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25. SECURITIES AND FINANCIAL SERVICES REGULATION

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General

25.1 There were about ten cases in 2018 involving securities or capital markets regulation, as the area may increasingly become known in Singapore with the coming into effect of the Securities and Futures (Amendment) Act 2017[1] in October 2018. This is because one of the main changes introduced was the enhanced coverage of the Securities and Futures Act[2] to include over-the-counter ("OTC") "derivatives contracts" as opposed to just exchange-traded "futures contracts" for, amongst other things, licensing purposes and exchange approval. At the same time, many of the provisions in the Act now apply to "capital markets products" rather than just "securities" or "futures contracts" through a streamlining process that has removed, for example, the duplication of provisions covering market abuse (although there are now a separate set of provisions on market abuse for the area of "financial benchmarks").[3] At the same time, provisions that in the past were peculiar to just "securities", such as prospectus requirements, now apply to "securities" as well as "securities-based derivatives contracts", although there may be more exclusions or exemptions in the case of the latter. For example, with the securities-based derivatives contracts, there is often a partial exemption under s 277 of the Securities and Futures Act in the case where the underlying is a share in a listed company, and what is needed instead of a full prospectus is an offer information statement.

1 Act 4 of 2017.
2 Cap 289, 2006 Rev Ed.
3 There is an authorisation requirement and administrators need to produce a code on a designated benchmark, and providers of information need to be authorised or exempted as "benchmark submitters". The new Div 2 of Pt XII of the Securities and Futures Act (Cap 289, 2006 Rev Ed) provides for the offence of manipulation of financial benchmarks such as occurred earlier in the decade with the Singapore interbank offered rate and some other foreign exchange benchmarks.

Securities and Futures Act as "forum mandatory statute"

25.2 It was held in *Goldilocks Investment Co Ltd v Noble Group Ltd*[4] that the Securities and Futures Act was arguably a "forum mandatory statute". Here, the issue was whether the plaintiff, a company incorporated in the United Arab Emirates that held shares in the defendant, a Singapore Exchange ("SGX") listed company incorporated in Bermuda, could be said to be a member of the company. Under the Companies Act,[5] a member had to be registered as such in the company's register of members, and that was also the case under Bermuda law for Bermudan companies incorporated there. By virtue of s 81SJ of the Securities and Futures Act,[6] however, a person that held shares in a listed company that were immobilised in the SGX's Central Depository Pte Ltd ("CDP") would be deemed to be members of the company, and the CDP would not be a member even if listed in the register of members. The problem here was that the plaintiff did not maintain direct accounts with the CDP but held their shares through a sub-account with DBS Nominees Pte Ltd ("DBS Nominees"), which itself had an account with the CDP. The plaintiff applied for a declaration that it was entitled to requisition certain resolutions (including proposing directors)[7] *qua* member at the defendant

4 [2018] 5 SLR 425.

5 Cap 50, 2006 Rev Ed.

6 Depository ("CDP") rules are given the same force and effect as Singapore Exchange Securities Trading Limited rules: Securities and Futures Act (Cap 289, 2006 Rev Ed) s 81ST. Recall though that CDP rules were first introduced into the Companies Act (Cap 50, 1990 Rev Ed) in 1993 and depositors were deemed to be members of the company by the then s 130D of the Companies Act. The Companies (Amendment) Act 2004 (Act 5 of 2004) extended this regime to cover unlisted and foreign shares, as well as units in collective investment schemes by deeming depositors of such securities members in a company or holder of units respectively. All these provisions are now found in Pt IIIAA of the Securities and Futures Act through amendments made by the Companies (Amendment) Act 2014 (Act 36 of 2014), which took effect in January 2016.

7 With the changes introduced by the Companies (Amendment) Act 2014 (Act 36 of 2014), which came into effect in January 2016, s 149B of the Companies Act (Cap 50, 2006 Rev Ed) expressly states that the shareholders can by ordinary resolution appoint directors. Prior to that, the constitution would provide for director appointment. In some situations, however, a shareholders' agreement could override the corporate constitution: *Wellness Group Pte Ltd v Paris Investment Pte Ltd* [2018] 2 SLR 973. The primacy of the shareholders' agreement may only just be with respect to this particular power to appoint directors as the Companies Act was previously silent on this: s 152 only referred to the removal of directors by shareholders' ordinary resolution. As a general position, the corporate constitution should prevail over a shareholders' agreement although courts try to interpret them in such a way that there is no conflict between the two. See now *BTY v BUA* [2018] SGHC 213 at [92], *per* Vinodh Coomaraswamy J:

(*cont'd on the next page*)

company's annual general meeting (which it also sought an interim injunction against) as it held 8.1% of its shares and that it was entitled to exercise all rights as a shareholder and member of the company.

