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27. SECURITIES AND FINANCIAL SERVICES REGULATION

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I. Introduction

27.1 COVID-19 clearly dominated many of the pressing issues in the world in 2020 and necessitated changes such as the suspension of wrongful trading provisions to help financially distressed firms[1] and the restriction on share buybacks in the case of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act[2] in the US for government bail-outs and by the Monetary Authority of Singapore ("MAS") for financial institutions given capital adequacy relief in Singapore.[3] It also brought greater focus back on the real economy as opposed to the over-financialised one that was described in the introduction to this chapter in the previous Annual Review.[4] One positive thing to come out of a pandemic is that it may reduce the inequalities seen in the world since the 1990s, in particular, without the even greater upheaval that has been thought necessary to level society.[5]

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1 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) Div 2. Compare 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), effective 26 November 2020. See also the suspension of wrongful trading in various jurisdictions discussed in Kristin van Zwieten & Amir Licht, "What's So Wong with Wrongful Trading? – On Suspending Director Liability during the Coronavirus Crisis" *Oxford Business Law Blog* (9 April 2020). Also, Paul Davies, *Introduction to Company Law* (Clarendon, 3rd Ed, 2020) at p 236 has said that "continued trading in the vicinity of insolvency might be absolutely the right decision".

2 Pub L 116–136.

3 Monetary Authority of Singapore, "MAS Takes Regulatory and Supervisory Measures to Help FIs Focus on Supporting Customers", media release (7 April 2020) allowed full recognition of regulatory loss allowance reserves as Tier 2 Capital. Share repurchases hit a March 2020 high point with buybacks then banned by the Monetary Authority of Singapore for banks till September 2021 unlike dividends which suggest that there are problems with the former: see Hans Tjio, "Rethinking Share Repurchases" (2021) 16 *Capital Markets Law Journal* (forthcoming).

4 (2019) 20 SAL Ann Rev 677.

5 Walter Scheidel, *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century* (Princeton University Press, 2017) describes the others as war, revolution or state collapse.

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II. Jurisdiction and Securities and Futures Act

27.2 In last year's Annual Review, we examined the decision of Aedit Abdullah J in *Goldilocks Investment Co Ltd v Noble Group Ltd*.[6] There, it was held that the Securities and Futures Act[7] ("SFA") was arguably a "forum mandatory statute". That was in the context of the deemed membership provisions for listed companies where s 81SJ of the SFA states that companies (including foreign companies) whose shares are immobilised or deposited (in the case of dematerialised securities) in the Central Depository Pte Ltd ("CDP"), a subsidiary of the Singapore Exchange ("SGX"), must recognise as members those shareholders whose interests are captured on the CDP register. This was so even if the law at its place of incorporation only recognised as members those whose names appeared on the company register, which in such cases would have been the CDP itself. That decision was not, however, one on its merits but only to determine that there was a serious triable issue. It may be that even if the SFA were a "forum mandatory statute", it is not so entirely but only with respect to certain specific provisions.

27.3 Given that, what is in fact covered by the SFA becomes critically important. In *CA Investment (Brazil) SA v Joesley Mendonca Batista*,[8] the Singapore Court of Appeal and High Court issued a series of decisions relating to service out of Singapore and the jurisdiction of the court in the context of claims under the SFA. For service out of jurisdiction, there must be a good arguable case of a sufficient connection between the dispute and Singapore, which has been described as a service-out "gateway".[9]

27.4 In this case, a minority shareholder in a Brazil-incorporated pulp-producing company brought a common law derivative action in the Singapore courts against certain directors and shareholders of the company. The minority shareholder alleged that those directors and shareholders had breached various duties to the company, by causing it to contravene provisions of the SFA relating to a proposed bond

6 [2018] 5 SLR 425.
7 Cap 289, 2006 Rev Ed.
8 The decision is unreported. The decision, as well as its description here, is drawn from the excellent client update of March 2020 by Rajah & Tann Asia. See Rajah & Tann Asia, "Singapore Court Decides on Jurisdiction in SFA-related Dispute" (March 2020) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-03_SG-Court-Jurisdiction-SFA-Related-Dispute.pdf> (accessed 2 February 2021).
9 Ardavan Arzandeh, "'Gateways' within the Civil Procedure Rules and the Future of Service-out Jurisdiction in England" (2019) 15 *Journal of Private International Law* 516.

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listing by an associated Austrian company on the SGX. The allegation was that there had been false or misleading statements in the offering memorandum that had been prepared for the listing, which would have contravened s 199 or 200 of the SFA, and the company would have been liable for the breach. As all the defendants were domiciled or had their place of business in Brazil, the shareholder had to obtain leave to serve the writs out of Singapore. If this case were heard on its merits, it would likely have involved claims similar to that of "stepping stone liability" in Australia where directors are sued, usually for breaches of the duty of care and to act in the best interests of the company in relation to the breach or non-compliance with other statutes, often involving securities disclosure.[10]

27.5 The defendants successfully set aside the service out of jurisdiction in various actions, as the High Court ruled that it did not have jurisdiction over the dispute. Vinodh Coomaraswamy J held that the plaintiff minority shareholder failed to establish that its claims fell within one of the grounds in O 11 r 1 of the Rules of Court[11] ("ROC"). This was because the claim was more closely connected to Brazil, and any connection with Singapore was only through the fact that the bonds were to be listed here. In any case, the bond issue had been aborted and so there had only been a threatened breach of the SFA, not an actual one. Further, that threat did not raise any public interest or policy concerns in the context of Singapore that displaced the fact that Brazil was the more appropriate forum. Consequently, the entire SFA is not a "forum mandatory statute" (which in any case has not been fully decided), so that the requirements for a derivative action should be determined by the law of incorporation of the company. Leave to appeal was denied by both the High Court and the Court of Appeal.

27.6 The issue of jurisdiction here is that of the court over a person which has been referred to as personal jurisdiction.[12] This is to be contrasted with prescriptive jurisdiction, or subject matter jurisdiction, something that was expressly recognised by Sundaresh Menon CJ in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd*.[13]

10 *Cf* R Teele Langford, "'Dystopian Accessorial Liability' or the End of 'Stepping Stones' As We Know It" (2020) 37(5) *Company and Securities Law Journal* 362.

11 Cap 322, R 5, 2004 Rev Ed.

12 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 16(1)(*a*)(ii), read with O 11 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

13 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [80]–[82].

