

Sustainability in Singapore's financial sector: asset management and ESG compliance

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Abstract

Despite the relatively small size of her stock markets, Singapore is a major fund management centre which Bruner has described as a 'market-dominant small jurisdiction'.

While a large proportion of its funds under management exist in the wealth management space with discretionary and non-discretionary private banking services, there are also many collective investment schemes that have been set up in Singapore operating within an Association of Southeast Asian Nations (ASEAN) framework. Further, in the past 20 years or so, Singapore has grown to become one of the largest real estate investment trust markets in Asia. Both ASEAN and the real estate investment trust market have provided Environmental, Social, and Governance (ESG) guidance as have the standards of the Task Force on Climate-Related Financial Disclosures.

The Singapore Government is also quite clear with respect to the importance of investor stewardship and sustainability and through its own state investment agencies has led the way in both ESG practices as well as its involvement in the formation of stewardship guidelines. This was driven in part by the Kay Review's philosophy against short-termism on the part of asset managers. Given the size of these sovereign funds, the market forces generated by their outsourcing have no doubt influenced external fund managers to adopt their ESG philosophy which is for their investment portfolio to achieve net-zero by 2050. How that philosophy translates into real action on the part of its external managers as well as its investee companies will be the challenge given the different cultural and economic circumstances in the region and how different investors view ESG.

This article will examine the disclosure and other regulatory obligations of asset managers and trustees of collective investment schemes in Singapore in the context of ESG. While much of this takes the form of softer law such as listing rules, codes, and guidelines, critical appraisal will be made of how this can be backed by the application of weightier sanctions, particularly with respect to the innovative use of private law. The law of investment fiduciaries in terms of how they manage contradictions that can arise in the ESG space between duties to their own investors, their principal beneficiaries and the public will have to be resolved given that outside of Europe litigation has not been as successful in driving real change.

Keywords: Securities Regulation; Investment Management; ESG; Stewardship; Collective Investment Schemes; Fund Entities; Fiduciary Law.

1. Fund management in Singapore

Singapore's fund management sector has shown remarkable growth and resilience despite global economic volatility and the poor performance of her stock markets which saw only S\$40 million raised through 4 IPOs in 2024 (with S\$30 million in the whole of 2023) and a general market PE ratio of 13.3 at the end of 2024 (compared to 15.7 in HK and UK and 19.8 in Australia, with US double that at 26.8).¹

¹ World PE Ratio, 'Global P/E Ratios by Country' <<https://worldperatio.com>> accessed 1 January 2025.

Accepted: 8 October 2025

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The Monetary Authority of Singapore (MAS) reported a 10% increase in assets under management (AUM) to S\$5.4 trillion in 2023.² This was 5 times more than the AUM in 2008.³ Over half of these assets are directed towards supporting businesses in the region (where the stock markets are doing well relative to Singapore, where the market capitalization of all listed shares is less than S\$1 trillion), highlighting Singapore's role as a pivotal regional investment hub. Even more importantly, 51% of the total AUM have an Environmental, Social, and Governance (ESG) overlay.

The compounded annual growth rate (CAGR) of 10% in AUM over the past five years underscores the sector's robust expansion and the effectiveness of its regulatory framework. While a significant proportion of those assets may be held in discretionary or non-discretionary accounts in private banks for high net-worth individuals, S\$146 billion was held in non-property funds that are structured as collective investment schemes (under the Securities and Futures Act 2001) and managed by external fund managers under a trust structure with custodian trustees. Many of these come under the ASEAN framework for unit trusts that was first set up in August 2014 when Singapore, along with Malaysia and Thailand, launched the ASEAN Collective Investment Scheme framework for cross-border CIS schemes to retail investors.⁴ As at the end of 2024, there were 224 ESG funds set up in Singapore.⁵

One important form of CIS in the past 20 years has been the real estate investment trust (REIT), which in Singapore are almost all listed on the Singapore Exchange. As of January 2025, Singapore had 40 CIS REITs spanning industrial, retail, healthcare, office/commercial, hospitality, diversified and speciality sectors listed on the SGX with a market capitalization over S\$100 billion, which is more than 12% of the market capitalization of the Singapore Exchange. These REITs had in total S\$136 billion AUM in 2023. Concerns have, however, been raised about the environmental impact of REITs,⁶ but they are subject to still evolving listing rules which increasingly have ESG disclosure, financial reporting and possibly even more prescriptive requirements.

Private equity and venture capital have also seen substantial growth, with a CAGR of 24.6% to over S\$650 billion from 2018 to 2023 (in comparison, Singapore hedge funds held S\$239 billion in 2023). This growth is driven by the increasing demand for alternative investments (with other funds directly holding S\$168 billion of real estate) and the strategic initiatives by MAS to attract global private credit managers to establish their presence in Singapore. These PE, VC, and hedge funds take the form of limited partnerships and the Singapore Variable Capital Company (of which there are now more than 1000 representing more than 2000 sub-funds,⁷ and is also considered a CIS).

Singapore is in that sense the Boston of the East, with Bruner terming it a 'market-dominant small jurisdiction'⁸ with respect to wealth management. As in perhaps some parts of the US, it may be easier to start a fund than it is other forms of businesses in Singapore,⁹ and the latter may also try to evolve into funds.¹⁰ The question is how effective the Singapore asset management industry has been in respect of ESG compliance given the evidence of greenwashing with respect to US funds, which has been shown empirically to have shied away from any real ESG changes.¹¹

² MAS, 'Singapore Asset Management Survey 2023' <<https://www.mas.gov.sg/publications/singapore-asset-management-survey>> accessed 1 June 2025.

³ 'Wealth Management Prospers in Singapore' *The New York Times* (New York, 14 November 2008).

⁴ This is quite separate from the wider Asia Region Funds Passport (ARFP) established in 2016 under the 'Memorandum of Cooperation on the Establishment and Implementation of The Asia Region Funds Passport' consisting of signatories Australia, Japan, New Zealand, Republic of Korea, and Thailand <<https://fundspassport.apec.org/about-us/about/>>.

⁵ MAS Information Paper, *Good Disclosure Practices for Retail ESG Funds*, 4 December 2024.

⁶ Joseph Chun, 'Are Reits Green? An Environmental Analysis of Real Estate Investment Trust Law in Singapore' (2007) 19 *Singapore Academy of Law Journal* 47.

⁷ Tervinder Chal, 'The evolution of variable capital companies (VCCs) in Singapore' (31 January 2024), online: Ogier <<https://www.ogier.com/news-and-insights/news/the-evolution-of-variable-capital-companies-vccs-in-singapore/>> accessed 13 April 2025.

⁸ Christopher Bruner, *Re-Imagining Offshore Finance* (OUP 2016).

⁹ US Tech Companies have been said to be Operating like Investment Funds: Rana Foroohar, 'How Big Tech is Dragging us to the Next Financial Crash' *The Guardian* (London, 8 November 2019).

¹⁰ Goola Warden, 'CapitaLand, Keppel and Mapletree go asset-light and take flight with an interest rate tailwind' *The Edge* (Singapore, 18 July 2024).

¹¹ Rajna Gibson Brandon and others, 'Do responsible investors invest responsibly?' (2022) 26 *Review of Finance* 1389. See also Kenneth Khoo and Roberto Tallarita, 'Expanding Shareholder Voice: The Impact of SEC Guidance on Environmental and Social Proposals' (30 July 2024), European Corporate Governance Institute—Law Working Paper No 822/2025 <<https://ssrn.com/abstract=4913660>> (accessed 15 October 2025, forthcoming in *The Journal of Law and Economics*).

