



EW Barker Centre for Law & Business
Faculty of Law

NUS Law Working Paper 2024/011

NUS EW Barker Centre for Law & Business Working Paper 24/05

The ‘Creditor Duty’ and other Rules

Hans Tjio

Professor, Faculty of Law, National University of Singapore

[Uploaded November 2024]

© Copyright is held by the author or authors of each working paper. No part of this paper may be republished, reprinted, or reproduced in any format without the permission of the paper’s author or authors.

Note: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the National University of Singapore.

Abstract

Cases all around the world have had to deal with statutory changes that have diluted capital maintenance rules. The duty on directors to act in the best interest of the company has had to fill the gap in situations in which returns to shareholders (even where enlightened) are no longer the only concern. Recent decisions on creditor interests in the vicinity of insolvency in the UK and Singapore are contrasted. The suggestion is that any indirect ‘creditor duty’ is hard to specify and enforce given the continued focus on the company and its shareholders. Instead, the focus should shift from the company’s interest to the proper exercise of powers by directors viewed against the various statutory obligations of companies (that remain) in or around insolvency.

Keywords: Directors' duties; Creditor-regarding duty; Proper Purposes; Insolvency Rules

The ‘Creditor Duty’ and other Rules

Introduction

Covid-19 resulted in the suspension of wrongful trading rules in many parts of the world as governments tried to allow companies to trade out of insolvency.¹ Aside from that, however, some countries have moved from what was seen as a more pro-creditor London banking model with 3 to 4 large commercial banks to one that is perhaps more debtor or shareholder friendly. The comparison here is the US, with its thousands of small state banks, and this is manifested in various ways. First, there is the adoption of Chapter 11 type business restructuring seen in countries like Singapore and the Netherlands which allows debtors to remain in possession. Second, there are increasing moments where there seems to be departures from creditor priority. The example here is where holders of the Credit Suisse AT1 bonds – also known as contingent convertible bonds – received nothing where the Swiss-government-supervised takeover of Credit Suisse by Union Bank of Switzerland triggered an event of default that contractually facilitated this, whereas shareholders received US\$3.23 billion (S\$4.3 billion). This in effect subverted the hierarchy of investor interests (in contrast many bail-in regimes convert banking debt to equity whilst wiping out prior equity). Singapore AT1 bondholders are amongst many that have formed class actions against the Swiss government for not adhering to international norms in its treatment of overseas investors.²

¹ See the suspension of wrongful trading in various jurisdictions due to COVID-19 discussed by Gert-Jan Boon and others, ‘The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog’ (11 April 2020) <<https://papers.ssrn.com/abstract=3573419>> accessed 1 July 2024. See also COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) (Singapore) Div 2 and the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, SI 2020/1349 (UK).

² Colin Tan, ‘Over 100 Credit Suisse Bond Holders in S’pore Join Lawsuit to Seek \$100 Million in Restitution’ *The Straits Times* (Singapore, 8 May 2023) <<https://www.straitstimes.com/business/over-100-credit->

A good place to analyse these developments would be with La Porta *et al*'s seminal 1998 paper, *Law and Finance*, which charted the legal regimes across jurisdictions in terms of how they protected creditor and shareholder rights.³ We then apply this to the duty of directors, if any, that may be owed indirectly to creditors (the 'creditor duty' which is formally owed to the company as separate entity) in a particular jurisdiction. Countries that protect creditors more, such as those that remain pro-banking, like the UK, should require their directors to consider the interests of creditors more than those in places like the US. As a matter of policy, US states have, for a long time, had very weak or even no direct rules on capital maintenance, perhaps because they saw capital stock as an asset on the 'upper left-hand side of the balance sheet, close to the modern businessman's concept of current assets'.⁴ Given that the main concern was to prevent the return of assets in bankruptcy, as opposed to extant creditor protection, rules on capital maintenance were not seen to be as important as insolvency rules.⁵ For insolvency restructuring, there was the Chandler Act in 1938 and then in 1978, Chapter 11 was introduced into bankruptcy legislation.⁶ La Porta gave the US a score of one out of five in terms of creditor rights, but gave the UK a score of four in the same category (with both having five for shareholder rights).⁷ Singapore, on the other hand, was scored the same way as the UK in the 1998 article.⁸ Things have, however, evolved with changes to the judicial management regime and schemes of arrangement, particularly from 2017. If creditor rights were scored in Singapore today using La Porta's matrices, it would also be given a score of 1 (like in the US), with changes to the coding for the categories 'No Automatic Stay on Assets', 'Restrictions for Going into Reorganization' and 'Management Does Not Stay in Reorganization'. Secured creditors continue to be well-protected, however, and so the changes may have resulted in more inter-creditor conflict, rather than just a shift in the balance from creditors in general to shareholders (whose protection remains largely the same).

suisse-bond-holders-in-s-pore-join-lawsuit-to-seek-100-million-in-restitution> accessed 1 July 2024. See also Narine Lalfaryan, 'Chameleon Capital' (2024) University of Cambridge Faculty of Law Legal Studies Research Paper No 30/2024 arguing that the debt-equity distinction has been blurred by the private capital market and may only be relevant in collective proceedings.

³ Rafael La Porta and others, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113, 1130–1137.

⁴ Bayless Manning, *A Concise Textbook on Legal Capital* (2nd edn, Foundation Press 1981) 28–29 (quoting *Wood v Dummer* (1824) 3 Mason 308).

⁵ Capital maintenance rules 'accelerate the point at which failing corporations must file for insolvency': William T Allen, Reinier Kraakman and Vikramaditya S Khanna, *Commentaries and Cases on the Law of Business Organization* (5th edn, Aspen Publishing 2016) para 4.2.3.

⁶ 'A Brief History of Bankruptcy' (*BankruptcyData*) <<https://www.bankruptcydata.com/a-history-of-bankruptcy>> accessed 31 December 2023.

⁷ Porta and others (n 3) 1130, 1136. See also Holger Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23 *Review of Financial Studies* 467, 475 (revisiting strictly 'antidirector rights' and rescoring the U.S. as a three whilst the U.K. remained a five); Simeon Djankov and others, 'The Law and Economics of Self-Dealing' (2008) 88 *Journal of Financial Economics* 430, 437.

⁸ Porta and others (n 3) 1130, 1136. Singapore's 'Antidirector Rights' score of 4 was revised to a 5 (Spamann (n 7)). This is likely to be scored as 4 today given the removal of the 'One Share-One Vote' rule in 2016.

