Case Note

JUDICIAL REVIEW OF SGX-ST'S PUBLIC REPRIMAND POWERS

Yeap Wai Kong v Singapore Exchange Securities Trading Ltd [2012] 3 SLR 565

One of the thorny issues in administrative law is when the right of judicial review would be available in relation to decision-making bodies that perform both public and private functions. This note discusses the court's approach in *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565, which considered the nature of the Singapore Exchange Securities Trading Ltd's public reprimand powers and whether a fair hearing had been accorded to the applicant in that case as mandated by the rules of natural justice.

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I. Introduction

1 The fundamental aim of judicial review is to ensure that the powers of decision-making bodies are exercised lawfully. If a decision-maker exercises his powers outside the jurisdiction conferred on him in a manner which is procedurally irregular or which is unreasonable in the *Wednesbury* sense,[1] he is acting *ultra vires* his powers and therefore unlawfully.[2] Judicial review, where available, is concerned with the process in which a decision is reached and not the merits or correctness of the decision. It is the limited means through which the court holds

1 See *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 at [64].
2 *R v Lord President of the Privy Council; Ex p Page* [1993] AC 682 at 701.

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decision-making bodies exercising a "public" function to the fundamental standards of legality.[3]

2 Traditionally, the test for determining whether a decision was susceptible to judicial review was a straightforward one: it required the court to consider the source of the respondent's power in making the decision that the applicant sought to impugn (the "Source Test"). If the source of that power was in a statute or subsidiary legislation, the decision would be susceptible to judicial review.[4]

3 The recent High Court decision of *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd*[5] ("*Yeap Wai Kong*"), however, continues the trend of recent cases in Singapore that have recognised the expanding role of judicial review in the modern world. The *Yeap Wai Kong* decision highlights the increasingly hybrid nature of many of the functions performed by decision-making bodies such as the Singapore Exchange Securities Trading Ltd ("SGX-ST"), which have both public as well as private dimensions.

4 This note discusses the court's approach in *Yeap Wai Kong* which centred upon the nature of the SGX-ST's public reprimand powers and whether a fair hearing had been accorded to the applicant in that case in accordance with the rules of natural justice.

II. Brief facts and decision in *Yeap Wai Kong*

5 The applicant, Yeap Wai Kong ("Yeap"), was a non-executive, independent director and member of the Audit Committee of China Sky Fibre Chemical Ltd ("the Company"). The Company was incorporated in the Cayman Islands and listed on the SGX-ST.

6 After noticing discrepancies in the Company's financial statements in April 2011, the SGX-ST required the Company to furnish certain information. The information sought continued to be withheld from the SGX-ST despite repeated requests. On 23 August 2011, the SGX-ST sent a "show cause" letter addressed to the Company and collectively its board of directors, which asserted that the Company was in breach of the Listing Rules due to non-disclosure of information. The "show cause" letter expressly referred to the SGX-ST's intention to issue a public reprimand and invited the Company to show cause why

3 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [3]. Judicial review is unavailable for the enforcement of private law rights: *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133.

4 H W R Wade & C F Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at p 638.

5 [2012] 3 SLR 565.

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relevant disciplinary actions should not be taken. This was followed by a document directive from the SGX-ST, addressed to the Board of Directors on 3 November 2011, requiring the Company to deliver specific documents to the SGX-ST. The SGX-ST subsequently also ordered a special auditor to be appointed by the Company but both directions were not complied with.

7 On 16 December 2011, the SGX-ST publically reprimanded all the directors of the Company, including Yeap. Yeap subsequently applied for and was granted leave to apply for a quashing order to overturn the SGX-ST's public reprimand ("SGX-ST Reprimand").[6] The essence of Yeap's complaint was that he was not accorded a fair and proper hearing by the SGX-ST and that the "show cause" letter was not addressed to Yeap as an individual director of the Company.

8 *Yeap Wai Kong* therefore concerned two main issues. First, whether the SGX-ST Reprimand was susceptible to judicial review. Second, whether Yeap had been accorded a fair hearing as required by the rules of natural justice.

