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Pearlie M.C. Koh

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PUNISHMENT AND PROTECTION—THE DISQUALIFICATION OF DIRECTORS IN SINGAPORE

Madhavan Peter v. Public Prosecutor[1]
Ong Chow Hong (alias Ong Chaw Ping) v. Public Prosecutor[2]

PEARLIE **KOH***

I. INTRODUCTION

The ability to operate behind the shield of the corporate form, thereby benefitting from limited liability, is thought to be a privilege[3] conferred by statute.[4] This privilege is however, curtailed for certain individuals who are "proven misfits".[5] The removal, by disqualification, of these individuals from corporate management is intended to *protect* the shareholders and creditors of the companies concerned from the possibility of future instances of undesirable conduct by these same individuals. Thus, the *Companies Act*[6] of Singapore provides for disqualification from holding directorships or from management of a company on a number of grounds.[7] Disqualification may be automatic[8] or dependent on a court making a disqualification order.[9] There is also recognition that disqualification is punitive. Indeed, the effect of a disqualification,

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1 [2012] 4 S.L.R. 613 (H.C.) [*Madhavan Peter*].

2 [2011] 3 S.L.R. 1093 (H.C.) [*Ong Chow Hong*].

3 For a consideration of the difference between treating this as a privilege or as a right, see Vanessa Finch, "Disqualifying Directors: Issues of Rights, Privileges and Employment" (1993) 22 Indus. L.J. 35.

4 Justice Lightman, "The Challenges Ahead: Address to the Insolvency Lawyers' Association" [1996] J. Bus. L. 113 at 125.

5 *Ibid*. See also Kingsley T.W. Ong, "Disqualification of Directors: A Faulty Regime?" (1998) 19 Company Lawyer 7.

6 Cap. 50, 2006 Rev. Ed. Sing.

7 Undischarged bankruptcy (s. 148); unfitness (s. 149); directorship in companies wound up on grounds of national security or interest (s. 149A); conviction for certain offences (s. 154); persistent default of delivery of documents to the Registrar (s. 155); and disqualification under the *Limited Partnership Act* (Cap. 163B, 2010 Rev. Ed. Sing.), s. 155A.

8 For, *inter alia*, an undischarged bankrupt (*ibid.*, s. 148), or a person who has been convicted of certain offences involving fraud or dishonesty (*ibid.*, s. 154(1)).

9 For, *inter alia*, "unfit directors of insolvent companies" (*ibid.*, s. 149) and any person who has been convicted in Singapore of offences related to the management or formation of companies (*ibid.*, s. 154(2)).

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given its "substantial interference with the freedom of the individual",[10] is at least quasi-penal.

This vacillating characterisation has led to decisions, not only from Singapore,[11] but also from England[12] and Australia, which have variously emphasised either or both the protective and punitive underpinnings of the regime. The importance of developing a coherent rationale for the disqualification of directors should not be underestimated. The statutory objective informs the court as to the applicable and relevant considerations, not only when assessing the appropriateness and extent of a disqualification order, but also when deciding whether to grant the affected person leave from the disqualification. This punitive-protective ambivalence has recently been seemingly resolved in Singapore by the High Court. In two recent and related cases,[13] the court concluded that the objective of the disqualification regime was not punitive, but was essentially protective in nature. This notwithstanding, a closer examination of the judgments demonstrates that the court did take account of punitive considerations in arriving at the final decision. Indeed, it is questionable whether a *purely* protective principle can exist in the context of the disqualification regime. The position may well be, as McColl J.A. accepted in the Court of Appeal of New South Wales, that the disqualification scheme admits of an essentially *hybrid* nature.[14] In that light, therefore, the punitive-protective dichotomy may be a "false" one.[15]

II. The Cases

Both cases involved Airocean Group Ltd, formerly a public listed company. The Chief Executive Officer ("CEO") of the company was being investigated for corruption by the Corrupt Practices Investigation Bureau ("CPIB"). Airocean's board of directors was aware of the investigations, having been so informed by the CEO when he was released on bail. On the basis of legal advice, however, the board decided that nothing further needed to be done at that point in time. News of the CPIB probe was published in the newspapers some two months hence. This led to the Singapore Exchange seeking clarification on the matter. An investigation by the Commercial Affairs Department into alleged contraventions of the disclosure