But the relationship between state policy and private law is a complex one. It may be that in larger jurisdictions where the legislature has greater resources that judges can be less interventionist and appear to be bound more to precedent and not influenced by prevailing public policy. The point was made by Lord Leggatt in *Philipp v Barclays Bank*⁹ that private law should not overreach into the regulatory space, there in the context of bank negligence not extending to authorised push payment fraud with respect to its depositor customers outside the realm of agency. This, however, may not hold true in smaller jurisdictions where private law may not be completely autonomous of regulatory needs. Places like Singapore and Hong Kong have been described as market-dominant small jurisdictions which have specialised in niche areas of finance.¹⁰ This has been facilitated both by legislation and private law. Judges there have been quite clear that the common law can be quite different in their respective countries, possibly to help policy translate into law in action.¹¹ The ‘creditor duty’ remains perhaps even more a common law matter in Singapore than the UK where s 172(1) of the UK Companies Act 2006 (CA 2006) provides that directors duties to the company are to promote its success for the benefit of member-shareholders as a whole (with sub-section (3) then expressly stating that this duty is ‘subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company’). In any case, the CA 2006 did not formally codify directors’ duties and so caselaw remains relevant. It has also been pointed out that, in general, corporate law is a form of private law.¹²

Even in larger jurisdictions, however, private law can be disrupted by a crisis that leads its courts to depart from precedent. Consequently, Delaware did appear to have something up to the early 2000s substituting for a ‘creditor duty’ that was linked to a ‘deepening insolvency’ tort cause of action, which suggests the continued influence of more traditional thinking countering the shareholder primacy that started circa 1980.¹³ But perhaps due to the need to let companies trade through the global financial crisis, it was said that Delaware courts moved away from recognizing the tort, followed by other state courts, and thought that creditors had to protect themselves through the use of insolvency law, fraudulent conveyances and through loan covenants.¹⁴ Today, it has been separately argued that in the US directors’ duties do not change in the vicinity of

⁹ [2023] UKSC 25, [2024] AC 346.

¹⁰ Christopher Bruner, *Re-Imagining Offshore Finance: Market-Dominant Small Jurisdictions in a Globalizing Financial World* (Oxford University Press 2016).

¹¹ See eg Phang JA in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 [133]. See now *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] AC 154. See also Adrian Briggs, ‘Private International Law and the Privy Council’ in Charles Mitchell and Stephen Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing 2020) 135.

¹² Asaf Raz, ‘Why Corporate Law Is Private Law’ (2023) 25 U Pa J Bus L 981.

¹³ Blake Rohrbacher, ‘Deepening Insolvency: Developments for Directors’ (2007) 15 The Corporate Governance Advisor 25; Brian R Cheffins, ‘Stop Blaming Milton Friedman!’ (2020) 98 Wash UL Rev 1607.

¹⁴ Jared A Elias and Robert Stark, ‘Delaware Corporate Law and the “End of History” in Creditor Protection’ in Arthur B Laby and Jacob H Russell (eds), *Fiduciary Obligations in Business* (2021).

insolvency and continues its corporate law focus on shareholder primacy.¹⁵ This is contrasted with what is said to be the ‘bankruptcy law approach’ of the UK system, which require their directors to change tack in the zone of insolvency, requiring them to focus on creditor interests. However, the earlier article concluded that this is unlikely to be ‘the end of history in creditor protection’.¹⁶ Given that the world continues to be affected by the after-effects of the GFC and Covid-19, we are still in a crisis inflexion point. The law may not be fully stable. Two important decisions in the UK and Singapore suggest that judges are still working out how to deal with the creditor/shareholder balance in companies where asset partitioning has been its greatest strength for raising finance, but also a barrier when it comes to its continued trading when in a financially parlous state.

Contrasting *Sequana* and *OP3*

In *BTI LLC 2004 v Sequana SA*¹⁷, a lawful dividend was paid by a company from distributable reserves to its holding company Sequana whilst having one material contingent liability. That was some ten years before the company, which was set up to meet the liability, became insolvent. However, the estimate of that liability which involved costs arising from the clean-up of a polluted river was too low and so the dividend payment was challenged as a conveyance intended to defraud creditors under section 423 of the UK Insolvency Act 1986, including here BAT, which was to be indemnified for the clean-up costs. The dividend was set aside by the High Court¹⁸, whose decision was affirmed by the Court of Appeal¹⁹, on the basis that it was given for no consideration (clearly a transaction at an undervalue) to Sequana to set off against debts owed by it to the company and to put those assets out of the reach of the company’s creditors. Unfortunately, Sequana was also bankrupt, and no amount was ever recovered by BAT. Consequently, the appeals which ultimately reached the Supreme Court focused only on whether the directors of the company, which assigned its claims to BTI and been sold by Sequana, had breached their duties to the company. While raised in the pleadings that there was a breach of the proper purpose rule in section 171 of the CA 2006, it was not followed up by argument in the lower courts that the directors had breached their duty simply for failing to comply with s 423 of the UK Insolvency Act 1986 (without asking the insolvency question). Indeed, Lord Briggs, with whom Lord Kitchin agreed, thought this an ‘irony’.²⁰

¹⁵ Odelia Minnes and Dov Solomon, ‘Game of Thrones: Corporate Law and Bankruptcy Law in the Arena of Directors’ Liability’ (2021) 27 Columbia Journal of European Law 1.

¹⁶ Elias and Stark (n 14).

¹⁷ [2022] UKSC 25, [2024] AC 211.

¹⁸ [2016] EWHC 1686 (Ch), [2017] 1 BCLC 453.

¹⁹ [2019] EWCA Civ 112, [2019] 2 All ER 784.

²⁰ *Sequana* (SC) (n 17) [182]. John Armour, ‘Avoidance of Transactions as a “Fraud on Creditors” at Common Law’ in John Armour and Howard Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) paras 7.59-7.60 thought that in such cases directors could be liable in negligence (although he also discussed a breach of terms of the constitution).

Instead, an argument was framed that directors had breached their duty to the company to promote its success for the benefit of its members under section 172(1). While the starting point is shareholder primacy, it was argued that creditor interests had come into the picture under a *West Mercia*²¹ duty because the company was near insolvency. This was held not to be so at every level as directors' duties did not shift its focus to creditors under subsection (3) as insolvency was not 'probable'²² or 'imminent'²³ when the dividend was paid. The company only became insolvent 10 years later. Even Lady Arden, who saw creditor interests as relevant even under the general s 172(1) duty, agreed that shareholder primacy was the starting point although she also thought that the interest of the company is polycentric.²⁴ All the judges did not think that *West Mercia* supported an earlier trigger involving a real and not remote risk of insolvency. Consequently, while the case confirms the existence of a 'creditor duty', it does not seem something that creditors can often invoke, let alone prove a breach of. Lord Reed was quite unequivocal that creditors are expected to protect themselves contractually.²⁵

In a sense, *Sequana* is consistent with the view of the UK Government in its First White Paper of July 2002²⁶ (leading to the new CA 2006) that said that any direct creditor duty (as opposed to one that is indirectly owed through the duty to the company) ran counter to the 'rescue culture' that it preferred.²⁷ It also pointed out that the Company Law Review Steering Group itself had recognised that a duty such as the one it had proposed would 'have a chilling effect, bringing with it the risk that directors may run down or abandon a going concern at the first hint of insolvency'.²⁸ Similarly, the High Court of Australia in *Spies v The Queen*²⁹ said that it was contrary to principle that directors owed an enforceable, independent duty to creditors. Canadian courts are even more unequivocal

²¹ *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250.