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27.7 In *Re PT MNC Investama TBK*,[14] it was held that an Indonesian-listed company with its bonds listed on SGX could access Singapore's insolvency regime, and obtain a moratorium to facilitate a scheme of arrangement under s 210 of the Companies Act.[15] The issue is complex as scheme or insolvency jurisdiction likely includes both personal and prescriptive jurisdiction.[16] The Companies (Amendment) Act 2017[17] introduced provisions widening the reach of the Singapore courts by introducing a set of factors to be considered by the court in determining whether a foreign company has a "substantial connection to Singapore" for the purposes of winding up, judicial management and schemes of arrangement. Section 351(2A) (now s 246(3) of the Insolvency, Restructuring and Dissolution Act 2018),[18] which came into effect on 23 May 2017, provided that the court may rely on the presence of one or more of the following matters, whether:[19]

> (*a*) Singapore is the centre of main interests of the company;
>
> (*b*) the company is carrying on business in Singapore or has a place of business in Singapore;
>
> (*c*) the company is a foreign company that is registered [as such in Singapore];
>
> (*d*) the company has substantial assets in Singapore;
>
> (*e*) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction;
>
> (*f*) the company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to the loan or transaction.

27.8 This case did not fall under those new provisions as, amongst other reasons, the bonds were not governed by Singapore law and all of its business was carried out in Indonesia. Aedit Abdullah J found, however, that the relevant Companies Act provision on scheme jurisdiction, the then s 351(2A), was not exhaustive and definitive. The fact that the bonds were listed and traded in SGX was a sufficient connection to Singapore as "it is akin to substantial business activity that is not merely transient".[20]

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14 [2020] SGHC 149.
15 Cap 50, 2006 Rev Ed.
16 See now *Duncan, Cameron Lindsay v Diablo Fortune Inc* [2018] 4 SLR 240.
17 Act 15 of 2017 which came into force on 23 May 2017.
18 Act 40 of 2018, which came into force on 30 July 2020.
19 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 246(3).
20 *Re PT MNC Investama TBK* [2020] SGHC 149 at [13]. Creditors may also seek to wind up foreign listed companies in the jurisdiction they are listed in, but it is quite difficult as seen in a recent Hong Kong decision in *Re China Huiyan Juice Group Ltd* [2020] HKCFI 2940. See also Singapore Exchange Regulation's ("SGX

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27.9 As to the reason why the SGX bond listing did not proceed in the first place in the Brazilian/Austrian case discussed above, details can be gleaned from the decision in *CA Investment (Brazil) SA v Eldorado Brasil Celulose SA*.[21] There, Vinodh Coomaraswamy J refused to grant a stay of those proceedings which had enjoined the bond listing under s 326 of the SFA in favour of arbitration under s 6(1) of the International Arbitration Act.[22] The proposed issuer's by-laws and shareholders' agreement between the only two shareholders contained an arbitration clause, as did the sale and purchase agreement for shares between them. The judge found, however, that the subject matter covered by s 326 (which gives the court powers to grant injunctions for breaches of the SFA) in relation to the interim injunction was not arbitrable due to the public interest in the dispute. This was a specific statutory action that involved more just than the interest of the parties. The judge held that the public needed to be protected from breaches of the SFA and so the court's jurisdiction over the matter could not be ousted in favour of arbitration. This was also seen in an earlier case involving a fraudulent conveyance claim which necessarily involved insolvency, as the "claim against [the defendant would be] in fact an insolvency claim that is non-arbitrable".[23]

III. Prospectus and continuous disclosure

27.10 The importance of the disclosure rules in the SFA, as seen above in the various unreported *CA Investment* cases,[24] cannot be over-emphasised. This is because the whole statutory structure is premised on a disclosure-based philosophy, which replaced what had been seen as one involving more merit-regulation prior to the coming into force of the SFA in 2002. This is true not just of prospectus disclosure, which is statutorily mandated, but also the continuous disclosure rules, which the

RegCo") efforts to amend its Listing Rules in that regard: Angela Tan, "SGX RegCo to Align Listing Rules with Singapore's Push for Restructuring Hub" *Business Times* (17 December 2020).

21 The decision is unreported. The decision, as well as its description here, is drawn from the excellent write up by P K Wong & Nair. See P K Wong & Nair, "High Court Rules on Arbitrability of Disputes under the Securities and Futures Act" (23 April 2020) <https://pkwongnair.com/2020/04/23/high-court-rules-on-arbitrability-of-disputes-under-the-securities-and-futures-act/> (accessed 2 February 2021).

22 Cap 143A, 2002 Rev Ed.

23 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [58]. In this context, the words "insolvency claim" refer to a claim arising from the insolvency regime, not that which relates to the insolvency regime. But compare *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158 with respect to pre-insolvency claims and arbitration where it was held that the policies underpinning the arbitration and insolvency regime are not necessarily at odds.

24 See paras 27.3–27.5 and 27.9 above.

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statute tags onto the listing rules of a securities exchange under s 203 of the SFA.

27.11 In relation to prospectus disclosure, in *Public Prosecutor v Tay Chee Ming*[25] ("*Tay Chee Ming*"), the accused, the chairman and majority shareholder of a private limited company that was planning for a listing, was found guilty of making an offer of securities without a prospectus under s 240(1), read with s 331 of the SFA. While the issuer was primarily liable for a breach of s 240, the accused was also liable for consenting to or conniving in a breach of the SFA by a body corporate under s 331, a criminal form of "stepping stone" liability. He was sentenced to 15 months' imprisonment. This case involved 33 convertible loan agreements ("CLAs") that the accused made with 25 lenders on behalf of the issuer, raising about S$3m (some of the charges in respect of the CLAs were stood down but taken into consideration for the purpose of sentencing). The CLAs were part of a pre-IPO fundraising process as the issuer intended to list on the Australian Stock Exchange ("ASX"), having failed to list on the SGX previously. The lenders were told that the IPO would occur soon after, and they could convert their loans to shares listed on the ASX. The listing did not eventuate despite the "best endeavours"[26] of the accused and issuer, and the lenders were not repaid their convertible loans (which they were entitled to 45 business days after the failed listing).