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[10] *Re Lo-Line Electric Motors Ltd* [1988] Ch. 477 at 486. Indeed, the consequences go beyond the individual, as the company's reputation, operations and relations are also likely to be adversely affected: Robert Baldwin, "The New Punitive Regulation" (2004) 67 Mod. L. Rev. 351 at 362. See also *Re Crestjoy Products Ltd* [1990] B.C.C. 23 (Ch.); *R. v. Secretary of State for Trade and Industry, ex parte McCormick* [1998] B.C.C. 379 at 386 (C.A.).

[11] For an emphasis on the 'punitive' aspect of disqualification, see *e.g.*, *Lee Huay Kok v. A.G.* [2001] 3 S.L.R.(R.) 287 (H.C.) [*Lee Huay Kok*]. See also *Public Prosecutor v. Sng Keng Ling* [2008] SGDC 344; *Public Prosecutor v. Peter Moe* [2008] SGDC 343; *Public Prosecutor v. Lim Kiang Soon* [2008] SGDC 342; *Public Prosecutor v. Lee Siew Hoe* [2008] SGDC 341; *Public Prosecutor v. Lee Thian Soon* [2008] SGDC 340. For an emphasis on the 'protective' aspect, see *e.g.*, *Lim Teck Cheng v. A.G.* [1995] 3 S.L.R.(R.) 223 (H.C.); *Yap Guat Beng v. Public Prosecutor* [2011] 2 S.L.R. 689 (H.C.).

[12] See generally Vanessa Finch, "Disqualification of Directors: A Plea for Competence" (1990) 53 Mod. L. Rev. 385; Finch, "Disqualifying Directors: Issues of Rights, Privileges and Employment", *supra* note 3.

[13] *Madhavan Peter*, *supra* note 1; *Ong Chow Hong*, *supra* note 2.

[14] *Rich v. Australian Securities and Investments Commission* [2003] 203 A.L.R. 671 at para. 344 (N.S.W.C.A.) (McColl J.A., dissenting), rev'd [2004] 220 C.L.R. 129 (H.C.A.) [*Rich* (HCA)].

[15] *Ibid.*

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provisions in the *Securities and Futures Act*[16] followed. In *Ong Chow Hong*, the earlier decision, Ong, the non-executive chairman of Airocean's board of directors, was charged for breach of s. 157(1)[17] of the *Companies Act* in connection with his conduct following the Singapore Exchange's request for clarification on the CPIB probe. When the company secretary contacted Ong by telephone to inform him that the Exchange had requested for a clarification statement in response to the newspaper report, Ong responded that "he would agree to any announcement issued by [Airocean] if [Madhavan] approved of it… because he was going to play golf that day".[18] Madhavan, a practising lawyer, was an independent director on the company's board, who was himself charged for disclosure offences in the second decision here under consideration. Ong did not see the draft announcement before it was released. He pleaded guilty and was fined and also disqualified from managing the affairs of any company for a period of 12 months. Ong appealed against the disqualification order. The High Court held that Ong "had committed nothing short of a serious lapse in entirely abdicating his corporate responsibilities".[19] In the circumstances, V. K. Rajah J.A. dismissed the appeal and extended the period of disqualification to 24 months.

In *Madhavan Peter*, three directors, including Madhavan and Chong, the Chief Operating Officer, were separately charged for, and found guilty by the District Court of, infringing the disclosure provisions of the *SFA* in respect of the failure to notify the Exchange of the investigations. In addition, Chong was convicted of insider trading, having sold three lots of Airocean shares during the relevant period. All three directors were, in addition to penalties imposed under the *SFA*, disqualified for varying periods under s. 154(2) of the *Companies Act*.[20] The directors appealed against their convictions. The High Court acquitted the directors of the disclosure charges, but upheld Chong's insider trading convictions, reducing the custodial sentence imposed by the District Court to a fine. The period of Chong's disqualification from acting as a director was however sustained at the original five years. Chan Sek Keong C.J. held that five years was not manifestly excessive as Chong had "abused his office as a director to trade in Airocean shares using inside information which he had acquired *qua* director".[21] This was, in Chan C.J.'s view, a transgression that was far more serious than Ong's.

