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27. SECURITIES AND FINANCIAL SERVICES REGULATION

Hans **TJIO**
LLM (Harvard), MA (Cambridge);
Advocate and Solicitor (Singapore); Barrister (Middle Temple);
Professor, Faculty of Law, National University of Singapore.

27.1 The eclectic nature of securities regulation can be seen in the selection of cases discussed in this Annual Review. There were few traditional Singapore cases involving insider trading or prospectus disclosure[1] but important ones about a restructuring of a business trust in the US which concerned a Singapore real estate investment trust ("REIT"), Eagle Hospitality Trust, as well as a case dealing with an old company law principle that prevents a shareholder from claiming for damages for loss to its value of shares while it has not rescinded the contract through which it purchased those shares. Both show the difficulties of applying corporate and securities laws to entities which have some but not all the attributes of the modern-day registered company.[2]

I. Bond and business trust restructuring

27.2 It has been argued elsewhere that there is now renewed conflict between shareholders and creditors given the amount of share repurchases and dividends paid to shareholders even when a company may not be doing well.[3] Where the former is concerned, previous Annual Reviews examined both the High Court and Court of Appeal decisions in *Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd*[4] which had held

1 *Cf Tendcare Medical Group Holdings Pte Ltd v Gong Ruizhong* [2021] SGHC 80 which involved an allegation that the director of Tendcare had conspired to induce institutional investors to invest in Tendcare by claiming that it intended to carry out an initial public offering ("IPO"). The money was instead misappropriated by the directors and Tendcare was placed under judicial management. The court found that the IPO was a fraudulent scheme and the funds had been misappropriated for other purposes. The court also found the directors of Tendcare liable for fraudulent trading, breach of fiduciary duties, and unjust enrichment.

2 Which is one that is registered under the Companies Act 1967 (2020 Rev Ed): see John Armour, "Companies and Other Associations" in *English Private Law* (Andrew S Burrows ed) (Oxford: Oxford University Press, 2013) at p 128.

3 Wee Meng Seng & Hans Tjio, "Singapore as International Debt Restructuring Centre: Aspiration and Challenges" (2022) 57(1) *Texas International Law Journal* (forthcoming).

4 [2019] 2 SLR 524, discussed in (2019) 20 SAL Ann Rev 688, affirming *International Healthway Corp Ltd v The Enterprise Fund III Ltd* [2018] SGHC 246, discussed in (2018) 19 SAL Ann Rev 754.

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that a transaction (including the provision of a credit facility) carried out for the purposes of allowing International Healthway Corp Ltd ("IHC", a company listed on the Catalist board of the Singapore Exchange ("SGX")) to purchase shares in itself to counter a short-selling attack was void pursuant to s 76A(1A) of the Companies Act.[5] This was because it had not obtained the necessary shareholder/creditor approvals for the buyback. In *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd*,[6] the Court of Appeal allowed IHC's action to hold the Crest Entities and IHC's former officers liable for damages suffered by IHC in connection with the void transaction.

27.3 The world also waits with bated breath the UK Supreme Court judgment in *BTI 2014 LLC v Sequana*[7] ("*BTI*") which has heard a drawn-out appeal from the Court of Appeal decision that a dividend paid to a holding company by its subsidiary when the subsidiary had a large contingent liability for environmental clean-up costs was a conveyance at an undervalue intended to defraud creditors even though the subsidiary was not insolvent at that time. In that case, the subsidiary became insolvent only ten years after the dividend payment, but the Court of Appeal also held that its directors, whose duty is to act in the best interest of the company, had to take into account creditor interests at the time where there was a "real, as opposed to a remote, risk of insolvency",[8] which was not the case here. In any case, that duty did not give rise to any right on the part of creditors to bring an action against the directors. Any wrong caused by the wrongful payment was to the company, and it was the proper plaintiff to bring an action against the directors. It has been highlighted[9] that Rose J at first instance in *BTI* had acknowledged that there may have been a separate duty owed by directors under the proper purpose rule that may have been of assistance to the claimants, but this was not followed up by counsel in the Court of Appeal.

5 Cap 50, 2006 Rev Ed.

6 [2021] 1 SLR 1337.

7 [2019] 2 All ER 784; [2019] EWCA Civ 112, noted in Rosemary T Langford & Ian M Ramsay, "The 'Creditors' Interests Duty': When Does It Arise and What Does It Require?" (2019) 135 LQR 385. Pending judgment in the UK Supreme Court after it was first heard in March 2020 and then adjourned to May 2021.

8 *BTI 2014 LLC v Sequana* [2019] 2 All ER 784; [2019] EWCA Civ 112 at [107]. For a recent decision on s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), now replaced by s 438 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (which is similar to s 423 of the UK Insolvency Act 1986 (c 45)), see *Rothstar Group Ltd v Leow Quek Shiong* [2022] SGCA 25 (legal mortgage not a voluntary conveyance to defraud creditors).

9 Hans Tjio, "Rethinking Share Repurchases" (2021) 16 *Capital Markets Law Journal* 141.

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27.4 COVID-19 has tipped the balance even further in favour of shareholders in many countries with, for example, the suspension of wrongful trading rules which are intended to stop a company incurring further debts when there is no reasonable possibility of repaying them.[10] As the leading UK corporate law academic Paul Davies has said, however, "continued trading in the vicinity of insolvency might be absolutely the right thing".[11] At the same time, in Australia, the continuous disclosure rules for listed companies have been relaxed due to COVID-19. In May 2020, the federal government introduced the requirement that listed companies would only be liable if they knew or were reckless or negligent with respect to whether information would, if it were generally available, have a material effect on the price or value of their securities. Then, in December 2020, the Australian Parliamentary Joint Committee Report recommended that this change be made permanent to align the standards with those in the US and UK. Their continuous disclosure regime is otherwise based on what the reasonable investor needs to know regardless of the issuer's state of mind, but with COVID-19 this was seen to set too high a standard. Singapore had studied the extant Australian position during the drafting of the Securities and Futures Act 2001[12] ("SFA") in 2001 and the initial consultation bill had a somewhat similar position. However, as enacted in 2002, s 203 of the SFA set the standard for civil penalty or liability as one of negligence, and criminal sanction fraud or recklessness. While this shows that so far the right balance has been obtained, and COVID-19 has increased the imperative (rightly so) to preserve existing businesses, the Ministry of Law[13] has said that they are monitoring the balance to make sure that it is maintained in the longer term. Too much protection for management, especially in insider-type companies where they are tied to the controlling shareholder, can create moral hazards.

27.5 It may be too simplistic to say that correlation is not causation, as there is clearly increased probability that the bond defaults that are being witnessed everywhere has some link to these changes. This leads to bond workouts and restructurings as haircuts and variation of bondholder

10 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) Div 2. See the suspension of wrongful trading in various jurisdictions due to COVID-19 discussed by Kristin van Zwieten *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 (11 April 2020). See now the UK Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (SI 2020 No 1349).

11 Paul Davies, *Introduction to Company Law* (Clarendon, 3rd Ed, 2020) at p 236.

12 2020 Rev Ed.

