12. CONTRACT LAW

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Formation of contract

Offer and acceptance

Coincidence of offer and acceptance

12.1 The High Court case of *Hon Chin Kong v Yip Fook Mun*[1] illustrates the basic principle that there must be a coincidence of offer and acceptance for a binding contract to be formed. In this case, the plaintiff sought to purchase the defendants' shares in CDX Singapore Pte Ltd ("CDX"). The defendants were the sole directors and shareholders of CDX. The parties agreed for the plaintiff to take over CDX from the defendants. However, the plaintiff encountered financial difficulties and requested to make payment in three tranches. The defendants agreed to this, with the first payment of $300,000 being a "down payment deposit". It was further agreed that the shares were to be transferred only after the second and third payments had been made.

12.2 The plaintiff only made the first payment. As such, the contemplated sale and purchase did not materialise. The plaintiff then

1 [2018] 3 SLR 534.

demanded the return of the first payment. When the defendants refused, the plaintiff sued for its return.

12.3 The defendants resisted the claim by saying that the first payment was a deposit which could be forfeited when the plaintiff failed to make further payments. However, the plaintiff argued, *inter alia*, that the payment was not a deposit because the parties did not have a binding contract between them.[2]

12.4 Kannan Ramesh J examined the facts and determined that a contract had been formed as there was a coincidence of offer and acceptance between the parties. First, the plaintiff expressed serious interest in purchasing CDX in an e-mail on 7 May 2013. The first defendant offered to sell CDX at a total price of $850,000 in an e-mail of 11 May. The plaintiff then counter-offered a price of $800,000 in his e-mail titled, "RE: Your offers (ACCEPTED)" on 11 May. Although this was not an acceptance as such – since the plaintiff's counter-offer constituted a fresh offer – the learned judge found that the plaintiff's use of the word "accepted" in the e-mail subject, as well as his suggestion that they open a bottle champagne to celebrate, and asking when to settle the paperwork, showed that the plaintiff had the clear intention to enter into a binding agreement. The defendant then counter-offered a final price of $828,000 on 20 May. The plaintiff's reply on 24 May, "Confirned [*sic*] la. $828k" showed that he accepted this offer. The plaintiff also expressed his gladness that they at least "sealed the deal". The entire sequence of events showed that the plaintiff had full intent to be bound were the defendant to accept – the classic definition of an acceptance, as it was put by the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter*.[3] There being a coincidence of offer and acceptance, the learned judge found that there existed a contract between the parties.

Postal acceptance rule

12.5 In a somewhat unusual circumstance, the High Court in *1L30G Pte Ltd v EQ Insurance Co Ltd*[4] had to decide whether the postal acceptance rule applied. EQ Insurance provided 1L30G with a performance bond. 1L30G made a first demand on the bond in February 2015, which was paid out by EQ Insurance. On 19 January 2017, 1L30G made a second demand on the bond, but this time, EQ Insurance refused to pay. It argued that the bond had expired on

2 Other questions as to whether the payment could be forfeited if a contract had been formed is discussed in paras 161–171 below.

3 [2009] 2 SLR(R) 332 at [47].

4 [2017] 5 SLR 1106.

26 October 2014, even before the first demand. EQ Insurance therefore requested a return of the sum paid under the first demand. 1L30G therefore sued for the second payment, as well as for a declaration that it was entitled to the first payment.

12.6 Key to the case was EQ Insurance's argument that the bond had already expired pursuant to its cl 3, which stated that it would automatically be extended for 180 days on 26 October 2014 unless a notice of non-renewal was given. EQ Insurance claimed that it gave such notice by posting a letter dated 27 June 2014. It further argued that even if the notice was not actually received by 1L30G, cl 3 would be satisfied by virtue of the postal acceptance rule.

12.7 Lee Seiu Kin J allowed 1L30G's claim. His Honour found as a matter of fact that EQ Insurance had posted the letter dated 27 June 2014. However, the postal acceptance rule did not apply because cl 3 required 1L30G to have "notice", suggesting that this required actual notice of the non-renewal letter before the bond could expire. This was supported by the fact that the non-renewal would trigger certain rights that 1L30G could exercise. For these rights to be effective, 1L30G should have had actual notice of non-renewal. Thus, because 1L30G did not receive the 27 June 2014 letter, the notice of non-renewal was not effective and there remained an active bond between the parties.

12.8 It could also be argued that this was not a case where the postal acceptance rule applied. The postal acceptance rule only applies in relation to offers made to enter into contracts. There was no such offer here. Rather, the correct date when the performance bond terminated is to be resolved by a process of construction as to when the notice of non-renewal was to be triggered.[5]

12.9 The learned judge also expressed some sentiments on the postal acceptance rule, which provides that the acceptance would be deemed to have taken place at the time of posting rather than receipt. In his Honour's view, although the rule introduced certainty for the accepting party, it introduced uncertainty for the offering party. Thus, the rule would only apply if both parties intended for it to apply, just as much as they could intend for the normal rules of notification to apply. Whether it applied thus depended on the parties' intentions, rather than the nature of communication. The fact that communications were instantaneous would only be a factor that showed that parties did not intend for the postal acceptance rule to apply, but this was by no means conclusive.

5 Goh Yihan would like to thank Tham Chee Ho for this point.

"Subject to" clauses and formation

12.10 There were at least two cases where the Singapore courts had to deal with whether the parties had qualified their discussions with each other so as to prevent the formation of a binding contract between them. The Court of Appeal in *Toptip Holding Pte Ltd v Mercuria Energy Pte Ltd*[6] ("*Toptip*") had the opportunity to deal with whether a contract had been formed. Toptip is a Singapore company dealing in bulk commodities. Mercuria, in turn, is the Singapore subsidiary of a global energy and commodity group, and dealt with the chartering out of vessels to carry dry cargo. Mercuria began negotiations with Toptip in October 2014 for the charter of a vessel, on the basis that Mercuria, which did not own any vessel, would be the disponent owner of the vessel if a charterparty was concluded.

12.11 The circumstances of the negotiations were as follows. Toptip had purchased iron ore pellets from Samarco. Under the terms of the sale contract, Toptip had to arrange for a suitable vessel to transport the cargo but Samarco had the right to reject the nominated vessel. Toptip engaged Shu, a ship chartering broker, to find a vessel. Shu was the one who negotiated with Mercuria on Toptip's behalf.

12.12 Toptip's requirements for the vessel were set out in an enquiry e-mail sent to Mercuria. Mercuria responded with a bid incorporating the following "subject review" clause: "[otherwise] subject review of charterers' *pro forma* charterparty with logical amendment".[7] At the end of the parties' discussions, a vessel was eventually nominated by Mercuria and a draft charterparty prepared by Shu. However, Mercuria then informed Toptip through Shu that it was rejecting the transaction because it found the draft charterparty unacceptable. Toptip accepted this rejection but had to secure a substitute charterparty. It sued Mercuria for the difference in freight it had to pay for the new charterparty compared to the freight it had to pay had Mercuria not withdrawn from the business. The trial judge dismissed this claim on the basis that no valid charterparty had been formed between the parties due to the subject review clause.

12.13 On appeal, Judith Prakash JA, writing for the Court of Appeal, allowed Toptip's claim. The Court of Appeal concluded that Mercuria's bid, when construed in the overall context, was a complete and certain offer that was capable of acceptance notwithstanding the subject review clause. Indeed, the bid expressly stated that it was an offer on a firm basis. Thus, when Shu replied to accept the "offer", a contract was

6 [2018] 1 SLR 50.

7 *Toptip Holding Pte Ltd v Mercuria Energy Pte Ltd* [2018] 1 SLR 50 at [7].

formed, which was subsequently repudiated by Mercuria. Moreover, Mercuria had remained silent and did not respond to clarify that its bid was not an offer and hence no contract could be formed. It also did not indicate any objection to the main terms or any reservation as to the particular form which the charterparty must take. If at all, Mercuria's conduct was consistent with a belief that a contract had been formed: it nominated the vessel and asked Toptip for the kind of documents that Samarco would need for the latter's approval.

12.14 As a matter of law, a subject review clause did not by itself preclude the formation of a contract. This depended on its meaning. Such a clause could either be a condition precedent to the formation of a contract or a condition subsequent. The exact meaning depended on the circumstances. Here, the subject review clause was a condition subsequent which did not prevent the formation of a contract. There was, for example, no indication on the facts that the subject review clause was intended to supersede the clear indication that the offer was made on a "firm basis".

12.15 The Singapore International Commercial Court had to deal with a similar issue in *Tozzi Srl v Bumi Armada Offshore Holdings Ltd*[8] ("*Tozzi Srl*"). In this case, the plaintiff and the first defendant had entered into an agreement for the plaintiff to work exclusively with the defendants. This was to support the defendants' bid for a project in Indonesia. In exchange, the defendants gave the plaintiff a right of first refusal for subcontracts to provide engineering services in respect of certain projects. Although the exclusivity agreement expired on 5 February 2014, both parties continued to work on the bid. The plaintiff claimed that on 31 July 2014, the parties had further agreed to extend the right of first refusal for subcontracts for engineering services for further projects. Although this was said to be evidenced in the meeting minutes, the defendants claimed that the last paragraph of the minutes expressly rendered all matters discussed "subject to contract". When the defendants awarded an engineering services subcontract to a party other than the plaintiff without giving the plaintiff the right of first refusal, the plaintiff sued for the defendants failure to do so.

12.16 Steven Chong JA, writing for the court, held that a contract was formed at the 31 July meeting. The "subject to contract clause" recorded in the minutes did not prevent the formation of a legally binding agreement because of the overall context. In particular, the right of first refusal was an independent right. Thus, while there remained other details to be worked out following the meeting, the extent of the right of first refusal was not one of those details. Indeed, the parties' conduct

8 [2017] 5 SLR 156.

during and subsequent to the meeting accorded with the defendants having extended the right of first refusal granted to the plaintiff.

12.17 Accordingly, *Tozzi Srl* and *Toptip* show the need for the courts to bear in mind the overall context when considering whether a valid contract has been formed between the parties. This could include circumstances before *and* after contract formation, if the latter showed that the parties had entered into an agreement between them.

Consideration

12.18 It is usually easy to find that the requirement of consideration has been satisfied in commercial cases. An example of this may be found in the High Court case of *Wartsila Singapore Pte Ltd v Lau Yew Choong*[9] ("*Wartsila*"). In this case, Wartsila Singapore Pte Ltd ("Wartsila") had entered into a contract ("the Repair Contract") with Geniki Shipping Pte Ltd ("Geniki") to repair the engine of the vessel "*Geniki Sarawak*" in 2010. Negotiations for the Repair Contract had been carried out by Geniki's general manager, Low Woei Pyng, and the Contract named Geniki as Wartsila's customer; no mention was made of the vessel's registered owner, Aga-Intra Sdn Bhd ("Aga-Intra"). The vessel suffered an engine breakdown three months after Wartsila had carried out its repairs ("the 2010 repairs"). Wartsila then carried out further repairs in 2011 ("the 2011 repairs"), following which the vessel was released by Wartsila in exchange for a personal letter of undertaking issued by Lau Yew Choong ("LYC"), a director of both Geniki and Aga-Intra, under which he undertook personal responsibility for all outstanding charges for the 2011 repairs. When its charges for the 2011 repairs were not paid in full, Wartsila brought proceedings in Suit No 168 of 2013 ("Suit 168") against LYC on this LOU. But in the meantime, Geniki and Aga-Intra commenced proceedings as co-plaintiffs in Suit No 521 of 2013 ("Suit 521") against Wartsila in which it was alleged that the 2010 repairs had been carried out negligently in breach of Wartsila's contractual duty to do so with reasonable care. This caused loss to Aga-Intra, which was alleged to be Geniki's undisclosed principal, and for whose benefit Geniki had contracted with Wartsila.[10]

12.19 In connection with Suit 168, Belinda Ang Saw Ean J found that the LOU was supported by consideration. Her Honour reasoned that there was an impasse between the parties when the LOU was entered into: Wartsila wanted some form of security for its right of payment to the 2011 repairs before giving up possession of the vessel (and so losing

9 [2017] 5 SLR 268.

10 Some of the interesting issues arising in connection with Suit 521 are discussed at paras 96–102 below.

its ship-repairer's lien). The LOU was issued by LYC to satisfy Wartsila. The LOU also provided for a set of payment conditions more favourable for the plaintiffs than if it were not agreed. The learned judge held that this sufficed as consideration provided by Wartsila in exchange for Lau's provision of the LOU. This case thus shows the relative ease by which consideration is found in commercial cases. Indeed, it is common that commercial agreements are struck to resolve differences of opinion, so that there will usually be an improvement in the parties' positions in the absence of the agreement. By the reasoning adopted in *Wartsila*, this would suffice as consideration.

12.20 The High Court case of *KLW Holdings Ltd v Straitsworld Advisory Ltd*[11] ("*KLW Holdings*") is another example of the ease with which consideration is found in commercial cases. In that case, the plaintiff-investor and the first defendant were involved in several property development projects. Each transaction was to be documented by way of a term sheet, which would set out the potential investment and provide for the investor to pay a commitment fee. The commitment fee would form part of the investment if the parties later entered into a definitive agreement in respect of the project. If not, the commitment fee would be refunded to the investor.

12.21 The dispute here concerned the term sheet entered with respect to a project in Vietnam ("Project Happy Term Sheet"). Prior to Project Happy, the investor's wholly owned subsidiary and the first defendant had entered into another term sheet in relation to a project in China ("Project Zhangye Term Sheet"). The subsidiary had paid the first defendant a $7m commitment fee for Project Zhangye. However, Project Zhangye did not materialise and so the subsidiary was entitled to a refund of the sum. Because the $7m had not been refunded to the subsidiary, the investor agreed that it be counted as the commitment fee for Project Happy. The second defendant, who is the director of the first defendant, personally undertook to fulfil the first defendant's payment obligations. Unhappily, Project Happy did not materialise and the investor sued for the return of the $7m. The defendants resisted the claim on the ground that no consideration had been furnished for them to enter into the Project Happy Term Sheet.

12.22 Hoo Sheau Peng JC (as her Honour then was) held that there had been consideration for the Project Happy Term Sheet. She found that the investor provided consideration by procuring its subsidiary to exercise forbearance from suing the first defendant for the repayment of the commitment fee. The investor also provided consideration by undertaking the obligation to use the commitment fee towards the

11 [2017] 5 SLR 184.

funding required for Project Happy should any definitive agreement be concluded eventually.

12.23 The defendants also argued that the requirement of consideration was not met because the consideration, even if provided, did not benefit the second defendant. However, Hoo JC held that there is no requirement in law that consideration must benefit each and every party to the contract. Indeed, while it is trite that consideration must move from the promisee, it need not move *to the promisor*. Otherwise, as the learned judicial commissioner noted, it would not be possible to enter into contracts that solely benefitted third parties. In the present case, consideration therefore did not have to benefit both defendants.

Certainty and completeness

12.24 The issue of certainty was also raised in *Wartsila* (the facts of which have been set out above).[12] In that case, Lau (the first defendant) also asserted that the LOU was unenforceable for lack of certainty. Lau primarily argued that the following material clause in the LOU meant that he was either providing a guarantee in respect of the plaintiffs' obligation to pay for the repairs in 2011, *or* that he was taking on a direct obligation to pay for those repairs:

> Further in our tele-conversation and email reply dated 01 Jun 2011. I hereby to responsible [*sic*] for the outstanding payment (in 9 instalments after initial down-payment of SGD100,000/- paid on 31 May 2011) for the above vessel which had returned to *Wartsila* for repair again, provided if the damage was not faulted by *Wartsila's* workmanship or negligence.