9 On the first issue, the court held that to determine whether the decision of a body was susceptible to judicial review, both the Source Test as well as the Nature Test had to be considered.[7] To recapitulate, the Source Test stipulates that if the source of power of the decision-making body originated in statute or subordinate legislation under a statute, then the body has a public nature and would thereby be subject to judicial review. Conversely, on the other end of the spectrum, if the source of power was purely contractual, then the body would not be subject to judicial review. The Nature Test applies in between the aforesaid extremes: if the nature of the power of the body involves exercising public law functions, or the exercise of its functions have public law consequences, then that may be sufficient to make the body in question subject to judicial review.[8]

10 In applying the Nature Test, the court in *Yeap Wai Kong* observed that non-statutory bodies may perform public law functions and may therefore be subject to judicial review in respect of those functions. Factors indicating whether a body performs public functions

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6 Leave would not be granted *unless* the court was satisfied that: (a) the matter complained of was susceptible to judicial review; (b) the applicant had sufficient interest in the matter; and (c) the material before the court disclosed an arguable or *prima facie* case of reasonable suspicion in favour of granting leave. The threshold for leave to be granted is "very low": *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033 at [10]–[12] and [29].

7 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [17].

8 See *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [13] and [15].

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and would thus be subject to judicial review in respect of these functions include:

> (a) the extent to which the decision-making body has been interwoven into a system of governmental regulation;
>
> (b) the extent to which there is any statutory recognition or underpinning of the body or the function in question; and
>
> (c) the nature of the function.[9]

11 In determining whether the SGX-ST Reprimand was susceptible to judicial review, the court in *Yeap Wai Kong* first considered the extent to which the SGX-ST had been interwoven into governmental regulation. In undertaking this enquiry, the court observed, *inter alia*, that the SGX-ST operated a securities market.[10] As an approved exchange under s 16 of the Securities and Futures Act[11] ("SFA"), the SGX-ST, in discharging its obligations under the SFA, was to:

> (a) have regard to the interests of the investing public;
>
> (b) maintain business and listing rules which make satisfactory provision for a fair, orderly and transparent market; and
>
> (c) enforce compliance with its business and listing rules.

Section 25 of the SFA went further by providing a statutory enforcement process whereby the SGX-ST's rules may be enforced or effected further by a court order.[12]

12 As regards whether there was any statutory underpinning in connection with the SGX-ST Reprimand, the court noted that SGX-ST's powers to publicly reprimand directors of listed companies for non-compliance with the SGX-ST Listing Manual ("Listing Manual") stemmed from r 720(4) of the Listing Manual, which was properly enacted and approved by the Monetary Authority of Singapore ("MAS") pursuant to s 23 of the SFA.[13]

13 In considering the nature of the reprimand function of the SGX-ST, the court adopted the approach in *Re Pergamon Press Ltd*,[14] which concerned inspectors' reports issued under the English Companies Act 1948.[15] Notwithstanding that the inspectors under the English

9 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [18].
10 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [19].
11 Cap 289, 2006 Rev Ed.
12 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [21].
13 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [24].
14 [1970] 3 WLR 792; [1970] 3 All ER 535.
15 c 38.

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statute only had powers to "investigate and report", the findings of fact which they made could potentially cause grave damage to those concerned, such as ruining reputations or careers. The English Court of Appeal held that these inspectors were bound by the rules of natural justice to give the persons they investigated a fair opportunity for correcting or contradicting what was said against them.[16] By analogy, the court in *Yeap Wai Kong* had regard to the potential ramifications of any public reprimand of a listed company's directors by the SGX-ST, both domestically and internationally, including adverse business reputational implications, implications on their continued service on board committees and directorships of other listed companies, and other professional and financial services licence implications.[17]

14 Based on the above factors, the court concluded that the reprimand power of the SGX-ST would properly be characterised as a public function within the Nature Test and consequently susceptible to judicial review.[18]

15 Having established that the SGX-ST's Reprimand was susceptible to judicial review for minimum compliance with the standards of "legality, rationality and procedural propriety", the second issue considered by the court was whether the applicant was accorded a fair hearing as required by the rules of natural justice, in compliance with procedural propriety.