27.12 In this case, one defence was that the prospectus provisions did not apply to private limited companies. This was rejected by the judge on the basis that, both, the private placement and small offer exclusions from prospectus requirements in the SFA (which were recommended by the Company Legislation and Regulatory Framework Committee ("CLRFC") in 2002) showed that it was not only concerned with public listed companies. Another significant point from the CLRFC, which was not argued, was another recommendation that was accepted by the Ministry of Finance to remove one of the characteristics of a "private company" in s 18 of the Companies Act. Prior to the Companies (Amendment) Act 2004,[27] it was required to have in its memorandum or articles a provision which "prohibits any invitation to the public to subscribe for any shares in or debentures of the company". As a result of the changes, private companies could now do so but had to comply with the SFA prospectus requirements.

25 [2020] SGMC 1.

26 For a recent case interpreting the meaning of "best endeavours" in the context of a reverse takeover, see *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86.

27 Act 5 of 2004.

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27.13 The judge found that there was an offer of, both, debentures and the underlying shares that required a prospectus. Crucially, the small personal offering exclusion in s 272A could not be relied upon, as the issuer *intended* to raise more than S$5m within a 12-month time period, even if they may not have done so eventually. Further, the offer did not satisfy the requirement of being "personal", in the sense that the offer must be:[28]

> … one that can be accepted only by the offeree and the offeree is likely to be interested in the offer due to: previous contact or professional or other connection with the offeror; or previous indication of interest to the offeror; or by Singapore licensed or exempt dealers and licenced financial advisers, dealers and financial advisers in other jurisdictions.

27.14 Unfortunately, the accused did not rely on the private placement exclusion in s 272B, which allows an offer to be made to fewer than 50 offerees within a 12-month period without a prospectus. Here, again, the test may not have been satisfied, as even if fewer than 50 persons actually lent money to the issuer, the test is based on the number of offerees and not persons accepting. The appeal may, however, focus on this issue. This case demonstrates the strictness of the prospectus disclosure rules, which are expressly provided for in s 240 (requirement for prospectus) and s 243 (the "reasonable investor"[29] standard of disclosure).

27.15 2020 also saw the first MAS civil penalty action for the failure to disclose changes in substantial shareholdings, which have also since 2012 (with the coming into effect of the Securities and Futures (Amendment) Act 2009)[30] been expressly covered by Pt VII of the SFA.[31] Other forms of continuous disclosure are regulated slightly differently. Section 203 of the

28 *Public Prosecutor v Tay Chee Ming* [2020] SGMC 1 at [77].

29 For a recent case brought on the basis of common law and statutory misrepresentations involving the non-statutorily required prospectuses of an excluded offer, see *Zuraimi bin Mohamed Dahlan v Zulkarnine B Hafiz* [2020] SGHC 219.

30 Act 2 of 2009.

31 Vivienne Tay, "MAS Fines Shareholder for Not Disclosing Interests in First Case of Civil Penalty for Such Breaches" *Business Times* (18 January 2020). A duty was previously imposed on the substantial shareholders to report their holdings directly to the exchange under the now defunct s 137 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"), which has been replaced by a new Pt VII by the Securities and Futures (Amendment) Act 2009 (Act 2 of 2009). The present position (which actually reverts to the pre-SFA position prior to 2002, where only the Companies Act (Cap 50, 1994 Rev Ed) was relevant to this area of disclosure), is that a substantial shareholder needs to inform only the listed company of any relevant changes. In turn, the listed company is now statutorily required (s 137G of the SFA) to inform the market of the changes, where previously it was only required to do so under r 704(3) of the Singapore Exchange Securities Trading Limited Listing Manual: Mainboard Rules.

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SFA provides statutory backing for the continuous disclosure requirements found in the SGX Listing Manual that are imposed on: (a) a company that is admitted to the official list of the securities exchange; (b) the responsible person[32] of a collective investment scheme that is quoted on a securities exchange; and (c) since 2004, the trustee of a listed business trust. Failure by issuers to make disclosure of material information could render it liable to the payment of a civil fine of up to S$2m. Unlike the other provisions in Pt XII of the SFA, there is only criminal, as opposed to civil, liability, where a misstatement or a material omission is intentional or reckless. There may have been some uncertainty as to what the continuous disclosure rules of an exchange are aside from those found in Appendix 7.1 (Corporate Disclosure Policy) of the SGX Listing Manual, but it is clear that this includes the failure to disclose interested person transactions.[33] It is also now very clear that the standards of continuous disclosure are strict, with the SGX amending its rules in February 2020[34] to affirm that what had to be disclosed was not just "price-sensitive" news (as suggested in *Madhavan Peter v Public Prosecutor*)[35] but also "trade-sensitive" news (which *Madhavan Peter v Public Prosecutor* held was applicable to insider trading but not continuous disclosure).

27.16 The strict disclosure requirements both for an initial offering as well as on a continuous basis for listed companies may have some part to play in why businesses no longer use so much equity financing from the public and rely on debt and private equity, with the numbers of listed firms in the US peaking in 1997 and almost halving by 2017 (although partly due to buybacks).[36] In Singapore, the SGX has seen the number of listings fall from 776 at the end of 2013 to 715 in mid-2020.[37] However,

32 Which is defined in s 283 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) as the corporation itself in the case of an incorporated scheme like a mutual fund, and the manager in the case of an unincorporated scheme like a unit trust. It was held in *Flavel v Roget* (1990) 1 ACSR 595 at 602–603 that a failure to disclose to the exchange a variation of an agreement (the original of which had been disclosed to the exchange) was not a dereliction of duty. Much depends on the circumstances in which a non-disclosure or misstatement occurs, and this can vary from company to company.

33 Tay Peck Gek, "Trek 2000 founder Henn Tan pleads guilty to Securities and Futures Act violations" *Business Times* (24 August 2020).

34 Singapore Exchange Regulation, Amendments to Practice Note 7.1 (Continuing Disclosure) of the Mainboard Rules and Practice Note 7A of the Catalist Rules (7 February 2020).

35 [2012] 4 SLR 613.

36 Kathleen M Kahle and Rene M Stulz have asked, "Is the US Public Corporation in Trouble?" (2017) 31 *Journal of Economic Perspectives* 67.

37 Mercedes Ruehl & Hudson Lockett, "Delistings Threaten to Spoil Singapore's Challenge to HK" *Financial Times* (2 July 2020).