2. Legal framework and regulatory environment

Kuntz¹² has written about the difference in supply and demand side ESG regulation in the context of investee companies. The former encompasses what the board and issuer must do in relation to ESG compliance and has been the focus of much ESG literature where outside of Europe there has not been much success in creating Hohfeldian enforceable duties to stakeholders other than shareholders. Demand side regulation are rules imposed on shareholders and investors themselves, for example, through the EU Sustainable Finance Disclosure Regulation.¹³ There are disclosure and perhaps even more prescriptive rules that can nudge investors so that they become greater proponents of ESG and will enforce the duties that are indirectly owed to them by investee boards in that direction. But institutional investors are intermediaries also raising funds and therefore have both demand side regulation requiring them to police their investee companies but also supply-side duties to their beneficiaries who in turn have demands on them. This offers greater avenue for ESG forces to work.

In 2012, the Kay Review stated that¹⁴:

there has been an explosion of intermediation in equity investment, driven both by a desire for greater professionalism and efficiency and by a decline in trust and confidence in the investment chain. The growth of intermediation has led to increased costs for investors, an increased potential for misaligned incentives and a tendency to view market effectiveness through the eyes of intermediaries rather than companies or end investors.

Although this was cast in a slight negative light, we believe that it identified something that provides a mechanism for ESG efficiency. Funds are rightly treated differently on the demand side from retail investors and on the supply side from other forms of companies as they are self-adjusting in terms of their ability to protect themselves as shareholders or bondholders as well as their much lesser path dependence in respect of their underlying business. Although the Kay Review was published in 2012, two years after the first UK Stewardship Code, the UK Stewardship Code 2020 now requires signatories to take account of 'environmental and social issues' even though such Codes are not tied to listing rules like the Code of Corporate Governance. What started as business sustainability has become societal sustainability (perhaps due to evolving 'stewardship sociality'¹⁵) but may have diluted enforceability as Milton Friedman warned many years ago.¹⁶

3. Private wealth management

This is probably the space that is hardest to regulate given the absence of regulatory oversight aside from anti-money laundering, terrorist financing and now proliferation financing rules. The Singapore Association of Banks Sustainable Private Banking and Wealth Management Guidelines¹⁷ requires private banks to 'recognise that the integration of sustainability and Environmental, Social and Governance ('ESG') dimensions encompasses their discretionary portfolio management activities, as well as their investment advisory business and execution mandates' (para 3.3).

Private banks are expected to 'recognise that in their investment advisory activities, they play an important role in directing financial flows towards the transition to a low-carbon sustainable economy and in bridging UN SDGs financing gaps' (para 4.1). Much of this area requires high net worth individuals (HNWI) to buy into ESG philosophy although private banks could nudge them in that direction. In this respect banks 'should disclose to clients the material ESG risks and

¹² Thilo Kuntz, 'ESG Demand-Side Regulation—Governing the Shareholders' in J-H Binder, KJ Hopt, and T Kuntz (eds), *Corporate Purpose, CSR and ESG: A Trans-Atlantic Dialogue* (OUP 2024).

¹³ Regulation (EU) 2019/2088.

¹⁴ *The Kay Review of UK Equity Markets and Long-term Decision Making, Final Report* (July 2012), Executive Summary x.

¹⁵ Konstantinos Sergakis, 'Shareholder stewardship: autonomy and sociality' (2023) 23 *Journal of Corporate Law Studies* 497.

¹⁶ Milton Friedman, 'A Friedman doctrine—the social responsibility of business is to increase its profits' *The New York Times* (New York, 13 September 1970).

¹⁷ Issued 14 October 2022.

potential impacts of their portfolio, where appropriate, at the product and entity level. These disclosures should include climate-related risks and opportunities and are reported in line with well-regarded international reporting frameworks such as the Task Force on Climate-related Financial Disclosures ('TCFD') recommendations and International Sustainability Standards Board ('ISSB') (para 4.11).

Harrington¹⁸ has highlighted the role that wealth managers play in protecting and guiding HNWI but in this space it is really only very weak demand side ESG that exists in that these HNWI require their wealth managers to comply with the mandate, even if discretionary, given to them. But because they are individuals without disclosure or other duties themselves, nor perhaps much peer socialization or pressure, they will likely prioritize their own profit maximization. Some recent studies have shown that only half of Vanguard's retail and retirement investors are ESG positive and more than half of those see it as hedging climate risk or for greater expected financial returns.¹⁹ There are in turn few, if any, real supply side duties imposed on the wealth managers unless ESG investing actually brings greater rewards, which is not seen to be the case as yet. The hope here is with education and enlightened self-interest.

More likely, however, as Booyesen has pointed out,²⁰ the bank mandate here to look after the customers' accounts delineates the scope of its duty of care and so not much may be expected of banks given that they are not usually fiduciaries with respect to the traditional banker–customer relationship, which legal characterization somehow permeates into other bank services.

4. Collective investment schemes

The definition of collective investment scheme,²¹ which is somewhat similar to the definition in schedule 1 of Hong Kong's Securities and Futures Ordinance, as well as the meaning of 'collective investment schemes' under the UK's Financial Services and Markets Act 2000, has concurrent requirements that require delegation to a manager *or* pooling of monetary contributions and profits and the sharing of what appears to be profits in *pecuniary* form ('the profits or income from which payments are to be made to them are pooled' and 'profits, income, or other payments or returns'). All unit trusts and REITs as well as Singapore Variable Capital Companies fall within the definition.

A collective investment scheme that is offered to the public and which is constituted in Singapore has to be authorized by the MAS under section 286 of the Securities and Futures Act 2001. Authorization would be granted only if certain requirements are fulfilled, which include:

- a manager that holds a capital markets services licence for fund management²² or person properly exempted from such a requirement. Such a manager has to satisfy a fit and proper test and is considered a fiduciary even if not a trustee;
- a trustee, independent of the manager, for the scheme approved by MAS in accordance with section 289, which requires the trustee to satisfy certain financial requirements and other prescribed criteria—the reality is that the trustee is just a custodian;
- a trust deed in respect of the scheme entered into by the manager and the trustee for the scheme that complies with prescribed requirements;
- the scheme, the manager for the scheme and the trustee for the scheme complying with the Act and the Code on Collective Investment Schemes, which includes prescribed investment restrictions and various requirements.²³ While non-compliance with the CIS Code does not lead to criminal or private rights of action, it can lead to revocation of its authorization.

¹⁸ Brooke Harrington, *Capital without Borders: Wealth Managers and the One Percent* (Harvard University Press 2016).

¹⁹ Stefano Giglio and others, 'Four facts about ESG beliefs and investor portfolios' (2025) 164 *Journal of Financial Economics* 103984.

²⁰ Sandra Booyesen, 'Authorised Payment Scams and the Bank's Duty of Care' [2022] *LMCLQ* 349, 355.

²¹ Securities and Futures Act 2001 (SFA 2001) s 2.

²² In the case of REITs, the manager must hold a capital markets services licence for real estate investment trust management. See SFA 2001, s 86 read with Second Schedule, Part 1 (d) and Part 2 'real estate investment trust management' definition.

²³ Where the manager proposes to offer a scheme for which no investment or borrowing limits are set out in the Code of Collective Investment Schemes, MAS should be consulted.

MAS restricts an authorized CIS to investments in securities or other assets that are liquid, such as precious metals, or which have stable income, such as completed real estate.²⁴ As such, an authorized CIS cannot invest in, eg, cryptocurrency, which clearly has poor ESG footprint. There is also a separate recognition procedure for collective investment schemes constituted outside Singapore. This requires some form of equivalence in the way the foreign fund is set up.

In addition, there must be a responsible person in both authorized and recognized collective investment schemes who, other than the trustee in the case of a unit trust, would be required to ensure that the requirements set out for the scheme are complied with, and this person is also responsible for furnishing such information or record regarding the scheme as MAS may require in administering the Act. The responsible person is either the manager of the scheme (where it is a unit trust, which is expected of locally constituted funds that are invariably externally managed) or the corporation where the scheme assumes the corporate form (which it may in the case of foreign constituted funds or Singapore Variable Capital Company which are internally managed, as well as a small number of REITs).