16 The court in *Yeap Wai Kong* held that while the common law prescribes minimum standards of procedural propriety by requiring a fair hearing and the absence of bias, there was no one-size-fits-all template for a fair hearing. What would constitute a fair hearing depended on the nature and context of the decision.[19]

17 Applying the approach in *R v Secretary of State for the Home Department; Ex p Doody*,[20] the court in *Yeap Wai Kong* concluded that a fair hearing, in the context of directors failing to comply with the relevant exchange rules to disclose material information – when timely and accurate disclosure of material information was crucial – required the person affected to be informed of the case against him and to be provided with an opportunity to make representations before the decision.[21] On the facts of *Yeap Wai Kong*, the issue then turned on whether Yeap was given adequate notice that the SGX-ST was intending

16 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [26].
17 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [27].
18 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [28].
19 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [29].
20 [1994] 1 AC 531.
21 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [31].

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to reprimand him, the case against him and whether he was accorded an opportunity to make representations.[22]

18 In this respect, the court observed that all relevant SGX-ST e-mails, letters and directives sent to the Company's Chief Financial Officer were copied to Yeap as an Audit Committee member.[23] Furthermore, the 23 August 2011 "show cause" letter addressed to the Board of Directors was also e-mailed to Yeap, and "meticulously pinpointed the particular Company announcements and set out the non-disclosures and misleading disclosures against the specific Listing Manual Rules that had been breached". The letter then concluded that the SGX-ST intended to issue a public reprimand and reserved the right to take any further action as necessary.[24] The court rejected Yeap's argument that the "show cause" letter was addressed to the Company and not to him as individual director. The letter was expressly addressed to the Board of Directors and this necessarily meant every director. It was also received by each director.

19 The court in *Yeap Wai Kong* further added that r 720 of the Listing Manual only related to directors of listed companies and not the companies themselves. On the facts, the directors of the Company were given unequivocal notice that SGX-ST intended to publicly reprimand them and they were all given full particulars of the case against them.[25] Further, the SGX-ST Reprimand came after a six-month interval of continuing non-disclosures, non-compliance with consequential directives and directors' approved Company announcements signifying a refusal to make accurate material disclosures. During this period, Yeap, as member of the Board of Directors and the Audit Committee, was in direct communication with the SGX-ST and had full opportunity to explain or make representations.

20 The court also added that if any individual director of the Company wished to put his personal representation upon the receipt of the "show cause" letter of 23 August 2011, which was at variance with approved Company announcements and communications to the SGX-ST, he had full opportunity to do so. There was, however, no evidence on record to show that any of the directors of the Company saw any need to comply with the "show cause" letter or the subsequent directives from the SGX-ST.[26]

22 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [74].
23 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [75].
24 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [75].
25 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [77].
26 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [78].

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21 Taking the above matters into account, the court concluded that the SGX-ST fully and substantively accorded the applicant a fair hearing by having given him notice of its intention to reprimand, particulars of the case against him and full opportunities between August to December 2011 to be heard.

III. Reflections on the court's analysis of the first issue: The availability of judicial review

22 Controversy in the *Yeap Wai Kong* case partially stemmed from differing views on the source of SGX-ST's public reprimand power under the Listing Manual, as well as the hybrid nature of the SGX-ST's commercial and regulatory roles as a private stock exchange operator and a front-line regulator for the market.

A. Contractual underpinning of the SGX-ST

23 Whilst the court in *Yeap Wai Kong* was undoubtedly correct as regards the utility of the Nature Test in determining the availability of judicial review, the force of the argument that judicial review was not available in relation to bodies whose sole source of power was *consensual submission* to their jurisdiction,[27] that is the decisions of bodies who acquired jurisdiction over individuals by contract are excluded from the ambit of judicial review, should not be overlooked.