25.3 Aedit Abdullah J held that there was a serious question to be tried despite the defendant company's argument that a person had to be on the company's own register of members as required under Bermudan law to be recognised as such. This was because it was arguable that the Securities and Futures Act, and in particular s 81SJ, could be said to be a "forum mandatory statute, displacing the application of foreign law".[8] The judge acknowledged that the plaintiff's position as sub-account holder did not fall within the literal scope of s 81SJ, but held that:[9]

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

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

Locus standi of bondholders in restructuring

25.5 Similar issues arise with the standing of bondholders in a restructuring exercise involving bond indentures. In *Re Swiber Holdings Ltd*,[10] the trustees of notes issued by the company under its multicurrency debt issuance programme applied to the court for directions as to whether (a) the trustees were the proper party to vote in respect of the notes; and (b) if so, whether, and how, the trustees should take into account the views of the ultimate beneficial owners of the

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> Company law subordinates a shareholders' agreement to company law on the company law plane even if the shareholders' agreement precedes the company's constitution in time and even if obligations in the shareholders' agreement are the source, whether factually or contractually, of the obligations in the constitution.

8 *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425 at [10].

9 *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] 5 SLR 425 at [13].

10 [2018] 5 SLR 1358.

notes in exercising its vote. The notes were issued under the Classical Global Notes structure, where one or more notes representing the entire principal amount of a series were placed with a depository ("the CDP"). The CDP then held the notes on trust for two clearing systems that hold their interests on trust for persons who hold accounts with the clearing systems. These account holders hold the beneficial interest in the notes on their own account, or for clients who are either the ultimate beneficial owners or intermediaries holding their interests for the ultimate beneficial owners. Section 81SJ did not apply and Kannan Ramesh J had to apply extant common law as well as interpret the relevant restructuring provisions in the Companies Act in determining how to count the votes for and against the restructuring proposals.

25.6 The trust deed provided that Swiber's obligations to pay out on the notes were owed to the trustee. It was also the trustee's right to institute proceedings against the issuer/borrower to enforce the issuer/borrower's obligations pertaining to the notes except in certain exceptional situations. The issue here, however, was whether bondholders had direct rights to vote in the judicial management of the company, which may have involved a scheme of arrangement. The court held that the ultimate beneficial holders of notes, in those cases, were creditors of the issuer company and might be entitled to vote directly in a judicial management and/or scheme depending on how the restructuring provision was phrased. Some of those provisions gave standing only to the trustee (for example, ss 227M–227N creditor meetings), whereas the bondholders could vote in meetings in place of the trustee to approve a scheme of arrangement under s 227X read with s 210 of the Companies Act. The latter situation was permitted on the basis that the bondholders were contingent creditors, and the common law recognised that contingent creditors could vote in scheme meetings. Where the trustee-only vote in the former situation was concerned, the court analysed four methods to determine how the trustee could still represent the views of the ultimate beneficial owners and opted for the "Split Vote Approach",[11] in which the trustee cast one vote "for" and one vote "against" in terms of number – in the event that the vote was split – and just one vote "for" or "against" where there was unanimity (as s 227N has a majority in number requirement). As for the value of trustee's votes (where s 227N also has a majority requirement), the trustees' voting value would be split to reflect the value of notes voting for and against.

11 *Re Swiber Holdings Ltd* [2018] 5 SLR 1358 at [51]–[53].

Regulation of intermediaries

Capital markets services licence

25.7 Although not a case on the capital markets services licence for one of the seven regulated activities under the First Schedule to the Securities and Futures Act, *Ochroid Trading Ltd v Chua Siok Lui*[12] ("*Ochroid*") may have shown once again the importance of obtaining a licence in the context of the Singapore financial markets.

25.8 In the old case of *Tan Chor Thing v Tokyo Investment Pte Ltd*[13] ("*Tan Chor Thing*"), which involved the pledge of shares with an unlicensed futures broker, it was held by Chan Sek Keong J (as he then was), whose judgment was affirmed by the Singapore Court of Appeal, that the failure to obtain a licence rendered the transaction illegal and unenforceable. On the facts, however, the plaintiff was allowed to recover the shares as he was not in *pari delicto* with the defendants and did not have to rely on the illegal agreement to found his claim to possession of the shares or to support the claim. The court thought that the then Futures Trading Act[14] was intended to protect members of the class of investing public, and the application of the usual canons of statutory construction permitted the court to allow the plaintiff's claim.