A scheme does not have to be authorized/recognized (nor is a prospectus required) if it falls within one of the exclusions, the most important of which would be offers to fewer than 50 beneficiaries within 12 months and offers to institutional investors and relevant accredited persons.²⁵ These 'restricted schemes' include many PE and VC schemes, as well as hedge funds, but there is still some regulatory oversight as MAS has to be notified of the scheme. An offeror can only commence offerings once the CIS has been entered into the 'List of Restricted Schemes' maintained by the MAS. The MAS may refuse to enter an offshore or onshore CIS into the 'List of Restricted Schemes' where it appears to the MAS that it is not in the public interest to do so. Similar to authorized/recognized schemes there has to be a responsible person and some form of licensing and satisfaction of fit and proper criteria for the fund manager. While no prospectus is required, an information memorandum is prescribed, which should comply with the Sixth Schedule of the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulation (CIS Regulation). Restricted schemes are not, however, subject to the Code of CIS.

5. Prospectus disclosure

There is thus a structure that exists to regulate the CIS as 'entity' which provides a sound foundation for the imposition of both demand and supply side ESG duties. For the latter, section 296 provides that a prospectus is required for a CIS offer. Paragraph 78 of the Third Schedule of the CIS Regulations provides that the CIS prospectus must (in addition to complying with the Third Schedule checklist):

State all other material information which investors and their professional advisers would reasonably require and expect to find in the prospectus, for the purpose of making an informed decision about the merits and risks of the scheme.

The reasonable investor standard depends on industry norms and can evolve with the times, and it has been argued separately how only firms that expressly represent themselves as accepting ESG policies may need to adopt and follow them given the expectations of the reasonable investor in such firms.²⁶ With prospectuses currently, it is only ESG funds that have certain prescribed requirements of disclosure in Singapore under a 2022 MAS Circular.²⁷ These state that any fund which represents itself as an ESG fund and utilizes ESG factors in its investment making decisions (two thirds of its net asset value should be in accordance with its investment

²⁴ See MAS Consultation Paper, P012-2014, *Proposals to Enhance Regulatory Safeguards for Investors in the Capital Markets*, July 2014, to address, amongst other things land banking.

²⁵ Securities and Futures Act 2001 ss 302C and 304/5.

²⁶ Hans Tjio, 'Sustainable Directors' Duties and Reasonable Shareholders' (2024) 25 EBOR 333.

²⁷ MAS Circular No CFC 02/2022, *Disclosure and Reporting Guidelines for Retail ESG Funds* (28 July 2022) Part C. This sets out how existing requirements under the CIS Code applies to retail ESG funds. See also MAS Information Paper (n 5).

strategy) should disclose the scheme's ESG focus (eg climate change, low carbon footprint, sustainability, reduction in greenhouse gas emissions); and the relevant ESG criteria, methodologies or metrics (eg third-party or proprietary ratings, labels, certifications) used to measure the attainment of the scheme's ESG focus. It also needs to disclose its investment strategy used by the scheme to achieve its ESG focus, the binding elements of that strategy in the investment process, and how the strategy is implemented in the investment process on a continuous basis. Any relevant ESG criteria, metrics or principles considered in the investment selection process must be included as well as the minimum asset allocation into assets used to attain the ESG focus of the scheme. Further, the risks associated with the scheme's ESG focus and investment strategy must be disclosed and any ESG-related terms used in the prospectus should be clearly defined.

Breaches of prospectus rules are backed by criminal sanctions under the Securities and Futures Act section 253 and investor actions for compensation under section 254 (both applied to CISs by section 302). Liability is strict for persons involved in the preparation of the prospectus or who have an economic interest in the offer, including both the issuer (its responsible persons)²⁸ or directors. This is subject to due diligence defences which are perhaps more applicable to third-party professionals involved in the offer process rather than the issuer itself.

6. Continuing ESG requirements

The MAS Disclosure and Reporting Guidelines for Retail ESG Funds (MAS Circular No. CFC 02/2022) provides that the annual report of an ESG Fund should disclose how and the extent to which the scheme's ESG focus has been met during the financial period, including a comparison with the previous period (if any); the actual proportion of investments that meet the scheme's ESG focus (if applicable); and any action taken by the scheme in attaining the scheme's ESG focus (eg stakeholder engagement activities). In addition, there has to be disclosed how the ESG focus is measured and monitored, and the related internal or external control mechanisms that are in place to monitor compliance with the scheme's ESG focus on a continuous basis (including methodologies used to measure the attainment of the scheme's ESG focus, if any); sources and usage of ESG data or any assumptions made where data is lacking; due diligence carried out in respect of the ESG-related features of the scheme's investments; and any stakeholder engagement policies (including proxy voting) that can help shape corporate behaviour of investee companies that the scheme invests in and contribute to the attainment of the scheme's ESG focus.

In August 2014, Singapore, Malaysia, and Thailand launched the ASEAN Collective Investment Scheme framework²⁹ (in Singapore through a new Chapter 10 in the Code for Collective Investment Schemes) for cross-border CISs to retail investors. Fund managers in Singapore, Malaysia and Thailand can now offer CIS constituted and authorized in their home country directly to retail investors in the other two ASEAN countries under a streamlined authorization process. By April 2016 there had been prospectus passports for 13 cross border CISs and many more since as Singapore, Malaysia, and Thailand have relatively more developed financial markets in which commonly-owned banks and their asset management arms operate. It is hoped that the different and even wider Asia Region Funds Passport for managed funds that covers the Asia-Pacific area will see similar success.

Chapter 10 provides that where a scheme seeks to qualify as an ASEAN Sustainable and Responsible Fund, the scheme should observe the relevant initial and continuous disclosure requirements under the MAS 2022 Circular discussed in the previous part. In addition, the MAS updated Chapter 10 to include references to the ASEAN Sustainable and Responsible Fund Standards (ASEAN SRFS October 2022) where relevant. The ASEAN SRFS were developed to establish minimum disclosure and reporting requirements for collective investment schemes seeking to qualify under the standard. The standards were implemented to increase the number of CIS focused on ESG investments. It seeks uniform and transparent disclosure of information, thereby reducing the risk of greenwashing in the industry. It also guides CIS or CIS operators on disclosing information important for sustainable and responsible investing.

Specifically, the ASEAN SRFS provides that:

²⁸ SFA 2001, s 302(4).

²⁹ This was one of the initiatives undertaken by the ASEAN Capital Markets Forum.

3.3.1 The CIS, CIS operator, or fund manager, as the case may be, must continuously monitor and evaluate the underlying investments to ensure that the ASEAN Sustainable and Responsible Fund continues to comply with the requirements under the ASEAN SRFS throughout its lifecycle.

3.3.2 Disclosures must be made on how the sustainable investment objectives and strategies are being measured and monitored throughout the lifecycle of the ASEAN Sustainable and Responsible Fund and the due diligence carried out to ensure the underlying investment's compliance with the ASEAN Sustainable and Responsible Fund's sustainable investment objectives and strategies

....

3.3.9 When an ASEAN Sustainable and Responsible Fund is found to be no longer in compliance with the ASEAN SRFS, the securities regulator in the respective ASEAN jurisdiction may revoke the ASEAN SRFS qualification of the CIS.

There are consequently enough off-exchange related continuous disclosure duties linked to these ASEAN cross border CIS, particularly when they are labelled funds with an ESG focus. The weakness is that there is no mandatory classification unlike the case in the EU.³⁰ While Singapore has studied the idea of introducing an ESG labelling framework, the view was taken that there is currently insufficient interest in such a separate regime. Consequently, although the system is based on disclosure, funds are not classified into eg green or brown funds and it is up to the fund to choose to be labelled an ESG fund. There are fewer supply side duties in that respect.