III. Punishment and Protection—A False Dichotomy?

Rajah J.A.'s judgment in *Ong Chow Hong* provides one of the most reasoned expositions by the High Court on the rationale of Singapore's disqualification regime,

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[16] Cap. 289, 2006 Rev. Ed. Sing. [*SFA*].

[17] *Companies Act*, *supra* note 6, s. 157 obliges company directors to "at all times act honestly and use reasonable diligence in the discharge of the duties of his office". A director in breach of s. 157 is guilty of an offence and liable on conviction to a fine or to an imprisonment term: *ibid.*, s. 157(3).

[18] *Ong Chow Hong*, *supra* note 2 at para. 9, referring to the agreed statement of facts [emphasis omitted]. To be fair to Ong, the golfing event was an official event at which Ong had a prominent role to play.

[19] *Ibid.* at para. 28.

[20] *Companies Act*, *supra* note 6, s. 154(2) provides as follows: "Where a person is convicted in Singapore of (*a*) any offence in connection with the formation or management of a corporation… the court may make a disqualification order in addition to any other sentence imposed."

[21] *Madhavan Peter*, *supra* note 1 at para. 190.

which is premised on the statutory provisions of England[22] and Australia.[23] His Honour observed that, although protection was *initially* the "overarching object" of disqualification in all three jurisdictions,[24] each jurisdiction had embarked on "different regulatory paths".[25] In the case of both the U.K. and Australia, the disqualification regimes there had developed such that they were respectively presently driven by considerations which went beyond protection. Singapore, on the other hand, had, in Rajah J.A.'s view, remained on the protective path, a view with which Chan C.J. concurred.[26] Rajah J.A. disagreed with Choo Han Teck J.C. (as he then was), who had opined in *Lee Huay Kok* that "there [was] a strong, if not predominant, punitive element"[27] in the disqualification provisions. Rajah J.A. considered Choo J.C. to have "departed from the original protective basis… [which] departure [sat] uneasily with the statutory structure of the disqualification regime".[28]

A. *Consideration of the English Position*

Rajah J.A. began with a consideration of the English regime. English company law had long provided for the disqualification of company directors.[29] The powers vested in the court to make disqualification orders were expanded and consolidated in the *CDDA*.[30] As Rajah J.A. noted, it had generally been judicially accepted[31] that the U.K. disqualification regime was developed to protect the public, especially potential creditors of companies. This notwithstanding, English decisions had included deterrence and punitive considerations in the making of disqualification orders under the *CDDA*. In *Secretary of State for Trade and Industry v. Griffiths, Re Westmid Packing Services Ltd (No. 3)*,[32] Lord Woolf M.R. explained the reason for adopting this

[22] The modern incarnation of which is found in the *Company Directors Disqualification Act 1986* (U.K.), 1986, c. 46 [*CDDA*].

[23] The present provisions are found in *Corporations Act 2001* (Cth.), Part 2D.6.

[24] *Ong Chow Hong*, *supra* note 2 at para. 13.

[25] *Ibid*.

[26] *Madhavan Peter*, *supra* note 1 at para. 189.

[27] *Lee Huay Kok*, *supra* note 11 at para. 10.

[28] *Ong Chow Hong*, *supra* note 2 at para. 19.

[29] Originally by virtue of the *Companies Act, 1928* (U.K.): see generally L.H. Leigh, "Disqualification Orders in Company and Insolvency Law" (1986) 7 Company Lawyer 179.