12.25 Ang J held that this passage did not render the LOU unenforceable for uncertainty, citing the well-known words of Lord Wright in *Hillas & Co Ltd v Arcos Ltd*:[13] courts do not expect documents prepared by parties to be drafted with the utmost precision and certainty. Indeed, courts strive to give effect to agreements, and not render them nugatory.

12.26 Applying this general principle to the present facts, Ang J acknowledged that the LOU was not drafted with absolute precision. However, this element of uncertainty should not, in and of itself, mean that the agreement should be destroyed. In any event, her Honour found that clarity could be sought through the exercise of interpretation, considering the discussions leading up to the provision of the LOU, to shed light on their intention at the point in time when the LOU was

12 See para 12.18 above.
13 (1932) 147 LT 503 at 514.

entered. These discussions showed that the parties had always envisaged a direct, personal undertaking to pay as opposed to a guarantee. As such, the learned judge found that the words of the LOU were not so uncertain as to render the LOU unenforceable.

12.27 Ang J's approach is undoubtedly in line with the general principle adopted by courts, especially in commercial cases, that contracts should not be rendered unenforceable by the mere hint of uncertainty. This is said to preserve the bargain reached by commercial parties. However, while it is permissible for courts to interpret the contract to ascertain whether it is truly uncertain, it is interesting that her Honour considered prior negotiations without engaging with the debate of whether such reliance is permitted to interpret contracts in the first place. Whilst using prior negotiations to ascertain the certainty of the contract at hand, her Honour was ultimately also using such evidence to determine the parties' intentions. This is contrary to the more restrictive approach taken by Singapore courts in relation to prior negotiations, and it would have been clearer had there been a more complete discussion on the legal permissibility of such reference.

Interpretation of terms

General approach

12.28 The general approach with regard to contractual interpretation is now well-settled in Singapore following several important decisions in the past few years. The Court of Appeal in *CIFG Special Assets Capital I Ltd v Ong Puay Koon*[14] ("*CIFG*") summarised the general principles in relation to contractual interpretation as follows:

> (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in 'the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context' (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).

14 [2018] 1 SLR 170.

(d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

12.29 A different summary of these principles can be found in *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd*.[15] Audrey Lim JC succinctly explained that "interpretation is the ascertainment of the meaning which the expressions in a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract", citing *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[16] ("*Sembcorp Marine*"). In line with the Court of Appeal's statement in *CIFG*, the learned judicial commissioner went on to explain that the text is always the first port of call, but that the relevant context is also important and the court must ascertain, based on all the relevant objective evidence, the parties' intentions at the time they entered into the contract. In doing this, the courts draw assistance from several canons of interpretation. And, there is also the parol evidence rule, which governs the admissibility of extrinsic evidence which can be used to interpret contracts. These principles were similarly referred to by other cases in the year under review, such as *TMT Co Ltd v The Royal Bank of Scotland plc*.[17]

Specific principles

Admissibility of extrinsic evidence

12.30 One of the key controversies concerning the admissibility of extrinsic evidence is whether prior negotiations and subsequent conduct can be admitted to interpret contracts in Singapore. After a period of uncertainty, it now appears that the Singapore courts have agreed that there is no blanket prohibition against the admission of such evidence, and that they should be admitted based on whether the requirements from *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*[18] ("*Zurich Insurance* requirements") are satisfied. This is a welcome development, as there is no good reason to treat prior negotiations and subsequent conduct as special classes of evidence that are subject to different requirements. This is especially so given that the Evidence Act,[19] which the courts have recognised governs the admissibility of extrinsic evidence, does not draw that distinction itself.

15 [2017] SGHC 22.
16 [2013] 4 SLR 193 at [33].
17 [2018] 3 SLR 70.
18 [2008] 3 SLR(R) 1029.
19 Cap 97, 1997 Rev Ed.

12.31 In so far as prior negotiations are concerned, the High Court in *Marken Ltd (Singapore Branch) v Scott Ohanesian*[20] ("*Marken*") held that they would indeed be subjected to the *Zurich Insurance* requirements. In an illuminating paragraph that summarises the legal position, Foo Chee Hock JC said:

> Besides these restrictions, the issue of pre-contractual negotiations merited further elaboration. The blanket prohibition on such evidence had been removed in *Zurich Insurance* (see *Zurich Insurance* at [132(d)]), but the *Zurich* criteria would have to be fulfilled before such evidence could be admitted (see *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ('*Xia Zhengyan*') at [63]–[69]; *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [50]). It should also be pointed out that the Court of Appeal had commented in *Xia Zhengyan* that the contours of this rule of admissibility remained an 'open question' and that limits and safeguards might have to be put in place (see *Xia Zhengyan* at [69]).

12.32 Given this statement of the law, the time may have arrived for the Court of Appeal to pronounce that this is no longer an "open" question. The position seems to be rather clear: prior negotiations can be admitted if they satisfy the *Zurich Insurance* requirements.

12.33 The Court of Appeal in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*[21] ("*GPK Clinic*") dealt with the admissibility of subsequent conduct for the interpretation of contracts. Chong JA, writing for the court, acknowledged that there was no blanket prohibition against subsequent conduct, but such evidence can only be admitted if it provided cogent evidence of the parties' agreement at the time the contract was concluded. This is in line with the court's previous pronouncements. It would appear that the admissibility of subsequent conduct would depend on the satisfaction of the *Zurich Insurance* criteria.

12.34 Furthermore, the learned judge also explained that the parties' subjective understanding of a contract should generally be treated with caution in interpreting the contract. According to the terms of the Evidence Act, such evidence can only be admitted where there was ambiguity in the contract which could not be resolved by reference to the surrounding circumstances of the contract. More generally, in the interpretation of a *written* contract, *oral* testimonies should be treated with caution as such evidence might be coloured by the onset of later events and the very dispute between the parties.

20 [2017] SGHC 227.
21 [2018] 1 SLR 180.

Commercial purpose

12.35 Underlying many of the decisions concerning the interpretation of contracts is the commercial purpose of the agreement. While the starting point of interpretation is the text, this invariably gives way to the broader context in which the text was agreed, and this in turn relates to the commercial purpose of the agreement. The importance of the commercial purpose was demonstrated in the Court of Appeal case of *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd*.[22] The case concerned a tenancy agreement between Ngee Ann Development and Takashimaya Singapore for the lease of the demised premises in Ngee Ann City. The lease permitted Takashimaya to sublet the demised premises on such terms and conditions as it might determine, but it was obliged to retain 10,000m^2 of the demised premises for occupation by a single sub-lessee, or by itself. From the commencement of the lease, some 38,000m^2 of the 56,105m^2 demised premises has been occupied by Takashimaya's own departmental store.

12.36 Takashimaya was to lease the demised premises for an initial term of 20 years. Following the first five years, a rent review would be conducted to determine the rent payable for the successive five-year periods up to the end of the 20 years. The parties were to endeavour to agree on the prevailing market rental value of the demised premises, but if they failed to agree, then the "prevailing market rental value of the demised premises" would be determined by a valuer. Later, Takashimaya sought to renew the lease for a further ten years, as it was entitled to under an option. Under this process, the parties were obliged to undertake a rent review process similar to the above. Takashimaya argued that the valuation should take place on the existing configuration of the demised premises, but Ngee Ann argued that the valuer could posit a different configuration, or one that would reflect the highest and best use of the demised premises. These different approaches obviously affected the eventual rent that Takashimaya was obliged to pay, and when the parties reached an impasse, Ngee Ann sued Takashimaya for its failure to instruct the valuers to conduct a re-valuation exercise. Takashimaya in turn sought a declaration that the "prevailing market value of the demised premises" was to be determined by the *existing use* of the demised premises. The High Court had found for Takashimaya.

12.37 In dismissing Ngee Ann's appeal, Chong JA, delivering the judgment of the Court of Appeal, paid attention to the features of the parties' agreement as reflecting the nature of their intended relationship. The underlying commercial purpose was for Takashimaya to operate a large department store on the demised premises as the anchor tenant.

22 [2017] 2 SLR 627.

Moreover, the nature of the parties' relationship had the nature of a joint commercial enterprise – Takashimaya was regarded as a joint venture partner, sharing ownership with Ngee Ann. Indeed, Takashimaya's department store had served the intended function of enhancing the image of Ngee Ann City. Accordingly, given the commercial purpose of the transaction, Chong JA held that it was improbable that the parties intended that the valuation should take place with reference to a hypothetical configuration. Requiring Takashimaya to pay rent at the highest possible level would defeat its contractual right to determine the configuration of the demised premises as it saw fit, subject to there being an anchor tenant. Moreover, it was not part of the agreement that Takashimaya should use the demised premises in a way that maximised the rental yield for Ngee Ann.

12.38 Accordingly, after a careful consideration of the underlying commercial purpose of the transaction, the Court of Appeal rejected Ngee Ann's contended interpretation. In doing so, the court demonstrated the importance of the underlying commercial purpose in arriving at the objective meaning of the contract.

Inconsistency between terms

12.39 The Court of Appeal in *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd*[23] ("*Sintalow*") addressed how inconsistencies between general and specific terms in a contract are to be dealt with. The dispute arose from a series of agreements for the supply of products to a building project by Sintalow to OSK. The parties executed a master contract that set out the general terms and conditions governing OSK's purchase of the products. However, in addition to the master contract, OSK later accepted three separate product quotations for the products, each of which contained specific prices, quantities and terms. Sintalow sued OSK when the latter refused to take delivery of all the products it had agreed to purchase. In particular, Sintalow argued that the master contract did not contain all the terms and conditions of the agreement between the parties, but that they were set out orally and in writing in a "total package agreement". Under this alleged agreement, Sintalow argued that it agreed to give OSK special discounts of the products in consideration of OSK purchasing at least $5m worth of products. OSK denied liability, arguing that the quantities set out in the product agreements were merely estimates as provided in the master contract, and so it had no obligation to take delivery of products that were in excess of the project's needs.

23 [2017] 2 SLR 372.

12.40 In allowing Sintalow's appeal, Chan Sek Keong SJ, delivering the judgment of the Court of Appeal, held as a general principle that a well-drafted contract would normally provide a hierarchy of precedence to deal with inconsistences between contractual terms, such as general and specific terms. However, if the contract did not specifically provide for such an order of precedence as between terms or documents, then, as a general rule, the more specific term or document should prevail over the more general term or document. This would especially be the case if the more general document were a standard form document. Nonetheless, the court should strive as best as it can to reconcile the terms as far as possible, so as to preserve the general terms.

12.41 Applying these principles to the case at hand, the court held that the master contract merely prescribed general terms and conditions of the supply of the products. It did not oblige OSK to purchase the products. Instead, the sale and purchase of the products were to be governed by the product agreements. Put this way, the general terms and conditions found in the master contract were effectively default terms and conditions. These would apply if the more specific product agreements did not contain any terms or conditions inconsistent with them.

12.42 In the present case, the product agreements did not merely confirm the terms and conditions in the master contract. They were independent and separate contracts. Indeed, they set out specific terms such as specific prices, quantities, delivery terms and validity periods. These specific terms were either absent or inconsistent with the terms under similar headings in the master contract. Accordingly, the general terms of the master contract were superseded or varied to the extent of the inconsistency. The result was thus that OSK was in breach of its obligations to take delivery of excess products.

12.43 At the heart of the court's approach is the general principle that the interpretation of contracts is about finding the parties' intentions. This is an objective exercise in as much as it is impossible for the court to find out exactly what the parties had intended at the point of contracting. As such, courts typically rely on default rules themselves to interpret contracts – the rule in *Sintalow* being that more specific terms should override more general terms. However, even this remains a default rule, and should there be evidence of how the parties specifically intended their agreement to be, there should not be any preclusion against a more general term superseding a more specific term. It all depends on the objectively ascertained intentions of the parties.

12.44 The Court of Appeal had to deal with the inconsistency between two clauses of a contract in *GPK Clinic*. In this case, the plaintiff, CLAM, operated a clinic in Orchard. This clinic was *de facto* operated by two

doctors, Dr Kelvin Goh and Dr Goh PK, even as their wives were the registered shareowners. They also operated another clinic called "8-11" through another company, MPC. Following an earlier dispute, the parties entered into a settlement agreement that provided that the parties were to sell CLAM and MPC in about three years' time at no less than $6m. Material to the present dispute was the supposed inconsistency between cll 7 and 10:

> (a) Clause 7 provided that in the interim, the parties "shall duly continue with and fulfil their full responsibilities, arrangements and operations of [8-11 Clinic] and [the Orchard Clinic]".[24]
>
> (b) Clause 10 provided that the parties "shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from [the Companies]".[25]

12.45 Subsequently, Dr Goh PK set up a competing clinic, GPK Clinic, just two units away from the Orchard Clinic. Dr Goh PK actively diverted patients from the Orchard Clinic to GPK Clinic, where he worked even on days he was assigned to be at the Orchard Clinic. This caused CLAM to sue Dr Goh PK, his wife (as co-owner of GPK Clinic) and GPK Clinic (Orchard) Pte Ltd for wrongful diversion, breach of confidentiality and conspiracy. In the High Court, the trial judge dismissed CLAM's action for diversion but allowed the other claims. The learned judge dismissed this claim because, in his view, cl 10 permitted such diversion. The issue on appeal was thus whether the second sentence in cl 10 ("For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from [the Companies].") permitted Dr Goh PK to actively divert patients the way he did.

12.46 Chong JA, who delivered the judgment of the Court of Appeal, held that cl 10 did not permit Dr Goh PK to do this. His Honour held as a starting point that the interpretation of cl 10 depended on reconciling the tension between it and cl 7. Clause 7 obliged all parties to fulfil their full responsibilities to the clinics, whereas cl 10 seemingly allowed for them to start competing businesses and divert patients to the new clinics. Taken literally, these clauses could not be reconciled, since the

24 *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180 at [27].

25 *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180 at [26].

diversion of patients under cl 10 is inconsistent with the responsibilities provided for by cl 7.

12.47 The learned judge held that two principles of contractual interpretation were particularly important in resolving this tension: first, the commercial purpose of the transaction; and second, an interpretation that led to a very unreasonable result was to be avoided unless it is required by clear words and there is no other tenable interpretation.

12.48 Considering the first principle, the commercial purpose of the transaction was to procure the sale of the clinics. This would have needed the parties to preserve the value of the clinics in the interim, so as to extract the maximum value from the sale. This was particularly so since the parties had stipulated a minimum sale price of $6m. As such, cl 10 could not be interpreted as allowing for diversion, since that would impermissibly allow the parties to reduce the value of the clinics, in contravention of the purpose of the transaction.

12.49 As for the second principle, the wording of cl 10 was not so clear as to lead to the clear conclusion that it permitted diversion. Indeed, the expression "for the avoidance of doubt" indicated that the second sentence in cl 10 was either unnecessary, or was included to dispel doubts created by the previous sentence. Since the first sentence of cl 10 did not create any doubt as to whether parties were permitted to actively divert patients from CLAM, the second sentence could not be construed to give the parties a right to so divert. It was only intended to preclude both parties from making any claim of passive diversion.