Only if a fund is characterized as ESG will supply side duties arise because its ultimate beneficiaries would have invested based on that representation. There may in that context be private law duties arising from some form of assumption of responsibility to those beneficiaries. More realistically, however, are the quasi-public duties discussed above which are then backed by section 199 of the Securities and Futures Act 2001 which makes it an offence to make false and misleading statements to induce a person to deal in securities. This leads to both criminal and civil penalties (as well as the possibility of investor compensation under section 234). MAS has clarified in amendments introduced by the Securities and Futures (Amendment) Act 2017 that there is no requirement for a false statement to have a significant or material effect with respect to section 199.³¹ The misstatement may have to be incorrect in a 'material particular' but this is not the same as materiality in terms of its relevance to the investment decisions of a reasonable investor. The drawback with section 199 is that it does not sit comfortably with omissions as, unlike statutory prospectus liability, it is not formally linked to any positive duty of disclosure. What helps is the increasing number of negative ESG assurance disclosures required, as is the case with financial statements. For example, clause 4.1(i) of the ASEAN SRFS states that ASEAN Sustainable and Responsible Funds must provide '(a) statement that the ASEAN Sustainable and Responsible Fund has complied with ASEAN SRFS within the reporting period'. The other difficulty with this provision, as interpreted by Singapore courts, is that it requires some form of subjective recklessness on the part of the statement maker.³²

Even where a fund chooses the ESG label, there is no equivalent of the EU ESG Ratings Regulation which formally controls how funds and rating agencies provide ESG ratings. In December 2023, MAS published its finalized Code of Conduct for ESG Rating and Data Product Providers which contained an accompanying checklist for providers to self-attest their compliance with the Code. This is consistent with the use of softer guidelines which started in December 2020, when MAS issued guidelines on environmental risk management for all fund management companies and REITs on governance strategy, portfolio construction, risk management and disclosure of risk information.³³ Corporations were given an 18-month transition period, with compliance expected from June 2022 onward. Then in October 2023, there was

³⁰ See Arnaud Van Caenegem, 'ESMA's Guidelines on ESG Funds' Names: A New Approach to ESG Fund Regulation' (*Oxford Business Law Blogs*, 31 May 2024).

³¹ MAS Consultation Paper P013-2015 on *Proposed Amendments to the SFA [Part XII and section 324]*, August 2015.

³² See Hans Tjio, Wai Yee Wan and Kwok Hon Yee, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 3rd ed, 2017) 654.

³³ MAS *Guidelines on Environmental Risk Management for Asset Managers*, 8 December 2020.

further consultation on MAS' proposed *Guidelines on Transition Planning* for all fund management companies and REIT managers which set out the expectation for these financial institutions to have a sound transition planning process to enable effective climate change mitigation and adaptation measures by their investee companies in the global transition to a net zero economy and the expected physical effects of climate change.³⁴ While most of this is soft law, we will see that what may be more important in Singapore is that Temasek, the large sovereign wealth fund which also parcels out funds to external fund managers, is committed to ESG (it issued its first Sustainability Report in 2024) and so would have obtained credible commitments from the managers they utilize.

7. Listed REITs and continuous disclosure

Where the 40 listed REITs are concerned, which make up 30 of the top 100 SGX listed entities (out of a total around 620) by market capitalization, not only must the Code of CIS be followed but given that they are listed on the Singapore Exchange there are both corporate governance and continuous disclosure rules of the SGX that must be adhered to. From FY 2017 sustainability reporting became mandatory for SGX-listed issuers. While the Code of Corporate Governance does not specify it, many of the REITs had established board sustainability committees by the end of 2023.³⁵

More importantly, SGX has introduced a phased approach to mandatory climate reporting based on the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) following a public consultation in 2021. All listed companies must report Scope 1 and Scope 2 greenhouse gas (GHG) emissions starting from financial year (FY) 2025 and also incorporate the climate-related requirements in the IFRS Sustainability Disclosure Standards issued by the International Sustainability Standards Board (ISSB). While many smaller listed companies in the manufacturing and industrial space have voiced difficulties in compliance, listed funds should have no difficulties given their size and the relative simplicity of their business.

An annual sustainability report is required,³⁶ no later than four months after the end of the financial year. If an issuer has conducted external assurance on the report, it must be released no later than five months after the financial year's end, since, as in many countries, this requires significant amounts of disclosure that complements financial reporting requirements. SGX recommends a list of 27 core ESG metrics for issuers to use as a starting point for sustainability reporting. These core ESG metrics are intended as a common and standardized set of ESG metrics, which in turn will help better align users and reporters of ESG information.

A survey by Ernst and Young found that the listed Singapore REITs have been relatively better than their global peers in climate disclosures.³⁷ This may be because the Singapore Exchange's continuous disclosure rules, unlike the rest of its listing rules, are backed by section 203 of the Securities and Futures Act which makes non-compliance with the exchange's disclosure rules both a criminal offence where the breach is fraudulent or reckless as well as a statutory contravention that also leads to civil penalties and possible investor compensation for negligence. Section 203, which clearly covers omissions, does, however, have a materiality requirement which has been said to be something that properly limits the amount of ESG disclosure to material risks that have financial significance.³⁸

³⁴ MAS Consultation Paper P014-2023 on *Proposed Guidelines on Transition Planning for Asset Managers* 18 October 2023.

³⁵ Sue-Ann Tan, 'S'pore firms show how they—and the planet—have a future as sustainability reporting takes root' *The Straits Times* (Singapore, 11 April 2024).

³⁶ SGX Practice Note 7.6 *Sustainability Reporting Guide*. See further Adrian Ang and Elsa Chen, 'ESG In Singapore: Trends And Developments' *IFC Review* (19 April 2023) <<https://www.ifcreview.com/articles/2023/april/esg-in-singapore-trends-and-developments/>> accessed 1 June 2025. On a 'comply or explain' basis since 2017, with climate reporting from 2022. In FY 2023, the latter became mandatory for issuers in the financial, energy, and agriculture, food and forest products industries. REITs are considered financial. Those in the materials and buildings and transport industries must do so from FY 2024. SGX has consulted on the requirement for Scope 3 GHG emissions for larger issuers from FY 2026.

³⁷ Ernst and Young, *Climate risk disclosures in real estate investment trusts (REITs) A study of Singapore REITs*: <<https://www.reitas.sg/wp-content/uploads/2023/09/ey-reitas-study-on-climate-risk-disclosures-in-reits.pdf>> accessed 1 June 2025.

³⁸ Bernard S Sharfman, 'Materiality, the "Reasonable Investor," and the SEC's New Climate-Related Disclosures Rule' *The University of Chicago Business Law Review Online Edition*, 15 August 2024. See also Freshfields *Reports for UN Principles of Responsible Investment* 2005 and 2021.

Importantly, SGX requirements for sustainability reporting on the part of listed issuers like REITs also states that it should contain a statement of the Board that it has considered sustainability issues in the issuer's business and strategy, determined the material ESG factors and overseen the management and monitoring of the material ESG factors. In addition, the sustainability report should describe the roles of the Board and the management in the governance of sustainability issues.

8. Mechanisms to translate ideals to action

How does what has been discussed above translate to an enforceable mechanism with respect to asset managers (and the individuals in them) and ESG, particularly outside of listed REITs? Here, things may be different for directors of investee companies and the funds that invest in them for the reasons below. Due largely to Government philosophy as well as the structure of funds (as opposed to their investee companies) it may be that funds and their senior management may be more (or less as the case may be) obliged to take ESG concerns into consideration, particularly when labelled an ESG fund.

9. Temasek philosophy and stewardship principles

The Singapore government, through its state investment agencies, has been a frontrunner in promoting ESG practices. This is reflected in the adoption by its sovereign wealth fund, Temasek, of stewardship guidelines and the commitment to achieving net-zero investment portfolios by 2050. Temasek itself has been seen as topping sovereign wealth funds' rankings governance, sustainability and resilience,³⁹ having been carbon neutral since 2020. Its belief in 2050 net-zero targets is driven both by idealism as well as understanding that a headstart can be obtained in green technology and investments. As with most funds, the origins were in stewardship and long-term sustainability of the fund itself, which followed the UK 2010 Stewardship Code as well as the 2012 Kay Review. Temasek was the proponent of stewardship principles for responsible investors in Singapore both for family companies as well as other entities in 2016.⁴⁰ Societal sustainability and ESG were weaved in later in 2022 into these principles and this increased demand side ESG regulation on its investee companies.⁴¹ These Temasek-linked companies are amongst the largest Singapore listed companies in areas like airlines, banking, communications, defence, engineering, property development, and shipyards. In a recent speech its former CEO gave to various large companies and agencies, she said⁴²:

To this end, I urge you to consider putting aside 2-5% of your annual economic returns to re-invest into the larger good, especially to neutralise CO₂ emissions.

