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2024. Securities and Financial Services Regulation

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2024. SECURITIES AND FINANCIAL SERVICES REGULATION

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I. Creditors as Investors

Securities Regulation is made up of disparate rules that Professor Louis Loss first put together with an overarching theme of investor protection. There is a danger though that we have associated investors mainly with shareholders, and creditors have largely been overlooked. But creditors are not just big banks who can and are expected to protect themselves as Lord Reed suggested in *BTI 2014 LLC v Sequana SA,*[1] which is the leading Commonwealth case on the duty on directors to take into account creditor interests when insolvency is imminent as part of their duty to act in the company's best interest. There are also many retail investors who buy bonds in a company (with there now being almost 40 retail bonds listed on the Singapore Exchange since the rules permitted them in 2016, even if the vast majority of the $4 trillion-sized SGX bond market involves wholesale bonds which are seldom traded). There are also non-adjusting creditors like tort claimants that financial regulation should not forget as well as bank depositors who rely on some protection from the bank itself (or in Singapore, the state authorities) from external fraud.

This particularly the case now when it is both the best of times and the worst of times for businesses, with soft tech and semiconductors in the former and more traditional manufacturing in the latter. Amidst high stock valuations are large volumes of insolvency restructuring that has seen creditor rights being varied, sometimes in ways that seem to invert the creditor-shareholder priority structure.[2] It has been said that we are in the "era of chameleon capital" due largely to the private capital market where much is negotiated and not mandatory.[3] The greater risks in the private markets were recently highlighted in *Asia-Euro Capital SPV I LLP v Regulus Advisors Pte Ltd*[4]. Equity and debt may also not have the legal effects their labels suggest and much depends on what is actually negotiated and whether terms have been complied with. In *Ang Kian Tiong v DBS Bank*[5], the issue was whether convertible bonds owned by an investor had been properly converted to shares within the guarantor of the issue by the investor. The bonds had a

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[1] [2022] UKSC 25.

[2] 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). 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: . Tan Nai Lun, 'Over 500 investors, including 300 Singaporeans, kick off claim against Switzerland over Credit Suisse bond losses of over US$250 million *The Business Times* (Singapore, 5 Feb 2025) .

[3] Narine Lalfaryan, "Chameleon Capital" (2024) University of Cambridge Faculty of Law Legal Studies Research Paper No 30/2024 argues that the distinction may only be relevant in collective proceedings.

[4] [2024] SGHC 279 (alleged fraud and misrepresentations in respect of shares in a private company).

[5] [2024] SGHC 292.

finance charge that if the issuer could not pay could be capitalised into additional bonds, which in turn could be converted into shares within the guarantor. When the bonds were bought for the investor by the defendant bank, which had a holding account with Clearstream through which the bonds were cleared, there were already some accrued charges, and more accrued subsequently. While the investor gave the defendant bank instructions to convert the bonds to shares, only the original bonds were converted. Due to Indonesian regulations, there were difficulties converting the bonds capitalised from accrued charges into shares. Given those difficulties, the issuer offered a cash option to settle those finance charges but the investor refused to accept it as he preferred shares which he could not obtain up to the time of the court action. The investor sought a declaration from the court that the finance charges had been capitalised into additional bonds which the defendant held for its benefit whereas the defendant bank said that the finance charges remained as a cause of action that the investor could pursue against the issuer. This was important as the issuer was being wound up and as the bonds were held in the Clearstream system which operated a no look-through principle, each party only had rights against its counterparty. As such, the investors could not lodge a claim in the issuer's insolvency directly but had to do so via its bonds with the defendant bank which had a holding account with Clearstream. The judge refused to exercise his discretion to grant the declaration as the investor could not establish that the additional bonds were ever issued. While the finance charges accrued, there was no evidence of the extra step taken by the investor or notice from the issuer that they had been converted to additional bonds. The court said that the defendant bank was not a fiduciary of the investor and the latter could not through its declaration force the former to take action to enforce its debt claim against the issuer which it should have done so itself or through the bond trustee.

Shareholder rights are clearly more protected in legislation and creditors through private ordering. While there is a proliferation of shareholder oppression actions, studies have shown that although debenture holders have standing to bring an oppression action under 216 of the Companies Act 1967, not a single one has been initiated in Singapore in contrast to the many shareholder oppression cases[6]. Even internationally, bond restructuring has had to draw from private law for the variation of rights in providing some protection to minority creditors by imposing duties on creditors to vote bona fide in the best interest of their class, which we are increasingly seeing is difficult to prove either way – much depends on who bears the burden of proof. Despite Lord Leggatt's warning in *Philipp v Barclays Bank UK Plc*[7] that some things are best left to regulation, private law still has a part to play. That was said in the context of the *Quincecare*[8] duty on banks to protect its customer's bank account when the latter is defrauded by its own agent, the

[6] Compare Hans Tjio, "An Empirical Look at the Consequences of Oppression Actions in Singapore" [2017] *Journal of Corporate Law Studies* 405 and Seah Chi Ling, "Bondholder Rights and the Section 216 Oppression Remedy" (2011) Sing JLS 432.
[7] [2023] UKSC 25.
[8] *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363.

basis of which was discussed by various Singapore cases in 2024. In that context, however, Singapore has clearly provided the necessary regulation from December 2024 for banks to assume some responsibility for phishing scams against their depositors.[9]

There was a time when insolvency restructuring was a priority for securities regulators with the SEC's initial mandate not just to look at the securities transactions and exchanges, but also corporate bankruptcy organisation as well as public utilities holding companies as part of the "social control of finance".[10] But the latter two were quickly given up as a compromise so that the SEC could eventually gain greater acceptance as part of the independent administrative state which went on to become what was seen as the fourth branch of government in the US. Things have gone one full circle there with the overruling of the administrative deference that had been recognised in *Chevron*[11] and even more recent Scotus cases which have held that civil penalties, an important administrative sanction, now have to go through the courts, which may lack expertise in a particular regulatory matter[12]. It shows that one cannot rely on regulation alone as that is too dependent on political winds. Private law is sometimes needed to fill the gap, even if only temporarily.