²² *Sequana* (CA) (n 19) [220] (David Richards LJ).

²³ *Sequana* (SC) (n 17) [86] (Lord Reed), [186] (Lord Briggs), [243] (Lord Hodge).

²⁴ *Sequana* (SC) (n 17) [303]. Lord Reed also agreed that the company's interest today could be seen to have changed: *ibid* [12].

²⁵ *Sequana* (SC) (n 17) [28].

²⁶ In response to the proposal of the UK Company Law Review Steering Group (CLRSG), 'Modern Company Law for a Competitive Economy: Final Report, Vol II' (Department of Trade and Industry 2001) paras 8 and 9 of Schedule 2. These special duties to creditors were also recommended by the Singapore CLRFC, 'Final Report of the Company Legislation and Regulatory Framework Committee' (2002) ch 3, para 3.4.

²⁷ See also Singapore CLRFC (n 26) ch 4, para 2.7.

²⁸ UK Trade and Industry Committee, 'Modernising Company Law' White Paper, Cm5553, 2002 in response to the CLRSG's proposals at paras 3.8-3.9.

²⁹ (2000) 201 CLR 603 clarifying Mason J's judgment in *Walker v Wimborne* (1976) 137 CLR 1. See also Anil Hargovan, 'Directors' Duties to Creditors in Australia after *Spies v The Queen* - Is the Development of an Independent Fiduciary Duty Dead or Alive?' (2003) 21 Company and Securities Law Journal 390, who believes that there is now clearly only a duty to take creditors' interests into account. The case which first recognised this in Singapore is *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 and compare *Chip Thye Enterprises Pte Ltd v Phay Gi Mo* [2004] 1 SLR 434.

in stating that fiduciary duties are only ever owed to the company³⁰, although directors may have some discretion to consider creditor interests when a company is in the vicinity of insolvency³¹. *Sequana* confirms that there is no direct duty, but even the indirect ‘creditor duty’ has been calibrated in a way that does not hamper entrepreneurship. This countervails the general perception that the UK is more creditor friendly (it is probably more bank or secured creditor friendly), as well as the fact that private law is fully autonomous of policy considerations. The courts are conscious that the real economy is still in difficulties after the GFC and so even if *Sequana* did not involve a real business (as opposed to a financial vehicle), it was mindful of the need to keep businesses afloat. As the leading UK corporate law academic Paul Davies has said, ‘continued trading in the vicinity of insolvency might be absolutely the right decision’.³² As such, we believe that there is some profit to be gained in understanding the political economy of creditor and shareholder rights even when looking at what otherwise appears to be a private law matter of directors’ duties.

The balance between creditors and shareholders was more recently at issue in Singapore in *Foo Kian Beng v OP3 International Pte Ltd*³³ (OP3). OP3 was an interior design, decorating and construction services company, where its liquidators argued that its sole director and shareholder, Foo, had breached the ‘creditor duty’ by authorising the payment of dividends, alongside other payments, to himself between 2015 and 2017. These payments were largely made at the time when the company was solvent on a balance sheet and cashflow basis but faced the risk of becoming insolvent in the future due to contingent liabilities stemming from a lawsuit brought against it in 2015 (there were no dividends for the 3 years prior to that). While Hoo J³⁴ held that OP3 would have been balance sheet insolvent at around 31 December 2016, she thought that the appellant had breached his fiduciary duty to act bona fide in the best interests of creditors in the case of a dividend paid on 27 December 2016 (as in the case of other loan repayments made in 2017 as OP3 was again found to be insolvent on December 31 2017). The Court of Appeal upheld this decision and said that Singapore courts had ‘spoken with one voice’³⁵ on the underlying rationale for the ‘creditor duty’ even if the language of the precise moment at which the duty is triggered differed. Here it disagreed with the views of the independent counsel that there was an extant ‘creditor duty’ regardless of the

³⁰ *Peoples Department Stores v Wise* [2004] 3 SCR 461 and *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560. In Hong Kong, see *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (2014) 17 HKCFAR 466.

³¹ See now the 2019 changes to the Canada Business Corporations Act.

³² Paul Davies, *Introduction to Company Law* (3rd edn, Oxford University Press 2020) 236.

³³ [2024] 1 SLR 361. While the company was in liquidation, the Court of Appeal expressed tentative views that it was possible for a company not in liquidation to bring an action against its directors for breach of the ‘creditor duty’ by way of a derivative action (since the shareholders would have to initiate it given that the board would unlikely do so) (at [67]).

³⁴ *OP3 International Pte Ltd v Foo Kian Beng* [2022] SGHC 225.

³⁵ *OP3* (n 31) [89].

proximity of the company to insolvency.³⁶ Instead, while creditor interests were always relevant when the company was a going concern, this usually coincided with shareholder interests. It was consequently necessary to set out the financial position of the company to determine if a ‘creditor duty’ arose before asking whether it had been breached.

Given the short time periods between the relevant payments and insolvency as opposed to the 10 years in *Sequana* it was quite clear that the director had breached its ‘creditor duty’. But the judgment is important for the points at which it largely adhered to and, more importantly, slightly reformulated the UK position, even though this has to be seen in context. Recognising the need to protect creditors from further losses of continued trading when insolvency is near, it also quoted Lord Reed’s observations in *Sequana* that ‘being on the brink of insolvency does not necessarily require an immediate cessation of trade and the realisation of the company’s assets’.³⁷ It also approved earlier Singapore decisions that had said that in the context of the ‘creditor duty’ that ‘a strict and technical application of the “going concern” test and the “balance sheet” test which are used in the context of a winding-up action would be of limited utility’.³⁸ The Court thought that this was fully consistent with what Lady Arden in *Sequana* said ie, that the two tests must be applied with ‘the degree of flexibility appropriate to the rationale and context of the creditor duty’.³⁹ So it is a balancing exercise with a fair amount of court discretion.

Importantly, however, in helping to determine whether there was a ‘creditor duty’, the Court of Appeal identified 3 relevant stages in the life of a company: as a fully solvent going concern, when it is near insolvency and when insolvency is inevitable. The ‘creditor duty’ only arises in the second and third stages. Where the Singapore court may have differed most substantially, it is submitted, from the majority in *Sequana* is with respect to the first stage. It said:

A corollary of this is that it remains possible for a director to breach his duty to act in the best interests of the company at a time the company is solvent by undertaking acts that unjustifiably prejudice the interests of creditors. This is most obvious where a director acts with the intent of defrauding creditors. While such a director may not be obliged to accord significant weight to the interests of creditors in taking decisions for the company given the company’s financial health, acting in complete disregard of creditor interests or acting in a way that is directly adverse to those interests will nevertheless evidence a failure to act in the best interests of the company.⁴⁰

³⁶ OP3 (n 31) [89]-[100]. The independent counsel was Singapore’s leading insolvency practitioner Lee Eng Beng SC.