13 K C Vijayan, "S'pore's Restructuring Regime Even-handed, Neither Pro-creditor nor Pro-debtor: MinLaw" *The Straits Times* (9 November 2020).

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rights are needed. In Singapore, there has been a significant number of defaults on wholesale bonds listed on the SGX since 2016, which includes those of many foreign entities, as well as some companies and business trusts set up in Singapore. Then, in 2018, the first retail perpetual securities issued by Hyflux (which the restructuring court found ranked *pari passu* with an earlier tranche of preference shares, and may thus have required the consent of those earlier preference shareholders under s 74(6) of the Companies Act 1967)[14] defaulted. In Singapore, most restructurings have taken the form of formal schemes of arrangement, which since the Companies (Amendment) Act 2017[15] (now Insolvency, Restructuring and Dissolution Act 2018[16] ("IRDA") which came into force in July 2020) has some elements of Chapter 11 woven into it. Previous Annual Reviews have discussed the success of this phenomenon (although it failed in Hyflux which then entered into judicial management at the end of 2020).

27.6 Where the restructuring of REITs and business trusts (as opposed to companies) are concerned, however, the issue has been with respect to jurisdictional basis for such schemes. It is ostensibly O 80 r 2 of the Singapore Rules of Court[17] ("ROC") or Pt 64 of the UK Civil Procedure Rules[18] which gives the court supervisory jurisdiction over trusts. In the restructuring of Soilbuild, however, at the court hearing approving the scheme, Vinodh Coomaraswamy J reportedly expressed "great interest in a separate question as to where the legal basis of a REIT trust scheme can be found" and said that it was "mindful of the fact that (it had) doubts about the basis on which the rights of unitholders can be expropriated, even under a trust scheme".[19] This was so even though in the earlier decision of *Re Croesus Retail Asset Management Pte Ltd*,[20] the High Court analogised the listed business trust there with the corporate form for restructuring purposes and said that it was "apparent that the proposed orders largely paralleled that in an application for a scheme of arrangement under section 210 of the Companies Act".[21]

27.7 While this issue has not been fully resolved in the Singapore appellate courts, useful guidance can be gained from the Delaware

14 2020 Rev Ed.
15 Act 15 of 2017.
16 2020 Rev Ed.
17 2014 Rev Ed.
18 The Civil Procedure Rules were made pursuant to the UK Civil Procedure Act 1997 (c 12), which replaced the Rules of the Supreme Court 1965 (SI 1965 No 1776) and County Court Rules 1981 (SI 1981 No 1687), and which came into force on 26 April 1999.
19 Rae Wee, "Reits Should Be Careful with Trust Schemes of Arrangement" *The Business Times* (1 July 2021).
20 [2017] 5 SLR 811.
21 *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [6].

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Bankruptcy Court which decided on the Chapter 11 restructuring of the US assets (which were in effect all the assets) of Eagle Hospitality Real Estate Investment Trust ("EH-REIT"),[22] an authorised collective investment scheme under the SFA. This had its initial public offering and listing in May 2019. Problems arose with its prospectus disclosure made exclusively to non-US investors in relation to the lack of financial information in relation to six hotels in the EH-REIT stable of assets of 19 US hotels. Further continuing disclosure breaches are still under investigation.[23] With the onset of COVID-19 affecting the hospitality industry, the counter was suspended in March 2020 without having paid any dividend to its unitholders. The gearing ratio of 45%/50% prescribed by the Code of Collective Investment Scheme was also waived as its debts grew. In December 2020, the REIT manager was removed by the REIT trustee pursuant to a directive of the Monetary Authority of Singapore. In January 2021, the Singapore High Court gave various orders to assist EH-REIT in that although it had not been able to appoint a replacement REIT manager, the REIT trustee was empowered to take any action it deemed "necessary for the management and administration of [EH-REIT] and its business".[24] In particular, the REIT trustee sought and obtained power to take immediate action on behalf of EH-REIT to join the Chapter 11 cases that had been commenced with respect to its special purpose vehicle ("SPV") affiliates in the US. Almost immediately, Chapter 11 proceedings in respect of EH-REIT itself commenced in the US Bankruptcy Court in the District of Delaware. The basis for the court assuming jurisdiction under Title 11 US Code was, however, challenged by a major creditor on the basis that EH-REIT was not a "business trust" registered under the Business Trusts Act 2004[25] (it was stapled to an inactive trust that was) and that it was not a separate entity needed for filing for bankruptcy protection. Title 11 US Code provides that only "a person … may be a debtor" under Chapter 11. It goes on, however, to state that this includes a "corporation" which in turn includes a "business trust".

27.8 Chief Judge Sontchi[26] held that EH-REIT was a business trust eligible to file for Chapter 11 bankruptcy. The judge held that the law

22 *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021). The author of this chapter was an expert witness in that case.
23 Fiona Lam, "MAS, Police Launch Probe into EHT Current, Former Directors over Disclosures" *The Business Times* (6 June 2020).
24 *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021) at 16.
25 2020 Rev Ed.
26 Judge Christopher Scott Sontchi was in November 2021 appointed an International Judge of the Singapore International Commercial Court, which jurisdiction has been expanded to include all international and commercial insolvency, restructuring and dissolution cases.

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applicable to the test of whether it was a business trust was Singapore law, not federal bankruptcy or common law (although the learned judge noted that "the weight of authority falls in favor of applying federal common law").[27] Instead, preferring the "bedrock" Supreme Court decision of *Butner v United States*,[28] the judge held that the insolvency or bankruptcy process should not alter pre-bankruptcy entitlements, as that would give people the incentive to trigger off the insolvency processes to reorder their rights.[29] Given that the expectations of the contracting parties were that Singapore law would govern EH-REIT, Chief Judge Sontchi held that EH-REIT was an "eligible debtor" under the Bankruptcy Code. The judge acknowledged that this was partly because "[t]he Trust Deed makes clear that acts taken by the REIT Trustee in its capacity as trustee of EH-REIT bind EH-REIT, and not [the Trustee]".[30]

27.9 Chief Judge Sontchi found that EH-REIT was a business trust under Singapore law and that it did not need legal personhood for this to be so, although he also thought that if legal personality were required for a business trust, it had "some attributes of legal personhood, which are sufficient to support a finding that it is a business trust".[31] Cross-border issues, however, cloud matters. It may be that another business trust could have difficulties being recognised in a different jurisdiction which, unlike Delaware or the US, does not have its own business trust legislation or familiarity with such. Even in the US, there were still complications with the actual liquidation plans of EH-REIT given their complexity that were objected to by the US Trustee, which is the US Department of Justice's bankruptcy watchdog.[32] This was on the basis that the plan would not allow the hypothetical, reasonable and average investor enough information to make an informed judgment of the plan which is consistent with the required test for a scheme of arrangement in Singapore – that the arrangement is such that an intelligent and honest

27 *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021) at 20.

28 440 US 48 (1979), discussed in Judge Sontchi's Opinion, *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021) at 19–20.