12.50 As was the case in *Sintalow*, the Court of Appeal's approach in *GPK Clinic* reflected an overriding search for the parties' intention. Again, as a default rule, the more specific clause would override the general clause. However, in the present case, the ultimate determinant of the parties' intention focused on a careful examination of the words, in light of the overall context. Such was also the approach adopted by the High Court in *MKC Associates Co Ltd v Kabushiki Kaisha Honjin*,[26] where Woo Bih Li J said:[27]

> When faced with seemingly inconsistent contractual provisions, the court's approach is to reconcile these provisions if that result can conscientiously and fairly be achieved (per Steyn J in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 1 All ER 81 at 89, upheld on appeal in *Pagnan SpA v Tradax Ocean Transporation SA* [1987] 3 All ER 565). However, if the inconsistency cannot be resolved by ordinary

26 [2017] SGHC 317.

27 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [105].

> processes of construction, the court will attempt to discern the overall intentions of the parties from the remainder of the contract and determine which portion of the contract should be given effect to (see Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at paras 4.12–4.13).

Entire agreement clauses

12.51 In *CIFG*, the High Court had occasion to deal with an entire agreement clause, which read:

> **Entire Agreement**: This Agreement and the documents referred to herein are in substitution for all previous agreements, both written and oral, between all or any of the parties and contain the whole agreement between the parties relating to the subject matter of this Agreement.

12.52 Lim JC held that the presence of the entire agreement clause meant that any alleged prior oral agreements between the parties would have been superseded by the agreement in which the entire agreement clause appeared. In doing so, she cited the well-known authority of *Lee Chee Wei v Tan Hor Peow Victor*,[28] which held that, absent fraud or some other vitiating element, entire agreement clauses will generally be given effect to, so that prior discussions concerning the contract may not prevail over what has been acknowledged in writing to constitute the parties' "entire agreement". Applying this to the facts of *CIFG*, the learned judge noted that there was no vitiating factor being alleged by the parties that would otherwise nullify the entire agreement clause concerned. As such, the alleged oral agreements, even if formed, would have no contractual force save in so far as they are reflected and given effect to in the main agreement between the parties.

Indemnity clauses

12.53 The Court of Appeal had to deal with the interpretation of an indemnity clause in *CIFG*, which provided that the losses covered by the indemnity include "any … losses" caused by "any breach or alleged breach of any term or condition of this Agreement". The clause had come about in a set of convertible bond subscription agreements ("CBSAs"). The plaintiff, CIFG, was an investment vehicle established to enter into the CBSAs with the defendants. The defendants included the initial shareholders of Polimet Pte Ltd, which was a special purpose vehicle incorporated as a holding company for the initial shareholders' other companies. Polimet and the initial shareholders were all parties to

28 [2007] 3 SLR(R) 537.

the CBSAs. The question was whether the clause had the effect of enabling CIFG to claim the entirety of its losses arising from Polimet's default against each of the initial shareholders on a joint and several basis. In doing so, the Court of Appeal agreed with the conclusion reached by the High Court, but differed somewhat in its reasoning.

12.54 Nonetheless, it is helpful to refer to the principles applied by the High Court in interpreting this clause. Lim JC relied on a canon of interpretation specific to such clauses, *viz*, that in cases of ambiguity, contracts of indemnity are to be construed strictly in favour of the indemnifier. As the learned judicial commissioner explained, this is because, unlike a guarantor's liability under a guarantee which is secondary to the liability of the principal debtor, an indemnifier's liability is primary and independent. Thus, a clearer form must be in place if a primary obligation is intended to be imposed, since the presumption is that most people would not be prepared to subject themselves to the trouble of a primary liability.

12.55 As Lim JC went on to explain, the *contra proferentum* rule provides another reason for construing any ambiguity in an indemnity clause in favour of the indemnifier. This rule provides, "where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it".[29] The rationale underlying this rule applies equally to the interpretation of indemnity clauses.

12.56 Sundaresh Menon CJ, who delivered the judgment of the Court of Appeal, did not disagree with these principles. His Honour referred to the context in which the parties had entered into the agreement, which included (a) the entirety of the document and the way the contract as a whole was drafted, (b) the entirety of the commercial documents that were entered into as part of the transaction, and (c) the circumstances in which the indemnity clause was entered into the agreement. His Honour considered that each of these points is clear, obvious and known to both parties and hence can be considered as the relevant context. In doing so, the learned Chief Justice was simply applying the *Zurich Insurance* criteria, which governed the admissibility of extrinsic evidence.

12.57 Considering the context as identified, the Court of Appeal concluded that the clause did not allow for CIFG to claim the entirety of its losses arising from Polimet's default against each of the initial shareholders. First, the entirety of the CBSAs showed that specific allocations of risk were made to Polimet, the initial shareholders or to a

29 See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131].

combination of them. As such, it would be odd for the indemnity clause to override these specific allocations of risk. Secondly, this conclusion was strengthened by the personal guarantees that had been structured into the transaction. Thirdly, the parties' negotiations showed that the indemnity clause was intended to be a boilerplate provision to complete the document, rather than to change the commercial structure of the deal.

"Pay when paid" clause

12.58 The Singapore International Commercial Court discussed so-called "pay when paid" clauses in *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*.[30] In that case, the parties were in the business of providing marine logistics and support services to the offshore oil and gas industry. The defendant entered into contracts with the main contractors of a project to build three liquefied natural gas plants ("the LNG projects"). The work was then subcontracted by the defendant to the plaintiff. The plaintiff subsequently sued the defendant for, among others, sums referred to as "back charges" in respect of work done and services provided by the plaintiff for the LNG projects. The defendant claimed that, at least for some of the plaintiff's claims, it had no independent obligation to pay unless and until the defendant was paid such corresponding sum by the main contractor. Put another way, it was only if the defendant were paid such corresponding amount by the main contractor that the defendant came under any obligation to pay the plaintiff. As that had not happened, and the burden was on the plaintiff to prove that it had happened, the defendant argued that the claims failed.

12.59 Sir Bernard Eder J allowed the plaintiff's claims. His Honour held that the defendant's argument outlined above was fatally flawed because they depended on the defendant proving that the main contractor had denied payment of certain items, and that the plaintiff was aware that this was the case. This, the defendant failed to prove. In any case, as a matter of law, a party could not rely on a "pay when paid" clause if the reason for non-payment was its own breach of contract or default. Indeed, a contractor impliedly agrees that it would pursue all means available to obtain payment, or it would not be able to rely on the provision to deny the subcontractor's claim.

12.60 In the present case, the burden of showing that the defendant had not received payment from the main contractor and that this was not due to any breach or fault on the defendant's part lay on the defendant. This is because it was the *defendant* who sought to rely on

30 [2017] 4 SLR 38.

the clause to show that payment had not been received. This also made practical sense as it would generally be the party relying on such "pay when paid" clauses who would be able to adduce the relevant evidence. This made all the more sense in the present case because the defendant maintained emphatically throughout the parties' dealings that the plaintiff should have no contact with the main contractor. It would thus be difficult, if not impossible, for the plaintiff to adduce evidence as to the reasons why the defendant had not received payment from the main contractor. Because the defendant failed to discharge its burden in this case, its defence premised on the "pay when paid" clause failed.

Implication of terms

12.61 It is clear now that the framework adopted by the Court of Appeal in *Sembcorp Marine* has gained currency, and is being consistently applied by all the cases. To recap, the framework is as follows:[31]

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded 'Oh, of course!' had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

12.62 In *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd*,[32] the Court of Appeal had to deal with the implication of a term of due diligence and expedition. In that case, Newcon was engaged by Jurong Town Corporation ("JTC") as the main contractor to work on a medical technology hub project. Newcon then, through a letter of intent, subcontracted the production and delivery of hollow core slabs to CAA Technologies. The construction schedule attached to the letter of intent made it plain that CAA would have to deliver the first batch of slabs before 23 February 2013. It also contemplated that a letter of acceptance would be executed. On 11 January 2013, a letter of acceptance was sent from Newcon to CAA for signature, and also set out a tentative delivery schedule. However, CAA never signed the letter of acceptance.

31 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].
32 [2017] 2 SLR 940.

12.63 Subsequently, CAA was not able to deliver the slabs according to the schedule. Newcon then terminated the subcontract with CAA, purportedly pursuant to the clauses in the letter of acceptance. CAA then sued Newcon, claiming that Newcon had breached the subcontract by failing to pay CAA the sums due without any proper basis. Newcon in turn sued CAA for breach of contract as well. The trial judge found that while the letter of acceptance did not have contractual effect, CAA had breached various terms of the letter of intent. Pertinent to the discussion at hand, the learned judge also found that CAA had breached an implied term of due diligence and expedition.

12.64 On CAA's appeal, the Court of Appeal had to consider whether a term of due diligence and expedition could be implied into the subcontract between the parties. Chong JA, delivering the Court of Appeal's judgment, held that this was a controversial question. His Honour acknowledged that there was no clear authority for the implication of such a term in the construction context. Indeed, there were two principal reasons why courts were reluctant to imply such terms in the construction context. First, parties had the opportunity to make such terms express terms of the contract. Indeed, parties would have recourse to standard form contracts that frequently contained such clauses expressly. As such, if the contract does not contain such a term, it might be more reasonably inferred that the parties did *not* wish for such a term to be implied. Secondly, it might not be necessary to imply such a term when the contract had provided for a certain completion date.

12.65 Given all these considerations, the court reversed the lower court's decision on this point. This was in part because the issue of whether Newcon was justified in terminating the contract could be resolved on the express terms present in the case. More broadly, the court left open for decision on another occasion whether such terms can be implied based on the specific facts of each case. It is clear, though, the court would generally be reluctant to do so. Indeed, applying the *Sembcorp Marine* framework, where only one party had contemplated an issue, the court was unlikely to find that a "true" gap had existed in relation to the issue at hand. If the party who had contemplated the issue did not raise it to the other party for discussion, then the inference must be that the original party did not intend for a term to deal with the issue. Furthermore, it would be counter-intuitive to think that the party who had wanted a term of due diligence and expedition would benefit from keeping silent, as opposed to raising the issue for discussion with the other party.

Vitiating factors

Misrepresentation

12.66 Silence is, in general, equivocal and hence an insufficient basis for founding actionable misrepresentation. However, silence or the omission to inform another party of pertinent facts may constitute misrepresentation if it is maintained in circumstances where there is an obligation to disclose. In *Alacran Design Pte Ltd v Broadley Construction Pte Ltd*[33] ("*Alacran*"), the High Court found that the plaintiff had been fraudulently misled by the defendant to sign an undertaking. The undertaking enabled the plaintiff to look to a third party for payment in respect of a sum owed by the defendant but – unknown to the plaintiff – it also purported to extinguish the defendant's liability. At the time of signing the undertaking, the plaintiff had specifically informed the defendant that it would continue to look to the defendant for payment under the contract. The latter, however, said nothing to contradict that statement. Lim JC held that this silence on the part of the defendant constituted a dishonest representation. As it was clear from the circumstances leading to the signing of the undertaking that the plaintiff had assumed that the defendant would remain liable, the latter was clearly obliged to disabuse the plaintiff of this assumption if it were incorrect. This omission constituted an actionable misrepresentation as it did in fact induce the plaintiff to sign the undertaking.

12.67 In *Alacran*, it was critical that the plaintiff did not know of the clause in the undertaking that purported to absolve the defendant from liability. Had the plaintiff read and understood the clause, it would surely not have been reasonable to contend that it had relied on the defendant's oral (and contradictory) misrepresentation. In *KLW Holdings*,[34] Hoo JC rejected a defence of misrepresentation precisely for that reason. In this case, it was found that the defendant could not have relied on an oral misrepresentation because that representation was plainly contradicted by the express term of a term sheet that the defendant had signed and was familiar with. In those circumstances, the element of reliance could not be established.

12.68 It is often said that an actionable misrepresentation must involve a statement of fact. For this purpose, facts are contrasted with intention and opinions, which are generally not actionable even if they were false and induced the representee's agreement. However, the distinction between fact and intention/opinion is a fluid rather than a

33 [2018] 4 SLR 224.
34 See paras 12.20–12.23 above.

rigid one. Thus, depending on the context, a statement that appears to comprise the maker's opinion can often be recharacterised as a statement of fact. In *Esso Petroleum Co Ltd v Mardon*,[35] an employee of Esso had made an unrealistic estimation of the annual throughput of a new petrol station that led (or misled) the defendant (Mardon) to enter into a tenancy agreement. The estimation was found to be a statement of fact (rather than a mere opinion) as it was made by a party who had, or who professed to have had, special skill and knowledge in the subject matter. In *Creative Technology Ltd v Huawei International Pte Ltd*[36] ("*Creative Technology*"), the High Court found a misrepresentation for similar reasons. Here, Creative had engaged Huawei as a turnkey contractor to build, design and operate a WiMAX mobile data network for Creative. In determining the specifications of the project, Huawei had advised and variously confirmed that 225 base stations would suffice to provide national coverage as intended by Creative. However, it subsequently transpired that some 619 *additional* stations would be required to achieve the connectivity that the contract envisaged. On these facts, Chan Seng Onn J had no difficulty finding that the representation as to the number of base stations required was one of fact. Huawei, having constructed numerous WiMAX networks in different parts of the world, had held itself out as an expert in WiMAX networks. It was thus in a far better position to advise on the number of base stations required and had indeed repeatedly asserted that 225 base stations would suffice. Accordingly, the statement relating to the number of base stations required was an actionable statement of fact.

12.69 Having found the statement to be false and actionable, Chan J proceeded to consider whether liability for the misstatement was nevertheless excluded by an entire agreement clause that purported to supersede "all prior negotiations, understandings, representations and agreements of the parties". Chan J held the clause did not have that effect as the fact relating to the number of required base stations was in fact incorporated into the contract as a contractual term. That being the case, the entire agreement clause could not sensibly and logically be interpreted to exclude a fact that was also stated in the contract. As Chan J explained:[37]

> The purpose and intent of the entire agreement clause read as a whole appears to me to exclude any understandings, representations and agreements made *prior* to the conclusion of the Contract that *contradict* or *do not conform to* the entire understanding and agreement between the parties as encapsulated by the wording of the Contract and its annexures as drafted. [emphasis in original]

35 [1976] 1 QB 801.
36 [2017] SGHC 201.
37 *Creative Technology Ltd v Huawei International Pte Ltd* [2017] SGHC 201 at [77].

12.70 One other interesting question considered in *Creative Technology* concerned the interaction between claims for misrepresentation and breach of contract. The court clarified that even though rescission (for misrepresentation) and termination (for breach of contract) are conceptually inconsistent remedies, a plaintiff is always entitled to plead them in the alternative as long as it does not offend common sense to do so. On the facts, Creative's pleadings were not offensive since it was complaining that Huawei had wrongfully induced it to contract *and* failed to perform their contractual obligations. Further, there was nothing on the facts that suggested that Creative had elected to waive its rights pertaining to misrepresentation. Although it is true that Creative was only entitled to either terminate or rescind the contract, that would still not prevent it from recovering damages for both misrepresentation and breach of contract so long as the damages flowing from each ground could be properly isolated and quantified. Perhaps the most important lesson that can be distilled from this decision is that a party who had furnished an important factual basis for a contract cannot hope to disclaim liability for that information either by denying its professional input or by relying on general exclusion (or entire agreement) clauses.