³⁷ *ibid* [101].

³⁸ *Dynasty Line v Sukanto Sia* [2014] 3 SLR 277 at [33]. *Sequana (SC)* (n 17) also rejected the ‘balance sheet’ test at [213], [220].

³⁹ OP3 (n 31) [83].

⁴⁰ *ibid* [71].

We have seen that the majority in *Sequana* saw the ‘creditor duty’ arising only as a special circumstance under s 172(3) whereas Lady Arden thought it could be invoked under the general polycentric directorial duty in s 172(1) focused on enlightened shareholder value. While the Singapore Court of Appeal did not expressly deal with that dichotomy, it might have married the two – while there is no extant ‘creditor duty’ in phase 1 as such, there may be exceptional circumstances even when the company is fully solvent that the directors have acted so egregiously towards the creditors that it would have breached its duty to act in the company’s best interest. Conversely, the Court of Appeal said that even in a phase 2 and 3 cases, compliance with the ‘creditor duty’ did not immunise the director from breaches of other duties, such as the more objective test of negligence.⁴¹ In contrast, it was pointed out earlier how in *Sequana* it had not been argued that a breach of the fraudulent conveyance rules was *per se* a breach of a director’s duty to use its powers for proper purposes, also a more objective test than the bona fide best interest duty, even though that had been pleaded. That question was asked and answered by the OP3 court.

We believe that in both *Sequana* and *OP3* the courts have been mindful of the background in which businesses are operating in today. Consequently, any tests that are formulated have to be flexible enough to deal with worsening, or conversely it is hoped in the near future, improving economic circumstances. In the end, discretion remains as to what exactly insolvency means, which itself is in a state of flux and, even more so, when it is imminent or bordered. As the *OP3* court said, ‘the court should be alive to the reality that prompt payment may not always be insisted on by creditors.’⁴² This is particularly so with junior creditors who might find themselves closer in the priority hierarchy to shareholders than to the senior creditors. There is also the second question as to whether a ‘creditor duty’, if it arises, has been breached. The Court of Appeal in *OP3* said that an objective approach is taken as to the surrounding circumstances to determine whether the directors had breached their subjective duty to act in the company’s best interests.⁴³ In *OP3*, the facts clearly pointed towards a breach of the ‘creditor duty’ given the proximity of the transaction, a self-serving payment of dividend, to the moment of insolvency. While the much larger dividend in *Sequana* looks even more egregious in isolation, we must recall that the ‘creditor duty’ did not arise there. The question remains, if Singapore law applied, whether the admitted transaction there to defraud creditors would have *per se* constituted a breach of directors’ duty even as a phase 1 case.

Standards act in terrorem but are not easily enforceable

In any case, the use of directors’ duties to regulate this area of law is to favour standards over rules. Standards lack clear bright lines, which can be both a weakness and a

⁴¹ *ibid* [76], [108].

⁴² *ibid* [104].

⁴³ *ibid* [74], [94].

strength. It is a weakness as complex litigation is required to resolve any dispute, but it is a strength as disputes may not arise in the first place given that parties anticipate difficulties in advance and give a wide berth to them. It has been said in the slightly different context of conflicts of interest that it is prophylaxis that underlies the area.⁴⁴ Consequently, some uncertainty can be a good thing in raising ethical behaviour. This is particularly so as, while some associate the best interest duty with a subjective standard, others do not. A Singapore lower court decision subsequent to OP3, *Inter-Pacific Petroleum Pte Ltd v Goh Jin Hian*, interpreted the Court of Appeal as prima facie seeing the duty as subjective but thought that the Court of Appeal could not have intended to depart from its previous decisions which had seen the standard as both subjective and objective (not just from an evidential perspective).⁴⁵

With the ‘creditor duty’, however, there is the further problem of correlativity and enforceability. The Singapore Court of Appeal in *Ng Kek Wee v Sim City Technology Ltd*⁴⁶ recently reiterated the need to distinguish ‘company’ from ‘personal’ wrongs, as that then determines the type of actions that may be brought. The same court reaffirmed that position in *Ho Yew Kong v Sakae Holdings Ltd*⁴⁷ although it acknowledged that the distinction between them was not always clear. But while the two causes of actions are clearly not mutually exclusive given that evidence of a breach of directors’ duty that affects minority shareholders adversely can clearly be used as evidence of oppression or unfairly prejudicial conduct, the underlying mental models they conjure are fundamentally different. Much depends on the nature of the claim and the relief that is sought.⁴⁸ With the ‘creditor duty’, however, we have seen that courts have been very careful to state that there is no direct duty to creditors but only an indirect one that goes through the company as proper plaintiff with standing (with respect to the merits of the case).⁴⁹

But the further problem which arises here is to do with the bifurcated property structure created by the company, which is now seen as part of the asset partitioning that is

⁴⁴ Matthew Conaglen, ‘The Nature and Function of Fiduciary Loyalty’ (2005) 121 LQR 452.

⁴⁵ *Inter-Pacific Petroleum Pte Ltd (in liquidation) v Goh Jin Hian* [2024] SGHC 178 at [193]. The Singapore statutory provisions are drawn from Australian provisions that have been said to be an amalgam of the subjective and objective: RT Langford and I Ramsay, ‘Directors’ Duty to Act in the Interests of the Company: Subjective or Objective?’ [2015] Journal of Business Law, 2015 173-182.

⁴⁶ [2014] 4 SLR 723 [60]–[71], following the Canadian decision of *Pappan v Acan Windows Inc* (1991) 2 BLR (2d) 180. See also more recently, *Rea v Wildeboer* (2015) ONCA 373 and further H-C. Hirt, ‘In What Circumstances Should Breaches of Directors’ Duties Give Rise to a Remedy Under ss 459–61 of the Companies Act 1985?’ (2003) 24 Company Lawyer 100; B Hannigan, ‘Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions’ [2009] 6 JBL 606.

⁴⁷ [2018] 2 SLR 333. See now *Ascend Field Pte Ltd v Tee Wee Sien* [2020] 1 SLR 771 noted in Ben Chester Cheong, ‘Oppression - Personal Wrongs or Corporate Wrongs: A Commentary on Ascend Field Pte Ltd and Others v Tee Wee Sien and Another Appeal [2020] SGCA 14’ (*Singapore Law Blog*, 6 July 2020).