29 Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986); Douglas G Baird & Anthony J Casey, "Bankruptcy Step Zero" (2012) Sup Ct Rev 203 at 204. See also Douglas G Baird, *Elements of Bankruptcy* (Foundation Press, 4th Ed, 2006) at p 6.

30 Judge Sontchi's Opinion, *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021) at 5.

31 Judge Sontchi's Opinion, *In re EHT US1, Inc, Chapter 11* Case No 21-10036 (CSS) (1 June 2021) at 28.

32 Uma Devi, "Liquidation Plan for Eagle Hospitality Trust Units Is 'Convoluted, Complex and Confoundingly Dense': US Trustee" *The Business Times* (2 November 2021). The US Trustee oversees the administration of Chapter 11 bankruptcy cases and private trustees. Its duty is to monitor and comment on plans and disclosure statements filed in such cases.

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man, a member of the class concerned and acting in respect of his interest, might reasonably approve.[33]

27.10 While Chief Judge Sontchi dismissed the US Trustee's concerns and approved the liquidation plans,[34] it is with respect to the other aspect of his decision with respect to the business trust as an entity that will be examined here. Whereas the company has had difficulties with too much risk taking in order to boost short-term shareholder value,[35] the business trust has lower risk-reward ratios due to the duty of impartiality which imposes on trustees the need to balance the interest of income and capital beneficiaries or unit-holders.[36] It has also been argued that business trusts are much better placed to capture modern goals of sustainability and corporate purpose.[37] They, however, also partition assets, though perhaps not as fully as the company due to weaker capital lock-in.[38] Consequently, it is important that the essential attributes of legal personhood are understood.[39]

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33 *Re National Bank* [1966] 1 WLR 819 at 829A–829E; *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123. The focus in Singapore is also on the quality of disclosure in assessing schemes: *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629; *Re Econ Corp Ltd* [2004] 1 SLR(R) 273; *Re Horizon Knowledge Solutions Pte Ltd* [2004] SGHC 270; *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112; *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77.

34 Tan Nai Lun, "US Bankruptcy Court Confirms EHT's Chapter 11 Plan to Liquidate Entities" *The Business Times* (27 December 2021); "Eagle Hospitality Units' Plan to Liquidate in Bankruptcy Approved" *Bloomberg Law* (21 December 2021).

35 One of the most egregious examples being the Boeing saga with the 737 Max: Jonathan Ford, "Boeing and the Siren Call of Share Buybacks" *Financial Times* (4 August 2019).

36 Steven Schwarcz, "Commercial Trusts as Business Organisations: Unravelling the Mystery" (2003) 58(2) *Business Lawyer* 559 at 577.

37 Lee-Ford Tritt & Ryan S Teschner, "Re-Imagining the Business Trust as a Sustainable Business Form" (2019) 97(1) Wash U L Rev 1. At a moral level, it may have more of a separate personhood than a company which some saw as driven only by shareholder value; *cf* Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85(2) Va L Rev 247.

38 See Margaret M Blair, "Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century" (2003) 51(2) UCLA L Rev 387 at 450 *ff* discussing the weaker formal capital lock-in of partnerships in general.

39 In 2011, when the Company Law Review Steering Committee decided to extend the registration of company charges to other business entities to improve the clarity of what is being disclosed, it said (Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act: Consultation Paper* (June 2011) at p 6-7, para 27):

> To illustrate, if a REIT takes out a secured loan, the charge is registered against the trustee. However, if a third party were to undertake an inspection of the register of charges of the trustee, it would come across a number of charges which would have no real relevance in relation to the obligations in respect of that specific REIT (given the other trusts for which the trustee has responsibility over). The tracing of REITs registered under section 131 may involve the

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27.11 In this regard, greater insight into corporate personality has been provided by the recent UK Supreme Court decision in *Hurstwood Properties (A) Ltd v Rossendale Borough Council*[40] ("*Hurstwood*"). This decision confirms that the doctrine of veil piercing in the UK is very narrow as it is about making a company liable for the actions or fault of the controlling shareholders, that is, removing entity shielding that protects the company's assets from the creditors or claimants of the controllers or shareholders, and not *vice versa*, that is, removing limited liability on the part of the shareholders or controllers for any corporate debt or wrong. What was sought here was the latter as two local authorities argued that the veil should be pierced with respect to certain tax mitigation schemes set up by ratepayers using SPVs. These ratepayers were landlords who tried to shift liability for business rates to these SPVs which were granted leases as tenants. These SPVs had no assets or liabilities and in one case was allowed to be struck off the register of companies almost immediately so that liability for business rates then fell on the Crown through *bona vacantia*. In the other case, the ratepayer attempted to take advantage of a special exemption from rates for a company undergoing voluntary winding-up, which is where the SPV was placed shortly after being granted the lease. As a matter of statutory interpretation of the relevant rate legislation, the Supreme Court held that there was a triable issue whether the landlords remained liable for business rates throughout the duration of the leases as the ownership of the property did not in fact shift to tenants.[41] Assuming that it did, however, the Supreme Court refused to pierce the corporate veil and relied on what was said by Lord Sumption in the Supreme Court earlier in *Prest v Petrodel Resources Ltd*[42] ("*Prest*"):[43]

> 'Piercing the corporate veil' is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.

27.12 Even assuming that the SPVs were controlled by the landlords (they were not shareholders; it was instead an individual who was also the SPVs' director), the Supreme Court in *Hurstwood* held that the "evasion" principle of Lord Sumption in *Prest* that was linked to the abuse of separate personality only facilitated making a company liable for breach of an obligation owed by its controlling shareholder. This is quite different

inconvenient process of finding out who the trustee is, and then doing a search of the charges registered under that trustee's name.

40 *Hurstwood Properties (A) Ltd v Rossendale Borough Council* [2021] UKSC 16.

41 The UK Supreme Court reversed the Court of Appeal on this point, which had upheld the High Court on this. On veil piercing, it upheld the Court of Appeal decision which had reversed the High Court.

42 [2013] UKSC 34; [2013] 2 AC 415.

43 *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415 at [16].

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from the obligations or liabilities incurred by the company subsequent to incorporation which is sought to be extended to the controllers due to the perceived unfairness of having a company shield the controllers from liability through things done by the company. Instead, here the court thought that:[44]

> … [t]he abuse in the present case lies in the way in which the SPV's liability for rates is then sought to be dealt with, by the abusive processes by which the SPV is either dissolved or put into liquidation. The law provides comprehensive remedies for abusive behaviour of that kind, which do not require the piercing of any corporate veil.

27.13 Courts in the US[45] and Singapore[46] still maintain a wider notion of veil piercing, but it has been argued that some of that may be captured by the ideas of "concealment" as opposed to "evasion" identified by Lord Sumption that does not require veil piercing.[47] *Prest* and *Hurstwood* would suggest that if it is about removing limited liability there are usually many ways to do this without piercing the corporate veil. Consistent with this, the UK Supreme Court in *Okpabi v Royal Dutch Shell plc*[48] recently held that a holding company can owe a duty in tort and be liable for the acts of a subsidiary to the extent to which the parent took over, or shared with the subsidiary, the management of the relevant activity (something that control by the parent might demonstrate without veil piercing).