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there are other positive external functions of an active stock market,[38] which remains important certainly for the emerging economies in East Asia.[39] What is also relevant is how strictly SGX has been in delisting or putting poorly performing companies on its "watch-list" which has been affected both by COVID-19 as well as changes to SGX rules from June 2020.[40]

IV. Markets and exchange regulation

27.17 It is clear that bitcoin and ethereum are currency or payment systems that are now regulated by the Payment Services Act 2019.[41] However, the talk of market capitalisation of bitcoin,[42] for example, shows that it is more an intangible asset from a functional perspective, given that the currency does not fluctuate as much except in times of hyperinflation.[43] They are partly accepted by Singapore courts as proprietary interests,[44] although some doubt may have been expressed by the Singapore Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd*.[45]

27.18 There, a virtual currency exchange operator Quoine Pte Ltd ("Quoine"), a Singapore incorporated company, was found liable for wrongfully reversing a number of transactions on its platform placed by a trader B2C2 Ltd ("B2C2") (an electronic trader using algorithmic trading software designed by its director) to sell Ethereum for bitcoin which, due

38 Nikita Koptyug, Lars Persson & Joacim Tåg, "Should We Worry about the Decline of the Public Corporation?: A Brief Survey of the Economics and External Effects of the Stock Market" (2020) 51 *North American Journal of Economics and Finance* 101061.

39 Facundo Abraham, Juan J Cortina & Sergio L Schmukler, "The Rise of Domestic Capital Markets for Corporate Financing: Lessons from East Asia" (2021) 122 *Journal of Banking & Finance* 105987.

40 Annebeth Leow, "SGX RegCo to Drop Minimum Trading Price Rule on June 1" *Business Times* (12 May 2020). See also Singapore Exchange, "SGX RegCo Removes Minimum Trading Price Rule while Enhancing Other Anti-manipulation Tools", media release (11 May 2020).

41 Act 2 of 2019.

42 See, *eg*, Shalini Nagarajan, "Bitcoin Explodes above $18,000, Taking Its Market Capitalization to an All-time High – And It's Even Exciting Hollywood" *Business Insider* (18 November 2020).

43 For a discussion of market manipulation of Bitcoin and other virtual assets, see Ronald J J Wong, "Digital Tokens and Market Conduct Laws" *Singapore Law Gazette* (December 2020).

44 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 (noted in Jeremiah Lau, "Computerised Mistake and Proprietised Bitcoin: *B2C2 v Quoine Pte Ltd*" (2020) 35 BFLR 205), where Simon Thorley IJ said that bitcoins may be the subject matter of a trust even if "there may be some academic debate as to the precise nature of the property right" (at [142]).

45 [2020] 2 SLR 20, noted in Alexander Loke, "Mistakes in Algorithmic Trading of Cryptocurrencies" (2020) 83 MLR 1343.

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to an outage on the system, led to a fallback "deep price" of 10 bitcoin to one Ethereum (this was set by B2C2). The market price prior to that moment was 0.04 bitcoin to one Ethereum, where other transactions had been effected, a difference of 250 times. Quoine cancelled the abnormal trades (which were matched with its forced sale customers) on the basis of a unilateral mistake which B2C2 knew about. B2C2 in turn sued for breach of contract, on the basis that Quoine had no right to unilaterally reverse the transactions and this breached the terms and conditions of the trading relationship. There was also a breach of trust if the bitcoin first credited to and subsequently removed from the plaintiff's account did in fact belong to the plaintiff.

27.19 The decision at first instance in the Singapore International Commercial Court, which found Quoine liable for both breaches, was examined in last year's Annual Review. On appeal, the five-judge Court of Appeal (Jonathan Mance IJ dissenting) upheld the decision below on breach of contract and did not accept that the contract had been vitiated by unilateral mistake. In *Chwee Kin Keong v Digilandmall.com Pte Ltd*,[46] it was held that the common law required that there be a sufficiently important or fundamental mistake as to a term of the contract and the party seeking to enforce the contract must have had actual knowledge of the mistake. Here, the Court of Appeal held that there was no mistake as to the terms of the trading contract which were directly made between B2C2 and the counterparties whose trades were matched with it. Quoine was merely a middleman, and there were no express or implied terms[47] that allowed it to reverse the trades. Even if there were, the director or programmer did not know of the other side's mistaken belief. The court felt that an incremental approach should be taken with respect to unilateral mistake in the context of algorithmic trading. The test was to see if the programmer intended to take advantage of a mistaken party from the point of programming to contract formation in knowing that the relevant offer would only ever be accepted by a party operating under a mistake. Mance IJ dissented on the grounds that any reasonable trader would at once have identified, as B2C2 did, a system breakdown as the cause of the transactions, and such error could be rectified without any detriment to B2C2. This focus on human involvement may be required with technology outages even if it is thought to be largely self-enforcing or correcting.

46 [2005] 1 SLR(R) 502.

47 For a recent application of the business efficacy test in the context of implied terms in a reverse takeover, see *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86.

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27.20 In 2016, the founders of German startup Stock. It conceived the Decentralised Autonomous Organisation ("DAO") as an automated investment fund.[48] The goal was to allow a company to be run as a DAO "without employees, solely governed by software or a virtual board of directors voting electronically".[49] Unfortunately, its governance structure proved inadequate. An attacker subsequently exploited a design flaw to siphon substantial funds out of the DAO, and this could only be remedied by a "hard fork" solution involving the splitting of the blockchain. However, Bruner has pointed out that the "hard fork" could only be carried out with human intervention and against arguments made by the attacker in that case that to do so "would undermine confidence in such undertakings".[50]

27.21 Where the alleged breach of trust was concerned, the Court of Appeal held that no trust was created over the bitcoins credited into B2C2's account. This was because there was no certainty of intention to create a trust. But that did not matter here, as B2C2 was contractually entitled to the proceeds of the abnormal trades from Quoine, and there was no issue of insolvency. However, the Court of Appeal thought that:[51]

> There may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property. There are, however, difficult questions as to the type of property that is involved.

27.22 It is submitted that this cautious approach is correct, as "an intangible asset only exists because the law says it does".[52] It is not traditional property seen as a thing that easily excludes others from using it but an intermediate interest lying between contract and property.[53] As such, there has to be disclosure or standardisation of rules in order for it to

48 Samuel Falkon, "The Story of the DAO – Its History and Consequences" *The Startup* (24 December 2019).

49 Hagen Schweinitz, "How the Board Can Make the Most of Blockchain" *INSEAD Blog* (15 October 2018). See further Mark Fenwick, Joseph A McCahery & Erik P M Vermeulen, "The End of 'Corporate' Governance: Hello 'Platform' Governance" (2019) 20 EBOR 171.

50 Christopher Bruner, "Distributed Ledges, Artificial Intelligence and the Purpose of the Corporation" (2020) 79 Camb LJ 431 at 441.