⁴⁸ *Ho Yew Kong* (n 44); *Zedra Trust Company (Jersey) Ltd v The Hut Group Ltd* [2021] EWCA Civ 904, [2021] 2 BCLC 373. Compare in the UK, *Ntzeγκoutanis v Kimionis* [2023] EWCA Civ 1480, [2024] 1 BCLC 354.

⁴⁹ We have sometimes overlooked the need for standing in private law: Timothy Liao, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford University Press 2023).

perhaps one of the most important ideas in company law.⁵⁰ Simply put, the company as proper plaintiff must also have suffered the loss before it has a right to sue. This may be an issue if the claim is activated by proximity to insolvency as an argument could be made that any loss then is in truth borne by the creditors and not the company-as-entity. This was an issue that arose in the ostensibly different yet, on deeper reflection from some angles, similar case of *Stanford International Bank Ltd v HSBC plc*⁵¹ ('Stanford').

Recall that it was mentioned that Lord Leggatt in *Philipp v Barclays Bank* did not extend a bank's duty of care to protect its customers' accounts to cases of external fraud practiced on its customer as that was a matter for regulation. Instead, using an agency analysis, he restricted the *Quincecare* duty to situations where a customer is defrauded by its own authorised agent which gave unauthorised instructions to the bank with respect to the customer's account. In *Stanford*, however, the funds were misapplied by paying off some HSBC's customer SIB's own creditors. Consistent with the move away from bank liability in these situations generally, the majority in the UK Supreme Court rejected an appeal against the striking out of a claim on the basis that SIB was already insolvent by the time its account was depleted and so did not suffer an actionable loss as the depletion in its assets was also matched on the balance sheet by the reduction in its debts owed to those preferred creditors (there were no formal preference laws in Antigua where SIB was incorporated).

Arguments against this holding were made using *Sequana* as the company is allowed to obtain damages from its directors for breaches of duty occurring from precisely the moment when the company is bordering insolvency and it could be said that their actions only damaged the creditors and not the company. In *Stanford*, Lord Leggatt admitted that *Sequana* would be relevant if it were directors of SIB that were being sued but even then thought that *Sequana* never said that losses to creditors were the focus of the 'creditor duty' as opposed to the loss to the company.⁵² In contrast, Lord Sales, who dissented and felt that the bank could be liable for the preferential payments said that '[t]o harm SIB's general creditors as a class was to harm SIB'.⁵³ Indeed, he saw little difference between the bank *Quincecare* duty and director *Sequana* duty⁵⁴ and thought that:

⁵⁰ Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale LJ 387.

⁵¹ [2022] UKSC 34, [2023] AC 761, Lord Sales dissenting on the basis that *Sequana* (SC) (n 17) sees the company representing creditor interests in insolvency.

⁵² *Stanford* (n 49) [83]. It is actually less an issue in *Sequana* (SC) (n 17) than in *OP3* (n 31) as a dividend payment may not be seen as a preferential payment to creditors reducing its debts the same way that loan repayments are. In *West Mercia* (n 21), as the recipient of the unlawful preference was also insolvent the director had to pay the 4000 pounds to the company and stand in the shoes of the recipient as creditor.

⁵³ *Stanford* (n 49) [93].

⁵⁴ *ibid* [137] (emphasis added). But compare Lady Rose's view at [34] that even in insolvency the duty of directors is different from the bank's duty to prevent crime on the customer account.

the relevant trust fund (the £116m in the hands of the company) has been depleted by being used *for improper purposes* and a loss has been suffered by the company, representing for these purposes its creditors as a general body.⁵⁵

Chua has reconciled the cases by pointing out that *Sequana* was a claim against an internal director and so the company and creditor divide could be overlooked which is not the case with a claim against an external bank.⁵⁶ The judge in *Inter-Pacific Petroleum Pte Ltd v Goh Jin Hian* also clearly thought that Lord Sale's arguments went against corporate separate legal personality, and preferred Lord Leggatt's reasoning as a general rule.⁵⁷

But it does show that the 'creditor duty' is a hybrid one that does not fit perfectly into a binary corporate or personal wrong divide. Perhaps then the best way to enforce it is not through a claim for damages ex post, but an ex ante injunction through, for example, s 409A of the Singapore Companies Act 1967. This helps creditors protect themselves as it allows a Court to grant an injunction '(w)here a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act' to 'any person whose interest have been, are or would be affected by conduct'. It will be argued in the last part that the duty on directors to exercise their powers for proper purposes is perhaps most apposite to found an injunction in this context.

That injunctions rather than damages may work better in this space can also be discerned from the point of view of the defendant. Obtaining large sums from directors may not be practicable (which is why US securities class action litigation is almost always against the listed company and not its directors) given that D&O insurance may not work once allegations of fraud are made against directors. The way that the 'creditor duty' operates and is enforced is also binary in that it is difficult to apportion fault and loss. It is all or nothing. Courts may therefore also be less inclined to find a breach given that the sums can be very large, directors cannot fully satisfy any award, and therefore the enforcement process is sub-optimal. What creditors want, or should want, is ex ante prevention through the enforcement of the 'creditor duty' with ex post recovery provided perhaps by more exacting rules.

Professor Sealy, for one, previously argued that statements to the effect that a director owes duties to creditors were:

⁵⁵ *ibid* [123].

⁵⁶ Rui Yuan Chua, 'The Aftermath of a Ponzi Scheme: Stanford International Bank Ltd (in Liquidation) v HSBC Bank Plc [2022] UKSC 34' [2023] LMCLQ 218.

⁵⁷ (n 45) [234]-[236].

extraneous words of censure directed at conduct which anyway comes within some well established rule of law, such as the law imposing liability for misfeasance, the expropriation of corporate assets of fraudulent preference.⁵⁸

Enforceable Rules that parallel the ‘Creditor Duty’

As Sealy suggests, there are specific rules setting aside fraudulent conveyances (outside insolvency) as well as the undervalued transactions and preferences operating within insolvency regimes. The Court of Appeal in *OP3* recognised that these existed alongside the ‘creditor duty’ and did not pre-empt it. Specifically, it rejected Foo’s arguments that the ‘creditor duty’ was circumscribed by the (pre-insolvency) dividend rule in s 403 of the CA 1967⁵⁹ and the (post-insolvency) voidable preferences rule now found in s 227 of the Singapore Insolvency, Restructuring and Dissolution Act 2018 (IRDA).⁶⁰ But much work continues to be needed to work out how these statutory provisions operate.