27.14 Our recent understanding of what separate legal personality and asset partitioning really means from Hansmann and Kraakman is that it allows for direct claims against the segregated fund by creditors with whom it contracts, and which in turn must be capable of being wound up and restructured, as has been the experience in Singapore with respect to its REITs and business trusts.[49] These were considered "unregistered

44 *Hurstwood Properties (A) Ltd v Rossendale Borough Council* [2021] UKSC 16; [2021] 2 WLR 1125 at [74].

45 See Stephen Bainbridge & Todd Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar, 2016) ch 9. For a comparative view, see Tan Cheng Han, Wang JiangYu & Christian Hofmann, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2019) 16(1) Berkeley Bus LJ 140.

46 Hans Tjio, Lee Pey Woan & Pearlie Koh, *Company Law* (Academy Publishing, 2015) ch 6.

47 Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20; Hans Tjio, "Challenges to Singapore from the Global Financial Crisis" [2013] Sing JLS 168. See further Smadar Ottolenghi, "From Peeping behind the Corporate Veil, to Ignoring It Completely" (1990) 53 MLR 338 and Mariana Pargendler, "Veil Peeking: The Corporation as a Nexus for Regulation" (2021) 169 U Pa L Rev 717.

48 [2021] UKSC 3. See also *Vedanta Resources plc v Lungowe* [2019] UKSC 20. Compare the US Supreme Court's approach in *United States v Bestfoods* (1998) 524 US 51.

49 A strict approach towards prohibiting shareholder personal claims for reflective loss strengthens the asset partitioning effect of the company: see *Sevilleja v Marex*
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companies" under Victorian era corporate legislation and the author has argued elsewhere that this continues to allow them to be liquidated (albeit only involuntarily) and restructured (through analogies with the company since it is not fully a separate entity) under the Companies Act (ss 351 and 210 respectively) here previously and now the IRDA (ss 246 and 64 respectively)[50]. Recently, Chua Lee Ming J in *Tan Huah Sun v Tan Huah Tai*[51] recognised that a partnership can be wound up as an unregistered company under the IRDA and discussed when a receiver should be appointed to preserve the partnership assets and pay its debts while the court takes the usual partnership accounts and supervises the dissolution.

27.15 One argument for this is that some partnerships were registered as companies (albeit unlimited) under early English companies legislation, such as the Companies Act 1862,[52] and so they were not considered "unregistered companies" but were in fact registered companies that came under the full provisions of the then Act (half the sections were concerned with winding-up in 1862). Those that were not so registered could then be wound up as "unregistered companies" as the distinction between those partnerships that were registered as companies and those that were not would otherwise be too stark at a time when we were still feeling our way towards corporate personhood. As will be seen in the next part, however, it is consequently also difficult to rely on the corporate law precedents of Victorian cases dealing with registered but unlimited companies; in particular, prior to the fuller recognition of corporate legal personality in *Salomon v Salomon*[53] in 1897.

Financial Ltd [2020] UKSC 31 which majority position was adopted in *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd* [2021] SGCA 116.

50 Hans Tjio, "Restructuring the Business Trust as Unregistered Companies" (2021) 15(3) J Eq 259. In the UK, all scheme jurisdiction was fully extended to unregistered companies only in 1907 and the provisions were first consolidated in the Companies (Consolidation) Act 1908 (c 69), then by s 153 of the consolidating UK Companies Act 1929 (c 38) which then became s 206 of the UK Companies Act 1948 (c 38). The latter is still found in s 210 scheme provisions of Singapore's Companies Act 1967 (2020 Rev Ed), where "'company' means any company or society liable to be wound up under this Act" with the words in italics drawn from s 181(10) of Australia's Companies Act 1961. This includes unregistered companies so long as it could potentially be wound up regardless of how and whether it is: *Re Punj Lloyd Pte Ltd* [2015] SGHC 321. As to what "liable to be wound up" means, see Philip Morrison, "Cross-border Schemes of Arrangement: Rationalising One Basis for Jurisdiction" [2019] JBL 185 at 190–191.

51 [2022] SGHC 29.

52 c 89.

53 [1897] AC 22.

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II. Securities fraud and litigation

27.16 There is renewed concern in Singapore with respect to the enforcement of securities regulation. In a panel discussion hosted by the Securities Investors Association of Singapore in October 2021, Hong Kong's approach in using a separate market misconduct tribunal was discussed and thought inappropriate for Singapore.[54] One argument is that the regime on continuous disclosure or misleading statements already has statutory backing under the SFA.[55] It has been pointed out elsewhere,[56] however, that contemporaneous investors may find it difficult to bring actions against wrongdoers in this context (with s 203 being the issuer and s 199 the maker of the statement which could be the issuer or a director). While more liberal class-action litigation may help solve some problems (and create others), one hurdle for such actions where a misrepresentation involved an allotment of shares by a company is that it was held in the late Victorian era decision of *Houldsworth v City of Glasgow Bank*[57] ("*Houldsworth*") that a subscriber has to rescind the share purchase contract before damages are obtainable from the company. If any of the bars to rescission applied, the shareholder would be without remedy. One such bar would be if the company was being wound up.[58] There, a partner was induced by director misrepresentation to buy bank stock from the bank, which paid dividends to its partner/shareholders before the bank was wound up after a year and a half with large liabilities (as seen in *BTI*,[59] dividend payments, along with share buybacks, is the *modus operandi* of some controlling shareholders/management in their priority fight with creditors). The partner was on the list of contributories and had to meet large sums for calls. He failed in his claims for misrepresentation to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. Lord Selbourne said:[60]

> Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, *viz.*, the Pursuer; it is to throw upon them the Pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord Cranworth in *Addie*'s Case) may have come and probably did come into the company after the Pursuer had acquired his shares. They are all as innocent of the fraud as the Pursuer himself.

54 Raphael Lim, "Market Misconduct Tribunal May Be Less Helpful in Singapore Context: Panel" *The Business Times* (18 October 2021).
55 See para 27.4 above.
56 Hans Tjio, "Enforcing Corporate Disclosure" [2009] Sing JLS 332.
57 (1880) 5 App Cas 317.
58 As was the case itself in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317.
59 See para 27.3 above.
60 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 329.

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27.17 Lord Hatherly also thought that "[i]n truth the Appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself".[61] Put differently, one cannot approbate and reprobate at the same time. Unlike the situation with goods,[62] one cannot elect to keep the shares and sue the company for damages. While that position has been reversed by statute in the UK by s 111A of the Companies Act 1985,[63] which was inserted by the UK Companies Act 1989[64] (now s 655 of the UK Companies Act 2006),[65] it is a rule which may still be applicable in Singapore, given that no such similar provision has been introduced into an Act which is still largely based on the UK Companies Act 1948.[66] In Australia, however, it was held that the rule does not apply to both purchasers on the open market, and even perhaps subscribers for shares, who have statutory claims for deceptive and misleading conduct against a company that has breached its continuous disclosure obligations.[67] In any case, s 247E of Australia's Corporations Act 2001 now provides that:[68]

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61 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 333.