25.9 It was, however, strongly arguable that courts today will not find transactions with an unlicensed person illegal for a number of reasons. Cases in the UK have interpreted licensing provisions as protecting the public interest through criminal sanctions, but where the contracts themselves were not forbidden.[15] This would also be consistent with the treatment of contractual illegality where there is failure by the remisier or dealer to obtain the requisite exchange approval. SGX requires dealer's representatives and remisiers to be registered with it as "Trading Representatives" and such persons have to be approved by it under Chapter 7 of the Singapore Exchange Securities Trading Limited (SGX-ST) Rules. In *Theresa Chong v Kin Khoon & Co*,[16] however, it was held that an unregistered remisier was liable to pay his client pursuant to contracted share dealings that the court found not to be contrary to

12 [2018] 1 SLR 363.
13 [1991] 1 SLR(R) 321, on appeal [1993] 2 SLR(R) 467.
14 Cap 116, 1985 Rev Ed.
15 *Hughes v Asset Managers plc* [1995] 3 All ER 669; [1994] EWCA Civ 14. Compare older cases like *Cope v Rowlands* (1836) 2 M&W 149; (1836) 150 ER 707, which the court in *Tan Chor Thing v Tokyo Investment Pte Ltd* [1991] 1 SLR(R) 321 referred to.
16 [1976] 2 MLJ 253. Similarly, in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, it was held that even if there were technical violations of Kuala Lumpur Stock Exchange's rules, that did not invalidate any contracts or render them illegal.

public policy or illegal even though the parties had breached the exchange's rules and by-laws that required the remisier to be registered with the exchange.

25.10 Increasingly, some licensing statutes themselves contain specific provisions to deal with such situations, and this removes the difficulties associated with allocating loss in the case of illegal contracts. For example, Div 11 of Pt 7.6 of Australia's Corporations Act 2001 provides that the person dealing with an unlicensed person has a statutory right to rescind the contract, but this is subject to certain conditions and takes into account the rights of third parties.[17] There is no such equivalent provision in Singapore. Orders under s 325 of the Securities and Futures Act can also be made against unlicensed persons to restrain them from carrying on a regulated activity.[18] As such, the absence of a licence quite often will still result in some form of contractual illegality.

25.11 In *Ochroid*,[19] the Court of Appeal applied a "stultification principle"[20] in the context of illegality where there was a failure by a lender to obtain a moneylender's licence to provide over 700 loans that were disbursed over a period of three years, which it sought to recover in respect of around 70 of them. Although there was an independent cause of action in unjust enrichment on the ground of the total failure of consideration, the importance of the Moneylenders Act[21] and its strict policy towards regulating unlicensed moneylenders, and not just protecting vulnerable borrowers, meant that recovery of the illegal loans was not permitted by the lender.

25.12 In the UK, the trend appeared to be that the courts were moving towards ameliorating the harsh effects of illegality, even in a case involving a conspiracy to commit an offence involving insider trading.[22] In *Patel v Mirza*[23] ("*Patel*"), the majority of the UK Supreme Court criticised rule-based concepts (such as the reliance principle) that had been used to manage the strict consequences of illegality. Since the reliance principle bars a claim if one party is "relying" on the illegality to found his claim, the claim's success would thus turn entirely on how the case is pleaded. Instead, the court favoured taking a more general

17 Robert Baxt, Ashley Black & Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 8th Ed, 2012) at para 13.64.
18 See *Waldron v Auer Pty Ltd* [1977] VR 236; *Von Doussa v Owens* (1982) 6 ACLR 692.
19 See para 25.7 above.
20 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [145]–[148].
21 Cap 188, 2010 Rev Ed.
22 *Patel v Mirza* [2016] UKSC 42.
23 [2016] UKSC 42.

interpretation/policy approach to see if there are any circumstances why the claim should be disallowed. The court will also ask if denying the claim would be a proportionate response to the illegality. Thus, restitution for unjust enrichment is possible and will not be denied by an illegality defence unless, on the facts, that court was offended by the wrongdoing. On the other hand, the minority (which, nonetheless, agreed with the case's result) was concerned that the court's discretion would lead to too much uncertainty. That said, it is not clear that the previous rule-based approach was any more certain as to whether one was "relying" on the illegality or not. Although the law is not fully settled, Lord Toulson (who was in the majority) had previously applied a wider policy approach requiring a determination of statutory policy and balancing of factors.[24]

25.13 The Singapore Court of Appeal in *Ochroid*, however, distinguished *Patel* on the basis that in Singapore, such an approach is only appropriate for contracts tainted by illegality (such as contracts which were not unlawful *per se* but entered into with the object of committing an illegal act), and not where the contract *itself* is prohibited by statute or under the common law (which *Patel* appeared to be). In the latter scenario, no recovery would be possible under the contract itself, so no proportionality or balancing exercise can take place.

25.14 Recovery is only possible on the traditional grounds that the parties were not in *pari delicto* (as in *Tan Chor Thing*),[25] where there is repentance, or where the plaintiff has an independent cause of action as in *Ochroid* itself. For the latter, it did not matter that the plaintiff had to "rely" on the illegality[26] in making the claim – the question was whether allowing it would stultify the very same principle sought to be protected that rendered the underlying contract void and unenforceable in the first place. Here the mischief was not just to protect weak borrowers from "loan sharks" but to prevent unlicensed moneylenders from operating in an environment they clearly understood (the lenders here sought to disguise the extortionate loans as a *bona fide* investment in a joint venture, which did not in fact exist).