II. Rules protecting creditors

What are the rules that protect creditors as investors? At one extreme are the regulations found in the Securities and Futures Act 2001 that mandate the need for trustees for any debenture issuance. As a sign of regulatory ambivalence towards creditor protection, however, in the case where a prospectus is required for an offer of debentures (which may be listed or unlisted), section 265A of the Securities and Futures Act 2001[13] from 2016 again required the borrowing entity to appoint a trustee for the debenture holders for the entire tenure of the debenture. But this revived a provision previously found in section 262 that had been removed by the Securities and Futures (Amendment)

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[9] Irene Tham, "Financial institutions, telcos to be accountable to scam victims; new framework kicks in on Dec 16", Straits Times, 25 October, 2024. The Protection from Scams Bill was introduced in Parliament on 11 November 2024 and is the first legislation in the world to give police the powers to issue restriction notices to banks which will then control the bank transactions of victims who insist they are not being scammed despite evidence showing they are.

[10] AC Pritchard and Robert B Thompson, *A History of Securities Law in the Supreme Court* (OUP, 2023) Ch 2.

[11] *Chevron USA Inc v National Resources Defence Council, Inc* 467 US 837 (1984), overruled by *Loper Bright v Raimondo* 603 US 369 (2024). This will make it even less certain what a security is in the US: J Seligman, "The Keys to the Kingdom: The Unexpectedly Unsettled Definitions of Security and Sale and the Overruling of Chevron" (January 01, 2025). Washington University in St. Louis Legal Studies Research Paper No. 25-01-01, Available at SSRN: https://ssrn.com/abstract=5107987

[12] *SEC v Jarkesy* (Docket No. 22-859). See in Australia: I Ramsay and M Webster, "An Analysis of Civil Penalties by the Australian Securities and Investments Commission" (2025) 53 Federal Law Review (forthcoming). Civil penalties are available under the Securities and Futures Act 2001 but not the Companies Act 1967.

[13] 2020 Rev Ed.

Act 2005,[14] as it was thought at that time that it should be left to the market (eg through the listing rules of a securities exchange)[15] to prescribe the need for a trustee and a trust deed (even if section 266 continued to set out the duties of such a trustee, if appointed). Section 268A now also prescribes additional requirements in the case of such debentures which are not listed on a securities exchange (which in Singapore is a more common phenomenon than the case of shares issued by companies which usually reach the hands of the investing public only through an exchange).

When we turn to the Companies Act, there were provisions that the Company Law Reform Steering Committee in 2011 thought should be moved to the Securities and Futures Act, largely to do with capital maintenance rules like share repurchases and the prohibition against a company giving financial assistance for the acquisition of its shares. But the Ministry of Finance correctly thought that these provisions were closer to company law "given the intricacies of the financial assistance provisions and the cross-references and inter-linkages between provisions".[16] But these rules are increasingly dependent on the declaration of solvency and are likely to be further liberalised over time. Creditor protection may need to be sought elsewhere.

There are then rules found in the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ('IRDA') which may or may not involve insolvency with the most prominent being the prohibition against wrongful trading in s 239 which proscribes an insolvent company incurring debts or other liabilities without reasonable prospect of meeting them in full (see s 239(12) of the IRDA). During the Covid-19 pandemic, however, these provisions were suspended worldwide, which was the case in Singapore as well.[17] Then there are insolvency related rules against transactions at an undervalue and unfair preferences with their relation back periods. However, given the relaxation of capital maintenance rules, we believe that much work remains for the fraudulent conveyance provisions in s 438 (similarly worded now to s 423 of the UK Insolvency Act 1986) which apply outside insolvency and prohibit transactions that are intended to defraud creditors generally. The UK Supreme Court heard very detailed submissions on the width of section 423 in the appeal from *El-Husseiny v Invest Bank PSC*[18] in May 2024. There the Court of

[14] Act 1 of 2005.
[15] Rule 308 of the SGX-ST Listing Manual: Mainboard Rules requires a listed debt issue to have a trustee unless it is a prescribed corporation under the Securities and Futures Act 2001 or if it is only offered to sophisticated or institutional investors and the minimum board lot size is $200,000.
[16] Ministry of Finance, *Public Consultation on Draft Companies (Amendment) Bill 2013* (2 May–14 June 2013) Annex A, Remarks S/N 92.
[17] COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) Div 2 of Pt 3, modifying both s 339(3) of the Companies Act and s 239(6) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed). See also GJ Boon *et al*, "The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog", Oxford Legal Studies Research Paper No 15/2020.
[18] [2025] UKSC 4, affirming [2023] EWCA 55. In a decision on its merits, [2024] EWHC 2976 (Comm), the High Court held that the purported debtor was not in fact one as it could not be proved that he had guaranteed two loans. Further, there was insufficient evidence that he had the purpose of putting his assets beyond reach of creditors or otherwise prejudicing their interests. This is subjective, and it may be

Appeal had held that a debtor, which caused a company he controlled to transfer its assets to his sons, had entered into a transaction to defraud his own creditors which resulted in the diminution in the value of his shares. This was so even though the debtor did not itself transfer any of its own property (in particular the shares he held) to a third party which counsel sought to argue that provision required. Rejecting counsel's argument that s 423 simply did not catch such transactions, however, egregious, the UK Supreme Court held that the meaning of a transaction was not restricted to the transfer of an asset beneficially owned by the debtor and included the debtor procuring a company which he owned to transfer a valuable asset. Given that so much wealth may be held by debtors in choses in action which consists of claims against other entities (both domestic and foreign) that are themselves asset stripped, this case will be of vital importance in combating cross-border financial fraud.

Finally, there is the largely private law duty on directors to act in the company's best interest, that is partly captured in the s 157 duty on directors to act 'honestly and use reasonable diligence', which is covered more extensively elsewhere,[19] and the bank *Quincecare* duty mentioned above. These were seen by Lord Sales in a recent UK Supreme Court decision to be quite similar in nature.[20]

III. Private law: Creditor interests and *Quincecare*

Taking private law first, it was held in *Foo Kian Beng v OP3 International Pte Ltd* (in liquidation)[21] (*OP3*), following *Sequana*, that the sole director and only shareholder, Foo, had breached the creditor-regarding duty by authorising the payment of dividends by the company, 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). The Court of Appeal upheld this decision and said that Singapore courts had "spoken with one voice"[22] on the underlying rationale for the "creditor duty" even if the language of the precise moment at which the duty is triggered differed.

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that proof of insolvency or "financial difficulties" is required. No adverse inferences were drawn against transferor for not giving evidence even though he told his financial advisers that the transfers were for "asset protection purposes".

[19] See Hans Tjio, "The 'Creditor-Duty' and Other Rules" [2025] Sing JLS (forthcoming).