[30] The *CDDA*, *supra* note 22, s. 11, prohibits undischarged bankrupts from acting as directors. The court may make disqualification orders where a director has been convicted on indictment of certain offences: *ibid*., s. 2; where there have been persistent breaches of the companies legislation: *ibid*., s. 3; where there has been fraudulent or wrongful trading: *ibid*., ss. 4, 10. In addition, the court must mandatorily disqualify a director of an insolvent company for 2 years if the court is satisfied that his conduct as a director of that company renders him "unfit to be concerned in the management of a company": *ibid*., s. 6. Section 6 is often considered the most important provision under which disqualification orders may be made: see Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law*, 29th ed. (Oxford: Oxford University Press, 2012) at para. 20.13.2.5; Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford: Oxford University Press, 1997) at 549, and has been described as "the state's weapon of choice": see Richard Williams, "Disqualifying Directors: A Remedy Worse than the Disease?" (2007) 7 Journal of Corporate Law Studies 213 at 215.

[31] See *e.g.*, *In re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164 at 176 (C.A.).

[32] [1998] B.C.C. 836 (C.A.).

position:[33]

> [T]here are occasions when disqualification must be ordered even though, by reason of the director's recognition of his previous failings and the way he has conducted himself since the conduct complained of, he is in fact no longer a danger to the public at all. In such cases it is no longer necessary for the director to be kept 'off the road' for the protection of the public but other factors come into play in the wider interests of protecting the public, i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about.[34]

Thus, in considering the period of disqualification to impose,[35] the U.K. courts have adopted a "backward-looking"[36] assessment. The focus on the past, which echoes the punitive tradition of retribution and desert,[37] has been criticised as involving "unnecessary and inappropriate confusion".[38] This criticism is not without merit. Focusing on the blameworthiness of the director's conduct, which takes account of individual mitigating factors, may, paradoxically, result in the director *not* being disqualified, or being disqualified for a shorter term, even where protective considerations may demand otherwise. The English decision of *Re Cladrose Ltd*[39] provides a useful illustration.[40] There, the directors of three insolvent companies had failed entirely to produce accounts for auditing, and to file annual returns. One of the directors, Pollard, had relied on the other, Platt, who was a qualified chartered accountant. The court disqualified only the chartered accountant, holding that Pollard was "very much less blameworthy… [as] it can be said [he] relied upon somebody whom [he] had good and sufficient cause to believe was a proper person to rely upon, and who was equally with [himself] responsible".[41]

From a protective vantage point, however, it should at least have been arguable that the public deserved to be protected against directors, regardless of their individual

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33 *Ibid.* at 843.

34 See also *In re Grayan Building Services Ltd (in liquidation)* [1995] Ch. 241 (C.A.).

35 It should be noted that *CDDA*, *supra* note 22, s. 6 imposes a minimum disqualification period of 2 years: s. 6(4).

36 Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed. (London: Sweet & Maxwell, 2008) at 243.

37 Frederic R. Kellogg, "From Retribution to 'Desert': The Evolution of Criminal Punishment" (1977) 15 Criminol. 179 at 182, citing Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976).

38 Finch, "Disqualifying Directors: Issues of Rights, Privileges and Employment", *supra* note 3 at 42; *cf.* Sally E. Wheeler, "Re Sevenoaks—Continuing the Search for Principle" (1990) Insolvency Law & Practice 174 at 175. For a view that disqualification should be concerned less with such concepts than with corporate governance generally, see Alice Belcher, "What Makes a Director Fit? An Analysis of the Workings of Section 17 of the Company Directors Disqualification Act 1986" (2012) 16 Ed. L. Rev. 386.

39 [1990] B.C.L.C. 204 (Ch.) [*Re Cladrose*].

40 See also Finch "Disqualification of Directors: A Plea for Competence", *supra* note 12 at 388; Finch, "Disqualifying Directors: Issues of Rights, Privileges and Employment", *supra* note 3 at 37.