We have seen that capital maintenance rules have been pushed back for 40 years now, including the prohibition against the giving of financial assistance for the acquisition of shares where the creditor protection rationale was weaker. Yet a breach of the financial assistance rules was enough to found a breach of director’s duties in *Selangor Rubber Estates v Craddock (No 3)*⁶¹ without asking an insolvency or near insolvency question. Those who cannot adjust to the recent changes suffer the most, usually employees or involuntary creditors. What remains a thorn to those desiring the frictionless movement of assets in the corporate/financial world is s 438 of IRDA (s 423 of the UK Insolvency Act 1986) which, despite the statute it is part of, is not dependent on bankruptcy and applies in the context of undervalued transactions made with the purpose of prejudicing persons with claims against the transferor. This was observed by Lord Neuberger in *Prest v Petrodel Resources Ltd*⁶² as a ‘specified and limited’ application of the principle that ‘fraud unravels everything’. US fraudulent conveyance cases in practice see a necessary purpose to defraud creditors only if it leaves the company ‘insolvent or with unreasonably small capital’ as that then puts assets beyond the reach of creditors.⁶³ Intent may otherwise be hard to prove as this is rarely ‘susceptible to direct proof’.⁶⁴ However, that is not the position in the UK, where in the lower courts in *Sequana* the judges continued to

⁵⁸ LS Sealy, ‘Directors’ Duties—An Unnecessary Gloss’ (1988) 47 CLJ 175.

⁵⁹ *OP3* (n 31) [109] – [114].

⁶⁰ *ibid* [115] – [123].

⁶¹ [1968] 1 WLR 1555.

⁶² [2013] UKSC 34, [2013] 2 AC 415 [83], noted in Ernest Lim, ‘Salomon Reigns’ (2013) 129 LQR 480, Hans Tjio, ‘Lifting the Veil on Piercing the Veil’ [2014] LMCLQ 19.

⁶³ Marcel Kahan, ‘Legal Capital Rules and the Structure of Corporate Law: Some Observations on the Differences Between European and US Approaches’ in Klaus Hopt and Eddy Wymeersch (eds), *Capital Markets and Company Law* (Oxford University Press 2003) 147. See US Bankruptcy Code (Title 11 of the US Code), s 548(a)(1); *Re Semcrude*, LP 526 BR 556 (Dist Del 2014).

⁶⁴ This is illustrated by *Re Kaiser* 722 F 2d 1574 (2d Cir 1983).

apply it without the need to prove insolvency,⁶⁵ which is itself a difficult matter to show in practice even if not conceptually.⁶⁶

Any projected insolvency is hard to demonstrate due to the interaction of the ‘balance sheet’ and ‘cash flow’ tests which still exist in many jurisdictions. As regards the ‘balance sheet’ test, the English Court of Appeal held, in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*,⁶⁷ that a company could not be said to be insolvent simply because its liabilities appeared to exceed its assets, partly due to the difficulties of taking contingent and prospective liabilities into account. In this case, a trustee of longer dated notes issued by a special purpose vehicle (whose Lehman-linked securitised assets had fallen in value during the Global Financial Crisis) was asked to declare a contractual event of default that mirrored the tests of insolvency in section 123 of the UK Insolvency Act 1986. This would result in the acceleration of the repayment of all the notes, without which the longer dated notes would bear the brunt of losses once payments could no longer be met out of those securitised assets (with those notes that matured earlier paid in full). It was held that there was no default as Eurosail continued to be able to meet its debt obligations. The insolvency provisions were meant to identify companies that could not pay their debts, and this would be so only if there were an incurable deficiency in their assets, where a ‘point of no return’ had been reached.⁶⁸ The Supreme Court rejected the need for the last point, but believed that the ‘cash flow’ test worked for the reasonably near future only.⁶⁹ A ‘balance sheet’ test was more sensible when looking forward, but the Court believed this was an imprecise test, which the party asserting that the company was insolvent had to prove. On the facts, given that the final redemption of the notes would only be 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.

In contrast, the Singapore Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd*⁷⁰ thought that much turns on the precise statutory wording which under s 254(2)(c) of

⁶⁵ In *Sequana (SC)* (n 17) Lord Reed at [61] appeared to see s 423 as an insolvency rule but compare, eg Lady Arden at [368]. Cf John Armour, ‘Transactions Defrauding Creditors’ in John Armour and Howard Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003) para 3.1.

⁶⁶ *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28, [2013] 1 WLR 1408.

⁶⁷ [2011] EWCA Civ 227, [2011] 1 WLR 2524. Cf Peter Walton, “‘Inability to Pay Debts’: Beyond the Point of No Return?” [2013] *Journal of Business Law* 212, pointing out that the meaning in s 123 went beyond winding up and affected other ancillary areas.

⁶⁸ *BNY (CA)* (n 64) [52] (Lord Neuberger MR) and [114] (Toulson LJ), referring to Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) para 4–06.

⁶⁹ *BNY (SC)* (n 63) [37], [42] (Lord Walker).

⁷⁰ [2021] 2 SLR 478, citing M S Wee, “Taking Stock of the Insolvency Tests in Section 254 of the Companies Act” [2011] *Sing JLS* 486 and overruling *Re Great Eastern Hotel (Pte) Ltd* [1988] 2 SLR(R) 276 [85] where it was thought that both the cash-flow test and the balance sheet test were relevant.

the Companies Act 1967 focuses on cash-flow or commercial insolvency. It pointed out that:⁷¹

where the legislature intended to incorporate a balance sheet test, it has done so in no uncertain terms (see s 123(2) of the UK Insolvency Act and s 100(4)(b) of the Bankruptcy Act).

Insolvency is not as we have seen always clearly demarcated and so the need to prove insolvency ex post (in the US) or declare solvency ex ante for capital returns (in UK and Singapore) means that where the burden of proof lies often decides the matter. There is a very large gap between a going concern and one that can be legally proven to be insolvent. Capital maintenance rules may consequently continue to be needed to ‘accelerate the point at which failing corporations must file for insolvency’.⁷² It does so by providing checkpoints at which the company’s position has to be examined by the board (solvency statement) or shareholders (resolution) before it can carry on certain transactions. Even if such rules are slightly inefficient, it might be better to err on the safe side by preventing a dividend payment upfront as it would be too late to unwind it when the company is finally shown to be insolvent.⁷³ Given the relaxation of capital maintenance rules, as well as further liberalisation that we foresee, we believe that much work remains for the fraudulent conveyance provisions in s 438 of the IRDA in Singapore (similarly worded now to s 423 of the UK Insolvency Act 1986). A first shot across the bows was seen in the use of its predecessor provision section 73B of the Singapore Conveyancing and Law of Property Act 1886 (based on the old s 172 of the UK Law of Property Act 1925) in *Envy Asset Management Pte Ltd v CH Biovest Pte Ltd*⁷⁴. It was held that payments out of a Ponzi scheme there were conveyances made without valuable consideration intended to defraud creditors. These payments were not seen as debt repayments given the terms of the scheme but rather extra-contractual payments. The judge distinguished the *Stanford* case discussed above on the basis that Lord Leggatt saw the payments by SIB as repayments of SIB’s debts and so there was no change in SIB’s net asset position. *Re MC Bacon*⁷⁵ still stands for the general proposition that there is no depletion in the value of a company’s assets when it, for example grants security to an existing creditor. It may only be an unfair preference, which is really focused on inter-

⁷¹ [2021] 2 SLR 478 [63].

