifications for veil piercing. The first is where the company is one and the same as the controller or is used as a mere front for the controller's affairs and the second where the corporate structure is abused to further an improper purpose. The first scenario is much harder to invoke as it often involves removing the limited liability given to shareholders and directors in relation to the debts incurred in operating a real business. The fact that often courts talk about *alter ego* (as in *Tjong*), sham or facade in this context shows the courts' reluctance to devise a clear test in this context. The recent English Supreme Court decisions in *Prest v. Petrodel Resources Limited*[121] and *VTB Capital plc v. Nutritek International Corp*[122] confirm the unhelpfulness of these phrases (noted by Lord

[116] Cai Haoxiang, "S'pore attractive to smaller hedge funds despite tighter rules" *Business Times [of Singapore]* (16 November 2012).

[117] Karmel, *supra* note 18.

[118] EC, Communication, COM/2012/0740, "Action Plan: European Company Law and Corporate Governance—A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies" (12 December 2012), online: EUR-Lex <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0740:EN:NOT>.

[119] Sing., Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper) (June 2011), Recommendation 4.1 (accepted by the Ministry of Finance October 2012).

[120] [2012] 3 S.L.R. 953 at para. 67 (H.C.) [*Tjong*].

[121] [2013] 3 W.L.R. 1 [*Prest*], aff'g [2013] 2 W.L.R. 447 (C.A.).

[122] [2013] 2 W.L.R. 398 [*VTB Capital* (S.C.)], aff'g [2012] EWCA Civ 808 at para. 68 [*VTB Capital* (C.A.)]. See also Lord Hoffmann in *Norglen Ltd. (in liquidation) v. Reeds Rains Prudential Ltd.* [1999] 2 A.C. 1 at 13. See also *Acatos & Hutcheson v. Watson* [1995] 1 B.C.L.C. 218 at 223, Lightman J.

Sumption at para. 28 and Lord Neuberger at para. 124 respectively). The second situation is, however, more concrete and is directed at persons trying to protect assets already accumulated from their own creditors or to escape some liability pressing on them.[123] Here, the issue is really about separate personality and entity shielding, where courts have traditionally been more willing to lift the veil. In this context, *VTB Capital* also holds that the fraud cannot exist in a vacuum,[124] but must be in relation to improper use of the corporate shell (as noted by Lord Neuberger at para. 128, although he did not see abuse of corporate structure as a separate and distinct ground for lifting the veil; subsequently in *Prest* he agreed at para. 81 with Lord Sumption at para. 35 that this was in fact the only ground). Consistent with this, Hansmann, Kraakman and Squire have identified "entity shielding" as more susceptible to greater abuse today than "owner shielding", particularly given the way in which an increasing number of entities have been given separate-entity status in the U.S.[125] They believe that the next stage in the evolution of organisational law is to deal with this problem, both within and outside of bankruptcy.

In cases of minority oppression, Chan C.J. consistently held that winding-up was a "last resort" as opposed to a buy-out remedy.[126] But even with the slightly separate jurisdiction to wind-up a company on the just and equitable ground (such as a loss of substratum), Chan C.J. always displayed a reluctance to wind-up a company that had an underlying business as opposed to one "initially incorporated as a dormant or shelf company"[127] that was, in his words, "merely an investment holding company".[128] There should be, and is, a consistency here with providing greater ability for company directors to trade in the vicinity of insolvency described in the previous part. Although this puts a company's remaining equity at risk, there is something to be said for providing less protection to shareholders and creditors in non-financial, industrial/service, companies as opposed to the risk-based regulatory capital requirements applicable to banks and insurance companies.[129]

At a more general level, company and securities laws could be shaped to direct capital to productive uses (even if highly risky like biomedical research, where the financial risks are borne internally by the entity or its shareholders) rather than into

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123 *Gilford Motor Company, Limited v. Horne* [1933] 1 Ch 935 (C.A.); *Jones v. Lipman* [1962] 1 W.L.R. 832 (Ch.).

124 *VTB Capital* (S.C.), *supra* note 122, at para. 128 and *VTB Capital* (C.A.), *supra* note 122 at para. 78; *cf. Antonio Gramsci Shipping Corporation v. Oleg Stepanovs* [2011] EWHC 333 (Comm), which was doubted in the context of veil piercing by Lord Neuberger in *VTB Capital* (S.C.).

125 Henry Hansmann, Reinier Kraakman & Richard Squire, "Law and the Rise of the Firm" (2006) 119:5 Harv. L. Rev. 1333 at 1337–1356.

126 *Tang Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng* [1992] 2 S.L.R. 1114 at para. 61. See also *Re Chong Lee Leong Seng Co (Pte) Ltd* [1989] S.L.R. 685 (H.C.) where Chan J. stated this position despite noting that Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 M.L.J. 227 (P.C.) had held that the winding up as an option "ranks equally with the others".

127 *Sim Yong Kim v. Evenstar Investments Pte Ltd* [2006] 3 S.L.R.(R.) 827 at para. 14 (C.A.) [*Evenstar*], referring to his earlier judgment in *Chua Kien How v. Goodwealth Trading Pte Ltd* [1992] 2 S.L.R. 296 (C.A.). In *Evenstar*, Chan C.J. thought that the winding-up order there could be tailored so that it looked like a buy-out order, and also applied the practice of staying a winding-up order for the parties to work out an alternative arrangement.