41 *Re Cladrose*, *supra* note 39 at 208.

qualifications or expertise, who had a propensity to abdicate their responsibility for matters which were by law within the purview of all directors.[42] This seems all the more so as the court took a serious view of the importance of proper company administration.[43] As Harman J. himself noted, the obligation to prepare accounts and make annual returns was "a matter which is the duty of all directors to deal with".[44] Protective considerations should therefore have seen Pollard also disqualified.

The approach taken in *Re Cladrose vis-à-vis* Pollard was in sharp contradistinction to the approach taken by Rajah J.A. in *Ong Chow Hong*. Rajah J.A. had considered it "imprudent"[45] to accept Ong's contention that he had relied on a professionally-qualified co-director as "[e]very director has to ensure that he discharges his responsibilities with due diligence in *all* pertinent matters".[46] Rajah J.A. clearly had the protective rationale firmly in mind when he stated pointedly:[47]

> [E]ven if I were to accept that [Ong] was under a mistaken apprehension of the severity of the circumstances… such a fact in my view would be a contention that worked against [Ong]. If he could not even perceive the severity in such palpable circumstances, it seemed to me that he should all the more be kept away from such directorship positions where perceptive judgments are fundamental.

However, Rajah J.A.'s approach cannot be said to be entirely without punitive considerations either. Rajah J.A. had indicated a preparedness to accept that Ong's transgression was a "one-off incident".[48] Had *purely* protective principles been applied, this factor should have meant that the need for protection was spent, given that the need for personal deterrence is low or even absent. Disqualification would be strictly unnecessary. His Honour however made the following observations:[49]

> [T]he court must also appropriately calibrate the *punishment* in order to *deter* similar irresponsible conduct. It ought to be made plain that the courts will not be slow to disqualify directors for substantial periods of time if and when it is established that there have been serious lapses in the discharge of their responsibilities.

In *this* respect, interestingly, Rajah J.A.'s approach approximated Harman J.'s *vis-à-vis* Platt, the accountant-director. Harman J. had considered Platt more blameworthy because as a chartered accountant, he had "exhibited an unwarrantable disregard, an unwarrantable lightness of view, as to the seriousness of keeping the registrar informed".[50] Platt was accordingly disqualified even though he was by then not a company director, and was unlikely, in the opinion of Harman J., to become one in the future.[51] Like Ong, Platt was no longer someone from whose actions the public required prospective protection. The fact that he was disqualified anyway cannot therefore be justified purely on protective grounds.

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[42] See also Finch, "Disqualification of Directors: A Plea for Competence", *supra* note 12 at 389.
[43] *Re Cladrose*, *supra* note 39 at 207, 214.
[44] *Ibid.* at 213.
[45] *Ong Chow Hong*, *supra* note 2 at para. 33.
[46] *Ibid.* at para. 34 [emphasis in original].
[47] *Ibid.* at para. 30.
[48] *Ibid.* at para. 35.
[49] *Ibid.* [emphasis added].
[50] *Re Cladrose*, *supra* note 39 at 214.
[51] *Ibid.*

It would appear, in the final analysis, that Rajah J.A.'s treatment of Ong's disqualification did introduce a significant punitive element. It may be, however, that such a hybrid approach is necessary, in order to achieve the fullest protection for the public.

B. *Consideration of the Australian Position*

Rajah J.A. also considered disqualification under the Australian *Corporations Act 2001*,[52] which provides for a number of grounds[53] on which both automatic disqualification, as well as disqualification upon the exercise of the discretion to disqualify vested in the court,[54] may occur. His Honour stated that disqualification was "used uniquely in Australia as a *civil penalty*".[55] As the civil penalty regime was introduced as a "statutory replacement for criminal sanctions… intended to provide a reduced form of 'punishment'",[56] his Honour opined that "it was natural for the Australian courts to articulate punitive objects underlying disqualification orders".[57] It is indeed the case that Australian courts do not take protection as the "sole purpose"[58] of a disqualification order. In *Rich* (HCA),[59] to which his Honour referred, the majority of the Australian High Court held that the privilege against exposure to a penalty applied to proceedings that sought a disqualification order because such proceedings, even if brought to protect the public, could also bear penal consequences.[60] The court observed that the punitive-protective divide is erroneous as it assumed that the categories are mutually exclusive when they were not. McHugh J. was more explicit. Echoing similar sentiments as those expressed by Lord Woolf M.R., he stated as follows:[61]

> Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the

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[52] *Supra* note 23.