51 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [144].

52 Richard Calnan, *Proprietary Rights and Insolvency* (Oxford University Press, 2016) at para 1.30. See further Hans Tjio & Ying Hu, "Collective Investment: Land, Crypto and Coin Schemes – Regulatory 'Property'" (2020) 21 EBOR 71.

53 See further Hans Tjio, "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law towards American Law" [2019] Sing JLS 235 (for the Singapore position on/acceptance of intermediate interests). As to the interface between corporations and trusts, see James Allsop CJ, "The Intersection of Companies and Trusts" (2020) 43 Melb U LR 1128.

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be acceptable to third parties expected to avoid or acquire it. The property label should not be lightly accorded to privately negotiated rights seeking to avoid regulation, and some believe that these are limited.[54] The slight contrast is with the recent first instances decisions in England (*AA v Persons Unknown*)[55] and New Zealand (*Ruscoe v Cryptopia Ltd*[56] both of which cited *B2C2 Ltd v Quoine Pte Ltd*[57] and relied on the recent Legal Statement on Cryptoassets and Smart Contracts by the UK Jurisdiction Taskforce[58] in perhaps finding more unequivocally that bitcoins were a species of property, at least for the particular issues that were before the courts.

V. Regulation of intermediaries

A. Licensing

27.23 In *Public Prosecutor v Nancy Tan Mee Khim*,[59] ("*Nancy Tan*") the defendant, who was the managing director and adjudged to be the directing mind and will of the Noble Consulting Group Pte Ltd ("Noble"), was jailed for eight months when found guilty of crowdfunding without a Capital Markets Services ("CMS") licence to deal in securities under s 82(1) of the SFA. While that provision deals with entity liability, the defendant was guilty of consenting or conniving in the breach of that SFA provision under s 331 of the SFA, which attributes liability to the individual – another example of criminal "stepping stone" liability. She had helped raise a total of S$15,355,000 for four small and medium enterprises ("SMEs") between July 2013 and December 2015. Noble sourced for these borrowers through newspaper advertisements and a loan broker. Although Noble was not licensed, it carried out some due diligence including having the companies provide financial statements for the last two years, a list of their past, current and future projects, and documents evidencing payments the companies received for past projects. In the case of one of the SMEs, it visited its construction project. This particular client, which later defaulted, raised S$6,345,000, which

54 Thomas Merrill & Henry Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale LJ 1.

55 [2019] EWHC 3556 (Comm); [2020] 4 WLR 35, noted in Kelvin Low, "Bitcoins As Property: Welcome Clarity?" (2020) 136 LQR 345 and Jeremiah Lau, "That New Chestnut – The Proprietary Status of Bitcoin" [2020] LMCLQ 378.

56 [2020] NZHC 728.

57 [2019] 4 SLR 17.

58 November 2019. The Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [143] also referred to this report.

59 [2020] SGDC 230.

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was the only one above S$5m (that is, exceeding the upper limit of the small offering exclusion discussed above in *Tay Chee Ming*).[60]

27.24 Noble obtained a 15% commission on the funds raised. The defendant herself was paid around S$440,000 in income from Noble during the relevant period. In 2015, two of the companies defaulted on their interest and principal payments which led to around 100 investor-lenders losing a total of S$9.5m. These investors had lent between S$25,000 and S$200,000 at interest rates of up to 28% per annum in the case of the largest borrower mentioned above, and the directors of the fund companies would provide guarantees for the loans. The investors came to know of the crowdfunding companies and funded companies through various channels, including organised seminars (which Noble advertised in *The Straits Times*);[61] in investment exhibitions and fairs; in marketing materials, such as brochures and flyers, which were disseminated to potential investors; and through ten to 13 agents that Noble appointed as portfolio consultants to solicit lenders.

27.25 The judge found that the loan agreements were debentures within the meaning of the SFA, and consequently securities. Noble was seen to have carried on a business of dealing in securities as it induced members of the public to acquire securities which required the CMS licence, and the defendant was found to have consented to Noble's breach of the licensing requirements which created a strict liability offence. This clearly shows that a dealer's licence may be required for activities in the primary market (as opposed to the secondary market trading previously issued securities). However, the defence raised the issue of it having sought legal advice both before and after May 2014, which was when MAS had contacted Noble to express some concerns and for it to check if its business model was in compliance with the necessary regulations. In the event, the judge found that the advice was not on the need for a CMS licence but for licensing under the Financial Advisers Act,[62] which had a 30-person accredited investor exemption for the giving of financial advice (which concerns portfolio investments and different from another SFA regulated activity of "advising on corporate finance"). The judge found that she had not been wrongly advised as she knew that crowdfunding was a "grey area" where the SFA was concerned. When it came to sentencing, the

60 See para 27.11 above.

61 A Capital Markets Services licensee giving financial advice would have to comply with the Financial Advisers Act (Cap 110, 2007 Rev Ed), including the suitability rule in s 27. This rule was at issue in *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 which involved the suitability rules of Dubai where Anselmo Reyes IJ found that no damage had been proven even if there were a breach.

62 Cap 110, 2007 Rev Ed. Discussed at para 27.47 below in the context of the suitability rule.

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judge was also not convinced that the accused had done all she could to ensure that Noble's business complied with the law.

27.26 While Noble and the defendant were guilty of licensing breaches in terms of dealing in securities, there was some evidence that their business may have also involved the regulated activity of "advising on corporate finance" (this was raised by one of the lawyers the defendant consulted). The regulatory position has been clearer since 2016 with various statements by MAS[63] which is that it relies to a large extent on crowdfunding platforms to safeguard investor interests, and these have to be licensed to deal in securities. In 2018, MAS published new guidelines[64] which clarify the due diligence checks to be carried out on issuers by licensed platform operators and that the advertising restrictions in the SFA do not prohibit crowdfunding platform operators from publicising their services, and provide guidance on the manner in which such advertisements can be made. The frequently asked questions ("FAQs") help market participants, including crowdfunding platform operators, better understand the regulatory framework underpinning lending-based crowdfunding. These licensed platforms are also required to institute policies to handle issuer/fundraiser defaults.