12.71 An operative misrepresentation vests in the representee a right to elect between rescission and affirmation. The election is binding once the representee communicates it either by word or unequivocal conduct. In England, it has also been suggested that an election is only binding if the representee had, at the material time, knowledge that it had a right to choose between affirmation and rescission.[38] In *SMRT Alpha Pte Ltd v Strait Colonies Pte Ltd*,[39] however, Chua Lee Meng J expressed (*obiter*) the view that it should suffice if the representee knew of the *facts* that gave rise to the right to elect without knowing that it had such a right. In his view, this position accords better with the general assumption in commercial law that ignorance of the law is a misfortune rather than an advantage. Requiring proof of the representee's knowledge would place too heavy a burden on the representor, who would often be prevented by rules of professional privilege from discovering evidence of the representee's knowledge. Ultimately, there is "no reason why a representee should benefit from his own ignorance of the law especially when that ignorance arose from his own decision not to seek advice despite having learnt of the representor's wrongdoing in making a false representation".[40]

38 *Peyman v Lanjani* [1985] Ch 475.
39 [2017] SGHC 243.
40 *SMRT Alpha Pte Ltd v Strait Colonies Pte Ltd* [2017] SGHC 243 at [56].

Duress

12.72 It is settled that a contract may sometimes be vitiated on the ground of economic duress but, in practice, such a plea has rarely succeeded. Not infrequently, a commercial party encountering unexpected difficulties in contractual performance may alert the counterparty to the possibility of breach if the difficulties remain unresolved. Such alerts would not, even if accompanied by demands for more favourable terms, generally be seen to exert illegitimate pressure on the counterparty. In determining whether the party making the demand was acting in the genuine belief that he had the moral right to do so, it would be relevant to take into account the victim's conduct. Absence of protests from the latter may suggest that the demand is perceived as fair. These principles were affirmed and applied by the High Court in *Wartsila*.[41] Stressing that the defence would succeed only in very "exceptional situations", the High Court held that a letter of undertaking was not procured by duress.[42] The circumstances in which the letter of undertaking was executed, together with the lack of protests by the alleged "victim" at the relevant time, demonstrated that it was executed as a satisfactory solution to an impasse.

Undue influence

12.73 In 2017, there were two interesting cases which considered the vitiation of a contract on grounds of undue influence. In *First Asia Capital Investments Ltd v Société Générale Bank & Trust*[43] ("*FAC Investments*"), the plaintiff who had suffered grave losses from investments in share accumulators sought to rescind the transactions against the defendant bank on, *inter alia*, the ground that it had acted (through its agent L) under the improper influence of the defendant's relationship manager, K. As the banker–customer relationship is not one of the established relationships that raises a presumption of undue influence, the plaintiff had to prove that L had reposed trust and confidence in K such that the latter could be said to have acquired influence over L (that is, Class 2B undue influence). Chong JA, who presided over the trial, found that the plaintiff had failed to discharge this burden. The learned judge explained that it is not the case that a presumption of undue influence would arise whenever there is evidence of trust between parties. The mere fact that the parties had a close relationship, or that the alleged victim trusted the counterparty in a general way is not sufficient. What must be shown is that the defendant has acquired such ascendency as to be able to improperly pressurise the

41 See paras 12.18–12.19 above.
42 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [145].
43 [2017] SGHC 78.

plaintiff into improvident transactions. On the facts, such ascendency was clearly absent since the evidence was that L understood the financial implications of the transactions and made the decisions independently of K's advice. This case usefully demonstrates that in a purely commercial context where parties are dealing with each other at arm's length, the threshold for proof of undue influence is generally a high one.

12.74 *FAC Investments* may be contrasted with *BOK v BOL*,[44] which involved a deed of trust ("DOT") executed in a familial context. In this unfortunate case, the defendant-wife had insisted that the plaintiff-husband execute the DOT within a week of the latter being bereaved of his mother. The effect of the DOT was to gift all his assets to their infant son. Valerie Thean J found that the deed could be set aside on account of both misrepresentation and mistake as the plaintiff had executed the deed in reliance on the defendant's false representation that notwithstanding the DOT, the plaintiff would be free to deal with the assets until his death. In addition, Thean J held that the defendant had procured the DOT by the exercise of undue influence over the plaintiff. Such influence fell under both categories of actual (Class 1) and presumed (Class 2A) undue influence. In respect of the former, Thean J found that the defendant had exploited her influence as a spouse at a time when the plaintiff was emotionally vulnerable by reason of his grief. Moreover, this influence was exacerbated by her lie as to the legal effects of the DOT, which was corroborated by her father, a senior practising lawyer. As regards Class 2A undue influence, the court accepted the plaintiff's argument that there was an implied retainer between the parties because (a) the defendant was a trained lawyer, (b) she had previously advised the plaintiff on the constitution of another trust as well as other legal matters, (c) she was the one who drafted the DOT, and (d) she had failed to qualify her work or advice but insisted, instead, that the plaintiff sign the DOT. For these reasons, the parties were found to be in a solicitor–client relationship, an established category under Class 2A that gave rise to the presumption that a *relationship of influence* existed between them. Coupled with the fact that the transaction was one that was manifestly disadvantageous to the plaintiff, since it effectively divested him of *all* his assets for nothing in return, the presumption arose that the trust was executed under the defendant's undue influence. The burden fell, therefore, on the defendant to rebut the presumption but she failed to do. The finding of an implied retainer in the context of a marital relationship may seem surprising but the decision is ultimately a salutary reminder that legally trained persons are expected, more so than others, to be alive to the

44 [2017] SGHC 316.

risks of conflicting interests and are hence required to be vigilant in taking adequate steps to resolve such conflicts.

Unconscionability

12.75 In addition to misrepresentation, mistake and undue influence, the plaintiff in *BOK v BOL* also pleaded unconscionability as a vitiating factor. Thean J concluded, after reviewing the doctrine's development in the UK, Australia and Singapore, that the Singapore authorities appear to have favoured the narrower English approach and rejected the wider Australian approach to the doctrine of unconscionability. In the UK, the modern foundation of the doctrine is found in *Cresswell v Potter*[45] ("*Cresswell*"), where Megarry J identified three relevant factors for determining the application of the doctrine, *viz*, "first, whether the plaintiff is poor and ignorant; second, whether the sale was at considerable undervalue; and third, whether the vendor had independent legal advice". This approach is generally thought to be more restrictive than that laid down by the Australian High Court in *Commercial Bank of Australia Ltd v Amadio*[46] ("*Amadio*"), which extends the doctrine beyond cases involving poor and ignorant victims to a wider class of persons with "special disability" or "special disadvantage", and also permits a broad enquiry as to whether the defendant's conduct was "unconscionable". Agreeing with the previous indications of the High Court in *Rajabali Jumabhoy v Ameerali R Jumabhoy*[47] and *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd*,[48] Thean J reaffirmed the point that inequality in bargaining power is not, by itself, a sufficient reason to vitiate a contract.[49] In the learned judge's view, "an approach based purely on inequality of bargaining power would undermine the certainty which is critical to commercial transactions".[50] For the same reason, Thean J preferred the *Cresswell* approach to that of *Amadio*, as the breadth of the *Amadio* inquiry would engender too much uncertainty as well as "undermine the historical fraudulent basis of the doctrine".[51]

12.76 Turning to the *Creswell* formulation, Thean J noted that the three factors identified by Megarry J in that case (*viz*, poor and ignorant, undervalue transaction and lack of independent advice) were not intended to exhaust the doctrine. Instead, Megarry J had (in *Creswell*)

45 [1978] 1 WLR 255 at 257.
46 (1983) 151 CLR 447.
47 [1997] 2 SLR(R) 296.
48 [2011] 2 SLR 232.
49 *BOK v BOL* [2017] SGHC 316 at [114].
50 *BOK v BOL* [2017] SGHC 316 at [114].
51 *BOK v BOL* [2017] SGHC 316 at [114].

specifically alluded to *other* "circumstances of oppression or abuse of confidence which will invoke the aid of equity".[52] In Thean J's view, this *dictum* furnished an alternative and broader ground for establishing unconscionability that could be explicated to comprise the following requirements:[53]

> 120 First, there must be weakness on one side. Such weakness could arise from poverty, ignorance or other circumstances, like acute grief in this case. Lack of independent advice would almost always deepen the weakness. Second, there must be exploitation, extortion or advantage taken of that weakness. A transaction at an undervalue would be a necessary component of this requirement.
>
> …
>
> 122 Once these two elements are established, it will be for the defendant to show that the transaction was … 'fair, just and reasonable' … If he is unable to do so, then the transaction is liable to be set aside on the ground of unconscionability.

12.77 For Thean J, this formulation is more restrictive than the *Amadio* approach as it is constrained by the requirement to prove "exploitation, extortion or advantage taken". So expressed, the requirement is consistent with the essential premise that contracts are not vitiated merely on account of inequality of bargaining power. Further, this adaptation of the *Creswell* test (by requiring proof of "exploitation, extortion and advantage taken") does not, unlike the requirement of "morally reprehensible" conduct suggested by some English authorities, over-emphasise the need for subjective, high moral judgment.

12.78 Since the plaintiff in *BOK v BOL* was both educated and well-to-do, he clearly could not complain of unconscionability under the *Cresswell* three-factor approach. Nevertheless, Thean J was satisfied that the DOT could be set aside under the alternative "exploitation of weakness" test. The plaintiff was in a position of weakness by reason of his grief and sense of isolation, his relationship with the defendant, his lack of independent advice and his trust in her as a lawyer. The defendant, in turn, exploited this weakness by asking him to part with all his assets on threat that he should leave their home if he did not do so, and by lying as to the effects of the DOT. Since the elements of weakness and exploitation were satisfied, the onus was on the defendant to demonstrate that the transaction was fair, just and reasonable. Thean J was not satisfied that defendant had discharged this burden: it

52 *Cresswell v Potter* [1978] 1 WLR 255 at 257.
53 *BOK v BOL* [2017] SGHC 316 at [120] and [122].

was not fair and reasonable to require the plaintiff to provide for his family by stripping himself of all entitlements to his assets.

12.79 Given that the doctrine of unconscionability is still very much at the incipient stage of development, this exposition in *BOK v BOL* marks an important step in clarifying its scope and application. Acutely aware of the classic tension between the desire to achieve fairness and justice in each case and the need for clear and more restrictive rules that enhance certainty, Thean J sought to locate the equilibrium in first admitting a broader concept of "weakness" and then constraining the doctrine through the notions of "exploitation, extortion and advantage taken". In her analysis, this formulation occupies a middle ground between a restrictive interpretation of *Cresswell* and the more liberal *Amadio* approach. However, given that concepts such as "weakness", "exploitation" and "extortion" are, by their very nature, imprecise and value-laden, one cannot be certain that this proposed approach would render the law any more certain than, say, the *Amadio* approach. Indeed, it is perhaps possible to argue that in so far as the *Amadio* approach explicitly requires unconscionability to be premised on proof that the defendant *knew of* or was *reckless* as to the plaintiff's special disadvantage,[54] that approach may, to that extent, be seen as more exacting and restrictive. Moreover, the final inquiry as to whether the transaction is "fair, just and reasonable" also vests in the courts further discretion that could undermine rather than promote certainty. That said, it seems inevitable that any attempt to delimit the doctrine of unconscionability without rendering it artificially narrow may prove elusive given the concept's inherent breadth. Ultimately, the proper development of the doctrine may be best achieved by its sensible and restrained application in each case.

Illegality

12.80 The doctrine of illegality has always been one of the most perplexing areas in the law of contract. In the UK, the difficulties surrounding this doctrine have recently been examined in a series of decisions culminating in *Patel v Mirza*[55] ("*Patel*"). In that case, a majority of the UK Supreme Court abandoned the "reliance rule" that was (purportedly) laid down in *Tinsley v Milligan*[56] and substituted in its place a policy-based "range of factors" approach for determining the legal effects of illegality at common law. Under this approach, the court will consider whether the denial of a claim is a proportionate response to the illegality in question having regard to the public policies

54 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 467 and 474.
55 [2017] AC 467.
56 [1994] 1 AC 340.

underlying the prohibition that has been transgressed. For this purpose, "proportionality" is determined not by an exhaustive definition but a "range of factors" that would include factors such as "the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability".[57] This departure from orthodoxy has sparked controversy. Critics bemoan the uncertainty that such an approach entails since it would appear to entrench considerable discretion in the judiciary. On the other hand, defenders of the traditional, rule-based approach are hard-pressed to identify a clear and satisfactory principle or rule that guides the application of the doctrine in novel cases.

12.81 In Singapore, the application of the illegality doctrine in the contractual context was previously considered by the Court of Appeal in *Ting Siew May v Boon Lay Choo*[58] ("*Ting Siew May*"). In that case, the court accepted that the effects of common law illegality cannot be determined only by the application of strict rules but are subject to the principle of proportionality, taking into account such factors as (a) the purpose of the prohibiting rule, (b) the seriousness of the offence, (c) the causal link between the claim and the illegality, (d) the conduct of the parties, and (e) the proportionality of denying the claim. That decision was, however, concerned only with the *enforceability* of a contract tainted by illegality, and did not deal with the recovery of benefits passed pursuant to a contract that is void for illegality. It also did not seek to lay down a universal principle or approach for ascertaining the effects of common law illegality across different spheres of private law, *viz*, contract, tort, trusts and unjust enrichment. That being the case, there is obvious room for considering whether there is merit in reforming our law by adopting the development in *Patel*. Such an opportunity arose in *Ochroid Trading Ltd v Chua Siok Lui*[59] ("*Ochroid*").

12.82 In *Ochroid Trading Ltd v Chua Siok Lui*,[60] the plaintiffs sought to recover a sum in excess of $10m as moneys due to them under a series of contracts or, in the alternative, on the ground of unjust enrichment. On the plaintiffs' account, the moneys were "investments" in the defendant's wholesale food business, in exchange for which the defendants were contractually bound to pay the plaintiffs a fixed rate of "profit". Lim JC dismissed the plaintiffs' claims, holding that the transactions were not genuine investments but a series of extortionate

57 *Patel v Mirza* [2017] AC 467 at [107].
58 [2014] 3 SLR 609.
59 [2018] 1 SLR 363.
60 [2018] 3 SLR 617.

loans made in breach of the Moneylenders Act.[61] This conclusion rested on the crucial findings that (a) the plaintiffs knew at all times that the trading invoices allegedly supporting the "investments" were fabricated, (b) the loans were not made pursuant to a *bona fide* business since the plaintiffs were in fact carrying on a business separate and independent of the lending activities, and (c) the plaintiffs could be said to have been carrying on the business of moneylending because there was a system and continuity in the transactions (it being immaterial that the lending had been made only to a single individual or to a restricted class). Consequently, the loans were made contrary to the Moneylenders Act and were void and unenforceable for illegality. In Lim JC's view, that conclusion also necessitated the dismissal of the plaintiffs' attempt to recover the sums on the ground of unjust enrichment. Were it otherwise, such claims would effectively serve as a "backdoor" to enforcing the illegal contracts, defeating the prohibition that rendered the contracts illegal in the first place.