24 The stance that the SGX-ST Reprimand should not be amenable to judicial review could be supported by arguing that it was the intention of Parliament to render the SGX-ST a private and *not* public body. The Singapore Parliament, cognizant of the experiences of other countries – such as how the UK had decided to give its listing rules statutory authority under the Financial Services and Markets Act 2000[28] or how Malaysia had chosen to embrace its listing rules within legislation under the Capital Markets and Services Act 2007[29] – decided to take its own path. The regulatory function of the SGX-ST over listed companies was left to "consensual submission" to the Listing Rules by companies seeking admission into the official list of the SGX-ST. The situation in Singapore may accordingly be argued to be more akin to that of a private club governing the conduct of its members[30] via a code of

27 *R v Panel on Take-overs and Mergers; Ex p Datafin plc* [1987] 1 QB 815 at 838. This would be a matter of private law which can only be enforced by way of an ordinary claim for damages, a declaration or an injunction: see Clive Lewis QC, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2009) at p 85.

28 See s 2(4)(a) and generally Pt VI of the Financial Services and Markets Act 2000 (c 8) (UK).

29 Act 671 (M'sia).

30 "Lawyers Clash over the Root of SGX's Powers" *Business Times* (19 April 2012).

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conduct. Thus, because the relationship between the SGX-ST and listed companies is contractual, the SGX-ST's power to reprimand is rooted in private law and ought not be susceptible to judicial review.

25 In this respect, the decision of *Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange*[31] ("*Ganda*") should be considered. There, the Kuala Lumpur Supreme Court had to consider whether a decision of the Kuala Lumpur Commodity Exchange ("KLCE") fixing the price of crude palm oil was susceptible to judicial review. The KLCE was a limited company and a body established under the Malaysian Commodities Trading Act 1980.[32] Ministerial control in its running was merely indirect and limited to policy matters rather than daily administration and business of the KLCE.

26 The court in *Ganda* held that the acts of the KLCE were *not* subject to judicial review because they did not contain a sufficient public element. In so holding, the court in *Ganda* also observed that the relationship between the parties who were members of the KLCE was clearly contractual and the exercise of the power of the KLCE under reg 11 of the General Regulations was an exercise of a power derived from contract. The act, which was the subject of the challenge, was, by its nature, not and should not be made amenable to judicial review.

27 The court in *Ganda* adopted the approach taken in *R v National Coal Board; Ex p National Union of Mineworkers*,[33] where representatives of four unions involved in the mining of coal sought judicial review of the National Coal Board's decision to close a colliery. It was argued on behalf of the Board that that was not a case amenable to judicial review since it did not involve public law. Macpherson J agreed with this argument and held that whilst the Board may have duties and powers given by statute and is for some purpose regarded as a public body, it was not in any way empowered by statute to make a decision which was the subject of the attack nor was the decision in any way part of its activities as a public body which could be reviewed.[34]

28 Likewise, the SGX-ST is a company incorporated under the Companies Act.[35] Ministerial control is also not extended to the daily operations of the SGX-ST. Much like the members of the KLCE which sign an agreement agreeing to be bound by all rules and regulations of the KLCE, listed companies under the SGX-ST also consensually submit to the Listing Rules via agreement. At first blush, it would therefore

31 [1988] 1 MLJ 174.
32 Act 229 (repealed by Act 324) (M'sia).
33 [1986] ICR 791.
34 *R v National Coal Board; Ex p National Union of Mineworkers* [1986] ICR 791 at 795.
35 Cap 50, 2006 Rev Ed.

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seem that the decision in *Yeap Wai Kong* is inconsistent with the approach taken in *Ganda*.

29 However, on closer analysis, it is submitted that the public reprimand function in *Yeap Wai Kong* is substantially different in nature from the decision sought to be impugned in *Ganda*. The latter was clearly a decision made in the course of day-to-day operations of the KLCE and was truly a matter of pure contractual discretion. The public reprimand function of the SGX-ST was clearly a power to be exercised in its capacity as front-line regulator for the market.

30 That the governmental arm, in the form of MAS, has the legitimacy to directly intervene in the regulatory affairs of the SGX-ST would bolster the "public" nature of many of the regulatory functions of the SGX-ST. Under s 34 of the SFA,[36] MAS is accorded emergency powers to direct the SGX-ST to take prescribed actions in an emergency. In the event the SGX-ST fails to comply with the direction of MAS, MAS is empowered to intervene via the means set out in s 34(3) of the SFA. In addition, s 46 of the SFA confers upon MAS the authority to issue directions to the SGX-ST, non-compliance with which would constitute a criminal offence.