While Temasek is more an asset owner with original stakes in many companies, with no real shareholders to account to other than the state which mandate is for long-term sustainable returns, it often does not just invest directly in investee companies but through other external funds. Here, it states in its inaugural 2024 Sustainability Report (which reported that its portfolio emissions were cut by 22% that financial year and that 12% or \$44 billion of Temasek's net portfolio consisted of sustainability-aligned investments) that⁴³:

we also extend our ESG philosophy to these investments. In assessing external fund managers, we evaluate their ESG approach from an investment lifecycle perspective to understand their ESG commitment, due diligence, stewardship practices, and reporting to investors on ESG. In

³⁹ Janice Lim, 'Temasek tops sovereign wealth funds' ranking for governance, sustainability and resilience' *The Business Times* (Singapore, 1 July 2024).

⁴⁰ Kenneth Lim, 'Singapore Stewardship Code expected to be launched by year-end' *The Business Times* (Singapore, 13 September 2016). See Stewardship Asia Centre, *Singapore Stewardship Principles for Responsible Investors* <www.stewardshipasia.com.sg>.

⁴¹ Now *Singapore Stewardship Principles for Responsible Investors 2.0* (2022).

⁴² Opening Remarks by Ho Ching, Chairman, Temasek Trust, at 'Frontiers in Impact: Planet', a Strategy Collective organized by Temasek Trust, 4 October 2024.

⁴³ Para 4.4 'Engaging Our Fund Managers'.

line with our own climate commitment, we seek to understand how they manage climate-related risks and opportunities, referencing leading international frameworks.

The challenge lies in translating sometimes high-level commitments into actionable strategies for asset managers and their investee companies, particularly within the diverse cultural and economic contexts of the Asia-Pacific region. In this context, Temasek has highlighted that it prefers voice over exit (which does not assist just transitioning in the Asia where any quick moves towards carbon neutrality is not feasible) and that a long-term perspective is required as to how climate change affects the cost of capital.⁴⁴ Exit may mean an Asian company or fund loses Temasek's expertise and influence in the ESG space. While the entities themselves are increasingly subject to disclosure duties backed by some statutory liability, the question is how the directors and senior management in fund companies and managers are made to further ESG goals. It certainly helps, however, if the fund obtains Temasek money as there is a further commitment it would have made to comply with the ESG rules discussed in the earlier parts of this article.

10. Funds versus corporations

Outside of Europe, private litigation has not been as successful in driving real change, emphasizing the need for regulatory frameworks that support ESG commitments. As we have seen these are growing in Singapore even if enforcement requires navigating the soft rules in Codes, stronger ones in securities exchange requirements and the statutory disclosure rules. But private law is needed to fill the gaps, as there often is the possibility of regulatory capture. In the US, we are also seeing the decline in administrative deference.⁴⁵

The fiduciary responsibilities of asset managers in the context of ESG are complex, involving balancing duties to their own investors, beneficiaries, and the public. The law of investment fiduciaries must address contradictions that can arise between these duties, particularly given the varying cultural and economic circumstances in the ASEAN region. Furthermore, we have to confront the reality that many fund structures evolved to reduce the incidents of liability and responsibility, and to shield individuals behind them. This has made the unit trustee just a custodian with little liability so long as it acts in good faith in taking instructions from the asset manager. It is really only the asset manager on whom responsibilities are imposed.

To counter this, the Australian Managed Investments Scheme⁴⁶ required a single trustee-manager and this was adopted by the Singapore Business Trust Act 2004, which similarly requires both the single trustee-manager and its directors to prioritize the interest of its beneficiaries over its own entity interest. This, however, applies only in the case of a very small number of listed business trusts in Singapore (9, usually involving non-Singapore assets which do not have the same tax advantages as Singapore REITs). In 2017, sections 286 and 287 of the Securities and Futures Act were amended to introduce a similar provision prioritizing the interests of beneficiaries over that of a separate REIT manager. With REITs and business trusts, quite often the business is more involved than simply asset management, and dissatisfaction with external managers have seen them replaced by internal ones chosen by the beneficiaries.⁴⁷

Private law may have been more effective if asset managers were seen as trustees themselves (as Colin Mayer seems to see all firms⁴⁸), where the highest equitable duties apply. Trustees have a duty of impartiality and so even in the US the business trust has lower risk-reward ratios than the corporation due to the need for trustees to balance the interest of income and capital beneficiaries.⁴⁹ It has separately been argued that US business trusts, which are seen as separate

⁴⁴ Dilhan Pillay, CEO Temasek Holdings, Panel Discussion on Investors' Duties, NUS *Towards Net Zero Conference: Legal Aspects of Corporate Climate Action in Asia* 17 October 2024.

⁴⁵ *Loper Bright Enterprises v Raimondo* 603 US 369 (2024), 144 S Ct 2244, overruling *Chevron USA Inc v National Resources Defence Council, Inc* 467 US 837 (1984).

⁴⁶ Under ch 5C of the Corporations Act 2001 (Cth).

⁴⁷ *ESR Group Ltd v HSBC Institutional Trust Services (Singapore) Ltd* [2024] SGHC(A) 25. There was an external expert's finding that internally managed REITs perform 7% better than externally managed ones.

⁴⁸ Colin Mayer, 'Ownership, agency, and trusteeship: an assessment' (2020) 36 *Oxford Review of Economic Policy* 223.

⁴⁹ Steven Schwarcz, 'Commercial Trusts as Business Organizations: Unravelling the Mystery' (2003) 58 *The Business Lawyer* 559, 577. Cf Max M Schanzbach and Robert H Sitkoff, 'Reconciling Fiduciary Duty and Social Conscience' (2020) 72 *Stanford Law Rev* 381 that only risk reward investing would satisfy the fiduciary duty.

entities, are much better placed to capture modern goals of sustainability and corporate purpose given their structure and flexibility.⁵⁰

The reality, however, is that fund managers, even as trustee-managers, are at best fiduciaries akin to directors of a corporation. As Jessel MR noted in *Smith v Anderson*,⁵¹ '(t)hey are called trustees, but they are, no doubt, directors'. Subjecting them to something like the fiduciary duties of directors, but adapting them to fund entities, may therefore be the more appropriate framework in which to regulate risk-taking funds for the benefit of outside investors. Despite some cases suggesting that a business trust is a separate entity for restructuring purposes in Singapore, it was recently held that it is still the trustee-manager that incurs debts on behalf of the 'trust', which is 'not a legal person but a relationship concerning property between the persons who hold that property on trust and those for whose benefit they do so'.⁵² Given that directors' duties to companies can be diluted by the interests of various stakeholders, and can only be enforced by the company, unincorporated fund structures may allow some beneficiaries greater say given their direct relationship with the trustee-manager. It is some evidence perhaps that fund fiduciaries (as opposed to corporate directors) could be subject to the more intense rules applicable to trustees. Similarly, in *Ng Eng Ghee v Mamata Kapildev Dave*,⁵³ Rajah JA also talked about a fiduciary (as opposed to trustee or director) duty to be 'even-handed' in an unincorporated situation.