128 *Evenstar*, *ibid*. at para. 44.

129 *Cf.* Lukas Handschin, "Risk-Based Equity Requirements: How Equity Rules for the Financial Sector Can be Applied to the Real Economy" (2012) 12 J.C.L.S. 255.

what is effectively savings looking for capital gains (such as entities holding properties and shares, with side-bets on the failure of Greece) where the link to real economic growth is more remote. Keynes wrote of the paradox of thrift.[130] Perhaps law, particularly softer ones like listing rules and codes, can do its part to put capital to better use. Wealth should become risk capital that is injected back into the economy rather than extracted or worse, allowed to grow at the expense of the real economy (through externalising systemic risks). The strength of the corporation was capital lock-in leading to corporate growth.[131] Underpinning all that was a business that employed people, and assumed risks that have advanced mankind. Many entities today are not of that nature.

V. Conclusion—Longer-Term Decision Making and Proper Purposes

It has been said that Australia came through the crisis unscathed because of the strength of its complex ecosystem, which included the 'twin peaks' regulatory system discussed above, which Singapore has also in effect had in place since the mid-2000s.[132] Commodity prices aside, one other important reason might have been because the Reserve Bank of Australia was well aware as early as 2003 of the generational problems that come from a property bubble and so maintained higher interest rates relative to the rest of the world.[133] It may be that inter-generational problems can be ameliorated through duties of impartiality and the impetus to act fairly on the part of decision makers, including legislators and directors, which would balance long-term and short-term interests of, respectively, the electorate and shareholders. Perhaps this Australian trait was seen most clearly in the High Court decision in *Gambotto v. WCP Ltd*,[134] which attempted to lay out a proper purpose rule even on the part of shareholders themselves when it came to voting on an expropriation or even variation of their rights, which was seen as a high point of court activism. While that decision made no inroads in England and Singapore, or indeed even in Australia after that,[135] the fact that the *Kay Review* is now re-examining the whole basis of shareholder value and short-termism in the U.K. shows that there is an alternative philosophy that should be considered seriously now that it is clear how deep a problem the global financial crisis was, and is.

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[130] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (London: Palgrave Macmillan, 1936).

[131] Lynn A. Stout, "On the Nature of Corporations" (2005) U. Ill. L. Rev. 253.

[132] Jennifer G. Hill, "Why did Australia fare so well in the global financial crisis?" in Eilís Ferran *et al.*, eds., *The Regulatory Aftermath of the Global Financial Crisis* (New York: Cambridge University Press, 2012) at 203.

[133] I. J. MacFarlane, "Economic Opportunities and Risks over the Coming Decades" (Speech delivered at the 2003 Melbourne Institute Economic and Social Outlook Conference Dinner, 13 November 2003). The speech preceded by a week the raising of interest rates to cool the housing boom in Australia.

[134] (1995) 182 C.L.R. 432. Where directors' duties are concerned, the proper purpose rule was found not to have been breached in *Townsing Henry George v. Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 S.L.R.(R.) 597 at para. 58: discussed in Hans Tjio, "Understanding the Company in Context" in Chao Hick Tin *et al.*, eds., *The Law in His Hands—A Tribute to Chief Justice Chan Sek Keong* (Singapore: Academy Publishing, 2012) 121 at 153.

[135] Ian Ramsay & Benjamin Saunders, "What Do You Do With a High Court Decision You Don't Like? Legislative, Judicial and Academic Responses to *Gambotto v. WCP Ltd*" (2011) 25 Austl. J. Corp. L. 112.

Shareholder primacy was the right strategy in a world with plentiful resources and new "general purpose technologies"[136] or "disruptive technologies".[137] But the world has changed, for a while at least. Most shareholders want to take on too much risk[138] and we are in the wrong part of the real, as opposed to financial, innovation cycle for that. Management, especially those in financial institutions,[139] ended up trading against their own constituents, starting with customers, creditors and, ultimately, employees and shareholders themselves. Because of cross-linkages, too much of the risk created was systemic in nature and externalised.

Recharacterisation of transactions, unconscionability and relaxing winner-takes-all causation are matters directly addressing the perils of complex financial engineering. Increasing protection to companies against creditors, prioritising businesses that create employment and duties focusing on the longer-term sound, however, like the socialisation of corporate and securities law. Of course there is some of that, but this is not a permanent state. It is a response to a crisis, which was financial and originated in the West, and rooted in libertarian philosophy, but which has now seriously impacted the world's economy. When the time is right, the next generation should be allowed the choice to perhaps make the same mistakes of every generation before it.

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[136] Robert Gordon, "Is U.S. Economic Growth Over? Faltering Innovation Confronts the Six Headwinds" (2012) NBER Working Paper No. 18315, online: The National Bureau of Economic Research <http://www.nber.org/papers/w18315>.

[137] Andre Geim, "Be afraid, very afraid, of the tech crisis" *Financial Times* (5 February 2013).

[138] Margaret M. Blair, "Corporate Law and the Team Production Problem" (2012) Vanderbilt Law and Economics Research Paper No. 12-12, online: SSRN <http://ssrn.com/abstract=2037240>.

[139] Christopher M. Bruner, "Conception of Corporate Purpose in Post-Crises Financial Firms" (2013) 36 Seattle U.L. Rev. 527.