62 Lord Chancellor Cairns in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 324, said:

> He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way.
>
> Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?

63 c 6.

64 c 40.

65 c 46.

66 See further J A Hornby, "*Houldsworth v City of Glasgow Bank*" (1956) 19 MLR 54 at 185; *Webb Distributors (Aust) Pty Ltd v State of Victoria* (1993) 179 CLR 15; Alexander F H Loke, "The Efficacy of Securities Investors' Rights in Singapore" [2009] Sing JLS 110 at 125; and Hans Tjio, "Enforcing Corporate Disclosure" [2009] Sing JLS 332 at 346.

67 *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1. The claimants would be treated as creditors of the company and would rank equally with unsecured creditors for the amounts of their claims, but this was seen as fatal to the Australian insolvency regime: see Andrew Bilski & Patrick Brown, "Sons of Gwalia *versus* Shareholder Subordination: Fairness *versus* Efficiency' (2008) 26 C & SLJ 93. See also *Cadence Asset Management Pty Ltd v Concept Sports Ltd* [2005] FCAFC 265. See further Elizabeth Boros, "Shareholder Litigation after *Sons of Gwalia v Margaretic*" (2008) 26 C & SLJ 235.

68 Section 247E of the Australian Corporations Act 2001 was introduced via the Corporations Amendment (Sons of Gwalia) Act 2010. At the Second Reading of the Bill, the Parliamentary Secretary tabling the Bill said (see Commonwealth (Australia), Senate, *Parliamentary Debates* (26 November 2010) at 2403:

> Thirdly, the Bill eliminates certain residual common law restrictions on the capacity of a shareholder to recover damages against a company. The 1880 House of Lords decision in *Houldsworth v City of Glasgow Bank* determined that a person who has subscribed for shares in a company may not, while

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> A person is not prevented from obtaining damages or other compensation from a company only because the person:
>
> (a) holds, or has held, shares in the company; or
>
> (b) has subscribed for shares in the company; or
>
> (c) has a right to be included in the register that the company maintains under section 169.

27.18 Singapore courts appeared, however, to have accepted that *Houldsworth* forms part of Singapore law. In *BTY v BUA*,[69] the High Court stated:[70]

> On the company law plane, a shareholder who commences litigation against a company on a claim related to his status as a member cannot at common law recover damages from the company as a remedy for that claim: *Houldsworth v City of Glasgow Bank* [1874–80] All ER Rep 333 and *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15. That is because an award of damages in these circumstances would constitute the shareholder a creditor of the company and elevate the shareholder into impermissible competition with the company's creditors.

More recently, however, Chua Lee Ming J in *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd*[71] ("*Song*") said that:[72]

> The fact that the defendant was an unlimited company and the plaintiff therefore had a proportionate liability to contribute towards payment of the defendant's liabilities (if the assets were insufficient) was a factor that influenced the House of Lords' decision in *Houldsworth*.

27.19 In 2010, the plaintiff, Song, invested $1.5m in redeemable preference shares for a fixed period of five years in the first defendant, Sunmax Global Capital Fund 1 Pte Ltd ("Sunmax"), which was part of Singapore's global investor programme, by way of a private placement. In all, Sunmax, which was set up to own an investment portfolio, raised $65.7m and issued a total of 6,570 preference shares to its investors. The

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> they retain those shares, recover damages against the company on the ground that they were induced by the company to subscribe for those shares by fraud or misrepresentation.
>
> Although case law in Australia has subsequently limited the reach of this decision, there are still situations where a shareholder may unfairly be prevented from suing for damages. The application of the old rule is limited, uncertain and difficult for stakeholders to comprehend. I note that in the United Kingdom, the rule was excluded in all cases by the Companies Act 2006 (UK).

69 [2019] 3 SLR 786.

70 *BTY v BUA* [2019] 3 SLR 786 at [89].

71 [2021] SGHC 217.

72 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2021] SGHC 217 at [82].

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second defendant, Li, was the sole ordinary shareholder and a director of Sunmax.

27.20 In 2016, Sunmax informed Song that the entire investment portfolio had been liquidated and he would receive a cash distribution of $224,510 and an *in specie* distribution of 1,500 shares in a liquidating SPV ("LSPV"). Certain illiquid non-cash assets in the investment portfolio held by Sunmax were to be transferred to the LSPV. Sunmax itself was not liquidated, which as will be seen was an important fact.

27.21 Song claimed that the second defendant, Li, had initially represented both orally and in a 2009 memorandum that Sunmax was a principal-guaranteed fund and that the terms governing his investment also provided that his investment was principal-guaranteed, excluding the management fees. This protection was not found in the subsequent 2010 memorandum accompanying the private placement that was given to later investors. Song brought an action against Sunmax and Li for misrepresentation and conspiracy to injure, and against Sunmax for breach of contract in not redeeming the preference shares in accordance with the earlier memorandum (query if there was implied duty to co-operate with respect to the redemption).[73] The defendants submitted that Song's claims were governed by the 2010 memorandum and also precluded by the principle in *Houldsworth*.[74] In finding for the plaintiff Song, Chua J held that the terms of the 2009 memorandum, which were offered to the initial investors, of which Song was one, prevailed and said that *Houldsworth* was not relevant here for the following reasons:[75]

> In my view, it is doubtful whether *Houldsworth* should be followed. There is much to be said for Professor Gower's criticism that the decision in *Houldsworth* does not recognise fully the separation between the corporate entity and the member. Further, as Gleeson CJ pointed out in *Sons of Gwalia* (at [5]), the 'reality of modern commercial conditions [is that] assets and liabilities usually are more significant for creditors than paid-up capital'.
>
> In any event, in my judgment, the principle in *Houldsworth* had no application to the present case. To the extent that the decision in *Houldsworth* was

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73 See *Easybook.com Pte Ltd v OWW Investments III Ltd* [2021] 4 SLR 996 where See J said that:

> I did not think that the defendant's position was so incontrovertibly made out that it would be dispositive of the main issue, *ie*, whether it had a right to demand that the plaintiff redeem its RCPS. As such, the plaintiff's claim would not have been struck out on this basis without more. However, as noted at [17] above, whether the defendant could rely on the plaintiff's alleged breaches of material terms is immaterial since I had found that the plaintiff failed on the first issue, which formed the core of its arguments on appeal.

74 See para 27.16 above.

75 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2021] SGHC 217 at [97]–[98].

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> influenced by the fact that the company was a partnership and the shareholders had unlimited liability, it is distinguishable. In the present case, Sunmax is a limited company and its preference shareholders (including Song) were liable only for the value of the preference shares that each had subscribed for.