With respect to an ESG fund, there would have been enough beneficiaries that invested based on the disclosed commitments that would require the manager to take their interests into account and to be fair to them. While the trustee-manager's duty is owed even more directly to the beneficiaries than directors to shareholders (given that in the Commonwealth their duty is to the company), it is also the case that these beneficiaries have less control than shareholders (which are given to them by mandatory rules provided in companies legislation as opposed to a contracted trust deed). With externally managed funds, the rules are negotiated and far more flexible. As Morley points out, for trust funds, '(t)hese features diminish the importance of control and increase the importance of asset partitioning'.⁵⁴

The trust fund is therefore an even more idealized notion of the Easterbrook and Fischel⁵⁵ business entity in that although the interests of beneficiaries are paramount, those interests are guarded by the manager without much input from those beneficiaries themselves. In a non-ESG fund, the financial interests of the beneficiaries are primary, as they are in most trusts,⁵⁶ but this has to be balanced between income and capital. Some inter-generationally equity is required. Given the wide preferences of individual beneficiaries, however, it is hard when balancing their interests to look at ESG, excepting complex arguments about stranded assets which are too hard to predict at the moment especially in a high interest rate environment.⁵⁷ But in an ESG fund, given the commitments made,⁵⁸ the manager would have to honour them due to the mandate (which should be drafted accordingly) as well as the requirement for even-handedness amongst what is now a more homogenous group of beneficiaries with less diverse and more altruistic investment preferences.⁵⁹ There is no duty owed to an entity to dilute the focus on beneficiaries. However, this works both ways. In a non-ESG fund, it is only the financial interest of the unit-holders that are paramount. But in an ESG fund, that duty owed directly to them translates

⁵⁰ Lee-Ford Tritt and Ryan Scott Teschner, 'Re-Imagining the Business Trust as a Sustainable Business Form' (2019) 97 *Washington University Law Review* 1. At a moral level, it may have more of a separate personhood than a company which some saw as driven only by shareholder value; cf Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247.

⁵¹ (1880) 15 Ch D 247.

⁵² *Re Dasin Retail Trust Management Pte Ltd* [2025] SGHC 6 at [38].

⁵³ [2009] 3 SLR(R) 109.

⁵⁴ John Morley, 'The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation' (2014) 123 *Yale Law Journal* 1228.

⁵⁵ Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991).

⁵⁶ *Learoyd v Whiteley* [1887] UKHL 1.

⁵⁷ Thilo Kuntz, 'Private Discounting for Future? On the Limits of Aligning Corporate Law and Environmental and Sustainability Regulation' in W Boyd and A De Franceschi (eds), *Sustainability and Climate Justice* (Hart 2025) (forthcoming).

⁵⁸ For trustee commitments generally, see now Lusina Ho and Matthew Harding, 'A Commitment Theory of Express Trusts' (2025) 141 *Law Quarterly Review* 245.

⁵⁹ Khoo and Tallarita (n 10); Patrick Bolton and others, 'Investor ideology' (2020) 137 *Journal of Financial Economics* 320.

better into ESG goals as there is no interposed separate entity with other stakeholder interests. Here the goals do not ‘inevitably and solely mean their financial benefit [since] beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources’.⁶⁰

11. Individual liability

Lynn Stout⁶¹ pointed out that entities have less of a conscience compared to humans who are prosocial creatures and are already incentivized to act well regardless of liability rules. Traditional negligence liability generally undercompensates but that has not resulted in suboptimal societal behaviour as humans take more care than legally required than, say, corporations.⁶²

What may be needed in these cases where a trustee-manager of a CIS has direct duties or liabilities imposed on them to comply with ESG requirements is for individuals within them to also be exposed to the risk of liability to incentivize them to go against a corporate culture that to various degrees requires them to focus on short-term profits when profit maximization should necessarily be on a longer-term basis.⁶³ Statutory liability, if it exists, does not usually directly apply to the directors of an internally managed CIS or an external fund manager. The struggle today is to craft something which can make senior management internalize—or at least take account of—external rules applicable to the company or manager. The mechanics are not as easy as some ESG advocates presume.

In the UK, there is a Financial Conduct Authority and Prudential Regulatory Authority (PRA) Senior Managers and Certification Regime which sets out a responsibilities map for senior managers to assess the fitness and propriety of certain employees carrying out a ‘significant harm’ function. If there is a breach of responsibility within a senior manager’s remit the regulator can take action against the senior manager for failing to take ‘reasonable steps’ to avoid a breach occurring. This regime became applicable to banks from March 2016 and other PRA firms from 2018 although doubts have been expressed whether it is working to change bank culture.⁶⁴ With Singapore financial institutions, the former head of the MAS, Ravi Menon, said that the goal is to punish individuals more than the institutions they work for.⁶⁵

In Singapore, if the internally managed fund or an external manager is criminally liable, an officer of the entity would also be criminally liable if the offence under the SFA (usually section 199 in the case of unlisted funds and section 203 with listed funds) is found to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of an officer of the entity (section 331 SFA).⁶⁶

But criminal liability is not always the solution given the burden of proof required. Instead, a company could sue its directors if the company suffers a loss or is criminally liable in a way that is ‘attributable’ to the director. ‘Stepping stone’ liability in Australia has helped in having directors made liable, 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 by the company, often involving securities disclosure. But Langford⁶⁷ has highlighted that derivative stepping-stone liability was seen in *Cassimatis v Australian Securities and Investments Commission*⁶⁸ as merely an

⁶⁰ *Cowan v Scargill* [1985] 1 Ch 270.

⁶¹ Lynn A Stout, *Cultivating Conscience* (Princeton University Press 2011).

⁶² *ibid* 174.

⁶³ Alex Edmans, ‘The Long-Term Consequences of Short-Term Incentives’ (2022) 60 *Journal of Accounting Research* 1007.

⁶⁴ Eleanore Hickman, ‘Is the Senior Managers and Certification Regime Changing Banking for Good?’ (2022) 85 *MLR* 1440.

⁶⁵ Yasmine Yahya, ‘Huge 1MDB-related fines “hurt shareholders, not those liable”’ *The Straits Times* (Singapore, 30 June 2017), quoting Ravi Menon, MD of MAS. See further Reuben A Guttman, ‘Effective Compliance Means Imposing Individual Liability’ (2018) 5 *Emory Corp Governance & Accountability Rev* 77.

⁶⁶ This was applied not to a fund but a listed company, China Aviation Oil, when its CEO Chen Julin, was found guilty of aiding and abetting the breach of insider trading and continuous disclosure rules by the company. *Public Prosecutor v Chen Julin* (DAC 23249/2005) (involving the continuous disclosure problems in the China Aviation Oil group).

⁶⁷ Rosemary Teele Langford, ‘Dystopian Accessorial Liability of the End of “Stepping Stones” As We Know It?’ (2020) 37 *Company and Securities Law Journal* 262.

⁶⁸ *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52, (2020) 376 *ALR* 261, where directors were found liable in negligence to their financial advisory firm when their investment strategy led to losses to their clients and caused the firm to lose its licence.

application of a direct statutory duty. It has, however, been pointed out by Ye⁶⁹ that an Australian law report on their Managed Investment Schemes that was used for fund structures there stated that:

wherever possible, there should not be a divergence between the regulatory approach adopted in relation to companies and that adopted in relation to collective investment schemes. This applies in the context of enforcement ...

Ye concluded that with respect of fund duties, many are quasi-public in nature (as are Australia directors' duties following *Cassimatis*) and these are enforceable by both public bodies and investors who suffer loss against directors of fund companies. Consequently, while we have seen settlements only with the trustee companies of superannuation fund themselves, it is certainly possible that the directors of these trustees could also have been liable in Australia.⁷⁰ Singapore's business trust legislation adopted similar provisions imposing fiduciary like duties separately on responsible entities and their officers of managed investment schemes.⁷¹

However, even with investee companies elsewhere, the fit of more traditional directors' duties with omissions and external requirements is not a comfortable one. In *Clientearth v Shell Plc*⁷² some shareholders of Shell, led by Clientearth which bought a small holding in the company, tried to bring a derivative action to sue Shell's board to get it to adopt a more environmentally friendly strategy when the majority of shareholders already approved the existing strategy at the AGM. The derivative action, the underlying causes of which are the duties under sections 172 and 174 of the UK Companies Act 2006 to promote the success of the company and negligence respectively, failed on the threshold grounds that it may not have been brought in good faith nor was it prima facie to promote the success of the company as, on the face of it, Clientearth could not show that Shell's directors had acted in a way no reasonable director would have in balancing the various risks.⁷³ The burden is not on directors to show that they acted reasonably.