⁷² Allen, Kraakman and Khanna (n 5) para 4.2.3.

⁷³ JB Heaton, ‘The Social Costs of Dividends and Share Repurchases’ (2019) 12 Journal of Business, Entrepreneurship & the Law 361, 370, pointing out that there is very little litigation on the fraudulent conveyance rules outside of insolvency, and such an approach requires a very large bankruptcy adjudication system, at 377.

⁷⁴ [2024] SGHC 46. Goh J also considered *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 and acknowledged that it had been extensively re-examined by the UK Supreme Court (at [77]).

⁷⁵ [1990] BCLC 324. Cf *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542, [2007] 1 WLR 2404, and *Encus International Pte Ltd v Tenacious Investment Pte Ltd* [2016] 2 SLR 1178 [39].

creditor conflicts.⁷⁶ While the Singapore Court of Appeal in *Rothstar Group Ltd v Leow Quek Shiong*⁷⁷ confirmed that *MC Bacon* applies in Singapore, it should be restricted to security given for the grantor's own existing debt. In contrast, the grant of security for a third party's existing debt can in principle still be considered a transaction at an undervalue. A comparison is made with respect to the actual quantifiable monetary value of the consideration received and provided by the grantor. In this case, the grantor received no value in money or money's worth compared to the significant value it provided and the legal mortgage was discharged as the grantor was insolvent at the time of, or became insolvent as a result of, granting the legal mortgage.

In *OP3* itself, the director would most likely also have had to disgorge the dividend (but perhaps not the other loan repayments in light of the continued acceptance of *Re MC Bacon*) on the basis that they were made with intent to defraud creditors without asking the further question whether he had been in breach of his duty as director to act in the company's best interest. Given the required amount of work that remains in interpreting these statutory rules protecting creditors⁷⁸, it will be suggested in the next Part that any 'creditor duty' owed by directors should also be partly understood as a matter of statutory interpretation. This was perhaps how the judge in *Inter-Pacific Petroleum Pte Ltd v Goh Jin Hian* rejected the defendant's argument there that the 'creditor duty' required:⁷⁹

a director to resort to running a Ponzi scheme by using new money to pay off existing liabilities, so as to spread the losses of the company's existing creditors by drawing in new creditors into the company's insolvency. It is antithetical to the *raison d'être* of the Creditor Duty to interpret it as calling on a director to increase the scale and the magnitude of the company's insolvency. Indeed, Dr Goh's suggestion flew in the face of the prohibition against wrongful trading in s 239 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), which specifically proscribes an insolvent company incurring debts or other liabilities without reasonable prospect of meeting them in full (see s 239(12) of the IRDA).

Balancing creditor and shareholder interests and the Proper Purpose Rule

We can see therefore that there are many balls in the air when it comes to judging director action taken in the vicinity of insolvency. *Ex post*, there are specific rules that could be made to unwind transactions and perhaps make directors pay (eg for wrongful or fraudulent trading). But many of these require contemporaneous or subsequent

⁷⁶ Although it has been recognised that a director may have a duty to mediate inter-creditor conflicts: *Moulin Global Eyecare Trading Ltd v Olivia Lee Sin Mei (No 3)* (2014) 17 HKCFAR 466, noted in TKC Ng, 'Director's Duty Not to Prefer One Creditor to Another' (2015) 74 CLJ 20.

⁷⁷ [2022] 2 SLR 158.

⁷⁸ See also Riz Mokal, 'The Mysterious Pari Passu Principle' (2024) 39(7) *Butterworths Journal of International Banking and Financial Law* 443.

⁷⁹ (n 45) at [217].

corporate insolvency. While the fraudulent conveyance rules do not, we have seen that it may be difficult to prove the intent to defraud creditors without also showing that the company was insolvent post transaction as competent corporate counsel will almost always be able to show that a solvent balance sheet negated that intent since there was sufficient assets to pay the creditors.

Perhaps a breach of directors' duties when a company is bordering insolvency should be used, as we have alluded to earlier, by creditors for the purpose of obtaining injunctions rather than damages where it has not been manifestly successful (and where it works as in *OP3* could very likely have been covered by the fraudulent conveyance rules). It is suggested here, however, that utilising the duty to act in the best interest of the company may not fully capture what is happening here. This is because aside from the special 'creditor duty', *OP3* (as well as Lady Arden in *Sequana*) has pointed out that even the general duty to act in the company's best interest, which usually translates to shareholder primacy, requires creditor interests not to be consciously prejudiced. But such balancing can in fact make it difficult to measure whether directors are in fact in breach of their duty; it becomes 'non-verifiable'. The EU in examining the area of directors' duties to act in the company's best interest which has been arrogated, largely unsuccessfully in the UK, to further ESG purposes lamented the 'lack of a clear definition of 'company interest' in company law frameworks'.⁸⁰ The problem may be that we are asking that duty to do too much. If the interest keeps changing with the context, this leads to the dilutive 'too many masters' problem identified by Easterbrook and Fischel.⁸¹

We believe, like Lord Leggatt in *Philipp*, that the first-best solution is a public law one through the use of regulation⁸². There is usually enough where creditor protection is concerned, and ESG proponents should learn from that. However, we have also pointed out that legislation may lag practice especially in smaller jurisdictions (eg there were and are no unfair preference rules in Antigua as we saw in *Stanford*), and so gaps may have to be filled by directors' duties. Instead, however, of working an old exhausted mine, the best interest rule, it is suggested that some profit can be gained from re-examining the proper purpose rule. As we have seen, the judges thought it ironic that this was pleaded but not argued further in *Sequana*.⁸³ More important, in *OP3*, it was held that even for fully solvent companies, a transaction intended to defraud creditors would *per se* be a breach of

⁸⁰ European Commission and Ernst & Young, 'Study on Directors' Duties and Sustainable Corporate Governance, Final Report' (2020) section 3.2.1 <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>> accessed 3 July 2024.

⁸¹ Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 38.

⁸² Eg Stephen M Bainbridge, *The Profit Motive: Defending Shareholders Value Maximization* (Cambridge University Press 2023).