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24 See, for example, *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23 at [141] (with Lord Hodge).

25 See para 25.8 above.

26 In *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609, the Court of Appeal said that the rule-based reliance argument (*ie*, that the claim is not affected by the common law illegality because the claim is not relying on it and that there is an independent cause of action) is really a fiction and of narrow application. In the end, it is an overall assessment that the court makes whether the contract should be enforceable based on the application of "a *legal* principle necessarily embodying *normative* elements" [emphasis in original] (at [127]).

Know your client rules and senior management liability

25.15 In 2018, there were a number of developments relating to the 1MDB money laundering investigations, which have been described in previous editions of this chapter. Although not a Singapore case, in November 2018, Tim Leissner, who was at the relevant time an employee of Goldman Sachs, the US firm which managed the bond financing for 1MDB (there were three tranches that raised $6.5bn), pleaded guilty to criminal charges brought in the US by the Department of Justice for conspiracy to commit money laundering, and to violate the US Foreign Corrupt Practice Act of 1977.[27] Leissner admitted to participating in a conspiracy to obtain and retain business from 1MDB for Goldman Sachs through the promise and payment of bribes and kickbacks to government officials in Abu Dhabi and Malaysia, and by embezzling funds from 1MDB for himself and others, and to launder these bribes, kickbacks and funds through financial systems in the US and elsewhere. With these recent developments coming to light, the Monetary Authority of Singapore ("MAS") in December 2018 increased the ten-year prohibition order imposed on him in March 2017 to a lifetime ban under s 101 of the Securities and Futures Act to prohibit him from performing any regulated activity under the Securities and Futures Act, and taking part, directly or indirectly, in the management of any capital markets services firm in Singapore. The MAS also expanded the scope of the initial prohibition order to also prevent him from acting as a director or becoming a substantial shareholder of a capital markets services licensee or exempt person under the Securities and Futures Act. This was appropriate as, given the then evidence available to it in March 2017, the MAS had only found Leissner to have issued an unauthorised reference letter on behalf of Goldman Sachs (Asia) LLC to a financial institution based in Luxembourg where he had made false statements without the firm's knowledge. The scope of the MAS's investigation was in December 2018 expanded beyond individuals to cover the role of Goldman Sachs itself in the misappropriation of funds raised through the bond issues by 1MDB.[28] Although those pertain to criminal liability, issues of fiduciary duties may also arise in the context of civil claims for equitable compensation or an account of profits.

27 15 USC §78dd-1 *et seq*.

28 See Kalyeena Markortoff, "Malaysia Seeks $7.5bn Damages from Goldman over 1MDB Scandal: Singapore Also Deepens Criminal Inquiry over Suspected Money-laundering Claim" *The Guardian* (21 December 2018) and Andrea Tan, "Singapore to Expand 1MDB Criminal Probe to Include Goldman" *Bloomberg* (21 December 2018).

Financial intermediaries' fiduciary duties to investors

25.16 It was held in *Zhou Weidong v Liew Kai Lung*[29] ("*Zhou*") that since the fund manager, the director of a company incorporated to spearhead investments in China, voluntarily undertook the responsibility of managing the client's investment moneys, both the fund manager and the company were fiduciaries (to the client). Accordingly, they owed a duty to act in good faith and for the client's benefit. The fund manager had diverted the moneys to a third-party acquaintance, and was also liable on guarantees for the agreed returns on the investment agreements. Since he was an undischarged bankrupt, other claims in unjust enrichment and for constructive trusteeship were brought against third-party recipients of the moneys. Audrey Lim JC opined that:[30]

> Even if investment or fund managers do not fall within settled categories of fiduciaries, the circumstances of the case justify the imposition of such duties.

25.17 In the US, there is still some confusion regarding the fiduciary standard or best interest duty required of investment advisers and brokers-dealers.[31] In Singapore, *Zhou* confirms that financial intermediaries can, depending on the factual circumstances, be fiduciaries with respect to their clients, even if the intermediaries do not fall within a traditional category of fiduciaries.[32]

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29 [2018] 3 SLR 1236.

30 *Zhou Weidong v Liew Kai Lung* [2018] 3 SLR 1236 at [27].

31 See the proposed Regulation Best Interest by the Securities and Exchange Commission, which opened the rules for a 90-day comment period on 18 April 2018.

32 In *Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd* [2018] 2 SLR 21, the Court of Appeal found that the arguments in the lower court had incorrectly proceeded on breaches of fiduciary duty based on the factual matrix of a joint venture agreement (which were very involved as it gave rise to only certain fiduciary obligations). The correct analysis was that trust property was wrongly administered by the recipient who, as trustee, was clearly subject to the most intense fiduciary obligations, although some of the claims were simply breach of trust/tracing claims rather than claims for secret profits. The difficulty with this case is that it suggests that a share pledge or charge may make the pledgee or chargee a trustee holding the collateral on behalf of the pledgor or chargor, which was rejected by Woo Bih Li J in *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 and *Associated Alloy Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588. It is premised on the retention of beneficial ownership, which was rejected in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 AC 669 and *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14, *per* Aickin J. What is clear, however, is that there is no transfer of legal and beneficial title in a share pledge, which was more accurately termed "shares used as security for the Loan": *Qilin World Capital Ltd v CPIT Investments Ltd* [2018] 2 SLR 1 at [4].