12.83 The matter then came before the Court of Appeal, which took the opportunity to evaluate the development in *Patel*. Delivering the court's judgment, Andrew Phang Boon Leong JA restated the law on illegality as follows:

> (a) There are two stages when analysing the effects of illegality on contracts. At the first stage, it is necessary to ascertain if the contract is either expressly or impliedly *prohibited* by statute or by an established head of public policy. Where the contract is so prohibited, there can be *no recovery* pursuant to the prohibited contract.
>
> (b) Where a contract is not illegal *per se*, but is entered into for an unlawful purpose or anticipates the commission of an unlawful act, whether the contract is enforceable (or not) is determined by the principle of proportionality laid down in *Ting Siew May*. To this limited extent, the court has discretion in determining the effects of illegality.
>
> (c) Even if a contract is void and unenforceable by reason of illegality, a second stage of inquiry may still be necessary. This occurs where the claim seeks to recover, on a restitutionary basis, payments or benefits that have passed to the defendant under the invalid contract. Such recovery may be sought on at least three grounds: (a) the parties are not *in pari delicto* (the claimant is less blameworthy than the defendant); (b) *locus poenitentiae* (timely repudiation); and (c) where there is an

61 Cap 188, 1985 Rev Ed.

independent cause of action (in, for example, tort, trusts or unjust enrichment).

(d) Where recovery is sought on the ground of restitution or unjust enrichment, the question whether the claim constitutes an independent cause of action is determined by reference to the reliance rule laid down in *Tinsley v Milligan*. However, "reliance" in this context is not to be understood in a procedural or formal sense, determined only by reference to the parties' pleadings. Rather, it should be conceived of as a "normative or substantive principle which is only engaged when a plaintiff seeks to enforce, and thereby profit from, the illegal contract through his claim" [emphasis omitted].[62]

(e) The availability of such restitutionary relief is itself subject to the defence of illegality. The principle that guides the application of the defence in this context is that of *stultification*. On this principle, the court would not allow a restitutionary claim "if to do so would undermine the fundamental policy, be it statutory or common law, that rendered the contract in question void and unenforceable in the first place" [emphasis omitted].[63]

12.84 In *Ochroid*, Phang JA categorically declined to adopt the *Patel* majority's "range of factors" approach. In his Honour's view, that approach is unprincipled[64] in so far as it purports to cover the entire field of common law illegality, extending the court's discretion to situations where it previously did not have such liberty. It would mean, for example, that a court should now have the discretion to permit recovery even under a contract that is void at common law under an established head of public policy, when no such discretion previously existed, leading to an unprincipled distinction between contracts void at common law and those prohibited by statutes (in respect of which no discretion exists). Further, Phang JA thought[65] that the *Patel* approach is not needed in Singapore to redress any unfairness that may result from a rigid application of the doctrine since that flexibility is now afforded by *Ting Siew May*, which permits the courts to apply the proportionality principle in cases where the contract is not illegal *per se* but is entered into with the objective of performing an unlawful act. In such cases, the court may reject the defence of illegality and permit a claim that is tainted by illegality if the consequence of disallowing the claim is disproportionate to the illegality in question. As the risk of unfairness is

62 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [128].
63 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [148].
64 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [114]–[115].
65 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [119].

greatest in this class of contracts, it makes sense to confine the court's discretion to this category of contracts rather than extend it over the entire field of common law illegality. Finally, the *Patel* approach is also objectionable because it engenders too much uncertainty.[66] Although Phang JA acknowledged that some uncertainty does reside in the proportionality principle, that uncertainty is contained since the proportionality principle is of limited application. In contrast, the "range of factors" approach of the *Patel* majority has a wider sphere of application and provides no overarching principle for determining how those factors are to be balanced. In Phang JA's view, this additional uncertainty is unwarranted.

12.85 Turning to the facts, the court affirmed the trial court's findings in entirety. As the parties had at all times intended the transactions to be repaid with fixed (and high) interest rates, the transactions clearly contravened, and were prohibited by, the Moneylenders Act. Since the policy underlying the Moneylenders Act is to preclude unlicensed moneylenders from recovering "*any compensation whatsoever* for their illegal loans" [emphasis in bold italics in original], it also follows from the principle of stultification that the claimant's alternative recovery in unjust enrichment had to fail.[67] As Phang JA explained:[68]

> Permitting restitution of the principal sums lent would make a nonsense of this policy and render ineffectual the prohibition in s 15 [of the Moneylenders Act], which reflects the *strong need to deter illegal moneylending due to its status as a serious social menace in Singapore*. [emphasis in bold italics in original]

12.86 Undoubtedly, *Ochroid* sets a new landmark in a complex area of law that, absent clarification, risks (at least to some commentators) becoming even more confounding post-*Patel*. In rejecting the *Patel* majority's "range of factors" approach, the Court of Appeal chose, instead, to strike a balance between the conflicting goals of certainty and fairness by preserving those rules and principles that have been stable over time, and confining judicial discretion to a "residual" category of cases where some flexibility is needed to avoid obvious injustice.

12.87 That said, it is equally clear that Phang JA's approach in *Ochroid* is not completely distinct from that of the *Patel* majority. Indeed, Phang JA acknowledged[69] that the proportionality principle in *Ting Siew May* overlaps with the majority's approach in *Patel* in so far as it requires the court to carry out a discretionary, balancing exercise to determine

66 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [123].
67 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [219].
68 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [219].
69 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [110].

the legal enforceability of a contract. Thus, to the extent that the "range of factors" approach is criticised for promoting uncertainty, the same criticism can be levelled at the proportionality principle (though arguably in a more limited fashion given its more restricted application). In the same vein, in as much as the stultification principle requires the court to evaluate competing policy goals, some measure of discretion – and attendant uncertainty – seems unavoidable. From this perspective, the approach propounded in *Ochroid* is perhaps a refinement of, rather than a radical departure from, that of the *Patel* majority.

12.88 Although the framework for analysing contractual illegality is now clearly laid out in *Ting Siew May* and *Ochroid*, the application of those principles and framework may, in practice, turn on how a particular case is managed or pleaded. In the unreported case of *Cheong Kok Leong v Cheong Woon Weng*,[70] the plaintiff had contributed $200,000 to the purchase of a private property ("the Property") that was purchased in the sole name of the defendant (the plaintiff's younger brother). In the High Court,[71] it was found as a fact that the plaintiff had contributed the said sum as an investment (rather than a loan) in the Property. However, the plaintiff could not be named as a joint owner of the Property as he had, at the material time, just purchased a Housing and Development Board ("HDB") flat and was thereby barred by HDB regulations from purchasing a private property.[72] The issue of illegality appears, however, not to have been pleaded before the High Court, which held that the Property was held by the defendant in trust for both parties in equal shares. On appeal, the issue of illegality was argued, but the restriction relied upon was s 47 of the Housing and Development Act[73] ("HDA"), which prohibited proprietors of private property from applying for HDB flats. In the event of breach, the HDB is empowered under s 56 of the HDA to compulsorily acquire the HDB flat purchase registered in the offender's name. On the basis of these arguments, the Court of Appeal held that the plaintiff's purchase of the Private Property was not prohibited by the HDA. This was because ss 47 and 56 were primarily concerned with prohibiting owners of private properties from subsequently acquiring HDB flats and did not regulate the subsequent acquisition of private properties by HDB owners. Indeed, this reasoning cannot be faulted in so far as the interpretation of ss 47 and 56 of the HDA is concerned. However, given that the HDB has in place a clear rule or regulation that HDB proprietors may not acquire any private property within the minimum occupation period (of five years from the time of acquiring the HDB flat), it would seem that the plaintiff's

70 [2017] SGCA 47.
71 *Cheong Woon Weng v Cheong Kok Leong* [2016] SGHC 263.
72 *Cheong Woon Weng v Cheong Kok Leong* [2016] SGHC 263 at [67].
73 Cap 129, 2004 Rev Ed.

acquisition of the private property contravened this rule. If this contravention had instead been pleaded, it would surely have been relevant to consider if his private ownership was in fact prohibited, or at the very least, tainted by the apparent illegality.

Remedies

Contract damages on "broad ground"

12.89 Suppose a husband, A, enters into a contract with a builder, B, under which B promises to perform acts (say, to replace the roof on a house) which will benefit the husband's wife, C (because the house is wholly owned by C, and not A). In such circumstances, the benefit of the contract between A and B will appear to vest in C, since if B performed his part of the contract in full, the consequential benefits would be enjoyed by C, and not by A.

12.90 In these third-party beneficiary contracts, B's breach of his contractual duty to A may lead to C sustaining losses by reason of such breach (say, by having to pay a second builder to do the work that B had promised, but had failed to do), whereas A appears to have sustained no loss at all. In such circumstances, B's liability to compensate A in damages for his breach may appear to disappear down a "black hole".[74]

12.91 Attempts have been made to resolve this problem. One entails the recognition of an exception (the so-called "narrow ground") where, by way of exception to the usual rule in contract in which the defaulting promisor is only liable to be ordered to pay damages to compensate for losses sustained by the promisee to the contract, the requirements of the "narrow ground" are satisfied, the promisor may be ordered to pay damages to the promisee for the losses sustained by a third-party to the contract.[75]

12.92 Alternatively, it has been suggested that the absence of any loss on the part of the promisee in these "black hole" cases is only apparent. Rather, there *is* a loss sustained to the promisee, once the promisor breaches its contractual promise to perform the act in question, even if the performance of that act would seemingly only benefit the third

74 *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* [1982] SLT 533 (HL).

75 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518. The requirements for the "narrow ground" derived from the case of *Dunlop v Lambert* (1839) 6 Cl & F 600; 7 ER 824 are discussed in *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 at [40]–[44].

party. The loss to the promisee arises because, in entering into the contract with the promisor and so binding the promisor to perform the act/acts in question, the due performance of that act/acts would be of benefit, in and of itself, to the promisee. In Lord Griffiths' words in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[76] ("*Linden Gardens*"):

> [The] answer is that the husband [A] has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder.

Hence, for Lord Griffiths in *Linden Gardens*, the better position was that non-performance or incomplete performance of that which the promisor had contractually bound himself to the promisee to do would lead to the promisee sustaining a loss in that the contractual performance that the promisee had "bargained-for" the promisor to provide had not been provided. Further, Lord Griffiths suggested that an appropriate measure of loss to use to reduce the promisee's loss of bargain in these circumstances into monetary units was to look to the cost of curing the promisee's shortfall in performance.

12.93 This alternative view of the promisee's loss by conceiving it more broadly than in the "narrow ground" analysis was recognised by Lord Millett and Lord Goff in *Alfred McAlpine Construction Ltd v Panatown Ltd*[77] ("*Panatown*") as a plausible way of defusing the problem. However, as Lord Griffith's analysis was not adopted by the majority in *Linden Gardens*, and Lord Millett's and Lord Goff's analysis were similarly not followed by the majority in *Panatown*, there still remains some doubt as to the status of the "broad" ground within English law.

12.94 In *Chia Kok Leong v Prosperland Pte Ltd*[78] ("*Chia Kok Leong*"), the Court of Appeal went further than the English courts have done. It explicitly recognised in *dicta* that both the "narrow" and the "broad" grounds were good law in Singapore. These views were accepted by the Court of Appeal to be correct in *Family Food Court v Seah Boon Lock*[79] ("*Family Food Court*"), citing with approval a point which Chao Hick Tin JA had emphasised in *Chia Kok Leong* that:[80]

76 [1994] 1 AC 85 at 97.
77 [2001] 1 AC 518.
78 [2005] 2 SLR(R) 484 at [53]–[55].
79 [2008] 4 SLR(R) 272.
80 *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 at [52].

> [Under] the broad ground, the plaintiff/promisee is recovering substantial damages for its own loss, and not on behalf of the third party.

12.95 Despite this, doubts still remain as to the application of the broad ground, and its relationship with the narrow ground, some of which were mentioned in *dicta* in *JES International Holdings Ltd v Yang Shushan*,[81] though without assessing their merits. However, in *Wartsila*,[82] the High Court has provided further *dicta* providing some slight indication that these doubts should be resisted.

12.96 The facts in *Wartsila* have already been set out above.[83] In connection with the proceedings in Suit 521 between Geniki and Aga-Intra, as co-plaintiffs, and Wartsila, as defendant, the issues arose as to whether Aga-Intra had standing to be joined as co-plaintiff with Geniki in the action against Wartsila for breach of its contractual duty to carry out the 2011 repairs with reasonable care, given that Aga-Intra was not mentioned in that contract, at all; and whether substantial damages could be awarded to Aga-Intra in respect of such contractual breach.

12.97 Having heard both Suit 168 and Suit 521 together, Ang J held that Aga-Intra was Geniki's undisclosed principal. It thus had standing to sue Wartsila under the Repair Contract.[84] Hence, so far as Aga-Intra's claim as co-plaintiff under Suit 521 against Wartsila was concerned, Aga-Intra would be permitted to recover damages for *its* losses under the Repair Contract *because* of its status as Geniki's undisclosed principal for whose benefit Geniki had entered into the Repair Contract with Wartsila.

12.98 In addition, the trial judge also held that certain provisions which could have operated to constrain Wartsila's liability for breach of the Repair Contract had not been validly incorporated into the contract.[85]

12.99 Although it was not strictly necessary to do so, the trial judge went on to consider the nature of Geniki's claim had Aga-Intra not intervened as its undisclosed principal:[86]

> For the sake of argument, if the doctrine of the undisclosed principal is not applicable in this case [had Aga-Intra not intervened], the

81 [2016] 3 SLR 193 at [200].
82 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268.
83 See para 12.18 above.
84 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [97].
85 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [104]–[127].
86 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [101].

> question that arises is whether Geniki Shipping who is not the registered owner of the vessel is allowed to claim substantial damages that are normally claimable by the registered owner …

12.100 Previously, the Court of Appeal had suggested in *Family Food Court*[87] that claims for contractual breach on a contract entered by an agent for an undisclosed principal, if brought by the agent and not its undisclosed principal, could potentially raise problems as to the quantification of such loss. However, it pointed out that the "broad" ground could be applied to overcome these problems.

12.101 Given this authority, Ang J concluded that had Aga-Intra not intervened as undisclosed principal by bringing proceedings against Wartsila, Geniki, as a counterparty to the Repair Contract, would have been entitled to recover substantial damages in respect of *its own loss* in terms of its loss of bargain by reason of the broad ground. However, the learned judge suggested that had Geniki successfully recovered such sums, it would then have had to account for such recovery to Aga-Intra by reason of its status as Aga-Intra's agent.[88] The learned trial judge suggested that, "[this was] understandable as the courts would not allow double recovery for the *same* loss" [emphasis added].[89] This is slightly problematic so far as this is presented by the learned judge as an independent reason for Geniki having to account for the damages so recovered to Aga-Intra. While it might be arguable that Geniki might have to account to Aga-Intra for such recovery by reason of some fiduciary duty arising out of their agent–principal relationship, it is difficult to see how such a duty to account for "broad ground" recoveries might be justified on grounds of preventing "double-recovery". With respect, it is unclear why, if Geniki was recovering in respect of its *own* (and not Aga-Intra's) loss, *Geniki's* loss might be taken to be the "same" as Aga-Intra's. Though the court might *measure* or *quantify* the two losses as amounting to the same numerical figure, the court is still measuring or quantifying two *different* losses sustained by two distinct entities.

87 *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 at [59], after explaining at [58] that the "narrow ground" would not be applicable to a case involving an undisclosed principal. It may be noted that although the Court of Appeal pointed out that the "broad ground" reasoning might be helpful in such cases, it accepted that the agent in such cases would still be recovering in respect of its *own* loss, and did not make any reference to the question whether it would have to account to the undisclosed principal for such recovery, independently of any duties it might owe to its principal by reason of the agent–principal relationship between them.