A Singapore judge also expressed 'surprise' that directors pleaded guilty to a breach of section 157 of the Singapore Companies Act, an earlier version of Australian legislation, that required them to act 'honestly and use reasonable diligence', for failing to get their company to comply with the continuous disclosure rules of the exchange.⁷⁴ It is not straightforward making directors liable for breaches by their companies due to the shield provided by the separate entity. Their duties are to the company itself, and the struggle today is to craft something which can make management internalize—or at least take account of—external rules applicable to the company. It is even more complex if the company suffers no clear loss from breach (indeed costs may be incurred by ESG requirements) as it is then purely about good faith compliance and faithfulness to rules. To the same effect with funds is *McGaughey and Davies v Universities Superannuation Scheme Ltd*⁷⁵ where the even more difficult common law derivative action brought by beneficiaries of a university pension fund against directors of the corporate trustees for not divesting fossil fuels failed. The court otherwise seemed to defer to the ability of trustees to integrate material climate risk into their investment decisions.

Crucially, in the context of trusts, however, the Court of Appeal in *McGaughey* suggested that the action may have stood a better chance had it taken the form of a 'beneficiary derivative claim' as opposed to a 'company derivative action'⁷⁶ in which beneficiaries bring an action against agents of the trustee (such as a director) for causing a breach of trust or a 'dog-leg action'

⁶⁹ James Ye, 'Applying a Cassimatis-lens to the directors of the trustees of managed investment schemes and superannuation funds' (2024) 39 *Aust Journal of Corp Law* 219.

⁷⁰ See Michael Slezak, 'Super fund REST being sued for not having a plan for climate change' *ABCNews* (Australia, 25 July 2018).

⁷¹ Corporations Act 2001 (Cth) ss 601FC and 601 FD respectively, which are only found in Singapore's Business Trusts Act 2004 and not applicable to mutual funds generally.

⁷² [2023] EWHC 1137 (Ch). In the UK, for certain disclosures in the Annual Report, directors can be liable under s 463 of the Companies Act 2006 but that requires more than negligence.

⁷³ *ibid* [66], noted Adefolake Adeyeye, 'The pursuit of corporate accountability: climate change litigation and the use of shareholder derivative actions' (2024) 83 *CLJ* 30.

⁷⁴ *Public Prosecutor v Ngiam Zee Moey* [2022] SGDC 115 on rule 703 of the SGX Listing Manual which has statutory backing under the Securities and Futures Act 2001 s 203.

⁷⁵ [2023] EWCA Civ 873 affirming [2022] EWHC 565 (Ch).

⁷⁶ *ibid* [78]–[90].

where the trustees hold the cause of action as a trust asset for the beneficiaries. But this action would require the view of other beneficiaries with substantial interests as it is really a representative action. While it is not fully clear if this is a direct or still closer to a derivative action, it provides a better chance for imposing obligations on directors of the trustee/manager corporation.

A practical problem is that documents drafted with US trust law in mind (where the business trust is a separate entity) may be used in jurisdictions where it is not. While we have seen that there is no separate entity that dilutes the focus of the asset manager outside the US, the laws in different countries appear to treat the asset manager sometimes as an individual and other times an entity. In the US, for example, it is said that⁷⁷:

Proponents of ESG apply the same fiduciary duty principles, and arguments, to both corporate directors and fund managers. Legislative and regulatory advancements in ESG, both generally and as it relates to fiduciary duty, will impact directors and managers similarly. Therefore, for the purposes of this article, the two will be addressed jointly, with diversions noted ... It places corporate directors and fund managers in the precarious position where the utilization of ESG and ESG investing is a breach of fiduciary duty, leaving them liable to civil action.

This is because in the US, the trust fund is seen as a separate entity like a company and so the trustee/manager is in that sense like the directors of the company. That is not the case in many parts of the Commonwealth which still see no separate entity in the trust and so the analogy with the company should be the trustee-manager itself. This is often a corporation, and the question is whether the directors and managers of that corporate trustee-manager can be liable. With the latter, whilst it is consistently reiterated that the trust, even the business trust, is not a separate entity, and that all claims against it goes through the trustee, it still visualizes the latter as an individual. This insulates the true individuals behind the trustee when that takes the form of a company. For example, it was said by the UK Trust Law Committee in its *1997 Consultation Paper* that the directors of a trustee/manager are only liable as accessories to a breach of trust.⁷⁸ This requires some form of dishonesty on their part in assisting in some form of fraudulent breach by the trustee, and would further insulate individuals from any direct duties of loyalty or care (even if those themselves struggle to accommodate external ESG requirements).

To summarize, we need to demarcate clearly the scope of responsibility/liability for the various actors in the fund management industry in order to create a proper mechanism in which ESG goals can be translated to real action. A law premised on individual trustee/managers will not sit well with the use of entities that can insulate the actual individuals who would otherwise be more pro-social in their behaviour if they were also subject to direct liabilities (as opposed to only being accessories). We have to guard against what has recently been termed a ‘disattribution heresy’.⁷⁹ All this may also depend on whether the fund itself is seen as a separate entity and that is still evolving in Singapore but may itself further insulate individuals from liability. *McGaughey* offers a chance of further development of the ‘beneficiary derivative claim’ or ‘dog-leg action’ for trust fund structures.

12. A more public oriented duty?

In the US, traditional fiduciary duties of loyalty and care were in fact used against the trustees of an employee retirement system that adopted ESG-positive investment decisions (divesting fossil fuel investments) that allegedly damaged the financial position of the fund in *Wong v NYCERS et al.*⁸⁰ The case was dismissed for lack of standing as these were defined benefit schemes where the beneficiaries obtained the same pension payouts regardless of fund performance and so did not suffer any loss. Although the court did not fully discuss this, and noted that the scheme involved more contract than trust law, satisfying the burden of proof is hard both ways in terms of

⁷⁷ Jonathan A McGowan, ‘The Trouble with Tibble: Environmental, Social, and Governance (ESG) and Fiduciary Duty’ (2022) University of Chicago Business Law Review: Online Edition.

⁷⁸ Trust Law Committee, *1997 Consultation Paper*, para 2.51.

⁷⁹ *El-Husseiny v Invest Bank* [2023] EWCA Civ 555, [2024] KB 49, [47], citing Neil Campbell and John Armour, ‘Demystifying the Civil Liability of Corporate Agents’ [2003] CLJ 290, 292.

⁸⁰ Index No 652297/2023 (NY Sup Ct filed 11 May 2023).

ESG issues as the court also said that it was highly speculative whether the divestment would affect the retirement funds' financial health. Again, as is the case in the US, the defendants were the fund managers themselves and not those managing them, ie individual directors or officers.