27.22 Chua J's decision recognises that shares were then not reified in the same way as it is today. The company was still seen more as an aggregate of members with ideas of separate bifurcation and asset partitioning not fully developed or understood (at least under *Salomon v Salomon*[76] in 1897). It is quite different today with limited liability companies even if these are seen as an "artificial construct".[77] While the earlier Joint Stock Companies Acts did not really even draw a clear distinction between companies and associations (which bank was such in *Western Bank of Scotland v Addie*,[78] a case followed in *Houldsworth*),[79] the UK Companies Act 1862 did but still registered as companies co-partnerships such as the bank in *Houldsworth* in 1877. There was reference in *Houldsworth* throughout it being a partnership and joint stock company; that it had "articles of co-partnership"; and that the bank was authorised by them to deal in its own shares (seemingly on an open-ended basis) with the claimant seen as a partner not the modern-day idea of a shareholder.

27.23 The qualification of *Houldsworth* and its *ratio* identified by Chua J helps in almost all cases of shareholder litigation in Singapore since companies today invariably create limited liability. There is no issue of a shareholder suing and taking back with one hand what it has promised to give with another as fully paid-up shares are seen as property with no further liabilities attached to them. Further, capital maintenance rules mean that such companies are as a rule closed-ended. But some things remain to be considered in light of the shareholder *versus* creditor priority fight identified earlier as well as securities litigation generally.

27.24 One that may need clarification in the near future is whether s 121 of the IRDA (previously s 250(1)(*g*) of the Companies Act) would apply to the shareholder claim against the company. This provision states that:

> … a sum due to any member in that member's character of a member by way of dividends, profits or otherwise is not a debt of the company payable to that member, in a case of competition between that member and any other creditor who is not a member, but any such sum may be taken into account

76 See para 27.15 above.
77 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77].
78 (1867) LR 1 HL Sc 145.
79 See para 27.16 above.

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> for the purpose of the final adjustment of the rights of the contributories among themselves.

As Chua J noted, this was not in issue in *Song* as Sunmax was not in liquidation (only its portfolio of investments). If it were, there may have been an issue with whether Song's successful claim was due to it being "in that member's character of a member" and consequently subordinated to other creditors. The relevant case discussed by Chua J here is *Soden v British & Commonwealth Holdings plc*,[80] where it appears that the question was whether the claim was linked to the subscription agreement as the equivalent provision in s 74(2)(f) of the UK Insolvency Act 1986[81] was held by the House of Lords to only apply to claims involving the purchase of shares directly from the company. While counsel there had tried to argue that it was illogical to draw a difference between purchase on secondary market and subscription on the primary market, their lordships thought that they had to go with the literal wording of the statute. It affirmed the decision of the Court of Appeal where it was said that:[82]

> … [i]n contrast with the position of a partner in partnership law, the legislature has imposed limiting conditions by requiring the sum due to the member to be so due in his character of a member by way of dividends, profits or otherwise.

27.25 This shows the modern approach to limited companies, which are seen structurally as strong separate entities, whereas in *Houldsworth* the unlimited company there was seen as a form of partnership. English academics, therefore, think that a limited subordination problem remains where the claim is linked to the contract to subscribe for shares from the company.[83] But in Australia, it has in fact been widened due to the fear of shareholder claims, even on the secondary market, causing problems for insolvency restructuring. At the same time that s 247E was introduced to remove the effect of *Houldsworth*, their equivalent of s 121 of the IRDA, found in s 563A of the Corporations Act 2001, was widened to subordinate "any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company" to other creditors. There was a fear that insolvency restructuring would not be possible without this further subordination, which is a different rationale given for subordinating partner claims. We are not bound to follow

80 [1997] 3 WLR 840.
81 c 45.
82 *Soden v British & Commonwealth Holdings plc* [1997] 2 WLR 206 at 220.
83 Andrew R Keay, *McPherson & Keay: The Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 12-016; Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell, 5th Ed, 2018) at para 8-30 includes this as a subordination of claim which they believe remains as a principle despite s 655 of the UK Companies Act 2006 (c 46). See also *Webb Distributors (Aust) Pty Ltd* (1993) 179 CLR 15.

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this in Singapore, but the success of any restructuring regime may be destabilised by these shareholder litigation awards if they have priority not just over other shareholders on their residual claims but are also then treated as creditors *vis-à-vis* other creditors. The advantage of statutory clarification, as was done in Australia even with courts restricting the ambit of *Houldsworth*, is that policy wise we can work out how we want to pitch the shareholder and creditor balance. Australia may have opted to protect creditor rights in restructuring, but we can choose to strengthen shareholder claims, or maintain the status quo as in the UK which only continues to subordinate claims that are linked to the statutory contract.[84] Much depends on which conflict separately identified by Hansmann and Kraakman[85] can or needs to be addressed: management *versus* shareholders; majority *versus* minority shareholders or shareholders *versus* creditors.

27.26 The above has implications for securities class-action litigation as much of that would involve investor claims against the company for inaccurate disclosures or misstatements made on a continuous basis on the secondary markets. These actions for compensation may run aground either because a share transaction cannot be rescinded or because any shareholder claim remains subordinated to unsecured creditors. The more fundamental question raised in that context, which *Song* also implicates, is with the ability to form class actions in the first place. The interesting thing here is that there was another case involving Sunmax and Li on exactly the same facts in *Lou Kan v Li Hua*[86] where Pang Khang Chau J also found Li liable for misrepresentation. The difference in this case was that only Li was sued and not Sunmax. But the factual matrix involving the 2009 and 2010 memoranda was the same. Appeals have been filed by Li in both cases and it would be interesting to see the further development in this regard with respect to consolidated actions or representative actions as even if the precise misrepresentations by Li in the cases would have been different, both could arguably have been brought under a single action. While some representative actions on the capital markets have been seen – for example, the Raffles Town Club and DBS High Notes cases – they are difficult to form as investors need to have the "same interest" in the suit as required under O 15 r 12 of the ROC.[87] In both those cases, the parties were in a direct transactional relationship

84 See also *Joint Administrators of LB Holdings Intermediate 2 Ltd v Lomas* [2017] UKSC 38 and David Milman, *The Company Share* (Edward Elgar, 2018) at para 142-3.

85 Henry Hansmann & Reinier Kraakman, "Agency Problems and Legal Strategies" in Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004).

86 [2021] SGHC 235.

87 See further Eunice Chua, "Representative Proceedings in Singapore: Is the Time Ripe for Reform?" in *Cambridge Handbook of Class Actions: An International Survey*

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over a short period of time. In contrast, where a club sold memberships over a ten-year span and would have made different agreements and representations to the potential members over that period, the Singapore High Court in *Koh Chong Chiah v Treasure Resort Pte Ltd*[88] held that the members did not have the requisite "same interest" needed to form a representative action.

27.27 In the UK, there is now the availability of the Group Litigation Order, introduced in 2000,[89] which is quite separate from their representative actions. This forms the basis for many of their class actions today and the test there is whether they "give rise to common or related issues of fact or law". Singapore does not have this alternative process, but civil procedure lawyers may feel that it is time for consideration to be given to such an action.

III. Market manipulation

27.28 The cases in 2021 in this area involved sentencing as the defendants all pleaded guilty to various charges of market misconduct, often involving price manipulation and/or the use of the trading accounts of others.[90] The most important of these, as it involved sentencing policy, was heard in the High Court by See Kee Oon J in an appeal from the Magistrates Court as to whether the sentence handed down had been manifestly excessive.