[20] *Stanford International Bank Ltd v HSBC Plc* [2022] UKSC 34, [137]. 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.

[21] [2024] SGCA 10. 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-regarding 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]).

[22] *OP3, ibid* [89].

In determining 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-regarding duty only arises in the second and third stages. But the concern for business could be seen in the statement that "the court should be alive to the reality that prompt payment may not always be insisted on by creditors."[23] 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.[24] This may suggest that the duty is still subjective (as seemed to have been accepted by the earlier 2023 Court of Appeal decision of *BIT Baltic Investment & Trading Pte Ltd v Wee*[25]) and that objective circumstances are only used as evidence that prove whether the directors of the company act had acted in what they themselves believe to be in the best interests of the company. In *Inter-Pacific Petroleum Pte Ltd (in liquidation) v Goh*[26] ("*IPP*"), Xu J thought, however, that it was quite clear that the *OP* court had not intended to distance itself away from its previous decisions:

> 193 Although the Court of Appeal referred to the "subjective intentions" and "subjective bona fides" of the director, and it does appear that the Court of Appeal's finding of no breach of the Creditor Duty in BIT Baltic turns on an application of a purely subjective test (at [55]), I do not read the Court of Appeal in Foo Kian Beng as having had the intention of laying down a purely subjective test of bona fides as the sole determinant of whether the director has complied with his Creditor Duty. To have done so would have entailed a substantial departure from earlier decisions of the Court of Appeal, in which the courts had been clearly alive to the difficulties attendant with a purely subjective standard.

That also seems to be the position in Australia[27]. But the fact that the test has still not been fully resolved after so many years does suggest that it is not entirely stable and supports arguments that have been made that it is difficult to identify what a company's best interests are (as opposed to its shareholders, which are still the primary focus of the duty as a starting point) and whether directors are acting in that regard. This is why the no-conflict rule is there to act as a form of prophylaxis to keep directors on track. Similar arguments have been made for why the proper purpose rule is necessary given the less focused nature of the best interest duty which has also been said to be a core fiduciary

[23] *OP3, ibid* [104].
[24] *OP3, ibid* [74], [94].
[25] [2023] SGCA 17.
[26] [2024] SGHC 178.
[27] See Ian Ramsey and Rosemary Teele Langford, "Directors' Duty to Act in the Interest of the Company: Subjective or Objective?" [2015] JBL 173. In the UK, see *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch 62, 74.

duty alongside the no-conflict rule.[28] It is more a standard than a rule, perhaps non-verifiable.

In *IPP*, its liquidators brought actions against its director (found to be an executive at the relevant time on the facts as a matter of substance, not form) for failing to apprise himself of the company's affairs and to monitor what the other directors and officers were doing. These other people had used IPP to borrow large sums of money for financing sham cargo trading transactions. Although most of what the director did consisted of omissions, the judge found that he was liable to repay the banks most of the loan drawdowns (with one set failing as the judge could not see how the company suffered a loss when the transactions there were not shams and it could not be explained why the bank had in turn suffered a loss[29]). As we have seen, the director failed to act in the company's best interest when the company was near insolvency and breached the creditor-regarding duty that had arisen in a situation of imminent insolvency if not inevitable insolvency.[30] He was also liable in negligence as he failed to meet the standards expected of a "reasonably diligent executive director" and could not limit himself to "confined area of responsibility" in IPP in light of the red flags he should have picked up.

One defence[31] that the director raised was that the banks owed IPP duties to protect the company and had breached their respective *Quincecare* duties to IPP in making payment to the company's putative suppliers in respect of the sham cargo trading transactions. Recall 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 agent which gave unauthorised instructions to the bank with respect to the customer's account. Under that framework, it had to be shown that the banks had received IPP's payment instructions from its agents in such suspicious circumstances that they ought to have been put on notice that the cargo trading transactions that they were financing were shams.

While no evidence had been led as to who these agents might have been and if they had been authorised to provide the payment instructions, the judge thought that the signatories to the drawdown had enough appearance of authority given that they were IPP

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[28] *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199, [253]. Contrasting proper purposes, see Hans Tjio, "Sustainable Directors' Duties and Reasonable Shareholders" [2024] 25 EBOR 901 and Robert Flannigan, "Fraud on a Power, Improper Purpose and Fiduciary Accountability" (2019) 62 Canadian Business Law Journal 133.
[29] *IPP, supra* n 26, [234].
[30] *IPP, supra* n 26, [202].
[31] Another defence was that there was fraud on the letter of credit, which the court also rejected. For the test of fraud in this context, see now *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2024] 1 SLR 1054; [2024] SGCA 31. See further Dimitrios Katsikis and Rishabh Raheja, "Letters of Credit: Is Recklessness Fraud? - Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd [2023] SGHC 220" (2024) 36 SAcLJ 423.

directors.[32] The thing about apparent authority is that, in corporate contracting, it is quite clear that the duty is on the third party to show reasonable reliance, which includes the fact that it was without notice of any lack of authority. Here, however, the judge thought that the company (and its director) could not point to any evidence that would have raised the banks' suspicion. The judge also had to deal with the earlier Court of Appeal decision of *Hsu Ann Mei Amy v Overseas Chinese Banking Corp Ltd*[33] where it appears that it was the lack of mental capacity on the part of the bank depositor that put the bank on notice. But Xu J interpreted *Hsu* as a possible agency case due to the role played in that case by the bank depositor's niece who could consequently have been seen as the customer's agent. But doubts remain about the agency analysis given the point about the burden of proof above as well as the recognition in *Philipp* that *Quincecare* had been applied in other jurisdictions in a wider set of circumstances. Xu J addressed this point:

> 296 Second, even if I am wrong that *Hsu Ann Mei* can be considered an agency case due to the pivotal role played by Amy, I consider that it is nevertheless distinguishable from *Philipp*. A case involving a customer who may lack mental capacity is self-evidently different from a case where no such doubt exists. The same doubt as to whether an instruction received by the bank is really the customer's instruction that engages the *Quincecare* duty in a case where the bank receives instructions from a person purporting to act as the customer's agent also exists in a case where, despite receiving instructions from the customer himself, the bank has reasonable cause for concern as to the customer's mental capacity, since it is well-settled that if a customer is mentally incapacitated such that the customer does not know what he is doing, he can give no mandate and the banker cannot act on the same (see *Paget* at para 6.44). Thus, an instruction from a mentally incapacitated customer is strictly not the customer's instruction if the bank is put on notice of the customer's mental incapacity, thus giving rise to the need to confirm the customer's capacity to give the instruction received.
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> 297 Indeed, any doubt as to the consistency between *Philipp* and *Hsu Ann Mei* was put to rest by Lord Leggatt JSC in *Philipp* itself. His Lordship commented, expressly citing *Hsu Ann Mei*, that "[s]imilar reasoning [as to the *Quincecare* duty] would also apply where a bank is on notice, in the sense of having reasonable grounds for believing, that the customer lacks mental capacity to operate a bank account or manage her financial affairs" (see *Philipp* at [99]).