88 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [102].

89 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [102].

12.102 It may be that this part of the judgment is better viewed as a *dictum*. When all was said and done, these observations favouring the co-plaintiffs amounted to nought as the trial judge also held that the co-plaintiffs had failed to establish that Wartsila's breach of its contractual duty to carry out the repairs with reasonable care had caused the losses that had been claimed by them in Suit 521.[90] The court therefore dismissed the plaintiffs' action against Wartsila in Suit 521.

Damages for losses arising from unaccepted "anticipatory" repudiatory breach

12.103 The law in Singapore on the nature and effects of a repudiation by a contractual promisor of its contractual obligations in advance of their time of performance (a so-called "anticipatory" repudiatory breach) was clarified by the Court of Appeal in *The STX Mumbai*.[91] In that case, the Court of Appeal made it plain that although such repudiations occur before the time when performance would be due, they are, actual breaches, nonetheless:[92]

> If it is the case that the defendant has evinced a clear intention that it will not perform its obligations under the contract, then we see little reason why this very fact might not itself form the basis for holding that, in principle and logic, an actual breach has, in substance, occurred – notwithstanding that the time for the defendant's performance has yet to arrive under the contract …

12.104 The proposition has often been repeated that an anticipatory repudiatory breach that has not been "accepted" by the non-repudiating party is a thing "writ in water". This suggests that a non-accepted anticipatory repudiatory breach has no substantial legal effect, until, by its acceptance, the contract is discharged. This seeming ineffectualness of the repudiation, without more, may lead one to assume that until it has been accepted, there can be no loss arising from the anticipatory repudiation, *per se*, either.

12.105 The Court of Appeal's clarification that such "anticipatory" repudiatory breaches are *actual* breaches, however, indicates that such breaches are *present* breaches. If so, it may be an over-generalisation to assume that there can be no loss at the point in time when an anticipatory repudiation has been made. If acts of anticipatory repudiation are actual *and present* breaches, then on appropriate facts, losses may well arise upon such present breach.

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90 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [90].
91 [2015] 5 SLR 1.
92 *The STX Mumbai* [2015] 5 SLR 1 at [51].

12.106 Though such facts may be difficult to imagine, precisely such facts occurred in the case of *Tembusu Growth Fund Ltd v ACTAtek, Inc*,[93] in which the High Court was tasked with assessing damages to be awarded in light of an anticipatory repudiatory breach which was not accepted by the non-repudiating party.

12.107 This case initially arose from a dispute over the giving of a notice of default under a convertible loan agreement ("CLA") under which the plaintiff, Tembusu Growth Fund Ltd ("Tembusu") had lent $1.5m to the first defendant, ACTATek, Inc ("AI"). Pursuant to cl 5.1 of the CLA, repayment of the loan was subject to a condition subsequent: if AI (or one of its subsidiaries) were successfully listed on the New Zealand Alternative Market stock exchange ("NZAX") and conducted a successful initial public offering ("IPO") of such listed shares before 30 June 2013, Tembusu would be obliged to convert its loan into shares in AI at a 50% discount to the assessed value of AI's shares.[94]

12.108 However, if AI was in material breach of any of its obligations under the CLA and failed to remedy it within 30 days of committing such breach (if remedy was possible), the CLA empowered Tembusu to declare a default, and if declared, the loan would be immediately repayable together with interest at 15% per annum compounded annually.[95]

12.109 On 16 May 2012, Tembusu's solicitors wrote to AI declaring a default under the CLA, demanding repayment of the loan with interest. However, AI did not repay the loan. Tembusu therefore brought proceedings against AI in connection with the repayment of the loan. Tembusu also brought proceedings against Wan, the second defendant, who was AI's chief executive officer, and three others, but those proceedings (and the counterclaims thereof) need not concern us in the present context.

12.110 In relation to Tembusu's contract claim, AI's position was that there was no basis for such declaration of default, and it counterclaimed against Tembusu on the basis that this wrongful declaration of default was a breach of the CLA, and had caused its plan to list a New Zealand-incorporated subsidiary ("ACTNZ") on the NZAX to fail.

12.111 Tembusu's action against AI succeeded at first instance, and AI's counterclaim was dismissed.[96] However, the decision of the High Court

93 [2017] SGHC 251.
94 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [13].
95 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [13].
96 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2015] SGHC 206.

was reversed on appeal.[97] *Inter alia*, the Court of Appeal held that there were no grounds for Tembusu to declare a default under the express or implied terms of the CLA. Consequently, by declaring an event of default wrongfully, Tembusu had committed an anticipatory repudiatory breach of the CLA: such wrongful declaration evinced a present intention not to comply with its future obligation to convert its loan into equity. The Court of Appeal also allowed AI's counterclaim – but the matter was then remitted to the court below for damages to be assessed in respect of AI's losses (if any), arising in respect of such anticipatory repudiatory breach.

12.112 In the assessment of damages, AI claimed to have lost the benefit of ACTNZ's listing or the chance to benefit from its listing. AI submitted that this amounted to a sum of NZ$30.5m. In addition, AI claimed damages in respect of costs it had incurred in preparing for the listing on the NZAX (amounting to approximately NZ$1.6m), and also damages for loss of reputation, credit, and future business.[98]

12.113 As to the last of these heads of claim, the court found that no evidence had been led as to either the fact or the quantum of such loss, and so, this claim was dismissed.[99]

12.114 As for the other heads in AI's counterclaim, while recognising that AI was the only counterparty to Tembusu in the CLA, the court awarded only nominal damages of S$1,000 in respect of Tembusu's anticipatory repudiatory breach of the CLA for a multitude of reasons, but chiefly, on one of two alternative grounds: one, that it had not suffered any loss as a result of the failed listing; or two, that Tembusu's breach did not cause the failed listing.[100]

12.115 In the course of arriving at his decision, the judge analysed the state of the law in Singapore on anticipatory repudiatory breaches following *The STX Mumbai*. Importantly, the court held that:[101]

> Tembusu's breach in this action was its declaration of default. Tembusu therefore breached the 2012 CLA on 16 May 2012. That conclusion is, in my view, dictated by both the traditional doctrine of anticipatory breach as conceived in *Hochster v De La Tour* (1853) 2 E & B 678 … and the modern doctrine as set out in the Court of Appeal's recent decision in *The STX Mumbai* … But Tembusu is correct to say that, because this is a case of anticipatory breach, the starting point is that the defendants' losses should not be quantified as

97 *ACTAtek, Inc v Tembusu Growth Fund Ltd* [2016] 5 SLR 335.
98 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [92].
99 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [159].
100 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [5].
101 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [36].

> at the date of the breach, as in the usual case, but as at the date fixed for Tembusu's performance of [its obligation to convert the debt into equity]: *Roper v Johnson* (1873) LR 8 CP 167 at 180.

12.116 The court noted, however, that on the traditional doctrine of anticipatory breach as had been developed in England following *Hochster v De La Tour*[102] ("*Hochster*"), it had become part of that theory that the non-repudiating party had to act in such a way as amounted to an "acceptance" of the repudiation in order for that repudiation to amount to a breach of contract.[103] This has been termed as the "breach-conversion" rule, and it has been argued it should be abandoned.[104]

12.117 On the other hand, on the "modern" view of anticipatory repudiatory breach, following the Court of Appeal's observations in *The STX Mumbai*, an anticipatory repudiatory breach would *be* a breach regardless of such acts of acceptance by the non-repudiating party. It would seem to follow, then, that:[105]

> [The] breach-conversion rule disappears … and with it the anomaly of including an element of the *plaintiff's* conduct in defining anticipatory breach. [emphasis in original]

12.118 On the unusual facts of this case, the judge held that Tembusu's anticipatory repudiation had never been accepted by AI.[106] At best, it might have been said that acceptance by AI occurred on 4 September when AI mounted its counterclaim against Tembusu – but the court noted that this had formed no part of either of the parties' cases.[107] Indeed, the court noted that in the initial appeal to the Court of Appeal on the question of liability:[108]

> [The] Court of Appeal in *ACTAtek (CA)* proceeded on the basis that Tembusu's breach of contract took place on 16 May 2012, even though AI has never expressly accepted Tembusu's repudiation and did not impliedly accept Tembusu's repudiation at any time before 4 September 2012.

12.119 Given the above, if the modern approach was applied, an actionable breach by Tembusu would have occurred on 16 May 2012 when it wrongfully declared an event of default, thereby committing an

102 (1853) 2 E & B 678.
103 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [55].
104 See Qiao Liu, *Anticipatory Breach* (Hart Publishing, 2011) at pp 28–30.
105 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [66].
106 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [78].
107 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [78].
108 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [78].

anticipatory repudiatory breach, independently of any acts of "acceptance" by AI.[109]

12.120 However, though it was perhaps not strictly necessary to do so, the judge also concluded that it would not matter that AI had not accepted Tembusu's breach, even if the traditional view of anticipatory repudiatory breach were to be applied:[110]

> The absence of acceptance in this case means that Tembusu may be right to say … that its declaration of default was no breach at all, and that the only true breach in this action is Tembusu's hypothetical future breach of cl 5.1 of the 2012 CLA. But even on that analysis, the causation inquiry is to be conducted with the repudiation as its reference point: the court must still assess the damage sustained by AI 'in consequence of' … Tembusu's repudiation of the 2012 CLA, namely, its declaration of default May 2012. This is so even if the repudiation 'does not, by itself, amount to a breach of contract' …

On Tembusu's case in which it had accepted that it had *only* breached the contract on its failure to convert the debt into equity on such date as the IPO might hypothetically have been successfully made, the judge's analysis was that the damages in respect of such breach would still have to be assessed by reference to the date of the repudiation.

12.121 In the judge's view, this had to be the case given the rationale underlying the rule in *Hochster* itself:[111]

> *Hochster* recognised the doctrine of anticipatory breach out of a pragmatic judicial desire to maximise the freedom of labour and capital … If the law postponed the plaintiff's right to seek a contractual remedy until the time for the defendant's performance arrived, and forced him to be ready to perform his own obligations in the interim in case the defendant ever reversed his repudiation before committing a performance breach [that is, actual non-performance of the obligation in question, at the time when such performance was contractually due], the law would be positively preventing the plaintiff from redeploying his labour or capital in the meantime by contracting elsewhere. That would be inefficient for the economy as a whole. So the law allows the plaintiff an immediate contractual remedy. But the law allows that benefit to the plaintiff only because the defendant's repudiation means that the plaintiff has lost his original opportunity under his contract with the defendant. The defendant's repudiation and consequent non-performance is therefore the event by which that loss is assessed.

109 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [68].
110 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [56].
111 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [57].

12.122 With respect, some of the above is not easy to follow. For one, it is not obvious how, where a repudiation is not accepted by the non-repudiating party, that party will have "lost his original opportunity under his contract with the defendant". If, on the "traditional" view, acceptance of the repudiation is necessary for there to *be* a breach by the repudiating party, if there is no acceptance, and hence no breach, it is unclear how there can be any relevant "loss" of the "original opportunity under [the non-repudiating party's] contract with the [repudiating party]". This, however, is probably not critical to the result arrived at by the court, given its alternative reasoning based on the "modern" view.

12.123 That said, although the judge found that there was a breach as at the date when Tembusu had wrongfully declared an event of default, independently of AI's "acceptance" thereof (given the "modern" view of anticipatory repudiatory breach), that did not mean that awards of substantial damages would necessarily follow. As mentioned above, the judge ultimately awarded only S$1,000 in nominal damages in light of such breach. This was so as AI failed to demonstrate that Tembusu's breach in wrongfully declaring an event of default had caused it to sustain substantial losses, at all.

12.124 In relation to AI's claim for loss in the form of the NZ$30.5m-worth of shares it would have gained in ACTNZ had its listing on the NZAX been successful, the judge pointed out that even if this valuation was valid, it failed to take into account that these shares would only have been issued in exchange for shares in AI's other existing subsidiaries. Since AI still owned the shares in these other subsidiaries and had not exchanged them, the quantum claimed was excessive. Further, the structure of the listing was such that it would not have brought additional capital into AI. The court therefore found that AI had not sufficiently proved that it had sustained NZ$30.5m of loss by reason of the failure of the listing process.[112]

12.125 Further, even if *some* loss had been sustained, the judge pointed out that AI had failed to prove that such loss would have occurred, but for the repudiation by Tembusu. Given that Tembusu's *only* breach lay in its repudiation:[113]

> 108 [The] specific issue is whether the listing [on NZAX] would have proceeded if Tembusu did not breach the 2012 CLA …
>
> 109 … So the only act which is relevant to the causation inquiry as being the event which precipitated AI's compensable loss is

112 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [102]–[105].
113 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [108]–[109].

> Tembusu's manifestation of its intention, through its declaration of default on 16 May, not to comply with cl 5.1 of the 2012 in the future.

12.126 Given the above, the judge noted that there was no evidence to show that Tembusu's repudiation had led inevitably to its failure to list on the NZAX. Indeed, the judge noted that the defendant's submission had conceded that the listing would only be prevented had Tembusu gone on to sue AI. The court therefore concluded that AI had failed to demonstrate that Tembusu's *sole* breach by reason of its anticipatory repudiation had caused its failure to list on the NZAX.[114]

12.127 Finally, even if it had been demonstrated that the failure to list on the NZAX had been caused by Tembusu's repudiation, the court noted that successful listing was also contingent on the acts of third parties apart from AI or Tembusu. Had but-for causation been established, AI could only have sustained *contingent* loss, and therefore, it would have been necessary to consider the principles set out in *Allied Maples Group Ltd v Simmons & Simmons*,[115] a decision of the English High Court which was approved in *Asia Hotel Investments Ltd v Starwood Asa Pacific Management Pte Ltd*.[116] Thus, even if Tembusu's repudiation had been a "but-for" cause for AI's failure to list, AI would still have to answer the additional question whether there was a real and substantial chance that the various third parties involved in a successful listing would all have acted in such a way that would ultimately confer on AI the benefit of listing.[117] As to this, the court found that AI had failed to prove that this was so.[118]

12.128 For completeness' sake, the court also addressed the question as to mitigation of loss. Even if it had been the case that AI had proved to the court's satisfaction that there was a real and substantial chance that all relevant third parties would have acted in such a way that would have resulted in AI losing the benefit of listing, but for Tembusu's repudiation, no substantial damages could have been awarded in any event as AI had not acted to reasonably mitigate its losses in such circumstances. In particular, the court noted:[119]

> [After] Tembusu's declaration of default on 16 May 2012, IRG [being AI's agent in the listing process] was, content simply to 'sit on its hands, keep its fee and declare that it was no longer possible to list'. That suggests to me that either the incentive [of losing the NZ$30.5m] was not as large as the defendants have made it out to be – which

114 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [106]–[113].
115 [1995] 1 WLR 1602.
116 [2005] 1 SLR(R) 661 at [47]–[48].
117 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [118].
118 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [131]–[137].
119 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [146].