27.29 In *Lau Wan Heng v Public Prosecutor*,[91] Lin Eng Jue ("Andrew") formed a scheme to manipulate the price of Koyo International Ltd ("Koyo") shares which were listed on the Catalist board of the SGX. There were in all eight scheme members, including Andrew and the appellant, who have also been slapped with prohibition orders by the Monetary Authority of Singapore ("MAS").[92] The appellant was first a broker and later on a remisier with CGS-CIMB Securities (Singapore) Pte Ltd ("CIMB"). He took part in a contra trading scheme (where buyers buy without paying for the securities as they are sold in the period, usually

(Brian T Fitzpatrick & Randall S Thomas eds) (Cambridge University Press, 2021) ch 17.

88 [2013] 1 SLR 1069.

89 Rules 19.10–19.15 of the Civil Procedure Rules were introduced by The Civil Procedure (Amendment) Rules 2000 (SI 2000 No 221).

90 See also *Public Prosecutor v Ee Cho Lian* [2021] SGDC 124, which involved sentencing for offences pursuant to ss 201(*a*) and 204(1) of the Securities and Futures Act (Cap 289, Rev Ed 2006) with respect to deceptive practices.

91 [2021] SGHC 240.

92 Vivienne Tay, "MAS Bans Four Individuals Involved in Scheme to Manipulate Koyo Shares" *The Business Times* (4 March 2021).

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three days, before payment is due, with only a net sum payable) from 6 February 2015 to 15 January 2016. It was the chief executive officer of Koyo who introduced the appellant to Andrew. On Andrew's directions, the scheme members used various trading accounts under their control to trade Koyo shares amongst one another, as well as with other third parties, and this pushed up the price of Koyo shares. In all, the scheme employed 53 trading accounts in the names of 15 individuals with eight brokerages. The appellant convinced her existing clients at CIMB, as well as her family members who had trading accounts with CIMB and other brokerages, to let her use their accounts to deal in Koyo shares. Those who allowed their trading accounts to be used were given a 10% commission from profits made through their accounts and promised that any losses would be covered by the scheme members.

27.30 On 15 January 2016, SGX issued a "trade with caution" warning. This stated that a "small group of individuals was responsible for 60% of the trading volume of Koyo [between 26 October 2015 and 14 January 2016], of which at least half of these trades were due to this group of individuals buying and selling among themselves".[93] After this announcement, Koyo's share price dropped by almost 84%, from $0.34 on 15 January 2016 to close at $0.056 on 18 January 2016. Koyo's market capitalisation fell by more than $58m and a total of $3,119,034.93 in contra trading losses was incurred in the accounts managed by the appellant. The appellant pleaded guilty and was sentenced to 20 months' imprisonment for the "market rigging offence" under s 197(1A)(*a*) of the SFA in relation to the price manipulation. There was a further six weeks' imprisonment for three "deceptive practice offences" under s 201(*b*) of the SFA,[94] largely in relation to the use of trading accounts of others, all to run consecutively. It was argued on appeal that the sentences were manifestly excessive and that the custodial threshold had not been breached for the offences under s 201(*b*) of the SFA.

93 *Lau Wan Heng v Public Prosecutor* [2021] SGHC 240 at [10].

94 Section 201(*b*) of the Securities and Futures Act 2001 (2020 Rev Ed) prohibits a person from directly or indirectly, in connection with the subscription, purchase or sale of any securities, engaging in any act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, upon any person. It is similar in wording to the US anti-fraud r 10b-5 provision under the Securities Exchange Act 1934 15 USC § 78a *et seq*.

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27.31 See J referred to the earlier decisions of *Ng Geok Eng v Public Prosecutor*[95] and *Public Prosecutor v Ng Sae Kiat*[96] which provided sentencing guidelines for s 197 as well as what the custody threshold may be for the s 201 offence respectively. It was argued by the Prosecution, however, that greater certainty would be obtained with the sentencing framework that it proposed for s 197 of the SFA. See J declined to prescribe a new framework but found that the earlier cases provided enough guidance as "sentencing is always a fact-sensitive exercise".[97] He thought that the sentence of 20 months' imprisonment for the s 197(1A)(*a*) market rigging offence was not manifestly excessive given the harm caused, the financial losses suffered and the distortion of Koyo's market price. For the s 201(*b*) offences linked to the use of trading accounts of others, See J explained *Ng Geok Eng*'s linkage of the non-consent of the account holder to the custodial threshold in this way:[98]

> A term of imprisonment is not the norm where there is no threat to innocent lay person investors, but the court still retains the discretion to determine the appropriate form of sentence where there is consent from the accountholder. This discretion to vary the type of sentence is broader in a situation where there is consent from the accountholder, as compared to a situation where there is no consent from the accountholder.

Hence, even though the account holders here knew that their accounts were used, See J found that the sentence of six weeks' imprisonment for each deceptive practice offence was not manifestly excessive and should run consecutively. Finally, he held that the global sentence was in keeping with the totality principle in sentencing.

27.32 While the s 201(*b*) offence was significantly less serious compared to s 197 of the SFA here as market prices were clearly pushed upwards

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95 [2007] 1 SLR(R) 913. In *Ng Geok Eng v Public Prosecutor* [2007] 1 SLR(R) 913, Tay Yong Kwang J (as he then was) held that for unauthorised share trades prosecuted under s 201(*b*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed), a distinction should be drawn between cases where this is unknown to the account holder as opposed to the situation where the securities firm has not consented to the trades. The former usually requires a custodial sentence but in the latter situation, the appropriate sentence depends on the circumstances of the case.

96 [2015] 5 SLR 167, which provided a non-exhaustive list of factors set out at [38], including the following: (a) the extent of the loss/damage caused to victim(s); (b) sophistication of the fraud; (c) the frequency and duration of the offender's unauthorised use of the relevant account; (d) extent of distortion, if any, to the operation of the financial market; (e) the identity of the defrauded party (*ie*, whether the defrauded party is a public investor or a securities firm); (f) relationship between the offender and the defrauded party; and (g) the offender's breach of any duty of fidelity that may be owed to the defrauded party. Discussed in (2016) 17 SAL Ann Rev 639.

97 *Lau Wan Heng v Public Prosecutor* [2021] SGHC 240 at [36].

98 *Lau Wan Heng v Public Prosecutor* [2021] SGHC 240 at [99].