In *Philipp*, Lord Leggatt also accepted (following the Australian decision of *Ryan v Bank of New South Wales*[34]) that there may be circumstances in which a bank may ignore the customer's instructions if the customer "would not desire their orders to be carried out if

[32] *IPP, supra* n 26, [310].
[33] [2011] SGCA 3.
[34] [1978] VR 555.

they were aware of the circumstances known to the bank".[35] Further, the question remains whether apparent authority should remain only in the realm of corporate contracting or if it has a wider part to play in order to "*not* set aside"[36] dubious transactions. The latter led to the duty of care of a director (a corporate services firm) towards the company to be framed in terms of third-party liability in *Ciban Management Corporation v Citco (BVI) Ltd*.[37] There, the corporate director, whose liability is usually analysed in terms of its own negligence, was instead treated as a third party dealing with the company and was entitled to rely on the ostensible authority of a company's agent who was not himself a director. The Privy Council acknowledged that "there has been considerable difficulty in deciding in this case whether the doctrine of ostensible (or apparent) authority has a pivotal role".[38] The director was said, however, to have acted reasonably due to the close links between the agent and the company's sole shareholder, who informally consented to the representation by conduct that the agent had authority. The contrast with the indoor management rule is stark, as it is said that insiders like directors usually find it hard to rely on those rules that protect outside third parties to the corporate entity.[39] With *Ciban*, the director was not liable because it was characterised as a third party that was not put on inquiry and so was entitled to rely on the appearance of authority and did not breach its duty of care owed to the company.

Consequently, much remains to be determined by the Court of Appeal as it was also noted by Goh J in *Envy Asset Management Pte Ltd v CH Biovest Pte Ltd*[40] that the UK Supreme Court in *Philipp* "undertook a root and branch re-examination of the juridical basis of the *Quincecare* duty"[41]. *Envy* itself is perhaps more important for statutory protections afforded to creditors given that the Court of Appeal in that case did not address *Quincecare*[42].

IV. Statutory Creditor Protections

Liquidators of the Envy group of companies brought actions against the defendant, which was the recipient of monies paid to it by the Envy Asset Management Pte Ltd (EAM) that resulted from an investment fraud scheme for qualified investors between October 2017 and February 2020. This involved the purported trading of nickel (which being a physical asset and not a capital markets product did not result in any required MAS licensing although EAM lied about having applied for such). The judge described this as a Ponzi

[35] *Philipp v Barclays Bank*, *supra* n 7, [99]-[108].
[36] *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [4].
[37] *Ciban Management Corporation v Citco (BVI) Ltd* [2021] AC 122, [2020] UKPC 21.
[38] *ibid* [6].
[39] Paul Davies, Sarah Worthington and Chris Hare, *Gower: Principles of Modern Company Law* (Sweet & Maxwell, 11th ed, 2021) [8-012]. Compare *Hely Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (CA) (implied actual authority).
[40] [2024] SGHC 46.
[41] *Ibid* [77].
[42] [2025] SGCA 3.

scheme with the recipient one of the luckier earlier investors who had paid over a principal amount for investment in nickel under a letter of agreement with EAM under which it would receive repayments under an investment formula (linked to the appreciation in the price of nickel) after 3 months. The defendant received such repayments that were in excess of the principal amount invested and this was the subject of recovery by the liquidators on the basis that they were pre-insolvency fraudulent conveyances intended to defraud creditors under section 73B of the Conveyancing and Law of Property Act 1886 (based on the old s 172 of the UK Law of Property Act 1925, as the relevant time ruled out the application of the newer provisions in s 438 IRDA) as well as transactions at an undervalue within the meaning of s 224(3) of the IRDA (post insolvency). The judge rejected the arguments that the investments were subject to any form of *Quistclose* or other trust, and held that the extra returns paid out on them were both fraudulent conveyances as well as transactions at an undervalue and could be recovered by the liquidators. This was affirmed by the Court of Appeal.

The defendant argued that it had provided valuable consideration for the profits, which is a specific defence to a s 73B claim, and which also showed that it was not a transaction at an undervalue for the s 224 action. The judges at first instance and on appeal rejected this as there was no consideration given for the extra repayments as these were an "extracontractual payment". The initial payment in by the defendant could not be seen as valuable consideration for the profits as there was no investment in nickel that could have appreciated in value (given that the whole scheme was a sham). Valuable consideration was not consideration in the contractual formation sense and had to relate directly to the repayment, even if Goh J thought that there was enough to prevent an unjust enrichment claim for the total failure of consideration, which the Court of Appeal did not feel it needed to address.[43]

Goh J also made the interesting observation that although there are some differences between the post-insolvency transactions at an undervalue provision in s 224 IRDA and the modern incarnation of the pre-insolvency fraudulent conveyance provision in s 438 IRDA (which as we have seen did not apply at the relevant transactional time as it only replaced s 73B CLPA on 30 July 2020) he thought that both shared the same principles.[44]

[43] The Court of Appeal disagreed with Goh J that the meaning of good consideration in s 73B (as opposed to valuable consideration) could be seen from a contractual lens: ibid at [78]-[80]. (. See also *El-Husseiny v Invest Bank PSC* [2025] UKSC 4 at [45].

[44] *ibid*, [171]. It is said to be the same in the US: David G Epstein and Steve H Nickles, *Principles of Bankruptcy Law* (Thomson West, 2007) at 120. *Cf* John Armour, 'Transactions Defrauding Creditors' in 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), 3.63 that there are 2 important differences with respect to remedies. Some doubt has been expressed over whether the provisions have a common rationale: *El-Husseiny v Invest Bank PSC* [2023] EWCA 55, [41], but compare [2025] UKSC 4 at [62]. See also *Envy CA* [2025] SGCA 3 at [90].