⁸³ In *Sequana (CA)* (n 19) [231]-[234] David Richards LJ (as he then was) was quite pointed in stating that section 171 of the UK Companies Act 2006 had not been sufficiently advanced before the judge even though it had been pleaded that it was an improper use of directors' power to pay dividends to Sequana to put Sequana's debts beyond the reach of the company's creditors.

directors' duties. While that was said in the context of the best interest duty (independent of any 'creditor duty'), we have said that perhaps too much is expected of that duty and may be counter-intuitive given the starting point of shareholder primacy. Perhaps a better way is to see some form of recharacterisation of the duty in this context to make it less private and more communal, given the wider interests at stake⁸⁴. With recharacterization in general,⁸⁵ it has been said that it is driven by both externalities as well as government interest analysis. On such an approach, in both *Sequana* and *OP3*, instead of asking whether the transactions bordered insolvency and whether the directors had breached their 'creditor duty', this would allow courts to examine how important s 423 of the Insolvency Act 1986 or s 438 of the IRDA respectively are in terms of its avoidance (and perhaps how it was breached). As it is, in *OP3*, the Court of Appeal had to deal with arguments that various statutory provisions had pre-empted the 'creditor duty'. The argument should be reversed to ask if the mischief sought to be prevented by those statutory provisions was so grave that a breach could also be a breach of a director's duty. This forms part of the question whether the directors had used their powers for proper purposes. Like with tax evasion, it may be seen as largely a matter of statutory interpretation.⁸⁶ State policy is relevant here, and so it can more obviously take account of events like the GFC and Covid-19 in deciding on ultimate liability.

For this to work, however, the legislature in Singapore might want to consider introducing legislation along the lines of s 171 of the UK Companies Act 2006 given the uncertain status of the proper purpose rule at common law in Singapore. Section 171(b) states that directors have to 'only exercise powers for the purposes for which they are conferred'. There is enough there to accommodate external rules and codes given that it is about constitutionality (expressed in s 171(a)), fairness and faithfulness to powers that are given to the power-holder.⁸⁷ And importantly, enforcing the duty is less about obtaining damages but seeing that the power is exercised properly. Thus, in the most recent leading proper purpose case of *Eclairs Group Ltd v JKK Oil and Gas Plc*⁸⁸, for example, an action was successfully brought by shareholders to enjoin the company from suspending their votes in an AGM as the board had done so not to compel disclosure (as the relevant power was intended to) but to improperly prevent a hostile takeover.⁸⁹ Most recently, the Privy Council in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group*

⁸⁴ Ernest J Weinrib, 'Private Law and Public Right' (2011) 61 University of Toronto Law Journal 191.

⁸⁵ Steven L Schwarcz, 'Collapsing Corporate Structures: Resolving the Tension Between Form and Substance' (2004) 60 The Business Lawyer 109; Hans Tjio, 'When Is an Elephant a Bird?' (2006) 18 SAcLJ 473.

⁸⁶ Robert Walker, 'Ramsay 25 Years On: Some Reflections on Tax Avoidance' (2004) 120 LQR 412.

⁸⁷ See Rachel Leow, *Corporate Attribution in Private Law* (1st edn, Hart Publishing 2022) 72 that 'for other powers, the proper purpose is likely to be what the power-holder believes to be the company's interest'. Interestingly, India has adopted s 171(a) but not (b).

⁸⁸ [2015] UKSC 71, [2016] 3 All ER 641.

⁸⁹ The other thing to note was that the shareholders could bring the actions personally and not derivatively through the company.

*Ltd*⁹⁰ held that even if directors' duties are owed to the company, a shareholder or a group of them may have an implicit and parallel personal right given by the statutory corporate contract to bring an action against the company to remedy any wrong affecting them which arises from a breach of directors' duty to utilise their powers for proper purposes. It adds another dimension to fiduciary duties as its role is to 'regulate the exercise of authority'⁹¹ rather than prevent opportunism or promote loyalty. It comes closest to the intersection between public regulation and private law.

Conclusion

There is the advantage of keeping the focus of directors' duty to an identifiable constituency, viz shareholders, but then calling for its recharacterisation in certain circumstances, such as in share issues and takeovers (where the proper purpose rule is most established), and insolvency situations, where the interests of creditors are important but it may not be possible to speak of a real duty to them (on a Hohfeldian level⁹²). While the first best solution is regulation, there may be a need for slightly hazier standards to improve corporate governance on an ex ante basis - the remedy with respect to a breach of the proper purpose rule is often an injunction.

Creditors can sometimes be seen as third parties to the corporate structure. But they, like shareholders, invest in the firm. Armour and Whincop, instead, suggest that creditors and shareholders share sequentially in the fortunes of the company.⁹³ A long time ago, *Colonial Bank v Whinney*⁹⁴ held that shares were property as a chose in action only through analogy with debts which were first accepted as such. Given this, although we accept that shareholder primacy is the focus for directors' duties today, and there are clear benefits to such, there are moments where creditor interests return to the fore

⁹⁰ [2024] UKPC 36 (appeal from the Cayman Islands). See further Hans Tjio, 'The Proper Purpose Rule' [2016] LMCLQ 176; Ernest Lim, 'Directors' duties: improper purposes or implied terms?' (2014) 34 Legal Studies 34.

⁹¹ Robert Flannigan, 'Fraud on a Power, Improper Purpose and Fiduciary Accountability: Part I' (2019) 62 Canadian Business Law Journal 133. It is about controlling the 'abuse of power' and not 'excess of power': *Eclair (SC)* (n 79), approved by Lord Richards in *Grand View PTC v Wong* [2022] UKPC 47 [55], who saw 'abuse' in the non-pejorative sense and approved the use of extrinsic materials like letters of wishes in determining the purpose of the power, at [63].

⁹² The creditors do not have a corresponding right to sue directly: Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1923).

⁹³ John Armour and Michael J Whincop, 'The Proprietary Foundations of Corporate Law' (2007) 27 OJLS 429, pt C. Lynn A Stout, 'Bad and Not-so-Bad Arguments for Shareholder Primacy' (2002) 75 S Cal L Rev 1189, 1192 has pointed out that, from another viewpoint, it could be said that it is in fact the debt holders that are residual claimants on a company's cash flow who have given a call option to the shareholders.

⁹⁴ In 1885, the House of Lords (11 App Cas 426) reversed the Court of Appeal (30 Ch D 261) and found that the share was a thing in action. The Judicature Act 1873 (36 & 37 Vict c 66) (UK) s 25(6) referred to 'all debts and other legal choses in action' and the House of Lords thought that shares were akin to debt securities which are more proprietary in nature: UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' (2019) para 68 <https://www.blockchain4europe.eu/wp-content/uploads/2021/05/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf> accessed 3 July 2024.

without fundamentally changing the nature of directors' duties. We suggest that the 'creditor duty' as it currently stands remains too amorphous⁹⁵ and that we could utilise the proper purpose rule requiring directors to comply with existing rules and regulations to better understand those situations calling for fairness to creditors (and perhaps even other stakeholders with interests different from controlling or majority shareholders).

⁹⁵ Peter G Watts, 'Sequana in the Supreme Court: Cautious Confirmation of the Creditor-Extension to the Director's Duty of Loyalty' [2023] JIBLF 74 who argues that it is neither principled nor required.