25.18 Nonetheless, the precise incidents of that fiduciary relationship can be altered by contract,[33] and parties can even agree that the intermediary is not a fiduciary at all. This is certainly the case for banker–customer relationships – in *First Asia Capital Investments Ltd v Société Générale Bank & Trust*[34] ("*First Asia*"), it was held that the starting position in Singapore is that a "bank does not ordinarily owe fiduciary duties to its customers given that the relationship between a bank and its customer is contractual".[35] The High Court in *First Asia* confirmed that this position also applied to Société Générale ("SocGen"), because the accounts were execution-only (see also *Deustche Bank AG v Chang Tse Wen*),[36] and the contractual documentation expressly stated that SocGen would not assume any fiduciary responsibility or liability (following *Susilawati v American Express Bank Ltd*).[37]

25.19 In other spheres of financial intermediation, financial institutions do attempt to replicate the banker–customer relationship in order to avoid undertaking fiduciary obligations. However, McMeel has argued, in the context of UK law, that a "judicial willingness to readily disapply fiduciary standards is wholly out of tune with the *zeitgeist*".[38]

25.20 In *Sabyasachi Mukherjee v Pradeepto Kumar Biswas*,[39] the plaintiffs left money with the defendant, an investment adviser and their close friend, who used their investment moneys for the benefit of various companies that the defendant and a British Virgin Islands company (that he nominated) had connections with or interests in. The

33 *Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd* [2018] 2 SLR 21 at [167].

34 [2017] SGHC 78 at [1], discussed in (2017) 18 SAL Ann Rev 680 at 681–682.

35 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [77].

36 [2013] 1 SLR 1310.

37 [2008] 1 SLR(R) 237. See also in the context of financial or corporate finance advisers: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, noted by Joshua Getzler, "Excluding Fiduciary Duties: The Problem of Investment Banks" (2008) 124 LQR 15 and discussed by Andrew F Tuch, "The Paradox of Financial Services Regulation: Preserving Client Expectations of Loyalty in an Industry Rife with Conflicts of Interest" in *The Regulation of Wealth Management: 10th Singapore Conferences on International Business Law* (Hans Tjio ed) (Centre for Commercial Law Studies, National University of Singapore, 2008) at p 53.

38 Gerard McMeel, "Banks, the Judiciary and 'Documentary Fundamentalism'" *Counsel* (April 2015), criticising the use of non-reliance clauses and contractual estoppels, for which see further Kelry Loi & Kelvin Low, "Non-reliance Clauses and the Unfair Contract Terms Act: Welcome Clarity from Singapore" [2014] JBL 155. *Cf* Kelry Loi, "Contractual Estoppel and Non-reliance Clauses" [2015] LMCLQ 346.

39 [2018] SGHC 271.

actions were for breaches of fiduciary duty and in the tort of deceit, although Belinda Ang Saw Ean J ruled out an action for breach of trust because the defendant never directly received the plaintiff's money in respect of the seven disputed transactions (out of the 700 in a long history of the defendant making largely successful investments for the plaintiffs).

25.21 Although Ang J noted that the relationship did not fall within the traditional fiduciary categories, she said:[40]

> A picture that emerges from the evidence is that the parties' relationship is not the conventional relationship between a bank's relationship manager and customer; even though Pradeepto tries to paint it as being no different from the usual. In the parties' dealings, there were clearly matters of a private nature quite separate and independent of Pradeepto's employment at the bank especially for non-bank products (referred to as his 'second role'). It is against this backdrop that this court needs to examine the scope of the obligations which Pradeepto is alleged to have undertaken in relation to the seven investments (*ie*, Pradeepto's second role).

25.22 The defendant had been the plaintiffs' private banker with various banks until he moved to a family office and at the same time became managing director of a financial advisory firm. Although the plaintiffs were not clients of the advisory firm, the defendant continued to advise the plaintiffs in his own personal capacity. Ang J found that the defendant's latter role (not the former) made him a fiduciary. Although the judge found that the plaintiffs were business-savvy, the seven disputed investments were in various private companies (with some at a pre-Initial Public Offering stage), not in bank products which they may have otherwise understood.

25.23 On the issue of whether the defendant breached his fiduciary duties (for example, failure to disclose conflicts of interest), Ang J found that the defendant had done so in six instances. While equitable compensation was ordered for the principal sums invested, reasonable return (on the principal sums) at a notional rate of 7.5% per annum was not awarded because the plaintiffs could not prove what alternative investment opportunities they would have entered into.