The courts also had very interesting comments on unfair preferences, which is the other major post-insolvency avoidance provision in IRDA, when asking if *"the claimants have fundamentally erred in their choice of avoidance provisions"*[45]. This was a threshold question that Goh J thought he had to answer given that some see preference law as concerned with inter-creditor conflicts, whereas undervalue transactions are more about asset preservation. Here, he identified a possible issue arising from another major Ponzi scheme case, *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc*[46] where the UK Supreme Court had seen the payments out there to investors in the nature of debt repayments. The debt or forbearance to sue on that would have provided the necessary consideration so that it would not be a transaction at an undervalue (there being no change in the repayer's net asset position), but only an unfair preference (which are more to ensure fairness amongst creditors). This was important as there were no formal preference laws in Antigua where SIB was incorporated. There the fallback was the argument that HSBC had breached its *Quincecare* duty to SIB. But the majority in the UK Supreme Court rejected the appeal against the striking out of a claim on the basis that the bank's customer was already insolvent by the time its account was depleted and so did not suffer an actionable loss. 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-regarding duty as opposed to the loss to the company.[47]

With respect to whether the extra repayments were an unfair preference as well or just a transaction at an undervalue (which it was given the absence of valuable consideration), Goh J again pointed out that the *Envy* case was different from *Stanford* as EAM did not owe a debt to the defendant since EAM never became obliged to repay any monies given that its liability would only have arisen if nickel had been purchased under the letters of agreement, and it had then appreciated in value. Given that no nickel was ever bought, no liability ever arose that could be discharged, and no preference ever ensued. The Court of Appeal disagreed that there was any "threshold requirement" as the basis for all avoidance provisions were not dissimilar, which was to "preserve the assets of the

[45] Goh J deals with preferences in another recent decision: *Group Lease Holdings Pte Ltd (in liquidation) v Group Lease Public Co Ltd* [2024] SGHC 302.

[46] [2023] AC 761. See further Chua Rui Yuan, "The Aftermath of a Ponzi Scheme" [2023] LMCLQ 218.

[47] *Ibid* [83]. It is actually less an issue in *Sequana* than in *OP3* 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 Safetywear Ltd v Dodd* [1988] BCLC 250, 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.

company", and this worked "in tandem with the 'Distribution Rationale'[48] Instead, it had to address the argument that the investment contract here was more in the nature of a contract for difference with the price of nickel to be used as a reference point at the end of 3 months whereupon a contractual obligation arose to pay both principal and profit. Here, the Court of Appeal distinguished the case of *Fairfield Sentry Limited (in Liquidation) v Migani*[49] as there was a certification clause provided under the agreement there that created an obligation to pay out once certification setting out the amounts due under a Madoff fund was made (based on the new asset value per share of the fund). In contrast, the investment agreement here required the actual trading of nickel to create any possible obligation to pay out on a profit which was not simply calculated on the underlying market value of nickel. The Court of Appeal thought that even if a certification clause was present on the facts, Biovest would still not have been entitled to the payouts since the certification clause does not "render valid what was otherwise a fiction".[50] The Court of Appeal[51] held that 'profits' paid out by fraudulent artifices are 'profits' merely in form but not substance. It cited the US case of *Donell v Kowell* ('*Kowell*')[52], where the US Court of Appeals for the Ninth Circuit said:

> payouts of 'profits' by Ponzi scheme operators are not payments of return on investment from an actual business venture. Rather, they are payments that deplete the assets of the scheme operator for the purpose of creating the appearance of a profitable business venture.

While s 73B CLPA referred to the "conveyance of property" which was clearly present here, s 438 IRDA looks at "any transaction" and is similar to insolvent undervalue transactions in s 224. Here, the Court of Appeal[53] disagreed with Goh J's analysis that a unilateral payment could be seen under the second limb of s 224(3)(a) as a transaction "on terms that provide for the company to receive no consideration". Mutual dealings are required in this context, which requires "some engagement, or at least communication, between the two parties and not merely a disposition of money which results in one party's money landing up in the bank account of the other without anything said or done by that other".[54] Instead, the Court of Appeal distinguished the facts of *Envy Trading* and *Sequana* as the fraudulent payouts in *Envy* were extra-contractual payments that were in the nature of a gift that was expressly covered by the first limb of that subsection, while *Sequana* concerned dividend declarations made pursuant to contractual obligations between the

[48] [2025] SGCA 3 at [38]-[40]. See also *El-Husseiny v Invest Bank PSC* [2025] UKSC 4 at [74].
[49] [2014] UKPC 9, preferring instead *Skandinaviska Enskilda Banken AB (Publ) v Conway (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd)* [2019] UKPC 3.
[50] *Envy CA* [2025] SGCA 3 at [48].
[51] *Envy CA* [2025] SGCA 3 at [59].
[52] 533 F 3d 962 (9th Cir, 2008). This case was also discussed in detail at first instance in *Envy*.
[53] *Envy CA* [2025] SGCA 3 at [92].
[54] *Re Hampton Capital Ltd* [2016] 1 BCLC 374 at [38].

company and its shareholders, which constitute 'transactions' in the second limb of section 224 *IRDA*[55].

What was left unclear, however, was whether the initial investment sum was a debt due and could consequently only be recovered as a preference as seemed to have been implicitly accepted by Goh J. It is likely that the Court of Appeal might reexamine this area, which all perhaps stemmed from *Re MC Bacon*[56] where it was held that the giving of security to an existing debtor could not be a transaction at an undervalue but only a preference as there was no diminution in the net asset position of the debtor. This has had to be qualified both in the UK and Singapore (see *Rothstar* which was discussed in the 2022 Annual Review with respect to giving security to a third party debtor[57]).

V. Unitholder Protection in REITS or Business Trusts

What has been even more difficult to understand is the continued undervaluation of Singapore listed shares where in mid-2024, less than a third traded above their book values.[58] There are a number of important committees looking at this. But one reason could be because they carried on their books property which is overvalued or at least valued very highly on a price-earnings basis. The solution more than 20 years ago was the use of real estate investment trusts (REITs), which has securitised many property assets and taken them off the books of listed property companies. But the REITs themselves have more recently been seen to be underperforming in a high-interest rate environment. This shows that many REIT units behave similarly to bonds in that their pricing is inversely correlated with interest rates. But unitholders in REITs are also similar to bondholders in another way, which is that there are fewer statutory protections given to them compared to shareholders in a company. The protections must be provided in the trust deed (and perhaps from the Code of Collective Investment Scheme which apply to S-REITs that were authorised or recognised as such). The contrast here is with unitholders in a business trust under the Business Trust Act 2004 which offers more formal unitholder protection under what is essentially a company-minus regime. There is constant talk of

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[55] *Envy CA* [2025] SGCA 3 at [93]-[108]. In *El-Husseiny v Invest Bank PSC* [2025] UKSC 4, the court thought that the second limb could not be limited by the reference to gifts in the first limb to require the transfer of property owned by the debtor. Instead the meaning of transaction was wider although that does not rule out the requirement of mutuality in some form. The declaration of dividends creates a debt owed to the company members. This logically follows from *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353, where it was held that even for normal preference shares, a dividend could only be paid if it had been properly declared out of profits.