> undermines AI's case on the value of its loss – or that AI did not take reasonable steps to prevent or reduce that loss – which undermines its case on mitigation. [reference omitted]

12.129 As to AI's claims of reliance loss in the form of the costs it had incurred in preparing for listing, given the court's finding that Tembusu's repudiation had not caused AI's listing to fail, it followed that AI's claim for reliance loss would also be dismissed for the same reason.[120] Alternatively, even if causation had been established, given the authority of *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd*,[121] the learned judge observed:[122]

> [A] plaintiff cannot claim wasted expenditure *and* loss of profit at the same time because a claim for profit is made on the hypothesis that the expenditure has been incurred. [emphasis added]

12.130 It would appear that the learned judge was referring to the notion of "gross profit" (or, perhaps more accurately, "gross revenue") and not to claims quantified by reference to losses of profit *net* of the expenses necessarily incurred to earn such profit. As has been noted elsewhere, there is, in principle, no double-recovery when claims are made for losses quantified in terms of net profit, as well as the necessary expenses incurred to earn such profit.[123] Thus, save where the claimant is shown to have made a "bad bargain" in the first place,[124] there is no inherent difficulty to awarding damages in respect of the claimant's expectation loss (quantified on the basis of the claimant's loss of net profits that would have been earned, but for the respondent's breach) together with the claimant's reliance loss (quantified on the basis of expenses incurred by the claimant in reliance on the respondent performing its part of the contractual bargain, but which would have been "wasted" as a result of the respondent's breach).

12.131 Although counsel for AI contended that its other claims were indeed computed on a net profit basis, the court held that that was not the case:[125]

> [The] figure of NZ$30.5m does not represent the net value of the benefit or profit that AI would have allegedly obtained had the listing proceeded … NZ$30.5m … represents the gross value, not the net value, of the benefit which would allegedly have accrued to AI. So the

120 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [149].
121 [1992] 2 SLR(R) 834.
122 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [150].
123 See, *eg*, *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 21.036–21.038.
124 As to this, see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 21.051–21.053.
125 *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2017] SGHC 251 at [152].

> defendants' submission must be rejected on a plain application of the principle stated in *Hong Fok*.

Consequently, it followed that it would not be possible for AI to recover both for its expectation loss in the form of the gross profit of NZ$30.5m had the NZAX listing been successful, as well as its reliance loss in the form of its expenditures required to earn that gross profit.

Damages to place innocent party in the position as if the contract had been performed

12.132 As the above has shown, the award of damages to compensate a contractual promisee for losses it would not have sustained, but for the contractual promisor's breach of its contractual duties, is not a straightforward or mechanical exercise. Although the goal of such awards of damages are to place the innocent party in the position as if the contract had been performed, as far as a sum of money can approximate that position, it is only an approximation in which public policy concerns have a not insignificant role. An illustration of this may be found in the difficult case of *ACB v Thomson Medical Pte Ltd*[126] ("*Thomson Medical (CA)*").

12.133 This case concerned a contract in which the second respondent agreed to provide in vitro fertilisation ("IVF") services to the appellant. Pursuant to the contract, an ovum was extracted from the appellant to be fertilised by sperm provided by her husband, and the ovum, so fertilised, would then be implanted in the appellant's womb. However, the appellant's ovum was fertilised with the sperm of a stranger. The wrongly fertilised ovum was implanted. The error was then discovered following the birth of the child ("Baby P").

12.134 Baby P was perfectly healthy. But, in light of the error, the appellant sued the second respondent, with whom the contract to provide the IVF services had been made, for breach of contract. In addition, the appellant had claimed that the first, third and fourth respondent, who were variously involved with the provision of the IVF services, also owed her duties of care in the tort of negligence, as did the second respondent. She also, therefore, sued the first to the fourth respondents for having breached such tortious duty of care.

12.135 In respect of each of her claims, the appellant sought damages in respect of her loss in terms of the "upkeep" costs for the expense of bringing up Baby P, and also punitive damages. In addition, the Court of

126 [2017] 1 SLR 918.

Appeal also asked for submissions on the question as to whether damages might not be awarded in light of the appellant's loss of autonomy by reason of the respondents' breaches of their duty in the tort of negligence.

12.136 Discussion of awards of damages in respect of the appellant's claims within the tort of negligence would fall outside the ambit of this chapter. And given that the bulk of counsels' arguments before it had concentrated on the respondents' liability in the tort of negligence, the Court of Appeal took the view that discussion of the award of punitive damages in connection with the second respondents' breach of contract ought to be left to another occasion when the issue was squarely raised on the facts of the case.[127]

12.137 However, it is apposite to take note of the Court of Appeal's comments in respect of awards of damages in respect of the second respondent's breach of contract in respect of the appellant's claim to recover for the cost of Baby P's upkeep.

12.138 As to this, the Court of Appeal emphasised that policy considerations also play a role within the context of damages for breach of contract:[128]

> [Policy] … has … a role (albeit a limited one) to play in contract *outside* the defence of illegality and public policy. In particular … policy has long had a role to play in regulating the types of damages which are recoverable in an action for breach of contract. In general, the law of contract concerns itself with the remediation of pecuniary damage, and the scope for recovering damages for non-pecuniary loss in contract is greatly limited. This is the reason for the well-established rule that the law of contract does not *generally* award recovery for reputational damage and mental distress from a breach of contract … One of the policy reasons for this rule is that the law of contract has long concerned itself with commercial affairs, in which contract-breaking is, as explained by Lord Cooke of Thorndon in the House of Lords decision of *Johnson v Gore Wood & Co* [2001] 2 WLR 72 at 108C-D, 'an incident of commercial life which players in the game are expected to meet with mental fortitude' … [emphasis in original]

12.139 After reviewing the policy considerations pertinent to such an award, as well as Commonwealth authorities on the matter,[129] the Court

127 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [154]; but see discussion on *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at paras 153–154 below.

128 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [53].

129 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [25]–[100].

of Appeal concluded that in respect of the preliminary question of law that had been put before it:

> [Recognition] of a claim for upkeep would require the court to regard, as actionable damage, the incidents of a relationship which is regarded as socially foundational and incapable of estimation as loss. Such recognition would also be inconsistent with, and deleterious to, the health of the institution of parenthood and would be against the public interest.

12.140 In the course of its decision, however, the Court of Appeal rejected a part of the reasoning in the court below. In the court below, the judge rejected the claim for upkeep damages because, *inter alia*, the appellant "had wanted a second child all along".[130] By this, the Court of Appeal took the judge below as having doubted whether any loss on this head had been caused by the respondents.[131] But the Court of Appeal held that this was incorrect:[132]

> The fundamental error in the Judge's analysis … is that he ignores the *purpose* for which the expenses were (and would have been) incurred … [emphasis in underlined bold italics in original]

12.141 The Court of Appeal took the view that the appellant had sought IVF solely in order to have a child with her husband:[133]

> This makes all the difference. The short point is this. There is no question that if the IVF procedure had been correctly performed and the Appellant had given birth to a child who was genetically related to herself and her Husband, she would have been perfectly willing to bear the costs of raising that child. However, it cannot be said that she or her Husband ever contemplated (let alone intended) having to raise a child that was not completely theirs, particularly one who had been born to them in the present circumstances … In this essential detail … the present case is like the wrongful conception cases in the sense that the Appellant's argument is that, *but for the Respondents' negligence, Baby P would not have been born and the Appellant would not now be put to the expense of raising her* … [emphasis added]

12.142 Though the Court of Appeal's clarification of the policy considerations which underpin the law on the point is welcome, the passage above requires careful consideration. In particular, the

130 *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 at [15].

131 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [35]–[37]. This was, admittedly, with reference to the claim against the respondents in negligence, but it does not seem that the Court of Appeal thought that the question of causation would be any different in connection with the claim against the second respondent in contract.

132 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [38].

133 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [41].

connection drawn by the Court of Appeal between the question of causation of loss by the respondents' breaches of their tortious and contractual duties and the appellant's purpose in dealing with the respondents and so creating those duties is debatable, particularly given the limited facts on which the preliminary question before the court had been argued.

12.143 In ascertaining the claimant's loss, one looks to the position which the claimant would have been in, had the defendant *not* failed to perform its contractual duty, and compare it to the position which the claimant is (or would be) in, given the occurrence of the said breach. Keeping this in mind, had the second respondent not breached its contractual duty (and, for that matter, had none of the respondents been negligent at all), the appellant's ovum would have been fertilised by her husband's sperm, and she would have had a child who was genetically related to herself and her husband.

12.144 Thus, in the counter-factual world where there had been no breach by the second respondent of its contractual duty to the appellant, she would *still* have had a child, albeit one who was genetically related to herself and her husband: the appellant would *not* have had *no child at all* in the counter-factual scenario derived from such facts as formed the basis of the appellant's case before the court.

12.145 The same would be true in respect of the counter-factual world where the respondents had *not* breached their respective duties of care. As recounted in the Court of Appeal's judgment,[134] the first and second respondents were alleged to have breached their duty of care in the tort of negligence by having, "failed to institute proper control measures to ensure that there would be no accidental or mistaken combination of genetic material as well as on account of their vicarious liability for the negligence of the third and fourth respondents", the former being alleged to have been negligent in, "handling more than one semen specimen at a time and for failing to ensure that there was no cross-contamination of genetic material between semen samples", and the latter being alleged to have been negligent in, "failing to put in place proper control measures in their respective duties of care in the fertility clinic, failing to properly verify that the sperm which she was injecting into the [ovum] was that of the Husband, and for inadequately supervising the work of the third Respondent".

12.146 Consequently, in the counter-factual world where the *only* counter-factual assumption made was that each of these duties had been carried out with due care, the result would have been that the appellant

134 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [10].

would have borne a child who was genetically related to both the appellant and her husband, not that she would have borne no child at all.

12.147 To make a counter-factual scenario where the appellant would have had no child at all relevant, it would have had to be part of the appellant's case that there had been additional breaches of duty pertaining to verifications and checks by the respondents as to the genetic makeup of the foetus in the months within which it could have been aborted in accordance with medical, ethical, and legal requirements, but which were not carried out. But this appears not to have been so. And although it had been argued in the court below that, had the appellant been told by any of the respondents sufficiently early about the mix-up, she would have aborted the foetus, it is unclear whether it was also part of the appellant's case that the respondents had actually known that the mix-up had occurred and had failed to inform her of the same before the window within which an abortion of the foetus could have been carried out, or that the respondents had been negligent in failing to discover that there had been such a mix-up and so were unable to tell her of the same within the relevant time frame.

12.148 Indeed, so far as the second respondent was concerned, it does not appear to have been the appellant's case that the second respondent was in breach of an express or implied contractual term in its IVF contract having failed to discover and disclose such mix-up, in time for an abortion to be carried out. At least so far as the contractual claim was concerned, it appears that the only breach that was argued for the purposes of the preliminary issue before the court was a breach of the contractual promise, "to fertilise the [appellant's ovum] with her husband's sperm".[135]

12.149 Given the above, the only breach of duty that was in issue lay in the respondents' failure to fertilise the appellant's ovum with her husband's sperm. Therefore, with respect, it is not obvious why the Court of Appeal was led to consider a counter-factual scenario which would *not* have arisen, had the insemination of the appellant's ovum been done with due care, and in compliance with the contract's requirements.

12.150 Taking into account the limited facts before the court on hearing the preliminary question before it, it is arguable that a more restrictive counter-factual scenario could have been applied. So applied, the same result would have been arrived at, even without consideration

135 *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 at [4].

of the policy concerns which the Court of Appeal highlighted in its reasoning.

12.151 That said, the points above are probably moot. Given the policy considerations raised by the Court of Appeal, it would appear that a claim for damages in light of the costs of upkeep of a child born to a claimant in circumstances like those of the appellant is now, as a matter of Singapore law, untenable. The precise counter-factual reasoning used by the Court of Appeal is, consequently, immaterial.

12.152 The significance of the landmark decision of the Court of Appeal in *Thomson Medical (CA)*, therefore, lies in its identification of the key policy concerns raised by in vitro fertilisation as applied to human beings, such that *even if* the facts had not been as narrow as those before it (given the nature of the proceedings), these policy concerns would bar similar kinds of claims. Absent legislative intervention, ascertaining the precise breadth of application of these policy concerns, though, will require further judicial elaboration.

Punitive damages for breach of contract

12.153 The law in Singapore on the availability of punitive damages for breach of contract was extensively re-examined by the Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*[136] ("*Airtrust (CA)*"), in which the Court of Appeal overruled the decision of the High Court to award such damages in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd*.[137]

12.154 In summary, the Court of Appeal came to the following conclusions:

> (a) Punitive damages (being damages awarded not by way of compensation for the plaintiff's loss, but damages awarded to punish the defendant) were recognised to be available where the defendant had breached its duties arising under tort law.[138]

136 [2017] 2 SLR 129.

137 [2016] 1 SLR 1060; see also discussion in (2015) 16 SAL Ann Rev 307 at 367–372 paras 12.193–12.207.

138 As to which, the Court of Appeal has clarified in *ACB v Thomson Medical Pte Ltd* [2018] 1 SLR 918, [176] that as a matter Singapore law, punitive damages in the law of tort may go beyond the three categories set out in *Rookes v Barnard* [1964] AC 1129, namely, beyond instances where there had been oppressive, arbitrary or unconstitutional action by the servants of the government, where the defendant's conduct had been calculated to profit himself which could exceed the compensation payable to the plaintiff, and where punitive damages were expressly authorised by legislation.

Thus, they may be available in circumstances where the defendant had breached duties arising concurrently in tort and contract so long as the plaintiff framed its claim within tort. But it did not follow that punitive damages had to be available in cases of contractual breaches *simpliciter*,[139] given the qualitative difference between tort and contractual duties, most significantly, in that contractual duties are voluntarily undertaken, whereas tort duties are imposed by law as a matter of policy.[140] It would thus be anomalous or inappropriate to regulate the conduct of contracting parties by imposing an award of punitive damages on the party in breach as this would entail imposing on the party in breach a standard of behaviour external to the contract.[141] The argument that contract and tort law should be uniform in this regard was, therefore, unpersuasive.[142]

(b) Nor was there necessarily any remedial gap which required filling-in by awarding punitive damages for breach of contract, so far as the range of measures of loss available to the court in connection with awards of compensatory damages has been broadening.[143] Examples include (i) the availability of damages awarded by reference to the *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[144] ("*Wrotham Park*") measure, and (ii) "restitutionary damages" awarded by reference to the profits gained by the party in breach as in the case of *Attorney General v Blake*.[145] So far as damages awarded by reference to such measures would differ from damages awarded by reference to more "traditional" measures, such damages awards would also have an incidental punitive or deterrent effect.[146]

(c) Awards of punitive damages for breaches of contract *simplicter* even where the breach was "outrageous" could harm

139 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [64].

140 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [68].

141 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [72].

142 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [110]–[111].

143 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [79].

144 [1974] 1 WLR 798 (CA).

145 [2001] 1 AC 268 (HL). Damages quantified in this manner were recognised by the Court of Appeal in *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [54]–[55].