[53] See generally Robert P. Austin & Ian Ramsay, eds., *Ford's Principles of Corporations Law*, 15th ed. (Dayton: Lexis, 2012) at c. 7.

[54] The Australian Securities and Investments Commission may also disqualify a person from being involved in the management of corporations on the basis of a liquidator's adverse report on the corporation's ability to pay its debts: *Corporations Act 2001*, *supra* note 23, s. 206F.

[55] *Ong Chow Hong*, *supra* note 2 at para. 15 [emphasis added].

[56] *Ibid.* It appears that Rajah J.A. may have been partially influenced by the term "penalty" in "civil penalty" to be persuaded that a disqualification order made for breach of a civil penalty provision is therefore punitive. Kirby J., who delivered a dissenting judgement in *Rich* (HCA), *supra* note 14, was of the contrary view that "the noun (penalty) is less important than the adjective (civil)": *Rich* (HCA), *ibid.* at para. 98. In contrast, the majority in *Rich* (HCA) described the expression "civil penalty provisions" as "a convenient description for a disparate group of provisions" and considered the reference to civil consequences as being inconclusive as to whether the proceedings are penal: *Rich* (HCA), *ibid.* at para. 22.

[57] *Ong Chow Hong*, *ibid.* at para. 15.

[58] *Australian Securities and Investments Commission v. Vizard* [2005] FCA 1037 at para. 35 (Finkelstein J.).

[59] *Supra* note 14.

[60] *Ibid.* at para. 35.

[61] *Ibid.* at para. 41.

> protection of the public inhere in the orders and periods of disqualification made under the legislation.[62]

It should, however, be noted that this position was adopted in relation to disqualifications *generally*, and not, with respect, because of the civil penalty regime as such. The civil penalty regime is essentially a *separate* regime from disqualification.[63] The link between the two regimes is found in s. 206C of the *Corporations Act 2001*, which provides one of several grounds upon which the court may make an order for disqualification. This section empowers the court to order that a person in breach of a "corporation/scheme civil penalty provision" be disqualified from managing corporations if such disqualification is "justified" and for such period as the court deems appropriate.[64] A "civil penalty provision" is one that falls within a list provided in s. 1317E of the *Corporations Act 2001*. The list includes provisions relating to directors' and officers' duties generally, as well as obligations imposed with respect to related party transactions, financial statements, and insolvent trading. Thus, a director who breached his statutory duty to exercise care and diligence, as enshrined in s. 180(1) of the *Corporations Act 2001*,[65] would, in addition to being subject to the specific orders[66] that may be made for that contravention, be liable to be disqualified under s. 206C. Section 206C is, therefore, very similar to s. 154(2) of the *Companies Act*. As we saw earlier, s. 154(2) permits the court to disqualify a person who is convicted in Singapore of, *inter alia*, an offence under s. 157. This latter section, in a similar manner to s. 180(1) of the *Corporations Act 2001*, enshrines Singapore's statutory duty of reasonable diligence for directors. An important distinction however is that contravention of s. 157 is an *offence*.[67] In contrast, a contravention of a civil penalty provision is not a crime, and civil penalty proceedings are, by statutory requirement,[68] subject to civil rules of evidence and procedure. By parity of reasoning therefore, if it is "natural"[69] to articulate punitive objects when the act underlying disqualification was a civil penalty, it would, with respect, be so *a fortiori* when the underlying act is a criminal offence. As such, it may not be entirely persuasive to distinguish Australian authorities purely on this basis.

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[62] See also *Elliot v. Australian Securities and Investments Commission* [2004] 10 V.R. 369 at para. 137 (Vic. S.C.A.).

[63] See generally Austin & Ramsay, *supra* note 53 at para. 3.390.12ff.