25.24 In Singapore, even if fund managers (or other financial intermediaries) are not found to be fiduciaries, they may be liable for the criminal offences of criminal breach of trust as agent (under s 409), or more likely, cheating (under s 420 of the Penal Code)[41] if they accept

40 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [23].
41 Cap 224, 2008 Rev Ed.

clients' moneys but misappropriate it: *Public Prosecutor v Julaiha binte Juraimi*.[42]

Markets and exchange regulation

Over-the-counter markets versus *organised exchanges*

25.25 The issue of whether financial products were traded on an OTC market or on an organised exchange was first explored in the 2016 edition of this Annual Review and by the court in *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)*.[43] At that time, the definition of "futures contract" was inextricably linked to an exchange or organised market. That said, the judge thought that the multilateral system used to trade the forward freight agreements could be considered an exchange – those agreements were thus regulated "futures contracts", subject to market abuse provisions in the Securities and Futures Act.

25.26 A somewhat similar issue arose in *Macquarie Bank Ltd v Graceland Industry Pte Ltd*[44] ("*Macquarie*") where the claim was brought prior to the October 2018 changes to the Securities and Futures Act, which extended the Act's scope to govern OTC derivatives contracts in general (not only for the purposes of trade reporting and clearing).

25.27 In *Macquarie*, the questions were (a) whether commodity swap agreements for 30,000 metric tonnes of urea valued at US$275 per metric tonne were OTC or exchange-traded; and (b) what the terms of the said agreements were. The plaintiff claimed that it was an OTC agreement made on a principal-to-principal basis, which incorporated standard International Swaps and Derivatives Association Inc ("ISDA") Master Agreement terms that allowed it to terminate the transaction and obtain a close-out amount when the defendant wrongly repudiated the transaction by failing to execute certain contractual documentation by the stipulated deadline. The defendant, however, argued that it thought that the swap would be effected by the plaintiff as its agent, broker or fiduciary on an exchange. It disputed the plaintiff's

42 [2018] SGDC 183 (foreign exchange trading). See also Tan Yock Lin, "Liability of Directors for Criminal Breach of Trust: Recovering a Lost Interpretation" [2018] SingJLS 57.

43 [2015] 2 SLR 540, discussed in (2015) 16 SAL Ann Rev 617. See also *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)* [2018] SGHC 228 where the court struck out the plaintiff's claim as an abuse of the process of the court for the plaintiff to continue its claim against the defendants in the light of an open offer made by the defendants under which the plaintiff would receive all the reliefs it was seeking in its claim.

44 [2018] 4 SLR 87.

claims based on mistake, breach of fiduciary duty and fraudulent misrepresentation (or non-disclosure). It argued that the transaction was void or had been avoided, and counterclaimed for losses suffered on these stated grounds.

25.28 The court held that the defendant knew that the swap was an OTC one and, thus, the transaction between the plaintiff and defendant was between sole principals (as opposed to the normal exchange-based relationship, where the plaintiff executed transactions in its capacity as the defendant's agent). Consequently, the defendant did not enter into the arrangement under a unilateral or mutual mistake. As the plaintiff was not the defendant's agent, it also owed no fiduciary duties. In any case, there was no breach even if there had been a fiduciary relationship, nor was there any fraudulent misrepresentation or non-disclosure.

25.29 However, since the ISDA terms had been incorporated into the swap arrangement, the plaintiff was required to act in good faith and to use commercial reasonable procedures to produce a reasonable result when determining the close-out amount. It was held that it was not commercially unreasonable to dump the swaps when the defendant failed to execute certain contractual documentation before the stipulated deadline because the market was volatile and unpredictable, and the defendant would otherwise have been subject to the risk of further adverse price movements.

Primary markets

Prospectus requirements for gold buy-back schemes

25.30 In *Public Prosecutor v Tan Seo Whatt Albert*,[45] the accused was convicted of consenting to the limited liability partnership ("LLP") he was a manager of (as acting Chief Executive Officer), in issuing securities generally to the investing public without compliance with the prospectus requirements in s 240 of the Securities and Futures Act. He was convicted of 20 charges under s 331 (which extends corporate criminal liability to individuals who consented to or connived with the entity, amended in 2005 to include LLPs with the coming into force of the Limited Liability Partnerships Act)[46] of selling gold memberships, with 49 other charges taken into consideration in sentencing. There were three variants of such memberships offered between June 2010 and November 2011, under which each investor that purchased a membership entered into a contract with the LLP by signing an

45 [2018] SGDC 247.
46 Cap 163A, 2006 Rev Ed.