It is difficult to say therefore whether ESG goals are or are not in the fund's best interest from a financial perspective. A fortiori, it is hard to say that the asset manager or its directors are negligent or not and much depends on who bears the burden of proof in the Anglo-American adversarial system. What may be needed instead of working an exhausted mine (cf the UK Private Member's Company Directors (Duties) Bill seeking to balance duties to promote the success of the company with duties to the environment and employees) is to look for other private law duties that may be more infused with public goals. Theorists have argued that it is certainly possible for 'public rights' to be recognised' without changing the nature of private law.⁸¹ It has been argued elsewhere that the proper purpose rule, which is less a duty than a restraint on the improper use of power,⁸² may provide a solution. It applies to trustees and directors and is about maintaining fairness between stakeholders. Traditional duties are owed specifically to a claimant needing to show standing.⁸³ The proper purpose rule comes closer to a standalone public type duty where a claimant may not need to show the same kind of personal loss or injury. The claimant's interest is in seeing to the faithful adherence to a constitutional rule or even external requirements imposed on the fund or its directors. It adds another dimension to fiduciary duties as its role is to 'regulate the exercise of authority'⁸⁴ or to 'prevent law's intentional abuse'⁸⁵ rather than prevent opportunism or promote loyalty (or in the US to compensate for negligence). This works particularly well with disclosure requirements, which are still what funds are largely subjected to in the ESG space, as that is better enforced through *ex ante* injunction than *ex post* through claims for damages. Many EU actions have been of this nature.⁸⁶

Breach of proper purposes was in fact argued in *McGaughey* but we have seen that the wrong procedure was used, ie the common law derivative action. It may work better with the 'beneficiary derivative action' which allows trust beneficiaries to enforce rights owed to trustees by its agents (which would include directors of trust companies) or third parties. Even in the corporate context, shareholders have been able to enjoin companies whose directors failed to use their powers for proper purposes, eg in *Eclairs v JKC Oil*,⁸⁷ where its directors wrongly suspended the votes of potential takeover bidders. How this occurred was not clear given that those duties are owed to the company. Most recently, the Privy Council in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*⁸⁸ held that even if directors' duties are owed to the company, a shareholder or a group of them may have an implicit and parallel personal right given by the statutory corporate contract to bring an action against the company to remedy any wrong affecting them which arises from a breach of directors' duty to utilize their powers for proper purposes. A trust deed could replicate the building blocks from the corporate structure here to provide unitholders an action against officers of a trustee-manager requiring compliance with any requirements imposed on a fund that holds itself out as an ESG fund. As it is, more work is needed to ensure that what is inserted in the trust deed by corporate lawyers comport with what litigation lawyers and judges say can work.⁸⁹

⁸¹ Ernest J Weinrib, 'Private Law and Public Right' (2011) 61 *University of Toronto Law Journal* 191.

⁸² Lionel Smith, *The Law of Loyalty* (OUP 2023).

⁸³ Timothy Liao, *Standing in Private Law* (OUP 2023).

⁸⁴ Robert Flannigan, 'Fraud on a Power, Improper Purpose and Fiduciary Accountability' (2019) 62 *Canadian Business Law Journal* 133. It is about controlling the 'abuse of power' and not 'excess of power': *Eclairs v JKC Oil* [2015] UKSC 7, approved by Lord Richards in *Grand View PTC v Wong* [2022] UKPC 47, [55], who saw 'abuse' in the non-pejorative sense and approved the use of extrinsic materials like letters of wishes in determining the purpose of the power: [63].

⁸⁵ Jessica Hudson, 'The Proper Purpose Rule: Preventing Law's Intentional Abuse' *Australian Law Journal* (forthcoming).

⁸⁶ See eg ClientEarth, *ClientEarth suing the Central Bank of Belgium for climate failings* (2024) <<https://www.clientearth.org/latest/news/why-clientearth-is-suing-the-central-bank-of-belgium-for-climate-failings/>> accessed 1 June 2025; Freshfields, *ESG litigation in the context of financial services* (2024) <<https://www.freshfields.com/en/our-thinking/briefings/2024/01/esg-litigation-in-the-context-of-financial-services-a-global-gear-change>> accessed 1 June 2025.

⁸⁷ See (n 93). See further Hans Tjio, 'The Proper Purpose Rule' [2016] LMCLQ 176.

⁸⁸ [2024] UKPC 36 [79] (appeal from the Cayman Islands); cf Ernest Lim, 'Directors' duties: improper purposes or implied terms?' (2014) 34 *Legal Studies* 34, arguing that the existence of the proper purpose rule is itself an implied term. See now Eva Micheler, 'The legal nature of the corporate constitution: *Hickman v Kent or Romney Marsh Sheepbreeders' Association Ltd* and *Tianrui v China Shanshui Cement Group*' (April 30, 2025). <<https://srn.com/abstract=5236836>>.

⁸⁹ We have seen recent uncertainty in Singapore with respect to whether the debts incurred by a fund are those of a separate fund itself or remain solely with the trustee-manager: *Re Dasin Retail Trust Management Pte Ltd* [2025] SGHC 6, [38].

13. Challenges to Singapore and ASEAN funds

The evidence suggests that there have been ESG fund outflows in recent years from Singapore and South-East Asia and even the world in general.⁹⁰ While this may have been due to the poorer performance of regional equities in a higher interest rate environment, which also weakens a stranded asset argument, it has also been highlighted that ESG funds in the region suffer from the lack of qualified individuals who can analyse and make ESG-positive investments. The funds are relatively smaller, with the largest having funds under management of S\$71 billion, and so they lack economies of scale to maintain much ESG expertise.⁹¹ This is supported by other evidence showing that non-ESG funds have received more money to manage at the same time. This is particularly the case with bond funds where the regulation focuses not only on the asset manager but also the underlying investment as green bonds may have been difficult to structure in the region. Consequently, as most ESG funds in South-East Asia are equity funds (81% when equity funds only total 43% of all funds), there has been a flight to non-ESG money market or fixed income funds.⁹² It should be noted, however, that the UK Stewardship Code 2020 also now covers bondholders⁹³ and Temasek's Stewardship Principles 2.0 2022 presently states that:

The application of stewardship to asset classes beyond listed equities. While the Principles primarily focus on guidance for listed equities, these updated Principles suggest that investors should explain how they discharge their stewardship responsibilities across all asset classes where possible.

The difficulty in Singapore is that most bonds listed on the SGX are not credit-rated let alone on an ESG basis. There is a long transition journey ahead with climate finance a serious problem in Asia that has to be addressed.⁹⁴

14. Conclusion

It has been argued that universal owners lack sufficient expertise to further ESG goals and that 'Investors' stewardship is a very poor substitute for environmental regulation'.⁹⁵ While the latter is still the first best solution, we have seen that Temasek in Singapore as an asset owner is quite different from fund managers and may indeed be a major driver of ESG in ASEAN funds and investee companies.

Intergenerational equity may create 'public rights' that can seep into the private law. There are developments that make fiduciary duties towards being ESG positive more workable with trusts and asset management. This includes the fact that the absence of a separate entity whose interests are paramount means that the focus is more on beneficiary interests. In an ESG fund, particularly one that has been funded by Temasek whose sustainability goals are quite clear, the managers and officers would have to follow its mandate. The disclosures attached to them and their increasing enforceability provide a clear mechanism to translate purposes to action. We should accept, however, that traditional duties of loyalty and care cannot fully capture the 'public rights' here and the proper purpose rule adds another dimension to fiduciary duties. With that in place, the focus should be on *ex ante* injunction as opposed to compensation. If so, it may matter less that individual liability is hard to obtain given the structures used in the asset management industry which shield natural persons from liability. Asia, however, continues to have its own challenges as it searches for a just transition.

⁹⁰ It may be a worldwide phenomenon: 'ESG funds hit by worst-ever redemptions as backlash deepens' *The Business Times* (Singapore, 3 February 2025). See now Quinn Curtis, 'The ESG Backlash and the Demand for ESG Mutual Funds' (forthcoming in the *Journal of Empirical Legal Studies*).

⁹¹ Ernest Chan, 'Cost of ESG is a growing challenge for some Asian fund managers' *Financial Times* (London, 31 May 2024).

⁹² Janice Lim, 'S-E Asia's ESG funds record outflows in Q1 as investors shun regional equities' *The Business Times* (Singapore, 27 May 2024).

⁹³ Suren Gomtsian, 'Debtholder Stewardship' (2023) 86 *Modern Law Review* 396.

⁹⁴ Pillay (n 48).

⁹⁵ Zohar Goshen and Assaf Hamdani, 'Will Systematic Stewardship Save the Planet?' (October 17, 2023). European Corporate Governance Institute—Law Working Paper No 739/2023, <<https://ssrn.com/abstract=4605549>>.

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Capital Markets Law Journal, 2025, 20, 1–16

<https://doi.org/10.1093/cmlj/kmaf022>

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