27.27 Where prospectus requirements are concerned, discussed in *Tay Chee Ming*[65] above, there are existing exemptions to the prospectus requirements to be used for crowdfunding. The two most important of these exemptions for crowdfunding purposes appear in ss 272A and 272B of the SFA, which were also the ones that were invoked by the private limited company in *Tay Chee Ming*. These exemptions are: (a) a small personal offer where the total amount raised from such offers within a 12-month period does not exceed S$5m or such amounts as may be prescribed by the MAS; and (b) a private placement to no more than 50 persons within any period of 12 months and under certain conditions.[66] While MAS discussed these in their 2016 and 2018 statements, they were

63 See Monetary Authority of Singapore, "Response to Feedback Received – Facilitating Securities-Based Crowdfunding", media release (8 June 2016) appearing on The Monetary Authority of Singapore website; see further Christian Hofmann, "An Easy Start for Start-ups: Crowdfunding Regulation in Singapore" (2018) 15 Berkeley Bus LJ 219 and Ying Hu, "Regulation of Equity Crowdfunding in Singapore: [2015] Sing JLS 46.

64 Monetary Authority of Singapore, "Controls and Disclosures to be Implemented by Licensed Securities-Based Crowdfunding Operators" (Circular No CMI 27/2018) (August 2018; amended 5 March 2021) and "Frequently Asked Questions (FAQs) on Lending-based Crowdfunding" (8 October 2018).

65 See para 27.11 above.

66 For details of the small offer exemption, see The Monetary Authority of Singapore, *Guidelines on Personal Offers Made Pursuant to the Exemption for Small Offers* (8 June 2016).

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not issues for the court to decide in *Nancy Tan*,[67] even though it was clear on the facts that the requirements for the s 272A small offer exclusions were not met. This could mean that with crowdfunding, the focus is on platform licensing and not on the need for a prospectus for the platform or persons raising funds through the platform. This shows a concern that exchanges or platforms may have been set up less to channel finance to SMEs, and more to facilitate even more financial activity, often trading in non-standard financial products other than shares and bonds.

VI. Private law

27.28 It is evident from the cases above that there is a large problem going forward with bonds issued by both public and private companies.[68] The difficulties with the respective Hyflux and Hin Leong restructurings in Singapore are also testament to that. The UK has recently had to deal with their own "Minibond"[69] scandal, which is a smaller and later version of Singapore's Minibond problem that resulted from the US sub-prime scandal, where derivatives based on the US sub-prime mortgage market were classified as debentures sold to the investing public in Singapore. Regulations aside, quite often the contractarian nature of bonds (which are governed less than shares are by the Companies Act), often mean that private law comes into play. Many of these have important ramifications for general contract and tort law.

27.29 *Ma Hongjin v SCP Holdings Pte Ltd*[70] involved a convertible loan of $5m extended by Ma to the company (the ultimate holding company of a group of companies known as "Biomax Group") pursuant to a Convertible Loan Agreement ("CLA") dated 6 January 2015. The CLA was negotiated by Ma's husband, Han, with, on the other side the controlling shareholder of the company, Sim.

27.30 Under cl 3 of the CLA, the S$5m loan was extended for a period of two years. In return, the company would have to pay interest at the rate of 10% per annum. The interest was to be paid in two instalments: (a) the first interest payment of S$500,000, due on 5 January 2016; and (b) the second interest payment of S$500,000, due on 5 January 2017. The

67 See para 27.23 above.

68 Hans Tjio, "Restructuring the Bond Market in Singapore" (2019) 14(1) *Capital Markets Law Journal* 16.

69 See Financial Conduct Authority, *Report of the Independent Investigation into the Financial Conduct Authority's Regulation of London Capital & Finance plc* (by the Rt Hon Dame Elizabeth Gloster DBE) (23 November 2020; revised 10 December 2020).

70 [2021] 1 SLR 304, affirming *Ma Hongjin v SCP Holdings Pte Ltd* [2019] SGHC 277.

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principal of S$5m was also repayable on 5 January 2017, making a total of S$5.5m payable on that date. Additionally, Ma was granted an option to require the company to procure a transfer of 15% of the shares in its subsidiary Biomax Holdings to her in lieu of paying the sum of S$5.5m due on 5 January 2017.

27.31 Within two months of entering into the CLA, and after two of the three loan tranches had been disbursed, Ma and Han became unhappy with the company's financial results. This caused Han to renegotiate some of the terms of the CLA with Sim sometime in March 2015. This resulted in Ma and the company entering into a "Supplemental Agreement relating to a S$5,000,000 Convertible Loan Agreement Dated 6 January 2015" ("the SA") on 16 April 2015.

27.32 The SA essentially imposed additional obligations on the company by stipulating several amendments to the CLA. First, the proportion of Biomax Holdings shares in respect of which Ma could exercise a call option on 5 January 2017 increased from 15% to 20%. Second, the SA imposed an additional "lump sum facility fee" of S$250,000 to be paid on the same day as the first interest payment (that is, 5 January 2016). These amendments were to take effect on 16 April 2015. Crucially, Ma did not assume any additional obligations to the company under the terms of the SA and simply went ahead and disbursed the third loan tranche after that.

27.33 In January 2016, the company made payment of S$500,000 but failed to pay the S$250,000 facility fee which was provided for under the SA. Ma thus commenced proceedings to obtain payment of the facility fee from the company and repayment of the outstanding loans and interest from Biomax Technologies (which was not the subject of the appeal but had also been a defendant at the trial for other loans extended by Ma to it).

27.34 At trial, other defences were dropped except for the lack of consideration for the SA. The judge found that the SA was not supported by consideration and found that the defendant had no case to answer. Although there was no appeal on the appropriate test for a submission of no case to answer by a defendant, the Court of Appeal said, whilst clarifying the evidential position in Singapore:[71]

> We therefore affirm that, in the situation where the defendant has submitted that it has no case to answer and has (as it legally must) also elected to call no evidence if it fails in this submission, *the plaintiff* would ***succeed*** if it can establish that it has *a* ***prima facie*** *case* on each of the essential elements of its claim. For the avoidance of doubt (and also for the reasons stated above), the

71 *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [33].