application form. In all, 853 memberships were sold to 547 investors (none of whom were accredited investors), and worth almost $30m. The form set out the salient terms, which included the investor receiving a gold bar that it continued to hold on trust for the LLP but where the investor would receive quarterly or bi-annual fixed payments. The investor could terminate the arrangement upon giving one month's notice whereupon it would receive the original membership fee or the prevailing market rate, minus an administrative fee (whichever was higher) and would return the gold bar to the LLP. At the same time, the LLP could call back the memberships whereupon the investor could either keep the gold bar, sell the gold to a third party or return the gold bar and obtain the market value of the membership from the LLP. District Judge Carol Ling Feng Yong held that the memberships were debentures that were secured by the gold bars as collateral (likely some form of lien) even though they were held on trust for the LLP.[47]

25.31 Unlike the sentencing position taken in respect of the other offenders involved in the same case (even for the accused's girlfriend and a partner in the LLP), where the Prosecution was content with fines, the Prosecution sought an imprisonment term of 12 to 16 weeks for the accused as he was the controlling mind behind the entire scheme. The judge, however, thought that a fine was sufficient given that:[48]

> … [a]s in the case for the majority of strict liability offences, this offence of making an offer of securities without a prospectus may also be seen as an offence that is more regulatory in nature, as opposed to being '*criminal*'. [emphasis in original]

47 This shows the danger of mixing trusts and security interests that was discussed at n 33 above (with the location of beneficial title there with the lender rather than the borrower, as is the case here.) Perhaps the best way to describe security *interests* is how Aedit Abdullah J described the charge recently in *Jurong Aromatics Corp Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [45]:

> As a charge is an encumbrance on the full equitable ownership which exists to benefit the chargee, it differs from an assignment, as currently understood, which is a transfer of ownership of some portion of interest in the property. This is reflected in the definition of a charge as a non-possessory security whereby the charged property is appropriated to the discharge of an obligation without any transfer of ownership (see para 6.17 of *The Law of Security and Title-Based Financing* by Hugh Beale, Michael Bridge, Louise Gullifer & Eva Lomnicka (Oxford University Press, 2nd Ed, 2012)). The important aspect is the appropriation of the property for a specific purpose, *ie*, the discharge of a primary obligation, by way of the security interest.
>
> This avoids the "necessary implication of the property conveyance theory … that encumbered property has multiple owners": Lynn M LoPucki, Arvin I Abraham & Bernd P Delahaye, "Optimizing English and American Security Interests" (2013) 88 Notre Dame L Rev 1785 at 1788. See now *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680.

48 *Public Prosecutor v Tan Seo Whatt Albert* [2018] SGDC 247 at [18].

25.32 There was no fraudulent or dishonest conduct in this case, and the judge thought that it was not completely clear that gold memberships were securities at that point in time. This has been confirmed by amendments to the definition of "debentures" by the Securities and Futures (Amendment) Act 2017, which came into effect in October 2018, to include gold buyback schemes, along with the necessary changes to the definition of "collective investment scheme" to cover land-banking. The judge also noted that this was the first prosecution brought under s 240, and felt that a fine was more appropriate although this had to be substantial enough "to send a clear and strong signal to all industry players to take their disclosure obligations seriously, as well as to meet the element of public interest in this case".[49] The accused was fined $600,000 for the 20 charges he was convicted of (and in default of payment, 60 months' imprisonment).

Secondary markets

Market abuse – Share buybacks

25.33 Although not traditionally seen as part of securities regulation, unlike insider trading or the use of misleading and deceptive devices under s 201 of the Securities and Futures Act which have been exhaustively explored by the courts in recent years,[50] perhaps abusive share repurchases should be seen as such, given how the sheer amount of buybacks have driven US securities markets to record levels. This was often based on corporations substituting equity for debt, thereby raising the amount of leverage, and helps explain why US stock prices were so high in 2018 but yet the total number of publicly traded companies on US markets was falling at the same time.[51]

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49 *Public Prosecutor v Tan Seo Whatt Albert* [2018] SGDC 247 at [40].

50 Surprisingly, there does not appear to be any cases in these areas in 2018, perhaps because parties settled out of court given the equilibrium that has now been reached in the law, although the trial in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 3 commenced in the last quarter of 2018. In 2017, the Singapore International Commercial Court dismissed an application for summary judgment pursuant to O 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) for breach of contract and breach of trust against B2C2 Ltd which operated a currency exchange platform which enabled third parties like Quoine to trade Bitcoin and Ethereum for other virtual currencies or for fiat currencies such as the Singapore or US dollars: [2018] 4 SLR 1. There were statements made in *B2C2 Ltd v Quoine Pte Ltd* [2018] 4 SLR 67 with respect to the disclosure of evidence in court litigation about possible market abuse concerning the prices of these cryptocurrencies following a market outage.

51 Jeff Sommer, "Perils Lurk in Shrinking List of Stocks" *The New York Times* (6 August 2018).

25.34 The unsustainability of such practices may have now led to the bear markets that were experienced in the last quarter of 2018 as borrowing costs started to increase. The danger of the abuse of share buybacks, or even capital reduction generally, is minimised in Singapore because most forms of permitted capital reduction would require a solvency statement as well as various forms of shareholder approval. Creditors are also permitted to challenge the buyback or reduction.