[56] [1990] BCLC 324, and compare now *Rothstar Group Ltd v Leow Quek Shiong* [2022] 2 SLR 158. *Cf Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 and *Eucus International Pte Ltd v Tenacious Investment Pte Ltd* [2016] SGHC 50 at [39].

[57] Sim Kwan Kiat, Wilson Zhu and Raelene Pereira "Insolvency Law" (2022) 23 SAL Ann Rev 533.

[58] David Gerald, 'Time to make it listed firms' business to tackle undervalued shares to revive S'pore's stock market' *Straits Times*, (Singapore, 11 April 2024).

equalising the treatment of REITs and business trusts in respect of, eg, corporate governance.[59] But clear differences remain.

The issue of unitholder rights in a REIT arose in *HSBC Institutional Trust Services (Singapore) Ltd v Quarz Capital Asia (Singapore) Pte Ltd* [60] (*Sabana HC*) which interestingly was described as a purpose trust in the keywords headlining the judgment. Sabana REIT is listed on the Mainboard of the Singapore Exchange Securities Trading Limited ("SGX"). [3] Its primary assets are industrial properties, which generates rental income that is then largely passed through to the unitholders without being taxed at an entity level or, even in the case of individuals, unitholder level. It was managed by an external asset manager which was wholly owned by the ESR entities that in turn collectively held about 21% of the issued units in Sabana REIT. Quarz owned around 14% of the units in Sebana REIT, and led a group of slightly less than 60% of the unitholders that voted in favour of removing the external manager and to replace it with an internal manager that would be beneficially owned by the unitholders.[61] The trustee of Sabana REIT sought a declaration from the court whether the ESR Entities were permitted to vote on the proposed amendments to the trust deed that it felt was required to effect the changes. However, Quarz was worried that given that the resolution approving internalisation was carried by just over 55% of the unitholders and a special resolution might have been required for any amendment, that it would not succeed in doing so. It argued that the proposed amendments were not required to replace the manager or that it could be made under cl 28.2.1 of the trust deed, which provides a mechanism for the trustee to amend the trust deed without the approval of the unitholders. Alternatively, if an amendment was required and an extraordinary resolution required, it argued that the ESR entities were prohibited from voting on it due to the conflict of interest it would face as unitholder given that the external manager that it owned would no longer receive management fees if internalisation was implemented. In reply, the ESR entities argued that those fees (that would be earned so long as internalisation was delayed or frustrated) were negligible and immaterial compared to the value of units the ESR entities held.

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[59] On 17 September 2024, the Monetary Authority of Singapore ("MAS") announced its Consultation (closing on 18 October 2024) on various proposed legislative changes to enhance: (i) corporate governance for registered business trusts ("BTs"); and (ii) alignment between the requirements for BTs and the requirements for Real Estate Investment Trusts ("REITs") and companies. These developments will pave the way for the coming into force of Phase 2 of the Business Trusts (Amendment) Act 2022 ("Amendment Act"), which will amend the Business Trusts Act 2004 ("BTA") the legislation governing the registration and regulation of BTs. In Phase 1, provisions of the Amendment Act that did not require supporting subsidiary legislation commenced operation on 12 March 2024.

[60] [2024] SGHC 153 (*Sabana HC)*.

[61] See further Tan Boon Gin, 'Internalisation of Reits: How to avoid the nuclear option' Business Times, 25 November 2024.

The protections in a REIT are largely provided in the trust deed itself, and revolved around the interpretation of Paragraph 4 of the First Schedule which stated that the external manager and its related entities:

> ***not be entitled to vote*** or be counted in the quorum thereof at a meeting convened to consider a matter in respect of which *the relevant controlling shareholders of the Manager* ***or*** *any Associate* ***has a material interest*** (emphasis in the judgment)...

Kumar J at first instance looked for guidance from both the SGX Listing Rules as well as statute. In particular, he referred to section 253E of the Australian Corporations Act 2001 (Cth) which states that:

> The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. However, if the scheme is listed, the responsible entity and its associates are entitled to vote their interest on resolutions to remove the responsible entity and choose a new responsible entity.

This provision, however, concerned a responsible entity in a Managed Investment Scheme which has a closer analogy with the Business Trust Act 2004 that requires a merged single trustee-manager (where however s 253E was not adopted). Australian decisions had applied the rule to prevent conflicts of interest on the part of a responsible entity and its associates even if the associates themselves (who could not therefore vote their interest) did not have an interest (as opposed to the responsible entity).[62] But the reference to listing rules also led the judge to look at Rule 748(5) of the SGX Listing Rules, which states that:

> The custodian, investment manager, any of their connected persons and any director of the investment fund and investment manager, is prohibited from voting their own shares at, or being part of a quorum for, any meeting to approve any matter in which they have a material interest.

While SGX had provided a letter in April 2024 to the effect that it did not see this rule applying, the judge held that the SGX letter was only binding on the issuer and not the parties before the case. In any case, he thought that the SGX did not address the matter of the interpretation of Paragraph 4 of the trust deed and only looked at whether the proposed amendments seen in isolation sought to benefit the interest of any specific group of unitholders.[63] The correct question that should have been addressed was

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[62] *Re AMP Capital Funds Management Ltd (in its capacity as responsible entity of the AMP Capital China Growth Fund (ARSN 122 303 744))* [2016] NSWSC 986 [36], endorsed on appeal in *AMP Life Ltd v AMP Capital Funds Management Ltd* [2016] NSWCA 176 [13].
[63] *Sabana HC, supra* n 60, [50]-[51].

whether the ESR entities had a "material interest" in delaying or frustrating the internalisation so that it should be prohibited on voting on the amendments (to the extent necessary to effect internalisation). It was held that this was the case. Kumar J said[64]:

> It is clear that a controlling shareholder *or* Associate is prohibited from voting even if it has no interest at all in the matter being decided, so long as just one of the members in its group has a material interest.