146 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [82].

commercial stability given the uncertainty surrounding such a concept, since in the often self-serving contractual context, it is very difficult to identify specific and workable criteria to determine when the threshold had been crossed.[147]

(d) So far as case law was concerned, the Court of Appeal noted that the position in Singapore was, as yet, unclear.[148] It noted, however, that public policy as expressed in judgments handed down in English and Wales, as well as in Australia and New Zealand, did not favour an award of punitive damages in connection with a breach of contract, *simpliciter*.[149] As for the Canadian authorities, in particular, the decision of the Supreme Court of Canada in *Whiten v Pilot Insurance Co*,[150] the Court of Appeal ultimately concluded that it had been decided in light of circumstances peculiar to the case itself, and to the Canadian context, and consequently, was of no relevance to the Singapore context.[151]

(e) As to the question whether punitive damages might be awarded for breach of duty to act in good faith arising from an implied,[152] or express, contract term, the Court of Appeal was of the view that breach of such a duty would not, on its own, justify an award of punitive damages. Where a contractual duty to act in good faith had been breached, compensatory damages for such breach could be available; but if any additional damages were to be awarded on punitive grounds, that would bring the analysis back to the question of justification for such non-compensatory, punitive damages in a contractual context. In the final analysis, the Court of Appeal concluded that the existence of such a duty would be a neutral factor.[153]

(f) Notwithstanding the above, however, the Court of Appeal recognised that since contractual breaches could arise in many ways, it would not be prudent to completely rule out the possibility that a truly exceptional case might come before the

147 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [89].

148 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [92]–[94].

149 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [96]–107].

150 (2002) 209 DLR (4th) 257.

151 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [112]–[129].

152 This would, admittedly, rarely arise: see *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [132].

153 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [134].

court one day as might justify its award, over and beyond the various alternative remedies that were already available under Singapore law.[154] But the Court of Appeal was certain that on the specific facts before it, *this* was not an appropriate case to depart from the general rule that punitive damages are not to be awarded in a purely contractual context,[155] even if planned and deliberate fraud had been established.[156]

Wrotham Park *damages*

12.155 In addition, by way of *dicta*, the Court of Appeal also made some helpful observations in *Airtrust (CA)* on the vexed issue of the award of *Wrotham Park* damages – being damages that are:[157]

> [Quantified] not by reference to a [contractual promisee's] pecuniary loss (which may be nominal or difficult to quantify) but by reference to the sum of money which the plaintiff could have reasonably demanded in return for permitting the defendant to breach a restrictive covenant or other legal restriction.

12.156 The Court of Appeal appears to have accepted that the legal requirements for the award of such damages set out in the English Court of Appeal decision in *One Step (Support) Ltd v Morris-Garner*[158] are applicable in Singapore, namely:[159]

> [The] defendant's deliberate breach of contract for its own reward, the plaintiff's difficulty in establishing financial loss, and the plaintiff's interest in preventing the defendant's profiting from a breach of contract …

12.157 Though the Court of Appeal noted that these prerequisites before *Wrotham Park* damages might be awarded could have the effect of deterring deliberate breaches of contract, it clarified that, "[ultimately,] *Wrotham Park* damages are largely accepted to be *compensatory* in nature, although they are different … from a traditional

154 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [136].

155 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [137].

156 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [139]. The Court of Appeal also noted that had fraudulent misrepresentation been established, damages under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) would have been available.

157 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].

158 [2016] 3 WLR 1281 at [146].

159 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].

award of compensatory damages".[160] However, even so, although they were, "a departure from the traditional loss-based measure of damages, their primary purpose [could] still be said to be compensatory, in that they protect a plaintiff's interest in contractual performance".[161]

12.158 These *obiter* observations were relied on by the High Court in the case of *Marken*, albeit also by way of *dicta*.

12.159 In this case, the defendant had been an employee of the plaintiff corporation. The plaintiff claimed that the defendant had breached his employment contract by terminating it without giving the contractually mandated six months' notice. *Inter alia*, the plaintiff claimed *Wrotham Park* damages with regard to its loss arising from such breach by the defendant.

12.160 The trial judge held that there was, in fact, no breach by the defendant at all. However, he went on to observe[162] that even if there had been a breach, the plaintiff's claim for *Wrotham Park* damages would have failed given the Court of Appeal's observations on the same in *Airtrust (CA)*. In addition, the trial judge also applied[163] Leggatt J's cautionary observations in *Marathon Asset Management LLP v James Seddon*[164] that *Wrotham Park* damages would be a "just response" only where compensatory damages were an "inherently inadequate remedy". Given his finding that the plaintiff had not shown that "compensatory damages were 'inherently inadequate'" on the facts of the case before him, the learned judge concluded that *Wrotham Park* damages would not be available, in any event.[165]

Forfeiture of sums paid by way of deposit as "earnest money"

12.161 In the case of *Hon Chin Kong v Yip Fook Mun*, in addition to illustrating the need for there to be a coincidence of offer and acceptance in order for a contract to be formed,[166] the High Court also considered the extent to which the rules precluding the enforcement of contractual penalties might apply to the question of forfeitures of sums paid by way of deposit.

160 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].
161 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [82].
162 *Marken Ltd (Singapore Branch) v Scott Ohanesian* [2017] SGHC 227 at [40].
163 *Marken Ltd (Singapore Branch) v Scott Ohanesian* [2017] SGHC 227 at [40].
164 [2017] ICR 791.
165 *Marken Ltd (Singapore Branch) v Scott Ohanesian* [2017] SGHC 227 at [40].
166 See discussion in paras 12.1–12.4 above.

12.162 Having held that a contract had been formed, the next question was whether the sum of $300,000 that had been paid by the plaintiff to the defendants, being the first of three payments for the purchase price of the shares, could be forfeited by the defendants following the plaintiff's repudiation of the contract.

12.163 The trial judge held that on the true construction of the contract, the $300,000 had not been paid as a mere advance payment, but was a deposit which was liable to be forfeited by the defendants were the plaintiff to repudiate the contract.[167] *Inter alia*, the trial judge pointed out that the plaintiff had conceded that the purpose of the payment of $300,000 had been, "to give confidence to [the first defendant] that he was 'serious' and 'wanted to go through with this transaction', and also to serve as 'security' for the first defendant'".[168] Further, the sum had been described by the defendants as a "down payment deposit", and although use of the word "deposit" was not conclusive, it was nonetheless significant given that the purpose of a deposit would be to serve as security for performance by the purchaser.[169] The question, then, was whether the rules regulating the efficacy of contractual penalties might apply to regulate such forfeitures.

12.164 While noting that there were some Singaporean authorities which could be read to have taken the positon that the rules regulating the efficacy of contractual penalty provisions were also applicable to constrain the forfeiture of deposits,[170] on the learned judge's reading, none of these cases were conclusive.[171]

12.165 Ultimately, after also reviewing English and non-Singapore authorities on the matter. the trial judge concluded that, as a matter of Singapore law, if the sum in question had indeed been paid as a deposit in the form of "earnest money", that is, as a sum indicating the plaintiff's seriousness in fulfilling his part of the contractual bargain, it would not be appropriate to extend the rules regulating contractual penalties to constrain the forfeiture of such deposits. This was because the law regulating the efficacy of penalties in Singapore is based on the view that any damages as may be awarded for breaches of contract should be compensatory and not punitive in their operation:[172]

167 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [46] and [58].
168 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [48].
169 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [49].
170 See *Indian Overseas Bank v Cheng Lai Geok* [1993] 1 SLR(R) 32 (CA), *Hua Khian Co (Pte) Ltd v Lee Eng Kiat* [1996] 2 SLR(R) 562 (CA), *Creek Bridge General Trading Co LLC v Cresdev Marketing Pte Ltd* [2012] SGDC 113 and *Allgreen Properties Ltd v Lim Lay Bee* [1998] 1 SLR(R) 703.
171 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [67] and [75].
172 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [127]–[128].

> Since liquidated damages serve to compensate for breach, they can give rise to a situation where it would be unconscionable to saddle one party with liquidated damages far exceeding the other's loss, particularly when there is inequality of bargaining power. Public policy therefore justifies ameliorating or departing from the parties' bargain as not to do so would be oppressive. A deposit, on the other hand, is usually paid at the commencement of contract and is deliberately calculated to dissuade parties who are unable to fulfil the contractual obligations from undertaking them in the first place. It sieves out the buyer who is not earnest. By paying the deposit, the buyer is demonstrating to the seller his commitment to perform the contract. There is thus nothing unconscionable about forfeiting the deposit upon breach (provided it is customary or moderate), notwithstanding its disproportion to the vendor's loss …
>
> For these reasons, the law treats deposits and liquidated damages differently in one important respect. A forfeiture clause does not preclude the vendor from claiming damages in respect of any loss suffered over and above the value of the forfeited deposit, whereas a liquidated damages clause does. This is precisely because liquidated damages serve as a pre-agreed quantification of the damages to which the vendor is entitled in the event of the purchaser's breach. Deposits, on the other hand, are not compensatory. If it were law that only a deposit amounting to a genuine pre-estimate of loss could be forfeited, then forfeiture of such a deposit ought logically to preclude a claim for damages for actual loss. But that is not the case. The vendor is entitled to sue separately for damages after giving credit for the amount of the deposit (see, *eg*, *Triangle Auto*[173] at [9], *Linggi*[174] at 91H and *Polyset*[175] at [77]).

12.166 The learned trial judge therefore agreed with Bokhary PJ's analysis in *Polyset Ltd v Panhandat Ltd*:[176]

> Provided that what the vendor takes as a deposit is within the bounds of an earnest of performance, it will constitute a true deposit. As such, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the vendor's loss is less than the deposit. It is so even if the vendor suffers no loss at all. *Indeed, it is so even if the vendor makes a profit by selling the property to someone else at a higher price. If the vendor's loss exceeds the deposit, he is of course entitled to recover the full extent of his loss, giving credit for the deposit forfeited to him*. [emphasis in original]

12.167 That said, in keeping with Denning LJ's concern in *Stockloser* and also that of the Privy Council in *Linggi Plantations Ltd v Jagatheesan*

173 *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594.
174 *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89.
175 *Polyset Ltd v Panhandat Ltd* [2002] HKLRD 319.
176 [2002] HKLRD 319 at [10].

and *Workers Trust*[177] that deposits could be abused to secure a power to forfeit sums exceeding reasonable earnest moneys or guarantees of performance, or even as compensation, the trial judge was of the view that, "deposits are only exempt from the penalty rule insofar as they are true deposits, *ie*, deposits which are reasonable as earnest money".[178]

12.168 The position set out above, however, was to be distinguished from a case where the deposit, payable and paid in advance, was not mere earnest money, but was by way of part payment of the purchase price. The trial judge recognised the arguments in the UK arguing for and against the penalty rule to apply to such part payments.[179] Drawing on the common-sense observations of Lord Neuberger and Lord Sumption in *Cavendish Square Holding BV v Talal El Makdessi*[180] that terms ought to be classified for the purposes of the penalty rule depending on their substance and not the form or the label which the parties had placed upon them, in the learned trial judge's view:[181]

> [The] fact that part payments are payable prior to breach is insufficient reason to exclude them from the scope of the penalty rule. The forfeiture of a part payment and the payment of liquidated damages are both contingent upon breach of contract, although the former involves the retention or withholding of a sum already paid while the latter involves the transfer of a sum yet unpaid, both arise as a secondary obligation or entitlement in the event of a breach of primary obligation to perform the contract. That is very much in the nature of a liquidated damages provision, which attracts the application of the penalty rule.

12.169 The learned trial judge was of the view, therefore, that the key distinction between forfeitable part payments that had been paid in advance which were *not* subject to the penalty rule (that is, "deposits"), and those that were, lay in the purpose behind their payment,[182] noting, though, that the need for such classification should only arise when the contract provided expressly or impliedly for the forfeiture of such sums upon breach.[183] Consequently, the fear that application of the penalty rules to forfeiture of such part payments expressed in some quarters would be mitigated.[184] Where there was no such provision for forfeiture, the sums paid in advance in part payment should be returned.[185]

177 [1972] 1 MLJ 89.
178 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [129].
179 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [133].
180 [2016] AC 1172.
181 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [134].
182 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [135].
183 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [136]–[141].
184 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [142].
185 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [139].

12.170 In summary, the trial judge proposed and applied the following framework to the issue before the court:[186]

> (a) The first question must be whether, on a proper construction of the contract, the vendor is contractually entitled to forfeit the so-called deposit. This will involve consideration of the parties' intentions and the terms of the contract (*Lee Chee Wei* at [85]), and may be express or inferred (*Zalco* at [40]; *The Blankenstein* at 450H). The character of the payment depends on the parties' intentions, to be ascertained by construing their agreement (*Mayson* at 985). In particular, if the parties intended the payment to be a deposit, it may arguably be said that they have agreed that it is to be forfeited in the event that the payer fails to complete (*Polyset* at [66]). The converse applies to a part payment.
>
> (b) If the sum was never intended to be forfeitable on a proper construction of the contract, it must be returned notwithstanding breach (see [139] above). This is subject to a right of set-off for damages.
>
> (c) If there is a right to forfeit, the next question is whether the sum is a true deposit. The applicable test is whether the sum is reasonable as an earnest or is customary or moderate.
>
> (d) Reasonableness involves a different enquiry from whether the sum is a genuine pre-estimate of loss. The focus is on whether the deposit is 'so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves' (*Polyset* at [165]). The customary or conventional deposit is only a starting point and 'does not mean that a larger deposit can never be regarded as a true deposit' (*Polyset* at [13]). If the deposit is higher than customary, it is up to the vendor to show 'special circumstances' to justify the amount (see [103] above). It should be noted that a 10% deposit, while conventional or customary in the context of sales of land, may not be the custom or convention in other types of contracts. There may also be some contracts of which it cannot be said that any particular percentage is customary or conventional as a deposit. Whether the contract is of such a type is for the court to decide, having regard to the parties' evidence and submissions. Where the contract is of a type in relation to which a customary or conventional deposit may be discerned, the approach set out in *Polyset* at [90] is useful guidance. Ultimately, the question of reasonableness is one for the court to assess on the facts of each case. It may have regard to any factors which are relevant to the effectiveness of the earnest, including any history of dealing between the parties, their financial means, and the commitment required on the vendor's part in keeping the subject-matter of the sale 'off the market' for the duration of the sale (see *Polyset* at [107]).

186 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [143].

(e) If the sum is reasonable as an earnest, it is a true deposit. It can be forfeited regardless of the actual loss occasioned to the vendor. The forfeiture of a true deposit cannot be regarded as a penalty, notwithstanding that it is disproportionate or has no reference to the vendor's loss. The purchaser's only option to prevent forfeiture is to invoke the court's equitable jurisdiction to relieve against forfeiture, assuming it is available. In this regard, it should be noted that relief against forfeiture has traditionally been available only to the forfeiture of interests in real property. Whether it is available in the context of forfeiture of deposits is a matter for another time.

(f) On the other hand, if the sum is not reasonable as an earnest, it is not a true deposit. It ought to then be recharacterised as a part payment and the right to forfeit tested against the penalty rule.

12.171 Applying this framework to the facts before him, the learned judge noted that the issue of equitable relief against forfeiture did not arise as the parties had not raised it,[187] nor was there any express provision for forfeiture of the "deposit" that had been paid by the plaintiff. But even so, the learned judge accepted that the defendants did have the power to forfeit the deposit (presumably as a matter of construction of the contract). He also held that on the facts, the sum forfeited was reasonable. In making this finding, the learned trial judge took into account post-breach behaviour on the part of the defendant, noting that it had kept the properties in question off the market longer than was originally agreed, "for what turned out to be an inordinately long time – more than a year – at a time when the property market was quickly rising".[188] Given this, the learned trial judge was of the view that it was "reasonable for [the defendant] to stipulate a deposit of $300,000 to assure themselves of the plaintiff's earnestness and commitment and to encourage performance on his part".[189]

187 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [144].
188 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [145].
189 *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [145].