25.35 The rules in the Companies Act are, however, extremely technical, and the Ministry of Finance in October 2012 recommended that the on-market share repurchase and the odd-lot programme provisions be moved to the listing rules as these are additional rules applicable to listed companies only, even though this had not been recommended by the Steering Committee previously in 2011. These recommendations were ultimately not included in the Companies (Amendment) Act 2014.[52]

25.36 However, this reflects the ongoing debate within the regulatory authorities and the Legislature about whether such provisions should be placed in corporate law or securities law, since they straddle both laws. The line between the two is not always clear. For example, the Securities and Exchange Commission ("SEC"), the US's federal securities regulator, attempted to force exchanges to adhere to a common policy towards weighted voting in 1987.[53] Although the SEC failed, partly because that was a matter of state corporation law, it succeeded in convincing the exchanges to adopt certain corporate governance measures, such as restrictions on weighted votes akin to r 19c-4[54] and audit committees. In Singapore, however, these matters are clearly part of company law, even if they pertain only to listed companies – ss 64 (one equity share for one vote, now deleted by Companies (Amendment) Act 2014) and 201B (audit committees, still in force). Due to the search costs involved, it can be argued that the share repurchase provisions should continue to be located where similar provisions are located in equivalent legislation around the world, and this would usually be in the Companies Act.

25.37 In *International Healthway Corp Ltd v The Enterprise Fund III Ltd*,[55] the plaintiff, listed on the Catalist, was advanced moneys by the defendants to "fund the general working capital". The defendants were

52 Act 36 of 2014.

53 See r 19c-4, promulgated under §19(c) of the US Securities Exchange Act 15 USC (1934), which was adopted in 1988 but invalidated in *Business Roundtable v Securities and Exchange Commission* 905 F2d 406 (DC Cir, 1990). Plans for a federal corporate governance law in the early years of the Securities and Exchange Commission never took off.

54 Promulgated under §19(c) of the US Securities Exchange Act 15 USC (1934).

55 [2018] SGHC 246.

given security over shares in the plaintiff purchased by one of the defendants on the open market on behalf of the plaintiff. The court found that those shares were to be held on trust for the plaintiff, who defaulted on the loan and then sought to avoid the transactions on the basis that they were related to the acquisition of its own shares in breach of s 76(1A)(*a*) of the Companies Act. Direct and indirect share repurchases are *prima facie* void under s 76A(1), but the court found the acquisition by the purchasing defendant on the market was not caught by the provision.[56] Instead, the trust arrangement was caught as an indirect acquisition by the plaintiff of its own shares, because the equitable interests they obtained under the trust were "units" as described in s 76A(1) of the Companies Act. The arrangement did not fall within the exception for "book-entry securities" in s 76A(1A), which was intended to prevent the situation where an upstream avoidance of a scripless transaction leaves downstream parties in those securities in an uncertain position with respect to title to the securities. Consequently, the trust arrangement was void; thus, the beneficial ownership of the shares did not pass to the plaintiff but remained instead with the purchasing defendant (the share prices had, however, collapsed from $0.31 to $0.10 after the SGX issued a warning that 60% of the trades in the plaintiff company shares appeared to be by connected persons).

25.38 Another issue was whether, under s 76A(2), the loan agreement and security arrangements were "related to" the share buybacks. If so, the agreement would be voidable at the option of the company. Hoo Sheau Peng J held that what is considered "related" requires a fact-specific inquiry, bearing in mind the mischief of the prohibition against share buybacks, which includes both the protection of creditors against capital reduction and the protection of the investing public against market manipulation of the company's share price through the use of the company's money.[57] As both transactions were related, the plaintiff company did not have any contractual liability to the defendants who, knowing that the company intended the share buyback solely to combat short-selling in its shares, had advanced money to the company pursuant to those transactions.[58] Rescission was not barred even though

56 See Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at paras 13.024–13.037.

57 *International Healthway Corp Ltd v The Enterprise Fund III Ltd* [2018] SGHC 246 at [59].

58 *International Healthway Corp Ltd v The Enterprise Fund III Ltd* [2018] SGHC 246 at [61]. With the coming into effect of the Securities and Futures (Amendment) Act 2017 (Act 4 of 2017), short-sell orders not only have to be marked/disclosed to an approved exchange but short positions beyond a certain threshold (0.2% of total issue shares or $2m) have to be reported to the Monetary Authority of Singapore. Short-selling is not *per se* prohibited under the Securities and Futures Act (Cap 289, 2006 Rev Ed).

the company directors affirmed the transactions. Barring rescission here would undermine the purpose of protecting the company's capital from the improper acts of the directors (who were later replaced by an entirely new board which commenced the action). Hence, the plaintiff company was entitled to the full protection of the statutory provisions. The judge also held that third party rights, a bar to rescission at common law, would be a factor considered under the provision of "just and equitable" relief under s 76A(4).