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> plaintiff would (***simultaneously***) have ***necessarily proved*** its (***overall***) case against the defendant ***on a balance of probabilities***. [emphasis in original]

27.35 The Court of Appeal also agreed with the judge below that the fact that the SA was supported by consideration did not have to be pleaded, and thought that:[72]

> There is no reason, in principle, why contracting parties cannot, by *agreement*, dispense with the doctrine of consideration with regard to the *variation* of *that* particular contract. Any contractual term to that effect would not only be *part of the bargain between the parties* but would also be one that is part of a contract, which, in its *formation*, was in fact *supported by valid consideration* in the eyes of the law to begin with. *If*, indeed, that particular contract had been formed *without* such valid consideration, then *that* contract (and, of course, all the terms contained therein) would *not* have been able to pass legal muster in the first place. [emphasis in original]

27.36 This supports ideas of pre-approved novation that has been discussed previously in both Singapore and English cases and academic literature.[73] On the facts, however, it was held that the relevant clause in this case could not be seen as effecting this, as all it did was require the need for writing should there have been a variation or amendment of the agreement. This was quite different from an earlier decision in *Benlen Pte Ltd v Authentic Builder Pte Ltd*,[74] which Ma relied on, where Chan Seng Onn J had held (*obiter*) that the meaning of a particular clause of the relevant contract there was that the parties had in fact agreed to dispense with the doctrine of consideration in relation to the variation of their contract, as that envisaged a variation or modification only with prior written consent from both parties.

27.37 The case therefore turned on whether consideration was in fact furnished for the SA. Recent cases have taken perhaps a more practical approach towards this issue. For example, an argument that consideration was past where a facility arrangement was entered into before the grant of security failed in *Rainforest Trading Ltd v State Bank of India Singapore*[75]

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72 *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [36].

73 Kwan Ho Lau, "Unilateral Transfers of Contractual Obligations" (2013) 129 LQR 491, discussing *Giuffrida Luigi v Julius Baer (Singapore) Ltd* [2010] SGHC 96. In the UK, see *Mulkerrins v Price Waterhouse Coopers* [2003] UKHL 41, discussed in Chee Ho Tham, *Understanding the Law of Assignment* (Cambridge University Press, 2019) at p 16.

74 [2018] SGHC 61 at [18].

75 [2012] 2 SLR 713. In this regard, s 6 of the Bills of Sale Act (Cap 24, 2011 Rev Ed) provides that "every bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void … if it is made or given wholly or in part in consideration of a pre-existing debt". While past consideration may not be seen as valuable consideration for the giving of security (*Wigan v English and Scottish*

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("*Rainforest*") on the basis that commercial reality requires that they be usually seen as part of a single composite transaction. The Court of Appeal there, relying on *Pao On v Lau Yiu Long*,[76] held that while proper consideration was required, a "strictly chronological approach in determining whether consideration is past or not is deeply unrealistic and unnecessarily restrictive", given that the consideration constituted a single composite whole of the transaction.[77] But such a "common understanding" was not the gist of the argument here. Instead, it was closer to the idea of "practical benefit" from *Williams v Roffey Bros & Nicholls Ltd*[78] with respect to the performance of existing contract, an idea which was rejected at first instance (as the third tranche of the loan had to be disbursed anyway). Ma's case was that "goodwill" had moved from herself to the company, and this alone constituted a sufficient nexus. Andrew Phang Boon Leong JA said that Ma misunderstood the meaning of "causal connection" in this sense which was not about the "common understanding" of a single transaction from *Rainforest* (which was not present here) but the need for consideration to be provided at the request of the promiser. It is the price of the promise. Goodwill could not be given in a vacuum but had to be requested by the respondent leading to the formation of the SA. In any case, the court found that goodwill was not sufficient in itself to be valid consideration.

27.38 Importantly, the Court of Appeal revisited the issue of consideration which it had last examined in *Gay Choon Ing v Loh Sze Ti Terence Peter*[79] ("*Gay Choon Ing*"), noting that things had not moved forward since then with respect to replacing the need for consideration with, for example, the intention to create legal relations. Specifically, with

Law Life Assurance Association [1909] 1 Ch 291), this was usually in the context of bankruptcy legislation, and older cases sometimes appeared to accept the converse as a general proposition in equity: *Burns v Burns* (1798) 3 Ves Jr 576 at 582.

76 [1980] AC 614, which is fully discussed in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at pp 193–196. See also *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166, which extends the concept of consideration in multiple sales and purchase contracts where the same consideration suffices for different promises in multiple contracts which are part of a "continuum".

77 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [38], referring to a "common understanding" of a single transaction. See further Goh Yihan, "Past Consideration or Unconnected Consideration" (2012) 24 SAcLJ 553.

78 [1991] 1 QB 1. See, however, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at p 213, pointing out in relation to *Williams v Roffey Bros & Nicholls Ltd* [1991] 1 QB 1 that "the precise scope of its applicability remains uncertain".

79 [2009] 2 SLR(R) 332 and its coda on consideration. See further Mindy Chen-Wishart, "Consideration and Serious Intention" [2009] Sing JLS 434.

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respect to consideration in the context of contract variation, Phang JA said:[80]

> With respect, ***none*** of the arguments in favour of the abolition of the doctrine of consideration in the context of the *variation or modification* of contracts is persuasive. [emphasis in original]

27.39 The position in Commonwealth jurisdictions like New Zealand and Canada were examined at length and found not to be sufficiently determinate to assist Ma. However, Phang JA concluded:[81]

> Fifthly (and this is a point that has been raised by many commentators with regard to the decision in *Anton Trawlings* ([67] *supra*)), the broader issue that is raised is whether abolishing the requirement of consideration in the context of contractual variation is the thin end of the legal wedge. Put simply, why should the doctrine of consideration not be abolished with regard to the formation of contracts as well if the doctrine is indeed abolished in the context of contractual variations ... That is a valid question to raise and brings us back – full circle once again – to the more general issue as to whether or not the doctrine of consideration as a whole should be abolished ... [emphasis in original omitted]

27.40 With respect to contractual interpretation, the 2020 case relevant to this chapter is *Tembusu Growth Fund II Ltd v Yee Fook Khong*.[82] This arose from an investment made in a business in China and the arrangements made between the parties for the investor to realise his investment. The parties entered into a series of agreements to facilitate the investor's exit, but disputes then arose as to what the parties' obligations actually were under the investment term sheet. The issues raised included questions as to contractual interpretation as well as promissory estoppel, causation of loss and remoteness of damages, but only the first will be discussed here.

27.41 In allowing the investor's claim for sums due under the term sheet, Ang Cheng Hock J relied on the principles that the Court of Appeal established in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*[83] ("*Zurich*") to "give effect to the parties' intentions objectively in the face of conflicting subjective interpretations advanced by ingenious counsel". While there may have been some doubt in other jurisdictions with respect to the use of post-contractual evidence in contractual interpretation, Ang J said of the position in Singapore:[84]

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80 *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [60].