[64] *Corporations Act 2001, supra* note 23, s. 206C.

[65] *Ibid.*, s. 180(1) provides as follows:

> A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

[66] Breach of a civil penalty provision permits the court to make a "declaration of contravention". Consequent upon that order, the court may make a "pecuniary penalty order" of up to AU$200,000: *ibid.*, s. 1317G(1). Additionally, the court may make a compensation order, whether or not it makes a declaration of contravention: *ibid.*, s. 1317H.

[67] *Companies Act*, *supra* note 6, s. 157(3).

[68] *Corporations Act 2001*, *supra* note 23, s. 1317L.

[69] *Ong Chow Hong*, *supra* note 2 at para. 15.

C. *Thick and Thin*

Rajah J.A. went on to develop the concept of protection that underpinned the disqualification regime.[70] In his view, protection may be specific (or 'thin') or general (or 'thick'). The 'thin' aspect of protection, upon which the cases had tended to focus, served to protect the public from the acts of the specific individual. The 'thick' aspect of protection, on the other hand, served to "generally protect the public from all errant directors by an uncompromising reaffirmation of the expected exemplary standards of corporate governance".[71] This form of protection was "expressed through the appropriate calibration of disqualification orders assessed to be sufficient to deter serious lapses in corporate behaviour".[72] Ong was, at the relevant time, a director of a listed company. The regulation of capital markets in Singapore shifted more than a decade ago from a merit-based system to a disclosure-based regime that depended on the reliability and integrity of market communications for its efficient operation. It was therefore very important that transgressions which compromise or threatened to compromise the integrity of the market be dealt with firmly. Accordingly, the 'thick' aspect of protection demanded a sufficiently lengthy disqualification period that would signal unambiguously the court's intolerance of such irresponsible conduct.

It should be immediately apparent that the ideals behind Rajah J.A.'s 'thick' protection are very similar to those that drive punitive regulation. Punitive regulation in general is often justified on the basis, *inter alia*, of its deterrent or preventive effect.[73] According to deterrence theorists, punishment is efficient if it "maximizes social welfare",[74] and the efficiency of a punishment is assessed on account both of "general deterrence", which refers to the wider societal impact the punishment of an offender has in general, and of "specific deterrence", which refers to the effect of the punishment on the offender's own individual behavior.[75] Rajah J.A.'s 'thin' and 'thick' aspects of protection echo these ideas closely.

IV. Conclusion

Protective considerations clearly underpin the disqualification regime in Singapore. The question is whether this should necessarily exclude a co-existent punitive underpinning. As the above discussion shows, Rajah J.A.'s treatment of Ong's disqualification was not independent of punitive considerations. And in *Madhavan Peter*, it was the degree of Chong's *blameworthiness*, a punitive factor, that Chan C.J. relied upon to affirm the five-year disqualification period.

Perhaps classification of disqualification proceedings is simply unnecessary, and perhaps the Singapore court ought to recognise that the twin goals of protection and punishment can co-exist and are not mutually exclusive. Punishment, after all, is

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[70] *Ibid.* at paras. 22-25.
[71] *Ibid.* at para. 23.
[72] *Ibid.* at para. 24.
[73] See generally Johannes Andenaes, "The General Preventive Effects of Punishment" (1966) 114 U. Pa. L. Rev. 949; Dan M. Kahan, "The Secret Ambition of Deterrence" (1999) 113 Harv. L. Rev. 413.
[74] Dan M. Kahan, *ibid*. at 425.
[75] *Ibid.*

not necessarily inconsistent with protective aims,[76] and proceedings brought with the aim of protecting the public or some segment thereof could concurrently punish the person against whom those proceedings were brought. Much is determined by the particular disqualification provision and the context of the application before the court.

[76] One theory of punishment is incapacitation, which is based on the idea that society should be protected against persons of "dangerous disposition… acting upon their destructive tendencies": Kent Greenawalt, "Punishment" (1983) 74 J. Crim. L. & Criminology 343 at 352. See also Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd ed. (Singapore: LexisNexis, 2012) at 56.