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and distorted, is the situation in which a buyer maintains a share price that it feels the company should be valued at seen as equally egregious? Put differently, is it manipulation if one genuinely believes that a share is undervalued and continues buying in a falling market at or up to a particular price? In *Public Prosecutor v Wong Leon Keat*,[99] the accused also pleaded guilty; this was again about sentencing but here the *actus reus* was closer to what a normal buyer of shares does, which is to buy shares when they are priced lower than what the buyer believes should be the case as predicted by normal demand curves. There were seven charges brought under s 197(1)(*b*) of the SFA for creating a misleading appearance ("market rigging") with respect to the price of shares of Gaylin Holdings Limited ("Gaylin", which was listed on the SGX Mainboard and is now known as Amos Group). Wong put in buy orders and/or purchased small lots of Gaylin, a highly illiquid counter, in tranches of between 100 and 200 shares at a price much higher than the then-trading price between November 2015 and October 2016. This was at the best ask price during trading hours but there were also buy orders to raise the closing price during the six-minute closing routine after trading stopped for the day. This led to Gaylin shares closing 6.5% to 38.6% higher on those days. Gaylin's share price had been on a downward spiral – declining from $0.60 in 2014 to slightly more than $0.15 in 2016. Wong tried to maintain the prices to protect his reputation as he had recommended Gaylin shares to various investors in order to convince them to accept placement shares of Gaylin.

27.33 Wong pleaded guilty to seven charges of market rigging and one count of using another person's securities account to trade. Another 11 similar offences were taken into consideration. The issue before the court was whether the custodial threshold had been crossed for the market rigging charges under s 197(1)(*b*) of the SFA or whether a fine was sufficient as there was "no real distortion"[100] of Gaylin's share price. Defence counsel further submitted that the length of the Prosecution's proposed custodial terms was also manifestly excessive. Again, following *Ng Geok Eng v Public Prosecutor* and *Public Prosecutor v Ng Sae Kiat*, Principal District Judge Toh Han Li held that this was not the case as "[t]he accused conduct in the present case of 'marking the close' was to support the flagging share price of Gaylin shares"[101] and this merited a custodial sentence. The sentence imposed was four weeks' imprisonment for each of the seven proceeded charges under s 197(1)(*b*) of the SFA, with only two to run consecutively, that is, a total of eight weeks. While

99 [2021] SGDC 53.
100 Tay Peck Gek, "Ex-director of Investment Firm Pleads Guilty to Rigging Gaylin Shares to Salvage Reputation" *The Business Times* (15 February 2021).
101 *Public Prosecutor v Wong Leon Keat* [2021] SGDC 53 at [34].

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there may have been no permanent effect on the share price, it was the actions at the close which would have led to false overnight prices.

27.34 The most prominent case involving "marking the close" was *Monetary Authority of Singapore v Tan Chong Koay*[102] ("*MAS v Tan Chong Koay*"). That, though, was an MAS civil penalty action. Here, however, criminal penalties were imposed that crossed the custody threshold for the market rigging charges. But the question still remains as to whether there is a contravention of s 197 in terms of false trading or market rigging if the attempt was to maintain the share prices during the trading day and not at the close where it remained "artificial" overnight. With the former, a high bid price would immediately be met by a host of ask prices that will bring the share price back down. While it is clear that there need be no permanent effect on the market price for there to be an offence of false trading or market rigging,[103] care has to be taken not to penalise the normal actions of an economically rational buyer on a market, which is to buy an undervalued stock in quantities which would then push the price up to what the buyer considers a fair valuation (since the rational buyer seeking a profit will buy up to that price given sufficient resources).

27.35 In *Public Prosecutor v Wong Leon Keat*[104] the judge also considered the totality of the global sentence[105] where the eight-week imprisonment was combined with a fine of $30,000 (in default two months' imprisonment) for the one charge under s 201(*b*) of the SFA with respect to the use of another person's securities account for the accused's own trades. The fine was paid but an appeal has been lodged against the s 197 custodial sentence. The difficulty for any court is in describing the elements of a price manipulation offence in a way which does not capture the legitimate activities of normal buyers or sellers of securities. Following Australian decisions on their similar statutory provision,[106] it

102 [2011] 1 SLR 348.

103 See *North v Marra Developments Ltd* (1981) 148 CLR 42, which involved s 70 of the New South Wales Securities Industry Act 1970 which was similar to s 97 of the Securities Industry Act (Cap 289, 1985 Rev Ed); *Fame Decorators Agencies v Jeffries Industries* (1998) 28 ACSR 58, which involved s 998 (now s 1041B) of the Corporations Act 2001). Section 197 of the Securities and Futures Act 2001 (2020 Rev Ed) is drawn from these provisions but has been significantly amended.

104 See para 27.32 above.

105 *Public Prosecutor v Wong Leon Keat* [2021] SGDC 53 at [85].

106 The then s 998(1) of the Australian Corporations Act 1989 where in *Fame Decorators Agencies v Jeffries Industries* (1998) 28 ACSR 58, Gleeson CJ (with whom Powell JA agreed) said:

> Section 998 aims to preserve the integrity of the share market. Markets, in reflecting the interaction of forces of supply and demand, may suffer from a variety of imperfections, including mismatches of information, without such imperfections destroying their integrity. However, the conduct of a seller of

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was said in *MAS v Tan Chong Koay* at first instance by Lai Siu Chiu J that what matters for a buyer accused of false trading or market rigging is whether the "strategy that it employed was also inconsistent with that of an investor seeking to purchase at the lowest possible price".[107] This was in the context of SGX Rule 13.9.2(4) which warned fund managers against improving the valuations of their portfolios by buying relatively illiquid assets before the close of the market, and the possible imputation of a purpose to distort share prices in those circumstances.[108] On appeal, the Court of Appeal[109] affirmed the decision on the basis that it was clear that the appellants intended to create a "false or misleading appearance" with respect to the price of purchased shares, as the primary purpose for the trades was to boost the year-end valuation of certain of its other funds holding those shares (with a willingness to take a loss on the impugned purchases as this would be counterbalanced by performance related fees from the other funds). There were some parallels with that case here as the judge noted that:[110]

> The SOF makes clear that apart from maintaining his standing and reputation amongst his clientele as the motivation behind his actions, the accused was also the beneficial owner, through Rhodus Capital Limited ("RCL"), of 12.3 million Gaylin Shares held by RCL. Further, the accused was also the beneficial owner of more than 7 million Gaylin Shares in Lim Teck Chuan's UOB Kay Hian account. As such, the accused's market rigging offences had the effect of setting an artificially higher closing price in respect of the Gaylin Shares, with the result that he benefited by having his portfolio of Gaylin Shares reflecting a higher market value.

27.36 It would be interesting to see if the question of what actual benefit the accused obtained from having his existing Gaylin shares valued higher is raised on appeal. One argument is that the overnight paper gain allowed those shares to be used as collateral for larger amounts of financing even if that did not in fact take place.

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thinly traded shares, calculated to effect sales at the lowest, rather than the highest, obtainable price, and timed so as to deflect the possibility of some purchasers bidding up the price, had both the purpose and effect of creating, temporarily, an artificial market and price.

107 *Monetary Authority of Singapore v Tan Chong Koay* [2011] 1 SLR 348 at [51]; see also [87].

108 *Monetary Authority of Singapore v Tan Chong Koay* [2011] 1 SLR 348 at [85].

109 *Tan Chong Koay v Monetary Authority of Singapore* [2011] 4 SLR 348.

110 *Public Prosecutor v Wong Leon Keat* [2021] SGDC 53 at [35].

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