81 *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [94].

82 [2020] SGHC 104. One such case in 2019 that was overlooked in last year's Annual Review was on interpreting the terms of a sale and purchase of shares in the context of a reverse takeover of a listed company in *Cheong Chee Hwa v China Star Food Group Ltd* [2019] SGHC 86.

83 [2008] 3 SLR(R) 1029 at [1].

84 *Tembusu Growth Fund II Ltd v Yee Fook Khong* [2020] SGHC 104 at [81].

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> My conclusions in relation to the proper interpretation of the Term Sheet are buttressed by the conduct of the parties *subsequent* to the Term Sheet being entered into. I case law in relation to the value of subsequent conduct in contractual interpretation makes clear that, subject to certain caveats, post-contractual conduct can be an aid in the interpretation of contractual terms. In fact, I have already extensively referred to the parties' post-contractual conduct as an aid in interpreting the SSP Agreement (see for example, [66] above). [emphasis in original]

27.42 Ang J noted the exception drawn from a case discussed above in the context of consideration, *Gay Choon Ing*,[85] which was that "subsequent conduct cannot be used to support an interpretation that is in direct contradiction to the express terms",[86] but this was not the case here. In *Zurich*, V K Rajah JA had thought that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct".[87] While he also thought at that time that this was still controversial and may require revisiting,[88] in a later article he said that *Zurich* "represents the current position in Singapore".[89]

27.43 There have been at least two other cases where post-contractual evidence has been admitted. It was used in *Cheah Geok Tuan v Lie Khin Sin*,[90] where it confirmed the parties' intentions. More recently, in *Lim Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd*[91] ("*Maxz*"), the Court of Appeal thought that long-term contracts such as that captured in the articles of association of a company allowed for a more dynamic form of interpretation than that laid out in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*.[92] In *Maxz*, the issue was how an article previously requiring shareholder approval for raising the level of authorised capital should be interpreted given subsequent legislative changes removing the concept of authorised capital.[93]

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85 See para 27.38 above.

86 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [86]. See also *Bridgeman Pte Ltd v Dukim International Pte Ltd* [2013] SGHC 220.

87 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132].

88 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)].

89 V K Rajah JA, "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" *Malaysian Bar Association* (30 July 2010) at p 10.

90 [2006] 1 SLR(R) 340 at [22].

91 [2009] 2 SLR(R) 624.

92 [1970] AC 583 (which does not allow *contracts* to be interpreted in the light of subsequent events due to the fear of contracts being seen differently at the point of contracting and at a later point).

93 *Lim Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624. The appellants argued *that* the quantum of any new share issue therefore had to be approved, which was more onerous than provided by s 161 of

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27.44 Torts are probably second only in importance to contract law in any law school curriculum. That is also the case with respect to the private law affecting the area of financial services, particularly when it comes to the giving of financial advice. The question of the limitation period on a vicarious liability claim against a financial advisor for negligent advice given by its employees arose in *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat*.[94] The Court of Appeal reversed the decision at first instance and found the claims time barred. Here, the appellant financial advisory company had as its client the respondent who "trusted their opinions and advice" ("their" being Moi and Quek, the appellant's partner and consultant respectively). They had advised Saimee to invest in the foreign exchange market through an online trading account, promising returns of 40% in a year. This did not materialise and in fact most of the investment was lost and nothing could be paid to Saimee when the first tranche of the principal plus profits were due in April 2012, a year after the investment was made. There were different settlement agreements in the meantime where the company promised to pay various stipulated amounts to Saimee. These did not eventuate, so Saimee then sued the company vicariously for the fraudulent negligent misstatements made by the partner and consultants in July 2018.

27.45 The Court of Appeal thought that it was crucial when the cause of action arose with respect to the claims. The law itself was well settled – the cause of action accrues upon proof of damage in reliance on the negligent misrepresentation. But it was questioned whether actual damage occurred upon the mere entry into the risky investments (in April 2011 as argued by the company and its employees) or upon the risks materialising or some other event. At first instance, the judge found that the claims were not time barred. The judge thought that the cause of action arose when there was default on the settlement agreements in September 2012, since that was the date "it could be said with certainty that [Saimee] suffered actual loss as a result of [Moi and Quek's] negligent misrepresentations". However, the Court of Appeal held that the claims were time barred. The court held that time began to run from April 2012, which was when the first tranche of payment plus profits to Saimee was due, which arose before the settlement agreements were entered into. The Court of Appeal thought that the judge below had conflated the recovery of any loss with the existence of the loss.

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the Companies Act (Cap 50, 2006 Rev Ed). The Court of Appeal held that the article now only allowed shareholders to set a limit or price on the issue and if that was not done, compliance with s 161 was sufficient.

94 [2020] 2 SLR 272.

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27.46 While the company bore the burden of pleading the limitation period, which had to be "expressly pleaded as a defence", it had discharged that burden through pleadings with respect to limitation that Moi and Quek made. The moment a limitation defence was raised by the defendant in pleadings, the burden was then on the plaintiff to prove that its claim fell within the limitation period, which it failed to do.

27.47 While vicarious liability for negligent misrepresentations is clearly actionable (though time barred in this case),[95] it may be harder to show that a financial advisory firm is vicariously liable, say, for a breach of the suitability rules in s 27 of the Financial Advisers Act. In *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd*,[96] it was held that a firm may not be strictly or vicariously liable for the acts of its representatives who were in breach of the relevant suitability[97] and disclosure of conflicts of interest rules when making recommendations on securities in Australia. It may be that a different rule of corporate attribution is required here,[98] such as that found in Div 5 of Pt XII of the Securities and Futures Act for market misconduct (of which there is no equivalent for the conduct of business rules in the Financial Advisers Act).

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95 Though it is arguable whether the basis for the principal's liability should lie in apparent or actual authority: Peter Watts, "Principals' Tortious Liability for Agents' Negligent Statements – Is 'Authority' Necessary" (2012) 128 LQR 260. For vicarious liability generally, see *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 and *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074; *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540. See further Justin Tan, "Vicarious Liability As Risk-Through-Placing" (submitted for publication).

96 (2004) 47 ACSR 649.

97 This rule was at issue in *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1, which involved the suitability rules of Dubai where Anselmo Reyes IJ found that no damage had been proven even if there were a breach.

98 See Rachel Leow, *Corporate Attribution in Private Law – Hart Studies in Private Law* (Bloomsbury, forthcoming 2022).

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