31 The decision in *Yeap Wai Kong*, however, leaves open the question of the types of decisions by the SGX-ST that may be amenable to judicial review, in addition to the exercise of its public reprimand function. This would have to be left to future judicial decisions although it is unlikely that decisions involving less severe sanctions could be judicially reviewed.

B. "Public" nature of the reprimand function

32 *Yeap Wai Kong* suggests that the fact that a body was exercising a function capable of causing grave reputational damage to those affected is one factor which can render it a public function. Indeed, the performance of regulatory functions by a body is likely to attract judicial supervision, particularly if the body exercises monopolistic powers and takes decisions which may affect the livelihood of individuals and if the public generally has an interest in the way that the body performs its functions.[37]

33 However, it is submitted that the aforesaid criteria may not necessarily confirm the exercise of a public function as it applies in the same measure to the private sphere as well. This is reflected in *R v*

36 Cap 289, 2006 Rev Ed.

37 *R v Disciplinary Committee of the Jockey Club; Ex p Massingberd-Mundy* [1993] 2 All ER 207.

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Disciplinary Committee of the Jockey Club; Ex p Aga Khan,[38] where Hoffmann LJ stated:[39]

> [T]he mere fact of power, even over a substantial area of economic activity, is *not enough*. In a mixed economy, power may be private as well as public. *Private power may affect the public interest and livelihoods of many individuals*. But that does not subject it to the rules of public law. If control is needed, it must be found in the law of contract … and all the instruments available in law for curbing excesses of private power. [emphasis added]

This is similarly reiterated in *R v Chief Rabbi; Ex p Wachmann*[40] which noted that whether or not a decision had "public law consequences" must be determined *otherwise than by references to the seriousness of its impact upon those affected*.

34 Simply put, although having the potential to cause severe repercussions to those affected may indicate the decision-making body's *de facto* or monopolistic power, such power by no means confirms the existence of a public function as its exercise is equally prevalent in the private domain.

C. Lack of clear-cut distinction between public and private realms in the modern context

35 The lines between entities exercising strictly public law functions and non-public ones are increasingly becoming blurred. This often makes it difficult to make a straightforward determination on whether decisions made by such entities fall within the scope of public or private law.

36 One example can be found in the increased privatisation of the public law function of regulation. Regulation is a form of public law which seeks to protect the public interest, as opposed to mere private litigation which aims to settle disputes between private parties or citizens about private rights and interests.[41] Yet governments increasingly favour regulation by the private sector because the source of funding comes from private individuals rather than the public purse. Public agencies responsible for monitoring and enforcing regulatory policy are in practice often unable to effectively fulfil their duties due to inadequate

38 [1993] 1 WLR 909.

39 *R v Disciplinary Committee of the Jockey Club; Ex p Aga Khan* [1993] 1 WLR 909 at 932–933.

40 [1992] 1 WLR 1036.

41 Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007) at pp 213–214.

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funding, generating an "enforcement gap".[42] Private regulators also wield first-hand knowledge of the relevant industry which is not enjoyed by public regulators. Indeed, *Yeap Wai Kong* itself echoes this point:[43]

> [P]ublic policy is increasingly effected not only by government and statutory bodies but also through *self-regulating entities* in sectors where the domain nature and complexity of the sector requires *front-line expertise coupled with back-line regulators to regulate the relevant sector*. [emphasis added]

Private regulation is also "instrumentally valuable"[44] because the threat of financial penalties and civil damages can serve as a strong deterrent in the commercial context. The SGX-ST itself is an example on point, being a self-regulatory for-profit company policing the compliance with its Listing Rules in the securities exchange.