While Kumar J's decision was upheld by the Appellate Division of the High Court in *ESR Group Ltd v HSBC Institutional Trust Services (Singapore) Ltd*,[65] (*Sabana AD)* Kannan Ramesh JAD was not certain that there could be "collective interests by association"[66] and felt that this should be determined only when the matter was directly relevant given that it was only *obiter dicta* in the decision below.

Importantly, however, the Appellate Division did not examine the Australian legislation which it expressly found to be unhelpful and indeed said with respect to s 253E of Australia's Corporations Act 2001 that "an exercise in interpretation of a trust deed was different from an exercise in statutory interpretation"[67]. It examined the meaning of "material interest" and saw that it concerned extraneous interests other than that qua member which may set the unitholder apart from the others and observed that[68]:

> While it was agreed between the parties that, at a high level of abstraction, Paragraph 4 was intended to address conflicts of interest, there was no reason why the regime implemented by statutes and rules to deal with such conflicts of interest must necessarily be imputed to the Trust Deed in order to determine the intention of the parties.

Although it affirmed the court below, the Appellate Division may have characterised the matter slightly differently. While at first instance the analysis was based on conflicts of interest on the part of a unitholder, the Appellate Division spent more time looking at the fact that the material interest of the ESR entities set it apart from the other unitholders. And it was perhaps even more critical of the April 2024 SGX letter when it stated that:

> However, consideration was not given to whether the ESR Entities' material interest, as the ultimate owners of the External Manager, could impact or influence their vote on the implementation of the internalisation process, which was the matter under consideration in relation to the Proposed Amendments. It

[64] *Sabana HC, supra* n 60, [42].
[65] [2024] SGHC(A) 25 (*Sabana A*).
[66] *Sabana AD, Ibid* [41]-[46].
[67] *Sabana AD, ibid* [53]. For recent UK case on statutory interpretation see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, paras 29-31.
[68] *Sabana AD, ibid* [51].

> seemed to us that had to be considered for the purpose of Rule 748(5) of the Listing Rules.[69]

The difficulty with the conflict of interest or fiduciary analysis as the courts noted is that shareholders, which unitholders are closest too, are not under any duties to vote in anyone else's interests but their own. It is true, however that this can be changed by corporate charter,[70] but even the duty that is imposed on them to act in the best interests of the company when altering the corporate constitution[71] is not seen as fiduciary[72]. The basis of that duty may lie elsewhere. That conflict of interest only affects fiduciaries as a legal matter was also found to be the case in *How Weng Fan v Sengkang Town Council* [73] (noted in the 2022 Annual Review 2022 under "Torts law" Kumaralingam Amirthalingam[74]) where Menon CJ found that public officials working for a town council were not as a starting point fiduciaries where a private action for breach of fiduciary duty was brought for failure to comply with statutory duties. As such they were only liable in negligence.

Conversely, the trustee in *Credit Suisse Trust Limited v Ivanishvili, Bidzina* [75] failed in its arguments that its only duty was to preserve trust assets as part of its tortious duty of care, breach of which required proof of causation and remoteness etc. The Court of Appeal held that there was also a breach of fiduciary duty in not acting in its clients best interest when a relationship manager of its related company defrauded the client over a period of 10 years[76]. The trustee, whose duty was to look after the client assets and should have prevented the manager's misappropriation, argued that fiduciary duties were only proscriptive in nature but the Court of Appeal held that the best interest duty, which might flow from the no-conflict and no-profit rules, was still a core independent fiduciary duty[77]. It confirmed that the duty has both subjective and objective elements[78]. But it differs from negligence with respect to the latter as it is "actuating"[79] and requires more action, ie omissions are more clearly covered.[80] Further, contributory negligence will be hard to assert.[81] As a result, the more liberal damages rules applied to "repair" or restore losses caused by the breach of fiduciary duty. In this case, it was computed on

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[69] *Sabana AD, ibid* [57]
[70] *Sabana AD, ibid* [49]
[71] See eg the PC in *Staray Capital Ltd v Cha* [2017] UKPC 43 where this is a weaker form of protection for minority shareholders outvoted in an amendment of constitutional documents.
[72] Ernest Lim, *A Case for Shareholders' Fiduciary Duties in Common Law Asia* (CUP, 2019) has suggested that shareholders should be fiduciaries in some circumstances.
[73] [2022] SGCA 72.
[74] (2022) 23 SAL Ann Rev 787.
[75] [2024] SGCA(I) 5.
[76] This was the case even though he was working for CS Bank, the asset management arm, with whom the assets were deposited.
[77] See also *supra* n 28.
[78] See also *supra* n 27.
[79] *Supra* n 75, [48].
[80] See further Robert Cooter and Bradley J Freedman, "The fiduciary relationship: its economic character and legal consequences" (1991) 66 NYU L Rev 1045.
[81] *Supra* n 75, [68].

the basis as to what would have happened if the assets had been taken out of the wrongdoing manager's hands and placed in another financial institution with an alternative investment portfolio.[82] The finding that the trustee was in breach of fiduciary duty was therefore quite crucial, even if it had non-fiduciary duties of care at the same time.

As such, while there may be statutory or in *Quacz* contractual duties or restrictions on unitholder voting, that may not be a fiduciary in nature as such. In these situations, they may be under what Flannigan calls a nominate duty[83] to vote in the best interest of the REIT which translates to those of the unitholders in general. This may then result in a situation where the ESR entities cannot vote or (to the same effect) that requires them to vote in a separate class from other unitholders which is something seen in both the variation of class rights as well as restructuring in companies. There, it is the fact that there are differing rights or interests that are so intense that may call for separate class voting. It is not so much about a conflict between the unitholder's own interest and its fiduciary duties owed to a principal (who has reposed trust and confidence in it) but about differing rights or interests between the unitholders which prevents a unitholder holder properly exercising its voting power simply in its own favour instead of the benefit of the class. We see this often in schemes of arrangement, although the need for separate class voting has to be balanced against the fear that a dissenting minority that successfully claims that it should be in a separate class can stymie any possible reorganisation. The focus is now just as much on whether in practice there are real differences in legal rights or whether it is simply that creditors and shareholders have divergent interests in the success of the scheme, which may involve a delicate weighing exercise.[84] Indeed, much of formal securities regulation, such as the headline rules preventing market manipulation[85] and insider trading, are about intra-constituency fairness in the market and not conflicts of interest. Even the US, which sees insider trading as based on a concept of fiduciary duty, has seen its academics recently question again whether that

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[82] The judgment largely concerned the threshold for appellate courts to intervene with respect to expert evidence that is sensitive to and subject to the objective factual evidence before the court.