37 However, the drawback of private regulation is that the private regulator's overriding motivation to maximise its self-interest may often shape regulatory strategies adopted and could compromise the intensity of enforcement effort. Unlike public regulators, the paramount legal duty to act in favour of the broader public interest may be less forceful. For example, while critics have alluded to SGX-ST's practice of not disclosing its private regulatory dealings with listed companies, which may compromise the efficacy of its regulatory function, this practice has continued.[45]

IV. The court's analysis on the second issue: Adequacy of notice to be provided

38 A duty to act in accordance with natural justice is nowadays considered as a duty to act fairly. The court in *Yeap Wai Kong* was undoubtedly correct when it held that its content varied with the circumstances of the case.[46] Certain factors will increase the likelihood of the principles being applied rigorously, for example, where there is an express duty to decide only after conducting a hearing or an inquiry, or where the exercise of disciplinary powers may deprive a person of his property rights or impose a penalty on him. What fairness requires and what is involved in order to achieve fairness is for the decision of the

42 Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007) at pp 211–212.

43 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [9], *per* Philip Pillai J.

44 Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007) at p 211.

45 "Special Audit can't Mend Broken Companies" *Business Times* (12 January 2012).

46 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [29].

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courts as a matter of law. The issue is not one for the discretion of the decision-maker.[47]

39 On the facts of *Yeap Wai Kong*, the decision of the court that there was no breach of the rules of natural justice must be correct. In fact, Yeap must have clearly appreciated the gravity of the situation, if he did not appreciate it earlier, by the time he received the "show cause" letter of 23 August 2011 even though it was addressed to the Board of Directors. This would have been evident from the fact that each director was separately served with a copy of the letter. Furthermore, the Board of Directors also subsequently took legal advice on this letter.[48]

40 *Yeap Wai Kong* is a cautionary tale for directors, in particular independent directors. As suggested by the court in the case, if an individual director disagreed with the collective decision of the company in question, it may be advisable to state his personal representation to the SGX-ST upon receipt of any regulatory directives to avoid collective responsibility. This is so even if the director had taken efforts at the board level to steer the company in the right direction.[49]

V. Could Yeap have sought private law remedies?

41 Given the outcome in *Yeap Wai Kong*, one might be tempted to ask: did Yeap take the "wrong" tactical step from the onset? Should Yeap have pursued private law remedies against the SGX-ST in relation to the SGX-ST Reprimand instead of resorting to public law?

42 It is, however, respectfully submitted that the public law route was probably taken deliberately. A judicial review application sidesteps the issue of whether the SGX-ST Reprimand was justified on the facts of the case since the court would generally only be concerned with the decision-making process (and *not* the merits). For example, if the SGX-ST had instead been sued for defamation in relation to the SGX-ST Reprimand, the claim would likely have been met with (at least) the formidable defences of justification (truth) and qualified privilege.[50] In addressing these defences, the court would then have been required to

47 *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 at [6].

48 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [76].

49 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [77]. The court noted that on the facts of the case, Yeap had expended "well-meaning efforts at urging compliance and arranging meetings" which unfortunately "appear[ed] to have distracted him from fully appreciating the significance" of the "show cause" letter of 23 August 2011: *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [81].

50 *Chan Cheng Wah Bernard v Koh Sin Chong Freddie* [2012] 1 SLR 506 at [43]–[44] and [86].

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look into the merits of the positions taken by the respective parties leading up to the SGX-ST Reprimand. Furthermore, there being no suggestion by Yeap of bad faith or malice on the part of the SGX-ST in issuing the SGX-ST Reprimand, it is unlikely that the claim in defamation would have succeeded at the end of the day.

VI. Conclusion

43 To conclude, the difficulties which were encountered in the *Yeap Wai Kong* decision can be attributed to the contractual underpinning of the SGX-ST. The power to reprimand is not expressly provided for in any statute and engenders directly from the Listing Manual which is not law. The Nature Test, however, sets the courts on the right path by requiring an analysis into what is the nature of the decision sought to be impinged instead of insisting on an overtly rigid inquiry as to the source of the decision-making power.

44 The willingness of the court to invoke its supervisory jurisdiction in deserving cases, in the light of the fluidity and lack of rigid demarcation between the private and public law divide in the modern context, with the increased privatisation of the public law function of regulation, is a good sign. While private regulators have the additional benefits of being equipped with ample funding and first-hand expertise, and are empowered to impose financial penalties, there is a concern that their self-interest may supersede wider public goals. In this respect, the courts can provide the necessary safeguards by looking into the adequacy of the decision-making process. *Yeap Wai Kong*, it is submitted, is a step in the right direction.

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