[83] Robert Flannigan, "Fiduciary Duties of Shareholders and Directors" [2004] JBL 277.

[84] See *Re Hawk Insurance* [2001] 2 BCLC 480 and Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345; [2002] 3 All ER 96. *Cf Re BTR Ltd* [1999] 2 BCLC 675, affirmed in [2000] 1 BCLC 740. See now *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 that:

> Just as the court must be careful not to empower the majority to oppress the minority by allowing the company to put everyone in the same class, it must be careful not to enable a small minority to thwart the wishes of the majority by fragmenting the creditors into small classes.

But this case also shows that the quality of disclosure has become critical in assessing schemes. See now *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77.

[85] There were a number of unreported sentencing decisions for false trading, market rigging and use of deceptive conduct in the securities markets in 2024 where the accused pleaded guilty: see eg *Public Prosecutor v Tan Kheng Yeow (Chen Qingyao)* [2024] SGDC 23; *Public Prosecutor v Chong Yong Von* [2024] SGDC 133; *Public Prosecutor v Sun Weiyeh* [2024] SGDC 242; *Public Prosecutor v Lee Wan Sing* [2024] SLR(StC) 234, [2023] SGDC 279.

should continue be the case, or whether the approach should be based on equal access to information by investors, as is the case in Singapore.[86]

Put differently, we may have to be more precise in the use of fiduciary language, and what it means for there to be a conflict of interest. Unlike in the US, Commonwealth courts have consistently said that the duty of care is not a fiduciary duty. Some cases have even suggested that the trustee/director best interest duty is not fiduciary[87] but that was clearly not accepted in *Credit Suisse*. At the same time, however, the best interest duty when vested in a non-fiduciary may not be seen as a fiduciary duty and its purpose is not to control conflicts of interest. It may, however, be to regulate or restrict the contractual powers of the majority to bind a minority (or in *Sabana* for a minority to frustrate the majority) and call for greater scrutiny of a decision where there are intra-constituency conflicts. That may mean that an investor cannot vote or may have to vote in a separate class because we cannot be sure that it is voting in the best interest of the class of investors. The idealized but perhaps impractical approach there is for disinterested shareholder voting and that is usually found in softer law like an exchange's listing rules and codes.[88]

VI. Conclusion

There are various ways of controlling voting on resolutions in the case of unitholders, creditors and shareholders but we may have to identify which one is at issue as it is something that will trouble us given all the corporate restructuring on the horizon, which as we stated at the outset, is a branch of securities regulation. At the same time, we have to maintain differences between these categories of investors as some are more clearly protected by statutes while others have to rely on contractual arrangements or private ordering. As the Appellate Division of the High Court warned in *ESR Group Ltd v HSBC Institutional Trust Services (Singapore) Ltd*[89], the exercise of statutory and contractual interpretation are not exactly the same, and any cross-fertilisation must be undertaken with great circumspection. The case also shows that while statute or quasi-statutory instruments like listing rules can cover a particular area, it may not be exhaustive and so the trust deed there could offer greater protection than what was in the listing rules (as interpreted by the SGX itself). Kannan Ramesh JAD said:[90]

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[86] Marc Steinberg, *Rethinking Securities Laws* (OUP, 2021) Ch 7 ("US securities law framework with respect to insider trading is abysmal", at 211).

[87] See eg *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 [52],

[88] See now Henry Hu, 'Decoupling and Motivation: Re-Calibrating Standards of Fiduciary Review, Rethinking "Disinterested" Shareholder Decisions and Deconstructing "De-SPACS" (2023) 78:4 Business Lawyer. But see the new UK Listing Rules removing disinterested shareholder voting for large transactions by listed issuers and IPTs and a reversion to board approval. See further, Alperen Afsin Gozlugol, "The Decline of Stock Markets in the UK: Is Regulation to Blame and Deregulation a Fix?" JCLS (forthcoming).

[89] *Sabana AD* [2024] SGHC(A) 25, [53].

[90] *Sabana AD*, *ibid* [56].

> Further, while there might well be reasons, perhaps relating to policy, which inform a regulator's decision on the construction of a rule, they might not be relevant in interpreting a deed. At any rate, no such policy reasons were apparent from the evidence before us.

The Court provided the appropriate level of deference to the view of a market regulator like the SGX within its sphere of expertise[91]. But as we saw above, it also suggested that SGX should have considered the material interest from the viewpoint of rule 748(5). This shows that judicial review of any binding SGX decision remains on the cards, even if the rules it administers are not statutory in nature, as they are "more than the private rules of a private body".[92] Less clear would be how the court might view a s 321 no-action letter on the interpretation of the Securities and Futures Act from a statutory regulator like the MAS, which conversely is not binding. However, given the retreat from administrative deference even in the US[93], it is likely that Commonwealth courts in general will continue to take the views of regulators into account but only up to a point. Interestingly, however, the September 2024 UK Property (Digital Assets Etc) Bill which recognises that many digital assets are neither things in possession nor action, but are a third form of personal property, also recommends the use of non-binding industry guidance to assist the development of the common law in defining which digital or electronic rights fall within this new category of things given the likely complexity of digital assets going forward.[94] So the issue of judicial deference to administrative agencies or even industry practice remains.

[91] The court acknowledged in *Sabana AD, ibid* [30] that "Quarz also argued that there was no principle of law or authority to the effect that the court should give deference to the SGX's decision".

[92] *FAI Insurances Ltd v Pioneer Concrete* (1986) 10 ACLR 801 at 812 *per* Kirby P.,

[93] *Loper Bright Enterprises v. Raimondo* 603 US 369 (2024), 144 S Ct 2244, overruling *Chevron USA Inc v National Resources Defence Council, Inc* 467 US 837 (1984).

[94] Ministry of Justice, Press Release, *New Bill Introduced in Parliament to Clarify Crypto's Legal Status*, 11 September 2024. For a private law misrepresentation/unjust enrichment decision on cryptocurrency, see *da Silveira, Virgilio Tarrago v Hashstacs Pte Ltd* [2024] SGHC(I) 32.